# Texas International Law Journal

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### Articles



### Notes




The University of Texas School of Law

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**ARTICLES**



**NOTES**

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast and informed of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former coeditor-in-chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, former member of the Constitutional Court of South Africa and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda; **the Honorable Dalia Dorner**, former Associate Justice of the Supreme Court of Israel; **Robert Reich**, professor of public policy at the University of California, Berkley, former U.S. Secretary of Labor, former professor of government and public policy at Harvard University, and former director of public policy for the Federal Trade Commission; **Joseph Jove**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under Presidents Kennedy and Johnson; **Ewell "Pat" Murphy**, former chairman of the American Bar Association's Section of International Law and respected practicing attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; **W. Michael Reisman**, professor at Yale Law School and honorary editor of the *American Journal of International* Law; and **Jay L. Westbrook**, professor and Benno C. Schmidt Chair of Business Law at the University of Texas School of Law.

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# Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice

HARRY HOBBS*

*Abstract*

Effective and meaningful victim participation in international criminal proceedings is a vital component of transitional justice. In post-conflict societies, victim participation can empower survivors, engender individual healing and social trust, and promote accountability and the rule of law. Although victim participation is well established and noncontroversial in domestic civil law jurisdictions, it cannot simply be translated into the international arena. A host of difficulties, beginning with the potentially enormous number of victims of international crimes, plague implementation of this crucial component of justice. This Article examines many of the difficulties involved in institutionalizing effective victim participation into international criminal proceedings, but it also proposes three solutions. These solutions offer a way forward for systemic development of the International Criminal Court (ICC) and future ad hoc international tribunals.

SUMMARY



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* Harry Hobbs is the Legal Research Officer at the High Court of Australia. He graduated in 2012 with a B.A. specializing in genocide studies and a LL.B. with First Class Honors. In 2011, he worked in the Pre-Trial and Supreme Court Chambers of the Extraordinary Chambers in the Courts of Cambodia. His work focused on the determination of Civil Party admissibility on appeal in Case 001 and on application in Cases 003 and 004. His work at the Court forms the basis of this Article, which was written as partial completion of his LLB. His research interests include international criminal law, transitional justice, and genocide studies. The author gratefully acknowledges the assistance of the editorial staff of this *Journal* for their tireless proofing work.

## INTRODUCTION

"The interests of society as a whole and of justice necessarily include the general interests of victims of the alleged crimes."[1]

Permitting the victims of mass atrocity to take an active role in the criminal prosecution of the accused is a delicate issue. How can their introduction be reconciled with the fair-trial rights of the defendant? This does not appear to be a problem for domestic jurisdictions of the civil-law tradition, which have long accommodated victims as subsidiary prosecutors,[2] and neither should it be a problem for international tribunals. Of course, international criminal prosecutions present their own difficulties, not least of which is the number of victims petitioning for participation, but the potential benefits of meaningful participatory rights are such

1. Co-Prosecutors v. Duch, Case No. 001/18-07-2007/ECCC/TC, Decision on Civil Party Co-Lawyers' Joint Response for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, para. 20 (Oct. 9, 2009), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E72_3_EN.pdf [hereinafter Duch Decision on Joint Response].

2. *See id.* para. 18 (discussing the right of victims to participate in criminal proceedings within jurisdictions following the civil-party system).

that they must be pursued. Victim participation has the potential to empower survivors and engender individual healing and social trust, promoting accountability and the rule of law in post-conflict transitioning societies. As the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) succinctly notes above, the interests of society and of justice require that victims participate as something more than witnesses.[3]

This Article first considers the question of "who is a victim" in international law. It then examines victim participation generally, evaluating its potential benefits and the modalities of participation in three specific jurisdictions (two international and one national). Next, it moves on to explore many of the difficulties involved in institutionalizing victim participation in international criminal proceedings. It analyzes how the admissibility of victims may affect fundamental fair-trial rights, such as equality of arms and undue delay, how the sheer number of victims of international crimes exacerbates issues of fraud and subversion and the divergent interests of the prosecution and victim's counsel, and how poor structural implementation still hinders effective victim participation. This Article also proposes three solutions to these issues. It argues that reforming the admissibility structure, collectivizing victim participation, and limiting reparations to moral and collective awards offer the best way forward for systemic development of the International Criminal Court (ICC) and future ad hoc international tribunals.

This Article is based on the Author's work in the Pre-Trial and Supreme Court Chambers of the ECCC in 2011. During this time, the Author assisted in the determination of Civil Party admissibility on appeal in Case 001 and on application in Cases 003 and 004.[4] The Article, therefore, focuses primarily on the experiences of the Cambodian tribunal—but examines ICC practice where appropriate—with the aim of providing lessons for practitioners and researchers. While victim participation in the ECCC has transformed into a sui generis beast that owes much to the peculiar circumstances of the Cambodian domestic code and the tribunal itself, there are many general lessons that can, and must, be gleaned from the country's experience if victim participation is to become institutionalized in international criminal courts.

## I. WHO IS A VICTIM?

The question of "who is a victim" under international criminal law prima facie appears both obvious and insulting. How can one witness the devastation and horror of Cambodia's killing fields, a Nazi death camp, or an Interahamwe massacre and ask whether these people are victims? *Of course* they are victims. Indeed this intuitive response is confirmed by international law in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration of Basic Principles),[5]

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3. *Id.* paras. 20, 25.

4. Case 001, Case 003, and Case 004 are three of the four cases currently before the ECCC. *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/en/about-eccc/introduction (last visited Oct. 17, 2013). The defendant in Case 001 is Kaing Guek Eav alias "Duch," while the identities of the defendants for Case 003 and Case 004 have not yet been made public. *Id.*

5. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res.

the first international standard on the rights of victims, defining them as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States . . . ."[6]

This definition encompasses victims of mass atrocity, but it is inadequate for international courts that offer participatory rights to victims. At these courts,[7] the inclusion of a *causal connection* between the alleged harm and the accused is an essential and important requirement of declaring who is a victim.[8]

Demonstrating a causal connection is relatively simple in domestic jurisdictions where offenses are typically direct and impact only one or a few individuals. However, difficulties arise in the prosecution of international crimes where the direct perpetrator, the child solider or the concentration camp guard, does not bear the greatest responsibility for the offense. In these cases, international law deems the militia leader, the camp commandant, the army general, or even the political head of state as responsible. To be a victim, the suffering must be linked not to the subordinate but to the de facto or de jure commander.[9] The difficulties that arise in defining who is a victim, therefore, stem from the difficulties in establishing the synapses within the chain of command.[10]

The ECCC and the ICC operate under a definition similar to that of the Declaration of Basic Principles but with the additional causal connection. At the

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40/34, U.N. Doc. A/RES/40/34, at 213 (Nov. 29, 1985) [hereinafter Declaration of Basic Principles].

6. *Id.* Annex, para. 1.

7. Please note that the ECCC, the ICC, and the Special Tribunal for Lebanon (STL) are currently the only international criminal courts that offer substantive participatory rights for victims. Int'l Crim. Court [ICC], *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, para. 14, 11th Sess., ICC Doc. ICC-ASP/11/22 (Nov. 5, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf. Because the STL's jurisdiction is much more limited than the ECCC or the ICC, and its victim participation regime is modeled on the ICC's, the SLT will not be the focus of this Article. *See* Marko Milanovi, *An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1139, 1139 (2007) (explaining that the STL "is the first international criminal court which will try persons who are accused solely of violating domestic, not international criminal law"); Matthew Gillett & Matthias Schuster, *The Special Tribunal for Lebanon Swiftly Adopts its Rules of Procedure and Evidence*, 7 J. INT'L CRIM. JUST. 885, 902–03 (2009) (outlining the similarities and differences between the STL's approach to victim participation and the ICC's approach to victim participation).

8. *See, e.g.*, Rules of Procedure and Evidence, ICC-ASP/1/3, R. 85(a) [hereinafter ICC Rules] (defining victims as "natural persons who have suffered harm as a result of the commission of any crime"); *see also* WAR CRIMES RESEARCH OFFICE, AMERICAN UNIV. WASHINGTON COLLEGE OF LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 50 (2007), *available at* http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf (noting that "a causal nexus [must] exist between the crime and the harm suffered" in order to satisfy the requirements of Rule 85(a) of the ICC Rules).

9. *See* Bakone Justice Moloto, *Command Responsibility in International Criminal Tribunals*, 3 BERKELEY J. INT'L L. PUBLICIST 12, 12, 16 (2009)

> (In cases where unidentified perpetrators are members of organized groups . . . the doctrine of command responsibility allows international criminal tribunals to hold superiors responsible for the crimes of their subordinates . . . . It is also not necessary that a formal, *de jure* subordination exist. A superior position for purposes of command responsibility can be based on *de facto* powers of control.).

10. It may be relatively easy to establish this causal connection when a photograph exists showing General *X* at crime site *Y* ordering militia *Z* to execute civilians, but such examples are not the norm.

ECCC, a victim is defined broadly as "a natural person or legal entity that has suffered harm as a result of the commission of any crime."[11] However, to participate as a Civil Party,[12] a victim must also demonstrate a causal connection between this harm and "at least one of the crimes alleged against the Charged Person."[13] The ICC operates under a similar rubric, defining victims as "natural persons who have suffered harm as a result of the commission of any crime,"[14] and finding that in order to participate "the harm alleged by a victim . . . must be linked with the charges confirmed against the accused."[15] As will be examined in Part IV, where victim participation is permitted, this causal connection is both necessary and valuable, as it limits the potentially enormous number of victim participants in criminal trials.

## II. WHAT IS VICTIM PARTICIPATION?

Victim participation offers individual victims of crime an opportunity to play an important role within, and indeed shape, the criminal justice process. This participation is vitally important because the interests of victims differ from those of the prosecutor; consequently, victims may be left out, and their positions may be unappreciated.[16] Interestingly, victim-centric dispute resolution is not a novel concept. In earlier cultures, blood feuds, banishment, and property destruction administered directly by the victim, his family, or his tribe were "the natural order for societies."[17] Today, enforcement and implementation of any judgment is

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11. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 8), Glossary [hereinafter ECCC Rules (Rev. 8)], *available at* http://www.eccc.gov.kh/sites/default/files/legaldocuments/ECCC%20Internal%20Rules%20(Rev.8)%20English.pdf. This definition mirrors the definition of victims in the Declaration of Basic Principles. *See* Declaration of Basic Principles, *supra* note 5, at Annex, para. 1 (defining victims as "persons who, individually or collectively, have suffered harm . . . through acts or omissions that are in violation of criminal laws operative within Member States").

12. Under the ECCC Rules (Rev. 8) Glossary, a Civil Party is defined as "a victim whose application to become a Civil Party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber in accordance with these IRs." ECCC Rules (Rev. 8), *supra* note 11, Glossary. Once a Civil Party, an applicant can participate in the proceedings. *See id.* R. 23(1) ("The purpose of Civil Party action before the ECCC is to [p]articipate in criminal proceedings . . . .").

13. *Id.* R. 23 *bis*(1)(b). The Pre-Trial Chamber of the ECCC has adopted an expansive interpretation of this phrase, declaring that "crimes alleged against the Charged Person" include crimes relating to policies "in areas other than those chosen to be investigated." Co-Prosecutors v. Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, paras. 77–78 (June 24, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D411_3_6_EN.PDF [hereinafter Sary Decision on Appeals]. This interpretation would significantly expand the definition of "victims" at international law.

14. ICC Rules, *supra* note 8, R. 85(a). An additional sub-paragraph, rule 85(b), extends this definition. *See id.* R. 85(b) (stating that "victims may include [certain] organizations or institutions").

15. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Reasons para. 2 (July 11, 2008), http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF [hereinafter Lubanga Judgment on Appeals].

16. *See* Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 303–06 (2005) (noting that victim participation in most common law systems remains uncertain and stymied by attempts to combine the private interests of victims with the traditionally broader interests of prosecutors acting for the public).

17. T. MARKUS FUNK, VICTIMS' RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL

considered to be the role of the State,[18] but in many jurisdictions, particularly those of the civil-law tradition, victims may participate in the proceedings.[19] The modalities of this participation differ but can include the following rights: to lodge a complaint to initiate prosecution, to participate in the prosecution as a party equal to the prosecutor and defense counsel, and to claim civil damages within the criminal action.[20]

### *A. Modalities of Participation*

The modalities of victim participation differ across jurisdictions according to the reason for participation. As discussed below, the participation regimes of the ECCC and the ICC, both of which enjoy international jurisdiction, grant less extensive participatory rights to victims than domestic jurisdictions like Cambodia. This brief analysis is designed to sketch out the differing jurisdictional limits of victim participation and does not discuss reparation schemes.

#### 1. The ECCC

At the ECCC, the purpose of Civil Party action is to "support[] the prosecution" and "[s]eek collective and moral reparations."[21] The rights of Civil Parties are therefore limited to merely supportive actions, although this has not always been the case.[22] At the pre-trial stage, despite being able to participate individually,[23] Civil Parties may only request that the Co-Investigating Judges undertake investigative actions on their behalf.[24] At the trial stage, Civil Parties lose this autonomy; they are required to participate collectively as a "single, consolidated

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COURT 19 (2010).

18. *See Enforcement of Judgments*, DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/law/judicial/judicial_691.html (last visited Oct. 22, 2013) ("In many foreign countries, as in most jurisdictions in the United States, the recognition and enforcement of foreign judgments is governed by local domestic law . . . .").

19. *See* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 233 (2006) ("In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* [Civil Party] in criminal proceedings.").

20. Doak, *supra* note 16, at 310–11.

21. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(a)–(b).

22. Under Rule 23(6)(a) of the original ECCC Rules, victims became parties to the criminal proceedings. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Original), R. 23(6)(a) [hereinafter ECCC Rules (Original)], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IR-Eng.pdf. Under this original scheme, victims were "endow[ed] . . . with near-equal participatory rights as the Prosecution and the Defense." Alain Werner & Daniella Rudy, *Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?*, 8 NW. J. INT'L HUM. RTS. 301, 301 (2010). However, the sixth revision of the Internal Rules removed any reference within the rules to a victim "becoming a party to the criminal proceedings." *See* Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 6), R. 23 [hereinafter ECCC Rules (Rev. 6)], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv6-EN.pdf (omitting many of the originally included provisions for "[C]ivil [P]arty actions by victims"). Civil Parties may now only "participate" in the proceedings. *Id.*; *see also* Werner & Rudy, *supra*, at 301 (discussing evolution of the victim participation scheme via changes in the ECCC Internal Rules over the course of the Duch trial).

23. ECCC Rules (Rev. 8), *supra* note 11, R. 23(3).

24. *Id.* R. 59(5).

group"[25] that is represented by two Civil Party Lead Co-Lawyers.[26] These counsels are "responsib[le] . . . for the overall advocacy, strategy and in-court presentation of the interests of the . . . Civil Parties during the trial stage and beyond."[27] The Lead Co-Lawyers have the right to appear before the Trial Chamber,[28] to summon witnesses and experts,[29] to question the accused,[30] and to object to the hearing of testimony of any witnesses.[31] While these Lead Co-Lawyers also have the right to make closing and rebuttal statements on behalf of the Civil Parties,[32] the victims themselves have been reduced to a merely supportive role in a decidedly restrictive regime.[33]

2. The ICC

The ICC regime is structured slightly different from the ECCC. Whereas an applicant deemed a Civil Party at the ECCC has a right to participate throughout all stages of the proceedings, victims at the ICC must continually reapply at each and every stage in order to participate.[34] The system is governed by Article 68(3): "Where the *personal interests* of the victims are affected, the Court shall permit their *views and concerns* to be presented and considered at stages of the proceedings determined to be *appropriate* by the Court . . . ."[35]

As these italicized terms are not defined in the Rome Statute or the ICC Rules of Procedure and Evidence, it has been left to the jurisprudence of the Court to develop an understanding of the modality of participation allowed.[36] Briefly, "appropriate proceedings" refers to judicial proceedings only and not the

25. *Id.* R. 23(3).

26. *Id.* R. 12 *ter*.

27. *Id.* R. 12 *ter*(5)(b).

28. *See id.* R. 88(1) (outlining procedures of appearance by Civil Parties before the trial chamber).

29. ECCC Rules (Rev. 8), *supra* note 11, R. 91(1). Rule 80(2) permits Civil Parties to summon witnesses and experts who do not appear on the list provided by the Co-Prosecutors. *Id.* R. 80(2).

30. *Id.* R. 90(2).

31. *Id.* R. 91(3). This right is limited to only when the Civil Party considers that "such testimony is not conducive to ascertaining the truth." *Id.*

32. *Id.* R. 94(1)(a), 94(2).

33. Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297, 327 (2012) ("[W]hile the ECCC Internal Rules establish a right of victims to participate in ECCC proceedings as [C]ivil [P]arties, they also limit victim participation in ways similar to the restrictions imposed on victims at the ICC.").

34. This requirement stems from the fact that at the ICC victims have never been considered parties to the proceedings, as they once had been at the ECCC. *See* Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L R. RED CROSS 409, 409 ("Victims [in the ICC] . . . are seen as nothing more than witnesses . . . .").

35. Rome Statute of the International Criminal Court art. 68(3), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (emphasis added).

36. *See* Baumgartner, *supra* note 34, at 411 ("The broad wording of the provisions on victim participation in the ICC's constitutive documents suggests that the drafters intended to leave wide discretion to the judges in actually shaping the Court's victim participation scheme.").

investigatory stage;[37] "views and concerns" has been interpreted liberally by the Pre-Trial and Trial Chambers as granting a right, in certain circumstances, to introduce evidence;[38] and "personal interests" has been interpreted differently at each stage of the proceedings.[39]

### 3. Cambodia

As a former French protectorate, the Cambodian legal system follows the civil law model and grants significant participatory rights to victims.[40] Cambodian law also forms the basis of ECCC law,[41] and, therefore, the rights guaranteed are broadly similar to those of the ECCC.

Under the Cambodian Criminal Code, "[t]he purpose of a civil action is 'to seek compensation for injuries to victims.'"[42] In this regard, victim applicants are granted extensive participatory rights, including foremost the right to initiate prosecution by way of seizing an investigating judge with a criminal action through the lodging of a complaint.[43] Granting a victim the right to initiate prosecution is an important right, as it forces the State to investigate actions it may have chosen not to pursue and gives victims a better chance to recover damages. This crucial right has never been granted to victims in international criminal proceedings,[44] and, because of a variety of issues discussed in Part III, is unlikely ever to be.

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37. *See* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-593, Decision on Victims' Participation in Proceedings Relating to the Situation in the Democratic Republic of the Congo, para. 9 (Apr. 11, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1053881.pdf [hereinafter DRC Victim Participation Decision] (acknowledging that victims may not be able to participate in the investigation stage but are entitled to participate in any judicial proceeding).

38. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2032-Anx, Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence During the Trial, paras. 19–20 (June 26, 2009) (recognizing the right of participating victims to "tender and examine evidence" and detailing the requirements that must be met in order to exercise this right). *See also* Lubanga Judgment on Appeals, *supra* note 15, para. 3 (discussing victim's opportunity to "lead evidence").

39. Baumgartner, *supra* note 34, at 423–24 (noting that "[t]he judges must determine whether there is sufficient personal interest for participation," a requirement which "change[s] from one stage of the procedure to another," and analyzing the criteria needed to show "personal interest" at different levels of a case). Unfortunately, there is simply not enough space to examine in detail the different rights of victims in the ICC, but they are broadly similar, although not as extensive, to those at the ECCC. *See* SáCouto, *supra* note 33, at 301 ("Although there are some significant differences in how the schemes work at the ICC and ECCC, both courts allow victims to participate in criminal proceedings independent of their role as witnesses . . . ."); Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 779 n.13 (2008) (noting that the ECCC "provides more extensive participatory rights for victims than any existing international tribunal").

40. Jennifer Holligan & Tarik Abdulhak, *Overview of the Cambodian History, Governance and Legal Sources*, HAUSER GLOBAL LAW SCHOOL PROGRAM (NYU LAW) (Apr. 2011), http://www.nyulawglobal.org/globalex/cambodia.htm; *see also* Phuong N. Pham et al., *Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia*, 3 J. HUM. RTS. PRAC. 264, 268 (2011) [hereinafter Pham et al., *Victim Participation and the Trial of Duch*] (discussing ways victims can participate in the Cambodian criminal justice system).

41. INT'L BAR ASS'N, SAFEGUARDING JUDICIAL INDEPENDENCE IN MIXED TRIBUNALS: LESSONS FROM THE ECCC AND BEST PRACTICES FOR THE FUTURE 8 (2011).

42. CODE CRIM. PROC. art. 5 (Cambodia).

43. *Id.* arts. 5, 6.

44. *See* SáCouto, *supra* note 33, at 325–26 ("As in the ICC context, civil parties at the ECCC do not

At the pre-trial stage, a victim may file an application to become a Civil Party.[45] Civil Parties may participate during the investigation by "request[ing] the investigating judge to question [the accused or witnesses] . . . conduct a confrontation or visit a site."[46] At the trial stage, a Civil Party has a right to question the accused and witnesses,[47] summon witnesses to appear before the court,[48] introduce evidence,[49] object to the hearing of testimony of a particular witness if such testimony is not helpful in ascertaining the truth,[50] make a closing statement,[51] appeal certain orders,[52] and appeal the final judgment in relation to civil matters only.[53] These rights are broadly similar, although generally more extensive than, those for Civil Parties at the ECCC. As this Article demonstrates, the difficulties and limitations of translating victim participation at the domestic level into the international arena necessarily results in a more restrictive participatory rights regime in international jurisdictions.

### *B. Benefits of Participation*

There is broad agreement among scholars of transitional justice that allowing victims to participate in criminal proceedings can offer significant benefits.[54] It is important to be clear, however, that these benefits are a potential consequence and

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have a right to initiate an investigation without the prosecution's consent, or to compel the [p]rosecutor to pursue any particular suspect or crime."); Mark E. Wojcik, *False Hope: The Rights of Victims Before International Criminal Tribunals*, 28 L'OBSERVATEUR DES NATIONS UNIES 1, 4 (2010) (discussing how victims in the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda cannot force the prosecutor to commence a criminal prosecution against an individual); *The Office of the Prosecutor*, THE SPECIAL COURT OF SIERRA LEONE, http://www.sc-sl.org/ABOUT/CourtOrganization/Prosecution/tabid/90/Default.aspx (last visited Oct. 21, 2013) (discussing the procedure for the Special Court of Sierra Leone and how "the [p]rosecutor is responsible for initiating and conducting the investigations," for preparing indictments, and does not "receive instructions from any Government or from any other source"); Jérôme de Hemptinne, *Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon*, 8 J. INT'L CRIM. JUST. 165, 166 (2010) ("[T]he proceedings [before the Special Tribunal for Lebanon] can only be initiated by the prosecutor and not by the victims themselves."); United Nations Transitional Administration in East Timor [UNTAET], *On Transitional Rules of Criminal Procedure*, *in* On the Amendment of UNTAET Regulation No.2000/11 on the Organization of Courts in East Timor and UNTAET Regulation No.2000/30 on the Transitional Rules of Criminal Procedure, § 7.1, UNTAET/REG/2001/25 (Sept. 14, 2001) ("The exclusive competence to conduct criminal investigations is vested in the Public Prosecution Service . . . . The competent [p]ublic [p]rosecutor is the only authority empowered to issue an indictment . . . .").

45. CODE CRIM. PROC. arts. 137–138 (Cambodia).

46. *Id.* art. 134.

47. *Id.* arts. 153, 325.

48. *Id.* art. 298.

49. *Id.* art. 334.

50. *Id.* art. 327.

51. CODE CRIM. PROC. arts. 335 (Cambodia).

52. *Id.* art. 268.

53. *Id.* arts. 375, 402.

54. *See* Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 73, 76–77 (2008) (stating that advocates of victim participation in criminal proceedings believe participation promotes victim "healing" and "empowerment" and gives victims "closure").

not a guarantee. Simply amending procedural rules to enable victims to participate may in fact have negative consequences, particularly if appropriate support and assistance is lacking. Indeed, the experience of the ECCC so far has revealed not only some broad successes in achieving beneficial outcomes for victims but also the worrying proposition that these "generally positive attitudes . . . may not be echoed in future ECCC or ICC cases."[55] As discussed below, achieving the benefits of participation requires a carefully constructed participatory regime, which can have both broader potential benefits and dangers.

There are three broad potential benefits. First, participation can promote individual "healing and rehabilitation"[56] by providing victims with a "sense of agency,"[57] "empowerment[,] and closure."[58] Some empirical research suggests that where the judicial sphere values and recognizes the victims' plight, victims may report higher overall levels of satisfaction with the criminal justice system.[59] Indeed, in providing an opportunity for a victimized individual to take a leading role in obtaining redress, victim participation has the power to make abstract and obtuse justice personal. Second, participation can contribute to reconciling a community by "promoting truth-finding in criminal proceedings."[60] As David Sokol notes, "by virtue of their unique position," victims are often best placed to assist in "establishing the truth of alleged crimes."[61] Any society or community seriously attempting to understand and come to terms with mass atrocity "must provide a platform for victims . . . [to] tell their stories [and publicly acknowledge] their suffering."[62] Although criminal law is not the only possible platform, the power of the judiciary in officially sanctioning expressions of hurt and shining a light on truth is immense.

A further potential benefit of victim participation is perhaps most important: providing a role for victims within the criminal justice system can promote knowledge, awareness, and understanding of the often oblique processes involved in, and the results obtained from, criminal proceedings. Even in more developed nations with independently functioning judiciaries, societal understanding of the criminal justice system is low,[63] and to a poorly or noneducated victim of mass-atrocity crime in a devastated society, this understanding is likely to be even less

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55. Eric Stover et al., *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT'L REV. RED CROSS 503, 543 (2011).

56. SáCouto & Cleary, *supra* note 54, at 77 (footnote omitted) (internal quotation marks omitted).

57. Hanna Bertelman, *International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia*, 79 NORDIC J. INT'L L. 341, 366 (2010) (footnote omitted); *see also* Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 337 (2005) ("By fighting back [victims] may regain a sense of agency and capacity to act that the original abuse sapped.").

58. SáCouto & Cleary, *supra* note 54, at 77 (footnote omitted) (internal quotation marks omitted).

59. Doak, *supra* note 16, at 312.

60. *Id.*

61. David S. Sokol, *Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia*, 10 WASH. U. GLOBAL STUD. L. REV. 167, 178 (2011).

62. Bertelman, *supra* note 57, at 365.

63. *See, e.g.*, Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 2 (1995) ("[A] majority of people in the United States receive much of their impressions and knowledge of the criminal justice system through . . . entertainment television viewing."). This understanding is likely to be somewhat limited. *See id.* at 9 (suggesting that television shows depicting crime are "typically characterized by omissions or distortions on information about the legal system").

meaningful. A significant problem, therefore, is transmitting to victims an understanding of the processes of justice, including their limitations.[64] In empowering people to understand decision making, victim participation can promote greater acceptance of the decision itself.[65]

It is, however, important to be clear—these are *only* potential benefits; they may not eventuate, and, alarmingly, participation may even have *negative* consequences. Victims may, for example, feel harassed or intimidated by a zealous defense counsel, or if the judgment does not meet their expectations, they may feel that the court has undervalued their suffering.[66] The most crucial aspect in attempting to ensure that the benefits of victim participation are realized is therefore one of managing expectations. Put simply, victims cannot be given unrealistic expectations about what their participation may or will achieve. Where the participatory scheme does not effectively manage the relationship between the victims and the court, problems may occur. At the ECCC, the significantly larger number of Civil Parties admitted in Case 002[67] necessitated a revamped regime, one centered not on participation but on representation.[68] Because of this change of focus, studies have suggested that the Civil Parties in Case 002 may not encounter the same transformative experience as the Civil Parties in the Duch trial.[69] Gone is the sense of personal participation and personal justice as the victim is unable to *personally* confront the accused.[70] Unfortunately, in international criminal proceedings, representation is a necessary evil; the sheer number of victims simply means that personal participation *á la* domestic proceedings is impossible.[71] The

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64. Two potential areas for misunderstanding include the nature of the level of proof required to convict and issues of mitigating circumstances on sentencing. The latter is particularly important, for if a victim does not understand the reasons behind a reduced sentence, any of the benefit gained by participating in the proceedings will be destroyed. This will be examined later in Part III.B.2. with an example demonstrating the victims' lack of information about sentencing calculations in the Duch trial.

65. *See* John Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice System*, 73 J. CRIM. L. & CRIMINOLOGY 317, 329 (1982) (finding that "court attendance in itself seems to improve victims' evaluations of sentencing decisions"); Doak, *supra* note 16, at 312 ("[O]ffering victims some form of acknowledged and formal role at the trial should enhance their sense of satisfaction with the criminal justice system . . . .").

66. For some examples of this, please see Part III.B.2.

67. Case 002 is another case currently before the ECCC. CASE 002, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/en/case/topic/2 (last visited May 28, 2013). The current defendants in this case are Nuon Chea and Khieu Samphan. *Id.* Two other defendants, Ieng Sary and Ieng Thirith, were also originally part of Case 002 but were later dismissed. *Id.*

68. *See* Stover et al., *supra* note 55, at 542 ("In early 2010, . . . in an effort to limit the number of [C]ivil [P]arty lawyers in the courtroom, the ECCC has decided that two Co-[L]ead Counsel (one international and one Cambodian) will represent all of the Civil Parties during the actual proceedings.").

69. *Id.* at 543 (discussing how Case 002 involves more defendants, a larger crime scene, and a significantly larger group of Civil Parties than the Duch trial, and "[a]s a result, what the [C]ivil [P]arties take away from their participation in Case 002 may be more formulaic and less individualized [than what the Civil Parties in the Duch trial took away], and therefore less transformative").

70. *Id.*

71. *See* Trumbull, *supra* note 39, at 805–06

> ([A]ny beneficial effect that victims receive from participation in domestic trials may be substantially reduced in international criminal proceedings . . . . The number of victims involved in trials for crimes against humanity, war crimes, and genocide . . . make it impossible for an individual victim to participate in a meaningful way . . . . Virtually all decision-making power

challenge is to implement and institutionalize an effective participatory scheme based on victim representation that still provides opportunities for victims to take an active role in the proceedings. The potential benefits of victim participation are such that this implementation should be pursued.

## III. DIFFICULTIES IN ACCOMMODATING VICTIMS IN INTERNATIONAL PROCEEDINGS

For common-law lawyers, granting participatory rights to victims appears at odds with an accused's right to a fair trial. Fair-trial rights are an essential precondition to the rule of law, and the primary concern of all judges "should be [to] guarantee[] a fair and expeditious trial for the accused."[72] Indeed, fair-trial rights are critical in ensuring that justice and the rule of law are maintained. Where they are ruptured, "the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice."[73]

The right to a fair trial is found within all major global and regional human-rights instruments and has become a fundamental pillar of international law. First acknowledged under Article 10 of the Universal Declaration of Human Rights (UDHR) as guaranteeing everyone "in full equality . . . a fair . . . hearing,"[74] this right has been further enumerated under later human-rights instruments and case law to include several minimum standards. These encompass both substantive and procedural safeguards, such as the right to be judged by an independent and impartial tribunal,[75] the right to be presumed innocent unless proven guilty,[76] the right of equality of arms,[77] the right to be tried within a reasonable time,[78] the principle of legality,[79] and the right to appeal to a higher tribunal.[80] Permitting victims to participate in international criminal proceedings will not affect all of these minimum standards but, crucially, may affect some of them.[81]

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will necessarily be ceded to th[e] legal representative.).

72. Liesbeth Zegveld, *Victims' Reparations Claims and International Criminal Courts: Incompatible Values?*, 8 J. INT'L CRIM. JUST. 79, 108 (2010).

73. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, para. 39 (Dec. 14, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243774.pdf.

74. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. Doc. A/RES/217(III), at 73 (Dec. 10, 1948) [hereinafter UDHR].

75. International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

76. *Id.* art. 14(2).

77. *See id.* art. 14(3) (discussing procedural elements that facilitate a fair trial).

78. *Id.* art. 9(3).

79. *Id.* art. 15.

80. *Id.* art. 14(5).

81. International criminal proceedings may particularly affect the right to an expeditious trial and the right to equality of arms. *See* Trumbull, *supra* note 39, at 816, 823 (discussing how victim participation can "significantly prolong the proceedings" and threaten a defendant's rights by making it more difficult to rebut victims who testify in camera and to obtain truthful evidence due to the victims' lack of an ethical code or obligation to reveal exculpatory evidence).

However, there is no reason per se that granting participatory rights to victims will necessarily conflict with the accused's right to a fair and expeditious trial.[82] National jurisdictions following the civil-law tradition have long accommodated victims as individual parties to the proceedings.[83] Nevertheless, victim participation in trials for mass-atrocity crimes is inherently difficult because of the sheer number of victims. Whereas in domestic criminal proceedings, an offense will generally only directly impact one or a few people, the nature of international crimes means that the victimized often number in the tens, if not hundreds, of thousands.[84] Reconciling every single victim's right to participate with fair-trial rights of the accused is complicated but by no means impossible, and the gradual institutionalization of participatory regimes offers hope that the implementation of such regimes will become more efficient and effective in future ad hoc tribunals and in a revamped ICC. This Part will present an analysis of some of the major difficulties with victim participation, which, although interconnected, can generally be classified as arising from either the sheer number of victims in international proceedings or from the difficulties in implementing an effective participatory regime.

### *A. The Number of Victims*

A peculiar feature of mass-atrocity crimes is the sheer number of victims. This in itself creates considerable problems if meaningful victim participation is to be not just a goal of criminal justice but a crucial component of it. The risk of delays in the administration of justice, the issue of equality of arms, and the threat of subversion and fraud are all exacerbated when the number of individuals seeking to participate is increased.[85] As discussed in Part I, this issue has led tribunals that grant victims participatory rights to compel applicants to demonstrate a causal connection between the harm suffered and the indicted perpetrator before granting such rights. This is a necessary and reasonable response to the problem of mass victimization. One need

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82. *See id.* at 824–25 (listing recommendations to balance victims' and accuseds' rights). At this point one should note that participating victims also have a right to a fair and expeditious determination of their *civil* claim, but this must not take precedence over the accused's rights. This is, of course, because of the severity of the consequences of any final criminal judgment. There is nothing more fundamental than a person's liberty, the issue that lies at the heart of a criminal trial. *See* Doak, *supra* note 16, at 316 ("While the determination of guilt should always be the focus of criminal trials, . . . the accused must always be at the centre of proceedings."). For authority that international law recognizes fair-trial rights in civil claims, see ICCPR art. 14(1) and the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]. Specifically, Article 6(3) of the ECHR lists minimum requirements to satisfy fair-trial rights of *criminal* and not *civil* proceedings under European law, indicating that rights during criminal proceedings are more important. *Id.* art. 6(3).

83. *See* Bassiouni, *supra* note 19, at 233 ("In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* [Civil Parties] in criminal proceedings.").

84. *See* Trumbull, *supra* note 39, at 806 (discussing how the number of victims involved in trials for crimes against humanity, war crimes, and genocide limit an individual victim's ability to participate unlike in domestic trials, which usually involve one victim).

85. *See id.* at 808, 816 (discussing how victims participating in international criminal proceedings, as opposed to domestic criminal proceedings, can obstruct an investigation by submitting false applications, frustrate the prosecution of the defendant, "significantly prolong the proceedings," and threaten the defendant's due process rights).

only examine the Cambodian experience to understand why. Under the period of Democratic Kampuchea, between 1.5 and 2.2 million people were killed, leaving the country devastated and the entire populace victimized.[86] A criminal court cannot accommodate an entire nation.

The ECCC is currently grappling with this problem. In Case 001, ninety-four applications for Civil Party status were received, and sixty-eight were eventually accepted by the Trial Chamber.[87] Even this relatively small number of Civil Parties proved unworkable, prompting rule changes.[88] And yet, owing to increased knowledge and awareness of the Court among Cambodians[89] and a broader criminal investigation,[90] the number of Civil Party applicants before Case 002 reached 3866.[91] The challenge facing the ECCC is to effectively manage almost four thousand Civil Parties, enabling both meaningful participation and respecting the fair-trial rights of the two accused. In this Author's opinion, the only possible solution, and the one adopted by the ECCC, is to organize Civil Parties into groups with common legal representation.[92] However, as discussed below, this solution presents its own problems.

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86. Christoph Sperfeldt, Asian Int'l Justice Initiative Reg'l Program Coordinator, Address at the Regulatory Institutions Network at Australia National University: The "Soft" Side of International Criminal Justice: Outreach, Victim Participation and Reparations at the Khmer Rouge Tribunal (May 16, 2011). For a participation figure of 1.5 million see Ben Kiernan, THE POL POT REGIME 460 (Yale University Press 3d ed. 2008). For a participation figure of 2.2 million see Patrick Heuveline, *Approaches to Measuring Genocide: Excess Mortality During the Khmer Rouge Period*, in ETHNOPOLITICAL WARFARE: CAUSES, CONSEQUENCES AND POSSIBLE SOLUTIONS 93–108 (Daniel Chirot and Martin Seligman eds, 2001).

87. Co-Prosecutors v. Duch, Case No. 001/18-07-2007/ECCC/TC, Judgement, paras. 637–38 (July, 26 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf [hereinafter Duch Judgement]. On appeal, the Supreme Court Chamber reviewed the Civil Party status of the twenty-two denied applicants. Co-Prosecutors v. Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, paras. 535–36 (Feb. 3, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf [hereinafter Duch Appeal Judgement]. The Supreme Court Chamber admitted nine of the appellants as Civil Parties in the case and corrected a clerical error that omitted one party in the original judgment. *Id.* paras. 540, 544, 563, 570, 580, 590, 599, 619, 629.

88. *See* ADRIENNE LYLE ET AL., AUSTRALIAN RED CROSS, THE ECCC—FROM CASE 001 TO CASE 002—FINDINGS AND THE FUTURE 18–22 (2011), http://www.redcross.org.au/files/2011_the_eccc_from_case_001_to_case_002_findings_and_the_future.pdf (discussing innovations in the ECCC's trial management procedures that were implemented as a response to Case 001).

89. In 2010, 25% of adults reported having no knowledge at all about the ECCC, compared to 39% in 2008 .... Of those who lived under the Khmer Rouge regime, 22% said they had no knowledge of the ECCC in 2010 compared to 34% in 2008, and among those who did not live under the Khmer Rouge regime, the proportion with no knowledge about the ECCC was 33% in 2010, down from 50% in 2008.

PHUONG PHAM ET AL., U. OF CAL. AT BERKELEY SCHOOL OF L. HUM. RTS. CENTER, AFTER THE FIRST TRIAL: A POPULATION-BASED SURVEY ON KNOWLEDGE AND PERCEPTION OF JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 21 (2011) [hereinafter PHAM ET AL., POPULATION-BASED SURVEY], *available at* http://www.law.berkeley.edu/files/HRC/Publications_After-the-First-Trial_06-2011.pdf.

90. Press Release, Office of the Co-Investigating Judges, Conclusion of Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ (Jan. 14, 2010), *available at* http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_PR14Jan2010-Eng.pdf.

91. *Id.* (declaring all Civil Party applications rejected by the Co-Investigating Judges admissible, thus bringing the number of Civil Parties in Case 002 up to 3866).

92. ECCC Rules (Rev. 8), *supra* note 11, Rs. 12 *ter*(5)–(6), 23(3).

### 1. Equality of Arms

The sheer number of victims in international proceedings creates equality of arms issues. Equality of arms is a fundamental precondition of fair-trial rights that may be impinged by victim participation in criminal proceedings.[93] As *Prosecutor v. Tadic* cited with approval, equality of arms dictates that "each party must have a reasonable opportunity to defend [himself or his] interests 'under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.'"[94] The addition of multiple victims or even a single victim in a criminal trial may create an imbalance by compelling the accused to not only answer the charges of the prosecutor "but also assertions of the victim(s)."[95] Victim participation must therefore be limited. Indeed, the ECCC has agreed, reiterating that, despite the somewhat substantive participatory rights afforded to Civil Parties under the Internal Rules, the accused has the right to face one prosecutor only, and the role of Civil Parties must not be transformed to one of "additional prosecutors."[96] Limiting victim participation so that victims do not become quasi-prosecutors does not negate meaningful participation, and there is still room within criminal trials for victims to record their suffering, enumerate their motivations for participating, and state their wishes for redress.

### 2. Undue Delay

The right to a fair trial necessarily entails the right to an expeditious one.[97] Allowing victims to participate meaningfully in any criminal proceeding will inevitably extend it; however, any delay should not automatically be considered undue. Problems of long delay in international tribunals are well documented,[98] but they are not unique to tribunals that offer substantive victim participation. Indeed, the Milosevic trial at the International Criminal Tribunal for the former Yugoslavia (ICTY), a tribunal that offered no participatory rights for victims,[99] was halted forty-nine months after the trial commenced[100] and a staggering eighty-one months after

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93. *See* Wojcik, *supra* note 44, at 16 ("[V]ictim participation may also threaten 'the efficiency, fairness, and costs of trials' . . . . Victim participation may deny due process or an 'equality of arms.'").

94. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, para. 48 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (footnote omitted), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

95. Wojcik, *supra* note 44, at 16.

96. Duch Decision on Joint Response, *supra* note 1, para. 26.

97. *See, e.g.*, ECHR, *supra* note 82, art. 6(1) ("[E]veryone is entitled to a fair and public hearing within a reasonable time . . . ."); ICCPR, *supra* note 75, art. 9(3) ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.").

98. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 323–24 (2009).

99. *See* VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT, *supra* note 8, at 12 (stating that at the ICTY, victims could be called as witnesses, but could not otherwise intervene or "participate in their own right").

100. *See* Prosecutor v. Milosevic, Case No. IT-99-37-PT, Order (Int'l Crim. Trib. for the former Yugoslavia Jan. 11, 2002), http://icty.org/x/cases/slobodan_milosevic/tord/en/20111WG517096.htm ("[T]he trial of the Kosovo Indictment will commence on 12 February 2002 . . . .").

the initial indictment,[101] when Milosevic was found dead in his cell on March 11, 2006.[102] As this case highlights, victim participation is *not* always the cause of prolonged and bloated criminal proceedings, but nevertheless, it *may* cause further delays, particularly where almost four thousand people wish to participate. Where these delays are simply a consequence of participation, they should not be considered to impinge on the right of the accused,[103] but where they are a result of bad-faith participatory tactics, they *will* conflict with the paramount right to an expeditious trial and must be dealt with appropriately by the judges. While delays caused by bad-faith tactics may occur, the idea that victims would desire a protracted criminal proceeding appears illogical,[104] as their "overriding interest is likely to see that justice is done."[105] Delaying and prolonging criminal proceedings is against the interest of victims.[106] Nevertheless, excessive delay is a natural consequence of multiple parties and multiple representatives, and it threatens the rights of an accused.

### 3. Diverging Interests

A further issue in accommodating victim participation within the criminal justice system is reconciling the different interests of victims and the prosecution. While to nonlawyers, the prosecutor and the victim may be expected to share the same desire—that is, the conviction of the accused—this is not always the case.[107] The role of the prosecutor is not simply to obtain a conviction at all costs but to act objectively and impartially in any investigation.[108] The prosecutor's first duty is to the criminal justice system as a whole.[109] The victim, on the other hand, is interested first and foremost in documenting his suffering and obtaining redress.[110] He is not

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101. *See* Prosecutor v. Milosevic, Case No. IT-99-37, Indictment, paras. 90–100 (Int'l Crim. Trib. for the Former Yugoslavia May 22, 1999), http://icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm (indicting Milosevic and others).

102. *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, Order Terminating the Proceedings (Int'l Crim. Trib. for the Former Yugoslavia Mar. 14, 2006), http://icty.org/x/cases/slobodan_milosevic/tord/en/060314.htm (terminating the proceedings against Milosevic a few days after his death). The Milosevic trial has not been nearly the most egregious example of delays in international criminal trials. *See, e.g.*, Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Judgement and Sentence, paras. 135–36 (June 24, 2011), http://www.unictr.org/Portals/0/Case/English/Nyira/judgement/110624_judgement.pdf (discussing a case where one accused spent at least twelve years in detention and another accused spent nearly fifteen years in detention before a judgment was reached).

103. This assertion accords with the Separate Opinion of Judge Song. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, para. 27 (Separate Opinion of Judge Sang-Hyun Song) (June 13, 2007), http://www.icc-cpi.int/iccdocs/doc/doc286765.pdf [hereinafter Lubanga Joint Application Decision] ("Th[e] delay [arising from victim participation] is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in proceedings before the Court.").

104. Sokol, *supra* note 61, at 184.

105. SáCouto & Cleary, *supra* note 54, at 84.

106. *Id.*

107. Trumbull, *supra* note 39, at 822.

108. Eighth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Guidelines on the Role of Prosecutors*, art. 13(a)–(b), U.N. Doc. A/CONF.144/28/Rev.1, at 192.

109. *Id.* arts. 10–16.

110. Trumbull, *supra* note 39, at 802–03.

concerned with the prosecutor's case theory or the intricacies of the legal process per se, but with its outcome. As such, victim participation may interfere with and undermine the prosecutor's "ability to conduct a focused investigation"[111] and perhaps even result in a failure to obtain a conviction.[112] Particularly in international tribunals, resource and evidentiary constraints necessarily mean that every criminal offense cannot be investigated and prosecuted.[113] Upon a motion by a Civil Party, the prosecution may be compelled to follow leads "unrelated to . . . or inconsistent with its overall strategy,"[114] potentially impacting "the timely and efficient conduct of investigations."[115] This issue arose in *Lubanga* during the confirmation-of-charges hearing when, at the urging of the victims' representative, the Pre-Trial Chamber amended the indictment to include war crimes committed during an international conflict.[116] As Trumbull notes, the prosecutor objected because "he had not intended to prove . . . that there was an international conflict."[117]

The objectives of international criminal justice are to end impunity, promote justice, and foster reconciliation.[118] Where victims or their representatives present credible evidence indicating that charges should be recharacterized or amended, the potential objections of the prosecution should be ignored. That victims and the prosecution will have separate interests is no reason to dismiss or subjugate the interests of the victim. Indeed, as seen in the *Lubanga* case, the very fact that the prosecution may only have evidence sufficient to support a lower charge demonstrates the importance of effective victim participation. While attempting to prove an enlarged case may place a greater burden on the prosecution, its eventual success will more fully document the extent of the accused's criminality and bring closure to additional victims. Potential concerns about extended trials are groundless in the sense that it is not a violation of the right to an expeditious trial to be tried for more than one crime.[119] The interests of both the international community at large

111. *Id.* at 807–08.

112. *Id.* at 807–09.

113. *See id.* at 816–17 ("The ICC has limited resources, and the [p]rosecutor cannot possibly prosecute every crime that falls within the jurisdiction of the Court.").

114. *Id.* at 808.

115. Situation in Darfur, Sudan, Case No. ICC-02/05-81, Prosecution's Reply Under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, para. 22 (June 8, 2007).

116. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, paras. 9, 204, 220 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF (agreeing with a victim's representative that the scope of the war crimes charge included war crimes committed during "an armed conflict of an international character," despite the fact that the prosecutor had only contended that the war crimes were committed during "an armed conflict not of an international character").

117. Trumbull, *supra* note 39, at 809.

118. *Id.* at 826.

119. *See, e.g.*, Prosecutor v. Bizimana, Case No. ICTR-98-44-T, Introduction, paras. 26, 28 (July 12, 2000), http://www.unictr.org/Portals/0/Case%5CEnglish%5CKabuga%5C120700.pdf (finding that "the similarity of the allegations in the present indictment [charging multiple crimes, including genocide and crimes against humanity] will further judicial efficiency" and that "a joint trial of the Accused will not infringe upon the Accused's right to be tried without undue delay").

and the victims of mass-atrocity crimes must align if international criminal justice is to meet its objectives.

4. Risk of Fraud and Subversion

In international proceedings, the large number of potential victim applicants exacerbates the risk of fraudulent claims aimed at subverting or obstructing the actions of the court.[120] The possibility of persons sympathetic to the accused fabricating requests in order to frustrate the proceedings, however unlikely, is amplified by the two-tiered approach to recognizing victim status at international tribunals. Under this approach, a preliminary determination is first made on a prima facie basis before the Trial Chamber makes a final determination much later.[121] The prima facie standard does not examine in detail the applicant's claims but simply assesses the plausibility of them (i.e., whether it is possible the harm alleged actually came into being).[122] After passing this initial, very low threshold, applicants at the ECCC are afforded all the rights of Civil Parties and could potentially use these rights to frustrate the prosecution through delay.[123]

Although there is no evidence that these risks have ever materialized at any international tribunal, concerns remain.[124] The ICC Prosecutor has suggested that this risk is "apparent,"[125] and Pre-Trial Chamber II of the ICC has also acknowledged the risk, considering that it "cannot be entirely ruled out."[126] Nevertheless, victim participation at the investigative stage of proceedings is no longer permitted at the ICC,[127] thus reducing the likelihood of obstruction at this preliminary stage. Despite the potential harm from fraudulent claimants, it appears unlikely that this issue will ever present itself.[128] In a situation where victims do not participate individually but

120. Trumbull, *supra* note 39, at 808.

121. Co-Prosecutors v. Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Ratanakiri Province, para. 9 (Aug. 26, 2010) [hereinafter Ratanakiri Province Order].

122. *See id.* paras. 7–9 (explaining that, in order to become a Civil Party, an applicant must be able to demonstrate a plausible claim and establish on prima facie credible grounds that he or she suffered harm as a consequence of the alleged crimes); Sary Decision on Appeals, *supra* note 13, para. 94 ("[W]hen considering the admissibility of the Civil Party application, the Pre-Trial Chamber shall be satisfied that facts alleged in support of the application are *more likely than not to be true*.").

123. *See* Ratanakiri Province Order, *supra* note 121, paras. 4–5 (identifying the purpose and the rights of Civil Parties in these actions); Trumbull, *supra* note 39, 807–09 (discussing ways in which victims participating in criminal proceedings can hinder prosecution).

124. *See, e.g.*, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-103, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, paras. 17–18 (Jan. 23, 2006), http://www.icc-cpi.int/iccdocs/doc/doc183444.pdf (discussing how victim participation poses "dangers in terms of the integrity and impartiality of the investigation," including the risk of fabricated requests for participation, disclosure of confidential information, and destruction of evidence).

125. *Id.* para. 18.

126. Situation in Uganda, Case No. ICC-02/04-112, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06, para. 35 (Dec. 19, 2007), http://www.icc-cpi.int/iccdocs/doc/doc400347.pdf.

127. DRC Victim Participation Decision, *supra* note 37, para. 9.

128. *See* Ratanakiri Province Order, *supra* note 121, paras. 7–9, 13–18 (noting that Civil Party applicants must meet numerous requirements and considerations before becoming Civil Parties). While

are grouped into collectives, no one individual, however driven, will have the opportunity to impart themselves onto the proceedings to such an extent as to seriously undermine the trial.[129] Owing to the documentary difficulties of proving some Civil Party claims, particularly in Cambodia where thirty years has elapsed, all victim or Civil Party requests should be treated as presumptively admissible.[130] The potential harm from fraud and subversion is less than the potential harm from denying applicable victims their participation.

### *B. Constructing the Participatory Regime*

One of the most pressing issues in institutionalizing an effective victim participatory regime in international proceedings is the difficulty involved in constructing and implementing such a regime. Indeed, the experiences of the Cambodian tribunal demonstrate the problems in simply transplanting participatory regimes from domestic legal systems into the international arena, but even when the scheme exists, implementation problems persist.

#### 1. A Sui Generis Scheme

Victim participation schemes of national jurisdictions cannot simply be transplanted into proceedings dealing with international crimes; rather, a participatory regime must be carefully constructed to meet the specific demands of an international court.[131] Because victim participation in international proceedings is an emerging institution, the creation of a new international scheme—both appropriate and effective for victims, the accused, and the efficiency of justice—is difficult to say the least. The ECCC has struggled with this charge. The ECCC's Internal Rules have been significantly amended a number of times over the course of its operation, evolving from a document that reflected Cambodian domestic procedure to a sui generis beast that has been built to respond to the specific circumstances at the ECCC.[132] The ECCC's difficulties can be seen in the dramatic

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these requirements only require a showing of plausibility, they nevertheless negate the potential for automatic participation and limit the risk for fraud by weeding out applicants who cannot meet these requirements.

129. *See* Werner & Rudy, *supra* note 22, at 306 (discussing how the revised Internal Rules "[f]urther limit[] Civil Parties' role" by providing that "during the Trial phase, individual Civil Parties are consolidated into one group" and how "th[is] new scheme is necessarily limited in scope due to the subjugation [of the individual interests] to the collective interest").

130. *See* Ratanakiri Province Order, *supra* note 121, paras. 9–12 (acknowledging the difficulties of victims in providing sufficient evidence in certain situations, such as birth and death certificates, and adopting a "flexible approach" in such situations).

131. *See* Trumbull, *supra* note 39, at 804, 822–24 (contending that "[t]he arguments justifying victims' right to participate in domestic prosecutions do not support victim participation in international criminal proceedings" and recommending a balancing test to determine the optimal level of victim participation in international proceedings).

132. *See* Charles Jackson, *CTM Interview: Andrew Cayley, International Co-Prosecutor at the ECCC*, CAMBODIA TRIBUNAL MONITOR (Apr. 4, 2011), http://www.cambodiatribunal.org/_archived-site/blog/2011/04/ctm-interview-andrew-cayley-international-co-prosecutor-eccc (arguing that the ECCC should apply international jurisprudence to the Duch trial because "[i]f you read the UN/Cambodia Agreement,

shifts in participatory rights[133] but are best exemplified through the evolution of the procedural requirements of Civil Party admissibility between Case 002 and Cases 003 and 004.

The Original Internal Rules allowed Civil Party applicants to apply in writing to the Co-Investigating Judges "[a]t any time during the judicial investigation,"[134] or to the Trial Chamber "up until the opening of proceedings before [that] Chamber."[135] This rule loosely followed the Cambodian Code of Criminal Procedure's requirements, which allow victims of a crime to file a complaint before an investigating judge[136] or at any time at trial before the "Royal Prosecutor [has] made his final observations."[137] The considerable time allowed for Civil Party applications under Cambodia's domestic law and under the original ECCC Internal Rules proved too extensive for the international arena and has since been significantly restricted.[138] This process began with Revision 2, which brought forward the limitation period to "at least 10 (ten) working days before the initial trial hearing,"[139] but was dramatically curtailed by Revision 4, which further reduced the period of time in which Civil Parties could apply.[140] Rule 23(3) of Revision 4 required written submission "no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation."[141] This rule has remained and is still operative,[142] meaning that victims are now unable to submit their Civil Party applications to the Trial Chamber.[143]

This evolution had a clear goal: "to promote more expeditious trial proceedings."[144] Indeed, in the face of four thousand Civil Parties in Case 002, a

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the ECCC Law and the Internal Rules, it is clear that this court is sui generis with its own jurisdiction .... You simply cannot find the answers in domestic law ..."); *Internal Rules*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/en/document/legal/internal-rules (last visited Nov. 3, 2013) (listing the eight revisions of the Internal Rules).

133. *See supra* Part III.A. (recounting difficulties in expanding participatory rights for victims).

134. ECCC Rules (Original), *supra* note 22, R. 23(3).

135. *Id.* R. 23(4); *see also id.* R. 82 (providing for consideration of applications at opening of trial). Rule 23(4) was later amended to allow the President, by special decision, to "extend or shorten the above-mentioned deadline." Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 2), R. 23(4) [hereinafter ECCC Rules (Rev. 2)], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv2-En.pdf.

136. CODE CRIM. PROC. art. 5 (Cambodia).

137. *Id.* art. 311.

138. *See 7th Plenary Session of ECCC Concludes*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Feb. 9, 2010, 12:00 AM), http://www.eccc.gov.kh/en/articles/7th-plenary-session-eccc-concludes (noting the problems with Cambodian criminal procedure as applied to large-scale victim participation in the ECCC, leading to the enactment of amendments "designed to ensure effective and streamlined Civil Party participation in ECCC proceedings").

139. ECCC Rules (Rev. 2), *supra* note 135, R. 23(4).

140. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4), R. 23(3) [hereinafter ECCC Rules (Rev. 4)], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv4-EN.pdf.

141. *Id.*

142. *See* ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis*(2) (listing the same fifteen-day window for victims to submit Civil Party applications as Revision 4).

143. *See id.* R. 83 (reflecting the repeal of the provision for Trial Chamber's consideration of victims' applications at the opening of trial).

144. *Sixth ECCC Plenary Session Concludes*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Sept. 11, 2009, 12:00 AM), http://www.eccc.gov.kh/en/articles/sixth-eccc-plenary-session-concludes [hereinafter *Sixth Plenary Session*].

streamlined procedure needed to be found. But this evolution also demonstrates the problems of amending a participatory scheme on the run.[145] Civil Parties applying in Cases 002, 003, and 004 must operate under a substantially stricter procedural requirement, enjoying only fifteen days after notification of the judicial investigation conclusion to submit their applications.[146] For victims unschooled in filling out legal process, this appears an onerous task; for disabled or illiterate victims, it may be impossible.

The general tenor of the ECCC's Internal Rules amendments has been to strip away the initially extensive (domestic) participatory rights of victims in order to maintain the (international) Court's efficacy.[147] Amending on the run to cope with issues raised by the practice of the tribunal may sometimes be necessary, but it is not the way to construct and institute an effective and meaningful participatory regime that achieves benefits for victims. More care needs to be taken when first constructing a victim participatory scheme and when implementing it.

### 2. Poor Structural Implementation

That the benefits of victim participation do not always eventuate is often not the fault of the institution but of the implementation of victim participation.[148] As victim participation in international criminal proceedings remains very much a work in progress, teething problems are inevitable; these problems should not be used as an excuse to do away with victim participation altogether but to rectify and improve the efficacy of the system. One example of poor implementation concerns informing victims of sentencing calculations, evidenced by the widespread anger and disbelief that surrounded the sentencing of Kaing Guek Eav, alias Duch, at the ECCC.[149] As leader of the S-21 Security Center, Duch oversaw the brutal torture and murder of "at least 12,273 victims"[150] and was individually found criminally responsible for

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145. *See id.* (detailing the immediate adoption of additional measures affecting Civil Party participation "to ensure that Case 002 proceeds smoothly").

146. *See* ECCC Rules (Rev. 4), *supra* note 140, R. 23(3) (shortening the application period for victims, effective September 11, 2009); *Sixth Plenary Session*, *supra* note 144 (stating that the change in application period was adopted immediately, thus Civil Parties in Case 002 could not, from that point forward, make applications during trial).

147. *See* Werner & Rudy, *supra* note 22, at 301–02 (discussing how the Trial Chamber increasingly limited victim participation that was otherwise allowed under the Cambodian Code of Criminal Procedure).

148. James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 529 (2009) ("Experience at the ECCC offers both an example of the great potential of the [C]ivil [P]arty system and a caution against embracing these principles without providing the necessary support to implement them properly.").

149. *See* Andrew Buncombe, *16,000 Deaths, 19 Years in Jail—Fury Greets Sentence for Pol Pot's Executioner*, THE INDEPENDENT (July 27, 2010), http://www.independent.co.uk/news/world/asia/16000-deaths-19-years-in-jail-ndash-fury-greets-sentence-for-pol-pots-executioner-2036197.html (surveying the reactions of shocked and outraged victims of Duch to his sentence at the ECCC).

150. Duch Judgement, *supra* note 87, para. 630. This is a conservative estimate. *See id.* para. 208 ("The Accused . . . acknowledged that the number of detainees who died or were executed was greater than the listed number (as amended) of 12,273.").

crimes against humanity and "grave breaches of the Geneva Conventions of 1949."[151] Despite the severity of the judgment, the Trial Chamber found that a number of mitigating circumstances "mandate[d] the imposition of a finite term of imprisonment rather than a life sentence,"[152] and Duch's jail time was reduced from thirty-five years to nineteen.[153] The Court spectacularly failed to adequately educate both Civil Parties and victims about the weight that the Trial Chamber would be likely to give to these mitigating circumstances.[154] As a result, Civil Parties were almost unanimous in their shock: "We are victims two times, once in the Khmer Rouge time and now once again";[155] "The sentence is a sham";[156] "The verdict is too light";[157] "I want Duch to be in jail for life. I want him to do forced labour, like the prisoners in Tuol Sleng."[158]

However, as Anne Heindel, a legal adviser at the Documentation Center of Cambodia, stated prior to the sentence being handed down, any reduction in light of the mitigating circumstances would be both "appropriate" and "rather straightforward."[159] Participation itself does not result in total understanding of the vagaries in criminal proceedings, and victims rely on their representation and the Court to clearly and precisely explain the process.[160]

Attempting to strike a balance between the fair-trial rights of the accused and meaningful participation to the victimized is very much a work in progress. As such, victim participation in contemporary international criminal proceedings poses many substantive and administrative difficulties. Nevertheless, there remains an emerging trend "towards recognizing the rights of victims,"[161] and the potential benefits of meaningful victim participation are such that this important development must be

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151. *Id.* para. 516.

152. *Id.* para. 629. These mitigating circumstances included "the Accused's cooperation with the Chamber, admission of responsibility, expressions of remorse[,] . . . the coercive environment in DK [Democratic Kampuchea] in which he operated, and his potential for rehabilitation." *Id.*

153. Seth Mydans, *Anger in Cambodia over Khmer Rouge Sentence*, N.Y. TIMES (July 26, 2010), http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?ref=sethmydans.

154. *See* Pham et al., *Victim Participation and the Trial of Duch*, *supra* note 40, at 284 ("[M]any [C]ivil [P]arties remained uncertain and lacked understanding about key aspects of the [Duch] trials, including sentencing.").

155. Mydans, *supra* note 153 (quoting Chum Mey's reaction to the verdict). Chum Mey is one of seven S-21 survivors, who participated as a Civil Party in Case 001. *ECCC Launches New Outreach Program*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, http://www.eccc.gov.kh/en/articles/eccc-launches-outreach-program (last updated Mar. 20, 2011, 6:08 AM).

156. Buncombe, *supra* note 149 (quoting Theary Seng's reaction to the verdict). Theary Seng withdrew as a Civil Party in Case 001. Luke Hunt, *Kissinger in Cambodia*, LATITUDE BLOG (N.Y. TIMES) (Nov. 20, 2012, 6:21 AM), http://latitude.blogs.nytimes.com/2012/11/20/protests-greet-obamas-visit-to-cambodia/.

157. Steve Finch, *Cambodians Upset by Genocide Sentence*, ASIA TIMES (July 28, 2010), http://www.atimes.com/atimes/Southeast_Asia/LG28Ae01.html (quoting Bou Meng's reaction to the verdict). Bou Meng is an S-21 survivor. *Id.*

158. Buncombe, *supra* note 149 (quoting Norng Chan Phal's reaction to the verdict). Norng Chan Phal is a witness in Case 001. Duch Judgement, *supra* note 87, para. 251 n.22.

159. Douglas Gillison, *Sentence, Not Guilt, Is Battle at S-21 Trial*, CAMBODIA DAILY (Mar. 30, 2009), http://www.camnet.com.kh/cambodia.daily/selected_features/cd-Mar-30-2009.htm.

160. *See* Bair, *supra* note 148, at 529 (stating that the victims' desire to see the accused convicted may lead to "confusion and misunderstanding" and that providing legal representation for victims may limit such occurrences).

161. *Id.* at 511; *see generally* Bassiouni, *supra* note 19.

pursued. The following Part offers some possible solutions for systemic development at the ICC and future ad hoc tribunals.

## IV. POTENTIAL SOLUTIONS

For victim participation to be both meaningful and effective in the future, solutions to the problems identified above must be found. This Part offers three suggestions. First, it advocates the dismantling of the bifurcated victim admissibility regime that both the ECCC and the ICC have adopted. Second, it supports the collective representation approach taken by the ECCC in the Court's attempt to deal with large numbers of victim-applicants but urges greater awareness of the desires and motivations of the individuals that make up the collective. Finally, it recommends that future ad hoc tribunals and a revamped ICC contain an in-house reparations system, establish a victims' trust fund, and limit compensation to collective and moral awards only.

### *A. Reforming the Admissibility Procedure*

The two major international tribunals that offer participatory rights for victims labor under a fractured and inefficient victim admissibility regime. At the ICC, Article 68(3) of the Rome Statute effectively entrenches delay.[162] That victims may only participate in "stages of the proceedings determined to be appropriate by the Court"[163] compels victims to repeatedly apply and reapply for the right to participate.[164] This markedly increases the workload of judges and the Court, costing extensive amounts of time and money and, at times, "jamm[ing] . . . the machinery of the proceedings."[165] Such a system reduces not just the efficacy of the victim participation regime that the Court ostensibly upholds but also violates the rights of victims and of the accused.[166] Christine Chung is scathing: "The record of the ICC's early years demonstrates that thousands of pages and thousands of hours (likely representing a substantial number of euro), have been expended in delivering actual participation in proceedings on behalf of very few victims."[167]

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162. *See* Rome Statute, *supra* note 35, art. 68(3) (stating that "[w]here the personal interests of the victims are affected," the Court must determine the appropriate stages of the proceedings during which the victims' "views and concerns" may be presented).

163. *See* Lubanga Joint Application Decision, *supra* note 103, para. 22.

164. *See id.* paras. 12, 22, 27–28 (discussing whether the victims could participate in the current stage of the proceedings, which concerned a narrow procedural issue, and how the Appeals Chamber would, in the event of an appeal, decide "whether it is appropriate for [the victims] to participate [in the appeal]" on the basis of the victims' application).

165. Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. INT'L HUM. RTS. 459, 460 (2008).

166. *See id.* at 464 (discussing how the negotiators of the Rome Statute believed that participation and efficient adjudication served the victims' best interests and cautioned that, in the face of greater victim participation, breakdowns in efficient adjudication may undermine the rights of the accused).

167. *Id.* at 461.

The process at the ECCC is slightly more complicated. While the Internal Rules appear to authorize only one decision on admissibility of Civil Parties,[168] in Case 001, the Co-Investigating Judges issued interim or provisional affirmative decisions, some of which were later rejected in a final decision by the Trial Chamber.[169] By a three-two majority, the Pre-Trial Chamber accepted the Co-Investigating Judges' procedure,[170] which was later unanimously re-affirmed by the Trial Chamber.[171]

The Pre-Trial and Trial Chambers' decisions are curious on two accounts. First, a two-step admissibility process appears to run counter to the Court's own Internal Rules[172] and, therefore, has no legal basis. Second, it heightens the risk of violations of both the victim's and the accused's right to an expeditious trial.[173] The Trial Chamber placed significant weight on the fact that issuing provisional determinations based on a prima facie assessment of their credibility comports "with the practice before comparable international tribunals."[174] However, as Judges Prak and Downing note, the Internal Rules of the ECCC "do not provide for a two part process";[175] comparative assessment is therefore unnecessary. Internal Rule 23(3) authorizes only one decision by the Co-Investigating Judges, after which they are *functus officio* and barred from making a further determination.[176] Moreover, Internal Rule 21(1) lists "legal certainty" as a fundamental principle of ECCC

168. *See* ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis* (2) (stating that a victim has fifteen days after receiving notification of the conclusion of the judicial investigation to submit a Civil Party application); ECCC Rules (Original), *supra* note 22, R. 23(3)–(4) (stating that a victim may apply to be a Civil Party "at any time during the judicial investigation" or "up until the opening of the proceedings before the Trial Chamber," and victims who filed a Civil Party application during the investigation are not required to file a second application before the Trial Chamber).

169. *See* Duch Judgement, *supra* note 87, paras. 647–49 (finding that certain individuals who had been admitted as Civil Parties did not meet the standard to be considered victims of the crimes at issue).

170. *Compare* Co-Prosecutors v. Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 47 & 48), Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, para. 11 (Opinion of Judges Ney, Marchi-Uhel, and Huot) (Apr. 27, 2010) [hereinafter Thirith Decision on Appeals], http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D250_3_2_1_5_Redacted_EN.pdf (holding that the Co-Investigating Judges' decision to reject the Civil Party application was not inconsistent with the Internal Rules), *with id.* para. 1 (Opinion of Judges Prak and Downing) (finding that the Co-Investigating Judges made an unauthorized and thus void decision to remove the victims from the case file).

171. Duch Judgement, *supra* note 87, paras. 636–37, 639.

172. *See* ECCC Rules (Rev. 8), *supra* note 11, R. 23 *bis*(2) (envisioning a one-step process in which victims submit a Civil Party application, and "[t]he Co-Investigating Judges may reject [such] applications at any time until the date of the Closing Order").

173. *See* Duch Appeal Judgement, *supra* note 87, paras. 489, 491 (upholding the two-tier process for purposes of Case 001 and acknowledging that "there is a legal interest in having the full 'cast' in the proceedings established as much as possible before the commencement of trial").

174. Duch Judgement, *supra* note 87, para. 636.

175. Thirith Decision on Appeals, *supra* note 170, para. 8 (Opinion of Judges Prak and Downing).

176. *Id.* paras. 8–9 (Opinion of Judges Prak and Downing). In fact, in the final appeal judgment, the Supreme Court Chamber noted with approval the approach taken by Judges Prak and Downing, although they ultimately upheld the two-stage admissibility test for Case 001. *See* Duch Appeal Judgement, *supra* note 87, para. 491 (agreeing with Judges Prak and Downing that "[s]ubsequent decisions on the same matter by the same body should be dependent on a change of circumstances in the case, new evidence . . ." but also stating that "these conclusions do not explicitly result from the legal framework of the Internal Rules at the time," and, therefore, subsequent orders issued by the judges below should be upheld).

proceedings.[177] The granting of provisional admissibility that may be revoked at any time does not satisfy this principle.[178]

More broadly, however, the two-step admissibility process in international criminal proceedings heightens the risk of violations of the right to an expeditious trial. At the ECCC, once a decision is made to grant a victim Civil Party status, the victim's legal representative is granted access to the case file and considered a party to the proceedings.[179] The consequences of admissibility are such that "any decision . . . cannot be taken lightly."[180] As discussed previously, the risk of fraudulent Civil Party applicants gaining access to the case file in order to frustrate proceedings, while unlikely, cannot be entirely discounted. The two-step admissibility procedure heightens this risk by employing an initial prima facie determination.[181] Future ad hoc tribunals should adopt a single, determinative admissibility procedure that provides victims an automatic right of participation. Such a procedure is in line with ordinary civil claims in national jurisdictions, which do not require a prima facie admissibility test before a civil suit can be raised.[182] Forcing victims to repeatedly seek the leave of the Court to participate or revoking a previously granted application increases the number of appeals and unduly delays proceedings, wasting precious time and money and potentially violating fair-trial rights of both the accused and the victim.

### *B. Victim Groups*

The inherent difficulty in providing meaningful participation for victims of crime where the number of those victims reaches into the hundreds or thousands, while, at the same time, not delaying the administration of justice must be resolved if victim participation in international criminal law is to be successful. One solution is to encourage or compel individual victims to form collective groups. Indeed, this

177. ECCC Rules (Rev. 8), *supra* note 11, R. 21(1).

178. *See* Thirith Decision on Appeals, *supra* note 170, paras. 8–14 (Opinion of Judges Prak and Downing) (emphasizing the importance of the "right to procedural fairness," which provides "certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner," and concluding that "if a second decision is [to be] considered . . . valid[,] it would have had to be specifically authorised by the rules or governing laws, which it is not"); Duch Appeal Judgement, *supra* note 87, para. 453 ("[T]he Civil Party Appellants further complain that the Trial Chamber violated the fundamental principles of legal certainty and transparency provided for in Internal Rule 21. The application of a two-step process resulted in different groups of victim applicants being granted different rights.").

179. Thirith Decision on Appeals, *supra* note 170, para. 7 (Opinion of Judges Prak and Downing).

180. *Id.*

181. *See id.* para. 2 (showing that upon receipt of a Civil Party application form, and instructions from the Co-Investigating Judges to place the application in the case file, the applicant is considered a Civil Party participant and is granted access to confidential information in the case file even though the Co-Investigating Judges reserve the ability to "make a formal decision with respect to the admissibility" of the application).

182. *See* Bassiouni, *supra* note 19, at 207 (explaining that "[r]edress of wrongs is a fundamental legal principle" that is recognized in all legal systems and "applies to private claims for which the . . . State provides a forum and enforcement of the remedy").

approach has been adopted by the ICC[183] and the ECCC,[184] but it presents its own difficulties.

1. Collective Representation

Victims of mass-atrocity crimes are not a homogenous community whose interest in participating in the prosecution of those responsible is defined solely by its victim status.[185] Survivors have entirely different "extra-legal identities [and] perspectives."[186] By dressing them up in a "singular legal identity,"[187] internationalized tribunals risk ignoring the fact that, even if victims share common experiences, "they may not share common views on appropriate punishments or remedies."[188] This is particularly so in the Cambodian experience where ex-Khmer Rouge members, "base people," and "new people"[189] have come forward to apply for Civil Party status. In fact, even this tripartite distinction ignores the very real motivations behind all individuals claiming victim status.[190]

However, both the ICC and the ECCC have gone further than simply collectivizing participation; they have collectivized representation.[191] Rather than coercing victims into groups during the trial stage, recent amendments to the Internal Rules limit all representation to two Lead Co-Lawyers.[192] The move to introduce

183. *See* ICC Rules, *supra* note 8, R. 90(2)–(3)

> (Where there are a number of victims, the Chamber may . . . request the victims or particular groups of victims . . . to choose a common legal representative or representatives . . . . If the victims are unable to choose a common legal representative . . . the Chamber may request the Registrar to choose one or more common legal representatives.).

184. *See* ECCC Rules (Rev. 8), *supra* note 11, R. 23(3) ("Civil Parties at the trial stage and beyond shall comprise a single, consolidated group . . . .").

185. *See* Werner & Rudy, *supra* note 22, at 306 (discussing the great diversity within victim groups in the context of Case 002).

186. Mahdev Mohan & Vani Sathisan, *Erasing the Non-Judicial Narrative: Victim Testimonies at the Khmer Rouge Tribunal*, 2 JINDAL GLOBAL L. REV. 37, 48 (2011).

187. *Id.*

188. Wojcik, *supra* note 44, at 12.

189. The Khmer Rouge divided civilians into two categories—base people and new people. SUCHENG CHAN, SURVIVORS: CAMBODIAN REFUGEES IN THE UNITED STATES 17 (2004). Base people were those who lived in areas under Khmer Rouge control before 1975, while new people were those who resided in the cities at the time of evacuation. *Id.* New people were believed to have been exposed to western influences and therefore were considered politically unreliable. *Id.* For more information, please see MICHAEL VICKERY, CAMBODIA: 1975–1982 81–82 (1984).

190. *See* NADINE STAMMEL ET AL., BERLIN CENTER FOR THE TREATMENT OF TORTURE VICTIMS, THE SURVIVORS' VOICES: ATTITUDES ON THE ECCC, THE FORMER KHMER ROUGE AND EXPERIENCES WITH CIVIL PARTY PARTICIPATION 35 (2010) (showing breakdown of Khmer Rouge victims' motivations to submit Civil Party applications, including justice, revenge, reparations, duty to relatives, personal coping, and finding out the truth).

191. This Part will emphasize the ECCC approach. For the ICC approach, see, e.g., Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, para. 13 (July 22, 2009) (ordering that a common legal representative shall represent all victims who have been admitted to participate in the case).

192. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 5), R. 12 *ter*(4) [hereinafter ECCC Rules (Rev. 5)], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv5-EN.pdf. The Lead Co-Lawyers were introduced in the fifth revision. *See id.* R. 12 *ter* (stating that the Lead Co-Lawyers provision was adopted on February 9, 2010, the same date that Revision 5 was released).

Lead Co-Lawyers demonstrates a desire to protect fair-trial rights of the accused over individual participation of victims, importantly limiting the delays caused by multiple counsels asking the same questions.[193] Nevertheless, their introduction need not further restrict effective victim representation. If the Lead Co-Lawyers remain responsive to the different motivations and interests of the diverse Civil-Party groups, victims will still benefit from their participation. Whatever problems a collectivized justice may entail, it is the only feasible way to allow participation of victims in mass-atrocity criminal proceedings.[194] Of course, collectivised justice can and must be organized better, with different Civil-Party groups clearly representing different motivations and desires for participation or different geographic and victimized locales.[195] By creating space for pluralism within collective representation, participation can still be meaningful. This is a delicate issue but one that is central to effective victim participation in international criminal proceedings.[196]

It is, however, important not to confuse collective victim representation with a class action; the individuals involved need to be considered individually. This is true even if Civil Parties are defined into classes of victims by victimization or geographic locale. Consider a Civil-Party group based on children who have lost both parents: although they are all nominally orphans, a victim who was one month old when her parents were murdered versus a victim who was seventeen years and eleven months old will have different needs. While conceivably they have both suffered the same type of harm, the reality is that their suffering is very different and should be treated as such. Collective representation will only be effective if it does not lose sight of the individuals involved.[197] Just how a tribunal goes about not losing sight of the individuals is another issue entirely and involves examining the importance of external actors.

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193. *See* Werner & Rudy, *supra* note 22, at 304, 308–09 (discussing ways to make the victim participatory scheme more efficient, such as having Civil Party lawyers consult with Lead Counsel, and how such methods help the accused obtain his right to an expeditious trial but also tend to limit victim participation in the ECCC).

194. *See id.* at 304–05 (acknowledging that consolidation poses issues but expressing doubt that other modes of representation besides consolidation are tenable in a group of over three thousand victims).

195. *See id.* at 306 (noting that the wide range of "ethnic, religious and national backgrounds" in the large Case 002 victim group necessitates that lawyers be able to voice "divergent interests and goals").

196. *See id.* at 305

> ([T]he Internal Rules do not explicitly address victims' fear that their individual interests will be subjugated in the interest of the common consolidated group during trial . . . . [This ambiguity] will form a great obstacle for the lawyer in his or her ability to carry out an effective representation on behalf of [Civil Party clients].).

Unfortunately it is too early to examine the effectiveness of the ECCC approach as Case 002 remains at the trial hearing stage. *See* CASE 002, *supra* note 67 ("Two former Khmer Rouge leaders are now on trial in Case 002.").

197. *See* Werner & Rudy, *supra* note 22, at 306 (discussing the need to empower Civil-Party lawyers in their representation of a diverse group of victims; "otherwise, the Civil Party attorney's role, and the Civil Party itself will become illusionary").

2. The Importance of External Actors

Collectivizing representation does not by itself negate the benefits of participation, but it does require an examination of the importance of the relationship between international courts and external partners. It should be remembered that a criminal trial is not primarily a peace-building exercise but a retributive mechanism designed to bring perpetrators to justice and justice to victims.[198] Where thousands of victims express a desire to participate, there is a need for external actors to assist victims with preparation for trial, manage victims' expectations during the trial, and support victims in the aftermath of the judgment.[199] Indeed, the changes proposed above would give more importance to the valuable work of civil-society organizations, nongovernmental organizations (NGOs), and other partners acting outside the judicial process.

There is broad agreement among scholars of transitional justice that NGOs and civil-society organizations "play a critical role in . . . rebuilding the state and establishing a firm foundation for strong democracies."[200] In Cambodia, around ten to fifteen local NGOs have engaged with the ECCC at various times, "working primarily at the intersection of the Court and Cambodian society."[201] Their skill and focus in documenting the Khmer Rouge atrocity pre-trial,[202] monitoring the Court's work during trial, and engaging in extensive outreach activities to bring news of the Court and its work to all Cambodians are invaluable.[203] Most significantly, without the support of NGOs, the number of Civil Parties at the ECCC would be substantially lower,[204] and their ability to represent themselves would be questionable.[205] The shift toward collective representation only increases the importance of the work of civil-society organizations and NGOs. Partnerships between international tribunals and civil-society organizations must aim to assist the "larger universe of survivors,"[206] who may feel left out by this process. This can best

198. *See* Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 637, 653 (2010) (discussing how "international criminal law's main purpose" is, in part, "to inflict retribution" and how public retribution is important to international trials "because atrocities excite the public's outrage and demand for justice").

199. *See, e.g.*, Christoph Sperfeldt, *Cambodian Civil Society and the Khmer Rouge Tribunal*, 6 INT'L J. TRANSITIONAL JUST. 149, 156 (2012) [hereinafter Sperfeldt, *Cambodian Civil Society*]

> (Outreach projects that initially were focused on providing general information about the ECCC and assisting victims to complete the Court's victim information form developed into comprehensive victim support projects involving notifying survivors about the status of their applications, facilitating their legal representation and regularly informing and supporting [C]ivil [P]arties to attend the trials and meet with their lawyers.).

200. Lucy Hovil & Moses Chrispus Okello, *Editorial Note*, 5 INT'L J. TRANSITIONAL JUST. 333, 333 (2011).

201. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 150.

202. For example, see the work of the Documentation Center of Cambodia (DC-Cam) in CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE (Praeger 2005).

203. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 150–51.

204. For example, approximately eighty-four percent of all Civil Party applications in Case 002 were submitted by or through NGOs. PHAM ET AL., POPULATION-BASED SURVEY, *supra* note 89, at 13.

205. The ECCC's Internal Rules did not initially include a legal aid scheme for Civil Parties, and NGOs were forced to provide pro bono representation. Sperfeldt, *Cambodian Civil Society*, *supra* note 199, at 151.

206. *Id.* at 160.

be achieved by managing expectations of victims throughout the process and by providing a viable and effective compensatory mechanism.[207]

### C. *Compensation*

A primary motivation for victim participation is to receive reparations.[208] Collective representation will only be beneficial if it does not hinder this goal. The right to remedy is guaranteed under a wide range of international agreements including the UDHR,[209] the International Covenant on Civil and Political Rights (ICCPR),[210] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[211] among many others.[212] This right was reaffirmed in 2005 when the U.N. General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation,[213] which reminded States of their obligation to ensure victims of serious human rights violations obtain "[a]dequate, effective and prompt reparation for harm suffered."[214] However, these noble gestures do not by themselves result in adequate, effective, and prompt reparations.[215] For compensatory mechanisms to be effective and for victim participation in international criminal proceedings to be both meaningful and worthwhile, three issues must be resolved. First, reparations claims must be conducted within the internationalized tribunal itself and not left to domestic

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207. *See id.* at 152–53, 160 (discussing how a lack of ECCC outreach strategy hindered the management of victims' expectations, among other problems, provoking the ECCC to direct more resources into outreach and victim participation, and suggesting that the "collective nature of reparations" might "create some meaning" for victims who did not participate).

208. STAMMEL ET AL., *supra* note 190, at 35. Eighty percent of respondents said it was important to provide reparations to victims of the Khmer Rouge, and 15.4% listed it as their primary motivation for application. *Id.* at 35–36. It should be noted, however, that the participation regime at the ICC is separate from the reparations scheme, meaning that victims can still receive compensation without participating in any trial. Karen Corrie, *Victims' Participation at the ICC: Purpose, Early Developments and Lessons*, AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT 6, http://www.amicc.org/docs/Victims_Participation.pdf (last updated Mar. 25, 2013); *see also* Rome Statute, *supra* note 35, art. 75(1) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.").

209. UDHR, *supra* note 74, art. 8.

210. ICCPR, *supra* note 75, art. 2(3).

211. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

212. *See, e.g.*, ECHR, *supra* note 82, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority . . . ."); Rome Statute, *supra* note 35, art. 75(1) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.").

213. *See generally* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., Supp. No. 49, (Vol. I), U.N. Doc. A/60/49 (Vol. 1) (Mar. 21, 2006).

214. *Id.* para. 11(b).

215. *See* Bassiouni, *supra* note 19, at 246 ("Although the existing national, regional and international mechanisms provide some provisions regarding reparations, there are several reasons why they cannot always ensure victims' access to reparations.").

jurisdictions. Second, reparations need to be available even if the convicted perpetrator is indigent. Third, the precise forms of reparations must be delineated.

1. In-House Reparations Regime

The importance of reparations to effective and meaningful victim participation cannot be understated. The award and implementation of compensatory measures are, however, threatened when international tribunals leave these central components of international justice to national judiciaries.[216] Such was the case for the ICTY and the International Criminal Tribunal for Rwanda (ICTR), whose reparations mechanisms were recognized as being wholly inadequate in enabling victims to receive compensation and were restructured under both the ICC and the ECCC.[217] Rule 106, common to both ad hoc tribunals, provides for compensation to be sought not through the international tribunal itself but through an "action in national courts (or other competent body)" pursuant to national legislation.[218] This rule does not just presuppose that relevant legislation or individual access to national courts exists, but also that the national courts, judiciary, and the government itself are all capable of, and even favorable toward, granting reparation claims. As Bassiouni has noted, "[i]n post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases."[219] This is not a surprise; countries recovering from mass-atrocity crimes do not have the benefit of a strongly independent judicial system.[220] It is crucial, if personal justice is to be found, that compensatory mechanisms are handled within the tribunal.

The ECCC and the ICC both contain an in-house reparations regime.[221] At the ECCC, a central purpose of Civil-Party application is to seek reparations.[222] As such, the Internal Rules provide an in-house mechanism, through Rule 23 *quinquies*, to deal with these claims.[223] At the ICC, the in-house reparations regime is governed by Article 75 of the Rome Statute, which allows the Court to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of,

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216. *See id.* ("Even binding treaties that provide for victim reparations can be limited by States' willingness or ability to comply . . . . [M]any States are unable to provide reparations to victims due to a lack of resources.").

217. *Id.* at 241–44; *see also* Zegveld, *supra* note 72, at 87–89 (discussing how the ICTY and ICTR "lack jurisdiction to deal with compensation for victims," but that the "lessons learnt from their inability to deal with victims" led the ICC to adopt a victim reparation scheme, and explaining that the ECCC allows victims to make reparation claims under certain circumstances).

218. Bassiouni, *supra* note 19, at 242.

219. *Id.* at 243.

220. *See* MARIE CHÊNE, U4 ANTI-CORRUPTION RES. CTR., OVERVIEW OF CORRUPTION IN CAMBODIA 3 (2009) (explaining that in Cambodia, the judiciary is considered the sector "most affected by corruption," and "only one in six judges has a law degree").

221. *See* Rome Statute, *supra* note 35, art. 75(1) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation . . . . [T]he Court may . . . determine the scope and extent of any damage, loss and injury to, or in respect of, victims . . . ."); ECCC Rules (Rev. 8), *supra* note 11, R. 23 *quinquies*(1) ("If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties.").

222. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(b).

223. *See id.* R. 23 *quinquies* (stating that "[i]f an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties" and giving the Chambers the power to "decid[e] the modes of implementation of the awards").

victims."[224] Interestingly, this order can be made "either upon request [by a victim] or on [the Court's] own motion."[225] Thus, even where a victim fails to request compensation, the Court may decide to award it regardless.

2. The Problem of the Indigent Perpetrator

An in-house reparations regime is only useful if the court orders are capable of being implemented; thus, the presence of an indigent perpetrator poses significant, but by no means insurmountable, problems. Domestic jurisdictions throughout the world have acted by establishing "victims of crime funds" that provide compensation to individuals injured by acts of violence.[226] There is no reason why international tribunals should not do the same, and indeed, the ICC has.[227] Article 79 provides for the establishment of a Trust Fund amassed "through fines or forfeiture" to be paid out "for the benefit of victims of crimes . . . and of the families of such victims."[228] Under Article 75(2), the Court has the discretionary power to order that any reparations award be made through this Trust Fund.[229] Victim trust funds offer the best solution for the indigent perpetrator. Awards can be implemented quickly after conviction, increasing victim satisfaction with the criminal justice process.[230]

The ECCC has, however, struggled with this issue. The original Internal Rules failed to anticipate, or chose to ignore, the possibility of an indigent perpetrator, stating that reparations "shall be awarded against, and be borne by convicted persons" alone.[231] This is an interesting oversight as some of the indicted were well known inside and outside of Cambodia to be destitute.[232] Mark Wojcik has noted this and remarks that Rule 23(11) "effectively shields the government from carrying any responsibility to the Civil Parties."[233] Questions of politicization aside, the Court has revamped its Internal Rules in an attempt to more effectively deal with an indigent perpetrator.[234] The sixth revision of the Internal Rules added a subparagraph, giving

224. Rome Statute, *supra* note 35, art. 75(2).

225. *Id.* art. 75(1).

226. *See* Bassiouni, *supra* note 19, at 225 (discussing a survey of States that found that a growing number of national systems provide compensation to victims, even in the absence of compensation from the perpetrator).

227. *See* Rome Statute, *supra* note 35, art. 79 ("A Trust Fund shall be established by decision of the Assembly of States Parties . . . .").

228. *Id.* art. 79(1)–(2).

229. *Id.* art. 75(2).

230. *See* Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice*, 16 BUFF. HUM. RTS. L. REV. 1, 52 (2010) (discussing how the ICC's Trust Fund for Victims "will provide much quicker relief, due to it being much better funded," a framework "which will enable victims to avoid the stress of participation at the trial").

231. ECCC Rules (Original), *supra* note 22, R. 23(11).

232. *See, e.g.*, Final Defence Written Submissions para. 50, Co-Prosecutors v. Duch (Nov. 11, 2009) (Case No. 001/18-07-2007-ECCC/TC), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E159_8_EN.pdf ("[T]he Defence wishes to point out that Duch was found indigent at the time of his transfer to the ECCC.").

233. Wojcik, *supra* note 44, at 12.

234. *Compare* ECCC Rules (Rev. 5), *supra* note 192, R. 23 *quinquies* (declining to provide a way to

the Chamber discretion in deciding how to implement an award.[235] Thus, the Chamber may "recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."[236]

Unfortunately, this new rule entirely fails to solve the problem. Instead of establishing a fund to provide victims ready access for compensation, Rule 23 *quinquies*(3)(b) requires any project to have already "secured sufficient external funding."[237] If this requirement must be met, then what is the point of the court order?

Civil-Party groups have long urged the Court to establish "a voluntary victims' trust fund."[238] Such a fund would permit the Court to make novel orders aimed at bringing personal justice to the victims by ordering collective and moral projects that otherwise would not be funded.[239] It may be too late for the ECCC to constitute this fund, but future ad hoc tribunals should take note of the ECCC's failings and establish a trust fund, as the ICC has done.

### 3. What Form?

A final issue surrounding reparations at international tribunals is defining exactly what form of compensation is appropriate. Should a court make an order for monetary compensation for individual Civil Parties and not for all victims of the mass atrocity? The ICC and the ECCC have taken different approaches. Under the Rome Statute, the ICC can award participating individuals monetary restitution.[240] The ECCC, however, limits compensation to simply "collective and moral reparations."[241]

The nature of international criminal proceedings is such that not all atrocities can be investigated and prosecuted, and participating victims can only ever be representative of the whole. A quirk of fate through prosecutorial discretion should not dictate which victims will or will not participate and possibly gain financial

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implement an award when the defendant is indigent), *with* ECCC Rules (Rev. 6), *supra* note 22, R. 23 *quinquies*(3) (adding subparagraph (3), which allows the costs of an award to be borne by the convicted person or by an appropriate victim support project).

235. ECCC Rules (Rev. 6), *supra* note 22, R. 23 *quinquies*(3)(b).

236. *Id.* This rule is unchanged in Revision 8 of the Internal Rules. ECCC Rules (Rev. 8), *supra* note 11, R. 23 *quinquies*(3)(b).

237. *Id.*

238. Civil Parties' Co-Lawyers' Joint Submission on Reparations, paras. 4, 34–36, Co-Prosecutors v. Duch (Sept. 14, 2009) (Case No. 001/18-07-2007-ECCC/TC), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E159_3_EN.pdf.

239. *See id.* paras. 35, 39

> ([A]lternative sources of funding, other than through the state, should also be examined if it may not be possible for the state to assume the responsibility for reparations. One possibility is the establishment of an independent and voluntary victims' trust fund for the purpose of implementing the collective and moral forms of reparations . . . . Clearly this Court is, at a minimum, in the unique position in which it can order the Victims Unit to set up a voluntary trust fund . . . .).

240. Rome Statute, *supra* note 35, art. 75(2).

241. ECCC Rules (Rev. 8), *supra* note 11, R. 23(1)(b).

compensation; therefore, international tribunals should only award collective and moral reparations. This is not to say that reparations cannot be directed at individuals and that international tribunals should not adopt innovative measures. Indeed, they should. Collective compensation that acknowledges different levels of harm and suffering is possible and must be encouraged. In the earlier example concerning two orphaned children, collective reparations may entail the funding of schools and pathways to education in orphanages across the province for the younger child, while the older child may seek simple acknowledgement of her suffering. There is indeed a need for innovative, individualized collective and moral reparations that promote personal justice and societal reconciliation.

## CONCLUSION

International justice is "justice divorced from local realities."[242] The challenge is to make justice available on a personal level, where victims are given agency and encouraged to participate within the proceedings.[243] International criminal law must do more than consider the survivors of mass atrocities as simply "those poor people."[244] If meaningful justice is its goal and "legitimacy and functional relevance are to be confirmed,"[245] then international criminal law must make the inclusion of victims a "central priority."[246] As an emerging area, victim participatory regimes have many difficulties in delineating the modality and extent of such participation so that it does not conflict with the fair-trial rights of an accused. The difficulties are very real: how can an entire nation, with divergent desires and motivations, be accommodated in the process? This Article has proposed three solutions aimed at systemic development of the ICC and future ad hoc tribunals to deal with these challenges. Despite lingering issues, this Author remains hopeful. The "terms of the debate have . . . changed," and victims have moved from the outskirts to the center of discussions of justice.[247]

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242. Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT'L REV. RED CROSS 441, 455 (2008).

243. *See* Harry Hobbs, *The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya*, 9 EYES ON THE ICC 19, 48–51 (discussing how international criminal trials *in-situ* can assist in this endeavor).

244. *See* Yael Danieli, *Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law*, 27 CARDOZO L. REV. 1633, 1644 (2005–2006) (discussing interview with Yisrael Gutman, who noted the tepid reaction by some to the suffering of the Jewish people during the Holocaust). Gutman is a Holocaust Survivor, director of the Holocaust Research Centre at Yad Vashem, and Professor at the Institute of Contemporary Jewry Hebrew University of Jerusalem. *Id.* at 1643.

245. Mark Findlay, *Activating a Victim Constituency in International Criminal Justice*, 3 INT'L J. TRANSITIONAL JUST. 183, 189 (2009).

246. Bair, *supra* note 148, at 551.

247. Danieli, *supra* note 244, at 1648.

# Follow the Leader?: The Utility of UNCITRAL's Legislative *Guide* on Secured Transactions for Developing Countries (and Its Call for Harmonization)

SEAN P. STACY*

*Abstract*

While law impacts economic development, the exact nature of its influence is quite elusive. Can law be a catalyst for growth, or is it more likely to be shaped by prosperity than to create it? To the extent that it does facilitate growth, under what circumstances are legal-reform efforts optimally applied? Despite the uncertainty that surrounds the essence of law's effect on economic growth, frequent efforts have been spearheaded to reform the laws of developing countries to more closely resemble those of affluent states. This Article explores one such reform effort of the laws governing secured transactions. Through this exploration, this Article demonstrates that even in an area like commercial law—deemed felicitous to reform efforts—pitfalls permeate. Ultimately, this Article calls into question the relative impact of the reform efforts and the more aspirational goal of global harmonization of the laws governing secured financing.

SUMMARY



* Sean P. Stacy is a Visiting Assistant Professor at the Roger Williams School of Law. Mr. Stacy received his JD from Harvard Law School in 2004 and Master's degree in Economics from New York University in 2011.

## INTRODUCTION

Law impacts economic development. Acceptance of this rather obvious supposition takes but a moment of abstract rumination on law's absence. In this imagined sea of anarchy, advancing any economic scheme, be it a Smithian[1] capitalist regime or a Marxist[2] command economy, would certainly be an exercise in futility. How might any actor, be that actor an individual or a state, identify an owner or property? How would individuals, companies, or the state contract? How might disputes between disparately powerful individuals be resolved? And so, with nary an

1. *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS: BOOKS I–III (Andrew Skinner ed., Penguin Books 1999) (1776).

2. *See, e.g.*, KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel Moore trans., Penguin Books 2002) (1888).

appeal to Aristotle's *Analytics*,[3] Wittgenstein's *Tractatus*,[4] or Whitehead and Russell's *Principia*,[5] we can feel comfortable accepting the logic of this seemingly incontrovertible claim.

But it is perhaps this very incontrovertibility that has led aid organizations, individual country governments, international governmental organizations (IGOs), and nongovernmental organizations (NGOs) to confidently conclude that they have found an Archimedean firm place from which to move the world.[6] From this first principle such actors have surmised in a seemingly syllogistic manner that, because law matters for economic development, legal regimes of economically affluent countries should be reproduced or mimicked by less affluent countries wherever possible.[7] Building on this first principle, it has been further asserted that in order to both (i) facilitate the global marketplace and (ii) aid in the economic growth of developing countries, model codes should be created, and these codes should likewise reflect the legal schemes of more affluent countries.[8]

The most extensive test of these hypotheses has come in the realm of commercial law.[9] In acquiescence of capitalism's near ubiquity and based on educated speculation that reform efforts made in the realm of private commercial law will meet less resistance and will be more easily incorporated than other areas of the law, broad-scale efforts have been made to reform existing commercial law regimes to reflect a more Western legal sensibility.[10] As if the grandiosity of such an

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3. *See generally* ARISTOTLE, POSTERIOR ANALYTICS (Jonathan Barnes trans., 2nd ed., Oxford Univ. Press 1993).

4. *See generally* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS [LOGICAL-PHILOSOPHICAL TREATISE] (C.K. Ogden ed., trans., Project Gutenberg 2010) (1922), *available at* http://www.gutenberg.org/files/5740/5740-pdf.pdf.

5. *See generally* A.N. WHITEHEAD & BERTRAND RUSSELL, PRINCIPIA MATHEMATICA [MATHEMATICAL PRINCIPLES] (Cambridge Univ. Press, 2d ed. 1927) (1913).

6. Pappus of Alexandria records in his *Collectio* the following statement purportedly made by the Greek mathematician Archimedes: "Give me but one firm spot on which to stand, and I will move the earth." THE OXFORD DICTIONARY OF QUOTATIONS 14 (2d ed. 1953).

7. Thomas Carothers, *Steps Toward Knowledge*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 327, 330 (Thomas Carothers ed., 2006).

8. *See, e.g.*, PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 139 (2007) (suggesting that codes should be created to "help reformers [in] . . . the bottom billion to achieve and sustain change[,]" which includes "norms that are analogous to the EU").

9. There has been a myriad of efforts aimed at universalizing commercial transactions. For example, the International Institute for the Unification of Private Law (UNIDROIT) has spearheaded a large number of initiatives, including the Convention on International Interests in Mobile Equipment, the Convention on Substantive Rules for Intermediated Securities, the Convention on International Factoring, and the Convention on International Finance Leasing, to name but a few. *UNIDROIT Conventions*, UNIDROIT, http://www.unidroit.org/dynasite.cfm?dsmid=84211 (listing the aforementioned conventions and providing a link to their texts). Efforts aimed at reforming the laws of a single country (or a developing region) have been equally numerous. A typical source of such efforts is the World Bank, often in conjunction with an affiliated, but financially and legally independent entity, the International Finance Corporation (IFC). *See Law, Justice and Development*, THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,menuPK:445640~pagePK:149018~piPK:149093~theSitePK:445634,00.html (providing general information on the World Bank's law and development initiatives).

10. *See, e.g.*, KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC

undertaking were not sufficient, harmonization of commercial law internationally has been set forth as an ultimate goal of reform efforts.[11] The hope of harmonization apologists is that these efforts will advance the ability of developed nations to gain access to areas with large growth potential (such as the relatively untapped waters of the developing world) and allow developing countries a more prominent place in the world marketplace.[12]

This Article will focus on one such commercial legal-reform effort and its purported and real ramifications for developing countries: the Legislative Guide on Secured Transactions (*Guide*) prepared by the United Nations Commission on International Trade Law (UNCITRAL).[13] In looking at the aspirations of the *Guide*, this Article will query the degree to which this document, or any other model secured-transactions law, may be expected to facilitate growth in developing countries and, to the extent that the creation of a model law is conducive to growth, whether the goal of harmonization helps or hurts this endeavor.[14] Through the

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DEVELOPMENT 215 (2006) (discussing transplantation of "best-practice" legislation in the corporate bankruptcy field).

11. *See* U.N. Comm. on Int'l Trade Law, 40th Sess., June 25–July 12, 2007, *Note by the Secretariat: Recommendations of the UNCITRAL Draft Legislative Guide on Secured Transactions,* para. 1, U.N. Doc. A/CN.9/631 (Mar. 16, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/817/11/PDF/V0781711.pdf?OpenElement (listing key objectives of the *Guide*, including "[t]o harmonize secured transactions laws").

12. *See, e.g.*, Neil B. Cohen, *Harmonizing the Law Governing Secured Credit: The Next Frontier,* 33 TEX. INT'L L.J. 173, 188 (1998) (explaining that successful harmonization efforts "can lower the cost of international credit transactions, making more credit available at a lower cost"); Anjanette H. Raymond, *Cross-Border Secured Transactions: Ongoing Issues and Possible Solutions*, 2 ELON L. REV. 87, 97 (2011) (discussing how a unitary security interest "broadens the reach of secured transactions law"); Catherine Pédamon, *How is Convergence Best Achieved in International Project Finance?*, 24 FORDHAM INT'L L.J. 1272, 1274 (2001) (indicating that convergence reduces costs, "mitigate[s] risk and create[s] a safer investment environment[,]" while also creating "certainty as to the legal rules that apply" when international disparity exists).

13. U.N. COMM. ON INT'L TRADE, LEGISLATIVE *GUIDE* ON SECURED TRANSACTIONS, U.N. Sales No.E.09.V.12 (2010) [hereinafter UNCITRAL *GUIDE*].

14. Throughout this Article, I refer to developing and developed countries, not to mention the overall concept of development. I use these terms with reservation for a couple of principal reasons. First, there is a lack of precision with which the terms "developing" and "developed" are used, so much so that the terms are nearly meaningless. Depending on the inclination of the utterer, be that speaker a member of an IGO, a development-centered NGO, or an academic, the terms may refer to what Paul Collier coined as the "Bottom Billion" or include over half of the population of the globe. *See* COLLIER, *supra* note 8, at 3, 11 (defining the "Bottom Billion" as the combined population of countries, located primarily in Africa and Central Asia, that have a growth rate of negative in the absolute, or "in relative terms massively below[,]" that of the rest of the developing world). From my perspective, I generally am speaking of the former, where per capita income hovers around one to two dollars per day. Even if a more widely accepted technical usage were available, my concerns about employing these terms would not be wholly ameliorated. I am sympathetic to the notion mentioned by Ruth E. Gordon and Jon H. Sylvester, who note the subtly insidious elevation of the seemingly developed country in juxtaposition to the implicitly inferior developing country. *See* Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development,* 22 WIS. INT'L L.J. 1, 5 (2004) ("The concept of development privileges certain societies, cultures and institutions, while disparaging others; it is grounded in defining the 'Other' as incompetent, inferior and in need of transformation."). Relatedly, the term development, as it is often employed, merely speaks of wealth as the quintessential reflection of development but does not take into account a fuller notion of development set forth by Amartya Sen. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999) (defining "[d]evelopment . . . as a process of expanding the real freedoms that people enjoy"). These latter conceptions attempt to conceive of a notion of development based upon a much wider swath of human experiences, including social opportunities, political freedoms, and a government's level and ability to respond to the needs of its people.

discussion, this Article will demonstrate that the production of a legislative guide for secured transactions, while not without merit, is unlikely to dramatically, or perhaps even slightly, improve growth prospects for developing economies in the short-term. This lack of potential impact is due to several impediments endemic to any transplantation of law from one people to another as well as specific issues related to the ability of secured transactions to act as a catalyst for growth in many developing countries.

While this conclusion should not necessarily cool the efforts to create (or even to proselytize the virtues of) a model law for secured transactions, it does argue for a trade of hubris for humility in the propagation of the *Guide* or other similar instruments. To the degree that a model law is advanced, policy makers should focus their collective attention on the creation of efficient, workable, and well-enforced secured-transactions law in a given developing country that has requested their counsel. Such a focus will inevitably require acceding a great deal of flexibility to each developing nation, offering broad themes that can be easily adapted to any existing legal structure and that allow for a given nation to put its own imprimatur on the adopted law. Similarly, such conclusions caution against making the adoption of the model a prerequisite for benefits such as preferential trade assistance and international aid, which is an all-too-frequent situation in the developing world.

Relatedly, the goal of harmonization, though appealing on the surface, is likely to harm rather than enhance the likelihood that secured-transactions reform will benefit the developing world. Formalizing the desire for harmonization will effectively erode the needed flexibility noted above by establishing an end-point at which all participants must converge. To the extent that the *Guide* is offered to developing countries as a template of secured-credit law, developing country policy-makers should feel free to proceed unburdened by the considerable weight of having to create functional secured-transactions laws within the specific context of that country, while simultaneously attempting to produce a regime that will be easily assimilated with Western schemes.

Structurally, this Article will proceed in two Parts. Part I will examine the efficacy and desirability of creating and propagating a legislative guide on secured-transactions law. In an effort to understand the impulse and intuition behind the creation of such a guide, this discussion will begin with a side-by-side comparison of the schemes of developing countries with the perceived paragon of secured-transactions law: Article 9 of the U.S. Uniform Commercial Code (UCC) (Article 9).[15] After providing this initial juxtaposition, Part I will then turn to a more nuanced examination of the ability of the *Guide* to foster and/or create economic growth in developing countries. This discussion will explore: (i) the nature of the financial sector's ability to aid in economic growth; (ii) the ability of commercial law to bolster the financial sector; and (iii) the capacity of the *Guide* to fix broken schemes. This latter discussion will focus on impediments to the successful transplantation of law

15. U.C.C. art. 9 (2010). In connection with this comparison, Part I will draw upon studies conducted by the World Bank, European Bank for Reconstruction and Development (EBRD), and the IFC that have highlighted the types of problems existent in many secured transactions structures in the developing world. *See infra* Part I. Part I will also note the reasons why such legal impediments inhibit economic growth and even drive inhabitants to informal sectors of the economy. *Id.*

from one country to another, both generally and specifically with respect to secured-transactions law.

Having explored the arguments in favor of creating and proliferating a model code of secured financing, Part II will turn to a brief discussion of one of the purported goals of the *Guide*'s drafters: harmonization. Part II will explore the rationale for this stated goal and, building upon the discussion in Part I, will examine the efficacy, feasibility, and desirability of such an objective with the purpose of determining if the presence of this aspiration in the *Guide* tends to help or hurt the development of robust secured-transactions law in developing countries.

## I. A DISCOURSE ON THE ABILITY OF THE *GUIDE* TO PROMOTE ECONOMIC GROWTH

### *A. The Intuitive Argument*

#### 1. UCC Article 9: A Paragon of Secured-Credit Law

One suspects that had the world never heard of Occam and his famous razor, we would still venerate order and economy of explication. There is, after all, an elegance and beauty in the simple solution. This need for simplification extends even where we intend to focus on the complex. Think, for example, of a museum patron meandering around a gallery of impressionist paintings where she is solicited to embrace nuance, technique, and the relativity of perspective. Despite this invitation, our patron is tempted—in relatively short order—to gravitate toward the back wall of each room in order to more easily order the images upon which her eyes gaze. Doing so has an immediate payoff—a view of water lilies here or an avenue in the rain there. This is not to say that our patron learns nothing substantive about the painting. Even from this distant vantage, she is likely able to make conclusions about the technique used to produce the resultant image—the general palette of colors employed, a sense of the brush strokes, etc.—all of which lend to a greater understanding of the painting and its creation. In fact, our patron may walk away feeling that she has gathered enough information about the piece to have a true sense of it.

The impulse behind the tack taken by our patron is arguably of the same order as that which stands as the progenitor of the *Guide* and similar model commercial laws. We look at the relative efficiency of credit markets in the West (and the potential gains in economic growth to be derived)[16] and wonder why this does not happen across the globe. We then set our gaze upon the laws that govern secured credit and, seeing noticeable differences, postulate that the laws of the less prosperous countries need to be altered to more closely reflect those of the more affluent ones.

16. According to the Commercial Finance Association, the asset-based lending industry in the United States has been growing rapidly since the mid-1970s, and the volume of movable asset lending has multiplied over thirty years, reaching a total of $545 billion in 2007. COMMERCIAL FIN. ASS'N, ANNUAL ASSET BASED LENDING AND FACTORING SURVEYS 9 (2008), *available at* https://www.cfa.com/eweb/docs/abl_factoring_2007_annualsurvey.pdf. The industry has grown by at least ten percent annually from 2004 to 2007. *Id.*

Make no mistake, this line of reasoning is compelling and is worthy of examination. This Part will explore the argument, first providing the basic intuitive connection between secured transactions and economic growth, then offering a juxtaposition between the secured-credit schemes of developing countries (and many of the problems plaguing those systems) and what is arguably the archetype of secured-transactions law: Article 9 of the UCC.

How might a secured-financing system act as a positive source of economic growth in either a developed or developing country? First, we must note the type of transaction typically governed by a secured-financing system. At its most basic level, a secured-transactions system allows for individuals or entities to use personal property as collateral for borrowing.[17] In its most common incarnation, a secured-financing lender takes a property right—a security interest—in one or more pieces of a debtor's collateral in exchange for providing that debtor more favorable loan terms than said debtor would have received without the grant.[18] The security interest, which is typically a non-possessory interest,[19] allows its holder—a secured party—to ensure against loss in the event that the debtor cannot fulfill the obligations under the transaction.

How then is something seemingly so prosaic of such great import? At its core, the argument is as follows:

(1) The ability of a debtor to grant property rights (particularly non-possessory property rights) to a creditor enables that debtor to obtain lower cost credit than he or she would have otherwise been able to procure.[20]

(2) Greater availability of less expensive credit allows debtors the ability to invest in a myriad of worthwhile endeavors.

(3) These endeavors can act as a catalyst, spurring investment, job creation, and ultimately economic growth.

If we accept this logic, the next step for any country, developing or otherwise, is to ask how said country could go about creating the best system possible to take advantage of the benefits secured financing has to offer. As mentioned above, this tends to incentivize a focus on the schemes in countries where access to credit is robust. In the United States, the laws governing secured transactions are governed

17. Generally, secured-financing systems are separate from the mortgaging of real property. As shall be explained, the term "personal property" is quite broad. *See infra* Part I.A.1.a.

18. *See* Cohen, *supra* note 12, at 176 (discussing how security interests lower the risks of loss for creditors and decrease interest rates for debtors such that transaction may be profitable).

19. The debtor typically retains possession of the collateral unless or until the debtor defaults in its obligations to the secured party. *See* GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24–25 (1965) (discussing the rise of non-possessory security interests). This is in contrast to security devices of centuries past, such as the pledge of chattels, which required the debtor to relinquish possession of collateral to the lender until such time as the debtor had satisfied the obligations it had to the secured party. *See id.* at 5 (explaining that in the past, "any arrangement under which the debtor had the right to retain the collateral until default could not be a pledge").

20. HEYWOOD FLEISIG, MEHNAZ SAFAVIAN & NURIA DE LA PEÑA, THE WORLD BANK, REFORMING COLLATERAL LAWS TO EXPAND ACCESS TO FINANCE 4 (2006).

by Article 9, which stands as something of a model of secured-transactions law and is, not unsurprisingly, quite similar to the substance provided in the *Guide*.[21]

a. Attachment

Article 9's coverage establishes and governs four major aspects of secured financing: attachment, perfection, priority, and enforcement.[22] The springboard for the majority of Article 9 is establishment of a security interest under Section 9-203, a process known as attachment.[23] This is the stage at which the relationship between debtor and creditor is formed.[24] Typically, a valid non-possessory security interest requires the completion of a written agreement between the debtor and the secured party (i.e., the security agreement). Once the creditor has extended value, its interest attaches to the debtor's collateral.[25] Though attachment is obviously important from a procedural standpoint, it is not the mechanics of attachment that set the secured-financing systems of the West apart from those of developing countries, but rather (i) the breadth of collateral types to which one is allowed to attach, (ii) the relative stickiness of the attached interest, and (iii) the lack of restriction on who may participate in a secured financing.[26] These factors, taken collectively, tend to make credit markets more accessible and less expensive for potential debtors.[27]

Under Article 9, debtors may grant security interests in an abundance of collateral types.[28] As one may expect, a debtor is allowed to grant an interest in virtually all varietals of tangible, moveable goods. These can be goods used for personal, family, or household purposes,[29] goods used to produce certain products,[30] the inventory of a manufacturer or retailer,[31] the products used or produced in a farming operation,[32] and even the combination[33] or commingling[34] of any of the above. Similarly, one can grant a security interest in a variety of intangible and pseudo-intangible property such as rights to payment (in the form of accounts

21. GERARD MCCORMACK, SECURED CREDIT AND THE HARMONIZATION OF LAW: THE UNCITRAL EXPERIENCE 182 (2011).

22. *See* U.C.C. § 9-203(a) (2010) (addressing attachment); *id.* § 9-308–316 (addressing perfection); *id.* § 9-317–339 (addressing priority); *id.* § 9-601–624 (addressing enforcement).

23. *Id.* § 9-203 (2010). It should be noted that there are additional avenues by which a security interest may be created under the UCC. *See, e.g.*, *id.* § 2-401 (allowing a seller to retain a security interest in goods delivered); *id.* § 9-109(a) (referring to other UCC provisions under which a security interest may arise).

24. *Id.* § 9-203.

25. U.C.C. § 9-203(b) (2010).

26. *See* FLEISIG ET AL., *supra* note 20, at 3–8 (discussing the importance of collateral in effective secured credit systems and comparing the use of collateral in developed and developing countries), *and* Cohen, *supra* note 12, at 176 (noting that "regimes differ as to the types of property in which a security interest may be granted and the creditors authorized to receive security interests").

27. FLEISIG ET AL., *supra* note 20, at 1.

28. *See* U.C.C. § 9-102(a)(12) (2010) (broadly defining "collateral" as property subject to a security interest or agricultural lien). *But see* U.C.C. § 9-109 (2010) (defining the outer limits of what may be a security interest under Article 9).

29. *Id.* § 9-102(a)(24).

30. *Id.* § 9-102(a)(33).

31. *Id.* § 9-102(a)(48).

32. *Id.* § 9-102(a)(34).

33. *Id.* § 9-102(a)(1).

34. U.C.C. § 9-336(b) (2010).

receivable,[35] promissory notes,[36] or payments to be received from a commercial tortfeasor[37]) and investment property (stocks and bonds).[38]

In addition to providing a secured party the opportunity to take an interest in a host of collateral categories, Article 9 also attempts to assure secured parties that a security interest, once made, is not easily terminated.[39] The notion that a security interest truly attaches to collateral—in the sense of being adhesive—is imperative to the secured financing enterprise because the type of collateral securing the debt is personal property. Unlike real property, personal property is generally mobile. Therefore, an easily severed security interest (e.g., if the law allowed a sale of the encumbered collateral to sever a secured party's interest in the collateral) would cause justifiable concern among secured parties that a debtor, having granted a nonpossessory security interest to the creditor, would simply dispose of the collateral as he or she sees fit, leaving the secured party the task of navigating the same cumbersome collection process used by an unsecured creditor.[40] Article 9 mollifies these concerns by not only making relatively certain that a secured party retains his or her interest in the encumbered collateral despite a sale, lease, license, or other transfer of the collateral by the debtor,[41] but also providing an automatic security interest (to the secured party) in any identifiable proceeds of the disposition of encumbered collateral.[42]

In concluding our discussion of attachment under Article 9, a final point should be made with respect to the creation of security interests under Article 9. Specifically, there are very few limitations on who may be party to a secured transaction.[43] If one is eligible to contract (and the collateral is not one of a small number of excluded collateral types), then that person is free to engage in secured financing.[44] As we will discuss in more detail below, this is seldom the case in many developing countries. The policy rationale behind a greater breadth of available actors stems from the underlying sentiment about secured transactions generally—the more the better.

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35. *Id.* § 9-102(a)(2).

36. *Id.* § 9-102(a)(47), (a)(65).

37. *Id.* § 9-102(a)(13).

38. *Id.* § 9-102(a)(49).

39. *See* U.C.C. § 9-315(a)(1), § 9-507(a) (2010) (providing continuing effectiveness of a security interest and a filed financing statement).

40. *See* Cohen, *supra* note 12, at 177–78 (discussing the difficulty in enforcing a secured credit and the uncertainty of enforcement where the collateral securing the underlying obligation are "mobile goods").

41. U.C.C. § 9-315(a)(1) (2010). There are important exceptions to this general rule, however. The most important of these is the "buyer in the ordinary course of business" exception, in which a buyer in the ordinary course of business takes free of a security interest, even if the secured party had perfected its interest in the sold collateral. *Id.* § 9-320(a).

42. *Id.* § 9-315(a).

43. *See id.* § 1-103(b) (establishing that, unless specifically displaced, the law relating to capacity to contract governs the UCC's provisions).

44. *Id.*

b. Perfection and Priority

The next piece in the Article 9 puzzle is the process known as perfection. If attachment creates the relationship of debtor and creditor, perfection establishes the relationship between creditor and the rest of the world with respect to debtor's collateral. Specifically, Article 9 provides an incentive (in the form of elevated status relative to other interested parties in a given piece of collateral) for a secured party to publicize its already-attached security interest in a given debtor's collateral, typically through some sort of public filing system.[45] The policy rationale for this requirement is principally two-fold. First, this stage provides an opportunity to prioritize creditors who share an interest in the same piece of collateral.[46] This provides creditors with a greater level of certainty as to who will be paid from the proceeds of the sale of encumbered collateral in the event that the debtor has defaulted in its obligations.[47] The second and more important reason for the perfection step is notice, which informs parties interested in debtor's collateral (often referred to as searchers) of a secured party's interest in said collateral.[48]

Efficiency of the marketplace is at the core of the incentivization of notice. Most economists long for, and even create, economic models assuming a world with perfect information. The supposition is that better information yields sounder decision making and ultimately a greater level of efficiency. When information is deficient or faulty, there is a related lack of efficiency, and society suffers (relative to a situation in which there is perfect—or close to perfect—information). This can be demonstrated in a simple thought experiment. Imagine that you live in a world in which all the information about a given piece of collateral is known. In such a world, each of the various sticks making up the bundle of property rights is visible. Thus, when you attempt to buy an item you know whether it is encumbered by another's interest or not. For example, say that you wish to buy a widget, whose current market value is $5. Your friend has recently purchased a widget and offers to resell it to you for $4. Given that you are in a world with perfect information, you fortunately know if your friend has granted a security interest (or some other

45. *Id.* §§ 9-310, 9-322. Article 9 also allows for other methods of perfection depending upon the collateral type involved. *See, e.g., id.* § 9-313; *id.* § 9-314; *id.* § 9-309. These exceptions to the general practice of filing a financing statement are generally seen as acceptable because of the level of notice afforded to those who would seek to obtain information about a given debtor's collateral.

46. *See, e.g., id.* § 9-322(a)(2) (setting out priority rules for conflicting security interests). The perfection step is at least partially intended to establish priority relationships among secured and other interested parties in the same collateral. To illustrate this point, suppose that a borrower receives a loan from Bank A using the inventory of the borrower's business as collateral. Further suppose that sometime after that secured transaction, Bank B provides a loan to our borrower, secured by the very same inventory that secures Bank A's loan. In the event that Bank A filed a financing statement before the transaction between Bank B and the borrower, Bank A will be said to have priority over Bank B in the inventory. If the borrower stops making loan payments to Bank A and Bank B and both banks attempt to foreclose on the collateral, the priority rules dictate that Bank A will be better positioned than Bank B to extract the full value from the inventory in which both banks have taken a security interest. The ability to accurately predict one's priority in a given piece of collateral (and by extension, one's likelihood of extracting value from said collateral) is essential to being able to provide market-efficient loan terms to debtors.

47. *See* U.C.C. § 9-607 (2010) (listing collection and enforcement procedures).

48. *See id.* § 9-502 cmt.2 (noting that the UCC adopts "notice filing" so that interested parties can discover if "a person . . . [has] a security interest in the collateral indicated" in the filing).

property right) to another in the item and, therefore, can make a sound decision as to whether you should buy the item or not.

Juxtapose this with a world in which one does not have knowledge of encumbrances. Again, you would like to buy a widget, and again, your friend offers to sell you his slightly-used widget for $4. Again, let's suppose your friend has granted a security interest in his widget, this time to Bank. If you were to buy the widget for $4, not knowing about the encumbrance, and subsequently had it taken from you by the secured party, it would have a profound effect on your view of market transactions. Indeed, you would be willing to pay less and less for items. If other consumers faced the same problem, this would severely distort the marketplace. Society would produce and consume far less of a given item (and collectively, most items) than would be socially optimal. In short, an Akerlof-like "market for lemons" would result for virtually all property.[49] The preponderant effect of ambiguity in the marketplace would be a significant cooling of economic activity.[50] It is precisely this concern that motivates the incentives for performing the perfection step under Article 9.[51] The idea is that the economy will reap the benefits of inexpensive borrowing and lending[52] without the market distortions that might occur due to the grant of nonpossessory interests.

Before discussing enforcement, it is important to explicitly note (albeit briefly) the role played by the priority schemes established in Article 9. While attachment establishes the debtor-creditor relationship and perfection broadcasts that relationship, the priority system of Article 9 attempts to provide a ranking of interested parties in debtor's collateral.[53] The clarity and predictability of the priority schemes are paramount, as an absence of either would severely quell the ability of a debtor to grant multiple security interests in a given piece of collateral.[54]

### c. Enforcement

While attachment and perfection provide the framework of a secured transaction in the United States, these are relatively fruitless exercises without an effective enforcement mechanism. In the event that a debtor has defaulted in its obligations, a secured creditor wishing to extract value from the collateral through a disposition of said collateral has a couple of available methods by which it may take

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49. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-92 (1970) (explaining the "market for lemons" theory, in which asymmetrical information with respect to quality influences the market).

50. *Id.* at 490.

51. *See* U.C.C. § 9-308 cmt.2 (2010) (addressing the concern of "protect[ing] [the secured party] against creditors and transferees of the debtor").

52. *See* Alejandro Alvarez de la Campa, *Increasing Access to Credit Through Reforming Secured Transactions in the MENA Region* 37 (The World Bank, Policy Research Working Paper No. 5613, 2011) (discussing the potential benefits of reform).

53. *E.g.*, U.C.C. § 9-322(a)(2) (2010).

54. It is interesting to note that, despite the implication that there is relative clarity and predictability in establishing the priority of an interested party's rights in a given piece of a debtor's collateral, it is an oft-litigated area of the law. *See* LINDA J. RUSCH & STEPHEN L. SEPINUCK, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS 303 (2d ed. 2010).

possession of a debtor's encumbered property.[55] First, the secured creditor may request that the court levy upon (i.e., take possession of) the collateral.[56] Second, the secured party may use a self-help remedy, so long as the secured party does not breach the peace in the course of taking possession.[57] This latter remedy is not available to all creditors.[58] Those creditors of a debtor whose loan is originally unsecured will not be given a self-help remedy, even if they were to obtain a lien upon the collateral by going through a judicial process.[59] Once in possession of debtor's collateral, Article 9 generally provides the secured party the right to conduct the disposition of the collateral and grants a great deal of latitude in the manner in which said disposition is executed.[60] The principle limitation on the secured party's power in the disposition process is the stipulation that the secured party must conduct the sale in a commercially reasonable fashion.[61] It should be noted that this term is construed rather broadly.[62] Ultimately, the drafters of Article 9 have taken the position that there is ample incentive for a secured party to obtain the best price available for collateral, and that the secured party is often in a better position than a court to identify the best means to dispose of the collateral since it may have a better sense of the marketplace for a given type of collateral.[63]

Like attachment, the precise mechanism for enforcement is perhaps less important than the clarity, predictability, and execution of the enforcement process. As indicated in the following discussion in Part I.A.2 the secured-financing system hinges on the secured party's belief that the state apparatus will be there to efficiently aid in the enforcement process.[64]

Having now examined Article 9, it is worthwhile to look at some of the issues plaguing secured-transactions schemes in the developing world. Specifically, we will now turn to a discussion of the types of secured-transactions systems found in many developing countries and the manner in which access to credit is being inhibited.

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55. Though dispositions (i.e., the selling, leasing, or licensing of collateral) are the most common way in which a secured party extracts value from collateral, Article 9 also allows for the possibility of strict foreclosure of the property. U.C.C. § 9-609 (2010). Where the collateral is relevant, Article 9 also allows for the possibility of collection. *Id.* § 9-607.

56. *Id.* § 9-609(b)(1).

57. *Id.* § 9-609(b)(2).

58. *See id.* § 9-609 (allowing only a secured party to use self-help).

59. *Id.*

60. *Id.* § 9-610. It is important to note that often times intangible collateral types—such as accounts receivables or promissory notes—are enforced in a process known as collection, in which the account debtor (i.e., the individual or entity with a payment obligation to the debtor) is contacted by creditor and is instructed to make the payments it owes to debtor directly to creditor. *Id.* § 9-607.

61. U.C.C. § 9-610(b) (2010).

62. For example, the secured party may fetch what would be recognized as a poor price for the collateral and still have conducted a "commercially reasonable" sale by Article 9 standards. *Id.* § 9-627; *see also id.* § 9-610 cmt.10 (explaining that "while a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure . . . [it] was commercially reasonable[,]" it is not itself sufficient to establish a violation).

63. *See id.* § 9-610 cmt.2 ("This section encourages private dispositions on the assumption that they frequently will result in higher realization on the collateral . . . .").

64. *See* FLEISIG ET AL., *supra* note 20, at 42–45 (discussing the role the judiciary and police in the enforcement of security interests).

2. Secured Transactions in Developing Countries

According to the International Finance Corporation (IFC),

> [m]ore than half of private firms in emerging markets have no access to credit. This percentage is even higher and reaches up to 80 percent [in the] Middle East and sub-Saharan Africa. The number of firms that use loans to finance investments in the developing world is half the number of those firms operating in countries of the Organization for Economic Cooperation and Development (OECD).[65]

An attempt to ascertain the source of this disparity inevitably leads to the laws governing secured credit in developing countries.[66]

The difference between secured-credit laws in the United States and the current secured-transactions systems in most developing countries is striking. The latter are marked by obsolete or confusing schemes, many of which place seemingly needless restrictions on creating security interests.[67] This results in the exclusion from the system of economically important properties and agents.[68] Even where a secured transaction is sanctioned, the ability of a creditor to publicize that interest or to collect on the property when a debtor has defaulted is often severely curtailed.[69] In short, existing secured-transactions regimes in developing countries erect hurdles at each stage of the process. Part I.A.2.a will highlight some of these impediments.

a. Issues Relating to Attachment

i. Who May Be a Secured Party?

"Unreformed systems place restrictions on who can be a party to a security agreement and thus limit who can lend and who can borrow."[70] In describing these limitations, the World Bank states:

> Sometimes such restrictions serve no public policy purpose, as when farmers cannot give a security interest in their property to merchants. Sometimes they undermine good public policy, as when a woman cannot sign a security agreement—or when only corporations can file security interests in the company registry, a restriction excluding most farmers, all microenterprises, and most small and medium-size ones .... Sometimes they are side effects of apparently unrelated laws, as when laws set the

65. IFC, SECURED TRANSACTIONS SYSTEMS AND COLLATERAL REGISTRIES 6 (2010) (citation omitted).

66. *Id.* at 7–9.

67. HEYWOOD FLEISIG, MEHNAZ SAFAYIAN, & JEVGENIJS STEINBUKS, THE WORLD BANK GROUP, UNLOCKING DEAD CAPITAL: HOW REFORMING COLLATERAL LAWS IMPROVES ACCESS TO FINANCE 2 (2006) [hereinafter FLEISIG ET AL., UNLOCKING DEAD CAPITAL], *available at* http://siteresources.worldbank.org/INTTOPCONF3/Resources/307Safavian_Fleisig_Steinbuks.pdf.

68. FLEISIG ET AL., *supra* note 20, at 24–26.

69. *Id.* at 38–44.

70. *Id.* at 24.

> minimum age for signing a contract above the age of many heads of household, particularly among the poor.[71]

Such restrictions deter potential lenders and borrowers from even attempting to engage in productive enterprises. Moreover, these types of limitations have the further negative impact of reinforcing the status of the poor by failing to offer them avenues by which they may improve their situation.[72]

Sometimes constraints on who may be party to a secured transaction are less egregious—perhaps even inadvertent. The World Bank notes:

> In Bangladesh, India, and Jamaica a company can give a security interest—a "charge"—against all its property, movable and immovable. But that charge must be filed in the company registry, which deals only with corporations (companies). This system for publicity of security interests thus excludes the sole proprietorships that makeup the vast majority of enterprises in these countries—all microenterprises and many small and medium-size ones.[73]

Exclusions like these limit the extent of financing and, by extension, opportunities for growth.

### ii. Limits on Property Capable of Being Collateralized

A common trend among firms in the developing world is that credit applications are rejected due to insufficient collateral.[74] Often, business owners refrain from applying for loans because they are confident that they cannot meet the collateral requirements requested by banks.[75] According to the World Bank and IFC, unavailability of collateral is not always the problem; rather, the problem maybe the inability of debtors to utilize valuable assets as collateral.[76] For example, laws may exclude goods not yet acquired by a debtor (e.g., the future crops of a farmer),[77] a debtor's rights to payment (e.g., a business's accounts receivable), other intangible property rights (e.g., copyright), and sometimes even immovable goods (e.g., large equipment or machinery).[78]

The economic impact of these restrictions is not difficult to decipher. If a business is unable to use what it owns as collateral, then it will almost certainly be

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71. *Id.* (citations omitted).

72. *See id.* at 25 (discussing how such restrictions "have a disproportionate effect on . . . poor people").

73. *Id.* at 24 box3.1.

74. FLEISIG ET AL., *supra* note 20, at 6–7.

75. *Id.* at 10.

76. *Id.* at 6–7.

77. *See, e.g., id.* at 26 (noting that in Nicaragua, the law does not permit taking a security interest in a future crop that will be harvested after eighteen months, quelling most forestry financing).

78. *Id.* at 25. In low-income countries, seventy-eight percent of the capital stock of a business enterprise is in movable assets such as machinery, equipment, or receivables and only twenty-two percent is in immovable property. *Id.* at 9 fig.1.7. Unfortunately, financial institutions are reluctant to accept movable property as collateral. *Id.* at 7–8. By contrast, "in the United States, . . . movable property makes up about sixty percent of enterprises' capital stock[s]" and "lenders consider such assets to be excellent sources of collateral." *Id.* at 7.

unable to obtain financing.[79] To the degree that a business is still able to obtain funding, it would certainly expect that a lender will demand substantially more in interest payments to offset the risk of lending to a borrower against whom said lender would have little to no legal recourse.[80]

Mere exclusions of collateral are not the only problem, however. Often times, existing laws are simply inconsistent or confusing with respect to the types of collateral that can be used. This lack of clarity creates costs to the users of the secured-credit system because creditors cannot be certain their rights will ultimately be enforced.[81]

b. Perfection and Priority Issues

i. Priority among Creditors

The deleterious effects on the efficacy of secured-transactions regimes, caused by laws governing priority and publication, are perhaps as important as attachment issues. Recall from the above discussion on perfection and priority that "[c]lear rules for establishing priority among creditors permit lenders to assess a loan's potential risk and return based on its size, the value of collateral, and the order of priority of other creditors."[82] On this score, the World Bank provides the following:

> With rules for establishing priority, a lender can determine the value of a borrower's assets as collateral—as opposed to their market value—because the lender can discover what prior interests exist in the property. For example, an asset with a market value of $100,000 might provide sufficient collateral for a loan of $30,000 if there are no prior security interests, but not if there is a prior security interest of $90,000.[83]

There are a couple of major concerns with regards to laws governing priority. First, it is not uncommon in developing nations to have multiple schemes governing priority.[84] For example, one system of priority in a developing nation may be based on possession of the collateral and another may not require possession. In the former, the secured party actually holds the collateral.[85] This type of scheme is not uncommon and governs priority in "pawnshops[] . . . and most warehousing systems

79. *Id.* at 9–10.

80. FLEISIG ET AL., *supra* note 20, at 4.

81. *Id.* at 26. The World Bank notes that in Peru, for example, "fish meal can be pledged as collateral because it can meet Peru's legal requirements for specific identification through the identification number stenciled onto each pallet. But fruit concentrate, stored in containers of no standard size and with no identification, cannot meet those requirements and so cannot serve as collateral." *Id.* Similarly, "[i]n Argentina wine in barrels kept in field warehouses—storage units supervised by lenders—can serve as collateral because each barrel can be separately identified. But grain in silos, not so identified, cannot serve as collateral." *Id.*

82. *Id.* at 30.

83. *Id.*

84. *Id.* at 31.

85. *Id.*

operating under unreformed laws."[86] In a nonpossessory system possession is not a trump. Often unreformed laws do not resolve potential conflict. So where a borrower gives a security interest under a possessory system on some collateral and then gives a security interest to a different lender under a nonpossessory situation, there may be serious confusion as to who holds priority interest.[87]

Even where there is only one system, confusion may still be prevalent because different security-interest laws may have different priority structures. For example, if a debtor pledges some piece of property and leases the same property to another party, it may be unclear as to who may prevail between the lessor and the pledgor if two different schemes govern.[88]

Another potential problem relating to priority involves the failure of systems to provide a definitive priority interest on future advances of funds that a creditor may make.[89] "Unreformed systems give a secured creditor priority only for the initial advance."[90] In essence, this drives out revolving-credit facilities and inventory financing.[91] When one thinks of how instrumental revolving credit is at both the individual (e.g., credit cards) and larger-firm levels in developed countries, it is understandable that serious negative ramifications result.

### ii. Perfection and Publication of Notice

Laws governing priority are intricately connected with the systems set up to give notice to potential creditors (among others) of existing encumbrances on a given debtor's collateral.[92] The most egregious problems of publication result from situations where parties must navigate a veritable sea of registries.[93] In such circumstances the basic question of where and how one gives notice of one's transaction may depend upon elements such as the geographic region of the transaction, the type of property serving as collateral, and the type of transaction involved.[94] Having to jump through the various legal hoops adds costs to secured financing due to expenses exacerbated by situations where a multiplicity of registries leads to confusion regarding priority.[95]

Even where there is only one registry system, problems still exist. "Often there is no internal or external computer access to the registry. And those wishing to conduct a search need the permission of a judge or another administrative official to do so."[96] In such instances as these, those requesting information may face delays

86. FLEISIG ET AL., *supra* note 20, at 31.
87. *Id.*
88. *Id.*
89. *Id.* at 32.
90. *Id.*
91. *Id.* at 32–33.
92. *See* FLEISIG ET AL., *supra* note 20, at 37 (connecting the complexity and ambiguity of inconsistent laws regarding priorities to problems in locating and identifying encumbrances).
93. *See id.* at 39–40 ("[M]ultiplicity of registries often can make search practically impossible . . . .").
94. *Id.* at 39.
95. *Id.* at 37.
96. *Id.* at 38.

before they are able to obtain it.[97] This has the effect of delaying or eliminating potential transactions, or at least increasing their costs.

An additional problem plaguing many publication systems in the developing world is the restrictions placed on who may search the registry records.[98] "[T]he registry law might even restrict who may approach the registry authorities for information: sometimes only the owner of the collateral may do so, and sometimes only individuals whom the judge deems to have a 'legitimate interest.'"[99] Limiting access to registries leaves those would-be creditors, buyers, etc., without an ability to offer lower-cost financing or a lower price for sale since these parties must now hedge against the additional risk of transacting with incomplete information.[100]

### c. Enforcement Issues

The import of an effective enforcement procedure in a secured-transactions regime cannot be overstated. Indeed, if the enforcement scheme is significantly flawed, any possible gains made by the secured-transaction system could be significantly eroded.[101] One can see this through a very simple thought experiment: Imagine a world in which you have one lender, Big Bank, and two potential debtors, Allison and Barbara. The two potential debtors are the same in every respect; they come from the same town, are born on the same day, are both married with two children, possess identical property, and share the same creditworthiness. Their only difference is that Barbara is willing to grant a security interest in her car (the same make and model as Allison's) and Allison is unwilling to grant a security interest. As a result, Big Bank would be willing to give Barbara more favorable loan terms than it would to Allison.

But now imagine that Big Bank believes that whether it takes an interest in Barbara's car or not, it would be nearly impossible to extract value from said collateral in the event Barbara defaulted on her loan. Perhaps Big Bank would have no right to take possession of the collateral itself. Big Bank may feel that it would have to pay off the police if it wanted to have the collateral levied upon in a timely manner. Perhaps, the law requires a judicial sale of the good and such sales take two to three years to occur. In any of these scenarios, Big Bank would be likely to give little to no benefit to Barbara for her willingness to grant a security interest in her car. Under such a circumstance, the whole secured-credit system becomes rather impotent in its ability to provide low-cost financing.

This latter scenario is where many developing nations find themselves. The World Bank notes:

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97. *Id.* at 38–39.

98. FLEISIG ET AL., *supra* note 20, at 38.

99. *Id.*

100. *Id.* Other problems contained in many reporting schemes in the developing world include: difficult filing procedures, high cost of registration, and uncompetitive systems for registration. *Id.* at 39–41.

101. *See id.* at 42–43 (examining the problems presented by flawed enforcement procedures).

> Lenders operating in unreformed systems report problems at all stages of the process. They describe court-dominated processes with uncertain outcomes, with judges' interpretations of the law differing substantially. All steps of the process are slow and complex. Courts are typically overloaded with cases, with each judge facing a backlog of hundreds of cases and only a few judicial executors licensed to foreclose on collateral.[102]

The World Bank illustrates this process in Chile and Argentina:

> In Chile, the creditor files a claim with the court, and the court must declare default and order a bailiff to seize assets, before there is a public auction. The debtor may appeal the process at every stage. In Argentina, enforcing collateral in the hypothetical good-case scenario takes 148 days and costs [forty-two] percent of income per capita.[103]

Brazil also provides an example of an inefficient judiciary causing problems for the efficacy of a secured-transactions regime.[104] The Financial Times related the following:

> Brazil's dysfunctional judicial system . . . is increasingly seen as an obstacle to national development. It is a system that allows debtors of all sizes to abscond at will, knowing that none but the most determined of creditors will pursue them through the courts. It forces banks to lend at astronomical rates of interest because they cannot foreclose on debts. More worryingly, it means vital infrastructure projects are stalled because investors cannot be sure the judiciary will uphold their rights.[105]

Many have suggested that these problems are exacerbated by the fact that lenders are often given very few rights to participate in the enforcement phase, be it at the stage of taking possession of debtors' collateral, or in conducting the sale of said collateral.[106]

> Unreformed laws provide for complex, multi-tiered systems for appraisal and auction of collateral that are administered by the court. The procedures are long and slow, and sometimes other laws and regulations impose other impediments, such as forbidding the sale of collateral for less

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102. *Id.* at 43.

103. THE WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION 62 (2004) (citation omitted).

104. Johnathan Wheatly, *Why Brazil's Judicial System is Driving the Country Nuts,* FINANCIAL TIMES (May 24, 2005, 3:00 AM), http://www.ft.com/cms/s/0/2410aa0c-cbf0-11d9-895c-00000e2511c8.html #axzz2grJyIcsf. "One-third of the approximately forty percent per annum interest rate paid at that time by Brazilian commercial borrowers was attributable to the legal uncertainties of collection." Boris Kozolchyk, *Secured Lending and Its Poverty Reduction Effect,* 42 TEX. INT'L L.J. 727, 728 (2007) (citing DEPARTAMENTO DE ESTUDOS E PESQUISAS [DEPARTMENT OF STUDIES AND RESEARCH], BANCO CENTRAL DO BRASIL [CENTRAL BANK OF BRAZIL], JUROS E SPREAD BANCÁRIO NO BRASIL [INTEREST AND BANKING SPREAD IN BRAZIL] (2000)). "These findings were consistent with the studies by another World Bank economist who estimated that the absence of commercial credit amounts to a loss of three to nine percent of a Latin American country's GDP." *Id.* at 729 (citation omitted).

105. Wheatly, *supra* note 104.

106. *See* FLEISIG ET AL., *supra* note 20, at 43 (stating that "[l]enders operating in unreformed systems report problems at all stages of the process").

> than the amount of the loan. Ostensibly designed to protect the debtor, the laws fail in that purpose. Fees of the court, attorneys, and auctioneers typically absorb most of the value of the collateral. The result: the lender does not get fully paid, and nothing is let over for the debtor.[107]

While one may debate the merits of providing extensive powers to creditors in the enforcement stage, one cannot deny the ramifications of a poor enforcement mechanism on a secured-transactions regime.[108] To be sure, the end result of this all-too-typical failing is ill-functioning secured-financing systems in developing countries.

### *B. A Guide For the Perplexed*[109]

> *Let me say that our system of government does not copy the institutions of our neighbours. It is more the case of our being a model to others, than of our imitating anyone else.*
>
> —Pericles[110]

The side-by-side contrast between Article 9 (and other Western secured-financing codes) and the schemes of developing countries seems to present a compelling case for reforming the laws of the latter to more closely reflect the scheme of the former. In fact, there is relatively ubiquitous support for both the reformation of developing-country secured-financing law and the more ambitious goal of harmonization.[111] The House of Delegates of the American Bar Association (ABA), for example, has championed such an undertaking as an aid to developing countries:

> [The ABA] supports the efforts of the United States Department of State and other national and international bodies to promote the development and harmonization of international trade and commerce law and the establishment of predictable systems of secured lending in developing countries through the reform of commercial laws, including secured transactions laws . . . . [The ABA] supports the efforts of international and multinational bodies, development banks, and multilateral and bilateral aid agencies in their efforts to (1) encourage governments in developing countries to pass legislation that facilitates secured lending (that considers

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107. *Id.* at 45.

108. *See, e.g., id.* at 42–43 (listing unnecessary delay, high costs, and uncertainty as negative effects of poor enforcement).

109. When perusing legislative guides and model codes meant for developing-country consumption, one cannot help but recall the medieval Jewish philosopher Maimonides and his work bearing the same name as this heading. *See generally* MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED (M. Friedländer trans., E.P. Dutton & Co. 4th ed. 1904).

110. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 145 (Rex Warner trans., Penguin Classics 2d ed. 1972) (c. 431 B.C.E.).

111. *See, e.g.*, G.A. Res. 59/39, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc. A/59/49 (Vol. I), at 494 (Dec. 2, 2004) (providing an example of U.N. support for reformation).

guides and model laws prepared by them) and (2) provide them technical assistance.[112]

The ABA is so strongly in support of such reform efforts that it has attempted to imbue a sense of duty among its members to help support these types of initiatives: "the [ABA] encourages lawyers to support and participate in efforts to have secured transactions reform adopted in developing countries and to participate in secured transactions reform education and training."[113]

Emboldened by this type of support, a myriad of efforts have been made to reform secured-transactions laws globally: the Model Law on Secured Transactions, completed by the European Bank for Reconstruction and Development (EBRD) in 1994;[114] the EBRD Core Principles for a Secured Transactions Law, completed by the EBRD in 1997;[115] the Organization for the Harmonization of Business Law in Africa's Uniform Act Organizing Securities, prepared in 1997[116] and revised in 2010;[117] the studies on insolvency and secured-transactions law reform in Asia[118] and the Guide to Movables Registries, prepared by the Asian Development Bank (ADB);[119] the United Nations Convention on the Assignment of Receivables in International Trade, adopted in 2001;[120] and the Model Inter-American Law on Secured Transactions, prepared by the Organization of American States (OAS) in 2002.[121] But perhaps the most ambitious effort is that offered in the *Guide*.

The scope of the *Guide* is quite broad, focusing not on international-secured transactions (i.e., secured transactions conducted by parties from differing nations) as one might expect of an international body, but rather on the problems confronting domestic regimes.[122] More specifically, "[t]he *Guide* is addressed to national legislators considering reform of their domestic secured transactions laws."[123] The aim of the *Guide* is equally broad, and certainly laudable: "The purpose of the *Guide* is to assist States in developing modern secured transactions laws (that is, laws

112. Am. Bar Ass'n House of Delegates Res. 301, at 1 (Aug. 8–9, 2011).

113. *Id.*

114. MODEL LAW ON SECURED TRANSACTIONS (European Bank for Reconstruction and Dev. 2004).

115. *Core Principles for a Secured Transactions Law*, EUROPEAN BANK FOR RECONSTR. & DEV., (July 2, 2010), http://www.ebrd.com/pages/sector/legal/secured/core/coreprinciples.shtml.

116. Org. for the Harmonization of Business Law in Africa [OHADA], *Acte Uniforme portant Organisation des Sûretés (Uniform Act Organizing Securities)*, Apr. 17, 1997, 3 Journal Officiel (JO) de l'OHADA [Official Gazette of, OHADA] 1, *available at* http://www.ohada.com/actes-uniformes/458/acte-uniforme-portant-organisation-des-suretes.html.

117. OHADA, *Acte Uniforme Révisé portant Organisation des Sûretés (Revised Uniform Act Organizing Securities)*, Dec. 15, 2010, 22 Journal Officiel (JO) de l'OHADA [Offical Gazette of, OHADA] 1, *available at* http://www.ohada.com/actes-uniformes-revises/938/acte-uniforme-revise-portant-organisation-des-suretes.html

118. RONALD WINSTON HARMER, ASIAN DEV. BANK OFFICE OF THE GEN. COUNSEL, 1 LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK (2000).

119. ASIAN DEV. BANK OFFICE OF THE GEN. COUNSEL, GUIDE TO THE MOVABLES REGISTRIES (2002).

120. United Nations Convention on the Assignment of Receivables in International Trade, G.A. Res, 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (Dec. 12, 2001).

121. MODEL INTER-AMERICAN LAW ON SECURED TRANSACTIONS, CIDIP-VI/RES. 5/02 (Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) 2002).

122. UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 9.

123. *Id.* (italics omitted).

related to transactions creating a security right in a movable asset) with a view to promoting the availability of secured credit."[124]

Ultimately, the *Guide* provides detailed suggestions (over 500 pages worth, in fact) as to how countries should reform their secured-transactions laws. The presentation of the various recommendations harkens one to the works of Thomas Aquinas—at the introduction of both large and small topics the reader is provided with goals toward which efforts and actions should be aimed.[125] The reader is then typically presented with a number of possible options in achieving the aim. Finally, the *Guide* provides a suggested course of action for countries.

Who are the intended recipients of the *Guide* and what characteristics do the suggestions contain? The *Guide* informs its readers that it is intended, not just for developing countries, but also for any "States that do not have an efficient and effective secured transactions" system.[126] The *Guide* further asserts:

> The terms used are not drawn from any particular legal system. Even when a term appears to be the same as that found in a particular national law (whether secured transactions or any other law), the *Guide* does not intend to adopt the meaning of the term in that national law.[127]

Despite these statements to the contrary, it would certainly seem that the intended recipients are, in large part, developing countries and the sources of the suggested legislative reformation are Western secured-transactions regimes like Article 9. In fact, whether one focuses on large-scale general topics such as priority or enforcement, or on definitional issues,[128] one cannot escape the Western influence on the *Guide*.

This is not to say that the *Guide* is without flexibility. The *Guide*'s drafters do not simply provide a model code to be adopted in whole by developing countries, but rather, to their credit, acknowledge the difficulties that may accompany a given developing country's attempts to incorporate the many elements of the *Guide*.[129]

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124. *Id.* Introduction para. 1 (footnote omitted).

125. *See* THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Christian Classics 1981) (1495) (providing general questions, with separate, smaller questions aimed at illuminating the answer to the larger one).

126. UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 7.

127. *Id.* Introduction para. 15 (italics omitted).

128. Though the *Guide* implies only incidental overlap between the definitions employed in any given national scheme (e.g., Article 9) and those contained in the *Guide* itself, such a claim does not survive close scrutiny. Indeed, there are a number of instances in which the *Guide*'s defined terms are the same in name, content, or both as those contained in Article 9. For example, one sees marked similarities between the principle parties in Article 9 (e.g., Debtor, Obligor, and Secured Party) and the *Guide* (e.g., Grantor, Debtor, and Secured Creditor). Likewise, the types of collateral that may be used in a secured financing are also quite similar—the definitions of Bank Account, Equipment, Financial Contract, Inventory, Mass or Product, Negotiable Instrument, and Receivable under the *Guide* are in concert with, though not identical to, the definitions of Deposit Account, Equipment, Investment Property, Inventory, Commingled Goods, Instrument, and Account under Article 9. *Compare Id.* Introduction para. 20, *with* U.C.C. § 9-102 (2010).

129. *See* UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 16 (explaining alternative methods for adapting the *Guide*'s terminology in different states). One wonders, however, whether the impression of flexibility is eroded by the *Guide*'s preference for adopting states to enact a "single comprehensive

Nevertheless, to deny the heavy influence of Western secured-credit law would be disingenuous.

Looking at the substance and aim of the *Guide*, one is compelled to ask the following question: If adopted, in whole or in part, will the *Guide* lead a developing country to anywhere of value?

### C. *Additional Viewings: Finance, Law, and Economic Growth*

Recall our museum patron who, in looking at impressionist paintings, decided to retreat to the rear of the gallery to more quickly ascertain and enjoy the artist's subject. One may note the immediate gratification accruing to our patron. But might one also contend that little was lost by our patron's parsimonious treatment of the painting? She was, after all, able to discern much about the painting and the techniques used to produce the final image, including the major colors employed and aspects of the brush strokes. Perhaps one may go even further and argue that the patron's vantage was sufficient to tell her all that was truly relevant about the painting and possibly even provided her enough information to reproduce it (or something like it) herself. If nothing else, her approach was an economical one, insofar as she had additional time to take in other works of art.

But assume for a moment that our patron decides to look at the painting from additional angles—up close, off to the side, and so on. With each of these positions, a new perspective is gained and a new truth revealed. Previously unseen aspects, such as the texture of the applied paint and the full palette of colors employed, come into view. In short, a more complete—and certainly more complex—sense of the instrumentation and techniques used to create the end product is gained. In the end, it may be that the extra viewings do no more than confirm the initial suspicions that were gained from the back of the room. However, it could just as likely be that the perception of the painting and the nature of its creation changes dramatically.

In our case, we have examined the notion that secured credit law is broken in developing countries and working well in developed countries. The natural conclusion is to surmise that the schemes of the latter should be incorporated into those of the former. It's now time for a closer look.

From the vantage of this Author, justification of the creation and dissemination of a legislative guide for secured transactions (and ultimately harmonization of secured-transactions law), particularly one purported to actively aid economic development in poorer countries, first requires evidence (or at least a plausible assertion) of a positive causal relationship between robust financial institutions and economic growth. If this link is established, a second connection must be established; that legal regimes are of import in the functioning of said financial institutions. To the degree that this second connection is found, a discussion of the characteristics of the connection, with particular emphasis on the causal relationship between law and financial institutions is necessary. If commercial law-reform efforts act exogenously on large societal institutions, and do so with predictably positive results, then our inquiry is concluded—these types of law reform efforts should abound. However, if law is an endogenous variable in the overall societal calculus (as seems more likely),

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statute (a method more likely to produce coherence and avoid errors of omission or misunderstanding)." *Id.* Introduction para. 18.

simultaneously affecting and influenced by larger societal institutions, then we have a couple of additional examinations to conduct. First, we must look at the factors that would tend to mitigate the effectiveness (in the sense of creating positive outcomes) of commercial-law reform efforts in developing countries generally. Then we must ask if there is anything unique in the nature of secured-financing law specifically that would tend to stultify reform efforts in developing countries.

Through this analysis one should be able to infer whether a mere change in the substantive law will bring about the desired effect in financial institutions, and thus the overall economy. Similarly, through this discussion, one should be able to reach an informed conclusion as to whether such changes in the law will create positive results relative to other plausible alternatives, such as (i) doing nothing or (ii) attempting to bolster financial or legal apparatuses through some other method.

### 1. Financial-Sector Development, Access to Credit, and Economic Growth

Most take it for granted that financial-sector development is either a prerequisite for, or a major contributor to, economic growth.[130] And while economists of any era would likely accede to a connection between the financial sector and economic growth, the direction of the causal relationship has been much debated.[131] Going back as far as the late nineteenth and early twentieth centuries, one finds an ardent debate of the supposition that a strong financial sector plays an important role in fomenting economic growth and stability.[132] Joseph Schumpeter, for example, asserted that an efficient banking sector serves to identify and fund "entrepreneurs with the best chances of successfully implementing innovative products and production processes."[133] These entrepreneurs, in turn, act as catalysts for overall economic growth.[134]

Other economists have come to the opposite conclusion. In the 1950's, Robinson posited that growth is followed by financial development rather than financial development being a catalyst for growth.[135] Similarly, Patrick asserted that development of financial sectors follows growth in a phenomenon labeled "demand-

130. *See, e.g.*, Hshin-Yu Liang & Alan Reichert, *The Relationship Between Economic Growth and Banking Sector Development*, 1 BANKS & BANK SYS., no.2, 2006, at 19, 20–21 (explaining that the majority of more recent studies show causation running from financial-sector development (FSD) to economic growth).

131. *See id.* at 19–21 (highlighting different theories regarding the causal relationship between FSD and economic growth).

132. *See* Ross Levine, *Financial Development and Economic Growth: Views and Agenda*, 35 J. ECON. LITERATURE 688, 688 (1997) (outlining different economists' views "regarding the importance of the financial system for economic growth").

133. *Id.*

134. *See* JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE 107 (Redvers Opie trans., 3d ed. 1961) (regarding credit as "the method by which development is carried out" through the entrepreneur).

135. Joan Robinson, *The Generalisation of the General Theory*, *in* THE RATE OF INTEREST AND OTHER ESSAYS 69, 86–87 (1953).

following," at least with respect to countries in the beginning stages of economic development.[136]

While debate still continues, there seems to be the beginning of coalescence around the notion that a healthy, stable, financial sector is a facilitator of growth. There is evidence of a link between a robust financial sector and both foreign direct investment (FDI) and overall economic growth.[137] According to McKinnon, for example, decreasing the fetters on actors in financial markets creates an atmosphere conducive to financial intermediation by savers and investors.[138] This, in turn, allows efficient flow of resources among people and institutions over time, which encourages savings and reduces constraint on capital accumulation and improves allocative efficiency of investment by transferring capital from less productive to more productive sectors.[139]

Some studies show that "an exogenous component of financial market development, obtained by using legal origin as an instrument, predicts economic growth."[140] In particular, financial development can accelerate economic growth in a few principal ways, says López-de-Silanes:

> First, by raising opportunities, financial development can enhance savings. Second, [financial sectors] can channel these savings into real investment and thereby foster capital accumulation. Third, to the extent that the financiers exercise control over the investment decisions of the entrepreneurs, financial development improves the efficiency of resource allocation, as capital flows toward the more productive uses. All three channels can in principle have important effects on development.[141]

Additionally, Rajan and Zingales provide evidence supporting the positive influence of financial development on economic growth by means of reducing the cost of external financing to firms.[142] They find that financial development is especially important for the process of creating new firms in an economy.[143]

Rather than looking only at the broad evidence related to the entire financial sector's impact on growth, it is important for the purposes of this Article to explore the more specific question of whether access to credit positively impacts economic growth. Beck and Levine have provided evidence that gives credence to the

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136. Hugh T. Patrick, *Financial Development and Economic Growth in Underdeveloped Countries*, 14 ECON. DEV. & CULTURAL CHANGE 174, 174–75 (1966). It should be noted that Patrick believed that, as a country grew economically, the direction of causality may actually reverse, leading to a "supply-leading" relationship where the benefits of a robust financial sector bring greater returns to economic growth. *Id.* at 175–76.

137. *See, e.g.*, Asli Demirgüç-Kunt & Vojislav Maksimovic, *Law, Finance, and Firm Growth*, 53 J. FIN. 2107, 2107 (1998) (investigating "how differences in legal and financial systems affect firms' use of external financing to fund growth").

138. RONALD I. MCKINNON, MONEY AND CAPITAL IN ECONOMIC DEVELOPMENT 14–17 (1973).

139. *Id.*

140. FLORENCIO LÓPEZ-DE-SILANES, UNITED NATIONS CONF. ON TRADE & DEV., THE POLITICS OF LEGAL REFORM 3 (2002).

141. *Id.*

142. Raghuram G. Rajan & Luigi Zingales, *Financial Dependence and Growth*, 88 AM. ECON. REV. 559, 584 (1998).

143. *Id.*

speculation that access to credit is an important factor for growth.[144] The authors identify a few indicators of financial sector development that are best at explaining differences in economic growth between countries over long periods.[145] One of the significant factors according to the authors is bank credit to the private sector.[146]

Other studies have plumbed the connection between bank credit and growth more deeply. Gavin and Haussmann have found that high ratios of bank credit to gross domestic product (GDP) in Latin America are associated with smaller detrimental effects of volatility on long-run growth.[147] Additionally, a study by Aghion et al. has confirmed this relationship for a cross-section of OECD and non-OECD countries.[148]

These results are important for substantiating secured-transactions reform efforts, especially when coupled with evidence showing the extent to which access to credit is positively affected by the ability of creditors to take a security interest in the collateral of their debtors.[149] "In countries where security interests are perfected and there is a predictable priority system for creditors in cases of loan default, credit to the private sector as a percentage of GDP averages [sixty percent] compared with only [thirty percent] to [thirty-two percent] on average for countries without these creditor protections."[150] Furthermore, borrowers in industrial countries who use collateral get "nine times the level of credit" compared to borrowers without collateral.[151] These same borrowers "also benefit from longer repayment periods ([eleven] times longer) and significantly lower interest rates ([fifty percent] lower)."[152]

Ultimately, while the argument for a causal connection between financial sector development and economic growth may not be air tight, there certainly seems to be enough evidence to suggest that we may move to the next step in our inquiry: whether legal institutions serve as the creative force behind the development of sound financial sectors.

144. *See* Thorsten Beck & Ross Levine, *Stock Markets, Banks, and Growth: Panel Evidence*, 28 J. BANKING & FIN. 423, 434 (2004) ("[T]he development of stock markets and of banks have both a statistically and economically large positive impact on economic growth.").

145. *Id.* at 427–28.

146. *Id.* at 428. The authors also include stock market activity (proxied by the turnover rate or the ratio of traded value to GDP) as having an important effect on growth outlooks. *Id.*

147. INTER-AM. DEV. BANK, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA, 1996 REPORT: SPECIAL SECTION, MAKING SOCIAL SERVICES WORK 6 (1995).

148. Phillippe Aghion et al., *Volatility and Growth: Credit Constraints and Productivity-Enhancing Investment* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 11349, 2005).

149. *See* FLEISIG ET AL., UNLOCKING DEAD CAPITAL, *supra* note 67, at 3 (describing characteristics of successful secured credit systems, which include no limits on collateral).

150. De la Campa, *supra* note 52, at 6.

151. *Id.*

152. *Id.*

### 2. Legal Reform and Financial Sector Development

#### a. Establishing a Link Between Law and the Financial Sector

As was mentioned at the outset, there is near-universal acceptance that a well-functioning legal apparatus is a variable—and perhaps a significant one at that—in the economic development calculus. The rule-of-law efforts, which have been in vogue over the last couple of decades, evidence the unanimity of this sentiment.[153] This is not to say that there is an absence of more detailed theoretical grounding for the importance of law to economic development. Quite to the contrary, there are two (at a minimum) very influential theoretical arguments about law's relationship to economic development; one that is more macro in its focus,[154] and another that speaks more directly to the specific benefits offered by secured-transactions law reform (or something like it) for development.[155]

The views of Douglas North and the other individuals comprising the so-called New Institutional Economics (NIE) constitute the present orthodoxy with respect to economic development.[156] NIE, as set forth by North, views institutions as fundamental to the creation of economic growth.[157] Institutions, which North refers to as the "rules of the game,"[158] are integral to a state's functioning.[159] For North, these rules, be they formal or informal, are comprised of the procedures and moral, ethical, and psychological norms, which constrain an individual's behavior.[160] Institutional frameworks can be seen as a mélange of constitutional rules, operating

153. Without hesitation—and seemingly without artifice—economists, jurists, and international governmental and aid organizations insist that it is imperative to create and reinforce conditions in which the rule of law will flourish if one wishes to enjoy fruits of prosperity. While it is not within the scope of this Article to provide a deconstruction of this phrase, it is important to note that a starting place—and sometimes the complete rationale—for real-world, sophisticated, legal-reform efforts begin with this somewhat self-evident assertion. The mere fact that one is able to garner near universal support for the notion that rule of law is important to economic development evidences the relative dilution of the phrase. Indeed, the phrase has become something like the term "postmodern": hopelessly elusive to all but the individual who uttered it (and sometimes not to him or her as well). An influential economist Dani Rodrik candidly questioned on his weblog, "Am I the only economist guilty of using the term ['rule of law'] abundantly without having a good fix on what it really means?" Dani Rodrik, *What Does the "Rule of Law" Mean?*, DANI RODRIK'S WEBLOG (Nov. 13, 2007, 2:57PM), http://rodrik.typepad.com/dani_rodriks_weblog/2007/11/what-does-the-r.html. Similarly, Rachel Kleinfeld aptly referred to the use of the phrase thusly: "Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another." Rachel Kleinfeld, *Competing Definitions of the Rule of Law, in Promoting* THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 32 (Thomas Caruthers ed., 2006).

154. Douglass C. North, *The New Institutional Economics and Third World Development, in* THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 17, 19 (John Harriss et al. eds., 1995) [hereinafter North, *New Institutional Economics*].

155. John Harriss, Janet Hunter & Colin M. Lewis, *Introduction: Development and Significance of NIE, in* THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT, *supra* note 154, at 1, 7.

156. *See id.* at 1–4 (arguing that NIE is "important as a major development within the dominant paradigm of modern economics").

157. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (James Alt & Douglass North eds., 1990).

158. *Id.*

159. *See id.* at 4–6 (discussing institutions as providing structure and rules for "human interaction").

160. *Id.*

rules, and normative behavioral codes, which are generated by humans (though they need not be intentionally created).[161] That is, NIE theorists view the state and the institutions that comprise it as endogenous to the development process, and perceive the design and functioning of institutions as critical determinants of countries' development prospects.[162]

Given that the primary role played by institutions is one of providing certainty and guidance in human interactions,[163] it is not surprising that substantive law is seen to be a critical part of any institution.[164] The certainty of this connection has given rise to the notion that legal rules purporting to govern certain human interactions stand as building blocks to economic growth.[165] These rules include: well-defined private-property rights (such rights providing for the alienability of the underlying property); a formal system of contract law allowing for a free exchange of goods and services; a corporate-law regime that facilitates the capital-investment function; a bankruptcy regime that induces the exit of inefficient firms and rapid redeployment of their assets to higher valued uses; and a nonpunitive, nondistortionary tax regime.[166]

To the extent that legal rules act as an influential force for the development and flourishing of societal institutions, reform efforts directed at legal regimes (as opposed to expending scarce resources in other reform endeavors), would seem a worthwhile endeavor. Then again, given the great height of this discourse, one may intuit the rationale underpinning law reform efforts aimed at the more arterial areas of the body law (e.g., basic contract and property law), but may not perceive a compelling basis for sustained efforts to repair legal capillaries like secured transactions.

Enter Hernando de Soto. While the works of North and other NIE scholars give credence to the notion that legal reform efforts will tend to yield economic dividends, it is the works of Hernando de Soto (and others) that provide the theoretical foundation for reform efforts like those proposed in the *Guide*.[167] In his

161. *Id.* at 4.

162. North, *New Institutional Economics*, *supra* note 154, at 24–26.

163. NORTH, *supra* note 157, at 3–4.

164. North, *New Institutional Economics*, *supra* note 154, at 23.

165. *See id.* at 22 (linking institutional creation of "rules" to "productivity" in modern economies).

166. *See, e.g.*, MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 196 (2000) ("[A market] may also reach its full potential only if all participants have secure and precisely delineated rights to private property."); Joseph E. Stiglitz, Senior Vice President & Chief Economist, The World Bank, Keynote Address at the World Bank Annual Bank Conference on Development Economics: Whither Reform? Ten Years of Transition (Apr. 28–30, 1999) (transcript available at http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814010799/stiglitz.pdf) (arguing that corporate governance, the institution of bankruptcy, and a tax regime are necessary for economic growth); *see also* Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 1 (1998) ("A modernizing nation's economic prosperity requires at least a modest legal infrastructure centered on the protection of property and contract rights."); NORTH, *supra* note 157, at 118 (discussing how institutions, which includes contract law, secure property rights, and capital markets, "provide the basic structure by which human beings . . . have created order" and "are the key to understanding . . . economic growth").

167. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 226–27 (2000)

opus, *The Mystery of Capital*, de Soto argues that capital is the engine of a market economy, with property rights acting as the mechanism by which the power of said capital may be effectively and efficiently deployed.[168] De Soto refers to the formal property system as "capital's hydroelectric plant. This is the place where capital is born."[169]

This begs the question: What is capital? At its essence de Soto is referring to the ability of simple property to serve multiple purposes.[170] Take, for example, a family home. While the apparent purpose of this house is to provide shelter to its owner, de Soto highlights the ability of the house to serve as a collateral in a loan or as a source of income if the owner wishes to rent that property.[171] De Soto states:

> One of the most important things a formal property system does is transform assets from a less accessible condition to a more accessible condition, so that they can do additional work . . . . By uncoupling the economic features of an asset from their rigid, physical state, a representation makes the asset "fungible"—able to be fashioned to suit practically any transaction.[172]

The ability of basic property to be brought to its fullest expression as capital requires the assistance of the legal sphere for de Soto.[173] When comparing Western and developing nations, de Soto asserts that much of the differences in affluence can be attributed to the ability of a country's legal regime to allow property to multitask.[174] Indeed, it is often a result of confusing, inadequate, or contradictory property-rights schemes, regimes that may (or may not) provide clarity on ownership but which fail to provide avenues by which to take full advantage of the full bundle of rights, that leave individuals in low-income nations with little prospect for improving their position, according to de Soto.[175] In sum, societies may have substantial masses of capital, yet they represent dead resources in that they are constituted by assets, interests, or claims that cannot be used or mobilized as capital.[176]

Implicitly, de Soto views a complex property system as a prerequisite for sustained growth. Thus, for de Soto, a reform effort aimed only at the establishment of basic property rights would be akin to attempting to construct a living organism by

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> ([I]nstead of being a cause that promises opportunity for all, capitalism appears increasingly as a leitmotif of a self-serving guild of businessmen . . . . I hope this book has conveyed my belief that this state of affairs is relatively easy to correct—provided that governments are willing to accept the following . . . .).

168. *Id.* at 50–51.

169. *Id.* at 47.

170. *Id.* at 49–50.

171. *Id.* at 50.

172. *Id.* at 56.

173. *See* DE SOTO, *supra* note 167, at 46 ("It is formal property that provides the process, the forms, and the rules that fix assets in a condition that allows us to realize them as active capital.").

174. *Id.* at 56–57.

175. *See id.* at 58 (explaining that Western property rights schemes that incorporate standard descriptions of assets reduce "the transaction costs of mobilizing and using assets" and that "their Third World counterparts remain trapped" in a rigid system).

176. *Id.* at 39–40, 47–48.

stacking carbon atoms—they are necessary but not sufficient conditions to life.[177] So too is it with property law's effect on development in de Soto's view. While a lack of recognized property rights will guarantee moribund capital, other aspects of the law are needed in order help breathe life into otherwise dead property. This supposition leaves would-be reformers with a slew of legal subjects on which to ply their trade, one of which is secured credit.

Before continuing, it should be noted that the arguments for law's connection with financial-sector development (and ultimately growth) do not rest solely on theory. There is empirical support as well, particularly pertaining to the presence of strong secured-transactions law. For example, the World Bank Group suggests that small and medium-sized businesses residing in countries possessing relatively robust secured-transactions laws have "greater access to credit, better ratings of financial system stability, lower rates of non-performing loans, and a lower cost of credit."[178] Similarly, La Porta et al. conducted a study on the legal systems of forty-nine different countries and found positive and significant connections between the protection and predictability afforded by a country's legal system and the scale and scope of financial systems that developed in each national environment.[179] Likewise, Levine has found that countries that "give a high priority to secured creditors receiving the full present value of their claims have better functioning financial intermediaries" and higher rates of economic growth.[180]

### b. Plumbing the Connection: Correlation or Causality?

While the discussion immediately above seems to confirm the suspicion that legislative reform of secured-transactions law will have a positive effect on a developing country's economic growth prospects, we have only established a strong theoretical correlation between substantive law and the health of the financial sector. Just as important for our purposes is a show of causality. That is, can we expect law reform efforts to improve the financial sector? Moreover, to the degree that such causality is shown, is a transplantation of law likely to achieve the desired outcomes?

To aid in answering this question, we return to the tenets of NIE. Speaking to the import of property and contract rights, North states:

> Broadly speaking, political rules in place lead to economic rules, though the causality runs both ways. That is, property rights and hence individual contracts are specified and enforced by political decision-making, but the structure of economic interests will also influence the political structure. In equilibrium, a given structure of property rights (and their enforcement)

177. *See id.* at 47–48 ("The poor have accumulated trillions of dollars of real estate during the past forty years. What the poor lack is easy access to the property mechanisms that could legally fix the economic potential of their assets so that they could be used . . . in the expanded market.").

178. De la Campa, *supra* note 52, at 6.

179. Raphael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1132 (1997).

180. Ross Levine, *Law, Finance, and Economic Growth*, 8 J. FIN. INTERMEDIATION 8, 32–33 (1997).

> will be consistent with a particular set of political rules (and their enforcement). Changes in one will induce changes in the other.[181]

As we have already noted, this view seems to provide a level of legitimacy to legal-reform efforts. More specifically, North implies the presence of a causal relationship running from aspects of an institution (e.g., property rights or other substantive legal rules) to the larger institution (e.g., the financial sector).[182] However, while providing a nod to the role played by substantive law, there seems an implicit warning that one must not overstate the written law's impact on the determination of an effective institution.[183] Indeed, with a conception of dynamic institutions seemingly derived from process philosophy,[184] NIE scholars would expect not only that the substantive law might shape the larger institution, but that the laws (i.e., the substantive law) themselves would be similarly molded—perhaps, significantly so—by the social mores, informal arrangements, and legal enforcement mechanisms extent in that locality, region, or country.[185] In short, causality between law and the greater institution would run in both directions, leaving the very real possibility that the content of the law would be largely provided not by the drafters of the rules, but by the institution over which the law was intended to govern.[186] Therefore, the impact of a mere alteration in the codified law might be substantially diluted or undone by other forces within the given institution to which that substantive law belongs (not to mention the effects of other extraneous societal institutions). Similarly, it is possible that the introduction of new law—which would simultaneously influence and be influenced by the greater institution of which it was a part—might bring about unintended changes never contemplated by reformers.[187]

De Soto's views seem to similarly reflect the dynamic structure envisaged by North. Take, for example, de Soto's claims about the extralegal aspects of property regimes:

> Extralegal social contracts on property underpin nearly all property systems and are part of the reality of every country, even in today's United States. As Richard Posner has reminded us, property is socially constructed. This means that property arrangements work best when people have formed a consensus about the ownership of assets and the rules that govern their use and exchange .... Efforts to reform property rights fail because officials in charge of drafting new legal rules do not realize that most of their citizens have firmly established their own rules by social contract ....
>
> That is why property law and titles imposed without reference to existing social contracts continually fail: They lack legitimacy. To obtain legitimacy, they have to connect with the extralegal social contracts that

181. NORTH, *supra* note 157, at 48.

182. *Id.*

183. *Id.* at 49.

184. *See, e.g.*, ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 317 (1929) (noting that process philosophy is focused on the dynamic nature of being).

185. *See* NORTH, *supra* note 157, at 43–44, 46–47 (discussing the interplay of informal and formal rules).

186. *Id.* at 48.

187. *Id.* at 53.

> determine existing property rights .... The only systematic way to integrate these social contracts into a formal property system is by building a legal and political structure, a bridge, if you will, so well anchored in people's own extralegal arrangements that they will gladly walk across it to enter this new, all-encompassing formal social contract.[188]

Building the bridge spoken of by de Soto certainly does not preclude the creation or consideration of a legislative guide, but it does suggest that an inflexible code thrust at its intended targets would be a relatively fruitless enterprise.

There is empirical evidence to support a more complex notion of causality with respect to law's influence on institutions and vice versa.[189] For example, Pistor, Raiser, and Gelfer, in their study of the improvement of corporate and bankruptcy law in the former Soviet Union and Eastern Europe, noted that the positive changes in financial markets occurred to the extent that legal institutions (as a whole) became more effective.[190] The study's "regression analysis shows that legal effectiveness has overall much higher explanatory power for the level of equity and credit market development than the quality of law on the books .... [G]ood laws cannot substitute for weak institutions."[191]

Another study of import entitled "Governance Matters" was conducted by Kaufmann, Kraay, and Zoido-Lobatón of the World Bank.[192] In this study, the authors compiled data relating to a large number of subjective measures of institutional efficacy and quality.[193] They grouped the data into six subset categories: voice and accountability, political stability, government effectiveness, regulatory burden, rule of law, and graft (control of corruption).[194] The rule-of-law category was further explicated as including several indicators that "measure the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of both violent and non-violent crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts."[195]

The authors of "Governance Matters" created indices that measure institutional quality along each of the six dimensions as well as a composite governance index designed to measure the overall quality of governance in society.[196] They then regressed three measures of development: per capita income, infant mortality, and adult literacy.[197] They found strong correlations and indeed causation between each

188. DE SOTO, *supra* note 167, at 172–73 (citations omitted).

189. *See, e.g.*, Kevin Davis & Michael J Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. no.1, 2001, at 33 (providing that in areas of human rights, real property, and even contracts, it is not clear from studies if law is an agent or a recipient of change).

190. Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325, 356 (2000).

191. *Id.*

192. Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobatón, *Governance Matters* (The World Bank, Policy Research Working Paper No. 2196, Oct. 1999).

193. *Id.* at 1–2.

194. *Id.* at 2.

195. *Id.* at 8.

196. *Id.* at 7–8.

197. *Id.* at 12–13.

of their sub-indices of institutional quality, including the rule-of-law index.[198] This is significant, as other empirical results merely seem to suggest a correlation between substantive law and either financial institutions or growth. It is only when law is defined more broadly, and with connection to what North would likely view as the larger institution, that a causal effect on growth appears. This would seem to add credence to the notion that law-reform efforts, to the degree they are to be advanced at all, are likely best accomplished in conjunction with efforts aimed at bolstering larger institutions.

### 3. General Impediments to Successful Law-Reform Efforts in Developing Economies

Given the complexity of the causal connection between substantive law and larger institutions (and ultimately, economic growth) implied by NIE theorists, would we prescribe a reformation of law like that contained in the *Guide* as a means of promoting growth? Perhaps. On one hand, one would be foolish to assert that no change would result from law reform. It does appear, after all, that substantive law acts as a mover of overall institutions.[199] On the other hand, it would similarly be a mistake to suggest that the new law, once adopted, would either (i) make a dramatic change (either positive or negative) or (ii) function in the same manner as it had in the country of its origin.[200] Indeed, one cannot be certain of the trajectory the alterations may ultimately take when confronted with the idiosyncrasies of the recipient country.[201] A myriad of other variables, including the culture of the people adopting the law, the history of those people with respect to similar reform efforts, the extent to which existent domestic legal rules and social norms conform with (or, at the very least, are not antithetical to) the revised law,[202] and the extent to which domestic political institutions are willing and able to support the proposed reform will all have an impact on the success or failure of a given law-reform project.

The culture and history of a given people can certainly impact the success of law-reform efforts. Dam notes that "law and legal institutions introduced, in the name of good governance, into developing countries that are at odds with local culture are unlikely to succeed."[203]

198. Kaufman, et al., *supra* note 192, at 15–18.

199. NORTH, *supra* note 157, at 4–6.

200. *See id.* at 6 (explaining that "institutions typically change incrementally" and that there is a gap between undeveloped and developed countries).

201. *Id.* at 6–7.

202. It is important to note that the drafters of the *Guide* explicitly reject the notion that a developing country should simply transplant the terms and substance of the *Guide*. UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 76. Rather, the *Guide* advises adopting countries to build upon the existing legal architecture of that country as well as other institutions within the country. *Id.* Introduction paras. 77–79. Quite confusingly, the *Guide* refers to this process as "harmonization." *Id.* Introduction para. 76. With that said, it is difficult to reconcile this paean to flexibility with both the specificity of recommendations provided in the *Guide* and the call for harmonization of individual country law with the laws prevailing globally. *Id.* Introduction para. 59.

203. DAM, *supra* note 10, at 63.

This notion complements the research by Pistor and her colleagues, who found that in the six countries studied, it was "decades, if not longer, before transplanted laws [were] accepted."[204] In discussing Pistor's work, Dam notes:

> In other countries, they found, the institutional base for adapting the law to changing realities was not present. And in some countries transplanted laws were changed erratically, sometimes in a retrogressive fashion, because the legal profession and lawmakers had so little knowledge of or experience with the legal field involved. In short, transplanted laws often do not operate in the host country the way they do in the home country.[205]

These problems would almost certainly be exacerbated by situations where the legal concepts to be introduced are either foreign or anathema to the recipient culture. In such cases, the chances of the new law taking root at all—let alone in the manner in which it was intended—are remote. Furthermore, it is not inconceivable that introduction of reformed laws could serve to corrode the rule of law in the adopting country. This might arise where the newly enacted laws actively compete with the former substantive law, extra-legal arrangements, or both. In such instances, a muddled set of incentives and actions might result. This would erode the sense that the substantive law was truly governing.

Though perhaps miscast as a purely cultural or historical element, this Author would also submit that a certain antipathy for reform efforts stands as an impediment for would-be reformers. For decades, developing countries have been made to feel that they must respond to each and every policy whim in vogue with the West at that particular time.[206] Threats made both by international aid organizations and Western nations to withhold aid in the event that certain policy prescriptions were not followed[207] have bred suspicion or resentment over the implicit (and sometimes explicit) claim that said developing nation's ideas and institutions are of lesser value. When this sense of degradation permeates a people, even good, rationale, well-intentioned ideas are met with skepticism or outright disdain. Professors Boris Kozolchyk and Dale Beck Furnish, in their defense of commercial-law reform in the Americas, illustrate this point anecdotally:

> One of the authors suggested to a Mexican negotiator that commercial credit at reasonable rates of interest could become available to Mexican merchants if Mexico enacted a secured transactions law compatible with the laws of its northern neighbors. The Mexican negotiator replied in exasperation: "Why is it that Mexico is always expected to harmonize its commercial laws with the laws of Canada and the United States, and not the other way around?" The author's reply was that, rhetoric aside, the

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204. Katharina Pistor et al., *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 WORLD BANK RES. OBSERVER 89, 109 (2003).

205. DAM, *supra* note 10, at 63.

206. *See, e.g.*, Charles Gore, *The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries*, 28 WORLD DEV. 789, 791–93 (2000) (discussing ideas propagated by international development agencies throughout the last five decades).

207. *Cf.* IFC, *supra* note 65, at 25–26 tbl.4 (stating that the threat of loss of financial support is a mitigating factor to the problem of rejection of key best-practice concepts).

> relevant question was whether Mexico wished to make commercial credit available to its small and medium-sized businesses. If it did, then it could not ignore the legal principles upon which such credit depended.[208]

Whether the antipathy expressed by a developing country's representative or its people is rational or whether development efforts in this area are offered out of a sense of beneficence rather than from neo-colonial impulses is immaterial. Perception is reality in this instance. If leaders in developing countries either suspect nefarious motivations underlay policy suggestions or suffer from a certain amount of development fatigue,[209] then the chances of seeing proper implementation are hurt when said structures are thrust upon them.

In addition to focusing on cultural and psychological mores that may impact the implementation of desired legal change, reformers must also be concerned with political and legal aspects that will either allow the reform to flourish or render it impotent.[210] With respect to the latter, reformers have to be concerned with the legal rules at every conceivable tier.[211] For example, it is difficult to begin secured-transactions law reform in a country where basic property and contract rights are in question.[212] Similarly, political and administrative factors may have an extremely important effect on the efficacy of reform in a given area of the law. For example, where there is a lack of political will to enforce the revised law, the impact of the revision will obviously be diluted. Even where the will is there, if there is insufficient resource allocation brought to bear on the intended area of reform, the efficacy of the change will be muted.[213]

### 4. Expected Efficacy of the *Guide* on Secured Transactions

Does hope remain for law-reform efforts of the kind set forth in the *Guide*? Even with all of the impediments to reform discussed immediately above, perhaps for certain areas of the law there is less complexity with which to contend and therefore a more fertile field in which to sow the seeds of law reform. Indeed, one might surmise that in such instances we may be able to obviate the need for more holistic approaches to reform. It has been the contention of advocates of commercial law reform that this area of law is of such a quality. Consider Dam's account of the internationalization of bankruptcy law:

> A preliminary point is that the transplanting of best-practice or state-of-the-art legislation should be easier and more successful in corporate

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208. Boris Kozolchyk & Dale Beck Furnish, *The OAS Model Law on Secured Transactions: A Comparative Analysis*, 12 SW. J.L. & TRADE AM. 235, 236 n.5 (2006).

209. By "development fatigue" I mean a sense of exhaustion with, or antipathy for, development reform efforts that might be experienced by a people of a given developing country that was a former colony, has incorporated several suggested/mandated development policies, or both.

210. *See* IFC, *supra* note 65, at 38–41 (outlining the process of mapping a country's existing legislation to understand the need for reforming and implementing secured-transactions laws along with the scope of said laws).

211. *See id.* at 39–41 (discussing the legal issues concerning reform of secured-transactions laws).

212. Then again, one might counter that where property regimes are in the process of formalization, a concurrent dedication to secured-transaction laws would be advisable.

213. *See* Davis & Trebilcock, *supra* note 189, at 31 (noting that one of the usual problems in implementing social welfare programs is a "lack of financial resources").

> bankruptcy than in many other legal fields. There are two primary reasons. First, the direct effects of corporate bankruptcy are focused on a relatively small number of people, and hence social norms and other informal constraints are less likely to be a constraint (the possibility of corruption aside). Second, corporate bankruptcy is a highly specialized field with relatively few (albeit knowledgeable) legal practitioners involved, and therefore the general level of the legal profession as a whole is not likely to be a concern.[214]

One would suppose that similar statements could be made about secured-transactions reform. Nevertheless, this sentiment should not engender as much optimism as it would seem to imply. The argument is akin to averring that one would rather scale the Matterhorn than the Mount Everest because Everest is significantly taller and has a rougher terrain. While this may be true, it does not do away with the fact that choosing to confront the former still involves scaling a mountain. So too, it would seem, is the case of reforming commercial law in general and secured-transactions law in particular. It may be easier to transplant foreign schemes in the commercial-law arena than in other more hotly charged venues, such as family law or criminal law, but such a conclusion does not address the more salient question: Do commercial-law reform efforts portend positive economic changes for a recipient developing country? When we consider the possible inhibiting factors to the success of secured-transactions reform in developing countries, it becomes difficult to assume success will naturally stem from reform. Indeed, problems of implementation exist at every stage of a secured transaction.

#### a. Attachment

Recall that the attachment stage of a secured transaction involves the point at which the relationship between the debtor and creditor is formed and the security interest is created.[215] Additional issues relating to the attachment of collateral (and more generally to the complete secured-financing system) concern both the types of parties who may participate in the transaction and the categories of collateral that may be used in a secured financing.[216] Depending on the developing country involved, there may be cultural, religious, or practical reasons affecting the ability of said state to incorporate law-reform efforts meant to bolster this stage of a secured transaction.

In some developing countries, the creation of a secured-transactions system is nearly impossible because certain fundamental elements of a financing directly conflict with religious or cultural norms. Take for example the issue of the charging of interest. While this is a critical characteristic of all credit markets, it may run counter to religious or social edicts. Dam notes "Muslim law—that is, the Sharia—

214. DAM, *supra* note 10, at 215.

215. *See supra* Part I.A.1.a.

216. FLEISIG ET AL., *supra* note 20, at 24–25.

forbids the charging of interest . . . . Catholic doctrine has traditionally condemned usury."[217]

Similarly, cultural or religious norms that would preclude certain individuals or groups (e.g., women) from participating in a system may pose a serious threat to the transplantation of Western law into a country with such a predilection. While this may offend our Western sensibilities, our disquiet does not change the fact that such reticence will not be ameliorated by our insistence on full participation and will almost necessarily limit (perhaps substantially so) the positive effects of enacting such a regime.

Admittedly, the *Guide* does attempt to address these issues relating to culture or religion (albeit implicitly) by striving to:

> [R]ise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in States with divergent legal traditions (civil law, common law, as well as Chinese, Islamic and other legal traditions) and in States with developing or developed economies. The focus of the *Guide* is on laws that achieve practical economic benefits for States that adopt them. While it is possible that States will have to incur predictable, though limited, costs to implement these laws, substantial experience suggests that the resulting short- and long-term benefits to such States should greatly outweigh the costs.[218]

Certainly, the language employed has a certain rhetorical appeal. But what exactly does it mean to rise above differences in situations where there is a fundamental schism? Indeed, if "rising above" simply refers to the production of a substantive law that is discordant with cultural or religious values, the viscosity between the developing country and the intended law reform is more likely be enhanced than mitigated.

While cultural or religious issues will certainly inhibit the effectiveness of reform in a handful of countries, there is a more common condition prevalent in developing nations that both (i) relates to the attachment stage of secured transactions and (ii) dampens the notion that secured-transactions reform can effectively act as an agent for immediate change. The World Bank reports that, as of 2006, the proportion of real property in most economies constitutes between one-half and three-quarters of all wealth.[219] While not necessarily an argument against creating or strengthening secured-transactions laws in a given developing country, this fact would seem to inhibit the extent to which such a reform could possibly act as a catalyst for growth in the reformed country. Secured-transactions schemes, like that proposed in the *Guide*, focus on the creation of security interests in personal property, which is typically composed of moveable goods and intangibles.[220] However, mortgages related to real property are generally dealt with separately. Thus, the creation of a secured-financing regime will not have tangible benefits to the

217. DAM, *supra* note 10, at 209.

218. UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 3.

219. THE WORLD BANK & INT'L FIN. CORP., DOING BUSINESS IN 2006: CREATING JOBS 32 (2006).

220. *See supra* Part I.A.1.b.

citizenry unless or until that citizenry holds a significant amount of its wealth in the form of personal property.[221]

b. Perfection and Priority

Another possible challenge for the reform of the laws governing secured transactions relates to the infrastructure necessary to facilitate a robust secured-transactions law. Proper infrastructure is certainly important in effectuating the registry systems that are the hallmark of the perfection stage of secured transactions.[222] Legal reform efforts would attempt to make previously confusing and redundant registry systems efficient, perhaps by creating a universal registry. While this would, no doubt, make for a more user-friendly system, it would not likely ameliorate the principle problem plaguing such systems in developing countries: poor infrastructure.[223] For example, inadequate telecommunications capabilities may limit the ability of a country to construct a collateral registry that can provide easy access to current security information.[224] The inability to definitively identify a borrower due to such shortcomings as a nonexistent or inadequately functioning national identification system or a poorly functioning or decentralized business registry may limit the success of reform.[225] A failure to adequately publicize the rights and benefits of secured transactions to the stakeholders in the country may keep pre-reform practices as the norm.

c. Enforcement

The impact of the *Guide*—or any other secured-transaction reform effort for that matter—would be significantly eroded by an inefficient enforcement system in the recipient country. As was noted earlier, enforcement efforts under existent regimes in developing countries have been quite poor and have greatly devalued the current secured-transaction laws in those countries.[226] This is primarily because one's ability to successfully navigate the enforcement process through the courts depends on factors deficient in many developing countries.

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221. Admittedly, there is a dynamic process in play here. The citizens of a country may be holding items that only have limited value because they cannot be used as collateral in a financing. Therefore, allowing those pieces of property to be used as collateral will alter the proportion of wealth in a given country by making these pieces of property more valuable. Nevertheless, such changes in the law will not, unto themselves, dramatically alter how wealth is held. Economic prosperity will.

222. *See* De la Campa, *supra* note 52, at 17, 19 (noting that a centralized registration system is an essential feature of modern secured-transactions law and that it is important for the institution operating such system to have an adequate infrastructure).

223. *See id.* at 20 (noting that a lack of modern registry systems stands out as a "major gap" in certain developing countries).

224. *See id.* at 19 (explaining that a country's level of development of technology infrastructure must be analyzed with regard to its capabilities in creating a modern secured-transactions registration system).

225. *See id.* at 18 box 2 (suggesting that successful reform requires a registry that provides rapid, widely available access to useful public information).

226. *See supra* Part I.A.2.c.

In any country, a would-be creditor has certain questions to ask before extending financing. In the event that the debtor defaults in its obligation, when, if at all, will the police levy on the property? When, if at all, will a judicial sale be conducted? Is there a corruption element to the enforcement mechanism (e.g., bribery) that will add further costs to the enforcement process? In the developing context, the answers to these queries can be disquieting to a potential lender.

Unfortunately for legal reformers this is not a dilemma for which there is a simple solution. The natural policy recommendation has been to suggest a scheme that mirrors that used in Article 9: allowing secured parties to enforce their own interests and to conduct sales.[227]

> The *Guide* recommends that, in order to maximize flexibility in enforcement and thereby to obtain the highest possible price upon disposition, creditors should have the option of proceeding either judicially or extra judicially when enforcing their security rights . . . .[228]

If such a change were possible, it seems to solve a major dilemma, obviating the need to wait for a slow or corrupt judicial system to spearhead, and possibly stymie, the ability of creditors to extract value from the collateral in which they have taken an interest.[229] In systems where there is either (i) a history of self-help mechanism—so much so that there are cultural mores associated with its proper use, or (ii) relatively efficient police and judicial systems, such a recommendation is sound. Social pressure, rigorous enforcement of the encoded law, or both will dampen a creditor's ability to unfairly take advantage of the self-help mechanisms set into law.

Where there is no history of such self-help remedies, however, or where police and judiciary are, to some extent, corrupt (as is the case in many developing countries), problems may result. Creditors, who may be quite influential locally, may be able to press the advantage the law has afforded them. For example, one might be concerned that the creditor will self-deal in the sales process, thereby obtaining the collateral at a low price and leaving the debtor with outstanding debt obligations, or take possession of property in which a party does not actually have an interest. The *Guide* drafters would counter with the notion that the reformed law would require creditors to behave in a prescribed fashion: "The law should provide that a person must enforce its rights and perform its obligations under the provisions on enforcement in good faith and in a commercially reasonable manner."[230]

But from a practical standpoint, how real is this safeguard where the judiciary and police are inefficient or corrupt? The creditor, who may be a relatively powerful player absent any additional protections, need only fear that a debtor will be so vexed that it will bring a lengthy and possibly expensive suit to reduce or eliminate a current debt obligation.

It is also worth mentioning that where self-help mechanisms, such as those provided in § 9-609 of the UCC,[231] are unfamiliar to a given society, there is a risk for

227. U.C.C. § 9-607, § 9-610 (2010); UNCITRAL *GUIDE*, *supra* note 13, Chap. VIII para. 1.

228. UNCITRAL *GUIDE*, *supra* note 13, Chap. VIII para. 31.

229. *See id.* (describing procedures to maximize flexibility in enforcement).

230. *Id.* Chap. VIII para. 131.

231. U.C.C. § 9-609(b)(2) (2010).

violence between debtor and creditor.[232] Indeed, behaving in a commercially reasonable manner may be the least of a creditor's worries in a scenario in which a creditor attempts to levy on a debtor's property where there is no precedent for such an action.[233]

Further eroding the notion that a change in substantive law will help with respect to secured-transactions law is the fact that the current laws in many developing nations are already quite favorable to creditors' rights. In a very influential 1998 article, La Porta et al. noted that "creditor rights are, if anything, stronger in poorer than in richer countries . . . ."[234] Interestingly, the authors' analysis actually showed an inverse relationship between stronger creditor rights and GDP per capita.[235] While drawing definitive conclusions based on such outcomes would be foolhardy, the results seem to provide additional credence to the *de minimis* impact of a mere change in written law where supporting institutions are less than robust.

Ultimately, one must conclude that these enforcement-related concerns are not addressed by a mere change in substantive law. Indeed, a country's poverty may mean that scarce resources cannot be allocated in a manner that efficiently supports enforcement of secured-transactions regimes.

### 5. A More Complete Picture

What might one conclude about the prospective impact of the *Guide* on economic growth in developing countries? Given the above discussion, it would appear that the adoption of the *Guide* would produce only marginally positive results absent the most felicitous of circumstances (e.g., the presence of strong legal and political institutions, not to mention a welcome stance among the recipient country's populace for the reforms). Since these characteristics are not found in abundance in developing countries, results will likely be modest.

It is important to note that this conclusion should not necessarily cool efforts to advance the major themes contained in the *Guide*.[236] After all, there are very real gains to be made by the launch or expansion of strong and well-functioning secured-credit systems, and there are very few scenarios in which introduction of elements of the *Guide* will actively harm a developing country. With that said, there should be a dampening of the zeal with which the *Guide* and other similar instruments are proselytized, since the willingness of the West to hammer square pegs into round holes stands as the foremost scenario by which harm to the recipient developing nation would result.

How then should the *Guide* be advanced? With humility. In lieu of using carrots or sticks to induce compliance with the *Guide*'s recommendations (in a

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232. *See* Mark G. Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 979 (1974) (asserting that debtor-initiated violence is "more likely" where the debtor does not realize that the repossession is a legitimate action).

233. *See id.* (discussing risk of debtor-initiated violence).

234. Rafael la Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1139 (1998).

235. *Id.*

236. There may have been a point at which one could argue against the expenditure of scarce resources in creating the *Guide* in lieu of some other endeavor, but that bell has already been tolled.

fashion that would be in keeping with the outdated approaches of the Washington Consensus[237]), aid organizations, IGOs, NGOs, and powerful Western states should genuinely support flexibility in the adoption and implementation of aspects of the *Guide,* even if the result is a total absence of incorporation of the *Guide*'s principles.

Furthermore, to the degree we are to espouse the NIE position (as well as positions of related scholars like de Soto, with focus on the interconnected nature of law and larger institutions), advice—to the extent it has been solicited—should be tailored to the specific conditions prevailing in a given developing country. Ultimately, this may mean that less stress is placed on individual, area-specific reform efforts (e.g., the *Guide*) and greater emphasis is placed on more general rule-of-law (or similar) efforts. In such an instance, a legislative guide might be introduced after (or in conjunction with) a host of other reforms, and each of these efforts would be meant to be mutually buttressing.[238]

## II. HARMONIZATION

> The *Guide* is addressed to national legislators considering reform of their domestic secured-transactions laws. However, because secured transactions often involve parties and assets located indifferent States, the *Guide* also seeks to address the recognition of security rights and title-based security devices (such as retention of title in and financial leases of tangible assets) that have been effectively created in other States. This recognition would represent a marked improvement for the holders of those rights over the laws currently in effect in many States, under which such rights are often lost once an encumbered asset is transported across national borders, and would go far towards encouraging creditors to extend credit in cross-border transactions, a result that could enhance international trade.[239]

Given the modest charge expressed in the above passage, the *Guide* would seem to be rather benign in its scope. In fact, even if held up against the conclusions drawn in Part I of this paper (that implementing countries need a great deal of flexibility in order to accommodate for the specific dynamics present in said country), the *Guide* seems able, and perhaps willing, to accommodate.

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237. *See generally* Gore, *supra* note 206 (discussing the Washington Consensus, a series of stabilization and structural adjustment policies implemented by the International Monetary Fund (IMF) and the World Bank). The Washington Consensus encourages reforming financial policies towards developing countries and recommends that governments "(a) pursue macroeconomic stability by controlling inflation and reducing fiscal deficits; (b) open their economies to the rest of the world through trade and capital account liberalization; and (c) liberalize domestic product and factor markets through privatization and deregulation." *Id.* at 789–90.

238. It should be noted that these types of efforts also have their impediments to success. *See generally* MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS (2008) (discussing key issues affecting relationships between rule of law and development). These include technical or resource-related impediments, social-cultural and historical factors, and political-economy based impediments, "where lack of effective political demand for reforms, on the one hand, and vested supply-side interests, on the other, render these reforms politically difficult to realize even if (by assumption) they would render most citizens better off in terms of their own values." MICHAEL J. TREBILCOCK & MARIANA MOTA PRADO, WHAT MAKES POOR COUNTRIES POOR?: INSTITUTIONAL DETERMINANTS OF DEVELOPMENT 54 (2011).

239. UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 9.

> It is presumed that States will implement the *Guide*'s recommendations by reference to existing legal architecture rather than by transplanting unfamiliar legal terms drawn from other jurisdictions that have no legal meaning or resonance. In particular, the *Guide* attempts to present its recommendations and their associated key concepts in such a manner that, whatever the legal tradition that underpins a State's national law, that State can adapt and enact these recommendations.[240]

So rather than attempting to coerce or compel developing nations (or developed nations, for that matter) to conform said nation's laws to the tenets of the *Guide*, perhaps the *Guide* is taking a more relaxed tack. Perhaps, the *Guide* is suggesting, "You do what's best for you, but I'll tell you what seems to work in our experience."

But amidst this paean to flexibility and respect for sovereignty, we find that the ultimate goal is:

> To harmonize secured transactions laws, including conflict-of-laws rules. Increasingly, business is becoming international in scope and credit is flowing across national borders. A State's secured transactions regime will be most effective in promoting international trade based on equality of and mutual benefit to States when it is harmonized with regimes in other States.[241]

Here the *Guide* offers, as a seemingly tangible goal, the harmonization of secured-transactions law. This goal raises a bevy of questions relating to the feasibility and appeal of the purported aim: queries that Part II will answer. Part II will begin with a look at the intuition and impulse behind such a goal. Then, building upon the discussion contained in Part I, it will discuss the relative practicability and desirability of the harmonization of secured-transactions law. Ultimately, the goal of harmonization is, at best, a dormant aspiration that developing countries are unlikely to achieve in the foreseeable future. At worst, it creates a less malleable approach to legal-reform efforts in developing countries and distracts those efforts from the more tangible goal of establishing workable, enforceable secured-transactions laws in each developing country.

### *A. Why Harmonization?*

It is natural, perhaps essential, that we conceive and aspire to the world of the possible. A future in which the laws governing secured credit are uniform, universally understood, and consistently enforced, brings about enticing possibilities.

From an individual-country perspective, we can imagine the benefits of harmonization that might accrue. Assuming that the harmonized law was consistently enforced, a developing country might find itself with access to a much larger swath of financiers—particularly those with a global reach. This is because a

240. *Id.* Introduction para. 77.

241. *Id.* Introduction para. 59 (italics omitted).

stable system, with readily identifiable and predictable rules, lowers the risk born by would-be financiers in a credit transaction.[242] The presence of competition would help to quell many of the market distortions that exist when there is a monopoly or oligopoly of lenders domestically and would also present an opportunity for large-scale projects, as larger financiers would be drawn to the market.[243] The end result would be that lenders are able to provide access to credit on terms more favorable to potential borrowers. These borrowers could then obtain financing at terms more sanguine than might otherwise be possible, allowing them to invest in a variety of projects.[244] Consumer borrowers will help to grow the economy (possibly the local or national economy, and certainly the global economy) with household purchases. Entrepreneurial borrowers might aid the local or national economy through their provision of gainful employment to their countrymen and provision of products or services. Still other entrepreneurs will invest in research and development, which may bring about technological change. Such an investment may positively increase the velocity of growth in the domestic economy.[245]

Likewise, at the macro, international level, the achievement of harmonization has positive results. The global marketplace for credit would be significantly more efficient, providing capital to the most desirable activities at a cost commensurate with the expected result.[246] Relatedly, developing countries would have an opportunity to engage not only as borrowers but eventually also as financiers, as increasing prosperity and knowledge of the credit laws would promote entrance into the lending market.[247] Finally, the increase in international transactions would tend to create a greater level of interdependence among the global players, which, in turn, may facilitate a more peaceful world.[248]

Given all of the potential benefits, is there any good reason why the *Guide* would refrain from setting harmonization of secured-transactions law as an aspirational target?

### *B. Feasibility of Harmonization*

In the late 1970's Professor Ulrich Drobnig, working with UNCITRAL, conducted a relatively comprehensive study of secured-transactions law.[249] One of the purported goals of that study was to "help to consider the necessity or desirability

242. *Id.* Introduction para. 6.

243. *See id.* Introduction para. 52 (stating that competition is an effective way to reduce the cost of credit).

244. *See id.* (stating that equal treatment across diverse credit sources will benefit credit consumers by effectively reducing the cost of credit).

245. *See, e.g.*, Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S93–S99 (1990) (describing the economical impacts of improved technology based on the model's findings).

246. *See* UNCITRAL *GUIDE*, *supra* note 13, Introduction para. 1 (promoting the goal of efficiency in secured transactions through harmonization of various States' laws).

247. *See id.* Introduction para. 7 (stating secured credit can "have a positive effect on the general economic prosperity of a State").

248. *See generally*, Zeev Maoz, *The Effects of Strategic and Economic Interdependence on International Conflict Across Levels of Analysis*, 53 AM. J. POL. SCI. 223 (2009) (discussing the effect of interdependence of nations on the level of conflict amongst them).

249. U.N. Secretary-General, *Rep. of the Secretary-General: Study on Security Interests*, U.N. Doc. A/CN.9/131 (Feb. 15, 1977), *reprinted in* 8 Y.B. INT'L TRADE L. 171, U.N. Doc. A/CN.9/131/SER.A/1977 (1977) (by Ulrich Drobnig) [hereinafter Drobnig Report].

of framing rules in this field on an international level, especially for the international movement of goods subject to security interests."[250] Taking note of previous attempts at harmonization,[251] Drobnig concluded:

> It would seem that international legislation in the form of a convention providing uniform rules of substantive and conflicts law is not appropriate in this case. As against international sales or international transportation or the international circulation of negotiable instruments, transnational incidence of security interests is as yet relatively moderate. It would probably be difficult to obtain sufficient government support for an international conference dealing with the relatively technical topic of security interests; and even if the text of an international instrument could be agreed upon, national parliaments would probably be slow and perhaps even reluctant to ratify such a text.[252]

Certainly, there are differences between the present world order and that existent when Drobnig produced his report. For instance, there has been a myriad of efforts aimed at secured-transactions law reform, including the *Guide,* since the publication of Drobnig's report. These changes would seem to portend a harmonized secured-credit law in the near future. However, one wonders if aspects of Drobnig's assessment still hold true.

While development organizations may be able to successfully press the case for secured-transactions reform as a tool for growth in individual countries, true harmonization of secured-financing law seems to require a groundswell of demand and a sustained commitment to the cause. Despite the possible benefits of harmonization, the political drive for full harmonization seems to be lacking.[253] Secured-credit transactions, though relatively common globally, are not as frequent as sales of goods or exchanges of financial instruments.[254] As such, secured-

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250. *Id.* para. 1.1.

251. Drobnig based his conclusions on a number of previous attempts at harmonization, including: (1) a uniform conditional sales act enacted by three Scandinavian countries (Norway, Sweden, and Denmark) during 1915 to 1917; (2) UNIDROIT draft provisions of 1939 and 1951 concerning the impact of reservation of title in the sale of certain goods; (3) provisions regarding the effect in bankruptcy of reservation of title in the sale of goods in the draft EEC Bankruptcy Convention of 1970; and (4) model reservation-of-title clauses contained in several General Conditions elaborated by the United Nations Economic Commission for Europe. *Id.* paras. 2.6.1.1–2.6.1.5. He also analyzed proposals for the harmonization of secured-credit law that had been submitted to the Council of Europe (the first such proposal was made by UNIDROIT in 1968; the other was submitted by the *Service de Recherches Juridiques Comparatives [Comparative Legal Research Service]* of the CNRS of Paris in 1972). *Id.* paras. 2.6.2–2.6.2.3.

252. *Id.* para. 4.2.1.

253. *See* Raymond, *supra* note 12, at 104–05 (using England as an example to highlight obstacles to harmonization). It is important to note that, even if there is zeal for the reform of secured-transactions law in a given country, such enthusiasm is not necessarily synonymous with a desire for harmonization.

254. This has much to do with the fundamental characteristics of a secured transaction. *See* Drobnig Report, *supra* note 249, paras. 2.1.1.1, 2.2.1 (discussing the fundamental characteristics of a secured-credit transaction). Secured transactions typically revolve around lending. While many individuals will act as a lender or borrower at one point or another in his or her life, the frequency with which one engages in these types of transactions is relatively small when compared with the vast number of instances in which that same individual will act as a buyer or seller of goods, for example. This is not to downplay the

transactions reform is unlikely to elicit the type of grassroots support among individuals, or even among small businesses, that would spur policymakers to action. Similarly, to the extent that secured-transactions law operates as an attenuated variable in the economic growth calculation, it is significantly less likely to spark the interest of policy makers (at least on its own) than more direct variables. An additional factor that would seem to stand in the path of harmonization is satisfaction with the status quo. Citizens of many developed countries may perceive very little value in gaining access to credit markets other than their own.[255] That is, the players living in strong credit markets are content to take advantage of the system that they have domestically or regionally, unconvinced that global harmonization of the law governing secured transactions would produce additional benefits.[256] On the other end of the spectrum are interests entrenched in developing and developed countries alike who do not wish to compete in a more global sphere.[257] This combination of ambivalence and antipathy would likely lead to the reticence of lawmakers referenced by Drobnig.

Ultimately, all of these impediments to harmonization pale in comparison to those mentioned in Part I.[258] Indeed, when one considers the difficulties that may be confronted by an individual country in successfully reforming its secured-transactions laws, it seems implausible to suggest the imminent harmonization of the laws governing secured credit. Thus, the preponderance of the evidence suggests that the likelihood for global harmonization of secured-credit law is still very much in keeping with Drobnig's analysis four decades ago: a significant distance from being a reality.[259]

### C. *Desirability Of Promoting Harmonization Vis-a-Vis the* Guide

If the ultimate goal of the *Guide* is to provide a suggested format for secured-transactions reform that will aid in yielding strong and consistently enforced secured-transactions laws in developing countries,[260] is it possible that stating a goal of harmonization could be harmful?

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importance of secured transactions (as has been discussed in Part I, secured-transactions law, when efficient, can facilitate well-functioning credit markets, and ultimately, growth). Rather, it evidences a potential hurdle to harmonization in that individuals may be less motivated to expend the time and energy necessary to take collective action (i.e., to work toward harmonization) given that these same individuals may not derive a direct benefit from these efforts.

255. *See* Raymond, *supra* note 12, at 105 (noting, as an example, England's rejecting of modernizing its secured-transactions regime and the lack of pressure on it to do so).

256. *Id.* at 105–06.

257. *See, e.g.*, Hugh T. Patrick, *Financial Development and Economic Growth in Underdeveloped Countries*, 14 ECON. DEV. & CULTURAL CHANGE 174, 187 (1966) (discussing criticism of lenders' capacity to charge higher rates in underdeveloped countries with the absence of global competition).

258. For additional hurdles to harmonization, see Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655, 660–64 (2009).

259. *See id.* at 660–63 (explaining the difficulty in global harmonization of secured-credit law).

260. The *Guide* makes explicit UNCITRAL's belief that all countries could gain value by holding their own secured-transactions laws up against the content of the *Guide*. UNCITRAL *GUIDE*, *supra* note 13, Annex. II para. 1. However, it seems relatively clear that the intended recipients of the *Guide*'s sagacity are developing countries.

Recall from earlier in this Article that a developing country needs to be afforded latitude in the degree to which said country chooses to adopt elements of the *Guide*.[261] The extent to which success may be expected is highly contingent upon the specific situations prevailing in a given country. How efficient and free from corruption are the judiciary and the police? How familiar is that country with the themes and terms that are to be incorporated in the legal code of that country? What political and cultural obstacles are there to adoption? In a given case, espousal of large elements of the code may be feasible; in others not so. Ultimately, the flexibility to embrace themes contained in the *Guide* in a manner that is most likely to yield functional secured-transactions laws in that country is paramount. This cannot be accomplished without the plasticity to meld together themes from the *Guide* and existing law in the given developing country as the circumstance requires.

Does a stated goal of harmonization impinge upon this malleability? This depends on whether we are to take the objective seriously or not. If the expressed ambition is simply a kind of rhetorical flourish akin to an aspiration of world peace—and everyone is aware that this is the case—then there would seemingly be no impact on how the *Guide* is advanced or in how developing countries would adopt elements of the *Guide*. Were they off the record, the *Guide*'s drafters might suggest that this should be the interpretation. As evidence, they may note how sparse the discussion of harmonization is and mention the many sections of the *Guide* that stress the flexibility to be afforded adopting countries. Moreover, they may assert that the *Guide* offers itself as a set of possible directions in no way meant to suppress the ingenuity or imagination of drafters in developing countries.

A naysayer may counter thusly: Is harmonization a goal or not? If it is, then what is envisaged is a coalescence of the substantive laws of the world's states. And around what set of rules would such an effort coalesce? Presumably this would be the themes and rules outlined in the *Guide*. So, whether overtly intended or not, there is rigidity within the *Guide*.

To the degree that the naysayer is correct, a couple of possible problems result. First, developing countries may see the mixed messages in the *Guide* and simply adopt its themes, despite the difficulty of incorporating them into said country's present legal system. Second, IGOs like the World Bank or the IMF, NGOs, large private banks, and powerful states may latch onto this goal of harmonization as a way to compel developing countries, by stick or by carrot, to more quickly conform their laws to meet the content of the *Guide*. This latter scenario is far from unthinkable. Consider the recent statement of Raymond on this subject of harmonization: "The time has come to put aside limits to harmonization and to begin to recognize the value that would occur if the harmonization of secured transactions could be achieved."[262]

Raymond goes on to note the present impediments to harmonization, such as a difficulty in unifying the definition of a unitary security device and the various conflict-of-law issues to be navigated, but does not pay much attention to the related structural concerns that will impact the success of reform in a given country or in

261. *See supra* Introduction.

262. Raymond, *supra* note 12, at 107.

cross-border transactions.[263] Clearly, there are those who would stridently push forward on this agenda with little regard to the context of the recipient countries.

Ultimately, the risk that is run by calling for harmonization in this fashion is that developing countries, whether from internal pressure, external pressure, or both, will adopt all the elements of the *Guide* in order to move toward harmonization with a greater deal of alacrity than circumstances would seem to allow. Ironically, this lurch toward progress may have the undesired effect of pushing the country further away from workable and enforceable secured-credit law.

One may counter by suggesting that the rewards of harmonization are well worth this risk. More specifically, it might be contended that developing countries, by adopting laws that more closely resemble those of powerful Western states, will instantly make themselves more attractive to lenders. But is this accurate? Do we truly expect that global creditors will be swooning over developing countries because there was a change in the substantive law to a format more recognizable to said creditors? I daresay no. The private sector will be intelligent enough to determine the risk of lending based on the complete picture. New substantive law, if ultimately unusable because of the factors enumerated in Part I, is not worth the paper on which it is written. Give those same creditors a legal institution that functions efficiently, is largely devoid of corruption, and provides knowable, consistent, enforceable secured-transactions law, however, and those same creditors will take the small transactions costs associated with making themselves knowledgeable as to those laws in order to access that market.

Even if we set aside the argument that a goal of harmonization may ultimately stymie efforts to produce a strong secured-credit system in developing countries, there is an additional reason to be skeptical of this aspiration: harmonization will tend to discourage legal entrepreneurialism. There is much to be said for avoiding a common misconception that what is good cannot be better. Whether in business, arts, or even law, innovation should be welcome. Different notions of secured transactions may allow for nuanced rules that may ultimately prove to be more beneficial than those already in place. It may be the case that, unburdened by the strictures of a model code, entrepreneurs will discover improvements that will aid in promoting low-cost financing for their citizens. Harmonization would serve to reinforce a stagnant set of rules and incentivize stability over change even in the face of fluctuations in the underlying business relationships.

## CONCLUSION

While law most certainly plays a role in economic development, the exact nature of its impact is elusive. Can law be a catalyst for growth, or is it more likely to be shaped by prosperity than to create it? To the extent that law does facilitate growth, under what circumstances are legal reform efforts optimally applied?

Despite the uncertainty that surrounds the essence of law's influence on growth, frequent efforts have been undertaken to reform the laws of developing countries in an attempt to make said laws more closely resemble those in more prosperous nations. If we are to take the reformers at their word, then the root desire for these changes is in fact a noble one: to make the lives of others better. Still, good

263. *Id.* at 95, 104–106.

intentions are insufficient grounds to justify reforms. Indeed, one must be wary of the pitfall of the overzealous—the assumption that any action is better than none.

Instead, reformers must acknowledge that the supposition that law operates as a prime mover in economic development is incorrect. As such, reform efforts must be justified based upon their ability to integrate with existing institutions and multifaceted reforms. As has been demonstrated in this Article, the necessity of this justification is not eliminated even where the area of the law to be reformed is thought to be ripe for change, such as secured transactions. Rather, law-reform efforts in these commercial arenas must also be conducted with a fair degree of circumspection.

In short, attention must be paid to nuance and the specific dynamics present in a given developing country. It is tedious work and tends to lend one to a posture of contemplation rather than triumph. But it is through these furrowed brows and scratched scalps that informed suggestions may ultimately be proffered.

# The FCPA's Legacy: A Case for Imposing Aiding-and-Abetting Liability on Corporations Through an Amended Alien Tort Claims Act

RACHEL RATCLIFFE*

SUMMARY



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* J.D. Candidate, The University of Texas School of Law, 2014; B.B.A. International Business and Finance, The University of Oklahoma, 2011. I owe many thanks to Garrett Martin, David Fisher, and the editors of the *Texas International Law Journal* for their tireless work in preparing this Note for publication. I appreciate Professor Jay Westbrook for his guidance in transforming these complex ideas into a well-structured argument. Finally, I am deeply grateful to my parents, Randy and Rita, and my siblings, Madeline and Noah, for their unwavering encouragement and love.

## INTRODUCTION

Modern multinational corporations sometimes extract economic gain by aiding and abetting grave human-rights violations—including slavery, genocide, and torture—without legal liability.[1] These corporations have few legal obligations because they can evade regulatory schemes by shifting operations through different facilities, becoming a stateless entity. The U.S. Congress has led a worldwide movement to end practices with severe human and social costs by enacting the Foreign Corrupt Practices Act (FCPA) to outlaw bribery.[2] This Note argues that multinational corporations should be subject to civil liability for aiding and abetting human-rights violations and that an amended Alien Tort Claims Act (ATCA) should be sculpted considering Congress' successful FCPA enactment.

At the outset, I acknowledge that this Note provides only a rudimentary examination of the problems of bribery and the case for corporate aiding-and-abetting liability. It is premised mostly on an economic evaluation of human and social costs. All serious foreign-relations considerations are ignored, as are the practical aspects of enforcing such a statute, particularly one that implicates foreign sovereigns. Parts I and II provide an overview of the costs of bribery and the passage and the implementation of the FCPA. Part III outlines the arguments in favor of holding corporations liable for aiding and abetting human-rights violations. Part IV discusses the current state of the ATCA and criticisms of interpreting it to cover

1. *See generally* Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L L. 451 (2012) (discussing liability for corporations for funding or participating in human-rights violations).

2. Pete J. Georgis, Comment, *Settling With Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U.L. REV. 243, 248 (2012).

corporate aiding-and-abetting liability. Finally, Part V posits that given the nature, background, and intent of the FCPA, the concerns raised by corporate human-rights violations are sufficient to justify a new ATCA.

## I. THE PROBLEM OF BRIBERY

Corruption, which encompasses bribery, is "the misuse of public power for private benefit."[3] In the words of legal scholar John T. Noonan, Jr., "[b]ribery is universally shameful."[4] That bribery adversely affects economic development has become increasingly accepted,[5] although the underlying reasons for this are hard to pinpoint. The remainder of this Part will address some of the common costs of bribery and corruption.

### *A. The Causes of Corruption*

Generally speaking, entities and individuals pay bribes "to obtain government benefits and to avoid costs."[6] A variety of economic opportunities invite bribery. For instance, because governments buy and sell goods and services, bribers pay off officials to access state supplies at below-market prices.[7] Additionally, bribers are able to buy subsidies in situations where government "spending on subsidies and benefits is too low to satisfy all who qualify . . . ."[8] Where firms bid to be a buyer, bribers pay officials for valuable information about competitors, the privatization process, or favor in the process.[9] Finally, bribers commonly engage in bribery in order to secure lower tax payments, avoid costly delays, or avoid enforcement of criminal laws.[10]

Susan Rose-Ackerman, a leading scholar in the study of the political economy of corruption, identified the common economic opportunities that give rise to corruption. Factors include: the honesty and integrity of participants, the overall level of benefits available for capture; the riskiness of corrupt deals; which in turn depends on the likelihood of detection and punishment; the relative bargaining power of the parties, which in turn depends on the relative vulnerability of the briber to prosecution; and other means of obtaining the desired benefit.[11] The World Bank

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3. JOHANN GRAF LAMBSDORFF, THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM: THEORY, EVIDENCE, AND POLICY 16 (2007) [hereinafter LAMBSDORFF, INSTITUTIONAL ECONOMICS]. Lambsdorff is widely cited for this work on the economics of corruption.

4. ROBERT KLITGAARD, CONTROLLING CORRUPTION 11 (1988) (quoting JOHN T. NOONAN, JR., BRIBES 702–03 (1984)).

5. *See id.* at 36 ("As the evidence mounts about corruption in developing countries, it seems clear that the harmful effects of corruption greatly outweigh the (occasional) social benefits.").

6. Susan Rose-Ackerman, *The Political Economy of Corruption – Causes and Consequences*, WORLD BANK VIEWPOINT Apr. 1996, at Note No. 74 [hereinafter Rose-Ackerman, *The Political Economy of Corruption*].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Rose-Ackerman, *The Political Economy of Corruption, supra* note 6. Rose-Ackerman stated that

also identified causes, including: dysfunctional government budgets; loss of organizational purpose; lack of protection for non-bribers; closed political systems; weak accountability; ineffective watchdog institutions; and "divergence between the formal and the informal rules governing behavior in the public sector."[12] Such causes of corruption mirror its costs, resulting in "vicious or virtuous spirals"[13] in developing countries.

### *B. The Costs of Corruption*

Before the 1970s, "the generally accepted view was that corruption greased the wheels of commerce."[14] The belief was that corruption served market efficiency by providing access to heavily regulated and closed bureaucratic economies, making these bureaucracies more efficient.[15] The underlying belief was "that through the multitude of benefits derived from bribery, emerging nations would soon transform into developed and industrious nations."[16] Today, numerous studies of the effects of corruption have dispelled this old view and fostered a more robust understanding of the economic, political, and social costs of bribery and corruption.[17]

Corruption generally follows a pattern. Initially, businesspeople bribe government officials to avoid regulatory roadblocks.[18] Instead of helping tear down these cumbersome, distorting regulatory roadblocks, bribery induces government officials to create further artificial regulatory bottlenecks to institutionalize these self-serving transactions, which ultimately favor the unscrupulous and well-off on both sides of the bribery transaction, perpetuating the process.[19] State capture occurs when the bribe-giving business "exploit[s] the malfeasance of [the government] officials" in order to change rules, laws, or regulations in their favor.[20] For example, police may be bribed to arrest a competitor; regulators might be bribed to fake evidence to shut down a rival; or lawmakers might be bribed to change the rules.[21]

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the size and incidence of corruption is a function of two main factors: the honesty and integrity of the public officials and the honesty and integrity of private actors. *Id.*

12. WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 12–13 (1997).

13. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 870–71 (2010).

14. Cyavash Nasir Ahmadi, Note, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 363 (2012) (citation omitted).

15. *Id.* at 363; Spahn, *supra* note 13, at 864; Pierre-Guillaume Méon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth?*, 122 PUB. CHOICE 69, 71–73 (2005). *But see* LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 59–60 (citing and rebutting arguments that bribery circumvents regulation that creates a wedge between equilibrium price and market price).

16. Ahmadi, *supra* note 14, at 363.

17. Spahn, *supra* note 13, at 865; Ahmadi, *supra* note 14, at 363; *see, e.g.*, LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 58–60 (describing the various costs of corruption). *But see generally* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 212 (1978) (positing that widespread corruption can be "consistent with even a grossly idealized version of representative democracy").

18. Méon & Sekkat, *supra* note 15, at 73; Spahn, *supra* note 13, at 866–67; Ahmadi, *supra* note 14, at 363. Corruption may exist prior to the entry of the businessperson in this example.

19. Méon & Sekkat, *supra* note 15, at 73; Spahn, *supra* note 13, at 866–67; Ahmadi, *supra* note 14, at 363.

20. Spahn, *supra* note 13, at 873 (citation omitted).

21. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 67.

As a result, powerful businesses and individuals use material rewards to reshape a nation in which they have limited interest.[22] Soon, the host nation resembles a mafia-controlled state in which "the rich get richer, elite government and business insiders profit, and any competitors are crushed or swallowed up."[23] This mafia-like regime is perpetuated by the now-insider businesses, which benefit from economies of scale; the expectation of future deals provides each party with sufficient incentive to avoid opportunistic behavior.[24] Finally, the bribery eco-cycle often culminates when the "cronies" realize the threat of regime destabilization created by popular unrest.[25]

1. Economic Costs of Corruption

Bribery and corruption impose macroeconomic costs on a society, which are magnified in developing countries.[26] The free-market economy theory is rooted in the idea that "economic transactions should be based solely upon the price and quality of a product and the service provided by the seller."[27] At a base level, bribery frustrates this fundamental tenet by "distorting the relationship between price and quality."[28] Further, there is no rational market competition to provide market discipline, leading to high prices and low quality.[29]

The effects of bribery on the operation of free markets are quite visible when examining the distortion of the price-quality relationship. Primarily, government-funded projects are selected based on bribe opportunities for officials instead of

22. Spahn, *supra* note 13, at 873.

23. *Id.* at 875.

24. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 150–51; Lambros Pechlivanos, Self-Enforcing Corruption and Optimal Deterrence (1997) (unpublished manuscript) (on file with Université des Sciences Sociales, Toulouse, France) (showing that collusion between briber and bribe-taker is only sustainable where any non-conforming behavior can be punished by cancelling or refusing to engage in future business).

25. Spahn, *supra* note 13, at 883; Ahmadi, *supra* note 14, at 367 (discussing the "violent conflict and civil war" that might result from corruption); Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 66, 76 (2001) (discussing how corrupting affects growth and political instability); *see* KLITGAARD, *supra* note 4, at 45 (suggesting corruption levels correlate with political instability).

26. Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 252 (1997); Ahmadi, *supra* note 14, at 365.

27. Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983); *see also* Salbu, *supra* note 26, at 249 ("Without bribes, buyers purchase from the best bidder in terms of relevant issues of transactional value such as price, service, and quality.").

28. Bader & Shaw, *supra* note 27, at 627; Rose-Ackerman, *The Political Economy of Corruption*, *supra* note 6, at 3 ("Quality may suffer if contractors make payoffs to be allowed to cut corners."); Ahmadi, *supra* note 14, at 364.

29. *See* Spahn, *supra* note 13, at 861 ("[I]ndividual victims . . . includ[e] humans injured or killed by 'low quality control' . . . ."); *see also* LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 66 (stating that bribes are biased in favor of those that can pay the largest bribe instead of those that can provide the highest quality product or service). Méon and Sekkat also explain the argument of Susan Rose-Ackerman, "that a firm may be able to pay the highest bribe simply because it compromises on the quality of the goods." Méon & Sekkat, *supra* note 15, at 74. They also explain the theory of N. Gregory Mankiw and Michael D. Whinston, which is that "entry on a market [of a bribe-paying firm] may be beneficial for the firm but detrimental for welfare." *Id.*

profitability and competitive superiority.[30] Additionally, corruption restricts market entry by permitting business insiders to use their bribe-based position to keep competitors out.[31] Also, multinational corporations targeted for bribes by foreign government officials are often in a catch-22; bribery may result in domestic criminal prosecution or civil sanctions, while not doing so may deny market access.[32]

Most importantly, studies show that corruption leads to reduced investment, which in turn inhibits economic growth.[33] Paolo Mauro in his famous study shows that as corruption levels rise, investment in a given emerging market will decline.[34] Further, the findings of the study indicate that corruption negatively affects a country's growth and that those negative effects are due considerably to corruption's effect on investment.[35] This is amplified where the rule of law is weak. Nobel Laureate Douglass North argued that "how effectively agreements are enforced is the single most important determinant of economic performance," particularly in developing countries.[36] Further, a 2005 study by Méon and Sekkat demonstrates that corruption tends to have a relatively more deleterious effect on investment as the enforcement of the rule of law deteriorates.[37] Where enforcement is lacking, corporations will be less likely to invest because property rights are insecure.[38] The rule of law becomes meaningless where a bribe-giver can simply buy his way around it.[39] This is especially true where the bribe-giver is bribing the highest, most powerful

30. Ahmadi, *supra* note 14, at 364; LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 68–69.

31. *See* Ahmadi, *supra* note 14, at 364 (acknowledging that bribery can be a condition precedent to market entry in corrupt countries).

32. *Id.* at 364–65.

33. Paolo Mauro, *Corruption and Growth*, 110 Q.J. OF ECON. 681, 700–01 (1995); Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, *in* GLOBAL CORRUPTION REPORT 2004 313, 313–14 (Robin Hodess et al. eds., 2004); Mo, *supra* note 25, at 76; *see also* Sanjeev Gupta et al., *Does Corruption Affect Income Inequality and Poverty?* 29–30 (Int'l Monetary Fund, Working Paper No. 98/76, 1998) (discussing the negative effects of corruption on income inequality and poverty); *Africa: Now Open for Business,* ALIX PARTNERS, http://www.alixpartners.com/en/WhatWeThink/General/AfricaNowOpenforBusiness.aspx?YRK_AfArt_FCPA_No_MAIN (last visited Apr. 21, 2013). The Alix Partners study was based on responses from executives charged with legal compliance in multinational corporations with annual revenues of $250 million or more. *Id.* The study found three-quarters of corporations not operating in Africa would not consider doing business there unless the local business culture and regulatory processes became more transparent. *Id.* Further, the study found that eighty-six percent of companies operating in Africa faced some risk associated with corruption. *Id.*

34. Mauro, *supra* note 33, at 700. Corruption seems to lower the "private marginal product" of capital by acting as a tax on the proceeds on investment. *Id.* at 704.

35. *Id.* at 704. A 2001 economic analysis by Mo demonstrated that for every one percent increase in corruption, the country's economic growth rate is reduced on average by about one-half percent. Mo, *supra* note 25, at 76.

36. Erik Berglöf & Stijn Claessens, *Corporate Governance and Enforcement* 2 (World Bank, Policy Research Working Paper 3409, 2004). For example, Bhattacharya's 2001 study shows that actions taken against insider trading, not the mere presence of insider-trading laws, helps explain the development of securities markets. Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. FIN. 75, 104 (2002).

37. Méon & Sekkat, *supra* note 15, at 90. The study specifically found that "a weak rule of law, an inefficient government[,] and political violence tend to worsen the negative impact of corruption on investment." *Id.* at 91.

38. Berglöf & Claessens, *supra* note 36, at 7.

39. Spahn, *supra* note 13, at 875.

state officials who are effectively above the law in their jurisdiction.[40] Thus, corruption leads to increasingly inhibited economic growth as the enforcement of the rule of law declines.[41]

On a microeconomic level, bribery, even if legal, is too risky a business transaction.[42] Bribery directs valuable resources away from research and development and other economically and socially beneficial uses, damages a corporation's image, and invites costly legal disputes.[43] Further, identifying the right official to bribe may be difficult.[44] The official may not have actual authority to do the requested deal, or may double-cross the business, or may get cut out of the deal by a higher official once the bribe is taken.[45] When a business uses a middleman with close ties to the local official, though he may provide good access and plausible deniability, his allegiance is to the official; he may collude with the official to cheat the business.[46] On the other hand, the middleman may not have the ties he claims at all.[47] Because contracts to bribe are illegal and unenforceable on public-policy grounds, the business has no recourse in such situations.[48] Additional risks include a lack of means to determine the fair price for a bribe, the potential factional struggles for power in the foreign nation, the lack of exit strategy, and the high transaction costs of bribery.[49] Finally, once a business enters a bribery relationship, it and the government official become "hostage" to each other for jointly participating in illegal conduct.[50] In sum, the costs of bribery and corruption are pervasive.[51]

2. Political Costs of Corruption

Corruption has two key political costs that undermine the legitimacy of governments. First, bribery and corruption diminish the power of the state to meet

40. *Id.*

41. *See* Méon & Sekkat, *supra* note 15, at 74 ("[I]t is likely that corruption may increase the risks associated with a weak rule of law instead of compensating it."); *see also* Mauro, *supra* note 33, at 700, 704 ("The finding that corruption is negatively and significantly associated with investment is consistent with the view that corruption lowers the private marginal product of capital . . . .").

42. Spahn, *supra* note 13, at 885–89.

43. Aaron Einhorn, *The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 DENV. J. INT'L L. & POL'Y 509, 513 (2007); Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 442 (2010).

44. Spahn, *supra* note 13, at 885.

45. *Id.* at 885–86.

46. *Id.* at 884–86.

47. *Id.*

48. *Id.* at 887; *see also* LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 144–46 (noting how transactions that conflict with public morals, such as bribes, are void in Germany and France).

49. Spahn, *supra* note 13, at 887–88.

50. *Id.* at 888.

51. *See id.* at 861 (discussing the unenforceable nature of contracts to bribe as well as the significant transaction costs); *see also* LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 66 (stating that bribes are biased in favor of those that can pay the largest bribe instead of those that can provide the highest quality product or service).

citizens' expectations in its allocative and redistributive roles.[52] For example, the budgets of many African governments provide for the political elite at the particular expense of poor and disadvantaged groups.[53] The associated social effects are discussed further in the next Part. "[The] [i]nability—or reluctance—of the elected governments to provide the essential public services . . . [undermines] the value of democracy and effectiveness of electoral politics."[54]

Also, bribery and corruption degrade international relationships.[55] Government officials are sometimes more interested in securing bribes than in building quality relationships with other nations and private economic entities.[56] This misplaced focus leads to weak relationships with economically superior partners and the purchased monopolistic presence of inferior ones, which relieves businesses from quality control and officials from the need to further develop these relationships.[57] Overall, these political costs are thought to be a major factor in persistent insecurity and instability in developing nations, which in turn undermine economic development, human development, and poverty eradication.[58]

### 3. Social Costs of Corruption

Unfortunately, the victims of the economic and political consequences of corruption are the citizens of corrupt host nations.[59] A strong correlation exists "between perceived high levels of corruption and low economic growth"—and the causal arrow points in both directions, creating vicious circularity.[60] The social costs of bribery and corruption predominantly relate to misallocation of the budget. Bribery provides incentives for officials to select "white elephant" projects that provide more bribe-getting opportunities (i.e., capital-intensive, sophisticated, custom-built products such as airports, military bases, military armaments, and

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52. Ahmadi, *supra* note 14, at 363–65; Gupta et al., *supra* note 33, at 29; *see also* LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 86–87 (explaining how bureaucratic government actors, by creating policies that favor certain sectors over others, misallocate state resources); Rose-Ackerman, *The Political Economy of Corruption*, *supra* note 6, at 3–4 (discussing the distributive consequences of corruptive contracting); Daron Acemoglu & Thierry Verdier, *The Choice Between Market Failures and Corruption*, 90 AMER. ECON. REV. 194, 195 (2000) (explaining how corruption improperly redirects subsidies and reduces tax revenues, which undermines the purpose of government assistance); KLITGAARD, *supra* note 4, at 46 tbl.1 (charting the costs of corruption, one of which includes its negative impact on distributive reallocation of government resources).

53. Ahmadi, *supra* note 14, at 366.

54. *Id.* (quoting U.N. Dev. Programme, Human Dev. Report Office, *Regional Overview of the Impact of Failures of Accountability on Poor People*, 17 (Nov. 2002) (by Ahmed Mohiddin) [hereinafter *Regional Overview*]).

55. Ahmadi, *supra* note 14, at 366.

56. *Id.*

57. *Id.*

58. *See Regional Overview*, *supra* note 54, at 2, 16 (providing Africa as an example of a region that has been affected by the developmental costs of political unaccountability, including those caused by administrative corruption).

59. Rose-Ackerman, *The Political Economy of Corruption*, *supra* note 6.

60. Spahn, *supra* note 13, at 870–71; *see also* Susan Rose-Ackerman, *Introduction* to INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION, at xvi–xvii (Susan Rose-Ackerman ed., 2006) (outlining that a correlation does exist between low economic growth and perceived high levels of corruption).

natural-resource extraction systems).[61] To make room for such projects, the government bypasses spending on medical supplies for the poor, feeder roads to villages, education programs, and public-health programs.[62] In addition, bribery-friendly regulatory environments (1) "erode safety regulations," (2) "distract business from tending to safety and quality controls,"[63] and (3) negatively impact pollution control and the environment.[64] Bypassing these programs and controls leads to the obstruction of the human rights of the poor[65] and positively correlate with income inequality.[66]

Significantly, corruption leads to the creation of violent conflicts.[67] Political instability results when government officials sacrifice their declared programs and constituents to receive illegal payments.[68] Mo's 2001 economic analysis demonstrated that political instability accounts for fifty-three percent of corruption's effect on growth, over human capital, private investment, and other factors.[69] If it does not create conflict, it will likely breed cynicism, apathy, and mistrust.[70] Consider, for example, tax collectors in corrupt Ghana: farmers understandably refused to pay

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61. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 68–69 ("The most visible sign of the adverse impact of corruption are 'white-elephant projects,' that is, projects that totally disregard public demand."); Spahn, *supra* note 13, at 870; *see also* Ahmadi, *supra* note 14, at 366–67 (discussing social programs that suffer due to corruption). One example given in Lambsdorff's book involves a report regarding a bottle-making factory in Mozambique that needed a machine available for $10,000. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 68. The manager bought an expensive version with only one supplier so he could over-invoice and pay himself a kickback. *Id.*

62. *Id.* at 76–77; *Regional Overview*, *supra* note 54, at 17–18; Ahmadi, *supra* note 14, at 366; Spahn, *supra* note 13, at 870. A 1997 study by Tanzi and Davoodi showed that corruption lowers infrastructure quality, based on the conditions of paved roads and power outages. Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* 9 (Int'l Monetary Fund, Working Paper No. 97/139, 1997). Additionally, a 2001 study by Gupta, Davoodi, and Tiongson shows that countries with high levels of corruption also provide low-quality public health care and experience high child-mortality rates. *See generally* Sanjeev Gupta et al., *Corruption and the Provision of Health Care and Education Services*, (Int'l Monetary Fund, Working Paper No. 00/116, 2000).

63. Spahn, *supra* note 13, at 861.

64. *Id.*; LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 77. In a 2004 study based on a cross section of 100 countries, Welsch showed corruption both directly, via the ineffectiveness of regulation where bribery exists, and indirectly, via the lower income levels experienced in corrupt countries. *See generally* Heinz Welsch, *Corruption, Growth, and the Environment: A Cross-Country Analysis*, 9 ENV'T & DEV. ECON. 663 (2004). Corruption has also been shown to limit the effect of conservation projects. *See generally* R.J. Smith et al., *Governance and the Loss of Biodiversity*, 426 NATURE 67 (2003).

65. Ahmadi, *supra* note 14, at 367; *Regional Overview*, *supra* note 54, at 17–18; Spahn, *supra* note 13, at 861; Press Release, CIET Int'l, Corruption: The Invisible Price-Tag on Education (Oct. 12, 1999) (available at http://www.ciet.org/_documents/200622318486.doc).

66. Ahmadi, *supra* note 14, at 367.

67. Johann Graf Lambsdorff, *How Corruption Affects Economic Development*, *in* Global Political Corruption Report 2004 310, 311 (Robin Hodess et al. eds., 2004) [hereinafter Lambsdorff, *How Corruption Affects Economic Development*]; Ahmadi, *supra* note 14, at 367.

68. Lambsdorff, *How Corruption Affects Economic Development*, *supra* note 67, at 311. Mauro's study showed that decreased investment is also responsible for decreased growth to a considerable extent. Mauro, *supra* note 33, at 704.

69. Mo, *supra* note 25, at 76.

70. *See id.* at 74 ("This opportunity for increased inequality [via corruption] . . . generates psychological frustration to the underprivileged . . . .").

taxes when the aristocrats collecting them were "fast developing pot bellies and paunches."[71]

One commentator recognized that systemic bribery opens gateways for organized crime.[72] While developed states often serve as the home base for many transnational criminal organizations (TCOs), such organizations often prey on developing countries and other regimes weakened by systemic corruption.[73] These global networks of organized crime "exploit corrupted regimes' weaknesses," using them for drug trade, illegal arms trade, human trafficking,[74] and terrorist-group funding.[75]

China's "Shanghai Style" crony capitalism in the 1980s and 1990s, which ultimately "distorted economic liberalization" at the expense of Chinese nationals and entrepreneurs, provides an example of the costs of corruption.[76] The entry of multinationals during the 1980s into the newly-liberalized Chinese economy and the willingness of Chinese officials to satisfy their demands led to a significant increase in bribery.[77] Land developers bribed officials to acquire "sweetheart" deals on land, then turned to officials' coercive tactics, such as land grabs resulting in forced eviction, to enforce their land rights.[78] Land grabs increased by fifteen times in the 1990s alone.[79] The results were crippling. In addition to increased violent protests and the financial costs of bribe-induced dealing and tax breaks, China faced social costs that continue today, including rising illiteracy, which increased by as many as thirty million people between 2000 and 2005.[80]

## II. THE FOREIGN CORRUPT PRACTICES ACT

### A. *Historical Development of the Foreign Corrupt Practices Act*

The FCPA was enacted in response to heightened public awareness of the increased incidence of bribery among American businesses.[81] In 1976, the Securities

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71. KLITGAARD, *supra* note 4, at 45.

72. Spahn, *supra* note 13, at 889–90 (citing Kelly M. Greenhill, *Kleptocratic Interdependence: Trafficking, Corruption, and the Marriage of Politics and Illicit Profits*, *in* CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER 96, 99 (Robert I. Rotberg ed., 2009)).

73. *Id.* at 890 (citation omitted).

74. Nearly ten percent of the female population of Moldova was trafficked by TCOs in the first decade after the USSR's collapse. *Id.* (citation omitted).

75. *Id.* at 890.

76. Spahn, *supra* note 13, at 877.

77. *See id.* at 877–78, 881 (referring to marked increases in the size and frequency of bribes).

78. *Id.* at 878.

79. *Id.*

80. *Id.* at 878–79.

81. *See* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 1 (2nd ed. 1999) (discussing the enactment of the FCPA as a result of disclosures of bribery among American corporations in relation to the Watergate investigation); Bader & Shaw, *supra* note 27, at 630–31 (detailing the enactment of the FCPA following congressional hearings on corporate bribery); Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 883 (2011) (stating that the enactment of the FCPA followed disclosures of American, corporate bribery by the SEC);

and Exchange Commission submitted a report to Congress chronicling widespread bribery and other illegal payments.[82] Subsequent congressional reports revealed that 527 companies, 117 of which ranked in the Fortune 500,[83] had made substantial bribes and other questionable payments to foreign officials in excess of $300 million.[84] Among the highest bribe payouts were Exxon at $59.4 million, Lockheed at $55 million, and Boeing at $50.4 million.[85]

Congress expressed concern.[86] The report of the House Committee on Interstate and Foreign Commerce stated that these bribes were "counter to the moral expectations and values of the American public," "erode[d] public confidence in the integrity of the free market system," "embarrass[ed] friendly governments, lower[ed] the esteem for the United States among the citizens of foreign nations, and len[t] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations."[87] The Senate Committee on Banking, Housing, and Urban Affairs stated in its 1977 Report:

> Many U.S. firms have taken a strong stand against paying foreign bribes .... Unfortunately, the reputation and image of all U.S. businessmen has been tarnished by the activities of a sizeable number ... of American firms. A strong antibribery law is urgently needed to [stop] these corrupt practices ....[88]

Legislative history reveals that, in enacting the FCPA, Congress sought to prevent and prohibit bribery "that (1) prompts officials to misuse their discretionary authority and (2) disrupts market efficiency and United States foreign relations ...."[89] Congress enacted the FCPA in 1977.[90]

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Thomas, *supra*, note 43, at 442–443 (listing a series of public corruption and bribery incidents that lead to the adoption of the FCPA); Salbu, *supra* note 26, at 239 ("The FCPA was passed by Congress in 1977, in reaction to a flurry of scandals during the 1970s and an SEC report of questionable payments made to foreign officials by hundreds of U.S. companies.").

82. COMM. ON BANKING, HOUS., & URBAN AFFAIRS, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976); Bader & Shaw, *supra* note 27, at 630–631.

83. H.R. REP. NO. 95–640, at 4 (1977).

84. Bader & Shaw, *supra* note 27, at 630 n.19 (citation omitted).

85. *Id.*; CRUVER, *supra* note 81, at 5–6. Involved industry sectors included "drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services; and chemicals." EHUD MENIPAZ & AMIT MENIPAZ, INTERNATIONAL BUSINESS 76 (2011).

86. *See* United States v. Kay, 359 F.3d 738, 746 (5th Cir. 2004) (discussing the legislative history of the FCPA).

87. H.R. REP. NO. 95–640, at 4–5.

88. S. REP. NO. 95–114, at 4 (1977) (Conf. Rep.).

89. *Kay*, 359 F.3d at 747.

90. CRUVER, *supra* note 81, at 7–11.

### *B. The Antibribery Provisions*

Generally, the antibribery provisions of the FCPA make it a crime for certain actors to engage in bribery. The prohibition applies to: (1) American and foreign corporations with registered securities or principle places of business in—or that are organized in—the U.S.;[91] (2) citizens, nationals, and residents of the U.S.;[92] and (3) any person who acts to further an instance of bribery while on American soil.[93] The antibribery provisions criminalize any such actor using any "instrumentality of interstate commerce"[94] corruptly to provide (or promise to provide) anything of value[95] to a foreign official in order to obtain or retain business with or for any person by (i) influencing official actions, (ii) inducing him to violate his lawful duty, (iii) inducing him to influence or affect an act or decision of the government, or (iv) securing improper advantage.[96] The antibribery provisions cover completed and attempted bribes, as well as using third parties to consummate bribes.[97]

The FCPA has been substantially amended twice since its enactment. Congress' first 1988 amendment expressly set out an exception and two affirmative defenses. The prohibition does not apply to "payment[s] to a foreign official . . . to expedite or to secure [his] performance of a routine governmental action . . . ."[98] Congress created this exception to alleviate concerns that U.S. companies would be disadvantaged where these payments were the social norm.[99] Additionally, the FCPA recognizes affirmative defenses where the payment was lawful in the foreign country and where the payment was directly related to marketing products and services or executing a government contract.[100]

The most recent amendment was the 1998 amendment, which implemented and codified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions promulgated by the Organization of Economic Cooperation and Development (OECD).[101] This amendment expanded the reach of the FCPA in three ways. First, it "broadened the meaning of bribery to include illicit payments that secure 'any improper advantage,'" thus focusing on the bribing party's

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91. 15 U.S.C. §§ 78dd-1, -2 (2006 & Supp. 2011); Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS INT'L TRADE L.J., Winter 2008, at 5; Georgis, *supra* note 2, at 256.

92. 15 U.S.C. § 78dd-2; Taylor, *supra* note 91, at 5; Georgis, *supra* note 2, at 256.

93. 15 U.S.C. § 78dd-3; *see also* Georgis, *supra* note 2, at 256 (explaining that the provisions apply to "three groups of actors: (1) issuers, (2) domestic concerns, and (3) any person who acts in furtherance of the bribery payment while on U.S. territory").

94. Qualifying uses include a "single letter, fax, cable, phone call, airline ticket, etc." Taylor, *supra* note 91, at 5 (citing Lillian Blageff, *Guide to the Foreign Corrupt Practices Act*, *in* 1 FOREIGN CORRUPT PRACTICES REPORTER, 1–7 (2008)).

95. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

96. *Id.*; Taylor, *supra* note 91, at 5–6 (citation omitted); *see* Thomas, *supra* note 43, at 444–45 (describing the antibribery provisions "which comprise the 'heart' of the FCPA").

97. Taylor, *supra* note 91, at 5.

98. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b); *see* Georgis, *supra* note 2, at 253 (describing the "routine governmental actions" exception).

99. Georgis, *supra* note 2, at 251–53.

100. 15 U.S.C. §§ 78dd-1(c), -2(c), -3(c); *see also* Thomas, *supra* note 43, at 446 (citing examples, including travel and lodging expenses).

101. United States v. Kay, 359 F.3d 738, 753–54; Georgis, *supra* note 2, at 254; Thomas, *supra* note 43, at 447.

goal instead of its intended effect or influence on the official.[102] Second, it permitted extraterritorial application to any American national.[103] Third, it expanded jurisdiction to include "any person" who violated the anti-bribery provision while in the territory of the United States.[104] In light of these amendments, the FCPA is broad enough to reach a substantial amount of bribery occurring both abroad and in the United States, carried out by American and foreign nationals and entities.

FCPA enforcement has increased dramatically in recent years, particularly through self-reporting. Many firms are voluntarily disclosing FCPA violations in hopes of limiting the effects of prosecution.[105] One commentator claims "self-disclosure is the norm" in FCPA enforcement because it provides a healthier solution, allowing companies to "disinfect the wound" by facing the truth and alerting interested parties of violations and consequences.[106] Furthermore, both the Department of Justice (DOJ) and the Securities and Exchange Commission have stated that they "place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."[107] The DOJ's *Principles of Federal Prosecution of Business Organizations* obligate "federal prosecutors [to] consider a company's cooperation in determining how to resolve" a criminal case (i.e., by plea agreement).[108] Additionally, the U.S. Sentencing Guidelines incorporate consideration of these factors in order to issue a reduced sentence and/or fine.[109] Conversely, these Guidelines specifically disqualify corporations from reduced sentence and fine programs who unreasonably delayed reporting the defense, thereby reinforcing the incentive to self-report.[110]

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102. Georgis, *supra* note 2, at 255.

103. 15 U.S.C. §§ 78dd-1(g), dd-2(i); Georgis, *supra* note 2, at 255. This amendment also extended FCPA coverage to foreign citizens and businesses that violate the prohibition while in the territory of the United States. 15 U.S.C. § 78(a), dd-3; Thomas, *supra* note 43, at 448.

104. 15 U.S.C. § 78dd-3; Thomas, *supra* note 43, at 448.

105. Taylor, *supra* note 91, at 8.

106. Richard L. Cassin, *Corporate Behavior Can Change. Really*, FCPA BLOG (Dec. 12, 2012, 4:23AM), http://www.fcpablog.com/blog/2012/12/12/corporate-behavior-can-change-really.html. Between January and July 2009, four FCPA cases arose involving self-reporting—Morgan Stanley, Sun Microsystems, eLandia, and Helmerich & Payne. *See, e.g.*, David Barboza, *Morgan Stanley Fires Executive in China on Suspicions of Bribery*, N.Y. TIMES, Feb. 13, 2009, at B6, *available at* http://www.nytimes.com/2009/02/13/business/worldbusiness/13morgan.html?_r=0 (discussing Morgan Stanley's self-reporting of the bribery actions of an executive); Richard L. Cassin, *What's the Impact of Sun's FCPA Disclosure?*, FCPA BLOG (May 12, 2009, 7:43 PM), http://www.fcpablog.com/blog/2009/5/12/whats-the-impact-of-suns-fcpa-disclosure.html (discussing Sun Microsystems' self-disclosure); Richard L. Cassin, *In Step with the DOJ*, FCPA BLOG (Apr. 20, 2009, 8:02 PM), http://www.fcpablog.com/blog/2009/4/21/in-step-with-the-doj.html (detailing eLandia's post-acquisition cooperation with the Department of Justice (DOJ)); Richard L. Cassin, *Driller Resolves FCPA Charges*, FCPA BLOG (July 30, 2009, 4:28PM), http://www.fcpablog.com/blog/2009/7/30/driller-resolves-fcpa-charges.html (regarding Helmerich & Payne's settlement with DOJ for FCPA charges).

107. CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 54 (2012), *available at* http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf.

108. *Id.*

109. *Id.*

110. *Id.*

### C. *The Value of the Foreign Corrupt Practices Act Despite Its Costs*

#### 1. The Criticisms and Costs of the Foreign Corrupt Practices Act Rebutted

The FCPA has been criticized on various grounds since its enactment. It has been criticized as a unilateral attempt to legislate morality in foreign trade,[111] as too vague in its terminology (especially the business nexus requirement, which is addressed in later amendments to the statute),[112] and as unenforceable internationally because enforcement is hampered by the potential lack of access to foreign evidence and witnesses.[113]

The most consistent and resounding criticism has been that compliance with the FCPA has cost American companies overseas business by crippling their competitive position abroad.[114] A 1999 report of the Congressional Research Service estimated that the FCPA's anti-bribery provisions cost up to $1 billion annually in lost U.S. export trade.[115] Additionally, the Department of Commerce reported that in about that same time period bribery was thought to have influenced the outcome of 294 international contracts involving trade valued at $145 billion.[116] Regardless, Congress has continued to support and enforce the FCPA.

The widespread, deleterious costs of bribery and corruption coupled with the pervasiveness of bribery-inducing situations produce ample support for legal liability for bribery through the FCPA despite its costs.[117] In fact, corporations who actively combat bribery may benefit. For example, private companies may willingly comply with the FCPA in order to avoid being defrauded by their own employees,[118] developing a culture of dishonesty within the company,[119] damaging their reputation,

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111. Bader & Shaw, *supra* note 27, at 628 (citing Lanpher & Phillips, *Time Has Come for Overhaul of the Foreign Bribery Act*, LEGAL TIMES OF WASH., Mar. 30, 1981, at 29); Salbu, *supra* note 26, at 275.

112. Bader & Shaw, *supra* note 27, at 632; *see* Salbu, *supra* note 26, at 262 ("[Detractors can argue] that supposed improvements in FCPA clarity are illusory, so that the 1988 Amendments do little to reduce compliance anxiety associated with gray-area situations."); ANDREW WEISSMAN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6 (2010) (citing MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL 30079, FOREIGN CORRUPT PRACTICES ACT (1999)). The business nexus requirement is the requirement that the bribe be part of an effort to assist the corporation in "obtaining or retaining business for or with, or directing business to, any person." Taylor, *supra* note 91, at 6 (citation omitted).

113. Bader & Shaw, *supra* note 27, at 632.

114. *Id.* at 633; Ahmadi, *supra* note 14, at 368; WEISSMAN & SMITH, *supra* note 112, at 6; Salbu, *supra* note 26, at 262. Salbu provides a particularly vehement argument in this regard, but he also states that "[b]eliefs that elevating all countries to the FCPA's lofty moral climate . . . appear to be unrealistic." *Id.* This assertion is now questionable as the paper was written before the OECD Convention was incorporated into the FCPA and other countries adopted similar regulations

115. WEISSMAN & SMITH, *supra* note 112, at 6 (citation omitted).

116. Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 551 (2000).

117. *See supra* Part I.B.

118. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 167–68. For example, a German airport operator faced bribery allegations that were dropped when it appeared that employees had instead embezzled the money unbeknownst to corporate officials. *Id.* Similar situations arose with French firm Elf Aquitaine and German firm Mannesmann. *Id.*

119. *Id.* at 168–69

(Companies that participate in corrupted dealings . . . do themselves no favors. Although a

and devoting valuable resources to legally unenforceable transactions.[120] Additionally, in a study for the World Bank, Klapper and Love found that improved corporate governance measures are highly correlated with better operating performance and market valuation—relatively more so in emerging markets with weak shareholder protection and poor judicial efficiency.[121] These findings indicate that, even absent compliance mechanisms like the FCPA, firms that create and implement effective corporate governance measures prohibiting bribery and encouraging transparency will reduce their cost of capital and improve their performance and valuation.[122] Thus, FCPA compliance actually *benefits* corporate performance to some degree.

Finally, bribery is in itself very costly for corporations operating abroad. A 2002 World Bank report provided estimates of the percentage of revenues paid out in certain countries in Europe and Central Asia as bribes: the highest percentage estimate was in the Krygyz Republic at about 3.75%, while the lowest was Estonia at about 0.5%.[123] Most countries hovered between 1% and 2.5%.[124] While these numbers seem inconsequential as a percentage of revenues, their affect on gross profits is much more pronounced. For example, in 2002, corporations operating in the Commonwealth of Independent States[125] were paying out "at least [ten] percent of their gross margins in bribes."[126]

### 2. The Worldwide Impact of Foreign Corrupt Practices Act Enforcement

A recent global wave of anticorruption law enactment measurably alleviates some concerns regarding disadvantage for American corporations. In enacting the FCPA, the United States was "the first country to outlaw the payment of bribes to

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> business deal here or there may be obtained, the cost includes creating a culture of dishonesty within the company. If cheating or bribery or fixing the books are tolerated for certain purposes, a company can never again be sure that these dealings are not tolerated for others.)

(quoting OECD, BUSINESS APPROACHES TO COMBATING CORRUPT PRACTICES (2003)).

120. LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 169, 172.

121. *See generally* LEORA F. KLAPPER & INESSA LOVE, CORPORATE GOVERNANCE, INVESTOR PROTECTION, AND PERFORMANCE IN EMERGING MARKETS (World Bank, Policy Research Working Paper No. 2818, 2002). The study used data from a Credit Lyonnais Securities Asia report that produced corporate governance rankings using information from "495 firms across 25 emerging markets and 18 sectors." *Id.* at 3.

122. *See id.* at 26

> (Our results suggest that even prior to legal and judicial reform, firms can still reduce their cost of capital by establishing credible investor protection provisions. Our paper proposes that firms in countries with poor investor protection can use provisions in their charters to improve their corporate governance, which may improve their performance and valuation.).

123. CHERYL GRAY ET AL., WORLD BANK, ANTICORRUPTION IN TRANSITION 2: CORRUPTION IN ENTERPRISE-STATE INTERACTIONS IN EUROPE AND CENTRAL ASIA 1999–2002 22–23 (2004).

124. *Id.*

125. The Commonwealth of Independent States includes Aremnia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine. *About Commonwealth of Independent States*, CIS STAT, www.cisstat.com/eng/cis.htm (last visited Feb. 21, 2014).

126. GRAY ET AL., *supra* note 123, at 23.

foreign officials" and became the worldwide leader in setting anticorruption policies.[127] The adoption of the FCPA sparked a global anticorruption movement, which resulted in international organizations and nations adopting similar regulations.[128] World Bank's conservative estimate that worldwide bribery results in approximately $1 trillion flowing from the private to public sector annually highlights the importance of this movement.[129] Most notably, as mentioned above, forty countries, including the United States, have signed the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention),[130] thereby agreeing to enact legislation in their respective countries prohibiting bribery of foreign officials.[131] The signing of the Convention was the culmination of "many years of diplomatic effort to gain international support in the fight against international bribery."[132]

Additionally, in recent years worldwide efforts to raise awareness of and combat corruption have been successful. In 1996, U.S. and Latin American officials drafted and subscribed to the Inter-American Convention Against Corruption (IACAC) as part of the Organization of American States.[133] Twenty-nine countries have ratified it and four have acceded to it,[134] agreeing to commit to adopting laws "that are the rough equivalent of the FCPA."[135] The IACAC also provides for "extradition, asset seizure, and evidence-gathering" assistance among signatories.[136]

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127. Georgis, *supra* note 2, at 248; Einhorn, *supra* note 43, at 521.

128. Einhorn, *supra* note 43, at 521.

129. *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann,* WORLD BANK, http://go.worldbank.org/KQH743GKF1 (last visited Feb. 25, 2014)

130. *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-bribery convention.htm (last visited Feb. 25, 2014) (including Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States).

131. OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS, art. 1, para. 1 (2011) [hereinafter OECD, CONVENTION ON COMBATING BRIBERY], *available at* www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf; James P. Wesberry, Jr., *International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth Is, the Corruption Eruption May Be Capped*, 18 NW. J. INT'L L. & BUS. 498, 519 (1998); Jordan, *supra* note 81, at 894; Thomas, *supra* note 43, at 447.

132. Thomas, *supra* note 43, at 447.

133. *See generally* Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 424, *available at* http://www.oas.org/juridico/english/treaties/b-58.html; Salbu, *supra* note 26, at 234.

134. *Signatories and Ratifications: B-58: Inter-American Convention Against Corruption*, ORG. OF AM. STATES, http://www.oas.org/juridico/english/Sigs/b-58.html (last visited April 21, 2013). Ratifying signatories are Argentina, Antigua & Barbuda, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States, Uruguay, and Venezuela. *Id.*

135. Salbu, *supra* note 26, at 234. *See* Inter-American Convention Against Corruption, *supra* note 133, art. 3 (setting forth the measures signing parties agree to enact within their institutional systems).

136. Salbu, *supra* note 26, at 234.

The World Bank and the International Monetary Fund (IMF) have also committed to fighting corruption. The President of World Bank in 1996 strongly endorsed anticorruption actions when he stated:

> [W]e need to deal with the cancer of corruption .... [C]orruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors .... [It] is a major barrier to sound and equitable development .... [T]he Bank Group will not tolerate corruption in programs that we support ....[137]

The IMF expressed support, albeit less fervently, for anti-corruption measures in 1997 when it issued guidelines warning that "[f]inancial assistance from the IMF ... could be suspended or delayed ... if there is reason to believe [poor governance] could have significant macroeconomic implications that ... puts in doubt the purpose and use of the IMF resources."[138] The IMF's Executive Board further expressly instructed IMF staff to take into account corruption and accountability in potential borrowing countries.[139] In 1997, the World Bank and the IMF worked together to suspend $292 million in loans to Kenya, citing the country's unwillingness to address pervasive bribery and corruption.[140] On April 17, 2013, the World Bank instituted its longest-ever sanction in a negotiated settlement when it debarred SNC-Lavalin and its 100 subsidiaries from bidding on World Bank development projects because of "alleged corruption in Bangladesh, Cambodia, Libya, and Algeria."[141]

Significantly, on January 1, 2013, a new Russian law went into effect imposing an affirmative obligation on organizations to develop and implement preventive measures with regard to corruption and bribery.[142] The new law was added to Russia's 2008 Law on Combating Corruption and appears to impose even greater obligations than the U.S. FCPA or the U.K. Bribery Act.[143] This is both striking in that Russia has consistently ranked among Transparency International's most corrupt countries,[144] and promising in that it may pave the way for other corruption-

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137. Wesberry, *supra* note 131, at 501 (citation omitted).

138. *Id.* at 515 (citing INT'L MONETARY FUND, THE ROLE OF THE IMF IN GOVERNANCE ISSUES: GUIDANCE NOTE para. 16 (1997)).

139. *Id.*

140. *Id.* at 517.

141. Richard L. Cassin, *Ten-Year World Bank Debarment for SNC-Lavalin*, FCPA BLOG (Apr. 18, 2013, 6:28AM), http://www.fcpablog.com/blog/2013/4/18/ten-year-world-bank-debarment-for-snclavalin.html#.

142. Thomas Firestone, *New Russia Law Goes Beyond FCPA, Bribery Act*, FCPA BLOG (Mar. 5, 2013, 8:02AM), http://www.fcpablog.com/blog/2013/3/5/new-russia-law-goes-beyond-fcpa-bribery-act.html; Jaclyn Jaeger, *Russia Anti-Bribery Law Sets New Compliance Standards*, COMPLIANCE WEEK (Mar. 26, 2013), http://www.complianceweek.com/russia-anti-bribery-law-sets-new-compliancestandards/article/285702/. Firestone, the first to report on the matter, is senior counsel in the Moscow office of Baker & McKenzie. *Id.*

143. *Firestone, supra* note 142.

144. *See, e.g.*, TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012 (2012) (ranking

ridden countries to enact similar laws. Finally, in 2008 the United States was actively coordinating investigations "with at least 23 other countries."[145] Thus, U.S. implementation of antibribery provisions has prompted a successful movement in the world community to negotiate and implement major multilateral conventions on bribery and, more generally, corruption.[146]

## III. CORPORATE ACCOUNTABILITY FOR HUMAN-RIGHTS VIOLATIONS

Multinational corporations operating abroad, particularly in developing nations, "bear almost no obligations under public international law" or national law concerning human-rights violations.[147] Part III discusses justifications for the imposing corporate aiding-and-abetting liability through an amended ATCA.

### *A. The Regulatory Challenge*

Modern corporations transcend traditional national legal control because, while legal systems are national, corporations are increasingly multinational.[148] The picture of globalization today is one of "some 70,000 transnational firms, together with 700,000 subsidiaries and millions of suppliers" engaging in global transactions.[149] Corporations have grown to a level of economic power that dwarfs most nations—as of 2010, 42 of the 100 largest economies in the world were corporations.[150] As both cause and effect of growing corporate economic power, national legal systems have increasingly failed to exercise control over business.[151] Corporations have also learned to evade national regulations, currency controls, taxation, and union

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Russia as the most corrupt nation in the G20); TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2011 (2011) (ranking Russia as highly corrupt and less corrupt than only thirty-two countries worldwide). Transparency International's purpose is fighting corruption and has become the "most prominent" and "active and vocal international non-governmental organization . . . in the fight against corruption." LAMBSDORFF, INSTITUTIONAL ECONOMICS, *supra* note 3, at 20.

145. Taylor, *supra* note 91, at 3.

146. *Id.*

147. Logan Michael Breed, Note, *Regulating Our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1006 (2002).

148. U.N. Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporation and Other Business Enterprises*, para. 12, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) [hereinafter *Report of the Special Representative*]; Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 58–59 (2002).

149. U.N. Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, para. 11, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *Interim Report*].

150. Tracey Keys & Thomas Malnight, *Corporate Clout: The Influence of the World's Largest 100 Economic Entities*, GLOBAL TRENDS 8–9 (2010), *available at* http://www.globaltrends.com/images/stories/corporate%20clout%20the%20worlds%20100%20largest%20economic%20entities.pdf.

151. Stephens, *supra* note 148, at 58–59; David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 938 (2004); *see also* Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 84 (1999) ("Even though the global community is aware of the tremendous power of [multinational corporations], private corporate entities bear almost no obligations under public international law.").

demands by moving operations through different facilities and dispersing their corporate form to transform into a stateless entity.[152]

### *B. The Case for Corporate Accountability*

Presently, corporations are capable of extracting economic gains by violating basic human rights (e.g., oppressive working conditions, slavery, genocide, and severe pollution) with few consequences because current economic and legal incentives are insufficient to produce voluntary compliance with international human-rights laws.[153] Not surprisingly, these harms are most prevalent in low-income countries—many of which have just emerged from or are still in conflict—in which the rule of law is weak.[154] Moreover, corporate self-regulation works—if at all—only in democratic host environments because government leaders who share in venture profits have no incentive to enforce human-rights norms.[155]

#### 1. The Tremendous Economic Might of Corporations

Imposing aiding-and-abetting liability on corporations for human-rights violations is warranted given corporations' economic might. Economically mighty corporations engage in corrupt and abusive behavior, which generates extensive social, political, and economic costs for the host nation.[156] The basis of economic might is vast corporate wealth coupled with developing nations' foreign direct-investment needs.[157] Foreign direct investment supports development of technology and human capacity, access to various forms of corporate governance, and innovation.[158] As a result, many host nations feel significant pressure to comply with the demands of multinational corporations because much-needed foreign capital is at stake.[159]

Corporate economic might can be exercised to facilitate increased enjoyment of human rights. There is no doubt, however, that it is often exercised to perpetuate

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152. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. REV. 1, 8 (1993); Stephens, *supra* note 148, at 58–59.

153. John Ruggie of the United Nations, stated,

> The root cause of the business and human rights predicament today lies in the governance gaps . . . between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

*Report of the Special Representative*, *supra* note 148, para. 3. *See also* Stephens, *supra* note 148, at 49, 53 (discussing "the harsh reality that corporations often profit from abusive behavior").

154. *Report of the Special Representative*, *supra* note 148, para. 16.

155. Stephens, *supra* note 148, at 62–3. *See infra* Part III.B.1.

156. *See supra* Part I.B.

157. Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 204–5 (2010).

158. *Id.* In 2008, forty-three percent of all foreign direct investment occurred in transitional or developing economies. *Id.* at 205.

159. *Id.*; *Report of the Special Representative*, *supra* note 148, para. 14.

human-rights violations without significant backlash from host governments unable or unwilling to displease them.[160] Corporations may reinforce problematic socio-cultural, political, and legal norms where they engage in gender-discriminatory wage payments or other similar behavior.[161] They may also affect government action via lobbying, campaign contributions, or mere presence to secure greater protection or monopolize the market.[162] Often, multinational corporations avoid application or enforcement of important protective labor and environmental laws in host nations.[163] For example, in the 1990s, a Nike supplier successfully avoided paying minimum wage (only enough to cover 70% of the needs of one individual) to over 25,000 workers by seeking an exception on the argument that minimum wage would cause them hardship.[164] Corporations often are permitted to undercut environmental laws, as Union Carbide did in 1984 when its Bhopal, India plant leaked toxic gas, killing 2,000 people and injuring 200,000.[165]

Of growing concern is the incidence of direct and indirect corporate employment of local armies and unofficial military forces to provide security for operations.[166] In some situations, corporations have been accused of perpetrating egregious human-rights violations including genocide, war crimes, torture, rape, and crimes against humanity as a result of this "militarized commerce."[167] U.N. Secretary-General Special Representative John Ruggie's 2006 Interim Report surveyed sixty-five human-rights violations reported by nongovernmental organizations and discovered that two-thirds of those violations occurred in the

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160. SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS 2 (2004); Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 7 (2012).

> [F]oreign direct investment injected by TNCs into developed and developing countries alike can and does bring jobs, capital, and technology, and thereby protects and promotes the rights to work and to adequate living standards, along with such derivative rights as health, education, housing, and even political freedoms. That said, it is equally certain that human rights abuses by TNCs do occur, and do so frequently in the sphere of economic, social, and cultural rights.

Kinley & Tadaki, *supra* note 153, at 933 (citations omitted). *See also Interim Report*, *supra* note 149, para. 21 (stating that globalization has led to the possible involvement of corporations operating abroad in human-rights violations).

161. Anderson, *supra* note 157, at 205.

162. *Id.* at 206.

163. *Id.*; JOSEPH, *supra* note 160, at 2. John Ruggie's U.N. *Interim Report* analyzes data of sixty-five instances of human-rights violations reported by nongovernmental organizations. *Interim Report*, *supra* note 149, paras. 25–26. He finds that two-thirds of the abuses occurred in the extractive industries, where violations of labor and environmental rights were among the lesser offenses, and a significant portion occurred in the food and beverage industry, where the chief concern was infringement of labor rights. *Id.*

164. Anderson, *supra* note 157, at 207.

165. JOSEPH, *supra* note 160, at 2.

166. *Id.* at 3; *see Report of the Special Representative*, *supra* note 148, para. 16 (stating that a significant number of the allegations of human-rights violations were linked to corporations acting complicitly with governments or armed factions); *e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 22 (D.C. Cir. 2011); Bowoto v. Chevron Corp., 557 F.Supp.2d 1080, 1083 (N.D. Cal. 2008); Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 247–48 (2d Cir. 2009); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *aff'd* 2013 WL 1628935 (2013); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 745–46 (9th Cir. 2011) (en banc); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 161 (5th Cir. 1999).

167. JOSEPH, *supra* note 160, at 3; *e.g.*, *Doe*, 654 F.3d at 22; *Bowoto*, 557 F.Supp.2d at 1083; *Presbyterian Church of Sudan*, 582 F.3d at 247–48; *Kiobel*, 621 F.3d at 116; *Sarei*, 671 F.3d at 745–46; *Beanal*, 197 F.3d at 161.

resource extraction industries and many involved harms by security forces, complicity in crimes against humanity, and killing, in addition to labor rights abuses and corruption.[168] Specific examples include Royal Dutch Petroleum, Shell, and Chevron in connection with Nigerian operations, Talisman in the Sudan, Exxon and Freeport-McMoran in Indonesia, Rio Tinto in Papua New Guinea, and BP in Colombia.[169]

Economic might is not only destructive in that it weakens human-rights protections in host nations and paralyzes host nations' willingness to address human-rights violations;[170] it is most problematic because those same scenarios open the door to *and* are reinforced by corruption, sometimes absent any direct, specific cash payment.[171] As discussed above in Part I.A, the incidence and extent of corruption depends on several factors, including the riskiness of corrupt deals based on the likelihood of detection and punishment—which is quite low in these cases—and the relative bargaining power of the briber versus the official, which is very high.[172] Thus, the presence of modern multinational corporations in developing countries presents significant dangers made even more acute given corporate might.

### 2. The Proper Allocation of the Costs of Human-Rights Violations

From an economic perspective, imposition of corporate liability for aiding and abetting human-rights violations is warranted because ill-gotten profits should not become the foundation of future corporate growth and because the social costs of doing business should be placed on the corporation.[173] First, absent corporate liability, ill-gotten gains would remain within a corporation, enhancing corporate value out of proportion to the social costs and value of business.[174] Providing compensation to the victims of human-rights abuse disgorges the ill-gotten gains and redistributes them as justice and economics commands.[175] During the Holocaust, decisions regarding business arrangements with the Nazi regime were made on purely economic, amoral terms,[176] so shareholders and managers of various corporations enjoyed significant profit from Holocaust activities without directly confronting the human consequences of their business.[177] For example, financial

168. *Interim Report*, *supra* note 149, para. 25.

169. JOSEPH, *supra* note 160, at 3; *Doe*, 654 F.3d at 22; *Bowoto*, 557 F.Supp.2d at 1083; *Presbyterian Church of Sudan*, 582 F.3d at 247–48; *Kiobel*, 621 F.3d at 116; *Sarei*, 671 F.3d at 745–46; *Beanal*, 197 F.3d at 161; Kinley & Tadaki, *supra* note 153, at 934.

170. Anderson, *supra* note 157, at 204.

171. *See* JOSEPH, *supra* note 160, at 2–3 (providing Chile as an example of a country where corruption generally was so pervasive that it played a role in facilitating an attempted coup).

172. *See supra* Part II.C.1.

173. *See* Stephens, *supra* note 148, at 46–47 (discussing the equities of compensation for those harmed by human-rights violations committed by corporations).

174. *Id.* at 49–50. *Cf.* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2182 [hereinafter Skyes, *Corporate Liability*] (providing economic perspectives on allocation of social costs with corporate vicarious liability).

175. Stephens, *supra* note 148, at 47.

176. *Id.* at 46.

177. *Id.* at 49.

corporations profited by retaining assets of murdered Jews.[178] Companies such as Ford, Volkswagen, BMW, and Daimler-Benz allegedly exploited slave labor provided by the Nazi party.[179] Deutsche Bank financed the construction of Auschwitz; Allianz insured buildings and facilities at concentration camps; pharmaceutical companies supplied medication and chemicals used in Nazi medical experiments; and IBM supplied punch cards for Nazi record-keeping.[180] These profits enriched successor corporations and were distributed to shareholders throughout the world.[181] Delaying disgorgement compounds the problem by complicating the analysis of what profits and growth is attributable to the abuses.[182] Courts struggled to properly disgorge gains of corporations who aided and abetted the Nazi regime because significant time had passed.[183] While no modern example parallels the horrific abuses of the Holocaust, similar concerns do arise with regard to modern-day abuses, including those referred to above in Part III.B.[184]

Second, Alan Sykes, a leading scholar on international law and economics, posits that the social costs of business operations should be properly allocated to the corporation to ensure that those costs are reflected in business output.[185] When businesses do not pay for the harms they cause, they avoid costs properly attributed to them, which leads to lower prices, and which in turn unduly expands risky activity.[186] This economic justification further explains why corporations are properly held vicariously liable for the human-rights violations aided and abetted by their agents.[187] Moreover, Sykes notes the formulation of an "indifference theorem," in which vicarious liability has no consequence on the amount the injured party collects where: "(a) employees have the financial resources to pay all judgments against them; (b) employers and employees can reallocate liability by contract costlessly . . . ; and (c) injured parties can always secure and execute judgments against employee-injurers when they alone are liable."[188] However, these conditions do not hold in many cases, particularly in this context.[189] Understandably, employees do not have assets sufficient to compensate for the commission of massive human-rights violations including genocide, war crimes, slavery, or torture.[190] Thus, suits brought

178. *See id.* at 47 (discussing how IBM benefitted from engaging the Nazis as clients).

179. *Id.* at 50.

180. *Id.* at 49–50.

181. Stephens, *supra* note 148, at 50.

182. *Id.* at 47.

183. *Id.*

184. *See supra* Part III.B.1.

185. Sykes, *Corporate Liability*, *supra* note 174, at 2184. Sykes is the former director of Stanford Law School's Master's Program in International Economic Law, Business, and Policy and now teaches at NYU Law School. He has published extensively on international economic law, law and economics, and international vicarious liability.

186. *Id.*

187. One commentator argues for vicarious liability for corporate superiors in addition to the corporation's vicarious liability. *See generally* Parker, *supra* note 160.

188. Sykes, *Corporate Liability*, *supra* note 174, at 2183 (citing Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345, 1358–60 (1982)). For more discussion on the economics of vicarious liability, see generally Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1239–40 (1984); Alan O. Sykes, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168, 185 (1981).

189. Sykes, *Corporate Liability*, *supra* note 174, at 2184.

190. *Id.*

directly against corporate agents for aiding and abetting human-rights violations will not sufficiently compensate plaintiffs or allocate social costs. Additionally, the costs of liability reallocation may be significant where a default legal rule exists and requires significant contracting to undo.[191] Of particular import here is that the injured party may have significant "difficulty identifying the individual employee responsible"[192] because the employee is only indirectly involved in the commission of the human-rights violation, is likely one of many employees working for a massive corporation, and may not even be located within the host nation.[193] Thus, vicarious liability has a significant effect on the injured party's ability to be fully compensated, which in turn affects whether or not a business will bear the full costs of operations.[194]

Three complications arise with regard to corporate vicarious liability for aiding and abetting human-rights violations. The first is the extent of a corporation's vicarious liability where the employee engages in human-rights violations with little or no connection to the corporation's business and with regard to which the corporation's monitoring ability is limited.[195] As a practical example, compare *Abdullahi v. Pfizer, Inc.*, in which Pfizer's physicians under direct corporate control allegedly undertook nonconsensual drug experimentation assisted by the Nigerian government,[196] with *Presbyterian Church of the Sudan v. Talisman Energy Inc.*, in which it was alleged that part of the revenues of oilfields in the Sudan that Talisman operated belonged to the Sudanese government and were used in the perpetration of war crimes, genocide, and other human-rights violations during civil war.[197] In *Abdullahi*, the ability of the corporation to control its own employees through rules of conduct and internal sanctions is clear, and in *Presbyterian Church of the Sudan*, Talisman's ability to control the Sudanese government's commission of war crimes and genocide seems fanciful. Where control and connection is limited, the corporation should not be vicariously liable because the corporation's monitoring opportunities are usually few, and the harm is equally likely to occur in the absence of any employment relationship, so it is not a true cost of the employer's business.[198] Harms that are not costs of a corporation's business operations should not be attributed to the corporation because the imposition of the costs will cause prices to exceed the social marginal cost of the goods, which will in turn lead to a smaller than socially-desirable scale of operations.[199]

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191. *Id.*

192. *Id.*

193. *See* Sykes, *Corporate Liability*, *supra* note 174, at 2183 (noting that the employee may have fled the jurisdiction). *Cf.* Parker, *supra* note 160, at 7 ("Corporate officers and employees may be more cautious regarding action or decisions that might lead to human rights violations, and more vigilant in preventing or remedying those crimes, if liability can be traced directly back to [them].").

194. Sykes, *Corporate Liability*, *supra* note 174, at 2184.

195. *Id.* at 2185–86; *see generally* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 581–93 (1988) (discussing scope of employment).

196. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169–70 (2d Cir. 2009).

197. Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 248–51, 264 (2d Cir. 2009).

198. *See* Sykes, *Corporate Liability*, *supra* note 174, at 2185–86 (discussing costs of attempting to monitor employees or agents when a monitoring capacity is inherently limited).

199. *Id.* at 2184–85.

The second complication is the proper economic calculation of damages. Damages must accurately reflect the social cost of the harm caused in order to effectuate proper cost internalization and cost-effective monitoring.[200] Importantly, punitive damages should not be assessed because they do not mirror social costs incurred by the corporation.[201] However, an upward adjustment in compensatory damages may be appropriate to ensure the corporation bears the full cost of human-rights violations (e.g., where the harms are only traceable to the corporation half the time).[202]

The third complication is the degree of liability properly allocated to a corporation for aiding and abetting human-rights violations.[203] An aider and abettor is, by definition, one who contributes to the ultimate commission of a harmful act but whose acts are not alone sufficient to cause the harm.[204] Liability for aiding and abetting is effective in achieving deterrence of harmful acts because it encourages the aider and abettor to withhold assistance important to the commission of the act.[205] Implicit is the idea that when important assistance is withheld, the harmful act is less likely to occur or its seriousness will be diminished.[206] Sykes points to Richard Posner, who argues that this justification for imposing aiding-and-abetting liability should not hold where the primary wrongdoer can obtain this assistance from another source.[207] However, some aiding-and-abetting liability is still appropriate though the assistance can be found elsewhere when human or social costs are very high.[208] Its utility is greatest where the corporation provides either essential assistance or assistance that significantly simplifies or cheapens human-rights violations, and the host nation cannot obtain comparable assistance from a corporation who will escape civil liability.[209] In summary, corporate liability for aiding and abetting human-rights violations is appropriate and proper from an economic perspective and essential from a harm-minimization perspective.

## IV. THE ALIEN TORT CLAIMS ACT

At present, the ATCA is the U.S. legal mechanism for general redress in tort for victims of human-rights violations aided and abetted by corporations. However,

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200. *Id.* at 2187.

201. *Id.*

202. *Id.* Sykes points to a situation in which employees commit harmful acts that can be traced to the corporation fifty percent of the time. *Id.* Sykes remarks that if the corporation is only held liable for the acts fifty percent of the time, in order for the corporation to bear the full cost of the harmful acts, the corporation's damages when liable must be adjusted—the corporation must pay double damages when liable. *Id.*

203. *Id.* at 2188.

204. Sykes, *Corporate Liability*, *supra* note 174, at 2188.

205. *Id.*

206. *Id.*

207. *Id.* at 2189 (citing RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW § 7.3 (8th ed. 2011)).

208. *Id.* at 2188, 2203. For example, consider a dressmaker who supplies a dress to a known prostitute versus a gun-seller who supplies a gun to a customer who has declared intent to commit murder. Sykes, again citing Posner, points out that, although either party can acquire their instrumentality for crime from another source, in the case of the gun, aiding-and-abetting liability is still appropriate given the probability and magnitude of resulting harm. *Id.*

209. *Id.*

the Supreme Court severely constricted the statute in two cases it decided.[210] Part IV will provide a brief look at the historical development of the act, its present doctrine, and common criticisms of corporate aiding-and-abetting liability under the ATCA.

### *A. Historical Development*

The ATCA was adopted at the first session of Congress as the Alien Tort Statute (ATS) as part of the Judiciary Act of 1789, sections of which addressed the right of aliens to commence litigation in American courts.[211] As the United States was attempting to win the respect of the international community, two incidents raised concerns regarding diplomatic immunity under U.S. federal law.[212] First was the 1784 Marbois Affair, when a former French military officer attacked Francis Marbois, a French consul, on a Philadelphia street in violation of the law of nations.[213] Then, in 1787, New York police officers entered the Dutch minister's home to arrest one of his domestic servants in violation of the minister's diplomatic immunity.[214] In both cases, the Continental Congress had to defer to state law because no federal law addressed these offenses.[215] Thus, Congress enacted the ATCA to address violations of the law of nations.[216]

The ATCA is a jurisdictional statute that states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[217] When passed, three actionable offenses existed: (1) violations of safe conduct, (2) infringement of the rights of ambassadors, and (3) piracy.[218] Between 1789 and 1980, the ATCA was used twenty-one times, and courts upheld ATCA jurisdiction only twice.[219] Recent years have seen a boom in ATCA litigation—between 1997 and 2004, a dozen cases cited over fifty corporate defendants for human-rights violations in Asia, the Middle East, Africa, and Latin America, for damages in excess of $200 billion.[220]

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210. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013) (providing a brief history of the ATCA); Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (detailing the jurisdictional nature of the ATCA that allows for redress of extraterritorial torts).

211. *Sosa*, 542 U.S. at 712; Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 716 (2012); Jonathon C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 459 (2011); Theresa M. Adamski, Note, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 FORDHAM INT'L L.J. 1502, 1510 (2011).

212. Adamski, *supra* note 211, at 1507–1509.

213. *Id.* at 1508.

214. *Id.* at 1508–09.

215. *Id.* at 1507–09.

216. *Id.*

217. 28 U.S.C. § 1350 (2006 & Supp. 2011).

218. Sosa v. Alvarez-Machain, 542 U.S. 692, 716, 723 (2004).

219. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. ECON. L. 245, 248 (2004).

220. *Id.* at 246.

### B. *The Present State of Alien Tort Claims Act Doctrine*

#### 1. General Principles of Alien Tort Claims Act Liability

In 1980, in *Filartiga v. Pena-Irala*, the first modern ATCA case, the Second Circuit held that "torture 'under color of official authority' is a clear violation of the law of nations and thus actionable under [the ATCA]."[221] In evaluating what constitutes a "violation of the law of nations," the court stated, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong . . . becomes an international law violation within the meaning of the [ATCA]."[222] Twenty-four years later, the Supreme Court weighed in, setting forth the standard for actionable conduct in *Sosa v. Alvarez-Machain*.[223] Though the Court in *Sosa* acknowledged that development in international law should be recognized in the ATCA, the Court repeatedly emphasized that the First Congress intended it to be a *limited* jurisdictional statute.[224] Thus, the Court fashioned a very narrow standard governing actionable conduct under the ATCA: "Any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to [conduct actionable in 1789]."[225] In other words, it had to be "specific, universal, and obligatory."[226]

Very recently, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* reversed endorsements of extraterritorial application implicit in *Filartiga* and *Sosa* and explicit in two circuit court decisions, *Doe v. Exxon Mobil Corp.* and *Sarei v. Rio Tinto, PLC*.[227] In *Exxon* and *Sarei*, the D.C. and Ninth Circuits, respectively, upheld extraterritorial application, reasoning that actions can be brought under the statute by non-American plaintiffs; that liability is based on international law; that piracy—which usually occurred outside U.S. territory—is one paradigmatic cause of action recognized under the ATCA; that a 1795 opinion by the then-U.S. Attorney General suggested that ATCA liability could extend to plunder of a British colony in Sierra Leone; and that Congress approved of extraterritorial application of the Torture Victims Protection Act.[228] However, in *Kiobel*, decided in April 2013, a five-Justice majority of the Court used the presumption against extraterritorial application to hold that the ATCA did not apply to extraterritorial conduct without further

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221. Sykes, *Corporate Liability*, *supra* note 174, at 2167 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)).

222. *Filartiga*, 630 F.2d at 888.

223. *Sosa*, 542 U.S. at 716–17.

224. *Id.* at 714, 715, 720, 724–25 ("Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions . . . ." "It was this narrow set of violations of the law of nations . . . that was probably on the minds of the men who drafted the ATS . . . .").

225. *Id.* at 725.

226. *Id.* at 732. One commentator defines this requirement as follows: A norm must be (1) "universal (widely accepted by the global community)," (2) "definable (sufficient criteria exist to determinate what amounts to a violation of the norm)," and (3) "obligatory (norm is non-derogable and binding)." Zia-Zarifi, *supra* note 151, at 91.

227. Sykes, *Corporate Liability*, *supra* note 174, at 2167, 2178.

228. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 745–46 (9th Cir. 2011) (en banc); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 22 (D.C. Cir. 2011).

Congressional action.[229] The Court applied the presumption on the grounds that it protects against overreaching by courts, members of which are unqualified to weigh matters of foreign affairs.[230] Tossing aside the popular piracy argument on the grounds that piracy occurred on the "high seas," the Court held that the presumption was not overcome because "clear indication of extraterritoriality" was absent and left decisions "triggering such serious foreign policy consequences . . . quite appropriately, to the political branches."[231]

The other four Justices, led by Breyer, concurred in the outcome, but mounted a vehement attack on the majority, arguing for a more flexible standard.[232] Breyer primarily attacked the majority for "wishing away this piracy example," and pointed to both the majority's and the *Sosa* Court's acknowledgement that pirates are "fair game wherever found."[233] Breyer remarked that, as acknowledged in *Sosa*, "today's pirates include torturers and perpetrators of genocide . . . [who are] like . . . [traditional] pirates, . . . 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'"[234] Ultimately, though Breyer found the facts insufficient justification for extraterritorial application, his concurrence made a strong case for a standard that balanced foreign relations and comity interests without shutting down extraterritorial application altogether.[235]

### 2. Actionable Conduct of Corporate Agents Under the Alien Tort Claims Act

The breadth of actionable torts depends on whether or not the defendant's allegedly tortious actions were infused with a state-action element.[236] A corporate agent's action can violate the law of nations in only three circumstances: (1) where the action violates a "norm of 'universal concern' for which individuals can be held liable without any need for state action," (2) where the action arises "under the color of state authority," or (3) where the corporate agent aids and abets a violation of international law carried out by state actors.[237] Allegations of conduct in violation of norms of universal concern "are uncommon . . . but do occasionally arise."[238] For

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229. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013).

230. *Id.* at 1664.

231. *Id.* at 1669.

232. [We] would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

*Id.* at 1671 (Breyer, S., concurring).

233. *Id.* at 1672.

234. *Id.* (citation omitted)

235. *Kiobel*, 133 S.Ct. 1659, 1670–78 (2013). The concurrence refused extraterritorial application because the defendant had only one office in New York, owned by an affiliate, which even if sufficient to provide general jurisdiction, was not enough in combination with the allegations of mere aiding-and-abetting liability. *Id.*

236. Sykes, *Corporate Liability*, *supra* note 174, at 2181.

237. *Id.* at 2170–71.

238. *Id.* at 2170; *see, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 743–44 (9th Cir. 2011) (en banc)

instance, in *Bigio v. Coca-Cola Co.*, the Second Circuit noted that there are certain violations that are punishable without any element of state action, such as "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[239] The Ninth Circuit in *Sarei v. Rio Tinto, PLC* expressed agreement, stating that war crimes and genocide were universal norms that could be violated by private actors while crimes against humanity and racial discrimination were not.[240]

On the other hand, actions under the color of state authority are more common.[241] For example, both *Filartiga* and *Sosa* involve state action—in the first, the tortious conduct was carried out by a state official, and in the second, the allegedly tortious conduct was carried out under the direction of a state official.[242] Absent state action, the *Filartiga* court would not have recognized the torture as actionable conduct under the ATCA because torture and summary execution carried out by a purely private actor do not violate any rule of international law.[243] Similarly, in *Aldana v. Del Monte Fresh Produce*, the Eleventh Circuit held that the mayor's active participation in torturing members of a labor movement was sufficient state action but that local police tolerated the use of private security forces and knew of wrongdoing was not.[244] In contrast, in *Abdullahi v. Pfizer*, the Second Circuit found sufficient state action where plaintiffs alleged that the Nigerian government was complicit in nonconsensual drug experimentation on Nigerian children because it provided a hospital facility knowing the intended use, allowed Pfizer to skirt certain regulations, and covered up Pfizer's activities after the fact.[245]

The third route, liability for aiding and abetting state actors, gives rise to two major issues: (1) "whether some corporate agent has engaged in behavior that amounts to aiding and abetting state actors in violation of international law . . . ." and (2) "whether corporate shareholders are vicariously liable for that behavior."[246] That the ATCA "encompasses liability for aiding and abetting state action seems to have been broadly accepted . . . ."[247] Cases have involved allegations that a Canadian oil company aided and abetted ethnic cleansing operations in the Sudan,[248] that an American corporation aided and abetted the Myanmar military in various human-rights violations while constructing a natural gas pipeline,[249] and that numerous companies aided and abetted the Apartheid regime in South Africa by doing

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(alleging genocide and war crimes).

239. Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1986)).

240. *Sarei*, 671 F.3d at 743–44.

241. *See* Sykes, *Corporate Liability*, *supra* note 174, at 2170 (stating that this type of claim is implicated in a "number of suits").

242. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (naming as defendant a Paraguayan police officer who allegedly tortured and killed plaintiff's family member); Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004) (naming as defendant a Mexican national hired by and acting under the direction of the U.S. Drug Enforcement Agency who allegedly arbitrarily arrested the plaintiff).

243. *Bigio*, 239 F.3d at 448; Sykes, *Corporate Liability*, *supra* note 174, at 2169.

244. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248, 1250 (11th Cir. 2005).

245. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169–70, 187 (2d Cir. 2009).

246. Sykes, *Corporate Liability*, *supra* note 174, at 2171.

247. *Id.*

248. Presbyterian Church of Sudan v. Talisman Energy Inc., 582 F.3d 244, 247–48 (2d Cir. 2009).

249. Doe I v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002).

business with it.[250] However, courts have not settled on the proper standard for aiding-and-abetting liability. Most courts and commentators rely on international law and, by extension, international criminal law.[251] The Second Circuit embraced the "purpose" standard, under which an actor aids and abets who acts "with the purpose of facilitating [violation of international law]."[252] On the other hand, the D.C. Circuit embraced the "knowledge" standard, under which an actor aids and abets who knows of the international violation and whose conduct substantially assists in the violation.[253] Other courts, including the Ninth Circuit, reserve judgment.[254] The principle concern arising from using an international-law standard is that all pertinent "language relate[s] to criminal liability," which may provide too lofty a standard for civil liability.[255]

### 3. The Question of Corporate Liability Under the Alien Tort Claims Act

The crucial question at present is "[t]o what extent might corporations legitimately be held responsible for the human rights infringements of their subsidiaries, agents, suppliers, and buyers?"[256] The theoretical underpinnings of imposing liability track the above economic justifications for the imposition of corporate vicarious liability[257] and are further reinforced by the sheer might of multinational corporations.[258] Present doctrine consists of two lines of cases: one considers that the standard for corporate vicarious liability must also be drawn from international law[259] and one that considers that the standard is an ancillary matter governed by domestic law.[260] While not recognizing corporate vicarious liability under the ATCA, a judicial majority held in only one case that the scope of such liability must be determined in accordance with customary international law.[261] Several circuits that have confronted the issue have held that corporations can be held liable because: the ATCA does not contain any language exempting corporations from liability, corporate vicarious liability was recognized domestically when the ATCA was passed, the first Congress would have anticipated agency

250. Khulumani v. Barclay National Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007).

251. Sykes, *Corporate Liability*, *supra* note 174, at 2171. The alternative is that the standard is an ancillary matter governed by domestic law. *Id.* at 2172.

252. *Presbyterian Church of Sudan*, 582 F.3d at 258–59; *see also Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

253. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Circ. 2011).

254. Sykes, *Corporate Liability*, *supra* note 174, at 2172.

255. *Id.* at 2172.

256. Kinley & Tadaki, *supra* note 151, at 961.

257. *See supra* Part III.B.2.

258. *See supra* Part III.B.1.

259. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), *aff'd* 133 S.Ct. 1659 (2013); Khulumani v. Barclay National Bank, 504 F.3d 254, 321–26 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 71–73 (D.C. Circ. 2011) (Kavanaugh, J., dissenting in part).

260. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 818 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting); Romero v. Drummond, 552 F.3d 1303, 1315 (11th Cir. 2008).

261. Kiobel, 621 F.3d at 148–49.

principles to govern corporate liability under the ATS, and legislative history does not provide contrary evidence.[262]

Moreover, the D.C. and Eleventh Circuits have pointed to the example of I.G. Farben, a German conglomerate that was dissolved after World War II because of its collaboration with the Nazi regime,[263] to illustrate that customary international law has in fact imposed penalties on corporations for violations of international norms by agents.[264] The D.C. Circuit notes that the Allies dealt with Third Reich natural persons who committed crimes and German "economic cartels" by "(1) partition[ing] Germany into zones; (2) dismantl[ing] Nazi Germany's industrial assets, public and private, and creat[ing] a system of reparations for injured individuals and states; and (3) prosecut[ing] major war criminals under the London Charter before an international military tribunal constituted at Nuremberg . . . ."[265] While natural persons were judged and sentenced by the Nuremberg tribunals, the tribunals did not view them as the only "persons" who had committed violations of international law.[266] The tribunal announced:

> [W]e find that the proof establishes beyond a reasonable doubt that offenses . . . were committed by [I.G.] Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries . . . . The action of [I.G.] Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich.[267]

Accordingly, Control Council Law No. 9 directed the dissolution of I.G. Farben and the disposal of its assets.[268] The I.G. Farben example, though extreme, lends credence to corporate vicarious liability for grave human-rights violations under international law.

### C. *Criticisms of Imposition of Alien Tort Claims Act Liability on Corporations*

Imposition of liability on corporations for the actions of their agents under the ATCA is criticized on three major grounds: (1) potentially negative foreign relations outcomes, (2) high litigation and error costs, and (3) possible reduction in corporate international competitiveness and the associated impact on developing nations.[269]

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262. Flomo, 643 F.3d at 1025; *Sarei*, 671 F.3d at 751; *Romero*, 552 F.3d at 1315; *Doe VIII*, 654 F.3d at 47–48.

263. I.G. Farben was a conglomerate of the eight main German chemical firms who provided inventions and scientific discoveries essential to the German war plan. By 1945, it employed more than 100,000 slaves provided by the Nazi party and operated plants in Auschwitz and Monowitz. Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495, 501–03 (2006) (citing 7–8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. Gov't Printing Office 1953) [hereinafter TRIALS OF WAR CRIMINALS]).

264. *Doe VIII*, 654 F.3d at 41; *Flomo*, 643 F.3d at 1017.

265. *Doe VIII*, 654 F.3d at 52.

266. *Id.* at 53 (citing 8 TRIALS OF WAR CRIMINALS 1132–33).

267. *Doe VIII*, 654 F.3d at 53 (citing 8 TRIALS OF WAR CRIMINALS 1140).

268. *Id.* at 52.

269. Sykes, *Corporate Liability*, *supra* note 174, at 2189, 2191–93; Robert Knowles, *A Realist Defense*

Foreign relations concerns arise primarily because foreign governments may believe the ATCA infringes on their sovereignty and discourages investment by punishing corporations for doing business with them.[270] As a result, the ATCA is criticized for undermining otherwise useful international cooperation and providing an opportunity for strategic negative reactions by foreign sovereigns.[271] However, little pertinent evidence exists of such strategic reactions.[272] In fact, evidence supports just the opposite conclusion with regard to investment: corruption has been shown to decrease investment and economic growth in the host country.[273] Presumably, corporate accountability would actually support investment by discouraging the corrupt, destructive behavior that deters it. Further, critics argue that the ATCA may retard the legal development of host nations.[274] However, the sheer number of recent ATCA cases alone, coupled with the weak rule of law in developing nations, indicates that in many cases local remedies are either unavailable or illusory; human-rights victims should not be denied redress simply because of their geographic location.[275]

Corporate aiding-and-abetting liability is criticized as disproportionately costly compared to the potential benefit.[276] In addition to typical litigation cost concerns, in these cases, the likelihood of error could also be very high.[277] Two factors bear on this high probability of error: (1) "the ability of the court to obtain reliable information about the alleged [human-rights violation]," which is complicated by foreign sovereigns' reluctance to release evidence that establishes their complicity, and (2) "when information is poor, [the inclination of] juries . . . to indulge any predilections and biases that they may harbor."[278] When probability of error is high, "the correlation between the litigation outcome and the purported harmful conduct goes to zero," which in turn decreases the deterrent value of the litigation and

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*of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1121 (2011).

270. Foreign governments dislike the allegations of misconduct and human-rights infringement against them that necessarily accompany ATCA corporate aiding-and-abetting actions. Sykes, *Corporate Liability*, *supra* note 174, at 2191–92. "[C]ritics argue . . . [that j]udgments against corporations with U.S. ties doing businesses in other countries will prompt disinvestment, dampening commerce." Knowles, *supra* note 269, at 1150. Note that Sykes and Knowles set forth the common arguments against imposing corporate vicarious liability for human-rights violations but do not agree with these criticisms.

271. Sykes, *Corporate Liability*, *supra* note 174, at 2192; Knowles, *supra* note 269, at 1121.

272. *See* Sykes, *Corporate Liability*, *supra* note 174, at 2192 (describing foreign sovereigns' dislike of ATCA claims but noting the possible practical inconsequentiality of this view); *see also* Knowles, *supra* note 269, at 1150–54 (explaining that China is likely the most fertile ground for these criticisms to come to fruition, though no empirical evidence exists to suggest that the Chinese government has at all altered its policy toward the U.S. as a result of ATS suits).

273. *See supra* Part I.B.1, III.B.1.

274. JOSEPH, *supra* note 160, at 149; Knowles, *supra* note 269, at 1160; Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. OF TRANSNAT'L L. 153, 165–66 (2003).

275. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 878, 888 (2d Cir. 1980) (involving allegations of threats of death and torture by Paraguayan officials in connection with the pursuit of justice in a criminal case involving the murder of plaintiff's brother at the hands of the same officials); *see also supra* Part I.B.2.

276. *See* Sykes, *Corporate Liability*, *supra* note 174, at 2188–90 (noting that corporate aiding-and-abetting liability involves many costs and stating that "aiding[-]and[-]abetting liability makes little economic sense unless it reduces the expected harm by enough to justify its costs").

277. *Id.* at 2190.

278. *Id.* at 2190–91.

renders the litigation costs "deadweight loss."[279] However, providing redress is crucial to incentivize corporations to exercise restraint, particularly where host country laws do not prescribe or enforce redress. Furthermore, one study on the ramifications of ATCA litigation in Africa concluded that, regardless of the success of the litigation, it may provide benefits, including enhancing the image of the United States as a "purveyor of human rights," establishing a taste for justice in countries where it cannot be sought, presenting an "otherwise unavailable means of accountability," and bringing attention to atrocities.[280]

The major concern created by the ATCA is that of reduced corporate competitiveness. Potential reduced competitiveness may cause (1) decreased investment in developing countries and repressive regimes[281] and (2) imposition of heavy costs without a corresponding improvement in behavior.[282] Two commentators express concern that ATCA liability may cause multinational corporations to curtail their investment in developing countries with imperfect human-rights records and substandard human-rights protection because of high risks for adverse legal and reputational consequences.[283] However, as mentioned, economic analysis shows that curtailed investment occurs even without liability imposed by the ATCA—threats of corruption and human-rights violations as well as lack of governance and enforcement deters multinational corporations.[284] More basically, human-rights violations should not be tolerated as a by-product of economic growth.

A further concern is that enormous costs will be imposed discriminatorily on corporations without corresponding improvement in behavior. Discriminatory liability may arise because many corporations are beyond the reach of U.S. courts.[285] ATCA plaintiffs often sue in the United States because local laws or courts do not provide a remedy for the tortious conduct at issue.[286] Actual and potential competitors of corporations subject to American jurisdiction have an advantage in that they need not fear liability for aiding and abetting in the commission of human-

279. *Id.* at 2190.

280. HARRY AKOH, HOW A COUNTRY TREATS ITS CITIZENS NO LONGER EXCLUSIVE DOMESTIC CONCERN: A HISTORY OF THE ALIEN TORT STATUTE LITIGATIONS IN THE UNITED STATES FOR HUMAN RIGHTS VIOLATIONS COMMITTED IN AFRICA 1980–2008 216 (2009); Knowles, *supra* note 269, at 1161. For a personal account on bringing these atrocities to court in the United States, see Dolly Filártiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21, *available at* http://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html?pagewanted=print&src=pm.

281. *See* Hufbauer & Mitrokostas, *supra* note 219, at 256 (discussing the risks of the ATCA on foreign direct investment, looking specifically to Africa as an example of an area that could be affected).

282. Sykes, *Corporate Liability*, *supra* note 174, at 2204.

283. Hufbauer & Mitrokostas, *supra* note 219, at 253–55. These critics argue that the detriment to these countries, among the most populous and most impoverished, would be astounding due to the fact that trade has been the engine of growth since World War II. *Id.* Countries that have already given rise to ATCA lawsuits, as of 2004, encompassed three-quarters of the world population and half of the world gross domestic product. *Id.* Their average per capita gross domestic product was an average of $3,700 in 2004, compared with $34,900. *Id.* The countries likely to be deprived of opportunities to participate in the global market via investment by large multinational corporations would be those that are the poorest, most corrupt, and least protective of human rights. *Id.*

284. *See supra* Parts I.B.1, I.B.2; *e.g.*, Mauro, *supra* note 33, at 700, 704; Habib & Zurawicki, *supra* note 33, at 313–14; Lambsdorff, *How Corruption Affects Economic Development*, *supra* note 67, at 310; Méon & Sekkat, *supra* note 15, at 74; Gupta et al., *supra* note 33, at 29–30; Berglöf & Claessens, *supra* note 36, at 7.

285. Sykes, *Corporate Liability*, *supra* note 174, at 2194; Knowles, *supra* note 269, at 1150.

286. Sykes, *Corporate Liability*, *supra* note 174, at 2194.

rights violations.[287] Thus, the market may shift business to corporations not subject to ATCA liability because corporations subject to ATCA jurisdiction will face higher compliance costs and, if involved in ATCA litigation, may incur substantial market penalties from customers, partners, and shareholders regardless of the outcome of the case.[288] These potentially higher-cost firms have *fewer or no incentives to respect human rights.*[289] This occurred following the *Presbyterian Church of the Sudan* litigation: a large number Talisman Energy's shareholders divested their shares, forcing Talisman to exit the Sudan and permitting Chinese firms to move in, even though the suit was ultimately dismissed.[290] Additionally, corporations subject to discriminatory ATCA liability may change their corporate structure to avoid U.S. courts' jurisdiction, which may make the corporation less efficient and effective, weaken the success of management, and add legal costs.[291] Thereafter, the corporation's products are more costly and their incentives to respect human rights are no greater than if they never faced ATCA liability.[292] Admittedly, this criticism is a legitimate one and one for which there is little rebuttal, except to repeat that the costs of human-rights violations are hefty and severe.[293] Additionally, considerable global support for corporate liability for human-rights violations has developed, as is discussed in Part IV.D., which, if it leads to another worldwide movement, would dispel this concern by lessening the discriminatory impact of the ATCA.

### *D. The Potential to Lead Another Worldwide Movement*

The United States has an opportunity to lead another worldwide movement. A revision of the ATCA could have a similar effect to the FCPA's 1998 revisions, particularly in light of indications that international players are giving increased consideration to the need for corporate human-rights regulation.[294] For example, John Ruggie, Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations, released a report advocating an affirmative obligation for companies to avoid infringing on the human rights of others.[295] Of particular import here is that Ruggie expressly states, "The corporate responsibility to respect human rights includes avoiding complicity[,]" which refers to

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287. *Id.*; *see* Knowles, *supra* note 269, at 1150, 1156 (noting that critics argue that companies not reachable under ATCA will fill the gap, contributing to non-competitiveness).

288. Sykes, *Corporate Liability*, *supra* note 174, at 2195–96.

289. *Id. Cf.* Grossman & Bradlow, *supra* note 152, at 9 ("The absence of clear international standards means that [TNCs] can also avoid regulation at the international level. Thus, TNCs are able to operate in an unregulated manner.").

290. Sykes, *Corporate Liability*, *supra* note 174, at 2195–96.

291. *Id.* Grossman & Bradlow, *supra* note 152, at 8–9 (discussing the ease with which TNCs have become "de-nationalized" and can transfer operations between multiple facilities around the world to avoid state power and regulatory constraints, thereby posing a significant threat).

292. Sykes, *Corporate Liability*, *supra* note 174, at 2197.

293. *See supra* Part III.B.

294. *E.g.*, Sarah A. Altschuller et al., *Corporate Social Responsibility*, 45 INT'L L. 179, 179–81 (2010); OECD, 2011 UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: COMPARATIVE TABLE OF CHANGES MADE TO THE 2000 TEXT 33–38 (2012) [hereinafter OECD, GUIDELINES FOR MNCs].

295. *Report of the Special Representative*, *supra* note 148, para. 52.

"indirect involvement by companies in human[-]rights abuses—where the actual harm is committed by another party. . . ."[296] Ruggie confirms that:

> [C]omplicity does not require knowledge of the specific abuse or a desire for it to have occurred . . . . [I]t may not matter that the company was merely carrying out normal business activities if those activities contributed to the abuse and the company was aware or should have been aware of its contribution.[297]

Similarly, the European Parliament adopted a resolution in November 2010 calling for the adoption of corporation social responsibility as an integral part of EU trade agreements.[298] The resolution called on the European Commission "to ensure that transnational corporations, whether or not they have their registered office in the European Union, . . . comply with their national and international legal obligations in the areas of human rights, labour standards[,] and environmental rules . . . ."[299]

Most promising is the OECD's 2011 update to its *Guidelines for Multinational Enterprises* (*Guidelines*). The *Guidelines* state that multinational enterprises should, within the framework of internationally-recognized human rights and the obligations of their host and home countries (1) respect human rights, including taking adequate measures to identify, prevent, and mitigate human-rights violations; (2) "avoid causing or contributing to human-rights violations through their activities," including both acts and omissions; (3) seek to prevent or mitigate human-rights violations directly linked to their business operations, products, or services by a business relationship, even if they do not contribute to those impacts, which entails the corporation using its leverage to influence, prevent, or mitigate; and (4) cooperate in remediation of human-rights violations where they have contributed to them.[300] With regard to operations in repressive regimes, the *Guidelines* emphasize that these obligations are not diminished by the host nation's inability or unwillingness to respect human rights.[301] Because the OECD has thirty-four member countries and served as a conduit for worldwide enactment of antibribery provisions, this signifies strong support for corporate liability.[302]

Finally, the United States is party to many treaties declaring various human rights that have been widely accepted around the world. These treaties include the International Covenant on Civil and Political Rights;[303] the International Covenant

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296. *Id.* para. 73.

297. *Id.* para. 80.

298. Resolution of 25 November 2010 on Corporate Social Responsibility in International Trade Agreements, EUR. PARL. DOC. (INI 2201) para. 20 (2009), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-446.

299. *Id.* para. 20.

300. OECD, GUIDELINES FOR MNCS, *supra* note 294, at 33–38.

301. *Id.* at 34.

302. *See* Abhay M. Nadipuram, Note, *Is the OECD the Answer? It's Only Part of the Solution*, 38 J. CORP. L. 635, 636 (2013) (discussing the thirty-four OECD member countries' support for punishing active bribery by corporations rather than passive bribery of governments).

303. It has seventy-four signatories and 167 parties. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 176; *4. International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en (last visited Feb. 27, 2014).

on Economic, Social, and Cultural Rights;[304] the Convention on the Prevention and Punishment of the Crime of Genocide;[305] the International Convention on the Elimination of All Forms of Racial Discrimination;[306] and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[307] In sum, a strong argument can be made for the imposition of aiding-and-abetting liability on multinational corporations, even considering combating criticisms of ATCA liability, particularly in light of significant potential for worldwide reform.

## V. STATUTORY EXPANSION OF THE ALIEN TORT CLAIMS ACT

Congress should redraft the ATCA to impose liability on corporations for aiding and abetting human-rights violations because (1) the potential harms inflicted by corporations operating abroad are more extensive and severe than those caused by bribery; (2) the criticisms leveled against the two statutes are substantially similar; and (3) despite these criticisms, Congress enacted the FCPA primarily to mitigate its harms. First, the harms incident to bribery and corporate economic might are substantially similar, despite the underlying differences in the way the harms are inflicted. Namely, whereas corporations often act indirectly through government officials in inflicting human-rights violations,[308] corporations act directly in bribing government officials. However, the FCPA was amended to apply to intermediaries who act as a conduit for bribery, indicating that Congress supports punishing even bribes carried out indirectly.[309] Despite this principle difference, the costs are effectively the same. For instance, host nations in both cases feel the negative impact over time as the costs of corruption weigh on the host nation. Additionally, if ever

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304. It has seventy signatories and 160 parties. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); *3. International Covenant of Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Feb. 27, 2014).

305. It has forty-one signatories and 142 parties. Convention for the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); *1. Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (last visited Feb. 27, 2014).

306. It has eighty-six signatories and 175 parties. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); *2. International Convention on the Elimination of All Forms of Racial Discrimination,* UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Feb. 27, 2014).

307. It has seventy-eight signatories and 153 parties. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); *9. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,* UNITED NATIONS TREATY COLLECTION, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Feb. 27, 2014).

308. E.g., corrupt influence on economic, political, and social policy; avoiding law enforcement; monopolizing markets; enlisting government forces to carry out so-called security; undercutting environmental protections; providing supplies or locations for the development of weapons; etc. *See supra* Part III.A.1.

309. *See supra* Part II.B

immediate harm is done, it arises via human-rights violations, not bribery.[310] Moreover, the immediate cost of corporate human-rights violations is biting: at worst, the murder of six million in the Holocaust, and more commonly, the torture, genocide, or war crimes of today's "pirates"[311] committed for the development of an oil well or other asset.[312] On the other hand, the immediate cost of bribery is its impact on the corporation's bottom line. As noted above, the costs of corruption and human-rights violations are properly borne by corporations who aid and abet their commission.[313] Thus, although the means of perpetrating bribes and human-rights violations differ, the harms inflicted by human-rights violations are substantially similar and potentially more severe than those inflicted by bribery.

Second, the criticisms leveled against the FCPA and corporate aiding-and-abetting liability for human-rights violations are essentially the same.[314] Passage and enforcement of the FCPA has demonstrated that these criticisms are largely inconsequential. For example, at passage of the FCPA, litigation and error costs seemed high, the foreign relations consequences deleterious, and the detriment to American competitiveness possibly substantial. Nevertheless, the United States led a worldwide antibribery movement, thus alleviating concerns of uncooperative governments and discriminatory treatment.[315] At present, a properly cabined statute imposing liability for corporate human-rights violations seems poised to do the same.[316] Furthermore, in passing the FCPA, Congress acknowledged enforcement concerns but chose to pass the statute as a preventive measure, at the least.[317] Finally, despite harsh criticisms and absent assurances these concerns would be alleviated, Congress passed the statute to stop the adverse consequences of bribery for Americans and host-nation constituents.[318] Thus, that the FCPA was passed and has flourished despite the same criticisms leveled against corporate aiding-and-abetting liability supports an assertion that the criticisms do not hamper liability under the ATCA.

Therefore, Congress should draft an amended ATCA to provide foreign plaintiffs redress against American corporations for aiding and abetting human-rights violations abroad for four reasons: (1) the harms inflicted by corporations in aiding and abetting human-rights violations are even more biting than those inflicted by corporations who bribe; (2) the human and social costs of those harms are only properly allocated by legal liability; (3) the criticisms leveled against liability under the FCPA and amended ATCA proved to be of minor concern with regard to the FCPA; and (4) Congress passed and the DOJ increasingly enforces the FCPA despite its criticisms.

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310. *See supra* Parts I.B, III.B.1.

311. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1670 (2013).

312. *E.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1245 (11th Cir. 2005); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169–70 (2d Cir. 2009); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), *aff'd* 133 S.Ct. 1659 (2013).

313. *See supra* Part III.B.2.

314. *See supra* Parts II.C, IV.C.

315. *See supra* Part II.C.2.

316. *See supra* Part III.D.

317. *See supra* Part II.A.

318. *See supra* Part II.A.

## CONCLUSION

In conclusion, Congress should pass an amended ATCA, looking substantially to the FCPA, its legislative history, and ATCA case law in fashioning its scope. Congress should scrap the existing ATCA and start over, setting forth a narrow category of corporations subject to the statute for a narrow set of "specific, universal, and obligatory" causes of action.[319] Congress should resolve the circuit split by setting forth a standard for aiding-and-abetting liability consistent with economic principles.[320] The amended ATCA should expressly provide for extraterritorial applicability to avoid imposition of the presumption against extraterritorial application.[321] Congress is strongly encouraged to consider requiring exhaustion of local remedies, a cabin mentioned by both the majority and the concurrence in the recent *Kiobel* decision.[322] Damages under the statute should be limited according to economic principles in order to properly allocate the costs of the harm caused.[323] Congress should strongly consider including self-reporting provisions, as they have served well in FCPA enforcement.[324] Finally, Congress should consider implementing the statute under the DOJ, as the FCPA is, in order to alleviate some of the concerns related to uncooperative and retaliatory foreign sovereigns.

319. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).
320. *See supra* Parts III.B.2, IV.B.2.
321. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1665 (2013).
322. *Kiobel*, 133 S.Ct. at 1670.
323. *See supra* Part III.B.2.
324. *See supra* Part II.B.

# The "Safe" Need Not Apply: The Effects of the Canadian and EU "Safe Country of Origin" Mechanisms on Roma Asylum Claims

MARINA STEFANOVA*

## SUMMARY



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* J.D. Candidate, The University of Texas School of Law, 2014; B.S., International Affairs, Georgetown University, 2011. I owe sincere thanks to Professor Denise Gilman for her guidance and valuable insights and to the staff of the Texas International Law Journal for their hard work in preparing this Note for publication. I am also deeply grateful to my parents and Brian Kendall for their encouragement and support.

## INTRODUCTION

National, regional, and international legal frameworks are increasingly excluding the Roma people by enacting procedural and substantive legislation that restricts their movement and their opportunity to seek asylum. The Roma face widespread and entrenched discrimination as well as instances of persecution in many European countries, but they are progressively offered fewer and fewer ways of escaping these conditions.

This Note focuses on the asylum systems of the European Union (EU) and Canada and explains how they are steadily restricting the Roma's ability to gain protection as refugees. This is a dangerous development that deserves greater attention because the Roma population is effectively confined and does not have adequate access to the legal and human-rights guarantees of the United Nations Convention relating to the Status of Refugees (U.N. Refugee Convention). The Roma's lack of access to the refugee framework would not be as troubling if they were not easily overlooked by officials charged with evaluating whether countries provide sufficient human-rights guarantees and then use these conclusions as a basis for evaluating many asylum claims.

The Roma face acute discrimination in employment, education, housing, and access to social services.[1] In many European countries, this discrimination is long-standing, entrenched, and even accepted, making it difficult to frame the plight of the Roma as a critical issue that demands urgent attention.[2] More importantly, the fact that discrimination against the Roma has been normalized creates the impression that the problem is monolithic and can even be summarized by the word "discrimination." This blanket approach conceals the troubling increase in racially motivated violence and acts of persecution against the Roma that has been documented primarily in Hungary and the Czech Republic since 2008.[3]

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1. AMNESTY INT'L, HUMAN RIGHTS HERE. ROMA RIGHTS NOW. A WAKE-UP CALL FOR THE EUROPEAN UNION 2 (2013).

2. *See id.* at 4–9 (detailing specific instances of persistent discrimination against the Roma in Hungary, Romania, Slovenia, and the Czech Republic).

3. *See* Rapporteur on the Committee on Migration, Refugees, and Population, Eur. Parl. Ass., *Roma Asylum Seekers in Europe*, 2010 Sess., Doc. No. 12073, 7–8 (2010) [hereinafter *Roma Asylum Seekers in Europe*] (by Milorad Pupovac) (highlighting the recent increase in racially motivated attacks against Roma in Hungary and the Czech Republic in the context of broader discrimination across Europe).

To escape these conditions, the Roma from one EU Member State or other "safe country of origin" cannot readily seek asylum in another Member State, and their mobility within the EU is otherwise restricted by employment and financial requirements.[4] Therefore, following recent surges in anti-Roma sentiments and violent extreme-right paramilitary activity in countries such as Hungary and the Czech Republic, many Roma have sought protection in Canada—a country that has historically been relatively more receptive to their claims than other developed countries, such as the United States.[5] However, in an attempt to reduce the influx of refugees (specifically, Hungarian Roma refugees), Canada recently adopted a Designated Country of Origin (DCO) mechanism[6] that places substantial barriers to asylum for individuals from most EU Member States (as well as ten other countries) by making it very difficult, if not impossible, for them to file and prepare their asylum claims.

This illustrates a new trend in international law—listing countries as "safe" in order to easily restrict the influx of certain populations and thereby circumvent the principles of the U.N. Refugee Convention. This Note aims to highlight the gaps, inconsistencies, and discriminatory treatment of the "safe country of origin" mechanism that is becoming widely used by countries that have previously been most welcoming to refugees. Specifically, this Note concludes that the Roma are particularly disadvantaged and discounted in this system, making it imperative to reexamine the way they are treated and perceived in Europe and Canada.

Part I of this Note provides a background of Roma history, details the present conditions that the Roma face in Europe, and offers a case study of the recent rise of extremist violence against the Roma in Hungary and the Czech Republic, two countries listed as "safe" by Canada's new asylum legislation. Part II examines the EU's common asylum system and how it affects Roma who may need to flee their home countries and seek protection elsewhere. Part III analyzes Canada's newly implemented DCO scheme and the way in which it limits the Roma's ability to apply for asylum. Part IV provides recommendations for the EU and Canada and offers additional reasons why countries should not be designated as "safe" in light of the dangers such designation poses to minorities such as the Roma, whose persecution or intolerable discrimination may be overlooked by officials who assess general country conditions for purposes of determining refugee eligibility. Lastly, Part V offers some concluding remarks.

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4. *See* Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons, art. 2(d), 2011 O.J. (L 337) 9, 13 (EU) [hereinafter Qualification Directive] (limiting the definition of refugee to third-country nations); Directive 2004/38, art. 7(1), 2004 O.J. (L 158) 77, 93 (EC) (stating employment and financial requirements for residency beyond three months).

5. *See Roma Asylum Seekers in Europe*, *supra* note 3, at 8 (reporting the high number of Roma who have sought refugee status in Canada).

6. *See infra* Part III.B.

# I. BACKGROUND, HISTORY OF PERSECUTION, AND PRESENT TREATMENT OF THE ROMA

## *A. Background and Definition of the "Roma"*

The term "Roma" is generally used to refer to individuals who identify as Gypsies, as well as Travellers, Manouches, and Sinti.[7] There is significant diversity within the Roma community in terms of "language and dialect, history, culture, religion, and social class."[8] The term "Roma" is used to refer to the general Roma community, but it is not intended to promote stereotypes or ignore the internal differences that exist within the group.[9] Rather, it is used to encompass the situation of this entire cultural and ethnic community, which is characterized by a history of persecution, discrimination, and marginalization.[10]

The current estimated population of the Roma in Europe ranges from ten to twelve million, with the majority of the population living in eastern Europe.[11] They are most represented in Bulgaria, Hungary, Macedonia, Romania, Serbia, and Slovakia, where they account for seven to ten percent of the total population in those countries.[12] There are also significant numbers of Roma in France (400,000), Italy (150,000), Spain (750,000), and the United Kingdom (225,000).[13]

The Roma are believed to have migrated from India and, from the fourteenth to the nineteenth century, settled in what is now Romania.[14] There, many Roma were subsequently enslaved and treated "as no more than cattle" until their emancipation in the nineteenth century.[15] Even in regions where they were not enslaved, they faced extensive discrimination that restricted their ability to integrate into local communities and forced many to adopt a nomadic way of life.[16] Today, though approximately eighty-five percent of the Roma are sedentary,[17] some still pursue a nomadic culture and way of life.[18]

Persecution against the Roma reached its height during World War II—many Roma women underwent forced sterilization, and an estimated 1.5 million Roma

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7. Iskra Uzunova, Note, *Roma Integration in Europe: Why Minority Rights Are Failing*, 27 ARIZ. J. INT'L & COMP. L. 283, 287 (2010).

8. Diana E. Mahoney, Note, *Expulsion of the Roma: Is France Violating EU Freedom of Movement and Playing by French Rules or Can It Proceed with Collective Roma Expulsions Free of Charge?*, 37 BROOK. J. INT'L L. 649, 649 n.1 (2012) (citing Uzunova, *supra* note 7, at 287).

9. *Id.*

10. *Id.* at 649–50.

11. AMNESTY INT'L, *supra* note 1, at 2.

12. *Id.*

13. *Id.*

14. Caitlin T. Gunther, Note, *France's Repatriation of Roma: Violation of Fundamental Freedoms?*, 45 CORNELL INT'L L.J. 205, 209 (2012).

15. *Id.* (quoting Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 924 (2010)).

16. Gunther, *supra* note 14, at 209.; Greenberg, *supra* note 15, at 924.

17. AMNESTY INT'L, *supra* note 1, at 2.

18. Mahoney, *supra* note 8, at 649 n.1.

were killed in targeted ethnic cleansing.[19] These atrocities are often referred to as the Roma Holocaust or *Baro Porrajmos* (the "great devouring").[20]

### *B. Present Discrimination and Persecution of the Roma*

The Roma continue to be Europe's most marginalized and segregated community, facing prevalent discrimination, poor living conditions, and little access to social services.[21] Though the EU and individual European countries recognize that they must address discrimination against the Roma, the situation of the Roma has not significantly improved.[22] A paradoxical phenomenon has emerged in which the group is further marginalized, discriminated against, and stereotyped even as states pursue a rhetoric of human rights and minorities protection. As a result, discrimination against the Roma has become acceptable and institutionalized.

This accepted form of discrimination severely infringes upon the human rights of the Roma, but it must be distinguished from the more troubling instances of racially motivated violence and persecution that the Roma have faced with increased frequency since 2008 in Hungary and the Czech Republic.[23] Though acts of persecution against the Roma are fewer and more isolated than other instances of discrimination,[24] they are either widely ignored or subsumed under the general label of "discrimination."[25] As a result, there is a risk that the situation of the Roma will not be adequately assessed, which in turn has implications for the international community's ability to protect the Roma and adhere to the principles of the U.N. Refugee Convention.

#### 1. The EU's Non-Discrimination Policies in Practice

The EU has made substantial efforts to assist the Roma communities by urging Member States to end their discriminatory practices and by developing proposals to end school segregation and encourage minority participation in the workforce.[26]

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19. Gunther, *supra* note 14, at 209.

20. *Id.*

21. *See* AMNESTY INT'L, *supra* note 1, at 2 (outlining the racial discrimination as well as the disparities in living conditions and educational access faced by the Roma population in the EU); *see also* MARINA CAPARINI, CTR. FOR EUR. POLICY STUDIES, STATE PROTECTION OF THE CZECH ROMA AND THE CANADIAN REFUGEE SYSTEM 11 (2010) (discussing the lack of Roma access to social benefits in the Czech Republic).

22. *See* AMNESTY INT'L, *supra* note 1, at 4 (discussing pervasive hatred and discrimination towards the Roma).

23. *Roma Asylum Seekers in Europe, supra* note 3, at 7–8.

24. Maxine Sleeper, Note, *Anti-Discrimination Laws in Eastern Europe: Toward Effective Implementation*, 40 COLUM. J. TRANSNAT'L L. 177, 181–82 (2001).

25. *See id.* at 182 (discussing the Romanian characterization of anti-Romani violence as a social problem).

26. *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Framework for National Roma Integration Strategies up to 2020*, at 3, COM (2011) 173 final (Apr. 5, 2011) ("The EU has made several proposals for Member States to promote the social and economic integration of Roma . . . .").

These trends indicate that the EU acknowledges the need to address the discrimination and poor living conditions of the Roma. However, the EU's efforts have often been overshadowed by a parallel development in which some Member States have adopted policies to prevent some members of the EU community (particularly workers from Bulgaria and Romania, many of whom are Roma) from entering their territories and taking part in their labor markets.[27]

The EU has enacted several laws to address discrimination against minorities such as the Roma. These initiatives became especially relevant in the 2004 and 2007 EU enlargements, when Member States with large Roma populations joined the EU.[28] In 2000, the EU adopted the Racial Equality Directive, prohibiting race- and ethnicity-based discrimination in employment, education, housing, health care, and access to goods and services.[29] Similarly, the 2009 Charter of Fundamental Rights of the European Union proscribes discrimination and promotes the right to employment, education, housing, and social assistance.[30]

Despite the progress that has been achieved through the harmonization of policies and practices in democratic governance, minority treatment, and freedom of movement, the EU has experienced significant tension following the 2004 and 2007 enlargements.[31] Even though the EU guarantees certain fundamental rights, such as the freedom of movement, to all its citizens, fifteen Member States instituted restrictions on the free movement of workers from Romania and Bulgaria, revealing that many Member States feared the entry of migrant workers from relatively poor eastern European backgrounds.[32] This development is particularly troublesome because it not only demonstrates the existence of second-class citizens in a supposedly unified EU, but it also places a disproportionate impact on the Roma, who constitute significant portions of the Romanian and Bulgarian populations and who would have welcomed the opportunity to work in other Member States.[33]

A notable example of many EU Member States' discriminatory treatment of the Roma occurred in the summer of 2010 when France attempted to remove a Roma encampment and to forcibly deport all individuals to their home countries.[34] The EU criticized France for violating fundamental citizenship rights granted to all EU citizens, the EU Free Movement Doctrine, and minority rights.[35] The EU's response to France's actions indicates that it will not ignore instances of such overt discrimination and human rights violations, but the dispute also reveals that some Member States, when left to formulate their policies independently, may engage in activity that seriously threatens certain individuals' or groups' fundamental rights.

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27. Gunther, *supra* note 14, at 214.

28. *See* Sleeper, *supra* note 24, at 178 (discussing developments hastening the implementation and acceptance of anti-discrimination norms).

29. *See generally* Council Directive 2000/43, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22 (EC).

30. *See generally* Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389.

31. *See* AMNESTY INT'L, *supra* note 1, at 4 (discussing prevalent prejudice in Europe despite anti-discrimination directives).

32. Gunther, *supra* note 14, at 214.

33. *See id.* at 212 ("[I]t seems that Roma are motivated by the same desires that motivated people to come to the United States—economic prospects and a better life.").

34. Mahoney, *supra* note 8, at 650.

35. Gunther, *supra* note 14, at 207–08.

While France's 2010 deportation may be famous, it is not unique. It appears that the practice of treating the Roma as an easily "deportable" group has been rendered acceptable and not uncommon. Similar programs have been instituted to deport the Roma in Finland, Italy, Denmark, Sweden, Germany, and the United Kingdom.[36] Furthermore, despite the criticism it received following the 2010 incident, France has not adjusted its treatment of the Roma; in 2012, French police dismantled another Roma camp, evicting seventy people (including nineteen children).[37]

Some have called the Roma's current circumstances a "de facto apartheid."[38] Their communities are often located at the outskirts of cities where they have restricted access to heat, running water, and garbage collection.[39] Many countries, such as Bulgaria and Greece, have been found to violate their obligations under the European Social Charter to provide the Roma the right to health care and housing.[40] Furthermore, many Roma are denied access to education or are placed in either segregated Roma schools or schools for children with mental disabilities.[41] For example, in 2007 the European Court of Human Rights found that the Czech Republic failed to provide Roma children the right to education free of discrimination.[42] The Czech government still has not implemented the judgment.[43] In the Czech Republic, only three out of ten Roma students complete secondary education (compared to eight out of ten non-Roma students); whereas in Slovakia, two out of ten reach this level (compared to nine out of ten non-Roma).[44] As a result of such practices, the Roma in eastern European countries have low levels of education, which further contribute to their inability to secure employment at home or abroad.[45]

### 2. The Treatment of the Roma in Hungary and the Czech Republic

Though the Roma face discrimination in most of the countries they inhabit, it is particularly important to assess their situation in Hungary and the Czech Republic

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36. *Id.* at 206.

37. Rhonda Parker, *New Expulsions, Persecution of Roma Have Some Warning 'Hitler Was Not Alone'*, EXAMINER (Aug. 31, 2012), http://www.examiner.com/article/new-expulsions-persecution-of-roma-have-some-warning-hitler-was-not-alone.

38. *Roma Asylum Seekers in Europe*, *supra* note 3, at 10.

39. *Id.*

40. Council of Eur., *Collective Complaints Procedure 1998–2010: Summaries of Decisions on the Merits Concerning Roma and Travellers*, at 17–20, 24–28, 32–33 (June 25, 2010), *available at* http://www.coe.int/t/dGHl/monitoring/Socialcharter/Theme%20factsheets/SummariesMeritsRomaRights_en.pdf (summarizing Greece's violations of the European Social Charter in the context of housing in a 2004 case and a 2009 case and Bulgaria's violations of the same in the context of housing and healthcare in a 2006 case and a 2008 case, respectively).

41. AMNESTY INT'L, *supra* note 1, at 8.

42. D.H. v. Czech Republic (No. 57325/00), Eur. Ct. H.R. 71 (2007) (providing that the Czech Republic violated the rights of Roma pupils to enjoy their right to education and requiring that it provide them equal education without discrimination).

43. AMNESTY INT'L, *supra* note 1, at 8.

44. *Id.* at 8–9.

45. *See id.* at 8 (stating that discrimination in education "compromise[s] Romani pupils' future").

for two reasons. First, instances of violent attacks and persecution have dramatically increased in Hungary and the Czech Republic since 2007, reflecting dangerous developments in the treatment of the Roma population in those nations. Second, it is precisely the Roma from Hungary and the Czech Republic who have filed abnormally large numbers of asylum applications in Canada, leading Canadian officials to suspect the claims are fraudulent and to implement a mechanism to limit claims from European countries that are generally considered safe.

In Hungary, the Roma are the largest, most disadvantaged minority with the highest levels of unemployment and the lowest level of education.[46] The U.S. Department of State Country Reports on Human Rights Practices for 2011, as well as other nongovernmental organizations (NGO) reports states that the Roma are discriminated against "in almost all fields of life, particularly in employment, education, housing, penal institutions, and access to public places, such as restaurants and bars."[47]

In 2007, the right-wing Fidesz political party won the parliamentary elections in Hungary and began a process of centralization of power.[48] This coincided with the rise of the Jobbik, an extreme-right party created in 2003, which asserts that Hungary is for true Hungarians and openly displays its anti-Semitic and anti-Roma persuasions.[49] In the 2010 parliamentary election, the Fidesz party remained in power, while the extreme-right Jobbik party won seventeen percent of the vote, becoming Hungary's third-largest party.[50] The forty-seven Jobbik members of Parliament and the four Jobbik members of European Parliament were elected in the northeastern part of the country, near Hungary's second-largest city, Miskolcs, where the Roma minority is concentrated.[51] Most of the Roma who seek asylum in Canada come from this city.[52]

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46. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, HUNGARY: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011 34 (2011) [hereinafter HUNGARY: COUNTRY REPORTS], *available at* http://www.state.gov/documents/organization/186571.pdf (noting that "[d]iscrimination against Roma exacerbate[s] their already limited access to education, employment, healthcare, and social services"); *International Roma Day Highlights Discrimination Against European Roma*, AMNESTY INT'L (Apr. 5, 2012), http://www.amnesty.org/en/news/international-roma-day-highlights-discrimination-against-european-romani-2012-04-05.

47. *Id.* at 34; *see also Hungary Must Protect Roma Communities from Attack*, AMNESTY INT'L (Aug. 15, 2012), http://www.amnesty.org/en/news/hungary-must-protect-roma-communities-attack-2012-08-15 (criticizing Hungary for discriminating against the Roma and failing to protect them from hate crimes).

48. Gina Csanyi-Robah, *Protecting Roma Refugees: A Unique Perspective*, CANADIAN JEWISH NEWS (Jan. 14, 2013), http://www.cjnews.com/index.php?q=node/100453.

49. *A Short Summary About Jobbik*, JOBBIK: THE MOVEMENT FOR A BETTER HUNGARY (Mar. 5, 2010), http://www.jobbik.com/short_summary_about_jobbik (asserting that the Roma population is an "unsolved situation" and the source of a unique brand of "delinquency" called "gypsy crime").

50. Keno Verseck, *Blurring Boundaries: Hungarian Leader Adopts Policies of Far-Right*, SPIEGEL ONLINE (Jan. 30, 2013), http://www.spiegel.de/international/europe/ruling-hungarian-fidesz-party-adopts-policies-of-far-right-jobbik-party-a-880590.html; Tony Paterson & Charlotte McDonald-Gibson, *The Shadow of Anti-Semitism Falls on Europe Once More as Hungary's Far-Fight* [sic] *Jobbik Party Protests Against World Jewish Congress Meeting in Budapest*, INDEPENDENT (May 5, 2013), http://www.independent.co.uk/news/world/europe/the-shadow-of-antisemitism-falls-on-europe-once-more-as-hungarys-farfight-jobbik-party-protests-against-world-jewish-congress-meeting-in-budapest-8604656.html.

51. Csanyi-Robah, *supra* note 48.

52. *Id.*

The Jobbik party also has a paramilitary wing, *Magyar Garda* (Hungarian Guard), which promotes the Jobbik mission through open acts of violence against the Roma community.[53] In 2008 and 2009, members associated with the Jobbik party and the Hungarian Guard engaged in organized acts of aggression against Roma communities, leading to eight dead and forty-eight injured Roma.[54] After this series of incidents, many Roma began to flee Hungary to seek asylum in Canada.[55]

The U.S. Department of State Country Report on Hungarian Human Rights Practices notes that in 2011, the Roma community faced increasing levels of discrimination and public hatred in Hungary as political extremist and paramilitary campaigns continued to target and vilify them.[56] Furthermore, Roma suspects have been the subject of excessive police force and intimidation by vigilante groups that have formed in the eastern part of the country.[57] For example, in March 2011, the extreme-right group For a Better Future Civil Guard Association marched in uniform through heavily Roma-populated regions in order to display their anti-Roma sentiments.[58] In April 2011, the paramilitary group *Vedero* (Defense Force) established a training camp near a Roma neighborhood in the village of Gyöngyöspata.[59]

The Ministry of Interior responded to these incidents by increasing police presence in the region, but NGOs have accused the government of failing to adequately address the deteriorating situation as extreme-right activists continued to incite violence and intimidate the Roma community following these measures.[60] Previous efforts have also been largely unsuccessful; in November 2009, in response to the rise of extreme-right violence against the Roma, Hungary imposed a fine on anyone wearing a Hungarian Guard uniform.[61] However, this proved ineffective as the Hungarian Guard continued to intimidate the Roma through targeted violent activity in regions predominantly inhabited by the Roma.[62] Furthermore, there are many extreme-right groups other than the Hungarian Guard that escalate racial violence. For example, four hundred extreme-right members attacked a Roma neighborhood in Cegléd, Hungary, following which the attackers declared that they would return and pursue their mission of chasing the Roma away from the area.[63] This indicates that the government's limited response to the rise in extreme-right

53. *Id.*; HUNGARY: COUNTRY REPORTS, *supra* note 46, at 32.

54. Csanyi-Robah, *supra* note 48.

55. *Id.*

56. HUNGARY: COUNTRY REPORTS, *supra* note 46, at 1.

57. *Id.* at 1, 5.

58. *Id.* at 35.

59. *Id.*

60. *Id.*

61. IMMIGRATION & REFUGEE BD. OF CAN., HUNGARY: TREATMENT OF ROMA AND STATE PROTECTION EFFORTS (2009–JUNE 2012) § 3 (2012), *available at* http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&category=&publisher=IRBC&type=&coi=HUN&rid=&docid=503600142bd&skip=0.

62. *See generally* HUNGARY: COUNTRY REPORTS, *supra* note 46 (giving examples of abuses by the Hungarian Guard, including physical violence).

63. Parker, *supra* note 37.

violence has been insufficient to protect the Roma and to prevent many of them from seeking refuge in other countries.

Recently, the ruling Fidesz party has been adopting much of the anti-Semitic and anti-Roma rhetoric and policies of the extreme-right Jobbik party.[64] The measures include: the display of a statue of Miklós Horthy, a far-right leader of Hungary from 1920 to 1944 who had significant responsibility for the deaths of Hungarian Jews during World War II; references to the message of the Horthy regime in Hungary's 2012 constitution; and measures specifically aimed at the Roma community requiring them to perform volunteer work and have their residences inspected for orderliness before receiving social assistance payments.[65] Most importantly, the rights of paramilitary groups have been strengthened through a new policy that allows individuals to use arms for self-protection when on their privately-owned property (a measure directly linked to the paramilitary groups' emphasis on defending their communities against the Roma and their petty crime).[66] The public discourse is further marked by extremist anti-Roma ideas, as seen in a recent article by Zsolt Bayer, co-founder of the Fidesz party.[67] Bayer wrote:

> A significant part of the Roma are unfit for coexistence .... They are not fit to live among people. These Roma are animals, and they behave like animals .... These animals shouldn't be allowed to exist. In no way. That needs to be solved—immediately and regardless of the method.[68]

A similar pattern of extreme-right violence against the Roma has emerged in the Czech Republic.[69] Between January 2008 and June 2009, there were three arsonist attacks against the Roma and several other attacks on Roma neighborhoods by extreme-right groups carrying stones and gasoline bombs, which left at least three Roma with life-threatening injuries.[70] The European Roma Rights Centre further reported that there were another forty-seven attacks against the Roma in the Czech Republic between 2008 and 2012.[71] It is uncertain how accurate the numbers of attacks are given that the Roma rarely report instances of abuse due to their distrust of the police.[72]

Though the EU has not taken any active measures to curb the rise in extremist violence in eastern Europe,[73] the EU Parliamentary Assembly has noted its concern over the fact that the perpetrators of the racially-motivated violence have "rarely been brought to justice and ... that, due to fear, threats and the lack of adequate

64. Verseck, *supra* note 50.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* (internal quotation marks omitted).
69. *Roma Asylum Seekers in Europe*, *supra* note 3, at 7–8.
70. *Id.* at 8.
71. EUR. ROMA RIGHTS CTR., ATTACKS AGAINST ROMA IN THE CZECH REPUBLIC: JANUARY 2008–JULY 2012 (2012), *available at* http://www.errc.org/cms/upload/file/attacks-list-in-czech-republic.pdf.
72. IMMIGRATION & REFUGEE BD. OF CAN., *supra* note 61, § 4.1.
73. *See* Verseck, *supra* note 50 ("[M]any politicians in Brussels either don't comment on or downplay the issue of right-wing extremism ....").

reaction by the authorities, several thousand Roma have left their countries to seek asylum."[74]

There continues to be pervasive, institutionalized, and accepted discrimination (as well as increasing instances of targeted violent acts) against the Roma, making it difficult for them to integrate into society, pursue an education, secure employment and housing, and have access to social services and health care. This has reinforced the Roma's stereotype as a group that prefers to exist on the margins of society and has perpetuated a cycle of discrimination that has now become normalized in many European countries.[75] Because of this history of consistent vilification, it is necessary to reevaluate the international community's treatment of the Roma and specifically, the obstacles they face when they attempt to seek refugee protection.

## II. THE EU'S ASYLUM SYSTEM: IMPLICATIONS FOR ROMA REFUGEES

### *A. The Common European Asylum System*

The EU's consistent emphasis on the harmonization of policies and standards has had a significant impact on Member States' treatment of refugees and their asylum claims. The Common European Asylum System is the product of several EU regulations and directives that aim to set common standards for the way EU Member States apply the principles of the U.N. Refugee Convention and treat refugees as they navigate through the asylum process. The legal instruments relevant to potential Roma refugees are: (1) the Qualification Directive, which provides that refugee status and subsidiary protection are available only to third-country nationals or stateless persons (thereby excluding citizens of EU Member States);[76] and (2) the Asylum Procedures Directive, which establishes the requirements to be part of a "safe country of origin" list whose citizens will be presumed to be ineligible for asylum.[77] As a result, Roma who are citizens of an EU Member State cannot seek asylum in another EU Member State, while Roma from non-EU states may be ineligible if their country of origin is listed as "safe."

#### 1. The Qualification Directive

A crucial component of the Common European Asylum System is the Directive "on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection

74. *Roma Asylum Seekers in Europe*, *supra* note 3, at 6.

75. Mahoney, *supra* note 8, at 653–55.

76. Qualification Directive, *supra* note 4, art. 1.

77. Council Directive 2005/85, arts. 29–31, 2005 O.J. (L 326) 13, 26–28 (EC) [hereinafter Asylum Procedures Directive].

granted"[78] (Qualification Directive), which recast the original Qualification Directive of 2004.[79] The goal of the Qualification Directive is to establish the standards to determine individuals' refugee status and to enumerate the rights and benefits the individuals will receive from this protection.[80]

The Qualification Directive defines a refugee as

> a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it . . . .[81]

Though this definition is similar to that of article 1(A)(2) of the U.N. Refugee Convention, it contains a significant difference. The Refugee Convention applies to "any person," while the Qualification Directive reserves the definition of refugee only for "third-country nationals" and "stateless persons" and, therefore, excludes all citizens of EU Member States.[82]

The Qualification Directive further allows subsidiary, or complementary, protection to be granted to individuals who do not meet the requirements for refugee status but nonetheless cannot return to their countries of origin because they "face a real risk of suffering serious harm."[83] Like refugee status, subsidiary protection is only available to third-country nationals and stateless persons.[84]

The Qualification Directive effectively prohibits Roma from EU Member States from seeking asylum or receiving subsidiary protection in another Member State. The prohibition on intra-EU asylum applications is based on the assumption that all EU Member States provide a fundamental and sufficient guarantee of human rights that makes it inconceivable that an individual would be a refugee from one Member State and qualify for asylum in another.[85] This is inconsistent with article 3 of the U.N. Refugee Convention, which states that "[c]ontracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."[86]

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78. Qualification Directive, *supra* note 4, Title.

79. *Id.* para. 1.

80. *Id.* art. 1.

81. *Id.* art. 2(d).

82. Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 137 [hereinafter U.N. Refugee Convention]; Qualification Directive, *supra* note 4, art. 2(d).

83. Qualification Directive, *supra* note 4, art. 2(f).

84. *Id.*

85. *See* Anca Gurzu, *Safe Country of Origin List at the EU Level: The Bargaining Process and the Implications*, 7 REV. OF EUR. & RUSS. AFF., no.1, 2012, at 1, 5 (quoting the 2004 draft Directive: "[a] country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstance, it can be shown that there is generally and consistently no persecution").

86. U.N. Refugee Convention, *supra* note 82, art. 3.

### 2. The Asylum Procedures Directive

The common procedures for processing asylum claims are set forth in the Asylum Procedures Directive.[87] Most notably, article 27 of the Asylum Procedures Directive defines the concept of the "safe country of origin,"[88] which the European Community had previously discussed in 1992.[89] At that time, the EU Immigration Ministers defined a "safe country of origin"[90] as a country that "can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the [U.N. Refugee] Convention have ceased to exist."[91] The EU Immigration Ministers envisioned that a "safe country of origin" determination would not automatically prevent refugees from that state from applying for asylum but rather would trigger expedited procedures and reduced legal protections and benefits.[92] Article 29(1) of the Asylum Procedures Directive similarly provides that the "Council shall . . . adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin . . . ."[93] Article 30 on "[n]ational designation of third countries as safe countries of origin" further allows Member States to list additional countries as safe countries of origin.[94]

Under the Asylum Procedures Directive, the applications of asylum seekers arriving from countries listed as a "safe country of origin" would be considered unfounded, and they would face accelerated procedures in which their claims would not be substantively examined.[95] Annex II to the Asylum Procedures Directive establishes the guidelines for designating a country as safe enough to trigger these expedited procedures in asylum determination. A country can be included on the list when "it can be shown that there is generally and consistently no persecution as defined in Article 9 of [the Qualification Directive], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict."[96] Due to internal disagreement, EU members have been unable to produce such a common list of safe countries, but many individual Member States maintain their own "safe country of origin" lists and apply them to their asylum procedures.[97]

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87. *See generally* Asylum Procedures Directive, *supra* note 77.

88. *Id.* art. 27.

89. *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, para. 1 (Nov. 30, 1992), *available at* http://www.refworld.org/docid/3f86c6ee4.html.

90. At the time, the term employed was a "countr[y] in which there is [generally] no serious risk of persecution." *Id.*

91. *Id.*

92. OLGA FERGUSON SIDORENKO, THE COMMON EUROPEAN ASYLUM SYSTEM: BACKGROUND, CURRENT STATE OF AFFAIRS, FUTURE DIRECTION 95 (2007).

93. Asylum Procedures Directive, *supra* note 77, art. 29(1).

94. *Id.* art. 30.

95. *Id.* arts. 23(4)(c), 31(2).

96. *Id.* Annex II.

97. Gurzu, *supra note* 85, at 6–7.

### B. *The EU Free Movement Directive*

Given the restrictions on the Roma's ability to seek asylum in other EU countries, it is important to consider whether the Roma have feasible alternatives to asylum when trying to avoid the persecution or discrimination they face in their home countries. In theory, Roma who are citizens of EU Member States can take advantage of the EU Free Movement Doctrine, which forms the basis of the EU Free Movement Directive "on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States."[98] In its preamble, the EU Free Movement Directive proclaims that the freedom to move and reside within the territory of the EU is a "primary and individual right" of EU citizens[99] and "one of the fundamental freedoms of the internal market."[100] Specifically, the EU Free Movement Directive provides that "Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport."[101] However, after a period of three months, EU citizens can reside in another Member State only if they can demonstrate that they are either employed or have sufficient funds to support themselves and their family.[102]

In practice, Roma from EU countries are rarely able to meet the requirements of the EU Free Movement Directive.[103] Due to the discrimination they face in their home countries, most of them lack work experience and education, making it more difficult for them to integrate into new societies and secure stable employment in a foreign country.[104] Consequently, they often violate the EU Free Movement Directive by remaining in EU host countries for over three months and are therefore unable to gain access to housing, education, healthcare, and other essential social services.[105] This further perpetuates the cycle of poverty, unemployment, and irregular travel that leads to their marginalization.

### C. *The Effect of the Common European Asylum System and the EU Free Movement Directive on the Roma*

The Common European Asylum System was ostensibly created to promote a uniform, common system for determining individuals' refugee status and processing their asylum applications.[106] The concept of harmonizing asylum procedures does not threaten the Roma or other marginalized groups in Europe. Rather, the issue of concern is that the EU has become unresponsive to many possible asylum claims from individuals within the EU or from other safe countries of origin. Some of these

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98. *See generally* Directive 2004/38, 2004 O.J. (L 158) 77 (EC).
99. *Id.* para. 1.
100. *Id.* para. 2.
101. *Id.* art. 6(1).
102. *Id.* art. 7(1).
103. *Roma Asylum Seekers in Europe*, *supra* note 3, at 12.
104. *Id.*
105. *Id.*
106. *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, at 2–4, COM (2008) 360 final (June 17, 2008) [hereinafter *Policy Plan on Asylum*].

claims may not only have been valid but may also have signaled an important change in the human rights conditions of countries previously considered safe. The rise in discrimination and violent crimes against the Roma in countries such as Hungary and the Czech Republic undermines the effectiveness and adequacy of the restriction on intra-EU asylum claims and the "safe country of origin" concept. The recent rise in violence against the Roma (which has prompted many Roma to seek refuge in Canada, as discussed in Part III below) demonstrates that no matter how safe a country is, individuals and, even more startlingly, entire groups may be treated with unexpected hatred or may be persecuted due to their race, political opinion, nationality, religion, or membership in a social group. The Common European Asylum System creates a region where the Roma will always be considered relatively safe but will have little opportunity to draw attention to their possible asylum claims. This further normalizes the discrimination and violence towards the Roma, making it difficult to ensure that they receive the protection enshrined in the U.N. Refugee Convention's principles.

Similar to the European Common Asylum System, the EU Free Movement Directive further restricts the Roma's ability to relocate by imposing stringent requirements on EU citizens' ability to live in other Member States.[107] As the Roma's opportunities to seek asylum and reside in other EU countries are precluded, their remaining alternatives are to return to their countries of origin, violate the EU Free Movement Directive by remaining in an EU host country for more than three months (or else travel from one EU Member State to another without exceeding the three month limit in any single country), or seek asylum in a non-EU country.[108] Of these alternatives, seeking asylum in a non-EU country is the most costly and difficult given the expenses of travel and the complications of acquiring travel documents.[109] As discussed below, it is becoming increasingly politically contentious as well.

## III. CANADA'S DESIGNATED COUNTRIES OF ORIGIN LIST: IMPLICATIONS FOR ROMA REFUGEES

### *A. The Provisions of the Designated Countries of Origin Scheme*

The Canadian Designated Countries of Origin (DCO) mechanism is the product of two interconnected trends in Canadian asylum law. The first underlying trend involves a progressive liberalization of asylum standards and an expansion of the definition of refugee through court decisions and policies that emphasize Canada's responsibility to assist individuals in crisis situations.[110] In response to the Canadian asylum system's expansion, a secondary trend has recently emerged to deter asylum seekers from filing claims in Canada.[111] This trend has materialized

107. *Roma Asylum Seekers in Europe*, *supra* note 3, at 12.
108. *Id.* at 6–7.
109. *Id.* at 7.
110. CAPARINI, *supra* note 21, at 16.
111. *Id.* at 17.

predominantly through the increase of restrictions and procedural barriers to obtaining asylum, as well as through a reduction in the rights and benefits made available to asylum seekers.[112] The DCO list is one such restrictive measure, whose purpose is not to redefine the term "refugee," but to limit the pool of possible applicants by establishing additional obstacles for refugees from certain countries.[113]

The DCO scheme is part of Canada's recently enacted Protecting Canada's Immigration System Act (Bill C-31) that aims to reduce the financial burden of the immigration and asylum system on Canadian taxpayers and imposes additional barriers and procedural safeguards to limit the influx of immigrants and asylum seekers.[114] Bill C-31 establishes the authority to designate certain countries as safe and allows additional restrictions to be placed on asylum seekers from those countries.[115]

In December 2012, Jason Kenney, Canada's then Minister of Citizenship and Immigration, announced the implementation of the DCO scheme to the Canadian asylum system.[116] The rationale for listing countries as safe was the presumption that countries that adequately protect their populations were unlikely to produce refugees.[117] The purpose of placing countries on a DCO list was to discourage residents of the listed countries from seeking asylum in Canada and to thereby expedite the judicial process for those who do.[118] The placement of Hungary and the Czech Republic on the DCO list prevents Hungarian and Czech Roma from seeking asylum in Canada, one of the last countries that still considered their claims.[119] This raises important issues regarding Canada's commitment to fulfill its obligations under the U.N. Refugee Convention since Hungary and the Czech Republic are the two countries where violence against the Roma has become exceedingly visible and unrestrained.

In order to be placed on the DCO list, a country must meet either quantitative or qualitative criteria before being further evaluated by the Minister of Citizenship and Immigration and other Canadian federal government entities.[120] Countries meet the quantitative criteria when at least seventy-five percent of their asylum claims are

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112. *Id.*

113. *See Designated Countries of Origin*, GOV'T OF CAN. (Feb. 1, 2013), http://www.cic.gc.ca/english/refugees/reform-safe.asp ("The aim of the DCO policy is to deter abuse of the refugee system by people who come from countries generally considered safe .... This will ensure that people in need get protection fast, while those with unfounded claims are sent home quickly through expedited processing.").

114. *See generally* Protecting Canada's Immigration System Act, S.C. 2012, c.17 (Can.) (providing for expedited processing of refugee claims and granting the Minister greater powers to designate arrivals in certain categories and to adjudicate matters of detention).

115. *Id.* § 58.

116. Press Release, Citizenship and Immigration Can., Making Canada's Asylum System Faster and Fairer (Dec. 14, 2012), http://www.cic.gc.ca/english/department/media/releases/2012/2012-12-14.asp.

117. *Backgrounder – Designated Countries of Origin*, GOV'T OF CAN. (Feb. 1, 2013), http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp.

118. *Id.*

119. Though some Roma have filed successful asylum claims in the United States, a complete analysis of the Roma's preference for Canada over the United States is beyond the scope of this Note. A notable reason for this pattern is that, historically, Canada has had relatively more welcoming refugee protection and asylum policies. Wilson Ring & Rob Gillies, *Gypsies Take Curious Route Through US to Asylum*, ASSOCIATED PRESS (Dec. 6, 2012), http://bigstory.ap.org/article/gypsies-take-curious-route-through-us-asylum.

120. *Backgrounder – Designated Countries of Origin, supra* note 117.

rejected by Canada's Immigration and Refugee Board (IRB) or at least sixty percent of these claims are withdrawn or abandoned.[121] Countries satisfy the qualitative criteria when they have an independent judicial system, recognize basic democratic rights and freedoms, provide ways to address invasions of those rights, and allow civil society organizations.[122] As of May 2013, thirty-seven countries have been listed as DCOs.[123] Those countries include most EU Member States,[124] Australia, Croatia, Iceland, Israel (excluding Gaza and the West Bank), Japan, Mexico, New Zealand, Norway, South Korea, Switzerland, and the United States.[125]

Asylum claimants from DCOs will face significant procedural obstacles and reductions in legal guarantees and financial assistance. Such claimants will have fifteen days to file their asylum claims and will have reduced time to prepare their cases; those who file an inland claim will have thirty days until their hearing, while those who make a claim at the border will have forty-five days.[126] Applicants whose claims are rejected will not have an opportunity to appeal to the new IRB Refugee Appeal Division.[127] They may ask the Federal Court to review their claims; however, applicants could be deported while they await the result due to the accelerated removal times for rejected claims.[128] In addition, claimants will not have access to basic and emergency health care except in situations that involve public health or safety concerns.[129] They will be ineligible for a work permit until the IRB approves their application.[130]

Canada's DCO scheme has been criticized by human-rights groups for violating refugee rights and undermining the provisions of the U.N. Refugee Convention. In particular, both the Canadian Council for Refugees and Amnesty International note that claimants from DCOs suffer discrimination in the access to justice simply because of their country of origin.[131] They point to article 3 of the U.N. Refugee Convention, which prohibits states from discriminating against refugees on the basis of their country of origin, to show that Canada's DCO scheme is at odds with provisions of the U.N. Refugee Convention.[132]

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121. *Id.*

122. *Id.*

123. *Designated Countries of Origin*, *supra* note 113.

124. All EU Member States are listed as DCOs with the exception of Bulgaria and Romania. *Id.*

125. *Id.*

126. *Backgrounder—Summary of Changes to Canada's Refugee System,* GOV'T OF CAN. (June 29, 2012), http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-06-29b.asp.

127. *Id.*

128. *Id.*

129. Press Release, Canadian Council for Refugees (CCFR) & Amnesty Int'l Can., New Refugee System Does Not Treat Refugees Fairly or Protect Those Most at Risk (Dec. 14, 2012), http://ccrweb.ca/en/bulletin/12/12/14 [hereinafter Press Release, CCFR].

130. *See Backgrounder – Designated Countries of Origin*, *supra* note 117.

131. Press Release, CCFR, *supra* note 129; *see also* Amnesty Int'l Can., Brief to the House of Commons, *Unbalanced Reforms: Recommendations with Respect to Bill C-31* 5–7 (Apr. 17, 2012) [hereinafter *Unbalanced Reforms*], *available at* http://www.amnesty.ca/sites/default/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf (discussing how Canada's Bill C-31 authorizes the Minister of Citizenship and Immigration to designate a country as a "safe" country of origin and then impose discriminatory and unfair limitations on the rights of refugee claimants originating from that country).

132. *Unbalanced Reforms*, *supra* note 131, at 7; *see also* U.N. Refugee Convention, *supra* note 82, art.

Furthermore, the organizations emphasize that not all the countries designated as safe have impeccable rights guarantees given that some have "records of serious and systematic human rights violations."[133] This poses significant risk for many refugees fleeing DCOs who may have suffered an act of persecution that has not been well documented by the official human-rights reports that the IRB relies on when evaluating country conditions.[134] As Amnesty International indicates, the international community often depends on refugee claimants to reveal the human-rights violations and the instances of persecution that may have escaped the attention of human-rights organizations, journalists, or government officials.[135]

Amnesty International also notes that the use of the DCO scheme involves a group-based determination of refugees' needs for asylum, which violates the principle of the U.N. Refugee Convention that a claim must be treated on its individual merits and not based on the situation of the group to which the applicant belongs or is perceived to belong.[136] What should be considered is the individual claimant's specific condition and his or her own fear or experience of persecution—not the general lack of persecution that most citizens in his or her country enjoy.[137] The criteria used to determine whether a country is "safe" enough are also questionable.[138] The quantitative criteria are satisfied when seventy-five percent of a country's asylum claims are rejected, withdrawn, or abandoned by the IRB or at least sixty percent of these claims are withdrawn or abandoned.[139] This statistic may indicate that not all claims from a certain country meet the Canadian asylum standard, but by including such countries on the DCO list, the twenty-five percent (or more) of claims that would have been otherwise considered valid now face heightened procedural obstacles and legal complications. These few claims that have the potential to be recognized and accepted are therefore sacrificed due to the prevalence of unacceptable claims coming from the same country.

### *B. A Notable Purpose of the Designated Countries of Origin List: Reducing Roma Asylum Claims*

Similar to the EU's "safe country of origin" concept, Canada's DCO scheme is intended to limit the influx of asylum seekers from countries that are recognized for protecting their inhabitants' democratic and human rights. However, the purpose

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3 ("The Contracting States shall apply the provisions of this convention to refugees without discrimination as to race, religion, or country of origin.").

133. Press Release, CCFR, *supra* note 129.

134. *Id.*; *see also Policy on Country-of-Origin Information Packages in Refugee Protection Claims*, IMMIGRATION & REFUGEE BD. OF CAN. (last modified Nov. 18, 2013), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/pol/Pages/PolOrigin.aspx (stating that "the IRB uses the best available current information about human rights and country conditions in countries from which claimants originate" and relies on the country-of-origin information packet, which "aims to accurately and objectively report on human rights and country conditions in the countries from which refugee claimants originate").

135. *Unbalanced Reforms*, *supra* note 131, at 7.

136. *Id.* at 6.

137. *Id.*

138. *See id.* at 6–7 (commenting that "[t]here is no reliable objective means for distinguishing between 'safe' and 'unsafe' countries when it comes to refugee protection").

139. *Backgrounder—Designated Countries of Origin*, *supra* note 117.

and message of Canada's DCO scheme suggests that it was partially motivated by the need to curb the increasing number of Hungarian Roma refugees, which the Canadian government perceived as abnormal given its finding that Hungary generally guarantees human rights. For this reason, it is particularly necessary to evaluate the connections that emerge between the implementation of the DCO and the Roma's relationship with Canada.

Jason Kenney, Canada's former Minister of Citizenship and Immigration and current Minister for Multiculturalism and of Employment and Social Development,[140] offered several financial justifications for implementing the new DCO measure to curb the influx of asylum seekers.[141] Embedded in his arguments for reducing the burden on Canadian taxpayers were comments regarding the Roma asylum seekers from Hungary, which revealed the Ministry's specific goal of reducing the number of Roma entering the country.[142] Kenney's comments, the Ministry's extensive investigations of Roma migration,[143] and Canada's information campaign to make asylum in Canada appear unattractive to Hungarians[144] all suggest that a significant reason for implementing the DCO measures, particularly as they relate to Hungary and the rest of the EU, is to minimize the number of Roma asylum seekers.

Kenney has often stated that Roma asylum claims are "bogus" and are pursued by individuals who are simply economic immigrants or who intend to engage in criminal activity.[145] He argues that if Hungarian Roma fear persecution, they should seek asylum in another European country instead of Canada.[146] However, as discussed in Part II above, this is not a viable alternative since the Qualification Directive prevents EU citizens from claiming asylum in other Member States, while

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140. *The Honourable Jason Kenney*, PRIME MINISTER OF CAN., http://www.pm.gc.ca/eng/minister/honourable-jason-kenney (last visited Jan. 6, 2014).

141. *See* Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism, Speaking Notes for News Conference to Announce the Initial List of Designated Countries of Origin (Dec. 14, 2012), http://www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp (emphasizing that, under the current system, "failed EU claimants are able to spend years in Canada at great expense to [Canadian] taxpayers," but with the new changes, "the number of unfounded claimants abusing Canada's generosity [should] decline").

142. *See id.* (discussing Hungary as Canada's top source for asylum claims and the low rate of successful or "well-founded" claims from Hungary); Press Release, Gov't of Can., Protecting Canada's Immigration System Act Earning Rave Reviews (Feb. 22, 2012), http://www.cic.gc.ca/english/department/media/releases/2012/2012-02-22.asp (detailing the account of a lawyer who described Kenney as a "loophole closer" and noting that the loophole that once allowed claimants, including "the Roma claimants," to "r[i]de on the taxpayer" by receiving free education, health care, and welfare benefits, is "dead").

143. *See* Press Release, Gov't of Can., Minister Jason Kenney Meets with Roma Leaders in Hungary (Oct. 9, 2012), http://www.cic.gc.ca/english/department/media/releases/2012/2012-10-09.asp (describing Kenney's visit to Hungary and his meetings with the Roma community about the "irregular migration" pattern).

144. Bilbo Poynter, *Is Canada Telling Hungary's Roma 'Do Not Seek Asylum Here'?*, CHRISTIAN SCI. MONITOR (Jan. 24, 2013), *available at* http://www.csmonitor.com/World/Americas/2013/0124/Is-Canada-telling-Hungary-s-Roma-Do-not-seek-asylum-here.

145. Stephanie J. Silverman et al., *Why Is There No Refuge for Roma Refugees?*, HUFFINGTON POST CAN. BLOG (Dec. 21, 2012), http://www.huffingtonpost.ca/stephanie-j-silverman/roma-refugees-canada-immigration_b_2346160.html?view=print&comm_ref=false.

146. *Id.*

the EU Free Movement Directive makes it difficult to resettle in another country for a period exceeding three months. Kenney's suspicions have been fueled by the drastic increase in Hungarians (mostly Roma) seeking asylum in Canada. In 2008, Canada received under three hundred asylum claims from Hungarians; by 2011, this number reached 4440.[147] This increase coincides with the escalation of extreme-right violence against the Roma in Hungary[148]—a fact that Kenney has not publicly addressed.[149] Czech asylum claims similarly increased from 860 in 2008 to over a thousand by the middle of 2009.[150] Despite the acceptance of forty percent of those claims in 2008,[151] Canada imposed a visa requirement on the Czech Republic, in part as a way to reduce the influx of Roma asylum seekers for whom travel to Canada would become prohibitively difficult as a result of the new visa requirement.[152] A similar visa requirement has not been imposed on Hungary, potentially due to the fact that Canada began negotiations for a free-trade agreement with the EU following the rise in Hungarian claims, and such an agreement would not be feasible if Canada instituted a visa requirement on Hungary.[153]

Due to the suspicions of fraudulent Roma asylum claims, the Canada Border Services Agency (CBSA) completed an intelligence report in 2011 based on an investigation called Project SARA, which examined the allegations of fraud and criminal activity among Hungarian refugee claimants in Canada, most of whom are Roma.[154] The report notes that the Roma "are known to engage in petty theft, break and enter, possession of property obtained by crime, fraud and forgery, and assault, and many engage in similar activities while in Canada."[155] The report further concludes that these crimes are indicative of a conscious, organized effort to abuse the benefits that Canada offers its residents.[156] However, the report does not place this information in context and does not offer statistics to explain what percentage of Roma refugees abuse Canadian benefits or are involved in the crimes listed.

The CBSA report has been criticized for being a case of "classic racial profiling" that focuses on relatively minor criminal activity without establishing the prevalence of such crime relative to the overall Roma population in Canada.[157] Refugee expert

147. Danielle Da Silva, *Roma at Risk: Fast and Fair Asylum Changes Leave Hungarian Roma Refugees in Limbo*, 46 PROJECTOR 5, 5 (2013), *available at* http://theprojector.ca/pdf/feb19-final-1web.pdf.

148. *Roma Asylum Seekers in Europe*, *supra* note 3, at 8.

149. *See* Poynter, *supra* note 144 (noting that Kenney questions the validity of Roma claims without inquiring into Hungary's treatment of the Roma).

150. *Roma Asylum Seekers in Europe*, *supra* note 3, at 8.

151. *Id.*

152. Rick Westhead, *Why the Roma Are Fleeing Hungary and Why Canada Is Shunning Them*, THESTAR.COM (Oct. 13, 2012), http://www.thestar.com/news/world/2012/10/13/why_the_roma_are_fleeing_hungary_and_why_canada_is_shunning_them.html; Silverman et al., *supra* note 145.

153. *See* Westhead, *supra* note 152 ("Canada is currently negotiating a free-trade agreement with the EU, which diplomats and economists say would probably collapse if Canada introduced a visa program for Hungarians.").

154. *See* CANADIAN BORDER SERVICES AGENCY, PROJECT SARA: INTERNATIONAL AND DOMESTIC ACTIVITIES FINAL REPORT 7 (2012) (alluding to fraud by finding that Hungarian refugee claimants are primarily economic migrants).

155. *Id.*

156. *Id.* at 6–7.

157. Louise Elliott, *Hungarian Roma Refugee Claimants Targeted in CBSA Report*, CBC (Oct. 17, 2012) (internal quotation marks omitted), http://www.cbc.ca/news/politics/story/2012/10/17/pol-cbsa-project-sara-immigrants-hungary-roma.html?cmp=rss.

and former chair of the IRB, Peter Showler, further objects to the report's apparent presumption that the Roma's asylum claims are fraudulent.[158] Additional evidence of Canada's effort to reduce Roma claims includes a targeted information campaign throughout Roma-populated regions of Hungary that uses billboards intended to discourage the Roma from seeking asylum in Canada and convince them that their claims will not succeed.[159]

### C. *The Effects of the Designated Countries of Origin List on Roma Refugees*

Canada's limitations on asylum applicants from DCO-listed countries have effectively made it increasingly difficult and often impossible for the Roma to seek asylum in Canada in order to avoid the discrimination and racially motivated violence they face in Hungary. In the last decade, nearly a thousand individuals from Hungary have been accepted as refugees by Canada's IRB.[160] This demonstrates that, despite suspicions of fraudulent claims and abuse of Canada's benefit system, a significant number of Hungarian Roma have met the Canadian requirements for refugee protection. This statistic does not, and should not, overshadow the fact that many Roma from Hungary and elsewhere may be filing frivolous claims or engaging in fraudulent activity following their claims' acceptance or rejection.[161] However, it indicates that the situation of individual Roma cannot be ignored simply due to the fact that other members of their ethnic and cultural group have filed unsatisfactory claims. Canada's DCO scheme generally, and the zeal with which it targets Hungarian Roma specifically, suggest that the Roma are a problem that Canada's Ministry of Citizenship, Immigration, and Multiculturalism is attempting to "correct" through mechanisms that otherwise appear neutral and diplomatic. Canada's DCO mechanism not only fails to apply the principles of the U.N. Refugee Convention, but it also promotes the stereotype of the Roma and fuels the vilification that they attempt to escape.

Organizations such as the Canadian Association of Refugee Lawyers have decried that the DCO scheme creates an "[a]rbitrary, [u]nfair, [a]nd [u]nconstitutional" refugee determination system that particularly disadvantages Roma who are at risk of prevalent discrimination and persecution.[162] The organization emphasizes that certain countries on the DCO list, such as Hungary, "are generally democratic but have state institutions, such as the police and the prosecutor's office, that do not provide effective protection for all of their citizens,"

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158. *Id.*

159. Nicholas Keung, *Roma Refugees: Canadian Billboards in Hungary Warn of Deportation*, THESTAR.COM (Jan. 25, 2013), http://www.thestar.com/news/canada/2013/01/25/roma_refugees_canadian_billboards_in_hungary_warn_of_deportation.html.

160. Silverman et al., *supra* note 145.

161. *See id.* (noting that the Canadian government maintains that "[v]irtually all Hungarian asylum claims are abandoned or withdrawn by the claimants themselves or [are] determined to be unfounded by the independent Immigration and Refugee Board").

162. Press Release, Canadian Ass'n of Refugee Lawyers, Designated Country of Origin Scheme is Arbitrary, Unfair, and Unconstitutional (Dec. 14, 2012), http://carl-acaadr.ca/articles/32.

and highlights that "[m]inority groups like Romani and Jewish peoples are subject to persecution, discrimination, and violence."[163]

## IV. RECOMMENDATIONS

### A. *Recommendations for European States and the EU*

Significant efforts have been made to reduce discrimination against the Roma and to increase their opportunities in education and employment. However, without a fundamental shift in the way Europeans perceive the Roma, their situation cannot be adequately transformed. Therefore, European nations and the EU must take concrete steps to prevent the Roma from being left out both by their own countries of citizenship as well as by the remaining EU Member States. This requires a stricter enforcement of EU anti-discrimination laws and a deeper inquiry into the racially motivated violence that has recently surged in eastern Europe.

The rationale behind the current instruments of the Common European Asylum System—policy uniformity—is essential to EU unity,[164] but unity among nations need not be achieved by making all nations equally blind to the same problem. To ensure that minorities will not be overlooked by their own countries and by the rest of the EU, asylum or subsidiary protection must be made available to individuals even if they are EU citizens. If the assumption that all EU Member States are safe and cannot produce refugees is correct, there will be no reason to fear an influx of EU asylum seekers. In the event that there are such asylum seekers, the EU will be able to respond to their needs and gain greater awareness of human-rights abuses that are occurring within the EU zone. If the asylum procedure is uniform among all Member States and is effective, strict, and well monitored, individuals filing fraudulent claims will not be able to abuse the benefits offered by EU Member States.

### B. *Recommendations for Canada*

Since an important reason for Canada's new measures is to reduce the asylum system's financial burden on taxpayers, Canada should consider strengthening its enforcement and verification mechanisms to ensure that individuals who are denied asylum or other immigrant status do not have access to its welfare programs. Canada must directly address the abuse and overextension of its social-benefits system instead of artificially tightening the influx of asylum seekers. If benefits are abused, the system that provides them should be strengthened, and blame should not be cast based on broad ethnic generalizations. Fraud cannot be adequately deterred by restricting a group's right to asylum on the assumption that the group, as a whole, is likely to engage in fraudulent activity. A more effective way to deter fraud would be to penalize those who have been found to commit it.

To avoid endangering the principles enshrined in the U.N. Refugee Convention, Canada must not treat any country as presumptively safe. Instead, it must ensure

163. *Id.*

164. *Policy Plan on Asylum*, *supra* note 106, at 2–4.

that it maintains adequate information on the conditions of each country so that it can evaluate asylum claims effectively and efficiently without resorting to expedited procedures and other barriers. If the Roma file disproportionately high numbers of invalid claims, the invalid claims should be rejected, but the remaining claims should not suffer as a consequence.

### *C. Additional Recommendations Against Designating Countries As Safe*

Designating countries as safe poses a multitude of risks that undermine the purpose and effectiveness of the U.N. Refugee Convention. The measure has risen in popularity among developed countries to which refugees commonly flee for protection, and it is necessary to reverse this trend by drawing attention to the pernicious consequences that can result from creating a presumption that certain countries will not produce refugees deserving of international protection.

In addition to the criticisms listed in Part III.A, the existence of a list of safe countries may very well imply that those that are not included in it are seen as unsafe. This is potentially detrimental to these unsafe countries' foreign relations, trade, and tourism, and they may respond by pressuring states that use the "safe country of origin" mechanism to include them on the safe list. Such a dynamic can distort the asylum system and the framework established by the U.N. Refugee Convention by detracting attention away from the evaluation of each individual asylum claim and instead placing even greater emphasis on political and economic considerations.

More importantly, designating a country as safe makes it difficult to react to spontaneous acts of persecution if they were to occur in that country. Though a country would not be listed as safe if it had not established that it guarantees and protects all the necessary rights of its inhabitants (albeit through the use of questionable criteria), the process of removing a country from the safe list poses many more political complications than placing a country on the safe list.[165] Therefore, many countries may remain on the safe list without consistently demonstrating their commitment to democracy and human rights.[166]

## CONCLUSION

The current asylum frameworks of the EU and Canada—the two main regions where the Roma turn to for protection—are progressively closing themselves off to Roma claims. Given the recent trends in the treatment of the Roma in eastern Europe, it is important to recognize that the Roma have increasingly limited opportunities to seek protection, raise awareness of their condition, and present their claims in front of an impartial system that will not impose restrictions and obstacles at every step of the process.

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165. *See* SIDORENKO, *supra* note 92, 96–97 (detailing the many factors considered in placing a country on probation from the safe list before the country is even considered for removal).

166. *See id.* (discussing how a suspended country is rehabilitated unless the European Commission makes a proposal to remove the country from the safe list).

Though expediting the asylum-seeking process and eliminating fraud are noble goals, they must be achieved with equally acceptable means that can be aligned with the spirit and purpose of the U.N. Refugee Convention. When national asylum procedures offer inadequate mechanisms for the detection of viable claims in the face of a large influx of asylum seekers, it is not international standards that can be lowered. Rather, well-tailored solutions must address the specific complications of the asylum process without placing general barriers to asylum seekers from a certain country. Furthermore, the international community must strive for an evolving understanding of human-rights protection in which countries can recognize their continued opportunities for improvement. This cannot be achieved by constructing a benchmark of human-rights protections that, when reached, creates the presumption that a country's residents are undeserving of asylum protection elsewhere.


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