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2006

## Towards a Political Theory of International Courts and Tribunals

David D. Caron

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# Towards A Political Theory of International Courts and Tribunals

By  
David D. Caron\*

## I. INTRODUCTION

Arbitrators, foreign ministry officials, scholars, secretariat staff members and members of non governmental organizations at locations around the world are designing and using international courts and tribunals. They are considering creating a new court or tribunal, changing the rules of the game for one that exists, or arguing a particular case or issue before another. They are doing this more than perhaps at any other time in history. These observations reflect not only the complexity and legalization of modern international relations, but also the current political assessment that international courts and tribunals can successfully fulfill various political objectives.

Over the past decade, theoretical explanations for various aspects of international courts and tribunals have been offered. Although scholarly attention to a theoretical framework has progressed dramatically over this period, the inquiry lacks a broad theoretical foundation, and addresses only in part the range of institutions in operation or the issues they face.

This Symposium volume of the *Berkeley Journal of International Law* contains thirteen student articles written in an advanced international law writing seminar focused on international courts and tribunals. This essay seeks to capture the essence of the discussion that animated the seminar and introduce the range of articles that resulted.

The discussion in the seminar that informs many of these articles in part should be seen as reflecting my then crystallizing views as to a political theory of international courts and tribunals that was subsequently delivered as lectures at the Hague Academy of International Law. In this essay, I provide a sketch of

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\* C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley. I wish to thank the participants in the seminar and the editorial board and staff of the *Berkeley Journal of International Law* for their thoughtful comments and enthusiasm for the questions presented. A teacher's joy is his students.

this theory, the detailed exposition of the theory is best sought elsewhere.<sup>1</sup>

The seminar discussion examined international courts and tribunals as a particular form of international institution. It explored the span of an institution's life: its creation, design and operation, and closing down. This discussion, while legal, was focused through the perspective of political science. Three themes in the seminar have particular relevance to this Symposium:

First, our understanding of, and theorizing regarding, international courts and tribunals may be enriched and furthered by having regard to not only theories of international relations, but also to political science research concerning courts generally.

Second, that incorporating the teachings of political science regarding courts generally, among other things, emphasizes a wider range of functions for international courts than is usually present in the existing literature and, in some instances, has significant implications for how one evaluates the 'effectiveness' of a given international court or tribunal.

Third, that the design and operation of international courts and tribunals can be understood through a theory of bounded strategic space within which actors in at most five, and at least two, institutional positions contend with one another, or against the space itself, so as to fulfill the logic of their position.

Before introducing the articles in this volume, this essay offers three sets of comments. First, by way of introduction to the field, this essay suggests two basic distinctions between types of international tribunals, distinctions present in many of the articles in this Symposium. Second, an overview of selected political science literature is provided to introduce a more expanded view of the function of international courts. Third, the essay provides a sketch of the bounded strategic space theory as a means for understanding and explaining international courts and tribunals.

## II. TWO DISTINCTIONS

One way of introducing a field is to provide an account of its development. The history of international courts and tribunals has been ably set forth elsewhere.<sup>2</sup> For the purposes of this essay, I would stress that the history of modern international courts and tribunals is quite recent.<sup>3</sup> The use of international arbitral tribunals is often traced back to the late 1700s and their use

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1. David D. Caron, *A Political Theory of International Courts and Tribunals*, RECUEIL DES COURS (forthcoming, 2007) (hereinafter "Lectures").

2. See JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION, FROM ATHENS TO LOCANO* (1929).

3. Although some histories would trace contemporary arbitration back to very early examples of arbitration such as those between Greek city states, I do not see a significant direct connection between ancient and modern international dispute resolution systems beyond the notion of employing a third party to decide disputes. See, e.g., DAVID D. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001).

in the Jay Treaties following the U.S. Revolutionary War.<sup>4</sup> Moreover, if the emergence of modern international tribunals is recent, the call for the permanent international courts is even more so. That movement finds its roots in the mid 1800s. The movement's first partial expression can be found in the creation of the Permanent Court of Arbitration as a result of the 1899 Peace Conference; its first full expression, in creation of the Permanent Court of International Justice in the interwar period.<sup>5</sup>

Taxonomies of international courts and tribunals, like their history, have also been extensively detailed in the literature.<sup>6</sup> Some dimensions of distinction are not ones particularly relevant to a study emphasizing the political and institutional side of international courts and tribunals. Yet the breadth of the taxonomies available reflects the diversity of these institutions. Indeed, it reminds us that unlike the domestic scene where the shape of courts can become rigid or limited by constitutional norms of process; institutions in the international arena come and go with all manner of experiments underway. For the purpose of this essay, I emphasize two important distinctions: community-originated institutions vs. party-originated institutions and retrospective institutions vs. prospective institutions.<sup>7</sup> In a sense, both of these distinctions point to the difference between a court and a tribunal.

#### *A. Community-Originated Institutions vs. Party-Originated Institutions*

Some dispute resolution institutions are created by a community and some are created by the particular parties to appear before the institution. This is a significant distinction in terms of the bounded strategic space theory described within and is employed in several of the contributions to this Symposium.

A party-originated dispute resolution mechanism is one where two parties create an institution to resolve a dispute between them. The dispute may be an existing one or one that will arise in the future. If the institution ever functions, it is the two states that created it that will be the parties before it. An example of a party-originated dispute resolution institution is the *ad hoc* tribunal that decided the Anglo-French Continental Shelf dispute. The two states – the United Kingdom and France – by international agreement created the dispute resolution mechanism, defined the question to be decided by that institution and

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4. See generally, David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4 (2000); and John R. Crook, *Thoughts on Mass Claims Processes*, 99 AM. SOC'Y INT'L L. PROC. 80 (2005).

5. Both the recourse to international arbitration and courts and the creation of international courts and tribunals arguably has tended to come in bursts following perceived success in a particular instance. For example, there arguably was a burst of use after the Jay Treaties in the late 1700s, the Alabama Arbitration in the late 1800s, and the Iran-United States Claims Tribunal in the late 1900s.

6. For a recent example see the synoptic charts prepared by the Project on International Courts and Tribunals (PICT). Project on International Courts and Tribunals, Synoptic Charts, [http://www.pict-pecti.org/publications/synoptic\\_chart.html](http://www.pict-pecti.org/publications/synoptic_chart.html) (last visited Jan. 3, 2007).

7. Examples of other distinctions include criminal vs. civil, nested vs. free-standing, jurisprudentially insular vs. integrated. For further discussion, see Lectures, *supra* note 1.

simultaneously entrusted that institution with the resolution of that question. Having created the institution, the two states normally pay the expenses of the institution.

A community-originated institution in contrast is created by a group of states to resolve disputes of concern to that community. A key distinction is that although members of the originating community may at some point be a party that eventually appears before the institution's dispute resolution processes, that is not necessarily the case. There are also more subtle consequences of an institution having a community, rather than party, origin. Most importantly, the institution exists for the ends of the community, not the ends of the parties. This ownership difference shifts control of the institution's work away from the parties. This shift can be seen, for example, in terms of the question for who does the judge or arbitrator believes themselves to be working? Members of a party-originated tribunal believe themselves to be working for the parties, while judges within a community-originated institution believe themselves to be working for that community. This perspective is reflected in the system of ethics applicable to, and oaths taken by, the members of the tribunal or court.

#### *B. Retrospective Institutions with Fixed Dockets vs. Prospective Institutions with Open-ended Dockets*

A second distinction is that a court or tribunal, whether its origin is with the parties or some larger community, may have a finite existing docket or it may have an open ended docket. The institution with a finite docket has a finite life, it will close down when it finishes the stated set of disputes it is to address. In this sense, the institution with a finite docket is retrospective. An example of an institution with a finite docket is the Eritrea-Ethiopian Claims Tribunal, the jurisdiction of which consists of "all claims for loss, damage or injury . . . that are (a) related to [a defined armed conflict] and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."<sup>8</sup> Although it is not clear precisely how many disputes there are within this defined docket, it is finite number and a set of claims that is in the past, not the future. An institution with an open ended docket, on the other hand, has an indefinite life span. An example of such an institution is the Inter-American Court of Human Rights whose jurisdiction includes not only existing cases, but also future ones. In this sense, the court with the open ended docket is forward looking. The retrospective vs. prospective distinction has (in my experience) subtle implications for the jurisprudential approach of the adjudicators in the two types of institutions. A retrospective institution is arguably more concerned with equality among the various defined claimants than with applying norms of justice as they evolve over time and thus

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8. Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Art. 5, Dec. 12, 2000, available at <http://www.pcacpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html>.

its jurisprudence is heavily path dependent. Once one set of claimants has been treated in a particular way, the retrospective institution will be loath to depart from the initial path – preferring instead to treat all similarly situated claimants similarly. The prospective tribunal, in contrast, is more willing to depart from its previous jurisprudence since it possibly has even more unknown claimants awaiting it in the future than those it has already addressed in the past.

With these two distinctions in mind, the following sections in turn explore the functions of courts and introduce the bounded strategic space theory of international courts and tribunals.

### III. THE FUNCTIONS OF COURTS

It is difficult to build on a poorly understood foundation – it’s not necessarily impossible, but it is difficult. This is a basic challenge for theorizing about international courts and tribunals. Doing the best they can in such a context, scholars have offered theories about particular aspects of international courts and tribunals, often recognizing the absence of a more general frame.<sup>9</sup>

Martinez, for example, offers a normative and prescriptive theory to promote a “functioning system” of international courts and tribunals “for solving disputes across borders.”<sup>10</sup> Slaughter and Helfer offer a normative and prescriptive theory to explain the effectiveness of “supranational adjudication” and thereby enable its further emergence.<sup>11</sup> Posner and Yoo, more normatively, offer design prescriptions asserting that effective international tribunals are those where the parties select the adjudicators.<sup>12</sup>

Each offers a theoretical view. Each view also is offered not only on the basis of limited cases, but also with sometimes unstated assumptions about the functions of courts. Martinez, Posner and Yoo appear assume to the function of courts is resolution of the disputes presented to the court and therefore effectiveness is measured by reference to the fulfillment of that task. Clearly, this is a function of courts, but the question is whether it is the sole function?<sup>13</sup>

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9. The term ‘theory’ as used in social science and law has numerous meanings. Ernie Haas explained that a theory for a given phenomenon may (1) provide a framework for understanding it, (2) explaining it (3) modeling how it behaves, (4) modeling it so accurately so as to offer predictions, or (5) offering normative prescriptions as to how it should be approached.

10. Jenny S. Martinez, *Towards an International Judicial System*, 56 *STANFORD L. REV.* 429 (2003).

11. Lawrence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273 (1997-98).

12. Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, 93 *CAL. L. REV.* 1 (2005).

13. In offering a theoretical view, each view is also based on assumptions about the types of international courts and tribunals extant, the types of disputes that are raised before them and the relationship of these institutions and disputes to one another. Each speaks of the growth in number of these institutions and disputes as a justification. Martinez in a breathless paragraph echoes the words of others in noting that there are “now more than fifty international courts, tribunals, and quasi-judicial bodies, most of which have been established in the past twenty years,” that international

Theorizing about international courts and tribunals often takes theories of international relations as a point of departure. In seeking a foundation for political theories of international courts, this essay argues that it is also instructive to refer to theories in the U.S academic political science community regarding courts generally. I have discussed elsewhere the transferability of theories of domestic courts to the international arena.<sup>14</sup> For the purposes of this essay and the various contributions in this Symposium, only a more limited claim need be made. In particular, the essay asserts that our understanding of the variety of political functions of, and justifications for, courts becomes richer and more complex by examining international courts and tribunals not only in terms of international relations, but also in terms of the political theory of domestic courts.

#### A. Political Theory of National Courts and their Functions

There is a small but significant set of writings offering a political theory of courts.<sup>15</sup> A singularly important contribution is Martin Shapiro's "Courts: A Comparative and Political Analysis."<sup>16</sup>

Shapiro's book begins with a description of ideal court – or what he terms the prototypical view of courts. This prototypical view of courts involves "(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal wrong and the other found wrong."<sup>17</sup> Martin's overall strategy is to look to the political functions served by courts and to identify how these functions all necessarily involve an institution that is different in form from (indeed, potentially in conflict with) this prototypical view. The three functions discussed by Shapiro are (1) conflict resolution, (2) social control or regime enforcement, and (3) lawmaking. Of course, Shapiro's analysis is nonexhaustive – other functions have been identified since his

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private arbitration is on the rise, and that national courts increasingly are faced with "applying international law." Martinez, *supra* note 2 at 430.

14. David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, in PROCEEDINGS, 100 AM. SOC'Y INT'L L. PROC. (forthcoming 2006).

15. The majority of works reflect particular political inquiries into national courts. See, e.g., FORREST MALTZMAN, JAMES F. SPRIGGS AND PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (Cambridge University Press, 2000); LEE EPSTEIN AND JACK KNIGHT, THE CHOICES JUSTICES MAKE (CQ Press, 1998); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton and Howard Gillman, eds., University of Chicago Press, 1999).

16. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1983). See also MARTIN SHAPIRO AND ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION (2002); and THOMAS GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIA (2003).

17. SHAPIRO, *supra* note 16, at 1. Curiously, but perhaps not surprisingly, Kaplan and Katzenbach offer a quite similar prototypical phrasing for "law" at the outset of their 1968 study: "Perhaps the purest analytical concept of 'law' is that in which an impartial judge objectively applies a pre-established rule to decide a controversy." MORTON KAPLAN AND NICOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATION OF INTERNATIONAL LAW 3 (John Wiley & Sons, 1961).

writing<sup>18</sup> – but this does not undercut his conclusions regarding the conflicted position of courts *vis-à-vis* his prototypical statement of courts.<sup>19</sup>

Shapiro begins with the function of *conflict resolution*, not because he views it as the foundational political function served by courts, but rather because “everyone seems to agree that conflict resolution is a basic task of courts” while there is less consensus as to the other functions he mentions.<sup>20</sup> He begins with the function (conflict resolution) on which there is the greatest consensus as to the political justification for courts so that he might crack the prototypical view even for the strongest case. Shapiro first argues that recourse to the court is only one way to fulfill the function of conflict resolution, more generally conceived. He thus places courts at one end of a conflict resolution spectrum where the mechanisms listed increasingly move from the consensual to the coercive, from the notion of compromise to the satisfaction of principle, from diplomatic settlements to law-based dichotomous decisions.

Shapiro asserts that the logic of conflict resolution requires a triadic structure (i.e. the two disputing parties and the decision-maker) where the decision-maker possesses some measure of authority to address the dispute because the parties have consented to such a role. For the ideal triad, the consent is proximate, ongoing and real. Indeed, where there is continuing consent, the question of whether the losing party will comply with the decision is by definition a forgone conclusion. Shapiro’s major contention is that courts as a general matter do not possess the consent of the parties, except in some remote social contract sense, and thus the idea that courts can fulfill the function of conflict resolution is fundamentally at odds with the logic of the triad. For Shapiro, those officials within the courts and otherwise responsible for the courts thus go to tremendous efforts to cloak themselves with the logic (and power) of the triad: “A substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.”<sup>21</sup>

Shapiro then shifts from conflict resolution to what he sees as historically and politically as the prime function of courts: *social control*. In other words, courts are the means by which the state rules *through* law.<sup>22</sup> To the extent that

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18. See, e.g., Thomas Ginsberg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 225 (2005).

19. In addition to this broad description of the political science view of courts as institutions, law and economics posits that effective courts allow parties to make more credible commitments and that courts also, in a way similar to Shapiro’s lawmaking function, allow parties to avoid contracting problems by delegating interstitial issues to courts to resolve.

20. SHAPIRO, *supra* note 16, at 17.

21. SHAPIRO, *supra* note 16, at 2.

22. Importantly, Shapiro when focusing on conflict resolution addresses on disputes between two members of the community or claims of the state against the individual. He does not particularly address disputes against the state. There appear to be three types of these disputes: (1) claims of individuals against the state, (2) claims that a member of the state is a criminal, and (3) claims that elements of the state are acting contrary to the political agreement underlying the state. In all of these cases, the transition can be seen as one from rule *through* law to one of rule *of* law.

the law reflects the views of an element of society either in terms of their interests or, more subtly, their view of the world, then the law and courts, captured by that element, enable that element to gain a measure of social control and regime enforcement. An example used by Shapiro is the law favoring creditors. No matter how independent and impartial the court is, the debtor knows that the substantive law is against their interests and, indeed, the mechanistic vision of a court applying the law only ensures that the court will be a trustworthy agent of the state. Of course, the most powerful example of social control through the courts is the criminal legal system.

The third function advanced by Shapiro is that of *lawmaking*. Here, Shapiro asserts that all courts are engaged in not only interstitial lawmaking, but also more dramatic forms of lawmaking. Thus not only is there not the continuing consent required of the conflict resolution triad, but the image of a judge applying a preexisting rule may also not be present.

### *B. The Functions of International Courts and Tribunals*

If there is not an extensive theoretical literature to explain courts, either national or international, there are well elaborated and contending theories as to international relations generally. The international relations theories, to the degree they address the matter, appear to assume that function of international courts and tribunals is to resolve the disputes presented to them. In realist terms echoing closely those of Martin Shapiro for the “prototypical court,” Hopmann, for example, sees international courts at one end of a conflict resolution spectrum where third parties are involved to assist two disputants that can not otherwise reach a solution.<sup>23</sup> Like Shapiro, Hopmann mentions the “go-between,” the mediator and ultimately the arbitrator. The institutionalists have a similar view but tend in addition to study international courts and tribunals as a type of institution nested within a general theory of international institutions.<sup>24</sup> Although this might lead to a broader statement of function, institutionalist accounts tend to describe international courts and tribunals as institutions tasked with resolution of particular disputes through application of law, as mechanisms for avoiding contracting problems, or as devices to increase the credibility of international commitments. The constructivist school of international relations has the broadest view, adding and emphasizing functions such as norm creation, augmentation, and diffusion.

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23. P. TERRENCE HOPMANN, THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS 221(1996) (“noting that his “previous analyses . . . depended primarily on [the disputing parties’] own interests and negotiating skills in overcoming differences” while here he “introduces third parties that are not direct participants in the negotiations, but whose role is to assist the conflicting parties to reach agreement in what otherwise basically remains a bilateral negotiation.”).

24. One particular theory present is that of the rational design project, see INTERNATIONAL ORGANIZATION, THE RATIONAL DESIGN OF INTERNATIONAL INSTITUTIONS (Barbara Koremenos, Charles Lipson, and Duncan Snidal, eds.) (2004) (first published in Koremenos, et. al., *The Rational Design of International Institutions* 55 INT’L ORG. 761, (No. 4, 2001).

The legal literature often takes international relations, consciously or not, as its point of departure in thinking about the function of international courts and tribunals. A common approach, for example, is to model the decision to create international courts and tribunals in terms of a rational actor weighing how it might most favorably resolve a conflict arising in regard to a particular treaty regime, issue area, or other relationship. Typically, these models assume that states are leery of surrendering important issues to binding adjudication and that line of reasoning runs to the oft stated conclusion that two states will only agree to binding tribunal- or court-based conflict resolution devices only when the matter involved is not of particular significance to the state. I do not argue that this approach is necessarily incorrect, but I would suggest that it is incomplete. Rather, I assert that in fact states decide quite often to undertake to create (or, as importantly, to not create) an international court or tribunal for reasons other than those associated with resolving a particular conflict or the function of resolving conflicts.

There are a wide variety of international courts and tribunals at present, and they are not all of equal consequence. The possible functions of these institutions should lead to observations about form, or – as a matter of diagnosis – their form might imply something about their functions. In the previous section, it was seen that theories of domestic courts assert a broader range of functions than we see generally in the literature regarding international courts and tribunals. I suggest that not only are the functions of international courts and tribunals more numerous than generally thought, I would argue that in some instances more functions are placed on international courts and tribunals than is the case with domestic tribunals. Indeed, it is the relative paucity of international institutions generally that may lead states to vest courts and tribunals with functions not normally associated with domestic judicial institutions.

I would argue that, historically, it is sometimes the case that the political circumstance, or a significant part of the circumstance, motivating the highest-level decisions to create an international court or tribunal is other than the resolution of the particular disputes that ultimately will be placed before the international court or tribunal. The political decision to create, or entertain the possibility of creating, an international court or tribunal needs to be distinguished from the task of implementing such a decision. It is after the political decision to create is taken that legal staffs are involved to operationalize the decisions in legal terms and in terms that satisfy shared notions of what it means to create something labeled a “court.” In these instances, the task is not so much whether to create a court or tribunal, but rather what that tribunal will look like. Although, doubts at the legal level as to the wisdom of the decision to create the court or tribunal certainly could result in a minimalist institution that meets the political objective, but goes no further.

An example of the political motive to create can arguably be seen in the string of decisions made to create international criminal tribunals in the last century. An assumption in much of the legal literature derived from the language of the constituent instruments is that the function of these institutions

is hold war criminals accountable and, possibly, to bring a measure of restorative justice. That certainly is a function, but there are other political functions possibly present. This is not to suggest that there are not some state actors or non state actors who sought accountability. Rather, it is to argue that a significant, if not key, force in particular decisions to take the route of creating an international criminal tribunal or court is more than simply the accountability of the accused.

Thus, the story of the Nuremberg tribunal has been described as a decision prompted as an alternative to the initial view of some powers that the leadership of Nazi Germany should be summarily executed. The Yugoslav Tribunal story has been told by some insiders as a decision prompted by a desire to do something given NATO's unwillingness to do more something serious, such as commit ground forces. Similarly, the story of the decision to create the Rwanda Criminal Tribunal can be told as one of shame for not acting in the first place and as a response to the demand that the developed world be consistent in its treatment of greater Europe and Africa. The decision to proceed down the track that leads to the International Criminal Court can be told as one resulting from a contest for influence between the General Assembly and the Security Council given the Council's creation of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda.

Judge Thomas Buergenthal reflecting on this discussion of function asked what we should make of the fact that there may have been some additional initial political motivations.<sup>25</sup> The relevant important difference between international courts and tribunals and their domestic counterparts is that almost all international courts and tribunals are relatively young and, as a general matter, more dependent on continuing political support from member states. In contrast, domestic courts are (for the most part) so deeply woven into the social fabric that their continued existence is not seriously threatened by short term political changes in domestic legislative and executive institutions. This is significant because in those instances where there are important political functions served by international courts and tribunals that are different from those stated in the constituent instrument, and since those "unwritten" and initially motivating political necessities may dissipate over time, the political consensus as to the continued need for particular international courts and tribunals may also degrade over time.

Finally, if this is an accurate account of the political functions served by these bodies, an important implication arises for academia: When assessing the value or effectiveness of international courts and tribunals scholars should not only proceed in terms of how well a given institution serves its constituted ends, but also how well it serves the unstated purposes.

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25. Thomas Buergenthal, *Brief Observations*, in PROCEEDINGS, 100 AM. SOC'Y INT'L L. PROC. (forthcoming 2006).

IV.  
THE DESIGN AND OPERATION OF INTERNATIONAL COURTS AND TRIBUNALS:  
A THEORY OF BOUNDED STRATEGIC SPACE

More than most international institutions, international courts and tribunals are highly structured spaces of contestation. They are not designed, for example, to promote cooperation or facilitate discussion. Rather, regardless of the several functions they may serve, they are designed for the presentation of argument by disputing parties to a third party.

Broadly stated, the theory offered in this section is that the structure and operation of international courts and tribunals can be understood as the result of the interactions of five or less different groups of actors *within* and *against* the bounded strategic space defined by the constitutive instrument establishing the international court or tribunal.

In this sense, the rules of procedure employed in the bounded strategic space may be viewed as the legal expression of the political efforts of these groups to control the influence of each other on the operation of the court or tribunal. Each of the groups of actors are defined by their institutional position and each group is motivated by the logic of that institutional position. Thus each group seeks to advance its logic by influencing, or limiting the influence of the other institutional positions, and in this effort they may seek, for example, to make allies of others. The net result of the efforts of the various institutional positions to control one another is the construction of a set of rules and practices that define a bounded strategic arena in which a contest takes place.

The significance of this approach is at least two fold. First, it leads to a dynamic view of international courts and tribunals as opposed to the prevalent static view. Much of the legal literature tends to describe the institutions as more stable than they often are in my experience. The dynamic view captures that initial design is a consequence of politics, and that that political contest can continue in further rounds both within the space created and in efforts to redraw the bounds of the space. Second, this approach exposes the legal structure in terms of efforts of groups to control the efforts of other groups.

Again, noting that the detailed exposition of this theory should be sought elsewhere, the sketch of the theory in this section proceeds in the following fashion. First, I outline the fundamental concept of a bounded strategic space. Second, I provide a brief overview of the five actor groups and their institutional logics. Third, the important added step of placing this model in motion in terms of strategic action by these various actors within or against the bounded strategic space is beyond the scope of this overview and thus only noted with the reader referred to the more detailed exposition elsewhere.

*A. The Bounded Strategic Space*

The 'systems' addressed by this theory are each of the various international courts and tribunals. This theory does not address the aggregate of all the

international courts and tribunals, but rather offers a way of understanding and explaining the structure and operation of each of the many international courts and tribunals. Obviously, there are a great many different international courts and tribunals. This theory asserts that there is a shared underlying dynamic structure that manifests itself in these different institutions.

In brief, the system of each particular international court or tribunal is defined by the constitutive instrument of that court or tribunal. For each international court or tribunal there is a 'big bang,' a moment of creation. The period of gestation may be a matter of only months, or it may last for years. But regardless of the period of negotiated development, there is a moment when a constitutive instrument is concluded, and in that moment the international court or tribunal comes into being. If the creators are states, then the instrument creating an international court or tribunal most often will be a treaty.

The constituent instrument creates a system that can be modeled because the system formed is quite fixed. For the system to set up a game that can be modeled in some way, the boundaries of this system and the "rules of the game" must be defined and relatively fixed. The constitutive instrument establishes such boundaries and rules for two reasons. First, as already stated, the institution that is created is intended to be an arena for contestation. The rules for this contest are thus demanded. Second, the shape of the institution is relatively fixed because (1) states negotiating international instrument as general matter make amendment difficult and (2) this tendency is particularly the case with international courts and tribunals where efforts to alter the strategic space later may be viewed as strategic moves to gain advantage in a particular contest within that strategic space. For these reasons, this theory terms the system modeled as a 'bounded strategic space.'

In addition to creating a system that can be modeled, the institutional positions created in the various international courts and tribunals are sufficiently similar that the model of a bounded strategic space occupied by five or less institutional positions holds true for the majority of such courts or tribunals.<sup>26</sup>

Some examples will help demonstrate the concept of a bounded strategic space. The Iran-U.S. Claims Tribunal (IUSCT), for example, is an institution created by a set of instruments collectively termed the Algiers Accords. The Accords define the basic shape of an institution, its docket, and the law it is to apply. In doing so, the Algiers Accords create a bounded space within which various groups of actors assess their interests and contest with others to gain some measure of control over the activities of the institution. Using the distinctions offered above, the IUSCT is a party-originated mechanism where both of the two state parties and their nationals could appear as claimants. The fixed nature of this specific strategic space is particularly apparent. Inasmuch as

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26. The significant exception to this assertion is the institutional position of Prosecutor present in the case of the international criminal courts and tribunals. This exception leads to a variation on the details of the theory offered. For a discussion of this variation, see the Lectures, *supra* note 1.

relations between the United States and Iran are strained, it has been difficult to imagine the two states succeeding in rewriting the dimensions of the space through amendment of the Accords. In this sense, the contest for influence has been carried out entirely within the strategic space created by the Accords. In defining the docket, the Accords at best could anticipate, and at a minimum set up, the challenges the institution has faced. The docket of approximately 4800 claims before the Tribunal was anticipated in the Accords by the requirement that the IUSCT be composed of nine arbitrators who would work in Chambers of three, along with the explicit authorization for the number of chambers in the Tribunal to be expanded.

The United Nations Compensation Commission (“UNCC”), in contrast, was a community-originated institution created by resolution of the U.N. Security Council. The UNCC’s docket – with some 2.5 million individual claims and around 200,000 larger claims by corporations, individuals and governments – was clearly much larger than that of the IUSCT. The originating resolution of the Security Council (which incorporated by reference a report detailing the recommendations of the Secretary General) anticipated that the challenging docket demanded an innovative and flexible approach. This flexibility was gained in part by not specifying all the details of the space in the constituent instrument, but rather by delegating authority for the elaboration of those details to bodies within the space.

There are two important points to add given the system definition adopted in this theory. First, not every institution that is labeled an international court or tribunal is equal in terms of its capacity for being modeled as a game. In particular, the open-ended nature of what has been termed ‘diplomatic’ arbitration in the 1800s, where a party could withdraw because they had lost confidence in the process or declare, with little possibility of review, the outcome of the arbitration a nullity, alters the shape of the space sufficiently that it may be more akin to structured negotiation or conciliation than the more legalized international court or tribunal of today. Similarly, it is worth noting that some strategic spaces may not be viable, that is, the space created may be incapable of achieving its stated function. This possibility may be the unintended consequence of negotiated positions or it may be in fact precisely the outcome an actor or actors seek. There are unfortunately instances where the basic genetic structure of the court or tribunal so limits the institution that it is, from the outset, challenged to do other than fall short of the expectations for it.

The second important point is that the defining of a system leads one to consider the relationship of the system to everything outside of it. The state that hosts the institution, the state that is requested to assist in securing evidence for the work of the court or tribunal, or the state non-party that claims to be affected by the contemplated decision of the court or tribunal are just three examples. The ‘outside’ of the system may be explicitly brought in as part of the system in the constitutive instrument and this is addressed in terms of one of the groups of actors, the “other interested parties.” But more broadly, and beyond the scope of this overview, the topic of what is outside of the system can be viewed as a

question of the autonomy or dependency of the system, depending on one's perspective.

### *B. The Actors*

In defining the boundaries of the system, we are led also to define the actors within the system. A critical insight in this regard is that the actor types found existing within international courts and tribunals repeat across the range of institutions. This theory asserts that there are at least five institutional positions, or actors, to potentially consider. The five groups of actors are each defined by a specific and distinct institutional position with each position being identified by a particular logic. In other words, "where one stands" – a diplomatic adage goes – "depends on where one sits." Thus in referring to actors, I do not refer to interest groups, but rather to institutional positions common to many international courts and tribunals. Specifically, the parties, the adjudicators, the constitutive community, the secretariat, and other interest parties. Although they are commonly present, these five actor groups do not exist in every institution, nor are they of equal power or influence.<sup>27</sup>

#### *1. The Parties*

A central institutional position is the group of actors who are present as the parties before the institution. In case of the Iran-United States Claims Tribunal, the parties were the governments of Iran and the United States and, as claimants, the nationals of those two states.

The logic of the parties to a dispute is defined as one seeking maximal attainment of their interests in the resolution of the dispute. In the vast majority of cases, the interest of the parties is to win on the legal merits of the dispute, but the spectrum of interests is varied and parties might reasonably hope only to minimize the degree of loss. In this strict definition, the logic of the party's desire to attain their interests trumps any countervailing interests of the institution or larger community.

This logic might be thought to be inconsistent with the presence of procedures that seek to ensure impartial and independent tribunals. But if we assume on average a measure of equality in bargaining power and skill, one would expect the logic of the parties to lead each party to seek to limit undue influence by the other party thus moving the international courts and tribunals toward the dominant preference for impartial and independent tribunals. The logic allows for the possibility, however, that a party would not be concerned with its possible tainting of a community-originated institution assuming its doing so would further its logic. Conversely, it should not be surprising that in a

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27. The existence of five positions means the views of some of these actors will often coincide. Indeed, not only may the groups coincide, but in some cases one group may serve as an agent of another. Such coincidental agency does not mean that such positions need not be considered in as much as the coincidence on one point does not require agreement on all points, nor is there necessarily a shared emphasis even when views coincide.

community-originated institution that the institution, the community that created the institution, and the adjudicators whose oath is to the institution and not the parties, may view the parties in terms of this logic.

### 2. *The Adjudicators*

A second institutional position is that occupied by the “adjudicators,” a term used here to encompass the sole arbitrator or the panel of judges or arbitrators who will carry out the adjudicative function of the institution.

The logic of this position is difficult to articulate because the logic in practice is complex and varied. A dominant logic, applicable more clearly among international commercial arbitrators, is one of self interest where the adjudicator seeks to be retained as an adjudicator again either on an *ad hoc* basis or within an institution. This logic is also applicable to the adjudicators in international courts and tribunals considered by this theory. The difficulty is that the self interest of the cadre of adjudicators in international courts and tribunals is often more complex than simply future retention and thus must be more loosely defined as a logic that seeks to maintain or increase the reputation of the individual adjudicator. The reasons for, and difficulties generated by, this logic are beyond the scope of this brief introduction, but are broadly speaking a product of the fact that international adjudicators can look to maintain their reputation or status not only within the world of international adjudicators but also, for example, within their national political realms or within the academic community from which they are often drawn. Again, this issue is discussed at some length in the full exposition of this theory.

In terms of the narrower logic of seeking to be retained as an adjudicator either on an *ad hoc* basis or within an institution, adjudicators are concerned with determining what their task is and, most importantly, with determining who has defined their task and will judge their performance of that task. That focus leads to the distinction of whether an institution finds its origin in the will of a community or the parties. If the institution was created by the parties, then the arbitrator serves in essence as a contractual agent of the parties, and his or her duties *as arbitrator* derive from that relationship. In contrast, a judge with a community-originated institution shares the community’s concern with the long term integrity of the institution. As a consequence, for example, the adjudicator in an community-originated institution will recognize that although the individual decision is the only thing of importance to the parties, the place of the individual decision in the overall framework of the institution’s jurisprudence may be of importance to the community that created the institution.

### 3. *The Community*

The first two institutional positions are present in all international courts and tribunals, the remainder are not. In the case of a party-originated international tribunal, the parties both create the institution and appear before it.

In a community-originated institution, the parties are still present as the actors appearing before the institution, but it is some community that creates the institution. It is this community that is the third institutional position. The group of actors that form this community in addition to creating the institution, often also have continuing roles outlined in the constitutive instrument. The community often funds the operation of the institution. In addition, the community as originating group often gives to itself authority over the selection of the adjudicators or members of the secretariat.

The logic of the community is *a priori* concerned with the interests of the community in the resolution of the identified disputes, and not necessarily the interests of the particular parties or the outcomes of particular disputes. The community in this sense may view particular parties with distrust.

In order to protect the interests of the community in creating the court or tribunal over the particular interests of the parties in the resolution of their specific case, the community, as stated above, may empower the court to take action on its own initiative. The community does so because it believes its conception of what may be at stake in the court's hearing a particular matter may not be adequately captured by the interests of the particular parties before the court. It is rare that the parties themselves grant such *sua sponte* authorities to the adjudicators. An example is the International Court of Justice, which possesses the power to order interim measures of protection *sua sponte*, while in the case of party-originated institutions the authority to grant interim measures first requires a party request.<sup>28</sup>

#### 4. The Secretariat

A fourth institutional position in many international courts and tribunals, but not all, is the "secretariat" of the institution. The functions of the secretariat vary. Among other things, the secretariat may assist the adjudicators in their work, perform clerical and administrative tasks, or act as host for meetings of the governing body. In practice, secretariats thus can exhibit a range of powers running from ones purely clerical to those critically important to both governance and adjudication.

The logic of the secretariat is similar to that of the adjudicators, that is, the logic of the members of the secretariat is to seek the continuation of the position enjoyed or the occupying of a similar or better position. The members of the secretariat likely do not enjoy the security of employment of the adjudicators and may not feel as secure in their positions. Often their logic of continuing their positions means that the secretariat is defensive of the long term health of the organization. They can seek both to promote the institution and defend its integrity and reputation. The logic of the secretariat differs from that of the

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28. See, e.g. David D. Caron, *International Dispute Resolution: Comparing the Roles Accorded the Parties and the Community Surrounding Them*, 85 AM. SOC'Y INT'L L. PROC. 65 (1991) (under the heading "Remarks by David Caron").

community in that the secretariat seeks the continuation of the institution, while the community values the institution only to the extent that it satisfies the interests that led the community to create the institution in the first place.

As stated, the functions and powers of secretariats vary significantly. One hypothesis is that there is an inverse relationship between the powers of the adjudicators and those of the secretariat: The stronger the adjudicators, the weaker the secretariat. One may appropriately view the creation of the WTO appellate body primarily as a manifestation of the legalization of the WTO. But, the creation of a permanent appellate body also moved the locus of control at the appellate level from the secretariat toward the adjudicators. It takes repeat interactions for adjudicators to be comfortable with one another and a full time presence for the adjudicators to take greater responsibility for an institution (as opposed to simply deciding the particular case put before them). In contrast, the adjudicators within the dispute settlement panels of the WTO can be seen as operating at a disadvantage vis-à-vis their colleagues in the appellate body. When a dispute settlement panel (an *ad hoc* group) is convened, they are aided in their work by an analysis of the secretariat applying the jurisprudence of the WTO. Given that these panelists may not have worked together before this, their ability to push back collectively on this secretariat analysis, it can be argued, is structurally limited. The more adjudicators are present and the more they can interact, the more they will operate at the extent of the powers available to them under the constitutive instrument. The more the secretariat is left day to day to manage an international court or tribunal, the more it will operate at the extent of powers available to it.

The secretariat thus in some instances is a weak force, while in other circumstances, particularly, for example, when it has a role in selecting the *ad hoc* adjudicators, the secretariat can shape greatly an institution's work and life.

##### *5. The Other Interested Parties*

As mentioned in the discussion of the bounded strategic space, there are numerous states and other actors outside of the space. Moreover, the bounded strategic space may be dependent on, or relatively autonomous of, this outside area. There is a final institutional position inside the strategic space of some international courts and tribunals that is intended to accommodate some of these outside entities. This is a group of actors that arguably possess a special interest in the outcome of particular proceedings to which they are not a party. One example would be non-governmental organizations who are allowed to make non party submissions in investment arbitrations under Chapter 11 of the NAFTA. Another example would be third states that in specific circumstances may intervene in proceedings before the International Court of Justice.

The logic of the other interested parties is to represent and further the interest that justifies their participation. Their claim often is that they represent an interest that is affected and arguably not protected or represented by parties. The parties are more interested in the outcome of their case, then the

consequences of that outcome for the interests of others, for a principle potentially at stake or for its spillover into another dispute.

*C. Setting the Model in Motion: Contestation Within and Against the Bounded Strategic Space*

The final step of envisioning the dynamic interactions of the various actors and the manifestations of these interactions in the structure of the various international courts and tribunals is beyond the scope of this overview. I briefly note only three points.

First, the five actors described above are not always present in every international court and tribunal. Historically, the most common model involved only the parties and the adjudicators in the most typical party-originated institution – *ad hoc* arbitration. The substitution of a community for the parties as the originating basis for the institution is crucial in this sense and in my view marks the transition from an international arbitral tribunal to an international court. To both the party-originated tribunal and the community originated court may be added secretariats and other interested parties.

Second, as to contestation *within* the bounded space, the possibility of contest invites both a search for allies and a search for control. In addition, as the various actor groups may have different images of the functions of the institution and may possess different interests as to the decisions, integrity and vision of the institution, such differences are often foreseen and controls on the behavior of various groups are built into the structure of the strategic space.

For example, the community may exert some influence over the adjudicators by requiring that they possess certain qualifications. Adjudicators may have to possess certain experience or qualities of character. Adjudicators may be required to apply specific norms spelled out in a treaty so as to limit judicial doctrinal innovation, may be granted the power to write dissents as a way to limit the law-making possibilities of the majority, may be removed from their posts for certain behaviors, or may be required to supply reasons for their decision so as to limit their discretion. The adjudicators are likewise controlled if decisions are subject to appeal, annulment or political review.

In this way, one may investigate each of the possible relationships between actors in a international courts and tribunals to understand the potential for alliance and conflict, and to identify the various control devices manifest in existing institutions. For example, the community in most community-originated institutions continues to exert influence past the formal creation of the institution through a formal or informal voice in the selection of adjudicators and the head of the secretariat. In other cases, the community has a continuing role through a governing body which is representative of the originating community.

Third, as to contestation *against* the bounded strategic space, it is important to note that there are at least to two phases to the construction of the bounded strategic space. First, there is the conclusion of the constituent instrument which

establishes the court or tribunal. But this layer of DNA sometimes provides only the skeleton of the institution and not the final details of the organism. The second phase comes with the initial governance of the institution, whether that governance is located in a governing body formed by the community, in the adjudicators or in the secretariat. In general, it is a characteristic of dispute resolution mechanisms that the structure arrived at, in both phases, is difficult to alter. Yet, although the odds are against successfully altering the bounded strategic space, the groups acting within the bounded strategic space may choose to act against the bounded space itself seeking to alter it, or defect from it.

## V.

### THE CONTRIBUTIONS TO THIS SYMPOSIUM

The contributions to this Symposium volume address a broad range of questions relating to the political and institutional aspects of international courts and tribunals. Several of the articles consider the conditions that bear on the decision to create, or the refusal to create, an international court or tribunal.

Charles Seavey in *The Anomalous Lack of an International Bankruptcy Court* asks why bankruptcy courts should be so common both historically and domestically, while they are yet to be created for sovereign nations. Seavey notes that despite the desperate financial situation of a number of developing states, there is not a sovereign bankruptcy mechanism but that rather “the IMF, the World Bank, and the Paris Club can at best be said to operate in the mediatory continuum.”<sup>29</sup> Seavey argues that “[m]ost participants in the debate over a sovereign bankruptcy court, with a few exceptions, agree with the notion that creating such a court would result in more equitable sovereign fresh starts while creating massive new [long term] efficiencies in the conversion process.”<sup>30</sup> Seavey asserts a number of reasons that potentially explain the decision to not create such a court. Among other things, Seavey concludes that the tendency towards the establishment of international courts and tribunals must be evaluated in terms of the existing institutional framework absent such a court. “Courts and tribunals are not desirable to a given party if they dilute their ability to dominate other parties. When a given institutional structure *already* creates domination or a disproportionate power for some parties over others, and when the dominant parties simultaneously control whether or not the institution creates an IC&T, that institution is unlikely to create an IC&T.”<sup>31</sup>

Jennifer Heindl’s contribution can be seen as a case study of creation (or refusal to create depending on one’s starting point). In *Toward a History of NAFTA’s Chapter 11*, Heindl using newly released materials offers a valuable negotiating history of Chapter 11 and the political context surrounding that negotiation. An official within the U.S. Trade Representative’s Office at the

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29. 24 BERKELEY J. INT’L L. 499, 517 (2006).

30. *Id.* at 506.

31. *Id.* at 514.

time of the negotiation commented to me that the U.S. sought to keep the institutional aspect of Chapter 11 to a minimum so as to avoid what was perceived as a tendency of any international institution to seek to grow in its range of competence. Heindl's study is an important step in uncovering the history of that negotiation and the factors that were at play.

The decision to create to a tribunal is related to (1) the scope of the power given to a tribunal, (2) the question of when it is time to close a tribunal and how one will go about that task and (3) the extent of support enjoyed by an existing tribunal. The first question is addressed in the contribution by Anne-Sophie Massa: *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*.<sup>32</sup> Massa asks not why an institution was created, but instead considers how prosecutorial discretion serves as a limitation on the reach of an existing institution. A similar study of the limits placed on the powers provided an institution is offered in Corrina Heyder's contribution: *The U.N. Security Council Referral of the Crimes in Darfur to the International Criminal Court in the Light of the U.S. Opposition Towards the Court*.<sup>33</sup> Heyder explores the seemingly conflicted position of the United States opposing International Criminal Court ("ICC") jurisdiction over its nationals while simultaneously accepting the value of the Security Council referring specified crimes in Dafur to the ICC. For Heyder, the U.S. participation in the referral of crimes in Dafur to the ICC means that "the U.S. will find it hard to ignore the court and has now factually admitted its legitimacy with respect to universal jurisdiction in cases of violent and horrific crimes" and that "it is hoped that the results of a properly working court will calm down the fierce concerns of the U.S. and lead to possible *ad hoc* cooperation in the long run."<sup>34</sup> The second question, that of closing down a court or tribunal, is considered by Laura Bingham in *Strategy or Process: Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*.<sup>35</sup> Bingham examines the end game for the international criminal tribunals for the Former Yugoslavia and Rwanda. She asks what the functions of these tribunals are and how that vision of function should inform the shape of a strategy to wrap-up their efforts. Finally, in *The Glue That Binds Us: Explaining the Broad-Based Support for WTO Adjudication*, Leah Granger examines the third question by considering why adjudication at the WTO, despite the fact that the matters addressed can be crucial to the disputing nations, is broadly supported.<sup>36</sup>

Contestation within the strategic space of an international court is examined by Shoab Ghias in his contribution, *The Expansion of Judicial Doctrine by*

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32. 24 BERKELEY J. INT.'L L. 610 (2006).

33. 24 BERKELEY J. INT.'L L. 650 (2006).

34. *Id.* at 671.

35. 24 BERKELEY J. INT.'L L. 687 (2006).

36. 24 BERKELEY J. INT.'L L. 521 (2006).

*WTO Appellate Body*.<sup>37</sup> Ghias examines the expansive practice of the WTO Appellate Body and the efforts of various actors to exert control over that expansion.

Two contributions focus on efforts to alter the strategic space of international courts and tribunals. Tom Walsh in *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?* examines various calls for the establishment of an appellate mechanism for investment disputes generally and within ICSID specifically.<sup>38</sup> He considers the proposal offered for debate by the ICSID Secretariat, and the divide between states that listen to the generally cautionary voice of the investor community and states that fear being the subject of adverse award. Christina Hioureas in *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights* considers the most recent effort to amend the European Convention on Human Rights which in turn became a debate about the function of the European Court of Human Rights.<sup>39</sup> Unlike many strategic spaces, the European Court of Human Rights has been amended numerous times, although as the size of the Council of Europe increases, it remains to be seen whether this most recent effort, Protocol 14, will be ratified as quickly as previous instruments.

It is sometimes argued that the strength of the European Court of Human Rights is a consequence of the desire of states to use the Council of Europe as a means of transition to the European Union. The eventual conferral of the economic benefits of the Union are seen as the hook pulling states toward compliance with the human rights and rule of law requirements of the European Convention on Human Rights. It is in this vein that Rebecca Wright in *Foreign Aid Donors and Institutional Change: Possibilities for Growth at the New African Court on Human and Peoples' Rights* looks to the possible linkage of compliance with the new African Court on Human Rights to foreign aid as a device whereby the African Court over time may be strengthened.<sup>40</sup> The new African Court is often described as a start, but also as a quite limited institution. Wright explores linkage as a means for institutional transformation. More generally, Mike Burstein in *The Will to Enforce: The Political Constraints Upon a Regional Court of Human Rights* considers why it is that one regional human rights court may flourish while another does not.<sup>41</sup> Burstein notes that “[t]he range of external forces that can constrain or enhance a regional court of human rights’s ability to function effectively is overwhelmingly broad, ranging from the structure of the court as defined in its organic treaty to the adequacy of funding a court receives from its member states or outside forces.”<sup>42</sup> For Burstein, a regional court is going to be “as good as its community will allow it

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37. 24 BERKELEY J. INT.'L L. 534 (2006).

38. 24 BERKELEY J. INT.'L L. 444 (2006).

39. 24 BERKELEY J. INT.'L L. 718 (2006).

40. 24 BERKELEY J. INT.'L L. 463 (2006).

41. 24 BERKELEY J. INT.'L L. 423 (2006).

42. *Id.* at 424.

to be.”<sup>43</sup>

Lastly, there is a look back. Durwood Reidel in *The U.S. Military Tribunals at the Former Dachau Concentration Camp: Lessons for Today?* examines not the well known International Military Tribunal at Nuremberg, but rather the far numerous trials of German war criminals before U.S military tribunals.<sup>44</sup> For Reidel, there can be seen in these often forgotten trials, an earlier manifestation of the notion expressed today as ‘complimentarity,’ and of the need to see international tribunals and national courts as a system possibly working together rather than at odds.

## VI. CONCLUSION

International courts and tribunals, like all courts and tribunals, are institutions. And although legal scholars appropriately may isolate courts from the surrounding political context as they study the jurisprudence of a court or tribunal, it is quite artificial to examine the court as an organic institution without reference to the functions it serves and political context of which it is an integral part. When examined in this way, the dynamic nature of these institutions is readily apparent. This Symposium is offered as a step towards a political theory of international courts and tribunals.

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43. *Id.* at 443.

44. 24 BERKELEY J. INT.’L L. 554 (2006).

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## The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights

Mike Burstein

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# The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights

By  
Mike Burstein

## I. INTRODUCTION

What good is a regional court of human rights? While these supranational courts ostensibly exist to apply the human rights norms codified in their governing treaties,<sup>1</sup> very little is known about the specific role that human rights courts play in establishing robust human rights regimes and the external factors that affect a regional court of human rights' ability to function effectively. As a result, the impact that a regional court of human rights can have on the lives of citizens within its jurisdiction remains unclear. The divergent experiences of the European and Inter-American systems illustrate this ambiguity. The European Court of Human Rights (ECHR) has inarguably overseen one of the world's most successful human rights regimes, and it can rightfully claim to have made a meaningful contribution to this progress.<sup>2</sup> However, the European Court of Human Rights is not solely responsible for the development of human rights within Europe, and much of the change can be attributed to the actions of courageous leaders who have shaped regional political discourse over the past forty-five years.<sup>3</sup> Alternatively, the structurally similar Inter-American Court of Hu-

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1. European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 19, *opened for signature* Apr. 11, 1950, 213 U.N.T.S 222 (entered into force Sept. 3, 1953) (purpose of European Court of Human Rights is “[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”); Statute of the Inter-American Court of Human Rights art. 1, Oct. 31, 1979, O.A.S. Res. 448, 9th Sess. (“The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.”).

2. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 134 (2001); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 63-66 (2005).

3. See, e.g., Pamela A. Jordan, *Does Membership Have Its Privileges?: Entrance into the*

man Rights has experienced only relatively limited success.<sup>4</sup> To what extent this difference in results is a product of the shortcomings particular to the Inter-American Court and the virtues of the European Court, or rather a consequence of factors exogenous to either institution, is far from certain.

The range of external forces that can constrain or enhance a regional court of human rights' ability to function effectively is overwhelmingly broad, ranging from the structure of the court as defined in its organic treaty to the adequacy of funding a court receives from its member states or outside forces. This paper will examine only the political factors that shape a regional court of human rights' capacity to develop a norm of respecting human rights. As outlined by Professor David Caron, the texts of the governing treaties and procedural rules of any international institution compose the boundaries of a unique "strategic space" in which regional courts of human rights operate.<sup>5</sup> Four primary actors operate within this space: the court, litigating parties, the community of member states, and outsiders (that is, interested parties without a strong legal relationship to the institution).<sup>6</sup> Under this theory, each actor has an independent, but potentially overlapping, set of interests, and the actors are aware of their own interests as well as each other's.<sup>7</sup> This theory also assumes that the actors will operate within the space in a manner logically consistent with advancing and defending their interests.<sup>8</sup> When interests overlap, actors may act in harmony to achieve mutual goals. Conversely, when their interests are at odds, actors will exert political or legal pressure to prevent their opponents from achieving their goals.

This paper will examine regional courts of human rights under the "strategic space theory," and argue that a regional human rights court has an interest in advancing human rights because it increases its political power, but this interest is constrained by both the community of member states' will to enforce (or disregard) the court's judgments and the political dynamics between the defendant-state and the rest of the community. A consequence of the political constraints is that regional courts of human rights are limited in their ability to act as an ad-

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*Council of Europe and Compliance with Human Rights Norms*, 25 HUM. RTS. Q. 660, 686 (2003) (noting that the Council of Europe primarily relies on "the soft power of pressure, shaming, and the threat of expulsion to keep members in line" rather than reliance on the judgment of the ECHR itself); see generally Gideon Sjoberg, Elizabeth A. Gill & Norma Williams, *A Sociology of Human Rights*, 48.1 SOC. PROBS. 11 (2001).

4. See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 514, 543-44 (1997) (discussing the dramatic difference in functions of the Inter-American and the European supranational human rights regimes despite their significant structural similarities); see also Cassel, *supra* note 2, at 134 (noting the marginal impact that the Inter-American system has had on its member states, especially in comparison with the European system); Posner & Yoo, *supra* note 2, at 41-44.

5. See generally David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401 (2006).

6. Although Caron identifies at least five primary actors, this paper will collapse the adjudicators and the administrators into one entity (the court) for the sake of simplicity. See *id.* at 402.

7. See *id.*

8. *Id.*

vocate for human rights norms beyond what the community defines as acceptable levels of observance. This is not to imply that courts are powerless or completely dependent upon the grace of the community of member states, but rather that regional courts of human rights are unable to take aggressive stances towards advancing human rights.

This paper will argue that the balance of power within a strategic space means that while a prototypical regional court of human rights has only a limited ability to change regional norms, it has a strong ability to address deviations from established norms. As a result, the most significant impact of regional courts of human rights will be to play a coordinating role in harmonizing the dominant standards of human rights observance within the community of member states, and, more importantly, prevent regression from these standards. It will also argue that, despite its lack of political dominance, a court *might* be able to develop the political capital to achieve political independence through a conservative long-term strategy. This, in turn, will allow the court to take bolder steps in advancing the community standard of human rights observance.

This paper will begin in Part II by explicitly detailing the theoretical framework that this paper will use to identify the actor's interests. Part III will then identify the actors and their interests. Part IV will explain how these interests interact and overlap to limit the capacity for a court to change regional norms. Part V will conclude by examining how a court is able to work within these limits to protect and potentially advance human rights norms.

## II. THEORETICAL FRAMEWORK

There are two overlapping questions that are central to understanding the political role that courts play within the bounded strategic space: (1) why do courts do what they do, and (2) why do states care what the court does? These questions have been addressed by two different wellsprings of scholarship: political theory of national courts and international relations theory. Due to the supranational character of regional human rights courts, the analytic tools in both intellectual traditions are useful but limited in their applicability to the case at hand. Thus, this paper will dip from both wells in an attempt to understand the court's political role.

Martin Shapiro's political theory of courts was predicated on a "prototypical court" that consisted of four characteristics: "(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong."<sup>9</sup> Through adjudication, a prototypical court fulfills three political roles. First, the court is an institutionalized dispute-resolution mechanism.<sup>10</sup> This is relatively self-explanatory insofar as the deci-

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9. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1986).

10. *Id.* at 1-17.

sion, if obeyed, will theoretically resolve the immediate conflict between the plaintiff and the defendant by declaring one side to be a winner and the other a loser. Second, the decision itself often serves a law-making function by “filling in the details of statutory or customary law.”<sup>11</sup> The third function is one of social control in which the court imposes pre-existing laws upon the litigants.<sup>12</sup> By applying laws that have been established by society as the chosen means of conflict resolution, the court imposes the interest of society at large upon the litigants’ dispute.<sup>13</sup>

Shapiro’s political theory of courts is limited to national courts because he assumes that the court is “a servant of the regime, imposing its interests on the parties to the litigation.”<sup>14</sup> This is not necessarily the case in regional courts of human rights. As will be discussed below, the court’s interests cannot be equated to the interests of the regime. In fact, there is reason to believe that the interests of the court and those of the member states are effectively in opposition in many instances. Similarly, it is not necessarily correct to assume that the laws are representative of the regime’s interests in the case of regional courts of human rights, especially considering that the states that comprise the regime are the exclusive set of defendants. Nevertheless, Shapiro’s theory holds great value as an analytic tool for illustrating the political nature of regional courts of human rights, and this paper will illustrate this role by examining the limits of Shapiro’s prototype.

The second question, why do the other actors care what the court does, is simultaneously an underdeveloped yet saturated field. It is underdeveloped insofar as there is little scholarship on the political relationship between regional courts of human rights and other interested parties.<sup>15</sup> Instead, the majority of intellectual firepower has been aimed at determining why nations comply with treaties and customary law.<sup>16</sup> This paper will apply these theories of compliance to the decisions of regional courts of human rights in an attempt to better understand why state parties and the community of member states allow their actions to be governed by these courts’ decisions. Clearly, there are differences between a decision from a regional court of human rights, a negotiated treaty, and customary law. Nevertheless, the analytic tools used within the existing theories to examine compliance with treaties and customary law are useful, though not perfect, in understanding the political character of member states’ relationships to regional courts of human rights.

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11. *Id.* at 28-37.

12. *Id.* at 18-28.

13. *Id.* at 25-26.

14. *Id.* at 26.

15. *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273 (1997) (identifying the characteristics of effective supranational adjudication, which includes but is not limited to regional human rights adjudication).

16. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823 (2002); Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998).

International relations and international law theories are conventionally divided into two camps, rational and constructivist. Unsurprisingly, each school of thought has limitations. The three main rational approaches, realist, institutionalist, and liberal theories, focus primarily on the actor's self-interests. A state's interest is generally defined in terms of political power or a strategic goal such as improving its reputation, furthering its ideological ends, avoiding conflict, or coercing another state to change its behavior. The calculus in determining whether a means is appropriate to employ in pursuit of a strategic goal is essentially an estimation of the possible negative consequences of taking an action (for example, marginalization from the international community, economic sanction, or increased difficulty in future negotiations), balanced against the magnitude and probability of the positive consequences of taking that action. The preferred means of achieving a goal is the one that maximizes the magnitude and likelihood of positive outcomes and minimizes the negatives. Realist approaches will assume that the international institutions exist only to serve state interests, and any compliance with international law is coincidental at best because obeying the law has no positive value independent of the consequences of compliance.<sup>17</sup> Alternatively, institutionalist approaches will argue that the institutions resolve inefficiencies in the otherwise anarchic international arena, and thus can act in the state's interests by playing a coordination or communication function.<sup>18</sup> Finally, liberal approaches reject unitary state actors and argue that compliance is effectively dependent on interest group politics within a nation.<sup>19</sup> In sum, all three of these theories share the presumption that states act rationally in pursuit of their interests.

In contrast, social constructivist theories of compliance "assume that ideas, not just tangible goals or interests, influence decision making. Ideas, such as international human rights norms, help shape the behavior of political actors and the structures in which they associate."<sup>20</sup> For example, Harold Koh proposes that the interactions of transnational public and private actors establish patterns of behavior within states, and that these patterns become habitual, theoretically creating a norm of compliance with international laws or institutions.<sup>21</sup> A nation may choose to act against its interests, as defined by rational models, because their culture and belief structure demands it and because this culture/belief structure has been shaped by repeated acts of compliance with the norm in ques-

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17. See, e.g., Posner & Yoo, *supra* note 2 (arguing that international institutions should not be independent of the controlling parties because then they may not represent state interests).

18. See, e.g., Guzman, *supra* note 16 (arguing that states comply with international law and institutions because they reduce transaction costs); Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

19. See, e.g., Helfer & Slaughter, *supra* note 15 (arguing in part that supranational adjudication is dependent upon the court's ability to align itself with domestic interest groups).

20. Jordan, *supra* note 3, at 664-65.

21. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 194-206 (1996).

tion.<sup>22</sup> Thus, transnational legal theory suggests that regional courts of human rights can play a significant role in developing norms within states because they regularly interact with states and attempt to elicit their compliance with international laws. One of the overriding problems with such constructivist theories is their limited ability to predict when one idea (for example, the right to a fair trial) will override other recognized interests of the state (for example, limiting access to politically sensitive evidence).<sup>23</sup> Although this often becomes apparent *post hoc*, this paper will assume that when a state refrains from acting in its interests, it is because the norm represented within the law, or at least the norm of compliance with international law, has been integrated into the fabric of the nation's society.

Thus, actors within a strategic space will have a set of interests, and will behave in a manner consistent with realizing these interests. An actor may also be influenced by the human rights norms codified within the court's governing treaty, and thus may be compelled to act in ways that either reinforce or undermine these interests. When an actor's compliance contravenes its own interests, the actor either acted irrationally or the action that would have advanced its own interest was unacceptable because it conflicted with established norms of state behavior.<sup>24</sup> Finally, an actor may have an apathetic outlook towards the normative significance of human rights, but will comply unequivocally because compliance is in line with the state's interest.

### III.

#### THE ACTORS AND THEIR STRATEGIC INTERESTS

##### A. The Court

The most obvious actor is the court itself. As Professor Caron has noted, the court is an amalgamation of adjudicators and administrators.<sup>25</sup> On an individual level, the court's employees have an interest in the institution's prestige and power because their personal success is tied to that of the court.<sup>26</sup> In this

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22. In the words of Alexander Wendt, "what stops the United States from conquering the Bahamas, instrumental factors, or a belief that this would be wrong?" Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55.4 INT'L. ORG. 1019, 1024-25 (2001). Likewise, even if the use of nuclear weapons in Iraq were favorable in a cost-benefit analysis, the "nuclear taboo" would prevent a nation from doing so because the norm of non-use has been internalized. *Id.*

23. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1958-62 (2002) (noting that the difficulty in determining which norms will be internalized in Koh's model and that Franck's model does not address why or when the 'compliance pull' of a legitimate international law will override conflicting state interests); Guzman, *supra* note 16, at 1836

24. For example, there is a normative reason why the United States does not invade the Bahamas.

25. Caron, *supra* note 5 at 404.

26. *Id.* at 415 ("The logic of this group [the adjudicators] may be viewed as one of self interest expressed in the ability to be retained as an adjudicator, hired within another institution as an adjudicator, or maintain and increase their reputations . . . . The logic of the secretariat is similar to that of the adjudicators.").

regard, the adjudicators' and administrators' interests are in line with a larger institutional interest in garnering political power and control over the other actors.<sup>27</sup> It is worth noting that the community of member states controls the judicial nomination and selection processes.<sup>28</sup> Therefore, it is possible that any given judge may be willing to act against the interests of the court if the judge believes, due to patriotic norms or out of a rational expectation of reward at the end of his or her term, that the interests of his or her nation deserve more consideration than those of the court. Although this is possible, this paper will presume that instances such as these are in the minority, and that the majority of adjudications are preformed in a manner supportive of the institution. This logic does not apply to the administrators because the judges in both the Inter-American Court of Human Rights and the European Court of Human Rights elect chief administrators.<sup>29</sup> The presumption that the aggregate and default preference of adjudicators is to support the court suggests that the administrators are chosen for their ability to advance the institution. Therefore, judges, administrators, and the court as a whole presumptively pursue the same strategic goals.<sup>30</sup>

How the court pursues its goals is less obvious. Within the strategic space model, political power manifests in three discrete powers: the power to act independently of constraints imposed by the other actors, the power to affect the boundaries of the space by creating and defining the binding treaties, and the power to control other actors' ability to act. The court's authority to issue binding decisions provides the legal basis for a court to order specific acts of the member states. Likewise, when the court issues a decision, it is also acting in a law-making fashion and is thus able to define the boundaries of the strategic space. These powers of binding decisions and law making are limited by the political constraints imposed upon the court by other actors. For example, compliance with any given decision may not be in a defendant-state's interest. Also, the community of member states might react to a court's overreaching in either capacity by retaliating via cutting the court's budget or amending the treaty or procedural rules.

Because it is within the court's interest to develop its capacity to issue binding decisions, a probable goal of any regional court is to develop a norm of obedience within its community of member states.<sup>31</sup> Although Harold Koh

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27. *Id.*

28. Statute of the Inter-American Court of Human Rights, *supra* note 1, arts. 6-9; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 22. Statute of the Inter-American Court of Human Rights art. 1, Oct. 31, 1979, O.A.S. Res. 448, 9th Sess. ("The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.")

29. Rules of Procedure of the Inter-American Court of Human Rights (entered into force Jan. 1, 1997), <http://www.cidh.org/Basicos/basic16.htm>; European Court of Human Rights, Rules of the Court, Rules 8-18 (Oct. 2005), <http://www.echr.coe.int/eng>.

30. However, as Professor Caron notes in the introduction to this issue, the administrators and adjudicators may be in conflict over control of the court. Caron, *supra* note 5 at 415.

31. Richard S. Kay characterized this as when the treaty and the court become genuine sys-

does not provide a method for predicting when, or if, a given externally imposed norm will become dominant in a nation state, he did outline four stages within the norm integration process: interaction with the norm promoting agent, interpretation of the norm, internalization of the norm (in which “agents of internalization” attempt to coerce domestic agents to obey the norm in specific instances), and eventual obedience to the norm.<sup>32</sup> In short, the court will reach its goal of political independence by repeatedly issuing judgments that increase interaction and interpretation with which states comply, thereby establishing a norm of obedience.

This also relates to the court’s jurisdiction, which, in theory, is bound by the text of the treaty, but is effectively limited to the extent of the court’s political reach. Each time a court accepts a case, it is claiming that a specific fact pattern falls within the strategic space, thus opening the door to rule upon similar subject matter in the future.<sup>33</sup> As Professor Jenny S. Martinez noted, “over time, the habit of obedience to judicial decisions becomes ingrained, allowing them [the courts] to issue decisions that are more controversial and still achieve a comparable level of compliance.”<sup>34</sup> Thus, compliance by member states begets greater compliance, and increases the court’s ability to expand its jurisdiction and shape its strategic space.

However, the court can also expand its jurisdiction on the basis of the power of its reasoning through incrementalism, which is to “edg[e] principles forward while deciding for those most likely to oppose them in practice.”<sup>35</sup> In other words, a decision in which a court finds for a defendant-state may include loaded language that the court will rely upon in a later case. Each iteration chips away at the limits on the court’s judicial authority.<sup>36</sup> The recent decision by the ECHR in *Bekos and Koutropoulos v. Greece* illustrates this approach. At issue was whether Greece was liable for degrading treatment on the basis of the victims’ race or ethnic origin.<sup>37</sup> The court found that the Greek police had arrested the victims, two Romani men, and had treated them inhumanely,<sup>38</sup> but dismissed the allegation that the treatment was racially motivated because the plaintiffs did not meet the necessary “beyond a reasonable doubt” standard of proof.<sup>39</sup> In so holding, the European Court of Human Rights noted that it “has

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tems of law and “any doubts we may have about a particular exercise of legal authority are swamped by our prior, and more basic, adherence to the legitimacy of that authority.” Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT’L L. 217, 218 (1993).

32. Koh, *supra* note 16, at 643.

33. Helfer & Slaughter, *supra* note 15, at 314-18 (identifying the strategy of expanding political power through incremental rulings).

34. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 448 (2003).

35. Helfer & Slaughter, *supra* note 15, at 315-18.

36. *Id.*

37. *Bekos and Koutropoulos v. Greece*, App. no. 15250/02, ¶¶ 63-68 (2005), available at <http://echr.coe.int/eng>.

38. *Id.* ¶¶ 42-55.

39. *Id.* ¶¶ 63-68.

not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and—if they fail to do so—find a violation of Article 14 of the Convention on that basis.”<sup>40</sup> In other words, the high “beyond a reasonable doubt” standard remains, but the court implied that it is not bound to maintaining this standard in similar situations in the future. Each time the court reasserts its ability to deviate or change the standard, it is creating case law which legitimates any potential future decision to do so. However, by not actually changing or deviating from the established standard, the court does not provide a strong reason for a member state to reject the decision. In sum, the ECHR expanded its power through its law making ability by defining its own power, but still made a politically convenient decision that will elicit the consent of the member states. Although this is a very slow means of expanding political power, the risks of extending a court’s power in this way are relatively low and there are sizable potential benefits from reliance on this strategy, as discussed *infra*.

Finally, it is important to recognize that noncompliance is just as detrimental to developing a court’s political power as compliance is essential. When a court issues a decision that is ignored, a state’s noncompliance could signal that the court lacks authority on a particular subject matter, and it may even initiate a norm of noncompliance for either the state or the community.<sup>41</sup> Acts of noncompliance do not occur in a void, but are dependent on a court’s history of ruling on the issue at hand.<sup>42</sup> Thus, an act of noncompliance by a member state will be seen as less legitimate if other member states have complied in similar situations; conversely, an act of noncompliance will be most legitimate when the court is expanding its jurisdiction.<sup>43</sup> However, if the court avoids handing down judgments that push the boundaries of what member states will accept and enforce, the court is establishing a norm of noninterference in ongoing violations.<sup>44</sup> Because a court faces a Hobson’s choice when presented with a novel fact pattern, a court, in its selection of cases, walks a fine line between maintaining the court’s political authority through the issuance of judgments that it can reasonably expect to be enforced by member states, and pushing the upper limit of its power by selecting cases that will nudge member states into fuller compliance with human rights norms without undermining its efforts by overreaching.

### B. The Parties

Part of what makes regional courts of human rights unique is the relation-

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40. *Id.* ¶ 65.

41. Helfer & Slaughter, *supra* note 15, at 283 (observing that other states pay attention to the precedential value of a nation’s decision to comply).

42. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL L. REV. 899, 952 (2005).

43. *Id.* at 952.

44. This is presuming that Harold Koh’s theory cuts both ways, which I believe it does. See Koh, *supra* note 16.

ship between the parties. In cases before a court of human rights, the defendants are exclusively states that are members to the court's organic treaty.<sup>45</sup> The plaintiffs are either the victims of an alleged human rights violation or institutional bodies acting as proxies for the interests of the victims.<sup>46</sup> Thus, a prototypical case before a regional court of human rights is one in which an individual sues his/her government.

The primary interest of each party before a regional court of human rights is to obtain a favorable ruling.<sup>47</sup> Although the specific subject matter may vary, victory and defeat for either side of the litigation will normally have similar consequences due to the specialized nature of regional courts of human rights. In the case of a victory by a plaintiff-victim, the court will issue a ruling defining a specific set of facts to be true, and holding that these facts compose a violation of the governing treaty according to the court's interpretation of the treaty. The consequence of this will be a prohibition against member governments acting in such a manner in the future. Contrariwise, in finding for the defendant-state, the court is either rejecting the plaintiff's facts, or granting member states the authority to treat their citizens in the manner alleged by the victim-plaintiffs.<sup>48</sup>

The central issue in litigation before a regional court of human rights is the determination of acceptable and unacceptable state behavior. The political consequences are three-fold. First, for the reasons discussed above, the court has a strong incentive to exert its political authority and rule against the government if compliance is probable. Second, unlike most international courts, failure to comply with decisions of regional courts of human rights does not carry a threat of retaliation from the plaintiff party.<sup>49</sup> The plaintiff-victim is unable to take any action as a result of noncompliance, such as the political retaliation or economic and military sanctions that a plaintiff-state could use to force compliance

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45. Organization of American States, American Convention on Human Rights, art. 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>. (Only the States, Parties and the Commission shall have the right to submit a case to the Court); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, arts. 33-34 (permitting inter-state cases and allowing individuals to bring a case against another member state, respectively). However, the vast majority of cases before the ECHR are brought under Article 34. See John Cary Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 641 (2004).

46. The Inter-American Court of Human Rights only allows the Commission and member states to be parties before the Court, but the new Rules of Procedure effective on January 1, 1997 allow the individual victim to play a significant role in the litigation. See Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 29, art. 23; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 34 (allowing individuals to bring a case against another member state).

47. See Caron, *supra* note 5 at 417-18.

48. Martin Shapiro would argue that the court is also imposing the interests of the regime upon the context. In this case, the court may be doing so, or it may be imposing its own interests, independent of the regime of member states. See *infra* Part IV.

49. Arguably, this is not significantly different from many instances in other forms of international litigation insofar as the differences in power between a global or regional power and a less-developed nation may make any threat of retaliation meaningless.

in other international adjudication mechanisms.<sup>50</sup> Third, and perhaps most importantly, because the parties are a state and a citizen, human rights are an intentional limitation on the traditionally recognized right of a government to (1) act in its own interest, and (2) define what is best for its people.<sup>51</sup> Therefore, a judgment by a court of human rights is an order by an international institution that can define the balance of power between the government and the citizenry.<sup>52</sup>

Because a ruling can severely constrain a government's dominion over its citizens, this paper will presume that obeying such a decision is contrary to any defendant-state's immediate interests.<sup>53</sup> The fact that a regime takes such an action in the first place demonstrates that the government believes that the action is in its interest.<sup>54</sup> Additionally, the regime's defense of the action suggests a desire to retain the legal authority to act in a similar manner in future.<sup>55</sup>

This is not to imply that all nations who fight for increased governmental power do not support human rights. For example, many cases within the European system of human rights are "along the thinly marked border between the legitimate exercise of public authority on behalf of the community and the irreducible claims of individual liberty."<sup>56</sup> Alternatively, the state may lack the capacity to fulfill its obligations under the treaty (for example, fair trials are expensive and resource-intensive).<sup>57</sup> In either instance, the government may support the principles that are laid out in the treaty, but vigorously disagree with the court's interpretation of how these obligations should be implemented. By virtue of the fact that the court does not adopt the state's rationale, this paper

50. Hathaway, *supra* note 23, at 1956 (noting that economic and military sanctions "are so costly, they are rarely administered and tend to be intermittent and ad hoc, and hence unlikely to serve as legitimate, effective deterrents") (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

51. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, at 871-76 (1990) (making an argument that human rights have effectively changed the notion of sovereignty to one of legitimacy in terms of representing, though not necessarily democratically, its citizenry); see also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 64 (2003) (describing a dichotomy of "sovereign nation, local culture, and political legitimacy" as codified in a nation's constitution versus "international, indeed universal, values that are thought to transcend the particularism of the nation").

52. See, e.g., Reisman, *supra* note 51, at 871-76.

53. Hathaway, *supra* note 23, at 1938 (arguing that human rights treaties are contrary to a state's interests).

54. *Id.*

55. Yoo & Posner, *supra* note 2, at 14-22.

56. Farer, *supra* note 4, at 512. However, the European member states have their own history of openly violating human rights. See, e.g., Bekos & Koutropoulos v. Greece, App. No. 15250/02 (2005), at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=5073229&skin=hudoc-en&action=html&table=1132746FF1FE2A468ACCBBCD1763D4D8149&key=46072&highlight=Koutropoulos%20%7C%20Greece> (last visited Dec. 19, 2005) (finding the Greek state responsible for the inhumane and degrading treatment of two Romani men by the police force and the subsequent failure to conduct an effective official investigation).

57. David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U.L. REV. 879, 884 (2003).

will assume that a government will find adverse decisions to be contrary to its interests. Such decisions create a tension between the state's desire to govern as it sees fit, and its obligation to human rights.

### C. *The Community of Member States*

Given that the community of member states consented to abide by the treaty and are the sole enforcers of its provisions, the generalized interest of the community would appear to suggest strong support for the principles within the treaty at first glance.<sup>58</sup> Logically, if a state has committed to the idea of living up to and enforcing the principles in a human rights treaty, then it makes sense to assume that the state also enforces similar laws domestically.<sup>59</sup> This is not necessarily the case. States that sign regional treaties of human rights are marginally more likely to violate human rights than similar non-ratifying states.<sup>60</sup> In fact, a government's human rights record actually regresses post-ratification in some cases.<sup>61</sup> This suggests that some states may join regional human rights regimes for reasons beyond protecting human rights on a regional level.<sup>62</sup>

Some authors have suggested that states join human rights treaty regimes out of a desire to be perceived as a nation that supports the norms in the treaty rather than any sincere willingness to see the treaty enforced.<sup>63</sup> This is because the benefits of ratifying a human rights treaty with a strong enforcement mechanism extend beyond human rights. Submission to the jurisdiction of a human rights regime is correlated with regime stability, a willingness to observe a re-

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58. In the case of the European Court of Human Rights, the Committee of Ministers is explicitly charged with "executing the judgments of the court." See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 46.2. The Inter-American system differs slightly by empowering domestic courts to execute the portion of the IACHR's judgments that stipulates compensatory damages. Other enforcement actions such as policy changes or governmental reform are purely the responsibility of the defendant-state. Organization of American States, American Convention on Human Rights, art. 68.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."). Although the treaty does not explicitly empower other member states to enforce its decisions, Article 65 enables the Court to inform the OAS General Assembly of noncompliance, and the OAS is free to adopt whatever political measures it deems appropriate, and is thus the *de facto* enforcer. See Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 349-55 (1995); Thomas Buergerthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 241 (1982).

59. Hathaway, *supra* note 23, at 1962-63 (noting that strict realist theories would predict no change domestically because some realists view treaties as nothing more than "cheap talk").

60. *Id.* at 2015-17; see also Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 HUM. RTS. Q. 906, 915 (2004) ("Using the notions of principle and practice for global analysis shows that regimes frequently make formal commitments to human rights treaties but continue to violate human rights.").

61. Hathaway, *supra* note 23, at 2015-17

62. See Moore, *supra* note 57, at 889-901 (outlining a rational choice model of human rights compliance in which states ratify and comply with human rights treaties to increase economic investment); see also Hathaway, *supra* note 23, at 2015-17.

63. See Moore, *supra* note 57, at 889-901; see also Hathaway, *supra* note 23, at 2015-17.

strained form of government, and the promise of an independent judiciary.<sup>64</sup> All of these characteristics indicate that investments within a nation with such a government are secure and will not be expropriated.<sup>65</sup> Additionally, committing to a human rights regime offers political rewards by further integrating the state into international society, thus mitigating the dangers associated with political marginalization from the international community.<sup>66</sup> Finally, these political and economic benefits are particularly significant in the regional context because states' proximity to each other necessitates an increased level of interaction and trust.<sup>67</sup>

The most obvious means of obtaining these rewards is to make a concrete commitment to human rights both internationally and domestically. However, complying with human rights norms is politically costly because it constricts governmental power and economically costly because enforcement and regulation is not cheap. Thus, nations who are not ideologically committed to human rights will seek to reap the benefits of being perceived as human rights compliant without incurring the costs of doing so. Some countries will attempt to avoid these costs by finding more cost-effective means of presenting a "human rights compliant" image—such as ratifying human rights treaties but then minimizing cost by only marginally complying.<sup>68</sup>

This is not to say that submitting to the jurisdiction of a regional court of human rights is without its costs by any means. If a state has joined a regional human rights treaty, so long as individual victims (or effective proxies) can bring suit before the court, the state will be subject to a potentially effective means of monitoring its compliance with the treaty.<sup>69</sup> However, it is an imperfect monitoring mechanism, and thus many violations will go unrecorded.<sup>70</sup> Additionally, the glacial pace of litigation before a regional court of human rights allows states to achieve short-term goals by violating human rights, and then apologizing for it years later when the case finally reaches a regional court

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64. Moore, *supra* note 57, at 882-88; Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84-93 (2002); Jack Donnelly, *Human Rights, Democracy, and Development*, 21 HUM. RTS. Q. 608, 610 (1999) ("[C]ivil and political rights, by providing accountability and transparency, can help to channel economic growth into national development rather than private enrichment.").

65. Moore, *supra* note 57, at 882-88; Farber, *supra* note 64, at 84-93. This is not to say that making a commitment to human rights is the only means of communicating a willingness to protect investments or that the regime is stable, but it is an indicator.

66. Hathaway, *supra* note 23, at 2015 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

67. *Id.* ("[I]n the regional context, the need to be an accepted member in what Chayes and Chayes term the 'complex web of international arrangements' is particularly strong, as membership brings with it an array of economic and political benefits, and exclusion poses dangers.").

68. Moore, *supra* note 59, at 882-88; Farber, *supra* note 64, at 84-93.

69. Moore, *supra* note 59, at 882-88; Farber, *supra* note 64, at 84-93. The Inter-American Court of Human Rights only allows the Commission and member states to be parties before the court, but the new Rules of Procedure effective on January 1, 1997 allow the individual victim to play a significant role in the litigation. See Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 29, art. 23.

70. See Hathaway, *supra* note 23, at 2017.

of human rights.<sup>71</sup> Although there is a cost in such apologies, the temporal distance between the violation and adjudication of the case can ameliorate some of the costs of compliance.

Thus, the costs are potentially high, but those costs come in the intermediate to long term. Considering the transitory nature of many governmental regimes, a ratifying government may rationally expect future administrations to be forced to bear most of the costs of membership. These nations usually remain committed to the treaty because governments that inherit a commitment to a regional court of human rights are constrained in their ability to withdraw from the regime because of the signal that it would send to their citizens and to the community as a whole.

This suggests a continuum of political agendas within the community of member states. On one hand, there are the nations that have an ideological commitment to the values within the treaty; on the other is the class of member states who wish to reap the benefits of the appearance of a pro-human rights stance, but have no desire to enforce the norms domestically.<sup>72</sup> Because of their willingness to be perceived as pro-human rights, these nations may further signal their commitment by supporting the enforcement of decisions against other parties, but even the threat of enforcement is politically costly, so the viability of such a strategy is context dependent.<sup>73</sup> Likewise, these states can be expected not to openly undermine adverse decisions from the court because this would undermine their credibility as a trustworthy member of the treaty.<sup>74</sup>

#### D. The Outsiders

The final category of actors is the “outsiders,” those who have an investment in the outcome of any given proceedings but have no role within the court.<sup>75</sup> Prominent examples are UN bodies, international human rights advocates, states that may potentially join the jurisdiction of the human rights court, and international investment agencies.<sup>76</sup> Although these actors have no official role in the court, they can play a prominent role in eliciting compliance with a court’s decisions.<sup>77</sup> The range of interests and political agendas of this category is exceptionally diverse, ranging from the economic incentives of investment agencies, to economic and political incentives for compliance from extra-regional states, to domestic activism by human rights organizations.<sup>78</sup>

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71. See *id.* at 2010-14.

72. See Moore, *supra* note 57, at 903; Hathaway, *supra* note 23, at 2015-18. It is worth mentioning that this second class of member states may nevertheless desire to see the court impose the norms on the other member states.

73. Moore, *supra* note 57, at 906

74. Moore, *supra* note 57, at 905; Hathaway, *supra* note 23, at 2016.

75. See Caron, *supra* note 5, at 416.

76. *Id.* The same logic holds true for both public and private investment. See Moore, *supra* note 57.

77. See Helfer & Slaughter, *supra* note 15, at 311-12, 331-36; Koh, *supra* note 16, 646-49.

78. For example, distribution of U.S. humanitarian aid is directly linked to a nation’s actions

Both liberal and transnational theories of legal process place a premium on the role of subnational entities in eliciting compliance with international court decisions and norm internalization.<sup>79</sup> Unfortunately, neither theory can predict when either the norm will be internalized or when the subnational actors aligned with an international institution will force a nation to comply.<sup>80</sup> Considering the cacophony of voices in the outsider category, it is important to recognize their potential to affect specific decisions and influence the dynamics within the strategic space, but it is impossible to account for all the instances in which they may be relevant.

#### IV. THE ROLE OF THE COURT

Regional courts of human rights are in an inherently delicate position. They advance their interests by eliciting state compliance with their judgments, but have minimal power to elicit such compliance. Instead, courts must rely on a combination of the defendant-states' willingness to comply, the threat of political sanctions from other members of the community, their own powers of persuasion, and the political capacity of entities outside of the strategic space to elicit compliance. In sum, courts possess little power inherent to their position vis-à-vis the community of member states and even defendant-states. Nevertheless, the European Court of Human Rights unquestionably has significant political power over its jurisdiction, and there is a growing body of evidence that suggests the Inter-American Court is strengthening over time.<sup>81</sup> This suggests that the regional courts of human rights may mature to politically powerful institutions despite structural handicaps. This section will illustrate how a regional court of human rights can erode the political and structural limitations imposed by its community of member states, and thus positively impact a community's observance of human rights on a long-term basis.

##### *A. The Balance of Power Overwhelmingly Favors the Community*

According to Martin Shapiro, when a court imposes preexisting rules, the court is imposing the interests of the politically powerful who created the laws pertaining to the dispute.<sup>82</sup> In the words of Shapiro, this is because

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in combating human trafficking. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7104 (2003).

79. Helfer & Slaughter, *supra* note 15, at 311-12, 331-36; Koh, *supra* note 16, 646-49.

80. See, e.g., Hathaway, *supra* note 23, at 1953-54 (“[liberalism] can be reduced to the unenlightening truism that if a country acts in a particular way, it must be because domestic politics made it do so”); Guzman, *supra* note 16, at 1835 (noting that transnational legal processes fail to explain how repeated interaction with transnational actors supplants pre-existing norms, or the dominant norm of acting in the state’s interests).

81. See Posner & Yoo, *supra* note 2, at 63-66 (noting the direct impact of the European Court of Human Rights on changing state’s behavior); Pasqualucci, *supra* note 58, at 349-53 (discussing the developing powers of the Inter-American Court of Human Rights).

82. Shapiro, *supra* note 19, at 26.

[t]he law must come from somewhere. Whether its origin is in custom or in the systematizing of earlier judgments, in the fiat of the rulers, or in some legitimated process of legislation, its very nature as a general rule applicable to future situations imports some element of social concern beyond the particular concerns of the particular disputants.<sup>83</sup>

In arguing that the law is manifest of a state's interests and independent of the interests of the two disputants, Shapiro assumes that the law at issue is an accurate reflection of the regime's interests.<sup>84</sup> Although reasonable in most instances, this is not necessarily the case in a regional court of human rights because of the diversity of interests and motivations of member-states within the community. This theoretically could result in the court imposing limits upon the community that are contrary to the community's wishes. In reality, however, this will rarely happen. This section will argue that the balance of power between the court and the community of member states forces the court to approximate the "servant of the regime" in Shapiro's prototype.

The primary reason courts will attempt to mimic the interests of the community is to avoid any potential backlash resulting from perceived judicial overreaching. The consequences of a court miscalculating the limits of member states' willingness to apply a progressive interpretation of a treaty could lead to political retributions such as reduced funding, less enforcement support from the community in the future, the reappointing of judges, public statements that undermine the court, or any one of a list of mechanisms available to the community to constrain what they view as "judicial activism."<sup>85</sup> In fact, the community of member states can easily counteract any attempts at judicial expansion if they so choose. A series of negative public statements by politically powerful states would be one of the clearest means of undermining the court, as it would encourage a tolerance of defendant-states' noncompliance.<sup>86</sup> Such actions would set a clear precedent that the court has no authority to adjudicate the issues in question and undermine the court's (potentially long running) attempts at developing a habit of obedience on the issue.<sup>87</sup> Regardless of whether the community uses this tactic or relies on more subtle means of admonishing the court, the costs of judicial overreach are sufficiently high to encourage a conservative approach to applying treaty norms.

This places great pressure on a court to determine the community's interpretation of the law and apply it in such a way that the court stays within the bounds imposed upon it by the community. The European Court of Human Rights has explicitly addressed this issue with the advent of the "margin of ap-

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83. *Id.* at 25-26.

84. *Id.* at 26 (Shapiro explicitly assumes that a court is "a servant of the regime, imposing its interests on the parties to the litigation.").

85. Helfer & Slaughter, *supra* note 42, at 945-53; see, e.g., Clare Dyer, *Law Lord Hits Back at Politicians After Attacks on Judges*, *The Guardian* (London), Sept. 15, 2005 (reporting that British Conservative leader Michael Howard characterized some rulings by the European Court of Human Rights as "judicial activism").

86. Helfer & Slaughter, *supra* note 42, at 952.

87. *Id.*

preciation” doctrine. The margin of appreciation doctrine is essentially the court’s practice of deferring to states when the court feels that there is insufficient consensus amongst the member states to rule against a state and, conversely, the practice of citing to consensus as a justification for rulings against a state.<sup>88</sup> In other words, the doctrine allows a regional court of human rights to explicitly poll the states for guidance rather than applying the law independently.<sup>89</sup> As a result of its *ad hoc* nature, “the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background.”<sup>90</sup>

The extra-legality of the margin of appreciation doctrine has raised some eyebrows.<sup>91</sup> This doctrine is not mentioned anywhere in the European Convention itself or in the Convention’s *travaux préparatoires*.<sup>92</sup> It is a completely court-created device that simultaneously allows the court to enforce deviations from community standards while deferring judgment in controversial issues that lack a clear consensus. As a result, the court is not independently applying the treaty to the merits of each case, but rather gauging the political winds of the community in deciding whether a fact pattern qualifies as a violation of the treaty.<sup>93</sup> While some have decried this practice of selective justice because of its political nature, the margin of appreciation doctrine is in many ways less a doctrine than a simple fact of the political realities that limit the court’s authority. In the words of one scholar, “the margin of appreciation is the natural product of the distribution of powers between the Convention institutions and the national authorities, who share the responsibility for enforcement.”<sup>94</sup> Because the doctrine of the margin of appreciation is a natural extension of how the strategic space is designed, the court must have a clear awareness of the community’s consensus opinion in any given case if it is to avoid the dangers of overreaching and reap the advantages of compliance.

Given the less-than-transparent motives of the member states, the challenge to the court lies in obtaining that clear awareness of the community’s consensus. As previously mentioned, any given state will fall somewhere along a continuum bound by two poles: the prototypical norm-advancer and the prototypical signaler state.<sup>95</sup> The norm-advancer supports a broad application of the treaty in general, and the signaler is apathetic to enforcing human rights, if not privately

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88. See Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115-16 (2004).

89. Helfer & Slaughter, *supra* note 42, at 953-54 (describing the margin of appreciation doctrine as acknowledging “the virtues of deferring to domestic actors and considering the broader political climate in which national governments will receive their decisions”).

90. Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) 15 (1984).

91. Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 627-34 (2001).

92. *Id.*

93. See, e.g., *id.*; Brauch, *supra* note 88, at 137-38.

94. Gross & Aoláin, *supra* note 91, at 626.

95. See *supra* Part III.C.

hostile, to interference in its domestic affairs by the court. The location of any given state on this continuum will depend on the issue at hand. Each state's willingness to enforce a court's ruling will also vary per case depending on the relationship between the defendant-state and any potential enforcer-states.<sup>96</sup>

Similarly, each state will have varying degrees of political capacity to enforce a judgment if they wish to do so.<sup>97</sup> For example, when considering a case involving defendant-state X, the European Court may place more relevance on the will of Germany and France to enforce a decision adverse to state X than the willingness of Liechtenstein and Andorra to enforce. This is not to say that regional courts of human rights are extensions of political hegemonies. Politically powerful states may be either uninterested in an issue, unwilling to use political capital against a specific state, or even mildly hostile to the decision. Thus, a context may arise when a regional court of human rights can expect sufficient enforcement support from a wide base of less hegemonic states to rule against a defendant-state. The point is that, prior to issuing a judgment, a regional court of human rights must estimate the relative will to enforce based upon how important the case might be to the individual member states, their relative political power, and the community's aggregated willingness and ability to enforce a judgment against a particular defendant-state.

While in some cases the community's preferred ruling is clear and the court's ruling is therefore predetermined by the will of the community, in any other circumstance it is in the best interest of a court to take a conservative stance towards interpreting the treaty.<sup>98</sup> Along with the costs of overreaching, the court must consider political costs of creating a situation in which the community must enforce one of its judgments. Just as the determination of the general consensus is something of a guessing game for the court, it is likely a similar problem for the defendant-state. Thus, if a court is unsure as to the general will, the defendant-state may feel sufficiently bold to test the supposed consensus. This will elicit either enforcement pressure or tolerance from the other community members—or, given the split interests, probably a little of both. Clearly, tolerance of noncompliance is counterproductive for the court's purposes, but so is over-reliance on enforcement, or the threat thereof, by other member states.<sup>99</sup> This is because political or economic coercion is costly to the enforcer-state, and over-reliance on enforcement will generate tension between the court and its most supportive member states.<sup>100</sup> In overly relying on coer-

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96. See Helfer & Slaughter, *supra* note 42, at 947-48 (noting that uneven distributions of power among states within a community can circumscribe international adjudication in multiple ways).

97. See *id.*

98. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 851-53 (1999).

99. Hathaway, *supra* note 23, at 1956 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

100. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 629 (2004).

cion, especially in questionable cases, a court may be straining its relationship with the member states that sincerely support it.

Thus, when issuing an adverse decision, a court is limited in its ability to press beyond the consensus norms of the community states. Even in the case of close calls, it is in a court's advantage to have a conservative strategy to avoid causing friction between states. If this were the extent of the court's powers, the court would be able to do little more than prevent the erosion of established human rights norms, and thus be relegated to merely enforcing the status quo. Fortunately, regional courts of human rights have other mechanisms available to them that are not within the exclusive control of their communities, thereby allowing courts to affect communal change by eroding the barriers to its authority.

### *B. The Role of the Court*

As illustrated above, the relationship between the court and the community leaves little room for regional courts of human rights to advance the cause of human rights. This is because a court is able to operate most effectively while enforcing the aggregate will of its regime. Because a regional court of human rights cannot impose its interpretation of a treaty upon the community, the most a court can do is eliminate deviations from the community norm.<sup>101</sup> However, a court's most significant contribution to human rights within the community is the increased efficiency with which deviations from the consensus standard can be eliminated. By consolidating the "enforcement will" of the community and providing access to individual victims of human rights violations, the court can have a large impact on human rights within the community by eliminating harmful deviations from the standard that would otherwise go unaddressed.

On one hand, the interests of the regime act as a ceiling insofar as a court cannot rule more progressively than what the community dictates. On the other, the presence of a court also provides the community with a floor insofar as deviations below the community standard are intolerable. Arguably, community standards acting as both a floor and a ceiling is a truism, but the contribution of a court is important in that it provides a centralized mechanism for bringing back into compliance recalcitrant states that have slipped below the community standards, either as a result of backsliding or a failure to keep up with the rest of the community's progress. For example, in *Dudgeon v. United Kingdom*, the European Court of Human Rights found an anti-sodomy law in violation of the plaintiff's right to private life.<sup>102</sup> Although the United Kingdom argued that the Court's own precedent explicitly allowed the regulation of sexual relations in furtherance of protecting public morals, the court did not directly address the United Kingdom's arguments or its prior rulings.<sup>103</sup> Instead, the court relied upon the fact that numerous states had abolished anti-sodomy laws since it last

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101. Helfer & Slaughter, *supra* note 15, at 316.

102. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

103. *Id.*

addressed similar laws, and found that, in light of the change in the larger community standard, the United Kingdom was in violation of the plaintiff's right to a private life.<sup>104</sup>

In cases such as *Dudgeon*, a court of human rights is serving two specific coordination functions.<sup>105</sup> First, it is coordinating the aggregate political will of the community to impose its standards on deviant states, such as the United Kingdom in the example above.<sup>106</sup> Presuming that all of the member states that had abolished their anti-sodomy laws wanted to force the United Kingdom to abolish its as well, the transaction costs of coordinating the diplomatic effort would have been prohibitive without the assistance of the ECHR.<sup>107</sup> Second, the court acts as a centralized monitor of adherence to a treaty, which primarily benefits the plaintiff. Without this mechanism, the cost for individual to attempt to persuade other member states to pressure the United Kingdom to eliminate the discriminatory law would be comically prohibitive. In this capacity, the court makes it possible for citizens to utilize the collective political enforcement mechanisms that would otherwise be inaccessible to them. The monitoring function jointly performed by plaintiffs and the court will eliminate ongoing violations and prevent regressions. Thus, a court can fill in holes in the floor of the community's standards, including when the community's standards become more progressive, thus raising the floor.

Even though the court is unable to directly challenge community standards and has very little capacity to address ongoing and openly tolerated injustices, both human rights and the court strongly benefit in the long-term from this dependent role. Each time a court is able to issue a judgment that definitively speaks with the voice of the community, not only will the victim-plaintiff benefit in that instance, but also the court's power will increase because each act of subordination by domestic politicians brings member nations closer to a norm of compliance with the court.<sup>108</sup> Similarly, each time the legal system or an activist group relies upon a ruling, that ruling will be incrementally further integrated into the states' domestic legal or civil societies.<sup>109</sup> Theoretically, the norm of obedience to the court will eventually become part of the culture and compliance will become automatic.<sup>110</sup> Richard S. Kay characterized this circumstance as the moment that the regional human rights treaties become "genuine systems of law" and "any doubts we may have about a particular exercise of legal authority are swamped by our prior, and more basic, adherence to the legitimacy of that

104. *Id.* ¶¶ 23-24.

105. Guzman, *supra* note 16, at 1829 (noting that international organizations generally are created to coordinate international interactions, which increases the probability that states will submit to the treaty).

106. Benvenisti, *supra* note 98, at 851-52; Goodman & Jinks, *supra* note 100, at 692-93.

107. Goodman & Jinks, *supra* note 100, at 692-93 (the creation of a formal body to criticize state performance eliminates transaction costs in individual members coercing recalcitrant states).

108. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656-57 (1997); see generally Koh, *supra* note 16.

109. *Id.*

110. *Id.*

authority.”<sup>111</sup>

In light of the ECHR’s continued use of the margin of appreciation, reaching this level of integration takes a very long time, even in favorable conditions. It may even be impossible.<sup>112</sup> It is difficult to predict how much time and effort is going to be expended before a norm becomes part of a society, or even what characteristics make a norm or country more amenable to compliance.<sup>113</sup> However, this “tradeoff of predictive value for explanatory value” does illustrate the true value of enforcing the regime’s will. As the norm of obedience develops, the courts will develop greater powers to push the boundaries of its strategic space and perhaps even begin defining the interests of the community. Until then, a court of human rights must play the more submissive role of coordination and centralization, and be content with providing justice on the individual level and preventing regression from community norms.

## V. CONCLUSION

This paper began by asking what good is a court of human rights. By examining the limits on a court as an actor within a bounded strategic space, the paper has attempted to illustrate that a court will be as good as its community will allow it to be. This raises questions as to the wisdom of establishing a court of human rights in regions without a history of respect for human rights or international institutions. Without the strong dedication of regional powers willing to provide the threat of enforcement, the court will have little power to advance human rights. This does not necessarily doom the court to failure because the role of the court is a dynamic one that will vary as the relationship between the actors within the strategic space changes. Theoretically, this threat could also come from actors within the “others” realm, such as extra-territorial hegemons. However, in the absence of an internal or external will to enforce the judgments, the utility of a regional court of human rights may only become apparent decades down the road, presuming it is able to survive for that long. Nevertheless, once a court can establish patterns of compliance, it can reap rewards for both individuals and the community.

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111. Kay, *supra* note 31, at 218.

112. Guzman, *supra* note 16, at 1836.

113. Hathaway, *supra* note 23, at 1962.

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## Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality

Thomas W. Walsh

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# Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?

By  
Thomas W. Walsh\*

On May 12, 2005, the Secretariat of the International Centre for the Settlement of Investment Disputes (ICSID or the “Centre”) unceremoniously shelved its proposed Appeals Facility for further study,<sup>1</sup> announcing that “it was premature to attempt to establish such an ICSID mechanism.”<sup>2</sup> The Appeals Facility would expand the scope of review of ICSID awards from the review of procedural legitimacy currently allowed under ICSID’s annulment process to also include review of the substantive correctness of an award. Was this rebuff of appellate review surprising? An examination of ICSID arbitration, and the interests of its Contracting States and the investors that many of these States represent, indicate that it was not. Investors value the high degree of finality the current ICSID arbitration process provides parties in resolving disputes. The finality of awards is guaranteed in part by ICSID’s disallowance of substantive review of decisions. The potential for inaccurate arbitral decisions to arise in this situation is obvious. Nonetheless, ICSID’s continued efficacy as a system for the protection of investor rights provides incentive to the Contracting States, particularly capital-exporting States, to protect the finality of ICSID awards.

ICSID’s Contracting States drafted the ICSID Convention<sup>3</sup> to enforce a re-

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\* J.D. candidate 2006, Boalt Hall School of Law, University of California at Berkeley. I wish to thank Professor David D. Caron and the members of the International Law Writing Seminar for their valuable comments. I also wish to thank Jordan Hinkes, J.D. candidate 2007, and Rebecca Wright, J.D. candidate 2007, Boalt Hall School of Law, University of California at Berkeley, for their editorial assistance.

1. ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* Discussion Paper ¶ 23 (Oct. 22, 2004), <http://www.worldbank.org/icsid/highlights/improve-arb.pdf> [hereinafter ICSID Proposal].

2. ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat ¶ 4 (May 12, 2005), <http://www.worldbank.org/icsid/052405-sgmanual.pdf>.

3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965), 17 U.S.T. 1270, 575 U.N.T.S. 159, <http://www.worldbank.org/icsid/basicdoc/partA.htm> [hereinafter ICSID Convention].

gime of investors' rights. The finality of ICSID awards is central to the Centre's purpose of acting as a neutral venue providing an effective remedy for investors. The Convention dictates that an ICSID award is "binding on the parties and shall not be subject to any appeal."<sup>4</sup> The Convention's focus on finality makes an amendment allowing substantive review of awards difficult. The Contracting States and the investors they represent must perceive a strong need for improving the accuracy of awards if substantive review is to be adopted.

Investor opinions are particularly important. Investors do not have the authority to alter the ICSID Convention, but the Contracting States, which do, often advance the interests of investors.<sup>5</sup> Capital-exporting States do not generally conceive of themselves as potential defendants in investor-State disputes; they primarily adopt an offensive view of foreign investment law, promoting the rights of their investors. In contrast, capital-importing States are aware that they may appear as defendants to an ICSID dispute. However, they too promote investors' interests with the hope of boosting foreign investment flows. Even if capital-importing States do not choose to support investors' interests, they cannot amend the Convention without the support of the capital-exporting States.

As the usual winners in ICSID disputes,<sup>6</sup> investors have a strong interest in maintaining the finality of ICSID awards. They are undoubtedly aware of alleged incorrect arbitral decisions, including the now infamous *Czech Republic* cases,<sup>7</sup> and the ICSID case *SGS v. Pakistan*.<sup>8</sup> However, these cases are still uncommon. It is not until investors begin to lose more disputes, and in particular lose disputes that they perceive to have been decided incorrectly, that investors and Contracting States will widely embrace substantive review of ICSID awards.

The one wrinkle in this analysis is the position of the United States. The advent of the United States as a defendant in NAFTA Chapter 11 investor-State disputes has caused the United States to become the first capital-exporting State to break with investors' interests.<sup>9</sup> The United States now evaluates foreign in-

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4. *Id.* art. 53(1).

5. Omar E. Garcia-Bolivar, *The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements*, 6 J. WORLD INVESTMENT & TRADE 751, 751 (2005).

6. See the outcomes of the cases concluded under ICSID, available at <http://www.worldbank.org/icsid/cases/conclude.htm>.

7. In 2003, the *Czech*, or *Lauder*, arbitrations gained notoriety when two arbitral tribunals came to two different decisions over essentially the same dispute. A London tribunal found that the Czech Republic discriminated against a United States investor in violation of the United States-Czech Republic BIT. Ten days later, a Stockholm tribunal applied the same facts to find that the Czech Republic had gone beyond discrimination and had breached its obligations to a Dutch subsidiary of the United States investor under the Netherlands-Czech Republic BIT. Franck, *infra* note 79, at 1559-69.

8. For further discussion of these cases, see *infra* Part II.

9. Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV.—FILJ 344, 348 (2004); see Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 ARB. INT'L L. 32-36 (2005).

vestment law in both an offensive and defensive light. The United States Congress's decision in the United States Trade Act of 2002<sup>10</sup> to allow substantive, as well as procedural, review of awards from disputes arising under future trade agreements—which now include the Central American Free Trade Agreement (CAFTA),<sup>11</sup> and the Chile and Singapore Free Trade Agreements (FTAs)<sup>12</sup>—reflected Congress' fear that the United States was on the cusp of losing one or more NAFTA disputes.<sup>13</sup> However, now that the United States State Department's team of NAFTA litigators has built an undefeated record, the United States' interests in the finality of awards are again aligned with investors' interests; the United States has little incentive to compromise the finality of awards that are in its favor. Much like investors, the United States is unlikely to support the substantive review of investor-State awards in ICSID until it is subjected to losses from arbitral awards.

The following analysis explores the significance of opening ICSID awards to appellate review, concluding that, although accuracy is a valid factor motivating the promotion of appeal, investors continue to prefer finality and so there is insufficient interest to compel the adoption of the Appeals Facility. Part I distinguishes appeals from the current standards of review available to international arbitration awards in ICSID and other jurisdictions. I begin by briefly defining the various levels of appellate review, differentiating between review of the legitimacy of the process of a decision and the review of the substantive correctness of a decision, and address the tension each form of review creates between the accuracy and finality of awards. The majority of this section is then spent applying these definitions of review to compare the Appeals Facility to other forms of arbitral review. The purpose of Part I is to convey the extent to which the adoption of the Appeals Facility would compromise currently accepted levels of finality of international arbitration awards.

Part II outlines the normative arguments for and against substantive review of ICSID awards, focusing on the benefit of substantive accuracy and the compromise of finality. I conclude that greater substantive accuracy is the primary benefit of appeal, more so than uniformity of law. Correction of an inaccurate award provides a direct benefit to disputing parties, while the benefits of uniformity of law accrue to the investment community.

In Part III, I evaluate whether the Appeals Facility's benefit of increased accuracy is sufficient to motivate the Contracting States to adopt it. My mes-

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10. Trade Act of 2002, 19 U.S.C. § 3802(b)(3)(G)(iv) (2002). For discussion of the appellate provisions of the Trade Act of 2002, see *infra* Part I.

11. The Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, 19 U.S.C.A. § 4001, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTADR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTADR_Final_Texts/Section_Index.html).

12. Free Trade Agreement, U.S.-Chile, June 6, 2003, 117 Stat. 909, 19 U.S.C. 3805, available at <http://www.ustr.gov/fta/chile.htm>; Free Trade Agreement, U.S.-Sing., May 6, 2003, 117 Stat. 948, 19 U.S.C. 3805, available at <http://www.ustr.gov/fta/singapore.htm>.

13. Daniel M. Price, *US Trade Promotion Legislation*, 2 *TRANSNAT'L DISP. MGMT.* 47, 48 (2005).

sage is threefold: (1) adoption of the Appeals Facility requires a significant change in the ICSID Convention and a compromise of ICSID's underlying principal of finality; (2) the change will only be made if investors and the Contracting States that represent them within ICSID come to value the substantive accuracy of awards more than the current level of finality of awards; and (3) capital-exporting States and their investors have not suffered significant enough losses or been subjected to enough inaccurate awards to want to compromise the finality of ICSID awards in return for the potential for greater accuracy.

## I.

### DISTINGUISHING THE APPEALS FACILITY ON THE FINALITY—ACCURACY SPECTRUM

Before comparing systems of arbitral review, it may be worthwhile to define what is meant by appellate review. Legal systems vary in the breadth of review, but appeals generally review awards in two ways: for the legitimacy of the process of the decision, and for the substantive correctness of the decision.<sup>14</sup> Legitimacy of process refers to the framework in which the decision is made, including the powers and composition of the tribunal, as well as the fundamental rules of procedure.<sup>15</sup> The substantive correctness of an award refers to review of the content of a decision—whether the decision reflects an accurate determination of the facts of the dispute and application of the law to those facts.<sup>16</sup> Understanding the two forms of review embedded in appeal—legitimacy of process and substantive accuracy—is important to understanding how review of arbitral decisions affects the finality and accuracy of awards.

Review of the process of an award is a narrower standard of evaluation that allows the parties to sacrifice a limited amount of finality for increased integrity and fairness in the decision-making process. Review of the substantive accuracy of an award opens the decision to a higher level of scrutiny in exchange for greater accuracy in the legal reasoning. Arbitral systems choose to review only process, or both process and accuracy, depending on the respective value they place on the finality and accuracy of awards.

The general policy in international arbitration is to recognize the finality of awards;<sup>17</sup> review and appeal procedures are limited. The purpose of this section

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14. David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.—FILJ 21, 24 (1992) (distinguishing between what aspects of an award are subject to review under appeal and in the ICSID annulment process); Giorgio Sacerdoti, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 247, 251 (Ernst-Ulrich Petersmann ed., 1997) (discussing the types and functions of international and domestic review systems).

15. Caron, *supra* note 14, at 24 (“A legitimate process of decision involves, for example, a body with authority to decide the dispute in question. Legitimacy of process might also require that the deciding body be properly constituted, not be corrupt, and observe fundamental rules of procedure.”).

16. *Id.*

17. Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral*

is to illustrate the extent to which the Appeal Facility's proposed substantive review would depart from this practice.

### *A. Review Under Public International Law*

With only a few exceptions, review of awards under public international law is limited to requests for interpretation of the decision, rectification of minor errors, or revision on the ground of discovery of a new fact. Of these three options, only revision due to new facts may result in reversal of an award. The standard of review for new facts is strict. For example, Article 61(1) of the Statute of Rules of the International Court of Justice provides that:

[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.<sup>18</sup>

Similar standards can be found in Article 44 of the Statute of the European Court of Justice, Rule 80(1) of the European Court of Human Rights, Article 55 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, and Article 83 of the 1907 Hague Convention, as well as Article 38(1) of the International Law Commission's Model Rules on Arbitral Procedure.<sup>19</sup> This standard provides a minimal level of review. Its impact on finality is limited by its scope and the low likelihood that review could result in a reversal of the original decision.

The current exceptions to this standard of review are the World Trade Organization's Appellate Body<sup>20</sup> and the little-used appeal process in the Convention on International Civil Aviation.<sup>21</sup> These two instruments are the only ap-

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*Awards*, 2 ICSID REV.—FILJ 85, 85 (1987). The views of appeal in domestic and international tribunals are distinct. In United States courts, for example, the right of appeal is "sacrosanct." Dalton, *infra* note 72, at 62. In fact, "[a]ppeal is considered so fundamental in states' legal systems that it has been made a basic human right in criminal matters. According to Article 14.5 of the U.N. International Covenant on Civil and Political Rights of 1966 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'" Sacerdoti, *supra* note 14, at 247. In contrast, the WTO's Appellate Body is the only significant international tribunal that engages in appellate review.

18. Statute of the International Court of Justice art. 61(1), May 25, 1993, 32 I.L.M. 1192, available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicctext/ibasicstatute.htm#CHAPTER\\_III](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicctext/ibasicstatute.htm#CHAPTER_III).

19. European Court of Justice, Statute of the Court of Justice, art. 44, <http://www.curia.eu.int/en/instit/txtdocfr/txtsenvigueur/statut.pdf>; European Court of Human Rights, Rules of Court, art. 80(1), <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E987E65AC8864BE4F0/RulesOfCourt.pdf>; Permanent Court of Arbitration, 1899 Convention for the Pacific Settlement of International Disputes, art. 55, <http://pca-cpa.org/ENGLISH/BD/BDEN/1899ENG.pdf>; Permanent Court of Arbitration, 1907 Convention for the Pacific Settlement of International Disputes, art. 83, <http://pca-cpa.org/ENGLISH/BD/BDEN/1907ENG.pdf>; International Law Commission, Model Rules on Arbitral Procedure, art. 38(1), [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/10\\_1\\_1958.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/10_1_1958.pdf).

20. Understanding on the Rules and Procedures Governing the Settlement of Disputes, art. 17, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) [hereinafter DSU].

21. Convention on International Civil Aviation, Dec. 7, 1944, <http://www.icao.int/icao/en>

peals mechanisms in the international system reviewing both the legitimacy of process of an award and its substantive correctness.<sup>22</sup> Over time, the appeals mechanisms being negotiated under CAFTA and the United States FTAs with Chile and Singapore, as well as the appeals mechanisms resulting from any future United States FTAs, as mandated by the United States Trade Act of 2002,<sup>23</sup> will also be available for disputes arising under those treaties.

The WTO Appellate Body emerged during the Uruguay Round as a balancing factor to the proposal to make adoption of panel reports automatic.<sup>24</sup> Its jurisdiction is limited to issues of law covered in panel reports and the panels' legal interpretations—issues of fact are not reviewed.<sup>25</sup> The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panels. However, regardless of the action taken, the decision of the Appellate Body is final, and the cases are not remanded. Without the risk of remand, parties are assured that their dispute will not be subject to a cycle of endless remands and appeals. Finality is also supported by the requirements that an appeal be filed before the adoption of the panel report by the Dispute Settlement Body,<sup>26</sup> and the limitation of the Appellate Body proceedings to ninety days. Nonetheless, the finality of panel awards is compromised by appeal in sixty-eight percent of the disputes, and the appeal delays the decision by an average of 129 days.<sup>27</sup>

Again, the uniqueness of the Appellate Body in international arbitration should not be overlooked. The Appellate Body's review of both the legitimacy of process and substantive accuracy of an award is a departure from the general adherence to the finality of awards and is unmatched in international arbitration. The Appellate Body is a valuable comparative tool because it is the closest in scope to the standard of review that would be allowed under the proposed ICSID Appeals Facility. It may be worthwhile to note that one of the primary criticisms of the Appellate Body is its deleterious affect on the finality of awards.<sup>28</sup>

### *B. Review Under Private International Law*

International arbitration for the settlement of commercial or investment disputes, whether in accordance with the rules of arbitral institutions, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration

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22. Marc Iynedjian, *Reform of the WTO Appeal Process*, 6 J. WORLD INVESTMENT & TRADE 809, 814 (2005).

23. 19 U.S.C. § 3802(b)(3)(G)(iv) (requiring that the United States government: "seek[] to improve mechanisms used to resolve disputes between an investor and a government through— . . . (iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.").

24. Sacerdoti, *supra* note 14, at 272.

25. *Id.* at 273.

26. The Dispute Settlement Body must adopt a panel report between the twentieth and sixtieth day after the circulation of the report. DSU, *supra* note 20, arts. 16(1), 16(4).

27. Iynedjian, *supra* note 22, at 816 (noting the delay in decisions and that the WTO appeal rate is high in comparison to appeal rates in domestic courts).

28. *See generally id.*

Rules, or other *ad hoc* arrangements, is generally subject to limited scope of review. Parties can include provisions in their arbitration agreements limiting or prohibiting judicial review of arbitral awards. In addition, most institutional arbitration rules contain express or implied limitations on judicial review of arbitral awards. For example, the International Chamber of Commerce (ICC) Rules of Arbitration, London Court of International Arbitration (LCIA) Arbitration Rules, and the American Arbitration Association (AAA) Commercial Arbitration Rules each limit review to the rectification of minor errors, and in the case of the ICC, the award may be interpreted by the original tribunal.<sup>29</sup> In all cases, the finality of the decision's process and substance is protected.

In the absence of institutional or contractual limitations, review of awards is possible in two different jurisdictions: (1) in the courts of the State in which the arbitration took place or under whose law the decision was rendered; or (2) in the courts of the State in which recognition and enforcement of the award is sought. Review is provided to protect the basic procedural and substantive rights of the parties. However, appeal on the merits, even when limited to narrow legal questions, is generally excluded.

### *1. Place or Law of Arbitration*

Review in the courts of the place or law of arbitration is limited by the State's arbitration statute. Domestic arbitration statutes distinguish international commercial arbitration from purely domestic arbitration as a prerequisite for limiting judicial review of arbitral procedures and awards.<sup>30</sup> On occasion, jurisdictions allow for complete finality—removal of any form of review of an award—of international arbitral awards. For example, subject to certain conditions, the laws of Switzerland and England allow transnational awards rendered in their territories to be excluded by agreement of the parties from the judicial control of their courts.<sup>31</sup> Belgium has even gone so far as to statutorily bar its courts from exercising any form of review over arbitral awards rendered in Belgium when none of the parties is connected with Belgium.<sup>32</sup> However, such complete finality is unusual.

In most jurisdictions, international awards may be reviewed for issues of legitimacy of process, including validity of the arbitration agreement, respect for due process, the competence of the arbitrators, and proper composition of the

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29. INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, arts. 28(6), 29(2), [http://www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf); LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA ARBITRATION RULES, arts. 26.9, 27.1, <http://www.lcia-arbitration.com/>; AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, art. 46, <http://www.adr.org/sp.asp?id=22440#R46>.

30. Sacerdoti, *supra* note 14, at 266.

31. Georges R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 *ARB. INT'L* 21, 29 (1989) (discussing the New Swiss Law on International Arbitration of 1989, and the English Arbitration Act of 1979).

32. *Id.*

tribunal.<sup>33</sup> The substantive correctness of an award may not be reviewed. Due to these limited grounds for review, arbitration statutes are generally thought to protect the finality of the substantive decision.<sup>34</sup>

## 2. Place of Recognition and Enforcement

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) allows for judicial review of international awards by domestic courts in the place where a party seeks to enforce an award. The Convention’s scope of review of arbitral awards is similar to most other international arbitral statutes’ scopes of review. Article V of the Convention authorizes courts to review awards for incapacity of the parties; invalidity of the arbitral agreement; basic defects as to due process; appointment of arbitrators; proper notice of the proceedings; possibility to present one’s case; a tribunal exceeding its powers; and whether the award has been set aside by the competent authority of the country in which the arbitration was conducted or under whose law the award was made.<sup>35</sup> Each of these grounds falls within review of legitimacy of process. Again, the substantive accuracy of an award is not subject to review.

The New York Convention and the arbitration statutes of the places and law of arbitration mentioned above afford a high level of finality to international commercial arbitration awards. Recourse to national courts is not uncommon under both avenues of review.<sup>36</sup> However, in the majority of national jurisdictions, parties can be confident that the finality of the merits of their awards will be upheld.<sup>37</sup>

## C. ICSID Annulment Process

The ICSID Convention, in contrast to other rules of international arbitration, does not allow review in municipal courts.<sup>38</sup> The Convention requires Contracting States to enforce the finality of ICSID awards; awards may not be subjected to “appeal or to any other remedy except for those provided for in th[e] Convention.”<sup>39</sup> Review under ICSID is conducted internally. Parties may

33. Sacerdoti, *supra* note 14, at 266.

34. *Id.* (citing Article 1501 of the French decree 81-500 of 1981; Article 190 of the Swiss Law of 1987; Article 838 of the Italian Law of 1994; Article 34 of the UNCITRAL Model Law).

35. Convention on the Enforcement and Recognition of Foreign Arbitral Awards (June 10, 1985) (New York Convention), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

36. Sacerdoti, *supra* note 14, at 266.

37. The United States, for example, has a strong public policy to enforce awards. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding that the arbitration clause is to be respected and enforced by federal courts in accord with the explicit provisions of the United States Arbitration Act, and that an arbitration agreement, such as is involved here, “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”) (citing 9 U.S.C. §§ 1, 2).

38. ICSID Convention, *supra* note 3, art. 53(1).

39. *Id.*

petition to have an award interpreted, revised in light of a new fact, or annulled. Much like the ICJ, revision due to new facts is contingent on the decisiveness of the fact and the requirement that the petitioning party's ignorance of the fact was not due to its own negligence.<sup>40</sup> The original tribunal generally conducts interpretations and revisions in light of new facts. The subject matter of annulment review requires that new *ad hoc* tribunals be convened for proceedings.<sup>41</sup>

Annulment is the only significant threat to the finality of an ICSID award. Nonetheless, annulment is a narrow scope of review.<sup>42</sup> Article 52(1) contains five grounds for annulment:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

The second, fourth, and fifth grounds are typically the subjects of annulment proceedings. The first and third grounds have never been claimed.

As of May 2004, for the approximately forty ICSID awards made since the Convention entered into force in 1966, there had been thirteen applications for annulment. Of the thirteen applications, seven have lead to proceedings, and only five cases have resulted in decisions. These five cases: *Klockner v. Cameroon*;<sup>43</sup> *Amco v. Indonesia*;<sup>44</sup> *MINE v. Guinea*;<sup>45</sup> *Vivendi v. Argentina*;<sup>46</sup> and *Wena Hotels v. Egypt*,<sup>47</sup> form the body of annulment jurisprudence. *Klockner* and *Amco*, were subject to two annulment proceedings each. However, the decisions in *Klockner II* and *Amco II* remain unpublished.

The annulment jurisprudence can be analyzed in three generations. The first two annulment cases, *Klockner I* and *Amco I*, provoked concern in the ICSID Community. The respective *ad hoc* Committees were criticized for "re-examining the merits of the two cases and for improperly crossing the line be-

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40. *Id.* art. 51(1).

41. *See id.* art. 52(3).

42. *See Caron, supra* note 14, at 34 ("The ICSID annulment process, like the prototypical annulment process, provides a quite limited remedy.")

43. *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Societe Camerounaise des Engrais*, Decision annulling the award, May 3, 1985, 2 ICSID REP. 95 (1994); *Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Societe Camerounaise des Engrais*, Decision rejecting the parties' applications for annulment, May 17, 1990 (unpublished).

44. *Amco Asia Corporation and others v. Republic of Indonesia*, Decision annulling the award, May 16, 1986, 1 ICSID REP. 509 (1993); *Amco Asia Corporation and others v. Republic of Indonesia*, Decision rejecting the parties' applications for annulment of the Award and annulling the Decision on supplemental decisions and rectification, Dec. 17, 1992 (unpublished).

45. *Maritime International Nominees Establishment v. Republic of Guinea*, Decision partially annulling the award, Dec. 22, 1989, 4 ICSID REP. 79 (1997).

46. *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on application for annulment, July 3, 2002, 41 I.L.M. 1135 (2002).

47. *Wena Hotels Limited v. Arab Republic of Egypt*, Decision on application for annulment, Feb. 5, 2002, 41 I.L.M. 933 (2002).

tween annulment and appeal.”<sup>48</sup> The second generation of cases, exemplified by *MINE v. Guinea*, quelled these concerns, reestablishing the divide between annulment and appeal.<sup>49</sup> Over ten years later, the divide between annulment and appeal was reinforced by the third generation of decisions in *Vivendi v. Argentina* and *Wena v. Egypt*.<sup>50</sup>

The first interpretations of Article 52(1)(e), in the *Klockner I* and *Amco I*, raised concerns that annulment could effectively result in a review of the adequacy of a decision’s reasoning.<sup>51</sup> However, *MINE v. Guinea*<sup>52</sup> and the subsequent decisions in *Vivendi v. Argentina* and *Wena v. Egypt* interpreted review of whether “an award has failed to state the reasons on which it is based” to be limited to scrutiny of the legitimacy of the process of decision.<sup>53</sup>

Examination of the other grounds of annulment reveals equally limited scopes for annulment.<sup>54</sup> “Manifest excess of power” in Article 52(1)(b) has been interpreted to mean that an *ad hoc* Committee may annul an award if the tribunal clearly exceeded its powers, as they are defined by the parties’ arbitration agreement.<sup>55</sup> Thus, Article 52(1)(b) “does not provide a sanction for every excess of its powers by a tribunal but requires that the excess be manifest which necessarily limits an *ad hoc* Committee’s freedom of appreciation as to whether the tribunal has exceeded its powers.”<sup>56</sup> Likewise, Article 52(1)(d), “serious departure from a fundamental rule of procedure,” has been defined narrowly.<sup>57</sup> The *MINE* Committee interpreted the adjective “serious” to “require that the departure from a fundamental rule of procedure ‘be substantial and be such to deprive a party of the benefit or protection which the rule was intended to provide.’”<sup>58</sup> The narrow interpretation of the grounds for annulment helps to maintain the finality of ICSID arbitral awards.

Importantly, annulment does not necessarily affect an award in its entirety.

48. Christopher Schreuer, *Three Generations of ICSID Annulment*, in ANNULMENT OF ICSID AWARDS 17, 18 (Emmanuel Gaillard & Yas Banifetami eds., 2004).

49. *Id.* Schreuer includes *Klockner II* and *Amco II* in the second generation of annulment decisions. Unfortunately, this author is not privy to those unpublished decisions, and therefore refrains from including them in the analysis above.

50. *Id.* at 18-20.

51. Caron, *supra* note 14, at 43 (“The *Klockner* Committee asked, ‘is it possible to liken *inadequacy* of reasons to failure to state reasons?’”) (citing *Klockner v. Cameroon*, *supra* note 43, para. 117) (emphasis in original).

52. *Guinea v. Maritime International Nominees Establishment (MINE)* (ICSID Case No. ARB/84/4). “A Committee might be tempted to annul an award because th[e] examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.” *Id.* paras. 5.08-5.09.

53. Caron, *supra* note 14, at 38-46; Schreuer, *supra* note 48, at 33-38; Emanuel Gaillard, *Comment*, 2 TRANSNAT’L DISP. MGMT. 38, 38 (2005) (noting that the recent generation of annulment cases has limited annulment to the integrity of the process).

54. For a more detailed discussion of the annulment jurisprudence, see Schreuer, *supra* note 48, at 20-38.

55. Caron, *supra* note 14, at 38, 40.

56. *Id.* at 38 (quoting *MINE v. Guinea*, *supra* note 46, para. 4.06).

57. *Id.* at 41-42.

58. *Id.* at 41 (quoting *MINE v. Guinea*, *supra* note 46, para. 5.05).

The party seeking review may request the partial annulment of the award, and an *ad hoc* Committee has “the authority to annul the award in its entirety or any part thereof.”<sup>59</sup>

The finality of awards is also supported by a number of procedural requirements that act to deter frivolous annulment proceedings. The request for annulment of a proceeding must be timely.<sup>60</sup> If the tribunal so decides, the party requesting annulment can be held responsible for the fees and expenses of the *ad hoc* tribunal and other direct costs of the annulment, and be required to provide a bank guarantee for the amount of the award.<sup>61</sup> In addition, interlocutory awards cannot be annulled; the Secretary-General will not register interlocutory decisions for annulment proceedings on the ground that they are not a true “award” as stated in Article 52(1).<sup>62</sup> Finally, the annulment jurisprudence has determined that even in the event that grounds for annulment exist, *ad hoc* committees have a measure of discretion as to whether to annul the award.<sup>63</sup> The *MINE* Committee found that annulment need not be granted, “where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.”<sup>64</sup> The *Wena* and *Vivendi* annulment decisions “contain further confirmation of this cautious attitude.”<sup>65</sup> In *Vivendi*, for example, the *ad hoc* Committee concluded that it “must guard against the annulment of awards for trivial cause.”<sup>66</sup>

Evaluating Article 52(1)’s grounds for annulment and the procedural rules governing annulment reveals a narrow scope for annulment proceedings, as well as procedural safeguards protecting the finality of an award.

#### D. The Appeals Facility

The primary distinction between ICSID’s proposed Appeals Facility and the annulment process is the Facility’s broader scope of review of an award.<sup>67</sup> The Facility’s procedural safeguards are similar to those in annulment. However, the Facility would combine the annulment process’s review of the legitimacy of the process of decision with review of the substantive correctness of the

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59. ICSID Convention, *supra* note 3, art. 52(3).

60. *Id.* art. 52(2). The application for annulment must be made within 120 days of the date that the award was rendered. In the case of corruption, the application must be made within 120 days of discovering the offense, but within no more than three years from the date the award was rendered.

61. *Id.* art. 61(2).

62. Caron, *supra* note 14, at 37 (citing *Southern Pacific Properties v. Egypt*, 32 I.L.M. 933 (1993)). In that case, the Secretary-General determined that he did not have the authority to register Egypt’s annulment application because the decision on jurisdiction, which Egypt wished to annul, was not an “award.” *Id.*

63. *Id.* at 46.

64. *Id.* at 46 (quoting *MINE v. Guinea*, *supra* note 46, para. 4.10).

65. Schreuer, *supra* note 48, at 19.

66. *Vivendi v. Argentina*, *supra* note 46, para. 63.

67. See Schreuer, *supra* note 48, at 23-24.

decision.<sup>68</sup> Substantively, the Facility would review awards for “clear error[s] of law” and possibly “serious errors of fact.”<sup>69</sup>

The scope of each prong of review would depend on the interpretations of “clear” and “serious.” Regardless, it is apparent that the Facility’s intent was to allow a restricted review of law and possibly fact. This type of restricted review of errors of law, requiring “clear” error, would be unique for arbitration awards. The WTO’s Appellate Body allows review of “issues of law covered in the panel report[s] and legal interpretations developed by the panel[s].”<sup>70</sup> A restricted standard of review for errors of law was proposed for the Appellate Body; however, the WTO adopted the broader standard of review of any “issues of law.”<sup>71</sup> Therefore, it appears that the Appeals Facility’s review of law would not provide as much latitude as the Appellate Body to compromise the finality of awards.

Review of “serious errors of fact” would also be unique to the Appeals Facility. The Appeals Body does not provide for review of fact.<sup>72</sup> The ICSID Secretariat indicated that “serious error of fact . . . would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal.”<sup>73</sup> Nonetheless, the narrow review of fact is an unparalleled encroachment on the finality of arbitral awards.

The potential impact of appellate review on the finality of ICSID awards would also be affected by the procedural restraints placed on the use of the Facility. Like the annulment process and the Appellate Body, applications to the Appeals Facility would have to be made in a timely manner.<sup>74</sup> The Secretariat has indicated that the annulment process’ time period of 120 days or the WTO’s period of 60 days should be considered as models.<sup>75</sup> To promote the resolution of the appeal, the Appeals Facility would likely have time limits for the parties to file pleadings, and for the tribunal to render its decision.<sup>76</sup> The Secretariat also proposed that, as in annulment proceedings, the applicant may be responsible for advances to ICSID for the fees and expenses of the appeal, and may be required to provide a bank guarantee for the value of the award.<sup>77</sup> Finally, the Secretary-General would act, as in the Additional Facility, as a gatekeeper.<sup>78</sup> Access to the Appeals Facility would be subject to the Secretary-General’s ap-

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68. ICSID Proposal, *supra* note 1, annex, para 7.

69. *Id.*

70. DSU, *supra* note 20, art. 17(6).

71. Iynedjian, *supra* note 22, at 814. It was proposed that appeal be limited to “exceptional cases” where the panel “committed fundamental interpretive errors.” *Id.*

72. DSU, *supra* note 20, art. 17.

73. ICSID Proposal, *supra* note 1, annex, para. 7.

74. *Id.* para. 11.

75. *Id.* n. 8.

76. *Id.* para. 12.

77. *Id.* para. 10.

78. Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes (Additional Facility Rules), art. 4, <http://www.worldbank.org/icsid/facility/partA-article.htm#a04>.

proval and would be contingent on compliance with the aforementioned timing requirement and whether the request is within the scope of the Appeals Facility rules.

This review of the Appeals Facility indicates that the Secretariat envisioned a limited appeal mechanism. Restricting appeals to “clear” errors of law would result in a narrower scope of review than in the Appellate Body. However, the Facility’s scope of review would be widened if issues of fact were subject to review. Regardless, the Facility’s proposed timeliness requirement and the time limits on the appeals process would help to minimize the costs of legitimate appeals. In addition, frivolous appeals should be deterred by the fee arrangement and bond requirement, and occasionally prevented by the Secretary-General’s supervision of applications. All of these restraints on the review of awards should mitigate the impact of the Appeals Facility on the finality of ICSID awards. Nonetheless, broadening the scope of review of awards from annulment to include, at a minimum, “clear error[s] of law,” and possibly “serious errors of fact,” marks a significant departure from principles of finality in the ICSID system, and throughout international arbitration.

Having assessed the significance of the Appeals Facility in terms of its potential impact on the finality of awards, I will next address the motivation for such change.

## II. MOTIVATION FOR THE APPEALS FACILITY

The purpose of this section is three-fold. First, I will review the two primary motivations for appealing ICSID awards: (1) the systemic interest in maintaining the consistency of the ICSID jurisprudence across all disputes; and (2) the localized interest of parties—primarily investors—in assuring the accuracy of awards in individual disputes. Second, I will argue that investors’ interest in the accuracy of awards is a more significant motivation than the community’s desire for uniformity of law. Finally, I will briefly flesh out the primary argument against the appeal of ICSID awards: the localized, rather than systemic, concern of parties, particularly winning parties, that the finality of their individual disputes will be compromised by appeal.

### A. The Case for Appeal<sup>79</sup>

Two often-enunciated benefits of municipal court appeal are the provision of uniform rules of law across cases and the correction of errors in individual cases.<sup>80</sup> Allowing a centralized review of the decisions of first-instance authorities improves the uniformity of law because the law is interpreted, shaped, and articulated consistently.<sup>81</sup> Uniformity of law is desirable mainly because it allows parties to predict with some degree of certainty how the law will be applied, allowing them to act accordingly.<sup>82</sup> Centralized review may also improve the accuracy of awards by allowing correction of substantive errors arising from first-instance authorities. Greater accuracy is desirable because it helps ensure that the parties to a dispute receive a fair decision.

Valuing uniformity of law assumes that appellate review is more than simply a device for ensuring the accuracy of particular decisions. The goal of accuracy assumes that dispute resolution is not a sufficient end unto itself; no matter how much value is placed upon the finality of an award, the parties prefer an ac-

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79. The normative arguments for appeal rely on the assumption that the Appeals Facility will prevent inconsistencies and inaccuracies in ICSID awards. It is important to note that both of these rationales for appeal of investor-State arbitrations are not without their critics. Review of the Appeals Facility leaves questions as to whether it would in fact create uniformity of law or correct inaccuracies in decisions. The Appeals Facility would in all cases only be applicable if both parties consent to a dispute, so arbitrations could in some cases be subject to the Facility and in other cases not. This suggests that, rather than unifying the ICSID jurisprudence, the Facility could further fragment the ICSID arbitral regimes, or at best, have no impact on the uniformity of law. ICSID Proposal, *supra* note 1, paras. 21-23.

The structure of the Appeals Facility also indicates that it may do little to ensure the accuracy of decisions. The current practice of having three arbitrators in most tribunals is one of the simplest guards against errant decisions. GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING 78 (1999) (noting that, in the absence of appeal, arbitration agreements provide for three-person arbitral tribunals in cases of any significant magnitude in order to protect against eccentric or incorrect decisions). But is there a reason to think that a second tribunal of three arbitrators will be better than the first? Caron, *supra* note 14, at 54. Appellate courts are often thought to be capable of correcting errors of first-instance adjudicators because they make decisions in groups of three or more, have greater expertise, and face lesser time pressures than the lower courts. Iynedjian, *supra* note 22, at 822. The ICSID appeals tribunals would have none of these advantages. As discussed, both arbitration and appeals tribunals are composed of three arbitrators, and there is no reason to think the members of an appeal tribunal will have greater expertise or reduced time pressure compared to an arbitral tribunal.

80. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 56 (1981); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 600 (6th ed. 2003); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381 (1995). Additional benefits of appeal include improvement of institutional legitimacy, and the supervision of first-instance adjudicators. SHAPIRO, *supra*, at 49-56.

81. SHAPIRO, *supra* note 80, at 54, 56; Dalton, *supra* note 80, at 69; DELMAR KARLEN, CIVIL LITIGATION 118-19 (1978) ("The [United States] Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.'"). Cf. S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 L. & SOC'Y REV. 637 (1972).

82. Shavell, *supra* note 80, at 425; POSNER, *supra* note 80, at 600.

curate decision.<sup>83</sup>

Uniformity of law and accuracy of decisions are also both cited as reasons for establishing an appellate system for investor-State disputes. James Crawford suggests that the dramatic increase in the number of investor-State arbitrations taking place in ICSID<sup>84</sup> and its sister organizations may create a need for greater uniformity of law.<sup>85</sup> The increased number of arbitrations raises the probability of inconsistent decisions, both in terms of the arbitrators' reasoning and in terms of the outcomes.<sup>86</sup> To date, no major inconsistencies have emerged in the ICSID jurisprudence.<sup>87</sup> However, some are concerned that the conflicting holdings in the *Czech Republic*<sup>88</sup> arbitrations are examples of what could occur in ICSID.<sup>89</sup>

The desire for uniformity of law has been echoed elsewhere in the debate on the merits of appealing investor-State arbitral decisions.<sup>90</sup> Most notably, the ICSID Secretariat introduced the Appeals Facility as a tool for "foster[ing] coherence and consistency in the case law emerging under investment treaties."<sup>91</sup>

Greater accuracy of international arbitration awards is not as often vocalized as a rationale for appealing investor-State disputes. In fact, the Secretariat did not promote the Appeals Facility as a tool for correcting inaccuracies.<sup>92</sup> Nonetheless, some commentators have raised concerns about the promulgation of inaccurate decisions, pointing to *SGS v. Pakistan* in ICSID,<sup>93</sup> *Loewen v.*

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83. Dalton, *supra* note 80, at 66.

84. Until the beginning of 2002, ICSID had registered ninety-five cases under the ICSID Convention and Additional Facility. By 2005, ICSID had registered an additional eighty-nine cases, bringing the total number of cases registered by the Centre since its inception to 184. See *supra* note 6.

85. James Crawford, *Is There a Need for an Appellate System?*, 2 *TRANSNAT'L DISP. MGMT.* 8, 8 (2005).

86. *Id.*

87. ICSID Proposal, *supra* note 1, para. 21. Nonetheless, the different outcomes in the *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (2003) and *Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (2004), have been pointed to as an example of conflicting decisions within ICSID. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1569-74 (2005).

88. For an explanation of these cases, see *supra* note 7.

89. See generally Crawford, *supra* note 85.

90. Doak Bishop has said that he believes an appellate body "can provide the perception to Governments, NGO's and others of consistency of decisions, predictability of the law, [and] objectivity in making decisions as to the meaning of investment provisions." Doak Bishop, *The Case for an Appellate Panel and its Scope of Review*, 2 *TRANSNAT'L DISP. MGMT.* 8, 10 (2005). Similarly, Susan Franck champions an appellate body as a tool to "promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system . . . legitimate in the long term." Franck, *supra* note 79, at 1607.

91. ICSID Proposal, *supra* note 1, para. 21.

92. ICSID Proposal, *supra* note 1, paras. 20-23.

93. *Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, *supra* note 87. In this case the tribunal decided in favor of Pakistan that the argued umbrella clause and the BIT did not accord broad rights to sue under the international instrument for contract violations. The Swiss Government responded on behalf of SGS in a letter to the ICSID Secretariat alleging that the award's restrictive interpretation of the umbrella clause was substantively incorrect. Mark W. Friedman, *Non-Party States' Efforts to Influence Ongoing Proceedings*, 2 *TRANSNAT'L DISP. MGMT.*

*United States* in NAFTA,<sup>94</sup> and the *Czech* cases as examples of tribunals that have arrived at inaccurate decisions.<sup>95</sup> Furthermore, one lesson of the WTO's Appellate Body is that appeal can be used to improve the accuracy of individual international arbitral awards.<sup>96</sup>

### *B. Accuracy as a Greater Motivator than Uniformity*

The question central to the support of the Appeals Facility is whether either uniformity of law or accuracy of decisions is a sufficient motivator for the Contracting States to adopt the Facility. Assuming, as this paper does, that the Contracting States' interests are aligned with the interests of their investors, I argue that the desire for accuracy of decisions, not uniformity of law, is the most significant incentive for the adoption of the Appeals Facility.

Uniformity of law and the predictability that it creates is a benefit that accrues to all potential parties to an ICSID dispute. However, it provides the greatest value to parties that engage in repeated ICSID arbitrations. Capital-importing States are the most common repeat parties to arbitration. Most investors are not repeat parties to ICSID arbitrations. They will not benefit from uniformity of law. Instead, investors derive value from procedures that enforce their rights in the immediate claim that they are arbitrating. Correction of an inaccurate award is a benefit that appeal can directly confer on any investor, regardless of the number of arbitrations in which they engage. In addition, even in the case of the group of investors that are party to multiple ICSID arbitrations, correction of an inaccurate award may provide a more direct benefit to the investor than uniformity of law.

Accordingly, the benefits of uniformity of law should have limited impact on whether the Appeals Facility is adopted. The capital-exporting States are not likely to compromise the finality of awards, against the interests of the investors, in favor of conferring the benefit of uniformity of law on the community. If the Contracting States adopt the Appeals Facility, it will be because investors perceive the opportunity to review the accuracy of awards as directly benefiting themselves.

### *C. The Case Against Appeal*

The push-back against the Appeals Facility arises from the uneasiness felt by investors regarding the potential impact of appellate review on the finality of ICSID awards. One of the primary benefits of arbitration is that it provides an official termination to a conflict.<sup>97</sup> The primary cost of appeal is to compromise this finality, delaying the final decision in the dispute while increasing the

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44, 46-47 (2005).

94. Rubins, *supra* note 9, at 1.

95. Franck, *supra* note 87, at 1568.

96. Crawford, *supra* note 85, at 8.

97. SHAPIRO, *supra* note 80, at 49.

monetary costs of arbitration. The scope of appeals, timeframe, and the power to remand can all extend a dispute.<sup>98</sup> Even in the quickest of appeals, a party may, rather than endure the costs and risks of appeal, settle with the appealing party for less than the tribunal awarded them.<sup>99</sup> At worst, a party may be mired in a cycle of appeals, unable to recover their losses as the unhappy losing party appeals without reason.<sup>100</sup>

The ICSID annulment process, as discussed in Part I, has an application rate of approximately twenty-eight percent, and approximately only eighteen percent of ICSID arbitrations have been subject to proceedings.<sup>101</sup> Nonetheless, these few annulment proceedings have ranged in length from thirteen to twenty-three months.<sup>102</sup> The WTO has an aggregate appeal rate of sixty-eight percent.<sup>103</sup> One explanation for the difference in the frequency of review in ICSID and the WTO is the scope of review. This suggests that the Appeals Facility's broadening of the scope of review of ICSID awards could significantly increase the frequency of review of ICSID awards. Increased frequency of review would inevitably increase costs and delays in ICSID arbitration.

This review of the arguments for and against appellate review highlights that the Appeals Facility sets in opposition the benefits of increased accuracy of awards and the burdens of decreased finality of awards. The following section addresses whether the perceived need for increased accuracy of ICSID awards is sufficient to compromise the established value of finality of awards.

### III.

#### IS THE DESIRE FOR ACCURACY SUFFICIENT TO COMPROMISE FINALITY?

The question of whether the Appeals Facility will be reconsidered in the future depends on whether investors and the United States will support the Facility. When the issue of appeal first emerged in ICSID, following the annulment proceedings in *Klockner v. Cameroon* and *Amco v. Indonesia*, expanding annulment to include the review of errors of law was widely regarded as an undesirable development<sup>104</sup> This appears to still be true today. As noted in the in-

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98. See Shavell, *supra* note 80, at 384-85.

99. Dalton, *supra* note 80, at 77. "[E]ven if appeal were cost-free and victory-assured, a perfectly rational winner of money damages would accept less than her due in order to avoid an appeal whenever (as is usually the case) the use value of having the money in hand exceeds the interest she could collect on the judgment." *Id.*

100. Appeal also strengthens a wealthy party's ability to outlast a poorer opponent. Thomas Wälde, *Alternatives for Obtaining Greater Consistency in Investment Arbitration: An Appellate Institution after the WTO, Authoritative Treaty Arbitration or Mandatory Consolidation?*, 2 *TRANSNAT'L DISP. MGMT.* 71, 74 (2005).

101. As of May 2004, the forty decisions rendered under ICSID have resulted in thirteen annulment applications, and seven cases have been subject to proceedings. See *supra* note 6. *Klockner v. Cameroon* and *Amco v. Indonesia* resulted in two annulment proceedings apiece. I did not include the second round of annulments in my calculations.

102. Caron, *supra* note 14, at 51.

103. Iynedjian, *supra* note 22, at 816.

104. Caron, *supra* note 14, at 22.

roduction, with the exception of the United States, the capital-exporting States' primary interests in ICSID are the interests of their investors; most capital-exporting States have not yet needed to think of themselves as parties to ICSID disputes.<sup>105</sup> Therefore, the capital-exporting Contracting States will support the Facility only if their investors perceive it to be in their best interests. As long as investors continue to win the majority of the investor-State arbitrations, their primary interest will be to maintain the finality of those awards, not the ability to appeal them.

For the United States, appeal also does not appear desirable. The inclusion of appeals provisions in the Trade Act of 2002, CAFTA, and the Chile and Singapore FTAs, suggests that the United States' interests would be served by appeal of arbitral awards. However, a closer look reveals otherwise. The United States Congress debated the Trade Act of 2002 at "a time of great ferment and fear about NAFTA Chapter 11."<sup>106</sup> The *Loewen* and *Methanex* cases were both pending against the United States.<sup>107</sup> Now that the United States has built a perfect record defending itself against investors, it too has little incentive to leave ICSID awards vulnerable to appeal.

The possibility of correcting an inaccurate adverse decision should at least be theoretically attractive to both investors and the United States. Investors and the United States often have millions of dollars at risk in ICSID arbitration, and it seems they would not want to risk those sums of money on one arbitration without recourse to appeal. However, again, both investors and the United States continue to win awards with high frequency. There is evidence outside of ICSID that some corporations are growing weary of the risk of arbitrating without appeal.<sup>108</sup> However, there is no evidence of this in ICSID. The Centre's docket continues to expand and one of the few cases that investors can point to as an example of an alleged error of law in an ICSID decision is the aforementioned *SGS v. Pakistan* award.

The bottom line is that both investors and the United States tend to win most ICSID disputes that they are party to. They have no incentive to review the accuracy of awards in their favor. Equally, they have no incentive to allow their opposing party the opportunity for review. Thus, we should only expect investors and the United States to support the adoption of the Appeals Facility if they begin to suffer or anticipate suffering adverse ICSID decisions, particularly adverse decisions that they perceive to be rooted in errors of law.

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105. See *supra* note 6. Outside of NAFTA cases, capital-exporting States are rarely the respondent in ICSID arbitrations.

106. Price, *supra* note 13, at 48.

107. *Id.*

108. William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 532 (2000).

#### IV.

##### CONCLUSION

The ICSID community should not be surprised by the Contracting States' decision against appeal. The proposal of the Appeals Facility was a bold step by the ICSID Secretariat. The ICSID Convention and much of international arbitration are founded on the assumption that awards are final. Adoption of the Appeals Facility would require a significant change in ICSID. The benefit of uniformity of law will not affect this change. ICSID was created to protect the rights of foreign investors. Uniformity of law does not augment investors' ability to enforce their rights. If the Appeals Facility is to be adopted it will be because investors seek to review the accuracy of ICSID awards. The opportunity to review the accuracy of awards is a direct tool by which investors can ensure the enforcement of their rights. Nonetheless, investors do not yet need further help to ensure their rights in ICSID. ICSID continues to fulfill its intended purpose of providing an effective remedy for investors. The Appeals Facility will remain on the shelf until investors perceive ICSID arbitral tribunals to be less likely than they are now to accurately enforce their rights.

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## Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights

Rebecca Wright

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# Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights

By  
Rebecca Wright\*

## I. INTRODUCTION

In Aesop's fable, *The Ant and the Chrysalis*, an ant discovers a chrysalis in a tree and derides it for being imprisoned in its shell, with "power only to move a joint or two of your scaly tail."<sup>1</sup> One day, the butterfly emerges from its bondage and flies off, leaving the ant with one clear lesson: evolution and change are always possible.

At first glance, the ant's lesson appears inapplicable to the new African Court on Human and Peoples' Rights (Court). Like the chrysalis, the Court has been tightly bound. Its two founding treaties, the African Charter on Human and Peoples' Rights (African Charter) and the Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol establishing the Court),<sup>2</sup> staunchly protect state sovereignty, restricting the institution's power to act. Individual access to the Court is only possible through state consent. Requirements of confidentiality, amicable settlement and exhaustion of local

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\* Rebecca Wright is a J.D. student at the University of California at Berkeley, Boalt Hall School of Law. She worked last semester in the Law School's International Human Rights Clinic, providing recommendations for the redrafting of the Rules of Procedure for the African Commission on Human and Peoples' Rights. Thanks go to Ariel Meyerstein and Yvonne Troya, fellow students in the Clinic, and to Ibrahima Kane, the Clinic's partner at the Commission's Working Group. Mr. Kane helped inspire the author's interest in human rights in Africa while she interned at INTERIGHTS, London during the summer of 2005. Thanks are also due to Professors David Caron, Andrew Guzman and Roxanna Altholz for conversations regarding this paper. All errors and misconceptions are, of course, the author's responsibility.

1. *The Ant and the Chrysalis*, Aesop's Fables: Online Collection – Selected Fables, at <http://www.pacificnet.net/~johnr/aesop/aesopse1.html> [hereinafter *Ant and Chrysalis*].

2. African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [hereinafter African Charter]. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (1998), available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> [hereinafter Protocol establishing the Court].

remedies allow states to avoid strict accountability. In addition, treaty-based institutions are notoriously difficult to change and evolution is strongly resisted once the power dynamics are locked in.<sup>3</sup> Thus, it appears that the Court's "basic genetic structure . . . so limits the institution that it is, from the outset, destined to fall short"<sup>4</sup> in its efforts to protect and promote human rights.<sup>5</sup> This paper, however, will explore one possible source for institutional change at the Court that might enable it to overcome its genetic shortcomings: foreign aid providers.<sup>6</sup> By linking aid provisions to demonstrated commitments to the Court, this group of "other interested parties"<sup>7</sup> can provide a potential source for growth. Observers may then find themselves as shocked as the ant, watching a tightly bound entity discover the impetus to evolve.

This paper will analyze the development of the Court from the perspective of rational design theory. While little of this literature addresses human rights directly, the observation that "states use international institutions to further their own goals, and . . . design institutions accordingly" is certainly applicable to human rights mechanisms.<sup>8</sup> The fact that institutions are a product of conscious state decision-making is evident in the treaties that establish the Court. State power has been left supreme and individual member states have purposefully restricted the ways they might be held accountable for human rights violations.

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3. See, e.g., Cesare Romano & Chidi Odinkalu, *Africa Won't Have a Second Chance to Make a First Impression*, "DO IT RIGHT:" NEWSL. OF AFR. CT. COALITION (Coalition for an Effective Africa Court on Human and Peoples' Rights, Nig., Afr.), 2004, at 1 (on file with author) (noting how, "[f]or courts like the African Court, established by treaty, it is often impossible to find the majority support necessary to modify statutes and rules of procedure. They are documents that, time and again, have proved remarkably resistant to change"); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001) (observing how "Japan and Germany play modest roles in the UN today because they have been unable to reverse the decision made in 1944-45 to exclude them from the Security Council").

4. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT.'L L. 401, 413 (2006).

5. The Preamble to the Protocol establishing the Court states that the Court should be created to "complement and reinforce" the functions of the Commission. These functions are "on the one hand promotion and on the other protection of Human and Peoples' Rights, freedom and duties." Protocol establishing the Court, *supra* note 2, pmbl.

6. Foreign aid is also known as official development assistance (ODA) and is provided by donor governments and multilateral institutions. The funding of regional human rights courts might not be considered "foreign aid" according to some definitions because it is not aimed directly at poverty reduction or macroeconomic policy. However, Steven Roper and Lilian Barria have described how a broader definition of foreign aid has emerged that focuses on "conflict prevention and resolution, reconstructing social networks, strengthening civil and representative institutions, promoting the rule of law and security sector reform." Providing foreign aid to a regional human rights court would fall within this broader concept of foreign assistance. See Steven D. Roper & Lilian A. Barria, *Funding Institutions of Human Rights: Do International Tribunals Provide Good Value?*, Prepared for delivery at the Annual Meeting of the American Political Science Association, 3 (Sept. 1-4, 2005), <http://www.eiu.edu/~polisci/RoperBarriaAPSA.pdf>.

7. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT.'L L. 401, 414 (2006).

8. Koremenos, *supra* note 3, at 762 (emphasis omitted). In an additional article, Koremenos et al. concluded that "the preliminary evidence suggests that our hypotheses will also apply to the human rights area." Barbara Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1062 (2001).

Thus, the nature of the game needs to be altered so that an incentive for change is provided. This is where foreign aid can play a role.

Apart from the evolution that occurs as a result of the “purposeful decisions” of state actors,<sup>9</sup> rational design theory does not tend to take account of the possibility for institutional change.<sup>10</sup> This paper, then, contributes to this body of scholarship by demonstrating how an outside influence can shift states’ interests, resulting ultimately in a judicial institution that serves functions unintended in its initial design. Part I provides a background to the development of the Court, demonstrating how the protection of state sovereignty has long been a priority in Africa’s regional human rights system. Part II describes the restrictive nature of the Court’s constituent instruments and how they limit the effective protection of human rights. It will compare a few key features of the African Court with the practices of the European and Inter-American Human Rights Courts and will suggest how the Protocol establishing the Court could have been made less restrictive. Part III will address how, as a group of other interested parties or “outsiders” with significant economic leverage over African nations, foreign aid donors could cause the Court to evolve. Although it is difficult to assess all the motivations underpinning the decision to grant foreign aid, the major donors have already begun to make their aid conditional on a respect for human rights—or at least conditional on efforts towards establishing good governance and rule of law. This last Part will provide concrete suggestions for the ways in which aid could be tied to institutional development.

Among the proposals discussed at the end of this paper are the need for individuals to have direct access to the Court and the need for a clear statement that domestic remedies should be fair and effective before they require exhaustion. Such measures will enable the Court to engage in “effective” adjudication by allowing it “to compel a party to a dispute to defend against a plaintiff’s complaint and to comply with the resulting judgment.”<sup>11</sup> Other functions, however, include strengthening the domestic courts and human rights institutions within Africa and providing a motivating focal point for African civil society. Only by fulfilling these latter two functions will the Court ensure that the human rights of African individuals are protected.

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9. According to rational design theory, the evolution of institutions only occurs in two situations: first, when states make “purposeful decisions as new circumstances arise”; second, when states begin to select a particular institution above others, favoring a specific institutional design. Koremenos, *supra* note 3, at 767.

10. In her article on international criminal tribunals, for example, Allison Danner noted how rational design scholars often assume that the interests of states remain constant. Danner explored ways in which institutional development can occur in unintended and irreversible ways so that courts perform functions not anticipated by the creating states. Such unintended evolution is, of course, a possibility for the African Court, but Danner’s theory is not predictive and will probably only be applicable over a long time period. Allison Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 *VAND. L. REV.* (forthcoming 2006), Vanderbilt Public Law Research Paper No. 05-30, available at <http://www.ssrn.com/abstract=822809>.

11. This definition of “effectiveness” is the one used by Laurence Helfer and Anne-Marie Slaughter in their article on supranational adjudication. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 283 (1997).

This whole paper is, of course, based on the premise that regional human rights courts are important institutions and that it is beneficial to have them functioning effectively. The Inter-American Court, established in 1979, has succeeded in persuading governments to release individuals who have been unjustly imprisoned. It has also successfully ordered governments to pay compensation to families who have lost members through human rights violations.<sup>12</sup> Even more impressive is the history of the European human rights system that was established in 1953, with the current version of the European Court of Human Rights created in 1998.<sup>13</sup> In 2000, Mary Robinson commented that: "The [European] Convention and Court have . . . played a key role in increasing human rights awareness and in the promotion and protection of human rights" in the region.<sup>14</sup>

Within Europe, states have been provided with economic incentives to protect human rights. No country has joined the European Union without first being a member of the Council of Europe, an "institutional watchdog of human rights principles, pluralistic democracy and the rule of law."<sup>15</sup> The fact that increased human rights protection is a prerequisite for membership in the European Union is a motivating factor that has played a significant role in the development of the human rights system in Europe. It is clear that African states would like to replicate the type of economic success achieved through the European Union, and ultimately the African region might be capable of providing its own economic incentives for human rights protection.<sup>16</sup> Presently, however, there is a dire lack of resources within the region and a number of organizational weaknesses. Bronwen Manby, for example, has noted that, while the regional group New Partnership for Africa's Development (NEPAD) contains human rights commitments for member states, the organization "has

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12. Peru, for example, complied with the Court's order to release Maria Elena Loayza Tamayo from prison following the decision in *Loayza Tamayo v. Peru* (1997). States have also amended domestic laws following decisions by the Inter-American Court. See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 8-9 (2003).

13. The European Human Rights system was established in 1953 when the Convention for the Protection of Human Rights and Fundamental Freedoms was ratified. The European Commission of Human Rights was established in 1954 and the limited Court of Human Rights was created in 1959. The current European Court of Human Rights (which replaces the dual system of Commission and Court) was created in 1998 by Protocol 11, an amendment to the Convention.

14. Mary Robinson, Address of the [United Nations] High Commissioner for Human Rights at the European Convention on Human Rights (Nov. 4, 2000), <http://www.unhchr.ch/hurricane/hurricane.nsf/0/F9DAEB800238EB3DC125698F00563E7C?opendocument>.

15. See Europa, *The EU's Relations with the Council of Europe*, [http://europa.eu.int/comm/external\\_relations/coe/](http://europa.eu.int/comm/external_relations/coe/). As Christina Hioureas' paper in this volume demonstrates, the European Court now has so many applications that it is almost a victim of its own success. Christina Hioureas, *Behind the Scenes of Protocol 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718 (2006).

16. Rachel Murray has noted how the AU takes "the wider political and economic view that the EU now encompasses," observing that "it was the EU that was said to have served as the AU's model." RACHEL MURRAY, *HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION* 31 (2004).

significant deficiencies” and so is unable to enforce these commitments.<sup>17</sup> As a result, economic incentives will need, at this present time, to come from an outside actor such as foreign donors.

## II.

### A HISTORY OF STATE SOVEREIGNTY AND THE GENESIS OF THE AFRICAN COURT

This Part will give a brief history of the regional human rights system in Africa, describing the main organizations and developments. It will begin by looking at the Organization of African Unity (now the African Union) and will then consider the African Charter and the African Commission on Human and Peoples’ Rights (Commission). Finally, it will describe the negotiations that led to the adoption of the Protocol establishing the Court. This history emphasizes the ways in which the African states have succeeded in protecting their sovereignty within their regional human rights system.

#### *A. The Organization of African Unity/ African Union*

The Court is a creation of the Organization of African Unity (OAU), which has now transformed into the African Union (AU). The Charter of the OAU entered into force on September 13, 1963 and provided for a “supreme organ” called the Assembly of Heads of State and Government (AHSJ).<sup>18</sup> The principal concern underlying the OAU Charter was the determination to protect the newly acquired statehood of many African countries. In fact, as Claude Welch has noted, the OAU was created “in a context of nearly untrammelled state sovereignty, in which heads of state sought sedulously to safeguard the independence so recently won.”<sup>19</sup> Article III of the OAU Charter set out the principles to which the Member States agreed to adhere: first was “[t]he sovereign equality of all member states”; second was “[n]on-interference in the internal affairs of states.”<sup>20</sup> Any disputes between the states were to be resolved using negotiation, mediation or arbitration.<sup>21</sup> At this point, the focus was clearly on the protection of the state and not the individual. As a result, the “sovereignty principle, together with the non-interference principle – the reserve domain – became the identity symbol of the organization. The organization, thus, became a personality club in perpetual mutual adoration.”<sup>22</sup>

Given that the heads of state who were themselves responsible for massive

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17. Bronwen Manby, *The African Union, NEPAD, and Human Rights: The Missing Agenda*, 26 HUM. RTS. Q. 983 (2004).

18. Charter of the Organization of African Unity, 479 U.N.T.S. 39, art. VIII, available at [http://www1.umn.edu/humanrts/africa/OAU\\_Charter\\_1993.html](http://www1.umn.edu/humanrts/africa/OAU_Charter_1993.html) [hereinafter OAU Charter].

19. Claude E. Welch, *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43 (1992).

20. OAU Charter, *supra* note 18, art. III(1), (2).

21. OAU Charter, *supra* note 18, art. III(3).

22. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT’L L. 811, 819 (2003).

human rights abuses traditionally led the OAU, it was no surprise that the organization strongly supported the principle of non-intervention. Idi Amin, for example, who was a dictator in Uganda during a notorious reign of terror, was elected as the chairman of the OAU in June 1975. Amin killed thousands of his countrymen after overthrowing the elected government of Milton Obote. One Ugandan Anglican bishop, Festo Kivengere, angrily commented after Amin's election in 1975 that: "At the very moment the heads of state were meeting in the conference hall, talking about the lack of human rights in southern Africa, three blocks away, in Amin torture chambers, my countrymen's heads were being smashed with sledge hammers and their legs being chopped off with axes."<sup>23</sup> Increasing political repression, denial of political choice, restrictions on freedom of association and other human rights violations met with rare murmurs of dissent from within the OAU.<sup>24</sup>

In the late 1990s, there was a growing momentum to replace the OAU with an organization that was able to handle modern political tensions and to address matters of economic and social concern. In September 1999, an Extraordinary Summit of the Heads and State of Government of the OAU was held in Sirte by the invitation of the Libyan leader, Colonel Ghaddafi.<sup>25</sup> This meeting resulted in the Sirte Declaration, which stated that: "[O]ur continental Organization (OAU) needs to be revitalized in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances."<sup>26</sup> The Heads of State and Government decided to establish the AU so that it could, among other things, work towards "[s]trengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community."<sup>27</sup> As a result, the OAU adopted the Constitutive Act of the African Union (AU Act) in July 2000.<sup>28</sup> The AU Act entered into force in May 2001. At this point, the OAU was, as *Time Europe* commented, "mercifully killed off by its member states."<sup>29</sup>

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23. George B.N. Ayittey, *Idi Amin Lives*, ProfileAfrica, Jan. 24, 2004, [www.profileafrica.com/Search195.htm](http://www.profileafrica.com/Search195.htm).

24. See, e.g., U.O. Umzurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 903 (1983) (noting that massacres of thousands of Hutu in Burundi in 1972-73, as well as repressive regimes in Uganda, Equatorial Guinea and the Central African Republic, "were neither discussed nor condemned by the OAU, which regarded them as matters of internal affairs.").

25. Some commentators have expressed distrust regarding Colonel Ghaddafi's leadership role in the OAU transformation process. As one reporter commented: "Doubt . . . hangs over the intentions of the Libyan leader . . . there were worries expressed in whispers in Lusaka about whether the Guide of the Libyan Revolution could really be the helmsman of the continental revolution. Questions are being asked about Al-Gaddafi's motives." Ofeibea Quist-Arcton, *From OAU to AU - Whither Africa?*, ALLAFRICA.COM, July 13, 2001, <http://allafrica.com/stories/200107130178.html>.

26. OAU, Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government (Sept. 8-9, 1999), [http://www.un.int/libya/sirte\\_dc.htm](http://www.un.int/libya/sirte_dc.htm).

27. *Id.*

28. Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, available at <http://www1.umn.edu/humanrts/africa/auconst-act2001.html> [hereinafter AU Act].

29. Peter Hawthorne, *All for One, One for All: The Organization of African Unity is dead*,

The AU Act establishes the AU as a political, economic and social organization. Its political organ is the Assembly of the Union comprised of the members' Heads of State and Government. Whereas respect for sovereignty and the commitment to "non-interference by any Member State in the internal affairs of another" are still included as important principles in the AU Act, there is some effort towards limiting these assumptions.<sup>30</sup> Article 4(h), for example, provides the "right . . . to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."<sup>31</sup> While the AU has intervened in some ways—mediating, for example, peace talks in Abuja between the Sudanese government and the two rebel groups, and monitoring a humanitarian ceasefire in Darfur since June 2004<sup>32</sup>—it still does not aggressively condemn human rights abuses and states do not appear wary of AU disapproval. In January 2006, Muthoni Wanyeki lamented the AU's ineffectiveness, commenting how:

It allowed us to feel proud about our capacity to resolve our own problems when it intervened in Togo following the death of one of those few remaining African presidents who went on and on and on . . . But, its duty apparently done, it sat back and did nothing about the post-election fallout. And, of course, it has said nothing on the deteriorating situation in Swaziland. Or on the situation in Zimbabwe.<sup>33</sup>

The same month, Human Rights Watch made similar observations.<sup>34</sup>

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*long live the African Union. Better luck this time?*, TIME EUROPE, July 14, 2002, available at <http://www.time.com/time/europe/magazine/article/0,13005,901020722-320737,00.html>.

30. AU Act, *supra* note 28, art. 4(g).

31. AU Act, *supra* note 28, art. 4(h).

32. The AU established an African Union Mission in Sudan (AMIS) and provided almost 7,000 troops to protect civilians in Sudan. This is the AU's largest ever military operation. See *Submission to the 38<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights*, HUMAN RIGHTS WATCH, Nov. 2005, <http://hrw.org/english/docs/2005/11/19/africa12060.htm>. Britain recently pledged more money to support the AMIS, noting that: "Despite its limited capacity, the 6,964-strong AMIS force, which was deployed in Darfur in August 2004, has been credited with helping to improve security in the region and enabling humanitarian agencies to deliver aid to those affected by the conflict." *Sudan: Britain to Give Additional Funding to AU Mission*, IRIN NEWS.ORG, Feb. 22, 2006, [http://www.irinnews.org/report.asp?ReportID=51846&SelectRegion=East\\_Africa](http://www.irinnews.org/report.asp?ReportID=51846&SelectRegion=East_Africa). But see *No Power to Protect: Increase Troops*, REFUGEES INTERNATIONAL, [http://www.refugeesinternational.org/section/publications/au\\_troops/](http://www.refugeesinternational.org/section/publications/au_troops/) (arguing that "AMIS needs more troops on the ground to effectively fulfill their mandate").

33. L. Muthoni Wanyeki, *AU's Dismal Date in Khartoum*, THE EAST AFRICAN (Kenya), Jan. 17, 2006, available at <http://allafrica.com/stories/200601171013.html>.

34. In addition to commenting on the situation in Togo and Zimbabwe, Human Rights Watch stated:

In the DRC, the A.U. has spoken of addressing the politically sensitive issue of foreign combatants in the country but has yet to act. In the Ivory Coast, the A.U. has downplayed issues of justice and accountability that are likely to prove essential to a lasting peace. Meanwhile, certain powerful leaders, such as Prime Minister Meles Zenawi of Ethiopia, escaped A.U. pressure altogether, even as he, unwilling to accept opposition gains in the country's first contested elections in May, led the police to kill scores of demonstrators and arrest thousands of opposition supporters.

*Darfur and the African Union*, HUMAN RIGHTS WATCH, Jan. 2006, <http://www.hrw.org/wr2k6/introduction/10.htm>.

*B. The African Charter on Human and Peoples' Rights*

Despite these problems, Africa does have a regional human rights treaty that will be integral to the functioning of the new African Court. This treaty is the African Charter on Human and Peoples' Rights which was adopted by the OAU in 1981 and came into force in 1986.<sup>35</sup> All AU states are now a party to this treaty.<sup>36</sup> While this Charter was heralded as a major advance in the human rights system in Africa,<sup>37</sup> it contains provisions that make state sovereignty supreme. For example, there are a number of "claw back clauses" that remove, or at least severely restrict, the human rights protections.<sup>38</sup> Article 6 states that: "No one may be deprived of his freedom *except for reasons and conditions previously laid down by the law.*"<sup>39</sup> Article 8 reads: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, *subject to law and order*, be submitted to measures restricting the exercise of these freedoms."<sup>40</sup> Many states in Africa have laws that directly restrict rights such as freedom of speech and freedom of conscience. For example, Article 46 of the new Algerian Charter for Peace and National Reconciliation prohibits, among other things, public debate regarding the atrocities committed during the past decade of internal conflict.<sup>41</sup> Article 21 of the Libyan Constitution states that

35. African Charter, *supra* note 2.

36. All African states apart from Morocco are members of the African Union. Morocco was forced to withdraw from the OAU in 1984 because it refused to recognize the Polisario movement's claim to the territory of Western Sahara. For an account of a 2001 proposal to allow Morocco to rejoin the OAU, see David Bamford, *OAU Considers Morocco Readmission*, BBC NEWS, July 8, 2001, <http://news.bbc.co.uk/1/hi/world/africa/1428796.stm>.

37. Kofi Oteng Gufuor has noted that: "The Banjul Charter was a turning point in the protection of human rights in Africa. Though the subject of much criticism, the Banjul Charter is still a landmark human rights treaty as, prior to its adoption, human rights were seen as issues within the domestic jurisdiction of the OAU's Members." Kofi Oteng Gufuor, *Human Rights in Africa: Interpreting and Understanding the Organization of African Unity's Grand Bay Declaration and Plan of Action*, University of East London Law Research Paper, 5-6, <http://www.uel.ac.uk/law/research/publications/documents/grandbay.doc>.

38. Most human rights treaties contain limitation or derogation clauses that provide specific circumstances in which states can limit or derogate from the rights guaranteed. However, as the Centre for Human Rights in the University of Pretoria has noted, claw back clauses are unique in that, claw back clauses have the effect of restricting rights *ab initio*. It [sic] undermines the proclaimed rights by granting states unqualified powers to infringe upon certain rights. Claw back clauses are therefore less precise because the restrictions are discretionary as it subject [sic] human rights to domestic laws. The negative aspect of this is that governments are traditionally the most frequent violators of human rights, and they also have the power to make and change laws. By inserting clauses that permit rights to be limited by domestic law, the Charter makes human rights vulnerable to those very institutions that attack them most often. Centre for Human Rights, University of Pretoria, *African Human Rights System*, [http://www.chr.up.ac.za/centre\\_publications/ahrs/african\\_charter.html](http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html).

39. African Charter, *supra* note 2, art. 6 (emphasis added).

40. African Charter, *supra* note 2, art. 8 (emphasis added). Such claw back clauses are also contained in Articles 9, 10, 11 and 14. For an analysis of these provisions, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 63 (2000).

41. Article 46 reads: "Anyone who, by speech, writing, or any other act, uses or exploits the wounds of the National Tragedy to harm the institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honorably served

“freedom of conscience is absolute,” but adds that foreigners have “the right freely to practice religion so long as it is not a breach of public order and is not contrary to morality.”<sup>42</sup> These types of laws, which are not uncommon throughout Africa, make the claw back clauses in the African Charter a concrete problem.<sup>43</sup>

### C. The African Commission on Human and Peoples’ Rights

Part II of the African Charter calls for the creation of an eleven-member independent Commission on Human and Peoples’ Rights (Commission). The Commission’s mandate is “to promote human and peoples’ rights and ensure their protection in Africa.”<sup>44</sup> While the Commission has recently begun to challenge state sovereignty by allowing representation by NGOs and individuals and by declaring that provisional measures are binding,<sup>45</sup> it is severely restricted by a number of factors. First is the problem that the states generally refuse to cooperate with the Commission, both during hearings and during

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it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 dinars.” See *Algeria: New Amnesty Law Will Ensure Atrocities Go Unpunished*, HUMAN RIGHTS WATCH, Mar. 1, 2006, <http://hrw.org/english/docs/2006/03/01/algeri12743.htm>.

42. CONSTITUTION, Art. 21 (Libya), available at <http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm>.

43. Vincent Nmehielle, however, has claimed that while the criticisms leveled against the claw back clauses are well founded, the Commission has not in practice implemented these clauses:

The African Commission has, in fact, variously rejected that interpretation [that the claw back clauses allow domestic law to trump international human rights standards], and reinforced the overarching reach of international human rights law, which does not succumb to flimsy domestic laws or regulations that tend to limit the enjoyment of human rights protection without cause, or in a very irregular situation. In a series of cases consolidated in *Media Rights Agenda and Constitutional Rights Project v. Nigeria* the Commission set the standard for reviewing state limitation of human rights.

Vincent Nmehielle, *Development of the African Human Rights System in the Last Decade*, 11 HUM. RTS. BRIEF 6, 7 (2004). Despite this observation, the claw back clauses do provide states with a legal justification for avoiding human rights obligations and signify a worrying protection of state sovereignty. While they are still present in the African Charter, there is always a danger that they could be used as a defense.

44. African Charter, *supra* note 2, at art. 30.

45. In the Sixteenth Ordinary Session, held in October 1994, the Commission stated in paragraph forty-eight that: “It should be pointed out that for the first time victims of human rights violations or their representatives came to defend their cause before the African Commission.” The Commission heard the author of the communication for *Louis Emgba Mekongo v. Cameroon*. Final Communique, Sixteenth Ordinary Session, Afr. Comm’n on Hum. Peoples’ Rts. (25 Oct.-3 Nov., 1994), <http://www1.umn.edu/humanrts/africa/achpr16f.html>. With regard to provisional measures, in *International PEN and Others v. Nigeria*, the Commission stated that “in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1 [of the African Charter].” This statement indicated that, in the view of the Commission, provisional measures were mandatory, a declaration that challenged Nigeria’s sovereignty (even though Nigeria ignored the Commission’s decision). *International PEN and Others v. Nigeria*, Afr. Comm’n Hum. & Peoples’ Rts., Comm. Nos. 137/94, 139/94, 154/96 and 161/97, holding (1998), available at [http://www1.umn.edu/humanrts/africa/comcases/137-94\\_139-94\\_154-96\\_161-97.html](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html) [hereinafter International PEN].

investigations.<sup>46</sup> Second, the Commission lacks independence because it is integrally linked with the African Heads of State and Government. The eleven Commissioners, for example, are “elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States Parties.”<sup>47</sup> Third, the work of the Commission is shrouded in secrecy, making any kind of external monitoring difficult. Article 59 states that: “All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.”<sup>48</sup> Fourth, individual access to the Commission is difficult. Communications received from non-state parties must “relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights.”<sup>49</sup> In addition, such communications cannot be “written in disparaging or insulting language,” a provision that the Commission has, at times, strictly applied. In *Ligue Camerounaise des droits de l’homme v. Cameroon*, for example, the Commission ruled that phrases such as “regime of torturers” and “government barbarisms” constituted the type of insulting language referred to in Article 56.<sup>50</sup> The Commission therefore held the communication inadmissible, despite the complainant’s credible allegations of serious and massive human rights violations.<sup>51</sup> Finally, the Commission is restricted by a dire lack of funds. This has been acknowledged by the OAU/AU on a number of occasions. For example, in 1989, the AHSG asked the Secretary-General of the OAU to “find, prior to next financial year, appropriate solutions to the budgetary, financial and personnel problems raised by the African Commission.”<sup>52</sup> For these reasons, the Commission has been dismissed by many critics as a “toothless bulldog” that was never “created to bite.”<sup>53</sup>

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46. In *International PEN*, Nigeria ignored the Commission’s demands that the defendant should not be harmed pending the trial and he was executed before the Commission ruled that the defendant was not guilty. *International PEN*, *supra* note 45, paras. 8, 9 (describing how the Commission had invoked interim measures against Nigeria asking that the executions of Ken Saro-Wiwa and others be suspended but how Nigeria had carried out the executions without responding to this request).

47. African Charter, *supra* note 2, art. 33.

48. *Id.* art. 59.

49. *Id.* art. 58.

50. *Ligue Camerounaise des droits de l’homme v. Cameroon*, Afr. Comm’n Hum. & Peoples’ Rts., Comm. No. 65/92, para. 13 (1997), available at <http://www1.umn.edu/humanrts/africa/comcases/65-92.html> [hereinafter *Ligue Camerounaise*].

51. *Id.* para. 1 (describing how the complaint documented ways in which the prison conditions in Cameroon constituted cruel, inhuman and degrading treatment and how there was additional evidence of, among other things, “massacres of the civilian population”).

52. OAU, Resolution Relating to the African Commission on Human and Peoples’ Rights, AHSG, Twenty-Fifth Ordinary Session (24-26 July, 1989), AHG/Res. 188 (XXV), available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/yHoGAssembly1989.pdf>. For a description of the Commission’s appeals for money, see MURRAY, *supra* note 16, at 55-57.

53. Udombana, *supra* note 40, at 64.

*D. Negotiations Toward an African Court on Human and Peoples' Rights*

It was the ineffectiveness of the Commission in protecting human rights in Africa that led to the creation of the Court. In 1993, the International Commission of Jurists (ICJ), under the auspices of Abdou Diouf, President of Senegal and then chairman of the OAU Assembly, convened a meeting of jurists and human rights specialists to address the failures of the Commission. Following the brainstorming session, several other meetings of experts were convened under the direction of the ICJ, together with the OAU and the Commission.<sup>54</sup> These meetings led to the creation of Resolution 230 which was adopted in the Thirtieth Ordinary Session of the AHSG of the OAU in June 1994. This Resolution expressed concern regarding, "the situation obtaining in the area of Human and Peoples' Rights" and requested that "the OAU Secretary-General to convene a meeting of government experts to ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court of Human and Peoples' Rights."<sup>55</sup>

This Resolution was followed by a number of meetings held between the OAU and international experts. A draft Protocol was first submitted by the OAU Secretary-General to the Conference of Governmental Experts in Cape Town, South Africa, in September 1995. The draft Protocol that emerged from this session is referred to as the "Cape Town Draft." A second meeting was held in Nouakchott, Mauritania in April 1997 and resulted in a draft referred to as the "Nouakchott Draft." At this point, governments had only participated in the drafting process in a limited way and this deficiency led to a final meeting in December 1997, accompanied by an appeal for more state input to try to finalize the draft.<sup>56</sup> The final version of the Protocol establishing the Court was then recommended for adoption by the OAU.

The comments made by states during this drafting process emphasized the reluctance of African states to have an external regional body passing judgment on their domestic affairs. This attitude can be seen in part from the way they emphasized that the "proper" (i.e. traditional) way to resolve disputes within Africa was through mediation rather than through contentious proceedings. In 1995, the South African newspaper *Sowetan* stated that, in Africa, "[c]onventional wisdom then, as now, was that it was improper and a sign of bad neighborliness to intervene in the internal affairs of others."<sup>57</sup> This type of "conventional wisdom" was emphatically expressed in a letter written in the

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54. For more information on this NGO process, see Julia Harrington, *The African Court on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000*, 308 (Malcolm D. Evans & Rachel Murray eds., 2002).

55. OAU, Resolution on the African Commission on Human and Peoples' Rights, AHSG, Thirtieth Ordinary Session (13-15 June, 1994), AHG/Res. 230 (XXX), para. 4, available at <http://www1.umn.edu/humanrts/africa/resafchar30th.html>

56. See Harrington, *supra* note 54, at 312-13 (discussing the lack of state participation in the drafting process and how this probably led to the final and third meeting of governmental experts).

57. Editorial, *SOWETAN* (S. Afr.), Sept. 6, 1995, at 10 (on file with author).

same year to the Assistant Secretary-General of the OAU. Edwin Maepe, of the International Metalworkers Institute, called for the OAU to focus on mediation at a “[h]igh powered level,” rather than on a regional court. According to Maepe, “African states will respond more positively in my opinion to a mediatory approach rather than an adjudicative approach.”<sup>58</sup> Maepe was particularly concerned that judicial condemnation of human rights abuses was ineffective; in his view, “to think that Africa’s problem can be solved by passing judgements on members states is rather outrageous.”<sup>59</sup>

The Secretary-General of the ICJ has also referred to Africa’s traditional emphasis on mediation in a 1995 speech. Discussing the lengthy process that was required to create an African Court, he noted that: “The refusal to create an African Court on Human and Peoples’ Rights, no doubt, had a philosophical explanation. Generally, it is during open-floor discussions that consensus is reached regarding conflict directed towards individuals or clans. Traditional African justice is essentially conciliatory.”<sup>60</sup>

However, the ICJ Secretary-General was also careful to note that the “delights of traditional anthropology should not lull us to the point of obscuring reality.”<sup>61</sup> Mediation was not sufficient to address human rights abuses and so victims of these violations should “have recourse to judicial process on demand.”<sup>62</sup> Indeed, a number of judicial developments within Africa make it difficult to maintain that mediation alone is the African way. For one, the reliance on domestic constitutional courts has been said to have paved the way for the creation of an African court.<sup>63</sup> In addition, the strong regional support for the African Court of Justice and the active participation of many African nations in the creation of the ICC indicate that litigation is a well-accepted method of resolving disputes within the continent.<sup>64</sup>

However, despite indications that African states no longer rely upon mediation as the sole means of solving disputes, the desire to avoid contentious proceedings was clearly a motive that helped to shape the Court. For example, in comments made in 1996, the Government of Tunisia called for an explicit statement to be included in the Protocol declaring that the Court “shall attempt to assist the parties in arriving at an amicable settlement.”<sup>65</sup> The reason this

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58. Letter from Edwin Maepe, International Metalworks Federation, to Ahmed Haggag, Assistant Secretary General of the OAU and to International Jurists, Switzerland (Sept. 26, 1995) (on file with author).

59. *Id.*

60. Adama Dieng, Secretary-General for the International Commission of Jurists, Speech given at the Meeting of Government Experts on the Question of the Creation of an African Court For Human and Peoples’ Rights, Cape Town, South Africa (Sept. 6-12, 1995), at 4 (on file with author).

61. *Id.*

62. *Id.*

63. See Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT’L L. 1, 9 (2004).

64. Frans Viljoen argued that: “African enthusiasm and participation in establishing the ICC, and its entry into force in 2002 . . . left its mark on the parallel process of establishing the African Human Rights Court.” *Id.* at 12.

65. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an

statement was necessary, noted the Tunisian Government, was “to highlight the fact that the purpose of the Court is to ensure respect for human rights and not to deliver a judgement condemning a State. If it succeed [sic] in achieving its end through prior reconciliation, it would have carried out the preventive role assigned to it.”<sup>66</sup> A provision on amicable settlement was not included in the Cape Town Draft, but it was added to the Nouakchott Draft, presumably in response to Tunisia’s comments.

An even more emphatic way to avoid interference with state sovereignty was to deny individuals direct access to the Court. The provision on individual access was one of the most contentious in the whole Protocol establishing the Court and provoked a number of comments by states. In the first draft produced after the Cape Town meeting, Articles 5 and 6 dealt with *locus standi*. Article 5 allowed two groups to submit cases to the Court: the Commission and the “State Party which had lodged a complaint to the Commission.”<sup>67</sup> Article 6 then provided for “exceptional jurisdiction” which read: “Notwithstanding the provisions of Article 5, the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter.”<sup>68</sup>

This type of language undoubtedly reflects the influence of NGOs who were instrumental in creating the first draft of the Protocol.<sup>69</sup> African states, however, were determined that such extensive *locus standi* should be avoided. In March 1996, for example, Mauritius expressed concern that Article 6 would bring “a risk of inundation of the Court by applications from international

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African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(e) Tunisia, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

66. *Id.*

67. OAU, Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, produced at Government Legal Experts Meeting on the Question of the Establishment of an African Court of Human and Peoples’ Rights (Sept. 6-12, 1995), Cape Town, South Africa, OAU/LEG/EXP/AFCHPR(I), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

68. Article 55 of the Charter stipulates that, before every session of the Commission, the Secretary has to make a list of communications submitted by individuals and NGOs and transmit them to the members of the Commission. Such communications are then considered by the Commission “if a simple majority of its members so decide.” African Charter, *supra* note 35, at art. 55.

69. Julia Harrington has noted that the 1995 Cape Town draft was not, in fact, the first version of the Protocol. Rather, “a draft protocol for an African court had first been made by Karl Vasak, a Czech jurist, in 1993, at the request of the International Commission of Jurists (ICJ), an NGO based in Geneva.” Harrington, *supra* note 54, at 308. For a copy of the early NGO draft, see [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

watchdogs.”<sup>70</sup> Egypt also expressed a reservation to this Article, providing two grounds for its objections: first, that it would undermine the work of the Commission, and second that it would “risk opening a wider discussion on the interpretation of article 55 of the Charter, which so far, had been interpreted by the Commission, as allowing individual complaints and not just ‘situation’ complaints.”<sup>71</sup> In the next round of negotiations, Burkina Faso supported Egypt’s statements and said that “individuals, non-governmental organizations and individual groups should first refer their issues to the Commission,”<sup>72</sup> a sentiment that was also reiterated by Madagascar.<sup>73</sup> These types of responses led to the rewriting of Article 6 in the Nouakchott Draft in such a way that individual access became conditional upon each State making an optional declaration accepting the competence of the Court to receive such petitions.<sup>74</sup>

Despite such hesitations, on June 8, 1998, the Thirty-Fourth Summit of the Heads of State and Government of the OAU adopted the Protocol on the Establishment of an African Court on Human and Peoples’ Rights. It came into force in January 2004 when the Protocol received the requisite number of ratifications.<sup>75</sup> At the beginning of 2006, the eleven judges were elected.<sup>76</sup>

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70. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(a) Mauritius, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

71. OAU, Annex I: Report of the Government Experts Meeting on the Establishment of an African Court of Human and Peoples’ Rights (Sept. 6-12, 1995), OAU/LEG/EXP/AFCHPR/RPT(I) Rev.1, available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

72. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(c) Burkina Faso, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc). Despite the reservations mentioned here, Burkina Faso is in fact the only country that has made a declaration accepting direct individual and NGO access to the Court.

73. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(i) Madagascar, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc) (noting concerns about how Article 6 would “reduce the importance of the role of the Commission”).

74. OAU, Draft (Nouakchott) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, produced at the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples’ Rights (Apr. 11-14, 1997), Nouakchott, Mauritania, OAU/LEG/EXP/AFCHPR/PRO (2), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

75. A minimum of fifteen ratifications was required before the Protocol entered into force. As of March 2006, twenty-one countries have ratified the Protocol establishing the Court. These are Algeria, Burkina Faso, Burundi, Côte d’Ivoire, the Comoros, Gabon, the Gambia, Ghana, Kenya,

Ultimately, according to comments made to Reuters by Ibrahima Kane, the Court “will be situated in East Africa, with Mauritius the most likely location, and should be in place by July [2006] with an initial annual budget of \$2.25 million.”<sup>77</sup>

### III.

#### THE RESTRICTIVE NATURE OF THE CONSTITUENT INSTRUMENTS

In 1995, the Assistant-General of the OAU, Ambassador Ahmed Haggag, emphasized that “no continent and no people have experienced so much agony and suffering as a result of massive violations of human rights.”<sup>78</sup> Emphasizing that the “oneness of humanity and the universality of human rights cannot be denied,” Haggag ultimately called for “collective action at the national, regional and international level.”<sup>79</sup> Thus, Haggag suggested that one motive for the African states in creating a Court should be to eradicate individual suffering, a goal that would rise above state sovereignty. However, as discussed above, this motive did not triumph during the writing of the Protocol establishing the Court. Instead, the protection of state sovereignty remained the principle concern—a concern that is evident in the Court’s institutional design.<sup>80</sup>

This Part will focus on four principal features of the Court’s constituent instruments that may impede its evolution into a functioning human rights mechanism. The first and most important feature is the lack of individual access. Second is the fact that the Court must take into account the provisions contained in Article 56 of the African Charter, including exhaustion of domestic remedies and avoiding insulting language. Third is the requirement that the Court take steps to encourage amicable settlement. The final feature is the guarantee of confidentiality. Each of these elements will be briefly considered and compared with other regional human rights practices. Suggestions for possible improvement will be made, but with a full awareness that this type of change will probably only occur if the political dynamics of the Court are altered.

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Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, and Uganda.

76. AU, Decision on the Election of Judges of the African Court on Human and Peoples’ Rights Doc. EX.CL/241 (VIII), Executive Council, Eighth Ordinary Session (Jan. 16-21, 2006), EX.CL/Dec.261(VIII), available at [http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th\\_ord\\_Council\\_Decisions\\_Jan2006\\_Khartoum.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th_ord_Council_Decisions_Jan2006_Khartoum.pdf). A list of judges with their biographies is available at [http://en.wikipedia.org/wiki/Judges\\_of\\_the\\_African\\_Court\\_on\\_Human\\_and\\_Peoples'\\_Rights#Dr.\\_Fatsah\\_Ouguergouz\\_.28ALGERIA.29](http://en.wikipedia.org/wiki/Judges_of_the_African_Court_on_Human_and_Peoples'_Rights#Dr._Fatsah_Ouguergouz_.28ALGERIA.29).

77. Nick Tattersall, *Africa Names Judges for New Human Rights Court*, REUTERS (Jan. 22, 2006), <http://www.alertnet.org/thenews/newsdesk/BLA251187.htm>.

78. OAU, Opening Ceremony Remarks, Government Experts Meeting on the Establishment of an African Court of [sic] Human and Peoples’ Rights (Sept. 6-12, 1995), Cape Town, South Africa, OAU/LEG/EXP/AFC/HPR/RPT(1) Rev.1 (on file with author).

79. *Id.*

80. Frans Viljoen has suggested another motive behind ratification of the Court that does not depend on a commitment to human rights. This motivation is “the prospect of bidding to host the African Court, an avenue open only to state parties to the Protocol.” Viljoen, *supra* note 63, at 12.

*A. Individual Access to the African Court*

Commenting on the Cape Town Draft, Tanzania said that if individual access to the Court was optional, it would “make the protocol virtually in operative [sic].”<sup>81</sup> Similarly, Burkina Faso’s Ministry of Foreign Affairs noted that individuals and NGOs should be able to access the Court directly because “[i]t would not be realistic to exclude them from having access to the Court at a time when on other continents texts are being revised to give them access to international justice in the area of human rights.”<sup>82</sup> This comment refers to the fact that, in 1998, individuals were allowed direct access to the European Court of Human Rights, a development that significantly improved the effectiveness of human rights protection in Europe.<sup>83</sup> Indeed, the lack of such access to the Inter-American Court has been one of its greatest weaknesses because it limits the role of the victim and necessitates instead the intervention of the Inter-American Commission which has to refer individual cases to the Court.<sup>84</sup> Unless African states allow individual access, this will also be the practice in the African Court, despite the fact that “[t]he right of individual petition, whereby individuals are granted direct access to justice at the international level, is a defining accomplishment of international human rights law. The essence of the international protection of human rights is the opposition of individual complainants to respondent states.”<sup>85</sup>

Not surprisingly, only one state, Burkina Faso, has currently made a declaration allowing individuals to access the Court. Most countries, it seems, share the sentiments expressed in a memorandum to the government of The Gambia which commented that the optional individual access “safeguards the integrity of the State and avoids vexatious and embarrassing actions being

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81. OAU, Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, received at the Third Government Legal Experts Meeting (Enlarged to Include Diplomats), Comments by Tanzania (Dec. 8-11, 1997), OAU/LEG/EXP/AFCHPR/Comm.(3), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

82. OAU, Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, received at the Third Government Legal Experts Meeting (Enlarged to Include Diplomats), Comments by Burkina Faso (Dec. 8-11, 1997), OAU/LEG/EXP/AFCHPR/Comm.(3), available at [http://www.chr.up.ac.za/centre\\_publicationshrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publicationshrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

83. This direct access was introduced by Protocol 11 in Article 34 that replaced the previous Article 26 of the Convention on Human Rights. See Vaughne Miller, *Protocol 11 and the New European Court of Human Rights*, House of Commons Research Paper 98/109, Int’l Aff. & Def. Sec. (Dec. 4, 1998), <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>. See also Christina Hioureas, *supra* note 15 at 723.

84. See PASQUALUCCI, *supra* note 12, at 98-99 (discussing how both the Inter-American Court and Commission are giving petitioners more autonomy).

85. Antonio A.C. Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 7 (1998).

brought directly to the Court by NGOs and individuals.”<sup>86</sup> Indeed, the states must have known that few governments would allow individual access. As Julia Harrington has commented: “The limitation on *locus standi* must be understood as a cynical move to diminish what power the Court might have over States by making it less accessible to those most likely to bring cases.”<sup>87</sup> Harrington hypothesized that one of the reasons for this tight restriction on individual access might have been the influence of Nigeria during the drafting stages. At that time, Nigeria was under the control of General Abacha’s government, which had “already given dramatic evidence of its disregard for human rights in general and the African Commission in particular.”<sup>88</sup> Given the secrecy that covers the majority of the debates regarding the Court, it is hard to know Nigeria’s exact input, but “as the largest country in Africa and one of the most powerful in the OAU, Nigeria surely made its presence felt.”<sup>89</sup>

### *B. Article 56 of the African Charter on Human and Peoples’ Rights*

Another restrictive element of the Court’s constituent instruments is the fact that Article 6 of the Protocol establishing the Court states that, when ruling on the admissibility of cases, the provisions of Article 56 of the African Charter must be taken into account. This statement ensures that the Court is in line with the procedure of the Commission, but it also introduces two elements that could safeguard state sovereignty. The first element is that Article 56 of the African Charter stipulates that domestic remedies must be exhausted before communications can be accepted. This requirement is, of course, important because it encourages domestic institutions to address human rights abuses and would allow the Court to become a potential agent for change within individual countries.<sup>90</sup> This function of a regional human rights court will be discussed in Part III because it is essential to the growth of human rights standards within Africa. However, a restricted application of the exhaustion requirement has enormous potential to exclude individuals from the communications mechanism, and it must therefore be applied carefully by the African Court.

It is essential, for example, that the Rules of Procedure for the Court contain an explicit reference to the fact that the domestic remedies must be both effective and adequate or exhaustion is not required. Article 31(2) of the Inter-American Commission’s Rules of Procedure, for example, makes this condition

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86. The Establishment of the African Court on Human and Peoples’ Rights (a memorandum addressed to the government of The Gambia that was endorsed by the Department of State for Foreign Affairs) (on file with author).

87. Harrington, *supra* note 54, at 319.

88. *Id.* at 321.

89. *Id.*

90. Jo Pasqualucci has stated: “It is a generally recognized principle of international law that a victim of human rights abuse must pursue and exhaust all available remedies in the local legal system before resorting to an international forum.” This can be seen in Article 46(1)(a) of the American Convention on Human Rights and Article 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. PASQUALUCCI, *supra* note 12, at 129-30.

explicit.<sup>91</sup> The African Commission has insisted on effective domestic remedies, ruling in a 1995 case that: "It would be improper to insist on the complainant seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles."<sup>92</sup> However, the Commission has also issued inconsistent decisions that have interpreted the exhaustion of domestic remedies rule strictly and out of line with its favorable precedents. In *Legal Defence Centre v. The Gambia*, for example, which was decided in 2000, the Commission ruled that there was a failure to exhaust domestic remedies even though the petitioner was prohibited from reentering the state and therefore had no access to the courts there.<sup>93</sup> If the Court fails to pass judgment on inadequate domestic remedies, it will do little to improve human rights protection within African countries and will only continue to condone state violations.

In addition, if the requirement of Article 56 that communications cannot be "written in disparaging or insulting language" is interpreted broadly, legitimate and serious cases will be withheld from consideration.<sup>94</sup> It is likely that the Commission will have already assessed this type of communication before it reaches the Court, but it still remains a "dangerously subjective" criterion that provides a potentially easy way for a complaint to be rendered inadmissible on political grounds.<sup>95</sup>

91. Article 31 of the Inter-American Commission's Rules of Procedure states that the need to exhaust domestic remedies will not apply when: a) "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." Inter-American Commission on Human Rights, Rules of Procedure, available at <http://www.cdh.oas.org/Basicos/basic16.htm>.

92. Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegba and others), Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 60/91, para. 10 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/60-91.html>. See also International PEN, *supra* note 45, at para. 77 (ruling that because the complainants were deceased, there were no domestic remedies that they could now seek and so the Commission could continue with the case); Media Rights Agenda, Constitutional Rights Project v. Nigeria, Afr. Comm'n Hum. & Peoples' Rts., Comm. Nos. 105/93, 128/94, 130/94, 152/96, para. 50 (1998), available at [http://www1.umn.edu/humanrts/africa/comcases/105-93\\_128-94\\_130-94\\_152-96.html](http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html)

93. Legal Defence Centre v. The Gambia, Commission, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 219/98, para. 17 (2000), available at <http://www1.umn.edu/humanrts/africa/comcases/219-98.html>. See also Kenya Human Rights Commission v. Kenya, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 135/94, para. 7 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/135-94.html> (failure to exhaust domestic remedies in a case involving unlawful repression of a university union despite the Commission's admission that the President of Kenya (who was also Chancellor of the university) stated "that the government would never register... [the union] despite the fact that the matter was already in court"); Mohammed Lamine Diakite v. Gabon, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 73/92, paras. 14-17 (2000), available at <http://www1.umn.edu/humanrts/africa/comcases/73-92b.html> (no exhaustion of remedies where complainant ordered expelled from Gabon on trumped up charges because Commission found he had never contested the decision of expulsion).

94. See Ligue Camerounaise, *supra* note 51.

95. Chidi A. Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 255 (1998) (observing how "it would be difficult to set objective standards for deciding, in the

### C. Amicable Settlement

Another problem with the constituent instruments is the amicable settlement clause. Article 9 of the Protocol establishing the Court, states that the institution “may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.”<sup>96</sup> The African Charter only explicitly mentions amicable settlement in state-to-state communications, but the Commission has also applied such settlements to individuals’ complaints.<sup>97</sup> If the Commission refers private party communications to the Court, then the Court will also have to deal with amicable settlements between individuals and states, and there is significant opportunity for the Court to abuse its discretion in deference to member state interests. The Commission, for example, has not always rigorously investigated the reasons for a complainant’s silence before concluding that the communication has been withdrawn. In *Maria Baes v. Zaire*, the Commission concluded that the communication had been withdrawn because the alleged victim had been released from prison and no further information was received.<sup>98</sup> By ruling in this way, the Commission allowed Zaire to avoid answering to charges of unlawful detention, in violation of Articles 6 and 7 of the African Charter.<sup>99</sup>

Again, this type of ruling will lead to the protection of state sovereignty rather than the championing of human rights, a bias that can only be avoided if the Court’s Rules of Procedure provide clear provisions regarding amicable settlement. For example, there should be a presumption in the rules that a settlement is not amicably settled unless the complainant and the state convey otherwise through an express communication. In addition, the Court should, as in the Inter-American system, be authorized to make follow-up inquiries.<sup>100</sup>

context of adjudicating on violations of human rights, what constitutes ‘disparaging or insulting language’” and pointing out that individuals are usually traumatized when they write these complaints and tend to be writing in their second language).

96. Protocol establishing the Court, *supra* note 2, art. 9.

97. See INGER OSTERDAHL, IMPLEMENTING HUMAN RIGHTS IN AFRICA: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS AND INDIVIDUAL COMMUNICATIONS 113-14, 125 (2002) (discussing how, despite the silence in the African Charter and the Commission’s procedural rules regarding amicable settlement with respect to individual communications, the Commission has applied friendly settlement to individuals’ cases).

98. The Commission found: “The author has failed to respond to inquiries from the Commission which learns that the detained person had since been released. The author shows no interest in pursuing the case. The Commission decides to close the file since the author has no interest in proceeding with the case.” *Baes v. Zaire*, Afr. Comm’n Hum. & Peoples’ Rts., Comm. No. 31/89, para. 2 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>.

99. The communication was filed by a Danish national, Maria Baes, on behalf of Dr. Shambuyi Naiadia Kandola. It was alleged that Kandola was “detained without charge in April 1988 for purely political reasons in breach of Articles 6 and 7 of the African Charter.” *Id.* at para. 1. Similar cases are discussed in OSTERDAHL, *supra* note 97, at 122.

100. Article 46(1) of the Inter-American Commission’s Rules of Procedure states that the Commission can, once it has published a report on friendly settlement, “adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.” Inter-

#### D. Confidentiality

Finally, state power is also retained if the proceedings of the Court are confidential so that they are not open to external monitoring by civil society. Article 10 of the Protocol establishing the Court states that the Court's proceedings shall be held in public, which is a welcome development from the heavy emphasis placed on confidentiality in the African Charter.<sup>101</sup> However, it also notes that: "The Court may . . . conduct proceedings in camera as may be provided for in the Rules of Procedure."<sup>102</sup> It is therefore important that these Rules stipulate such confidentiality only in specific circumstances, where it is necessary to protect the privacy of individuals. Otherwise, the African Heads of State could exert improper influence over proceedings and, because of the secrecy, external groups and complainants might not be provided with the necessary information to object.

Overall, both the African Charter and the Protocol establishing the Court contain important provisions that make it difficult to challenge state sovereignty. These include not only the elements discussed above, but also provisions such as the 'claw back clauses' contained in the African Charter. If states did, over the years, decide that they wanted to make the Protocol establishing the Court more binding, they could, of course, accept *locus standi* for individuals and NGOs. In addition, Article 35 of the Protocol does allow for the possibility of amendment. A State Party to the Protocol establishing the Court can propose a draft amendment to the AHSG and this can then be adopted by a simple majority. Alternatively, the Court may propose amendments through the Secretary-General of the AU. However, the language of Article 35 is not entirely clear. Article 35(3), for example, declares that amendments shall come into force "for each State Party which has accepted" them.<sup>103</sup> It does not stipulate whether this process requires a declaration or whether it is automatic if the state votes for the amendment. Similarly, it is unclear what happens if a state votes for or against an amendment and then changes its mind. Regardless, it seems unlikely that the State Parties will be sufficiently motivated to amend the Protocol establishing the Court any time soon, particularly as treaties have consistently "proved remarkably resistant to change."<sup>104</sup>

#### IV.

#### FOREIGN AID DONORS AND INSTITUTIONAL CHANGE

It is clear that African states made rational and purposeful decisions about

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American Commission on Human Rights, Rules of Procedure, available at <http://www.cidh.org/Basicos/basic16.htm>.

101. Article 59 of the Charter states: "All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide." African Charter, *supra* note 2, at art. 59.

102. *Id.*

103. *Id.*

104. Romano & Odinkalu, *supra* note 3, at 1.

the nature of the Court, creating an institutional design that protected state sovereignty. Their principal interest was not protecting human rights, but avoiding accountability. Yet African leaders have made powerful statements about the need to protect human rights. In 1995, for example, the Assistant-General of the OAU argued that it was important to strengthen regional institutions “to enable our continent to contribute with the rest of the world in consolidating the respect and protection of human rights.”<sup>105</sup> Similarly, the OAU’s 1999 Grand Bay Declaration noted “the growing recognition that violations of human rights [in Africa] may constitute a burden for the international community.”<sup>106</sup> The new African Court, however, appears to be principally a symbolic gesture. Some African politicians involved in the negotiations to create the Court were undoubtedly committed to human rights protection and see the Court as the next step in the slow process of creating an effective regional system. Yet it is difficult to avoid the impression noted by Osita Eze in her book on Africa that “[f]or the most part, a gap exists between declaration [regarding human rights protection] and actual practice.”<sup>107</sup>

Given that the states’ interests are focused principally on protecting their sovereignty, it is necessary to change the political dynamics of the Court and to alter states’ priorities. The pressure required to shift these interests and priorities is, however, substantial. As rational design theory emphasizes, states tend to “use international institutions to further their own goals.”<sup>108</sup> African countries will therefore have to believe that it is in their own self-interest to make financial contributions to the Court and to adhere to that institution’s judgments. Foreign aid donors are one group of outsiders that could generate this belief.

Foreign aid donors are in an unusually powerful position to influence African states. They have huge leverage over African countries because aid provides an important source of income for a large number of these states.<sup>109</sup> At least twenty percent of Burkina Faso’s government budget is financed by foreign aid and, according to the US State Department, the country “has excellent relations with European aid donors, as well as Libya, Taiwan and other states which have offered financial aid. France and the EU in particular offer significant aid. Other donors with large bilateral aid programs include Germany,

105. OAU, Statement by the OAU Assistant Secretary-General, H.E. Ambassador A. Haggag at the Government’s [sic] Experts Meeting on the Establishment of an African Court of [sic] Human and People’s [sic] Rights (Sept. 6-12, 1995), Cape Town, South Africa (on file with author).

106. OAU, Grand Bay (Mauritius) Declaration and Plan of Action, OAU First Ministerial Conference on Human Rights in Africa (Apr. 12-16, 1999), CONF/HRA/DECL (I), available at <http://www.africanreview.org/docs/rights/grandbBay.pdf>.

107. OSITA C. EZE, HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS 23 (1984).

108. Koremenos, *supra* note 3, at 762 (emphasis omitted).

109. From 1975-1995, just over half of central government expenditures of the fifty most aid-dependent countries, the majority of which are in Africa, were funded by foreign aid. Jakob Svensson, *Foreign Aid and Rent-Seeking*, 51 J. INT’L ECON. 437, 438 (2000). In addition, “between 1960 and 2005, foreign aid worth more than \$450 billion, inflation adjusted, poured into Africa.” Marian L. Tupy, *Poverty that Defies Aid*, WASH. TIMES, June 19, 2005 at B03.

Denmark, the Netherlands, Belgium and Canada.”<sup>110</sup> Similarly, Burundi, as the poorest country in the world, is supported in large part by Western Europe, though much of this aid was suspended after civil war broke out in 1993 and has only just been resumed.<sup>111</sup> This type of relationship with donors is representative of the majority of African countries that have both ratified and refused to ratify the Protocol establishing the Court.

This final Part will therefore consider the role that foreign donors can play in generating institutional change at the Court. It will briefly consider the motivations for providing foreign aid and why donors might be concerned with strengthening the Court. It will then describe how economic incentives have been critical in the European human rights system and how, despite increasing economic integration within Africa, African countries are currently unable to provide such incentives. Finally, the Part will conclude by providing sample, concrete proposals that could be tied to economic aid and will emphasize the critical need for effective monitoring. It will look at three possible recipients of aid: 1) the Court; 2) the countries that have ratified the Protocol establishing the Court; and 3) African civil society. By funding all three recipients, donors can ensure that the pressure for institutional change is maintained.

#### A. Donor Motivations

The incentives for providing aid are complex, and it is beyond the scope of this paper to delve into donor motivations in any detail. It will suffice to acknowledge that scholars have proposed a number of reasons why donors decide to give foreign aid. Principal among these is the desire to promote national interests and to provide money to states that enhance the donor’s political, economic or military goals.<sup>112</sup> Domestic politics is said to play a role, with pressure groups lobbying for aid donations and certain sections of the donor’s society benefiting from such contributions.<sup>113</sup> So why then would

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110. U.S. Dept. of State, *Background Note – Burkina Faso*, [www.state.gov/r/pa/ei/bgn/2834.htm](http://www.state.gov/r/pa/ei/bgn/2834.htm).

111. On November 30, 2005, Germany gave the Burundian government nearly seventeen million euros. This donation marked the end of the suspension of German aid. *Burundi: Germany Resumes Aid with 17 million euros for water, sanitation*, IRINNEWS.ORG, Nov. 30, 2005, <http://www.irinnews.org/report.asp?ReportID=50423>.

112. Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33 (2000) (noting how they found “considerable evidence that the direction of foreign aid is dictated as much by political and strategic considerations, as by the economic needs and policy performance of the recipients.”). The US Congressional Research Service also emphasized the strategic importance of foreign aid, stating: “Foreign assistance supports a great many objectives. Especially since the September 11 terrorist attacks in the United States, foreign aid has taken on a more strategic sense of importance, cast frequently in terms of contributing to the global war on terrorism.” Congressional Research Service, *Foreign Aid: An Introductory Overview of U.S. Programs and Policies* (Apr. 15, 2004), <http://usinfo.state.gov/usa/infousa/trade/files/98-916.pdf>.

113. Wolfgang Mayer & Pascalis Raimondos-Moller, *The Politics of Foreign Aid: A Median Voter Perspective*, 7 REV. DEV. ECON. 165 (2003), available at <http://ssrn.com/abstract=411189> (presenting a model of how the voters in donor countries determine support for foreign aid).

donors care about the success of the African Court? An answer to this question can be broken into three parts: first, it is important to note that it is not unusual for donors to contribute to regional courts; second, there are reasons why the African Court in particular might serve a donor's national interests; third, donors have become increasingly concerned with standards of good governance and human rights in recipient states. For these reasons, it is possible that foreign aid donors could become a force for institutional change.

### *1. Contributions to Regional Courts*

The provision of foreign aid to regional human rights courts is not a new phenomenon. While it is difficult to pinpoint the exact sources of funding for most regional organizations, it is clear that the Inter-American Court has received funding from both the EU and individual European countries. A 2004 report on the Inter-American Court's lack of financial sources noted that, "in order to make up some financial shortfalls the IACHR [Inter-American Court of Human Rights] has requested and obtained specific funds from member states of the OAS [Organization of American States] and from friendly countries in Europe."<sup>114</sup> The report went on to add that: "In order to cover all its needs the Commission will continue to seek additional resources from cooperation agencies and friendly countries that wish to contribute to special projects and specific funds."<sup>115</sup>

Even more significant for the purposes of this paper is the fact that foreign governments have already provided funding that was aimed at assisting in the establishment of the African Court. In 2002, for example, the British Foreign and Commonwealth Office (FCO) provided £92,573 to a project that aimed "to promote early ratification of the Court Protocol for the African Court on Human and Peoples' Rights."<sup>116</sup> In 2005, the FCO contributed £61,500 to another project that "aimed to enhance the capacity of the African Commission on Human and Peoples' Rights to fulfil its mandate to protect and promote human rights in Africa through the creation of an African Court of Human Rights."<sup>117</sup> In the same year, the FCO noted how "the UK continued to support the UK-based NGO Interights to work with the African Union in assisting countries to ratify the protocol [establishing the Court]... The UK welcomes the new

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114. Financing the Inter-American Human Rights System, A Report Prepared by the Office of the Secretary General of the OAS for the Ad Hoc Working Group on Human Rights (Apr. 28, 2000), <http://www.derechos.org/nizkor/la/doc/fine.html> [hereinafter *Financing the Inter-American System*].

115. *Id.*

116. FCO, Human Rights Annual Report 2003, Annex II: FCO Funding for Human Rights, 258 (2003) available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302592088>.

117. FCO, Human Rights Annual Report 2005, Annex II: GOF Projects, 258 (2005), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302592088>.

protocol.”<sup>118</sup>

While it is interesting to note how national governments have already funded projects to help develop the African Court, the motivations underlying such contributions are unclear. In a recent study of foreign assistance provided to international criminal tribunals, Steven Roper and Lilian Barria concluded: “While we can rule out membership in the Security Council, regionalism and colonialism as having an appreciable effect among all tribunals, this result is not very satisfying. We are still at a loss to explain why countries contribute to tribunals aside from as a general policy of foreign assistance.”<sup>119</sup> What is undeniable, however, is that donor states somehow have to believe that it is in their best interests to provide financial assistance to a court because this will both spur the provision of money and allow politicians to justify their actions.<sup>120</sup>

## 2. *The African Court Serving Donors’ Interests*

There are significant reasons why donors would want to strengthen a regional human rights court in Africa. The Court is an important institution for protecting human rights and could be a source for stability within the region. Donors might desire a strong court in the belief that it will generate an environment within Africa that is conducive to trade and the expansion of foreign business. Certainly, there are clear indications that this factor might be a powerful incentive. A 2004 United Nations Economic Commission for Africa (UNECA) study emphasized how Africa was a continent with significant

118. FCO, Human Rights Annual Report 2005, Chapter 4: Human Rights and International Actions, 131 (2005), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119526503628>.

119. Roper and Barria analyzed why countries provide voluntary contributions to war crimes tribunals. They looked both at tribunals that have guaranteed funding under United Nations Chapter VII (such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia) and at tribunals that depend on voluntary contributions (such as the Special Court of Sierra Leone and the Extraordinary Chamber for Cambodia). The authors attempted to discover why a state would give voluntary financial contributions when it was already providing funds through Chapter VII and why, in addition, it might provide funds to a tribunal that is located in a country that offers few strategic and economic benefits (such as Cambodia and Sierra Leone). As noted above, the authors found it difficult to account for these actions. Roper & Barria, *supra* note 6, at 12.

120. The process of justification through self-interest is evident, for example, in the UK’s FCO report of 2003 which talks about British funding of the ICC. The FCO justified this financial contribution in the following terms:

[G]iven that the Court is intended as a disincentive to future war criminals, the potential human and economic savings are large. The genocide in Rwanda in 1994 was estimated to have cost 0.8-1 million lives. Between 1997 (when a UK development programme for Rwanda started) and 2002, the UK has contributed around £140 million in humanitarian assistance and other financial aid – a substantial amount of which contributed to rebuilding the country and its institutions following the conflict. Prior to 1997, the level of UK development assistance was minimal.

FCO Departmental Report, Chapter 7: Quality of Life and a Strong International Community, 80 (2003), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1051783486185>.

economic potential: "In recent years, the continent has begun to recover from the 'lost decades' of the 1980s and 1990s. In 2003, Africa was the second fastest growing region in the developing world, behind Eastern and Southern Asia."<sup>121</sup> In a US State Department article published on March 7, 2006, the strategic importance of Africa was also highlighted: "Africa has evolved into a region of key strategic importance to the United States, China and many other countries worldwide as a supplier of energy and natural resources."<sup>122</sup>

The principal factor that has hindered the growth of Africa's potential, however, is the frequent recurrence of conflict and political instability. The Court can play a role in resolving these conflicts by establishing a stronger tradition of rule of law and by providing a forum where human rights violators can be brought to justice. It can provide a stabilizing force to a region that is rich in natural resources. Thus, foreign aid donors have clear incentives to encourage the development of an effective Court. As Jack Straw, the British Foreign Secretary, noted in 2003 in a section specifically about giving aid and support to Africa:

British diplomacy is not only about international security and maintaining relationships with key allies and partners. More than ever, it is also about working to tackle poverty, root out human rights abuses and improve the quality of life of all. There are moral imperatives for this approach. It is also in the UK's self-interest. Prosperity, justice and security are increasingly intertwined. Our long-term security depends on economic growth and political development elsewhere.<sup>123</sup>

Given that the Court could be a powerful force for justice in Africa, funding this institution will arguably serve the self-interest of foreign aid donors.

### 3. *Foreign Aid and Human Rights Standards*

Over the last ten years, donors have begun to make foreign aid conditional on good governance, rule of law and the protection of human rights, and so it is likely that these donors could also be persuaded to emphasize commitments to the African Court when making aid decisions. In a 1997 article, David Forsythe noted that Western governments, the European Union and Japan had started talking about human rights and democracy in their foreign aid programs.<sup>124</sup> During a speech in June 2005, President Bush stated that the link between democracy and development was critical because experience had shown that

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121. UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, *Overview, in ECONOMIC REPORT ON AFRICA 2004: UNLOCKING AFRICA'S TRADE POTENTIAL* (2004), <http://www.uneca.org/ERA2004/full.pdf>.

122. Charles W. Corey, U.S. Dept. of State, *Pan Africa: Africa of Key Strategic Importance to U.S., World, Scholar Says*, ALLAFRICA.COM, March 7, 2006, <http://allafrica.com/stories/200603080122.html>.

123. Jack Straw, Foreword to FCO Departmental Report 2003 (May 12, 2003), <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1051783486185>.

124. David P. Forsythe, *The United Nations, Human Rights, and Development*, 19 HUM. RTS. Q. 334, 338 (1997).

“aid works best when certain conditions are in place such as a commitment to just governance, respecting the rule of law, investing in citizens’ health and education, and opening up economies.”<sup>125</sup> A related sentiment is reflected in the Bush administration’s Millennium Challenge Account (MCA) that expands development assistance for countries that are “ruling justly, investing in their people, and encouraging economic freedom.”<sup>126</sup>

This type of language is also included in the US African Growth and Opportunity Act (AGOA), a law that requires labor rights and human rights protection as a requisite for cooperation with the United States. The annual review of AGOA eligibility includes a careful examination of a state’s human rights record.<sup>127</sup> Similarly, as OXFAM Australia noted in a January 2001 report: “The UNDP, UNICEF, UNIFEM and a number of national governments – notably the United Kingdom and Sweden – have adopted an explicitly human rights approach to their development program.”<sup>128</sup> Thus, an important group of outsiders is already insisting on human rights protection as a fundamental prerequisite for foreign aid, suggesting that donors could be persuaded to show an interest in the development of the Court.

### *B. The Case for Change Through Aid*

The potential effectiveness of tying economic incentives to demands for institutional change is evident from developments made within Europe. Members of the EU benefit greatly from financial integration with other members and from the increased levels of investment and grants that flows from membership. The criteria for EU membership requires candidates to achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”<sup>129</sup> Turkey is just one country that

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125. Lloyd O. Pierson, African Organizations and Institutions: Positive Cross-Continental Progress, Statement Before the Committee on Foreign Relations (Nov. 17, 2005), *available at* <http://www.usaid.gov/press/speeches/2005/ty051117.html> (quoting a speech made by President George Bush on June 10, 2005).

126. Millennium Challenge Corporation, Frequently Asked Questions: How Does a Country Become Eligible for MCA Assistance, [http://www.mca.gov/about\\_us/faq/index.shtml](http://www.mca.gov/about_us/faq/index.shtml) (reporting President George Bush’s statement regarding required criteria).

127. “The Act authorizes the President to designate countries as eligible to receive the benefits of AGOA if they are determined to have established, or are making continual progress toward establishing the following: market-based economies; the rule of law and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing availability of health care and educational opportunities; protection of human rights and worker rights; and elimination of certain child labor practices.” African Growth and Opportunity Act, Country Eligibility, [http://www.agoa.gov/eligibility/country\\_eligibility.html](http://www.agoa.gov/eligibility/country_eligibility.html).

128. OXFAM Australia, The Link Between Aid and Human Rights, Submission to the Human Rights Sub Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (Jan. 2001), *available at* <http://www.oxfam.org.au/campaigns/submissions/aidhumanrights.pdf>.

129. Conclusions of the European Council, Copenhagen, June 1993, *quoted in* Kristin Archick, Congressional Research Service Report for Congress: European Union Enlargement (May 2, 2005), *available at* <http://fpc.state.gov/documents/organization/47070.pdf>.

has made significant domestic reforms so that it can qualify for membership, moving away from a history of ethnic conflict. Human Rights Watch's 2005 report on Turkey notes how: "Since 1999, the promise of E.U. membership has supported a dynamic process of reform."<sup>130</sup> Thus, in Turkey's case, the desire to benefit from the financial gains of the EU has resulted in the evolution of domestic institutions.

Obviously, if African states did not care about economic development, such rewards would be less likely to make them change their priorities and allow the Court to develop. For, as Yitan Li and A. Cooper Drury have stated, economic engagement with countries that are poor and need reform is only effective when a state "tie[s] its future to economic development and world trade."<sup>131</sup> Fortunately, there has been a great push within Africa in the last five years to improve economic conditions. In a meeting between European and African experts in December 2004, the AU made a statement that: "Never before has Africa been so determined and resolute in her attempt to enhance socio-economic conditions on the continent."<sup>132</sup> Over the last ten years, a number of regional economic organizations have been created in Africa, including the Economic Community of West African States (ECOWAS),<sup>133</sup> the Southern African Development Community (SADC),<sup>134</sup> the UN Economic Commission for Africa (ECA),<sup>135</sup> and the African Development Bank (AfDB).<sup>136</sup> Recently, African leaders have also created the New Partnership for Africa's Development (NEPAD),<sup>137</sup> an organization with the goal of eradicating poverty, promoting sustainable development and increasing Africa's participation in the process of globalization. NEPAD has been heralded as a welcome development by the international community. The G8, for example, produced an African Action Plan when NEPAD was formed that was "designed to encourage the imaginative effort that underlies the NEPAD and to lay a solid foundation for future

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130. *A Crossroads for Human Rights?: Human Rights Watch's Key Concerns on Turkey for 2005*, HUMAN RIGHTS WATCH, <http://hrw.org/english/docs/2004/12/15/turkey9865.htm>.

131. Yitan Li & A. Cooper Drury, *Threatening Sanctions When Engagement Would be More Effective: Attaining Better Human Rights in China*, 5 INT'L STUD. PERSP. 378, 392 (2004).

132. AU, Africa's Position on Governance, Africa-Europe Enlarged Experts Meeting, Dec. 2-3, 2004, at 3, available at [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/AU-EU%20MEETING/4%20AFRICA's%20position%20in%20governance.doc](http://www.africa-union.org/News_Events/Calendar_of_%20Events/AU-EU%20MEETING/4%20AFRICA's%20position%20in%20governance.doc) [hereinafter *Africa's Position on Governance*].

133. The ECOWAS is a regional organization of fifteen West African nations, founded in 1975. ECOWAS, <http://www.ecowas.info/>.

134. SADC is a southern African regional organization that aims to integrate the economies of member states. See generally South African Development Community, <http://www.sadc.int/index.php>.

135. UNECA was established in 1958. It is a regional arm of the UN and is mandated to support the economic and social development of member states. United Nations Economic Commission For Africa, <http://www.uneca.org/>.

136. The AfDB was established in 1964 and is "a regional multilateral development finance institution." African Development Bank Group, <http://www.afdb.org/>.

137. NEPAD is an organization established by the OAU to promote socio-economic development in Africa. New Partnership for Africa's Development, What is NEPAD?, <http://www.nepad.org/>.

cooperation.”<sup>138</sup>

None of these African economic groups, however, have tied economic incentives to the way in which states act towards the Court. Indeed, it is questionable whether any of these organizations are, as yet, sufficiently powerful to achieve such leverage.<sup>139</sup> The AU itself has admitted that: “Africa’s resource base is not yet strong enough to undertake all the activities needed to enhance democracy and hence economic development.”<sup>140</sup> It therefore asked for Europe’s help: “The EU can therefore play its role as a constructive partner to buttress Africa’s efforts by providing strategic financial resources.”<sup>141</sup> Similarly, it will probably require an outside force such as foreign donors to provide the necessary leverage to generate institutional development within the Court.

Such institutional change can only occur if the donors ensure two things. First, they should make clear demands on the recipients of the aid. Second, they must establish an effective and consistent monitoring system to check that these demands are met. The remainder of this paper will offer some ideas for the types of demands that could be made and how they could be monitored. These are not exclusive suggestions but merely provide a starting point for possible change.

### C. Concrete Proposals for Change

Foreign aid donors could provide money in three different ways, all of which could be done concurrently. The first is to give the aid directly to the Court. The second is to give the aid to individual states that have signed the Protocol establishing the Court and are supportive of the Court’s mission. The third is to provide money to specific groups within African civil society that have a mandate to promote and improve the Court. By providing aid to all three recipients, donors can generate a dynamic force for institutional development. However, as noted above, the provision of aid is of little use if it is not combined with effective monitoring. Human rights systems have notoriously weak monitoring, with the majority of states failing to cooperate with treaty bodies or providing regular reports. This is precisely what allows states to use human rights treaties for their symbolic function, without worrying about the actual obligations undertaken.<sup>142</sup> Donors should therefore make thorough

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138. G8 Summit Site, G8 African Action Plan, <http://www.g8.gc.ca/2002Kananaskis/kananaskis/afraction-en.asp>.

139. See, e.g., Bronwen Manby’s recent article that assessed whether NEPAD can improve the human rights situation in Africa. Manby concludes that NEPAD has “significant deficiencies” that limit its effectiveness. Manby, *supra* note 17, at 983.

140. *Africa’s Position on Governance*, *supra* note 132, at 10.

141. *Id.*

142. Oona Hathaway has suggested that states often ratify human rights treaties merely to signal to other important actors that they are committed to human rights. She calls this signaling the “expressive aspect of treaties.” The actual ratification, she argues, is costless because human rights treaties are rarely enforced. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2007 (2002).

investigations into whether the recipients are fulfilling the required conditions.<sup>143</sup>

### 1. *Providing Aid to the Court*

According to Article 32 of the Protocol establishing the Court, the “[e]xpenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.”<sup>144</sup> As successor to the OAU, the AU will now be responsible for funding the Court.

The Inter-American Court provides a clear example of the difficulties an institution can face when it is funded by a regional organization. The Inter-American Court has to deal with serious financial shortfalls because the Organization of American States (OAS) does not allocate it sufficient funds. In a 2000 report on the financing of the Inter-American human rights system, it was noted that:

Whereas the OAS spends 5.2% of its budget on human rights, the European Court of Human Rights enjoys a much greater budget priority within the work of the Council of Europe (COE). Of the COE’s 1999 total budget of over 1 billion French Francs, 19% – roughly US \$147m – went to the Court and other human rights programs.<sup>145</sup>

If human rights are not made a priority by the states that constitute the AU, the Court, like the African Commission, will find itself hampered by a lack of funds.<sup>146</sup> As with the Inter-American Court, the African Court would probably benefit from the assistance of foreign aid donors, which would at the least ensure that the Court has adequate financial resources to fulfill its basic functions. Yet, as the next section will emphasize, the foreign aid provided to the Court should not replace the funds given by the African states because these individual contributions play an important role in the politics of human rights.

In order to encourage institutional development, the donors should make clear demands regarding the Court’s function. It is important to note, however, that the requirements stipulated by the donors should not be too rigid or too extensive because this will restrict the growth of the Court and the freedom of the judges to develop their own body of jurisprudence. When Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, requested additional funds from the OAS, he stated that: “Increased funding

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143. At present, such monitoring (and consequent sanctions) is not undertaken in a consistent manner. One example is that of President Bush, who has continued to allow AGOA eligibility to states such as Rwanda, Eritrea and Cote d’Ivoire whose human rights conditions are notoriously poor. See *Bush Trip to Africa, July 2003*, HUMAN RIGHTS WATCH, <http://hrw.org/backgrounders/africa/bush-africa2k3.htm> (declaring that, “[b]y failing to consistently use AGOA to press for an end to abuses in recipient countries, the administration risks squandering a potentially useful tool in the promotion of human rights in Africa”) [hereinafter *Bush Trip, 2003*].

144. Protocol establishing the Court, *supra* note 2, art. 32.

145. *Financing the Inter-American System*, *supra* note 114.

146. See discussion regarding the Commission’s lack of funds, *supra* Part I.C.

must be earmarked for institutional strengthening of the organs, which must enjoy the autonomy necessary to decide how to utilize the additional resources according to their needs and development strategies.”<sup>147</sup> Similarly, the Court should have a large amount of autonomy with only specific, limited requirements being made by donors.

Such requirements could involve certain areas of the court’s jurisprudence. For example, the donors could insist that the exhaustion of domestic remedies be dependent on whether the remedies are fair and effective. Similarly, the proceedings of the Court should be made as public as possible. Another extremely important area of the Court’s functioning is the election of judges. Amnesty International stated in 2004 that: “The effectiveness and efficiency of the African Court on Human and Peoples’ Rights will depend on the appointment of highly qualified judges with a strong commitment to human rights.”<sup>148</sup> Already, criticisms have been leveled against the January 2006 election of judges. Before the first eleven judges were elected, “an expert Coalition of African Jurists, National Human Rights Institutions, and NGOs . . . declared that the process of electing judges for the proposed African Court on Human and Peoples’ Rights is ‘substantially’ flawed.”<sup>149</sup> This group claimed that the process lacked transparency and that the candidates did not have sufficient experience in human rights.<sup>150</sup> Donors could tie the money they provide to the Court to certain goals regarding judicial independence and human rights experience. In other words, they could simply ensure that the Court reaches the standards that were agreed to in the Protocol establishing the Court.<sup>151</sup>

In order to assure compliance with these standards, the donors should establish a monitoring group that would, ideally, be composed of independent experts that could submit reports on the operation of the Court. This group could provide training to the judges and provide workshops and literature to NGOs and individuals who wish to bring a case before the Court. Training could also

147. Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, In the Context of the Dialogue on the Improvement of the Inter-American Human Rights System, Address Before the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, Washington, D.C. (May 3, 2001), <http://www.cidh.org/Discursos/05.03.01eng.htm>.

148. AI Press Release, African Court on Human and Peoples’ Rights: Only the Best Qualified Candidates Should be Appointed Judges, AI Index: IOR 10/001/2004 (Feb. 17, 2004), <http://web.amnesty.org/library/Index/ENGIOR100012004?open&of=ENG-375>.

149. Coalition for an Effective African Court on Human and Peoples’ Rights, Khartoum Unsuitable to Elect Judges of the African Human Rights Court (Jan. 19, 2006), <http://www.amdatatechnologies.com/acc/UploadedDocuments/119200614003PM218.doc>. See also Alexis Unkovic, *Africa Rights Court Judge Nomination Process Slammed for Lack of Transparency*, JURIST, Jan. 21, 2006, <http://jurist.law.pitt.edu/paperchase/2006/01/africa-rights-court-judge-nomination.php>.

150. *Id.*

151. For example, Article 11 of the Protocol establishing the Court states that judges should be selected “from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights.” Article 17 states: “The independence of the judges shall be fully ensured in accordance with international law.” Protocol establishing the Court, *supra* note 2, arts. 11, 17.

be provided to improve the interaction between the Commission and the Court. As a result, the Court would not be as rigidly locked into its institutional design, nor would it be as hampered by the states' desire to protect their sovereignty.

*2. Providing Aid to Individual States that Have Signed the Protocol establishing the Court*

While providing money directly to the Court might help with its basic operating costs and enable it to survive the vicissitudes of AU funding, the provision of aid directly to a human rights court could be problematic. This is because of the uniquely political nature of human rights systems and the fact that every state should be forced to participate by providing funding. This issue was addressed by the Secretary-General of the OAS who, while discussing external funding of the Inter-American Court, noted that:

A basic operating premise from which our human rights mechanism derives much of its power and legitimacy, is that the member states themselves fund it. There is even some tension that derives from the fact that some countries within the system donate more funds to the system than others. The farther we move away from the notion that the entire membership funds their own human rights enforcement mechanism, the more distortions and tension are likely to obtain.<sup>152</sup>

Thus, while direct funding to the Court might ensure that the institution does not collapse, and could provide some pressure for institutional reform, this should not replace AU funding provided by individual African countries. Rather, the most immediate way in which donors could influence the institutional design of the Court would be through demands they make to individual state recipients of aid.

If money was given to individual states, it could be tailored so that there were different levels of aid, the top ranks of which would be given on more favorable terms. The states that qualify for the "best" types of aid would be those that have ratified the Protocol establishing the Court and have made a declaration accepting individual applications. This aid should be reduced, however, if states fail to cooperate with the Court—either during proceedings, in the monitoring process, or after a judgment has been handed down.

The Court's design, however, could be most effectively altered if amendments were made to both the African Charter and the Protocol establishing the Court. Article 68 of the African Charter allows for amendment if a submission is made to the AU and the Commission has assessed the request. It will then come into force if a simple majority of states approves the amendment, but will only be effective in relation to states that have specifically accepted it. Article 34 of the Protocol establishing the Court has similar provisions.<sup>153</sup> Thus, the donors could provide incentives for individual states to

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152. *Financing the Inter-American System*, *supra* note 114.

153. Protocol establishing the Court, *supra* note 2, art. 34.

request and then accept amendments. In this way, the institutional design of the Court could be altered in a concrete manner, especially if provisions such as the 'claw back clauses' of the African Charter were removed so that states could not hide behind the defense of domestic law.

Once again, monitoring is essential. An independent group of experts should track the amount of funding provided to the AU by states and, in particular, to the African Court. The most crucial element that needs to be monitored, however, is the way in which domestic institutions in individual countries enforce human rights. The Court can attempt to hold states accountable for abuses, but if domestic institutions refuse to enforce the Court's holdings or never provide an effective remedy for individual citizens, little will be accomplished towards improving human rights within the region. One of the reasons the European Court of Human Rights has been so effective is because it has "achieved substantial compliance with its judgments by forging relationships with domestic government institutions."<sup>154</sup> The European Court has also made it clear that it is a subsidiary to national systems rather than a substitute for domestic courts.<sup>155</sup> Indeed, as Christina Hioureas notes in this volume, one of the principal recommendations to deal with the overload of cases currently submitted to the European Court is to ensure that Contracting States' domestic remedies are adequate. In this way, individuals will not need to file applications with the European Court of Human Rights.<sup>156</sup>

In order to strengthen domestic institutions within Africa, foreign aid donors could provide the type of "strategic financial resources" requested by the AU with regard to NEPAD that could fund local monitoring systems to strengthen domestic institutions.<sup>157</sup> Such systems are probably best established by African civil society because these groups are on the ground and are best suited to monitor domestic actions. Additionally, the type of peer monitoring mechanism established as part of NEPAD could play a role in strengthening domestic courts. Under NEPAD's African Peer Review Mechanism (APRM), states undertake to submit to and facilitate periodic peer reviews directed and managed by a group of African "Eminent Persons," "to ascertain progress being made towards achieving mutually agreed goals."<sup>158</sup> The EU has welcomed this

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154. See Helfer & Slaughter, *supra* note 11, at 298.

155. Luzius Wildhaber, President of the European Court of Human Rights, has emphasized how the European Court should not replace domestic courts, stating: "What is . . . not in doubt is that these issues [constitutional issues regarding the fundamental rights of European citizens] are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies. Luzius Wildhaber, President of the European Court of Human Rights, The Place of the European Court of Human Rights in the European Constitutional Landscape, Address at the Conference of European Constitutional Courts XIIth Congress, 2 (2002), <http://www.confcoconsteu.org/reports/Report%20ECHR-EN.pdf>.

156. See Christina Hioureas, *supra* note 15 at 726.

157. See *Africa's Position on Governance*, *supra* note 132, at 10.

158. NEPAD, African Peer Review Mechanism (ARPM) [sic]: Base Document, Sixth

peer review system and has “offered to support the APRM, including through the APRM Trust Fund and through the implementation of APRM recommendations in the future.”<sup>159</sup>

States could be monitored by their peers to see if they are fulfilling two key commitments that will help to ensure that domestic institutions adequately protect human rights. The first is contained in Article 1 of the African Charter, which declares that all ratifying states “shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>160</sup> The second is contained in Article 30 of the Protocol establishing the Court which reads: “The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”<sup>161</sup> Just as the EU provides funds to assist the APRM, foreign donors could guarantee financial assistance to this type of peer monitoring of domestic institutions.

### 3. *Providing Aid to African Civil Society*

There is an understandably strong feeling in Africa that Africans should be supported to help themselves.<sup>162</sup> In 1997, an OAU representative, Ambassador Bah, “stressed the need for perseverance in all efforts aimed at ensuring that Africa was empowered to deal with its own problems.”<sup>163</sup> Indeed, African civil society might appear to be better placed to influence the Court than a group of foreign outsiders. However, this set of actors currently lacks the necessary power and leverage over states that will be required to encourage national administrations to change their interests and allow for institutional change. In a publication on Inter-African Initiatives in the field of human rights, INTERIGHTS noted the difficulties faced by African NGOs, particularly those that were working to build inter-regional support. These groups were “hampered by poor records and communications infrastructure and by having to deal with governments that have historically been alien to and alienated from their own

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Summit of the NEPAD Heads of State and Government Implementation Committee (Mar. 9, 2003), in AU, *The New Partnership for Africa’s Development (NEPAD)*, *The African Peer Review Mechanism (APRM)*, AHSG, Thirty-Eight Ordinary Session of the OAU (July 8, 2002), AHG/235 (XXXVIII), Annex II, paras. 6, 15, available at [http://www.chr.up.ac.za/hr\\_docs/aprm/docs/book3.pdf](http://www.chr.up.ac.za/hr_docs/aprm/docs/book3.pdf).

159. Press Release, Luxembourg Presidency, European Union-African Ministerial Meeting, Final Communiqué (Apr. 2005), [www.eu2005.lu/en/actualities/communiqués/2005/04/1lue-ua-final/](http://www.eu2005.lu/en/actualities/communiqués/2005/04/1lue-ua-final/).

160. African Charter, *supra* note 2, art. 1.

161. Protocol establishing the Court, *supra* note 2, art. 30.

162. Gebreselassie Tesfamichael, *In Africa, Just Help Us to Help Ourselves*, WASH. POST, July 24, 2005, available at <http://www.globalpolicy.org/soecon/develop/africa/2005/0724helpourselves.htm>.

163. OAU, Remarks of Ambassador Mamadou Bah, Representative of the Secretary-General, Nouakchott, Mauritania (Apr. 11-14, 1997), OAU/LEG/EXP/AFC/HPR/RPT(2) (on file with author).

people.”<sup>164</sup> The dangerous situation faced by many human rights defenders within Africa was more emphatically expressed in a November 2005 report by the Observatory for the Protection of Human Rights Defenders that was presented to the African Commission. This report drew attention to “the worsening situation of human rights defenders in the African continent in 2005” and observed how “this year was marked by numerous acts of violence, including killings, against human rights defenders in a great number of countries.”<sup>165</sup> The report then documents in detail human rights defenders across Africa who have been killed, threatened with death, tortured, threatened and arbitrarily detained.<sup>166</sup> Thus, while NGOs and other elements of civil society might gain strength in the future, it is currently difficult to predict how they could provide the necessary incentives for the Court’s evolution.

However, even though it might be best for foreign donors to focus initially on the states and the Court itself, it is important to recognize that civil society will ultimately play a significant role in pushing for institutional change.<sup>167</sup> For this reason, donors should provide resources to civil society groups that are working within Africa to influence the development of the Court.<sup>168</sup> Such assistance is, in fact, already being allocated. For example, the British Government currently provides funds to The Coalition for an Effective African Court on Human and Peoples’ Rights,<sup>169</sup> an organization that “is open to civil society and non-governmental organizations from both within and outside Africa who share its objectives.”<sup>170</sup> These objectives include ensuring that all

164. Emma Playfair, *Preface to BUILDING BRIDGES FOR RIGHTS: INTER-AFRICAN INITIATIVES IN THE FIELD OF HUMAN RIGHTS*, at xi (Marguerite Garling & Chidi Anselm Odinkalu eds. 2001).

165. The Observatory for the Protection of Human Rights Defenders, *Situation of Human Rights Defenders*, Submission to the African Commission on Human and Peoples’ Rights, Thirty-Eighth Ordinary Session, (Nov. 2005), <http://www.fidh.org/IMG/pdf/cadhpbgeng-2.pdf>.

166. *Id.*

167. See, e.g., Harold H. Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1409 (1998) (arguing that “[m]any efforts at human rights norm-internalization are begun not by nation-states, but by ‘transnational norm entrepreneurs,’ private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm”). Note too, however, how Oona Hathaway emphasizes how the transformation created by Koh’s norm entrepreneurs “can take decades to lead to tangible change.” Hathaway, *supra* note 142, at 2022.

168. There are, of course, difficulties associated with providing foreign aid to civil society. Some groups do not want to be politically associated with foreign governments. And, even if these groups manage to maintain a distance from their funders, they might be accused of pushing a foreign agenda. This has, indeed, been a particular problem in Africa, where “African governments have accused Western-backed NGOs of being closely aligned to the governments that fund them and whose aid they distribute.” For example, “Zimbabwe President Robert Mugabe has led an assault on NGOs with a draft law tightening registration and barring foreign funding for NGOs with political and human rights programmes.” Cris Chinaka, *NGOs Tiptoe through Africa’s Political Minefields*, *REUTERS*, Oct. 11, 2005, reproduced in *Global Policy Forum*, <http://www.globalpolicy.org/ngos/state/2005/1011tiptoe.htm>.

169. The funding is provided by the Foreign and Commonwealth Office, whose logo is at the bottom of the organization’s web page. The Coalition for an Effective Court on Human and Peoples’ Rights, [http://www.africancourtcoalition.org/eng\\_about\\_us.html](http://www.africancourtcoalition.org/eng_about_us.html).

170. Coalition for an Effective African Court on Human and People’s [sic] Rights, About

states sign the Protocol establishing the Court and that these states allow for individual access to the Court. In addition, the organization focuses on the need for a fair and transparent election of judges. There are other groups within African civil society that work with the Court and receive foreign funding—though not necessarily state funding—that could be a good target for foreign aid. For example, in 2005, the MacArthur Foundation provided \$400,000 to the Alliance for Africa “in support of the establishment of an effective African Court on Human and Peoples’ Rights.”<sup>171</sup> In the same year, they provided \$395,000 to the Institute for Human Rights and Development in Africa “in support of a project to develop litigation for the African Court on Human and Peoples’ Rights.”<sup>172</sup>

By providing aid to these types of organizations, while also putting pressure on states and the Court, foreign aid providers could establish a dynamic force for institutional change. In the immediate future, focus should be concentrated on the states because they have the power to change the most fundamental flaws in the Court’s genetic design—namely, the lack of individual access and the potential for proceedings to remain confidential. Ultimately, however, the growth of civil society within Africa is crucial because it is this more localized outside actor that is better placed to bring cases before the regional system and to monitor domestic implementation of the Court’s decisions.

## V. CONCLUSION

At present, the African Court on Human and Peoples’ Rights is an institution that is so tightly bound by its constituent instruments that it will only become involved in human rights protection by moving, like the chrysalis, “a joint or two.”<sup>173</sup> The community of states, which is one of the key actors at the Court,<sup>174</sup> has focused more on safeguarding national sovereignty than protecting human rights and so, in accordance with rational design theory, has created a Court that serves their self-interest. There is, however, a possibility for change arising from one crucial outside actor: foreign aid providers.

If foreign donors are able to initiate the type of institutional reform that is necessary to make the Court effective, the Court itself will be able to pass judgment on the failure of states to implement their human rights commitments. It will be able to police the rule of law in the domestic realm, making the African human rights system more effective. Indeed, this domestic influence is,

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the Coalition, [http://www.africancourtcoalition.org/eng\\_about\\_us.html](http://www.africancourtcoalition.org/eng_about_us.html).

171. MacArthur Foundation, Human Rights and International Justice: Recent Grants, [http://www.macfound.org/site/c.lkLXJ8MQKrH/b.938985/k.7091/International\\_Grantmaking\\_Human\\_Rights\\_and\\_International\\_Justice\\_Recent\\_Grants.htm](http://www.macfound.org/site/c.lkLXJ8MQKrH/b.938985/k.7091/International_Grantmaking_Human_Rights_and_International_Justice_Recent_Grants.htm).

172. *Id.*

173. *Ant and Chrysalis*, *supra* note 1.

174. David D. Caron, *supra* note 4 at 415.

for many African civil society activists, the Court's most significant function. Halidou Ouédraogo, head of the Union Interafricaine des Droits de l'Homme (UIDH), commented soon after the Protocol establishing the Court came into force: "With the [African] court we can put pressure on states to lessen their hold on the [domestic] courts, which they use to massively violate human rights throughout the region."<sup>175</sup>

However, before the Court can itself become an agent of reform, states will have to have their priorities altered and their interests changed. As a result, the Court could begin to operate in a way that was not anticipated in its initial design. If foreign donors impose the types of obligations and monitoring outlined above, this type of institutional evolution might well be attained.

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175. Michael Fleshman, *Human Rights Move up on Africa's Agenda*, 18 AFR. RENEWAL 10 (July 2004), available at [http://www.un.org/ecosocdev/geninfo/afrec/vol18no2/182human\\_rights.htm](http://www.un.org/ecosocdev/geninfo/afrec/vol18no2/182human_rights.htm). The UIDH is a network of NGOs from about fifty African countries.

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## The Anomalous Lack of an International Bankruptcy Court

Charles Seavey

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# The Anomalous Lack of an International Bankruptcy Court

By  
Charles Seavey\*

## I. INTRODUCTION

It is universally agreed that bankruptcy courts, in use since Roman times and employed in most domestic legal systems, minimize waste while granting worthy debtors a fresh start. Why is it that, in the year 2006, this proven judicial mechanism has yet to be established for sovereign nations, as recommended by Adam Smith himself?<sup>1</sup> This paper describes two key impediments that have prevented the establishment of a sovereign bankruptcy court: (i) the conflicts-of-interest of creditor and debtor state representatives; and (ii) the voting and political structures of the International Monetary Fund, the World Bank, and the Paris Club.

## II. DEVELOPMENT OF THE SOVEREIGN DEBT RESTRUCTURING REGIME

“Property” is a term that is particularly socially-constructed. That is, the word no longer relates to its plain meaning, but instead to abstractions that have evolved over time and that are loosely based on that meaning. These abstractions have proven powerful. Rousseau considered the modern concept of alienable property owned by a single person the “founding myth” of modern civilization.<sup>2</sup> Before modern civilization, and in many indigenous societies to this day,

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\* The author is a JD candidate at the University of California, Berkeley, School of Law (Boalt Hall). He was awarded a Masters of Business Administration from the University of Chicago, Graduate School of Business, and has analyzed and managed emerging-markets investments for Soros Fund Management, and Teleos Asset Management. The author thanks Gretchen, Jason and Cole, as well as David Caron, Ticien Sassoubre, Stephen Golub, Marci Hoffman, Jan Dalhuisen, Paul Khoo, and Caroline McAughtry.

1. “When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both the least dishonourable to the debtor, and least hurtful to the creditor.” ADAM SMITH, *THE WEALTH OF NATIONS* 468 (Cannan ed., Methuen and Co. 2000) (1776).

2. CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE*

property was “owned” by the tribe, the community, or the Crown—not by individuals. Communal ownership only made sense when the community, the tribe or the people occupied and used the property. It was their territory, where they lived. The colonialist notion, far-removed, is that a legal person has a right to own property in a territory divorced from the colonialist’s community. This concept of property, which would have seemed abstract in a previous era, has become dominant over the last few hundred years, so much so that to disavow the colonialist notion would now seem illogical or heretical.

The modern notion of property first gained acceptance with advanced ships and navigation, as well as increased imbalances in military power, leading to a period of discovery, colonization and economic imperialism by rich Western states. Charles Lipson notes:

A central feature of all law, domestic and international, is the rationalization and maintenance of social relations, including, most significantly, property relations. The most effective legal systems do this with the least coercion, stimulating support for some political claims and hiding others from public view.<sup>3</sup>

Such rationalization took (and takes) place in a variety of forms, falling along a spectrum of imperial effort. At one end of this spectrum is colonization, the most coercive and expensive option for the rationalization and maintenance of social and property relations. Colonization was deemed necessary by Western powers in the early days of colonialism, where the perceived legal backwardness of the local populations required physical occupation in order to achieve economic exploitation.<sup>4</sup>

Later, the imperial powers discovered that they could avoid the expense of physical occupation, with its “causal link [to] investment security,”<sup>5</sup> by resorting to only occasional armed intervention and indirect coercion through the “rule of law” and property rights. In Latin America a result similar to overt colonialism was achieved in this way through a combination of periodic armed intervention<sup>6</sup> and co-optation of the local elites to enforce the property rights of foreign investors. Even better than employing mixed panels of colonial and native judges (in order to provide some local participation in government and some expertise on local law),<sup>7</sup> Latin American native judges could be relied upon, by themselves, to enforce the rights of the creditor states.

Thus, there existed in Latin America a remarkably pure example of what Professor David Caron describes as rule *through* law.<sup>8</sup> As Martin Shapiro de-

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NINETEENTH AND TWENTIETH CENTURIES 3 (1985).

3. *Id.* at 55. It is interesting, and perhaps internally inconsistent, that Lipson adopts the idea that property relations are the “most significant” social relations while simultaneously noting that the “West’s” emphasis on property relations is self-serving.

4. *Id.* at 16-17.

5. *Id.* at 149.

6. *Id.* at 54. Platt has discovered at least 40 examples of British armed intervention in Latin America between 1820 and 1914.

7. MARTIN M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 59 (1981).

8. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT’L L.* 401, 406 (2006) (referencing Shapiro, Note 7, *supra*, pp. 17-20).

scribes it:

[S]o long as a judge acts to impose preexisting rules on the disputants, he is importing an element of social control. Or to put the matter differently, he is importing a third set of interests, whatever interests are *embodied in those rules*, to be adjudicated along with the interests of those two parties. (emphasis added).

Latin American judges adopted the rules of foreign states to the benefit of the foreign creditor states. Direct appointment of judges by the imperial power was unnecessary.

Thereafter, the Western powers found that they could move even further down the spectrum of imperial effort by creating international bodies that had as their goals free trade and the encouragement of foreign investment. In 1889, the US convened the first Inter-American Conference.<sup>9</sup> The first Hague Conference was convened in 1899, followed by the bombardment and blockading of Venezuela by Britain, Germany and Italy to demand satisfaction of claims, including bond defaults.<sup>10</sup> In the 1920s, the League of Nations held economic conferences, culminating with an attempt in 1929 to codify international property rights.<sup>11</sup> Then, in the wake of World War II, the victorious powers at the Bretton Woods Conference in 1944, after years of planning and negotiation between the US and Britain, created the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank. In 1956, an informal group of creditor nations now known as the Paris Club held its first meeting. The constellation of the IMF, the World Bank, and the Paris Club has since become the principal locus of the international community's "sovereign debt restructuring" activities,<sup>12</sup> which are the subject of this paper.

### III.

#### THE PROBLEM: THE ABSENCE OF A SOVEREIGN BANKRUPTCY COURT

The debt-restructuring functions of this constellation of the IMF, the World Bank, and the Paris Club have fallen far short of an ordered and predictable bankruptcy regime. Such regimes, as they have developed in domestic legal systems, have three goals in common:

- 1) They avoid the "run for the assets" and "run for the courthouse" problems that arise when multiple creditors have claims to a debtor's assets;
- 2) They enforce the payment of claims according to priority; and
- 3) They mandate the cancellation of all or most unpaid claims following

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9. LIPSON *supra* note 2, at 58.

10. *Id.* at 73.

11. *Id.* at 75.

12. "Sovereign debt restructuring" is the euphemism adopted in academic and policy discussions on this topic, a phrase that rhetorically preserves the principle of *pacta sunt servanda*. To the extent that debt discharge is ever acknowledged in such discussion, it is generally termed "debt forgiveness." The term "debt repudiation" almost never appears in the literature.

bankruptcy in order to give the debtor a fresh start.<sup>13</sup>

Thomas Jackson reduces these three goals to what he describes as the two first principles of bankruptcy law:

- 1) Maximize efficiency by minimizing “conversion” or transaction costs in the bankruptcy process; and
- Provide some debtors with a fresh start.<sup>14</sup>

The way Jackson looks at it, the crafter of a bankruptcy regime first decides on the second item, a mechanism for deciding on whether or to what degree to grant a “fresh start” to various debtors. In the United States, for example, debtors are divided into classes and a fresh start is supplied according to class. A true fresh start, complete discharge, is granted to individuals with an income below the median income in their state. A less-generous fresh start is provided to more prosperous individuals. No discharge is granted to corporations.<sup>15</sup>

Whatever the mechanism, by answering the fresh-start question the crafter slices off a percentage of a various debtor’s total liabilities as “dischargeable,” with the balance “exempt-from-discharge.” Having made this determination, the crafter then turns to what Jackson calls the “core” goal of bankruptcy law; namely, maximizing the efficiency of the “conversion” process in order to leave the creditors as whole as possible.<sup>16</sup> Efficiency is maximized by preventing wasteful conduct by the parties, especially the creditors, such as seizing assets that prevent the accumulation of income by the debtor, free-riding, holdout litigation, delay, and the like. *For their own benefit*, creditors acquiesce to an ordered bankruptcy process that arrives at a reasonably fair (as between creditors), swift, and utility-maximizing plan for repaying the debtor’s exempt-from-discharge liabilities as fully as possible.

In a sovereign context, creditors would ideally work with a debtor state as it approached bankruptcy in order to help the debtor state avoid bankruptcy, or to maximize their returns in a bankruptcy proceeding. But herein lies the problem: what should a rational creditor do if what will happen to the state following its bankruptcy is an unknown because the “bankruptcy” process is chaotic? Under such circumstances, it would be a fool’s game to bet on the outcome of a bankruptcy proceeding. The rational choice would be to hold out on the staunchest possible terms, even as the sovereign descends into bankruptcy. This tendency on the part of creditors in turn increases the probability of suicidal default. Such is the sovereign bankruptcy process as it exists today.

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13. Patrick Bolton, *Toward a Statutory Approach to Sovereign Debt Restructuring: Lessons From Corporate Bankruptcy Practice Around the World*, IMF Working Paper WP/03/13 18 (Jan. 2003).

14. THOMAS JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 2-5 (1986).

15. Jeffrey D. Sachs, *Resolving the Debt Crises of Low-Income Countries*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY* 2002:1 22-23, 27 (William C. Brainard & George L. Perry eds., 2002). In a sovereign context, Jeffrey Sachs suggests a case-by-case resolution of the fresh start question by an independent panel, perhaps under the auspices of the IMF. The panel would analyze the sustainability of the state’s debts in the context of its “business plan” and financial projections and decide what percentage of the debts were to be canceled.

16. JACKSON, *supra* note 14, at 5.

*A. Sovereign Problem 1: Inadequate, Arbitrary Provision of Fresh Starts*

The international community has in recent decades evolved non-judicial mechanisms for “sovereign debt restructuring,” such as the Highly Indebted Poor Countries Initiative (HIPC), the increasingly generous “Restructuring Terms” of the Paris Club,<sup>17</sup> and recent debt forgiveness discussions/commitments by western leaders in the context of the Millennium Development Goals. The international community has, in other words, developed *ad hoc* mechanisms for providing something of a fresh start to debtors. However, the *ad hoc* nature of these acts has led to arbitrary inconsistencies among the degrees of debt relief offered to various nations.

For example, based in large part on the diplomatic efforts of special envoy James Baker III, the US has been successful in convincing the nineteen members of the Paris Club to agree to forgive eighty percent of debts owed to them by Iraq. On November 21, 2004, Jean-Pierre Jouyet, Paris Club president, said that the agreement urged by the US foresaw eighty per-cent of Iraq’s debts to the Paris Club being canceled in three stages: thirty per-cent immediately, a further thirty per-cent in 2005, and twenty per-cent in 2008.<sup>18</sup>

The arguments made by Mr. Baker in securing this accord apparently centered on the concept of “odious debts,” that is, debt proceeds misused by a previous government, specifically that of Saddam Hussein, for purposes other than the benefit of the people and territory of the state. These arguments contrast with decades of US assertion that sovereign debt agreements are binding under international law, regardless of the use of proceeds (*pacta sunt servanda*). As this news became public, one newspaper noted: “Some developing country policymakers and debt-relief campaign groups have contrasted the generous and swift relief being considered for Iraq with slow progress in reducing the debt of highly indebted African economies.”<sup>19</sup> Meanwhile, sub-Saharan Africa has foreign debts of \$201 billion,<sup>20</sup> developing countries worldwide had almost \$1.25 trillion in external long-term debt at the end of 2003,<sup>21</sup> and developing-country debt service is over \$179 billion per year.<sup>22</sup> In Malawi, for example, one of the world’s poorest nations, twenty-one percent of government revenue is devoted to debt payments, approximately as much as Malawi spends on education, health, science, and technology combined.<sup>23</sup>

17. Sachs, *supra* note 15, at 20.

18. Ralph Atkins & Andrew Balls, *Snow Praises Berlin for Iraq Debt Pact at G20 Summit*, FINANCIAL TIMES, Nov. 20, 2004, at 7.

19. *Id.*

20. ATKINS & BALLS, *supra* note 18.

21. U.N. Conference on Trade and Development, *Handbook of Statistics*, <http://www.unctad.org/Templates/Page.asp?intItemID=1914&lang=1> (last visited Mar. 1, 2006).

22. *Id.*

23. Warren Vieth, *Stubborn Debt Burden Spurs Search for New Ideas: On Eve of World Bank and IMF Talks, Activists Call on Rich Nations to Honor Pledges of Relief and Even Write Off Third World Obligations*, L.A. TIMES, Apr. 23, 2004, at 11. One could argue that a difference between Iraq and Malawi is that in the former case a dictatorial regime has been removed, whereas in the latter it remains in power. The relevance of this logical distinction is somewhat undermined by a

Apart from the special criteria that apparently surrounded Iraq's debt forgiveness, normal fresh-start mechanisms generally center around IMF "surveillance," the linchpin of informal debt relief. The focuses of IMF surveillance are macroeconomic and fiscal "reforms," which either increase the likelihood of debt repayment or benefit creditor-nation exporters and corporations.<sup>24</sup> No attention is placed on whether debt proceeds, undertaken on behalf of the people and territory, are actually being used on their behalf.

Similarly diffuse, the Heavily Indebted Poor Countries (HIPC) Initiative, jointly launched by the IMF and the World Bank in 1996, is based on a nation's total outstanding debt relative to exports and GDP, as opposed to ratios of debt service expenses to government revenues.<sup>25</sup> Turning back to Malawi, for example, the twenty-one percent of government revenue devoted to debt payments is the amount required *after* HIPC relief. Such debt service burdens, coupled with a general decrease in foreign aid since the 1990s, create what Jeffrey Sachs describes as a "poverty trap" in low-income countries.<sup>26</sup> Because the economic output of these nations added to foreign aid and then minus debt service is insufficient to maintain a subsistence level of income, the nations suffer a negative savings rate. That is, they are forced to cannibalize their income-producing capital stock, ensuring a decline in economic output and a decline in capital-labor ratios.<sup>27</sup> As a result, "requiring an IMF program has been an absorbing state: once in the IMF's clutches, it has been almost impossible to escape."<sup>28</sup>

The significance of the Iraq write-down, for the purposes of this article, is less its irony than how it was achieved. The agreement was deliberately negotiated on an informal basis, and not even by a current US government official. The reasoning behind the agreement was not memorialized in any public document that carries value as precedent. The agreement, like the workings of institutions such as the Paris Club, was achieved in a manner kept outside the judicial or official realm. Denied such special treatment, Malawi soldiers on, its people unable to feed their children<sup>29</sup> even as the country cannibalizes its capital base due to a negative savings rate.

### B. Problem 2: Failure to Maximize Conversion for Creditors

This *ad hoc* sovereign bankruptcy system is even more notable for its fail-

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comparison of the generosity of the international community to post-Hussein Iraq relative to post-dictatorship Indonesia and the Philippines.

24. I.M.F., *IMF Surveillance: A Factsheet* (Sept. 2005), <http://imf.org/external/np/exr/facts/surv.htm>.

25. I.M.F., *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative* (Sept. 2004), <http://www.imf.org/external/np/exr/facts/hipc.htm>.

26. Sachs, *supra* note 15, at 5.

27. *Id.* at 5-10.

28. *Id.* at 18. Sachs further notes that "[i]n 1978, there were 22 countries in IMF lending programs. By 1996 that figure had reached 75, and as of 2001, 63. Dozens of these countries have experienced nearly a quarter century of continuous IMF lending."

29. Craig Timberg, *Drought Magnifies Hunger, Suffering of Children in Malawi: Rural Village Tracks Malnutrition's Toll on Young*, WASH. POST, Nov. 4, 2005, at A1.

ure to maximize the efficiency of the “conversion” process, what Jackson describes as the core purpose of bankruptcy law. Argentina’s recent default, for example, involved more than 90 different bond issues and countless direct foreign investment disputes. With no mechanism in place to order these competing claims fairly, Argentina’s default resulted in a rush to exit from Argentina’s own debt, massive economic dislocation within Argentina (reducing its ability to repay), a cloud of litigation (notably holdout litigation), and years of delay.

In holdout litigation, a creditor (typically a hedge fund) buys up a significant portion of a bond issue and then, even if a restructuring settlement has been achieved with seventy or ninety percent of the bondholders, holds out by aggressively litigating their rights in the jurisdiction that was the choice of law for the bonds, usually New York. They hope to achieve a more favorable settlement than the rest of the bondholders even if it delays a global settlement for years, as has been the case with Argentina. At the same time, debtors have become more sophisticated and willing to litigate. However, as one Argentine official stated: “Forget litigation. It is useless . . . . The world has changed. Just over a decade ago, we had state-owned companies with assets all over the place that investors would have been able to target. The only thing left today are embassies and they are protected.”<sup>30</sup> The current system and the clouds of litigation it creates can be viewed as benefiting only lawyers.

Had a sovereign bankruptcy mechanism been in place to handle Argentina’s default, Argentina’s economic dislocation would have been minimized by a stay on litigation and debt service, as well as the infusion of new “priority” (debtor-in-possession) financing. Moreover, creditors would have been repaid more quickly and in an amount far greater than the roughly thirty five cents-on-the-dollar that they received pursuant to Argentina’s unilateral offer. The details could vary, but such a sovereign bankruptcy process would broadly consist of Argentina, after default, seeking in good faith temporary shelter in a court. The court would impose a stay on legal action as well as interest and principal repayments on Argentina’s debt. Then the court would, according to preexisting rules, sort out and prioritize various creditors’ claims against Argentina and propose a plan to which any party could object before it was adopted. After considering objections, the court would then set out a repayment and reorganization plan that would be binding on all parties.

As Professor David Caron points out in the introduction to this volume, a state’s expectation that it will most often appear before a given international court and tribunal (IC&T) as a claimant or a respondent will often drive its choice to back the creation of the IC&T.<sup>31</sup> In Argentina, we have a situation where both claimant and respondent would benefit from the efficient solution described in the previous paragraph. Most participants in the debate over a sov-

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30. Adam Thomson, *Stirring Up Talk of Legal Action: Adam Thomson Assesses How Effective Litigation Might Be for Argentina’s Frustrated Creditors*, FINANCIAL TIMES, Oct. 1, 2004, at 7.

31. Caron, *supra* note 8 at 415-16.

foreign bankruptcy court, with a few exceptions,<sup>32</sup> agree with the notion that creating such a court would result in more equitable sovereign fresh starts while creating massive new efficiencies in the conversion process. We now turn to the conflicts of interest and historical forces that may be at work in the international community's failure to establish such a court.

#### IV. THE CONFLICTS OF INTEREST OF CREDITOR AND DEBTOR STATE REPRESENTATIVES

Common sense and international law distinguish between state representatives and the state. State representatives make up government and conduct international affairs, but they are not the state.<sup>33</sup> The state is the people and territory. For example, in the Vienna Convention on the Law of Treaties, if the expression by a State of "consent to be bound by a treaty has been procured through the corruption of its *representative* directly or indirectly by a negotiating State . . . [the State] may invoke such corruption as invalidating its consent to be bound by the treaty" (emphasis added).<sup>34</sup> International courts and tribunals are necessarily created by state representatives with limited tenure. These representatives, in choosing to create or not create a given IC&T, are driven by concerns unique to the circumstances of the incumbent political regime.<sup>35</sup> As such, state representatives exhibit two characteristics that may interfere with their ability to make reliable decisions about a given IC&T based upon an objective assessment of whether launching or not launching would maximize the utility of the com-

32. Two such exceptions are an industry group, the International Primary Market Association (IPMA) and the academic Nouriel Roubini.

Robert Gray, the chairman of the IPMA, states that "the IMF ha[s] produced no empirical evidence [of] . . . an inherent collective action problem among private sector creditors in sovereign debt restructuring that precludes agreement between them." Robert Gray, *Collective Action Clauses: The Way Forward* 4 (Feb. 2004), [http://www.law.georgetown.edu/international/documents/Gray\\_000.pdf](http://www.law.georgetown.edu/international/documents/Gray_000.pdf). This is an assertion of credibility similar to the chairman of an association of energy companies stating that there is no empirical evidence precluding the nonexistence of global warming. Nouriel Roubini states on his blog: "The current system of unilateral debt exchanges works and it should not be changed as it is not broken. All previous debt restructuring deals were done without negotiations between the debtor and its creditors. In a typical deal—Pakistan, Ukraine, Ecuador, Uruguay and now Argentina—the debtor never negotiates: it hires a legal advisor and a financial advisor who do some extensive market soundings—not negotiations—to figure out which deal is acceptable to a large fraction of creditors. Then, when the homework is done, the country makes an exchange offer, that is, a take-it-or-leave-it debt exchange. And in all cases before Argentina, 99% of creditors accepted the offer and there were very few holdouts. Argentina behaved in the same fair way: it did its market soundings and then made an exchange offer. Yes, some extra info sharing and consultation by Argentina with its creditors would have been nice and fair but it would have not changed the substance of the eventual deal." Nouriel Roubini, *The Successful End of the Argentine Debt Restructuring Saga* . . . (Mar. 2005), <http://www.rgemonitor.com/blog/roubini/91192>.

33. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 306 (3<sup>d</sup> ed. 2003). A state is "a group of people permanently occupying a fixed territory and having common laws, government and the capability of conducting international affairs."

34. Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, May 22, 1969, art. 50, 1155 U.N.T.S. 331.

35. Caron, *supra* note 8 at 415-16.

munity of nations. First, state representatives are political actors; they are not necessarily motivated by the goals of a given IC&T as stated in its constitutive instrument.<sup>36</sup> Second, they are temporally-limited actors. In both respects, they are conflicted actors.

#### *A. State Representatives are Temporally-Limited Actors*

Jeffrey Sachs answers the question of why no sovereign bankruptcy court exists with the observation that, at any given starting date for a rational sovereign bankruptcy process, existing creditors will likely suffer a capital loss due to a more even-handed provision of a fresh start to debtors.<sup>37</sup> To put it in economic parlance, Sachs implies that even though the long-run utility of the creditor states will be maximized through the creation of an efficient sovereign bankruptcy system, state representatives avoid this rational choice either because: (i) their state's current creditors will suffer a disproportionate amount of the existing-creditor losses; or (ii) regardless of whether their state will suffer disproportionately relative to other creditor states, their interests are politically aligned with their state's current creditors as opposed to its future creditors.

With respect to the first possibility, it is true that the position of states as creditors shifts over time. For example, in 1914, 68% of Latin American external public debt was from Britain,<sup>38</sup> and 47% of private foreign investments in Latin America were from Britain.<sup>39</sup> The corresponding percentages in 1914 of US investment were far lower: 4% and 18% respectively.<sup>40</sup> In the years 1961-1967, by contrast, US investment constituted 61% of foreign direct investment flows from the thirteen major industrial countries.<sup>41</sup> The corresponding percentage for Britain at that point was nine percent.<sup>42</sup> Accordingly, if the starting date for a sovereign bankruptcy mechanism had been 1914, Britain would have suffered disproportionately. If the starting date had been 1967, the US would have suffered disproportionately. Such shifting burdens among states that have effective veto power over the establishment of a judicial mechanism make its approval less likely at any given point in time.

Second, at the starting date of the mechanism, the current constituencies of the creditor state representatives, and the state treasuries themselves, will likely see the efficiency gains from an improved conversion process more than canceled out by the accompanying fresh-start provisions. In contrast, future creditors will likely gain, on balance, from the new system due to increased effi-

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36. *Id.*

37. Jeffrey Sachs, *The Roadblock to a Sovereign Bankruptcy Law*, 23 CATO J. 5 (Spring/Summer 2003).

38. U.N. Department of Economic and Social Affairs, Economic Commission for Latin America, *External Financing in Latin America* 16 (1965).

39. *Id.* at 17.

40. *Id.* at 16-17.

41. O.E.C.D., *International Investment and Multinational Enterprises: Recent International Direct Investment Trends* 40, table 3 (1981).

42. *Id.*

ciency of conversion and the disciplining effect of a sovereign bankruptcy mechanism on their investment decisions. Further, creditors will gain from improved behavior by sovereign debtors in their use of proceeds, which would be under closer scrutiny under the new system.

Debtor-state representatives face a similar conflict. Their primary goal with respect to their state's finances is to maximize, at least during their tenure, the difference between current account inflows and outflows. The expense of servicing existing debts generally forms a relatively minor part of outflows, whereas new borrowings could dwarf those outflows. A debtor-state representative's concern is therefore that the provision of a fresh start would be more than offset by a decrease in new investment. In the short-term, a fresh start is less valuable than continued foreign investment.

### *B. State Representatives are Political, Self-Interested Actors*

These conflicts between the *status quo* and a sovereign bankruptcy regime are strongest, with respect to both creditor and debtor state representatives, when then debts being extended and assumed are to some degree odious. A debt is odious if the proceeds of the debt were not used for the benefit of the population and territory burdened by it,<sup>43</sup> a test used in the Versailles Treaty of June 28, 1919.<sup>44</sup>

The ability of governments to use sovereign debt proceeds in an odious manner is virtually unlimited under the current system. Indeed, the current system imposes no checks or balances on the use of the money raised through sovereign debt agreements. This omission, and the malfeasance that it enables on the part of both creditors and borrowing government officials, is a major flaw in the current system of sovereign borrowing. Far from the detailed business plan that Sachs would require as part of a sovereign bankruptcy proceeding, the descriptions of the use of proceeds in most sovereign debt instruments are remarkably non-specific. For example, the "Use of Proceeds" section of a recent prospectus for an offering of \$12.6 billion in sovereign debt by the Republic of Argentina of states in full: "Unless otherwise specified in a prospectus supplement, the Government will use any net proceeds from the sale of securities offered by this prospectus for the general purposes of the government of Argentina."<sup>45</sup>

In an 189-page prospectus, this single sentence is the extent of Argentina's disclosure regarding use of proceeds. How the proceeds will in fact used by the government of Argentina for its "general purposes," with no further elaboration,

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43. D.P O'CONNELL, STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW 460 (1967).

44. Treaty of Versailles, June 28, 1919, art. 296, 225 Parry 188, 2 Bevans 235, 13 AMER. J. INT'L L. SUPP. 151, 385 (year).

45. *Debt securities Registration Statement Filed by the Republic of Argentina with the Securities and Exchange Commission*, 5 (July 2, 2004), <http://www.sec.gov/Archives/edgar/data/914021/000095012304008163/y98698svb.htm>.

will be monitored by the government itself.

One solution to this ambiguity would be to require that Argentina's borrowing take the form of project finance: Five billion dollars for this power plant, one billion dollars for that highway. An intermediate solution would be for the document to show at least *some indication what the money is for*. Absent such a declaration, Argentina will nevertheless be under IMF "surveillance," but such surveillance does not focus on spending but instead focuses on macroeconomic issues such as exchange rates, deficits, inflation, and trade. According to the IMF:

Exchange rate, monetary and fiscal policies remain at the center of IMF surveillance . . . . "Article IV consultations," as IMF surveillance discussions are known, usually take place once a year. IMF economists visit the member country to gather information and hold discussions with government and central bank officials, and often private investors and labor representatives, members of parliament, and civil society organizations. Upon its return, the mission submits a report to the IMF's Executive Board for discussion. The Board's views are subsequently summarized and transmitted to the country's authorities.<sup>46</sup>

Astonishingly, no element of Article IV consultations is devoted to tracking the use of the proceeds of specific sovereign debt offerings; in these consultations the IMF never asks the question, "So what did you actually do with that \$12.6 billion?"

In contrast, the use-of-proceeds statements of developed-country corporations are far more detailed than those of sovereigns. These statements are made in the prospectus itself or in other filings, press releases, analyst conference calls and meetings, or other disclosures. The corporation's subsequent adherence to its planned use of proceeds is then enforced through internal controls and external monitoring by a fleet of analysts, investors, and credit-rating agencies.

Proposals such as Sachs' and the SDRM would move sovereigns closer to the transparency and disclosures required of public corporations, which would in turn reduce or penalize the provision of odious debts. Perhaps unsurprisingly, the transparency requirements of the SDRM were among the provisions most hotly contested when the members of the IMF debated the idea in 2002-03.

Under the current system, creditors of sovereigns benefit from the lack of transparency and scrutiny because no one inquires into implicit or explicit tying arrangements that might have accompanied the funds. They also avoid objective scrutiny of whether it makes sense for the sovereign to assume the debt in the first place; that is, whether the additional capital can be used in a manner that increases economic output sufficiently to justify future debt service expenses. Debtor state representatives likewise benefit from a lack of scrutiny because it frees them to potentially use a portion of the funds for the consumption or aggrandizement of themselves, families, and friends.<sup>47</sup>

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46. *IMF Surveillance: A Factsheet*, *supra* note 24.

47. John Perkins puts all of this more darkly. He states that his role as an international economic consultant was, first, to "justify huge international loans" to developing countries that would "funnel money back" to US engineering and construction companies, and, second, to "bankrupt the

Thus, to the extent that international lending tends to produce odious debts at the expense of the peoples and territories on whose behalf the debts are assumed, both creditor and debtor state representatives stand to lose from a sovereign bankruptcy mechanism that would impose greater discipline and transparency. Similarly, state representatives, in assenting to an IC&T, are not necessarily motivated by the goals of a given IC&T stated in its constitutive instrument.<sup>48</sup> Furthermore, state representatives may also be conflicted by political and economic motivations specific to themselves and a subset of the constituencies that they represent.

## V.

### IMPEDIMENTS CREATED BY THE STRUCTURES OF THE IMF, THE WORLD BANK, AND THE PARIS CLUB

As Professor Caron notes, IC&Ts are often created by the community, not by parties.<sup>49</sup> The community is *a priori* concerned with the interests of the community in the resolution of a given class of disputes, and not necessarily in the interests of particular parties or the outcomes of particular disputes.<sup>50</sup> However, a community can define and organize itself in various ways, and these choices of definition and organization, particularly with respect to voting rights, affect how the “community” expresses its interests. We now turn to the political process through which a community of nations defined and organized itself in creating the IMF, the World Bank, and the Paris Club.

#### A. The IMF

In 1940, Britain stood isolated against German military onslaught. Britain’s armaments and food were being depleted at an alarming rate. In December 1940, President Roosevelt submitted to Congress a “Lend-Lease” program that would provide support to Britain and was greeted in London “with immense relief and gratitude.”<sup>51</sup> During the following months and years, the US supplied Britain with temporary aid as Britain anxiously awaited Lend-Lease’s passage by Congress. During that period, in May 1941, the US initiated discussion with Britain regarding post-war economic policy.<sup>52</sup> In response, the British and Lord

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countries” (after the US companies had been paid) “so that they would be forever beholden to their creditors, and so they would present easy targets when we needed favors, including military bases, UN votes, or access to oil and other natural resources . . . . The unspoken aspect of every one of these projects was that they were intended to create large profits for the contractors, and to make a handful of wealthy and influential families in the receiving countries very happy, while assuring the long-term financial dependence [of the state] . . . *The larger the loan, the better*” (emphasis added). JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN 15-16 (2004).

48. Caron, *supra* note 8 at 414-15.

49. *Id.* at 415-16

50. *Id.*

51. ARMAND VAN DORMAEL, BRETTON WOODS: BIRTH OF A MONETARY SYSTEM 13 (1978).

52. *Id.* at 21.

Maynard Keynes responded with the latest draft of their post-war economic order that, according to Dean Acheson, “provided merely that lend-lease should be extended; that the British should return what was practicable for them to return; that no obligation should be created; and that they would be glad to talk about other matters.”<sup>53</sup>

In reply, on July 28, Acheson handed Keynes a draft regarding what Britain could supply to the US as “consideration” for its generosity, stating in Article VII:

The terms and conditions upon which the United Kingdom receives defense aid from the United States of America and the benefits to be received by the United States of America in return therefor, as finally determined, shall be such as not to burden commerce between the two countries but to promote mutually advantageous economic relations between them and the betterment of world-wide economic relations; they shall provide against discrimination in either the United States of America or the United Kingdom against the importation of any product originating in the other country; and they shall provide for the formulation of measures for the achievement of these ends.<sup>54</sup>

Keynes asked Acheson if Article VII in fact contained requirements regarding “imperial preferences” and “exchange and trade controls.”<sup>55</sup> Acheson acknowledged that it did. According to Acheson, Keynes thereupon “burst into a speech” that the agreement would “require an imperial conference” and “saddled upon the future an ironclad formula from the Nineteenth Century.”<sup>56</sup>

In the next few months Keynes sketched out “an ideal scheme [for an International Clearing Union] which would preserve the advantages of an international means of payment universally acceptable, whilst avoiding those features of the old system which did the damage.”<sup>57</sup> Keynes’s ideas were self-described as “utopian” and “of the spirit of bold innovation,”<sup>58</sup> and were also borne of Britain’s position relative to the US under the circumstances. Britain at the time had close to zero foreign reserves, was a net-importer, and was being torn apart by war. In contrast, the US economic position was like that of China today: a massive net-exporter with an extraordinary level of foreign reserves. Keynes’ utopian proposals were perhaps motivated by principle and also perhaps the best Britain could hope for under the circumstances.

Meanwhile, US Treasury Department economist Harry White, Keynes’ intellectual counterpart in the US, developed a scheme for a “United Nations Stabilization Fund and a Bank for Reconstruction of the United and Associated Nations.”<sup>59</sup> Keynes finished the fourth draft of his Clearing Union proposal in February 1942,<sup>60</sup> and White finished the first draft of his proposal on May 8,

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53. *Id.* at 22.

54. *Id.* at 22.

55. *Id.* at 22.

56. *Id.* at 22-23.

57. *Id.* at 34.

58. *Id.* at 34.

59. *Id.* at 51.

60. *Id.* at 48.

1942.<sup>61</sup>

In October 1942, US Treasury Secretary Robert Morgenthau and White traveled to Britain, where a meeting was held regarding the competing proposals. According to a participant in the meeting:

The exchange of views was left almost wholly to Keynes and White . . . . There was a substantial area of agreement but there were also sharp differences . . . . Differences arose on the voting system and other points. Finally Keynes argued for direct negotiations between the U.S. and U.K. alone or possibly with the Dominions and the Soviet Union added, while White maintained that this would create suspicion of an Anglo-Saxon financial 'gang-up.' Keynes heatedly argued that, the subject matter being complicated, it was essential that the U.S. and U.K. should work out a plan themselves, invite the Russians, in order to allay suspicion, and perhaps the Dominions and French, to join, and then set it up and invite the rest of the world to join . . . .<sup>62</sup>

By March 1943, the US and Britain had prepared a draft regarding a "Stabilization Fund for the United and Associated Nations and an International Bank for Reconstruction and Development," which was then shared with Russia and China. In June 1943, the US hosted a meeting to further discuss the plan that was attended by representatives of 12 nations, which resulted in another draft.<sup>63</sup> The Bretton Woods Conference was ultimately convened in July 1944. Representatives of 44 nations accepted the invitation of the US to attend the Conference.

Throughout the Conference, White and a small group of technical advisers kept absolute control over the text of the articles to be included in the agreement. Virtually all other important decisions, such as decisions over the allocation of quotas (voting rights), were made behind closed doors by negotiations between the American delegation, led by Morgenthau, and the foreign delegation involved.<sup>64</sup> At the end of the Conference, the Articles of Agreement of the IMF and the Articles of Agreement of the IBRD were presented for ratification by member governments.

The Articles granted voting rights to the Original Members of the IMF and the IBRD based upon quotas effectively determined by the US delegation.<sup>65</sup> The US, Britain, and the Union of Soviet Socialist Republics received the largest quotas, measuring \$2.75 billion, \$1.3 billion, and \$1.2 billion, respectively (by an agreement preceding the conference, the quota of the US and the entire British Commonwealth would be equal).<sup>66</sup> The remaining forty one nations re-

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61. *Id.* at 51.

62. *Id.* at 62-63.

63. I.M.F., *Bretton Woods Conference Collection: Bretton Woods Conference Files*, <http://www.imf.org/external/np/arc/eng/fa/BWC/s4.htm>. The 12 nations were Belgium, Bolivia, Canada, Czechoslovakia, Ecuador, France, the Netherlands, Norway, Philippines, Poland, the United Kingdom, and the US. By the spring of 1944, the "Joint Statement of Experts on the International Monetary Fund" was published simultaneously in eight consulting countries, reporting the views of these nations.

64. VAN DORMAEL, *supra* note 51, at 179.

65. *Id.* at 182-83.

66. Articles of Agreement of the I.M.F., adopted at the United Nations Monetary and Finan-

ceived quotas ranging from between \$500,000 and \$550 million, with twenty nine of the forty one states receiving quotas of less than \$100 million.<sup>67</sup> The quotas of "Other Members" not invited or not present at the Conference, but that later joined the IMF, were to be determined by the IMF Board of Governors,<sup>68</sup> which would in turn consist of one representative from each current IMF member, each voting in an amount roughly corresponding to the state's quota.<sup>69</sup> Any change in quotas would require an eighty-five percent majority of the total voting power.<sup>70</sup>

The IMF now includes 184 members. Currently, the (approximate) voting rights of the US (17%), Japan (6%), Germany (6%), Britain (5%), France (5%), Saudi Arabia (3%), Canada (3%), Italy (3%), Russia (3%), China (3%), and Belgium (2%),<sup>71</sup> are together sufficient to establish a majority in any Board of Governor decision. The voting rights of the US alone are sufficient to veto any decision, such as a change in quotas, which requires an eighty-five percent super-majority. Similarly, the US can effectively veto any amendment to the Articles of Agreement, which would require a sixty percent majority of members having eighty-five percent of the total voting power of the IMF.<sup>72</sup>

### B. The IBRD

The IBRD/World Bank was set up parallel to the IMF. The Original Members were the Original Members of the IMF<sup>73</sup> and the size of their subscriptions and voting rights paralleled those of the IMF.<sup>74</sup> Like the IMF, the admission of Other Members and the size of their Subscriptions and corresponding voting rights is decided by the current members.<sup>75</sup> The relative member voting rights of the four organizations that constitute the World Bank Group (the IBRD, the International Finance Corporation, the International Development Association, and the Multilateral Investment Guarantee Agency) also roughly parallel those of the IMF.<sup>76</sup> In other words, they grant majority control to a relatively small group of rich nations, with by far the largest voting power (ranging from 13.92% at the International Development Association to 23.65% at the International Fi-

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cial Conference, Dec. 27, 1945, Schedule A, 2 U.N.T.S. 39.

67. *Id.*

68. *Id.* art. II, sec. 2.

69. *Id.* art. XII, sec. 2(e).

70. *Id.* art. III, sec. 2.

71. I.M.F., *IMF Members' Quotas and Voting Power, and IMF Board of Governors* (Nov. 7, 2005) <http://www.imf.org/external/np/sec/memdir/members.htm>.

72. Articles of Agreement of the I.M.F., *supra* note 66, at art. XXVIII(a).

73. I.B.R.D. Articles of Agreement, art. II, sec. 1(a) (Feb. 16, 1989), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,contentMDK:20049557~menuPK:64020046~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html>.

74. The World Bank, *Voting Powers*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,contentMDK:50004947~menuPK:64020035~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (last visited Mar. 1, 2006).

75. I.B.R.D. Articles of Agreement, *supra* note 66, art. II, sec. 1(b).

76. World Bank, *Voting Powers*, *supra* note 74.

nance Corporation) going to the US.<sup>77</sup>

### C. The Paris Club

The Paris Club describes itself as a “non-institution,” “an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor nations.”<sup>78</sup> It has brokered 399 creditor agreements involving 82 debtor nations since inception.<sup>79</sup> The Paris Club’s Agreed Minutes are a “recommendation” to the participating parties.<sup>80</sup> They are not put on record. Instead, the Paris Club deliberately operates outside the realm of formal international or national law. The Paris Club’s stated restructuring terms for low-income countries have dramatically changed at least five times since 1988,<sup>81</sup> without a consistent normative basis.

### D. Green Rooms and IC&Ts

Courts and tribunals are not desirable to a given party if they dilute their ability to dominate other parties. When a given institutional structure *already* creates domination or a disproportionate power for some parties over others, and when the dominant parties simultaneously control whether or not the institution creates an IC&T, that institution is unlikely to create an IC&T. Other papers in this volume echo this assertion. Those papers variously discuss the failure to open any investigation into the air campaign in Yugoslavia,<sup>82</sup> the unequal effects of the World Trade Organization (WTO) dispute resolution mechanism on developing countries,<sup>83</sup> the premature termination of the Yugoslavia and Rwanda war crimes tribunals,<sup>84</sup> and the failure to include dispute resolution procedures in the North American Free Trade Agreement (NAFTA).<sup>85</sup> These myriad failures and omissions, like the failure to create an international bankruptcy court, were not oversights. Rather, they stemmed from powerful states’

77. *Id.*

78. The Paris Club, *Description of the Paris Club*, <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B01WP01> (last visited Mar. 1, 2006).

79. *Id.*

80. The Paris Club, *Definitions*, <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B04WP02#1> (last visited Mar. 1, 2006).

81. Sachs, *supra* note 15, at 20-21. Such changes include the Toronto Terms (1988), the London Terms (1991), the Naples Terms (1994), the Lyon Terms (1996), and the Cologne Terms (1999).

82. Anne-Sophie Massa, *NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 BERKELEY J. INT.’L L. 610 (2006).

83. Leah Granger, *Retaliation under World Trade Organization (WTO) Dispute Settlement System and its Relatively Different and Unequal Effects on Developing Countries*, 24 BERKELEY J. INT.’L L. 521 (2006).

84. Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT.’L L. 687 (2006).

85. Jennifer A. Heindl, *Toward a History of NAFTA’s Chapter Eleven*, 24 BERKELEY J. INT.’L L. 672 (2006).

perception of their interests coupled with their effective or statutory dominance over the institution in question.

If the game is fixed for certain parties in the very voting structure of an institution, why should the favored parties ratify an independent tribunal to question the institution's decisions? An institution that favors certain parties over the rest in its voting structure is unlikely to spawn an independent IC&T.

Similarly, unequal voting power makes the emergence of new IC&Ts at those institutions unlikely. This reality became starkly clear when Anne Krueger, soon after joining the IMF as its new First Deputy Managing Director (at the invitation of Managing Director Horst Köhler) in September 2001, proposed a Sovereign Debt Restructuring Mechanism (SDRM) that would have effectively created a sovereign bankruptcy court under the auspices of the IMF. Krueger's idea was to set up an "orderly framework"<sup>86</sup> within the IMF "legally ringfenced" from the IMF Executive Board<sup>87</sup> that would adjudicate sovereign bankruptcies.<sup>88</sup> Krueger's initial proposal, *A New Approach to Sovereign Debt Restructuring*, was met with criticism.<sup>89</sup> She then offered an extensively-revised version.<sup>90</sup> The revised proposal was still not acceptable to IMF leadership. Finally, a further revised proposal was formally considered and rejected by the IMF Executive Board in 2003.<sup>91</sup> The adoption of the latter proposal was supported by seventy percent of the membership of the IMF,<sup>92</sup> but implementation of the SDRM would have involved amendment of the IMF Articles of Agreement, which requires a sixty percent majority of members having eighty five percent of the total voting power of the IMF Board of Governors. Because the US prefers collective action clauses,<sup>93</sup> as opposed to the SDRM, amend-

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86. I.M.F., *Transcript of a Teleconference on Sovereign Debt Restructuring Mechanism with Washington-based Journalists and First Deputy Managing Director, Anne Krueger* (Apr. 1, 2002) <http://www.imf.org/external/np/tr/2002/tr020401.htm>. ("QUESTION: Do you have any model in your head or any sort of existing model of how the judicial panel might work? Is it going to be based on a sort of WTO model or World Bank dispute model or what? MS. KRUEGER: Well, it could be any of those or it could actually be something from the International Court of Justice, whereby you have these judges who are called in for particular cases, and so you have—well, as WTO does, too—we don't have a model in mind, but I think the idea is that there would be a panel that could be called in as these cases arose.")

87. Anne O. Krueger, *To Make Sovereign Debt Restructuring Smoother, Not To Dictate the Terms*, LE MONDE ECONOMIE, Feb. 18, 2002, <http://www.imf.org/external/np/vc/2002/021802.htm>.

88. Anne O. Krueger, *A New Approach To Sovereign Debt Restructuring*, I.M.F., Apr. 2002.

89. GROUP OF THIRTY, WORKING GROUP REPORT: KEY ISSUES IN SOVEREIGN DEBT RESTRUCTURING 7 (2002).

90. *Id.*

91. I.M.F., *Proposals for a Sovereign Debt Restructuring Mechanism (SDRM)* (Jan. 2003), <http://imf.org/external/np/exr/facts/sdrm.htm>. The mechanism, based upon best practices in domestic bankruptcy law, would have allowed a defaulting sovereign and a qualified majority of creditors to reach an agreement that would then be made binding on all creditors, deterred disruptive litigation, protected creditor interests, and excluded a specified amount of new financing from the restructuring.

92. Gray, *supra* note 32, at 1 n.1.

93. John B. Taylor, *Sovereign Debt Restructuring: A U.S. Perspective, Remarks at the Conference on Sovereign Debt Workouts: Hopes and Hazards*, Institute for International Economics (Apr. 2, 2002), <http://www.ustreas.gov/press/releases/po2056.htm>.

ment of the Articles has been impossible because the US holds seventeen percent of the voting power at the IMF.

The proposal was, according to at least one report, also opposed by a few debtor states because they believed it would raise the price of credit due to increased creditor discipline, increased ease of restructuring, and a corresponding decrease in bailouts.<sup>94</sup> It was likewise opposed by some debtor advocates because it would place control of the mechanism permanently into the hands of the IMF. As Ann Pettifor, a director of Jubilee 2000,<sup>95</sup> stated at an IMF forum:

[U]nder the rule of law, wherever you have the rule of law, it is not appropriate to be judged in one's own court. And under the sovereign debt restructuring mechanism, the IMF, both as a major creditor in her own right but also the agent of creditors, is the judge effectively in the court of the SDRM.

We believe that this process is being driven by institutional self-interest because the sovereign debt restructuring mechanism would enhance the role of the Fund and would enshrine the international role of the Fund in law.<sup>96</sup>

The IMF, with its colonialist provenance and undemocratic voting structure, has yet to receive the imprimatur of being a truly representative international body. Pettifor worries that giving the IMF jurisdiction over a sovereign bankruptcy court would grant it such credibility.

Indeed, as Pettifor suggests, the status in international law of the IMF, the World Bank and the Paris Club are unclear. The Yearbook of the United Nations for 1946-47 mentions that the question of an agreement between the United Nations and the IBRD clarifying the relationship of one to the other had, at the request of the IBRD, been postponed (apparently indefinitely). Similarly, the US effectively required that the location of the headquarters of the IMF and the World Bank be located in Washington, D.C., despite the strong objection of Keynes. Keynes preferred New York for four reasons:

- (1) the Fund and bank should appear international and independent;
- (2) no single government should be in a position to influence unduly the directors and the staff;
- (3) there were technical advantages in being located in New York, which was the financial centre of the United States; and
- (4) co-operation with the Economic and Social Council would be easier.<sup>97</sup>

The formal title of the Bretton Woods conference was the United Nations Monetary and Financial Conference. The question that Krueger and Pettifor are currently concerned with is whether, at the creation of the Bretton Woods institutions, the international community effectively ceded jurisdiction over the in-

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94. Hal S. Scott, *A Bankruptcy Procedure for Sovereign Debtors?*, 50 (Sep. 2003), <http://www.law.harvard.edu/programs/pifs/pdfs/hscottsovereigndebt.pdf>.

95. See generally The Jubilee Debt Campaign, <http://www.jubileedebtcampaign.org.uk/?lid=280> (last visited Mar. 1, 2006).

96. Transcript of an IMF Economic Forum, *A New Approach to Sovereign Debt Restructuring: An IMF Proposal*, Comments of Ann Pettifor, Programme Coordinator, Jubilee Research (Jan. 22, 2003), <http://www.imf.org/external/np/tr/2003/tr030122.htm>.

97. VAN DORMAEL, *supra* note 51, at 294.

ternational economic matters to the IMF and World Bank,<sup>98</sup> and whether these institutions, designed by two states, now in reality comprise the ‘international order’ for economic affairs.<sup>99</sup>

*E. The “Big Man” Problem*

The IMF, World Bank and Paris Club do not make it clear what their rules are to begin with. Their ever-changing approaches to resolving sovereign defaults often lack coherence or consistency, or sometimes even a rational basis. For example, the latest approach, the Heavily Indebted Poor Countries (HIPC) Initiative, jointly launched by the IMF and the World Bank in 1996, is based on a nation’s total outstanding debt relative to exports and GDP, instead of ratios of debt service expenses to government revenues.<sup>100</sup> The HIPC criteria thereby penalize countries with: (i) low government tax revenues relative to exports or GDP; and/or (ii) high debt service relative to total outstanding debt. These criteria, which focus on a country’s balance sheet as opposed to its cash flows, have been repeatedly criticized by economists and debt-relief advocates.<sup>101</sup>

Given this lack of logic in rule-making, as well as their self-appointment, the IMF, the World Bank, and the Paris Club can at best be said to operate in the mediatory continuum<sup>102</sup> in a role analogous to the “big man,” the Papuan owner of many pigs, as described by Shapiro in his book.<sup>103</sup> In Shapiro’s account, the Papuan disputants

do not expect [the big man] to be neutral in the sense of having no interests of his own. Indeed the bigger he is, the broader is likely to be the web of his interlocking social and economic interests. The requirement of mutual consent allows the Papuans, like modern corporations in search of an arbitrator, to settle on a third who will not see his interests, whatever they may be, as parallel to those of one but not the other of the parties.<sup>104</sup>

The idea is that the big man, because of his wealth and position, is above bribery, and that placing him in the position of arbiter of disputes between those be-

98. “The memories of the economic, political, and social turbulence of the 1930s and the enormous suffering as well as the cost associated with its unfortunate aftermath, the Second World War, provided the impetus for establishing an order in the community of nations that would prevent the recurrence of such painful episodes. On the international front, the efforts that underpinned this order led to the creation of the United Nations and its numerous specialized agencies. In the economic area, the order was based on a framework laid out and agreed upon at the Bretton Woods Conference, which established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank (emphasis added).” I.M.F., *The Unique Nature of the Responsibilities of the IMF*, <http://www.imf.org/external/pubs/ft/pam/pam46/pam46int.htm>.

99. *Id.*

100. I.M.F. Fact Sheet, *Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative* (Sept. 2004), <http://www.imf.org/external/np/exr/facts/hipc.htm>.

101. For a summary of these critiques, see NANCY BIRDSALL & JOHN WILLIAMSON, *DELIVERING ON DEBT RELIEF* 33 (2002).

102. See generally SHAPIRO, *supra* note 7, at 8-17.

103. *Id.* at 6.

104. *Id.* at 18.

low him on the social and economic ladder reduces the likelihood of corruption of the judicial process.

The quota/subscription voting systems of the IMF and World Bank similarly derive from big-man logic. As an IMF Factsheet puts it, “quotas . . . broadly reflect each country’s economic size.”<sup>105</sup> Because IMF/World Bank members consented to membership (though the same cannot be said for the Paris Club), they could be said to have consented to the big nations’ mediation of their disputes, despite the fact that the organizations’ voting structures would seem to preclude true independence from “the party that receives the more favorable outcome . . . .”<sup>106</sup>

However, a larger problem in applying the big-man analogy to these organizations is that it is difficult to say that their members consented to the norms enforced by the IMF, World Bank or the Paris Club. It could be argued that poor countries turn to the big man because he “knows more of the law and custom, because he has the economic, political, or social power to enforce his judgment, or because his success or high position is taken as an indication of his skill and intelligence at resolving disputes.”<sup>107</sup> It is not possible, however, to argue that poor countries are consenting to a detailed preexisting rule (even in an abstract sense) for in this instance the big man’s rules have been ever-changing without anchor in a clear set of norms.

A final impediment to the establishment of a sovereign bankruptcy court created by the structures of the IMF, World Bank, and Paris Club, is the very fact that creditor nations, by dint of history, find themselves in the role of the big man. They are naturally loath to dilute that position for two reasons. First, an international bankruptcy court would take away their power to respond to different situations in different ways, and they want to preserve that power because they feel it suits their interests. Second, even if such a bankruptcy court in and of itself were to appeal to the creditor nations, its creation could set a precedent that would open the door to the creation or strengthening of other independent international judicial institutions. The creation of an independent mechanism that circumvents *ad hoc* institutions threatens a slippery slope down from the unique position of control in which history has placed the big men over the international economic order. For example, in the latest efforts to avoid such a slippery slope, US United Nations Ambassador John Bolton is seeking to expand the influence of “principal budget contributors” over the United Nations through various “reform[s],” including reversion to past practice on the Security Council where the five permanent members—the US, Britain, Russia, China and France—reach agreement amongst themselves before bringing a proposal before

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105. I.M.F., *The IMF at a Glance*, <http://www.imf.org/external/np/exr/facts/glance.htm> (last visited Mar. 1, 2006).

106. SHAPIRO, *supra* note 7, at 16. “So long as the [mediator] exercises any independent influence over the outcome, he must demonstrate his independence of the party who achieves the more favorable outcome if he is to achieve the consent of the less favored.”

107. SHAPIRO, *supra* note 7, at 6.

the wider membership.<sup>108</sup>

## VI. CONCLUSION

After World War II, the major economic powers formulated a new “international economic order” that allocated voting rights in the new order according to the size of states’ economies. In so doing, they effectively adopted a “big man” theory of conflict resolution for economic matters. This mode of organization, with the implicit veto power that it grants to various states and the incentives it creates for the big man to prevent decentralization of his authority, has frustrated the creation of an independent body or process to coordinate the sovereign default process.

Added to this impediment are factors stemming from the somewhat unique nature, relative to most treaties, of sovereign debt agreements. The debtor state receives the benefit immediately, while the burden falls on future governments or generations. Conversely, at the start date of an independent body or process to equitably and efficiently coordinate sovereign bankruptcies and provide fresh starts, the burden would fall on existing creditors, with only future creditors likely to benefit on balance from improved efficiency and coordination. These differences between the present and the future create conflicts of interest between state representatives and the long-term interests of the people and territory that they represent. In addition, both creditor and debtor state representatives suffer from perverse incentives created by a degree of corruption, in the form of odious and tied debts, which characterize the *status quo*. Because the state representatives, or powerful constituencies to whom they are beholden, benefit from such corruption, creditor and debtor state representatives are again conflicted when it comes to the question of creating an institution that would eliminate it.

As a result, the current self-declared political authority for international economic matters, institutionalized in the Bretton Woods bodies, has avoided the emergence of a sovereign bankruptcy court. It has employed three of the four tactics as listed by Shapiro that centralized political authorities use in various mixes to respond to courts that make laws that run counter to the centralized authority’s interests:

First, they can yield and in the process become more decentralized. Second, they can systematically withdraw from the legally defined competence of the judiciary all matters of political interest to themselves. Third, they may intervene at will to pull particular cases out of the courts and into their own hands. Fourth, they can create systems of judicial recruitment, training, organization, and promotion that ensure that the judge will be relatively neutral as between two purely private parties but will be the absolutely faithful servant of the regime on all legal matters

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108. Mark Turner, *US Calls Urgent UN Meeting Amid Concern Over Reforms*, FINANCIAL TIMES, Nov. 17, 2005, at 11.

touching its interests.<sup>109</sup>

Here, the centralized political authority has pro-actively employed the second tactic by preventing the creation of a sovereign bankruptcy court in the first place. We also see tactics three and four at work (to the extent that the workings of those institutions can be said to be quasi-judicial or systematic). Iraq's debt, for example, was not forgiven pursuant to the HIPC process, but by informal negotiations conducted outside the institution. And to the extent that IMF and World Bank staff occasionally exercise quasi-judicial independence in their assessments and decisions, that independence is tethered by the voting mechanisms of the institutions.

Recall, for example, Anne Krueger's recent unsuccessful multi-year campaign to establish an SDRM within the IMF. Her failed attempt demonstrates once and for all that the non-emergence of a sovereign bankruptcy court in the last half-century has not been an oversight. Instead, this failure has been, as Jeffrey Sachs puts it, a charade,<sup>110</sup> a deliberate choice that has its roots in: (i) history; (ii) issues unique to sovereign debt; and (iii) the choices the "community" made in structuring itself. Problems (i) and (ii) could have been overcome, as Krueger's near-success demonstrates. But in the end, problem (iii), the voting structure that the "community" chose in organizing itself, has been intractable.

The community can only make rational choices regarding modes of conflict resolution if it organizes itself in a way that motivates rational choices. In a community that has adopted the big-man theory, no matter how attractive independent conflict resolution might be for a given class of disputes, the big man will be loath to start down the slippery slope of allowing his position to be diluted. Avoiding the creation of IC&Ts preserves the big man's freedom to maneuver. A system that relies on *ad hoc* mechanisms for dealing with issues arising from sovereign debt preserves the power of the big man.

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109. SHAPIRO, *supra* note 7, at 32.

110. Speaking on the eve of a summit of the heads of state of the African Union on July 5, 2004, economist Jeffrey Sachs, special economic adviser to UN Secretary General Kofi Annan, said: "The time has come to end this charade. The debts are unaffordable. If they won't cancel the debts I would suggest obstruction; you do it yourselves." *Economist Advises on African Debt*, ASSOCIATED PRESS, July 5, 2004.

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## Explaining the Broad-Based Support for WTO Adjudication

Leah Granger

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# Explaining the Broad-Based Support for WTO Adjudication

By  
Leah Granger

*"The dispute settlement system is only as good as the negotiations and political deals it serves to encourage."*<sup>1</sup>

*"Although the WTO lacks direct enforcement powers, its decisions are taken seriously because its member nations have agreed to play by its rules. A WTO ruling gives the winning side the moral upper hand in a dispute, even if the winner chooses to negotiate a compromise rather than impose hefty penalties that could touch off a trade war."*<sup>2</sup>

## I. INTRODUCTION

Critics of globalization point to the World Trade Organization ("WTO") as an unjust and biased system, dominated by rich and powerful nations, designed to force small and developing countries<sup>3</sup> to open their markets to the forces of global capitalism.<sup>4</sup> Indeed, the WTO has become a lightning rod for the anti-globalization movement, drawing protests whenever members meet. And yet,

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1. David Woods, *Letter to the Financial Times*, FIN. TIMES (London), Nov. 1, 2002, at 20.

2. World Trade Organization, Trade Resources: Quotes, [http://www.wto.org/trade\\_resources/quotes/mts/dispute.htm](http://www.wto.org/trade_resources/quotes/mts/dispute.htm) (last visited Mar. 11, 2006) (quoting Thomas S. Mulligan & Evelyn Iritani, DOW JONES INT'L NEWS SERV., Aug. 24, 2001).

3. I use "small," "small economies," and "developing" interchangeably throughout this article. I use "large," "large economies," and "developed" to mean the United States, European Union, Japan, Canada, and Australia. There is no universally accepted definition for a "developing" or "developed" country, and this is a very rough division. Developing countries are a diverse group, varying in physical size, population, and resources. The challenges facing geographically small countries with few natural resources differ from those facing economically poor countries that have sufficient natural resources. See FRANK J. GARCIA, TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE 20-26 (2003); WTO Committee on Trade and Development, *Small Economies: A Literature Review*, WT/COMTD/SE/W/4 (July 23, 2002) (thorough review of risk factors that make small states more vulnerable to marginalization in the WTO system).

4. See GRAHAM DUNKLEY, THE FREE TRADE ADVENTURE: THE WTO, THE URUGUAY ROUND AND GLOBALIZATION (2000); GARCIA, *supra* note 3.

when given the opportunity, most countries, large and small, are eager to join the organization. Why do less powerful nations assent to a process that critics say is biased against them? How does one reconcile images of massive protests broadcast on nightly news with the fact that most nations welcome WTO membership?

While developing countries may complain about a lack of fairness in trade talks and engage in heated discussions about other aspects of the WTO,<sup>5</sup> virtually the entire membership supports maintaining a strong dispute settlement system. As I will explain below, the dispute settlement system supports the interests of both large and small countries. Developed countries agree to participate largely because the WTO legitimizes their penetration of new markets, whereas developing countries adhere because they need the power of the WTO to enforce trade agreements. The combination of centralized dispute resolution with decentralized enforcement of obligations makes members particularly willing to participate in the WTO.

## II. THE ADJUDICATORY FUNCTION OF THE WTO

The WTO's primary mission is to "develop an integrated, more viable and durable multilateral trading system" with a view to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income."<sup>6</sup> The WTO promotes trade by reducing trade barriers and offering equal trade terms to all members.<sup>7</sup> An essential element of the WTO's structure is a strong, rule-based dispute settlement system.<sup>8</sup>

Trade disputes are settled through the WTO's Dispute Settlement Body ("DSB"), which is composed of representatives from all WTO member states.<sup>9</sup> When a member state brings a complaint to the DSB, a dispute panel is created at the Body's next meeting unless the entire membership, including the complainant, decides not to pursue the matter.<sup>10</sup> Any member may bring a complaint against any other member.<sup>11</sup> The language of the WTO's Dispute Settlement

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5. ZHEN KUN WANG & L. ALAN WINTERS, *BREAKING THE SEATTLE DEADLOCK* 42 (2000); CONSTANTINE MICHALOPOULOS, *DEVELOPING COUNTRIES IN THE WTO* 3 (2001).

6. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

7. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 1, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Offering equal trade terms to all members is known as "Most Favored Nation" status.

8. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 354 (1999), 1869 U.N.T.S. 401, 405; 33 I.L.M. 1226, 1230 (1994) [hereinafter DSU].

9. WTO Agreement art. 4.3.

10. DSU art. 6.

11. *Id.* art. 1.

Understanding (“DSU”)<sup>12</sup> provides an opportunity for other member states to sign onto complaints.<sup>13</sup> Once a Dispute Settlement Panel (“panel”) is created, an adjudicatory process is triggered in which both parties must participate.<sup>14</sup> Consultation is attempted first to try to solve the problem without formal arbitration.<sup>15</sup> If this step fails, an ad hoc panel of three judges is created that hears formal arguments from both parties.<sup>16</sup> The panel reports its findings and recommendations to the full DSB.<sup>17</sup> If the losing country objects to the findings of the panel, it can appeal a question of “law” to the permanent Appellate Body (“AB”).<sup>18</sup> If a losing state refuses to bring its trade practices into compliance with WTO obligations, the winning state may take retaliatory measures in the form of trade sanctions.<sup>19</sup> The DSU limits the form and scope of retaliations because the goal of dispute settlement is to support and maintain the integrity of the trading regime.<sup>20</sup> Since retaliation leaves both parties worse off (through increased trade barriers), the WTO strongly favors finding a mutually satisfactory solution to a dispute. The highly structured neutral arbitration process is central to members’ support of the dispute settlement system.

#### *A. History of International Trade Dispute Settlement*

The first international trade dispute settlement system, developed under the General Agreement on Trade and Tariffs (“GATT”), was signed in 1947.<sup>21</sup> The GATT began with twenty-three signatories, in which countries made 45,000 tariff concessions, affecting one-fifth (\$10 billion) of the world’s total trade.<sup>22</sup> Under GATT, the predecessor to the WTO, countries adjudicated disputes in an ad hoc manner.<sup>23</sup> Members could block the effective resolution of disputes through a variety of foot-dragging tactics, as well as outright refusals to participate in adjudication.<sup>24</sup> The lack of binding timelines or appellate procedures frustrated dispute settlement.<sup>25</sup> Losing parties could block adoption of the report documenting their violation and requiring corrective action.<sup>26</sup> This inefficient system

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12. The DSU is the agreement governing the structure and functioning of the DSB.

13. *Id.* art. 10.

14. *Id.* art. 4.3-22.6.

15. *Id.* art. 4.3.

16. *Id.* art. 8.

17. *Id.* art. 16.

18. *Id.* art. 17. The Appellate Body is staffed by seven judges, each serving four-year terms.

19. DSU art. 22.

20. ROBERT Z. LAWRENCE, *CRIMES & PUNISHMENTS?: RETALIATION UNDER THE WTO* (2003); DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM* 346 (2003).

21. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35-43 (2d ed. 1997).

22. JACKSON, *supra* note 21, at 74.

23. JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 122-24 (2000).

24. *Id.*

25. *Id.*

26. *Id.*

resulted in significant cheating. States continued using prohibited quotas, developed an array of new subsidies, and enacted retaliatory sanctions without approval from GATT.<sup>27</sup> Developing countries focused their energy on the creation of alternative forums and developed countries pursued bilateral agreements.<sup>28</sup> The failures of the GATT dispute settlement system set the stage for countries to later support the WTO's stronger rule-based system.

By the 1990s, it became increasingly apparent to member nations that GATT needed reforming.<sup>29</sup> In 1994, a meeting of the GATT contracting parties resulted in the formation of a new World Trade Organization, which included a reformed and much strengthened dispute settlement system.<sup>30</sup> Under the WTO regime, membership has grown to 149 countries,<sup>31</sup> trade barriers have been further reduced,<sup>32</sup> and enforcement has become more effective.<sup>33</sup> Trade under the WTO system now accounts for ninety-six percent of all world trade.<sup>34</sup>

The table below provides a rough sampling of the WTO's diverse membership. Together with the statistical data on the use of the dispute settlement system, it is a valuable reference point in an examination of the system.<sup>35</sup> The implications of having a large membership with widely varying ability to participate in a multi-lateral trading system will be discussed in the second part of this article.

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27. DUNKLEY, *supra* note 4, at 35; LAWRENCE, *supra* note 20, at 68-69 (noting examples of United States and European Community unilateralism and selective use of GATT); Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 44 (2005) (suggesting that the frustration countries felt over the blocking and delaying tactics of non-complying states led to evasion of the system through unilateral retaliation).

28. GARCIA, *supra* note 3, at 26-30.

29. JACKSON, *supra* note 21, at 69-73; DUNKLEY, *supra* note 4, at 102-03 (listing some of the common criticisms of the GATT).

30. WORLD TRADE ORG., A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 12-17 (2004); *see also* THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

31. WORLD TRADE ORG., UNDERSTANDING THE WTO 112 (3d ed. 2005) [hereinafter UNDERSTANDING THE WTO], available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf). As of December 2005, another thirty-three countries have obtained observer status. *Id.*

32. ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO 70-72 (2001).

33. JACKSON, *supra* note 21, at 341-45.

34. Progressive Policy Institute, WTO Members Account For 96 Percent of Trade, [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=108&subsecid=900003&contentid=253607](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecid=900003&contentid=253607) (last visited Mar. 11, 2006). Members of the WTO include twenty-three of the world's twenty-five largest economies, thirty-eight of the world's forty largest exporters, and twenty of the world's twenty-five most populous countries. *Id.*

35. *See also* Nohyoung Park, *Statistical Analysis of the WTO Dispute Settlement System (1995-2000)*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, *supra* note 30, at 531-53.

|                   | SMALL GNP                                  |                                                                 | MEDIUM GNP                                                                                                                                                                                                                         |                        | LARGE GNP         |                          |
|-------------------|--------------------------------------------|-----------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------|-------------------|--------------------------|
| SMALL POPULATION  | Nepal (LDC)                                | \$1,382/<br>\$5,803                                             | Iceland (IND)                                                                                                                                                                                                                      | \$29,749/<br>\$9,041   | Australia (IND)   | \$28,262/<br>\$485,640   |
|                   |                                            | 26,289p                                                         |                                                                                                                                                                                                                                    | 294p                   |                   | 20,092p                  |
|                   | Haiti (LDC)                                | \$1,623/<br>\$2,851                                             | South Africa (DEV)                                                                                                                                                                                                                 | \$10,152/<br>\$182,280 | Switzerland (IND) | \$30,008/<br>\$339,642   |
| 8,549p            |                                            | 45,323p                                                         |                                                                                                                                                                                                                                    | 7,175p                 |                   |                          |
| MEDIUM POPULATION | Dem. Rep. Congo (LDC)                      | \$621/<br>\$4,660                                               | Mexico (IND)                                                                                                                                                                                                                       | \$8,972/<br>\$374,729  | Japan (IND)       | \$26,937/<br>\$5,608,149 |
|                   |                                            | 56,079p                                                         |                                                                                                                                                                                                                                    | 106,385p               |                   | 127,914p                 |
|                   | Philippines (DEV)                          | \$4,171/<br>\$95,570                                            | S. Korea (IND)                                                                                                                                                                                                                     | \$17,161/<br>\$680,293 | Canada (IND)      | \$29,484/<br>\$741,060   |
| 82,809p           |                                            | 48,182p                                                         |                                                                                                                                                                                                                                    | 31,972p                |                   |                          |
| LARGE POPULATION  | Bangladesh (LDC)                           | \$1,695/<br>\$53,751                                            | Brazil (DEV)                                                                                                                                                                                                                       | \$7,752/<br>\$810,244  | USA (G2)          | \$35,749/<br>\$9,221,179 |
|                   |                                            | 152,593p                                                        |                                                                                                                                                                                                                                    | 182,798p               |                   | 300,038p                 |
|                   | Nigeria (DEV)                              | \$919/<br>\$32,953                                              | India (DEV)                                                                                                                                                                                                                        | \$2,681/<br>\$517,843  | China (DEV)       | \$4,577/<br>\$1,206,605  |
| 130,236p          |                                            | 1,096,917p                                                      |                                                                                                                                                                                                                                    | 1,322,273p             |                   |                          |
| KEY               | Country (development status) <sup>36</sup> | GDP per capita income <sup>37</sup> /<br>2002 GDP <sup>38</sup> | G2 – The European Community and the U.S.A. (16 countries).<br>IND – Other industrialized countries (27 countries).<br>DEV – Developing countries other than LDC (74 countries).<br>LDC – Least developed countries (31 countries). |                        |                   |                          |
|                   |                                            | Population in 2005 <sup>39</sup>                                |                                                                                                                                                                                                                                    |                        |                   |                          |

**Table 1. Representative sample of WTO members.** <sup>40</sup> This table provides an

36. Development status as determined by HENRIK HORN & PETROS C. MAVROIDIS, *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2004: SOME DESCRIPTIVE STATISTICS 3* (2006).

37. *EARTH TRENDS, INCOME AND POVERTY 2005*, at 3 (2005) [hereinafter *INCOME AND POVERTY*], available at [http://earthtrends.wri.org/pdf\\_library/data\\_tables/ecn3\\_2005.pdf](http://earthtrends.wri.org/pdf_library/data_tables/ecn3_2005.pdf).

38. "Gross Domestic Product, Constant 1995 Dollars is the sum of the value added by all producers in an economy. Data are expressed in millions of U.S. dollars. Currencies are converted to dollars using the International Monetary Fund's average official exchange rate for 2002. Gross domestic product estimates at purchaser values (market prices) include the value added in the agriculture, industry, and service sectors, plus taxes and minus subsidies not included in the final value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion of natural resources. To obtain comparable series of constant price data, the World Bank rescales GDP and value added by industrial origin to a common reference year, currently 1995. National accounts indicators for most developing countries are collected from national statistical organizations and central banks by visiting and resident World Bank missions. The data for high-income economies are obtained from the Organisation for Economic Cooperation and Development (OECD) data files (see the OECD's monthly Main Economic Indicators). The United Nations Statistics Division publishes detailed national accounts for UN member countries in National Accounts Statistics: Main Aggregates and Detailed Tables and updates in the Monthly Bulletin of Statistics." *EARTH TRENDS, ECONOMICS AND FINANCIAL FLOWS 3* (2005) [hereinafter *ECONOMICS AND FINANCIAL FLOWS*], available at [http://earthtrends.wri.org/pdf\\_library/data\\_tables/ecn1\\_2005.pdf](http://earthtrends.wri.org/pdf_library/data_tables/ecn1_2005.pdf).

39. Number is in thousands of people. Total Population refers to estimates and projections of de facto population as of July 1, 2005.

40. Data compiled from Earthtrends Data Tables, sources provided by the World Bank and

example of how it is difficult to neatly categorize countries, determine natural alliances, and ascertain economic interests. For instance, Nepal and Australia have similar size populations but drastically different GNP and GNP per capita. This table further illustrates the persistent economic inequality between countries.

While least developed countries are not utilizing the dispute settlement system at all, developing countries are bringing a significant number of violation claims. Henrik Horn and Petros Mavroidis have compiled data on the 311 cases heard by the DSB between 1995 and 2004.<sup>41</sup> They divided the WTO membership into four economic development groups and examined each group's use of the dispute settlement system. The G2,<sup>42</sup> IND,<sup>43</sup> and DEV<sup>44</sup> groups each brought about thirty percent of the complaints to the DSB. The G2 brought complaints equally against other G2, the IND, and the DEV groups. The IND and DEV groups both brought about forty percent more cases against G2 countries than against other IND or DEV countries.<sup>45</sup>

According to the United Nations Council on Trade and Development ("UNCTAD"), Developed Countries produce sixty-five percent of the global trade with the European Union producing thirty-eight percent and the United States producing ten percent. Developing Economies produce thirty-two percent of global trade with China contributing six percent. The Least Developed Countries produce just one percent of global trade.<sup>46</sup> While these UNCTAD categories do not align perfectly with the Horn and Mavroidis categories, the UNCTAD data helps draw a relationship between global share in trade and use of the dispute settlement system. The data illustrates that participation rates are high among all groups except the LDCs, and not in proportion to either percentage of global trade or population. The G2 produce almost fifty percent of world trade, but only bring thirty percent of the disputes before the WTO. By this metric, their participation appears low; however, looking at participation based on number of countries bringing claims (the G2 make up about ten percent of the total membership but bring thirty percent of the claims), the G2 participation appears high. This data does not address the many complaints that are settled through informal mediation, nor does it say anything about how often countries actually comply with trade obligations.<sup>47</sup> The main point to draw from this data is that developing countries are participating in the dispute settlement system.

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the United Nations Conference on Trade and Development. INCOME AND POVERTY, *supra* note 37; ECONOMICS AND FINANCIAL FLOWS, *supra* note 38.

41. There are a total of 856 bilateral complaints, counting complaints brought or joined by multiple countries. HORN & MAVROIDIS, *supra* note 36, at 5.

42. G2 includes the European Community and the United States (sixteen countries). *Id.* at 3.

43. IND includes other industrialized countries (twenty-seven countries). *Id.*

44. DEV includes developing countries other than least developed countries (seventy-four countries). *Id.* LDCs are least developed countries (thirty-one countries). *Id.*

45. *Id.* at 8.

46. United Nations Conference on Trade and Development, 3.2 Network of Exports by Group of Countries and Commodity Group, <http://stats.unctad.org/Handbook/TableViewer/tableView.aspx?ReportId=133> (last visited Mar. 18, 2006).

47. See *infra* Part II.

The question to ask is, given what the critics say about how biased the trade system is against developing countries, why do they participate?

*B. The Scope of Trade and Trade Negotiations*

The WTO covers both a greater quantity and variety of trade than did the GATT regime. The WTO currently has agreements covering goods,<sup>48</sup> services,<sup>49</sup> and intellectual property, with major negotiations occurring on an ongoing basis in all areas of trade.<sup>50</sup> Trade negotiations are complicated and dynamic, and contentious trade negotiations frequently revolve around the exchange of concessions.<sup>51</sup> Developing countries tend to be the most vocal about the lack of fairness in trade negotiations, complaining trade deals are often largely negotiated without their input.<sup>52</sup> Specifically, less formal, and often exclusive, meetings occur between a limited number of members, which frequently set the parameters of a deal prior to the issue being raised in the General Council. Such informal or exclusive meetings add another layer to the trade negotiation process.<sup>53</sup> It is important to discuss briefly those aspects of trade negotiations most relevant to understanding how they influence dispute settlement.

Trade concessions are developed during intensive meetings, called “rounds,” and are usually bundled together into a single agreement for approval by the entire membership.<sup>54</sup> This process allows countries to trade “losses” in one sector for “gains” in another. Because the talks are “multi-party,” a member may trade losses and gains between multiple countries and economic sectors. This centralization of negotiation brings diverse interests to the same forum and,

48. “Goods” include agreements on agriculture, health regulations for farm products (SPS), textiles and clothing, product standards (TBT), investment measures, anti-dumping measures, customs valuation methods, preshipment inspection, rules of origin, import licensing, subsidies and counter-measures, and safeguards.

49. “Services” include movement of natural persons, air transport, financial services, shipping, and telecommunications.

50. See World Trade Organization, The Sixth Ministerial Conference, [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/min05\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm) (last visited Mar. 11, 2006).

51. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 776 (2001).

52. In addition to all the formal meeting bodies, there are a number of “informal” negotiating bodies where most of the real work of the WTO takes place. These informal meetings can vary in size from all 148 Heads of Delegations to groups of two to three meeting with the chairperson of a subcommittee. The smaller informal meetings have raised cries of a need for transparency and inclusiveness. The most notorious of these informal meetings are known as the “Green Room” negotiations, named after the director-general’s conference room. Delegates complain about not having access to Green Room negotiations, so that by the time issues are raised in the General Council the parameters of an agreement are more or less set in stone. On the other hand, it is politically more difficult for delegates to make compromises and deals in the larger setting of the General Council. The official opinion is that a delicate balance must be maintained between the informal meetings, which accomplish a lot but exclude the majority of the members, and the meetings of the full membership, which are inclusive but less productive. See KENT JONES, WHO’S AFRAID OF THE WTO? 160-166 (2004); DILIP K. DAS, THE DOHA ROUND OF MULTILATERAL TRADE NEGOTIATIONS: ARDUOUS ISSUES AND STRATEGIC RESPONSES 18-20 (2005).

53. HODA, *supra* note 32.

54. DAS, *supra* note 52, at 3-4.

because tariff reductions are extended equally to all members, everyone enjoys the benefits of greater market access. Since the trade negotiation process is not open to the public, evidence of “trades” must be gathered circumstantially. For instance, during the Uruguay Round developing countries agreed to stop importing generic drugs and honor drug patents while developed countries agreed to adopt maximum agricultural tariffs on all products.<sup>55</sup> Since Uruguay, developing countries are increasingly taking a more active role in trade negotiations. The Uruguay Round convinced many developing countries that the foundation for an equitable trading regime is created in the negotiation process.<sup>56</sup> A strong dispute settlement system will be of no avail if trading rules are biased. For their part, developed countries continue to advance their own issues. The next section examines challenges for developing countries in enforcing trade obligations of other members.

### III. ENFORCEMENT OF TRADE OBLIGATIONS

While the dispute resolution system is highly structured and institutionalized, it lacks any independent enforcement rules. There are no prosecutors or police officers in the WTO. Rather, enforcement is structured as follows: if a violation has occurred, then the DSB will call for corrective measures, which in turn allows the harmed country to implement retaliatory tariffs and duties.<sup>57</sup> The fact that there are no independent enforcement rules affects the operation of the entire organization. Small and developing countries express concern about their ability to enforce trade obligations effectively against more powerful trading partners.<sup>58</sup> The WTO acknowledges that enforcement of concessions is a considerable problem for less developed countries.<sup>59</sup> Despite this problem, less developed countries agree to be bound by the dispute settlement system.

#### *A. Practical Participation in Enforcement*

Membership driven compliance can mean several things. First, a country can violate its trade commitments if the cost it imposes on other members indi-

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55. ALICE LANDAU, *THE INTERNATIONAL TRADING SYSTEM* 14 (2005); MICHALOPOULOS, *supra* note 5, at 129.

56. DAS, *supra* note 52, at 1-28.

57. WORLD TRADE ORG., *supra* note 30, at 74-86.

58. David Palmeter provides several examples of countries unable to enforce favorable rulings. “In *Bananas*, Ecuador was faced with the fact that shutting off imports of most goods from the EC would be highly detrimental to Ecuador.” PALMETER, *supra* note 20, at 360-61. Similarly, in a case won by Costa Rica, Palmeter describes: “[g]iven the disparity in the relative sizes of their economies, any action Costa Rica could have taken against the United States would have inflicted more pain on Costa Rica than on the United States. Had the situation been reversed, however, the United States undoubtedly could have taken action against Costa Rica that would have inflicted more pain on Costa Rica than on the United States.” *Id.*

59. UNDERSTANDING THE WTO, *supra* note 31, at 93.

vidually is less than the cost of an enforcement action.<sup>60</sup> This may result in “death-by-a-thousand-cuts” for a country with many trading partners who all “cheat” just a little. Second, countries may bring harassment-type claims.<sup>61</sup> Third, as Jenny Martinez notes, strong enforcement of the WTO regime might come at the cost of overriding prior national decisions about health and safety priorities or values.<sup>62</sup> A country may also choose non-compliance if the political costs of compliance are higher than the economic costs of sanctions that may be imposed by other members in retaliation for non-compliance.<sup>63</sup> Fourth, countries may buy their way out of compliance. For instance, a violation may hurt many countries, only one of which has the resource capacity to pursue a claim. The violating country may be able to cut a deal with the single capable country, leaving the remaining countries to suffer the harm of the violation with no recourse. Additionally, a country may choose not to enforce a DSB decision if the political gains of non-enforcement are larger than the economic gains of enforcement. Finally, even if a poor country wins before the DSB, the losing country’s compliance may not be forthcoming. The losing country may still be able to negotiate a compromise or may only superficially change its trade policy.

It appears unlikely that poor countries with small economies can ever exact effective remedies from big, rich countries. Countries that do not control a large share of a non-complying state’s exports will not be able to take effective individual action.<sup>64</sup> A less developed country that raises tariffs on essential goods is likely to harm the domestic population more than it harms the offending country. Raising tariffs on luxury goods is even less likely to have an economically significant impact on the offending country, especially if the offending country has a large share of the world market for a particular commodity. Countries without domestic production capacity are faced with the prospect of not being able to meet their citizens’ basic needs if they enact retaliatory measures. Despite these structural challenges, developing countries remain committed to a strong dispute settlement system, because an adverse ruling from the WTO is still the strongest compliance mechanism available to small countries.

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60. UNCTAD Secretariat, *Notes on Developments in the International Trading System for the Review under Conference Resolution 159(VI), Paragraph 14, and Board Decision 320(XXXI)* (extract), in *PAVED WITH GOOD INTENTIONS* 14-22 (Yash Tandon & Megan Allardice eds., 2004).

61. Robert Lawrence characterizes the *United States-FSC* case as such. He suggests that Europe brought the case against the United States in response to the United States’s victory in *EC-Beef/Hormones*. LAWRENCE, *supra* note 20, at 1-3, 88-89, 91-92.

62. Jenny Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 492 (1975). Developed countries especially express concern over the erosion of health and environmental standards, such as exploitative child labor and extinction of plants and animals.

63. See Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997); Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998); see also JONES, *supra* note 52, at 111-12.

64. PALMETER, *supra* note 20, at 360-61.

### B. Building Capacity

Under a rule-based enforcement regime, questions pertaining to fairness and accessibility arise. The huge financial costs and intellectual resources associated with bringing a claim can be insurmountable for less developed countries. Guaranteeing that less developed countries have access to the dispute settlement system on the same terms as economic giants does not mean that everyone has the same practical ability to participate. Without special assistance, less developed countries may not be able to take advantage of legal rights guaranteed to them as members of the institution. Without the ability to use the enforcement regime, the concessions exacted from developed countries during trade negotiations become meaningless. The WTO has created the Training and Technical Cooperation Institute and Advisory Centre on WTO Law (“ACWL”)<sup>65</sup> to address the concern that some members are unable to take advantage of available legal remedies due to inadequate domestic legal resources.

The WTO has devoted a great deal of institutional resources to investigating, holding meetings and training seminars, and establishing special committees to address the lack of capacity for full participation among less developed countries. However, many of the changes first demanded during the 1970s Tokyo Round have not occurred, and the symptoms of an unequal system persist.<sup>66</sup> Trade issues concerning textiles, agriculture, debt, international financing, and commodities have not been addressed to developing countries’ satisfaction.<sup>67</sup> For instance, developed countries’ tariffs on agricultural products from other developed countries are lower than tariffs on agricultural products from developing countries.<sup>68</sup>

## IV.

### STRUCTURE OF DISPUTE SETTLEMENT SYSTEM FOSTERS MEMBER SUPPORT

While arguably problematic, the decentralized enforcement structure of the dispute settlement system can be seen as key to the success of the current trading system. It is easy to understand why economically powerful countries, which dominate trade negotiations, would support a strong dispute settlement sys-

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65. The Training and Technical Cooperation Institute is run by the WTO Secretariat. UNDERSTANDING THE WTO, *supra* note 31, at 109. The ACWL, created by thirty-two WTO members, operates independently from the WTO. The ACWL has provided legal assistance in eighteen DSB cases and/or consultations since its creation in 2001. Advisory Centre on WTO Law, Quick Guide, [http://www.acwl.ch/e/quickguide\\_e.aspx#h](http://www.acwl.ch/e/quickguide_e.aspx#h) (last visited Mar. 11, 2006).

66. Agriculture and textiles still have the highest tariffs of any products, and less developed countries complain of unequal status and access during trade talks. Of the fifty counties identified by the United Nations as least developed, thirty-two are members of the WTO. World Trade Organization, Understanding the WTO: Least-Developed Countries, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Mar. 11, 2006). Eight other countries are in the accession process and two more have observer status. *Id.*

67. Miles Kahler & John Odell, *Developing Countries and the Global Trading System, in PAVED WITH GOOD INTENTIONS*, *supra* note 60, at 33.

68. DAS, *supra* note 52, at 147.

tem.<sup>69</sup> But it is not as immediately clear why less developed and smaller countries should support a strong system. After all, if negotiations favor developed countries and the dispute system is difficult to access, it would appear that small countries would have little reason to come back to the table.

### A. Elements of an Effective System

The institutional structure of a dispute settlement system determines how effective the system is. An effective system, which adheres to its institutional goals, is perceived as more legitimate. This process builds on itself, increasing the use, effectiveness, and legitimacy of the institution over time. Laurence Helfer and Anne-Marie Slaughter propose that one must measure the effectiveness of an institution against the stated and implicit function of that institution.<sup>70</sup> The closer an institution's behavior follows its stated function, then the more legitimate the institution will be. Article 3 of the DSU identifies the dispute settlement system as "a central element in providing security and predictability to the multilateral trading system" which "preserves the rights and obligations" of members by providing for "prompt settlement" of disputes.<sup>71</sup> Critics of the WTO say the dispute settlement system is a tool of powerful countries; an attempt to place the force of law behind their exploitative practices.<sup>72</sup>

To build support among members, DSB and AB decisions must adhere to institutional rules and the dispute settlement system must appear to conform to its explicit purposes. Helfer and Slaughter identify several sources of "judicial" legitimacy at the domestic level, including impartiality, principled and reasoned decision-making, continuity of court composition over time, consistency of judicial decisions over time, respect for the role of political institutions at the federal, state and local levels, and provision of a meaningful opportunity for litigants to be heard.<sup>73</sup> The appearance of these factors at the international level can help inform our understanding of international judicial effectiveness.

69. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 16-18, 52-54 (1981). Social control, according to Martin Shapiro, is one of the primary functions of a judiciary. Shapiro argues that social control manifests through the administration of a regime, lending legitimacy to its practices. Examples of this kind of social control are found in every empirical expansion and colonization. This explanation describes why dominant economies generally support a strong adjudicatory system in the WTO. Namely, the most developed countries dominate trade negotiations, creating a trading system that is beneficial to their respective interests.

70. Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 284 (1997).

71. DSU art. 3.

72. See, e.g., Greenpeace International, *Why Is the WTO a Problem?*, <http://www.greenpeace.org/international/campaigns/trade-and-the-environment/why-is-the-wto-a-problem> (last visited Mar. 11, 2006); Friends of the Earth Australia, *National Campaigns*, [http://www.foe.org.au/nc/nc\\_trade\\_wto.htm](http://www.foe.org.au/nc/nc_trade_wto.htm) (last visited Mar. 11, 2006); People & Planet, *Trade Justice Campaign*, <http://www.peopleandplanet.org/tradejustice/whyvote.php> (last visited Mar. 11, 2006); Social Conscience, *Free Trade, WTO, and Colonialization*, <http://www.socialconscience.com/articles/2003/wto/> (last visited Mar. 11, 2006).

73. Helfer & Slaughter, *supra* note 70, at 284.

### B. Evidence of Institutional Effectiveness

According to Helfer and Slaughter, international tribunals must rely on additional factors because they lack a “direct coercion mechanism to compel either appearance or compliance.”<sup>74</sup> These factors include (1) the immediate perceived interests of states involved in particular disputes in securing judicial settlements; (2) the institution’s legitimacy and the legitimacy of any particular judgment reached; and (3) the strength and importance of the international legal rules governing a specific dispute and the general force of normative obligations.<sup>75</sup> The degree to which the dispute settlement system evinces these factors should directly affect its perceived legitimacy.

**Perceived Self-Interest:** The WTO’s dispute settlement system is structured such that it is in each country’s self-interest to help make it effective and respected. Members benefit from maintaining good standing within the organization. A country’s perceived willingness to play by the rules increases its bargaining power in trade talks. States are aware of the importance of maintaining healthy long-term relations because they understand their trade prospects are integrally linked to their economic welfare. Countries believe that their future gains will be higher if the dispute settlement system has a high rate of compliance. States that lack the economic capacity to enforce compliance maintain a strong interest in encouraging the legitimacy of the institution because a decision from the DSB is the strongest tool available to them. Countries with small economies exert compliance pressure most effectively by appealing to powerful countries’ respect for rule of law.

**Legitimacy:** Less developed countries who feel that the WTO may not be taking their interests seriously have a stake in not questioning the legitimacy of the DSB and AB because their only hope of exacting compliance from powerful countries comes from the perceived legitimacy of the adjudicatory body.<sup>76</sup> These states want the dispute settlement system to have legitimacy because it is one of their only leverage tools. The losing country cannot challenge the legitimacy of the decision if it hopes to employ the dispute settlement system credibly in the future. For example, if a developed country uses the DSB to enforce patent compliance in a less developed country, it becomes difficult for the developed country to shirk compliance with a DSB decision on agricultural tariff obligations that favors the same less developed country. Economically powerful countries may have very different reasons for promoting legitimacy than less powerful states.<sup>77</sup> Large states may want the dispute settlement system to be

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74. *Id.* at 285.

75. *Id.*

76. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 558 (1993). Concerns over illegitimacy may play out differently, depending on which members are concerned.

77. Large states want the DSU to have legitimacy because they want access to LDC to extract natural resources and sell finished products. The argument stems from the idea that large states believe that they have enough power to structure trade deals so that they are never on the “losing”

perceived as legitimate because they want access to less developed countries to extract natural resources and sell finished products.<sup>78</sup>

**Strength and Compliance:** As long as large states have enough power to structure trade deals so that they are never on the “losing” end of a trade negotiation, the large states will have an interest in a strong compliance mechanism to lend credibility to retaliatory actions taken in response to violation of trade agreements. Any gains made by developing countries through trade talks can only be enforced through the pressure to comply with the ruling of the DSB/AB.

This analysis shows that the WTO dispute settlement system meets Helfer and Slaughter’s criteria, which helps explain why the DSB and AB are perceived as legitimate and why states abide by the decisions.

## V. CONCLUSION

The WTO altered multilateral trading practices forever by introducing a strong and important set of international legal rules. Its large membership and share of total global trade encourage members to reconcile trade disputes through structured proceedings. The perceived legitimacy of the dispute settlement system and the perceived self-interest of member states in the outcome of its decisions explain why WTO members adhere to DSB and AB holdings.

It is often difficult to ascertain exactly when and how questions of legitimacy matter in practice.<sup>79</sup> However, the interrelated processes of trade negotiations and dispute resolution at the WTO seem to strengthen each other’s perceived legitimacy. Fairness in one setting encourages cooperation and compromise in the other. This appears to be an important function of subcommittees established to address challenges facing less developed countries; this type of “good faith effort” by larger economies and by the organization as a whole, helps keep less developed countries involved in the organization. Most countries, developed and developing, will likely continue to participate in the dispute resolution process and lend it legitimacy by abiding its decisions. However, granting developing countries greater access to critical negotiation forums and addressing problems facing countries that are often outmatched in trade negotiations, may go a long way toward reducing the resentment and anger we see expressed in the form of protests.

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end of a trade negotiation. It is in their interest to have a strong compliance mechanism and a credible institution to lend credibility to retaliatory actions taken for violation of trade agreements. Small states (measured by GNP) want the DSU to have legitimacy because it is one of their only leverage tools and any gains made through trade talks can only be enforced through the pressure to comply with the ruling of the institution.

78. See SHAPIRO, *supra* note 69; JACKSON, *supra* note 21, at 6-9, 11-18.

79. Caron, *supra* note 76, at 558.

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Shoaib Ghias

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# International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body

By  
Shoaib A. Ghias\*

## I. INTRODUCTION

In the past twelve years, the World Trade Organization (WTO)<sup>2</sup> has come to epitomize globalization (and its discontents)<sup>3</sup> as a cornerstone of the “new world order.”<sup>4</sup> The WTO has also led to increasing judicialization of politics<sup>5</sup> in international trade, since the Dispute Settlement Body (DSB) of the WTO has the power to issue binding reports that are generally respected by member states. This article shows how dispute resolution in the WTO is shaping and making international trade law and policy.

The WTO is the successor to the General Agreement on Tariffs and Trade (GATT),<sup>6</sup> an international treaty regulating trade relations since 1947. The fundamental aim of GATT was to promote liberalization of international trade by reducing protectionist measures.<sup>7</sup> The WTO expands on the legacy of GATT while remaining committed to the fundamental aim of trade liberalization.<sup>8</sup> The

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\* Ph.D. student, Jurisprudence & Social Policy Program, Boalt Hall School of Law, University of California, Berkeley. I should like to thank David D. Caron, Martin M. Shapiro, Malcolm M. Feeley, Gordon Silverstein, Richard M. Buxbaum, Rebecca J. Wright, Jennifer R. Landsidle, and Khalid Kadir for their comments and feedback. I would also like to thank Brad R. Roth and Aleem A. Ghias who have been a constant source of inspiration and encouragement. I am alone responsible for all the errors in this work.

2. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

3. For a critical assessment of WTO, see RICHARD PEET, *THE UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO* 146-99 (2003).

4. See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183 (1997).

5. See generally ON LAW, POLITICS, AND JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002).

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

7. JEFF WAICYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* 31 (2002).

8. Whereas GATT only regulated barriers on trades of goods, WTO and its agreements regu-

DSB is the institution that governs how these rules are enforced. It consists of WTO member states and appoints ad hoc Panels to review cases. Appeals to the Panels' reports can be taken to the standing Appellate Body, an institutionally independent organ with permanent members that functions like an appellate court. This article examines the jurisprudence of the Appellate Body from the perspective of public law theory in political science.

The public law model states, in brief, that economic liberalization not only requires rules governing economic exchange (such as multilateral trade agreements), but also institutions (such as courts) governing how rules are enforced. However, once courts are established to govern economic exchange, they tend to expand their competence to political and social policy. Courts first assert judicial independence and embed claims to broad judicial powers in relatively uncontroversial decisions. Later, they rely on the precedential value of these decisions to expand their control to areas beyond economic exchange. In this way, the courts redefine the terms of the original agreement that they were designed to uphold. Political scientists have used this theoretical framework to explain the evolution of domestic (for example the U.S. Supreme Court) and quasi-international (for example the European Court of Justice) judicial institutions.<sup>9</sup> In this article, I explain how this model can be extended to a truly international "judicial" institution, the WTO's Appellate Body. The thesis of this article is that the Appellate Body has followed the process predicted by public law theory by using its institutional independence to develop doctrine that has spilled over to political and social policy areas.

The article is organized as follows. Section II outlines the contours of public law theory in political science used to explain the behavior of courts. Section III describes the institutional structure of dispute resolution by the WTO, in particular the Appellate Body, which is the focus of this study. Section IV applies public law theory to describe and explain the behavior of the Appellate Body. This section presents the main claim of the article and argues that the Appellate Body has used its institutional independence to expand its influence over the political and social policies of member states in three steps. First, by incorporating the Vienna Convention into its jurisprudence, the Appellate Body declared that the general principles of international law are applicable to disputes involving WTO law. Second, relying on this jurisprudence and an expansive reading of the preface to the WTO Agreement, the Appellate Body incorporated environmental policy concerns into WTO dispute settlement. Third, by asserting the discretion-

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late trade in services, and in traded inventions, creations and designs (intellectual property). See WORLD TRADE ORGANIZATION, INFORMATION AND MEDIA RELATIONS DIVISION, UNDERSTANDING THE WTO (3d ed. 2005), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_text\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf) [hereinafter UNDERSTANDING THE WTO].

9. Gordon Silverstein, *Globalization and the rule of law: "A machine that runs of itself?"*, 1 INT'L J. CONST. L. 3, 427 (2003); see also Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 4, 803 (1989).

ary power to accept amicus briefs, the Appellate Body brought “civil society”<sup>10</sup> concerns into the WTO dispute resolution process. This section also describes the measures member states are taking to control the Appellate Body and explains how effective they can be. Section V concludes with the projection that the Appellate Body will continue, albeit cautiously, to expand and consolidate its influence over political and social aspects of international trade.

## II. PUBLIC LAW THEORY OF COURTS

In this article, I use the notion of “theory” offered by David Caron in this volume. The article primarily offers a framework for *understanding*<sup>11</sup> the phenomenon of expansion of judicial competency by the Appellate Body. I do not seek to question the wisdom of WTO law or policy, whether made by treaty negotiation or through dispute resolution. My aim is to make objective observations, in the tradition of positive political theory, that help us in understanding the nature and role of dispute resolution by the WTO. The theoretical framework I rely on holds that courts achieve judicial independence, by virtue of their ability to uphold credible commitments, in order to support economic growth. But courts use this independence not only to uphold credible commitments, but also to engage in judicial lawmaking. And judicial lawmaking finally spills over from economic exchange to social and political arenas.

### *A. Credible Commitments and Judicial Independence*

Credible commitments—that is *reliable* rules governing economic exchange—are considered necessary for economic growth.<sup>12</sup> Therefore, a critical political factor underpinning economic growth and development of markets is the degree to which the regime is committed to not simply the rules governing economic exchange, but also the institutions governing how these rules are enforced. Courts are unique institutions that can enforce the rules of economic exchange by claiming institutional independence, and thereby support economic growth. This independence is not challenged; in fact it is often encouraged by political powers because economic growth rests in part on the independent judiciary. For example, dispute resolution under GATT was not very efficient in governing the rules of economic exchange. The losing party could refuse to adopt the report of the dispute resolution panel.<sup>13</sup> Therefore, the WTO provided

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10. The term civil society, in the context of international trade, means non-governmental, non-profit making organizations, networks and voluntary associations focusing on influencing the policy of international governmental institutions. See Glossary of EU Jargon, [http://www.lgib.gov.uk/european\\_work/glossary.html](http://www.lgib.gov.uk/european_work/glossary.html).

11. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT'L L* 401 (2006).

12. See North & Weingast, *supra* note 9.

13. See JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 122-23 (2000).

for binding dispute resolution at the panel level and an independent appellate body for the purpose of “providing security and predictability to the multilateral trading system.”<sup>14</sup>

### *B. Judicial Independence and Judicial Lawmaking*

Courts use their independence not only to uphold credible commitments, but also to engage in judicial lawmaking. The notion of judicial lawmaking is often cast off by lawyers. Martin Shapiro points out that lawyers see adjudication as “(1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned a legal right and the other found wrong.”<sup>15</sup> This conception of adjudication is mirrored in literature published by the WTO, which describes dispute settlement in the WTO as follows:

Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.<sup>16</sup>

However, as Alec Stone Sweet argues, courts not only uphold credible commitments, they do a great deal of policy making.<sup>17</sup> In the process of adjudication, courts not only resolve a dispute, they also “enact elements of the normative structure.”<sup>18</sup> Both of these activities involve significant rule-making. First, courts make rules that are “concrete, particular, and retrospective.”<sup>19</sup> For instance, they resolve the dispute between two parties about a contract. Second, in justifying their decision—giving a normative basis for or against a particular act—they make rules that are “abstract, general, and prospective.”<sup>20</sup>

It is not possible to ignore the existence of judicial choice and thus judicial lawmaking in either theory or practice.<sup>21</sup> But the abstract, general, and prospective rule-making raises the issue of the legitimacy of the court. From the perspective of the disputing parties, “the exact content of the rules governing the dispute could not have been ascertained at the time the dispute erupted.”<sup>22</sup> The perception of the court’s neutrality erodes as its capacity to make rules is revealed. The court can mitigate but can never permanently resolve this problem.

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14. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 3.2 [hereinafter DSU].

15. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS I (1981).

16. See UNDERSTANDING THE WTO, *supra* note 8, at 10.

17. Alec Stone Sweet, *Judicialization and the Construction of Governance*, in ON LAW, POLITICS, AND JUDICIALIZATION 63, 64-5 (Martin Shapiro & Alec Stone Sweet eds., 2002).

18. *Id.*

19. *Id.*

20. *Id.*

21. Martin Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism and Stare Decisis?*, 2 LAW IN TRANSITION Q. 134, 155 (1965).

22. Sweet, *supra* note 17.

Courts can portray adjudication as a “deliberation about the precise relationship of abstract rules to a concrete dispute, portraying [their] decision as a record of these deliberations.”<sup>23</sup> In this way, they portray rule-making as a by-product of adjudication rather than an outcome that they desire in and of itself.

In other words, courts reconsecrate the contract and re-enact the normative structure. At this stage, courts can take either a conservative or an activist path. If the courts select a conservative path, they can fashion a “partial victory for each disputant and [appeal] to rules whose prior existence is relatively unquestioned.”<sup>24</sup> In this way, they reinforce the “existing structure while clarifying its domain of relevance and application.”<sup>25</sup> On the other hand, if the courts take an activist path, they can declare “a clear winner and loser while revising an existing rule or crafting a new one.”<sup>26</sup> In this way, they reshape the “normative structure, expanding its domain.”<sup>27</sup>

However, in order for this process to work, the disputing parties must consider that they are better off in a world with adjudication than they would be in a world without adjudication. In addition, courts must consider that their decisions have some authoritative value as precedent. If these conditions are fulfilled, courts will “inexorably become powerful mechanisms of political change,” and exchange between conflicting parties will inevitably be placed in the “shadow” of judicial lawmaking.<sup>28</sup>

### *C. Judicial Lawmaking and Social Control*

Judicial lawmaking does not remain limited to the enforcement of contracts. It spills over to social and political arenas. As Shapiro argues, courts also play the role of “social control.” When two parties go to a third who is an officer, they are not going to a disinterested third. “Instead, they are introducing a third interest.”<sup>29</sup> When courts are subordinated by a sovereign, social control takes the form of enforcing the sovereign’s will in the adjudication of disputes. However, when courts are institutionally independent, they acquire a will of their own. Gordon Silverstein describes this almost mechanistic spill over of judicial power from economic liberalization to social and political areas in three steps:

First, judges will embed claims to judicial authority, making it increasingly difficult for the government to reverse their rulings. Second, judges will identify and employ implied powers (and implied restrictions) inferred from explicit powers and prohibitions. And third, because of the nature of legal reasoning, doctrine developed in one arena will not be easily limited to that arena and thus will overlap with other areas. Therefore doctrine needed to assure economic goals, particularly

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. SHAPIRO, *supra* note 15, at 18.

economic liberalization, will spill over to govern cases in the political and social realms as well.<sup>30</sup>

### III.

#### UNDERSTANDING THE DISPUTE SETTLEMENT UNDERSTANDING

This section first traces the historical development of dispute resolution under GATT, and describes the Dispute Settlement Understanding (DSU) adopted by the Uruguay Round in 1994 and subsequent attempts at revising the agreement. The section then focuses on the institutional structure of WTO panel and appellate review, and sets the background for a political analysis in the subsequent section.

##### *A. Background and History*

GATT, the predecessor of the WTO, had a mechanism of non-binding arbitration for resolution of disputes. Under the GATT dispute resolution system, a member state could request a Panel to be established for resolving a dispute with another state. The report of the Panel could only be adopted, however, by a consensus of the GATT Contracting Parties. This meant that the party losing the case had the power to effectively block the dispute resolution process.<sup>31</sup> In addition, there was no timetable for the resolution of disputes and some cases dragged on for long periods without any conclusion. In the absence of an effective system for the settlement of disputes, the rules-based system of GATT was proving less successful than desired because the rules could not be enforced. In order to address these concerns, the Uruguay Round adopted the DSU at the formation of the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO member states, generally represented by ambassadors or the equivalent.<sup>32</sup> Emphasizing the importance of the rule of law, the DSU was designed to make the trading system more secure and predictable. The DSU sets up clearly defined procedure for dispute resolution, including review by a three-member Panel,<sup>33</sup> a timetable for completion of the case,<sup>34</sup> and the opportunity to appeal the Panel's decision.<sup>35</sup> The final report can also be rejected if all members of the DSB, including the representative of the losing state, vote against it.<sup>36</sup>

The Uruguay Round also included a ministerial decision for a complete review of the rules and procedures of DSU after four years of entry into force of the WTO Agreement. The decision further stated that the Ministers would "take

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30. Silverstein, *supra* note 9, at 430.

31. JACKSON, *supra* note 13.

32. DSU art. 2.1.

33. DSU art. 8.

34. DSU art. 20.

35. DSU art. 17.

36. DSU arts. 16.4, 17.14.

a decision on the occasion of [their] first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.”<sup>37</sup> Members decided to complete the review by January 1, 1999 (later extended to January 31, 1999). But the review yielded no agreement. At the Doha Ministerial Conference in November 2001, member states once again decided to improve and clarify the DSU. The ministers agreed that new negotiations should be completed by no later than May 2003.<sup>38</sup> The negotiations on the DSU took place in special sessions beginning in March 2003. In July 2003, the General Council agreed to extend the special session’s timeframe by one year (up to May 2004) to give the DSB special session more time to conclude its work. The special session has continued to meet beyond the May 2004 deadline without reaching any agreement. The inability to reach any agreement highlights the structural constraints in the evolution of the WTO. Since the WTO Agreement, including the DSU, consists of multilateral treaties that create international legal obligations, it can only be modified through the painstaking process of treaty negotiation and ratification. The consent of all signatory parties is thus required to make any change. Given the vast membership of the WTO,<sup>39</sup> and the varied interests among member states, gaining the consent of all parties on any issue is a daunting task. Current negotiations have focused, *inter alia*, on procedures for accepting amicus briefs, and the mechanism for adopting Panel and Appellate Body reports by the DSB.<sup>40</sup>

### B. Panel Review

The DSB has jurisdiction over any dispute arising out of the WTO Agreement. If a member state determines that another member state is not complying with its WTO obligations, for example, by imposing tariffs or other trade restrictions, the aggrieved member state can bring the dispute to the DSB. The disputing parties are given up to sixty days to resolve the dispute through consultation.<sup>41</sup> If the parties fail to reach a resolution by diplomatic means at the end of this period, the DSB appoints a Panel of three (or in some cases five) arbitrators to review the case and issue a report.<sup>42</sup> The report of the Panel is then adopted

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37. Uruguay Round Agreement: Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, [http://www.wto.org/english/docs\\_e/legal\\_e/53-ddsu.pdf](http://www.wto.org/english/docs_e/legal_e/53-ddsu.pdf).

38. World Trade Organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, art. 30.

39. With the recent accession of Saudi Arabia to the WTO, the number of member countries of the WTO has risen to 149. See General Council, Welcoming address by the Director-General to the Kingdom of Saudi Arabia, Nov. 11, 2005, [http://www.wto.org/english/news\\_e/news05\\_e/stat\\_lamy\\_11nov05\\_e.htm](http://www.wto.org/english/news_e/news05_e/stat_lamy_11nov05_e.htm) (last visited Mar. 18, 2006). For a complete list of WTO member states (not including Saudi Arabia), see UNDERSTANDING THE WTO, *supra* note 8, at 116.

40. Special Session of the Dispute Settlement Body, Minutes of Meeting, TN/DS/M/27, Doc. No. (05-3436) (Jul. 15, 2005).

41. DSU art. 4.7.

42. DSU art. 8.

by the DSB, unless there is a consensus against adopting it.<sup>43</sup> Officially the job of the Panel is to give recommendations, but because of the high threshold for rejecting a Panel's report (unanimity of members, including the losing state), the reports are extremely difficult to overturn. However, the Panel's report can be appealed in the Appellate Body.

### *C. Appellate Review*

Either party can appeal the report of the Panel to the Appellate Body. The appeals can only be based on the Panel's application of WTO law to the case in controversy, and not a reevaluation of the facts of the case.<sup>44</sup> The Appellate Body consists of seven permanent members, appointed for four-year terms, which are renewable once.<sup>45</sup> In this way an Appellate Body member may have a fixed appointment of up to 8 years, as opposed to Panel members, who are appointed ad hoc for each dispute. The length of the appointment of the Appellate Body members has important ramifications for WTO jurisprudence, as will be discussed later. The Appellate Body members must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government."<sup>46</sup> They have come from a variety of backgrounds, and include retired government officials and judges, international law academics, international lawyers, international courts and tribunals' judges, et cetera.<sup>47</sup> Most of them have had a significant connection to academia and national or international judicial institutions.

The remainder of this article will focus on the role of the Appellate Body in developing WTO jurisprudence. As I will argue, the Appellate Body is guided by a particular set of economic, political and social policy preferences, as opposed to only WTO law and policy that is negotiated by member states.

## IV.

### A PUBLIC LAW ANALYSIS OF WTO DISPUTE RESOLUTION BODY

#### *A. Preconditions for Judicial Independence*

As discussed earlier, in order for courts to become mechanisms for political and social change, two preconditions must be fulfilled. First, the disputing parties must consider that a regime of adjudication is useful for their long term interests. A look at the compliance record of member states to dispute resolution shows that this condition is met. Secondly, courts must consider that their deci-

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43. DSU art. 16.4.

44. DSU art. 17.6.

45. DSU art. 17.2.

46. UNDERSTANDING THE WTO, *supra* note 8, at 61.

47. For a complete list of Appellate Body members, past and present, including their biographies, see WTO Dispute Settlement: Appellate Body Members, [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descr\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descr_e.htm) (last visited Mar. 18, 2006).

sions have some authoritative value as precedent. An analysis of “collegiality” in the Appellate Body’s working procedures along with the self-consciousness of its members portrays the extent to which its members regard the precedential value of its reports.

### 1. Collegiality

If we examine the DSU, it appears that while the Panels and Appellate Body were designed to function as conflict resolvers in a court-like way, the DSU deliberately stopped short of creating a court *per se*. The dispute resolution institutions of WTO lack some fundamental and conspicuous markers of the judiciary. For example, the DSU creates a “Dispute Settlement Body,” not a “World Trade Court.” At the Panel level, the dispute is reviewed by “panelists” not “judges.” The Appellate Body, too, has “members” instead of “judges.” The panelists and the Appellate Body members issue “reports” instead of “opinions.” In addition, the Panels and Appellate Body have no fixed bench *per se*.

Despite this lack of conspicuous signs of judicial institutions, the Appellate Body has understood itself as a judicial institution from the very beginning. While the DSU gives detailed working procedures for the panel review,<sup>48</sup> the Appellate Body has fairly broad discretion to draw its own working procedures.<sup>49</sup> The DSU does specify some details, however, about the working of the Appellate Body. For example, Article 17(1) of the DSU explicitly states that the Appellate Body “shall be composed of seven persons, three of whom shall serve on any one case.” Soon after the Appellate Body came into force, its members exercised their authority to adopt a document called Working Procedures for the Appellate Review (Working Procedures), which included a section entitled “Collegiality.” This section states that:

- (1) To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure . . . .
- (3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members.<sup>50</sup>

When a case on appeal is under review by the acting division consisting of three members of the Appellate Body, the acting division convenes with the other four members of the Appellate Body at some point during the process in Geneva to discuss the case. The other four members are also kept informed based on a provision of the Working Procedures stating that “each Member shall receive all

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48. DSU art. 12 (“Panel Procedure, 1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.”).

49. DSU art. 17 (“Appellate Review. . . 9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.”).

50. Working Procedures for Appellate Review, WT/AB/WP/5, Jan. 4, 2005, art. 4 [hereinafter Working Procedures].

documents filed in an appeal.”<sup>51</sup> Collegiality has been understood by some commentators as a practice that “promotes consistency in decisions, and it offers the acting division members the benefit of their colleagues’ expertise.”<sup>52</sup> While celebrating the institutional virtues of the practice, these commentators have failed to notice or appreciate that collegiality seems to go against Article 17(1) of the DSU, which explicitly states that three of the seven Appellate Body members shall serve on any given case.<sup>53</sup> In essence, collegiality marks the move toward the judicial nature of the Appellate Body in a way in which DSU does not seem to imagine. It provides an institutional mechanism to develop the sort of camaraderie among the Appellate Body members that is necessary for a more activist jurisprudence. The Appellate Body’s composition as a rotating three-member appellate panel as envisioned by the DSU has been transformed into a seven-member fixed appellate bench.

The move toward a conscious judicialization of WTO dispute resolution is also evident in the descriptions of the Appellate Body’s role by its former members. As one member stated in a speech:

[T]he Appellate Body has been described as unflinching in its rulings. I believe this to be the case. We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe this also to have been the case.<sup>54</sup>

The focus on independence, impartiality, and objectivity of the institution moves the focus away from the institution as a dispute resolution mechanism. I shall argue that the Appellate Body, like other judicial institutions, has not been very objective. It has, however, managed to muster substantial independence, which it has used to promote a particular vision of trade liberalization.

## 2. Compliance Record

As Sweet argues, “[c]ompliance is a crucial test of the social legitimacy of consensual [dispute resolution].”<sup>55</sup> Compliance in WTO dispute resolution is consensual since the remedy of last resort in case of noncompliance is only the right to withhold trade concessions. Therefore, compliance would demonstrate that the disputing parties recognize the overall efficacy of the system. The compliance record of DSB/Appellate Body reports has been very successful, espe-

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51. *Id.* art. 4.2.

52. John H. Jackson, *The Role and Effectiveness of WTO Dispute Settlement Mechanism*, BROOKINGS TRADE FORUM 179, 188 (2000) [hereinafter *WTO Dispute Settlement Mechanism*].

53. Article 4.4 of the Working Procedures, however, addresses the concern of such an inconsistency as follows: “Nothing in these Rules shall be interpreted as interfering with a division’s full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 17 of the DSU.” Working Procedures, *supra* note 46.

54. Julio Lacarte (appellate body judge from 1995-2001), swearing in-ceremony for new Appellate Body members on Dec. 19, 2001, quoted in Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, in WTO JURISPRUDENCE AND POLICY: PRACTITIONERS’ PERSPECTIVES 13-57 (Marco C.E.J. Bronckers & Gary N. Horlick eds., 2004).

55. Sweet, *supra* note 17, at 63.

cially if compared to other international judicial institutions.<sup>56</sup> This record lends the Appellate Body a form of social legitimacy and emboldens it to assert independence and judicial lawmaking powers as described next.

### *B. Judicial Lawmaking*

Courts assert judicial independence not only to uphold credible commitments, but also to engage in judicial lawmaking. This judicial lawmaking often spills over from rules of economic exchange to social and political arenas.<sup>57</sup> In this subsection, I will describe the judicial lawmaking of the Appellate Body by explaining how it incorporated the Vienna Convention into its jurisprudence and declared that the general principles of international law are applicable to disputes involving WTO law. Then, I will discuss how the Appellate Body relied on this jurisprudence and an expansive reading of the preface to the WTO Agreement in *Shrimp-Turtle* to incorporate environmental policy concerns into WTO dispute settlement. Finally, I will show how the Appellate Body asserted the power to accept amicus briefs to bring civil society concerns into the WTO dispute resolution process. This section will also describe the steps member states are taking to control the Appellate Body and the effectiveness of those steps.

#### *1. Vienna Convention and Public International Law*

As Sweet argues, courts not only uphold credible commitments, they also enact elements of a normative order.<sup>58</sup> After embedding claims to judicial authority, courts identify and employ implied powers derived from explicit powers.<sup>59</sup> This section focuses on the Appellate Body's incorporation of parts of the Vienna Convention on the Law of Treaties (Vienna Convention) as applicable law in WTO disputes.<sup>60</sup> The Appellate Body has used the explicit power that it has under the DSU to use "customary rules of interpretation of public international law," to acquire implied power from the Vienna Convention. Article 3(2) of the DSU stipulates that:

The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

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56. See William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 1 (2005); but see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 44-45 (2005).

57. Silverstein, *supra* note 9, at 430.

58. Sweet, *supra* note 17, at 64-65.

59. Silverstein, *supra* note 9, at 430.

60. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

The 1996 Appellate Body report on *US – Standards for Reformulated and Conventional Gasoline (US-Gasoline)* said that the general rule of interpretation in Article 31(1) of the Vienna Convention “forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply . . . . That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”<sup>61</sup>

In *Japan – Taxes on Alcoholic Beverages (Alcoholic Beverages)*, the Appellate Body stated that “Article 31, as a whole, and Article 32 [of the Vienna Convention] are each highly pertinent to the present appeal.”<sup>62</sup> The report then produced Articles 31 and 32 *ad verbum*, and made specific references to Articles 31(1), 31(2), and 31(3)(b). The report did not, however, make any reference to Article 31(3)(c) perhaps because of finding no use for it in the case presented. Article 31(3)(c), which states that treaty interpretation shall take into account “any relevant rules of international law applicable in the relations between the parties,”<sup>63</sup> gives broad powers to the Panels and the Appellate Body. What is the reach of this article? Does this article open the door to considering non-WTO law (for example, human rights conventions, environmental law, etc.) in the interpretation of WTO Agreement by the Panels and the Appellate Body? Joel P. Trachtman, relying on the DSU provision that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,”<sup>64</sup> asserts that:

This language would be absurd if rights and obligations arising from other international law could be applied by the DSB. The standard panel terms of reference provided under article 7 provides for reference only to law arising from the WTO agreements. Finally, article 11 of the DSU specifies the function of panels to assess the applicability of and conformity with the covered agreements. With so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.<sup>65</sup>

However, it appears that now there is a general consensus that while the WTO Agreement constitutes *lex specialis*, it does not constitute a self-contained regime.<sup>66</sup> As John H. Jackson puts it:

The Appellate Body has made it clear that general principles of international law

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61. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), at 17.

62. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8, WT/DS10, WTDS/11/AB/R (95-0000) (Oct. 4, 1996), at 6 [hereinafter *Alcoholic Beverages*] (emphasis added).

63. Vienna Convention, *supra* note 61.

64. DSU art. 3.2.

65. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 2, 7 (1999).

66. MARIANO GARCIA-RUBIO, ON THE APPLICATION OF CUSTOMARY RULES OF STATE RESPONSIBILITY BY THE WTO DISPUTE SETTLEMENT ORGANS: A GENERAL INTERNATIONAL LAW PERSPECTIVE 67-73, 83 (2001); see also Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 4 (2002).

apply to the WTO agreements. Under GATT, there had been some question about this, and certain parties argued that the agreement was a separate regime. The Appellate Body explicitly ruled that it is not and has referred to international law in support of its ruling, particularly as embodied in the Vienna Convention on the Law of Treaties, on which the Appellate Body calls for questions of treaty interpretation.<sup>67</sup>

The above discussion shows that the doctrine of application of “customary rules of treaty interpretation of public international law”<sup>68</sup> found in DSU has been transformed into the application of “general principles of public international law.”<sup>69</sup> In other words, the Appellate Body, through its jurisprudence in *US-Gasoline* and *Alcoholic Beverages*, has succeeded in identifying and embedding implied powers with a significantly broad scope from explicit powers in the DSU.

## 2. Product/Process Distinction and Environmental Concerns

Environmental concerns are perhaps the most potent space for public criticism of free international trade.<sup>70</sup> The need to protect the environment has led to legislation in many states in recent years.<sup>71</sup> Under GATT, states could enforce import restrictions on *products* if they damaged the health and safety of their citizens, but import restrictions on products based on their *process* of production were considered illegal. This distinction between product and process in the legal treatment of import restriction prevented states—generally developed states—from placing trade restrictions on products that were manufactured in an environmentally unfriendly way—generally by undeveloped states. The product/process distinction was addressed by the GATT dispute resolution system in *United States – Restrictions on Imports of Tuna (Tuna-Dolphin)*.<sup>72</sup> While the GATT Panel recognized in *Tuna-Dolphin* that there is a “problem about how the environment and the process question relate and how process characteristics should be applied in this context,”<sup>73</sup> the Panel did not consider it appropriate to solve that problem, leaving it for the negotiators to address the question. In this way, the Panel took a conservative approach by relying on rules whose prior existence was relatively unquestioned and reinforced the existing structure while clarifying its domain of relevance. According to Jackson, “This raises the ques-

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67. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 196.

68. DSU art. 3.2

69. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 196; *See also* Vienna Convention, *supra* note 61, art. 31(3)(c).

70. Robert Howse & Donald Regan, *Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 *EUR. J. INT’L L.* 249, 250 (2000).

71. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 241 (7th ed. 1997).

72. Report of the Panel, *United States – Restrictions on Imports of Tuna from Mexico*, GATT B.I.S.D. (39th Supp.) at 155 (1993) (report not adopted by the GATT Contracting Parties) [hereinafter *Tuna-Dolphin*].

73. John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 *EUR. J. INT’L L.* 303, 305 (2000) [hereinafter *Comments on Shrimp/Turtle*].

tion of judicial activism or judicial restraint, in other words, the question of whether the Panel is the appropriate place to frame an appropriate rule to accommodate the opposing policy motives involved or, alternatively, whether this task more appropriately belongs to the negotiators.”<sup>74</sup> Given the lack of “judicial” authority and independence of panels under GATT, the Panel was well-advised to exercise restraint.

The WTO’s Appellate Body, however, changed the jurisprudence of international trade on the question of product/process distinction with respect to environmental concerns. The Appellate Body report in the 1998 case *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)* addressed this issue.<sup>75</sup> The WTO Panel had followed the GATT Panel’s report and argued that environmental concerns could not supersede trade policies under the WTO Agreement. The Appellate Body reversed this view. As discussed earlier, the Appellate Body had asserted in *Alcoholic Beverages* that Article 31 of the Vienna Convention applied as a whole in the interpretation of treaties under WTO Agreement, including Article 31(3)(c) that provided for using “any relevant principles of international law applicable in the relations between the parties.” If any doubt remained after *Alcoholic Beverages* as to the incorporation of Article 31(3)(c), that doubt was laid to rest in *Shrimp-Turtle*. In *Shrimp-Turtle*, the Appellate Body used Article 31(3)(c) to argue that “our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.”<sup>76</sup> The Appellate Body, then, relying on the preamble to the WTO Agreement and a series of non-WTO international treaties and declarations, determined that the WTO dispute settlement process must take into consideration policies other than trade liberalization. Jackson argues that the *Shrimp-Turtle* decision was probably the most important case in WTO jurisprudence, and describes his reaction to it as follows:

On this point, many observers believe that the Appellate Body rose to a high standard; some, however, have faulted the Appellate Body as perhaps a little too innovative. Nevertheless, most legal systems of the world, national and international, have to struggle with the problem of balancing competing policy goals in contexts where each has considerable merit. The WTO system cannot escape that difficult position, and the Appellate Body has not sought to escape it.<sup>77</sup>

The Appellate Body, however, took an activist path when it could have taken a more conservative approach. Instead of applying rules whose prior existence was relatively unquestioned, as in *Tuna-Dolphin*, the Appellate Body revised existing rules and crafted new ones in *Shrimp-Turtle*. In this way, it reshaped the normative structure and expanded its domain. But Jackson justifies the Appellate Body’s approach as follows:

At the time of that case, it could be argued (and I have so argued) that the Panel

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74. *Id.*

75. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*].

76. *Id.* para. 158.

77. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 197.

took an appropriate approach [in *Tuna-Dolphin*]. But it is my belief . . . that if after ten years no progress has been made using other procedures, then there is an institutional argument that there should be more accommodation within the 'judicial process'.<sup>78</sup>

Jackson's argument, however, depends on the presumption that trade barriers by (developed) states to enforce environmental protection on other (developing) states are good policy.<sup>79</sup> While this notion may or may not be true (perhaps based on where you stand), it is different from the question whether the WTO Agreement provides an exception for such trade barriers. Moreover, the fact that the negotiators have not reached a decision means that there is a lack of consensus on these issues among member states, which is responsible for the inability to reach an understanding on the appropriate public policy. What qualifies the judicial bodies to make public policy? The text of the DSU is clear in saying that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>80</sup> The Appellate Body was designed to interpret WTO treaty provisions in the resolution of disputes. These treaty provisions were a result of painstaking negotiations between sovereign states about what policies best achieve trade liberalization (as they understand it), and what other policy exceptions should be allowed from trade liberalization. Policy considerations, whether about trade liberalization or other concerns, were not within the mandate of the Appellate Body. However, the Appellate Body has taken advantage of the fact that as long as member states think that the benefits of adjudication outweigh the costs, it can continue to enact policy considerations. In addition, the United States, which exercises relatively great influence in WTO negotiations, won the case. In Silverstein's words, "[h]aving won, however, the state had no incentive to reject or oppose the ruling, and, by accepting the ruling in the case at hand, it implicitly accepted and supported the doctrine and jurisprudence that came with that ruling."<sup>81</sup> In this way, the Appellate Body which is designed to uphold credible commitments (that is, the WTO Agreement) among member states has become a mechanism for social and political change, and the exchange between member states has been placed in the shadow of judicial lawmaking.

Jackson, nevertheless, recognizes the importance of *Shrimp-Turtle's* doctrinal implication.

[T]he Appellate Body ruled that there *may* be circumstances under which a country might prohibit the importation of goods based not on the product characteristics of those goods but on the process by which those goods were developed, harvested, or prepared for commerce—namely, prohibiting shrimp imports on the basis of whether shrimp harvesting resulted in deaths of an endangered species of

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78. Jackson, *Comments on Shrimp/Turtle*, *supra* note 73, at 305.

79. In *Tuna-Dolphin*, the United States (a developed state) was trying to impose its standards for the protection of dolphins on Mexico (a developing state). Similarly, in *Shrimp-Turtle*, the United States was trying to impose its standards for the protection of turtles on Pakistan, India, Malaysia, and Thailand (all developing states.)

80. DSU art. 3.2.

81. Silverstein, *supra* note 9, at 432.

turtles.<sup>82</sup>

This doctrine brings into question the entire product/process distinction. According to Jackson, the product/process distinction has been a bright-line barrier against abuse. If this distinction is abandoned, the “question then becomes: what other conditions could be addressed (such as minimum wage standards or gender discrimination) and what other process possibilities should we consider? One could think of thousands of them, and they could become serious obstacles for the trade policies we are trying to promote.”<sup>83</sup>

Other considerations that can be addressed if the product/process distinction is abandoned include child labor, slave labor, human rights, et cetera.<sup>84</sup> In summary, the *Shrimp-Turtle* case is an example of the Appellate Body seizing on the opportunity to identify and apply implied powers—not just trade liberalization—from explicit powers and explicit prohibitions. The developed state (that is, the United States) won the case, but in accepting the ruling it wanted, the United States lent legitimacy and authority to the expansive legal doctrine embedded in the case.

### 3. Amicus Briefs

Under the DSU, only WTO member states that have a conflict over the interpretation or application of a particular provision of the WTO Agreement can take a dispute to the DSB and submit briefs.<sup>85</sup> Members who are not directly involved in a particular dispute can become third-party participants if they show a substantial interest in the outcome of the case.<sup>86</sup> The DSU does not explicitly allow for any participation by NGOs or private individuals. The *Shrimp-Turtle* case, however, also laid the foundation for the participation of NGOs or private individuals in the WTO dispute settlement process by allowing them to submit amicus briefs. The Appellate Body said that based on the DSU:

[O]nly Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.<sup>87</sup>

This emphasis on the legal right of disputants and third parties, and the legal obligation of the panelists, was used to argue that accepting solicited or unsolicited submissions from NGOs was left to the Panel’s discretion.<sup>88</sup> The Panel’s origi-

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82. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 197.

83. Jackson, *Comments on Shrimp/Turtle*, *supra* note 73, at 306-7.

84. See Marceau, *supra* note 66.

85. UNDERSTANDING THE WTO, *supra* note 8, at 59.

86. DSU art. 10.

87. *Shrimp-Turtle*, *supra* note 75, para. 101.

88. It is interesting to see how the Appellate Body report exploits the Hohfeldian inconsistency in the DSU. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING* (1919).

nal position had been that amicus briefs could be accepted only if they were a part of a disputing party's submissions. The Appellate Body, however, said that the Panel held the discretionary power to accept (or reject) unsolicited amicus briefs even when they were submitted independently.<sup>89</sup> In a later case, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, the Appellate Body provided working procedures for submitting amicus briefs, though these working procedures were applicable only to the particular case.<sup>90</sup>

The issue of amicus briefs is yet another example of how the Appellate Body identified and employed implied powers inferred from explicit powers and prohibitions. Instead of upholding the Panel's position based on rules whose prior existence was relatively unquestioned, the Appellate Body crafted a new rule. The Appellate Body once again reconstructed the terms of the contract. Allowing amicus briefs from NGOs means that the Appellate Body is asserting the discretion to consider other policy considerations. While the Appellate Body relied on environmental policy considerations in *Shrimp-Turtle*, the *EC-Asbestos* case shows that doctrine developed in one arena (namely environmental law) spills over to other arenas (namely public health).

However, as Sweet argues, judicial rule-making raises the issue of the court's legitimacy. The perception of the court's neutrality is eroded as its capacity to make rules is revealed. The courts can mitigate but never really resolve this problem. The vociferous opposition of developing member states to amicus curiae procedures shows erosion of the Appellate Body's credibility.<sup>91</sup> In fact, "some [states] have called the situation created by the *amicus curiae* conflict an 'institutional crisis.'"<sup>92</sup> The Appellate Body has tried to mitigate these concerns by not accepting most of the amicus briefs submitted (while retaining the power to accept them at discretion). Nevertheless, it seems that the Appellate Body has also taken advantage of the lack of consensus against its inclusion of civil society concerns. In the review of the DSU during the Doha Round, the concerns of WTO member states on the question of amicus briefs can be summarized as follows:

Touching on an issue of intense interest to civil society, the European Union and the United States have proposed explicit recognition of the right of panels and the Appellate Body to accept unsolicited friend-of-the-court (*amicus curiae*) briefs, as they already do on an *ad hoc* basis. Most developing countries vigorously oppose this practice — and the two proposals — partly due to fears that well-

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89. *Shrimp-Turtle*, *supra* note 75, para. 110.

90. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

91. For a detailed analysis of the amicus brief procedure and political response to it from developing states, see C.L. Lim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85; see also Chakravarthi Raghavan, *Appellate Body Asserts Right to Receive Amicus Curiae Briefs*, THIRD WORLD NETWORK, Geneva, May 11, 2000, <http://www.twinside.org.sg/title/amicus.htm>; *WTO General Council Slaps Appellate Body on Amicus Briefs*, 4 BRIDGES WEEKLY TRADE NEWS DIGEST 45 (Nov. 28, 2000), <http://www.ictsd.org/html/weekly/story1.28-11-00.htm>.

92. Ehlermann, *supra* note 54, at 57.

endowed institutions in developed countries, including powerful business associations, would be most likely to be called upon for information and technical advice.<sup>93</sup>

Moreover, the developing countries know that most of the amicus briefs would be in favor of more health, safety, labor, and environmental limitations on them than presently exist under WTO law. They are not as much concerned about amicus briefs in principle, as they are concerned about how these briefs will adversely affect their trade interests.

#### 4. Future Directions: Enforcing Kyoto in WTO Dispute Settlement

It has been suggested that the European Union, relying on doctrine developed in *Shrimp-Turtle*, can enforce the Kyoto protocol using the DSB.<sup>94</sup> If this move toward a global rule of law works, countries such as the United States may find themselves having an increasing array of international obligations in WTO dispute settlement. For instance, “with the evolution of WTO case law, as exemplified by the *Shrimp-Turtle* decision, it is conceivable that a Kyoto Annex 1 country could claim that a border tax . . . is entitled to an environmental exception under GATT Article XX.”<sup>95</sup>

#### C. Controlling the Powers of the Appellate Body

So far, this article has described how the Appellate Body has expanded its powers beyond the WTO Agreement’s text and taken the role of economic and social policy-maker. Arguably, the Appellate Body sees itself as the institutional organ addressing civil society concerns and responding to critics of globalization. The Appellate Body has been able to take these steps because of the institutional structure of dispute settlement in WTO—Appellate Body decisions cannot be overruled by member states unless there is a negative consensus, which is almost impossible to achieve.

Expansion of judicial authority, however, does not always go unnoticed. For example, when the European Court of Justice expanded its power into the political and social sphere, the Maastricht Treaty tried to limit the court to enforcing only economic treaty provisions of the union. This approach nevertheless failed to completely control the European Court of Justice, which continues

93. *Review of the Dispute Settlement Understanding*, 1 DOHA ROUND BRIEFING SERIES, Feb. 2003, at 1. [http://www.wto.org/english/forums\\_e/ngo\\_e/iisd\\_disputesettlement\\_e.pdf](http://www.wto.org/english/forums_e/ngo_e/iisd_disputesettlement_e.pdf).

94. See Gary P. Sampson, *WTO Rules and Climate Change: The Need for Policy Coherence*, GLOBAL CLIMATE GOVERNANCE: INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES, <http://www.geic.or.jp/climgov/04.pdf>; see also W. Bradnee Chambers, *International Trade Law and the Kyoto Protocol: Potential Incompatibilities*, GLOBAL CLIMATE GOVERNANCE: INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES, <http://www.geic.or.jp/climgov/05.pdf>.

95. See United States Council for International Business, *WTO Rules and Procedures and Their Implication for the Kyoto Protocol: A Background Paper*, <http://www.uscib.org/index.asp?documentID=2323> (last visited Mar. 18, 2006).

to handle cases that implicate political and social policy.<sup>96</sup>

Reforming the DSU has become an important concern for many states. Developing states, on the one hand, seem to be concerned about developed states imposing their environmental and labor standards, and thereby affecting the competitive advantage of the developing states. Developed states, on the other hand, seem to be realizing that requiring developing states to internalize externalities is setting precedents that would come back to haunt them. There is an emerging sense that when the Appellate Body's decisions widen (or narrow) "the ability of member states to restrict trade in ways that go beyond the negotiated limits placed on the use of trade measures, they are not applying WTO law, but are legislating it."<sup>97</sup> Many suggestions have been made in ongoing negotiations to reform the Appellate Body. For example:

One of these suggestions is that the Director-General or a special standing committee of the Dispute Settlement Body (DSB) be empowered to step in and direct the contending WTO Members to settle their difference through bilateral negotiations, mediation, or arbitration by an outside party. Another recommendation is to set up a new blocking mechanism according to which at least one-third of the members of the DSB, representing at least one-quarter of the total trade among WTO Members, could oppose a panel or Appellate Body report, so that the report would be set aside.<sup>98</sup>

Whenever courts try to expand their power to political and social arenas, there is a possibility of backlash from political institutions.<sup>99</sup> The Appellate Body's response to the crisis created by amicus briefs shows that it is mindful of this risk. As a former Appellate Body member put it, "It seemed to me then – and even today – to be wise not to take the existence of such a compulsory system for granted, and guaranteed forever, but to contribute through each Appellate Body report to its steady consolidation and further development."<sup>100</sup> It is not likely that the Appellate Body is going to gain unbridled power over international trade law and policy; rather, it will slowly continue to consolidate and expand its influence as it engages in judicial lawmaking.

## V. CONCLUSION

This article uses public law theory in political science to analyze the WTO's dispute settlement system. Dispute resolution is considered important because of the need to add predictability and security to the international trading system. However, binding dispute resolution not only strengthens the system, it

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96. See Silverstein, *supra* note 9, at 432-36.

97. John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113, 114 (2003).

98. Ehlermann, *supra* note 54, at 53.

99. See Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883 (2003); see also Silverstein, *supra* note 9.

100. Ehlermann, *supra* note 54, at 16.

also remakes the system.<sup>101</sup> The WTO's Appellate Body is remaking international trade by moving into policy areas beyond the WTO Agreement. In this regard, the Appellate Body, an international "court," is following the same path that domestic and quasi-international courts tend to follow. The expanding judicial power of the Appellate Body, however, has created some risks for the institution. But the Appellate Body has remained largely successful in maintaining the perception of its importance in the multilateral world trading system, and to the extent that this perception has eroded, it has responded by judiciously exercising self-restraint. In this way, the Appellate Body has continued to expand its influence, taking further advantage of the fact that it is very difficult for WTO member states to renegotiate the DSU and change the institutional structure of the Appellate Body. It is expected that the Appellate Body will continue to consolidate and expand its control over the economic and social policy aspects of the WTO.

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101. This is the problem that Martin Shapiro describes as, 'If you buy a junk yard dog, you will occasionally get bitten.' See Martin Shapiro, "Deliberative," "Independent" *Technology v. Democratic Politics: Will the Globe Echo the E.U.?*, 68 *LAW & CONTEMP. PROBS.* 341, 356 (2005) ("One historical lesson, however, to which politicians repeatedly appear singularly blind is that the junk yard dog of judicial review, once unleashed, will likely have a much larger bite than anticipated.").

2006

## The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today

Durwood Riedel

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# The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?

By  
Durwood “Derry” Riedel\*

War Crimes Courts were established, not to right wrongs, as that is impossible, but to attempt to impose proper penalties upon proven wrongdoers. The evils of concentration camps and death marches cannot be dealt with by illegal methods. Our occupation policy will not tolerate perjured testimony in a War Crimes Court, or any Court. We do not want convictions at that price.<sup>2</sup>

To subject an enemy national to an unfair trial only outrages the enemy and hinders the reconciliation necessary to a peaceful world. We must insist that

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2. Memorandum from John K. V. Goff, Chief Judge for Upper Bavaria, to 770S War Crimes Group, APO 407, US Army, on Perjury Case against Adolf Kűfner and Karl Gautsch (Apr. 8, 1948), *microformed on* Nat’l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Microfilm Publication M1204 (16 Reels), United States v. Becker, Reel 12 [hereinafter Microfilm Publication 1204]. Three collections of primary sources were relied upon extensively in writing this article. The first are WWII-era documents collected in the aforementioned National Archives microfiche publications. These documents stem almost exclusively from U.S. Army officials involved in the war crimes prosecution program. Many of these documents were what lawyers would call “work product” – written, informally, for internal purposes and thus offer relatively uncensored thoughts and perspectives. The second source is the *Foreign Relations of the United States* series [hereinafter FRUS]. Within its volumes are collected diplomatic cables, communiqués, telegrams, etc., as well as other important U.S. government documents, such as internal memoranda and other papers which shed light on the inner workings of governments and allow one to look behind the curtain of diplomatic negotiations. The last source is Bradley F. Smith’s collection of U.S. government documents, transcripts of telephone conversations, and notes relating to the development of the U.S. war crimes prosecution program. All three collections offer easy access to primary sources otherwise effectively inaccessible to the general public. I attempt to cite extensively to primary sources when possible in order to allow the reader to evaluate the information for him or herself.

within the confines of our jurisdiction the highest standards of conduct be applied to the trials of war criminals and to all matters connected therewith.<sup>3</sup>

I.  
 INTRODUCTION

When students of international law think of the significance of World War II (WWII), they think first and foremost of the International Military Tribunal (IMT),<sup>4</sup> a/k/a the “Nuremberg Trial,” and the contemporaneous “Tokyo Trial.” Some might remember that U.S. authorities immediately after the conclusion of the Nuremberg Trial began a series of twelve trials of leading Nazis. But few students know that from 1945 until 1947, the U.S. Army tried 1,672 alleged German war criminals in 489 cases in front of U.S. military tribunals at the former Dachau Concentration Camp (the *Dachau* trials).<sup>5</sup>

In the wake of WWII, the U.S. government, within an international framework, prosecuted members of the armed forces of the Axis Powers and others in a four-tiered structure depicted in Table 1.

TABLE 1

|                             | Trial Admini-<br>strators        | Source<br>of<br>Juris-<br>diction | Number of<br>Cases | Class of<br>Defen-<br>dants                       | Years<br>of<br>Opera-<br>tion  | Initial<br>Sentences                                                                                     |
|-----------------------------|----------------------------------|-----------------------------------|--------------------|---------------------------------------------------|--------------------------------|----------------------------------------------------------------------------------------------------------|
| Nuremberg<br>Trial/IMT      | Allied<br>Powers                 | The<br>London<br>Agree-<br>ment   | One                | Twenty-<br>two top-<br>ranking<br>Nazi<br>leaders | Nov.<br>1945 –<br>Oct.<br>1946 | Twelve<br>executions,<br>three<br>acquittals,<br>seven<br>sentences of<br>imprison-<br>ment <sup>6</sup> |
| U.S.<br>Nuremberg<br>trials | Office of<br>Military<br>Govern- | Control<br>Council<br>Law         | Twelve             | 185 2nd-<br>tier Nazi<br>leaders                  | Oct.<br>1946 –<br>Apr.         | Twelve<br>executions,<br>eighty-eight                                                                    |

3. Memorandum from Lt. Col. Wade M. Fleischer, Chief, Int'l Affairs Branch, to the Judge Advocate, Perjury Charges Arising out of the Flossenburg Case 3-4 (Oct. 27, 1947), *microformed on Microfilm Publication 1204, supra* note 2, Reel 12.

4. So called, even though it was primarily civilian in nature. EARL F. ZIEMKE, *THE U.S. ARMY IN THE OCCUPATION OF GERMANY: 1944-1946*, at 394 n.65 (1975).

5. Legal and Judicial Affairs (Cumulative Review), OMGUS Report No. 38 (Sept. 1, 1947 – Aug. 31, 1948) (Aug. 1948), in OFFICE OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF STATE, PUBLICATION NO. 3556, *GERMANY, 1947-1949: THE STORY IN DOCUMENTS 118* (1950) [hereinafter OFFICE OF PUBLIC AFFAIRS].

6. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, OFFICIAL TEXT IN THE ENGLISH LANGUAGE, OFFICIAL DOCUMENTS 366-67 (1947) [hereinafter NUREMBERG].

|                                              |                                        |                            |                                                                                                              |                                               |                        |                                                                                                                                                           |
|----------------------------------------------|----------------------------------------|----------------------------|--------------------------------------------------------------------------------------------------------------|-----------------------------------------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                              | ment – U.S. (OMGUS)                    | No. 10 <sup>7</sup>        |                                                                                                              |                                               | 1949                   | acquittals, eight life sentences, seventy-seven sentences of imprisonment <sup>8</sup>                                                                    |
| U.S. Army Tribunals/<br><i>Dachau</i> trials | U.S. Forces – European Theater (USFET) | JCS 1023/10                | 3,887 (opened), 489 (tried), 3,029 (closed administratively), 369 (discontinued investigations) <sup>9</sup> | 1,672 low-ranking war criminals <sup>10</sup> | June 1944 – early 1948 | 426 death sentences, 256 acquittals, 199 life sentences, 530 sentences of five years or less, 261 sentences ranging from six to fifty years <sup>11</sup> |
| German courts/<br>denazification trials      | Federal Republic of Germany (FRG)      | Control Council Law No. 10 | unknown                                                                                                      | unknown                                       | unknown                | unknown                                                                                                                                                   |

This article will focus on the seemingly forgotten third level of the international war crimes prosecution effort, which accounted for the lion’s share of German war criminals tried by the United States after WWII.

The popular focus on the IMT as the expression of justice in the wake of WWII’s horrors has had a significant impact on contemporary thought. First, is the charge that the IMT and the International Criminal Tribunals for the Former

7. See *infra* APPENDIX 1.

8. Subsequent Nuremberg Proceedings, available at <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007074> (last visited Feb. 2, 2006).

9. LT. COL. C.E. STRAIGHT, JAGD, DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944 TO JULY 1948, 160, Appendix XVIII (1948).

10. Legal and Judicial Affairs (Cumulative Review), in OFFICE OF PUBLIC AFFAIRS, *supra* note 5; John Mendelsohn, *War Crimes Trials and Clemency in Germany and Japan*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952, at 226, 228 (Robert Wolfe ed., 1984). There is some disagreement about the exact numbers, see ROBERT SIGEL, IM INTERESSE DER GERECHTIGKEIT: DIE DACHAUER KRIEGSVERBRECHERPROZESSE 1945-1948, 38 (Campus Verlag 1992). Whatever the exact figures, this was a drop in the bucket of the overall judicial system created in the American zone of occupation. At its height, the judicial system consisted of 343 general, intermediate, and summary military government courts which had tried approximately 385,000 cases involving violations against the American occupation. LUCIUS D. CLAY, DECISION IN GERMANY 246 (1950).

11. STRAIGHT, *supra* note 9, Appendix XVIII. These are initial sentences, which often times were subsequently reduced.

Yugoslavia and Rwanda (ICTY and ICTR, respectively) are simply examples of “victor’s justice.”<sup>12</sup> In addition, a good deal of literature exists debating the merits of ad hoc international tribunals such as the ICTY and ICTR, permanent international tribunals such as the International Criminal Court (ICC), and hybrid international tribunals such as the Special Court for Sierra Leone.

This focus on the purely international level, however, risks overshadowing other potential avenues of punishment of international crimes such as national trials. One implicit and erroneous understanding of the successful operation of international tribunals is that only an extremely limited number of perpetrators, such as high level organizers and leaders, can be held accountable for crimes of vast magnitude. National tribunals are an explicit rejection of this notion as they have been used extensively to try international crimes. Their influence on the dispensing of international justice should not be relegated to the dustbin. In the instant case, American actors strongly influence the development of the IMT. In addition, the U.S. Army directive JCS 1023/10, which was the authorizing document for the *Dachau* trials, also served as the template for Control Council Law No. 10, one of the international agreements for the prosecution of war criminals.

The focus on international tribunals has created unnecessary problems in the dispensing of international justice as is exemplified by two contributors to this journal edition. The article by Laura Bingham entitled *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda* addresses the “Closing Strategy” of the ICTR.<sup>13</sup> Like most international tribunals, the ICTR has managed to prosecute only a relative handful of perpetrators of the Rwandan genocide. At the end of its existence, when it is obvious that many perpetrators have gone unpunished at the international level, the question becomes “now what?” The focus naturally has turned to the continuing prosecution of Rwandan genocide defendants at the national level.

Jennifer Landsidle, in her unpublished manuscript entitled *International Jurisdiction Over the Rwandan Conflict: the Costs and Benefits of Primacy*, addresses the relationship between international and national courts in prosecuting international crimes.<sup>14</sup> Specifically, she addresses the question of whether international courts should serve a complementary rather than primary function with respect to national tribunals. An understanding of national trials would benefit the discussions of prosecutions at the international level, and vice versa.

Part II of this article provides a brief numerical overview of war crimes

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12. Professor Martin Shapiro might well argue that this is a charge that can be leveled at all criminal trials due to the lack of defendants’ consent. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 6 (1981). He goes on to explain that most criminal defendants are likely to perceive supposedly neutral judges as seeking nothing more than to control them. *Id.* at 27.

13. 24 *Berkeley J. Int’l L.* 690 (2006).

14. (manuscript on file with author).

prosecution at the national level after WWII.<sup>15</sup> Part III outlines the development of the war crimes prosecution program (both within the international and U.S. contexts).<sup>16</sup> Part IV presents three war crimes prosecution case studies. Lastly, Part V distills lessons from the WWII war crimes prosecution program for possible application to the current operation of U.S. military commissions.

## II. A NUMERICAL OVERVIEW

In terms of the volume of war crimes cases, lesser known national tribunals conducted almost all of the trials in Germany and throughout Europe. Countries used three types of tribunals throughout the world: military, national and special tribunals. The following countries used military tribunals: Australia, Canada, China, France, the Netherlands, the United Kingdom and the United States.<sup>17</sup> Some countries employed the national judicial systems for the trial of war crimes committed on their territory: Austria, Belgium, Bulgaria, Denmark, France, Hungary, Italy, Norway, Romania and Yugoslavia.<sup>18</sup> Still others created special tribunals for this purpose: Czechoslovakia, Holland, Greece, Luxembourg and Poland.<sup>19</sup> In Europe, a total of 969 cases were tried, involving 3,470 defendants, which resulted in 952 death sentences, 613 acquittals and 1,905 prison sentences.<sup>20</sup>

Of special relevance to this article are the efforts by the other Allied powers to try German war criminals under their auspices. The Soviet Union, due to the extensive bloodshed which occurred on its soil, carried out the large majority of cases.

15. See also the fifteen volumes of the U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co., Inc. 1997), which covers war crimes trials from all the theaters of World War II [hereinafter LAW REPORTS].

16. This article does not describe exhaustively the history of the U.S. Army's war crimes prosecution program or the scandals that developed from it, such as the ones surrounding Ilse Koch, a/k/a "the Bitch of Buchenwald," and the Malmédy Massacre. See CLAY, *supra* note 10, at 253. For thorough treatments of these aspects, see generally FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946 – 1955 (1989); Sigel, *supra* note 10; William F. Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45 (1948); TOM BOWER, THE PLEDGE BETRAYED: AMERICAN AND BRITAIN AND THE DENAZIFICATION OF POSTWAR GERMANY (1982); JOSHUA M. GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR (2003).

17. *Id.*; U.N. WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 461-75 (His Majesty's Stationery Office 1948) [hereinafter UNITED NATIONS].

18. *Id.*

19. *Id.*

20. *Id.* at 515-18. In comparison, the Commission reported 1,024 cases in the Far East for the same time period, involving 2,794 accused and resulting in 685 death sentences, 1,694 sentences of imprisonment, and 415 acquittals. *Id.* Noteworthy is the fact that former Axis Power and allied countries also prosecuted war crimes. *Id.*

TABLE 2

|                              | Location            | Number of defendants | Sentences                                            |
|------------------------------|---------------------|----------------------|------------------------------------------------------|
| France <sup>21</sup>         | Rastatt             | 1,639                | unknown (many to five years of imprisonment or less) |
| Soviet <sup>22</sup> Union   | unknown             | 9,717                | unknown                                              |
| United Kingdom <sup>23</sup> | Hamburg & Brunswick | 749                  | unknown                                              |

By the end of the 1950s, the western Allied powers had released all of the convicted German war criminals in their custody.<sup>24</sup> Often, politically motivated large-scale reviews and reductions of the original sentences handed down by the war crimes tribunals made this phenomenon possible.<sup>25</sup>

The 489 cases tried by U.S. military tribunals consist of four distinct groups: “parent” concentration camp cases; subsequent concentration camp cases, which involved defendants tried after the main cases had been completed or involving satellite camps of the main concentration camps; “flyer” cases, which had to do with war crimes committed against downed Allied airmen primarily by German civilians and policemen; and miscellaneous cases involving war crimes such as the Malmédy Massacre of American prisoners of war by the Waffen-S.S., the *Hadamard Murder Factory* case and the *Skorzeny* case involving German soldiers fighting in American uniforms.<sup>26</sup>

21. Mendelsohn, *supra* note 10, at 254; UNITED NATIONS, *supra* note 17, at 515-18.

22. Another 3,815 individuals were being held in investigatory detention. GEORGE GINSBURGS, *MOSCOW’S ROAD TO NUREMBERG, THE SOVIET BACKGROUND TO THE TRIAL* 56 n.33 (1996). In comparison, at approximately the same time, the Soviet government stated that 1,847 Japanese convicted war criminals were serving sentences and another 971 were awaiting transfer to China to face war crimes charges there. *Id.* The statistics are silent as to the number of death sentences and acquittals handed out by Soviet tribunals. *Id.* Some interesting details on the extradition of war crimes suspects from U.S. to Soviet control are found in BOWER, *supra* note 16, at 218.

23. UNITED NATIONS, *supra* note 17, at 515. Interestingly enough, in 1946 the British had already tried 495 persons and were preparing to try another 3,913. *Id.*

24. Mendelsohn, *supra* note 10, at 254.

25. See generally Mendelsohn, *supra* note 10 (detailing the history of this aspect of the system); and BUSCHER, *supra* note 16, at 69-90 (detailing the history of this aspect of the system).

26. Mendelsohn, *supra* note 10, at 226-28; Introduction 2-3, *microformed on Microfilm Publication 1204*, *supra* note 2, Reel 1.

TABLE 3 – TYPES OF CASES

|                                     | Number of cases | Number of defendants |
|-------------------------------------|-----------------|----------------------|
| “Parent” Concentration Camp Cases   | Six             | 200                  |
| Subsequent Concentration Camp Cases | 250             | 800                  |
| “Flyer” Cases                       | 200             | 600                  |
| Miscellaneous Cases                 | unknown         | unknown              |

The first and fourth types of cases include the two most well-known scandals arising out of the *Dachau* trials, respectively: the sentence reduction for the “Bitch of Buchenwald” and the *Malmédy Massacre* trial. The *Flossenburg* case study in this article is of the first type, as well.

### III. THE INTERNATIONAL BACKDROP

The idea that Nazi war criminals would be put on trial was far from a foregone conclusion during the Second World War.<sup>27</sup> This uncertainty changed only with the signing of the London Agreement, at which the four Allied powers ratified the Charter for the IMT. The indecision on the question, and the resulting delay, had a fundamental impact on the eventual shape of war crimes prosecution efforts.

Various actors sought to influence the “policy for dealing with the major Nazi war criminals[which] was both a political and a legal question.”<sup>28</sup> On one end of the spectrum, the Soviet government and many governments-in-exile of countries occupied by the Nazis advocated trials and other means of punishment for war criminals.<sup>29</sup> On the other end of the spectrum, the British and U.S. governments were very reluctant to take any definitive position on what, if anything, should be done with war criminals.<sup>30</sup> Once the governments decided, however, that Nazi war criminals should be punished using legal means, the planning on how exactly this would occur took place primarily in Washington, D.C.<sup>31</sup>

27. BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 4 (1981).

28. *Id.* at 7.

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 4. This book provides an excellent treatment of the development of the U.S. government’s policies in this field (and the influence of foreign actors on them).

Governments-in-exile and refugee groups were some of the most forceful advocates of strong punishments for Nazi war criminals.<sup>32</sup> This was natural, as their constituencies were in large part the victims of war and other crimes perpetrated by the Nazis. Largely in reaction to pressure exerted by these actors, the British and U.S. governments unwillingly acquiesced to the creation of the United Nations War Crimes Commission (UNWCC or “the Commission”).<sup>33</sup> Both governments viewed this agreement as an easy way to placate the demands of these groups.

Nonetheless, the British and U.S. governments did their best to marginalize the Commission.<sup>34</sup> It was relegated, among other functions, to receiving reports of war crimes, investigating them, and publicizing lists of war criminals.<sup>35</sup> The Commission lacked any adjudicatory or enforcement powers. It did, nonetheless, manage to contribute to the field of humanitarian law, urging the creation of a treaty-based international criminal court. The British and U.S. governments did not react favorably to this proposal:

General agreement has been tentatively reached [between the United States and U.K. governments] that (1) the United Nations War Crimes Commission plan for a grandiose international criminal court created by treaty is not practicable but some non-treaty tribunal must be provided and announced before any rejection of the War Crimes Commission proposal . . . .<sup>36</sup>

This limited support by two of the most important Western Allies would have a strong influence on the nature of the war crimes prosecution programs that did eventually arise and helps to explain their ad hoc nature and resulting shortcomings.

Due to the visceral ideological hatred between the Nazi Third Reich and the Soviet Government and the shocking scale of the bloodshed in Eastern Europe and the Soviet Union during WWII, the Soviets cared deeply about the treatment of German war criminals. Consequently, regarding the question of their punishment, “Soviet spokesmen were primarily responsible for setting the tone . . . within the ranks of the anti-Axis coalition.”<sup>37</sup> The Soviet government “support[ed] all practical measures . . . in bringing the Hitlerites and their accomplices to justice, and favor[ed] their trial before ‘the courts of the special international tribunal’ and their punishment in accordance with applicable

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32. BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944–1945* 6-7 (1982).

33. *Id.* at 6.

34. *Id.*

35. Memorandum from the Secretaries of State and War and the Attorney General for the President, Trial and Punishment of Nazi War Criminals (Jan. 22, 1945), in U.S. DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE OF MALTA AND YALTA 1945 403 (1955) [hereinafter FRUS – MALTA AND YALTA].

36. Telegram from Ambassador Winant in the United Kingdom to the Secretary of State (Apr. 7, 1945), in III FRUS, EUROPEAN ADVISORY COMMISSION: AUSTRIA; GERMANY 1945 1158 (1968) [hereinafter III FRUS].

37. GINSBURGS, *supra* note 22, at 50.

criminal law.”<sup>38</sup> Despite their misgivings, the British and U.S. governments signed the Moscow Declaration on war crimes in 1943. The Soviet Government quickly held the first trial of alleged Nazi war criminals in 1943, which led to disagreements among the signatories of the Declaration on whether such trials were permissible or not.<sup>39</sup>

The British government, unlike the Soviet and French governments,<sup>40</sup> did not support the international punishment of war criminals, intending rather that the liberated countries try the individuals responsible for war crimes committed in those countries.<sup>41</sup> This position reflected the general tenor of the Moscow Declaration. As British Ambassador Halifax explained to Secretary of State Hull:

The United Nations should . . . in the opinion of His Majesty’s Government in the United Kingdom, not themselves assume any formal obligation in regard to the punishment of those responsible for such atrocities . . . nor should they impose upon the enemy any formal obligation to try them or surrender them for trial.<sup>42</sup>

Thus, consistent with their position on an international criminal court, the British government generally was unreceptive to the idea of post-war prosecution of war crimes, which perhaps explains the lower number of prosecutions under the British Royal Warrant in comparison to the other Allied powers.

In fact, the British government for most of the war opined that the wise and expedient solution was the summary execution of Nazi war criminals. As British Lord Chancellor Sir John Simon explained in a memorandum:

I am strongly of opinion that the method by trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders . . . . [T]he question of their fate is a political, not a judicial, question . . . .

A formula which might meet the Prime Minister’s suggested views would be as follows: “. . . Upon any of these major criminals falling into Allied hands, the Allies will decide how they are to be disposed of, and the execution of this decision will be carried out immediately.”<sup>43</sup>

Thus, at least in part, Simon and like-minded people objected not for pragmatic reasons, such as the difficulty of gathering evidence, but rather based on the

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38. Memorandum from the Secretaries of State and War and the Attorney General for the President, *in* FRUS – MALTA AND YALTA, *supra* note 35, at 408. The British also supported limited use of mixed tribunals. *Id.*

39. GINSBURGS, *supra* note 22, at 52, 54; ZIEMKE, *supra* note 4, at 170. For more information on these trials, see THE PEOPLE’S VERDICT – A FULL REPORT OF THE PROCEEDINGS AT THE KRASNODAR AND KHARKOV GERMAN ATROCITY TRIALS (1944).

40. SMITH, *supra* note 32, at 138. The French government also supported the idea of some kind of trial.

41. British Aide-Mémoire (Aug. 19, 1944), *in* I FRUS, GENERAL 1944 1351-53 (1966). This position was not unequivocal, however, as they occasionally did acquiesce to trials. See *supra* note 38.

42. *Id.*

43. FRUS, THE CONFERENCE AT QUEBEC 1944 91-93 (1972) [hereinafter FRUS – QUEBEC]. Roosevelt, at times, shared Churchill’s preference for summary executions. ZIEMKE, *supra* note 4, at 172.

principled view that the resolution of war crimes was a political matter inappropriate for resolution by courts. Simon was even more explicit in regard to his preferred solution a year later:

[His Majesty's Government] assume[s] that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for the conduct. . . . It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military Court unless the ringleaders are dealt with with equal severity.<sup>44</sup>

By addressing the issue of relative degrees of responsibility and concomitant sentences, Simon's thinking on the issue of war crimes prosecution displayed an insightfulness lacking to a certain degree among American planners. British fears in regard to the use of trials included long and convoluted proceedings, accusations of judicial proceedings constituting "show trials," impatient public opinion and condemnation of the whole endeavor as a farce.<sup>45</sup>

The end of the war, during which many of the Nazi leaders committed suicide or were killed, made British Secretary of State for Foreign Affairs Eden much more amenable to trials.<sup>46</sup> As is recorded in notes from a meeting attended by all the Allied powers,

the British understood that the normal military courts of the four Allies would be used to take care of the ordinary war crimes committed inside Germany. This would take care of a large number of cases. There would also be a large number of cases of criminals who would be returned to the country where their crimes were committed. . . . [Eden] felt that the smaller the number of people who were dealt with by a formal state trial, the better.<sup>47</sup>

Thus, the British government never completely abandoned the idea heavily limiting any war crimes prosecution efforts. Nonetheless, as indicated by the previous quotation, by May of 1945, the Allied powers generally agreed on the use of military tribunals to try war criminals. However, the principles of the Moscow Declaration, which called for the extradition of war criminals back to the countries where the crimes were committed, qualified the use of such tribunals.

#### A. The American Context

It was against this international backdrop that U.S. government policy on war crimes prosecution took shape at a very late point in the war. Time was of the essence because the end of the war was, as Secretary of War Stimson

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44. SMITH, *supra* note 32, at 155-56.

45. Lord Chancellor Simon, the Argument for Summary Process Against Hitler and Co. (Apr. 16, 1945), in SMITH, *supra* note 32, at 155-57. These concerns were not only proven true – partially – but also have currency in the modern international trials.

46. Memorandum of Conversation Held in San Francisco (May 3, 1945), in III FRUS, *supra* note 36, at 1164.

47. *Id.*

famously wrote on August 23, 1944, “approaching on a galloping horse.”<sup>48</sup> The challenge was to quickly transform “vague threats of full and just retribution” into concrete policies.<sup>49</sup> As then Acting Secretary of State Dean Acheson wrote to President Roosevelt on March 17, 1945, “[i]n as much as the war crimes program is more or less bogged down and in as much as we have assured the public that we have definite plans in mind, we should take prompt steps to get things moving in the right direction.”<sup>50</sup> American planners rose to Acheson’s challenge.<sup>51</sup>

The U.S. government hesitated in publicly charging ahead with an aggressive war crimes prosecution strategy for two reasons. First, officials, especially in the military, feared that such a policy carried out during the war might lead to reprisals against American prisoners of war in German custody.<sup>52</sup> Second, there was a tendency within the federal government to avoid potentially divisive political questions within it and the Allied coalition.<sup>53</sup>

Just as there were extreme positions in the international debate, the various federal bureaucracies involved, primarily the Departments of State, Treasury and Army, also held sharply differing views on the treatment of Nazi war criminals. Historian Bradley F. Smith famously coined this political infighting “[t]he Great German War on the Potomac.”<sup>54</sup>

Perhaps the most infamous position was Secretary of the Treasury Morgenthau’s “deindustrialization” and “pastoralizing” plan for post-WWII Germany, which entailed turning the country back into a pre-Industrial Revolution agrarian society.<sup>55</sup> In line with the British thinking on the matter of war criminals, Morgenthau had prepared a list of “arch criminals . . . whose obvious guilt is recognized,” who would be executed summarily by firing squad.<sup>56</sup> He did plan, however, on lower level war criminals, who had perpetrated specific crimes “leading to or causing the death of persons,” being tried by military commissions.<sup>57</sup>

The State Department, led by Secretary of State Hull, was concerned primarily with the long-term economic aspects of post-war Germany and its hoped-for role in the burgeoning cold war.<sup>58</sup> As such, the State Department

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48. SMITH, *supra* note 27, at 11.

49. *Id.*

50. III FRUS, *supra* note 36, at 1155.

51. Nonetheless, the system they would create would be hampered by short comings such as lack of appeals procedures (discussed *infra*) and trained personnel. STRAIGHT, *supra* note 9, at 4.

52. Memorandum from Green H. Hackworth, Legal Advisor, to Dean Acheson, Assistant Secretary of State (Mar. 27, 1945), in III FRUS, *supra* note 36, at 1158.

53. SMITH, *supra* note 27, at 9.

54. *Id.* at 12.

55. ZIEMKE, *supra* note 4, at 102; SMITH, *supra* note 32, at 10.

56. Memorandum from Henry Morgenthau, Jr., U.S. Secretary of the Treasury, to Franklin D. Roosevelt, U.S. President (Sept. 5, 1944), in SMITH, *supra* note 32, at 27-28.

57. ZIEMKE, *supra* note 4, at 171.

58. Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 *BERKELEY J. INT’L L.* 401, 414 (2005).

played a swing role, early on siding with the harsher views of the Treasury Department,<sup>59</sup> but then later supporting the War Department's more moderate views.<sup>60</sup>

The War Department, under Secretary Stimson, played the most influential and moderating role within the U.S. government in the development of its war crimes policy. In one sense, it was natural that Stimson took a lead role on this question, as it was "his" U.S. Army, which would occupy and govern Germany, at least for the short term.<sup>61</sup> At first, Stimson did not outright reject the idea of summary executions, but at the very least wanted explicit policies. In his personal notes from the middle of 1944, he wrote "[p]resent instructions seem inadequate beyond imprisonment. Our officers must have the protection of definite instructions if shooting is required. If shooting is required it must be immediate; not postwar."<sup>62</sup> In this sense, Stimson agreed with the British position of having summary executions, but wanted it to proceed under clear guidelines.

As time passed, however, Stimson's thinking on the postwar treatment of German war criminals changed. In a memorandum to the president, he opposed Morgenthau's harsh policies, stating:

I do not mean to favor the institution of state trials or to introduce any cumbersome machinery but the very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.

... I have great difficulty in finding any means whereby military commissions may try and convict those responsible for excesses committed within Germany both before and during the war which have no relation to the conduct of the war ... Such courts would be without jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our own country.<sup>63</sup>

Although the Secretary viewed trials as problematic, he viewed them as beneficial for pragmatic reasons: it was both the best means of showing the U.S. government's "abhorrence" of the Third Reich and its crimes and also the best means of securing peace.<sup>64</sup> "The difference is not whether we should be soft or

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59. SMITH, *supra* note 32, at 8; FRUS – QUEBEC, *supra* note 43, at 96.

60. SMITH, *supra* note 32, at 10.

61. *Id.* at 7.

62. Notes of Henry L. Stimson for a Conference with the President (Aug. 25, 1944), *in id.* at 20.

63. Memorandum of Secretary of War to the President (Sept. 9, 1944), *in* FRUS – QUEBEC, *supra* note 43, at 125. Even though Secretary Stimson's reference to lynchings was perhaps unique and definitely troubling, he was not alone in his unease about overly broad jurisdiction. Justice Jackson wrote, "[i]t has been a general principle of the foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants." Borgwardt, *supra* note 58, at 441.

64. Memorandum from Henry L. Stimson, U.S. Secretary of War, to Henry Morgenthau, Jr., U.S. Secretary of the Treasury (Sept. 5, 1944), *in* SMITH, *supra* note 32, at 30.

tough on the German people, but rather whether the course proposed will in fact best attain our agreed objective, continued peace.”<sup>65</sup> Thus, Stimson was less interested in the fate and rights of the defendants and more motivated by abstract policy concerns.

Once Stimson and like-minded individuals managed to secure agreement within the U.S. government, the Allied powers, and the United Nations that punishment of war criminals should take place within some kind of judicial mechanism, they were able to start developing their ideas. But what exactly were their goals for the trials of war criminals? It is important to understand the motivations of the architects in order to better understand their actions and the successes and failures of the trials.<sup>66</sup> The goals for the trials of war criminals consisted of a mix of pragmatic and idealistic concerns: punishment, rehabilitation and prevention.<sup>67</sup>

Professor Martin Shapiro would classify these goals as “conflict resolution and social control activities of courts.”<sup>68</sup> Among other administrative functions, courts in this capacity remind litigants they must consent to fundamental societal norms.<sup>69</sup> In the role of social controller, courts “operate to impose outside interests on the parties,”<sup>70</sup> in this case, the interests of the victorious Allied powers, specifically the United States. A particularly relevant method of social control identified by Shapiro is that of a “conqueror” imposing his own courts on “conquered territories” through the use of criminal law.<sup>71</sup> He does this in an effort to “recruit . . . support for the regime.”<sup>72</sup> Such local support is fostered through emphasizing the “conqueror’s” adherence to the rule of law over the rule of the sword and the moral righteousness of his cause. Both of these goals partly motivated the creation of the U.S. war crimes prosecution system.

The architects of the prosecution program considered the punishment of war criminals essential not only for the moral value thereof but also because of the very pragmatic concern that if left unpunished, Nazi leaders would spearhead a future Nazi revival.<sup>73</sup> They preferred judicial means not only because summary executions would “be violative of the most fundamental principles of justice, common to all the United Nations,” but they would also potentially turn those executed into martyrs.<sup>74</sup> Thus, the goals of the war crimes trials were not only to determine the individual guilt of defendants but also “social control.”

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65. Stimson (Sept. 15, 1944), in SMITH, *supra* note 27, at 12.

66. *Id.* at 7.

67. BUSCHER, *supra* note 16, at 2.

68. SHAPIRO, *supra* note 12, at 18.

69. *Id.* at 6.

70. *Id.* at 37.

71. *Id.* at 22.

72. *Id.*

73. Memorandum of Conversation, *supra* note 46, at 1163.

74. Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS – MALTA AND YALTA, *supra* note 35, at 405.

Perhaps the most controversial goal of the trial proponents was rehabilitation. The historian John Mendelsohn stated the “democratic reeducation” of Germany required the prosecution of war criminals in order to underscore the evil and criminal nature of the Third Reich.<sup>75</sup> As Lieutenant Colonel Bernays, one of the primary architects of the trial system, explained, “[n]ot to try these beasts would be to miss the educational and therapeutic opportunity of our generation.”<sup>76</sup> Thus, at least one of the American planners of the program had goals for it above and beyond the determination of individual guilt.

Many officials also believed that another advantage of trials was the creation of an objective historical record, which would be beyond reproach, be educational and also contribute to preventing the reoccurrence of such events. Both the American and the British prosecutors at the Nuremberg Trial shared this optimism for the historical usefulness of war crimes trials.<sup>77</sup> Lastly, some individuals considered the punishment of war criminals through trials to be necessary for post-war security.<sup>78</sup>

A memorandum drawn up in the Assistant Secretary of War’s Office summarized the benefits and goals of trials as follows: since summary executions resorted to primitive practices, trials would act as a deterrent and raise international standards of conduct, and would not detract from the moral force behind the Allied cause and be more favorably looked upon by future generations.<sup>79</sup> As will be shown later, however, once the goals of trials move beyond determining guilt and morph into “social control,” they can have a significant impact upon the conduct and outcomes of trials.

A lawyer working in one of the many types of U.S. military courts operating in Germany after the war spoke of their social control functions. “These courts, which began as a device to protect the interests of the occupier, eventually became a guarantor of the fundamental rights of the inhabitants of the occupied area [and] played a[n] . . . important role in demonstrating democracy in action to the German people.”<sup>80</sup> Not only the designers of the judicial system, but also its implementers, were aware of the courts’ more abstract functions.

### *B. The U.S. Army’s War Crimes Prosecution Plan*

It was in this environment of international and national disagreement over how and whether to punish German war criminals that planners within the Army

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75. Mendelsohn, *supra* note 10, at 226.

76. Borgwardt, *supra* note 58, at 408-09.

77. 3 NUREMBERG, *supra* note 6, at 92; ZIEMKE, *supra* note 4, at 394.

78. SMITH, *supra* note 32, at 9; Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS – MALTA AND YALTA, *supra* note 35, at 405.

79. Memorandum (Apr. 20, 1945), in SMITH, *supra* note 32, at 158.

80. Eli E. Nobleman, *United States Military Courts in Germany: Setting an Example and Learning Lessons*, in AMERICANS AS PROCONSULS, *supra* note 10, at 185.

created the blueprint for the U.S. war crimes prosecution system. It was natural for the U.S. Army to take a leading role in this area, as it would naturally have a primary role in its implementation of the system and the Secretary of War had been a leading advocate.<sup>81</sup> The planning proceeded on two different levels. On the inter-federal government departmental level, those responsible drafted the basic blueprint for the IMT, including the Bernays Plan. On another level, solely within the U.S. Army Judge Advocate General (JAG), officers drafted several documents for what later became the *Dachau* trials, including the JCS 1023 and JCS 1067.

In late 1944, a flurry of activity ensued in the development of a war crimes trial policy. In September of 1944, Stimson ordered the creation of what would become the National War Crimes Office.<sup>82</sup> In a conversation that same month, Stimson sought the advice of the JAG, Major General Cramer, on the format of war crimes trials.<sup>83</sup> Stimson noted “[a] great many people think that the question of the guilt of some of these people is already decided. I’m taking the position that they must have the substance of a trial.” Stimson, nonetheless, wanted the process “cut down to its bare bones.”<sup>84</sup> “[T]he tribunal must be absolutely free of the restrictions of courts-martial. I understand that’s so from experience with the saboteur case. It can make its own rules.”<sup>85</sup> Cramer agreed that a simplified trial process, semi-military in character, with some basic procedural guarantees was possible, but he suggested that “the evidence should be taken down verbatim for future records . . . .”<sup>86</sup> Thus, both the Secretary of War and his chief legal advisor agreed that procedurally slimmed down trials were possible and desirable for policy reasons.

Stimson assigned the development of war crimes prosecution plans to “G-1,” the Special Projects Office of the Personnel Branch.<sup>87</sup> On September 15, 1944, the head of G-1 wrote a revolutionary memorandum (the aforementioned Bernays Plan), which solved two related problems facing proponents of war crimes prosecution: the vast number of potential defendants and the gathering of evidence.<sup>88</sup> It suggested the use of the legal concepts of conspiracy and criminal organizations to solve the problem of how to punish not just the

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81. SMITH, *supra* note 32, at 6.

82. ZIEMKE, *supra* note 4, at 172.

83. Telephone conversation transcript (Sept. 5, 1944), in SMITH, *supra* note 32, at 26.

84. *Id.* at 25.

85. *Id.*

86. *Id.* at 26.

87. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 2 n.9 (1949); SMITH, *supra* note 27, at 10.

88. Memorandum by Col. Murray C. Bernays, G-1, Trial of European War Criminals (Sept. 15, 1944), in SMITH, *supra* note 27, at 33-37; see also Memorandum from the Secretaries of State and War and the Attorney General for the President, in FRUS – MALTA AND YALTA, *supra* note 35, at 405 (“Witnesses will be dead, otherwise incapacitated and scattered. The gathering of proof will be laborious and costly, and the mechanical problems involved in uncovering and preparing proof of particular offenses one of appalling dimensions.”).

relatively small number of Nazi leaders, but the enormous number of potential lower level war criminal defendants.<sup>89</sup> Bernays's superiors gave the plan cautious approval.<sup>90</sup>

In the JAG's approval of the Bernays Plan, he reiterated his earlier point for the need of a verbatim record, which he believed would show the fairness of the trial and be a useful historical record.<sup>91</sup> In the same memorandum, Cramer went on to discuss the possibility of prosecuting lower level war criminals. In order to do so, however, he noted the IMT would somehow have to be binding on the lower courts.

In his opinion, this could be done by either a treaty provision, which would make the IMT decisions binding on U.S. courts, or by Executive Order, which would make the IMT decisions binding on military tribunals.<sup>92</sup> The advantage of military tribunals, in Cramer's view, was that "[t]he procedure of the military commission is expeditious, and its rules of evidence are now relaxed; but the basic principle that the accused must be proved guilty on the evidence presented to the tribunal in the particular case still applies."<sup>93</sup> The basic idea for many involved in the planning, then, was to create a trial system with the absolutely lowest standards possible, which could still pass muster.

In a directive in December of 1944, the War Department ordered U.S. armies in the field to create subordinate war crimes investigation units with the explanation that "Mr. Stimson regards the investigation of war crimes as a subject of top importance."<sup>94</sup> Each unit had as "its primary function the investigation of alleged war crimes."<sup>95</sup> The U.S. Army in Europe implemented the directive on February 24, 1945.<sup>96</sup> Although the specific order was new, the western Allied forces had already included the arrest of war criminals as one of the objectives in their pre-D-Day orders.<sup>97</sup>

Beyond the objective and specific order, however, the Army lacked detailed instructions on the matter as it advanced eastward through France. Telford Taylor, who was U.S. Supreme Court Justice Jackson's successor as the chief American prosecutor at Nuremberg, noted that planning for the IMT overshadowed efforts to develop the U.S. Army's war crimes prosecution

89. Memorandum by Col. Bernays, *supra* note 88, at 33-37.

90. Memorandum from Maj. Gen. Myron C. Cramer, Judge Advocate General, to the Assistant Secretary of War, Trial of European War Criminals, Comments on the Bernays Plan (Nov. 22, 1944), in SMITH, *supra* note 32, at 58-61; Memorandum from Col. Ammi Cutter, Assistant Executive Officer, Office of the Assistant Secretary of War, to Mr. McCloy, War Crimes (Oct. 1, 1944), in SMITH, *supra* note 32, at 37-38. Col. Cutter went on to become a Justice on the Massachusetts Supreme Court. *Id.* at 37 n.1.

91. Memorandum from Maj. Gen. Myron C. Cramer, *supra* note 90, at 58-61.

92. *Id.* at 60.

93. *Id.* at 59.

94. ZIEMKE, *supra* note 4, at 173.

95. STRAIGHT, *supra* note 9, at 18.

96. *Id.* at 18 nn.17, 18.

97. ZIEMKE, *supra* note 4, at 108, 170 (showing the existence of orders to arrest war criminals).

system.<sup>98</sup> Only in August of 1944 did the U.S. Army start drafting the first version of the document titled JCS 1023, which would later become known as the War Crimes Directive.<sup>99</sup> The Joint Chiefs of Staff (JCS) approved the third version of the directive, JCS 1023/3, on October 1, 1944 and forwarded it to the Combined Chiefs of Staff (CCS).<sup>100</sup> It languished there for over six months because decision makers at the highest levels of the federal government were considering the Bernays Plan and competing proposals.<sup>101</sup> Consequently, in April 1945, the JCS withdrew the directive, and the U.S. Army had no instructions other than to support the proposed IMT in apprehending defendants.<sup>102</sup>

The Joint Chiefs of Staff subsequently revised and re-approved the directive on July 15, 1945, and Eisenhower's command received it with considerable delay.<sup>103</sup> The tenth version of this directive, JCS 1023/10, provided both the inspiration and substance for what would later become Control Council Law No. 10, the U.S. Nuremberg Tribunals and the Office of the Chief of Counsel for War Crimes; in effect, it and the IMT were the nucleus of the entire U.S. war crimes prosecution system.<sup>104</sup>

Control Council Law No. 10, although intended to achieve uniformity among the four Allied zones of control, fell short of its goal: both the British and French governments proceeded to try war crimes under authority other than Law No. 10 and the U.S. government tried only the twelve subsequent Nuremberg cases under its authority.<sup>105</sup> On June 18, 1945, the British War Office released the Royal Warrant authorizing the prosecution of war criminals and prescribed the applicable procedure.<sup>106</sup> The French government-in-exile, primarily interested in war crimes committed within its borders, authorized the prosecution of war criminals in an ordinance dated August 24, 1944.<sup>107</sup>

Before JCS 1023/10 and Control Council Law No. 10 were in place, however, and in the absence of a detailed federal government policy on war crimes prosecution, the War Department issued two sets of internal instructions for its forces in the field: an interim directive on occupation policy dated August 21, 1944 and a handbook of instructions dated September 1, 1944.<sup>108</sup> The

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98. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 269 (1992); see also TAYLOR, *supra* note 87, at 2; ZIEMKE, *supra* note 4, at 170 (stating that people in Washington were doing little on this issue).

99. TAYLOR, *supra* note 87, at 1.

100. *Id.* at 2.

101. *Id.* at 2-3.

102. *Id.* at 3.

103. *Id.* at 4.

104. *Id.*

105. TAYLOR, *supra* note 98, at 276.

106. *Id.* at 270.

107. *Id.* at 270, 276.

108. Interim Directive for Military Government of Germany (Aug. 21, 1944), in SMITH, *supra* note 32, at 14; War Department Handbook of Military Government for Germany (Sept. 1, 1944), *id.* at 15-16.

problem, once again, was that both documents were vague on the issue of war criminals, calling only for their apprehension by U.S. forces.<sup>109</sup>

As a result, developments on the ground preceded the development of policy, and the U.S. Army carried out the first war crimes trial in Western Europe, with the exclusion of Italy, in April of 1945, near Aachen, Germany.<sup>110</sup> The second such trial, the *Back* case, took place on June 1, 1945, in which German police officers and civilians were convicted of having killed a downed Allied airman.<sup>111</sup> By the end of the summer of 1945, U.S. Army war crimes investigation teams had collected evidence on eight hundred such cases mostly involving German police and civilian defendants.<sup>112</sup> Pursuant to General Eisenhower's Ordinance No. 2, these trials took place in a court system consisting of three types of courts listed here from highest to lowest: General, Intermediate and Summary Military Courts.<sup>113</sup>

With the *Back* case having already gone beyond the traditional definition of war crimes because the defendants were not members of the German armed forces, General Eisenhower felt justified in asking the CCS for permission to prosecute concentration camp personnel.<sup>114</sup> He pointed out that the Moscow Declaration said nothing about United Nations victims inside Germany.<sup>115</sup> The trial, without delay, of such war criminals, General Eisenhower believed, would have "a salutary effect on public opinion both in Germany and in Allied countries."<sup>116</sup> On June 19, 1945, the CCS gave the general free reign in regard to trying war crimes "whether the offenses were committed before or after occupation . . . and regardless of the nationality of the victim."<sup>117</sup>

Another important U.S. Army directive was JCS 1067, released on May 10, 1945, which "set forth policies relating to Germany in the initial post-defeat period. As such it . . . [was] not intended to be an ultimate statement of policies of . . . [the U.S.] Government concerning the treatment of Germany in the post-war period."<sup>118</sup> It ordered the arrest of "all persons who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or

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109. *Id.* at 6.

110. A German officer was convicted of having ordered the execution of two American POWs. ZIEMKE, *supra* note 4, at 391.

111. *Id.*

112. *Id.*

113. Sigel, *supra* note 10, at 35.

114. Cable from Eisenhower to AGWAR, for CC's, in SHAEF SGS 000.5/1 (Jun. 2, 1945), in ZIEMKE, *supra* note 4, at 391 n.58.

115. *Id.* Nonetheless, the declaration's focus on United Nations nationals perhaps explains why in the *Flossenburg* case the presence of United Nations POWs among the victims was specifically enunciated.

116. *Id.*

117. Cable from AGWAR, CCS, to Eisenhower, in SHAEF SGS 000.5/1 (Jun. 19, 1945), in ZIEMKE, *supra* note 4, at 391.

118. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, JCS 1067 (May 10, 1945), in OFFICE OF PUBLIC AFFAIRS, *supra* note 5, at 21, 22.

war crimes.”<sup>119</sup> It offered no further instructions and provided many loopholes through which this order could be avoided.<sup>120</sup> Even with its intended temporary and vague nature, JCS 1067 quickly became the semi-permanent guiding directive on the question of German war criminals.<sup>121</sup>

The JCS apparently had sent a version of JCS 1023 to the U.S. Commander-in-Chief by July 25, 1945. It stated:

Appropriate military courts may conduct trials of suspected criminals in your custody. In general these courts should be separate from the courts trying current offenses against your occupation, and, to the greatest practicable extent, should adopt fair, simple and expeditious procedures designed to accomplish substantial justice without technicality. You should proceed with such trials and the execution of sentences except in the following cases: Trials should be deferred of suspected criminals who have held high . . . positions . . . to ascertain whether it is desired to try such persons before an international military tribunal.<sup>122</sup>

This authorization for U.S. military tribunals embodied the American philosophy regarding war crimes trials: simple and quick.

With the issuance of JCS 1023/10, dated July 8, 1945, but not issued until September, the U.S. Army’s war crimes prosecution system underwent one final refinement. It was “[t]he first comprehensive directive issued by the Joint Chiefs of Staff” on the issue of war crimes prosecution.<sup>123</sup> The U.S. Army Theater Judge Advocate estimated that under the new directive potentially 100,000 criminals would need to be prosecuted, while others feared that the number of defendants might be five times higher.<sup>124</sup> Assuming he had 375 judges organized into three-member panels, and each defendant’s trial lasting one hour, the Theater Judge Advocate estimated that it would take four months to complete the assigned task.<sup>125</sup> After extended negotiations between the various U.S. entities involved in the war crimes prosecution effort, they concluded “that literal compliance with JCS 1023/10 is in practice out of the question.”<sup>126</sup> U.S. officials blithely decided that all pre-1944 cases would be turned over to the German courts as a “test of German regeneration.”<sup>127</sup>

Moreover, once it became clear that the IMT’s findings would not support subsequent war crimes trials based solely on membership in criminal

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119. *Id.*

120. *Id.*

121. Another interim directive was apparently sent to the U.S. Commander-in-Chief by the Joint Chiefs of Staff at some point before July 25, 1945. Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, *in* I FRUS – THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945 580 n.11 (1960).

122. *Id.* at 582.

123. STRAIGHT, *supra* note 9, at 23. For an in-depth review of the U.S. Army’s war crimes prosecution program, with a passing reference to the appeals stages, see generally STRAIGHT, *supra* note 9.

124. ZIEMKE, *supra* note 4, at 394.

125. *Id.*

126. *Id.* at 395.

127. *Id.*

organizations such as the Gestapo, U.S. officials decided that German courts would handle all “denazification” cases.<sup>128</sup> By the fall of 1945, just as the International Military Tribunal was gearing up for its one and only trial, the U.S. Army had clear instructions on how to proceed with its *Dachau* trials.

### *C. The Aborted International War Crimes Prosecution Effort*

Its difficult and abrupt birth meant that the IMT would enjoy only a short existence. U.S. government officials, not enamored by the idea of an international criminal court, envisioned the IMT would exist for only a brief period of time in order to lay the legal foundation for subsequent lower-level trials.<sup>129</sup>

The international negotiations leading up to the creation of the IMT also foreshadowed the difficulties it would experience. Justice Jackson, the American negotiator, reported that difficulties between the Soviet and Anglo-American sides were slowing down the negotiations.<sup>130</sup> Moreover, Jackson continued in the telegram, “[the] deep difference in legal philosophy and attitude . . . is difficult to reconcile and even after words are agreed upon we find them . . . to mean different things.”<sup>131</sup> He concluded that unless all parties adopted the American proposal for an IMT, they would simply have to agree on the fundamentals of the applicable law and proceed with their own trials. “This would be easier for me and faster. But [I] think [it] desirable [to] give [an] example [of] unity on [the] crime problem if possible.”

In general, Justice Jackson anticipated international cooperation in trying war crimes would be problematic as the Soviets might try to use it to settle political scores.<sup>132</sup> In various other aspects of the war crimes prosecution effort, such as extraditions, at the same time U.S. officials sought international cooperation and coordination, they developed their own independent, parallel structures and procedures.<sup>133</sup>

The great amount of time and energy it took to try the Nuremberg defendants in an international setting, as well as Soviet behavior during the trial, made the United States unreceptive to further international war crimes trials.<sup>134</sup> Additionally, a lack of American support for more trials, especially solely American ones, contributed to the IMT being convened only once.<sup>135</sup>

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128. *Id.*

129. Memorandum from Green H. Hackworth, Legal Advisor, to the Secretary of State (Jan. 22, 1945), in FRUS – MALTA AND YALTA, *supra* note 35, at 402.

130. Telegram from Ambassador Winant in the United Kingdom, *supra* note 36, at 1167.

131. *Id.*

132. *Id.*

133. Sigel, *supra* note 10, at 32.

134. CLAY, *supra* note 10, at 251; HAROLD ZINK, THE UNITED STATES IN GERMANY, 1944-1955 146 (1957); TAYLOR, *supra* note 87, at 22-26.

135. TAYLOR, *supra* note 98, at 287-88.

#### *D. Critiques of the U.S. Army's War Crimes Program*

The first head of the U.S. Military Government in Germany, General Lucius D. Clay, was never completely satisfied with the initial judicial system adopted as an “emergency measure.”<sup>136</sup> He explained that “the dispensation of justice was too dependent upon the capacity and ability of the individual[,] . . . uniformity was lacking and there were instances of undue punishment.”<sup>137</sup> The inadequate level of professionalism found in the judicial system largely resulted from U.S. Supreme Court Chief Justice Vinson’s decision not to allow federal judges to work in Germany in response to the sharp criticisms aimed at Jackson’s role at the Nuremberg Trial.<sup>138</sup>

The criticisms leveled at the judicial system created in the U.S. zone of occupation consisted primarily of charges of inadequate procedural protections. German defendants did not receive “democratic legal processes,” the argument went, because of undue haste in the trials, lack of juries, and improper pre-trial investigations including the alleged use of questionable interrogation techniques in the Buchenwald and Malmédy cases.<sup>139</sup> As a result of these flawed trials, the critics charged, the rate of conviction was unreasonably high: for example, out of the 1,672 *Dachau* defendants, 426 initially were sentenced to death.<sup>140</sup>

In tracing the history of the U.S. Army’s war crimes prosecution program, the repeated emphasis on lower standards from the very inception of the program is noticeable. Nor were the military planners alone in their thinking on this matter. Harvard Law School Professor Sheldon Glueck wrote an influential book in 1944 entitled *War Criminals: Their Prosecution and Punishment*, in which he argued for simplified standards of justice.<sup>141</sup> Justice Jackson, as well, held the view that the rules of procedure and constitutional protections available in U.S. trials should not govern the trial of accused German war criminals. “[T]he procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.”<sup>142</sup> Everybody agreed that trials were the appropriate response to German war crimes, but patience was in short supply.

#### *E. Post-trial Aspects of the U.S. Army's War Crimes Prosecution Program*

For many involved in trying cases, one of the most troubling aspects of the procedures governing trials was the lack of an appellate structure.<sup>143</sup> This was a

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136. CLAY, *supra* note 10, at 247.

137. *Id.*

138. *Id.* at 251.

139. ZINK, *supra* note 134, at 146, 148.

140. *Id.* at 146.

141. JAMES J. WEINGARTNER, *CROSSROADS OF DEATH: THE STORY OF THE MALMÉDY MASSACRE AND TRIAL* 258-59 (1979).

142. Report of Robert H. Jackson to the President, released by the White House on June 7, 1945, in DEPARTMENT OF STATE, PUBLICATION NO. 2420, *TRIAL OF WAR CRIMINALS* 3 (1945).

143. BUSCHER, *supra* note 16, at 159-60.

fundamental departure from the Anglo-American principles of justice, which these lawyers valued.<sup>144</sup> According to Professor Shapiro, systems of appeal are a means of “hierarchical political management.”<sup>145</sup> They assure that law is “uniformly administered”<sup>146</sup> and provide “an independent flow of information to the top on the field performance of administrative subordinates.”<sup>147</sup> In the end, according to Professor Shapiro, “appellate institutions are more fundamentally related to the political purposes of central regimes than to the doing of individual justice.”<sup>148</sup> As will be shown below, the ad hoc “appeals” system strongly supports his argument.

It seems that the war crimes prosecution program’s architects gave little thought to the post-trial treatment of convicted defendants.<sup>149</sup> Thus, the program had no way to equalize sentences for similar crimes or address inconsistent results.<sup>150</sup> Or, as Shapiro would state it, they lacked “a device for exercising centralized supervision over local judicial officers.”<sup>151</sup> As a result, often times early trials handed out more severe sentences than comparable, later trials: for example, the *Dachau Concentration Camp* case in late 1945 included 40 defendants, of whom 36 received death sentences and the remaining four either life or ten-year sentences of imprisonment; the *Nordhausen Concentration Camp* case in late 1947 resulted in one death sentence, fourteen sentences of imprisonment and four acquittals.<sup>152</sup>

As U.S. Army officials became aware of such disparities and inconsistencies in sentences, they sought recourse to executive review procedures.<sup>153</sup> They created clemency and review boards “for purposes of equalizing and modifying sentences for war criminals;” this unfortunately had the unintended and deleterious effect of appearing to be “mass clemency,” which, in turn, undermined the legitimacy of the war crimes prosecution program.<sup>154</sup> At the same time that executive review procedures were being implemented in the U.S. Army’s program, the U.S. Military Government’s Ordinance No. 11 codified a judicial appellate procedure, which only applied to the subsequent American Nuremberg Trials.<sup>155</sup>

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144. *Id.*

145. SHAPIRO, *supra* note 12, at 54.

146. *Id.* at 55.

147. *Id.* at 50.

148. *Id.* at 52.

149. Mendelsohn, *supra* note 10, at 226.

150. *Id.* at 160.

151. SHAPIRO, *supra* note 12, at 39.

152. Mendelsohn, *supra* note 10, at 229.

153. *Id.* at 226. For two excellent reviews of the executive appellate procedures created for war crimes cases, see generally Mendelsohn, *supra* note 10; BUSCHER, *supra* note 16.

154. Mendelsohn, *supra* note 10, at 226, 247.

155. Ordinance No. 11, art. 2, in OFFICE OF PUBLIC AFFAIRS, *supra* note 5, at 116 (“A joint session of the Military Tribunals may be called . . . to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals . . . [and] to review conflicting or inconsistent final rulings . . . . Decisions by joint

The account of a young U.S. Army lawyer who served on a court that tried common criminal and civil offenses rather than war crimes illuminates the short comings of the U.S. judicial system in post-war Germany. As he explained:

[M]any excesses were committed by the officers manning the courts. In many respects, defendants were treated no differently than they would have been in the old Nazi courts and, unfortunately, when they began transferring into the courts combat officers who had been through a lot of combat, the attitude of a regimental commander who was now operating as a court officer was: "Well, the hell with them – we were supposed to kill every German from the Rhine all the way east – so obviously he is guilty, he's German." This made it very uncomfortable for me, as a junior officer and the only lawyer on these courts, with a colonel on each side since I was a first lieutenant at the time. Fortunately, the review process enabled us to correct a lot of these errors.<sup>156</sup>

He quickly cast the efficacy of the review process into doubt, though, highlighting the lack of separation of powers within it. "[W]e had a bad situation because the local commander not only appointed the judges and the prosecutors but was also the reviewing authority."<sup>157</sup> Thus, although on paper the U.S. war crimes prosecution effort seemed to comport with basic concerns of fairness, this first-hand account casts doubt on the actual fairness of the trials.

A U.S. Army lawyer on the Malmédy prosecution team gave more ambiguous insight into officers sitting in judgment on war crimes defendants. "I did not like [the witness] McCown's testimony. That wasn't a question of a lawyer sitting on a bench evaluating his testimony. That was a question of one soldier who had been in combat evaluating another soldier who had been in combat."<sup>158</sup> The judge's background apparently influenced his courtroom judgment, perhaps to the defendants' detriment. At the same time, being judged by one's peers is a treasured principle of Anglo-American justice and thus officers judging war crimes defendants is seen by some as an assurance of fairness.<sup>159</sup> Nonetheless, there is a certain irony to the fact that American and German soldiers would sit in judgment on one another because they were each other's peers.

#### *F. Phase-out of the U.S. Army's War Crimes Prosecution Program*

The program can be divided into two phases. The first, "[t]he trial or punishment phase of the reeducation program for Germany," operated through 1948.<sup>160</sup> The subsequent "clemency" phase resulted from the convergence of two factors. First, the U.S. government desired to maintain good relations with

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sessions of the Military Tribunals . . . shall be binding upon all the Military Tribunals.").

156. Nobleman, *supra* note 80, at 184.

157. *Id.*

158. WEINGARTNER, *supra* note 141, at 226.

159. Eric Metcalfe, *Inequality of Arms: the Right to a Fair Trial in Guantanamo Bay*, 6 EUR. HUM. RTS. L. REV. 573, 579 (2003); Lt. Col. Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 70 (2004).

160. Mendelsohn, *supra* note 10, at 226.

the new German state in the face of the developing cold war.<sup>161</sup> Second, both within the U.S. government and among the public, support diminished for the continued punishment of German war criminals due to, among other reasons, constitutional concerns and scandals arising out of the program.<sup>162</sup>

These constitutional and other legal concerns included the procedures created by the London Agreement, such as the lack of an appeals court, the clash with standard Anglo-American judicial procedures and inconsistencies in sentences and conflicts of interest, such as the Deputy Theater JAG serving as both prosecutor and first reviewer and the Theater JAG's presence on the War Crimes Modification Board.<sup>163</sup> The transition between the two phases of the war crimes prosecution program is best explained by the historian Frank Buscher, who explained that the punishment of war criminals "ceased to be a priority, and became instead a political burden in the 1950s."<sup>164</sup>

#### IV.

##### THREE EXAMPLES OF THE U.S. ARMY'S WAR CRIMES PROSECUTION PROGRAM

The *Hadamar Hospital* case which began on October 8, 1945, at the War Crimes Group's headquarters in Wiesbaden was the first of several concentration camp and mass atrocity war crimes trials.<sup>165</sup> It was the only case of its kind tried before a military commission, as all subsequent trials took place before special military government courts whose members served on them permanently and consequently built up experience trying such cases.<sup>166</sup>

As a memorandum by Colonel Leon Jaworski of later Watergate fame indicates,<sup>167</sup> U.S. Army officials likely tried the *Hadamar Hospital* case before a military commission rather than a military government court due to the latter's inexperience at that early time with war crimes trial procedures.<sup>168</sup> Whether

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161. *Id.* at 251, 259; BUSCHER, *supra* note 16, at 2.

162. Mendelsohn, *supra* note 10, at 251, 259; BUSCHER, *supra* note 16, at 2.

163. BUSCHER, *supra* note 16, at 159-61.

164. *Id.* at 159.

165. ZIEMKE, *supra* note 4, at 393.

166. These special military government courts were distinct from regular military government courts which dealt with offenses committed during the American occupation. *Id.*; STRAIGHT, *supra* note 9, at 46, Appendix XIX – Order AG 250.4 JAG-AGO from Headquarters, U.S. Forces, European Theater, to Commanding Gens.: E. Military Dist., W. Military Dist., Military Commissions (Aug. 25, 1945), Appendix X – Order AG 000.5 JAG-AGO from Headquarters, U.S. Forces, European Theater, to Commanding Gen., Third U.S. Army Area, Trial of War Crimes Cases (Oct. 14, 1946). For an overview of the creation of regular military government courts, see Eli E. Nobleman, *American Military Government Courts in Germany*, 40 AM. J. INT'L L. 803 (1946).

167. Leon Jaworski, who would later gain prominence as the Watergate Special Prosecutor, was the Trial Judge Advocate in the *Hadamar Murder Factory* case. Special Order Number 265 from Headquarters, Seventh Army (Sept. 22, 1945); see also Introduction, *microformed on* Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Microfilm Publication 1078, United States v. Klein, Reel 1 [hereinafter Microfilm Publication 1078].

168. Memorandum from Col. Leon Jaworski, JAGD, Executive, Trial Section, to Col. Miekclwait, Case No. 12-449, Hadamar 4 (Sept. 13, 1945), *microformed on* Microfilm Publication

this was the only motivation driving the choice of tribunal is questionable based upon a memorandum sent to Jaworski in which the benefits of military commissions were detailed:

A basic reason underlying the employment of military commissions . . . is . . . that in such cases . . . the execution of justice shall be as swift as is consistent with fairness . . . . They are governed by the restrictions imposed by the source of the authority. These restrictions are few . . . . The Commission may make its own rules of procedure – *ad hoc*.<sup>169</sup>

Once again, the emphasis is on the speed and simplicity of the trials.

Military commissions provided clear procedural benefits. Jaworski consequently “estimate[d] that it [would] . . . not take longer than four days to complete the trial.”<sup>170</sup> Another interesting note regarding this early case was the policy on publicity. In the same memorandum to Jaworski, the author explains, “such trials should be in camera, for reasons of security. The accused [a civilian] is *not* entitled to the privileges of a prisoner of war, and no notice of any sort will be furnished the protecting power or the International Red Cross.”<sup>171</sup> This policy on publicity, if enforced at all during the trial, was dropped in subsequent trials. Those in charge of the program evidently did not consider the emphasis on secrecy as important as and perhaps even counterproductive to the goal of publicizing the evils of the Nazi state.

Special military government courts, which did not come under the jurisdiction of the U.S. Military Government until March of 1947, tried Germans accused of war crimes.<sup>172</sup> Although special military government courts were more like military commissions than regular military government courts, which tried common offenses such as theft occurring during the occupation, their designation carried with it great procedural significance.<sup>173</sup> Military government courts, for example, did not operate under strict guidelines.<sup>174</sup> As the military government court regulations stated:

[R]ules may be modified to the extent that certain steps in the trial may be omitted or abbreviated so long as no rights granted to the accused are disregarded. Opening statements in particular may frequently be omitted. No greater formality than is consistent with a complete and fair hearing is desirable and the introduction of procedural formalities from the Manual of Courts Martial or from trial guides based thereon is discouraged except where specifically required by these rules.<sup>175</sup>

The historian Earl Ziemke observed that with such extensive powers, procedural flexibility and efficient prosecution of defendants based upon the theory of

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1078, *supra* note 167.

169. Memorandum, General Observations on Military Commissions, *microformed on Microfilm Publication 1078, supra* note 167.

170. Jaworski, *supra* note 166, at 4.

171. General Observations on Military Commissions, *supra* note 167.

172. It must be noted that in the literature there is some confusion as to the exact name of these tribunals – Clay refers to them as “special military tribunals.” CLAY, *supra* note 10, at 253.

173. ZIEMKE, *supra* note 4, at 393.

174. *Id.*

175. *Id.*

“common design,” it came as no surprise that the *Dachau Concentration Camp* case, involving thousands of victims and forty defendants, required only four weeks to try.<sup>176</sup>

This judicial system designed for maximum efficiency resulted in two major international scandals that seriously damaged the legitimacy and shortened the lifespan of the war crimes program: they arose out of the *Buchenwald Concentration Camp* case and the *Malmédy Massacre* case.<sup>177</sup> U.S. authorities had tried and convicted Ilse Koch, the infamous “Bitch of Buchenwald” and wife of the Buchenwald Concentration Camp Commander, of, among other things, producing lamp shades made out of human skin.<sup>178</sup> Based upon a review of the trial record, General Clay decided that the evidence presented at trial did not justify her sentence and accordingly reduced it.<sup>179</sup> This produced an avalanche of criticism, culminating in a congressional investigation.<sup>180</sup>

It was the *Malmédy Massacre* trial, though, that would have a more harmful impact upon the U.S. war crimes prosecution system and foreshadow some contemporary debates. To a large degree, it was individuals with ulterior motives, such as the then relatively unknown Senator McCarthy, who created the *Malmédy* legacy.<sup>181</sup>

U.S. officials accused the approximately seventy defendants from the *Waffen-S.S.* of having killed approximately the same number of American prisoners of war.<sup>182</sup> The scandal erupted out of allegations of American improprieties committed during the investigation and prosecution of the case, such as the mistreatment of German POWs. Perhaps enabling this alleged abuse, a U.S. Army document detailed that the German prisoners had lost their POW status and had become civilian internees “in order to preclude the possibility of legal complications.”<sup>183</sup> Specifically, U.S. officials took this action in order to preempt any defense claims that the defendants should enjoy the same rights as U.S. nationals.<sup>184</sup>

The *Malmédy* defense team faced a host of problems. First, the lawyers only had one month to prepare their case, half of which they were forced to

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176. *Id.*

177. The actual case names are *United States v. Prince Zu Waldec et al.* and *United States v. Berzin et al.*, respectively. For a provocative and thorough investigation of the Malmédy scandal, see WEINGARTNER, *supra* note 141.

178. Mendelsohn, *supra* note 10, at 247-49; CLAY, *supra* note 10, at 254-55.

179. CLAY, *supra* note 10, at 254-55.

180. *Id.* Additionally, she drew the ire of folksinger Woody Guthrie, who composed a song about her. Available at [http://www.woodyguthrie.org/Lyrics/Ilsa\\_Koch.htm](http://www.woodyguthrie.org/Lyrics/Ilsa_Koch.htm) (last visited Feb. 2, 2006).

181. Mendelsohn, *supra* note 10, at 249 n.41.

182. *Id.* at 248.

183. Internal Route Slip from Headquarters, U.S. Forces, European Theater, Discharge of German Prisoners of War (Apr. 26, 1946), in WEINGARTNER, *supra* note 141, at 98.

184. WEINGARTNER, *supra* note 141, at 98.

spend on bureaucratic matters.<sup>185</sup> Second, the German defense attorneys involved in the case faced significant barriers because of their inability to speak English and ignorance of Anglo-American judicial procedure.<sup>186</sup> Third, the presiding U.S. officer did not sever the trials of the defendants who had served in the same units, thereby hampering the use of incompatible defenses, such as *respondeat superior*.<sup>187</sup>

If this had been the extent of the claimed violations of the defendants' rights, then the *Malmédy* case likely would never have caught the attention of the public and the government back in the United States. Rather, the most damning attack against the conduct of the trial actually stemmed from the pre-trial investigation phase and alleged due process violations. The defendants claimed that U.S. Army personnel forced them to sign confessions and that the interrogators used improper interrogation techniques, including "physical and psychological [duress]," such as mock trials, other "psychological 'stratagems'" and physical abuse.<sup>188</sup>

Even if the goal of the trial simply was, according to one of the defense attorneys, to foster a "democratic nationalism" in Germany and the charges of impropriety went largely unproven, the damage had been done.<sup>189</sup> The U.S. Congress and others launched investigations, the American and German publics reacted with outrage and some U.S. newspapers like the Chicago Tribune called for the courts-martial of the investigation and prosecution teams.<sup>190</sup>

These *Buchenwald* and *Malmédy* scandals discredited the U.S. Army's war crimes prosecution program and put U.S. Army officials on the defensive.<sup>191</sup> From 1951 onwards, the program no longer sought to punish war criminals but rather to avoid criticism, both from Germany and the U.S.<sup>192</sup> This fact, then, puts into context the decision of General Handy to reduce the sentences of many convicted war criminals, including those from the *Malmédy Massacre* and concentration camp cases:

For four and a half years the execution of the sentences [in the *Malmédy* trial] has been delayed by a continuous and organized flood of accusations and statements made to discredit the trial . . . . However, the record is convincing that these men are guilty. Investigations carried on by Congressional Committees and the reviews by trained judges have failed to unearth any facts which support a reasonable doubt as to the guilt of these prisoners. . . . The commutation has been based upon other facts, which are deemed to mitigate in favor of less severe punishment than death . . . . The crimes are definitely distinguishable from the more deliberate killings in concentration camps. Moreover, these prisoners were of comparatively lower rank. . . . I cannot overlook the fact that the Army

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185. *Id.* at 97.

186. *Id.*

187. *Id.* at 100-01.

188. *Id.* at 117.

189. CLAY, *supra* note 10, at 253; WEINGARTNER, *supra* note 141, at 159, 249.

190. WEINGARTNER, *supra* note 141, at 196; Mendelsohn, *supra* note 10, at 249.

191. *Id.*; BUSCHER, *supra* note 16, at 3.

192. *Id.*

Commander, his Chief of Staff, and the Corps Commander are each serving only terms of imprisonment.

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Although [some defendants] . . . participated actively in the brutalities of the concentration camps to which they were assigned for duty, their positions were relatively subordinate . . . [and] the records do not show that they went out of their way to add to the brutalities . . . . There is no question as to their responsibility for these murders. However, certain mitigating circumstances [exist], such as the excitement resulting . . . after heavy bombing, and the fact that their crimes did not show a pattern of their character.<sup>193</sup>

General Handy's lengthy explanation highlights several interesting aspects of the U.S. war crimes prosecution program in its closing phase. First, the program had come under extensive attack due to the previously mentioned scandals, which had put the program's administrators on the defensive. Second, Handy's view on the appropriate level of punishment is very forgiving of the defendants. This could have stemmed from the criticism leveled at the program from both Washington and Germany, which left the program administrators with little political support or appetite to be "tough" on German war criminals.

#### A. The Flossenburg Concentration Camp Case Study<sup>194</sup>

The U.S. Army's war crimes prosecution program is perhaps better understood through an in-depth analysis of one of the *Dachau* trials. *United States v. Becker* (also known as the *Flossenburg Concentration Camp* case or case number 000-50-46) was the longest concentration camp case tried at Dachau.<sup>195</sup> The charge and particulars accused several dozen relatively low-ranking individuals of complicity in the activities of the Flossenburg Concentration Camp. Throughout the entire process, U.S. authorities never forgot the public nature of the main trial and subsequent perjury trial. As a reviewing officer stated, "a report without a transcript of the perjury proceedings would be inadvisable. Anyone reviewing the matter in the future would want a transcript of the Court proceedings."<sup>196</sup> It appears that the officer not only anticipated the openness of the trial, but also implicitly welcomed it.

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193. Decisions of Gen. Thomas T. Handy, Headquarters, European Command, Pub. Info. Div., EUCOM Release No. 51-91 (Jan. 31, 1951), in *LANDSBERG: A DOCUMENTARY REPORT 23-24* (Office of the U.S. High Comm'r For F.R.G., 1951).

194. The post-trial activities are referred to in this article as the "appellate process," "appellate procedures," or "review process." Technically, however, neither the prosecution nor the defense appealed the holdings of the trial court, nor were the findings and sentences ruled on by a higher court. Instead, they were automatically reviewed by several higher levels of authority (both legal and non-legal).

195. Sigel, *supra* note 10, at 107.

196. Memorandum from J.L.H. to Col. Bresee (Apr. 16, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

### 1. *Jurisdiction*

The JCS Directive 1023/10 authorized the creation of the Flossenburg tribunal.<sup>197</sup> Under this grant of authority, the Commander in Chief (CIC), United States Forces, European Theater (USFET), in turn, empowered the commanding generals of the Eastern and Western Military Districts to establish military commissions for the trial of war crimes and set forth the rules of procedure.<sup>198</sup> USFET headquarters shortly thereafter rescinded this order, consolidated the war crimes prosecution system under its direct control and issued regulations for the organization of and procedures governing war crimes tribunals.<sup>199</sup>

Although the authorities issued these regulations after the beginning of the *Flossenburg* trial, similar rules likely governed the trial. At the same time, General Orders No. 3 from the Deputy Theater Judge Advocate's Office (DJAO) created the unit within the U.S. Army charged with bringing to trial the war crimes cases.<sup>200</sup> The *Flossenburg* tribunal was a "General Military Government Court appointed by paragraph 36, Special Orders No. 123, Headquarters, Third United States Army"<sup>201</sup> "for the trial of such persons as may be properly brought before it."<sup>202</sup>

### 2. *A Description of the Concentration Camp*

The U.S. Army defined Flossenburg as a "Category III" concentration camp, which meant that its facilities included quarries and a factory in which inmates performed hard labor.<sup>203</sup> The inmate population contained some German nationals and Allied POWs, but consisted mostly of Eastern Europeans.<sup>204</sup> The S.S. operated the camp, although some individuals employed at the camp were not S.S. members.<sup>205</sup>

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197. Introduction, *supra* note 26, at 2.

198. Order AG 250.4 JAG-AGO from Col. H.F. Newmann, Acting Adjutant Gen., to Commanding Gens.: E. Military Dist., W. Military Dist., Military Commissions (Aug. 25, 1945), in STRAIGHT, *supra* note 9, Appendix XIX.

199. See APPENDIX 2.

200. See APPENDIX 3.

201. United States v. Becker, Case No. 000-50-46, Review and Recommendations from Deputy Judge Advocate's Office 1 (May 21, 1947), *microformed on* Nat'l Archives Collection of World War II War Crimes Records, Records of the U.S. Army Commands, 1942-, Record Group 338, Review of U.S. Army War Crimes Trials in Europe, 1945-1948, Microfilm Publication M1217 (5 Reels), Reel 5 [hereinafter DJAO Review]. This document is also available as part of a book. See U.S. JUDGE ADVOCATE'S OFFICE: WAR CRIMES GROUP; REVIEW & RECOMMENDATIONS; CONCENTRATION CAMP CRIMES.

202. 1 Record of Testimony 11-12, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 2.

203. DJAO Review, *supra* note 201, at 4.

204. *Id.* at 4-5.

205. *Id.*

TABLE 4: *Flossenburg Concentration Camp Statistics (1942 to April of 1945)*

(numbers are approximate)<sup>206</sup>

|       | Number of Arriving Prisoners | Number of Deaths                    | Death Rate           |
|-------|------------------------------|-------------------------------------|----------------------|
| Total | 94,200                       | 25,300 (including 2,000 executions) | Twenty-seven percent |
| Men   | 78,200                       | 24,300                              | Thirty-one percent   |
| Women | 16,000                       | 1,000                               | Six percent          |

The fifty-two defendants can be divided as follows:<sup>207</sup> fifty-one were indicted,<sup>208</sup> thirty-three were relatively low-ranking members of the S.S., such as guards, “Operators of the Camp” and “Work Detail Leaders”,<sup>209</sup> sixteen were inmates such as “Capos” and “Block Eldest”; and two were civilians.

Four different categories of U.S. Army personnel made the *Flossenburg* court function. Although the number of judges varied from six to seven, the presiding judge held the rank of colonel and the “Law Member” the rank of major.<sup>210</sup> The prosecution team consisted of the chief prosecutor with the rank of lieutenant colonel, a technical sergeant and two civilians.<sup>211</sup> The defense team had a chief defense counsel with the rank of lieutenant colonel, a major and two civilians.<sup>212</sup> Lastly, administrative personnel, such as interpreters and court reporters, also worked in the courtroom.<sup>213</sup>

The Manual for Trial of War Crimes and Related Cases, prepared by the Deputy Judge Advocate’s Office, 7708 War Crimes Group, European Command, laid forth the procedural details for the *Flossenburg* court.<sup>214</sup> The

206. *Id.* at 11.

207. *Id.* at 2-4; Table of Statistics, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; Introduction, *supra* note 26, at 4.

208. The prosecution, having insufficient evidence regarding a Ukrainian defendant and lacking a Ukrainian interpreter, decided not to charge him. Introduction, *supra* note 26, at 6.

209. The highest ranking defendant was an S.S. major, a *Flossenburg* deputy camp commandant. DJAO Review, *supra* note 201, at 23.

210. Special Orders No. 123, Extract (May 17, 1946), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

211. *Id.*

212. *Id.* Several of the defendants were also represented by German counsel. DJAO Review, *supra* note 201, at 19.

213. Record of Testimony, *supra* note 202, at 4.

214. See generally APPENDIX 4. For a useful comparison of the powers of tribunals and of the rules under which U.S. military tribunals tasked with hearing war crimes cases throughout the various theaters of operation (such as Italy, Germany, the Pacific Rim and China) worked, see LAW REPORTS, *supra* note 15, 111-24; for a complete version of the rules under which military tribunals operated in Germany, see OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.), MILITARY

manual allowed for the presiding judge's involvement in the proceedings. He could become involved actively if one of the parties was unfamiliar with common law proceedings and would do so "to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried."<sup>215</sup>

The reasons for the court's modified form, and its effects on the fairness of the outcome, are unknown. A possible explanation is that occupied Germany was a civil law country, and officials anticipated that many local defense attorneys would take part in the proceedings yet be unfamiliar with Anglo-American procedure. Their relative ineffectiveness is demonstrated by a failed attempt to impeach a witness who, it later turned out, had already been imprisoned for committing perjury.<sup>216</sup>

The most telling sign of the overall nature of the court and proceedings, however, is Section 270(c)(5), which stated "[c]ourts will to the greatest possible extent apply expeditious and non-technical procedure." This was perhaps a pragmatic acknowledgment of the unusual nature of a war crime, the circumstances of a court run by the occupying power in the wake of WWII and individuals lacking legal training presiding over the proceedings. Nonetheless, the emphasis on "expeditious and non-technical procedure" does not speak well for questions of procedural and substantive fairness.

There is at least one example where this procedural urgency undermined a defendant's due process rights. As a German defense attorney wrote in a letter to U.S. Army officials:

It had been desired to finish the trial as quickly as possible. It has also been requested that the presentation of evidence be out as short as possible. I complied with this desire and told [my client] Brusch that I did not consider it necessary for him to take the witness chair in view of the statements of the witnesses Schippel and Osswalt.<sup>217</sup>

The attorney went on to state that this decision had negatively affected the outcome of the trial.

### *3. The Various Stages of the Flossenburg Trial*

A typical *Dachau* case proceeded along the following lines:

- Pre-trial Investigation
- Indictment
- Trial
- Post-trial Branch Review

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GOVERNMENT REGULATIONS: TITLE 5: LEGAL AND PENAL ADMIN. (Berlin, Mar. 27, 1947), especially sections 5-390 to 5-394.

215. See APPENDIX 4.

216. Memorandum from Lt. Col. Wade M. Fleischer, Chief, International Affairs Branch, to Col. Harbaugh, Perjury Charges in Flossenburg Case (Sept. 16, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

217. Petition for Review from W. Wacker, Defense Council for the accused, to Military Ct., Dachau 1 (Apr. 12, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

- War Crimes Review Board
- Commander in Chief Approval
- Subsequent Recommendations
- Review Committee
- War Crimes Modification Board<sup>218</sup>

Those individuals involved in the *Flossenburg* case, however, skipped or reversed several steps in this process. The War Crimes Review Board seems to have at first not reviewed the trial court's findings at all and then examined only a handful of the sentences after the perjury trial.<sup>219</sup> Apparently there is no evidence of any action taken by the War Crimes Modification Board.<sup>220</sup>

#### 4. The Trial Chronology

The main *Flossenburg* trial took place at Dachau, Germany, from June 12, 1946, to January 22, 1947.<sup>221</sup> On December 17, 1946, the Deputy Theater Judge Advocate for War Crimes (Deputy Judge Advocate or DJA) ordered the court to enter a *nolle prosequi* against six of the defendants.<sup>222</sup> On January 20 and 22, 1947, the court announced its findings and sentences.<sup>223</sup> On May 21, 1947, the DJAO, 7708 War Crimes Group, issued its Review and Recommendations of the court's findings and sentences.<sup>224</sup>

From that date until September 10, 1947, the findings and sentences proceeded through several additional layers of administrative review and approval. This process included a third-party review of one defendant's sentence prior to August 28, 1947.<sup>225</sup> On September 10, 1947, the CIC USFET approved the DJAO's modified findings and sentences.<sup>226</sup> Thereafter, reviewing authorities modified several defendants' sentences.

On August 25, 1947, a defendant's relative informed the Deputy Judge Advocate of the ongoing perjury trial in a German court against two of the prosecution's witnesses for their testimony in the *Flossenburg* case.<sup>227</sup> This

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218. An untitled document listing data in table-format for some of the accused (name, age, rank, position, length of service), as well as actions taken by reviewing bodies, can be found, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Table Data].

219. *Id.*; Rep. of War Crimes Bd. of Rev. No. 1 (May 24, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Board].

220. *Id.*

221. DJAO Review, *supra* note 201, at 1.

222. *Id.* at 2.

223. *Id.*

224. *Id.* at 1.

225. Internal Route Slip from Col. J.L. Harbaugh, Jr., JA EUCOM, to S/GS EUCOM, No. 3, ¶ 1, Tab A, Analysis by Maj. J.C. Duvall (Aug. 21, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter Duvall].

226. Internal Route Slip No. 6 from Lt. Col. Earl W. Smith, JA Liaison, to JA EUCOM, Attn: Int. Affairs Branch 2 (Aug. 28 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

227. Memorandum from Lt. Col. C.E. Straight, DJA for War Crimes, APO 407, to JA, EUCOM, APO 757 (Sept. 9, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel

precipitated an in-depth internal review and discussion regarding the possible consequences for the sentences in the *Flossenburg* trial. Major dates include September 18, 1947, when the Judge Advocate, European Command, conducted an initial review of the case in light of the perjury charges and stayed the execution of several sentences.<sup>228</sup> U.S. authorities transferred the perjury trial from German to U.S. jurisdiction, and on April 7, 1948, a U.S. Military Government Court issued its findings and sentences against the two accused perjurers.<sup>229</sup> On May 24, 1948, a War Crimes Review Board reviewed the findings and sentences of some of the *Flossenburg* defendants in light of the perjury trial.<sup>230</sup>

### 5. The Pre-Trial Stage

The U.S. military swiftly began its pre-trial preparations for the *Flossenburg* trial, including the collection of evidence. Already on May 6, 1945, the Third United States Army appointed eleven “Investigator-Examiner[s to] investigate all war crimes coming to . . . [their] attention.”<sup>231</sup> These orders came in response to a letter from the Twelfth Army Group Headquarters, dated April 30, 1945 and titled “Establishment of War Crimes Branches and Investigations of War Crimes.”<sup>232</sup> This swift action was extremely important to the relatively accurate and complete collection of evidence for use in the trial, as the chaos of WWII quickly made accurate reconstructions impossible through the dispersion and destruction of evidence. The Deputy Judge Advocate noted in a summary report the difficulties experienced by investigators in gathering evidence in war crimes cases, such as the unavailability of victims through death or dispersion, and defendants trying to elude capture.<sup>233</sup>

Even before their official appointments, these investigator-examiners began to collect evidence. They took the witness statements of some local inhabitants and victims as early as April 30, 1945.<sup>234</sup> In addition, the investigator-examiners collected statements and interrogation reports from German POWs.<sup>235</sup> The first U.S. Army personnel who entered the Flossenburg

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228. Internal Route Slip from Col. J.A. Harbaugh, Jr., JA DIV EUCOM, to CinC thru C/S, EUCOM (Sept. 18, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

229. Goff, *supra* note 2.

230. Board, *supra* note 219.

231. Order AG 092-GNHCF from Lt. Col. R.W. Hartman, Assistant Adjutant Gen. (May 6, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1. One of the interpreters was Benjamin B. Ferencz, who would later gain fame as a prosecutor at the American Nuremberg trials. See Report from Milos Kucera & Karel Prochaska, Short History of the Concentration Camp at Flossenburg 6 (Apr. 30, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1 (showing Ferencz’s signature on an oath taken by interpreters).

232. Hartman, *supra* note 231.

233. STRAIGHT, *supra* note 9, at 35-36.

234. Kucera & Prochaska, *supra* note 231.

235. Report From Captured Personnel and Material Branch, Military Intelligence Div., U.S. War Dep’t 2 (May 18, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

Concentration Camp supplemented this evidence with their own affidavits.<sup>236</sup>

In a memorandum, two investigator-examiners detailed their research conducted from May 28, 1945 to June 1, 1945.<sup>237</sup> They collected evidence regarding the evacuation march of prisoners from Flossenburg to Dachau in April of 1945. Their investigative report and techniques were typical and consisted of collecting testimony from a wide variety of witnesses through the use of sworn affidavits.<sup>238</sup>

Another report presented a detailed history and description of the Flossenburg Concentration Camp and included “[p]hotographs of some of the SS personnel of Camp Flossenburg . . . [a]trocidity scenes [and an incomplete] list of perpetrators.”<sup>239</sup> Even in regard to photographs, the investigator-examiners took care to comply with rules of evidence by preserving the chain of custody through the submission of affidavits by U.S. Army photographers.<sup>240</sup>

After a year of such pre-trial activities, on May 14, 1946, a Military Government Court published the charge sheet for the *Flossenburg* trial, which gave the names of the accused and the charge and particulars.<sup>241</sup> The only

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236. Affidavit of Capt. Elijah C. Carter (Oct. 18, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

237. Memorandum from 2nd Lt. Patrick W. McMahon to Commanding Gen., Twelfth Army Group, APO 655, U.S. Army (July 2, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

238. “The testimony of all witnesses examined in the course of this investigation was secured through the use of an interpreter, after the witness had been sworn by the Investigator-Examiner . . . . The testimony of the witnesses examined was obtained through the use of affidavits. Each witness who could write, wrote his statement and signed the same in his own hand, and executed the same in the presence of the Investigator-Examiner, under oath. The remaining witnesses dictated their statements to the interpreter, said statements being read back to the witness in their native tongue, and they executed the same under oath, in our presence. It was impracticable to obtain the testimony of the witnesses in question and answer form. The use of a stenographic reporter and the use of an assistant investigator-cross-examiner were impracticable . . . . Photographs of the victims disinterred in the vicinity of Schwarzenfeld on 24 April 1945 are being prepared and will be forwarded as a supplement to this report.” *Id.* at 1-2.

239. Memorandum from 2nd Lt. John J. Reid to Commanding Gen., Third United States Army, APO 403 (June 21, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

240. One such document explained that the affiant “had been assigned to taking [sic] photographs . . . ; that he personally photographed the scene shown on [the] photograph . . . [which] bears his personal signature; that said photograph was taken on the 30th day of April 1945 at Flossenburg Concentration Camp in Germany; that it is a true and correct reproduction of and accurately depicts the following scene as it appeared at said time and place.” Affidavit re Authenticity of Still Photograph from Howard E. James, PFC (Sept. 1, 1945), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

241. The particulars read as follows: “In that [the defendants], German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses and indignities, did, at or near the vicinity of Flossenburg Concentration Camp, near Flossenburg, Germany and at or near the vicinity of the Flossenburg out-camps . . . and with transports of prisoners evacuating said camps, all in German or German-controlled territory at various and sundry times, between the 1st of January 1942 and the 8th of May 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of . . . stateless persons . . . [and] non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then Germany Reich . . . the exact names and numbers of such persons

charge consisted of the “Violation of the Laws and Usages of War.” The particulars laid out the specific acts which each accused individual allegedly had committed “in pursuance of a common design.” On May 17, 1946, “Service of Charges was made upon the . . . accused in the Flossenburg Concentration Camp Trial” by the prosecution.<sup>242</sup>

### 6. The Trial

This paper will not focus on the actual trial, as this would require an article all of its own. It is noted, however, that all fifty-one defendants whom the U.S. Army tried pled “not guilty” to the charge and particulars.<sup>243</sup> The trial lasted approximately six months, produced a trial transcript approximately 9,500 pages in length and on January 20 and 22, 1947, the court issued its findings and sentences.<sup>244</sup> The sentences were as follows:

TABLE 5: Overview of the Sentences

| Sentences                                 | Number   |
|-------------------------------------------|----------|
| Death Sentences                           | Fifteen* |
| Imprisonment for Life                     | Eleven   |
| Imprisonment for Thirty Years             | One      |
| Imprisonment for Twenty Years             | Four     |
| Imprisonment for Fifteen Years            | Four     |
| Imprisonment for Ten Years                | Three    |
| Imprisonment for Three and One-half Years | One      |
| Imprisonment for One Year                 | One      |
| Not Guilty                                | Five     |
| <i>Nolle Prosequi</i>                     | Six      |
| Not Tried                                 | One      |

\*“The DJAWC [Deputy Judge Advocate for War Crimes] recommend[ed] the reduction of two of these sentences to life imprisonment.”<sup>245</sup> Exactly half of the fifty-two accused received life imprisonment or death sentences. Whether these sentences were appropriate for low-ranking defendants from “a factory dealing in death” is arguable.<sup>246</sup> In eighteen subsequent trials, an additional

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being unknown, but aggregating many thousands.” Charge Sheet from Col. Howard F. Bresee (May 14, 1946), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

242. Certification of Stephan F. Pinter, Prosecutor (June 10, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 1.

243. DJAO Review, *supra* note 201, at 2-4.

244. Introduction, *supra* note 26, at 18.

245. Memorandum from W.M.F. to Col. Harbaugh 1 (July 12, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 [hereinafter W.M.F.].

246. Reid, *supra* note 239, at 3.

forty-two defendants had to face the same charge and particulars.<sup>247</sup>

### 7. *The Rules of Evidence*

A more in-depth analysis of some of the relevant rules of evidence allows the reader to better understand the nature of the *Flossenburg* trial. Sections 270 of the Manual for Trial of War Crimes and Related Cases states the applicable rules of evidence.<sup>248</sup> In order to be admissible, evidence had to either be of “assistance in proving or disproving the charge, . . . have probative value [or] aid in determining the truth.”<sup>249</sup> Section 270(a) explained these admissibility standards were “not contrary to the . . . Articles of War [because p]ersons charged with the commission of a war crime [we]re not ‘persons subject to military law’ within the meaning of the Articles of War and are not entitled to their benefit.”

This standard of admissibility could have caused some *Flossenburg* defendants to have been found guilty solely based upon the sheer amount of evidence, which, although not directly relevant to their guilt, supported the general charge of having acted “in pursuance of a common design.” This possibility was ruled out, though, in one of the reviews.

Section 270(c)(2) required “the production of the best evidence reasonably available. However, this principle is not to be confused with the ‘best evidence rule.’ The latter is definitely not applicable.” The court’s low standard was an explicit acknowledgment of “the difficulties involved in procuring evidence” in post-World War II Germany, which were described in Section 270(d). The only apparent check on the admissibility of evidence was discussed in this section, as well. “[T]he court need only satisfy itself that . . . the accused will not unreasonably be prejudiced by admission of such evidence.”

In line with the weakened best evidence rule, Section 270(b) plainly stated that “[h]earsay evidence is admissible.” The court further “presume[d] under Section 270(c)(4)], subject to being rebutted by competent evidence, that sworn statements . . . from accused and witnesses were voluntarily made.” In addition, Section 273 did not limit the scope of cross-examination, perhaps making defendants more reluctant to take the stand.

## *B. The Review Procedures*

### *1. Introduction*

The review process in the *Flossenburg* case consisted of several formal and informal steps. Excluding actions taken in regard to allegations of perjury stemming from the trial, there appears to have been one significant review of the entire case. In addition, officials conducted numerous informal reviews and

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247. Sigel, *supra* note 10, at 109.

248. See APPENDIX 4.

249. *Id.* §§ 270(a)-(b).

recommendations of certain aspects of the case. It is unknown whether these officials simply did not adhere to the review process, or whether insufficient records exist.

In addition, although the perjury allegations lengthened and intensified the review process, it is uncertain to what exact degree this is the case. Would the CIC USFET and others have otherwise paid such great attention to the details of the case?

## 2. *The Judge Advocate's Memorandum*

An undated memorandum by the Judge Advocate was one of the best informal reviews of the trial.<sup>250</sup> He first considered the charge:

This case was tried on the theory of "common design," which legal theory had been employed previously in the Dachau and Mauthausen Concentration Camps. While not exactly similar to the legal theory of conspiracy it is substantially the same inasmuch as it imputes to all who participated in the common design the guilt of anyone. The Court found the majority of the accused guilty as charged, that is, participating in a common design to kill, murder, etc. . . . In my opinion the evidence before the Court warranted such a finding . . . However, in imposing sentences the Court did not apply this theory but based its sentences almost wholly [sic] upon the actual atrocities committed by an individual accused. There are several exceptions to this . . . The President of the Court in his rulings almost uniformly ruled in favor of the accused. . . . To again weigh this evidence is impossible. We must trust . . . the judgment of the Court . . . Inasmuch as the offenses charged are in violation of the rules of war a sentence of death in each case is legal.<sup>251</sup>

This thorough review was unexceptional except for one apparent act of self-censorship. In an apparent draft version of the document, the Judge Advocate drew a line through the following sentence: "I am unwilling to arrive at a decision in direct conflict with that of the Court but I do think the sentences in these [two] cases should be commuted to life imprisonment."<sup>252</sup> It is unknown how widespread such self-censorship was and how much the review process suffered as a consequence.

The Judge Advocate continues the memorandum by expanding upon his critique of the two cases mentioned in the crossed-out sentence:

It is hard to determine the theory upon which the Court imposed death sentences in [these two] cases . . . I am inclined to the view that so far as these particular executions were concerned they were not convinced they were executing illegal orders. If the sentence is to be sustained at all it must be sustained on the theory that knowing the whole operation of the Concentration Camps was illegal and wrongful, any act that they did in connection therewith must have been known to them as wrong.<sup>253</sup>

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250. Memorandum from J.L. Harbaugh/wdb, *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

251. *Id.* at 1-2, 4.

252. *Id.* at 3.

253. *Id.* at 4. Both death sentences were carried out. See Legal Form No. 16 from Gen.

Thus, the Judge Advocate falls back on the legal theory of “common design” in order to uphold the sentences. The two defendants in question were executed on October 3 and 15, 1947 or 1948.

### 3. The Deputy Judge Advocate’s Office’s Review

On May 21, 1947, the DJAO completed and published the only significant and formal review of the court’s findings and sentences. A captain and a civilian attorney in the Post Trial Branch of the DJAO wrote the report, which the Deputy Judge Advocate, a colonel, approved after reviewing the trial record.<sup>254</sup> The report was seventy-three pages in length, cited the trial record extensively, and was organized into the following sections:

- basic trial information
- the charge and particulars
- the general findings and sentences
- a statement of the evidence for the prosecution (nine pages in length)
- a statement of the evidence for the defense (two pages in length)
- a review of trial motions
- several sections devoted to the court’s jurisdiction
- a conclusion regarding the overall conduct of the trial
- a section devoted to the issue of *respondeat superior*
- a section constituting the bulk of the report, which spelled out the findings and sentences against all of the defendants individually
- a conclusion regarding all of the sentences handed down by the court

### 4. The DJAO Review – Jurisdiction

The DJAO examined the question of the court’s jurisdiction in three separate sections: jurisdiction in general, jurisdiction over the victims, and jurisdiction over the accused. In regard to general jurisdiction, the DJAO noted that pursuant to orders the court had been properly constituted and

[i]t is well settled by accepted international law that members of an enemy armed force, or civilian nationals of an enemy country, may be punished by properly constituted courts established by the occupying power for crimes against the laws and usages of war committed prior to the cessation of hostilities.<sup>255</sup>

In support, the report cited a U.S. military manual, several U.S. cases and the *Mauthausen Concentration Camp* case.<sup>256</sup> This reliance on U.S. military and federal court sources and precedent from within the war crimes prosecution

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Clay to Director, War Criminal Prison (Aug. 16, 1948), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; Introduction, *supra* note 26, at 8.

254. DJAO Review, *supra* note 201, at 73.

255. *Id.* at 16.

256. *Id.*

program indicates that the DJAO was not simply a “rubber-stamp” authority but went about its task diligently.

The DJAO noted the court could exercise jurisdiction over the victims, as well. Accordingly, the U.S. Military Government Court had the authority to try individuals accused of war crimes against nationals of allies or co-belligerents of the United States. The report cited the *Dachau Concentration Camp* case and various authorities listed in a U.S. military manual. In addition, the DJAO stated the court had jurisdiction *a fortiori* as the victims included American POWs, again citing the *Dachau* case and a U.S. military manual.<sup>257</sup>

Even though no one raised the issue at trial, the DJAO examined the issue of jurisdiction over the accused, specifically nationals of the Netherlands and Yugoslavia, which were members of the United Nations, that is, not aligned with the Axis powers.<sup>258</sup> Analogizing war crimes to piracy, for which the DJAO cited a treatise on international law, the report noted similar jurisdiction had been exercised in other concentration camp cases. There, the DJAO opined, the authorities so strongly assumed universal jurisdiction to exist that they did not even feel the need to discuss it. Moreover, the report stated that with some exceptions, U.S. Military Government Courts had jurisdiction over all nationals in their zones of occupation.

#### 5. *The DJAO Review – Due Process*

The report also reviewed the adherence to due process standards. The report noted that all the accused were represented by competent American counsel, one member of the court was a legally trained officer, sufficient interpreters were present, full rights of cross-examination were available, most of the accused exercised their right to testify on their own behalf and the court approved all findings of guilt with a two-thirds vote. Thus, the DJAO concluded, “[t]he trial was conducted with fairness to all convicted accused.”<sup>259</sup>

Apparently, the DJAO did not feel that the following short-comings were significant. First, the accused-to-counsel ratio was very high. Second, it seems indicative of more fundamental inequalities that in the report, the statement of the prosecution’s evidence was nine pages in length, whereas that of the defense was only two pages long.

#### 6. *The DJAO Review of the Defense’s Motions*

The DJAO report reviewed the five motions made by the defense at the outset of the trial.<sup>260</sup> The Post Trial Branch lawyers concluded in the report that the five defense motions had been properly ruled on by the court. The one

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257. *Id.* at 16-17.

258. *Id.* at 17.

259. *Id.* at 19.

260. *Id.* at 15-19.

motion upheld by the court was a motion to exclude all potential witnesses from the courtroom prior to the initial questioning of the defendants.

One of the motions denied by the court sought severance of the defendants' trials. The DJAO accepted this ruling because it was within the court's "sound discretion," as severance was neither a right nor a privilege.<sup>261</sup> The DJAO then went on to state that in war crimes trials, "the test is whether an injustice would result to [the] accused and not whether [the] purported substantial rights of [the] accused would be violated, if the motion were overruled, because accused have no right in this connection."<sup>262</sup> This reasoning regarding severance demonstrates the potential effect of the emphasis on speedy, non-technical procedures employed by the military tribunals.

### 7. The DJAO Review – The Theory of *Respondeat Superior* & Its Conclusion

The DJAO then responded to the defense of *respondeat superior*. It stated that compliance with superior orders was not a defense to the charge of having committed a war crime and cited Congressional documents, a treatise on international law, a law journal, two prior war crimes cases, "anglo-american jurisprudence," and a U.S. military manual.<sup>263</sup> The DJAO nonetheless allowed that compliance with superior orders could, when it met a three-part test, constitute a mitigating factor in the sentencing phase.<sup>264</sup> In its discussion of superior orders, the report also cited the London Agreement, several books, and other materials.<sup>265</sup>

After reviewing the defendants' individual findings and sentences, the DJAO summarized the trial. Finding no error with the court or the trial, the report recommended approval of all but two of the sentences.<sup>266</sup>

### 8. Post-DJAO Reviews

After the DJAO reviewed the trial, several other authorities reviewed both the trial record and the DJAO's report. In a short memorandum from the Chief of the International Affairs Section to the Judge Advocate, the former suggested that the sentences of several additional defendants be reduced on grounds of insufficiency of the evidence and the defense of superior orders;<sup>267</sup> these suggestions seem to have had no impact upon the decisions of the Judge

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261. *Id.* at 19.

262. *Id.*

263. *Id.* at 21.

264. *Id.*

265. *Id.*

266. "An examination of the entire record of trial fails to disclose any error or omission which resulted in injustice to the accused and discloses that the evidence is legally sufficient to support the findings of the Court. Accordingly, it is recommended that the findings of the Court be approved as to all the accused and . . . that the sentences to death by hanging as to [two] accused . . . be approved, but commuted to imprisonment for life and as commuted ordered executed." *Id.* at 72.

267. W.M.F., *supra* note 245.

Advocate. He seconded the approval of the report by the Deputy Judge Advocate for War Crimes and urged that a third sentence not mentioned by the Chief of the International Affairs Section be commuted as well.<sup>268</sup>

Interestingly, the Chief of Staff did not initially agree to the commutation of this third sentence and urged the Judge Advocate to reconsider.<sup>269</sup> He ordered a third-party review of the sentence at issue. The reviewer agreed with the Judge Advocate that “[a]fter reviewing sentences heretofore ordered in cases involving low-ranking soldiers in War Crimes acting pursuant to direct orders issued by superior officers then present, it is believed that the sentence of death is unnecessarily harsh and excessive.”<sup>270</sup>

Subsequently, the Judge Advocate reiterated his initial view in a detailed memorandum to the Chief of Staff.<sup>271</sup> On August 28, 1947, the Chief of Staff agreed to the Judge Advocate’s position and allowed the amended DJAO’s report to be forwarded to the CIC for review.<sup>272</sup> The CIC confirmed the findings and sentences on September 10, 1947.<sup>273</sup>

The architects of the U.S. Army’s war crime prosecution program intended the review process to take into account petitions for clemency and review filed by defendants and other interested parties. In the *Flossenburg* case, many petitions were filed but will not be addressed in this article as they seemed to have had only a marginal impact on the process. This is exemplified by the reaction of the Judge Advocate to one such petition. “The petition for clemency presented by the brother of the accused is not grounded on the existence of pertinent new evidence or predicated upon any other compelling considerations which warrant [sic] further investigation. It is merely a plea for mercy.”<sup>274</sup> Many petitions did try to advance arguments based on evidence, but either the evidence was not new or the Judge Advocate and others did not consider the arguments persuasive. One petition submitted by a German counsel argued that procedural errors had prevented his client from testifying on his own behalf, thereby violating his due process rights.<sup>275</sup> The petition had no noticeable impact.

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268. Internal Route Slip from JA EUCOM APO 757 to Commander in Chief Thru Chief of Staff No. 1 (Aug. 4, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

269. Internal Route Slip from Secy GS-EUCOM to JA, No. 2 (Aug. 7, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

270. Duvall, *supra* note 225, at 9.

271. Memorandum from Col. J.L. Harbaugh, Jr., JA EUCOM, to S/GS EUCOM ¶ 7 (Aug. 21, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

272. Internal Route Slip from Secy GS EUCOM to JA EUCOM, No. 4 (Aug. 28, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

273. Smith, *supra* note 226.

274. Internal Route Slip from Col. J.L. Harbaugh, Jr., to CINC, No. 1, § 3 (Sept. 4, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

275. Wacker, *supra* note 217, at 1; *see also* note 4, at 393 (the regulations governing the operation of the courts encouraged efficiency).

### 9. The Perjury Trial

One petition submitted by a defendant's nephew did, however, have an enormous impact upon the course of the trial, insofar as it was "predicated upon . . . [a] compelling consideration." On August 25, 1947, the nephew sent a letter to the 7708 War Crimes Group requesting that his uncle's execution be postponed, as he had filed a suit against two prosecution witnesses for having committed perjury while testifying in the *Flossenburg* trial.<sup>276</sup> The Office of Military Government – Bavaria (OMGB), pursuant to Military Government – Germany, Law No. 2 (German Courts), Article VI, Paragraph 10a, prevented the German courts from exercising jurisdiction.<sup>277</sup> The nephew's letter triggered an investigation into the underlying charges.

By September 15, 1947, the War Crimes Group had recommended to the Judge Advocate that the execution of the defendant's death sentence be suspended until the perjury charges had been dealt with by the military courts.<sup>278</sup> On September 18, 1947, the Judge Advocate, in a memorandum to the CIC, recommended the temporary suspension of several sentences related to the possibly perjured testimony.<sup>279</sup> The Judge Advocate intended this suspension to be in effect until the conclusion of both the perjury investigation and the determination of whether any sentences needed to be altered. The CIC approved this suspension on September 22, 1947.<sup>280</sup>

On April 7, 1948, an Intermediate Military Government Court in Munich announced its findings in the case of the two prosecution witnesses accused of perjury in the *Flossenburg* trial.<sup>281</sup> In its opinion, the court addressed the question of its jurisdiction.<sup>282</sup> Interestingly, once again the persons involved in

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276. Straight, *supra* note 227.

277. Memorandum from Lt. Col. Wade M. Fleischer, Chief, International Affairs Branch, to Col. Harbaugh (Sept. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12; *see also* Military Government – Germany, Supreme Commander's Area of Control, Law No. 2, German Courts, Article VI, Change 18 (Jan. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12 (stating "no German Court shall assert or exercise jurisdiction in the following cases or classes of cases: (a) Criminal cases involving: (1) Any of the United Nations").

278. Memorandum from Lt. Col. Wade M. Fleischer, Chief, Int'l Affairs Branch, to Col. Harbaugh (Sept. 15, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

279. Harbaugh, *supra* note 228.

280. Letter from Brigadier Gen. C.K. Gailey, GSC Chief of Staff, to Gen. White (Sept. 22, 1947), *microformed on* Microfilm Publication 1204, *supra* note 2, Reel 12.

281. The court made clear that "[t]his is a common trial for convenience and not a joint trial." Goff, *supra* note 2, at 3.

282. "No question of general jurisdiction or 'War Crimes' rather than MG [Military Government] jurisdiction has been raised, but the Court comments on this point, in passing, for the benefit of subsequent reviewers of the case, as follows: (a) The case has been cleared with the Chief of 7708 War Crimes Group and EUCOM and the Legal Division, OMGUS, have been advised of the commencement of these proceedings and the execution of the sentence imposed upon [the defendant] has been indefinitely stayed pending the conclusion of this case. (b) The jurisdiction of MG Courts is unlimited and extends to the persons involved, as accused, the crimes charged, and the evidence adduced. (c) War Crimes Courts were of limited jurisdiction and might well be held legally here to punishing perjury as a matter of contempt, only. In any case, War Crimes Courts at Dachau have been discontinued, so trial by those courts is impossible." *Id.* at 1-2 (emphasis added).

the review process were conscious of the fact that it would be an open record. The court stated that it commented “on . . . [its jurisdiction] for the benefit of subsequent reviewers of the case.” The judge acquitted one defendant and found the other one guilty and sentenced him to six years of imprisonment.<sup>283</sup>

In a memorandum written before the end of the perjury trial, a reviewing officer discussed its effect on the *Flossenburg* defendants.<sup>284</sup> The only option, the memorandum concluded, was to review the original findings and sentences in order to determine whether the sentences needed to be commuted. As a result, after the perjury trial, a member of the War Crimes Group reviewed the findings and sentences of five of the *Flossenburg* defendants.<sup>285</sup> Specifically, the reviewer considered whether the non-perjured evidence was sufficient to uphold the findings and sentences. He concluded it was for all five defendants, including ironically the one whose relative had triggered the entire perjury investigation.

On May 24, 1948, the War Crimes Board of Review No. 1 issued its report regarding the findings and sentences for several of the defendants.<sup>286</sup> In coming to its conclusions, the Board examined the record of the *Flossenburg* trial, the Review and Recommendations of the Deputy Judge Advocate for War Crimes, the record of the perjury trial, the Deputy Judge Advocate’s memorandum of April 30, 1948, and petitions which the reviewing officers had previously not taken under consideration.<sup>287</sup> The Board described the scope of its inquiry in the following manner:

This War Crimes Board of Review in this report is concerned with two questions only. First is the evidence in the record of trial in the above captioned case, excluding entirely from any consideration the evidence given by [the witness convicted of perjury], legally sufficient to support the findings and sentences of the court with respect to the several accused mentioned by this witness in his testimony? Second, have the various petitions with supporting documents, raised issues or presented equities which call for revision of findings and sentences as they now stand?<sup>288</sup>

The Board answered the first question in the affirmative and the second one in the negative.<sup>289</sup> Thus, although the Board found that perjured testimony had been introduced in the *Flossenburg* trial, it concluded that it did not unjustly affect the outcome of the trial.

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283. *Id.* at cover sheet.

284. Fleischer, *supra* note 3.

285. Memorandum from Capt. Mueller to DJAWC, APO 407 (Apr. 30, 1948), *microformed on Microfilm Publication 1204, supra* note 2, Reel 12.

286. Board, *supra* note 219.

287. *Id.* at 1-2.

288. *Id.* at 3.

289. “The petitions are without merit. The evidence in the record of trial, with no weight given to the testimony of the [perjured] witness . . . is legally sufficient to support the findings and the sentences.” *Id.* at 11.

### 10. The Flossenburg Sentences

Of the thirty-three members of the S.S. whom the court tried, it convicted twenty-seven, acquitted one and entered *nolle prosequi* against five.<sup>290</sup> Of those the court convicted, eight defendants received death sentences, ten received life sentences and nine received lesser sentences.<sup>291</sup> Of the sixteen inmates tried by the court, twelve were convicted and four were acquitted.<sup>292</sup> Of the twelve convicted by the court, four received death sentences, three received life sentences and five received lesser sentences.<sup>293</sup> Of the two civilians tried, the court sentenced one to death and the other received a *nolle prosequi*.<sup>294</sup>

U.S. Army officials carried out the death sentences on October 3 and 15, 1947 or 1948.<sup>295</sup> A Polish war crimes court sentenced to death one of the defendants extradited by the U.S. Army.<sup>296</sup> Of the six defendants against whom the court entered *nolle prosequi*, subsequent U.S. military tribunals tried and convicted two of them in *United States v. Heerde*.<sup>297</sup> One received a life sentence and the other a death sentence. In the following *Flossenburg 1 & 2* trials, *United States v. Degner* and *United States v. Wodak*, respectively, the court acquitted one defendant and sentenced the other to death.<sup>298</sup> The U.S. Army apparently did not retry the two remaining defendants.<sup>299</sup>

An undated document in table-format gives an overview of what happened to twenty-six of the defendants after they received their initial sentences.<sup>300</sup> Two defendants had their initial sentences reduced from death to life sentences by the Deputy Judge Advocate for War Crimes.<sup>301</sup> The War Crimes Review Board initially conducted no reviews of the findings and sentences.<sup>302</sup> Two other defendants had their sentences reduced from death to life sentences by the CIC.<sup>303</sup> Interestingly, the CIC, in his third review, commuted the sentence of the defendant whose nephew had triggered the perjury trial.<sup>304</sup>

“Subsequent HQ Recommendation[s]” were given by War Crimes Review Boards No. 1 and 2 in regard to three defendants.<sup>305</sup> For the first defendant, “WCRB No. 1 recommended clemency consideration.” For the second

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290. Table of Statistics, *supra* note 207.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Introduction, *supra* note 26, at 8.

296. *Id.*

297. *Id.* at 6.

298. *Id.* at 7.

299. *Id.*

300. Table Data, *supra* note 218.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

defendant, the “WCRB No. 2 recommended 15 yrs,” as opposed to the initial life sentence. As for the third defendant, whose relative had sparked the perjury trial, “WCRB No. 1 recommended reaffirmation of death sentence [thereby overturning the CIC’s decision]; WCRB No. 2 recommended commutation to life.” If these three defendants can serve as any indication, reviewing authorities tended to reduce the initial sentences handed down by U.S. military tribunals.

Presumably not more than ten years after the initial sentences were handed down, the Review Committee reduced almost all of the remaining sentences.<sup>306</sup> The War Crimes Modification Board made no recommendations as to these twenty-six sentences.<sup>307</sup>

Additional light is shed upon the *Flossenburg* sentences by a document prepared by the National Archives. From December of 1950 to January of 1951, the War Crimes Modification Board reviewed the sentences of the remaining twenty-six defendants, commuting sentences either to “time served as of February 1951” or to other shorter sentences.<sup>308</sup> U.S. officials also released early or granted parole to several defendants.<sup>309</sup> They granted the last defendant parole in 1957 and remitted his sentence on June 11, 1958, approximately thirteen years after the war crimes investigators-examiners began their work.<sup>310</sup>

## V.

### U.S. MILITARY COMMISSIONS AT GUANTANAMO BAY – ECHOES OF THE PAST?

As the history of the U.S. Army’s war crimes prosecution program demonstrates, its architects sought to do much more than just resolve questions of individual guilt or innocence in putting on the *Dachau* trials. Professor Shapiro, though, warns against using trials for non-legal purposes, such as social control:

Where social control is the dominant mode, as in criminal law, all sorts of shifts in the balance of proof may be made for policy reasons . . . . Presumptions, burdens of proof, and per se rules are the standard form for manipulating factual issues to achieve policy goals.<sup>311</sup>

His fear came true in the *Dachau* trials, where politics, at least in part, steered the judicial cart. A military regulation cited in the DJAO report plainly stated:

The purpose of proceedings in Military Government Courts . . . [is] the advancement of the political, military and administrative objectives declared by the Control Council and the Theater Commander . . . . Proceedings will be conducted with a view to the attainment of this purpose to the fullest possible extent. Technical and legalistic view points will not be allowed to interfere with

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306. *Id.*

307. *Id.*

308. Introduction, *supra* note 26, at 8-9.

309. *Id.*

310. *Id.*

311. SHAPIRO, *supra* note 12, at 47.

such a result.<sup>312</sup>

This is not to say that the *Dachau* trials were rife with injustice; they were not. If justice in an individual case conflicted with larger policy objectives, however, then justice did not prevail. The reduction of many sentences in the latter phase of the war crimes prosecution program due to outside pressures is one example of the triumph of policy over justice. The scandals surrounding the *Malmédy* and *Buchenwald* trials are perhaps two others.

Are the policy pressures bearing down on the U.S. military commissions at Guantanamo Bay comparable to the ones existing at the time of the *Dachau* trials? For instance, are the procedural rules crafted in such a way as to make a specific outcome more likely? President Bush authorized the establishment of a U.S. military commission system in his Military Order of November 13, 2001, which Secretary of Defense Rumsfeld implemented in Military Commission Order No. 1 on March 21, 2002.<sup>313</sup> The procedural rules applied by such commissions, according to Rumsfeld, will “ensure . . . [that a trial] is handled in a measured, balanced, thoughtful way that reflects our country’s values.”<sup>314</sup> He gave several reasons why military commissions are preferable to civilian courts, largely echoing the language and ideas behind the *Dachau* trials.<sup>315</sup>

Rumsfeld’s first reason was security concerns for those involved in trying “unlawful belligerents.”<sup>316</sup> Against such a backdrop, “[m]ilitary commissions would permit speedy, secure, fair and flexible proceedings.”<sup>317</sup> Second, federal rules of evidence, which reflect “public policy reasons . . . have no application in a trial of foreign terrorists.” Consequently, “military tribunals can permit more inclusive rules of evidence . . . allow[ing] those judging the case to hear all probative evidence.”<sup>318</sup> These justifications for the standards employed by military commissions are almost identical to the ones offered almost sixty years ago, and arguably the standards will have similar effects today.

Some commentators, such as the American Bar Association (ABA), have been relatively neutral on the question of U.S. military commissions. On the one hand, the ABA states, “[m]ilitary commissions probably will not afford the same procedural protections as civilian courts.”<sup>319</sup> On the other hand, the report goes on to state, “[i]f conducted under reasonable procedures . . . military commissions can deliver justice with due process.”<sup>320</sup> The question is whether

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312. DJAO Review, *supra* note 201, at 20.

313. Bialke, *supra* note 159, at 77.

314. Sec’y of Def. Donald H. Rumsfeld and Deputy Sec’y of Def. Paul Wolfowitz, Prepared Statement: Senate Armed Services Committee “Military Commissions” (Dec. 12, 2001), available at <http://www.dod.mil/cgi-bin/dlprint.cgi?http://www.dod.mil/speeches/2001/s20011212-secdef.html> (last visited Nov. 20, 2005).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions*, 2002-MAR ARMY LAW. 8, 15.

320. *Id.*

today's procedures are, in fact, "reasonable."

Other commentators stake out more partisan positions than that of the ABA. One argues that military commissions "in their current form . . . are patently unjust and, in particular, offer no hope of an independent or impartial tribunal."<sup>321</sup> He goes on to explain that the "[procedural] safeguards are . . . necessary but not sufficient conditions for the provision of a fair trial."<sup>322</sup> Moreover, the commentator views the military commissions as insufficiently independent and impartial, as "detainees subject to trial by military commission are entirely in the hands of the executive branch of government."<sup>323</sup> Thus, the argument goes, adequate procedural safeguards will be insufficient to insulate the trials from policy concerns emanating from the executive branch, which has the duty of policing itself.

Those who believe military commissions will give "full and fair" trials counter such criticisms.<sup>324</sup> This is the view held by Lieutenant Colonel Bialke. His motivation for trying crimes in front of U.S. military commissions is that "[t]here can never be a lasting peace without justice. Just as important, opposing forces are not deterred when . . . [the Law of Armed Conflict] is not enforced."<sup>325</sup> Lieutenant Colonel Bialke's ideas partially echo those of Lieutenant Colonel Fleischer from roughly sixty years earlier. As he explained, "[t]o subject an enemy national to an unfair trial only outrages the enemy and hinders the reconciliation necessary to a peaceful world."<sup>326</sup> Bialke seems to stop short, though, of adopting the second part of Fleischer's argument that "[w]e must insist that within the confines of our jurisdiction the highest standards of conduct be applied to the trials of war criminals and to all matters connected therewith."<sup>327</sup>

Bialke repeats many of the arguments put forth by Rumsfeld.<sup>328</sup> In light of them, he explains, "U.S. military commission rules of evidence, in limited circumstances, are crafted with more flexibility and less procedural formality."<sup>329</sup> These rules take into account the difficulties presented by war, in which "acquiring evidence in the battlefield environment is completely different from traditional peacetime law enforcement evidence gathering."<sup>330</sup> Bialke assures the public that a "special [civilian] independent review panel" would automatically review every sentence for "material errors of law."<sup>331</sup> This is

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321. Metcalfe, *supra* note 159, at 576.

322. *Id.* at 581.

323. *Id.* at 582-83.

324. See generally Frederic L. Borch, III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, 2003-NOV ARMY LAW. 10; Bialke, *supra* note 159.

325. Bialke, *supra* note 159, at 68.

326. Fleischer, *supra* note 3.

327. *Id.*

328. Bialke, *supra* note 159, at 73-74.

329. *Id.* at 75.

330. *Id.* at 76.

331. *Id.* at 79-80 n.81.

definitely an improvement on the review process in the *Dachau* trials, but doubts remain.

These doubts are fed by the controversy surrounding the resignation of two military prosecutors involved with the Guantanamo military commissions.<sup>332</sup> The prosecutors accused their colleagues of “ignoring torture allegations, failing to protect exculpatory evidence and withholding information from superiors.”<sup>333</sup> One of the former prosecutors described “a process that appears to be rigged” and recounts being told “that the panel sitting in judgment on the cases would be handpicked to ensure convictions.”<sup>334</sup> Assuming these allegations to be accurate, policy seems to be influencing not only the procedural rules but the entire prosecution system at Guantanamo Bay.

The same policy considerations and procedural shortcomings that plagued the *Dachau* trials, then, seem to be influencing the functioning of today’s military commissions. Can a firewall be erected to insulate these judicial proceedings from external, non-judicial influences? Historian Frank Buscher, in reflecting upon the *Dachau* trials, offered one possible solution. He argued that war crimes trials should be limited solely to punishment, and not focus on other goals.<sup>335</sup> All courts like to think that this is what they do: they focus on questions of individual culpability, and nothing more. This article’s examination of the *Dachau* trials, however, casts some doubt upon this supposition. Military tribunals, because they are deeply enmeshed within a large institution of the executive branch of government, are perhaps insufficiently independent to be able to resist outside political influences.

## VI. CONCLUSION

Just as trials can complement non-legal means for dealing with international crimes, so can national tribunals support the efforts of international bodies. Each, however, comes with its own set of problems. The shortcomings of international tribunals are well documented. The inadequacies of national tribunals, however, in addressing international crimes are different in nature, as is demonstrated by this article.

The historian Bradley F. Smith, writing about the U.S. WWII war crimes prosecution program, noted the “special quality of excess in American foreign relation in the postwar years that, when combined with an inclination toward overmoralizing . . . often produced serious difficulties.”<sup>336</sup> These problems

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332. Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

333. *Id.*

334. *Australian govt backs US Guantanamo military trial despite 'rigged' claims*, AFX NEWS LIMITED, Aug. 2, 2005, available at <http://www.forbes.com/afxnewslimited/feeds/afx/2005/08/02/afx2166436.html> (last visited Dec. 23, 2005).

335. BUSCHER, *supra* note 16, at 164.

336. SMITH, *supra* note 27, at 259.

included the “blur[ing of] the line between moral condemnation and possible legal redress.”<sup>337</sup> British Lord Chancellor Sir John Simon seemed to recognize this distinction when he termed dealing with Nazi war criminals a political, not a judicial, problem.<sup>338</sup> The American planners of the war crimes prosecution program rejected this view. Unless the line between moral condemnation and legal redress is respected, however, political considerations will infuse military legal proceedings. If this is the case, military tribunals will lack the necessary judicial independence to operate properly, and the justice they dispense will be distorted beyond recognition.

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337. *Id.* at 253.

338. *See* FRUS-QUEBEC, *supra* note 43.

APPENDIX I  
CONTROL COUNCIL LAW NO. 10

Article I

The Moscow Declaration . . . and the London Agreement . . . are made integral parts of this Law.

Article II

1. Each of the following acts is recognized as a crime:

- (a) Crimes against Peace . . .
- (b) War Crimes . . .
- (c) Crimes against Humanity . . .

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or . . . .

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment. (b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

Article III

1. Each occupying authority, within its Zone of occupation,

(d) . . . . Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945. *Microformed on Microfilm Publication 1204, supra note 2, Reel 1.*

APPENDIX 2  
AG 000.5 JAG-AGO

5. General

As a matter of policy, such cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 9 May 1945, as may from time to time be determined by the Deputy Theater Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts, except where otherwise directed by the Theater Commander.

6. Procedural Matters Before Trial

c. United Nations Observers . . . [T]he Deputy Theater Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgment should be invited to send observers to the trial.

d. Appointment of Courts. The courts will be appointed by this headquarters and will be composed of officers within this command. General Military Government Courts and Intermediated Military Government Courts appointed as contemplated herein will consist of not less than five and not less than three members, respectively, and the senior member present at each trial will be the president and presiding officer of the court. The orders appointing such courts will detail at least one officer with legal training as a member of such courts. The Deputy Theater Judge Advocate for War Crimes will assign one or more prosecutors and defense counsel but they will not be formally designated in the orders appointing the courts.

7. Trial

b. The trial will be conducted according to pertinent Military Government directives and instructions, except that no person will be convicted or sentenced except by the concurrence of two-thirds of all the members present at the time the vote is taken.

c. The effective date of prison sentences will be as provided for other Military Government Courts. Sentences imposing death will provide for the execution thereof by hanging. Confinement without "hard labor" will not be imposed, providing, however, that sentences heretofore or hereafter imposed which do not include the words "hard labor" will be construed to require hard labor as a part of the punishment.

8. Post-trial action

b. The prosecuting officer will be responsible for the preparation of the record of trial, which, after being properly authenticated will be forwarded to the Deputy Theater Judge Advocate for War Crimes, who will prepare a written Review and Recommendations for submission to Theater Judge Advocate.

c. In taking the action prescribed in subparagraph b, above, the Deputy Theater Judge Advocate for War Crimes will take into consideration and include in the Review and Recommendations any Petition for Review or request for clemency filed on behalf of the accused.

d. Except as hereinafter provided in this subparagraph, no sentence will be carried into execution until the sentence has been approved by the Theater Commander after having received the recommendations of the Theater Judge Advocate as to the views expressed in the Review and Recommendations. The Theater Judge Advocate is hereby authorized and directed to exercise all of the powers of the Theater Commander in cases where no sentence of death has been pronounced.

10. Permanent Filing of Records.

After final action the case record of all trials will be forwarded to the Deputy Theater Judge Advocate for War Crimes for permanent file.

12. Mass Atrocity Subsequent Proceedings.

b. With regard to subsequent proceedings against accused other than those involved in the initial or "parent" mass atrocity cases heretofore or hereafter tried involving charges and particulars substantially similar to those described in subparagraph a, above, it is prescribed as follows.

Order AG 000.5 JAG-AGO from Lt. Col. Peter Peters, Assistant Adjutant Gen., Headquarters, US Forces, European Theater, Trial of War Crimes Cases (Oct. 14, 1946), *microformed on* Microfilm Publication M1204, *supra* note 2, Reel 1; STRAIGHT, *supra* note 9, Appendix X.

APPENDIX 3  
GENERAL ORDERS NO. 3

I. General.

Recommends promulgation of procedures for collection and perpetuation of war crimes evidence and rules of procedure for the trial of war crimes involving American nationals as victims and mass atrocities committed in the American Zones of Occupation in Germany and Austria.

VI. Prepares Reviews and Recommendations for reviewing authority.

1. Prosecution Section.

Initiates promulgation of rules of procedure and policies for tribunals.  
Initiates appointment of tribunals.

2. Post-Trial Section.

Maintains records of findings and sentences.

Drafts Reviews and Recommendations for reviewing authority.

VII. Dachau Detachment.

2. Counsel Section. Takes final steps to prosecute or defend cases assigned . . . Prosecutes and defends cases, supervises preparation of records of trial and prepares and presents necessary petitions for review and clemency requests.

Memorandum from DJAO, 7708 War Crimes Group, U.S. Forces, European Theater, APO 178, *microformed on* Microfilm Publication M1204, *supra* note 2, Reel 1. Of note is the requirement that the prosecution was responsible for compiling the trial record which seems to indicate that these trials were meant to be formally reviewed and even made public. Most of the documents on microfiche were declassified in the early 1950s.

APPENDIX 4  
MANUAL FOR TRIAL OF WAR CRIMES AND RELATED CASES

PART II, POWERS AND PROCEDURE

SEC 201, General Directives.

Reference is made to: (a) Military Government Regulations, Title 5, Legal and Penal Administration. (b) Letter of this Headquarters, file AG 000.5 WCB-JAG, subject, "Trial of War Crimes Cases," dated 14 October 1946.

SEC 210, Personnel of the Court.

General Military Government Courts and Intermediate Military Government Courts shall consist respectively of not less than five (5) members and not less than three (3) members, and, in addition, personnel of the prosecution and defense . . . .

Whenever deemed necessary, a Military Government Court may, on its own motion or the request of the accused, appoint an impartial adviser to assist . . . as an expert on German law, local customs, business practices, or technical matters. Such an adviser may be invited to sit with the court but will not participate in the court's deliberations or in its decisions.

SEC 220, Duties of President as Presiding Officer.

a. General.

The practice in continental countries is for the presiding judge to conduct the examination of the accused and witnesses and generally to take a leading part in the proceedings. However, this should be done in these trials only when it appears that the prosecutor, defense counsel, or the accused are not familiar with common law procedures. In such event the presiding judge should conduct the proceedings to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried.

b. Interrogations by Court.

[T]he interrogation of the accused by the court at the time of pleading is discretionary. For the purpose of obtaining from the accused sufficient information to determine whether he has the intention of admitting the elements of the charge or denying it, the court will arrange to be provided with a dossier of the case against the accused, prior to the trial, such dossier to contain a summary of all documentary evidence and testimony of the prosecutor's witnesses . . . . It will be used as a basis for such examination but not regarded as proof of the statements it contains which will have to be established in evidence in the usual way . . . . The accused's statements made upon the interrogation will form part of the record, and anything he says may be used as evidence for or against him.

c. Interrogations by court in war crimes trials.

[T]he suggestions in MGR [Military Government Regulations, Title 5] concerning the questioning of the accused by the court primarily relate to ordinary cases in which the court is sitting in a capacity similar to that of a committing magistrate as contrasted with war crimes trials in which adequate

prosecution and defense counsel are present.

SEC 230, Prosecutor.

a. Qualifications of prosecutor.

Any qualified officer, enlisted or civilian lawyer may serve as prosecutor.

SEC 240, Defense Counsel.

a. Qualifications of defense counsel.

Any lawyer not debarred from appearing by the Military Government may appear as defense counsel.

SEC 250, Powers of the Court.

a. General.

A General Military Government Court may impose any lawful sentence including death. An Intermediate Military Government Court may impose any lawful sentence except death, imprisonment in excess of ten (10) years, or fine in excess of 100,000 Reichsmarks.

A Military Government Court shall have power to summon as a witness any person . . . .

[He] may be ordered to bring with him any document or article [and]

he [may] be detained as a material witness . . . . The Court shall have power to order trial in camera.

b. Sentences.

A military Government Court shall have the power to hold in contempt any person . . . who offend[s] the dignity of the court, in any manner or disregards its orders.

SEC 260, Voting on Rulings and Verdicts.

If the members of the court agree, all interlocutory questions arising during the trial may be decided by the president subject to objection by any member of the court . . . . [Otherwise, all questions] will be determined by a majority vote . . . . A two-thirds vote of the members present is required to convict, and to assess a punishment on the accused.

SEC 270, Rules of Evidence.

a. Non-applicability of AW 25 and AW 38.

A directive to a military tribunal charged with trial of offenses against the laws of war to the effect that it will admit "such evidence as in its opinion will be an assistance in proving or disproving the charge, or such as in (its) opinion would have probative value in the mind of a reasonable man" is not contrary to the provisions of Article 25 or Article 38 of the Articles of War. Persons charged with the commission of a war crime are not "persons subject to military law" within the meaning of the Articles of War and are not entitled to the benefit (in re YAMASHITA, #61 and #672, Sup. Ct., October 1945).

b. Non-applicability of rules of evidence for Courts-Martial.

Hearsay evidence is admissible.

c. General rules of evidence.

2. [T]he "best evidence rule" . . . is definitely not applicable.

3. Evidence of bad character of an accused shall be admissible.

4. War Crimes tribunals will not require foundation evidence.

5. Courts will to the greatest possible extent apply expeditious and non-technical procedure, and shall admit any evidence which they deem to have probative value.

f. Rights of witnesses.

An accused has no privilege against self-incrimination. He will not be warned that he is not required to answer when questions are put to him. . . . If he refuses to answer any questions put to him, the court may draw an unfavorable inference from his refusal to answer.

Manual for Trial of War Crimes and Related Cases, *microformed on Nat'l Archives Collection of World War II War Crimes Records, Records of U.S. Army Commands, 1942-*, Record Group 338, *United States v. Geiger* (July 9 – Aug. 5, 1947), Microfilm Publication M1191 (Ebensee Outcamp Case) (2 reels), at Reel 1; STRAIGHT, *supra* note 9, Appendix XX.

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## NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion

Anne-Sophie Massa

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# NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?

By  
Anne-Sophie Massa\*

*Prosecutors will have to exercise their discretionary powers in total impartiality, avoiding the semblance of appearing on the side of the victors or the powerful.*<sup>1</sup>

## I. INTRODUCTION

When the member states of NATO decided to initiate Operation Allied Force, few governments probably contemplated that they risked defending their actions before an international court. The increasing presence and importance of international courts appear to be the way of the future, whether one likes it or not. The ICTY [International Criminal Tribunal for the Former Yugoslavia] is one court before which NATO leaders will not have to appear. Although the Court clearly had jurisdiction, the prosecutor at the Court decided to follow the advice of the Committee that no formal investigation be initiated.<sup>2</sup>

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\* J.S.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall); former Rotary World Peace Fellow (2003-2005); Joint Masters Degree in Law and in International and Area Studies, University of California, Berkeley, 2003-2005; LL.M., 2003, University of Cambridge (United Kingdom); LL.B., 2000, University of Liège (Belgium). The author wishes to thank Professor Caron for providing valuable assistance with her research for this article as well as being a source of constant inspiration and support throughout her studies at Boalt Hall. Neelam Ihsanullah also deserves special thanks for her excellent editing efforts and her thoughtful suggestions.

1. Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 175 (2005).

2. Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U.

From March 24 to June 10, 1999, the North Atlantic Treaty Organization ("NATO") engaged in a bombing campaign against the Federal Republic of Yugoslavia ("FRY") in response to the atrocities committed by Serbian forces against the ethnic Albanian population in Kosovo. Code-named "Operation Allied Force," the campaign resulted in the deaths of approximately 500 innocent civilians while injuring more than 800 others.<sup>3</sup> Both the number of casualties and the circumstances in which they occurred gave rise to the question of whether NATO forces had committed war crimes and should be held criminally responsible for their actions before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Many viewed the incidents as sufficiently serious for an investigation to be conducted by the Tribunal.

However, on June 2, 2000, after considering her team's assessment of NATO's conduct in the campaign, the Prosecutor of the ICTY, Carla del Ponte, who had taken over for former Prosecutor Louise Arbour on September 15, 1999, concluded "that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign."<sup>4</sup> While conceding that some mistakes were made by NATO, the Prosecutor nevertheless announced that she was "satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the campaign."<sup>5</sup>

The decision by the Prosecutor of the Tribunal not to investigate, while favorably welcomed by NATO members and some writers,<sup>6</sup> generated strong and persistent criticism from the majority of scholars,<sup>7</sup> who questioned the Prosecu-

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INT'L L. REV. 765, 812 (2002).

3. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 53, 90 [hereinafter OTP Report], available at <http://www.un.org/icty/pressreal/nato061300.htm>. See also HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN: THE CRISIS IN KOSOVO para. 26 (2000), available at <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (estimating that between 489 and 528 civilians were killed during NATO's bombing campaign).

4. Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000), available at [www.un.org/icty/pressreal/p510-e.htm](http://www.un.org/icty/pressreal/p510-e.htm).

5. *Id.*

6. See, e.g., RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY 199-207 (2004); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 540 (2003); Aaron Schwabach, *NATO's War in Kosovo and the Final Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, 9 TUL. J. INT'L & COMP. L. 167 (2001).

7. See, e.g., Côté, *supra* note 1; Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503 (2001); Natalino Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia Acceptable?*, 82 INT'L REV. RED CROSS 1017, 1020 (2000) (considering that "[b]ecause of its deficiencies, the Report does not constitute the definite and conclusive element on which a decision not to proceed may be grounded"); Laursen, *supra* note 2; Paul Tavernier, *Responsabilité Pénale? L'action du Tribunal Pénal International pour l'Ex-Yougoslavie*, in KOSOVO AND THE INTERNATIONAL COMMUNITY 157 (Christian Tomuschat ed., 2002); Michael Mandel, *NATO's Bombing of Kosovo under International Law Politics and Human Rights in International Criminal Law*, 25 FORDHAM INT'L L.J. 95 (2001); PIERRE HAZAN, JUSTICE IN A TIME OF WAR 133-39 (James Thomas Snyder trans., 2004).

tor's impartiality and expressed their suspicions that political rather than legal considerations, had influenced her decision.<sup>8</sup>

Discretion is one of the cornerstones of the prosecutorial office, guaranteeing a prosecutor the ability to be both independent and effective in the discharge of her functions. The scope of a prosecutor's discretion varies among national systems. But, at the international level, the Prosecutor of the ICTY has been vested with a wide degree of discretion. The aim of this contribution is to determine whether the decision not to investigate the NATO bombing campaign falls within the proper limits of the Prosecutor's exercise of discretion or whether it illustrates the potential abuses that such an attribute might produce.

Following a brief presentation of Operation Allied Force (Section II) and an analysis of the jurisdiction of the ICTY over NATO's bombing campaign (Section III), this article will examine the alleged war crimes committed by NATO (Section IV), study the Final Report of the Review Committee established by the Prosecutor (Section V), and discuss the decision of the Prosecutor not to prosecute in the light of prosecutorial discretion (Section VI). Some concluding remarks will consider the adjustments made to the scope of prosecutorial discretion at the international level by the Statute of the International Criminal Court and whether we should be optimistic about the exercise of discretion by the Prosecutor in the future (Section VII).

## II. OPERATION ALLIED FORCE

In reaction to the climate of violence prevailing in Kosovo in early 1999, and more particularly to the heinous massacre of forty-five Albanian civilians by Serb forces in the village of Racak on January 15, 1999, the United States, Germany, France, Italy and Russia decided to convene a conference in Rambouillet, France.<sup>9</sup> The two-week negotiations, from February 6 to 22, 1999, were nothing less than an ultimatum addressed to the Federal Republic of Yugoslavia, whose presence at the table was guaranteed by the threat of air strikes. The peace agreement provided for substantial autonomy for Kosovo, with possible independent status to be discussed after a three-year period, as well as a strong NATO presence to ensure the agreement's implementation.<sup>10</sup> Although the

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8. See, e.g., Tavernier, *supra* note 7, at 161; Côté, *supra* note 1, at 180; HAZAN, *supra* note 7, at 133-39; Benvenuti, *supra* note 7, at 505; KERR, *supra* note 6, at 203.

9. HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 56-59 (2001).

10. *Id.* at 58-59. For an in-depth analysis of the Rambouillet negotiations, see Emmanuel Decaux, *La Conférence de Rambouillet: Négociation de la Dernière Chance ou Contrainte Illicite?*, in *KOSOVO AND THE INTERNATIONAL COMMUNITY*, *supra* note 7, at 45-64 (contending that the solution to the conflict negotiated at Rambouillet was the only reasonable option and that it did not fall within Article 52 of the Vienna Convention which voids a treaty concluded under the threat to use force in violation of the UN Charter); Eric Herring, *From Rambouillet to the Kosovo Accords: NATO's War Against Serbia and Its Aftermath*, in *THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS* 225, 225-28 (Ken Booth ed., 2001) (arguing that the peace agreement negotiated at Rambouillet was unworkable and that NATO's war did not result in a better peace in terms of human rights in Kosovo).

Kosovar delegation accepted the agreement under the convening states' pressure, the Serb delegation, opposed to NATO military presence on the ground, refused to sign.

Following the breakdown of the negotiations at Rambouillet and the increased attacks against the Albanian population that had created a massive flood of refugees,<sup>11</sup> NATO decided to engage in a military intervention against Serbia with the objective of putting an end to, or at least disturbing, the campaign of ethnic cleansing taking place in Kosovo.<sup>12</sup> However, the NATO air strikes, far from stopping the humanitarian crisis, "added a new dimension"<sup>13</sup> to it, thereby contributing to the greatest exodus of refugees since the Second World War.<sup>14</sup> Eventually, Slobodan Milosevic bowed to NATO demands, and the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia signed the Military Technical Agreement at Kumanovo, Macedonia, on June 9, 1999.<sup>15</sup> This agreement, which laid down the principles for a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of Serbian military, police, and paramilitary forces, was officially accepted by the international community with the adoption of Security Council Resolution 1244 one day later,<sup>16</sup> and resulted in the suspension of the air strikes.<sup>17</sup>

In the early days of the intervention, the criticism emerged that the Alliance was failing to comply with the rules of warfare.<sup>18</sup> Despite NATO's public statements during the campaign that it was acting in accordance with the principles laid down in the Geneva Conventions and Additional Protocol I,<sup>19</sup> several incidents, during which numerous civilians were killed and injured, called into question the official declarations of the Alliance. Decisions made by NATO officials regarding the choice of targets, the means of attack, and the selection of

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11. On the situation of refugees in Kosovo, see Jim Whitman, *The Kosovo Refugee Crisis: NATO's Humanitarianism versus Human Rights*, in *THE KOSOVO TRAGEDY: THE HUMAN RIGHTS DIMENSIONS*, *supra* note 10, at 164-83.

12. See, e.g., HUMAN RIGHTS WATCH, *supra* note 3, para. 5.

13. John Currie, *NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 1998 CANADIAN Y.B. INT'L L. 303, 322.

14. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 271 (2000); see also RICHARD N. HAASS, *INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD* 166-67 (1999) (explaining how the "initiation of the air campaign coincided with an intensification of military pressure by Serbian ground forces against the people of Kosovo," giving rise to the refugee crisis).

15. International Security Force for Kosovo Online Homepage, *Background to the Conflict*, <http://www.nato.int/kfor/kfor/intro.htm> (last visited Mar. 3, 2006).

16. S.C. Res. 1244, ¶ 2, U.N. Doc. S/RES/1244 (June 10, 1999); see Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, S/1999/682, available at <http://www.un.org/peace/kosovo/s99682.pdf>.

17. International Security Force for Kosovo Online Homepage, *supra* note 15.

18. Int'l Comm. Red Cross, *The Balkan Conflict and Respect for International Humanitarian Law* (Apr. 23, 1999), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/9946AD4CBB6F813FC1256B66005C8B3B>.

19. See, e.g., Jamie Shea, NATO Spokesman, & David Wilby, Air Commodore, Transcript of Press Conference (Mar. 26, 1999), available at <http://www.nato.int/kosovo/press/p990326a.htm>.

weapons employed were highly questionable in as many as ninety incidents,<sup>20</sup> including the attack on the Radio-Television Station, the bombing of several refugee convoys, and the use of cluster bombs and depleted uranium in densely populated areas.

In order to evaluate whether the Prosecutor of the ICTY properly exercised discretion in deciding not to initiate investigations into NATO's controversial decision-making regarding the planning and the implementation of the military operation, it must first be established that the ICTY had jurisdiction over the bombing campaign and that the allegations against NATO were far from frivolous. We will examine these two issues in Sections III and IV, respectively.

### III.

#### JURISDICTION OF THE ICTY OVER OPERATION ALLIED FORCE

The jurisdiction of the ICTY over serious violations of international humanitarian law committed in Kosovo is indisputable under the mandate established by UN Security Council Resolution 827, and has been repeatedly reaffirmed by the UN Security Council in its resolutions on Kosovo,<sup>21</sup> as well as by the Tribunal itself.<sup>22</sup>

A close look at both the mandate and the Statute of the ICTY is necessary to assess whether the Tribunal's jurisdictional scope encompasses the conflict in Kosovo, in general, and NATO's military intervention, in particular.

##### *A. Mandate of the ICTY*

On May 25, 1993, the Security Council adopted Resolution 827, establishing an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. During the first years of its activity, the ICTY focused on the atrocities perpetrated in Bosnia-Herzegovina and Croatia. However, the Tribunal began to get involved in the Kosovo situation in 1998, when the conflict between the Kosovo Liberation Army ("KLA") and the FRY forces intensified in the province.

Although the roots of the conflict in Kosovo are often traced back over seven centuries to the defeat of the Serbs by the Ottoman Turks in 1389, "[i]t has been argued that the spark that ignited the Balkan wars was Serbian President Slobodan Milosevic's decision to remove Kosovo's autonomy in 1999."<sup>23</sup>

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20. HUMAN RIGHTS WATCH, *supra* note 3, para. 16.

21. See, e.g., S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 1160, ¶ 17, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1203, ¶ 14, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1207, ¶ 4, U.N. Doc. S/RES/1207 (Nov. 17, 1998).

22. Sonja Boelaert-Suominen, *The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict*, 82 INT'L REV. RED CROSS 217, 227 (2000); see also Tavernier, *supra* note 7, at 161 (explaining that Security Council Resolution 827 and the Statute of the Tribunal establish the ICTY's jurisdiction over Kosovo and that the subsequent Security Council Resolutions on Kosovo only confirmed this interpretation).

23. SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* 207 (2000).

Kosovo, which had been granted the status of an "autonomous region" under Tito's leadership in 1974, witnessed the rise of Serbian nationalism and human rights abuses in the 1990s without garnering the attention of the international community.<sup>24</sup> Promoting a non-violent approach, Kosovar Albanians responded to the revocation of their autonomy by declaring their independence and creating a parallel state in 1991.<sup>25</sup>

However, the intensification of violence toward the Albanians led to the emergence of an armed group, the KLA, in 1996,<sup>26</sup> which "criticized the 'passive' approach of the ethnic Albanian leadership and promised to continue their attacks until Kosovo was free from Serbian rule."<sup>27</sup> Confrontations between the KLA and the Serbian police forces continued until the Drenica incident, which took place between February 28 and March 5, 1998. The killing of more than eighty people, including at least twenty-four women and children, by Serbian special forces in that incident "marked the beginning of the Kosovo conflict in the terms of the laws of war" and eventually caught the international community's attention.<sup>28</sup>

On March 10, 1998, then-ICTY Prosecutor Louise Arbour declared that she was empowered to investigate the crimes being committed in Kosovo.<sup>29</sup> The Security Council supported the Prosecutor's decision when it "urge[d] the Office of the Prosecutor of the International Tribunal established pursuant to resolution 827 . . . to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction."<sup>30</sup> As one author explains, "[i]n the light of the mandate of the Tribunal, and in view of its jurisdictional competence . . . , there was no need for a separate Security Council resolution authorizing the Tribunal's involvement in Kosovo."<sup>31</sup> In other words, all resolutions adopted by the Security Council in connection with the Kosovo situation did not really expand the existing jurisdiction of the Tribunal; the resolutions only reasserted the Tribunal's existing jurisdiction over Kosovo.<sup>32</sup>

The Prosecutor subsequently conducted a series of investigations in Kosovo with the repeated support of the Security Council.<sup>33</sup> In response to the refusal of FRY authorities to continue to deliver visas to the Tribunal's personnel, the Security Council "call[ed] for prompt and complete investigation, including international supervision and participation, of all atrocities committed against

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24. HUMAN RIGHTS WATCH, *supra* note 9, at 20-29.

25. *Id.* at 28-29; CHESTERMAN, *supra* note 23, at 207.

26. HUMAN RIGHTS WATCH, *supra* note 9, at 30.

27. *Id.* at 32.

28. *Id.* at 38-39.

29. Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., The Prosecutor's Statement Regarding the Tribunal's Jurisdiction over Kosovo (Mar. 10, 1998), available at <http://www.un.org/icty/pressreal/p302-e.htm> [hereinafter Prosecutor's Statement on Jurisdiction]; see Boelaert-Suominen, *supra* note 22, at 221.

30. S.C. Res. 1160, *supra* note 21, ¶ 17.

31. Boelaert-Suominen, *supra* note 22, at 229.

32. Tavernier, *supra* note 7, at 161.

33. Boelaert-Suominen, *supra* note 22, at 222.

civilians and full cooperation with the International Tribunal for the former Yugoslavia, including compliance with its orders, requests for information and investigations.”<sup>34</sup> The persistent opposition by Belgrade authorities to the investigations of the Prosecutor resulted in a new Security Council resolution, which “deplor[ed] the continued failure of the Federal Republic of Yugoslavia to cooperate fully with the Tribunal”<sup>35</sup> and reminded “the authorities of the Federal Republic of Yugoslavia, the leaders of the Kosovo Albanian community and all others concerned to cooperate fully with the Prosecutor in the investigation of all possible violations within the jurisdiction of the Tribunal.”<sup>36</sup>

Because Article 25 of the United Nations Charter obliges all Member States to “accept and carry out the decisions of the Security Council,” the creation of the ICTY by the Security Council under Chapter VII of the Charter and its empowerment to exercise jurisdiction over the whole territory of the former Yugoslavia deprived the FRY of any legal foundation to oppose the conduct of investigative activities by the Prosecutorial office within Kosovo.<sup>37</sup> Thus, the mandate of the ICTY clearly encompasses its involvement in the Kosovo situation. We now turn to the ICTY Statute.

### *B. Jurisdiction of the ICTY over Kosovo*

On 24 March 1999, 19 European and north [sic] American countries have said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts.<sup>38</sup>

Article 1 of the ICTY Statute defines the jurisdiction of the Tribunal in the following terms: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” The subject matter, territorial, and temporal jurisdictions of the Tribunal are successively described in Articles 2 to 8 of the Statute.<sup>39</sup>

The Tribunal has jurisdiction *ratione materiae* over genocide, crimes against humanity, and war crimes.<sup>40</sup> As the question of whether the acts com-

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34. S.C. Res. 1203, *supra* note 21, ¶ 14.

35. S.C. Res. 1207, *supra* note 21, pmb1.

36. *Id.* ¶ 4.

37. Boelaert-Suominen, *supra* note 22, at 230.

38. Press Release, Louise Arbour, Prosecutor of the Int'l Criminal Tribunal of the Former Yugo. and the Int'l Criminal Tribunal of Rwanda, Introductory Statement at the Launch of the ICC Coalition's Global Ratification Campaign (May 13, 1999), available at <http://www.un.org/icty/pressreal/p401-e.htm> (emphasis added).

39. Statute of the International Tribunal, arts. 1-8, May 25, 1993, 32 I.L.M. 1192, 1192-94, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute].

40. *Id.* arts. 1-5, 32 I.L.M. at 1192-94.

mitted by NATO fall within the substantive jurisdiction of the Tribunal will be discussed *infra* in Section IV, we will for now limit our discussion to the territorial and temporal jurisdictions of the ICTY.

With regard to the Tribunal's jurisdiction *ratione loci*, Article 8 of the Statute asserts that "[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land, surface, airspace and territorial waters."<sup>41</sup> Kosovo clearly falls within the scope of the tribunal's territorial jurisdiction, as it is part of the territory of the former Yugoslavia.<sup>42</sup> This was confirmed by the Security Council in Resolution 1244, when it authorized an international civil presence that would allow Kosovo to benefit from "substantial autonomy within the Federal Republic of Yugoslavia."<sup>43</sup>

Article 8 of the Statute defines the Tribunal's jurisdiction *ratione temporis* as "extend[ing] to a period beginning on 1 January 1991."<sup>44</sup> The Security Council specified that it would run from that time to "a date to be determined by the Security Council upon the restoration of peace."<sup>45</sup> The absence of an end date to its temporal jurisdiction makes it possible for the Tribunal to exercise its jurisdiction over crimes committed in the various stages of the Yugoslavian crisis.<sup>46</sup> The situation in Kosovo, with the core of the hostilities taking place from 1998 to 1999 and ending with the suspension of NATO's air strikes, undoubtedly falls within the temporal limitations of the Tribunal's jurisdiction.

ICTY Prosecutor Arbour correctly interpreted both the territorial and temporal jurisdictions of the Tribunal when she declared that "the Statute of the Tribunal, adopted by the United Nations Security Council in May 1993, empowers the Tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This jurisdiction is ongoing and covers the recent violence in Kosovo."<sup>47</sup> Moreover, in the particular context of Operation Allied Force, former Prosecutor Arbour confirmed the jurisdiction of the Tribunal:

I have received requests from persons and groups urging me to indict various NATO and other officials for war crimes in relation to the air strikes conducted in Serbia. There is no doubt in my mind that the jurisdiction of the Tribunal over Kosovo is well known to all, and indeed has never been contested by anyone except the FRY. The Tribunal has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war, which have been committed since 1991, or continue to be committed anywhere in the former Yugoslavia, by *anyone*.<sup>48</sup>

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41. *Id.* art. 8, 32 I.L.M. at 1194.

42. Tavernier, *supra* note 7, at 160.

43. S.C. Res. 1244, *supra* note 16, ¶ 10.

44. ICTY Statute, *supra* note 39, art. 8, 32 I.L.M. at 1194.

45. S.C. Res. 827, *supra* note 21, ¶ 2.

46. Tavernier, *supra* note 7, at 161.

47. Prosecutor's Statement on Jurisdiction, *supra* note 29.

48. Press Release, Louise Arbour, Prosecutor of the Int'l Criminal Tribunal of the Former Yugo. and the Int'l Criminal Tribunal of Rwanda, Statement of the Prosecutor (Mar. 31, 1999),

Thus, as one scholar states, it is clear that “the ICTY. . . has temporal and territorial jurisdiction over offences defined in Art. 2 to 5 of the Statute that would have been committed by NATO forces against targets on the territory of Kosovo or of the rest of the FRY from March 24 to June 10, 1999.”<sup>49</sup> The following section examines whether the incidents that occurred during the bombing campaign fall within the scope of the crimes defined in the ICTY Statute.

#### IV. DID NATO COMMIT WAR CRIMES?

Not all of NATO's actions were beyond any doubt lawful, and . . . some of the humanitarian law violations committed by NATO forces appear to be covered by Art. 3 of the ICTY Statute.<sup>50</sup>

Whether NATO forces committed war crimes in the course of the military intervention against Serbia has been the subject of much controversy among scholars. However, the allegations implicating the Alliance were credible and sufficiently serious to warrant opening an investigation.

##### *A. Crimes Under the Jurisdiction of the ICTY*

Articles 2 to 5 of the ICTY Statute confer jurisdiction to the Tribunal over genocide, crimes against humanity, and war crimes. However, with respect to NATO's intervention against Serbia, it seems that only the last category of offenses might have been committed by the Alliance.<sup>51</sup> This section will therefore focus on this particular type of international crime.

War crimes are commonly classified into four distinct categories: (1) crimes against persons not taking part in the hostilities (civilians, prisoners of war, etc.), such as murder, acts of torture, and sexual violence; (2) crimes against enemy combatants or civilians involving prohibited methods of warfare, such as intentional direct attacks against civilians, indiscriminate attacks having excessive effects on civilians, and attacks causing long-term, widespread and severe damage to the natural environment; (3) crimes against enemy combatants or civilians involving prohibited means of warfare, such as the use of poisoning weapons and the use of weapons causing unnecessary suffering; and (4) crimes against specially protected people and objects, such as attacks against religious and medical personnel and attacks against religious or cultural edifices.<sup>52</sup>

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available at <http://www.un.org/icty/pressreal/p391e.htm> (emphasis added).

49. Michael Cottier, *Did NATO Forces Commit War Crimes During the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000*, in 44 *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 505, 508-09 (Horst Fischer et al. eds., 2001).

50. *Id.* at 535.

51. *E.g., id.* at 509-10.

52. *See, e.g.,* ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 54-57 (2003). Casseese also mentions a fifth, lesser category—crimes consisting of improperly using protected signs and emblems, such as a flag of truce, the emblem of the Red Cross, etc. *Id.* at 57.

The jurisdiction of the ICTY over war crimes is addressed in two provisions, Articles 2 and 3 of the Statute.<sup>53</sup> The former, which addresses the “grave breaches of the Geneva Conventions of 1949,” covers the Geneva Law aimed at the protection of certain categories of persons; whereas the latter, entitled “Violations of the Laws and Customs of War,” encompasses the Hague Law limiting the means and methods of warfare and has been recognized by the Tribunal as “a general clause covering all violations of international humanitarian law not falling under Art. 2 of the Statute”<sup>54</sup> as long as the following requirements are met:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

(iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>55</sup>

For its violation to amount to a war crime, a rule of international humanitarian law must therefore be conventional—the most important international instrument in this regard being the Additional Protocol I to the Geneva Conventions of 1949—or have the status of customary international law, and a violation of the rule must entail individual criminal responsibility. In this context, a dis-

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53. Article 2 of the ICTY Statute reads:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) willfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

ICTY Statute, *supra* note 39, art. 2, 32 I.L.M. at 1192.

Article 3 of the ICTY Statute reads:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

*Id.* art. 3, 32 I.L.M. at 1192-93.

54. Cottier, *supra* note 49, at 510.

55. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e51002.htm>.

inction must be made between the NATO member states that had ratified the Additional Protocol I at the time of the intervention and those that had not done so, namely the United States, France,<sup>56</sup> and Turkey. The application of the Additional Protocol I by the ICTY to the attacks conducted by military forces belonging to the first category of states is indisputable.

As far as the military operations planned and conducted by forces from the second category of states are concerned, however, “the ICTY thus can only exercise jurisdiction over violations of relevant rules of AP I if these rules reflect customary international law and if their violation gives rise to individual criminal responsibility under customary international law.”<sup>57</sup> The high number of ratifications of the Additional Protocol I,<sup>58</sup> the inclusion of many of that treaty’s principles in numerous military manuals, and the application of these principles by non-party states constitute evidence of the customary character of the main principles of the Protocol.<sup>59</sup> For instance, the obligations imposed on troops under the U.S. Military Code are largely similar to those binding the member States of NATO.<sup>60</sup> The most important principles of the Additional Protocol I, conventional by nature and customary in part,<sup>61</sup> are therefore arguably applicable to NATO.

Yet, not all violations of international humanitarian law amount to war crimes and result in the charging of individuals.<sup>62</sup> The following sub-section will briefly review the principles of international humanitarian law giving rise to individual criminal responsibility, and to which NATO’s actions were submitted.<sup>63</sup>

56. Since the intervention in Kosovo, France has ratified Additional Protocol I (April 11, 2001). See International Committee of the Red Cross, States Party to the Geneva Conventions and Their Additional Protocols, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party\\_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf) (last updated Apr. 12, 2005).

57. Cottier, *supra* note 49, at 511-12.

58. As of April 12, 2005, 163 States have ratified Additional Protocol I to the Geneva Conventions. See International Committee of the Red Cross, *supra* note 56.

59. Cottier, *supra* note 49, at 512.

60. By including the principles of Additional Protocol I in its Military Code, the United States thus avoided a main criticism that resulted from Operation Desert Storm in Iraq in 1991, when the disparities between U.S. and U.K. troops with regard to the obligations they had to respect under international humanitarian law led the U.K. to refuse to participate in some operations.

61. Cottier, *supra* note 49, at 512.

62. INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 178-79 (2000); Cottier, *supra* note 49, at 528.

63. For additional analysis of the intervention in light of international humanitarian law, see, e.g., AMNESTY INT’L, “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS?: VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000); Frédéric de Mulinen, *Distinction Between Military and Civilian Objects, in KOSOVO AND THE INTERNATIONAL COMMUNITY*, *supra* note 7, at 103; Philippe Weckel, *Les Devoirs de l’Attaquant à la Lumière de la Campagne Aérienne en Yougoslavie, in KOSOVO AND THE INTERNATIONAL COMMUNITY*, *supra* note 7, at 129; Sergey Alexeyevich Egorov, *The Kosovo Crisis and the Law of Armed Conflicts*, 82 INT’L REV. RED CROSS 183 (2000); Konstantin Obradović, *International Humanitarian Law and the Kosovo Crisis*, 82 INT’L REV. RED CROSS 699 (2000); Péter Kovács, *Intervention Armée des Forces de l’OTAN au Kosovo: Fondement de l’Obligation de Respecter le Droit International Humanitaire*, 82 INT’L REV. RED CROSS 103 (2000); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*,

## B. Principles of International Humanitarian Law

As a matter of principle, questions of *ius ad bellum* must be strictly separated from the *ius in bello*: Invoking a right to 'humanitarian intervention' does not alter legal obligations under humanitarian law and cannot justify violations of this branch of international law.<sup>64</sup>

The purpose of international humanitarian law is "to moderate the conduct of armed conflict and to mitigate the suffering which it causes."<sup>65</sup> It follows that persons who are not or are no longer participating in the hostilities, such as civilians, wounded and sick combatants, and prisoners of war, must be protected during the conflict and allowed to benefit from humanitarian care. The core rules of international humanitarian law consist of the principles of distinction, proportionality, and precaution in the attack, as well as the idea of limiting the use of certain types of weapons.<sup>66</sup> While these principles have been codified in various instruments including Additional Protocol I to the Geneva Conventions, they also seem to be recognized as part of customary international law.<sup>67</sup>

### 1. The Principle of Distinction

According to the principle of distinction, set forth in Article 48 of the Additional Protocol I, a war is waged only against the armed forces of the enemy and thus requires distinctions to be drawn between civilians and combatants and between civilian property and military objectives. The main consequence of the principle of distinction is that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack."<sup>68</sup> In other words, the civilian population and civilian property—the latter being "all objects which are not military objectives"<sup>69</sup>—must be protected in all circumstances.<sup>70</sup>

It follows that "[t]he attempt to define exactly what constitutes a military objective is an essential step in making the principle of distinction operative."<sup>71</sup>

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7 DUKE J. COMP. & INT'L L. 539; Peter Rowe, *Kosovo 1999: The Air Campaign—Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INT'L REV. RED CROSS 147 (2000); James A. Burger, *International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned*, 82 INT'L REV. RED CROSS 129 (2000); HUMAN RIGHTS WATCH, *supra* note 3.

64. Cottier, *supra* note 49, at 514.

65. HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE* 1 (2d ed. 1998).

66. On the principles of international humanitarian law, see A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (1996); Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 105 (Dieter Fleck ed., 1995).

67. See Oeter, *supra* note 66, at 153 (principle of distinction); Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, *supra* note 50, at 209, 212 (duty to protect and respect civilians); ROGERS, *supra* note 66, at 14 (rule of proportionality).

68. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(2), Dec. 12, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Protocol I].

69. *Id.* art. 52(1), 1125 U.N.T.S. at 27.

70. *Id.* arts. 51(2), 52(1), 1125 U.N.T.S. at 26, 27.

71. Oeter, *supra* note 66, at 155.

The definition of "military objective" offered by Article 52(2) of the Additional Protocol I<sup>72</sup> combines an objective element (the effective contribution to military action made by the object) with a subjective element (the definite military advantage conferred by the neutralization of the object).<sup>73</sup> Only when both criteria are met in a specific instance can an object be considered a military objective.<sup>74</sup> Whereas the traditional military objectives are relatively easy to identify

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72. According to the definition contained in the Protocol, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Protocol I, *supra* note 68, art. 52(2), 1125 U.N.T.S. at 27.

73. For an analysis of the concept of military advantage, see ROGERS, *supra* note 66, at 33-46; Oeter, *supra* note 66, at 153-69.

74. Both the International Committee for the Red Cross and the doctrine have attempted to set up a non-exhaustive list of military objectives. However, it is important to remember that it is not sufficient for an object to be on the list in order to be considered a military objective; the two cumulative criteria of article 52 must be met. The following is the proposed list of categories of military objectives drawn up by the ICRC in 1956:

I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:

(1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting. (2) Positions, installations or constructions occupied by the forces indicated in subparagraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces). (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and others organs for the direction and administration of military operations. (4) Stores of arms or military supplies [sic], such as munition dumps, stores of equipment or fuel, vehicles parks. (5) Airfields, rocket launching ramps and naval base installations. (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance. (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance. (8) Industries of fundamental importance for the conduct of the war: (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material; (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces; (c) factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military; (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c); (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption. (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.

II. The following however, are excepted from the foregoing list:

(1) Persons, constructions, installations or transports which are protected under the Geneva Conventions I, II, III, of August 12, 1949; (2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities.

III. The above list will be reviewed at intervals of not more than ten years by a group of Experts composed of persons with a sound grasp of military strategy and of others concerned with the protection of the civilian population.

INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2002 n.3 (Yves Sandoz et al. eds., 1987).

in the light of the requirements of Article 52, the task is much harder with regard to those objects employed for both civilian and military purposes, commonly referred to as dual purpose objects, such as roads, bridges, railway lines, broadcasting facilities.

The said objects will obviously make an effective contribution to the ordinary commerce of life in general (including military activity), but this is not the same as saying that they make an effective contribution to military action. Nor will their destruction (taken as a whole) necessarily lead to a 'definite military' advantage.<sup>75</sup>

Importantly, Article 52(3) of the Additional Protocol I explains that in case of doubt as to whether a possible use makes an effective military contribution, an object normally dedicated to civilian purposes must be presumed civilian.

Violating the principle of distinction and launching an attack against civilian populations or individual civilians constitutes a grave breach of the Geneva Conventions and the Additional Protocol I,<sup>76</sup> and falls within the categories of grave breach and "violation of the laws or customs of war" under Articles 2 and 3 of the ICTY Statute,<sup>77</sup> respectively.<sup>78</sup> The direct attack on civilian property qualifies as a grave breach under Article 2 of the ICTY Statute<sup>79</sup> and is also covered by Article 3 of the ICTY Statute.<sup>80</sup>

## 2. The Principle of Proportionality

The principle of proportionality, in turn, prohibits an attack that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>81</sup> In practice, the application of this principle gives rise to a series of critical issues, as it is difficult to "assess the value of innocent human lives as opposed to capturing a particular

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Turning to the doctrine, the most notable tentative list of military objectives has been proposed by A.P.V. Rogers in 1996:

military personnel and persons who take part in the fighting without being members of the armed forces; military facilities, military equipment, including military vehicles, weapons, munitions and stores of fuel, military works, including defensive works and fortifications, military depots and establishments, including War and Supply Ministries; works producing or developing military supplies and other supplies of military value, including metallurgical, engineering and chemical industries supporting the war effort; areas of land of military significance such as hills, defiles and bridgeheads; railways, ports, airfields, bridges, main roads as well as tunnels and canals; oil and other power installations; communications installations, including broadcasting and television stations and telephone and telegraph stations used for military communications.

Rogers, *supra* note 66, at 37.

75. Rowe, *supra* note 63, at 151.

76. See Protocol I, *supra* note 68, art. 85(3)(a), 1125 U.N.T.S. at 42.

77. See ICTY Statute, *supra* note 39, art. 2(a), (c), 32 I.L.M. at 1192.

78. See *id.* art. 3, 32 I.L.M. at 1192-93; Fenrick, *supra* note 63, at 553-55, 559.

79. See ICTY Statute, *supra* note 39, art. 2(d), 32 I.L.M. at 1192.

80. See *id.* art. 3, 32 I.L.M. at 1192-93; Fenrick, *supra* note 63, at 553-55, 559.

81. Protocol I, *supra* note 68, arts. 51(5)(b), 57(2)(b), 1125 U.N.T.S. at 26, 29.

military objective.”<sup>82</sup> Some issues raised are the extent to which not only direct, but also indirect, incidental injury or damage to the civilian population must be taken into consideration;<sup>83</sup> the extent to which the military leadership must endanger its own forces in order to avoid civilian casualties;<sup>84</sup> and the extent to which the respect for proportionality must be assessed in the context of the attacks as a whole.<sup>85</sup>

Launching an attack in violation of the principle of proportionality amounts to a “grave breach” of the Additional Protocol I<sup>86</sup> and constitutes a “violation of the laws or customs of war” under Article 3 of the ICTY Statute.<sup>87</sup>

### 3. *The Principle of Precaution*

The principle of precaution in the attack is based on the idea that in order for the principles of distinction and proportionality to be effective in practice, they must be implemented through a series of precautionary measures.<sup>88</sup> This principle has been codified in Article 57 of the Additional Protocol I, which establishes a number of precautions that must be taken at different levels of the military hierarchy in order to avoid civilian casualties.

A first precaution, which applies to all levels of the military structure, requires that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”<sup>89</sup>

A second precaution, which applies to “military planners and commanders who give the orders for the execution of those plans,”<sup>90</sup> obliges them to do everything feasible to verify that the targets to be attacked are strictly military objectives,<sup>91</sup> to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects,”<sup>92</sup> and to refrain from launching an attack which may be expected to be disproportionate.<sup>93</sup>

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82. Fenrick, *supra* note 63, at 546; see also Oeter, *supra* note 66, at 178-79 (emphasizing the “subjective assessment and balancing” of the principle of proportionality in practice); ROGERS, *supra* note 66, at 17 (referring to the case “where in adopting a method of attack that would reduce incidental damage the risk to the attacking troops is increased”).

83. On indirect damage, see Rowe, *supra* note 63, at 152-53.

84. Fenrick, *supra* note 63, at 546, 548-49; ROGERS, *supra* note 66, at 17.

85. See Oeter, *supra* note 66, at 179 (positing that “only in the framework of the more complex overall campaign plan of a belligerent can one assess the relative military value of the specific purpose of an individual attack”).

86. See Protocol I, *supra* note 68, art. 85(3)(b), 1125 U.N.T.S. at 42.

87. See ICTY Statute, *supra* note 39, art. 3, 32 I.L.M. at 1192-93.

88. Oeter, *supra* note 66, at 183.

89. Protocol I, *supra* note 68, art. 57(1), 1125 U.N.T.S. at 29.

90. ROGERS, *supra* note 66, at 69.

91. Protocol I, *supra* note 68, art. 57(2)(a)(i), 1125 U.N.T.S. at 29.

92. *Id.* art. 57(2)(a)(ii), 1125 U.N.T.S. at 29.

93. *Id.* art. 57(2)(a)(iii), 1125 U.N.T.S. at 29 (also defining a disproportionate attack as one that would “cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

A third precaution, which not only applies to military planners and commanders but also to the members of the armed forces who carry out the attack,<sup>94</sup> asks for the cancellation or suspension of an attack

if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>95</sup>

A fourth precaution requires that the attacking forces give an "effective advance warning" for the attacks that may affect the civilian population, "unless circumstances do not permit" otherwise.<sup>96</sup> Concretely, the warning can take the form of radio and television broadcasts in a language that the population understands or the dropping of leaflets.<sup>97</sup> On the other hand, the warning "would have to be short-term to avoid essential equipment being removed from a building to be attacked."<sup>98</sup>

Article 57(3) contains a final precaution: "[w]hen a choice is possible between several military objectives for obtaining a similar advantage, the objective to be selected shall be the attack on which it may be expected to cause the least danger to civilian lives and to civilian objects."

The violation of the principle of precaution does not constitute a war crime in itself. Nevertheless, if a violation of the principle leads to a direct attack on civilians or civilian property, or an indiscriminate attack, the lack of precaution indirectly contributes to the commission of war crimes covered either by Articles 2 or 3 of the ICTY Statute.<sup>99</sup>

#### 4. The Use of Weapons

Lastly, the Additional Protocol I, while it does not prohibit the use of specific types of weapons, contains a general provision which asserts that the right of the parties to choose a means of warfare is not unlimited.<sup>100</sup> More specifically, Article 35(2) bans the use of weapons "of a nature to cause superfluous injury or unnecessary suffering."<sup>101</sup> As far as the protection of the environment is concerned, Article 35(3) excludes the use of means of warfare that would

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94. ROGERS, *supra* note 66, at 69. Thus, pilots who are unable to identify a target should refrain from bombing and cancel the attack on their own initiative. *But see* Oeter, *supra* note 66, at 185-86 (stating that it remains in doubt whether the obligation affects ordinary soldiers in the lower levels of the military hierarchy who implement the attack).

95. Protocol I, *supra* note 68, art. 57(2)(b), 1125 U.N.T.S. at 29.

96. *Id.* art. 57(2)(c), 1125 U.N.T.S. at 29.

97. ROGERS, *supra* note 66, at 61.

98. Rowe, *supra* note 63, at 154.

99. *See* Cottier, *supra* note 49, at 529 (explaining that the failure to take required precautions which could have avoided civilian casualties "might give rise to responsibility for reckless killing of civilians which constitutes a grave breach of the AP" and "might be taken into account by judges when reflecting on the proportionality of incidental casualties in relation to military advantage").

100. Protocol I, *supra* note 68, art. 35(1), 1125 U.N.T.S. at 21.

101. *Id.* art. 35(2), 1125 U.N.T.S. at 21.

cause "widespread, long-term and severe damage to the natural environment."<sup>102</sup> Beside the Additional Protocol I, several conventions prohibit the use of specific weapons, such as chemical<sup>103</sup> and biological<sup>104</sup> weapons and land mines.<sup>105</sup>

Article 3 of the ICTY Statute recognizes that the "employment of . . . weapons calculated to cause unnecessary suffering" amounts to a violation of "the laws or customs of war" and therefore constitutes a war crime.<sup>106</sup>

In sum, "[a]rmed forces thus are restricted in their choice of means and methods of waging war and must take certain precautions in planning and conducting attacks against specific targets."<sup>107</sup> However, individuals may only be held criminally responsible for serious violations of humanitarian law constituting war crimes if both an objective and subjective element are present. The following section examines these elements.

### *C. Individual Criminal Responsibility*

The objective element, or *actus reus*, required in cases of direct individual criminal responsibility may "be inferred from the substantive rule of international humanitarian law allegedly violated."<sup>108</sup> In other words, for the objective element to be satisfied, a violation of international humanitarian law amounting to a war crime must have occurred.

Although the existence of a war crime is necessary to hold an individual directly criminally responsible for its commission, this objective element alone is insufficient. In addition to the *actus reus*, the *mens rea* or subjective element is also required. The ICTY has defined the *mens rea* as requiring "intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."<sup>109</sup> With respect to war crimes,

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102. *Id.* art. 35(3), 1125 U.N.T.S. at 21. For a commentary on what constitutes "widespread, long-term and severe damage to the environment," see Oeter, *supra* note 66, at 116-18.

103. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

104. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

105. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, S. Treaty Doc. 105-1, at 45 (1997), 1342 U.N.T.S. 168; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Dec. 3, 1997, 36 I.L.M. 1507.

106. ICTY Statute, *supra* note 39, art. 3(a), 32 I.L.M. at 1192.

107. Cottier, *supra* note 49, at 515.

108. CASSESE, *supra* note 52, at 54.

109. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 674 (May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>. *Accord* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 322 (Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 241, 243 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index>

however, the Tribunal has added that the *mens rea* "includes both guilty intent and recklessness which may be likened to serious criminal negligence."<sup>110</sup>

At the same time, according to the doctrine of superior responsibility, military and civilian superiors may be held responsible for the crimes of their subordinates if they failed to prevent the crimes from occurring or to punish them once they had taken place.<sup>111</sup>

#### *D. War Crimes Allegedly Committed by NATO*

Various incidents that occurred during the bombing campaign against Serbia present the constitutive elements required to consider that a war crime has been committed and that the authors of the attacks and the military commanders should individually be held criminally responsible. The following examines four of these incidents;<sup>112</sup> each illustrates a different facet of Operation Allied Force's controversial planning and implementation phases. The bombing of Radio-Television seriously challenges the scope of what constitutes a military objective. The attack on a civilian passenger train crossing a bridge and on several refugee convoys casts doubt on NATO's respect for the principle of precaution. Lastly, the use of cluster bombs in the bombing of a densely populated area runs counter to the clear prohibition of indiscriminate attacks under the principle of distinction.

##### *1. The Radio-Television Station Incident*

On April 23, 1999, NATO aircrafts bombed the Serbian State Television and Radio in Belgrade without denying that it was their intended target.<sup>113</sup> The nature of the target is at issue in this case. As discussed *supra*, the Statute of the ICTY has recognized the principle of distinction by classifying attacks against civilian objects and civilians as war crimes.

Whether the Radio-Television Station qualifies as a military objective is controversial because television stations may constitute dual-use objects. The International Committee for the Red Cross has included television stations on their list of potential military objectives; however, this list is not determinative. The ICRC itself underscored that the nature of the target must still be resolved on a case-by-case basis; that the "military objective" requirements provided by the Additional Protocol I must be met in each particular instance; and that, even if the targets "belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances

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110. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 152 (Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trial1/judgement/index.htm> [hereinafter Blaskic case].

111. ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW 94-5 (2002).

112. For another analysis of the first two incidents, see Cottier, *supra* note 49, at 516-35.

113. AMNESTY INT'L, *supra* note 63, at 47.

ruling at the time, offers no military advantage.”<sup>114</sup>

NATO repeatedly insisted it had carried out the attack on the Radio-Television Station because the station was playing a propaganda role in the conflict.<sup>115</sup> The Alliance ostensibly bombed the infrastructure because the station refused to broadcast six hours of Western media reports on a daily basis.<sup>116</sup> However, even the Committee set up by the Prosecutor of the ICTY determined that “[d]isrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by the Additional Protocols.”<sup>117</sup>

At the same time, however, NATO contended that the television station was a dual-purpose object because it was part of the military broadcast network. Yet, “there is no public evidence that the RTS was in fact used for C3 [Command, Control, and Communication] purposes.”<sup>118</sup> Even if one accepts NATO’s argument, it is difficult to see how the requirement of a “definite military advantage” was met when broadcasting resumed approximately three hours after the bombing<sup>119</sup> and NATO knew beforehand that the broadcasting would only be minimally affected by the attack.<sup>120</sup> Furthermore, as one scholar notes, “NATO may have had more effective alternative means to counter the Serb propaganda without bombing a dual-use, if not civilian, object and without risking the lives [sic] of civilians by jamming the radio and television programs and communicating its own ‘truth’ to the Serbian population.”<sup>121</sup> In this context, it is more than reasonable to conclude that the television station was a civilian objective, which indicates that the material element of the war crimes covered by Articles 2 and 3 of the ICTY Statute (attack against civilian objectives and civilians) is fulfilled.

The question that remains is whether the commanders who ordered the at-

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114. INT’L COMM. RED CROSS, *supra* note 74, ¶ 2002; *see also* Cottier, *supra* note 49, at 520 (explaining that “the approach of drawing up lists of military objectives was abandoned in favour of the general definition in Art. 52 AP I” and furthermore that a categorical approach is vulnerable to being applied in a way “which reverses the presumption that objects ‘normally dedicated to civilian purposes... shall be presumed not to be so used’”).

115. AMNESTY INT’L, *supra* note 63, at 48.

116. In earlier statements, NATO had indicated that it would target TV studios unless they broadcasted six hours per day of Western media programming. *See, e.g.,* Cottier, *supra* note 49, at 517; OTP Report, *supra* note 3, ¶ 74; Robert M. Hayden, *Biased Justice: ‘Humanrightsism’ and the International Criminal Tribunal for the Former Yugoslavia*, in YUGOSLAVIA UNRAVELED 259, 265 (2003).

117. OTP Report, *supra* note 3, ¶ 76.

118. Cottier, *supra* note 49, at 518; *see also* Hayden, *supra* note 116, at 265 (explaining that “no one has suggested that RTS studios played any military role” or that the studios were integrated into military facilities in any way).

119. AMNESTY INT’L, *supra* note 63, at 51; *see also* Cottier, *supra* note 49, at 519 (noting that “Yugoslav State broadcasters were able to easily move operations to other facilities after the strike” on the RTS).

120. AMNESTY INT’L, *supra* note 63, at 51; Cottier, *supra* note 49, at 523.

121. Cottier, *supra* note 49, at 519.

tack and the soldiers who carried it out acted with the required *mens rea*. With regard to the commanders, the most plausible interpretation, supported by various authors, is that they knew the role played by the television station in the conflict and the fact that the television station constituted a civilian objective,<sup>122</sup> but nevertheless deliberately ordered the attack because they wanted to undermine the morale of the enemy.<sup>123</sup> Under this interpretation, the NATO commanders possessed the intent and knowledge required. Even if they did not intentionally order the bombing of a civilian objective, but rather thought that the station was a military objective, their responsibility might still be engaged: an incorrect interpretation of the legal definition of military objective is a "mistake of law," and such mistakes might not exclude their responsibility. In addition, with regard to the war crime of attacking civilians, the mental element is met in both interpretations, as "willful" may denote a *mens rea* of either intent or recklessness according to the ICTY.<sup>124</sup>

Nevertheless, even if one concludes that the Radio-Television Station was in fact a military objective, the commanders might still incur individual criminal responsibility under Article 3 of the ICTY Statute if the civilian casualties were excessive in relation to the military advantage anticipated. As one scholar notes, "there is no evidence that the effected military advantage, if any, was considerable. The broadcasts were interrupted for only approximately three hours in the middle of the night. It indeed appears that NATO was aware that the attack would not disrupt broadcasting for a long period."<sup>125</sup> On the other hand, NATO forces were aware that a significant number of civilians were present in the buildings of the Radio-Television Station. Whether precautions were taken before and during the attack should therefore be reviewed. Notably, NATO failed to warn these civilians even though it knew that the building was staffed twenty-four hours. In summary, "it is difficult to see how the probable death or injury of a substantial number of civilians could not be qualified as excessive when compared to an anticipated military advantage of disrupting broadcasting for a few hours past 2 AM."<sup>126</sup>

With respect to the soldiers who carried out the attack, their situation differs slightly from that of their commanders. The soldiers, as low-rank army members, may not have known the exact role played by the television station in the conflict and therefore may have thought that the station fell within the definition of a military objective. Their responsibility for the bombing would not necessarily be engaged; even though they must have known that in cases of doubt the civilian character of an objective should always be presumed. How-

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122. Cottier, *supra* note 49, at 519; Hayden, *supra* note 116, at 265.

123. See, e.g., Cottier, *supra* note 49, at 519; Hayden, *supra* note 116, at 265; see also AMNESTY INT'L, *supra* note 63, at 49 (explaining that attacking a civilian facility in an effort to undermine the enemy's morale falls outside the acceptable interpretation of what constitutes a military objective).

124. See Blaskic case, *supra* note 110, ¶ 152.

125. Cottier, *supra* note 49, at 525.

126. *Id.* at 526.

ever, as the ICTY has affirmed in the *Blaskic* case, the reckless attack of civilians resulting from a lack of precaution also engages individual criminal responsibility.<sup>127</sup> To the extent that there is evidence that the pilots did not take all necessary precautions during the attack to protect the civilian population, the soldiers' responsibility would also be implicated.

## 2. *The Gredelica Railroad Bridge Incident*

During an attack that occurred in the middle of the day on April 12, 1999, two bombs hit a civilian passenger train while it was crossing a bridge. The object of the attack was the bridge, not the train. Whereas the dropping of the first bomb on the train is attributable to the Alliance's failure to verify the train schedules and the high altitude that apparently prevented the pilots from getting a precise view of the target at the time of the attack; the dropping of the second bomb is inexplicable. The pilot must have realized that the bomb dropped in the first attack had hit the train instead of the bridge. The explanations given by NATO's representatives are highly problematic, as they suggest that the pilot dropped the second bomb because he "had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties."<sup>128</sup>

This incident raises the issues of whether the pilot who dropped the second bomb may incur individual criminal responsibility for war crimes under Articles 2 and 3 of the ICTY Statute (willful killing of civilians and indiscriminate attack causing excessive civilian casualties or damage); and whether his military superior may be held accountable on the basis of the doctrine of superior responsibility. As far as the pilot is concerned, one interpretation is that he consciously and deliberately attacked the train, a clearly civilian objective, because it was located on the bridge, his initial target.<sup>129</sup> Another is that the pilot did not intend to target the train as such. However, even in the latter hypothesis, he may still be held responsible for the reckless killing of civilians because he did not take sufficient precautions.<sup>130</sup> Indeed, "[h]e could simply have cancelled the attack or waited until the view on the bridge cleared."<sup>131</sup> His responsibility might also be engaged if he "was aware that a high number of civilian casualties would result from the attack and if these casualties would be excessive in relation to the military advantage anticipated."<sup>132</sup> It follows that the material and mental elements required seem present and that the pilot might incur individual criminal responsibility.

As long as the pilot misunderstood his orders and the commanders neither

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127. *Blaskic* case, *supra* note 110, ¶ 152.

128. AMNESTY INT'L, *supra* note 63, at 36.

129. See Cottier, *supra* note 49, at 532.

130. As Michael Cottier notes, "He should have known that the train, which was already partly on the bridge of only about 50 metres long, would almost inevitably be affected by a bomb targeted against the bridge, and as it appears that he could have avoided the death of some civilians had he taken feasible and warranted precautions." *Id.* at 533.

131. *Id.* at 532.

132. *Id.* at 533.

explicitly nor implicitly ordered the attack of the train, the latter may not be held directly responsible. However, their responsibility as superiors may be implicated if they failed to punish the pilot once the crime had been committed.<sup>133</sup> No serious investigation of the incident seems to have occurred at any point after the attack.<sup>134</sup> Moreover, the commanders' direct responsibility is clearly engaged if they ordered the bombing of the bridge regardless of the presence of civilians in or around the target.<sup>135</sup>

### 3. The Djakovica-Decan Road Incident

On April 14, 1999, NATO bombed several refugee convoys, killing seventy ethnic Albanians and wounding over 100 others. At first, NATO did not recognize its responsibility for the attack and blamed Yugoslav forces. Later, it admitted that aircrafts from the Alliance had carried out the bombing but argued that the pilots thought they were attacking military vehicles.<sup>136</sup> However, only tractors and wagons were hit, and there is no evidence that military vehicles were present among them.<sup>137</sup> Even so, it must be recalled that the "presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."<sup>138</sup>

This attack raises the issue of whether the pilots and their commanders are responsible for the willful killing of civilians, a war crime under Article 2 of the ICTY Statute. The pilots could argue that they committed a mistake of fact, which negates the mental element required. However, this defense may not be invoked when the mistake results from negligence.<sup>139</sup>

In this case, the pilots clearly mistook the convoy for a military column due to their failure to take sufficient precautions to distinguish between civilian and military objectives. Indeed, NATO itself recognized that the altitude at which the pilots were required to fly, 15,000 feet and above, had been a factor in the misidentification of the convoy and that none of the aircraft involved in the attack descended to low altitudes to double check the nature of the target.<sup>140</sup> The fact that NATO modified its rules of engagement after this incident and asked its pilots to fly as low as 6,000 feet in order to get a visual confirmation of the ab-

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133. *Id.* at 534.

134. "On 15 April 1999 Amnesty International called on NATO to conduct an inquiry into this attack. NATO officials who met with Amnesty International delegates in Brussels said they were not aware of the second bomb being dropped by the pilot. Assistant Secretary General Buckley said that if General Clark's account is that the pilot fired a second time at the bridge, it must mean that there was an internal investigation and the pilot was cleared." Nevertheless, it is difficult to imagine how a serious investigation could have led to the clearance of the pilot with regard to his criminal conduct. AMNESTY INT'L, *supra* note 63, at 37.

135. See Cottier, *supra* note 49, at 533 (stating that "such orders or training would have to be revised to be fully compatible with the requirements of international humanitarian law").

136. AMNESTY INT'L, *supra* note 63, at 37-38.

137. *Id.* at 39.

138. Protocol I, *supra* note 68, art. 50(3), 1125 U.N.T.S. at 26.

139. CASSESE, *supra* note 52, at 251.

140. AMNESTY INT'L, *supra* note 63, at 45-47.

sence of civilians in the vicinity of the target shows that the prior rules of engagement were not satisfactory under international humanitarian law.<sup>141</sup> The lack of proper precautions resulted in the death of innocent civilians, and the pilots should therefore incur individual criminal responsibility for the reckless killing of civilians.

The responsibility of their military superiors should also be engaged; it appears that no serious investigation was conducted afterward and that NATO simply satisfied itself with the "high altitude" factor to explain the incident.<sup>142</sup> Because the high altitude at which the pilots were flying prevented them from properly identifying their target and seems to run counter to the principle of precaution in the attack, their military superiors should have carried out a more serious investigation.

#### 4. *The Niš Incident*

On May 7, 1999, in the middle of the day, cluster bombs were dropped in two residential areas in the city of Niš, around the market place and the main hospital, killing fourteen civilians while injuring about thirty others.<sup>143</sup> According to Amnesty International, "the bombs fell on a busy part of town at a time when people were out in the streets and at the market, not protecting themselves in the bomb shelters where they had spent the night."<sup>144</sup> This time, NATO neither denied the attack nor its use of cluster bombs; it instead maintained that the incident had resulted from a weapon that had missed its objective, and that the real targets of the attack were a nearby airfield used by the Serbian army and the aircraft, air defense systems, and support vehicles located there, "targets to which cluster munitions are appropriately suited."<sup>145</sup>

In the Niš incident, the use of cluster bombs seems to have been a significant factor in the death of civilians.<sup>146</sup> Although NATO claimed it only used cluster bombs in areas where no civilian casualties could result from the attack,<sup>147</sup>

[t]he fact that cluster weapons were used on a target in proximity to a civilian area, and at a time of day when civilians were on the streets and most likely to be harmed, raised serious concerns as to whether NATO was indeed taking the proper steps to distinguish between military targets and civilians and civilian objects, and whether it was taking all the necessary precautions to ensure that civilians were not put at risk.<sup>148</sup>

Because cluster bombs often miss their target, their use results in indiscriminate

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141. *Id.* at 18.

142. *Id.* at 39-40, 45-47.

143. *Id.* at 57; HUMAN RIGHTS WATCH, *supra* note 3, paras. 90-91.

144. AMNESTY INT'L, *supra* note 63, at 57.

145. *Id.* (quoting NATO officials at a May 8, 1999 press briefing).

146. *See* HUMAN RIGHTS WATCH, *supra* note 3, paras. 89-90.

147. AMNESTY INT'L, *supra* note 63, at 57.

148. *Id.* at 58.

attacks that may violate the principle of distinction.<sup>149</sup> The fact that the United States decided to issue a directive asking for the restriction of the use of cluster bombs in the aftermath of the Niš incident evidences the fact that the choice of weapons used during the intervention was not appropriate and violated the principles of international humanitarian law.

Both the criminal responsibility of the pilot and his superiors might be engaged for the commission of war crimes encompassed by Articles 2 and 3 of the ICTY Statute, specifically as an attack resulting in excessive civilian loss or damage and/or the wilful killing of civilians.<sup>150</sup> The military superiors who ordered the attack knew that their intended target lay within the vicinity of a residential area; consequently, they must have been aware that by using cluster bombs to attack the target during daytime without warning the population, the resulting casualties would be excessive in relation to the military advantage anticipated. However, even if such knowledge is not proved, the superiors might still incur criminal responsibility for the wilful killing of civilians due to a lack of precautions, as the required *mens rea* also encompasses recklessness.

A close examination of these four incidents that occurred in the course of Operation Allied Force reveals that the conduct of NATO was sufficiently questionable to warrant an investigation for possible war crimes. In its refusal to investigate NATO's bombing campaign, the ICTY quietly made clear that political circumstances would ultimately circumscribe the actions taken by the Tribunal.<sup>151</sup>

## V.

### THE REPORT OF THE REVIEW COMMITTEE

Even if one is inclined to agree with the conclusion of the OTP Report, it is very difficult to accept the reasoning and the ambiguities of the Report. An inability or unwillingness to determine the facts, as well as a subsequent inability to apply legal rules to those facts, mars the OTP Report.<sup>152</sup>

Finally responding to the arguments made by scholars, NGOs, and individual states like Russia, who urged that an investigation into the NATO bombing campaign be conducted,<sup>153</sup> ICTY Prosecutor Louise Arbour established a Committee on May 14, 1999 to determine whether there was "a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing."<sup>154</sup>

Nothing in the Statute of the ICTY expressly authorized the Prosecutor to

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149. The Independent International Commission on Kosovo notes that sixty percent of the British Royal Air Force's cluster bombs missed their intended target in the course of NATO's intervention. INDEP. INT'L COMM'N ON KOSOVO, *supra* note 62, at 358 n.34.

150. See ICTY Statute, *supra* note 39, arts. 2, 3, 32 I.L.M. at 1192-93.

151. Tavernier, *supra* note 7, at 159.

152. Laursen, *supra* note 2, at 812.

153. Danner, *supra* note 6, at 538; KERR, *supra* note 6, at 200.

154. OTP Report, *supra* note 3, ¶ 3.

set up a Committee of this type.<sup>155</sup> Rather, the power to establish the Committee resulted from the guarantee of independence of the Prosecutor as enunciated in Article 16 of the Statute; the prosecutor is only prohibited from seeking or receiving instructions from any government or other source not seeking or receiving assistance or advice.<sup>156</sup> It was nevertheless clear that, notwithstanding the findings of the Committee, the ultimate decision to investigate belonged solely to the Prosecutor, and that she alone bore the responsibility and the consequences of that decision.<sup>157</sup>

The approach taken by the Prosecutor in establishing the Committee was both unusual and innovative, and the move was well received by some scholars who welcomed the public exposure that the Report of the Committee would receive.<sup>158</sup> Nevertheless, the initial intent of Louise Arbour and her successor Carla Del Ponte was to keep the process confidential. The public and NATO officials were only informed of the Committee's existence and work after the London *Observer* disclosed that the Prosecutor was gathering information on alleged war crimes committed by NATO.<sup>159</sup> Later on, in response to the criticism, even from within the Tribunal, of her refusal to investigate, Del Ponte publicly released the Report of the Committee to explain how she had reached her decision.<sup>160</sup>

#### A. Critique of the Methodology

The Report gives rise to serious criticism.<sup>161</sup> One critique of the Report concerns the sources considered by the Committee in elaborating its report and the different weight given to these sources. On the one hand, the Committee set up by the Prosecutor concedes that it

conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences. . . . It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The Committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents.<sup>162</sup>

As one academic notes, the assumptions of the Committee here are problematic. Documents like the press statements relied on by the Committee are not entirely reliable as, in times of war, parties to the conflict aim to attract the firm

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155. Ronzitti, *supra* note 7, at 1020.

156. Daniel D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 135 (2005).

157. Benvenuti, *supra* note 7, at 504; Ronzitti, *supra* note 7, at 1020.

158. See, e.g., Côté, *supra* note 1, at 180-81; Cottier, *supra* note 49, at 537.

159. Danner, *supra* note 6, at 538-39.

160. HAZAN, *supra* note 7, at 133.

161. For a critique of the ICTY Report, see Laursen, *supra* note 2; Benvenuti, *supra* note 7; Mandel, *supra* note 7; Ronzitti, *supra* note 7.

162. OTP Report, *supra* note 3, ¶ 90.

support of public opinion, either at the national or international level.<sup>163</sup> In addition, the “blind trust by the Review Committee in NATO’s reliability”<sup>164</sup> was not diminished even when NATO, questioned in writing by the Committee on general matters and specific incidents, only gave a “general reply.”<sup>165</sup> This illustrates that the Alliance was not as cooperative as the Committee tended to lead one to believe and makes one wonder whether “this *a priori* favoritism to one of the parties of the conflict is compatible with the Prosecutor’s avowed impartiality.”<sup>166</sup>

Meanwhile, the Committee explained that it “did not travel to the FRY and it did not solicit information from the FRY through official channels as no such channels existed during the period when the review was conducted.”<sup>167</sup> Nevertheless, as one scholar observes, claiming the absence of channels as the reason for not giving FRY documents the same weight as NATO ones is untenable, because the Committee also recognized that it had received “a substantial amount of material concerning particular incidents” from the FRY.<sup>168</sup> How could this have happened without some vehicle for communicating with the FRY?

Helper and Slaughter have come up with a set of criteria to determine whether international courts and tribunals effectively exercise their functions. One of their criteria, the existence of an independent fact-finding capacity—or the “ability to elicit credible factual information on which to base the tribunal’s decisions,”<sup>169</sup>—“helps counter the perception of self-serving or ‘political’ judgments.”<sup>170</sup> In the case of the Report requested by the Prosecutor, it does not seem that the facts “have been independently evaluated,”<sup>171</sup> as the Review Committee gave considerable weight to NATO’s interpretations of the facts, even though they often were far from satisfactory.

To sum up, it is difficult to consider that the sources of documentation on which the Committee based its report were adequate and, more importantly, balanced. Rather, as one author explains, the Committee “display[ed] a one-sided attitude, hardly consistent with the Prosecutor’s duty of impartiality and independence as envisaged in the ICTY Statute: the work of the Review Committee therefore appears to be undermined in its very foundation.”<sup>172</sup>

163. Benvenuti, *supra* note 7, at 506.

164. *Id.* at 507.

165. OTP Report, *supra* note 3, ¶ 12.

166. HAZAN, *supra* note 7, at 136 (quoting 1999 internal and confidential report of the International Committee for the Red Cross).

167. OTP Report, *supra* note 3, ¶ 7.

168. *Id.*; Laursen, *supra* note 2, at 777.

169. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 303 (1997).

170. *Id.*

171. *Id.*

172. Benvenuti, *supra* note 7, at 507.

### *B. Critique of the Content*

The content of the Report presents various deficiencies, both in general and more specifically in its interpretation of international humanitarian law.<sup>173</sup> One general criticism is the fact that the Report failed to draw firm and clear conclusions.<sup>174</sup> For instance, instead of clearly determining the incidence of the use of the Radio-Television Station for propaganda purposes, it stated that the nature of the station was “debatable.”<sup>175</sup>

With respect to the interpretation of international humanitarian law, the Committee’s legal reasoning in this area was often vague and unsatisfactory, particularly in reference to the definition of crimes against humanity<sup>176</sup> and the principles of distinction<sup>177</sup> and proportionality.<sup>178</sup> Regarding possible crimes against humanity, the Report concluded that “[i]f one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity.”<sup>179</sup> As one scholar notes, “this purely quantitative line of reasoning in fact is flawed, despite the apparently correct conclusion that no acts of genocide nor crimes against humanity were committed by NATO forces.”<sup>180</sup> Indeed, the high number of victims is not a condition *sine qua non* for the definition of crime against humanity to be met, and in some instances, no death or injury is even required, as in the case of widespread or systematic deportations.<sup>181</sup>

Another criticism derives from the Committee’s interpretation of the principle of distinction, which presents an inaccurate reading of how the principle of precaution should be assessed in practice. The Report states that:

a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.<sup>182</sup>

But, the Committee ignores the fact that even “if the precautionary measures have worked adequately in a very high percentage of cases, this does not mean that they are generally adequate, so as to excuse violations occurring in a small

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173. For an in-depth analysis of the content of the Report, see, e.g., *id.*; Laursen, *supra* note 2; Ronzitti, *supra* note 7.

174. See Laursen, *supra* note 2, at 777, 789-90; Benvenuti, *supra* note 7, at 522-23.

175. OTP Report, *supra* note 3, ¶ 76.

176. See, e.g., Cottier, *supra* note 49, at 509-10.

177. See, e.g., Benvenuti, *supra* note 7, at 514-16.

178. See, e.g., *id.* at 517-19; Ronzitti, *supra* note 7, at 1025-26; Laursen, *supra* note 2, at 790-96.

179. OTP Report, *supra* note 3, ¶ 90.

180. Cottier, *supra* note 49, at 509.

181. *Id.*

182. OTP Report, *supra* note 3, ¶ 29.

number of cases.”<sup>183</sup> Rather, each attack must be examined separately, taking into consideration its particularities, in order to assess whether all feasible measures of precaution have been taken.<sup>184</sup>

Finally, the Committee’s interpretation of the principle of proportionality is hardly acceptable in the light of international humanitarian law and appears even to contradict the rulings of the ICTY. First, the Report only concentrated on incidents that involved civilian deaths. In doing so, it deliberately decided not to take into consideration damage to civilian property, even though such damage can significantly affect the civilian population. As one scholar asserts, “it is unsatisfactory to assess the lawfulness of an attack with regard to the principle of proportionality if damage to civilian property is not evaluated.”<sup>185</sup> Second, with respect to the Radio-Television Station attack, the Report concludes that “[t]he proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident”<sup>186</sup> and refers to the important *Kupreskic* case decided by the ICTY Trial Chamber in January 2000.<sup>187</sup> However, as one author points out, “[t]he OTP Report completely misconstrues the Trial Chamber’s dictum by concluding that it meant to compare the total number of casualties with the overall goals of the military action.”<sup>188</sup> In the *Kupreskic* case, the ICTY held that “in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law.”<sup>189</sup> From this finding, the Report deduces that an illegal attack may be legal when viewed in the broader context of the entire bombing campaign, an inference that is incompatible with the ICTY ruling and the common interpretation of the principle of proportionality in the literature.<sup>190</sup>

### C. Critique of the Conclusion Reached

Finally, the very substance of the conclusions reached by the Committee has also been criticized, as the reasons put forward to justify the recommendation not to investigate are weak excuses rather than compelling legal arguments. At the end of its proceedings, the Committee concluded that

[o]n the basis of the information reviewed . . . neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents [were] justified. In all cases, either the law [was] not sufficiently clear or investigations [were] unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for

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183. Benvenuti, *supra* note 7, at 514-15.

184. *Id.* at 515.

185. *Id.* at 508.

186. OTP Report, *supra* note 3, ¶ 78.

187. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment (Jan. 14, 2000), available at <http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>.

188. Laursen, *supra* note 2, at 793.

189. Kupreskic case, *supra* note 187, ¶ 526.

190. Laursen, *supra* note 2, at 793-96.

particularly heinous offences.<sup>191</sup>

With regard to the first reason advanced, the lack of clarity of the law, a critic rightfully notes:

This is equivalent to a non liquet. Difficulties in interpretation are not a good excuse for not starting an investigation. There are aspects of international humanitarian law, as in any body of law, which are not sufficiently clear. However, it is precisely the task of the Tribunal to interpret and "clarify" the law; it cannot therefore conclude by saying that it cannot adjudicate the case, since the "law is not clear."<sup>192</sup>

Turning to the second justification, the difficulty in obtaining sufficient evidence to substantiate an indictment, "[e]vidence acquisition is undoubtedly a difficult and time-consuming task. Yet this is no excuse for not commencing an investigation."<sup>193</sup> Both the ICTY Statute and the Rules of Procedure and Evidence provide the Prosecutor with a wide range of power for gathering evidence that does not justify the pessimistic conclusion of the Committee.

In conclusion, because of "the clear partiality taken in the establishment of facts, the legal approximations and errors" demonstrated by the Committee in its report, "[n]either the ICTY, nor international law in general nor international humanitarian law has come out greater from the report of the commission established by the prosecutor of the ICTY."<sup>194</sup>

## VI.

### THE DECISION NOT TO PROSECUTE AND THE CONCEPT OF PROSECUTORIAL DISCRETION

Some degree of selectivity was required, but there was an important distinction between the exercise of prosecutorial discretion and 'selective prosecution'. 'Selective prosecution' is understood in this context to mean partiality or bias on the part of the prosecutor, rather than the exercise of discretion based on fixed criteria.<sup>195</sup>

#### *A. The Notion and Scope of Prosecutorial Discretion*

"Discretion" is generally defined as "the power to choose between two or more permissible courses of action."<sup>196</sup> It is sometimes added that this choice must be made "in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances."<sup>197</sup> The notion of discretion is particularly important in the context of international criminal justice, as a prosecutor may only discharge his functions efficiently if he is vested with some de-

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191. OTP Report, *supra* note 3, ¶ 90.

192. Ronzitti, *supra* note 7, at 1020-21.

193. *Id.* at 1021.

194. HAZAN, *supra* note 7, at 135 (quoting 1999 internal and confidential report of the International Committee for the Red Cross).

195. KERR, *supra* note 6, at 178.

196. Danner, *supra* note 6, at 518.

197. Ntanda Nsereko, *supra* note 156, at 124.

gree of discretion in the exercise of his powers. However, discretion has both positive and negative aspects.<sup>198</sup> Indeed, “[i]f prosecutorial discretion on one hand ensures prosecutorial independence on the international scene, it is also potentially a source of danger that can impair the right to a fair trial and the integrity of the whole international criminal judicial system.”<sup>199</sup>

### *I. Prosecutorial Discretion: National versus International Systems*

[I]t is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system.<sup>200</sup>

In most countries, an independent representative of the executive, commonly named the prosecutor, initiates criminal proceedings. However, the scope of this function varies from one country to another. While the prosecutor is involved in both the investigation and the decision to prosecute in some countries, such as France, he is only vested with the power to prosecute and does not participate in the investigating phase in others, such as Britain.<sup>201</sup> In the context of the International Tribunal for the Former Yugoslavia, the first approach has been favored. Article 16 of the Statute asserts that “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law.”<sup>202</sup>

In addition to its scope, the implementation of the prosecutorial function also differs among judicial systems. Some civil law systems have adopted the approach under which the prosecutor has the obligation to prosecute every time there is sufficient evidence to support a charge. On the other hand, common law systems favor the approach under which the existence of evidence does not automatically result in prosecution, allocating a wide degree of discretion to the prosecutor to decide whether to initiate a prosecution.<sup>203</sup>

At the international level, international criminal law has elected the second approach, a practice easily explained by the large number of potential suspects in cases of widespread violations of humanitarian law.<sup>204</sup> By their very nature as temporary bodies dealing with specific conflicts, ad hoc tribunals like the ICTY have also influenced prosecutorial policy,<sup>205</sup> that is, “both the nature of the courts, as well as the extensive nature of the crimes, impose on the Prosecutor a strategy of selecting and concentrating on the most serious cases.”<sup>206</sup>

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198. Danner, *supra* note 6, at 518.

199. Côté, *supra* note 1, at 165.

200. Council of Europe, Recommendation of the Comm. of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System and Explanatory Memorandum, Doc. No. Rec(2000)19E, at 21 (2001).

201. Ntanda Nsereko, *supra* note 156, at 126 nn.5-6; *see also* Danner, *supra* note 6, at 512-13.

202. ICTY Statute, *supra* note 39, art. 16(1), 32 I.L.M. at 1196-97.

203. Ntanda Nsereko, *supra* note 156, at 127-28.

204. Côté, *supra* note 1, at 165.

205. Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145, 150 (2005).

206. *Id.*

Article 18 of the ICTY Statute affirms that “[t]he Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”<sup>207</sup> Although one scholar interprets the terms of this provision as vesting the Prosecutor with a nondiscretionary duty to prosecute,<sup>208</sup> others note that the Tribunal itself has “in the last ten years, recognized a clear prosecutorial discretion as to the decision to investigate and to indict individuals.”<sup>209</sup>

## 2. *Scope of Prosecutorial Discretion*

To reduce the risk of actual or perceived illegitimacy, the Prosecutor must himself take steps to ensure that he reaches his decisions in a fair and nondiscriminatory way. He must, in short, demonstrate that he adheres to good process in his decision making. The hallmarks of good process in this context are principled decision making, reasoned decision-making, and, most important, impartiality. Impartiality, in turn, suggests qualities of fairness and evenhandedness among the possible targets of investigation and prosecution.<sup>210</sup>

Prosecutorial discretion, as understood in the context of the ICTY, applies to both the investigation and prosecution phases.<sup>211</sup> As has been recognized by the International Tribunals for the Former Yugoslavia and Rwanda, the Prosecutor is entitled to exercise her discretionary power to not only decide which situations to investigate, but also to select the individuals who will be indicted, amend or withdraw an indictment, and choose the prosecutorial strategy.<sup>212</sup>

In practice, it seems that the Prosecutor will apply a series of criteria in exercising her discretionary power. However, the lack of transparency makes it difficult to identify these criteria with any certainty.<sup>213</sup> Some scholars urge the promulgation of a set of *ex ante* standards that would “minimize arbitrariness in discretionary decision making.”<sup>214</sup> Be that as it may, it is generally accepted that the Prosecutor will look into only

the most important cases . . . , which involves a consideration by her of factors such as the nature and seriousness of the crime, the military rank or the governmental position of an alleged perpetrator, the significance of the legal issue involved in the case, the prospect for arresting the suspect, and the impact of the case on the resources of her Office.<sup>215</sup>

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207. ICTY Statute, *supra* note 39, art. 18(1), 32 I.L.M. at 1197.

208. See Ntanda Nsereko, *supra* note 156, at 136 (“this peremptory language suggests a duty and not discretion on the part of the Prosecutors to indict”).

209. Côté, *supra* note 1, at 165.

210. Danner, *supra* note 6, at 536-37.

211. Côté, *supra* note 1, at 166.

212. *Id.* at 167; Ntanda Nsereko, *supra* note 156, at 135-37; cf. Danner, *supra* note 6, at 520-21 (listing most of the same tasks as coming within the discretion of the Prosecutor for the International Criminal Court).

213. Côté, *supra* note 1, at 168.

214. Danner, *supra* note 6, at 538; see also Côté, *supra* note 1, at 171-72; Ntanda Nsereko, *supra* note 156, at 143-44.

215. Morten Bergsmo et al., *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 121, 135 (Louise Arbour et al.

Whereas some of these criteria appear to be rather objective and straightforward, others involve a subjective approach and are therefore more problematic. Only by determining the limitations to prosecutorial discretion will we be able to define the scope of an acceptable subjective appreciation by the Prosecutor.

### 3. Limitations to Prosecutorial Discretion

With respect to prosecutorial discretion, one issue that arises is to what degree it is subject to external control, without compromising the independence of the Prosecutor or undermining the Prosecutor's role in the criminal justice system.<sup>216</sup>

The ICTY has affirmed that prosecutorial discretion is not without limits<sup>217</sup> and that the Prosecutor should act in accordance with recognized principles of human rights and the ICTY's Statute and Rules of Procedure and Evidence.<sup>218</sup> It further emphasized the strong relationship between prosecutorial discretion and prosecutorial independence, the latter being recognized by Article 16(2) of the ICTY Statute. This guarantee of independence can be ensured by different means, each limiting the discretion of the Prosecutor.

An essential limitation to prosecutorial discretion relates to the political context of the situation in which the crimes have occurred. Indeed, the Prosecutor should refrain from founding her decision to prosecute on political considerations. Two former Prosecutors of the ICTY, Louise Arbour and Richard Goldstone, have strongly supported this approach. Arbour has argued that

[a]n independent Prosecutor must be able to stand apart from national politics, the interests of individual States and the goals of any particular foreign policy. Indeed, not only must the Prosecutor stand *apart* from such considerations, he or she must stand *above* them, and be fully prepared without fear or favour to contradict them or to challenge political pressures which may seek to influence the course of justice.<sup>219</sup>

Goldstone has adopted the same position, adding that such independence is preferable to "having politicians dictate to a prosecutor who should or should not be indicted and when indictments should be issued."<sup>220</sup>

A similar approach has been chosen by the International Association of Prosecutors, a non-governmental and non-political organization whose purpose is "to promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences."<sup>221</sup> Article 2.1 of the Association's Standards states that "[t]he

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eds., 2000), *quoted in* Côté, *supra* note 1, at 168.

216. Jallow, *supra* note 205, at 154.

217. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment in the Appeals Chamber, ¶ 602 (Feb. 20, 2001), available at <http://www.un.org/icty/celebici/appeal/judgement/index.htm>.

218. *Id.* at ¶¶ 602, 604.

219. Louise Arbour, Keynote Speech at the International Conference on War Crimes Trials (Nov. 8, 1998), *quoted in* KERR, *supra* note 6, at 178.

220. RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 132 (2000).

221. The International Association of Prosecutors, About the Association, <http://www.iap.nl.com/estab.htm> (last visited Feb. 23, 2006).

use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.”<sup>222</sup>

Helfer and Slaughter also identify the attributes of “neutrality and demonstrated autonomy from political interests” as necessary for an international tribunal to discharge its functions effectively:<sup>223</sup> “The challenge for a court seeking to present itself as a judicial rather than a political body is thus to demonstrate its independence from . . . political authorities.”<sup>224</sup> The prosecutor of an international tribunal should therefore be “willing to brave political displeasure,”<sup>225</sup> as “secrecy and compromise are the hallmarks of diplomacy, not law.”<sup>226</sup>

Another limitation to prosecutorial discretion directly relates to the principle of equality and highlights the danger of double standards. One of the core principles underlying the rule of law is that “the law applies with equal force and obligation to all.”<sup>227</sup> It follows that “international Prosecutors will have to exercise their discretionary powers in total impartiality, avoiding the semblance of appearing on the side of the victors or the powerful.”<sup>228</sup> But, the criticism levied against the ICTY—that it exercised a form of victor’s justice by unfairly targeting Serbs while ignoring the atrocities committed by Croats and Bosnians<sup>229</sup>—only seemed more accurate after the Prosecutor decided not to prosecute NATO forces. This could have important and unintended consequences for the Prosecutor, the Tribunal, and the pursuit of justice. As one academic notes,

If the tribunals are to have any chance of deterring future conflict and contributing to social reconstruction . . . it [sic] needs the independence to prosecute all serious violations of international humanitarian law. Prosecuting the losers while leaving the winners immune will risk sending a contradictory message of accountability. Instead of promoting accountability, the tribunal’s failure to prosecute the winners may actually promote impunity by teaching the lesson that atrocities will not be punished as long as one prevails in battle.<sup>230</sup>

A final means of limiting the discretionary power of the Prosecutor consists of allowing judicial review of prosecutorial decisions. Whereas the “[s]eparation of the prosecuting body and the Court is a fundamental element of a fair trial . . . , prosecutorial functions may be made accountable to judicial review in cer-

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222. The International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, <http://www.iap.nl.com/stand2.htm> (last visited Feb. 23, 2006).

223. Helfer & Slaughter, *supra* note 169, at 313.

224. *Id.*

225. *Id.* at 314.

226. *Id.*

227. Ruti Teitel, *Bringing the Messiah Through the Law*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 177, 188 (Carla Hesse & Robert Post eds., 1999).

228. Côté, *supra* note 1, at 175.

229. On this point, see Victor Peskin, *Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 *J. HUM. RTS.* 213 (2005).

230. *Id.* at 228.

tain circumstances.”<sup>231</sup> However, the ICTY’s Rules of Procedure and Evidence evince a clear reluctance to allow substantial judicial review over prosecutorial decisions.<sup>232</sup> In addition to deciding whether to investigate and who to investigate, the Prosecutor has the freedom to conduct her investigation without any judicial control.<sup>233</sup> Only at the closing stage of the investigation does Rule 47 require a judge to review and confirm an indictment before it is served to the accused.<sup>234</sup> This limited judicial control is further qualified by the fact that the Prosecutor’s decision not to prosecute is not subject to review because it could affect her independence.<sup>235</sup>

### *B. Application of the Notion of Prosecutorial Discretion to the NATO Case*

If a real investigation had been opened, it is very likely that the Prosecutor would have taken the same decision but without giving rise to an appearance of bias. If the main goal of the Prosecutor in publishing that Report was to reaffirm her independence and impartiality in the eyes of the international community, it was not achieved.<sup>236</sup>

As discussed *supra*, the decision to initiate an investigation belongs to the Prosecutor of the ICTY alone. The Prosecutor had the Committee’s Report at her disposal when forming her assessment, but was by no means obliged to follow its recommendations, the report being “merely advice to the Prosecutor.”<sup>237</sup> However, as has already been emphasized in the previous section, “[b]ecause of its deficiencies, the Report does not constitute the definite and conclusive element on which a decision not to proceed may be grounded.”<sup>238</sup> If the Prosecutor had taken other elements into consideration, she would most likely have reached a different decision, thus following the recommendation of Antonio Cassese, a former Judge and President of the Tribunal, who stated that Operation Allied Force deserved to be investigated.<sup>239</sup> Nevertheless, “the impression is given that the Prosecutor’s intent has been, on the whole, to prevent investigations against NATO officials, and to hide herself behind the ‘technical opinion’ of the Review Committee.”<sup>240</sup>

In the light of the standards apparently used by the Prosecutor in deciding when to initiate investigations<sup>241</sup> and the unique character of Operation Allied Force, it seems that most of the criteria were met in the NATO case. Moreover, in the specific context of an intervention based on humanitarian grounds, the ad-

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231. Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 85 (2004).

232. *Id.* at 86.

233. CASSESE, *supra* note 52, at 408.

234. Ntanda Nsereko, *supra* note 156, at 137.

235. *Id.*

236. Côté, *supra* note 1, at 183.

237. Benvenuti, *supra* note 7, at 504.

238. Ronzitti, *supra* note 7, at 1020.

239. *Id.* n.7.

240. Benvenuti, *supra* note 7, at 505.

241. See discussion *supra* Section VI.A.2.

herence to the rules of humanitarian law should be particularly rigorous.<sup>242</sup> The protection of the civilian population cannot be solely a reason to go to war; this goal must also be implemented throughout the course of the intervention. In this humanitarian context, the war crimes allegedly committed were serious. As former ICTY Judge Georges Abi-Saab notes,

NATO intervention was 'to protect the Kosovar populations against Serb atrocities'. NATO should have limited itself to military objectives and avoided all indiscriminate strikes likely to hit civilians. It is, thus, not acceptable that an army, intervening without having been attacked, in the name of ensuring respect for international law, act in a manner that minimizes risks for itself while maximizing them for civilians. And that is what the American policy to avoid any casualties among NATO soldiers implies.<sup>243</sup>

In addition, the legal issues involved were significant. The Prosecutor was confronted with the question of whether the rules of international criminal law equally bind direct parties to a conflict and third party forces that intervene militarily for humanitarian purposes. The resolution of this issue would have had a considerable impact on future U.N. peacekeeping operations and other humanitarian interventions. Other more specific legal questions were also at stake, such as the nature of radio and television stations and the circumstances in which they may constitute military targets. This issue is of particular importance in the light of the growing role played by the media in warfare. The Review Committee's conclusion that the law was unclear in some instances should have encouraged the Prosecutor to investigate, as it would have permitted clarification of the law by the judges should the case have reached that stage in the proceedings.<sup>244</sup>

Beyond the aforementioned criteria, the limitations to prosecutorial discretion discussed *supra* should also have informed the Prosecutor in her decision-making process. Consequently, she should have refrained from taking political considerations into account and departing from the principle of equality. With regard to the first restriction, one scholar argues that

[t]reating the tribunal as one that perceived itself as merely a propaganda arm of NATO, is the only way to make sense of its violation of the most basic principles of judicial impartiality. This is apparent above all in its failure to charge NATO leaders for the crimes they committed in the bombing campaign, something it was legally required to do by its Statute, not to mention morally required to do by the facts of the case.<sup>245</sup>

Without going that far, it is nevertheless legitimate to believe that the Prosecutor ultimately decided not to initiate an investigation as a result of pressure from NATO officials, thereby taking into account political considerations that were unacceptable in light of her duties of independence and impartiality.<sup>246</sup> As far as

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242. INDEP. INT'L COMM'N ON KOSOVO, *supra* note 62, at 179.

243. See HAZAN, *supra* note 7, at 134-35 (quoting *Le Temps* June 9, 2000 interview).

244. For a similar view, see Cottier, *supra* note 49, at 530.

245. Mandel, *supra* note 7, at 96-97.

246. See, e.g., HAZAN, *supra* note 7, at 138-39 (asking, "How far did the pressure go? Would the great Western states have abandoned all support for the tribunal, as they had threatened under their breath for so long?").

the second restriction of equality before the law is concerned, some feel that the decision not to prosecute “was enough to raise suspicion as to the Prosecutor’s impartiality and the use of double standards in the exercise of her discretion when applied to ‘friendly’ powers.”<sup>247</sup>

Had Serbian rather than NATO forces perpetrated the alleged crimes considered by the Committee, the Serbian actors would very likely have been subjected to an investigation. The ICTY, for example, indicted Bosnian Serb leaders Radovan Karadzic and Ratko Mladic in 1995 for the killing of civilians during the bombing of Sarajevo.<sup>248</sup> The number of victims mentioned in their initial indictment—twenty dead and fifty wounded<sup>249</sup>—suggests that the bombing of the Radio-Television Station by the Alliance, which resulted in the death of at least sixteen civilians, presents the same level of gravity. Meanwhile, Milan Martić, the President of the self-proclaimed Republic of Serbian Krajina, was indicted for the bombing of the city of Zagreb, in the course of which cluster bombs were employed,<sup>250</sup> the use of this type of weapon appears to have been a crucial element in the indictment.<sup>251</sup> Even though NATO’s attack on Niš does not seem to have been intentionally directed against civilians, “one can only wonder why the Prosecutor has not, thus far, seen NATO’s use of cluster bombs against the city of Niš as being as serious as the Krajina Serbs’ use of cluster-bomb warheads against the city of Zagreb.”<sup>252</sup>

Lastly, the limited judicial scrutiny over the Prosecutor’s decisions also failed to curb her discretion, as it did not allow a judge to review her refusal to investigate. The debate surrounding the scope of judicial interference with prosecutorial discretion is fascinating and essential, especially as some view the Prosecutor as the “Achilles heel of the tribunal”<sup>253</sup> and the judges as the guarantors of the Tribunal’s independence. Indeed, in exercising pressure on the Prosecutor, “NATO’s leading nations gave indirect and unintentional homage to the judges’ independence; it was because these Western states believed in the ICTY’s impartiality that they wanted to escape its judgment.”<sup>254</sup>

To conclude, “it would have been preferable if the OTP had conducted a formal investigation. On the whole, there seems to be enough doubt to warrant such a formal investigation, and the doubt should not necessarily benefit NATO in the present circumstances.”<sup>255</sup> Amnesty International shared this position, recommending that “[t]he International Criminal Tribunal for the former Yugoslavia should investigate all credible allegations of serious violations of interna-

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247. Côté, *supra* note 1, at 180.

248. Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-I, Initial Indictment, ¶ 44 (July 24, 1995), available at <http://www.un.org/icty/indictment/english/kar-ii950724e.htm>.

249. *Id.*

250. Prosecutor v. Martić, Case No. IT-95-11, Initial Indictment, ¶¶ 8, 9 (July 25, 1995), available at <http://www.un.org/icty/indictment/english/mar-ii950725e.htm>.

251. Hayden, *supra* note 116, at 262.

252. *Id.*

253. HAZAN, *supra* note 7, at 138.

254. *Id.* at 139.

255. Laursen, *supra* note 2, at 813-14.

tional humanitarian law during Operation Allied Force with a view of bringing to trial anyone against whom there is sufficient admissible evidence.”<sup>256</sup>

By accepting full responsibility for the conclusions of the Committee Report, refusing to conduct an investigation of NATO's bombing campaign against Serbia, and privileging political over legal imperatives when serious war crimes may have been committed, however, the current Prosecutor of the ICTY undermined her predecessor's vision of the Tribunal as an “international forum that, even in its short history, has demonstrated its competence, its integrity, and its transparency.”<sup>257</sup> In doing so, the Prosecutor has abused the discretion allocated to her by the Tribunal's Statute, leading some to hope that “the final report of the Review Committee and its acceptance by the Prosecutor will not damage beyond repair the standing of the ICTY or undermine the promising outlook for international criminal justice generally.”<sup>258</sup>

## VII.

### CONCLUDING REMARKS: THE INTERNATIONAL CRIMINAL COURT AND A CALL FOR JUSTICE IN THE FUTURE

If the Prosecutor becomes identified with any political agenda other than seeking justice, the role of the Court in providing an impartial, independent forum for individuals accused of the most serious crimes will be severely compromised.<sup>259</sup>

The on-going discussion regarding the scope of prosecutorial discretion took an interesting turn during the creation of the International Criminal Court (“ICC”). Although the negotiations over the ICC occurred before NATO's intervention and the debate following Carla del Ponte's decision not to investigate, it is nevertheless interesting to examine how the international community envisioned the new prosecutor of the ICC and how the NATO case, hypothetically, would have been dealt with had the ICC exercised jurisdiction over it.

#### *A. An Independent Prosecutor for the International Criminal Court?*

One of the most controversial and harshly debated issues during the negotiations leading up to the establishment of the ICC was the scope of the Prosecutor's powers.<sup>260</sup> Originally, the International Law Commission had vested the Prosecutor with the power to investigate only in situations referred to the Court by a State Party or the Security Council. The Commission was concerned about creating an independent prosecutor who would be allowed to initiate investigations on her own, as giving a prosecutor such powers raised a potential risk for “politically motivated or frivolous proceedings.”<sup>261</sup>

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256. AMNESTY INT'L, *supra* note 63, at 32.

257. Arbour, *supra* note 38.

258. Benvenuti, *supra* note 7, at 527.

259. Danner, *supra* note 6, at 537.

260. *Id.* at 513; Ntanda Nsereko, *supra* note 156, at 138.

261. Danner, *supra* note 6, at 513.

During the negotiations, however, the allocation of *proprio motu* powers to the Prosecutor became a central issue. Each side invoked the fear of politicization of the Court and acknowledged that, whatever the outcome of the debate, the decision on *proprio motu* powers would have a fundamental effect on the structure and functioning of the new Court.<sup>262</sup> On the one hand, supporters of a prosecutor with *proprio motu* powers emphasized the importance of the Prosecutor being able to initiate investigations on the basis of information gathered by non-state actors such as NGOs and the decrease in independence and credibility that a system only based on the referral of political institutions, namely states and the Security Council, would create.<sup>263</sup> On the other hand, opponents claimed that

the Prosecutor could become either a 'lone ranger running wild' around the world targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, NGOs, and other groups who would seek to use the power of the ICC as a bargaining chip in political negotiations.<sup>264</sup>

Powerful states, such as Russia, China, and the United States, fiercely opposed the idea of a prosecutor who "would use the powers to intrude into their internal affairs and thereby infringe upon their sovereignty."<sup>265</sup>

While "[t]he delegates at Rome found making the Court formally subordinate to political institutions, and especially to the Security Council, incompatible with the purpose of the ICC,"<sup>266</sup> they, at the same time, took the concerns of the powerful states into consideration and recognized the necessity of some kind of judicial oversight over the prosecutor's exercise of discretion.<sup>267</sup>

### *B. The Scope of Judicial Review over Prosecutor's Actions*

The outcome of this compromise has been described by some authors as "a most progressive and fair prosecutorial regime,"<sup>268</sup> and the independence of the Prosecutor from "direct political control [has been] rightly celebrated as a salutary development."<sup>269</sup>

Article 15(1) of the ICC Statute stipulates that "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."<sup>270</sup> However, the subsequent paragraphs of the article contain an important restriction to the Prosecutor's discretion when the Prosecutor is not acting in response to a referral from a State Party or the Security

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262. *Id.*

263. *Id.* at 514.

264. *Id.* at 513-14.

265. Ntanda Nsereko, *supra* note 156, at 138; *see also* Danner, *supra* note 6, at 537-38 (discussing the strong opposition of the United States to an independent ICC Prosecutor).

266. Danner, *supra* note 6, at 514.

267. Ntanda Nsereko, *supra* note 156, at 138. *See* Brubacher, *supra* note 201, at 86.

268. Ntanda Nsereko, *supra* note 156, at 137.

269. Danner, *supra* note 6, at 515.

270. Rome Statute of the International Criminal Court, art. 15(1), July 17, 1998, 2187 U.N.T.S. 90, 100 [hereinafter ICC Statute] (emphasis added).

Council, but rather on his own. The Prosecutor must request authorization from the Pre-Trial Chamber, composed of three judges, before initiating any investigation. Only when the Chamber "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" will it approve the commencement of an investigation.<sup>271</sup>

In addition, although the Prosecutor may still decide not to investigate, Article 53 specifies that if his decision is based only on the discretionary determination that "an investigation would not serve the interests of justice,"<sup>272</sup> the Pre-Trial Chamber must be informed.<sup>273</sup> The Chamber may then review the decision on its own initiative, and it will only be effective if confirmed by the Chamber.<sup>274</sup> Similarly, whereas the Prosecutor may decide not to prosecute a situation referred to him by a State Party or the Security Council,<sup>275</sup> he must inform both the institution that made the referral and the Pre-Trial Chamber when the sole ground of his decision is that a prosecution would be contrary to the "interests of justice."<sup>276</sup> Once again, the Prosecutor's decision not to prosecute will only be effective following a confirmation from the Pre-Trial Chamber if it has decided to review that decision<sup>277</sup> or the institution that made the referral has requested it do so.<sup>278</sup>

As a scholar notes, "[g]enerally speaking, the Prosecutor of the ICC has ample discretion to effectively discharge his mandate. However, compared to his counterparts before the national courts and the ad hoc Tribunals, the Prosecutor's discretion is considerably restricted, particularly by the powers of the Pre-Trial Chamber."<sup>279</sup>

### C. Conclusion

To those used to prosecutors with absolute or untrammelled discretion, the restrictions placed on the Prosecutor [of the ICC] may appear intrusive and obstructive. Nevertheless, given the volatile political environment in which the Court operates, the interests of states that may be at stake and the profile of the individuals that are likely to appear before the Court, the restrictions are justified. They ensure transparency and accountability in the exercise of the Prosecutor's powers. They serve to shield the Prosecutor from accusations of initiating politically motivated prosecutions.<sup>280</sup>

Looking at the NATO case and the decision of the Prosecutor not to investigate, it is particularly interesting to imagine what would have happened if the scope of prosecutorial discretion had been governed by the Statute of the Inter-

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271. *Id.* art. 15(4), 2187 U.N.T.S. at 100.

272. *Id.* art. 53(1)(c), 2187 U.N.T.S. at 118.

273. *Id.* art. 53(1)(c) *in fine*, 2187 U.N.T.S. at 118.

274. *Id.* art. 53(3)(b), 2187 U.N.T.S. at 119.

275. *Id.* art. 53(2), 2187 U.N.T.S. at 118-19.

276. *Id.* art. 53(2)(c) *in fine*, 2187 U.N.T.S. at 118-19.

277. *Id.* art. 53(3)(b), 2187 U.N.T.S. at 119.

278. *Id.* art. 53(3)(a), 2187 U.N.T.S. at 119.

279. Ntanda Nsereko, *supra* note 156, at 141.

280. *Id.* at 141-42.

national Criminal Court, which would have allowed for review of the Prosecutor's decision by the Pre-Trial Chamber. While the Prosecutor would have certainly argued that her decision was justified by the fact that an investigation would not have served the interests of justice, it is reasonable to believe that the Chamber would not have confirmed the decision and that the Prosecutor would have been compelled to conduct an investigation. The opinions of two judges of the ICTY concerning NATO's bombing campaign and the choice made by Carla Del Ponte tend to support this outcome.<sup>281</sup> Whether or not such investigations would have resulted in the indictment of senior officials from the Alliance is not what really matters. Rather, opening an investigation would have given the impression, in the eyes of the international community, that justice was equally exercised against the weak and the powerful.

The evolution in the scope of prosecutorial discretion at the international level and the increasing judicial review over prosecutor's actions recognized in the Statute of the International Criminal Court are therefore most welcome, as they represent an important step toward a more impartial discharging of justice, insulated from the political pressures of powerful governments. Hopefully, these changes will be reflected in the future work of the ICC, and the safeguards contained in the Rome Statute will help prevent future abuses of discretionary power.

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281. Both Judge Cassese and Abi-Saab criticized NATO's bombing campaign and the former expressly recommended for an investigation to be opened. See discussion *supra* Section VI.B.

2006

## The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status

Corrina Heyder

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# The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court:

## Implications for the International Criminal Court's Functions and Status

By  
Corrina Heyder

### I. INTRODUCTION

On March 31, 2005, the United Nations Security Council referred the situation in Darfur to the International Criminal Court ("ICC"). The decision of the United States to abstain from the Security Council's vote, rather than exercise its veto power as many expected, allows the ICC to exercise criminal jurisdiction over the crimes committed in Darfur. With the United States not pushing their opposition to the Court to the point of blocking the Security Council's referral of the Darfur case, the ICC made an important move from academic exercise to legal reality.<sup>1</sup> Although the State Department did not tire of emphasizing that this abstention does not mark a change in the United State's position on the Court, the first case to be referred by the Security Council is nonetheless an important step for ensuring the ICC's future work. While some celebrated the referral as a "breakthrough" for the Court, others remained skeptical, stressing the unchanged U.S. position towards the ICC and its consequential diminishing of the Court's power and legitimacy.

Part II of this article will address a question prompted by the referral of the Darfur situation and the political debate surrounding the content of Security

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1. George P. Fletcher & Jens David Olin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. L. 539, 561 (2005).

Council Resolution 1593, adopted in 2005.<sup>2</sup> Namely, which actors were the most influential in shaping the referral according to their needs: the United States or the states in favor of the ICC? The analysis of this question is based on Professor David Caron's theoretical approach, which posits that different actors' "bounded strategic actions" shape the structure and the procedural and substantive law of institutions into their ideal form.<sup>3</sup> After considering the influence of the actors involved in negotiating the referral and their distinct views regarding the Court's "ideal form," Part III examines whether the Security Council's referral actually mandated the Court with full power to investigate and prosecute the crimes committed in Darfur successfully. Or whether, on the contrary, the United States could shape the referral according to its own interests. Parts IV and V analyze these U.S. interests and relate them to the functions that the Court is supposed to fulfill according to its mandate. Finally, this analysis leads me to address the possibility of transforming the present silence between the ICC and the United States into a constructive dialogue by limiting the strategic space of the former without putting its functions in peril.

## II. BACKGROUND

### A. *Crimes Committed in Darfur*

With the Security Council's referral, the ICC has jurisdiction to prosecute crimes committed in Darfur as far back as July 1, 2002. The proceedings will focus on the deaths of at least 300,000 people<sup>4</sup> in a barbaric civil war in Sudan that experts believe led to one of the greatest humanitarian disasters on the planet.<sup>5</sup> Specifically, a massive campaign of ethnic violence in Sudan's western region, Darfur, has claimed more than 70,000 civilian victims and uprooted an additional estimated 1.8 million. The roots of the violence are complex and remain partly unclear. The primary perpetrators of the killings and expulsions are government-backed "Arab" militias, while the victims are mainly members of black "African" tribes.<sup>6</sup>

In early September 2004, after reviewing the results of a government-sponsored investigation of the crimes committed in Darfur, U.S. Secretary of State Colin Powell described the crimes as genocide, and President George W.

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2. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

3. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT'L L.* 401, 401-02 (2006).

4. Thomas Darnstaedt & Helene Zuber, *The Hague Takes On the Sudanese Blood Bath*, *DER SPIEGEL*, Aug. 22, 2005, available at <http://www.globalpolicy.org/intljustice/icc/2005/0822darfur.htm>.

5. Scott Straus, *Darfur and the Genocide Debate*, 84 *FOREIGN AFF.* 123 (2005); Int'l Com'n for Inquiry on Darfur, *Report of the International Commission for Inquiry on Darfur to the United Nations Secretary-General*, ¶ 50, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Report of the International Commission*], available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

6. *Id.* ¶¶ 5-7.

Bush used this term in a speech to the United Nations several weeks later.<sup>7</sup> This marked the first time that senior U.S. government officials had ever conclusively applied the term to a current crisis and invoked the Genocide Convention.<sup>8</sup> Subsequently, the U.N. Secretary General established a Commission of Inquiry to investigate the crimes committed in Darfur.<sup>9</sup> In January 2005, this Commission reported to the Security Council that, although it could not conclude that Sudanese government authorities had pursued a genocidal policy, other equally serious war crimes and crimes against humanity had been clearly committed in Darfur.<sup>10</sup> Consequently, the Commission recommended that the Security Council immediately refer jurisdiction over the crimes to the ICC.<sup>11</sup>

*B. Referral by the Security Council Pursuant to Article 13(b) of the Statute of Rome*

The Security Council passed the referral of the Darfur situation on March 31, 2005 with eleven votes in favor of the referral, none against it, and four abstentions (Algeria, Brazil, China, and the United States). The Resolution was the result of long and intensive debates. Although the international community unanimously condemned and called for justice for the Darfur crimes, the referral to the ICC seemed doomed to fail as the United States clearly supported the idea of a more expensive and time consuming ad hoc mechanism instead.<sup>12</sup> Though the referral procedure had been highly lauded during the negotiations of the Statute of Rome as the most viable and likely “trigger mechanism” for bringing cases before the Court,<sup>13</sup> it appeared to present an insurmountable obstacle during these negotiations, given the fierce opposition of the United States.

Article 13(b) of the Statute of Rome states that the ICC may exercise jurisdiction in “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>14</sup> Having its legal basis in Chapter VII of the Charter, the Security Council’s referral of the crimes in Darfur is conditioned on the determination that they continue to constitute a threat to international peace and security.<sup>15</sup> Where the ICC obtains jurisdiction over a

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7. Straus, *supra* note 5. In July 2004, the U.S. Congress had already passed a resolution that the crimes in Darfur qualify as genocide. *Id.*

8. *Id.*

9. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

10. *Report of the International Commission*, *supra* note 5, at 1.

11. *Id.* ¶ 569.

12. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (March 31, 2005) [hereinafter Security Council Press Release], available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

13. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 702 (2004).

14. Rome Statute of the International Criminal Court, July 17, 1998, art. 13(b), U.N. Doc A/Conf.183/9 (2002) [hereinafter Statute of Rome], available at <http://www.un.org/law/icc/statute/romefra.htm>.

15. S.C. Res. 1593, *supra* note 2, pmb1. Any action of the U.N. Security Council under

case by virtue of such a Security Council referral, its jurisdiction is considered much stronger and truly universal, rendering irrelevant the consent of the state where the crime occurred.<sup>16</sup> The Darfur situation is the third case on the docket of the ICC, but the first in which the Court's jurisdiction is premised on a Security Council referral pursuant to Article 13(b) of the Statute of Rome.

*C. The Relevance of the Referral for the Future Shape of the International Criminal Court*

With the referral of the crimes committed in Darfur, the U.S. government's opposition to the ICC as an institution came into direct conflict with its interest in justice for the victims in Darfur. Although the United States was not a party to the Statute of Rome, it had the political authority to deprive the Court from exercising jurisdiction in the matter, given its veto power in the Security Council.

It seemed crucial, however, that the ICC have jurisdiction over the crimes committed in Darfur, as the case fell clearly within the Court's limited mandate. The global community faced horrific crimes against humanity and war crimes, that qualified as genocide according to the United States, while the state in whose territory the crimes were committed made no attempt to prosecute the perpetrators. In addition, as the major outbreaks of violence against defenseless civilians occurred in early 2003, these incidents fell within the temporal limits of the ICC's jurisdiction, which started with the entry into force of the Statute of Rome in July 2002.

Considering the fact that the ICC is a very young, still untested, and controversial court, the referral of jurisdiction from the Security Council was crucial for the Court as an institution in order to prove its ability to prosecute the most serious crimes. A failure to refer this case would consequently have prompted the question of whether the ICC could ever exercise universal jurisdiction in any case other than those in which States Parties had consented to jurisdiction. While such a failure might have left the institution's legitimacy intact, it nonetheless would have marginalized the Court and cast doubt on any hopes of its becoming an important instrument for ensuring global accountability for the most serious crimes.

Had it chosen to veto the referral and consequently thwart the Court's jurisdiction, the United States could have unilaterally, and from the outside, considerably restricted the Court's strategic space, as defined by the Statute of Rome. By refraining from exercising its veto power, however, the United States,

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Chapter VII of the U.N. Charter presupposes an imminent threat to international peace and security.

16. The referral, according to Article 13(b) of the Statute of Rome is only one of the three trigger mechanisms that establish the jurisdiction of the ICC. First, and most uncontroversial, any State Party has the right to refer a "situation" to the ICC that would fall under its jurisdiction. Statute of Rome, *supra* note 14, arts. 13(a), 14. Second, the ICC prosecutor has the authority to initiate proceedings *proprio motu*. Statute of Rome, *supra* note 14, arts. 13(b), 15. The prosecutor's decision is subject to review by the Pre-Trial Chamber, consisting of three judges. Statute of Rome, *supra* note 14, art. 15(3)-(4).

who in terms of Professor David Caron's theory of bounded strategic space is an outsider lacking direct control over the institution, ultimately contributed to the Court's legitimacy. Nevertheless, during the negotiation of Resolution 1593, the United States insisted on a number of provisions that did significantly limit the strategic space of the ICC and that set precedence for future referrals. These limitations will now be subject to further examination.

### III.

#### ANALYSIS OF SECURITY COUNCIL RESOLUTION 1593

After the referral, both supporters and adversaries of the ICC characterized the text of the Resolution as supporting their positions. Friends of the International Criminal Court stated,

The resolution is . . . a breakthrough for the Court . . . . Thus, from now on, it will be impossible for the U.S. to declare that the ICC is useless. Moreover, this action demonstrates that the ICC is the only legitimate international institution able to prosecute reasonably quickly heinous atrocities when states fail to do so.<sup>17</sup>

On the other hand, U.S. Ambassador to the United Nations, Anne Woods Petterson, stressed that the United States believed that a better mechanism would have been a hybrid tribunal in Africa.<sup>18</sup>

Considering this range of assessments, an analysis of the Resolution's text is necessary for a realistic evaluation of its impact upon the ICC's mandate, or its strategic space through which it can render justice in Darfur. Specifically, some parts of the Resolution provoked serious skepticism about the Court's ability to render justice with the mandate provided by the Security Council.<sup>19</sup> The following therefore analyzes the Resolution's text with respect to the cooperation of non-States Parties, the costs of the proceedings, immunity for non-States Parties, and exemption agreements.

#### *A. The Cooperation of Non-States Parties*

Although the Resolution referring jurisdiction to the ICC was made by the Security Council acting on behalf of the global community of states, paragraph 2 of the Resolution states that only the government of Sudan and the other parties to the conflict are under the obligation to cooperate with the ICC.<sup>20</sup> In contrast, all other states are merely "urged" to cooperate.<sup>21</sup> This means that, on the one hand, the international community has mandated that the ICC to exercise juris-

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17. Letter from American Non-Governmental Coalition for the International Criminal Court, to members (Apr. 4, 2005), available at <http://www.amicc.org/docs/Darfur%20Referral.pdf>.

18. Security Council Press Release, *supra* note 12.

19. Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation on Darfur to the International Criminal Court*, 3 J. INT'L CRIM. JUST. 590, 593 (2005).

20. Only the government of Sudan and the other parties to the conflict have to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." S.C. Res. 1593, *supra* note 2, ¶ 2.

21. *Id.*

diction; but that, on the other hand, states that are not party to the Statute of Rome, except for Sudan, have no obligation to cooperate or support the ICC in fulfilling this task. This contradiction, inherent in the Security Council's logic, is hardly understandable.

An alternative that would have strengthened the position of the ICC would have imposed obligations on all states, including the United States, to cooperate in the Darfur proceedings. Certainly, according to Article 86(ff) of the Statute of Rome, only States Parties are under an obligation to cooperate with the Court, except where they have not agreed to do so, as treaty-based obligations are not binding on third-party states. Nonetheless, considering the exceptional circumstances in Darfur, the Security Council could have decided otherwise. According to Article 87(5) of the Statute of Rome, non-States Parties can also be brought under an obligation to cooperate with the Court on any other "appropriate basis." Such a basis could be provided by the Security Council acting pursuant to Article 41 of the U.N. Charter.<sup>22</sup> Under Article 41, the Security Council could adopt a resolution compelling all member states to give full effect to the Security Council's decision to refer the Sudan case to the ICC.

Not finding such a universal obligation to cooperate seems disturbing, considering that the authority of an ICC prosecutor with full "Chapter VII power" would be much stronger. The fact that not all states are under an obligation to cooperate with the ICC may weaken its position when it comes to pressuring the Sudanese government to surrender accused individuals. By exercising political and economic pressure, together with the ICC member states, the United States could have played a vital role in bringing justice to Darfur.

In the present situation, the Sudanese government could use the lack of universal cooperation as another argument to challenge the legitimacy of proceedings and as a pretext to refuse to surrender suspects. Fifty-one names of suspects were referred under seal to Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court. While the "list of 51" remains under U.N. seal,<sup>23</sup> it is clear from the Commission of Inquiry's report that senior Sudanese government officials are implicated by virtue of chains of command and authority.<sup>24</sup> The President of Sudan, Omar al-Bashir, already made clear that he would never surrender any Sudanese citizen to the court.<sup>25</sup> Given this strong Sudanese opposition and lack of full U.S. government support, it seems predictable that

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22. According to Article 41 of the U.N. Charter, the "Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." See also Condorelli, *supra* note 19, at 593.

23. See OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE U.N. SECURITY COUNCIL PURSUANT TO UNSCR 1593, at 3 (2005) [hereinafter SECOND REPORT OF THE PROSECUTOR], available at [http://www.icc-cpi.int/library/organs/otp/LMO\\_UNSC\\_ReportB\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf).

24. Eric Reeves, *Darfur and the International Criminal Court*, MIDDLE EAST REPORT ONLINE, Apr. 28, 2005, <http://www.merip.org/mero/mero042905.html> (last visited Mar. 9, 2006).

25. *Id.*

only a few of the perpetrators will eventually be held accountable.<sup>26</sup> Although the limited duty to cooperate imputed to non-States Parties does not prevent the Court from fulfilling its work, neither does it expand its strategic space in which to tackle this difficult case.

### *B. Costs of the Proceedings*

Another detail introduced by the United States that considerably weakens the ICC's authority in the Darfur case is contained in paragraph 7 of Resolution 1593, which provides that none of the costs incurred in connection with the investigations and prosecutions shall be borne by the United States.<sup>27</sup> All such costs shall be covered by the parties to the Statute of Rome and those states that contribute voluntarily. According to the Statute of Rome, however, all funds for the ICC shall be provided by both the States Parties and by "[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."<sup>28</sup> The decision of the Security Council that all costs shall only be borne by the ICC's member states therefore contradicts the Statute of Rome and burdens the Court. Further, the U.S. government has even stressed that with respect to the Darfur proceedings, "any effort to retrench on this principle [that all costs be borne by Statute of Rome member states] by [the United Nations] or other organizations to which [the United States] contribute[s] could result in [its] withholding funding or taking other action in response."<sup>29</sup> This rigorous position reveals the continuing hostility of the United States towards the ICC, which is even more surprising given that the United States was willing to contribute generously to a hybrid ad hoc tribunal dealing with the same case<sup>30</sup> and has emphasized that crimes and atrocities clearly occurred in Darfur and that the violators must be held accountable.<sup>31</sup>

The inconsistencies in the Resolution can hardly be explained from the perspective of international law and logic, but might be understood upon consideration of the politics behind the referral, particularly the United States's intention to strictly limit any obligation to cooperate with the ICC to its member states. However, the Resolution's unreasonable treatment of costs and duties relating to cooperation seem to be the necessary price for the international community and the International Commission for Inquiry's demand that justice be rendered to victims of the Darfur crimes.<sup>32</sup>

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26. Condorelli, *supra* note 19, at 599.

27. S.C. Res. 1593, *supra* note 2, ¶ 7.

28. See Statute of Rome, *supra* note 14, art. 115(b); Condorelli, *supra* note 19, at 594.

29. Press Release, U.S. Ambassador to the United Nations, Explanation of Vote on the Sudan Accountability Resolution (Mar. 31, 2005), available at <http://www.state.gov/p/io/44388.htm>.

30. See *id.*

31. *Id.*

32. Condorelli, *supra* note 19, at 594.

### C. Immunity for Non-States Parties

In paragraph 6 of Resolution 1593, which was included upon the United States's request, the Security Council granted a broad and unprecedented exemption for all American citizens. All Americans, as well as,

current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts . . . arising out of or related to operations in Sudan . . . .<sup>33</sup>

This wording represents the broadest exemption for American citizens that the United States has so far achieved, and U.S. representatives considered this language as a "precedent-setting assurance."<sup>34</sup> Considering that the United States's main reason for objecting to the ICC's authority is the possible risk of the politically motivated prosecution of U.S. military personnel, the call for blanket immunity for U.S. citizens was predictable; nonetheless, the scope of the granted immunity is surprising as it is not limited to military personnel but covers all U.S. citizens.

Since the entry into force of the Statute of Rome, the United States has made its contribution to military operations adopted by the Security Council dependent upon the condition that the Resolution provides full protection for members of the U.S. armed forces from prosecution by the ICC.<sup>35</sup> Security Council Resolutions 1422,<sup>36</sup> 1487,<sup>37</sup> and 1497,<sup>38</sup> granted this immunity, provoking strong criticism from the international community.<sup>39</sup> These Resolutions follow Article 16 of the Statute of Rome, which provides that the Security Council may request that the ICC defer its investigations "adopted under Chapter VII of the Charter of the United Nations" for the period of twelve months and may renew this request under the same conditions.

The immunity provided for under Resolutions 1593, and 1497, however, does not meet the requirements for a deferral as provided for in Article 16 of the

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33. S.C. Res. 1593, *supra* note 2, ¶ 6.

34. Nicholas Burns, Under Sec'y of State for Political Affairs, Remarks to the Press on Sudan (Apr. 1, 2005), <http://www.state.gov/p/us/rm/2005/44138.htm> (last visited Mar. 9, 2006). Burns states that it was clearly acknowledged that "states that are not party to the Rome statute . . . should not be subject to the ICC jurisdiction without our consent or without referral to the Security Council." *Id.*

35. Neha Jain, *A Separate Law for Peacekeepers?*, 16 EUR. J. INT'L L. 239, 240 (2005); S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003); S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

36. S.C. Res. 1422, *supra* note 35, grants immunity for U.S. soldiers in Bosnia-Herzegovina. The U.S. threatened to veto to stop the renewal of the SC mission in Bosnia-Herzegovina. As a compromise, the Resolution excluded the jurisdiction of the ICC over non-party states. *Id.*

37. S.C. Res. 1487, *supra* note 35. Security Council Resolution 1487 renewed Resolution 1422.

38. S.C. Res. 1497, *supra* note 35. Security Council Resolution 1497 passed in the response to the conflict in Liberia.

39. Jain, *supra* note 35, at 241-42. (explaining his view that the immunity granting provisions were considered largely inconsistent with both the Statute of Rome and international law).

Statute of Rome for two reasons.<sup>40</sup> First, both Resolutions contain language providing that the state of the potential offender, namely the troop-contributing state, retain *exclusive* jurisdiction.<sup>41</sup> Second, although the immunity reached through a deferral under Article 16 can be renewed repeatedly, as exemplified by the resolution dealing with operations in Bosnia-Herzegovina, the jurisdiction of the ICC and other courts is merely considered suspended.<sup>42</sup> This is markedly different from Resolutions 1593 and 1497, where jurisdiction other than that of the sending state is permanently barred.<sup>43</sup> Barring proceedings in domestic courts is extremely questionable and contradicts the principle of universal jurisdiction, according to which all states are entitled to exercise their general jurisdiction with respect to the most serious crimes against the whole international community. The fact that the United States accomplished precedent-setting immunity for all of its nationals, and not just its military personnel, must be viewed as a substantial setback for the ICC.

#### D. Exemption Agreements

Paragraph 4 of the Resolution comprises a symbolic reference to the immunity agreements<sup>44</sup> negotiated by the United States according to Article 98(2) of the Statute of Rome. Article 98(2) refers to the bilateral immunity agreements concluded between the United States and a number of states, which ensure that U.S. military personnel are not surrendered to the ICC without U.S. consent.<sup>45</sup> Article 98 recognizes that some nations had previously existing agreements obligating them to return personnel sent by another nation when a crime had allegedly been committed. Thus, the delegates at Rome designed Article 98(2) to address any discrepancies potentially arising as a result of these pre-existing agreements and to facilitate cooperation with the ICC.

Critics of the U.S. policy of concluding new agreements claim that Article 98 was not intended to allow new agreements that preclude the possibility of a trial by the ICC when the sending state decides not to exercise jurisdiction over its own nationals.<sup>46</sup> Indeed, Article 27 provides that no one is immune from the crimes under its jurisdiction. By contrast, the U.S.-introduced immunity in bilateral agreements and the present Resolution expands immunity to a wide-ranging class of persons; in the present Resolution specifically, immunity is expanded to

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40. *Id.* at 248, with regard to S.C. Res. 1497, *supra* note 35.

41. Condorelli, *supra* note 19, at 596.

42. *Id.*

43. *Id.* at 594.

44. Coalition for the International Criminal Court, US Bilateral Immunity or So-called "Article 98" Agreements (Apr. 18, 2003), <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm> (last visited Mar. 9, 2006).

45. PHILIPP MEIBNER, THE INTERNATIONAL CRIMINAL COURT CONTROVERSY: AN ANALYSIS OF THE UNITED STATES' MAJOR OBJECTIONS AGAINST THE ROME STATUTE 78 (2005).

46. Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Promises*, in 2 Y.B. INT'L HUMANITARIAN L. 143, 165 (1999); MEIBNER, *supra* note 45, at 82.

all U.S. citizens.

Although the Security Council only “acknowledges existence” of these bilateral agreements, which from a strictly legal and formalistic point of view does not imply any approval or a validation, the wording of this passage has to be viewed as a success for the United States.<sup>47</sup> The acknowledgement of these bilateral agreements in clear opposition to the ICC is a compromise that contradicts the text of the Statute of Rome, even if it does not limit the authority of the Court.

### *E. Conclusion*

This analysis of the referral leads to the question of whether the obtained jurisdiction in the Darfur case can be viewed as a “breakthrough” for the ICC or as an expensive compromise. By referring the Darfur case to the ICC, the Security Council used its power to extend the Court’s jurisdiction beyond that allowed under a traditional state consent regime and consequently conferred jurisdiction over a non-consenting state. This must be viewed as a success for the Court as it puts it in a position to prove its capability and effectiveness. However, the passages included as a result of U.S. efforts to safeguard its national interests and their inevitable practical effects cast some doubt on the extent to which the referral represents a true “breakthrough.”

The Resolution referring the crimes committed in Darfur to the ICC seems to be more a compromise than a vital statement towards the universal jurisdiction of an influential ICC. The United States successfully limited the scope of the Court defined by its member states and introduced its own national interests into the framework of the Statute of Rome. With the ability to threaten any future referral with its veto, the United States has the power to control the ICC through the referral procedure. Thus, though an outsider to the Statute of Rome, the United States nonetheless exercises considerable influence by setting precedents for the referral process, thereby shaping the Court’s future work under that process.

The above analysis prompts an inquiry into the extent to which the Court’s strategic space under the Rome Statute may be altered before it is rendered incapable of achieving its designated function. While it would be far too pessimistic to state that the Darfur referral has already resulted in such an incapacitation, it is necessary to consider just how much external influence the institution can bear without losing credibility and the ability to fulfill its international role.

## IV.

### WHAT ARE THE IMPLICATIONS OF U.S OPPOSITION FOR THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT?

So far, the United States’s efforts to safeguard its national interests vis-à-

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47. Condorelli, *supra* note 19, at 597.

vis the ICC have been very successful: the United States achieved far-reaching immunity for its soldiers in the field and in some cases even for civilians. As an outsider to the Court, but a member of the Security Council, the United States is in a position to successfully control and prevent the referral of any case to the ICC. Why then is the United States still resisting cooperation on a case-by-case basis with the ICC, in cases where the demand for justice is obvious such as in Darfur? This question must be viewed within the broader framework of the relationship between the United States and the Court, and any attempt to answer it would be incomplete without an analysis of the United States's position prior to the entry into force of the Statute of Rome. Specifically, it is necessary to review the United States's historical opposition to the Court, the ICC's functions, and the concerns underlying the United States's opposition to the Court.

### *A. U.S. Opposition to the International Criminal Court*

Up to the present date, the United States has consistently supported the international prosecution of perpetrators of the "most serious crimes."<sup>48</sup> Since playing a central role in the post-war tribunals of Nuremberg and Tokyo, the United States has taken the initiative in setting up and financing the ad hoc tribunals for the Former Yugoslavia and Rwanda, as well as the Special Court for Sierra Leone.<sup>49</sup> Additionally, the U.S. delegation actively contributed to the drafting of the Statute of Rome.<sup>50</sup> David Scheffer, Ambassador at Large for War Crimes Issues and U.S. Chief Negotiator in Rome, stated that the United States "[n]onetheless . . . came very close in Rome in 1998 to supporting the final text of the Treaty."<sup>51</sup> However, on July 17, 1998, when a majority of 120 adopted the Statute of Rome, the United States and seven other states voted against it, and twenty-one states abstained.<sup>52</sup> Three key concerns were identified as rendering the Statute of Rome flawed from the United States's perspective: (1) the legality of the ICC's jurisdiction over nationals of non-State Parties; (2) the absence of sufficient control mechanisms with regard to the prosecutor, and (3) the lack of control of the ICC through the Security Council.

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48. Schabas, *supra* note 13, at 702; Gerhard Haffner, *An Attempt to Explain the Position of the USA Towards the International Criminal Court*, 3 J. INT'L CRIM. JUST. 323 (2005).

49. Schabas, *supra* note 13, at 707.

50. The U.S. delegation, one of the largest delegations present during the negotiations in Rome, played a constructive role by successfully inserting a number of progressive provisions into the Statute of Rome, such as the inclusion of crimes against humanity in internal armed conflicts, as well as a comprehensive set of gender crimes. For more details, see MEIBNER, *supra* note 45, at 77.

51. David Scheffer, *Restoring U.S. Engagement with the International Criminal Court*, 21 WIS. INT'L L.J. 599 (2003); see also Schabas, *supra* note 13, at 709 (describing the role of the United States during the negotiations as active and constructive and arguing that any suggestion that the United States was out to sabotage or defeat the Court is far too simplistic).

52. The vote proceeded unrecorded, and therefore it cannot be determined without doubt which countries voted against the adoption of the Statute of Rome. However, the United States, China, and Israel declared publicly to do so. As to the other four states, speculations include Iran, Iraq, Sudan, Qatar, and Yemen. See Sarah B. Sewall & Carl Kaysen, *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 220 (2000).

The U.S. administration under both Bill Clinton and George W. Bush asserted similar objections to the Statute of Rome. Whereas the Clinton administration pursued a strategy of "constructive engagement,"<sup>53</sup> the Bush administration's policy can be characterized as aggressive unilateralism.<sup>54</sup> Nevertheless, given the arguments advanced by both administrations, a ratification of the Statute of Rome without significant modifications was unlikely under either administration.<sup>55</sup> Therefore, Clinton's signing of the Statute of Rome on December 31, 2000, the last day that signature without ratification was possible, must be interpreted as a strategic step to remain involved in the continuing negotiation process.<sup>56</sup> Subsequently in 2001, the Bush administration discontinued participation in ICC meetings and, on May 6, 2002, officially nullified the Clinton administration's signature of the Statute of Rome. In addition to this express rejection of the Court's legitimacy, John Bolton, the present U.S. ambassador to the United Nations, went on to describe the Court as "an organization that runs contrary to fundamental American precepts and basic Constitutional principles of popular sovereignty, checks and balances and national independence."<sup>57</sup>

These objections by the United States to the Court's role and functions have been followed by various measures banning any cooperation between the ICC and the United States. In 2001, the U.S. Congress, by a large majority of both parties, passed the American Service Members Protection Act,<sup>58</sup> which prohibits any U.S. court or agency from responding to a request from the ICC. The Act further forbids access by ICC members to U.S.-controlled territory for the pursuit of investigations, while providing the possibility of a presidential waiver of this prohibition where national interests are concerned.<sup>59</sup> The Bush administration has also continued pursuing bilateral agreements according to Article 98 of the Statute of Rome.<sup>60</sup> According to these agreements, no U.S. military or financial aid will be provided to the government of a party to the ICC unless that state agrees not to surrender any U.S. nationals to the Court.

Apparently, even after the referral of the Sudan proceedings, which could actually have been a starting point for cautious cooperation between the United States and the ICC, the relationship between the two hit bottom. It is difficult to understand why the United States does not support the ICC on an ad hoc basis in the Sudan proceedings, given the fact that accountability for serious violations of humanitarian law is a deeply rooted part of U.S. foreign policy.

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53. See BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND RULE OF LAW 168 (2003); Patricia Wald, *Is the United States Opposition to the ICC Intractable?*, 2 J. INT'L CRIM. JUST. 19, 20 (2004).

54. Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 685 (2003).

55. MEIBNER, *supra* note 45, at 32.

56. Scheffer, *supra* note 51, at 600.

57. See Wald, *supra* note 53, at 19.

58. 22 U.S.C. § 7401 (2002); see also MEIBNER, *supra* note 45, at 77.

59. MEIBNER, *supra* note 45, at 78.

60. Galbraith, *supra* note 54, at 688.

## B. Functions of the International Criminal Court

Analyzing the functions of the ICC and distinguishing them from the functions of a domestic court will contribute to an understanding of the Court's strategic space and an evaluation of the relationship between this space and the Court's functions. This relationship might be variable in the sense that a restriction of the strategic space might or might not affect the Court's ability to fulfill its functions. As explained *infra*, the ICC's various objectives and their justifications are complex. They extend well beyond providing punitive or social controls, as is largely the case with domestic courts. While the main purpose of domestic criminal courts is to secure convictions and thereby contribute to lawmaking and enforcement, the functions of the ICC have a wider resonance and include historical and conciliatory as well as preventive and symbolic functions.

### 1. Punitive and repressive functions

The primary function of the ICC is to investigate and prosecute individuals who commit certain, "most serious crimes of concern to the international community as a whole."<sup>61</sup> These crimes are, for the time being, crimes against humanity, genocide, and war crimes. The primary objective is to hold individuals accountable for atrocities committed in cases where the domestic state is unable or unwilling to prosecute them.

According to the principle of complementarity, the ICC is distinguished from domestic criminal courts in that it *complements* states' domestic criminal laws. Specifically, the ICC may only exercise jurisdiction when the state having domestic jurisdiction over the crime committed on its territory or by its national is unwilling or unable to investigate and prosecute the crime.<sup>62</sup> In this way, the Court builds on and reinforces the traditional domestic repression system in which states possess the duty to enforce international humanitarian law. In cases where the Court's jurisdiction is established, however, the ICC's functions are comparable to those of a domestic criminal court, where the theoretical reasons for criminal punishment include deterrence of future crimes, incapacitation and rehabilitation of the perpetrator, restoration of the public order, and satisfaction for the victims.

### 2. Historical and conciliatory functions

There is an increasing hope that the trials of international criminal courts, including the ICC, hybrid courts, and the International Criminal Courts for Yugoslavia and Rwanda, will contribute to the processes of recovery and reconciliation in the respective countries.<sup>63</sup> Richard Goldstone, Chief Prosecutor of

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61. Statute of Rome, *supra* note 14, art. 5(1).

62. *Id.* art. 17.

63. Daniel Joyce, *The Historical Function of International Criminal Trials: Rethinking In-*

the International Criminal Court for Yugoslavia and International Criminal Court for Rwanda, stressed that a permanent international criminal court "plays an important role not only in serving justice in the immediate present, but in laying the groundwork for preventing future conflicts."<sup>64</sup> With respect to the International Criminal Court for Rwanda investigations, Goldstone explains that "by assembling evidence, in particular hundreds of first-hand accounts by survivors of the massacres, we established the fact of genocide, that more than 800,000 men, women and children had been systematically murdered in a period of less than a hundred days. We established historical truth."<sup>65</sup>

The historical and reconciliatory functions of international criminal tribunals has also been recognized by the International Criminal Court for Yugoslavia Trial Chamber. In its *Erdemovic* decision, the judges recalled that the tribunal's objectives, as seen by the Security Council, were general prevention, reprobation, and retribution, as well as collective reconciliation. Interpreting these functions, the judges added that "impunity of the guilty would only fuel the desire for vengeance in the former Yugoslavia, jeopardising the return to the 'rule of law', 'reconciliation' and the restoration of 'true peace'."<sup>66</sup>

### 3. Preventive and symbolic functions

The Court's most important role might be served by its preventive and symbolic functions, which are grounded in the Court's complementarity. This expectation was expressed recently by Goldstone,<sup>67</sup> who stated that a permanent international criminal court will contribute to preventing conflicts in the future and will enforce prosecution at the domestic level. The principle of complementarity significantly limits the jurisdiction of the ICC by allowing the Court to exercise jurisdiction only where the state having domestic jurisdiction over the crime committed on its territory fails to provide an adequate remedy because of its inability or refusal to investigate and prosecute the case genuinely.<sup>68</sup> In order to avoid investigation by the Court, states may be motivated to adopt and apply legislation in order to demonstrate their active role in prosecuting individuals accused of the most serious crimes.<sup>69</sup> If that kind of legislation and its strict ap-

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*International Criminal Law*, 72 NORDIC J. INT'L L. 461 (2004).

64. Richard Goldstone, *Justice Now, and for Posterity*, INT'L HERALD TRIB., Oct. 14, 2005, available at <http://www.globalpolicy.org/intljustice/icc/2005/1014posterity.htm>.

65. *Id.*

66. Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Judgment, ¶ 58 (Nov. 29, 1996), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-ts961129e.htm>; see also President of the Int'l Criminal Tribunal for the Former Yugo., *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶¶ 11-16, U.N. Doc. S/1994/1007, A/49/342 (Aug. 29, 1994), available at <http://www.un.org/icty/rappannue/1994/AR94e.pdf>.

67. Goldstone, *supra* note 64.

68. Statute of Rome, *supra* note 14, art. 17.

69. Jason Ralph, *International Society: The International Criminal Court and American Foreign Policy*, 31 REV. FOR INT'L STUD. 27 (2005).

plication result in the prosecution of persons who would otherwise have escaped domestic justice, this would constitute a clear success for the ICC, even without its having played a direct role in the particular case.<sup>70</sup>

The Court can also perform the important task of setting standards that the domestic court must meet to avoid interference by the ICC. The ICC's function here would be performed simply by existing as a backup jurisdiction. Unlike an ad hoc tribunal, which depends on a political decision of members of the Security Council, the ICC has the authority to act independently based on purely factual and judicial motives at any given time. This symbolic function may be underestimated in the controversies surrounding the ICC, as there are no effective means to quantify the conflicts avoided by the presence of the ICC.

## V.

### U.S. OPPOSITION AND CONCERNS WITH RESPECT TO THE INTERNATIONAL CRIMINAL COURT'S FUNCTIONS

Considering the traditionally supportive attitude that the United States has shown toward previous ad hoc tribunals and its participation during the Statute of Rome negotiations, it would be a misinterpretation of the U.S. position to say that it objects to the general objectives of a permanent criminal court. Summarizing the U.S. position in 2002, David Scheffer stated that "the question . . . has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively, and appropriately within a global system that also requires our constant vigilance to protect international peace and security."<sup>71</sup> In order to understand the rigorous U.S. opposition toward the ICC, I would now like to analyze those aspects of its present form that are allegedly incompatible with U.S. concerns and interests regarding, specifically, national sovereignty and the protection of U.S. military personnel and citizens.

#### *A. Preservation of National Sovereignty Through the Security Council*

The most fiercely articulated opposition against the Statute of Rome relates to its Article 12(2), which enables the Court to exercise jurisdiction over nationals of non-consenting, non-States Parties. Indeed, since jurisdiction of the ICC is established when there is the consent of the national state of the individual *or* the territorial state where the crime occurred, U.S. citizens could be indicted before the court for "core crimes" committed on the territory of a state that is party to the Statute of Rome. When the United States un-signed the Statute, on May 6, 2002, Marc Grossman, Under Secretary for Political Affairs, stated that "the U.S. respects the decision of those nations who have chosen to join the ICC; but

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70. *Id.* at 37.

71. David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

they in turn must respect our decision not to . . . place our citizens under the jurisdiction of the court.”<sup>72</sup>

According to the U.S. position, Article 12 of the Statute of Rome represents a violation of international treaty law as set out in Article 34 of the Vienna Convention of the Law of the Treaties, stating that a “treaty does not create either obligations or rights for a third State without its consent.”<sup>73</sup> However, this official U.S. position<sup>74</sup> does not apply to all states: Sudan is not a party to the Statute of Rome and the United States, by qualifying the acts committed in Darfur as genocide, did not challenge the need to convict the perpetrators of the committed crimes before an international tribunal, but only argued that the ICC would not be the right institution to do so.<sup>75</sup> The main rebuttal to the United States’s contention that Article 12 of the Statute of Rome violates its national sovereignty is that the principle of territoriality is well established under international law. According to Hans-Peter Kaul, judge at the ICC, the principle of territorial jurisdiction represents a “universally undisputed standard rule in international criminal law.”<sup>76</sup> Under the terms of this rule, a state has jurisdiction over non-nationals accused of having committed a crime described under the national law of the state, irrespective of whether or not the state of the nationality consents. Consequently, no state is under an obligation to seek the consent of the state of the nationality of the person in custody.<sup>77</sup> In fact, the United States, in calling for an ad hoc tribunal for Darfur, argued that the core crimes of the Statute *did* in fact demand universal jurisdiction, but refused to acknowledge that this jurisdiction could be exercised by a permanent court.<sup>78</sup>

Universal jurisdiction, as opposed to territorial jurisdiction, does not require any link between the prosecuting state and the indicted individual; however, this basis of jurisdiction is limited to the most heinous crimes, such as genocide, war crimes and crimes against humanity. Stressing the need and legitimacy to bring the Darfur crimes to trial, the United States pointed out that universal jurisdiction over core crimes has been accepted in customary interna-

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72. See Schabas, *supra* note 13, at 709 (citing Marc Grossman, U.S. Under Sec’y of State for Political Affairs, Am. Foreign Policy & the Int’l Criminal Court, Remarks to the Center for Strategic and International Studies (May 6, 2002)).

73. See Vienna Convention on the Law of the Treaties, May 23, 1969, art. 34, U.N. Doc. A/Conf.39/27.

74. Richard Boucher, U.S. Dep’t of State Spokesman, Daily Press Briefing (Apr. 1, 2005), <http://www.state.gov/r/pa/prs/dpb/2005/44132.htm> (last visited Mar. 9, 2006).

75. SECOND REPORT OF THE PROSECUTOR, *supra* note 23, at 3.

76. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE STATUTE OF ROME AND THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 607 (Antonio Cassese et al. eds., 2002).

77. The United States take a less conservative approach to this question when it comes to its national interest. In 1998, the United States took the lead in negotiation the International Convention for the Suppression of Terrorist Bombings without seeking to limit its application to offenses committed by nationals of States Parties to the Convention. See Michael Scharf, *The International Criminal Court Jurisdiction over Nationals of Non-Party States*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 220.

78. SECOND REPORT OF THE PROSECUTOR, *supra* note 23, at 3.

tional law. In fact, the jurisdiction of the ICC does not go beyond this and actually does no more than to set up a new and permanent mechanism to enforce this law collectively.<sup>79</sup>

In order to reconcile its rejection of the ICC's jurisdiction with its affirmation of universal jurisdiction, the United States argues that universal jurisdiction can only be exercised by states.<sup>80</sup> This implies that states are not entitled to delegate their territorial and universal jurisdiction over the most serious crimes to an international court. David Scheffer explains that the jurisdiction *by states* is not equivalent to the *delegated* jurisdiction of the ICC.<sup>81</sup> While recognizing the fact that international courts can prosecute core crimes when the state where those crimes were committed is unwilling or unable to do so, the United States concludes that such jurisdiction can only be referred by the Security Council.<sup>82</sup> However, the origin of such a far-reaching limitation on state sovereignty is unclear. On the contrary, the Permanent Court of International Justice, in its 1927 *Lotus* decision, held that "[r]estrictions upon the independence of States cannot . . . be presumed," and that states possess considerable discretion, "which is only limited in certain cases by prohibitive rules . . ."<sup>83</sup> Far from being outdated today, the *Lotus* holding was confirmed by the United States in its written statement for the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.<sup>84</sup>

As such, the U.S. argument that the decisions regarding which international crimes shall be prosecuted must remain with the Security Council can only be interpreted as an attempt to maintain hegemonic power over international criminal justice.<sup>85</sup> A member of the Security Council, the United States is effectively empowered to block prosecutions, whereas under the Statute of Rome U.S. influence on concrete proceedings would be very limited and without legal certainty.<sup>86</sup> However, it appears inconsistent that the United States even threatened

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79. Ralph, *supra* note 69, at 37.

80. David Scheffer, *Staying the Course with the International Criminal Court*, 47 *CORNELL INT'L L.J.* 47, 65 (2002).

81. *Id.*

82. Ralph, *supra* note 69, at 41.

83. S.S. *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 14-15, available at [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus/](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/).

84. See Scharf, *supra* note 77, at 73-74. (quoting the U.S. statement for the International Court of Justice's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "it is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations").

85. See Ralph, *supra* note 69, at 31. In addition, U.S. officials argue that the United States, as the only superpower on the Security Council, carries unique responsibility to balance the demands of international justice with the maintenance of international peace and security. A politically motivated prosecutor would pose a threat to international peace and security by preventing the United States from contributing to U.N. peacekeeping. The exemption of U.S. service personnel from the Court's jurisdiction is therefore itself a matter of peace and security. See Lawrence Weschler, *Exceptional Case in Rome: The United States and the Struggle for an ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 52, at 102-03.

86. Schabas, *supra* note 13, at 716.

to use its veto power when the Security Council, acting on the behalf of the world society, actually intended to refer a case to the ICC.

The referral of the Darfur case seems to prevent the United States from continuing to deny the legitimacy of the ICC's prosecution of the most serious crimes. The argument that international criminal justice can solely be attained by states thinly disguises a policy motivated by a desire to decide when and where justice should be done.<sup>87</sup> In the light of these considerations, the United States' simultaneous support for international criminal justice in Darfur and opposition to the ICC must be interpreted as an attempt to safeguard American exceptionalism and enable the United States to more easily advance its particular interests.<sup>88</sup> Nonetheless, the fact that the United States refrained from using its veto power in the Security Council to prevent the referral, as well as its emphasis on the urgent need to act in Darfur, should be viewed in a positive light.

### *B. Protection of U.S. Citizens from an Independent Prosecutor*

Another reason for the United States's opposition to the ICC is its independent or *proprio motu* acting prosecutor, provided for in Article 15 of the Statute of Rome. The *proprio motu* prosecutor has the authority to initiate prosecutions independently of the authorization of the Security Council or a State Party. This was a concept heavily opposed by the United States, which supported a much more limited approach where the Prosecutor could only act without prior referral of a case from the Security Council. The present checks and balances controlling the prosecutor were deemed insufficient.<sup>89</sup> However, in order to limit the broad discretion of the prosecutor, the Statute of Rome does impose control mechanisms through the Pre-Trial Chamber,<sup>90</sup> though these are purely judicial and not political controls.<sup>91</sup>

U.S. officials argue that the United States, being a superpower with military presence in many parts of the world, has a unique responsibility to balance the demands of international justice with the maintenance of "international peace and security".<sup>92</sup> This task would be set at risk by a prosecutor that can *proprio motu* initiate politically motivated investigations against U.S. military personnel.<sup>93</sup> The U.S. administration stresses that the U.S. capacity to carry out worldwide military commitments is threatened by the ICC and that a military action that is seen by the United States as required for reasons of international peace and security would not necessarily be assessed in the same manner by the ICC. However, this argument does not take into account that future political

87. Ralph, *supra* note 69, at 29.

88. *Id.*

89. MEISNER, *supra* note 45, at 50.

90. The prosecutor needs to seek the authorization of the Pre-Trial Chamber, consisting of three judges, before he can commence investigations. Statute of Rome, *supra* note 14, arts. 15(3)-(4)

91. Schabas, *supra* note 13, at 716.

92. Haffner, *supra* note 48, at n.47.

93. *Id.* at 323.

charges would also have to meet the gravity requirement set forth in Article 17 of the Statute of Rome. In addition, the principle of complementarity provides adequate assurance for countries like the United States that possess a working judicial system. In this context, the trials of U.S. military personnel in U.S. military courts on charges of torture committed in Iraq have demonstrated that such cases would remain in domestic forums, where they belong.<sup>94</sup> The decision of Luis Moreno-Ocampo, Chief Prosecutor of the ICC, not to open investigations on the military operations in Iraq by the coalition forces between March and May 2003 also demonstrates that the gravity threshold is taken seriously by the court.<sup>95</sup> In February 2006, the Chief Prosecutor concluded that there were no reasonable indices for committed crimes against humanity during military operations.<sup>96</sup> The Chief Prosecutor also assessed whether the military operations amounted to war crimes and concluded that despite the high number of civilian victims there was no prove for intentional and exsivives attacks on civilians by nationals of State Parties to the ICC.<sup>97</sup> However, the Chief Prosecutor affirmed that there was reasonable basis to beleave that inhuman treatment of civilians and mistreatment of prisoners ocured and that such crimes fell within the jurisdiction of the ICC, but concluded that these acts did not meet the gravity threshold set out in the Statute of Rome and denied the larges-scale commission of such crimes.<sup>98</sup>

Another very successful tool for preventing politically motivated investigations against U.S. military personnel is the conclusion of agreements pursuant to Article 98 of the Statute of Rome, whereby parties commit not to bring other parties' current or former government officials, military, or other personnel before the jurisdiction of the Court.

Due to the U.S. government's successful policy of seeking immunity for U.S. military personnel acting worldwide, the gravity threshold and the principle of complementarity, the risk that U.S. soldiers can actually be prosecuted by the ICC seems equal to zero. Given the fact that it is very unlikely for any U.S. soldier to become the subject of an investigation, the underlying motivation for U.S. opposition to the ICC must be the fear that officials high in the chain of

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94. It is neither established that the incidents in Abu Ghraib would qualify as most serious crimes nor that they would therefore fall under the jurisdiction of the ICC.

95. See generally Response to Communications received by the Chief Prosecutor regarding alleged crimes in Iraq (February 10, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (last visited Apr. 5, 2006).

96. *Id.* at 4. However, the Chief Prosecutor also states that available information suggests that most of the military activities were carried out by non-State Parties. *Id.* at n. 14.

97. *Id.* at 5.

98. *Id.* at 9. Assessing whether the violations ocured on a large scale, Luis Moreno-Ocampo compared the number of potential victims of willfull killing in Iraq with the number of victims found in other situations under investigations by his office. *Id.* at 8-9. While the number of potential victims of willfull killing in Iraq is estimated to be 4 to 12 persons and a "limited number of victims of inhuman treatment," the other situations (Northern Uganda, Democratic Republic of Congo, and Darfur) currently under the court's investigation, involved thousands of wilfull killings as well as intentional and large-scale sexual violence and abductions in hundreds or thousands of cases. *Id.*

command, ultimately the highest state actors, could be subject to the jurisdiction of the ICC.<sup>99</sup>

### C. Conclusion

Considering that 100 states<sup>100</sup> have already delegated jurisdiction to the ICC, the United States seems isolated in its opposition to the Court. Remaining outside the framework of the ICC, the U.S. government successfully achieved blanked immunity for its citizens through the policy it has pursued in the Security Council and the conclusion of Article 98 bilateral agreements.

Answering the question of why the United States continues to resist cooperation on a case-by-case basis in cases like Darfur is difficult. Considering the U.S. arguments against a case-by-case cooperation, I posit that the United States's legal arguments and alleged justifications lack foundation in international criminal law and are instead purely political in nature. Highlighting their unfounded fear of a politically motivated prosecutor, the United States favors a solution that places the Court entirely under the control of the Security Council, which itself is a highly politicized body.

## VI. OUTLOOK

An evaluation of the political persuasiveness of the United States's arguments is beyond the scope of this note. However, it is worthwhile to consider briefly the possibility of transforming the present silence between the ICC and the United States into a constructive dialogue. How much does the Court's bounded space need to be limited before the United States no longer views it as a threat to its national interests?

Apparently, the quasi-independent prosecutor is the major obstacle to obtaining the more active involvement of the United States. However, modifying the Court's *proprio motu* competencies and subordinating the Court to the Security Council by providing jurisdiction only in cases of referral would transform the ICC into a regime-controlled court. This is a far too expensive price to pay for obtaining U.S. support for the Court. Such a modification would abolish one of the most revolutionary aspects of the Statute of Rome.<sup>101</sup> By providing for a trigger mechanism other than a Security Council referral, the Statute of Rome has empowered voices beyond those in the Security Council to bring their claims before the Court. An independent Prosecutor can pursue cases based on evidence presented not only by states, but also by non-governmental organizations. In fact, the Statute of Rome has enabled individuals and groups that are

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99. Haffner, *supra* note 48, at 327.

100. As of December 20, 2005, 100 countries are States Parties to the Statute of Rome. See International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/statesparties.html> (last visited Mar. 9, 2006).

101. Ralph, *supra* note 69, at 29.

not necessarily represented by states to have their claims heard in a court.<sup>102</sup> The participation of actors other than states in the investigations and proceedings benefits the Court itself as it increases its legitimacy and information gathering capacity. Additionally, the need to give victims of gross human rights abuses a voice before an international tribunal, when the domestic systems fail to provide them justice, was a driving force when the states designed the concept of an independent prosecutor.<sup>103</sup>

In order to exclude the risk of politically motivated prosecutions, the discretion of the prosecutor is already limited by several mechanisms, some of which were introduced to the U.S. draft.<sup>104</sup> First, before the prosecutor can proceed, he requires the consent of a panel of pre-trial judges. Second, and maybe more importantly, the prosecutor must adhere to the principle of complementarity. As already discussed above, the principle of complementarity should limit the fear of an abusive prosecutor because a state can always avoid its investigation by announcing, within one month of being informed of the case, that it is conducting its own investigation.<sup>105</sup>

The United States clearly favors a Court that would be permanent in its design in the sense that the procedural framework is indispensable but ad hoc in its functioning. The advantage of such a permanent ad hoc institution would certainly be that it could investigate within short time limits and would contribute to a unified lawmaking process while acting in a state-controlled bounded space.

How would an ad hoc ICC, acting exclusively upon referral, be able to fulfill the symbolical, preventive, and punitive functions identified in Part VI? The experiences of the International Criminal Courts for Yugoslavia and Rwanda show that the ad hoc tribunals, by successfully prosecuting alleged crimes, do fulfill their punitive function. Goldstone also points out that these courts serve their historical function by collecting a common memory that might facilitate the peace and reconciliation process in the respective country.

However, there is less reason to assume that ad hoc courts subordinate to the Security Council are capable of satisfying their preventive and symbolic functions. It seems doubtful that ad hoc tribunals, mandated to try a limited number of cases in a specified time period, can bring about either significant domestic legislative reforms or increased prosecution of individuals accused of the most serious crimes.<sup>106</sup> A factor that certainly limits the credibility of ad hoc courts is the fact that decisions in the Security Council to refer a case to an international tribunal reflect underlying political and economic interests. States tolerating gross violations of human rights might rely on the little chance that their citizens or leaders will be prosecuted and consequently avoid changing their national legislation or policy. Additionally, by abusing its veto power, a

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102. Statute of Rome, *supra* note 14, art. 15.

103. Ralph, *supra* note 69, at 36.

104. Scheffer, *supra* note 51, at 600.

105. Statute of Rome, *supra* note 14, art. 17.

106. Ralph, *supra* note 69, at 37.

permanent member of the Security Council could ensure that its citizen never become subject to the jurisdiction of the ICC.

With the ability to act independent of the political decision-making processes of the Security Council, the ICC has the authority to act exclusively based on purely factual and judicial motives, at any time and free from political influence. I am reluctant to endorse further amendments that weaken the Court's authority if we expect it to perform its symbolic function. It is this symbolic function that makes the ICC valuable and distinct from existing ad hoc tribunals with limited scope and jurisdiction. Consequently, the United States's suggested limitations on the strategic space provided for the Court by the Statute of Rome would endanger the fulfillment of its symbolic function.

It must be noted that the political objections of the United States and the national interests involved render it very unlikely that the U.S. opposition to the Court will change in the foreseeable future. Nevertheless, the parties to the Court will likely continue to defend their defined strategic space of the Court and seek to expand, rather than contract, its scope. Consequently, one need not be a pessimist to perceive the prospects of cooperation between the Court and the United States in the near future as very modest.

To a certain extent, the lack of U.S. support for the Court must be viewed as a factor that weakens its authority, financial capacity, and legitimacy. But, the referral of the Darfur crimes has also highlighted that U.S. objections to the Court will not necessarily cause the United States to exercise its veto power over a referral or to hinder the universal jurisdiction of the Court over non-States Parties in all cases. By shaping the referral according to its national interests, the United States set a precedent for future referrals. Although its limitations on the Court might have betrayed some optimists' hopes that the United States would adopt a more supportive attitude in the face of genocide in Darfur, its implications for the Court's future strategic space has positive aspects. After all, the United States will find it hard to ignore the Court and has now passively admitted the legitimacy of its exercise of universal jurisdiction in cases of violent and horrific crimes.

This precedent gives the Court a chance to prove its capacity and legitimacy for prosecuting the most serious crimes. Backed by the support of 100 member states, the Court will have enough support and funds to fulfill its functions without U.S. support. From the perspective of the states supporting the Court, the high standards of legitimacy and justice, including the independent prosecutor, is a gain that weighs more than the loss of proactive U.S. support. However, it is hoped that the results of a properly working court will calm the fierce concerns of the United States and lead to possible ad hoc cooperation in the long run.

2006

## Toward a History of NAFTA's Chapter Eleven

Jennifer A. Heindl

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# Toward a History of NAFTA's Chapter Eleven

By  
Jennifer A. Heindl

## I. INTRODUCTION

Most commentators agree that Chapter Eleven on investment is one of the most important sections of the North American Free Trade Agreement (NAFTA).<sup>1</sup> Over ten years after the passage of NAFTA, Chapter Eleven continues to be controversial, not least because preliminary drafts of the Free Trade Agreement of the Americas contain an investment chapter that is virtually identical to NAFTA's.<sup>2</sup> Supporters see Chapter Eleven as necessary to allow companies to rationalize regional production and improve global competitiveness.<sup>3</sup> Skeptics see a threat to sovereign immunity and interference with the sovereign's regulatory powers.<sup>4</sup>

Perhaps the most innovative aspect of the investment chapter is the adjudicatory regime it implements, giving investors the right to require the arbitration of disputes with state parties. The Chapter Eleven dispute settlement procedures thus allow an investor to do something that was not possible under any previous multilateral trade agreement, all of which required that the investor's state pursue its citizen's claim.<sup>5</sup> This provision of NAFTA has raised the hackles of those who view it as a means for corporations to interfere with the sovereign rights of party nations to establish policies that may hurt investors'

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), available at <http://www.nafta-sec-alena.org> [hereinafter NAFTA] (last visited Mar. 17, 2006).

2. Laura Altieri, *NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 870 (2003).

3. See Daniel Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

4. See Public Citizen, *NAFTA Chapter 11 Cases: Bankrupting Democracy* (2001), available at <http://www.citizen.org/documents/ACF186.PDF>. (last visited Mar. 17, 2006).

5. See NAFTA, *supra* note 1, art. 1110, available at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=160#A1110](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160#A1110) (last visited Mar. 5, 2006).

bottom line.<sup>6</sup>

Traditionally, industrialized states and transnational corporations have favored arbitration for the resolution of investment disputes, while developing countries were often coerced into accepting such dispute resolution procedures.<sup>7</sup> The dispute resolution mechanism of NAFTA, pushed especially by the United States, was intended particularly to restrain Mexico, with its autarchic government and history of nationalizing the petroleum industry.<sup>8</sup> Ironically, since NAFTA's implementation far more investor-state disputes have been initiated against Canada and the United States than against Mexico.<sup>9</sup> Criticism of investment arbitration has come from a new corner, and reached a new pitch, as politicians and domestic interest groups in the US and Canada voice concerns about sovereignty and adjudicatory transparency. Further anxiety surrounds questions of the exact scope of Chapter Eleven, which purposefully defines both investment and expropriation in terms that can be interpreted quite broadly.<sup>10</sup>

But how did we get to Chapter Eleven? Only recently the negotiating drafts of Chapter Eleven were released by the state parties, though without any commentary.<sup>11</sup> The negotiators of NAFTA and of Chapter Eleven in particular have offered little detailed information about the course of negotiations. The post-facto reports of negotiators that do exist tend naturally to present a smooth narrative of goodwill and mutual compromise, free from rancor.<sup>12</sup> We are thus left to interpret the various drafts as best we can to present some account of the negotiation: the players, their goals, their wins, and their losses.

Chapter Eleven, as ultimately formulated, established a substantive standard, an ad hoc tribunal that was available to investors in place of national courts. The strategic space of the resulting dispute-resolution body is tightly delimited, offering little room for institutional expansion.<sup>13</sup> As such, it represents an almost total victory for investor parties whose interests coincided largely with those of the United States negotiators. Canada, the most wary participant, could be seen as the least successful party, though it managed to preserve national review of some foreign investment.<sup>14</sup> With Mexico willing to follow the United States' lead, Canada was unable to get the more independent

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6. See Public Citizen, *supra*, note 4.

7. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*, 28 YALE J. INT'L LAW 365, 367 (2003).

8. RALPH H. FOLSOM, MICHAEL WALLACE GORDON & DAVID LOPEZ, NAFTA: A PROBLEM-ORIENTED COURSEBOOK 25-28 (2000).

9. For a "score card" of NAFTA investment disputes, see Alvarez & Park, *supra* note 7, at 401-07.

10. HEMISPHERIC SOCIAL ALLIANCE, BRIEFING PAPER SERIES: TRADE AND INVESTMENT, VOL. 2, NO. 5, NAFTA INVESTOR RIGHTS PLUS 5 (2001), available at [http://www.policyalternatives.ca/documents/National\\_Office\\_Pubs/brief2\\_5.pdf](http://www.policyalternatives.ca/documents/National_Office_Pubs/brief2_5.pdf); see also Price, *supra* note 3.

11. NAFTA, *supra* note 1. Drafts of Chapter Eleven are available at [http://www.dfait-macci.gc.ca/tna-nac/disp/trilateral\\_neg-en.asp](http://www.dfait-macci.gc.ca/tna-nac/disp/trilateral_neg-en.asp) (last visited Mar. 17, 2006).

12. See, e.g., Keith Bradsher, *Economic Accord Reached by U.S., Mexico, and Canada to Lower Trade Barriers*, N.Y. TIMES, Aug. 13, 1992, at A1.

13. See, e.g., *id.*

14. NAFTA, *supra* note 1, Annex 1138.2.

and institutionalized dispute-resolution body it favored; one that it had gotten in the Canada United States Free Trade Agreement (CUFTA), where the treaty-established Commission was empowered to settle disputes.<sup>15</sup> Mexico, economically the weakest party and anxious to entice American investment, had to play a careful game. While willing to concede to American wishes on most issues, the Mexican government was constrained by domestic politics to avoid *appearing* overly subservient to American demands.

In Part II, I briefly describe Chapter Eleven's major provisions and the dispute resolution procedure it established. In Part III, I discuss the background and lead-up to negotiation. What sort of domestic and international concerns were at work going into the negotiations? What did the players want? In Part IV, I discuss the negotiations on investment as revealed in the drafts and other sources describing major points of conflict and how they were ultimately resolved. In the last section, I briefly discuss the implications of the negotiating history both for those who have praised Chapter Eleven as a much-needed innovation and those who have critiqued it as a threat to national sovereignty.

## II.

### CHAPTER ELEVEN OF NAFTA

Chapter Eleven of NAFTA provides broad protection to US, Mexican, and Canadian investors, including incorporated and unincorporated entities, state entities, and natural persons, who own or control investments in the territory of any of the state parties not their own. Section A of Chapter Eleven defines the standards for treatment of investors by the state parties. NAFTA parties must treat NAFTA investors and investments as favorably as they treat non-NAFTA investors (most-favored nation treatment) and domestic investors in like circumstances<sup>16</sup> NAFTA parties must ensure that investors enjoy minimum standards of treatment prescribed by international law, including due process.<sup>17</sup> NAFTA parties may not impose or enforce specified performance requirements for the establishment, operation, management, conduct and operation of investments.<sup>18</sup> Most controversially, that NAFTA parties may not expropriate investments (neither directly nor indirectly, nor through any measures tantamount to expropriation, unless such expropriation is non-discriminatory) is established in pursuit of a public purpose, meets international minimum standards of treatment, and is accompanied by compensation at fair market value.<sup>19</sup>

A major innovation of NAFTA is its establishment of a procedure by which a private investor may initiate a claim against a NAFTA party when any of the

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15. See Canada-U.S. Free Trade Agreement, art. 1608, H.R. Doc. No. 216, 100th Cong., 2d Sess. 2977 (1988), *reprinted in* 27 I.L.M. 281 [hereinafter CUFTA].

16. NAFTA, *supra* note 1, arts. 1102-03.

17. *Id.* art. 1105.

18. *Id.* art. 1106.

19. *Id.* art. 1110.

above-described commitments are not met.<sup>20</sup> The NAFTA investment dispute-settlement procedure thus most closely resembles those that exist in the many bilateral investment treaties (BITs) which have proliferated over the last twenty years.<sup>21</sup>

Under Chapter Eleven, disputes between investors and state parties are settled through negotiation and arbitration. At least six months after an alleged violation and written notice of the claim, but not more than three years from when the investor knew or should have known of the alleged violation, a NAFTA investor may submit a claim to either the International Centre for the Settlement of Investment Disputes ("ICSID") under either the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention"). In the event that either the investor's home government or the host state is not a signatory to the Convention, the claim may be submitted under the ICSID Additional Facility Rule.<sup>22</sup> Alternatively, a dispute may be submitted to the United Nations Commission on International Trade Law ("UNCITRAL").<sup>23</sup>

The investor and the state-party must engage in a ninety-day consultation prior to initiating arbitration, to attempt to resolve their dispute. If the dispute is not resolved during this period, the investor can request binding arbitration.<sup>24</sup> The challenged state must agree to arbitration, and state parties must implement the ruling of the arbitration panel if it finds expropriation or an act "tantamount to expropriation" has taken place.<sup>25</sup>

The arbitration tribunal consists of three arbitrators, one chosen by the challenged state-party, one by the investor, and the third chosen jointly by the other two arbiters.<sup>26</sup> If the panel finds a violation of Chapter Eleven it can order the state to pay compensation to the investor for lost profits and related losses during the existence of the policy or act that has violated NAFTA, as well as future lost profits resulting from a continuing act or policy.<sup>27</sup> The panel cannot force the state-party to reverse a policy that it finds violates NAFTA; it can only require the state-party to make "fair and equitable" compensation to the investor for losses resulting from the policy.<sup>28</sup>

Chapter Eleven arbitration is available only for investors with complaints against state parties other than their own.<sup>29</sup> A Canadian, for example, cannot

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20. Azinian v. Mexico, Final Award, ICSID Case No. ARB(AF)/97/2 para. 82 (NAFTA Ch. 11 Arb. Trib., Nov. 1, 1999).

21. MAXWELL A. CAMERON AND BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 100 (2000).

22. NAFTA, *supra* note 1, art. 1120.

23. *Id.*

24. *Id.* art. 1119.

25. *Id.* arts. 1122, 1136.

26. *Id.* art. 1123; *see also* art. 1126 (allowing consolidation of claims before a tribunal consisting of arbitrators chosen by the Secretary-General).

27. *Id.* at art. 1135.

28. *Id.*

29. *Id.* art. 1117.

pursue Chapter Eleven arbitration for a Canadian policy that costs him profits; the dispute must be international in character. Investors can challenge the policies or actions of sub-national governments (regional, state, local) but only by way of the national government of the state-party.<sup>30</sup>

### III.

#### THE POLITICAL AND ECONOMIC CONTEXT

##### A. *The United States*

While NAFTA's investment arbitration procedures have attracted a great deal of anxiety in the United States in the ten plus years since the agreement was signed, investment arbitration has long played a role in US trade policy. In the wake of the American Revolution, the Jay Treaty of 1794 granted British creditors the right to arbitrate claims for losses in the struggle for independence.<sup>31</sup> In the wake of the Civil War, in the Alabama Claims case, an international tribunal of arbitrators awarded the United States millions in damages against Great Britain, which had allowed its ports to be used for the construction of Confederate ships.<sup>32</sup> More recently the United States, like other developed nations has favored investment arbitration in its bilateral investment treaties, a preference that it brought to the NAFTA negotiating table.<sup>33</sup>

From the onset of negotiations the US insisted that all issues be on the table, including issues that were extremely sensitive to Mexico, like petroleum, and to Canada, like culture.<sup>34</sup> Trade groups in the US pressed for a comprehensive removal of not only trade, but also investment restrictions.<sup>35</sup> The US wanted the widest, most pro-investment measures it could get, which, considering the power differentials between the Parties, was not an unreasonable thing to expect.

##### B. *Canada*

Canada and the United States have had an extensive and relatively open trade relationship since the nineteenth century. Yet negotiations toward a free trade agreement repeatedly failed, largely because of fears within Canada, first of outright annexation and then of economic domination. Not until 1986 did the negotiations that led to the Canada-United States Free Trade Area Agreement begin.<sup>36</sup> CUFTA entered into effect in 1989.<sup>37</sup>

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30. *Id.*

31. Barton Legum, *Federalism, NAFTA Chapter 11 and the Jay Treaty of 1794*, ICSID NEWS, Spring 2001, available at <http://www.worldbank.org/icsid/news/news.htm>. (last visited Mar. 17, 2006).

32. See THOMAS WILLING BALACH, *THE ALABAMA ARBITRATION* (1900).

33. CAMERON & TOMLIN, *supra* note 21, at 100.

34. *Id.* at 77.

35. *Id.*

36. MARYSE ROBERT, *NEGOTIATING NAFTA: EXPLAINING THE OUTCOME IN CULTURE*,

Investment was a central interest of the US in pursuing CUFTA. The Trudeau administration had alienated the US in the 1970's with its nationalist economic policies which limited the level of foreign investment in Canada, including the creation of the Foreign Investment Review Agency in 1973.<sup>38</sup> During the CUFTA negotiations, Canada resisted the strong investment discipline that the US tried to impose, and the final agreement is less demanding than the US wished. It is less favorable than the BITs that the US has signed with other countries.<sup>39</sup>

Canada's involvement in what would become the NAFTA discussions only began after the United States and Mexico formally announced their intention to pursue a bilateral trade agreement; and only after President Bush began the fast track process with Congress.<sup>40</sup> The appeal of entering NAFTA for Canada, despite the existence of CUFTA, included participation in the setting of rules which might lead to the movement of American industries in Canada to Mexico.<sup>41</sup>

Mexico's decision to negotiate a free trade agreement with the US put the Canadians in a difficult situation. Historically, Canadian trade and investment relations with Mexico specifically, and Latin America more generally, was minimal.<sup>42</sup> There was little indication that Mexico would pose an immediate threat to Canada's place in US markets, but over the long term this could easily change.<sup>43</sup> Canada had little incentive to seek an agreement with Mexico. At the same time, Canada had just finished negotiating a trade agreement with the United States that had been controversial at home.<sup>44</sup> However, in order to protect its interests in the North American market, Canada was compelled to participate.<sup>45</sup>

Canada was also concerned that a US-Mexico agreement would result in a hub and spoke trade model in North America with Mexico potentially getting preferential treatment and better market access than Canada had in CUFTA.<sup>46</sup> At the same time, if the US had trade agreements with both Canada and Mexico, this might make it more attractive than Canada for investors seeking access to a continental market.<sup>47</sup> Perhaps a multilateral agreement further offered a greater sense of equity over the hub and spoke quality of two separate bilateral agreements between two smaller economies and one economic powerhouse.

In negotiations, Canada would seek to preserve its position and potentially

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TEXTILES, AUTOS, AND PHARMACEUTICALS 23 (2000).

37. *Id.*
38. CAMERON & TOMLIN, *supra* note 21, at 100-01.
39. *Id.*
40. ROBERT, *supra* note 36, at 29-30.
41. CAMERON & TOMLIN, *supra* note 21, at 65.
42. *Id.* at 63.
43. *Id.* at 64.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

to improve the resultant free trade agreement. At the same time, it was intent on keeping the US from getting through the back door of NAFTA what it had failed to get in the front door CUFTA.<sup>48</sup>

### C. Mexico

Mexico has been perceived, especially by NAFTA's critics, as the odd man out in the NAFTA negotiations.<sup>49</sup> Its political and economic situation as well as its status as a developing nation meant that while it had a good deal to gain from the establishment of a free trade zone, it also had much of great significance to lose. Mexico's identity as a nation was deeply implicated in its economic organization, which, as negotiations began, was far more closed than that of either Canada or the United States.<sup>50</sup>

The Mexican Constitution, established in 1917, was the product of revolution, and its progressive, even radical character reflects this fact.<sup>51</sup> Both revolution and constitution aimed to remedy the fact that, by the early 20<sup>th</sup> century, the vast majority of Mexico's land and natural resources were owned by a few families, by the Roman Catholic Church, and by foreigners.<sup>52</sup> Landholding and agriculture were essentially feudal in nature. Article 27 of the Constitution addressed the desire of victorious revolutionaries for land reform by authorizing expropriation to achieve a more equitable distribution of land. Article 27, includes the so-called "Calvo Clause." The Calvo clause establishes that no foreigner can have more rights than a Mexican, including rights of protection against expropriation.<sup>53</sup>

The Constitution of 1917 gave all underground resources to the state, and the Calvo clause required that foreign investors, who had dominated national industry and commerce, to promise not to seek the protection of their home governments.<sup>54</sup> In 1938 President Cardenas' nationalization of the oil and natural gas industry, creating PEMEX, a state monopoly, was seen by many Mexicans as an extension of the revolution; a declaration of economic independence from foreign powers.<sup>55</sup>

The Mexican political system is centered on a strong executive. At the time of NAFTA's negotiation, Mexico's government had been in the hands of the Partido Revolucionario Institucional ("PRI") or its forebears since the Revolution.<sup>56</sup> The PRI found a solid base among the subsistence farmers, union

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48. *Id.* at 100-01.

49. *Id.* at 51.

50. *Id.*

51. FOLSOM ET. AL., *supra* note 8, at 26.

52. *Id.*

53. *Id.*; see also CARLOS CALVO, *LE DROIT INTERNATIONAL THEORETIQUE ET PRATIQUE* (1896); Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT Y.B. INT'L L 130 (1945).

54. FOLSOM ET. AL., *supra* note 8, at 26.

55. *Id.*

56. *Id.* at 27.

laborers, and state employees who had supported it for over fifty years.<sup>57</sup> During the seventies Mexico benefited greatly from high oil prices. At the same time, perhaps as a result, the government engaged in reckless spending. Corruption, always a problem in Mexico, became rampant. Even as the national debt grew, the country became more hostile to foreign investment. Mexico moved further towards a centralized command and control economy.<sup>58</sup> In 1982, President Portillo nationalized the banks and devalued the peso.<sup>59</sup>

President Portillo's successor, Miguel de la Madrid, inherited an economic crisis. One of the new generation "technocrat" PRI politicians, he began to address corruption, brought Mexico into GATT (1986), and pursued limited market reforms.<sup>60</sup> Presidents Salinas (1988-1994) and Zedillo (1994-2000), also PRI candidates, continued in the same vein, pursuing a policy of privatization and movement toward a free market economy.<sup>61</sup>

On trade, the technocrats were not only willing, but also anxious to attract foreign investment. In order to pay its external debts and expand its economy, Mexico needed to liberalize trade, and the technocrats were ready to accept hard discipline in an investment agreement.<sup>62</sup> At the same time, Mexican officials were aware that such a move would likely be controversial at home, and that some things, such as the state monopoly on petroleum, would not be negotiable.<sup>63</sup>

#### IV. THE NEGOTIATIONS AND THE DRAFTS

Negotiations on NAFTA began in June 1991 in Toronto. They would close at the Watergate in Washington, D.C. in August of 1992. The negotiations included nineteen working groups organized under six major negotiating areas: market access, trade rules, services, investment, intellectual property, and dispute settlement.<sup>64</sup> One negotiator for each country headed each group. The Chief Negotiators, Julius Katz (US), Herminio Blanco Medoza (Mexico) and John Weeks (Canada) met regularly to discuss the most contentious issues.<sup>65</sup> During the negotiating period there were also seven ministerial meetings in which the progress of negotiations was reviewed and pressure applied to keep things moving forward. In addition to the government negotiators, there was a bevy of advisory committees from the private sector, including business, labor,

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57. *Id.* at 28.

58. *Id.* at 27-28.

59. Jose Lopez Portillo, *President when Mexico's Default Set Off Debt Crisis, Dies at 83*, N.Y. TIMES, Feb. 18, 2004, available at <http://www.latinamericanstudies.org/mexico/portillo-obituary.htm> (last visited Mar. 17, 2006).

60. Robert, *supra* note 36, at 26.

61. *Id.*

62. CAMERON & TOMLIN, *supra* note 21, at 100-01.

63. *Id.*

64. ROBERT, *supra* note 36, at 36-37.

65. *Id.* at 37.

and academic representatives from each country.

Though negotiations officially started in June, the real bargaining began in October, when the first tariff offers were exchanged. At the end of October, after the third ministerial meeting at Zacatecas, Mexico, drafting began.<sup>66</sup> By December 1991 lawyers had put together a draft text with initial proposals.<sup>67</sup> On December 13<sup>th</sup> and 14<sup>th</sup>, Presidents Salinas and Bush met at Camp David and pressed the negotiations, announcing publicly that they were committed to a free trade agreement.<sup>68</sup> In January at Georgetown, Washington, D.C., the working groups worked on producing the first bracketed composite text in which the preferred elements and language of each country were arranged next to each other.<sup>69</sup>

Despite pressure from the three ministers, momentum seemed to be flagging until the pivotal four day session in Dallas, beginning on February 17<sup>th</sup>. Referred to as the "Dallas Jamboree," this meeting was aimed at resolving those areas where the negotiators seemed closest to agreement.<sup>70</sup> The Dallas meeting marked a turning point, but the Dallas composite (which was leaked to the press) did not address major areas like energy and autos.<sup>71</sup> It also still included 1,200 brackets, each containing the preferred (sometimes conflicting) text of the three parties.<sup>72</sup>

The momentum established in Dallas did not endure very long. By July, President Bush's declaration that negotiations were in the "ninth inning" was belied by major differences and increasing frustration among the negotiators.<sup>73</sup> Only on August 12<sup>th</sup>, after a final, extended (and acrimonious) push at the Watergate Hotel, did consensus form as to the most controversial terms of the agreement.<sup>74</sup>

In the area of investment, the issues at stake in negotiation were various and contentious. Generally, Canada wanted to keep Chapter 11 as close to CUFTA provisions as possible. Early bracketed texts were dominated by Canadian exceptions and limiting clarifications. The US was interested in expanding even beyond the measures included in its maximalist bilateral agreements, and insisted from the beginning on starting from scratch, rather than building on CUFTA.<sup>75</sup> Canada wanted especially to maintain the right to review certain foreign investments present in CUFTA.<sup>76</sup> The United States was

66. *Id.*

67. *Id.* at 38.

68. *Id.*

69. *Id.*

70. *Id.* at 39. Competing text presented by each party was included in most of the negotiating drafts within brackets, and usually marked with an abbreviation denoting the state party that had suggested the language presented.

71. *Id.*

72. *Id.*

73. CAMERON & TOMLIN, *supra* note 21, at 174.

74. *Id.*

75. *Id.* at 77, 100.

76. *Id.* at 100.

hoping to avoid such a provision in NAFTA.<sup>77</sup>

Compensation for expropriation was a particularly fraught issue for Mexico. Typically, bilateral trade agreements negotiated by the US contain a clause insisting that in the event of expropriation, compensation must be "prompt, adequate, and effective."<sup>78</sup> This was the specific language with which the United States had opposed Mexico's expropriation of American interests in the Mexican petroleum industry in 1938.<sup>79</sup> This language was bound to be problematic for Mexico. At the same time, the United States insisted on including provisions establishing a cause of action for individual investors against member states and a mandatory arbitration procedure. Arbitration of course had a very different historical valence for developing countries such as Mexico, who had suffered under unfair and colonialist arbitration treaties, as is evinced by the inclusion of the Calvo Clause in Mexico's constitution. At the same time, in its eagerness for foreign investment, Mexico was willing to deal. Even more fundamental to the achievement of consensus was the definition of investment in the chapter. The United States wanted the broadest possible definition of both investment and expropriation.

Surprisingly, as negotiations went forward Mexico and the US became closer. Both wanted very limited restraints on investment, although for different reasons. According to a Mexican negotiator, Canada was a more reluctant player throughout: "Mexico was closer to the US than Canada. We wanted more discipline than Canada. Canada based its position on the Canada-USA FTA, which for us had little substance. Canada was more afraid of foreign investment. What Mexico wanted was more foreign investment and, while the constitution created limits, Mexico was open to strong disciplines."<sup>80</sup>

At the February Dallas meeting, Mexico's openness to "strong disciplines" and Canada's ambivalence became more pronounced. It was here that Mexico agreed both to arbitration between states and individual investors and to rules regarding expropriation.<sup>81</sup> However, significant wrinkles remained to be ironed out between both Canada and Mexico. The United States pressed Canada on the issue of review of foreign investment, trying to reduce the scope of review allowed in CUFTA. CUFTA had allowed government review of direct acquisitions over CAN\$150 million.<sup>82</sup> Canada's economy was already heavily, some said too heavily, transnationalized, making the Canadians extremely reluctant to concede on this issue.<sup>83</sup>

That February, US negotiators continued to clash with Mexico on the sticky

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77. *Id.*

78. See, for example, United States State Departments 2004 Model BIT, art. 6, available at <http://www.state.gov/documents/organization/38710.pdf> (last visited Mar. 17, 2006); see also NAFTA Chapter 11 draft, Jan 16, 1992 (Georgetown Composite), at 16.

79. FOLSOM ET. AL., *supra* note 8, at 26.

80. CAMERON & TOMLIN, *supra* note 21, at 101.

81. *Id.* at 112.

82. *Id.*

83. *Id.*

issue of expropriation. Both the US and Mexico were sensitive on this issue. The Calvo Clause in Mexico's constitution allowed expropriation of foreign concerns in the service of the national interest. However, the United States' insistence on "prompt, adequate, and effective" compensation for expropriation was bound to raise hackles among the Mexican delegation.<sup>84</sup> Ultimately, words would prove immensely important. While the current Mexican administration was ready to make concessions, it needed less charged language. Eventually the Mexicans accepted the less historically charged term "fair market value" regarding compensation for expropriation.<sup>85</sup> An anonymous negotiator described the results:

The trade off in Dallas was crafting a law that does not violate the Mexican constitution. We had to craft the expropriation language not using the words 'prompt, adequate and effective.' There are three paragraphs, and if you read them, you find that what they say is exactly those three words, but in substitute language.<sup>86</sup>

In addition to benefiting from a strong bargaining position, the US also used time to its advantage. The negotiation team from the US had made it known that it was in no hurry. This changed from the Dallas to the Watergate meeting. President Bush announced that he wanted to be able to sign the finished agreement before the presidential election.<sup>87</sup> By law, Bush had to wait 90 days after the conclusion of the negotiations before he could sign the agreement.<sup>88</sup> In order to meet the election-day deadline, negotiations had to be completed by August 5th.<sup>89</sup> Bush's insistence put new power into the hands of the beleaguered Canadians.

At this point, the investment negotiating group was being held back by the issue of right to review. The CUFTA allowed Canada to review direct acquisitions of more than CAN\$150 million. The US hoped to dispose of this provision in NAFTA. At the Watergate, US negotiators thought that they could get a Canadian concession on the right to review in return for maintaining the exception on cultural industries in CUFTA. The heavy protection in the film and entertainment sectors remained an obsession for Canada on which the US negotiators had compromised, to the great disappointment of the very vocal and powerful US entertainment industry.<sup>90</sup> The United States disparaged "Canadian culture" as an oxymoron, but ultimately was unable either to omit this exception

84. *Id.*

85. See NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Initial Proposal Composite of December 1991, art. 405(1)(d), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/01-December1991.pdf>. Cf. NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of May 1, 1992, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/08-May011992.pdf>. (last visited Mar. 17, 2006).

86. CAMERON & TOMLIN, *supra* note 21, at 112.

87. *Id.* at 151.

88. *Id.*

89. *Id.*

90. *Id.* at 174.

or to leverage it as a means of overcoming the right to review in CUFTA.<sup>91</sup> Canada remained unwilling to offer any quid pro quo for the culture concession it had already secured. When Mexico saw that Canada was unwilling to give up right of review, it refused to give up review as well. The United States was stymied. The final agreement allowed Canada its cultural exception and preserved some right of review, but not without a considerable bitterness on the part of American negotiators.<sup>92</sup>

## V. RESULTS AND CONCERNS

The terms of Chapter Eleven left a lot of room for interpretation, and continue to raise concern among party-states as well as non-governmental groups within party-states. The great irony of the implementation of Chapter Eleven is that contrary to expectations, it is not Mexico that has been subject to the most investor suits nor levied the most complaints, but Canada and the United States, Canadian and American investors have actually filed more claims in total against the two Northern members of NAFTA than against Mexico.<sup>93</sup> While arbitration has historically been used in blatantly unfair ways against developing nations, the tables have turned with Chapter Eleven, with some of the most strident critiques coming from the more developed host states who are newly that are concerned about their sovereignty.<sup>94</sup> Concerns continue to be raised about the definition of terms such as "fair and equitable treatment," what constitutes expropriation, and when administrative regulations give rise to a compensable taking.

NAFTA's combination of an investment treaty and a trade agreement led to compromises, especially in those areas where it looked as though Chapter Eleven might conflict with other aspects of the treaty or with issues of sovereignty.<sup>95</sup> The definition of investment is not as broad as the US had wished.<sup>96</sup> Furthermore, Chapter Eleven bows to other chapters in the treaty in part by narrowing the definition of investments to "investment means" rather than "investment includes."<sup>97</sup> In doing so, Chapter Eleven excludes from investment any loans made to state enterprises, as well as money claims arising from contracts for the sale of goods or services or the extension of commercial

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91. *Id.*

92. *Id.*

93. Alvarez & Park, *supra* note 9, at 370, Appendix: Score Card of NAFTA Proceedings, 401-07. According to Alvarez and Park, as of 2003, investors had filed seventeen claims against Canada and the United States (nine and eight respectively). Investors had filed 14 disputes (including the twice filed Waster Management claim) against Mexico.

94. *Id.*

95. Chapter 11, for example bows to Chapter 14 on financial services. See NAFTA, *supra* note 1, art. 1139; see also Alvarez & Park, *supra* note 79, at 393.

96. Alvarez & Park, *supra* note 79, at 389 (citing art. 1139).

97. *Id.*

credit.<sup>98</sup> Intellectual property rights can generally not be the subject of claim of expropriation, nor will non-discriminatory governmental measures of general application be considered expropriatory of a loan or debt security merely because they impose an increased cost that causes debtor default.<sup>99</sup>

Expropriation is also defined more narrowly than the United States would perhaps have desired. The result is a fairly wide area of exclusion or exception. Matters involving tax and finance are not susceptible to arbitration without the express permission of the state-party whose laws are implicated.<sup>100</sup> Taxation has often been used as a means of expropriation. At the same time the ability to tax is central to sovereignty, and taxation always possesses a certain element of expropriation. Who decides what constitutes valid taxation as an expression of sovereignty as opposed to what constitutes abusive and expropriatory taxation? Chapter Eleven assigns the determination to the fiscal administrations of the host and investor countries, in effect giving veto power to the state parties to block the arbitration of the investor's taxation based claim.<sup>101</sup>

Chapter Eleven established a negative deadlock procedure for investor disputes based upon taxation. An investor who wants to make a Chapter Eleven claim against a host state based on a taxation measure must at the time of advising the host state of its intention to arbitrate submit the tax measure to the appropriate fiscal authorities.<sup>102</sup> The investor may proceed to arbitration only if after six months of consideration, the authorities "do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation."<sup>103</sup> The investor's country can protect the investor's right to arbitrate by refusing to join the joint veto. In this area at least, sovereignty concerns of the state parties seem to have won out over the wishes of investors for the broadest possible protections. The limited scale (as well as the awkward quality) of these exceptions, however, suggest that they are, as one US negotiator called them, mere "carve-outs," minor concessions granted on the way to negotiating an otherwise immensely broad agreement.<sup>104</sup>

Perhaps most important to the US negotiators and to investors was the dispute resolution system established by Chapter Eleven. Unfortunately, tracing the development of the negotiations in this area is particularly difficult. Few specific comments were offered by negotiators, and the drafts are ambiguous. In all the composite drafts and lawyers' revisions currently available, the US proposal (which is very close to that eventually adopted) dominates. Canadian and Mexican comments are limited to brief paragraphs. In early composites, Mexico includes two paragraphs insisting that investors either turn to their own

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98. *Id.*

99. *Id.* (citing art. 1110(8)).

100. *Id.* at 390 (citing art. 2103(6)).

101. *Id.*

102. *Id.*

103. *Id.*

104. Daniel M. Price, *Chapter 11- Private Party Vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 CAN.-U.S. L.J. 107, 109 (2000).

state party as a proxy in investment disputes or that they seek relief in the domestic courts.<sup>105</sup> The Mexican article's assurance of "an impartial judicial system," would have been cold comfort to US negotiators and investors.<sup>106</sup> Canada's contribution to the draft is limited to the assertion of an exception for any decisions made under the Investment Canada Act.<sup>107</sup> In the composite draft of May 22, 1992, the Canadian and Mexican articles drop out, and the US version of the dispute settlement procedures is all that remains.<sup>108</sup> While Canada would eventually manage to keep the right of review for certain investments that it had under CUFTA, it appears that the US strategy of starting from scratch with a broad vision of strong investor rights and only conceding the minimal "carve outs" necessary to attain a deal, was largely successful. How it came to be successful is more unclear. Perhaps, as has been suggested by commentators, it is simply more evidence of the power differential between the parties, and Mexico's willingness to submit to "strong disciplines" in return for US investment dollars.<sup>109</sup>

## VI. CONCLUSION

Chapter Eleven continues to be both controversial and influential. It set a new, intensely pro-investor standard for investment protections in international trade treaties. At the same time, it has been a lightning rod for critics of globalization.<sup>110</sup> Negotiations for the FTAA, currently stalled, have suffered

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105. NAFTA, Chapter 11, Composite of May 13, 1992, available at [http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral\\_neg-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp), setting forth the following:

MEX [Article: Dispute Settlement

1. (Definition of an investment dispute)

2. In the event of an investment dispute, the investor may send written notice to the Party with which it has the dispute ("the host government"), setting forth the provision or provisions of this Chapter which it believes has been breached and the facts on which its assertion is based. The investor shall simultaneously send a copy of this written notice to the Party of which it is a national ("the home government"). The two Parties shall thereupon immediately refer the matter to dispute resolution under Chapter 23.]

MEX [Article: Domestic Judicial Enforcement of the Rights of

Investors 1. Each Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors established under this Agreement.]

106. *Id.*

107. "Notwithstanding anything in the Agreement, the provisions of Part 6 shall not apply to any Decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review." NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of January 16, 1992, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/02-January161992.pdf>. (last visited Mar. 17, 2006).

108. NAFTA, Chapter 11 - Trilateral Negotiating Draft Texts, Composite of May 22, 1992, available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/10-May221992.pdf>.

109. CAMERON & TOMLIN, *supra* note 21, at 101.

110. Public Citizen, *supra* note 4; see also NOW: Bill Moyers Reports: Trading Democracy, transcript available at [http://www.pbs.org/now/transcript\\_tdfull.html](http://www.pbs.org/now/transcript_tdfull.html); Mary Bottari, NAFTA's

from the ongoing critique of Chapter Eleven and NAFTA.<sup>111</sup> At the same time, Chapter Eleven's arbitration policy has proved, in a historical irony, to be at least as troublesome to the United States and Canada as it has been to Mexico. NAFTA represented the first time two G-7 industrialized countries have entered into mandatory arbitration agreements with each other.<sup>112</sup> The result has been a plethora of claims by Canadian investors against the United States and by United States investors against Canada.<sup>113</sup> Reflecting perhaps the law of unintended consequences, the United States, so anxious for a system of strong investment protections and dispute settlement by ad-hoc tribunal has begun to see the political and financial costs of the "level playing field" represented by Chapter Eleven's mandatory arbitration.

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Investor Rights: A Corporate Dream, A Citizen Nightmare, 22 *Multinational Monitor*, available at <http://multinationalmonitor.org/mm2001/01april/corp1.html> (last visited Mar. 17, 2006).

111. Patrick J. McDonnell & Edwin Chen, *Americas summit ends in stalemate. US vision for free-trade zone thwarted by 5 of 34 nations; no date for more talks*, *SAN FRANCISCO CHRONICLE*, Nov. 6, 2005, at A-15, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/11/06/MNGLTFJTDL1.DTL&hw=Free+Trade+Area+of+the+Americas&sn=006&sc=173>. (last visited Mar. 17, 2006).

112. Alvarez & Park, *supra* note 7, at 370.

113. *Id.* Appendix: Score Card of NAFTA Proceedings, 401-07.

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## Strategy or Process - Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Laura Bingham

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# Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda

By  
Laura Bingham

*Nothing is final until it's right.*  
- Abraham Lincoln

## I. INTRODUCTION

The other articles in this volume explore various important aspects of international courts and tribunals in operation, as well as the decision to invoke international judicial process by creating a court or tribunal.<sup>1</sup> However, in an age of unprecedented activity within and among international courts and tribunals,<sup>2</sup> the twin *Ad Hoc* Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)<sup>3</sup> must confront the prospect of permanent closure.<sup>4</sup> To this

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1. For illuminating discussions on the creation of international courts and tribunal, see Mani Sheik, *The Establishment of Special Criminal Courts* (manuscript on file with author); Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights*, 24 BERKELEY J. INT'L L. 423 (2006); Rebecca Wright, *African Court of Human Rights*, 24 BERKELEY J. INT'L L. 463 (2006); and Charles Seavey, *The Lack of an International Bankruptcy Court*, 24 BERKELEY J. INT'L L. 499 (2006). For analyses of international criminal courts in operation, see Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today*, 24 BERKELEY J. INT'L L. 554 (2006); Jennifer Landside, *International Jurisdiction Over the Rwandan Conflict: the Costs and Benefits of Primacy* (manuscript on file with author); and Anne-Sophie Massa, *ICTY's Response to NATO's Intervention in Kosovo*, 24 BERKELEY J. INT'L L. 610 (2006).

2. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 437 (2003). Martinez notes that a "flurry of judicialization" began in the 1970s and 1980s, accelerated in the 1990s, but has somewhat plateaued in the new millennium. *Id.* at 437. However, she emphasizes that "the institutions created in that burst of premillennial enthusiasm now have a life of their own; how effective they will be is still open to question, but their existence (at least for now) is not." *Id.*

3. Hereinafter they are referred to individually as the "ICTY" and the "ICTR" and collectively as the "International Criminal Tribunals" or the "Tribunals."

4. The current projections of closing dates for the ICTR and ICTY, respectively, are 2008 and 2009 for completion of all trials in the first instance. The role of deadlines in the Completion Strategies is discussed at length in Part IV.

end, an ongoing dialogue between the Security Council and high-ranking administrative officials within the Tribunals has resulted in the articulation of official Completion Strategies to be implemented by the Tribunals.<sup>5</sup> While Part IV further outlines the substance of the Completion Strategies, it is important to note at the outset their composite and fluid form. In reality, the Completion Strategies are a combination of Security Council Resolutions, Annual Report projections, internal policy initiatives, formal amendments to the Rule of Procedure and Evidence, and informal dialogue between countless political actors associated with each of these bodies.<sup>6</sup> The actors involved have consistently referred to the means of closure as a strategy, and discourse on the subject understandably turns on logistics, efficiency and deadlines.

This article addresses the question of how the Completion Strategies, as one particular means of closure, might impact the remaining work and eventual legacy of the Tribunals, beyond the scope of their administrative role as fora for trying war criminals. It proceeds from the premise that the creation of the Tribunals triggered an organic judicial process, and that closure is logically opposed to that process. This premise borrows heavily from two theoretical schools of thought. First, the concept of “norm internalization,” espoused by Harold Koh as an integral part of transnational legal process theory, posits an ongoing “complex process . . . whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.”<sup>7</sup> Second, while Koh’s transnational legal process theory is largely an effort to explain compliance by states, Alec Stone Sweet and Martin Shapiro use the concept of internalization as a means of explaining a wider range of behavior by individual actors in the expanding process of “judicialization.” In particular, Stone Sweet argues that these processes, once begun, are “irreversible.”<sup>8</sup> The

5. For the most comprehensive enumeration of the Completion Strategies for closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda (hereinafter Completion Strategies), see President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *Assessments and Report of Judge Theodor Meron provided to the President of the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, Annex I to U.N. Doc. S/2005/343 (May 25, 2005) [hereinafter Meron]; and *Completion Strategy of the International Criminal Tribunal for Rwanda* (Nov. 2005 version), <http://65.18.216.88/ENGLISH/completionstrat/301105.pdf> (last visited Dec. 22, 2005).

6. The literature summarizing the development and implementation of the Completion Strategies is still limited, and most commentators focus on the immediate concerns of avoiding impunity and ensuring that the Tribunals continue to meet international due process standards. See, e.g., Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT’L L. 158 (2005); Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?* 28 FORDHAM INT’L L. J. 591 (2005) [hereinafter Mundis, *Lessons from Nuremberg*]; Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142 (2005) [hereinafter Mundis, *Judicial Effects*]; Dominic Raab, *Evaluating the ICTY and Its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT’L CRIM. JUST. 82 (2005).

7. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996) [hereinafter Koh, *Transnational Legal Process*].

8. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 1

prospect of closure is inherently inimical to the idea that judicialization is ever-expanding and irreversible.

At the time of the Tribunals' creation, the Security Council and other actors in the international community extolled and seized on the potential symbolic force that an international judicial process could exert in the face of unimaginable displays of inhumanity. However, practical concerns and the desire to see an end to disputes, have led to the imposition of target dates for completion and procedures through which the Tribunals might meet these deadlines. The Completion Strategies, as a product of political dialogue between the Tribunal leadership and the Security Council, are external to the judicial process carried out by the Tribunals. Perhaps because they have taken shape through external political channels, the Completion Strategies tend to disregard both the dynamic nature of legal process, and the eventual legacy of the Tribunals, when they are no longer seats of judicial reckoning and only exist in archives and collective memory. This article argues that the Completion Strategies formulated for the ICTY and ICTR suffer from a potentially damaging omission: they reflect a lack of value for the host of implicit social and political functions not enumerated in the Statutes that created the institutions over a decade ago. By setting these functions aside in favor of a strategic model that invites equating closure with docket clearing, the various authors of the Completion Strategies risk wagering the legacy of the Tribunals on the ability to meet deadlines.

Part II begins by surveying the creation of the Tribunals, in order to understand the purposes and original functions conceived of at the moment they came into existence. This important exercise, to the extent it may have taken place, was not adequately performed in the public eye as the Completion Strategies developed in press releases, Security Council resolutions and Annual Reports. Through an exploration of the moment that generated the Tribunals, Part II stresses the importance of their function as a powerful symbol in the international sphere. Part III discusses how the functions of the Tribunals—judicial, political and social—have changed over time. This Part, in particular, notes the “dissipation” of the symbolic function in Security Council rhetoric,<sup>9</sup> while other actors have continued to seize upon the Tribunals as symbolic of various trends and phenomena in the international sphere. Part IV takes up the Completion Strategies proper, setting out the development, methods and problematic aspects at play as the Tribunals wrestle with implementation. Part V undertakes a theoretical analysis of the role that the Completion Strategies play in light of the functions identified in Parts II and III. The article concludes that, because the Completion Strategies tend to neglect, rather than vindicate the non-judicial functions embraced by the Security Council at the outset of the process, the Tribunals face the risk of losing legitimacy and positive symbolic value in the tran-

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(2000); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE POLITICAL ANALYSIS* 17-28; 36-7 (1981).

9. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT'L L.* 401, 411 (2006) [hereinafter Caron, *International Courts and Tribunals*].

sition from reality to legacy.

## II.

### ICTY AND ICTR CREATION: INVOKING INTERNATIONAL PROCESS

#### A. ICTY: Symbolic Function at Creation and the Translation into Reality

The catalogue of atrocities visited upon the civilian populations of Rwanda and the republics of the Former Yugoslavia is too long and appalling to render adequately here the horror that those responsible for the conflicts brought into the world. However, the gravity of the outrages upon humanity committed in these regions did not inevitably dictate the creation of international war crimes tribunals, particularly after decades of the Cold War had all but erased the legacy of Nuremberg from political and cultural memory. It is proper, therefore, when considering the impact of closing the Tribunals, to endeavor to understand the purposes for which they were created, and why the international community chose to respond to the unimaginable havoc of war and genocide with international judicial institutions.

During the deliberations leading to the establishment of the ICTY, the permanent members of the Security Council voiced several justifications for bringing about such an institution.<sup>10</sup> In their statements, the representatives focused considerably on the ability of a tribunal to send messages to victims, to future would-be perpetrators, and to the “international community.”<sup>11</sup> As Michael P. Scharf writes, “[t]he punishment of crimes committed in the Balkans would send the message, both to potential aggressors and vulnerable minorities, that the international community will not allow atrocities to be committed with impunity.” Scharf quotes Richard Goldstone, the first Prosecutor for the ICTY:

[I]f people in leadership positions know there’s an international court out there, that there’s an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren’t going to think twice as to the consequences. Until now, they haven’t had to. There’s been no enforcement mechanism at all.<sup>12</sup>

Thus one aim of the Tribunals at the time of creation involved not the reality but the *image* of a tribunal—the semaphoric weight of the institution in the abstract. Thomas Franck cites “symbolic validation” as a key indicator of the legitimacy of rules, because symbolic “cues” signify the link between an abstract rule and “the overall system of social order.”<sup>13</sup> While Franck identifies “ritual and pedi-

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10. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Resolution 808 Report].

11. 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 298-310 (1995).

12. Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons From the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 932 (2000) (quoting Richard Goldstone).

13. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 34 (1995).

gree”<sup>14</sup> as examples of symbolic validation, the Tribunals themselves, at the time of creation, validated international rules proscribing genocide with a seat of judicial process. In this way, because the rules preceded the Tribunals, creating fora for judicial reckoning had the important effect of stamping international rules with authority.<sup>15</sup> It is this symbolic function of the Tribunals, so apparent in the rhetoric of their creation, that is most threatened by the prospect of their permanent closure. In other words, not only will the Tribunals no longer be “out there,” they also face the difficult task of closing without unraveling or distorting their role as a “symbolic validation”<sup>16</sup> of the international community’s commitment to bringing war criminals to justice.

Translated into the legal language of UN Security Council Resolutions, the purpose of the Tribunals became a determination “to put an end to . . . [the threat to peace and security posed by the atrocities] and to take effective measures to bring to justice the persons who are responsible for them.”<sup>17</sup> In his Report advocating the creation of the ICTY, the Secretary-General presciently articulated the paradoxes that have complicated the process of establishing, operating and closing an “independent” tribunal under the auspices of the United Nations:

[The Tribunal] would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security . . . and Security Council decisions related thereto.<sup>18</sup>

Thus, under its Chapter VII authority to maintain international peace and security,<sup>19</sup> the Security Council proposed an independent, terminable tribunal—and therein lies the paradox. For written into the constitutive process that brought about the ICTY (and by extension the ICTR, see below) was the caveat that work would end when the Security Council decides. It is difficult to stake a claim to judicial or prosecutorial independence<sup>20</sup> without acknowledging this

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14. *Id.*

15. *Id.* at 35.

16. *Id.* at 35-36.

17. S.C. Res. 827, Preambular ¶ 5, U.N. Doc. S/Res/827 (May 25, 1993) (establishing the ICTY under Chapter VII powers).

18. Resolution 808 Report, *supra* note 10, ¶ 28.

19. S.C. Res. 25704, Annex, U.N. Doc. S/RES/25704/Annex (May 3, 1993) (Statute of the Tribunal).

20. For a detailed account of the Security Council’s decision to split the Office of the Prosecutor for the Tribunals, ending Prosecutor Carla del Ponte’s mandate in Arusha, see Eric Husketh, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT’L HUM. RTS. 8 ¶ 66 (2005). Husketh explores the “expediency” of the Security Council’s decision, given the fact that Del Ponte intended to investigate war crimes allegations against members of the RPF, the predominately Tutsi group responsible for overthrowing the genocidal Interim Government in 1994. Many former RPF members hold positions in the current Rwandan administration, which strenuously resisted the investigation and prosecution of RPF acts committed within the ICTR’s temporal jurisdiction. Del Ponte’s persistence sparked tension between the ICTR and the Rwandan government, and the Security Council decision has been criticized as a thinly veiled attempt to derail further investigation into RPF activities during the genocide. *Id.* ¶¶ 72, 80.

reality.<sup>21</sup>

The Secretary-General noted two possible methods under international law for bringing about the Tribunal. Because of the “urgency”<sup>22</sup> of the situation, the Secretary-General advised the Security Council to bypass a more traditional treaty process and instead create the Tribunal as an enforcement measure under Chapter VII.<sup>23</sup> To sum up, “[t]he treaty process would probably have taken years, if not decades, and might have been derailed through the opposition of a number of governments . . . On the other hand, Article 25 of the Charter binds all UN Members to accept and carry out the decisions of the Security Council.”<sup>24</sup> Again, in the interest of “effective and expeditious implementation,” the Tribunal’s “life span” was bound to the UN organs in a novel way. Under the Statute, annexed to Security Council Resolution 827 establishing the Tribunal,<sup>25</sup> the Secretary-General himself appoints the Prosecutor,<sup>26</sup> the General Assembly appoints judges nominated by the Secretary-General,<sup>27</sup> and, perhaps the most direct form of political control, the General Assembly approves the budget of the Tribunal.<sup>28</sup>

The validity of establishing the Tribunal as an enforcement measure under Chapter VII was judicially challenged in the first case brought to trial in The Hague.<sup>29</sup> The defense in *Prosecutor v. Tadic* argued, *inter alia*, that the Tribunal was not “established by law” in accordance with Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) because, essentially, the Security Council is an executive and not a legislative body.<sup>30</sup> The Appeals

21. “While the Yugoslavia Tribunal is designed to be independent from the Security Council, one cannot ignore the fact that the statute provides that the Tribunal’s prosecutor is selected by the Security Council and its judges are selected by the General Assembly from a short list proposed by the Security Council.” MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIBUNAL SINCE NUREMBERG 72* (1997) [hereinafter *BALKAN JUSTICE*].

22. See YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 151 (1999).

23. S.C. Res. 25704, *supra* note 19, ¶ 22.

24. BEIGBEDER, *supra* note 22.

25. S.C. Res. 827, *supra* note 17, Annex.

26. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 72.

27. *See id.*

28. *See id.* at 79. Article 32 of the Tribunal’s Statute provides: “The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.” S.C. Res. 827, *supra* note 17, Annex; *see also* BEIGBEDER, *supra* note 22, at 151.

29. *Prosecutor v. Tadic*, Case No. IT-94-I-T, Trial Chamber Judgment, (May 7, 1997), reprinted in *I.H.R.R.*, Vol. 4, No. 3 (1997); *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), 35 *I.L.M.* 32 (1996) [hereinafter *Tadic*]. “Tadic was arrested in Germany in February 1994 on a genocide charge, after witnesses asserted that he had killed and maimed Muslim prisoners while serving as a guard at concentration camps run by the Bosnian Serbs and was later extradited to The Hague.” BEIGBEDER, *supra* note 22, at 156. Tadic was eventually convicted and sentenced to 20 years of imprisonment. *Id.*

30. *Tadic*, *supra* note 29, at 22, 31-32. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 105. Article 14(1) states: “[i]n the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and

Chamber rejected the defense argument in part by observing that “since there was no legislature, in the technical sense of the term, in the United Nations system, the argument was inapplicable to a Security Council-created judicial institution.”<sup>31</sup>

While the *Tadic* decision on jurisdiction is now firmly entrenched in the legal framework developed through the Tribunals, the strength of the defense argument concerning political entanglements written into the Statutes should not be forgotten in light of the evolution of the Completion Strategies. Indeed, in the transition from image to reality, the Security Council left the Tribunals vulnerable to allegations of illegitimacy<sup>32</sup> such as that formulated in the *Tadic* argument. The logic of the Appeals Chamber’s decision on the proper establishment of an international tribunal “by law” was far from airtight. The Chamber basically conceded that the Tribunal could not be “established by law” according to case law treating national systems,<sup>33</sup> but found the Chapter VII route acceptable in light of the procedural fairness of the process *ex post*.<sup>34</sup> With the *Tadic* challenge as the “root”<sup>35</sup> of illegitimacy arguments, the degree to which these allegations resonate is amplified by further “mere executive orders”<sup>36</sup> that interfere with the judicial work of the Tribunals.

The Completion Strategies, to the extent they are perceived as executive orders emanating from the Security Council, pose just such a challenge to the legitimacy of the Tribunals. As David Caron writes, allegations of illegitimacy “appear to manifest a sense of betrayal of what is believed to be the promise and spirit of the organization.”<sup>37</sup> Caron points to the “space between the promises of the preamble” and the “realities of the compromises in the text that follows, a space in which there is discretion regarding the use of authority.”<sup>38</sup> In the case of the Tribunals, the symbolic function touted at creation outstrips even the

Political Rights, Dec. 16, 1966, art. 14(1), 999 U.N.T.S. 171.

31. SCHARF, BALKAN JUSTICE, *supra* note 21, at 105.

32. For a valuable discussion of the role of legitimacy and allegations of illegitimacy in the international legal community, see David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 552-62 (1993) [hereinafter *Legitimacy*]. See also THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) (significantly contributing to thought on the subject of legitimacy). On “judicial legitimacy” see, for example, Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1357, 1390-409 (1991).

33. The Chamber held that “it is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be ‘established by law’ finds no application in an international law setting.” *Tadic*, *supra* note 29, ¶ 43.

34. “The important consideration in determining whether a tribunal has been ‘established by law’ is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.” *Id.* ¶ 45.

35. Caron, *Legitimacy*, *supra* note 32, at 559.

36. *Tadic*, *supra* note 29, ¶ 43.

37. Caron, *Legitimacy*, *supra* note 32, at 559.

38. *Id.* at 560.

weighty promises of the preamble, further widening the contested space between promise and reality.

### B. ICTR: The Symbol as Precedent

Regarding the creation of the ICTR, one commentator surmises that, "having recently created an international criminal tribunal for humanitarian law violators in the European States of the former Yugoslavia, [the Security Council] decided it could do no less for African Rwanda."<sup>39</sup> Though this brief observation glosses over significant differences in the applicable substantive law owing to the internal nature of the conflict in Rwanda,<sup>40</sup> the statement also illustrates something of the political tenor surrounding the creation of the ICTR.<sup>41</sup> Because the ICTY existed as a very recent precedent, the ICTR as a concept was easy to appropriate and, in fact, Rwanda itself requested the "international community" to "[set] up as soon as possible an international tribunal to try the criminals."<sup>42</sup> The ICTR Statute and Rules of Procedure and Evidence substantially mirror the ICTY template.<sup>43</sup> In the words of Alison des Forges, who has served as an expert witness on the genocide in Rwanda in many of the trials before the Tribunal, "[t]he fact that there was already in existence the ICTY made a very easy route for [the Security Council], and they adopted exactly the same procedures as the ICTY."<sup>44</sup> Indeed, Des Forges further notes:

With the existence of the ICTY as precedent, it would have been almost impossible for them [the Security Council] not to have created a tribunal because the crimes in Rwanda were so much more blatant and grievous and large in scale that

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39. Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 421 (1994).

40. Both Tribunals have contributed immensely to the extension of humanitarian law into the realm of internal conflicts. The *Tadic* Appeals Chamber Decision on Defense Motion for Interlocutory Appeal on Jurisdiction demonstrates the progressive development in this area, where the Tribunal found that "the distinction between interstate and civil wars is losing its value as far as human beings are concerned." SCHARF, BALKAN JUSTICE, *supra* note 21, at 107 (quoting Geoffrey R. Watson).

41. See, e.g., U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 298-310 (1998). For an account by the Commander of the U.N. Mission to Rwanda, presenting the Security Council's reluctance to provide needed assistance during the genocide, see LT. GEN. ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003); Alison des Forges, Remarks at the Berkeley Human Rights Center Conference Justice in the Balance: Military Commissions and International Criminal Tribunals (Mar. 16, 2002), [http://www.hrcberkeley.org/download/justice\\_alisondesforges.pdf](http://www.hrcberkeley.org/download/justice_alisondesforges.pdf) (last visited Dec. 21, 2005).

42. Letter from the Permanent Representative of Rwanda to the United Nations to the President of the Security Council (September 28, 1994), U.N. Doc. S/1994/1115 (Sept. 29, 1994), reprinted in 2 MORRIS & SCHARF, *supra* note 41, at 359, 361.

43. The ICTR was formally created by Resolution 955, S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994), with the Statute attached at the Annex. Because the genocide was the result of an internal conflict, the Tribunal is limited in the substantive criminal law available for the prosecution of genocidaires and other international war criminals who would otherwise fall within its within its personal, temporal and territorial jurisdiction. The symmetry between the two Tribunals is also reflected in the Completion Strategies, discussed further in Part IV.

44. Des Forges, *supra* note 41, at 6-7.

it certainly seemed to them that they had no choice if they were not to risk accusations of racism.<sup>45</sup>

A prevalent motivation for establishing the ICTR, according to the Russian Representative, was the perception that the Tribunal would “give yet another clear and unequivocal signal to the effect that the international community will not tolerate serious violations of norms of international humanitarian law and disregard for the rights of the individual.”<sup>46</sup> Thus, in the same vein as the discourse that led to the creation of a tribunal to address the atrocities in the Former Yugoslavia, the “international community” (filtered through the prism of the Security Council) envisioned a tribunal for Rwanda as a powerful expressive mechanism to invoke in response to the inhumanity of the situation. The functions envisioned for the Tribunal were not limited to prosecuting war criminals, but also included the symbolic, non-judicial purpose of “promot[ing] the process of national reconciliation, the return of refugees, and the restoration and maintenance of peace in Rwanda.”<sup>47</sup> The delegate from Argentina also described the establishment of the Tribunal as a symbol for the world and “a clear message that the international community is not prepared to leave unpunished the grave crimes committed in Rwanda.”<sup>48</sup> Finally, the Tribunal would “signify a breakthrough in creating mechanisms that would impose international criminal law.”<sup>49</sup>

However, unlike the vote to establish the ICTY, the Security Council was not unanimous in upholding the draft resolution creating the ICTR. In fact, the only “no” vote came from the Rwandan delegate. Among the litany of shortcomings identified by Delegate Bakuramutsa was the allegation that “so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of the genocide in particular.”<sup>50</sup> In his examination of “collective guilt,” George P. Fletcher suggests that turning to the law of individual responsibility “repress[es] the dimension of collective action.”<sup>51</sup> A frequent criticism of the ICTR is the fact that it was created as a token gesture to assuage the guilty conscience of an international community that knowingly failed to intervene and prevent the genocide in Rwanda.<sup>52</sup> Again, upon closing the ICTR,

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45. *Id.*; see also 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA xv-xvi* (1998) (quoting Nelson Graves’s succinct accusation of discrimination on the part of the Security Council: “[I]s it because we’re Africans that a court has not been set up?”).

46. 2 MORRIS & SCHARF, *supra* note 42, at 299.

47. *Id.*

48. *Id.* at 303.

49. *Id.* at 302 (delegate from the Czech Republic).

50. *Id.* at 308.

51. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1522 (2002). For a more sustained discussion of the relationship between collective guilt and war crimes tribunals, see Mani Sheik, *supra* note 1.

52. “When the genocide finished, actually some weeks before it finished, there was a considerable amount of guilt on the part of various international actors, which led them to begin championing the cause of justice.” Des Forges, *supra* note 41; see also DALLAIRE, *supra* note 41.

the international community runs the risk of amplifying the resonance of such allegations.

The ICTR complement to the *Tadic* decision on jurisdiction came in 1997, when the former burgomaster of Ngoma commune Joseph Kanyabashi challenged the jurisdiction of the ICTR to consider charges against him.<sup>53</sup> The defense argued that the ICTR was “just another appendage of an international organ of policing and coercion, devoid of independence.”<sup>54</sup> According to Kanyabashi, due to the Tribunal’s political rather than judicial character, it did not retain the power to render a legal judgment.<sup>55</sup> The Trial Chamber rejected Kanyabashi’s challenge, pointing to the procedural protections in place to ensure fair, legal process.<sup>56</sup> However, Kanyabashi’s assertions have returned to haunt the judges of the Tribunals as political pressure to successfully implement the Completion Strategies has seeped into the daily workings of the institutions. In the particular case of the ICTR, which was viewed not only as an appendage of the Security Council, but also as an annex to the ICTY,<sup>57</sup> Security Council involvement in implementation of the Closing Strategies could lend credence to assertions of dependency and illegitimacy.<sup>58</sup>

While the Trial Chamber in *Kanyabashi* and the Appeals Chamber in *Tadic* argued that the structural protections in place fostered judicial independence in the Tribunals, it can hardly be denied that a unique political dimension to the creation, operation and closure of these institutions exists. Both the political circumstances that led to their creation and the political nature of the United Nations system itself lend the Tribunals a peculiar quality of cabined dependency.<sup>59</sup> As noted above, the General Assembly is responsible for the budgets of both Tribunals. According to Cesare P. R. Romano, “[t]he single most persistent criticism that has been leveled against the ‘twin criminal tribunals’ throughout their life is that they are far too expensive.”<sup>60</sup> Romano estimates that the total cost of the Tribunals upon closure could exceed \$2.5 billion.<sup>61</sup> Because the Tribunals exist at the will of the donor community, structural protections can only partially eliminate political pressures from influencing the judicial work of the Tribunals.

Furthermore, because of the lack of structural protections softening the di-

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53. Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Jurisdiction, ([Month Day], 1997).

54. *Id.* ¶ 37.

55. *Id.* ¶¶ 37-50.

56. See Virginia [sic] Morris, Prosecutor v. Kanyabashi, *Decision on Jurisdiction*, 92 AM. J. INT’L L. 66, 69 (1998) (summarizing the response by the Trial Chamber).

57. 2 MORRIS & SCHARF, *supra* note 10, at 298-310; see also *Tadic*, *supra* note 29, ¶ 42.

58. Caron, *Legitimacy*, *supra* note 32, at 556-62.

59. See, e.g., Des Forges, *supra* note 41, at 7 (asking Goldstone what door he would knock on at the UN to seek provisions for “the simplest logistical materials,” like pencils and paper. His response: “That’s the problem. There’s no door.”).

60. Cesare P. R. Romano, *The Price of International Justice*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 281, 295 (2005).

61. *Id.* at 296.

rect link between the General Assembly and the Tribunals on budgetary matters, the Tribunals are vulnerable to the prevailing will of the international community in arguably the most political way: funding. As the deadlines established in the Completion Strategies approach (see Part IV, *infra*), the financial vulnerability of the Tribunals could lead to an unfettered political solution, putting an inappropriate, administrative end to a complex judicial process.<sup>62</sup>

As noted above, the more political the effort to close the Tribunals becomes, the stronger the *Tadic* and *Kanyabashi* argument resonates. This is better understood through Martin Shapiro's argument, which posits that courts of all kinds rest on an "essential social logic" that is, in turn, based on consent by parties to have a third party decide the outcome of a dispute.<sup>63</sup> Shapiro identifies a "permanent crisis" faced by contemporary courts because they have become dislodged from the clearly established consent in the original "social logic" of dispute resolution.<sup>64</sup> By challenging the legality of the Tribunals as judicial bodies, *Tadic* and *Kanyabashi* cut directly to the social fabric of the ICTY: they rejected the consent of the entire international community because of the political, rather than legislative, function of the United Nations. Although they upheld the legality of the Tribunals, the *Tadic* and *Kanyabashi* decisions on jurisdiction do not place the legitimacy of the Tribunals beyond question, particularly if the United Nations system imposes a premature end to work. Such a move would vindicate to some extent the charge that the Tribunals were created merely to serve as "appendages" of a political behemoth.

### III.

#### CHANGING FUNCTION: THE PROCESS OF A WAR CRIMES TRIBUNAL

As Professor David Caron emphasizes in his Introduction to this volume, the sparse literature advancing general theories of international courts and tribunals often overlooks the fact that institutions, even judicial institutions, may change dramatically over time.<sup>65</sup> Caron also notes that the political functions of international courts and tribunals will often go unstated in the relevant constitutive instruments.<sup>66</sup>

Part II identified the "non-related function" of imagery or symbolic valida-

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62. This possibility is not without precedent, even in the context of the Tribunals themselves. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 48 (discussing the premature termination of the investigative Commission established for the former Yugoslavia under Security Council Resolution 780). According to Scharf, the unexpected termination forced "an early end to Commissioner Cleiren's rape investigation, with two hundred victims from Croatia and Bosnia still scheduled to be interviewed. It also prevented the commission from finishing the exhumation of the Vukovar mass gravesite which had been suspended during the cold Croatian winter." *Id.* at 48. Scharf goes on to cite Chairman Bassiouni's response questioning the reason for premature termination: "[P]erhaps it is the nature of the U.N. beast—part political, part bureaucratic—that accounts for what I believe to be an unconscionable outcome, no matter what reason." *Id.* at 48-49.

63. SHAPIRO, *supra* note 8, at 8.

64. *Id.*

65. Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

66. *Id.* at 411.

tion of the Tribunals and its presence at the time the Tribunals were created. The Security Council appropriated the symbolic validation embodied in the Tribunals in order to signify its commitment to rendering justice and to lend authority to the rules of humanitarian law. The decision to invoke international legal process<sup>67</sup> tapped into the enduring legacy of the Nuremberg trials—where the victorious nations opted for public trials of Nazi perpetrators over summary executions.<sup>68</sup> Laura Dickerson terms the decision to invoke legal process, including the complex web of historical circumstances and political dialogue leading up to that decision, a “Nuremberg moment,”<sup>69</sup> which, consequently, is the point at which the symbolic weight of the resulting tribunal is at its zenith. Non-related functions, however, because they are not cast in legal language and incorporated into the operative structure of the institution, can “dissipate over time.”<sup>70</sup>

As the Tribunals have gone about the judicial work of investigating and trying war criminals, other functions, related and non-related, have emerged and faded in the process. A host of actors has shaped the international legal process, initiated in the “Nuremberg moments” that brought about the creation of the Tribunals, by working “with and against” the “bounded strategic space” carved out in the constituent documents discussed above.<sup>71</sup> However, it is important to note that throughout this ongoing process, the Tribunals have continued to be seized upon as symbols, most significantly for the purposes of this article by commentators asserting the progressive development of an international system of courts and tribunals. In this regard, the twin Tribunals have become “the darling of international human rights lawyers.”<sup>72</sup>

Many commentators debate the existence of an international legal system.<sup>73</sup> While the scope of this article does not permit a sustained exploration of this subject, the striking evolution of international criminal law during the lifetimes of the Tribunals, and particularly the interrelationship between the relevant international bodies, bears considerably on the question of how to *close* the

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67. For an informative account of the development of the International Legal Process school of international law, as well as previous and subsequent scholarly thought related to the school, see Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L. J. 2599 (1997) [hereinafter Koh, *Nations Obey*].

68. Laura A. Dickerson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1442 (2002).

69. *Id.* at 1438.

70. Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

71. *See id.* at 412.

72. Martinez, *supra* note 2, at 479.

73. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); FRANCK, *supra* note 13; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997); LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1968); Koh, *Transnational Legal Process*, *supra* note 7; Martinez, *supra* note 2; HANS J. MORGANTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d ed. 1954); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) [hereinafter Posner & Yoo, *Judicial Independence*].

Tribunals. Before the Tribunals existed, international criminal law had not yet awakened from “the long sleep into which it had fallen after the Nuremberg and Tokyo trials.”<sup>74</sup> Today, landmark precedents exist in numerous areas of substantive international criminal law, a working set of Rules of Procedure and Evidence has been developed and applied for over a decade, and the day-to-day operation of the Tribunals animates the once dormant corpus of legal tools for prosecuting international war criminals.<sup>75</sup>

Over the course of their operation, the Tribunals have also served as a dynamic mechanism for bringing about both legal and cultural changes in the war-torn regions to which they are devoted.<sup>76</sup> Moreover, and perhaps more emphatically than non-criminal international courts and tribunals, the Tribunals have been incorporated into the trajectory of an evolving “global community of law,”<sup>77</sup> capable of apprehending and prosecuting individual war criminals.

Repeated interaction with dispute resolution mechanisms over time “will construct . . . causal linkages between the strategic behaviour of individuals and the development of rule systems.”<sup>78</sup> In other words, with the Tribunals open and operating, individuals and groups negotiate their behavior according to the “bounded space” of the institutions within which they must act. But, according to Stone Sweet, and David Caron in this volume, the space carved out is *reactive*, meaning that the strategic behavior also changes the character of the institution in a mutual, symbiotic relationship.<sup>79</sup> One important effect of this process is the gradual acclamation of the community to conceiving their actions in relation to the judicial process, or the judicialization of behavior.<sup>80</sup> Moreover, “the community” should not be narrowly defined for a proper understanding of the political and social functions of international courts and tribunals. Rather, and particularly in the case of the Tribunals, the community that has engaged in strategic behavior associated with the Tribunal includes actors such as the international human rights practitioners who have made these institutions their “darlings.”

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74. Romano, *supra* note 60, at 297.

75. See, e.g., INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY (Gideon Boas & William Schabas eds., 2003); HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004), <http://hrw.org/reports/2004/ij/> (last visited Dec. 22, 2005).

76. Both Tribunals have spawned extensive outreach programs, within the institutions themselves and in their namesake countries. Much information about these programs can be found at the respective Tribunal websites: [www.ictt.org](http://www.ictt.org) and [www.icty.org](http://www.icty.org). Additionally, both Tribunals, in preparation to transfer cases to national jurisdictions, have engaged in ongoing dialogues with officials in the national governments in order to ensure due process standards can be met in future trials. While the scope of this article does not permit a full discussion of the trials of national jurisdiction, it is important to note the extensive interaction between governments and Tribunal leadership. For a more thorough exploration of this topic, see Jennifer Landside, *supra* note 1.

77. Helfer & Slaughter, *supra* note 73, at 281.

78. STONE SWEET, *supra* note 8, at 3.

79. *Id.*; Caron, *International Courts and Tribunals*, *supra* note 9, at 412.

80. STONE SWEET, *supra* note 8, at 1.

It was the process of judicialization upon which the Security Council rested its hope to restore peace, stability and the rule of law to the former Yugoslavia and Rwanda. More precisely, the Council hoped to use the organs as a means of “social control” through which the rules of humanitarian law would operate.<sup>81</sup> This method of dispute resolution already “undercuts” independence, because the Tribunals “operate to impose outside interests on the parties.”<sup>82</sup> Indeed, according to Shapiro, the Tribunals were vulnerable at the outset, because their function placed them at the lowest ebb of social legitimacy as conflict resolvers—“deeply embedded in the general political machinery” of the United Nations.<sup>83</sup> Nevertheless, the Tribunals have exerted a tremendous influence on international criminal law, substantially delivering on the promise of judicialization. But the process is also a seductive and expansive affair; and though it began on paper, it cannot now be reduced to the constitutive documents that brought it about. As Stone Sweet contends, once the process of judicialization has begun, it is irreversible.<sup>84</sup>

The problem presented here is how to account for the vacuum left when the Tribunals close, leaving the community without a reference point for modeling their behavior. How will members of the community interact with the legacy of the Tribunals once they are closed? Does closure entirely efface the “bounded space” carved out by the Statutes? Thus, in moving to a discussion of the Completion Strategies, it is important to reiterate that, to the extent that the Completion Strategies take on the form of “mere executive orders,” they suggest a lack of integration into the organic process that the Tribunals triggered. The lack of integration, in turn, conjures up the illegitimacy arguments brought by Tadic and Kanyabashi. If the wide community, to which the Tribunals were originally presented as symbols, perceives the Completion Strategies as a top-down executive edict, allegations of illegitimacy are far more likely to resonate with significant and influential figures in the international legal community and beyond. Part IV will present the Completion Strategies in their current form,<sup>85</sup> while Part V returns to the central question of this article: do the Completion Strategies properly adjust for the judicialization that has taken place, or do they leave the Tribunals poised to be seized upon as symbols of illegitimacy?

#### IV. THE COMPLETION STRATEGIES

##### *A. Beginnings: A Quest for Efficiency*

It is beyond question that the International Criminal Tribunals must, one day, reach a definitive end. While the language of the Security Council resolu-

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81. SHAPIRO, *supra* note 8, at 37.

82. *Id.*

83. *Id.*

84. STONE SWEET, *supra* note 8, at 1.

85. Current through Nov. 2005.

tions establishing both Tribunals is markedly open-ended, the nature of the work undertaken, the *travaux préparatoires*, and implicit assumptions in the operative language of their Statutes all dictate the finite nature of the Tribunals.<sup>86</sup> However, the Completion Strategies emerged later, after the Tribunals had achieved remarkable milestones in the development of international criminal law,<sup>87</sup> and after time had obscured the horror of the events that spawned their creation.

While sources trace the origin of the Completion Strategies to different moments in the political dialogue between the Security Council and the ICTY President,<sup>88</sup> one significant aspect of the Completion Strategies is the very fact that they arose as a result of a politically charged dialogue among states and various U.N. institutions.<sup>89</sup> The public character of the Completion Strategies, like the Completion Strategies themselves, is without precedent.<sup>90</sup> In his first address to the press in January of 1999, for example, then-President of the ICTY Claude Jorda observed that “[t]he Tribunal [was] at a turning point in its history,” and the time had come to “question the productivity and efficiency of the Tribunal,” and to identify a “time-frame . . . for fulfilling its mission.”<sup>91</sup> President Jorda’s speech was self-consciously addressed to “the international community,”<sup>92</sup> and his remarks are representative of subsequent reports and press releases denoting the progress of the Tribunals in fulfilling the Completion Strategies.<sup>93</sup> An obvious and reasonable motivating concern behind the devel-

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86. See Raab, *supra* note 6, at 84. While Raab cites the drafting history of Resolution 808 as evidence of the Security Council’s intent to create a finite Tribunal for the Former Yugoslavia, *id.* at n.7, the language of both Statutes also implies the assumption that the Tribunals would hold finite mandates. For example, Resolution 827 created the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law.” S.C. Res. 827, *supra* note 17 (emphasis added). The ICTR Statute contains identical language, and both Tribunals exert bounded temporal and territorial jurisdiction under their Statutes. See *id.*; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

87. See, e.g., HUMAN RIGHTS WATCH, *supra* note 75.

88. The earliest such moment is Kofi Annan’s appointment of a group of experts in the late 1990s to study the efficiency of the Tribunals. Mundis, *Lessons from Nuremberg*, *supra* note 6, at 600. See also G.A. Res. 634, U.N. Doc. A/54/634 (Nov 22, 1999) (the resulting report on financing of the International Criminal Tribunals).

89. The political nature of international war crimes tribunals is undeniable. The fact that the Closing Strategies may arguably be traced to a budgetary study only emphasizes the respective bargaining positions of the Security Council and the Tribunals created by it. The International Criminal Tribunals are unique among international courts and tribunals in this sense because it is impossible to divorce their temporary existence from the political mechanisms that brought them into being. In short, there are no private parties with controlling interests to buffer the political element.

90. See Mundis, *Lessons from Nuremberg*, *supra* note 6, Part IV. “One of the big advantages of the Control Council Law No. 10 prosecutions stemmed from the availability of the IMT infrastructure, which facilitated the success of the follow-on trials. Similarly, [Telford] Taylor was successful in encouraging some of the IMT staff to remain in Nuremberg for the subsequent trials.” Mundis, *Lessons from Nuremberg*, *supra* note 6, at 614.

91. Press Release, <http://www.un.org/icty/pressreal/p466-e.htm> [hereinafter Jorda]. See also Press Release, H.E. Judge Claude Jorda, President, Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/pressreal/RAP000620e.htm> (last visited Nov. 2005).

92. *Id.*

93. An extensive compilation of annual reports and press releases can be found on both Tribunals’ web sites.

opment of the Completion Strategies, then, was the “price of international justice.”<sup>94</sup>

It is important to recognize that the public iterations of the Completion Strategies are substantially aimed at donor states, and that they express, at least in part, the promise of efficiency in return for continued financial support.<sup>95</sup> The potential deficit in judicial process that could result from placing political demands on the judicial systems in place has not gone unrecognized.<sup>96</sup> However, it is equally important to note that the Tribunals are creatures of international politics, and that their completion will be no less political than their creation. Any discussion of the Completion Strategies would be incomplete without acknowledging the extent to which judicial process and political influence shade together, and the beginnings of the strategies illustrate this point with considerable force.

### *B. Principle Components Framing the Completion Strategies*

#### *1. Security Council Resolutions 1503 and 1534*

The first definitive enumeration of the Completion Strategies appears in Security Council Resolution 1503 of August 28, 2003, ten years after the ICTY came into existence.<sup>97</sup> The preambular paragraphs affirm “in the strongest terms” the President of the Council’s endorsement of the ICTY’s Completion Strategy.<sup>98</sup> The Resolution goes on to set out the two most basic prongs of the Completion Strategies: (1) concentration on prosecuting and trying the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction, and (2) transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions.<sup>99</sup> Resolution 1503 goes on to urge the ICTR to “formalize a detailed strategy, modeled on the ICTY Completion Strategy.”<sup>100</sup> The Security Council also incorporated the formal deadlines proposed by the ICTY in its own Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts (ICTY Completion Strategy).<sup>101</sup> At the time, the ICTY “target dates”<sup>102</sup> pro-

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94. Jorda, *supra* note 91; *see also* Romano, *supra* note 60.

95. This is particularly true in light of the 2004 hiring freeze placed on the Tribunals by the Secretary-General.

96. *See, e.g.*, Prosecutor v. Milosevic, Case No. IT-02-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, ¶¶ 20-22 (Oct. 21, 2003), available at <http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm>; Mundis, *Judicial Effects*, *supra* note 6, at 147-59; Mundis, *Lessons from Nuremberg*, *supra* note 6 at 606 (discussing the amendments to ICTR and ICTY Rules of Procedure and Evidence made to facilitate the Completion Strategies); Johnson, *supra* note 6, at 158.

97. S.C. Res. 1503, Annex I, U.N. Doc. S/RES/1503/Annex I (Aug. 28, 2003).

98. *Id.*

99. *Id.*

100. *Id.*

101. The ICTY proposal was jointly prepared by the President, the Prosecutor and the Registrar of the ICTY and approved by the judges. S.C. Res. 678, U.N. Doc. S/2002/678 (June 17, 2002) (Letter from the Secretary-General to the President of the Security Council (June 17, 2002)).

jected that investigations would end by the end of 2004; first instance trial activity would cease by the end of 2008; and all work would conclude by 2010.<sup>103</sup>

The second major Security Council action in developing the Completion Strategies followed Resolution 1503 in close succession. In part as a response to the ICTY Prosecutor's October 2003 report on her intention to indict approximately 30 new defendants, the Security Council issued Resolution 1534 in March of 2004.<sup>104</sup> The principle operative clauses call for increased attention to the Completion Strategies by the Tribunal bodies, and closer monitoring by the Security Council of the progress.<sup>105</sup> First, Paragraph 5 emphasizes the substantive focus on high-ranking officials.<sup>106</sup> Here the Council formally called for a judicial check on the Prosecutor's power, a highly controversial demand that is further discussed in the next two sections. Second, Resolution 1534 calls for bi-annual reports from the President and Prosecutor of each Tribunal, "setting out in detail the progress made toward implementation of the Completion Strategy of the Tribunal."<sup>107</sup> Daryl A. Mundis, a prosecutor at the ICTY, posits that a report by the UN Office of Internal Oversight Services on the Office of the Prosecutors of the ICTY and ICTR may have spurred the Security Council to enact Paragraph 6 reporting requirements. The oversight report noted, *inter alia*, "that there was insufficient evidence to support the contentions that the completion strategy was on track to meet its target dates."<sup>108</sup> The reporting requirement thus implicitly confirms the end of an era: with a new report due every six months, the completion of work now commands the daily attention of the President and the Prosecutor of each Tribunal. A considerable portion of the administrative function of these leadership positions would now be devoted to the inexorable progression toward completion of work.

## 2. Amendment of Tribunal Rules

The latest Annual Report to the Security Council submitted by the ICTY references the amendment of Rule 98 *bis* of the Rules of Evidence and Procedure (RPE). The amendment, in an effort to increase the efficiency of the Tribunal at the trial level, permits oral arguments instead of written briefs in a mo-

102. "[T]he dates are 'target dates' or goals, not definitive decisions on when certain activities of the ICTY must cease." Johnson, *supra* note 6, at 160 (disputing David A. Mundis's assertion that the Security Council had "compell[ed]" the Tribunal to adhere to the deadlines); see Mundis, *Lessons from Nuremberg*, *supra* note 6.

103. S.C. Res. 1503, *supra* note 97; see also Raab, *supra* note 6, at 87.

104. See S.C. Res. 1534, U.N. Doc. S/Res/1534 (Mar. 26, 2004).

105. *Id.* §§ 5-6.

106. The paragraph "[c]alls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in Resolution 1503 (2003)." *Id.* § 5.

107. *Id.* § 6.

108. Mundis, *Judicial Effects*, *supra* note 6, at 145. See Review of the Office of the Prosecutor at the International Criminal Tribunal for Rwanda and for the Former Yugoslavia, G.A. Res. 677, Summary, ¶¶ 8-13, U.N. Doc. A/58/677 (Jan. 7, 2004).

tion for acquittal at the close of the Prosecutor's case.<sup>109</sup> The so-called "internal reforms"<sup>110</sup> to the ICTY trial process stemming from the Completion Strategies also include amendments to RPE 11 *bis* (permitting the transfer of cases to national jurisdiction) and RPE 28<sup>111</sup> (vetting of indictments to ensure only the most senior officials are charged in the Hague).<sup>112</sup> As of the August 2005 Annual Report, four Rule 11 *bis* motions, involving eight accused, were pending appeal,<sup>113</sup> and on September 29, 2005, Radovan Stankovic became the first ICTY indictee to be transferred to Sarajevo for trial by the War Crimes Chamber<sup>114</sup> of the Court of Bosnia and Herzegovina.<sup>115</sup> Therefore, the global Completion Strategies outlined in Resolutions 1503 and 1534 have already resulted in considerable secondary structural changes within the ICTY.

The ICTR judges also amended RPE 11 *bis* to permit the transfer of cases to national jurisdiction in accordance with the requirements of Resolution 1534.<sup>116</sup> However, the judges collectively declined to amend the Rules to allow the ICTY RPE 28 vetting procedure for authorizing indictments. The decision highlights the fact that amendments to the Rules of Procedure and Evidence of both Tribunals are promulgated by the judges themselves, although ostensibly the Security Council could amend both the Rules of Procedure and Evidence and the Statutes of the Tribunals.<sup>117</sup> Therefore a considerable margin of discretion

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109. Rule 98 *bis*, G.A. Res. 267, at 3, U.N. Doc. A/60/267 (Aug. 17, 2004) (now reading "[a]t the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction").

110. *Id.* at Summary, 3.

111. The vetting procedure was hotly contested by Prosecutor Del Ponte as yet another check on prosecutorial independence, this time placing her decisions under direct scrutiny by the judges who would decide the cases. See, e.g., RACHEL S. TAYLOR, INSTITUTE FOR WAR AND PEACE REPORTING, JUDGES CHANGE THE RULES (Apr. 16, 2004), <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/0416rules.htm> (last visited Dec. 22, 2005).

112. Rule 28(A), ICTY Rules of Evidence and Procedure (as amended July 2005), <http://www.un.org/icty/legaldoc-e/index.htm> (last visited Nov. 2005) (now providing that "[o]n receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor.")

113. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS ON THE IMPLEMENTATION OF THE "COMPLETION STRATEGY" OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1, <http://web.amnesty.org/library/print/ENGEUR050012005> (confirming that 10 cases, totaling 18 accused, had moved into the 11 *bis* pipeline).

114. For more in-depth analysis on the creation of the War Crimes Chamber in Sarajevo, see Mundis, *Lessons from Nuremberg*, *supra* note 6, at 607 *et seq.*

115. See Press Release, ICTY, Radovan Stankovic Transferred to Bosnia and Herzegovina (Sept. 29, 2005), <http://www.un.org/icty/pressreal/2005/p1008-e.htm> (last visited Nov. 2005).

116. ICTR Rules of Evidence and Procedure, *supra* note 112. Rule 11 *bis* was amended in the Twelfth Plenary Session of the Judges (July 5-6, 2002). *Id.*

117. "Asked whether the Prosecutor [Del Ponte], as announced earlier, had asked the President for clarification regarding the amendment to Rule 28 of the Rules of Procedure and Evidence,

exists in how the Completion Strategies will go forward at the Tribunal level, and how the Rules should or should not bend to increase the pace at which the Tribunals eliminate their dockets.

### C. Conflation

Commentators consistently overlook one striking feature of the Completion Strategies: they are remarkably similar in spite of substantial differences in the substantive international criminal law applied, the status of relations with relevant national governments, and the underlying conflicts.<sup>118</sup> The similarity was perhaps heralded by Resolution 1503 itself, which called upon the ICTR to model its strategy after the ICTY Completion Strategy as set forth in the 2002 ICTY Report on Judicial Status.<sup>119</sup> However, although practical concerns and force of habit undoubtedly bore on the adoption of a single template for closing both tribunals, the pattern suggests that the solutions adopted were inevitable, which is far from the case.

The fungible, transsubstantive character of the Completion Strategies also obscures the fact that actors within the institutions hold very different views on the advisability of some of the measures adopted, as well as the efficacy of the methods of implementation.<sup>120</sup> First, as noted above, the judges at the ICTR refused to establish the same vetting procedure in Rule 28(A) of the ICTY Rules of Procedure and Evidence.<sup>121</sup> Amending the ICTR Rules would have resulted in a significant judicial check on the Prosecutor's independence in the interest of ensuring that indictments comport with Resolutions 1503 and 1534. However, the ICTR judges felt "the amendments [to be] a violation of the Statute since they limit the independence of the prosecutor."<sup>122</sup> Given the concerns voiced by Judge Hunt in his dissents to Appeals Chamber decisions,<sup>123</sup> the fact that the ICTR judges declined to amend the RPE further demonstrates a lack of accord among judges as to the means of complying with the Completion Strategies.

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Ruch replied that the Prosecutor had indeed asked for a clarification and that she had received yesterday a personal letter from the President. Ruch said that the view of the Prosecutor and the view of the President were different. Her view was much closer to the view of the Judges of the ICTR, who had not amended Rule 28. The Prosecutor's feeling was that at the end of the day this would be an issue which had to be solved at the level of the Security Council. There was no other mechanism or procedure to deal with this matter." Press Release, ICTY Weekly Press Briefing Summary (Apr. 28, 2004), <http://www.un.org/icty/briefing/2004/PB040428.htm> (last visited Dec. 22, 2005).

118. To begin with, the genocide in Rwanda was a purely internal conflict, which limits substantively the international criminal law applicable. For a comprehensive account of the war crimes prosecuted by each Tribunal, including in-depth case law analysis, see HUMAN RIGHTS WATCH, *supra* note 75.

119. See S.C. Res. 1503, *supra* note 97; S.C. Res. 678, *supra* note 101.

120. The debate between Mundis and Johnson is representative. Mundis, *Judicial Effects*, *supra* note 6, at 147; Johnson, *supra* note 6, at 148; see also Milosevic, *supra* note 96, ¶¶ 20-22.

121. See Mundis, *Judicial Effects*, *supra* note 6, at 148; Mundis, *Lessons from Nuremberg*, *supra* note 6, at 612.

122. S.E. NEWS SERVICE EUROPE, *Good Enough for the Hague, not Good Enough for Arusha*, May 12, 2004, <http://www.sense-agency.com/portal/english/index.php?sta=3&pid=5201>.

123. Milosevic, *supra* note 96.

Second, the two Prosecutors have adopted opposite mechanisms for streamlining the trial process through new indictment policies, with ICTY Prosecutor Carla Del Ponte advocating multi-defendant cases and ICTR Prosecutor Hassan Jallow calling for severance and “trial readiness.”<sup>124</sup> On September 21, 2005, for example, Trial Chamber III of the ICTY granted the Prosecution’s motion to join six cases, including nine accused, under a single indictment.<sup>125</sup> The six cases all relate to atrocities inflicted upon Bosnian Muslims during their forced removal from the Srebrenica and Zepa enclaves in Eastern Bosnia in July 1995.<sup>126</sup> The Trial Chamber reasoned that the “megatrial”<sup>127</sup> would promote judicial economy by avoiding the need to revisit a common set of underlying facts.<sup>128</sup>

In stark contrast, it is the express policy of the ICTR Prosecutor’s office to abandon multi-accused trials, an approach that has led to lengthy delays in the past.<sup>129</sup> Prosecutor Jallow’s policy has already been reflected in the severance of André Rwamakuba<sup>130</sup> from the joint indictment of four accused in the Prosecution’s “Government I” case.<sup>131</sup> Instead of joining cases with similar factual underpinnings or common enterprises, Prosecutor Jallow intends to focus on honing indictment language to be as specific as possible to the alleged crimes of the accused, and on making sure that cases are discrete and “trial-ready” before indictments are signed.<sup>132</sup>

It is worthwhile to note that Resolution 1503, which first enunciated the Completion Strategy for the ICTY, also formally split the Office of the Prosecutor (OTP) of the two Tribunals, leading to the installation of Jallow as Prosecutor in Arusha.<sup>133</sup> Therefore, the occasionally lockstep attitude adopted by numerous actors and commentators is misleading, since the two Tribunals became more independent from each other even as the Security Council endorsed the joint Completion Strategies. Of course, as discussed above in Part II, the decision to end Carla del Ponte’s mandate in Arusha provoked a flurry of criticism that the Security Council had encroached upon her prosecutorial discretion to

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124. Author’s notes from ICTR Office of the Prosecutor intern meeting with Chief Prosecutor Jallow, July 21, 2005 (on file with author) [hereinafter Author’s notes].

125. See Press Release, ICTY, Nine Accused Charged Jointly for Crimes Committed in Srebrenica and Zepa, <http://www.un.org/icty/pressreal/2005/p1005-e.htm> (last visited Nov. 2005).

126. *Id.*

127. See COALITION FOR INT’L JUSTICE, REPORT ON PROSECUTOR CARLA DEL PONTE’S “MEGA TRIAL STRATEGY”: ICTY PRESIDENT TO UN SECURITY COUNCIL—TRIALS SHOULD FINISH BY 2009 IF ALL RULE 11 BIS MOTIONS GRANTED, ALL JOINDERS ALLOWED AND NO NEW ARRIVALS; PROSECUTOR: FUGITIVES—“MOST SERIOUS OBSTACLE,” <http://www.cij.org/index.cfm?fuseaction=viewReport&reportID=690&tribunalID=1> (last visited Nov. 2005).

128. *Id.*

129. See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T (Mar., 2, 2001) (the largest trial with six accused) [hereinafter *Nyiramasuhuko*].

130. See *Prosecutor v. Karamera et al.*, Case No. 98-44-TS, Decision On Severance of André Rwamakuba and for Leave to File Amended Indictment, (Feb. 14, 2005), available at <http://www.ictor.org/ENGLISH/cases/Rwamakuba/index.htm>.

131. *Id.*

132. Author’s notes, *supra* note 124.

133. S.C. Res. 1503, *supra* note 97.

investigate the activities of the RPF during the genocide in Rwanda.<sup>134</sup> Thus, Resolution 1503 stands as an especially bold interference by the Security Council, not only for its imposition of the Completion Strategies as such, but also for the politically charged decision to remove Del Ponte from her position in Arusha.

In sum, the Completion Strategies hold three general elements in common. First, the OTP and the Chambers must work in concert to limit indictments to the highest-ranking officials with the most responsibility. Second, the groundwork must be laid so that cases involving lower-ranked officials are successfully transferred to national jurisdictions capable of trying these accused in accordance with principles of international criminal law. Third, the Tribunals must make every effort to complete their work by the slated deadlines. However, further conflation of the two strategies runs the risk of overlooking key differences in how the actors within these institutions seek to preserve prosecutorial independence and judicial deference, and uphold the rights of the accused, all in the face of (actual or perceived) political pressure to end their mandate.

#### *D. The Role of Deadlines*

Unlike the Nuremberg process,<sup>135</sup> the International Criminal Tribunals are subject to express, highly publicized<sup>136</sup> deadlines for the completion of all work, whereupon the Tribunals will cease to exist, leaving the remainder of prosecutable war crimes in the hands of national judicial systems. The unprecedented use of deadlines for closing a war crimes tribunal has gone largely unacknowledged by commentators. Authors do, however, consider the meaning of the deadlines from a practitioner's point of view. Larry D. Johnson, Chef de Cabinet of the Office of the President of the ICTY, argues that "from the legal point of view, the [Security] Council did not decide that the Tribunal must complete all activities in 2010, but that it should do so."<sup>137</sup> But commentators and judges alike dispute this distinction between "must" and "should" as nothing more than semantics in practical application.<sup>138</sup> Moreover, whether target dates or deadlines, the numbers are easily appropriated by the press and have come to embody a significant component in the collective international understanding of

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134. Husketh, *supra* note 20., ¶¶ 76 *et seq.*

135. See Mundis, *Lessons from Nuremberg*, *supra* note 6, at 614.

136. See, e.g., Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, Address (Oct. 10, 2005), <http://www.un.org/icty/pressreal/2005/Meron-ga-10-10-2005.htm> (last visited Dec. 22, 2005); Carla del Ponte, Address (June 30, 2004), <http://www.npwj.org/?q=node/1754> (last visited Dec. 22, 2005). A complete compendium of Annual Reports and Press Releases is also available on both Tribunal web sites.

137. Johnson, *supra* note 6, at 160.

138. Johnson, *supra* note 6, at 174. Johnson is directly addressing Daryl Mundis's position with respect to the judicial effects of the deadlines established in Resolution 1503. See Mundis, *Judicial Effects*, *supra* note 6, at 158. Johnson also dismisses as "groundless" Appeals Judge Hunt's concerns regarding diminished procedural fairness for the accused. Johnson, *supra* note 6, at 174. See also Milosevic, *supra* note 96.

the Tribunals as *temporary*. For instance, Richard Prosper, the U.S. ambassador-at-large for war crimes issues, openly deemed the completion of work at the International Criminal Tribunals a challenge to “reach the finish line.”<sup>139</sup>

Statements such as Prosper’s suggest that the deadlines in Resolution 1503 will comprise a significant factor in assessing the overall effectiveness of the Tribunals over the long term. According to Prosper’s logic, the Tribunals should be commended if (and maybe only if) they “finish” on time. This is precisely what Appeals Judge Hunt warns in his *Milosevic* and *Nyiramasuhuko* dissents.<sup>140</sup> Judge Hunt’s dissents, interestingly, dispute propositions not entirely present in the language of the relevant majority opinion.<sup>141</sup> This may indicate that his concerns voice a more generalized opposition to the deadline-intensive approach underlying the Completion Strategies as a whole.<sup>142</sup>

Finally, neither the Security Council nor the Tribunal leadership clearly relates the “judicial economy” concerns to the substantive mandates set out in the Tribunal Statutes. In fact, the legal character of the Completion Strategies, or any one component thereof, is ambiguous at best, and is rendered more so by the different implementation mechanisms adopted by the two Tribunals. If the Tribunals “reach the finish line” behind schedule, how does this failure relate to the substance of the work mandated in the respective Statutes?<sup>143</sup> Without an un-

139. Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at OSCE Conference in Belgrade, War Crimes and State Responsibility for Justice (June 15, 2002), <http://belgrade.usembassy.gov/press/2002/020615.html>.

140. *Milosevic*, *supra* note 96, ¶¶ 20-22; *Prosecutor v. Nyiramasuhuko et al. Decision re Proceedings Under Rule 15 bis(D)*, No. ICTR-98-42-A15bis (Sept. 30, 2003), Dissenting Opinion of Judge David Hunt, ¶¶ 17, 36 [hereinafter *Nyiramasuhuko 15 bis*].

141. Mundis points out that “[w]hile the term ‘completion strategy’ is not employed in the appeals chamber’s decision, the majority does discuss policy considerations, including the ‘economic management of criminal trials before the Tribunal.’” Mundis, *Judicial Effects*, *supra* note 6, at 156. See also *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.4, Appeal Decision on Admissibility of Written Statements ¶ 21 (Sept. 30, 2003).

142. See, e.g., AMNESTY INTERNATIONAL, *supra* note 113; HUMAN RIGHTS WATCH, A LETTER TO THE U.N. SECURITY COUNCIL: “DEADLINES FOR THE TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA MUST BE FLEXIBLE” (June 24, 2004), <http://hrw.org/english/docs/2004/06/28/rwanda8970.htm> (last visited Dec. 22, 2005).

143. Two further important points regarding deadlines should be included here. First, both Tribunals faced an additional challenge in the May 2004 hiring freeze, imposed by the Secretary-General. In the words of President Meron (ICTY) before the Security Council: “[t]he freeze is beginning to have a devastating effect on the Tribunal . . . [T]he perceived lack of support from the international community cannot help but influence staff morale and motivation. We are striving hard to do more with less, but we can only redistribute workloads for so long. Inevitably the hiring freeze will cripple our ability to operate efficiently and to fulfill the goals of the completion strategy. As an institution with only a limited mandate and an impermanent duration, we already face difficulties in recruiting and retaining talented staff members who are attracted, naturally, to more permanent employment, with greater opportunities for advancement, at other institutions. This intrinsic disadvantage, coupled with the hiring freeze, poses a serious threat to our completion goals.” Address of Judge Theodor Meron, President of the International Criminal Tribunal For the Former Yugoslavia to the United Nations General Assembly (Nov. 15, 2004), <http://www.un.org/icty/pressreal/2004/p912-e.htm> (last visited Dec. 22, 2005). Second, and related, is the fact that the ICTY has already pushed back the projected deadline of 2008 to 2009. In its Resolution 1534 Report to the Security Council for May 2005, the ICTY leadership listed several factors bearing on the “recapitulation” of the deadline, as well as pausing to point out the “uncertain and tentative nature of

derstanding of the legal weight of the deadlines in relation to the Statutes, allegations of illegitimacy lodged against the Tribunals might acquire further resonance as the deadlines of the Completion Strategies approach. This is particularly true where the Completion Strategies appear to downplay the “promises”<sup>144</sup> extended not only in the lofty mandates set out for the Tribunals, but also in the rhetoric that the Council itself espoused at the moment of creation.

Whether or not the deadlines are distinguishable from “target dates,” the impact of the dates will be felt after, as much as during, the proceedings in The Hague and Arusha. Both Johnson and Mundis agree, after all, that “treating the target dates mechanistically” could warp the process envisioned in the Tribunal Statutes, resulting in a failure of due process and prosecutorial independence, or, worse still, outright impunity.<sup>145</sup> However, this article is concerned with the consequences of identifying a “finish line” from a different perspective. Part V will explore the impact of the Completion Strategies on the work of the Tribunals, where that work is conceived of as a process rather than a terminable docket.

## V.

### CLOSING THE TRIBUNALS: STRATEGY OR PROCESS?

#### A. *In Search of an Adequate Analytical Framework*

Now that the Tribunal leadership has responded to the Security Council’s calls for formal strategies, the question remains: do the Completion Strategies, in form and in substance, appropriately adjust for the vacuum that will be left when the bounded space carved out by the Tribunals no longer exists?

In an effort to identify an analytical framework for understanding the potential effects of the Completion Strategies, Part V begins by surveying several theories addressing international courts and tribunals generally. This exercise is meant to demonstrate the difficulty of separating the “strategy” involved in closing the Tribunals from the “process” described in Parts II and III. The first section of Part V is also intended to stimulate further integration of the *Ad Hoc* Criminal Tribunals into generalized theories about the existence and character of an international judicial system, and the role of independence and effectiveness as tools for understanding courts and tribunals as a social phenomenon.

One reality that cannot go unrecognized is certainly cost. Cesare Romano’s discussion of the price of international justice brings home the drain that the Tribunals have exerted on UN coffers.<sup>146</sup> In this sense, part of the life span of a

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any estimated final date.” *Meron*, *supra* note 5, ¶ 29.

144. Caron, *Legitimacy*, *supra* note 32, at 560.

145. Johnson, *supra* note 6, at 174; *see also* Mundis, *Judicial Effects*, *supra* note 6, at 157-58.

146. Romano, *supra* note 60; *see also* Husketh, *supra* note 20, ¶¶ 4-6 (citing, *inter alia*, the fact that as of 2003, the ICTR on average resolved two cases per year). Husketh goes on to point out

temporary tribunal is devoted not to the resolution of the disputes or atrocities that gave rise to its mandate, but rather to the cost-effective resolution of its need to exist. Therefore, an important distinction must be drawn between permanent international tribunals and *ad hoc* tribunals with a very limited mandate, both temporally and substantively. These temporary institutions require resources comparable to a permanent institution, both financial and personnel, but their longevity is inescapably bound to the narrow focus of their jurisdiction.

At a certain point, the supranational interests bearing down on the Tribunals shifted from the creation of a mandate to the push for a closing strategy. The dialogue among actors has notably shifted as well. The “closing phase,” as Prosecutor Jallow has called it,<sup>147</sup> cannot help but distract high-ranking administrative and judicial actors from the substance of the Tribunal Statute.<sup>148</sup> The Completion Strategies have worked themselves into the daily judicial proceedings of the Tribunals,<sup>149</sup> and though they grew out of a separate process of “rulemaking,”<sup>150</sup> the Completion Strategies operate alongside the body of substantive law applied in the cases. Similarly, the Tribunals themselves are not divorced from the culture of judicial dialogue<sup>151</sup> simply because they have entered the “closing phase.” Rather, the strategies adopted by the OTP in Arusha (narrowing of targeted accused, creating an *ad litem* judge pool and streamlining the indictment process),<sup>152</sup> may now be dislodged from the ICTR context and put into place in future *ad hoc* tribunals for their entire life span.<sup>153</sup> As a result, untangling the strategy for completion from the judicial function of the Tribunals becomes increasingly difficult in the “closing phase.”

As stated above in Part IV, scholars fervently debate what actually constitutes a judicial system, particularly in relation to the potential effectiveness of international justice.<sup>154</sup> The debate over the need for an international judicial system between Eric Posner and John Yoo (largely rejecting the premise that an international system exists),<sup>155</sup> and Anne-Marie Slaughter and Laurence Helfer

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“that the legal work of the tribunal carries a massive burden of human suffering. The resulting emotional charge should not be overlooked because . . . the Tribunal cannot and does not operate in a vacuum.” *Id.* ¶ 4.

147. Author’s notes, *supra* note 124.

148. See, e.g., Nyiramasuhuko 15 *bis*, *supra* note 140, ¶¶ 17, 36; Milosevic, *supra* note 96, ¶¶ 20-22.

149. This is particularly true now that the Chambers are hearing 11 *bis* motions to transfer cases to national courts. See, e.g., Prosecutor v. Mejkic et al., Case No. 9 IT-02-65-PT, Transcript of Motions Hearing (Mar. 3, 2005), available at <http://www.un.org/icty/transe65/050303MH.htm> (discussing the role that the Completion Strategies should play in the Chamber’s decisionmaking process) (last visited Dec. 22, 2005).

150. See description of the composite framework of the Completion Strategies, *supra* Part III.B.

151. See generally Martinez, *supra* note 2 at 429, 437; see also Helfer & Slaughter, *supra* note 73, at 277

152. See Author’s Notes, *supra* note 124, describing Prosecutor Jallow’s remarks on the OTP strategy.

153. *Id.*

154. See Posner & Yoo, *Judicial Independence*, *supra* note 73, at 5-6.

155. *Id.*

(heralding the rise of “supranational adjudication”),<sup>156</sup> bears relevance in assessing the wisdom of the Completion Strategies, as well as the implications they might have when viewed as precedent. The Tribunals stand at an uncertain crossroads between the two sides of the debate. They have often been touted as a stepping stone along the way to a system of individual responsibility for international crimes, and yet they suffer from a debilitating dependency on the Security Council and have weathered staggering bouts of inefficiency throughout their lifetimes. In short, the literature in this area does not define effectiveness<sup>157</sup> in a way that is helpful for understanding the possible ramifications of the Completion Strategies. It is submitted here that placing an emphasis on effectiveness in the context of temporary tribunals invites too much focus on deadlines, which is the most obvious way to test whether or not the Tribunals are “on track.” In other words, with the Completion Strategy implementation in full swing, the question of effectiveness may boil down to one of sheer efficiency: whether or not the Tribunals can complete their mandates within an arbitrarily selected time frame. Considering the substance of the task at hand, this hardly seems like an adequate criterion for determining effectiveness.

Moreover, while the relationship between effectiveness and legitimacy is far from clear,<sup>158</sup> assessing the work of the Tribunals from the limited perspective of effectiveness could amplify the resonance of illegitimacy allegations if the Tribunals operate past the deadlines.<sup>159</sup> This potentially problematic relationship between effectiveness and legitimacy holds regardless of the function of the Tribunals. That is, allegations of illegitimacy will resonate more strongly whether the functions are tied to the fate of Rwanda and the former Yugoslavia, the development of a system of supranational criminal justice, or the ability of the United Nations to address threats to international peace and security.

The same authors also debate the role of judicial independence with respect to the effectiveness of international dispute resolution.<sup>160</sup> The Tribunals do not fit neatly into this discussion when one considers the criteria for independence asserted on both sides.<sup>161</sup> Certainly the Chambers operate independ-

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156. Helfer & Slaughter, *supra* note 73, at 276.

157. See Posner & Yoo, *Judicial Independence*, *supra* note 73, at 28-29 (defining effectiveness as measured by compliance with decisions and frequency of use); Helfer & Slaughter, *supra* note 73, at 283 (defining effectiveness as “the power of a court to compel parties to appear before it and to comply with its judgment”). The coercive powers of the Security Council render this discussion somewhat moot when read too narrowly. This stems from the limited exploration by both sets of authors into the structural distinctions within different international courts and tribunals, especially the differences between civil and criminal adjudication. See also Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

158. See Caron, *Legitimacy*, *supra* note 32, at 558.

159. *Id.*

160. *Id.*; Posner & Yoo, *Judicial Independence*, *supra* note 73, at 3, 12. See also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 901 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 958 (2005) [hereinafter Posner & Yoo, *Reply*].

161. Both sets of authors focus their analysis on either permanent courts and tribunals or private arbitration, neither of which clearly captures the unique set of actors and roles involved in

ent of the OTP and the Registry in both the ICTR and ICTY: all judges, including *ad litem* judges,<sup>162</sup> are appointed by the General Assembly, for example. However, as a component of a temporary tribunal, the judicial role also bears some of the characteristics common to dependent arbitrators. A prime example is the sometimes tortured relationship between the General Assembly Advisory Committee on Administrative and Budgetary Questions (ACABQ), the Security Council and the Tribunal organs (see discussion *supra* in Part II regarding the creation and structure of the Tribunals). Furthermore, Rwanda itself requested (and then voted against) the creation of an international tribunal in order to aid in its recovery from the genocide.<sup>163</sup> Political motives for making this request, as well as the political decisions that honored it, whether base or high-minded, helped to bring about the very existence of the ICTR. Viewed in this sense, the ICTR is more like a “problem-solving device” at the disposal of the state.<sup>164</sup>

Finally, the special case of the Tribunals reveals another weakness in the literature with respect to effectiveness and independence in an international judicial system (regardless of whether that system is coherent or interstitial). The Prosecutors play a vital role in determining and implementing the mechanism for bringing the Tribunals to a close.<sup>165</sup> No counterpart to the criminal prosecutor exists in the commercial arbitration setting, or even in the field of international human rights litigation. However, commentators do not always account for the vast distinctions in the roles played by actors in a given system, distinctions that are based purely on the substance of the dispute.

The effectiveness debate also overlooks the need to “complete” non-related functions—functions that attach themselves to the Tribunal as a seat of international judicial process. Non-related functions of international courts and tribunals,<sup>166</sup> as this article has argued, can be pivotal in their creation and daily operation.<sup>167</sup> Posner and Yoo do acknowledge that a “possible answer” to the question of why states comply with decisions of international tribunals is that “states think there are valuable symbolic reasons for setting up tribunals that look like independent courts, and that by doing so they increase their prestige.”<sup>168</sup> This glance at the possible symbolic function of international courts and tribunals glosses over the dynamic process of reckoning with the unspeakable horrors of genocide and ethnic cleansing. In sum, because the literature

international criminal legal practice. Furthermore, as David Caron points out, both sides of the debate envision static institutions with clear, identifiable and constant functions with respect to the parties that turn to them. Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

162. See S.C. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000) (establishing an *ad litem* judge pool and amending statutes).

163. See Letter dated 94/09/28 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/1115 (Sept. 29, 1994),

164. *Id.* at 6.

165. See *supra* Part II, especially note 20 (discussing the problematic bundle of relations between the Prosecutor, the Security Council, the judges and the namesake states).

166. See Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

167. See *supra* Part II.

168. Posner & Yoo, *Reply*, *supra* note 159, at 970.

tends to homogenize tribunals in search of a general theory of “effective” international adjudication, the functions of tribunals are limited to their narrow, scripted renditions on paper, rather than their organic, process-driven manifestations in practice.

*B. The Closing Process and Legacy: Non-Related Functions Revisited*

This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.<sup>169</sup> - *Judge David Hunt*

Today, “Nuremberg” is both what actually happened there and what people think happened, and the second is more important than the first . . . it is not the bare record but the ethos of Nuremberg that we must reckon with today.<sup>170</sup> - *Telford Taylor*

Understood as part of a process, rather than as a separate “strategy” (as the rhetoric of Security Council Resolutions conceptualizes them), the Completion Strategies actually articulate what might otherwise happen through the judicial workings of the Tribunals alone. The Completion Strategies understood as policy directives emanating from the Security Council and the General Assembly, on the other hand, threaten to accelerate the judicial work of the Tribunals to such an extent that the process becomes unrecognizable, and the *function* of the Tribunals becomes *to close down*. This risk is only apparent when the Tribunals are understood as organic “bounded strategic spaces,”<sup>171</sup> sites where a wide variety of actors participate in an international legal process.<sup>172</sup>

This participation is linked to the symbolic, “non-related functions” of the Tribunals identified in Parts II and III. To summarize, Shapiro stresses that courts can behave in significantly uncourtlike ways, particularly in the performance of various “social control functions.”<sup>173</sup> These, non-related, not strictly judicial functions allow organs like the Security Council or, more traditionally, domestic executive and legislative bodies, to “rule *through* law.”<sup>174</sup> Norms become entrenched, and actors come instinctively to obey them, through repeated participation, or “cycle[s] of interaction, interpretation, and internalization” fostered by international institutions like the Tribunals.<sup>175</sup> The internalization of norms, in turn, can be traced to a community-wide process of judicialization.<sup>176</sup> The Security Council seized upon this non-related function at the moment of creation.<sup>177</sup> The very existence of an international criminal tribunal was in-

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169. Milosevic, *supra* note 96, ¶ 22.

170. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 13-14 (1970).

171. Caron, *International Courts and Tribunals*, *supra* note 9, at 402.

172. See generally Koh, *Transnational Legal Process*, *supra* note 7, at 183-94 (presenting a cogent overview of the evolution of legal process scholarship).

173. SHAPIRO, *supra* note 8, at 17.

174. Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

175. Koh, *Transnational Legal Process*, *supra* note 7, at 2655.

176. STONE SWEET, *supra* note 8, at 19.

177. See *supra* Part II.

tended as a signal for would-be transgressors to abandon their illegal methods.<sup>178</sup>

Yet the Completion Strategies could easily be perceived by these same actors as the product of the Security Council clamoring to abandon its own attempts to rule through law. Indeed, the Completion Strategies could be perceived as cashing out on the social control function of courts and tribunals altogether—particularly considering the extent to which they emphasize the practicalities of budgetary constraints, the jurisdictional limitations, and lack of independence written into the structure of the Tribunals. As one critic puts it: “It was not supposed to be this way. In 1993 the UN created [the Tribunals] . . . to revive the Nuremberg process, and once again world leaders promised the start of a new age of accountability.”<sup>179</sup> Amnesty International charges that the Completion Strategies appear to be “mostly dictated by financial constraint influenced by a changing geopolitical setting, where countries of the former Yugoslavia have become less of a priority in the international scene.”<sup>180</sup>

It can hardly be asserted, however, that the Security Council has entirely abandoned its interest in providing the international community with a symbol to ward off future manifestations of the inhumanity inflicted in Rwanda and the former Yugoslavia. On the other hand, now that over a decade has passed since the Tribunals were created, the non-related function of symbolic imagery has, to some degree, “dissipated,”<sup>181</sup> and the Completion Strategies reflect a shift in the political conception of the Tribunals. The direct link between the General Assembly and the Tribunal budgets (coupled with waning political will to fund the Tribunals), the need for restorative justice in other regions of the world, and the development of a permanent International Criminal Court (ICC) are among the many factors that have placed increased emphasis on closing the Tribunals. This emphasis, in turn, necessarily overshadows the image of international support and justice so universally valued in the decision to invoke international process.

The problem, however, is not the simple fact that such allegations are lodged against the Tribunals generally, or the Completion Strategies as a particular method of closure. Instead, the problem is more cogently conceived as a question of the degree to which criticisms will resonate with those to whom promises were made.<sup>182</sup> The striking discrepancy between the early promises in Security Council rhetoric, described in Part II, and the detached tenor of Resolutions 1503 and 1534 leaves ample room for perceptions of betrayal to multiply.

Moreover, closing the Tribunals will freeze the image they are capable of providing. While the Tribunals were always temporary, only upon closing will

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178. See 2 MORRIS & SCHARF, *supra* note 11, at 298-310; see also Scharf, *supra* note 12, at 928.

179. *Pressures on Hague court undermining its work*, THE IRISH TIMES, Nov. 21, 2005, at 13.

180. AMNESTY INTERNATIONAL, *supra* note 113.

181. See Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

182. See Caron, *Legitimacy*, *supra* note 32, at 560.

they become finite as operating seats of international justice. The Completion Strategies inevitably form an intricate part of that finite symbol. It is this role of the Completion Strategies that has not received great attention from political actors and commentators alike. Because they have taken shape as “mere executive orders,”<sup>183</sup> the Completion Strategies exist as a thing apart from the judicial work of the Tribunals.<sup>184</sup> The lack of integration between the social control or judicialization function of the Tribunals and the Completion Strategies may prove problematic in establishing a positive symbolic “ethos,” to borrow Telford Taylor’s term, that will be true to the loftier purposes for which they were created.

Irrespective of the role that the Completion Strategies will play in the ultimate legacy of the Tribunals, the very prospect of closing down means an end to the participatory utility of the Tribunals as a mechanism for encouraging the internalization of international norms.<sup>185</sup> Put another way, the “social control function” of the Tribunals terminates with the judicial function.<sup>186</sup> Viewing the Tribunals as webs of interaction rather than static institutions brings home the myriad effects of extricating these living, functioning institutions from the political and social networks into which they have become embedded.

The spokesman and Legal Advisor to the ICTR has expressed some of the concerns explored in this article in the context of a plea for continued media support for the Tribunals:

In a world in which imagery is having an increasingly important influence in international relations, perceptions—whether created by the media or other actors—determine to a large extent the importance or relevance of global issues and activities. New dimensions of international relations such as international criminal justice are no exception to the reality of the power and influence of imagery. . . . The impact of the tribunals beyond the forensic combat of the courtroom . . . is just as important as what happens in their courtrooms.<sup>187</sup>

The leadership of the Tribunals and the Security Council have developed and elaborated the Completion Strategies in a transparent, public manner, and this method is to be commended to the extent that it prepares the relevant communities in Rwanda and the former Yugoslavia for the next phase in their quest for transition and reconciliation. However, the cognizance of perception stops there. Because the Security Council has chosen to adopt official Completion Strategies insensitive to the non-related functions that the Tribunals have performed throughout their existence, closure will especially threaten the legacy or

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183. Tadic, *supra* note 29, ¶ 43.

184. Of course, to the extent that certain structural changes have been incorporated into the Rules of Procedure and Evidence and the Statutes themselves, the legal character of the Completion Strategies has gelled, but these are only piecemeal amendments meant to facilitate some aspects of the strategies, rather than systematic implementation measures.

185. See Koh, *Nations Obey*, *supra* note 67, at 2656.

186. See SHAPIRO, *supra* note 8, at 17.

187. Kingsley Chiedu Moghalu, *The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 22 (2002).

ethos of the Tribunals. As Parts II and III emphasized, the *Tadic* and *Kanyabashi* challenges to the legitimacy of the Tribunals could find new and amplified resonance if the Security Council inserts itself too far into the closure process. This risk can only be fully understood when the current formulation of the strategies is projected forward to 2010, or 2009, when the deadlines take on a reality that has not quite set in, perhaps, in the public mind. Imagery is a delicate and fickle thing, and symbols can rapidly take on new meaning in the eyes of the perceiver. There is room in the process of closing a tribunal to venerate the ethos crystallized through its operation. The Completion Strategies, to the extent they have taken shape in response to politically charged directives from the Security Council, have failed to seize on this moment.

## VI.

### CONCLUSION: TOO MUCH FINALITY, TOO SOON?

#### *Interesse rei publicae ut sit finis litium.*

The public interest requires that there be an end to disputes. This adage cuts both ways in the world of transitional justice—because the dispute itself, inevitably, shoulders the weighty burden of reconciliation. In other words, the trials in The Hague and Arusha are meant to symbolize an end to disputes in and of themselves. Still, the Tribunals must eventually close their doors even to those who have shaped the bounded space they carved out in operation. The views expressed in this article are presented with the understanding that closure is not only necessary but also at least several years away. The Tribunals are now operating in their third mandate,<sup>188</sup> with a great deal of experience and valuable precedent—and many early stumbling blocks—behind them. Nor are the authors of the Completion Strategies blind to the legacy that the Tribunals will leave behind them. ICTR President Erik Møse recently announced that “the Registrar has set up a Legacy Committee, composed of representatives of all three branches of the Tribunal. In its report, the Committee will consider issues arising in connection with the completion of the ICTR’s work as well as the situation thereafter.”<sup>189</sup> Indeed, cause for optimism about the intentions and facility of Tribunal leadership is most certainly in order.

Nevertheless, this article has identified a potentially damaging weakness in the form and substance of the Completion Strategies as they exist today. The discrepancy between the promise of the Tribunals as powerful symbolic validations of international rules against war crimes and the current rhetoric of judicial efficiency under close Security Council scrutiny leaves too much space for a sense of betrayal to seep into the closure process. From their very creation as

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188. The third mandate will last from 2005-2008. For a breakdown of the achievements of the ICTR according to its four-year mandates, see Erik Møse, *Main Achievements of the ICTR*, 4 J. INT’L CRIM. JUST. 920, 920 (2005).

189. Interview with Judge Erik Møse, ICTR President, by the Hironelle News Agency (Oct. 29, 2005), <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2005/1029interview.htm> (last visited Dec. 22, 2005).

quasi-independent creatures under the Security Council's Chapter VII auspices, the Tribunals have faced an uphill battle against allegations of illegitimacy, and even illegality. Despite momentous progress, nothing has come to pass that sets the Tribunals above reproach for rendering too much finality, too soon. The price of international justice being what it is, the authors of the Completion Strategies would be wise to embrace, once again, the value of what the international community has purchased.

2006

## Behind the Scenes of Protocol No.14: Politics in Reforming the European Court of Human Rights

Christina G. Hioureas

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# Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights

By  
Christina G. Hioureas\*

## I. INTRODUCTION

It is well known that the European Court of Human Rights (“ECHR” or “the Court”) is facing an influx of individual applications, which has obstructed its complaint review procedure.<sup>1</sup> In fact, from 1993 to 1998, the number of applications filed for review increased by 465 percent, further adding to the case backlog.<sup>2</sup> Even worse, the Council of Europe projects that the Court’s caseload “would continue to rise sharply if no action were taken.”<sup>3</sup> Still more alarming is that, while the Court’s caseload continues to increase exponentially, only four-

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\* J.D. Candidate 2007, University of California, Berkeley School of Law (Boalt Hall); B.A., Political Science and Peace & Conflict Studies minor, University of California, Berkeley. Hioureas served as a Study Visitor at the European Court of Human Rights, where she assisted Judge Matti Pellonpaa with research. Special thanks goes to Mr. Jeroen Schokkenbroek, former Secretary to the Reflection Group and the Drafting Group of the Steering Committee, for his time and invaluable help with legislative history research. The author would also like to especially thank Judge Matti Pellonpaa, Professor David D. Caron, and Professor Bruce E. Cain for their help, guidance, and support. Also, Jill Heine, Legal Advisor to Amnesty International, and John Dalhuisen, Special Advisor to the Commissioner for Human Rights, for their time, assistance, and crucial feedback. Last, but not least, the author would like to thank Professor Eleni Hioureas and *Berkeley Journal of International Law* Associate Editor Armen Adzhemyan for their incredible attention to detail. The author and the editor blame each other for any errors.

1. See generally *The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?* Declaration adopted by the European Ministerial Conference on Human Rights, Rome, Nov. 2000, available at [http://www.coe.int/T/E/Human\\_rights/cddh/4\\_Other\\_activities/02\\_Rome\\_Ministerial\\_Conference/H-Conf%282000%29001%20E.asp](http://www.coe.int/T/E/Human_rights/cddh/4_Other_activities/02_Rome_Ministerial_Conference/H-Conf%282000%29001%20E.asp) [hereinafter *The European Convention on Human Rights at 50*]; also available at Directorate General of Human Rights, Council of Europe, F-67075 Strasbourg CEDEX; Strasbourg: Council of Europe, Human Rights Information Bulletin No. 50 35.

2. Cesare P.R. Romano, *The Price of International Justice*, 4 *LAW & PRACTICE OF INT’L COURTS AND TRIBUNALS* 281, 290 (2005).

3. *Explanatory Report to Protocol No. 14*, CETS 194 para. 13 (2004), available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> [hereinafter *Explanatory Report*].

ten percent of applications filed are found admissible.<sup>4</sup> Furthermore, of the four-ten percent admissible cases, sixty percent are regarding issues already decided by the Court, i.e. “repetitive cases.”<sup>5</sup> The Court is, therefore, spending a significant amount of time filtering out inadmissible cases and deciding repetitive cases, rather than determining new subject matter cases to further shape human rights law in Council of Europe Contracting States.

To address this concern, the Committee of Ministers appointed an Evaluation Group to research the problem, and thereafter appointed the Steering Committee for Human Rights (CDDH)<sup>6</sup> to draft a reform proposal to “assist the Court in carrying out its functions” and to reflect “on the various possibilities and options” to ensure “the effectiveness of the Court in the light of this new situation.”<sup>7</sup> Protocol No. 14 (“Protocol 14”) emerged from these discussions as the means of restructuring the Court’s process to “guarantee the [Court’s] long-term effectiveness”<sup>8</sup> so that it may continue serving its mission by playing a “pre-eminent role in protecting human rights in Europe.”<sup>9</sup>

In April 2003, the CDDH presented a package of reforms to the Committee of Ministers, including Protocol 14. The reform package addressed three main areas in need of reform: (1) preventing Member State violations and improving domestic remedies to reduce the number of cases in the first place; (2) facilitating more rapid filtering and applications processing, so as to quickly filter and dispose of repetitive filings; and (3) improving the Committee of Ministers’ role in enforcing and accelerating the execution of Court judgments to better ensure Contracting State compliance.<sup>10</sup> The CDDH characterized the three-pronged reform as essential because “only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court’s present overload.”<sup>11</sup>

More specifically, Protocol 14, once it enters into force, will improve the Court’s case filtering process by (1) establishing single-judge formations as opposed to three-judge panels, (2) expediting the process for reviewing “manifestly well-founded” repetitive cases by enabling a panel of three judges to review such cases rather than the Chamber of seven judges or the Grand Chamber of seventeen judges, and (3) adding a new admissibility criterion for applications filed by individuals to raise the bar for admissibility.<sup>12</sup>

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4. *Id.* para. 7. The *Explanatory Report* states that more than 90% of the applications filed are declared inadmissible and in 2003, 96% of the applications filed were disposed of; thus 4-10% of applications are admissible.

5. *Id.*

6. Comité Directeur pour les Droits de l’Homme (CDDH).

7. *The European Convention on Human Rights at 50, supra* note 1, para. 3.

8. *Explanatory Report, supra* note 3, para. 2.

9. *Id.*

10. *Id.* para. 26.

11. *Id.* para. 14.

12. Council of Ministers, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, CETS 194 (May 13, 2004), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>, art. 4

Additionally, the Protocol will (4) alter judges' terms of office (5) change the procedure for appointing ad hoc judges, (6) expressly give the Commissioner for Human Rights' a role in the Convention, and (7) enable the European Union (EU) to become a party to the Convention.<sup>13</sup> But there has been significant criticism of the reform, mainly focused on the new admissibility criterion's effect on the ECHR's mission and effectiveness.<sup>14</sup>

The root of this debate is centered on determining and shaping the Court's mission and function to preserve the Court in the long-term. The parties are all concerned with the Court's future, but differ in their interpretation of the appropriate means for reforming the Court. One perspective, mainly that of the Committee of Ministers<sup>15</sup> and the ECHR judges,<sup>16</sup> is that the Court should serve as a quasi-Constitutional court and still promote individual justice for human rights violations.<sup>17</sup> From another perspective, mainly that of non-governmental organizations ("NGOs"), the Parliamentary Assembly and a few Contracting States,<sup>18</sup> the Court should function to promote individual justice.<sup>19</sup> Therefore, all individuals should have the right to access the Court because it provides redress for individuals whose rights have been violated and whose states have

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(changing art. 25 of the Convention), art. 8 (changing art. 28 of the Convention), art. 12 (changing art. 35 of the Convention) [hereinafter *Protocol 14*].

13. *Id.* art. 2 (changing art. 23 of the Convention), art. 6 (changing art. 27 of the Convention).

14. See Press Release, Amnesty International, European Court on Human Rights: Imminent reforms must not obstruct individuals' redress for human rights violations, AI Index: IOR 30/012/2004, Apr. 24, 2004 (expressing Amnesty's opposition to the new admissibility requirement); Steven Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, P.L. 2003, 663-73 (outlining the debate over the effect of the new admissibility criterion on the Court's mission); Marie-Aude Beernaert, *Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, 5 E.H.R.L.R. 2004, 544-57 (identifying the negative ramifications of the admissibility criterion on the Court's mission); Paul Mahoney, *An Insider's View of the Reform Debate*, 29 NJCM-BULLETIN 171, 175 (2004) (writing independently on his views of the debate over Court mission); Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?* 23 H.R.L.J. 161, 63 (2002) (outlining the pressing need for court reform); Amnesty International, *Joint Response to the Proposals to Ensure the Future Effectives of the European Court of Human Rights*, (Dec. 1, 2003), AI Index: IOR 61/008/2003 (expressing NGO joint opposition to the new admissibility criterion) [hereinafter *Joint Response*].

15. For the purpose of this paper, the Committee of Ministers' view is identified as the collective view of at least 2/3 of the Contracting States Ministers. Also, it should be noted that the Committee's primary goal was to ensure the Court's long-term effectiveness, but it did not promote a particular means until it received suggestions from the CDDH.

16. It should be noted that although the Court "broadly welcomed the reform," judges had different individual opinions on each reform that they did not make public. See generally European Court of Human Rights, *Position paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003*, CDDH (2003) 006 final (the Position Paper was unanimously adopted by the Court at its 43rd Plenary Administrative Session on Sept. 12, 2003) [hereinafter *Position Paper*].

17. Steven Greer, *Protocol 14 and the Future of the European Court of Human Rights*, P.L. 2005, SPR, 83-106, 94-106.

18. Austria, Belgium, Finland, Hungary, Latvia and Luxembourg; see Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 6 H.R.L.R. (forthcoming Apr. 2006) (manuscript at 6, on file with author).

19. Greer, *supra* note 17, at 94-106, *Joint Response, supra* note 14, para. 2.

failed to provide an effective remedy.

These conflicting interpretations of the Court's mission and function are reflected in the struggle over amending the Protocol draft. During the drafting process, the Committee of Ministers, Parliamentary Assembly, Contracting States, ECHR Judges and Court Registry, as well as the Commissioner for Human Rights and NGOs/Special Interest Groups, aimed to influence and shape the Court in light of their interpretation of the Court's function.

This paper will serve as an examination of the CDDH's decision-making process regarding the final draft of Protocol 14. To explain the dynamics of decision-making amongst these actors, I will turn to David Caron's theory of "bounded strategic space"<sup>20</sup> to determine which political actors had the greatest influence in drafting the Protocol and how this will affect the Court's mission and effectiveness. I will apply Caron's theory because it serves as a useful heuristic for reviewing the dynamics of institutional change, particularly regarding international tribunals.

Caron defines "bounded strategic space" as a set institutional design in which: "(1) a strategic space is bounded (defined) by the constituent instrument that creates the [International Court and Tribunal], (2) the strategic space consists of the basic structure (DNA) of the institution, the content and size of the docket, and the resources available to the institution, and (3) within the bounded space, there are five sets of actors that each have a logic and that each acts strategically *within and against* the bounded space so as to fulfill their logic."<sup>21</sup> Based on this design, different actors' "bounded strategic actions" aim to shape the institution's structure, procedural law, and substantive law to their ideal form.<sup>22</sup> This theory helps describe the struggle amongst the actors to shape the Court's function through influencing the final Protocol draft.

Part II of this paper will outline the ECHR's origin by reviewing the 1950 Convention for the Protection of Human Rights, the instrument that created the ECHR. Part III will explain the reasons behind the Court's problems with application processing based on its structure, docket size and type, and resources. Part IV will outline the final Protocol draft to be ratified by the Contracting States. Part V will present the different interpretations of the Court's mission, so as to create a better understanding of each party's motivation. Part VI will introduce the actors who influenced the Protocol's creation and will assess their roles in the drafting process by looking at the recommendations that were incorporated into the final draft. Lastly, Part VII will conclude the paper by assessing why certain actors were more successful than others in persuading the CDDH and in shaping the Court's "bounded strategic space."

I conclude that the transparent process and unique interaction between the actors involved in the drafting process led to a final Protocol draft that will

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20. David D. Caron, *A Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 402 (2006).

21. *Id.*

22. *Id.*

incrementally reform the Court, rather than radically alter it.<sup>23</sup> Although I find that the Committee of Ministers was the most influential body because, as the decision-making body, it controlled the reform process, this is not to say that it achieved its aims. Rather, Protocol 14 is a partial solution to the problems which must be overcome in order to preserve the Court's long-term effectiveness. The Protocol will not radically transform the ECHR into a quasi-Constitutional Court, as some had aimed.

My conclusion is reflected in the fact that after the adoption of the Protocol, the Committee set up a Group of "Wise Persons" to look into additional necessary reforms and to outline a program of actions to further reform the Court. Therefore, I conclude that although the Committee of Ministers was the most influential, Protocol 14 and the reform package were not entirely adequate in addressing those problems identified by the actors, or their desired reforms, because of the many actors and interests involved in the struggle to shape the Court's "bounded strategic space." At the same time, this diversity of interests also strengthened the draft process by bringing a variety of views and options to the table to more thoroughly consider the Court's future.

## II. ECHR BACKGROUND

Since an institution's "strategic space" is bound by its instrument of creation, an examination of the Council of Europe's 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") is important. The Convention was created following World War II in an effort to promote the "maintenance and further realisation of human rights and fundamental freedoms."<sup>24</sup> As Barbara Koremenos, Charles Lipson, and Duncan Snidal indicate, the purpose of the treaty can bring stability within regime theory. This is especially so where coordination among states is necessary to prevent future harms, or as Koremenos et. al. say, "the 'shadow of the future' can support 'cooperation under anarchy.'"<sup>25</sup> Koremenos's theory supports the idea that Contracting States were willing to forgo sovereignty in order to promote democracy, encourage the rule of law, and prevent further human rights violations.<sup>26</sup>

To enforce these human rights obligations, the Convention established the European Commission of Human Rights (1954) and the European Court of

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23. In comparison to Protocol 11, which radically altered the Court's structure. See discussion on "ECHR Background," *infra* Part II.

24. Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 13, 1950, ETS No. 5 [hereinafter Convention].

25. According to Koremenos et al., "[o]ur basic presumption, grounded in the broad tradition of rational-choice analysis, is that states use international institutions to further their own goals, and they design institutions accordingly. This might seem obvious, but it is surprisingly controversial." Barbara Koremenos, Charles Lipson, & Duncan Snidal, *Rational Design of International Institutions*, 55 MIT INT'L ORG. 761, 764 (2001).

26. Convention, *supra* note 24, pmbl.

Human Rights (ECHR) (1959) to process and review applications against Contracting States' Convention violations.<sup>27</sup> The Convention also enumerated the Committee of Minister and Parliamentary Assembly's Convention-related tasks such as enforcing judgments and appointing judges.<sup>28</sup> Since its creation, the ECHR has played an increasingly important role in promoting and maintaining democracies. The Court's success is due, in part, to Contracting State approved protocols and amendments drafted to adapt the Court to changing circumstances.<sup>29</sup> In doing so, the Court has maintained its effectiveness in adjudicating human rights claims under the Convention.

One such key reform is Protocol No. 11. Adopted on May 11, 1994 in an effort to address case influx by simplifying Court structure, the Protocol abolished the Commission, transformed the ECHR into a single full-time court, and granted individuals the permanent right to bring their cases directly before the Court.<sup>30</sup> The Convention originally permitted only Contracting States to file complaints against other Contracting States before the Commission, and Contracting States were permitted to voluntarily enable individuals to petition the Commission.<sup>31</sup> However, Protocol 11 granted the ECHR the power to adjudicate Convention violation complaints against Contracting States from individuals, groups of individuals, non-governmental organizations, and other Contracting States.<sup>32</sup> This reform dramatically transformed the Court's function by expanding its jurisdiction beyond adjudicating purely Contracting State cases.

In broadening the Court's jurisdiction, the Protocol also enlarged the Committee of Ministers' role by assigning it the duty to supervise proper execution of judgments in order to guarantee Contracting State compliance with Court judgments.<sup>33</sup> However, when drafting the Protocol, the authors failed to consider the potential influx of cases that could be brought against the new Contracting States of the former Yugoslavia, Russia, and the Ukraine,<sup>34</sup> which is part of the reason for the case backlog today. Further reason for the backlog is the adoption of Protocols Nos. 1, 4, 6, 7, 12, and 13, which "added further rights and liberties to those guaranteed by the Convention."<sup>35</sup> These Protocols greatly expanded the ECHR's scope by granting individuals further grounds under

27. EUROPEAN COURT OF HUMAN RIGHTS (ECHR), ANNUAL REPORT 2001 9 (2002) [hereinafter ECHR ANNUAL REPORT].

28. *Id.*

29. *Explanatory Report*, *supra* note 3, para. 1.

30. ECHR ANNUAL REPORT 2001, *supra* note 27, at 9-10. Although it should be noted that prior to Protocol 11, there was an optional individual right to petition but Contracting States had to recognize this right specifically. But by 1998, all Contracting States had enabled individuals to directly apply and Protocol 11 merely adjusted the Convention to reflect this change and made the individual right to petition permanent.

31. *Id.*

32. *Id.*

33. History of the Court, para. 4 (2005), <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/>.

34. Greer, *supra* note 14, at 663.

35. ECHR ANNUAL REPORT, *supra* note 27, at 9-10.

which to file a claim.

### III.

#### PROBLEMS IN CASE PROCESSING: STRUCTURE, RESOURCES AND DOCKET

A tribunal's "bounded strategic space" consists of its basic structure, resources, and docket size and content.<sup>36</sup> As discussed in the previous section, the restructuring of ECHR has significantly affected the size and content of its docket, which has created a greater need for additional resources. The Council of Europe's membership enlargement, along with the Convention's expanded scope, the right to individual petition, and the increasing popularity of the Court in Member States through the publicity given to important cases, has led to a growth in the number of applications filed for review and an increase in the number of cases heard before the Court.<sup>37</sup> To best understand the reasons for the case review delay, it is important to understand the Court's structure, resources, and docket.

#### A. Structure

The ECHR is a full-time court composed of forty-five judges (one from each Contracting State), who are appointed to six-year terms by the Parliamentary Assembly.<sup>38</sup> The judges, however, do not represent a particular state, but rather serve to promote the mission of the Court to promote and maintain human rights and the rule of law.<sup>39</sup>

The Court is divided into four<sup>40</sup> Sections of judges, each of which "shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties."<sup>41</sup> The Sections are then divided into Committees of three and Chambers of seven judges.<sup>42</sup> Furthermore, a national judge (ad hoc judge) from the state against whom the applicant has filed is permitted to sit on the Committee or Chamber deciding the case.<sup>43</sup> Committees can only determine case inadmissibility, in which decisions must be

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36. Caron, *supra* note 20, at 404-05.

37. Beernaert, *supra* note 14, at 544.

38. Although there are only 45 judges, there are 46 Contracting States in which Monaco, a new Contracting State, has yet to appoint a judge. European Court of Human Rights, Council of Europe, Rules of Court, Chpt. III-The Registry, para. 1 (Registry of Court, 2005), available at <http://www.echr.coe.int/NR/ronlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> [hereinafter Rules of Court; see also European Court of Human Rights, Organisation of the Court, para. 1, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Organisation+of+the+Court/> [hereinafter Organisation of the Court].

39. *Id.* Rules of Court, Chpt. III-The Registry, para. 1; see also Organisation of the Court, para. 1.

40. As of March 1, 2006, there were five Sections.

41. Rules of Court, *supra* note 38, Rule 25-Sections, para. 2.

42. *Id.* Rule 26-Chambers, para. 1, Rule 27-Committees, para. 1; see also Organisation of the Court, *supra* note 38, para. 1.

43. Organisation of the Court, *supra* note 38, para. 4.

unanimous.<sup>44</sup> If the decision on inadmissibility is not unanimous, then the application is referred to a Chamber for further review.<sup>45</sup> Chambers mainly decide cases in which there exists established ECHR case law on the issue.<sup>46</sup> Within three months of the Chamber's decision, applicants or Contracting States can request that the Grand Chamber, composed of seventeen judges, review the case.<sup>47</sup> Grand Chamber proceedings are composed of the seventeen judges in addition to three substitute (ad hoc) judges, in which the Court addresses issues that have not previously been considered by the Court.<sup>48</sup>

This structure does not enable quick disposal of inadmissible cases since, at the least, a Committee of three judges must meet to dismiss a case. Moreover, repetitive cases must be reviewed by a minimum of seven judges, requiring a significant amount of resources to review cases similar to ones already decided by the Court. Lastly, under this structure, there are not enough judges to review the complaints since the Court receives around 40,000 cases per year.<sup>49</sup> Therefore, either the Court's structure needs to be drastically reformed or the process must be altered so that the judges can review cases more quickly.

### *B. Resources, Docket Size and Docket Type*

The twelve additional protocols conferred a significant amount of rights on individuals.<sup>50</sup> As a result, the Court's docket size significantly increased and the docket type diversified.<sup>51</sup> Since Contracting States were no longer the only parties to the Convention, and since the rules for admissibility became more numerous, most individual applicants have failed to follow the applications requirements and thus their complaints have been deemed inadmissible.<sup>52</sup> Therefore, a root cause of the case influx may be the lack of education of citizens regarding how to bring a valid claim and what constitutes a valid claim. Yet another significant cause of the case influx is Contracting States' inability to

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44. European Court of Human Rights, Basic Information on Procedures, para. 6, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/>.

45. *Id.* para. 7.

46. *Id.*

47. *Id.* para. 15; see also Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms-restructuring the control machinery established thereby, Strasbourg, May 11, 1994, ETS 155, available at <http://conventions.coe.int/treaty/en/Treaties/Html/155.htm>.

48. Rules of Court, *supra* note 38, Rule 26-Chambers, para. 1.

49. European Court of Human Rights, Council of Europe, Survey of Activities 2004, at 35 (Registry of the Court, 2005) [hereinafter ECHR Survey of Activities 2004].

50. *Supra*, Part II.

51. ECHR Survey of Activities 2004, *supra* note 49, at 10-28.

52. In order of hierarchy, the current grounds for an inadmissible application include: (1) anonymous applications (Convention, *supra* note 24, art. 35, § 2[a]); (2) abuse of the right of application (art. 35, § 3); (3) substantially the same as a matter previously examined (art. 35, § 2[b]); (4) has already been submitted to another international procedure (art. 35 § 2[b]); (5) incompatibility (art. 35, § 3): *ratione personae, loci, temporis, materiae*; (6) exhaustion of domestic remedies (art. 35, § 1); and (7) six months rule for statute of limitations (art. 35, § 1), and manifestly ill-founded *prima facie* case disposal (art. 35, § 3).

provide adequate domestic remedies and Contracting States' failure to reform their laws and practices in compliance with judgments due to structural problems within states.<sup>53</sup> Rather than address these root causes, prior Court reforms have aimed at changing administrative practices/technology and increasing the budget.<sup>54</sup>

Although the Court's budget nearly doubled from 1998 to 2004,<sup>55</sup> the increase was insufficient to resolve the Court's case processing problems. In fact, the Court's caseload has increased significantly each year. In 2002, the caseload increased by ninety percent, leaving the Court able to review only 65 percent of the cases it received in 2003.<sup>56</sup> Although Protocol 11 aimed at restructuring the Court so that it could better review cases, it did not sufficiently address problems in processing cases and issuing judgments.<sup>57</sup> Therefore, more needs to be done to ensure that the Court will continue to influence Contracting States and help to shape their laws and practices.

The problems that the Court faces today are much different from those addressed in 1994. Even though the number of applications has increased drastically, 90-96 percent of applications filed are found inadmissible.<sup>58</sup> Of the remaining 4-10 percent admissible cases, over half involve different claimants asserting violations identical to those that have been previously decided by the Court.<sup>59</sup> These cases arise because Contracting States face "structural or systematic" problems that need to be addressed in order to prevent further violations on the same grounds.<sup>60</sup> On the basis of this reality, as shown by these statistics, the Committee of Ministers instructed the Evaluation Group to research the problem, and later appointed the CDDH to draft a proposal to ensure the "long-term effectiveness of the [Court]."<sup>61</sup> The end result was a solution that would expedite the filtering process, enable quick disposal of

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53. *Explanatory Report*, *supra* note 3, secs. A, C.

54. Telephone Interview with John Dalhuisen, Special Advisor to the Commissioner for Human Rights, in Strasbourg France (Dec. 2, 2005).

55. In 1998, the ECHR's budget was \$25,297,147 and in 2004, the Court's budget was increased to \$50,063,647. Romano, *supra* note 2, at 290.

56. In 1998, the Court received 18,164 applications and in 2002, the Court received 34,546 applications. Also, although the Court decided 1,500 cases per month in 2003, it received 2,300 new cases each month. See *Explanatory Report*, *supra* note 3, para. 5.

57. Of course, this is not to say that Protocol 11 should not have been adopted. As Laurence Helfer and Anne-Marie Slaughter argue, Protocol 11 strengthened the Court's ability to influence Contracting States, as individuals can now bring attention to Convention violations against Contracting States. See generally Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273 (1997).

58. *Explanatory Report*, *supra* note 3, para. 7.

59. *Id.* Around ninety to ninety-six percent of the cases are found inadmissible. Of the four to ten percent admissible cases, sixty percent are "repetitive cases;" the applications regard issues already decided by the Court.

60. Beernaert, *supra* note 14, at 545. The most common example of repetitive cases is "length of proceedings" cases, in which applicants claim a denial of the right to a speedy trial. These cases are common in most of the post-satellite states and especially in Italy. *Id.* at 545, n. 6.

61. *Explanatory Report*, *supra* note 3, para. 2.

repetitive cases, and raise the bar for admissibility.<sup>62</sup>

#### IV. THE PROTOCOL AND REFORM PACKAGE

The final draft of Protocol 14 includes reforms to improve the function of the Court by (1) establishing single-judge formations,<sup>63</sup> (2) expediting the process for reviewing “manifestly well-founded” repetitive cases,<sup>64</sup> and (3) adding a new admissibility criterion for applicants.<sup>65</sup> Other reforms within the Protocol include (4) altering judge’s terms,<sup>66</sup> (5) changing the procedure for appointing ad hoc judges,<sup>67</sup> (6) increasing the Commissioner for Human Rights’ role,<sup>68</sup> and (7) enabling the European Union to accede to the Convention.<sup>69</sup>

##### A. Case Filtering Process

The Protocol aims to expedite case processing by creating single-judge formations, altering the review process for repetitive cases, and adding an additional admissibility criterion for applicants.

Articles 6 and 7 of the Protocol establish single-judge formation in which “a single judge may declare an application inadmissible or strike it out.”<sup>70</sup> Prior to the Protocol, the smallest judge formation was a Committee of three, which could only decide on inadmissibility of cases.<sup>71</sup> The rationale behind these judge formations was that they ensured collegiate decisions and repetition to reduce error.<sup>72</sup> The amended procedural review allows a single judge, with two rapporteurs’ assistance, to review individual applications, so long as they are not claims against their country of origin.<sup>73</sup> The aim is to expedite the review of inadmissible cases so that judges can deal more efficiently with the 90-96

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62. *Id.* para. 36; *see also Protocol 14, supra* note 12, art. 6 (changing art. 26 of the Convention), art. 8 (changing Article 28 of the Convention), and art. 12 (changing art. 35 of the Convention).

63. *Explanatory Report, supra* note 3, paras. 61-67; *see also Protocol 14, supra* note 12, art. 6 (changing art. 26 of the Convention).

64. *Id.* paras. 68-72; *see also Protocol 14, supra* note 12, art. 8 (changing art. 28 of the Convention).

65. *Id.* paras. 77-85; *see also Protocol 14, supra* note 12, art. 12 (changing art. 35 of the Convention).

66. *Id.* para. 50; *see also Protocol 14, supra* note 12, art. 2 (changing art. 23 of the Convention).

67. *Id.* para. 64; *see also Protocol 14, supra* note 12, art. 6 (changing art. 26 of the Convention).

68. *Id.* paras. 86-89; *see also Protocol 14, supra* note 12, art. 13 (changing art. 36 of the Convention).

69. *Id.* paras. 101-02; *see also Protocol 14, supra* note 12, art. 17 (changing art. 59 of the Convention).

70. *Protocol 14, supra* note 12, art. 6 (changing art. 26 of the Convention); *id.* art. 7 (inserting new art. 27 into the Convention).

71. RULES OF THE COURT, *supra* note 41.

72. *Id.* Rule 26-Chambers, para. 1; Rule 27-Sections, para. 1; Committees, para. 1.

73. *Protocol 14, supra* note 12, art. 4 (changing art. 24 of the Convention).

percent of applications received which are inadmissible or struck-out, allowing them to focus their attention on pressing human rights abuses.<sup>74</sup>

To remedy the problem that the Court faces in reviewing the sixty percent of cases that are well-founded but repetitive, Article 8 of the Protocol states that for cases in which the underlying question has already been decided by established case law, a Committee of three judges may issue a unanimous judgment.<sup>75</sup> This is in contrast to the prior procedure, which only permitted a Committee of three to rule on admissibility while a Chamber of seven reviewed repetitive cases.<sup>76</sup> After the Protocol is implemented, although Committees of three judges will be able to make rulings on repetitive cases, the State Party will be able to accept or contest the application of this well-established case law or to argue that the claim does not fall under the Convention.<sup>77</sup> If judges in the Committee of three are unable to reach a unanimous decision, then the application will be reviewed through the standard procedure, either in the Chamber or Grand Chamber.<sup>78</sup> By allowing Committees of three judges to dispose of repetitive cases, this reform will help to process repetitive cases more quickly in order to enable the Court to rule on new issues.

Article 12 of the Protocol adds an additional admissibility criterion to Article 35 of the Convention.<sup>79</sup> The Court can declare applications inadmissible if the applicant has not suffered "significant disadvantage."<sup>80</sup> The exception is that "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>81</sup> The motivation behind "raising the admissibility threshold"<sup>82</sup> is to weed out cases in which individuals suffered only minor harm, so that judges may devote their time to more pressing human rights abuses.<sup>83</sup> Although this measure has been the focus of the debate surrounding the Protocol, there was significant debate on other Protocol reforms as well.

### *B. Other Reforms*

Other reforms addressed in the Protocol include altering judges' terms, changing the procedure for appointing ad hoc judges, expanding the role of the Commissioner for Human Rights, and enabling the European Union to accede to the Convention.

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74. *Explanatory Report, supra* note 3, para. 67.

75. *Protocol 14, supra* note 12, art. 8 (changing art. 28 of the Convention).

76. *Explanatory Report, supra* note 3, para. 67.

77. *Id.*

78. *Id.*

79. *Protocol 14, supra* note 12, art. 12 (changing art. 35 of the Convention).

80. *Id.*; see also *Explanatory Report, supra* note 3, paras. 77-85.

81. *Id.*

82. Eaton & Schokkenbroek, *supra* note 18, at 13.

83. *Explanatory Report, supra* note 3, para. 19.

Article 2 of the Protocol increases judges' terms to one nine-year-term, rather than unlimited six-year-terms.<sup>84</sup> The rationale behind this amendment is that there "seemed to be an abuse of the current provisions" in which some countries, for political reasons, would not include current ECHR judges on their list of judges to be appointed when the judges' terms expired.<sup>85</sup> Although the change reduces the institutional memory of the Court, the authors viewed it as necessary to ensure that such abuse of judicial appointment would not continue and also to keep judges from campaigning in their home states.<sup>86</sup>

Article 6 of the Protocol amends the process of appointing ad hoc judges.<sup>87</sup> Ad hoc judges take the place of an elected judge who is unable to hear a particular case.<sup>88</sup> Upon a judge's indication that she must recuse herself, the President of the Court will ask the State from which the judge is from to recommend a judge to hear the case.<sup>89</sup> The Protocol removes the right of the Contracting State to choose the judge who will hear a *particular* case.<sup>90</sup> Instead, it requires states to issue an advance list of potential judges from which the President of the Court will select the appropriate judge to hear the case.<sup>91</sup> This change was motivated by a concern that Contracting States would appoint judges who would find for them in the particular case.

Article 13 of the Protocol grants the Commissioner for Human Rights the ability to "submit written comments and take part in oral hearings" in Chamber and Grand Chamber cases.<sup>92</sup> The purpose of this addition is to enable the Commissioner to comment and provide evidence in support of an applicant since he and his staff visit and investigate human rights conditions in Contracting States and can identify problems for the Court.

Lastly, Article 17 enables the European Union to accede to the Convention.<sup>93</sup> The Council of Europe encourages EU accession to ensure "legal certainty and coherence in European Human Rights protection."<sup>94</sup> Although the European Constitution was not unanimously adopted by EU Member States, and hence did not pass, the Council of Europe encourages the EU to make another effort to accede to the Convention.

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84. See *Protocol 14*, *supra* note 12, art. 2 (changing art. 23).

85. Eaton & Schokkenbroek, *supra* note 18, at 22; see also Eur. Parl. Ass., *Candidates for the European Court of Human Rights*, 8<sup>th</sup> Sitting, Recommendation 1649 (2004), available at <http://assembly.coe.int/Documents/AdoptedText/TA04/EREC1649.htm>.

86. *Id.*

87. *Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* art. 13 (changing art. 36 of the Convention).

93. *Id.* art. 17 (changing art. 59 of the Convention).

94. Eaton & Schokkenbroek, *supra* note 18, at 25; see also *Explanatory Report*, *supra* note 3, paras. 101-02; *Protocol 14*, *supra* note 12, art. 17.

### C. Recommendations to Contracting States

The CDDH's reform package also includes Recommendations to Contracting States on measures to reduce the number of applications filed.<sup>95</sup> The Recommendations aimed to enhance the implementation of the Convention in and by Contracting States, in order to reduce violations and ensure domestic remedies in the event of violations by Contracting States.<sup>96</sup> The CDDH indicates that since the Court was created to serve as a secondary avenue for individuals to have their complaints heard, Contracting States should reform their laws and practices in compliance with the Convention to provide their citizens with adequate domestic remedies for human rights violations.<sup>97</sup> If Contracting States provide adequate domestic remedies, individuals would not need to file applications to the ECHR.

However, under Article 15.2 of the Statute of the Council of Europe, these Recommendations are *not binding* on Contracting States, as the Committee of Ministers may only request compliance.<sup>98</sup> This is due to the principle of subsidiarity, which is the idea that matters should be handled by the most local authority unless supranational authority is necessary to carry out the mission.<sup>99</sup> Because these recommendations deal with administrative practices and policy, the Committee of Ministers did not want to impose a single model for all states because there is significant variation between Contracting States.<sup>100</sup> Nevertheless, Council officials have indicated that Contracting States still take these Recommendations seriously and comply.<sup>101</sup> Based on this rationale, the Committee recommends that states (1) provide training to academics and professionals regarding the provisions of the Convention,<sup>102</sup> (2) verify that

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95. Recommendation Rec (2004) 4 of the Committee of Ministers to Member States on the European Convention on Human Rights in university education and professional training, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEERING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 56 (Council of Europe, 2004) [hereinafter, Rec (2004) 4]; Recommendation Rec (2004) 5 of the Committee of Ministers to Member States 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, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEERING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 62 (Council of Europe, 2004) [hereinafter, Rec (2004) 5]; Recommendation Rec (2004) 6 of the Committee of Ministers to Member States on the improvement of domestic remedies, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEERING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 69 (Council of Europe, 2004) [hereinafter, Rec (2004) 6].

96. *Id.*

97. Beernaert, *supra* note 14, at 547.

98. Statute of the Council of Europe, art. 15.2, May 5, 1949, CETS 001.

99. DESMOND DINAN, *EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION* 152 (2nd ed. 1999).

100. Eaton & Schokkenbroek, *supra* note 18 at 29; *see also Explanatory Report, supra* note 3.

101. *See id.* at 29, n.60 (indicating that many recommendations have resulted in changes in law and practice of many states).

102. Rec (2004) 4 recommends that Contracting States "ascertain" that law schools and professional schools include instruction on the Convention in their core curriculum. The intent is that judges, lawyers, police officers, hospital staff, prison officers, and immigration officers will have a

national laws are compatible with the Convention,<sup>103</sup> and (3) improve domestic remedies.<sup>104</sup>

#### *D. Measures to Improve the Execution of Court Judgments*

The aim behind the effort to improve execution of judgments is that if Contracting States fail to comply with judgments, Court judgments will become ineffective. Also, if Contracting States comply with judgments and change their laws and practices, then there should be fewer subsequent filings. The reform, therefore, aims to identify judgments issued on systematic problems in each state, and determine the source of the problem.<sup>105</sup> Structural problems in Contracting States may stem from a variety of sources.<sup>106</sup> By publicizing these judgments, the CDDH hopes Contracting States will comply due to media pressure.

#### V.

#### THE MOTIVATION BEHIND ACTORS' PROPOSED AMENDMENTS: COURT MISSION

Fundamental to the debate over the Protocol is what effect it may have on the Court's mission of serving either to promote an individual right to justice or to serve as a quasi-Constitutional court (or both).<sup>107</sup> As Paul Mahoney, former Registrar of the Court,<sup>108</sup> points out, "[T]he mission of the Court, the service that it is expected to render European citizens and European societies, should dictate the contours of any reform."<sup>109</sup> Therefore, there is debate as to whether the Protocol will promote the Court's true purpose. Essential to this discussion is determining what this true purpose is.

Parties worked within and against the "bounded strategic space" to structure the Court in a manner that would promote their interpretation of the Court's mission. NGOs such as Amnesty International, the Parliamentary

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good understanding of the Convention to better address human rights in their realm of work. Included with the recommendation is an Explanatory Appendix, which outlines examples of initiatives that Contracting States can take to implement the recommendations. Rec (2004) 4, *supra* note 95.

103. Rec (2004) 5 asks that Contracting States check the compatibility of the Convention with draft laws and current legislation, as well as with current laws and administrative practices. The recommendation to adapt current laws and administrative practice is not as strong since it uses the language "whenever necessary." The motivation behind this is to improve domestic remedies and prevent Convention violations. Once again, the Appendix includes examples of how to supervise draft laws to ensure their compatibility. Rec (2004) 5, *supra* note 95.

104. To address systematic problems in Contracting States' laws and practices, Rec (2004) 6 suggests that States examine their available domestic remedies based on each of the Convention Articles and investigate ways in which to improve them or make available more remedies. The motivation is to avoid repetitive application filings in which Contracting States fail to remedy the root cause of the Convention violation. Rec (2004) 6, *supra* note 95.

105. Rec (2004) 6, *supra* note 95.

106. *Id.*

107. Greer, *supra* note 17, at 94.

108. In October 2005, Mahoney became the President of the Civil Service Tribunal of the European Union. The new Registrar is Erik Fribergh.

109. Mahoney, *supra* note 14, at 175.

Assembly and the Commissioner for Human Rights believe that the Protocol may cause the ECHR to become a quasi-constitutional body at the expense of individual justice.<sup>110</sup> However, the CDDH, the Committee of Ministers and Court judges believe that the reform will allow the Court to serve both functions.<sup>111</sup>

Which mission(s) will prevail depends on how one views “individual justice.” According to Steven Greer, how one views “individual justice” depends on how people characterize the right of individual petition.<sup>112</sup> If one interprets “individual justice” in a broad sense, as granting individuals the right to application, then it is possible for the ECHR to serve both missions.<sup>113</sup> However, if one narrowly interprets “individual justice” to mean that every complaint must be heard no matter its gravity, then the Court cannot serve both missions.<sup>114</sup>

The CDDH argues that the Court can serve to promote both quasi-constitutional justice and individual justice since both are legitimate functions of the ECHR.<sup>115</sup> They indicate that the Protocol aims to “reconcile the two [missions],” since neither mission will survive unless the Court can properly filter cases.<sup>116</sup> President of the Court Luzius Wildhaber explained, “Failing to deal with these cases within a reasonable time not only frustrates the original purpose of the Convention as an early warning system, it also allows prejudice for the [injured] individual to accrue and prevents the taking of timely general corrective measures.”<sup>117</sup> Therefore, if a reform measure is not adopted, most agree that the Court will fail to accomplish either mission. And as further indicated in the April CDDH report, it is vital that judges are able to devote a significant amount of time to “constitutional judgments,” meaning authoritative and serious human rights violation cases “which raise substantial or new and complex issues of human rights law.”<sup>118</sup> From this stance, the reform is

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110. Press Release, Amnesty Int’l, *supra* note 14.

111. Resolution I.16 and I.18(i)-(ii) of the Ministerial Conference on Human Rights, *The European Convention on Human Rights at 50*, *supra* note 1, Human Rights Information Bulletin No. 50, at 35, 37. See also Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, *supra* note 14, at 667.

112. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17 at 94.

113. *Id.* at 94-106; see also Mahoney, *supra* note 14, at 173.

114. *Id.*

115. Steering Committee for Human Rights (CDDH), *Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights: Final Report Containing Proposals of the CDDH*, CDDH (2003) 006, available at [http://www.coe.int/T/E/Human\\_rights/cddh/3\\_Committees/01\\_Steering\\_Committee\\_\(CDDH\)/02\\_CDDH\\_Texts/](http://www.coe.int/T/E/Human_rights/cddh/3_Committees/01_Steering_Committee_(CDDH)/02_CDDH_Texts/) (follow “03. Activity Reports” hyperlink; then follow “CDDH(2003)006 Final” hyperlink); see also Eaton & Schokkenbroek, *supra* note 18 at 8.

116. *Id.*

117. Mahoney, *supra* note 14, at 171.

118. Evaluation Group to the Committee of Ministers, *Report of Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court (2001) 1, para. 98, available at [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Steering\\_committees/CDCJ/Documents/2001/EGCourt\(2001\)1E.pdf](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Steering_committees/CDCJ/Documents/2001/EGCourt(2001)1E.pdf); see also Greer, *supra* note 17, at 96-106.

necessary in order to ensure that the Court continues to address serious human rights concerns effectively and efficiently.

Some even argue that the narrow reading of “individual justice” is not ideal because such a reading may allow individuals to abuse the Court and use it as a “small claims court.”<sup>119</sup> They argue that the ECHR was created as a remedy for rights not addressed at the national level and so “insubstantial” claims should not be addressed by the ECHR.<sup>120</sup> As Mahoney explains, “it is generally recognized now, I believe, that right of individual petition cannot mean right to a full, individualized examination of every petition.”<sup>121</sup> From this interpretation, it is thus possible for the Court to serve both missions since it should not only review each individual application, but should also produce a substantive body of law from the cases it reviews.<sup>122</sup>

In contrast, NGOs believe that the Court should serve the narrower function of administering “systematic individual justice,” as opposed to broad individual justice.<sup>123</sup> They argue that these two missions are mutually exclusive as certain filtering options would allow some human rights violations complaints to slip through the cracks.<sup>124</sup> As Marie-Aude Beernaert argues, the Court will become less accessible as a result of the new filtering scheme, thus eroding the ECHR’s human rights protection.<sup>125</sup>

NGOs and others interpret the characterization of “individual justice” as causing the ECHR to become a “small claims court” as inaccurate because the Convention *guarantees* individuals the right to bring forth these claims.<sup>126</sup> Instead, those concerned with the operations of the ECHR should question why the issue was not redressed at the national level.<sup>127</sup> Also, NGOs argue that there are no insubstantial claims because all human rights violations are substantial.<sup>128</sup> Therefore, they argue that the Protocol should not send a signal to individuals that their concerns and experiences are not important. These two interpretations of the Court’s mission affected which proposals actors put forth in their aim to influence the final protocol draft.

## VI.

### DEBATE OVER THE REFORM: ACTORS INVOLVED IN DRAFTING PROTOCOL NO. 14

Six main sets of actors worked within and against the Court’s “strategic

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119. Mahoney, *supra* note 14, at 175; Greer, *supra* note 17, at 96-106.

120. Mahoney, *supra* note 14, at 175.

121. *Id.* at 173.

122. *Id.* at 171.

123. Greer, *supra* note 17, at 94.

124. *Id.*

125. Beernaert, *supra* note 14, at 556-57.

126. Telephone Interview with Jill Heine, Legal Advisor to Amnesty International, in London, England (Nov. 29, 2005); Eaton & Schokkenbroek, *supra* note 18, at 6.

127. Telephone Interview with Jill Heine, *supra* note 126.

128. See *Joint Response*, *supra* note 14.

space” to impact the reform process and influence the draft.<sup>129</sup> The actors include the Committee of Ministers, the Parliamentary Assembly, Contracting States, ECHR judges and the Court registry, the Commissioner for Human Rights, and NGOs. Each of these actors aimed to influence the drafting process by acting strategically to shape the Protocol in a manner which best promoted its interpretation of the Court’s mission.<sup>130</sup>

The CDDH made an effort to ensure that its drafting process was transparent by consulting with concerned parties.<sup>131</sup> In fact, the CDDH invited the Parliamentary Assembly; Court Registry; Commissioner for Human Rights; and NGOs with Observer Status, including Amnesty International, Fédération Internationale des Droits de l’Homme (FIDH), and the International Commission of Jurists to various meetings.<sup>132</sup> Furthermore, the CDDH published its main reports and even posted them on the Council of Europe website.<sup>133</sup> The drafting process became transparent after Amnesty International and other NGOs called on the government bodies to make the process open and to include their ideas and suggestions.<sup>134</sup> Jill Heine, Legal Advisor to Amnesty International, agreed that “the request for transparency was not met with any resistance.”<sup>135</sup> Soon thereafter, the CDDH invited national judges and NGOs to drafting meetings, although it is unclear how the CDDH determined whom to invite.

#### *A. Summary of the Protocol Adoption Process*

The Committee of Ministers appointed an Evaluation Group and the CDDH, which in turn established a Reflection Group (GDR),<sup>136</sup> to analyze the problem and develop solutions.<sup>137</sup> The Evaluation Group completed its work and issued a report that was available publicly.<sup>138</sup> Then the GDR researched the issue and prepared reports for the CDDH, which in turn drafted Protocol 14.<sup>139</sup> Shortly thereafter, the CDDH welcomed recommendations from the Parliamentary Assembly, judges, NGOs and citizens.<sup>140</sup> The CDDH compiled the research and presented an Interim Activity Report to the Committee of

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129. Caron, *supra* note 20, at 402-03.

130. *Id.*

131. Telephone Interview with Jill Heine, *supra* note 126; Eaton & Schokkenbroek, *supra* note 18, at 6; *Explanatory Report*, *supra* note 3, para. 30.

132. Telephone Interview with Jill Heine, *supra* note 126; Eaton & Schokkenbroek, *supra* note 18, at 8-9; *Explanatory Report*, *supra* note 3, para. 30. These NGOs were granted “Observing Status” to the CDDH.

133. Eaton & Schokkenbroek, *supra* note 18, at 8.

134. Telephone Interview with Jill Heine, *supra* note 126.

135. *Id.*

136. “Groupe de Réflexion,” which was appointed by the CDDH.

137. *Explanatory Report*, *supra* note 3, at para. 29.

138. *Id.* para. 21.

139. *Id.* para. 28-29.

140. *Id.* para. 30.

Minister in November 2003.<sup>141</sup>

The Committee noted this proposal and asked the CDDH for further work on five measures in particular: (1) the admissibility requirement, (2) the application filtering mechanism, (3) the procedure for appointing ad hoc judges, (4) proposals to strengthen the Commissioner for Human Rights' role, and (5) increasing the number of judges on the Court.<sup>142</sup> The CDDH then shared its research with the Parliamentary Assembly, the Court, and citizens. In the meantime, the Committee of Ministers requested a final draft by May 2004.<sup>143</sup>

The CDDH presented a draft protocol, but it was still met with opposition by some Contracting States because of disagreement on the new admissibility requirement and on the procedure for appointing ad hoc judges.<sup>144</sup> The CDDH then forwarded the proposal to the Parliamentary Assembly for comments in April 2004, which criticized the same two measures in its opinion to the Committee.<sup>145</sup> The members of the CDDH and the Ministers conducted informal meetings to try to resolve the dispute.<sup>146</sup> From these discussions, the parties reached a compromise on the admissibility criteria.<sup>147</sup>

Finally, on May 12, 2004, the Committee of Ministers adopted Protocol 14 in which 44 Ministers voted for the proposal, zero against, and one abstained.<sup>148</sup> In addition, the three Recommendations were adopted unanimously without debate.<sup>149</sup> The next day, the Protocol was open for signature by the Contracting States. All Contracting States must sign and ratify the Protocol in order for it to take effect. As of December 1, 2005, thirteen states have signed and ratified (and thus have acceded) to the Protocol, while thirty-one have only signed it, and two have not signed or ratified it yet.<sup>150</sup> Whether the drafting process will result in Court reform hinges on whether Contracting States will accede to the Protocol.

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141. *Id.* para. 31; see also CDDH, *Interim Activity Report: Guaranteeing the long-term effectiveness of the European Court of Human Rights*, CDDH (2003) 26, Addendum I Final, available at [http://www.coe.int/t/e/human\\_rights/cddh/3.\\_committees/01.\\_steering\\_committee\\_%28cddh%29/02.\\_cddh\\_texts/](http://www.coe.int/t/e/human_rights/cddh/3._committees/01._steering_committee_%28cddh%29/02._cddh_texts/) (follow "04. Meeting Reports" hyperlink; then follow "CDDH(2003)026" hyperlink).

142. Amnesty Int'l, *Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights*, AI Index: IOR 61/005/2004, Feb. 1, 2004, para. 27 [hereinafter *Amnesty Interim Activity Report*].

143. *Explanatory Report*, *supra* note 3, paras. 31-33.

144. Easton & Schokkenbroek, *supra* note 18, at 6.

145. *Explanatory Report*, *supra* note 3, para. 31; see also Eur. Parl. Ass., *Opinion No. 251 (2004)* 13th Sitting, (2004), available at <http://assembly.coe.int/Documents/AdoptedText/ta04/EOP1251.htm>.

146. *Id.*

147. See generally *Protocol 14*, *supra* note 12.

148. Russia abstained on the grounds of disapproval of the voting procedure. Easton & Schokkenbroek, *supra* note 18, at 7.

149. *Explanatory Report*, *supra* note 3, at 31.

150. Bulgaria and Russia have not signed or ratified the Protocol. List of Contracting State status available online at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=05/07/05&CL=ENG>.

### *B. The Actors and Their Institutional Positions*

According to Caron, although the functions of an institution's secretariat may vary, most serve to assist the judges, and act as host for meetings of the governing body, but, "[i]n practice, secretariats exhibit a range of powers going from one purely clerical to one critically important to both governance and adjudication."<sup>151</sup> Relating this to the Council of Europe's structure, the Committee of Ministers and the Parliamentary Assembly together fit this role. However, whereas the Committee of Ministers serves as the main legislative body, the Parliamentary Assembly has no legislative power, but rather serves to provide consultative opinions.<sup>152</sup>

#### *1. Committee of Ministers*

The Committee of Ministers is composed of the Ministers for Foreign Affairs from each Contracting State.<sup>153</sup> Each Minister has an equally weighted vote.<sup>154</sup> The Committee serves both as a governmental body and also as a regulatory body to ensure Contracting State compliance with judgments and the Convention.<sup>155</sup> Although the Committee is composed of a collection of views—that is, the views of each Contracting State Minister—for the purpose of this paper, I will refer to the Committee's opinion as that of the majority of the Ministers and the CDDH. Minority Ministers' views will be outlined in the "Contracting States" section of this paper.<sup>156</sup>

The Committee has played a significant role in drafting Protocol 14. In fact, the decision to launch this reform process originated at the Council of Europe's Ministerial Conference in Rome in November 2000, during which the Ministers called on the Committee of Ministers to research the root of the case backlog problem and draft recommendations on how to best address the problem.<sup>157</sup> From this Conference, the Committee of Ministers established the Evaluations Group and later mandated its own Steering Committee on Human Rights, which was composed of members of the Committee of Ministers Steering Committee

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151. Caron, *supra* note 20, at 416.

152. Telephone Interview with Jeroen Schokkenbroek, former Secretary to the Reflection Group and the CDDH and current Head of the Human Rights Intergovernmental Programmes Department at the Directorate General of Human Rights of the Council of Europe, in Strasbourg, France (Nov. 17, 2005).

153. The Ministers themselves only rarely attend meetings of the Committee of Ministers, as they are normally represented by their permanent representatives (i.e. ambassadors), in Strasbourg. E-mail from Matti Pellonpaa, ECHR Judge, to Christina Hioureas, Student at UC Berkeley School of Law (Boalt Hall) (Dec. 19, 2005, 12:11:08 am PST) (on file with author) [hereinafter *e-mail from Judge Pellonpaa*].

154. About the Committee of Ministers, [http://www.coe.int/T/CM/aboutCM\\_en.asp](http://www.coe.int/T/CM/aboutCM_en.asp) (last visited Feb. 13, 2006).

155. *Id.*

156. *See infra*, Part VI.B.3.

157. *The European Convention on Human Rights at 50, supra* note 1; *see also Explanatory Report, supra* note 3, para. 2.

who volunteered to take on this task.<sup>158</sup> Therefore, those who researched and drafted the Protocol originated from the Committee of Ministers. Based on this information, it is clear that the Committee of Ministers framed the reform discussion and controlled the process by which amendments would be included. The Court's mission, as promoted by the majority of the Ministers and by the CDDH, was to provide broad individual justice while also serving as a quasi-constitutional structure.<sup>159</sup>

The Protocol must be adopted by 2/3 of the Committee of Ministers' Representatives and then signed and ratified by all Contracting States in order to take effect.<sup>160</sup> Although the procedure for adopting the Protocol requires only a 2/3 majority of the Ministers, the Committee's goal was most likely to create a draft that would not only address the Court's problems, but also result in unanimous or near unanimous approval by the Ministers. This is because each Minister represents the views of the appointing Contracting State based on the structure of the Committee of Ministers.<sup>161</sup> Therefore, opposition to the Protocol by a Minister may well indicate the opposition of her Contracting State as well. Thus, achieving only a 2/3 majority would defeat the purpose of adopting the Protocol in the first place because not all Contracting States would sign or ratify the measure.

Based on these adoption procedures and the Committee's aims, it can be inferred that the Committee employed a "minimum winning coalition"<sup>162</sup> strategy in which the Committee conceded only what was needed to win (i.e. accomplish its aims) and nothing more. This way, the Committee conceded as little as possible to gain the votes of the minority Ministers who opposed certain measures of the Protocol draft. In fact, according to one of the main Protocol drafters, former Secretary to the Reflection Group and current head of the Council of Europe's Human Rights and Intergovernmental Programmes Department, Directorate General of Human Rights Jeroen Schokkenbroek, "Contracting State positions became clear at the early stages of the process, well before the Protocol reached the Committee of Ministers," and therefore, the CDDH was able to incorporate these concerns into the early Protocol drafts so as to ensure Contracting State support.<sup>163</sup> The CDDH "negotiated [Contracting] State problems early on, to guarantee that the final result [would be] supported by as many states as possible."<sup>164</sup>

For example, probably the most hotly contested portion of the Protocol is

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158. Telephone Interview with Jeroen Schokkenbroek, *supra* note 152.

159. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17, at 94-106; *see also* Mahoney, *supra* note 14, at 173; *Protocol 14*, *supra* note 12.

160. *See* Statutory Resolution (93) 27 on majorities required for decisions of the Committee of Ministers (1), at <https://wcd.coe.int/ViewDoc.jsp?id=99211> (Dec. 12, 2003).

161. About the Committee of Ministers, at [http://www.coe.int/T/CM/aboutCM\\_en.asp](http://www.coe.int/T/CM/aboutCM_en.asp).

162. *See generally* WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

163. Telephone Interview with Jeroen Schokkenbroek, *supra* note 152.

164. *Id.*

the new admissibility requirement.<sup>165</sup> Article 12 of the Protocol indicates that applicants must have suffered “significant disadvantage” in order to have a valid claim “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>166</sup> As indicated above, the rationale given in the Explanatory Report is to further filter out applications in which the harm is not severe so that judges may devote a greater portion of their time to more serious cases.<sup>167</sup>

In the initial draft, applications would be denied if they did not contain a “substantial issue.”<sup>168</sup> However, the CDDH decided that the wording would give too much discretion to judges to determine what constitutes a “substantive issue.”<sup>169</sup> Ministers questioned whether judges would interpret the wording strictly or expansively, since the Protocol did not include an author’s intent as to how it should be applied.<sup>170</sup> As a result, the CDDH changed the wording early in the process to “substantial harm” and included an exception to its application so as to ensure state approval.<sup>171</sup> However, there was still significant dissent amongst some Ministers.

The parties, therefore, reached yet another compromise in which the new admissibility criteria would only be applied by Chambers and Grand Chambers for the first two years after the Protocol’s implementation.<sup>172</sup> This would allow the Chambers and Grand Chambers to establish case law on how to interpret the standard so that it would be applied consistently.<sup>173</sup> Although NGOs still opposed this wording,<sup>174</sup> their recommended amendments were not adopted.<sup>175</sup> This may be because, although they were included in the Protocol discussions, they did not have any voting power,<sup>176</sup> and therefore the CDDH and the Committee of Ministers did not need to follow their opinion.

Yet another example of the Committee’s “minimum winning coalition” is the debate over single-judge formation. Although this measure was less controversial, NGOs and the Parliamentary Assembly still opposed the measure because reducing the number of judges who are reviewing a case would remove

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165. See Press Release, Amnesty Int’l, *supra* note 14; Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, *supra* note 14, at 663-73; Beernaert, *supra* note 14, at 544-57; Mahoney, *supra* note 14, at 175; Wildhaber, *supra* note 14, at 163-64; *Joint Response*, *supra* note 14.

166. *Protocol 14*, *supra* note 12, art. 12.

167. *Explanatory Report*, *supra* note 3, paras. 39, 77-78.

168. *Id.* at 34.

169. Bernhardt, *supra* note 14, at 553; see also Greer, *supra* note 14, at 668-70.

170. *Id.*

171. *Protocol 14*, *supra* note 12, Article 12.

172. *Id.* art. 20, para. 2; see also *Explanatory Report*, *supra* note 3, paras. 81-85.

173. *Explanatory Report*, *supra* note 3, at paras. 81-85.

174. See *infra* Part VI.B.6 (describing the reasons for NGO opposition).

175. See generally *Protocol 14*, *supra* note 12.

176. Interview with Jill Heine, *supra* note 126.

collegiate decision-making from the process.<sup>177</sup> However, as indicated in the Explanatory Note, currently judges base their decisions almost completely off of the rapporteurs' reports instead of fully discussing the case.<sup>178</sup> In fact, the judges almost never disagree with the rapporteur's report.<sup>179</sup>

Further, a study published by the CDDH in April 2003 indicated that the single-judge formation filtering procedure would affect over fifty percent of the Chamber cases and would represent "a significant increase" in the Court's ability to adjudicate pressing human rights cases.<sup>180</sup> The final version of the Protocol reveals that the Committee ignored the NGOs and Parliamentary Assembly's dissent and maintained the provision because most Ministers supported this measure.

Probably the clearest example of the Committee's use of a "minimum winning coalition" is the debate over allowing a national judge to sit on the Committee panel to review repetitive cases.<sup>181</sup> The rationale behind this reform is that the measure would ensure that it would allow a national judge, who is knowledgeable of the state's law, to insert its opinion during the evaluation of a "repetitive" case.<sup>182</sup> NGOs and the Parliamentary Assembly opposed this measure because they believed it would allow states to influence the procedure and would unfairly prejudice the claimant.<sup>183</sup>

However, the majority of the Ministers did not agree with this view because it is up to the committee of judges to decide whether or not to invite a national judge to sit on the panel.<sup>184</sup> Furthermore, as the Explanatory Report<sup>185</sup> outlines, the reason why a state's ability to contest has been "explicitly mentioned" in paragraph three of the Protocol as "one of the factors which could bring the Committee to solicit the participation of the 'national judge' is that there would otherwise have been no mention at all in the Protocol of the possibility for States to contest the application of the simplified procedure."<sup>186</sup> This measure was included to guarantee that Contracting States would have a say in the expedited review process.<sup>187</sup> In order to ensure the Protocol's passage, the Committee needed to cater to this concern. The result was a compromise in which the Council of Ministers representing the Contracting

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177. Amnesty Interim Activity Report, *supra* note 142.

178. Explanatory Note, *supra* note 3, para. 67; p. 4, n. 30. Also, since the publication of the *Explanatory Report*, the practice changed so that the Registry directly presents reports to Committees rather than through rapporteurs. It is still true that judges in Committees rarely disagree with these reports. E-mail from Judge Pellonpää I, *supra* note 153.

179. Bernhardt, *supra* note 14, at 549, ns. 30, 31; Amnesty Interim Activities Report, *supra* note 142.

180. CDDH Final Report, *supra* note 106; see also Easton & Schokkenbroek, *supra* note 18, n. 13.

181. *Explanatory Report*, *supra* note 3, para. 71.

182. *Id.*

183. *Id.*

184. Eaton & Schokkenbroek, *supra* note 18, at 21.

185. *Explanatory Report*, *supra* note 3, para. 71.

186. Eaton & Schokkenbroek, *supra* note 18, at 21.

187. *Id.*

States agreed to allow the Court to review repetitive cases in an expedited manner, which could potentially lead to more judgments against states; and in return Article 8, paragraph three, would give states some assurance that the Court will not automatically hold for the plaintiff based on prior case law.<sup>188</sup>

From these examples, it appears that the Committee's aim was to ensure that the Protocol would not only serve to expedite the case review process by eliminating inadmissible and "insubstantial" cases, but also to ensure near unanimous Contracting State approval so as to guarantee adoption of the Protocol. In fact, in an interview, Schokkenbroek agreed that there would be "no point in adopting a treaty like this by a very narrow majority since it requires ratification by all forty-six member states."<sup>189</sup> Without this assurance of support, the effort in drafting a Protocol would have gone to waste.

Whether the Committee of Ministers' "minimum winning coalition" strategy was successful will depend on whether all of the Contracting States sign and ratify the Protocol. However, regarding the final version of the Protocol, the Committee was probably the most successful because it accomplished its aim of shaping the Court's function into more of a quasi-constitutional court. The Committee's success is mainly due to the fact that it controlled the Protocol drafting process, as the CDDH was composed of members of the Committee's Steering Committee and the Ministers had the power to vote or send back for further work any of the Protocol drafts.

Although the Committee of Ministers was the most influential, it was not able to accomplish all of its aims. If adopted, Protocol 14 will incrementally change Court process. The Committee's disappointment with this incremental reform is reflected in the fact that it has already set up another reform committee, the group of "Wise Persons," to research further measures to transform the Court in a more radical manner. Thus, although the Committee controlled the Protocol drafting process, it was unable to achieve its aims, possibly due to the conflicting interests involved in the struggle to shape the "bounded strategic space."<sup>190</sup>

## 2. Parliamentary Assembly

The Parliamentary Assembly consists of members of domestic parliaments who are either popularly elected or appointed by their governments.<sup>191</sup> There are 630 Representatives and 18 "Observers." The number of Representatives per state varies and is proportional to the state's population.<sup>192</sup> In this way, the

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188. *Id.*

189. Interview Jeroen Schokkenbroek, *supra* note 158.

190. However, because the Committee of Ministers controlled the entire process, they were able to significantly limit the impact of the other actors within and outside of the "bounded strategic space." See *infra* Part VI.B.2-6.

191. About the Parliamentary Assembly, at [http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE\\_framework.htm](http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_framework.htm) (last visited Feb. 13, 2006) (Member States choose how to elect the representatives either through direct democracy or through political appointments).

192. About the Parliamentary Assembly Structures, at <http://assembly.coe.int/Main.asp>

Parliamentary Assembly can be characterized as similar to national Parliaments in which the Representatives' opinions more closely represent the concerns of their constituents. Whereas the Committee of Ministers represents the interests of the Contracting States, the Parliamentary Assembly represents the interests of the citizens within each Contracting State. However, it should be noted that the Assembly does not have legislative power, but rather, gives Consultative Opinions to the Committee of Ministers, which they must then adopt or reject.<sup>193</sup> One of the Assembly's most important functions is to appoint ECHR judges.

As indicated above, the Protocol draft procedure was transparent. The CDDH welcomed suggestions from the Parliamentary Assembly, and particularly their Consultative Opinion, which the Committee of Ministers adopted.<sup>194</sup> Most of the Parliamentary Assembly's opposition to or support for certain measures stems from its effort to increase its role and power within the "bounded strategic space."

While the Assembly was concerned with the new admissibility criterion and the procedure for adopting additional ad hoc judges, it also did not want national judges to be permitted to contest the application of existing precedent in the repetitive case review procedure.<sup>195</sup> All of these measures deal with either reducing or increasing the Parliamentary Assembly's role. Since it has no legislative power, it is struggling to remain relevant and influential. In fact, as Schokkenbroek explained, "The Parliamentary Assembly wants to protect their prerogative to appoint judges. However, the Steering Committee felt the need to change the way that ad hoc judges are appointed and so could not cater to [the Assembly's] concern."<sup>196</sup> Therefore, the Assembly was not as successful in shaping the Court's "bounded strategic space" in its favor.

The Parliamentary Assembly agreed with the NGOs and opposed the new admissibility requirement.<sup>197</sup> The Assembly argued that the requirement was "vague, subjective and liable to do the applicant a serious injustice."<sup>198</sup> Nevertheless, the criterion was adopted, although some compromises were reached so as to reduce its severity.<sup>199</sup>

Instead, the Parliamentary Assembly suggested increasing the number of judges at the request of the Plenary Assembly of the Court, which is composed of all forty-five judges.<sup>200</sup> In this proposal, the Assembly would appoint

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?link=/AboutUs/APCE\_structures.htm (last visited Feb. 13, 2006).

193. *Id.*

194. Interview with Jeroen Schokkenbroek, *supra* note 158.

195. Parliamentary Assembly, *Opinion No. 251*, *supra* note 145.

196. *Id.*

197. *Id.*; see also *Joint Response*, *supra* note 14.

198. *Id.*; see also Stefania Bianchi, *EU: Amnesty Concerned Over Reform of Rights Court*, IPS-Inter Press Service/ Global Information Network, May 12, 2004.

199. See *supra* Part VI.B.1.

200. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17, at 85.

additional judges from the Contracting States with the greatest violations.<sup>201</sup> The rationale was that increasing the number of judges would expedite the review by taking the workload off of current judges. The members of the CDDH considered the views of Contracting States (through their Ministers) and ultimately rejected this suggestion. One can interpret this recommendation as an effort by the Assembly to increase its role by altering the Court's structure so that it would appoint additional judges and play a more significant role.

The Assembly did not like the provision that altered the ad hoc judge appointment procedure because the procedure would no longer require the Parliamentary Assembly's approval of ad hoc judges.<sup>202</sup> Since one of the Assembly's main roles is to approve ECHR judges, it wanted to increase its role by assuring that it reviewed and approved *all* judges.<sup>203</sup> Additionally, the Assembly aimed to approve who sits on a panel not only to increase the Assembly's role, but also to ensure that the judges that review cases are legitimate.<sup>204</sup> Ultimately, this proposal was not adopted because Ministers argued that this would retard the appointing process since achieving Assembly approval would take a significant amount of time and ad hoc judges need to be able to be appointed quickly. The Assembly's suggestion would add a further layer of bureaucracy.<sup>205</sup> As Schokkenbroek explained, "The Assembly's role in the selection of ad hoc judges goes pretty far. [The old process was] a heavy procedure and the Court needs to move faster without such bureaucracy."<sup>206</sup>

Again, together with the NGOs, the Parliamentary Assembly did not approve of the measure to allow national judge presence at Committee meetings dealing with repetitive cases because this would detract from the Assembly's role of appointing judges. If national judges are permitted to sit on a panel without Parliamentary Assembly approval, then its role and power is reduced.<sup>207</sup> However, the Assembly was unable to persuade the Committee of Ministers, as the final version of the Protocol included the measure allowing national judge presence without Parliamentary Assembly approval.<sup>208</sup>

Considering the suggestions and opinions expressed by the Parliamentary Assembly in comparison to the final version of the Protocol, it is clear that the Assembly was not particularly successful in shaping the Court's "bounded strategic space." Not only were all of its efforts to increase or maintain hold of its power in the Council of Europe rejected, but it also failed to shape the Court's mission to reflect its view of "individual justice."<sup>209</sup>

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201. *Protocol 14*, *supra* note 12; *see also* Eaton & Schokkenbroek, *supra* note 18; *Joint Response*, *supra* note 14.

202. Eaton & Schokkenbroek, *supra* note 18, at 21.

203. *Id.* at 23.

204. *Id.*

205. Interview with Jeroen Schokkenbroek, *supra* note 152.

206. *Id.*

207. Eaton & Schokkenbroek, *supra* note 18, at 21.

208. *See Protocol 14*, *supra* note 11, art. 6 (changing art. 26 of the Convention), para. 4; art. 8 (changing art. 28), para. 3.

209. Due to the institutional structure of the Council of Europe, the Parliamentary Assembly

### 3. Contracting States (“the Community”)

The “Community,” or the Contracting States, may have a continuing role in terms of funding and governance.<sup>210</sup> For the purpose of this paper, “Contracting States” will refer to the minority of Committee of Ministers Representatives who expressed opposition to at least one measure (even though they ultimately voted for the Protocol).

There was significant disagreement amongst Contracting States on the proposed new admissibility criterion, particularly by six States: Austria, Belgium, Finland, Hungary, Latvia and Luxembourg.<sup>211</sup> The Austrian Minister presented a compromise proposal to resolve the debate on the wording of the new admissibility criterion.<sup>212</sup> However, most Ministers found the proposal to be too complicated. The Austrian proposal indicated that the language “no significant disadvantage” put forth an unintended negative message that some human rights violations are not significant.<sup>213</sup> NGOs agreed with this interpretation, as the language could be wrongly interpreted as a signal to national authorities that there was no need to redress minor human rights violations.<sup>214</sup> Judges then presented an amendment to the criterion that was adopted into the final version.<sup>215</sup>

Another contested point was the Parliamentary Assembly’s proposal to increase the number of judges. Russia strongly opposed this measure. According to Schokkenbroek, because the measure would allow the Parliamentary Assembly to appoint additional judges from states with the greatest number of claims filed against them, Russia had “great difficulties” with this measure because if the Court were to be composed of two Russian judges, this would “visibly expose Russia as having violated a significant number of human rights.”<sup>216</sup> The final version of the Protocol did not include this provision.<sup>217</sup>

Considering that these opposing states ultimately adopted the final Protocol version, and since most of their recommendations were taken into consideration, they were successful. Although the Protocol only required support from 2/3 of the Ministers, the Committee aimed for unanimous or near unanimous support

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had little leverage within the “bounded strategic space.” Cf. Committee of Minister, *supra* Part VI.B.1.

210. Caron, *supra* note 20, at 415-16.

211. Eaton & Schokkenbroek, *supra* note 18, at 6.

212. The proposal setting the standard for inadmissibility was: “if it appears from the file that the object of the application has been duly examined by a domestic tribunal according to the Convention and the Protocols thereto and in the light of the case-law of the Court, unless respect for human rights as defined in the Convention and the Protocols thereto requires a further examination of the application or the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.” *Id.* at 15, n. 36.

213. *Id.* at 18.

214. *Joint Response*, *supra* note 14.

215. Eaton & Schokkenbroek, *supra* note 18, at 18.

216. Interview with Jeroen Schokkenbroek, *supra* note 152.

217. *Protocol 14*, *supra* note 12.

so as to ensure that Contracting States would sign and ratify the Protocol.<sup>218</sup> Therefore, these dissenters were successful in shaping the Court's "strategic space."<sup>219</sup>

#### 4. ECHR Judges and Court Registry

Caron points to "adjudicators" as another group that works within and against the "bounded strategic space."<sup>220</sup> He defines the group as "the sole arbitrator or the panel of judges or arbitrators who will carry out the adjudicative function of the institution."<sup>221</sup> Caron further explains, "[T]he logic of this group may be viewed as one of self-interest expressed in the ability to be retained as an adjudicator, hired within another institution as an adjudicator, or maintain and increase their reputations."<sup>222</sup> He concludes that the group is concerned with "what their task is and most importantly who has defined their task."<sup>223</sup>

Although this definition describes a portion of the ECHR judges' motivation, it should be noted that the judges' also have an interest in ensuring that the Court continues to function so as to continue protecting human rights.<sup>224</sup> Additionally, their motivation for influencing the reform can be seen as one in which they aim to reduce their workload, especially with regard to inadmissible cases, so that they can decide more Chamber cases and have a significant effect on setting precedent.

With regards to the Court's mission, there was no clear consensus amongst judges on whether the Court should serve as more of a quasi-constitutional court or as a court for individual justice. However, ultimately, the judges supported the final Protocol (which included the new admissibility criterion), indicating support of the quasi-constitutional aim.<sup>225</sup> President of the Court Wildhaber was especially vocal about his independent views and goals for the Court as more quasi-constitutional.<sup>226</sup> In fact, he has frequently appeared before the group of "Wise Persons" to express his views on how to further reform the Court.<sup>227</sup>

Currently, judges are appointed by the Parliamentary Assembly for six-year unlimited terms, but Protocol 14 will change this to one nine-year term.<sup>228</sup> NGOs supported this measure, together with the judges, in order to reduce the

218. See *infra* Part VI.B.1.

219. The unanimity requirement for the adoption of the Protocol gave individual Contracting States greater influence within the "bounded strategic space," resulting in several key compromises. See *supra* Part VI.B.3.

220. Caron, *supra* note 20, at 415.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Position Paper, supra* note 16.

225. See *id.*; *Protocol 14, supra* note 14.

226. See generally Wildhaber, *supra* note 14.

227. European Commission for the Efficiency of Justice, CEPEJ (2005) 16 Rev. paras. 14-20, available at [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Operation\\_of\\_justice/Efficiency\\_of\\_justice/Meetings/1\\_Plenary/2005plenary6\\_en.asp](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Meetings/1_Plenary/2005plenary6_en.asp).

228. *Protocol 14, art. 2, supra* note 12; *Position Paper, supra* note 16.

politics involved in judge appointments.<sup>229</sup> Often politics played a role in state's recommendations to the Parliamentary Assembly, and thus states would not include the current ECHR judge from their state on the list because that judge had decided a significant amount of cases against the state.<sup>230</sup> Limiting judicial terms to a single term would therefore remove the politics from appointments and judges would no longer have to worry about campaigning in their states to influence their appointment.<sup>231</sup> The judges supported this change because it would make them appear more impartial and would remove their need to campaign back home.<sup>232</sup> The measure was approved and generally uncontested.

Regarding single-judge formations, the judges did not attain their goals.<sup>233</sup> The CDDH considered alternatives to single-judge formations, including the one promoted by the judges to create a completely separate filtering committee, in which registry lawyers would serve solely to filter cases and dismiss invalid claims.<sup>234</sup> The design would be similar to a regional court of first instance like that of the European Court of Justice.<sup>235</sup> The judges' amendment to create a separate admissibility reviewing institution was ultimately rejected because of the belief that it would de-legitimize the case review process.<sup>236</sup> Opponents argued that the process would not be legal in nature because lawyers rather than judges would review such applications.<sup>237</sup>

There was no consensus amongst the judges regarding the admissibility criterion, which relates back to the lack of judge consensus on the Court's mission.<sup>238</sup> However, the Judge Position Paper indicated general support of the final Protocol which included the admissibility criterion.<sup>239</sup> ECHR Judge, Matti Pellonpaa, explained, "Any opposition may have been based on different motives. Some may have thought that the provision did not go far enough, others would have liked it to be drafted differently, still some others may have been against it as a matter of principle."<sup>240</sup> In the end, the judges, as a whole, supported the measure so that they could focus on "more important" constitutional decisions.<sup>241</sup>

President of the Court Luis Wildhaber was one of the main proponents of the admissibility criterion to transform the Court into a constitutional court similar to that of the Supreme Court of the United States.<sup>242</sup> In fact, Wildhaber

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229. *Position Paper*, *supra* note 16; *Joint Response*, *supra* note 14.

230. Eaton & Schokkenbroek, *supra* note 18, at 22.

231. *Id.*

232. *Position Paper*, *supra* note 16.

233. *Id.*

234. Mahoney, *supra* note 14, at 173.

235. *Explanatory Report*, *supra* note 3, para. 34.

236. *Id.*

237. *Position Paper*, *supra* note 16.

238. *Id.*

239. *Id.*

240. E-mail from Matti Pellonpaa, ECHR Judge, to Christina Hioureas, Student at UC Berkeley School of Law (Boalt Hall) (Nov. 12, 2005, 2:0211 am PST) (on file with author).

241. See *Position Paper*, *supra* note 16.

242. Wildhaber, *supra* note 14, at 163-64; Interview with John Dalhuisen, *supra* note 54.

is one of the individuals behind the creation of the group of “Wise Persons” to further reform the Court because he was unable to accomplish his objectives with Protocol 14.<sup>243</sup> From his perspective, although review of each individual application to the Court is important, it would be even more important to filter out inadmissible claims in order to reach constitutional judgments in key cases.<sup>244</sup> Wildhaber prioritizes new subject matter cases over repetitive claims because he believes the former serve as the “magnifying glass which [reveals] the imperfections in national legal systems,” thereby allowing the ECHR to influence Contracting State human rights standards through its judgments.<sup>245</sup> However, Wildhaber’s instant move to further reform the Court without allowing Protocol 14 to take effect first may have a negative effect on Contracting States. That is, because the Protocol has not yet been implemented, establishing a group of “Wise Persons” immediately after the passage of the Protocol may dissuade Contracting States from signing and ratifying the Protocol.

But it appears that Wildhaber has taken a pragmatic stance on the status of the ECHR and fears that the current case influx and projected further influx will handicap the Court.<sup>246</sup> His idea of reform would allow judges more time to reflect on more serious cases.<sup>247</sup> As John Dalhuisen, Special Advisor to the Commissioner for Human Rights, explained, “The more time judges have to spend on dynamic cases, the more interesting and significant their decisions will be.”<sup>248</sup> With less time to spend on each case and more work being delegated to the Court registry, Wildhaber fears that the Court will devolve into a small claims court and no longer play a preeminent role in human rights jurisprudence.<sup>249</sup> Based on Wildhaber’s statements, Dalhusien speculates that “perhaps part of the motivation behind this reform is to alter the perception of the Court as purely an administrative churning.”<sup>250</sup>

But Wildhaber’s concerns also stem from the history of Court reform. After the adoption of Protocol 11, the Court was reformed administratively by changing practices and updating technology, and was also reformed fiscally by increasing resources. However, neither of these reforms has succeeded in curbing the influx of cases or the number of inadmissible claims.<sup>251</sup> Therefore, Protocol 14 was proposed to change the filtering process in order to reduce the number of cases accepted. Wildhaber’s vision of the reform is one of radical change in which he aims to “change the nature of the Court altogether.”<sup>252</sup> The

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243. Interview with John Dalhuisen, *supra* note 54; Interview with Jill Heine, *supra* note 126.

244. Wildhaber, *supra* note 14, at 164.

245. *Id.*

246. Wildhaber, *supra* note 14, at 163-65.

247. *Id.* at 163-64.

248. Interview with John Dalhuisen, *supra* note 54.

249. Wildhaber, *supra* note 14, at 163-65.

250. *Id.*

251. See generally *supra* note 3 and accompanying text.

252. *Id.*

question now is whether such dynamic change is acceptable to the actors within and outside of the “bounded strategic space.”

If one bases the judges’ success on their Position Paper, it appears that they were successful on the majority of their suggestions and opinions, but unsuccessful regarding establishing a separate filtering body. However, their joint opinion to transform the Court into more of a quasi-constitutional court was successful. Conversely, President Wildhaber’s individual struggle to shape the Court’s “bounded strategic space” appears to have not been successful. This is reflected in his almost immediate formation of the group of “Wise Persons” after the close of the Protocol drafting process to further reform the Court in a more radical manner.<sup>253</sup>

### 5. *The Commissioner for Human Rights*

The position of Commissioner for Human Rights was created in 1999 and is a separate institution within the Council of Europe.<sup>254</sup> The Commissioner’s main tasks include promoting education in human rights, encouraging states to create human rights structures and improve existing structures, identifying problems in human rights law in relation to practices, and generally promoting the Convention in Contracting States.<sup>255</sup> The Commissioner’s goal for the Court’s reform was mainly to increase his role to more significantly affect human rights jurisprudence.

The Commissioner aimed to increase his role by changing Court process so as to enable him to present proposals to bring forth claims.<sup>256</sup> Rather than accept his complete proposal, a compromise was reached because Ministers expressed concern that one must directly experience the harm in order to bring forth claims.<sup>257</sup> The compromise was to permit the Commissioner to intervene as a third party and provide evidence for cases. Schokkenbroek explained that the Steering Committee hesitated to adopt the Commissioner’s proposal because it would have complicated the Commissioner’s role by transforming it into something “similar to a prosecutor and this may have a negative impact on his capacity to dialogue with states.”<sup>258</sup> Therefore, in the end, the CDDH adopted this more “modest proposal” of allowing the Commissioner to intervene as a third party.<sup>259</sup>

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253. The absence of early consensus amongst the judges prevented the creation of a strong role for them within the “bounded strategic space.” However, their Position Paper was used by other actors to push their own agendas. *See, e.g.*, Amnesty Interim Activity Report, *supra* note 142. While at the same time, individual judges such as President of the Court Wildhaber, sought to influence the CDDH to reflect his independent goals for the Court. By doing so, Wildhaber, in effect, substituted himself for the role of the judges within the “bounded strategic space.”

254. *See generally* The Commissioner for Human Rights, *4th Annual Report to the Council of Europe and the Parliamentary Assembly*, CommDH 10 (2004).

255. *Id.* at 9-12.

256. *Id.*

257. Eaton & Schokkenbroek, *supra* note 18, at 24-25.

258. Interview with Jeroen Schokkenbroek, *supra* note 152.

259. *Id.*

According to Dalhuisen, the Commissioner was “mainly concerned with his own role and strengthening his relationship with the Court.”<sup>260</sup> By comparing Commissioner Alvaro Gil-Robles’ proposal to the final version of the Protocol, however, it is apparent that he did not get entirely what he wanted.<sup>261</sup> Nevertheless, the Commissioner “welcomes [the compromise amendment] in the European Convention for the Protection of Human Rights and Fundamental Freedoms as an important development.”<sup>262</sup> The Commissioner’s language indicates that although the Committee of Ministers did not accept his original proposal, the final version was to his liking.

Based on the Commissioner’s goals and the end result of the Protocol, one can conclude that the Commissioner was mildly successful. Given that he was not actively involved in the process and given that he was satisfied with any increase in his role, the Commissioner was successful in working within the “bounded strategic space” to encourage the CDDH and the Committee of Ministers to adopt a compromised version of his suggestion.<sup>263</sup>

#### 6. NGOs/Special Interest Groups

Although they do not have an official role in the institution, NGOs/special interest groups may express preferences for a particular proceeding outcome or institutional reform.<sup>264</sup> Caron identifies these groups as “other interested parties” or “outsiders” to the process because they do not serve a direct role in the institution and thus are not within the “bounded strategic space.”<sup>265</sup> He further explains, “even though the outsider groups may view the positions they hold as important, they are almost by definition of marginal influence in the process.”<sup>266</sup> Thus, the NGOs strive to increase their influence and often work *against* the “bounded space.”

The three main NGOs involved in the drafting process, Amnesty International, Fédération Internationale des Droits de l’Homme (FIDH), and the International Commission of Jurists, have Observer Status to the Council of Europe. Therefore, although they are “outsiders” because they do not have

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260. Interview with John Dalhuisen, *supra* note 54.

261. Commissioner for Human Rights Report, *supra* note 254, at 17. (“The Commissioner’s proposal and the Assembly’s Recommendation were not retained in Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, amending the control system of the Convention; the concern being expressed that such a role might prejudice the necessary confidence between the Commissioner and member States.”). See also Parliamentary Assembly, *Opinion No. 251*, *supra* note 145.

262. Commissioner for Human Rights Report, *supra* note 254, at 17.

263. Because the Commissioner had humble goals for his individual position rather than lofty institutional aspirations, he was able to adapt within the strategic space and work within the framework of the Council of Ministers. The Parliamentary Assembly faced the opposite scenario.

264. Caron, *supra* note 20, at 417-18 (giving an example of environmental non-governmental organizations that have an interest in the work of panels of the World Trade Organization).

265. *Id.*

266. *Id.*

official voting capabilities, they may also be considered “insiders” in that they have participatory status as the Counsel has established this unique relationship with members of civil society. NGOs not only express the views of their respective organizations, but also represent the voices of current and future applicants to the Court. Thus, they serve the purpose of promoting individual human rights by serving as “the living voice of future applicants in their aim to seek redress” for human rights violations in their states.<sup>267</sup>

Probably the most actively engaged NGO was Amnesty International. Jill Heine, Legal Advisor to Amnesty International, characterizes the NGOs’ goal as “ensuring that the voice of civil society was heard and considered in the reform discussions.”<sup>268</sup> More specifically, NGOs aimed to ensure that the “individual right to decision on their rights and the merits of the claim was not curtailed” by defeating the new admissibility criterion clause.<sup>269</sup> NGOs suggested addressing the root of the case influx problem by encouraging better implementation of the Convention at the national level and stronger domestic remedies, but they also suggested treating the present problem through a filtering mechanism.<sup>270</sup> They wanted to make sure that the reform process addressed the serious challenges identified by better filtering inadmissible cases and expediting the repetitive application review procedure. They view the Court’s mission as serving individual justice through upholding the Convention. This includes the right of individuals to seek redress from the Court, the proper “implementation of the Convention at the national level,” and the assurance that states will work to provide effective remedies at the national level.<sup>271</sup>

NGOs were actively included in the Protocol reform discussions and although they can be characterized as “outsiders” because they did not have an official institutional role, NGOs were to some extent treated as “insiders” since they were invited to meetings and were encouraged to draft opinions of and suggestions for the Protocol.<sup>272</sup> However, Heine points out a key distinction in that the NGOs were “observers, [who] commented and followed the CDDH carefully” but had no direct influence, such as voting rights.<sup>273</sup> Although NGOs “were privy to documents and discussions,” the public in general was as well.<sup>274</sup>

However, NGOs had multiple avenues by which to exert their influence as they lobbied the CDDH, Committee of Ministers, Parliamentary Assembly, Commissioner for Human Rights, and Contracting States.<sup>275</sup> NGOs made efforts to get as many influential individuals and groups to support their recommendations as possible in order to persuade the Committee to adopt their

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267. Interview with Jill Heine, *supra* note 126.

268. *Id.*

269. *Id.*

270. *Joint Response*, *supra* note 14.

271. Interview with Jill Heine, *supra* note 126.

272. *Id.*; Interview with Jeroen Schokkenbroek, *supra* note 134.

273. Interview with Jill Heine, *supra* note 126.

274. *Id.*

275. *Id.*

suggestions. Together with 114 NGOs,<sup>276</sup> Amnesty presented “Comments on the [CDDH] Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights.”<sup>277</sup> In this report, the NGOs detailed their objections to the CDDH’s Interim Report and offered amendments.<sup>278</sup> Their main fear was that the Protocol draft would curtail the right of individual petition.<sup>279</sup> Therefore, the NGOs’ main objections were the admissibility criteria and the presence of national judges at Committee hearings on recurring cases.<sup>280</sup>

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276. Signatories to the *Joint Response*, *supra* note 14; The “*Joint Response* to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights” has been signed by the following NGOs and bodies: AIRE Centre (Advice on Individual Rights in Europe) [United Kingdom], Amnesty International, APADOR-CH (The Romanian Helsinki Committee) [Romania], Association internationale pour la défense de la liberté religieuse [Switzerland], Association for the Prevention of Torture (APT) [Switzerland], Association for the Rehabilitation of Torture Victims - Center for Torture Victims [Bosnia and Herzegovina], Association for European integration and human rights, Ældresagen [Denmark], Bar Human Rights Committee, British Institute for Human Rights (BIHR) [United Kingdom], British Irish Rights Watch [United Kingdom], Bulgarian Helsinki Committee [Bulgaria], Bulgarian Lawyers for Human Rights [Bulgaria], Bulgarian Section of ICJ [Bulgaria], Centre for Development of Democracy and Human Rights [Russian Federation], Children’s Legal Centre [United Kingdom], Committee on the Administration of Justice (CAJ) [United Kingdom], Conference of European Churches (CEC), Conference of European Justice and Peace Commissions [Netherlands], Dansk Retspolitisk Forening [Denmark], Den Danske Helsingforskomité (Danish Helsinki Committee) [Denmark], European Council on Refugees and Exiles (ECRE), European Human Rights Advocacy Centre [United Kingdom], European Network Against Racism, European Roma Rights Centre (ERRC), Fair Trials Abroad, Fédération Internationale des Assistants Sociaux (FIAS), Fédération Internationale des ligues des droits de l’Homme (FIDH), Folkekirkens Nødhjælp [Denmark], FN-forbundet (United Nations Association) [Denmark], Georgian Young Lawyers Association [Georgia], Gesellschaft Für Bedrohte Völker [Germany], Greek Helsinki Monitor [Greece], Helsinki Foundation for Human Rights in Poland [Poland], Humanistische Union e.v. [Germany], Human Rights Association, Human Rights Watch, Hungarian Helsinki Committee, Ihmisoikeusjuristit ry (Finnish Section of the ICJ) [Finland], Immigration Law Practitioners’ Association (ILPA) [United Kingdom], INQUEST [United Kingdom], Institut de formation en droits de l’homme du barreau de Paris [France], International Commission of Jurists (ICJ), Internationale Gesellschaft für Menschenrechte (IGFM) [Germany], International Federation of the Action by Christians Against Torture (FIACAT), International Helsinki Federation, Interights [United Kingdom], International Working Group for Indigenous Affairs (IWGIA) [Denmark], Irish Penal Reform Trust [Eire], Justice [United Kingdom], Kindernothilfe e.v. [Germany], Kurdish Human Rights Project (KHRP) [United Kingdom], The Law Society of England and Wales [United Kingdom], League of Human Rights [Czech Republic], Liberty [United Kingdom], Ligue internationale de l’Enseignement, de l’Education et de la Culture populaire [France], Marangopoulos Foundation for Human Rights [Greece], Medical Foundation for the Care of Victims of Torture [United Kingdom], Minority Rights Group [Greece], Moldovan Helsinki Committee for Human Rights [Moldova], Movement against Racism, Nottingham University Human Rights Law Centre [United Kingdom], Nürnberger Menschenrechtszentrum [Germany], Opusgay [Portugal], Pat Finucane Centre [United Kingdom], Peace Brigades International (Deutscher Zweig e.V.) [Germany], PRO ASYL [Germany], Red Barnet (Save the Children) [Denmark], Rehabilitation and Research Centre for Torture Victims (RCT) [Denmark], Reporters Sans Frontières (RFS) [France], Resources Center of Moldovan Human Rights NGO’s [Moldova], Scottish Human Rights Centre [United Kingdom], Sokadre (Coordinated Organizations and Communities for Roma Human Rights) [Greece], World Organization against Torture (OMCT)

277. See generally Amnesty Interim Activity Report, *supra* note 142.

278. *Id.*

279. *Id.* para. 5.

280. *Id.* paras. 28-37, 52.

Although the admissibility criterion was amended from “substantial harm” to “significant disadvantage” because the former would potentially be interpreted too ambiguously, the NGOs still oppose the amended proposal, arguing that it would contradict the underlying mission of the Court as set out in the Convention, which is the right to individual application and justice, because the criterion could eliminate potentially valid claims.<sup>281</sup> In a press release, Amnesty asserted that the decision-makers must ensure that Protocol 14 “does not curtail the possibility for individuals to gain redress for human rights violations.”<sup>282</sup> Amnesty further argued that every human rights violation poses a significant disadvantage and expressed its concern that the criteria in the proposed amended admissibility criterion was “vague [and] could lead to arbitrary decisions,” allowing the Court to potentially reject well-founded cases.<sup>283</sup> Fearing that the criterion could be applied differently depending on which state is involved, and fearing that it could be inconsistently applied by different Court Chambers, the NGOs aimed to eliminate any expansion of the admissibility criterion from the Protocol.<sup>284</sup> In the end, the Parliamentary Assembly, Commissioner for Human Rights and some Contracting States agreed with the NGOs’ position opposing the measure.

Yet another reason for their opposition is that allowing the Court to dismiss less “substantial” claims would send a signal to Contracting States that they may violate “less significant” human rights and get away with it.<sup>285</sup> Amnesty and the other 114 NGOs, therefore, interpret the additional requirement as “an erosion of the protection of human rights,” potentially leaving victims without a remedy.<sup>286</sup>

Further, since ninety to ninety-six percent of applications are already deemed inadmissible, the NGOs argued that there was no need to add another admissibility criterion; rather the reform needed to address and expedite the filtering process. According to Steven Greer, “It was generally agreed, however, that such a test would have little impact upon the Court’s case management problems.”<sup>287</sup> However, two of the individuals closely involved in drafting the Protocol, Martin Eaton and Jeroen Schokkenbroek, argue that the additional criterion *would* affect the case backlog—it would affect about five percent of the applications filed.<sup>288</sup> Although opponents to the criterion have argued that five percent is insignificant, the authors argue to the contrary because there are currently 16,000 cases pending before the Court and five percent of that would

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281. *Id.* paras. 5, 33-37, 67-72.

282. Amnesty Int’l, *supra* note 14.

283. Amnesty Interim Activity Report, *supra* note 142, para. 36; *see also Position Paper*, *supra* note 16, para. 34 (indicating that the admissibility criterion was “rather vague, even potentially arbitrary.”).

284. Amnesty Int’l, *supra* note 14.

285. *Id.*

286. Greer, *supra* note 14 (explaining the ramifications of changes in the wording of the new criteria).

287. Greer, *supra* note 17, at 89.

288. Eaton & Schokkenbroek, *supra* note 18, at 14.

be 800 cases.<sup>289</sup> In their opinion, this is a significant number of cases disposed.<sup>290</sup>

Rather than add another admissibility criterion, NGOs urged the Committee of Ministers to focus on improving human rights at the state level, such as the Recommendations described above, and to address the filtering mechanism by implementing a system for expediting case review process.<sup>291</sup> If the reforms addressed the root of the problem, that is, Contracting State violations, this would “lead to fewer violations and the creation or improvement of redress mechanisms in member states.”<sup>292</sup> Therefore, the NGOs promoted a Recommendation for the Council of Europe to urge Contracting States to allocate financial resources to lawyers and NGOs so that they can provide legal aid to potential applicants and help to ensure the claims brought forth are valid.<sup>293</sup> This reform would reduce the number of inadmissible cases since citizens could request assistance to file a valid claim. NGOs state, “Our experience is that the provision of such advice has dissuaded people from making misconceived applications.”<sup>294</sup> While this measure could help reduce the number of inadmissible claims, this proposal is also possibly a self-serving measure to encourage Contracting States to better fund NGOs and strengthen their role.

Lastly, the NGOs recommended increasing the budget since an adequate budget is key to the Court’s continued effectiveness (although the budget process is separate from the protocol process). They noted that the ECHR’s budget is only a quarter of the European Court of Justice’s budget, and urged that “it is essential that Contracting States show greater commitment to the Court system by providing the Court with sufficient resources to carry out its tasks.”<sup>295</sup> However, Schokkenbroek indicated that the budget was not an issue for states because there is a consensus that proper funding for the Court is essential.<sup>296</sup> Therefore, he explained that in a separate budgetary process, Ministers are likely to vote in favor of increasing the budget.<sup>297</sup> For his part, Dalhuisen considered that, “[t]he Committee of Minister’s financial tolerance is not infinitely elastic. Although states are not interested in limiting the Court’s role to reduce the budget, states are inevitably concerned with increased costs.”<sup>298</sup> Although states support the Court and will likely vote to increase the budget if deemed necessary, they aim to reform the Court in a manner which would not require a significant budgetary increase.

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289. *Id.*

290. *Id.*

291. Interview with Jill Heine, *supra* note 126.

292. Bianchi, *supra* note 198.

293. *Joint Response*, *supra* note 14, para. 10.

294. *Id.* para. 11.

295. *Id.* para. 16.

296. Interview with Jeroen Schokkenbroek, *supra* note 152.

297. *Id.*

298. Interview with John Dalhuisen, *supra* note 54.

Amnesty and the other NGOs also opposed the single judge formation on the grounds that the rapporteurs would be playing a more significant role in the decision-making process, thus taking on a judicial role.<sup>299</sup> NGOs opposed granting rapporteurs this much power because the Convention entitles applicants to have their cases “determined by a court, not by administrative officers.”<sup>300</sup> They further argue that the Court will lose its credibility if it adopts such a measure because the decisions would lack collegiality.<sup>301</sup> Since the CDDH did not present any information as to how much time judges spend in committees, the NGOs argue that there is no proof that single-judge formations will be more efficient than committees of three judges deciding admissibility.<sup>302</sup> However, Amnesty indicated that if the CDDH did adopt the single-judge formation measure, then they would recommend that the CDDH limit it only to admissibility.<sup>303</sup> The final version of the Protocol did include single-judge formations, but only to decide admissibility, as Amnesty had recommended.<sup>304</sup>

Likewise, regarding “manifestly well-founded” or “repetitive cases,” NGOs did not want a national judge present at such hearings.<sup>305</sup> This would give the Committee of three judges the ability to substitute an elected judge on behalf of the state party if the state opposes the application of the three-judge committee procedure for repetitive cases.<sup>306</sup> The NGO view was that this measure would reduce the Court’s appearance of independence and prejudice the applicant.

Amnesty welcomed the change in judges’ terms of office to single nine-year terms because longer terms would give judges “greater security of tenure of office” which would reinforce their independence.<sup>307</sup> However, NGOs opposed the Parliamentary Assembly’s proposal for changing the manner in which ad hoc judges would be appointed.<sup>308</sup> Instead, Amnesty supported the version that was ultimately adopted by the Committee; that is, that the provision alters the process so that states must first submit a list of judges and the President of the Court will then select which ad hoc judge will sit on the panel depending on the case.<sup>309</sup> This way, states cannot strategically place a judge to hear a specific case because they believe she will find in the state’s favor.<sup>310</sup>

Although the Parliamentary Assembly proposed increasing the number of Court judges to expedite the application review process, NGOs did not support

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299. *Joint Response*, *supra* note 14, para. 7.

300. *Id.*

301. *Id.*

302. Amnesty Interim Activity Report, *supra* note 142, para. 46.

303. *Id.* para. 48.

304. *Protocol 14*, *supra* note 12.

305. Amnesty did not want the following language: Article 38(3): “including whether that State has contested the applications of the procedure under paragraph 1(b).” Amnesty Interim Activity Report, *supra* note 142, para. 24.

306. *Protocol 14*, *supra* note 12, art. 38(3).

307. Amnesty Interim Activity Report, *supra* note 142, para. 16.

308. Press Release, Amnesty Int’l, *supra* note 14.

309. *Protocol 14*, *supra* note 12, art. 6.

310. Amnesty Interim Activity Report *supra* note 142, para. 52.

this proposal because they did not find it to be a necessary means of expediting the procedure.<sup>311</sup> They argued that since the states that have the greatest number of violations would get to appoint an additional judge, this would not be fair because it would bias the process and “undermine the consistency of the jurisprudence and collegiality of the Court.”<sup>312</sup>

Additionally, Amnesty supported increasing the Commissioner’s role and also argued for increasing his budget and staff in order to strengthen his role.<sup>313</sup> Although Amnesty and the Commissioner supported each other’s proposals, neither claims to have engaged in logrolling, as both “operate on principle.”<sup>314</sup> Rather, Dalhuisen explained that Amnesty International’s arguments were very persuasive and well articulated, which may explain the similarity in their stances.<sup>315</sup>

Amnesty was, in fact, very persuasive, as it also managed to successfully build a coalition of 114 NGOs that spoke with a unified voice in support and opposition to specific measures.<sup>316</sup> This is especially remarkable considering that special interest groups often battle against one another and try to put forth different proposals. When asked how Amnesty built this coalition, Heine explained that Amnesty participated in meetings with London-based international and national NGOs and other professionals, in which they formulated a plan and reached out to NGOs across states by urging them to voice their opinions.<sup>317</sup> Amnesty would consult with NGOs and at the same time also fix a position on a certain measure and ask the others to sign on.<sup>318</sup> Heine explained that the decision-making process amongst these NGOs was very transparent and democratic.<sup>319</sup>

Asked whether Heine views the NGOs as successful in shaping the final Protocol draft, she replied, “No, we were not successful in ensuring the maintenance of individual right to application by eliminating the admissibility criterion.”<sup>320</sup> However, considering that the NGOs were working outside of the “bounded strategic space,” they were fairly successful. First, they mounted a tremendous campaign of 114 NGOs that proposed alternative solutions to the case influx and to the enormous number of inadmissible applications. By putting forth these alternative proposals, NGOs influenced the reform process by encouraging debate on certain proposals. Moreover, they succeeded in publishing these views to raise awareness. Second, in the end, some Ministers, the Commissioner for Human Rights, and the Parliamentary Assembly agreed

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311. *Id.* paras. 62-63.

312. *Id.* para. 66.

313. *Id.* paras. 49, 53-56.

314. Interview with Jill Heine, *supra* note 126.

315. Interview with John Dalhuisen, *supra* note 54.

316. *See Joint Response*, *supra* note 14.

317. Interview with Jill Heine, *supra* note 126.

318. *Id.*

319. *Id.*

320. *Id.*

with their views. Third, their suggestion that judges' terms be limited to one nine-year term was adopted, as was their recommendation to increase the Commissioner's role. In addition, the Ministers ultimately agreed with the NGOs and rejected the proposal to increase the number of judges based on which states had the most applications filed against them or alter the ad hoc appointment process so that the appointments would require Parliamentary Assembly approval.

However, these successes were insignificant in relation to the entire Protocol. NGOs were unsuccessful in their most important aim, which was to convince states and their Ministers not to accept the new admissibility criterion. This was the focus of their entire effort and was crucial to their goal. By failing to defeat the criterion, they failed to shape the Court's mission to preserve individual justice.<sup>321</sup>

## VII.

### CONCLUSION: WHO PREVAILED AND WHY?

Some have characterized the Protocol as a "missed opportunity."<sup>322</sup> President of the Court Luzius Wildhaber views the Protocol as a "step in the right direction [but even] with the new reform, the Court will continue to have an excessive workload."<sup>323</sup> However, this comment may merely reflect his loss in the process as he was unable to achieve radical Court reform by transforming it into a constitutional court. But if Wildhaber is correct, what more could have been done, and what prevented that from happening?

The Protocol 14 drafting process was a complex interaction of many actors that resulted in an incremental reform rather than a radical restructuring of the Court. This modest reform is mainly due to the reluctance of states to adopt a more drastic reform. In considering the complex interaction of actors, it is difficult to determine who was the most successful in the effort to shape a tribunal's "bounded strategic space." One interpretation is to consider which actors were the most successful in shaping the Protocol and in determining the Court's mission by considering each actor's political motivations and suggested changes in comparison to the final version of the Protocol.<sup>324</sup> Also key to this

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321. Although not completely within the "bounded strategic space," NGOs were able to alter other actors' positions within the space by bringing forth alternative proposals that were taken seriously by other actors within the strategic space. See, e.g., Parliamentary Assembly, *supra* Part VI.B.2; Contracting States, *supra* Part VI.B.3; Commissioner, *supra* Part VI.B.5.; *Contra* Committee of Ministers, *supra* Part VI.B.1.

322. Interview with Luzius Wildhaber, President of European Court of Human Rights (Apr. 21, 2004), [http://www.coe.int/t/e/com/files/interviews/20040421\\_interv\\_wildhaber.asp](http://www.coe.int/t/e/com/files/interviews/20040421_interv_wildhaber.asp).

323. *Id.*

324. Some political scientists have turned to calculating legislative "batting averages," in which they calculate the total legislation proposed and divide it by the amount of legislation that passed. However, to apply this tactic to the *Protocol 14* drafting process by dividing the number of amendments suggested by the number adopted would not serve as a significant measure of success. This is because taking a pure numerical calculation of these reforms ignores the significant

assessment is determining which actors were most restricted by the “bounded strategic space,” and were thus unable to shape the Court into their vision.

Those who pushed for narrow individual justice were least successful, as indicated by the fact that the new admissibility criterion was adopted. This included the NGOs, the Parliamentary Assembly, the Commissioner for Human Rights (to some extent), and some Contracting States. Meanwhile, those in favor of a broad interpretation of individual justice to restructure the ECHR into a quasi-constitutional court were the most successful. This includes the Committee of Ministers and judges.

The Committee of Ministers was probably the most influential actor because it controlled the process and only needed to concede enough to get the Contracting States to ratify the Protocol. Thus it was able to succeed in achieving its mission of transforming the Court into a quasi-constitutional Court. However, time will tell if the Protocol will result in these aims. One can characterize the Committee’s most important goal as ensuring the Protocol’s passage because failure to do so would render the drafting process useless. From this standpoint, it is clear that the Committee was successful in achieving consensus amongst Ministers. However, whether they will be successful in ensuring Contracting State signature and ratification is another story.

Even so, the Committee’s efforts may still be interpreted as unsuccessful or incomplete since the Committee set up a group of “Wise Persons” to look into further reforms and to outline a program of actions to further reform the Court almost immediately after the adoption of the Protocol. This move gives the appearance that the Protocol will not accomplish the Ministers’ aims. Therefore, although the Committee of Ministers was the most influential, Protocol 14 and the reform package were not entirely adequate in addressing the Committee’s identified problems and desired solutions. This result is probably due to the many actors involved in the struggle to shape the Court’s “bounded strategic space.”

The Parliamentary Assembly was probably the least successful, as it was unable to achieve its main goal of maintaining or increasing its role. Maybe the Assembly’s lack of success says something about the Council of Europe’s structure, where the body composed of popularly elected representatives is significantly less influential than the body representing the views of Contracting States. It is possible that this reform process sheds light on a democratic deficit in the Council of Europe in which officials directly representing voter views are significantly less influential than appointed bureaucrats.

Despite this possible structural problem within the Council of Europe, the Protocol drafting process was a particularly unique interaction between a significant amount of actors and ideas, which resulted from the transparency of

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differences between each proposal. Some amendments aim to change the protocol more significantly than others and thus could be more difficult to reach a consensus on. Not all proposed amendments should be weighed equally and therefore, such a formalistic assessment would not be helpful to this discussion.

the process. At the same time, the process gave an illusion that “outsiders” would be treated as “insiders,” in that NGOs were invited to meetings and encouraged to put forth ideas, but most of these recommendations were not adopted.

However, even though the majority of the “outsiders” views were not ultimately adopted, these actors played a significant role in making the process more deliberative so that the insiders considered the measures and the alternatives that they were voting on more thoroughly. Although NGOs were restricted by the “bounded strategic space” because they do not have voting capabilities, they themselves influenced the reform process by expressing the voice of civil society, as they presented alternative proposals that led to a greater debate on the Court’s future. In the end, some Ministers, the Parliamentary Assembly, and the Commissioner for Human Rights agreed with their views and expressed these concerns to the Committee of Ministers. Although the vast majority of NGO proposals were not adopted, and although their main goal to defeat the new admissibility criterion failed, NGOs significantly altered the process, making it more transparent and democratic despite the limitations imposed by the Court’s “bounded strategic space.”



