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Feature Articles

Student Article

A Comparison of Tax Exempt Organizations in the People's Republic of China and the United States

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The charities that soothe and heal and bless
are scattered at the feet of man like flowers.

William Wordsworth, *The Excursion*[1]

I. Introduction

Throughout recorded history, man has relied upon the good works of his fellow man to support those left behind by the collective endeavor.[2] As a result, charitable organizations hold a special place in society. Because they find strength in the number of their members, charitable organizations have "the energy, the vision, the drive, the tenacity," that individual philanthropists and reformers may not possess.[3] They have proved themselves agents of change at home and abroad.[4]

As such, charitable organizations have been unwelcome in countries with non-democratic forms of government.[5] The People's Republic of China is one such country. The Cultural Revolution eliminated nearly all of the country's charitable institutions for a period of over twelve years, ending in 1978.[6] Afterward, the Chinese government established a handful of closely controlled nongovernmental organizations to facilitate the receipt of international aid and cooperation.[7] Over the past ten years, these and other Chinese organizations have undergone signifi-

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[1] William Wordsworth, The Excursion (Liver Pool Univ. Pr. 2004) (1814).

[2] For instance, Leviticus 23:22, thought to be written in the 6th century B.C., provides that "[w]hen you reap the harvest of your land . . . you shall not pick your vineyard bare, nor gather up the grapes that have fallen. These things you shall leave for the poor and the alien."

[3] Lowell W. Livezey, Nongovernmental Organizations and the Ideas of Human Rights 19 (1998).

[4] *Id.* at 28 (citing Puritans, Quakers, and abolitionist societies as "modern organizations of political dissent" that acted "for explicitly egalitarian and revolutionary change"); *see also* Report to Congress and the Nonprofit Sector on Governance, Transparency, and Accountability 10 (2005), *available at* http://www.NonprofitPanel.org (follow "final report" hyperlink; then follow "final report" hyperlink) (last visited Oct. 22, 2005) [hereinafter Panel on the Non-Profit Sector] (describing the rapid expansion of the nonprofit sector in the colonial and revolutionary periods, as noted by Alexis de Toqueville in 1831, as differentiating the United States from Europe and noting the sector's development into integral community institutions such as libraries, local schools and 911 services).

[5] *See generally* Livezey, *supra* note 3, at 19-34.

[6] Deng Guosheng, *NGO's Come of Age*, Beijing Review, Apr. 1, 2004, at 28.

[7] *Id.*

cant changes in functional purpose and governance, moving in lockstep with China's transformation to a limited market economy.[8]

In the United States, by contrast, activities of volunteer organizations first appeared in the form of services provided by religious societies.[9] With the growth of a strong market economy, these services gave rise "to the 'market failure' theory of volunteer organizations, to the view that voluntary organizations have their *raison d'etre* in the failure of the market to meet the needs that they are established to meet."[10] Some scholars within the United States also view voluntary organizations as mediators between individuals and the mass society.[11] "As 'mediating structures' they both give the individual access to institutions in order to claim the society's benefits more effectively, and provide space for individuals to retreat from society, better to fulfill the values and experience the customs that are not shared by society at large."[12] It is difficult to overstate the prevalence in the United States of groups tailored to serve these purposes. In 2003, the Internal Revenue Service ("IRS") master file contained information on 1.6 million tax-exempt organizations.[13] In fiscal year 2000, these organizations held over two trillion dollars in assets and reported over nine hundred billion dollars in revenues.[14]

Both the United States and China are on the cusp of major changes in governmental regulation of charitable organizations. As China moves forward with the marketization of its socialist economy, the use of nonprofit organizations for both mediation and alleviation of market failure has become increasingly important. Toward that end, China's State Council has enacted a law describing the role and governance of charitable foundations in China. The United States, on the other hand, has a fully developed charitable law, but it is one that the government has considered amending to discourage instances of fraud and self-dealing that have recently come to light.[15] This article seeks to compare and contrast the two systems with an eye toward informing the work of scholars and policy-makers interested in the governance of charitable organizations.

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[8] *See id.*

[9] LIVEZEY, *supra* note 3, at 29-30.

[10] *Id.*

[11] *Id.* at 33.

[12] *Id.*

[13] STAFF OF JOINT COMMITTEE ON TAXATION, DESCRIPTION OF PRESENT LAW RELATING TO CHARITABLE AND OTHER EXEMPT ORG. AND STATISTICAL INFO. REGARDING GROWTH AND OVERSIGHT OF THE TAX-EXEMPT SECTOR, JCX-44-04, at 1 (June 22, 2004) [hereinafter JOINT COMMITTEE ON TAXATION].

[14] *See id.*

[15] *See* Sen. Max Baucus, *Baucus Calls Behavior of Some Charities "Unacceptable,"* TAX NOTES TODAY 121-42 (June 23, 2004) [hereinafter *Baucus Remarks*].

II. Recent History in Charitable China

A. The Social Backdrop

China's recent history has been one of upheaval and of phenomenal growth. After the economic standstill of the Cultural Revolution in the late 1960's and 1970's, reform policies adopted by Deng Xiaoping in the early 1980's quadrupled the Chinese per capita gross domestic product by the year 2000.[16] As part of its reform, China's government created nongovernmental organizations to interact with international interests and to spur investment in the country.[17] Less than a decade after its military action on Tiananmen Square, which seemingly quashed the possibility of individual pursuits, the country began a government-controlled transition to a market economy.[18] The country's rapid economic growth created "astounding disparities in the distribution of wealth, placing China today among the most unequal nations in the world."[19] Consequently, these events have "rendered the current Chinese social and political environment sensitive, unstable and potentially explosive. Social tensions are now created not only from aspirations for greater individual and political freedom . . . but increasingly from the unequal distribution of wealth and power."[20]

At least one commentator has noted that this unequal distribution is the result of inefficiencies in China's newly established market economy. He notes:

> Even if a competitive market might generate a Pareto-efficient allocation of resources, there are still the cases for government action, because an efficient allocation of resources might entail great inequality.. . . The problem is to decide which Pareto-efficient allocation conforms to society's notion of distributive justice. Obviously, the market cannot do it. The social welfare function is simply not a market construct; it must evolve from the political process.[21]

The Chinese government, through recent enactment of meaningful charitable organization reform, has taken one step toward this elusive distributive justice. In doing so, it has implicitly bent to its citizens' demands for both greater freedom and for a greater stake in the country's wealth. Beginning in the late 1990's, reform of government-sponsored charitable organizations began to give way to

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[16] XUDONG ZHANG, WHITHER CHINA? INTELLECTUAL POLITICS OF CONTEMPORARY CHINA 9 (Xudong Zhang ed., 2001).

[17] Despite their name, the government closely controlled these groups. *See* Guosheng, *supra* note 6.

[18] *See* ZHANG, *supra* note 16.

[19] *Id.* at 11. The author adds,

> The polarization between China's richest and poorest regions is considered by economists in China and worldwide to be not only worse than that of the United States, one of the most unequal of all advanced capitalist countries, but also on par with such oligarchic or crony-capitalist countries such as Russia or Indonesia.

[20] *Id.* at 12.

[21] Shaoguang Wang, THE CHANGING ROLE OF GOVERNMENT IN CHINA 5 (Feb. 8, 2000), http://www.cuhk.edu.hk/gpa/wang_files/UNDP.pdf (last visited Oct. 23, 2005).

the establishment of truly independent ones.[22] While government-sponsored organizations had confined their operation to fields in harmony with the socialist ideal, such as women's rights and environmental protection, independent charities broadened their scope to include migrants, Acquired Immunodeficiency Syndrome ("AIDS"), and legal assistance to the poor.[23] Nonetheless, these organizations, while permitted to exist, did not have the imprimatur of the Chinese government.[24] As a result they sometimes suffered from "a lack of public prestige."[25] In fact, fewer than 100,000, or one percent, of China's 10 million registered companies have records of charitable donations to such charities.[26]

B. The Portent of SARS

Special regulations, adopted in May 2003, paved the way for the introduction of substantial changes to public participation in the China's charitable foundations.[27] The regulations provided that products, diagnosis, treatment, quarantine equipment, and vehicles donated by foreign sources for use in the fight against Severe Acute Respiratory Syndrome ("SARS") could pass to the China Charity Foundation and the Red Cross Society of China free of import, customs, Value Added Tax ("VAT"), and consumption taxes.[28] In addition, the State Taxation Administration announced that companies in China could deduct one hundred percent of the value of cash and materials donated to combat SARS.[29] Generally, Chinese law limits corporate income tax deductions for charitable contributions to ten percent of a company's income.[30] The SARS measure was a significant departure from past practices, and it foreshadowed an even greater change to come.

C. Enactment of the Regulation on Foundation Administration

China's current Regulation on Foundation Administration took effect on June 1, 2004.[31] It was adopted to effectuate three much-needed policy goals: to encourage the organization and activities of foundations; to maintain the legal rights and interests of foundations, donors, and beneficiaries; and to promote

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22 *See* Guosheng, *supra* note 6.

23 *See id.*

24 *See id.*

25 *Id.*

26 *See* Chen Chao, *China's Charities and Philanthropists*, CHINA INTERNET INFO. CENTER, Apr. 27, 2004, http://www.china.org.cn/english/2004/Apr/94150.htm (last visited Oct. 22, 2005).

27 *See* CIRCULAR OF THE MINISTRY OF FINANCE ON EXEMPTING THE IMPORT TAXES FOR DONATED MATERIALS FOR PROPHYLAXIS AND TREATMENT OF CONTAGIOUS ATYPICAL PNEUMONIA (promulgated by the Ministry of Finance May 2, 2003, effective May 2, 2003), *available at* LEXIS PRCLEG 2778.

28 *See id.*

29 Chao, *supra* note 26.

30 *See* AUDITING CRITERIA (People's Republic of China), art. 79.

31 REGULATION ON FOUNDATION ADMINISTRATION, (promulgated by the State Council of China, Mar. 8, 2004, effective June, 1, 2004), *available at* LEXIS PRCLEG 3463.

public participation in the country's welfare undertaking.[32] As with most of its market reform policies, the Chinese government has not completely loosened its grip. All foundations must "abide by the Constitution, laws, statutes, regulations and the state policy, and shall not endanger the national security, unity, and national solidarity, and shall not breach social morality."[33] Nonetheless, this law represents a turning point in China's relationship with charitable organizations. Although its subjective restriction on activities against solidarity and morality open the door for government intervention should the experiment fail, the Regulation ushers in a new period of respectability for nonprofit organizations that are not affiliated with the government.

III. Regulatory Regimes: Comparing Chinese and United States Laws

Although starkly different in many ways, the United States and Chinese governments share in common the governance of vast and economically potent nations. Both are shepherd market economies, one long established and the other a promising fledgling. Both are called to fight for the individuals that national progress leaves behind. Charitable organizations are an important part of these struggles. China has a decades-long history of seeking social parity for its people but is inexperienced in governing a market of free actors. On the other hand, the United States has over two centuries' experience in governing a market of free actors but has never, as a nation, sought complete social equality for its people. This dichotomy of experience and increasing unity of economic structure has produced two systems of charitable governance whose similarities and differences speak to the similarities and differences of their countries of origin.

A. Organizational Classes

Both China and the United States regulate charitable organizations through use of a classification system. Under China's Regulation on Foundation Administration (the "Regulation") "foundation" refers to a nonprofit organization that uses donated property in pursuance of welfare undertakings.[34] These organizations are divided into two classes. Public offering foundations solicit contributions from the general public, and non-public offering foundations are not permitted to do so.[35] Public offering foundations are further divided into national public offering foundations, whose mission and solicitation is national in scope, and regional public offering foundations, whose operation and solicitation is limited to the state in which the foundation is organized.[36] The tax consequences to donors

[32] *Id.* art. 1.

[33] *Id.* art. 4. The theme of this subjective catch-all prohibition on anti-State activities is repeated in a separate regulation, which provides that the name of a foundation must not harm state or public interest, mislead the public, connote superstition, or contain foreign letters or the name of a foreign country; *see* PROVISIONS ON THE ADMINISTRATION OF NAMES OF FOUNDATIONS, (promulgated by The Ministry of Civil Affairs, June 23, 2004, effective June 7, 2004), *available at* LEXIS PRCLEG 3569.

[34] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 2.

[35] *Id.* art. 3.

[36] *Id.*

do not appear dependent on the organization's classification, although methods of governance differ for public and nonpublic foundations.[37]

In contrast, the Internal Revenue Code of the United States (the "Code") names no fewer than twenty-nine individually numbered categories of tax-exempt organizations, most of which serve a public policy goal.[38] These organizations run the gamut—the catalogue includes everything from instrumentalities of Congress to social and recreational clubs.[39] Tax treatment and regulation of an organization and its donors depends upon the organization's numerical classification.[40] The numerical classification system allows the United States government to tailor legislation to a particular category of organization.[41] This versatile component of United States law is an important feature of the Code because the needs and possible pitfalls of organizations may vary according to their purpose, but it also adds a level of complexity in governance that is not present in the Chinese Regulation.

B. Description of Charitable Purpose

Both China and the United States require tax-exempt organizations to serve a specified purpose. Due to the complexity of United States tax exemption law, this article will focus on organizations described by section 501(c)(3) of the Code. These organizations are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.. . ."[42] This organizational description, of the twenty-nine enumerated descriptions provided by the Code, appears similar to the Chinese criterion that foundations "participate in a welfare undertaking."[43] Although the Chinese Regulation lacks the detail of the United States provision and does not elaborate on the meaning of "welfare undertaking," purposes of some organizations discussed in English-language articles released around the effective date of the Regulation are similar to those governed by section 501(c)(3) of the Code, with the absence of promotion of religion.[44] It is

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[37] *See generally id.*

[38] *See* 26 U.S.C. §501(c)(3), (d) (2005).

[39] *See id.*

[40] *See, e.g.*, 26 U.S.C. §§170, 501, 505 & 511 (2005).

[41] *See, e.g.*, 26 U.S.C. §505 (2005) (establishing anti-discrimination rules for employee benefit organizations).

[42] 26 U.S.C. §501(c)(3) (2004).

[43] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 1.

[44] For instance, Great New Wall for Impoverished University Students provides college scholarships for rural students. *See* Tang Yuankai, *The More You Give, The More You Get*, BEIJING REV. June 17, 2004 at 28 (June 2004), *available at* http://www.bjreview.com.cn/ml-zhong/ml-200424-z.htm (last visited Oct. 23, 2005). The Shanghai Education Development Foundation shares a similar mission; *see* Chao, *supra* note 26. Others include Friends of Nature, The China Youth Development Foundation, China Foundation for Poverty Alleviation and the Green Volunteer Association of Chongquing, which "successfully aroused public concern about forest protection in Sichuan Province, through a TV program on China Central Television." *See also* Guosheng, *supra* note 6. It must be noted, however, that the promotion of religion is significantly absent from China's accepted "welfare activities."

worth noting that the standard set forth in the Regulation is subjective and therefore open to interpretation by taxpayers and the government.

C. Incorporation and Federal Recognition Processes

Organizations hoping to benefit from the regulatory framework established for charities in the United States and in China generally must satisfy several bureaucratic requirements before they begin operation. In the United States, organizations are formed under state law but must also apply for federal recognition of tax-exempt status if they anticipate receiving annual incomes in excess of $5,000.[45] As a result, organizations are subject to regulation by both federal and state governments. The federal government monitors tax exempt status, and the state governments monitor corporate organization and fiduciary use of funds.[46]

The Chinese process also embodies national and local components. Although the entire incorporation and exemption process is a function of national law, it is carried out at the provincial level.[47] The process differs somewhat from that of the United States because China does not have independent state governments.[48] As a result, the national government has a constant hand in governing all aspects of charitable compliance, and for that reason, it has a potential organizational advantage over the United States in matters of charitable oversight.

A recent proposal of the Senate Finance Committee (the "Committee") suggests the United States may move to eliminate this discrepancy by assigning federal prosecutorial power to the states in exchange for assumption of traditional state business oversight powers.[49] Under the proposal, "[s]tates would be provided the authority to pursue certain Federal tax law violations by exempt organizations with approval of the IRS."[50] In addition, the proposal would impose federal best corporate practices on charities.[51] This is an area traditionally reserved to state governance, and the proposal, if adopted, would be a significant affront to federalist principals. Under it, the Code would go so far as to prescribe

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[45] JOINT COMMITTEE ON TAXATION, *supra* note 13, at 11; IRS, 2004 Form 1023 Instructions at 2, http://www.irs.gov/pub/irs-pdf/i1023.pdf (last visited Oct. 23, 2005) [hereinafter IRS Form 1023 Instructions].

[46] *See* PANEL ON THE NON-PROFIT SECTOR, *supra* note 4, at 13.

[47] *See* REGULATION OF FOUNDATION ADMINISTRATION, *supra* note 31, arts. 9-19 (public offering foundation established through application to provincial business supervisory authority and administrative department of registration).

[48] *See* OWEN D. NEE ET. AL., BUSINESS OPERATIONS IN THE PEOPLE'S REPUBLIC OF CHINA, 957-2nd T.M.I(B) (2004).

[49] *See* SENATE FINANCE COMMITTEE, TAX EXEMPT GOVERNANCE PROPOSALS: STAFF DISCUSSION DRAFT 7 (June 22, 2004), *available at* http://www.finance.senate.gov/sitepages/2004HearingF.htm/hearings2004.htm (follow "Tax Exempt Governance Proposals: Staff Discussion Draft" hyperlink) [hereinafter SENATE FINANCE COMMITTEE DISCUSSION DRAFT] (last visited Oct. 23, 2005); *see also* PANEL ON THE NONPROFIT SECTOR, *supra* note 4, at 4. (recommending creation of a federally funded program to help states increase oversight and education and urging elimination of statutory barriers to information sharing between the IRS and the states).

[50] SENATE FINANCE COMMITTEE DISCUSSION DRAFT, *supra* note 49, at 7.

[51] *See id.* at 11-15.

the number of directors a charity might have.[52] This is strikingly similar to the Chinese law.[53] In addition, the proposal would grant the IRS power to remove board members, officers, or employees of a charity who violate "self-dealing rules, conflicts of interest, excess benefit transaction rules, private inurnment rules, or charitable solicitation laws."[54] Charitable solicitation laws traditionally have been state laws.[55] The federal government's assumption of solicitation monitoring would further blur the line between state and federal enforcement of charitable law and bring the United States system of charity creation and governance into agreement with the Chinese system. This is a surprising result given that China's government is national while the United States government is federal.

D. Tax Benefits to Donors

China and the United States both impose limits on the amount of charitable contributions that individuals and corporations may deduct for income tax purposes. These limitations reveal something of each nation's political culture. In China, limitations are based on the recipient.[56] Corporations and individuals are entitled to unlimited dollar for dollar (or, more appropriately, Yuan for Yuan) deductions for their contributions made for the purpose of national defense or troop support;[57] however, deductions for contributions to charitable organizations are limited to ten percent of income for corporations and twenty percent of income for individuals.[58]

Conversely, the United States draws no distinction among charitable recipients based on national defense. Contributions to organizations described in section 501(c)(3) of the Code are equally deductible regardless of the charitable purpose those organizations serve.[59] Instead, the main limitation imposed on donors within the United States stems from their income.[60] An individual donor generally may not claim charitable deductions in excess of fifty percent of income, and a corporate donor may not claim charitable deductions in excess of ten percent of income.[61] In addition, deductions for the nation's wealthiest individual donors are further reduced by an amount that is equal to the lesser of three percent of the taxpayer's adjusted gross income or eighty percent of the taxpayer's otherwise

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52 *Id.* at 13.

53 *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 20.

54 SENATE FINANCE COMMITTEE DISCUSSION DRAFT, *supra* note 49, at 13-14.

55 *See* Multi-State Filer Project, STANDARDIZED REGISTRATION FOR NONPROFIT ORGANIZATIONS (2004), http://www.multistatefiling.org/index.html for an example of the Unified Registration Statement, which is submitted to states and requires detailed information on an organization's solicitation activities.

56 *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 27.

57 *See* AUDITING CRITERIA (People's Republic of China), art. 79.

58 *See* AUDITING CRITERIA (China), art. 79; INCOME TAX LAW (China), art. 17.

59 *See generally* 26 U.S.C. §170 (2005).

60 *See* 26 U.S.C. §170(b) (2005).

61 *See id.* Note that in some instances, donors' deductions are limited to 30% or 20% of their adjusted gross income.

allowable itemized deductions.[62] The Chinese law does not yet impose similar restrictions.[63]

E. The Private Foundation Difference

Unlike their Chinese counterparts, tax deductions available to United States donors may be further limited to twenty or thirty percent of the donor's income if the donee is a "private foundation" that does not meet certain requirements.[64] A private foundation is one that receives a substantial portion of its funding from a single source or a few sources.[65] Organizations with this funding structure are more susceptible to tax abuse than those that are funded by the general public.[66] As a result, they must abide by stricter rules than those applicable to publicly-funded charities.[67] These rules include restrictions on dealings between the foundation, its substantial contributors and its managers, annual distribution requirements, rules against holding substantial equity positions in companies, rules against investments that jeopardize the foundation's charitable purpose, and stricter requirements regarding permissible donees.[68]

Like the United States, China has established separate systems of governance for private and public foundations.[69] Many provisions of the Regulation approximate those of United States private foundation law; however, some provisions which would only apply to private foundations in the United States apply to both private and public foundations in China.[70] In essence, the Chinese system subjects all charities, and not just those with limited sources of funding, to stricter rules of governance than those that apply to United States publicly funded charities.

F. Restrictions on Conduct of Charities

Despite their comparative flexibility, basic restrictions applicable to United States charities are easily characterized and clearly defined. Four universal rules apply to all United States charities described in section 501(c)(3) of the Code.

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[62] 26 U.S.C. §68(a) (2004). In 2005, the §68 limitation only applied to individuals whose adjusted gross income exceeds $145,950. Rev. Proc. 2004-71, 2004-50 I.R.B. 970. This limitation will be gradually reduced over a five-year period beginning in 2005 and completely eliminated in 2010 per §68(f), however, the limitation will return full force in 2011 unless Congress acts to counter the sunset provision contained in §901 of Public Law No. 107-16.

[63] *See generally* REGULATION ON FOUNDATION ADMINISTRATION *supra* note 31.

[64] 26 U.S.C. §170(b)(1)(E) (2005).

[65] 26 U.S.C. §509 (2004).

[66] *See* TURNEY P. BERRY, PRIVATE FOUNDATIONS—SELF-DEALING (Section 4941), 879-2nd T.M. I(A) (2004) (stating "the provisions of Chapter 42 of the Internal Revenue Code, enacted by the Tax Reform Act of 1969, were intended to curb certain perceived abuses involving private charitable foundations.").

[67] *See id.*

[68] *See* 26 U.S.C. §§4940-45 (2005).

[69] *See generally* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31.

[70] *Id.*

First, a charity must be operated exclusively for a public purpose.[71] Next, none of a charity's net earnings may inure to the benefit of any individual who is not a charitable beneficiary.[72] This generally means that a charity may not provide excessive compensation for goods and services, and upon dissolution of a charitable organization, its assets must be transferred to another charity.[73] Third, "no substantial part" of the charity's activities can be the "carrying on of propaganda" or attempting to influence legislation, and the organization may not campaign on behalf of political candidates.[74] Finally, the organization must not conduct activities that violate public policy.[75] Whether an activity violates public policy is judged by reference to the laws and pronouncements of the executive, legislative, and judicial branches of the government.[76]

China's law does not contain counterparts to these United States provisions, although they may be inferred from some parts of the Regulation. For instance, a foundation is required to engage in welfare activities according to its charter, and the foundation's charter must not "specify contents that are beneficial to a special natural person, legal person, or other organization."[77] Taken together, these provisions may have similar substantive effects as the United States' ban on private inurement and its requirement of operation exclusively for a public purpose. Nonetheless, those rules are not explicit in the Regulation, and it is unclear whether a charitable organization in China might be permitted latitude to perform those activities disallowed to United States organizations.

Stricter rules apply in other areas. The Regulation contains many generally applicable operating provisions that affect only private foundations under the Code. First, foundations in China are required to make prudent and productive investments of donated funds.[78] This rule is reminiscent of the jeopardizing investment restriction applicable to private foundations in the United States, which imposes a five percent tax on certain investments that are inconsistent with the organization's charitable purpose.[79] Next, the Regulation requires a public offer-

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[71] 26 U.S.C. §501(c)(3) (2005).

[72] *Id.*

[73] *See generally* Church of Scientology of Cal. v. Comm'r, 823 F.2d 1310 (1987) (church which transferred over two million dollars directly to church founder, who controlled all of church's funds, was not exempt under section 501(c)(3) of the Code because its actions resulted in private inurnment); IRS Form 1023 Instructions, *supra* note 45, at 8-9.

[74] 26 U.S.C. §501(c)(3) (2005).

[75] Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

[76] *See generally id.* at 600-02 (court reviewed legislative, executive, and judicial authority to determine whether the IRS exceeded its authority.).

[77] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, arts. 5, 10. Interestingly, this provision seems to ban supporting organizations, which have commonly been employed in the United States to provide monetary support to civic leagues and other charitable organizations; *see* 26 U.S.C. §509(a)(3) (2004) where recent investigation into charitable organizations has revealed that supporting organizations are particularly susceptible to abuse, and recently proposed amendments to United States law have called for their elimination; *see* Senate Finance Committee Discussion Draft, *supra* note 49, at 2.

[78] *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, arts. 25, 27.

[79] *See* 26 U.S.C. §4944(1)(a) (2004) (that provides, "[i]f a private foundation invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes, there is hereby imposed on the making of such investment a tax . . .").

ing foundation to make welfare expenditures that meet or exceed seventy percent of its income from the prior year.[80] Non-public offering foundations must make welfare expenditures that meet or exceed eight percent of their prior year's total net asset value.[81] Again, private foundations in the United States are subject to similar minimum expenditure rules. A foundation that fails to make welfare distributions in excess of five percent of the net value of assets not used directly in carrying out the foundation's exempt purpose is subject to a fifteen percent excise tax on the undistributed amount.[82]

The Regulation diverges from the Code on the subject of administrative expenses. It provides that "[t]he wages and welfare of the staff of a foundation and the expenses of administration shall not exceed 10% of the total expenditure of the current year."[83] In contrast, the United States places no limit on administrative expenses.[84] Instead, "reasonable and necessary" administrative costs are considered part of the foundation's charitable giving.[85] Although a limitation was briefly imposed in the United States, an IRS study published in 1990 found that most foundations' charitable expenditures far exceeded their administrative ones.[86] Congress never renewed the limitation; however, recent investigations into the activities of charitable organizations have spurred a new proposed limitation.[87] The new limitation would apply only to private foundations and would call for an automatic IRS investigation of administrative expenses in excess of ten percent of the foundation's total expenses.[88] Any expenses above thirty-five percent of the foundation's total expenses would be considered *per se* unreasonable.[89] It is worth noting for comparison purposes that if the proposed limitation were passed, both the United States and China would use ten percent as the benchmark of acceptable charitable administration cost.

G. Related Person Restrictions

China's rules on related persons in foundation management are more restrictive than the corresponding United States provisions.[90] In China, foundations are required to have boards of directors composed of five to twenty-five individu-

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[80] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 29.

[81] *Id.*

[82] *See* 26 U.S.C. §4942 (2004).

[83] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 29.

[84] Section 4942(g)(4) of the Code used to limit the amount of administrative expenses counted as nontaxable "qualifying distributions." This limitation expired in 1990. *See* 26 U.S.C. §4942(g)(4)(F) (2004).

[85] 26 U.S.C. §4942(g)(1)(A) (2004).

[86] *See* THOMAS J. SCHENKELBERG, ESQ. AND VIRGINIA C. GROSS, PRIVATE FOUNDATIONS – DISTRIBUTIONS (§4942), 880 2nd TMP III(J)(2) (2004), citing IRS Grant-Making Administrative Expenses Study (Jan. 27, 1990).

[87] *See* SENATE FINANCE COMMITTEE DISCUSSION DRAFT, *supra* note 49, at 5.

[88] *Id.*

[89] *Id.*

[90] *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, ch. III.

als.[91] Only one third of the directors may receive compensation for their services.[92] In non-public offering foundations that are created with private funds, "[I]f some of the directors thereof are close relatives, the total number thereof shall not exceed one third of the total number of directors. The directors of other foundations who are close relatives shall not hold a post concurrently [on the board of directors]."[93] In addition, an interested director (meaning one whose affairs outside of the foundation will be affected by the board's decision on a particular matter) is not permitted to participate in decisions related to the relevant interest.[94] Finally, directors and supervisors of the foundation, and the close relatives of those individuals, are flatly forbidden to engage in transactions with the foundation they serve.[95]

These restrictions on related persons are similar in nature to disqualified person rules applicable to private foundations found in the Code. Although there is no prohibition against relatives serving as co-directors of private foundations, "self-dealing" transactions with "disqualified persons" are heavily taxed.[96] Disqualified persons include a substantial contributor to the foundation, officers and directors of the foundation, a relative of a substantial contributor, officer or director, or finally a business in which a substantial contributor, officer or director owns more than a thirty-five percent stake.[97] "Self-dealing" transactions include a sale or lease of property, lending or borrowing money, furnishing goods and services, payment of compensation by the foundation, and transfer of foundation property to the disqualified person.[98]

An excise tax may also apply to managers and employees of United States public charities who enter into questionable compensation arrangements.[99] The tax applies to any "disqualified person" who receives a benefit from a charity in excess of the value of goods or services provided to the charity by that person.[100] The definition of disqualified persons for purposes of the excise tax on public charities is similar to that used for private foundations and generally includes any person who is able to exercise financial control over the organization.[101] It also applies to any manager who approved the excess benefit transaction.[102]

The Code contains exceptions to the self-dealing rules for those transactions that benefit the foundation and do not benefit the disqualified person.[103] In addi-

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91 *Id.* art. 20.

92 *Id.*

93 *Id.*

94 *Id.* art. 23.

95 *Id.*

96 *See* 26 U.S.C. §4941 (2004).

97 26 U.S.C. §4946(a)(1) (2004).

98 26 U.S.C. §4941(d)(1) (2004).

99 26 U.S.C. §4958 (2004).

100 26 U.S.C. §4958(a)(1) (2005).

101 26 U.S.C. §4958(f)(1) (2005).

102 *Compare* 26 U.S.C. §4958(a)(2) *with* 26 U.S.C. §4946(a)(1).

103 *See* 26 U.S.C. §4941(d)(2) (2005).

tion, the United States tax regulations permit a private foundation or a public charity to pay a reasonable salary to directors and officers for services rendered in pursuit of the organization's charitable purpose.[104] As a result, governance of related person transactions in the private foundation context is in some ways less restrictive than its Chinese counterpart. China flatly forbids foundation managers from engaging in transactions with the foundations that they serve, while the United States allows all such transactions but subjects those that endanger the integrity of the foundation to a prohibitive excise tax.

Recently proposed amendments to the tax law in the United States would bring its content much closer to that of China's law.[105] In particular, the Committee has suggested that self-dealing rules should apply to all charitable organizations, whether public or private.[106] In addition, the proposal would expand the definition of "disqualified person" to include a corporation or partnership with respect to which an otherwise disqualified person "is a person of substantial influence."[107] The Committee's proposal would flatly forbid compensation of a private foundation's directors, and it would limit compensation of a public charity's directors to "comparable federal government rates for similar work and similar time to support salary."[108] These changes, if put into effect, would make the United States' system of charitable governance quite similar to China's. Both countries would limit the influence and compensation of interested persons in charitable organizations and strongly discourage self-dealing transactions.

H. Annual Reporting and Government Oversight

The Committee's proposal would also draw the United States closer to China in its' oversight of charitable activities. Currently, U.S. charities with annual income in excess of $25,000 are required to file a report with the IRS and must make the report publicly available for inspection.[109] In the absence of an audit, this report serves as the sum total of the federal government's oversight of charitable organizations. States generally follow the same procedure, and most states' laws do not give government agencies the right to participate in foundation activities.

In contrast, China supervises foundations directly.[110] Foundations are required to appoint "supervisors" who must attend board meetings and "reflect information to the administrative departments of registration, business supervisory authority, and tax authorities or the accounting department in charge."[111] In ad-

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104 *See* Treas. Regs. §53.4941(d)-3(c) (as amended in 1980); Treas. Regs. §53.4958-4 (as amended in 2002).

105 *See generally* SENATE FINANCE COMMITTEE DISCUSSION DRAFT, *supra* note 49.

106 *Id.* at 3-5.

107 *Id.* at 4.

108 *Id.* at 5.

109 *See* Instructions for Form 990 and Form 990-EZ 1, 8, *available at* http://www.irs.gov/pub/irs-pdf/i990-ez.pdf.

110 *See generally* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31.

111 *Id.* art. 22.

dition, various provincial government offices are directed by statute to annually inspect foundation offices, direct and supervise foundation activities, and review annual reports.[112] Furthermore, foundations are required to "accept the tax supervision and the accounting supervision by the competent departments of taxation and the competent accounting departments."[113] These powers are much broader than those imposed by either federal or state governments in the United States and reflect a strong difference in political culture between the two countries. Finally, illegal acts by a Chinese foundation can result not only in cancellation of the foundation's existence but also in criminal punishment.[114] This provision is no small matter in a country that recently executed four bankers for fraud and embezzlement.[115]

III. Analysis of Compared Laws

From two extremes of political culture, the United States and China have nearly reached consensus, at least on paper, of the appropriate method of governing charitable organizations. This agreement is hardly surprising, given China's push for rapid marketization and the United States' slow drift from a truly federal government toward a national system. The recent vintage of China's law, in comparison to the long history of relevant the Code sections, suggests that Chinese lawmakers may have something to learn from the relative complexity of the United States system. On the other hand, revelation about the prevalence of fraud among charitable organizations in the United States has produced a proposal from the Committee that would shift United States law strongly in the direction of Chinese-style governance.

A. Recommendations for Revision of the Code Based on a Comparison to the Regulation of the People's Republic of China

The United States' governance of charitable organizations is more permissive than China's governance in several important ways. Charitable institutions in China are required to distribute a minimum percentage of either their income or the value of their assets each year.[116] In the United States, only private foundations are subject to a minimum distribution rule, and this rule requires only distribution of a percentage of the value of the charity's assets not used in furtherance of its exempt purpose rather than a percentage of the value of *all* of the charity's assets.[117] In addition, China requires charities to minimize expenses of administration.[118] The United States places no limit on those expenses.[119] China also

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[112] *See id.* arts. 34-36.

[113] *Id.* art. 37.

[114] *See id.* arts. 40-45.

[115] Jiang Zhuqing, *Financial Crooks Get Tough Penalty*, CHINA DAILY, 2004 WL 89401066 (Sept. 2004).

[116] *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 29.

[117] *See* 26 U.S.C. §4942 (2004).

[118] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 29.

flatly forbids all charitable directors from transacting business with the foundations that they serve.[120] The United States limits these transactions only for private foundations, and only in certain instances.[121] Finally, China takes a more hands-on approach to supervision of charities, employing annual on-site visits and permissive government intervention in charities' operations as a means of oversight.[122] In contrast, the United States requires only an annual report.[123]

The results of the United States' hands-off approach to charitable foundations cannot be summarized easily. The nonprofit sector is notably varied and controls vast resources.[124] It plays a vital role in the social, economic and moral lives of United States citizens.[125] It seems likely that the country's relaxed method of oversight has contributed to the growth and importance of charitable institutions, which is no doubt a blessing rather than a curse. Nonetheless, the Committee's recent investigation revealed that some charities have paid inflated salaries to executives, participated in insider deals without adequate transparency, engaged in abusive tax shelters, and funneled money to terrorist organizations.[126] Senator Max Baucus denounced the behavior as "sloppy, unethical and criminal."[127]

Selective adoption of China's stricter methods of governance could improve charitable oversight in the United States. Many of China's proposals are tailored to maximize use of charitable foundations' assets for charitable work, while many of the problems cited by the Committee center on use of those assets for purposes unrelated to charitable work. It is no surprise, then, that the Committee's proposed remedy bears many similarities to China's law. Like China's Regulation, the Committee's proposal would limit administrative expenses, place restrictions on the dealings of foundation directors, and give the IRS greater oversight power.

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119 *See* SCHENKELBERG, *supra* note 86.

120 *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 23.

121 *See* 26 U.S.C. §4941 (2004).

122 *See generally* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31.

123 *See* Instructions for Form 990 and Form 990-EZ 1, 8, *available at* http://www.irs.gov/pub/irs-pdf/i990-ez.pdf.

124 *See* JOINT COMMITTEE ON TAXATION, *supra* note 13.

125 *Baucus Remarks*, *supra* note 15.

126 *See id.*; *see also* Written Statement of Mark W. Everson Commissioner of Internal Revenue Before the Committee on Finance United States Senate Hearing on Exempt Organizations: Enforcement Problems, Accomplishments, and Future Direction 5-14, Apr. 5, 2005, *available at http://finance.senate.gov/hearings/testimony/2005test/metest040505.pdf* (detailing abuses of tax exempt status by charitable organizations).

127 *Baucus Remarks*, *supra* note 15. For example, a committee was recently formed to investigate the Statue of Liberty-Ellis Island Foundation on charges that the foundation had misled donors about its financial condition in order to raise funds and on charges that it paid unjustifiably high salaries to its executives; *see* Fred Stokeld, *Review Committee Releases Findings on Statue of Liberty Charity; Finance Committee Probe Continues*, 2004 TAX NOTES TODAY 149-3 (Aug. 2, 2004). The executive salary controversy is not isolated—there have been a number of high profile investigations in recent months. For one example, *see Study Finds Some Charities Pay "Astronomical Compensation" Packages*, 2004 TAX NOTES TODAY 163-52 (Aug. 20, 2004) (noting that compensation packages paid to executives of the Greenpeace supporting organization, Greenpeace Fund, "appear to be entirely inappropriate considering the organization performs essentially no work.").

Even with those recommendations in place, the Committee's recommendation does not approach the Regulation in terms of simplicity and potential effectiveness. Using the Regulation as an example, the United States should consider enacting simple limits on administrative expenses, directors' salaries, and minimum grant distributions. These measures would not only help good charitable actors who are unsatisfied with the ambiguous state of current law, they would also reduce funds available for malfeasance by boards of directors gone awry. In addition, simple numerical limits would enhance the IRS's enforcement function by making annual charitable foundation reports more meaningful to reviewing agents. Although adopting this recommendation will not solve all of the United States' charitable governance problems, it will ensure that, in the absence of outright fraud, charitable organizations will report instances when their executives' salaries and administrative expenses exceed an acceptable level and when grants for their charitable purposes fall below an acceptable level. This bright-line proposal would seem to be an effective check on even marginally law-abiding boards of directors.

B. Recommendations for Revision of the Regulation Based on a Comparison to Internal Revenue Code

The Code is both more and less detailed than the Regulation. Although it prescribes the many minutiae of incorporation, capitalization, and report filing of charitable foundations, the Regulation fails to anticipate the fine details of taxpayer ingenuity now covered by the Code. Because the United States Congress has spent decades observing and correcting various forms of tax-exempt organization abuse, the Code's anti-abuse provisions, particularly those relating to excess benefit transactions and private foundations, are extraordinarily complex. Although this complexity is an obvious detriment to charitable organizations (and a boon to their attorneys), it serves an important purpose. Without it, United States charitable foundations would be open to personal use rather than exclusively public use. For China, whose forceful reform policy has already encouraged corporate graft and whose citizenry harbors only shallow support for privately run institutions, abuse of tax-exempt organizations will no doubt become a serious matter as use of those organizations becomes more widespread.[128]

The Code differs from the Regulation in several key respects. First, the Code clearly enunciates and categorizes the various purposes of tax-exempt organizations.[129] This enables Congress to legislate specifically and narrowly to a particular kind of organization when necessary. It also enables the founders and directors of organizations to properly tailor their purposes and activities to those that are sanctioned by the Code. China, in contrast, requires only a "welfare undertaking" that does not jeopardize national security, solidarity, or morality.[130] In doing so, it loses the legislative ease retained by Congress to target particular

[128] *See* ZHANG, *supra* note 16.

[129] *See* 26 U.S.C. 501(c) (2004).

[130] REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, arts. 2, 4.

kinds of organizations. In addition, the Regulation's subjective description of charitable purpose makes the government appear less than genuine in its encouragement of independent organizations. The standards of national security, solidarity, and morality would seem to prevent a charitable organization from undertaking any task in contravention of current government thinking.[131] In areas prone to controversy, such as foreign adoption, migration, and ethnic preservation, the Regulation's subjective stance could have a serious chilling effect on charitable activity because it seems to allow the government to eliminate any charity at will.

To avoid inhibiting charitable undertakings, the Chinese government should outline a policy similar to that described by the United States Supreme Court in *Bob Jones University v. United States*.[132] In that case, the Court looked to all three branches of the government in order to determine whether racial discrimination at an educational institution ran counter to the common-law rule against granting tax-exemption to organizations that, through their actions, violate public policy.[133] China, too, should look to existing written expressions of law and policy preference, which could serve as a foothold for charitable organizers and courts in instances of dispute.

Another difference between the Code and the Regulations comes in the area of related person transactions. The Regulation limits the number of "close relatives" who may serve as directors of a private offering foundation.[134] It also prohibits directors from participating in decisions on matters of personal financial interest to them.[135] Finally, it prohibits business transactions between directors or their close relatives and the foundation they serve.[136] These provisions are broader than corresponding provisions of the Code because the Regulation's provisions apply to *all* charities while the Code's provisions apply only to private foundations. Nonetheless, the Code provisions contain an important level of detail that is absent in the Regulation.

The Regulation restricts its concept of a disqualified person to foundation directors and supervisors. The Code, in contrast, looks not only to a charitable organization's management but also to those who may be in a position of influence, for instance, after making substantial contributions to the foundation.[137] There is no doubt that even in the United States, charities must be responsive to

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131 China's Ministry of Culture has used similar standard to rule by fiat in the past year, requiring Britney Spears to wear less revealing clothing during concerts given in the country and banning as "an insult to national dignity" a Nike television commercial featuring NBA star LeBron James as a character in a kung-fu movie; *see Britney Given Green Light on China Tour,* China Daily, June 1, 2004, at 1, *available at* http://www.chinadaily.com.cn/english/doc/2004-06/01/content_335591.htm; *see China Bans Nike TV Ad as National Insult*, China Daily, Feb. 12, 2004, at 1, *available at* http://www.chinadaily.com.cn/english/doc/2004-12/07/content_397920.htm.

132 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

133 *Id.* at 600-02.

134 *See* REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 20.

135 *Id.* art. 23.

136 *Id.*

137 *See* 26 U.S.C. §4946(a)(1) (2004); Treas. Regs. §53.4958-3(c).

the wishes of their high-dollar donors. The Code restriction exists to keep this responsiveness within reasonable bounds. The failure of China's law to comprehend the influence of substantial contributors leaves open the possibility of abusive quid pro quo transactions with wealthy taxpayers who are not foundation directors.

In addition to targeting managers and substantial contributors, the Code also prohibits foundations from dealing with businesses that are heavily influenced by the foundation's managers and substantial contributors.[138] The Regulation seems not to contain any corresponding provision.[139] This second omission is also important. With China's increasing privatization, the number of wealthy individuals who hold ownership interests in businesses will grow. By not prohibiting transactions between these businesses and charitable foundations directed by related business owners, the Regulation opens the door to an income tax shelter that has been outlawed in the United States by the private foundation regulations. Under the Regulation, a wealthy business owner could create a private offering foundation by donating a sum of money to it. One-third of the directors could be close relatives of the founder, and one third of the directors could draw a salary from the foundation.[140] Under the Regulation, the foundation's investment earnings would not be subject to income tax.[141] Furthermore, although the founder and his close relatives would be prohibited from transacting business with the foundation, their corporation would not be subject to a similar prohibition. Although the founder would be somewhat restricted in his dealing with the foundation, he would still have two viable and important avenues of withdrawing his appreciated donation: directors' salaries and transactions with his corporation. Thus, the Regulations should define the term "close relative" to include businesses owned in specific percentages by foundation directors and contributors in order to prevent the shelter described above.

One final and important difference between the Regulation and the Code is the approach of both laws to government oversight. The Regulation currently calls for a very high level of government involvement in the administration of charitable foundations.[142] The Chinese government is required to inspect foundation offices annually, to engage in "routine supervision and administration," to examine the foundation's annual report, and to provide special tax and accounting supervision.[143] The Code does not call for a similar level of government involvement. Instead, it requires the IRS to review an annual return and to conduct investigation of that return if necessary.[144]

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138 *Id.*

139 The term "close relative" is not defined in the Regulation. I have assumed that it refers to family members.

140 REGULATION ON FOUNDATION ADMINISTRATION, *supra* note 31, art. 20.

141 *See id.*

142 *See id.* at ch. V.

143 *Id.*

144 26 U.S.C. §6033 (LEXIS through 2004).

Although the United States may be moving toward a more hands-on approach to governing charities, it is unlikely to reach the level required by the Chinese regulation.[145] Even if there were a political will to scrutinize each and every charitable organization in the United States, the IRS simply lacks the resources to do so.[146] In 2003, the IRS was responsible for policing 1.6 million exempt organizations.[147] If China's new Regulation encourages growth of its nonprofit sector on par with that of the United States, its bureaucracy will be overwhelmed.

Both countries should consider adopting a system of oversight that combines elements of both the Code and the Regulation. This hybrid method should employ a meaningful reporting system that would require submission of a foundation's audited financial statements, bank records, and managers' affidavits in order to identify charitable organizations at risk under the law. The governments could then focus their attention on those organizations, employing on-site visits, and special guidance when appropriate. By using a hybrid oversight statute, China could learn from the United States' experience and avoid prevalent misuse of charitable organizations without overwhelming its bureaucratic system. Likewise, the United States could move toward a more effective system of governance.

In summary, there are useful lessons to be learned on both sides. The United States should consider adopting bright-line minimum distribution and maximum administrative expenditure requirements to encourage an appropriate level of grant-making and to provide the IRS with meaningful guidelines for assessment. Such guidelines would allow the IRS to follow China's example and increase on-site oversight where organizations' returns indicate potential problems. China should likewise rely upon organizations' annual reports for guidance as to the appropriate level of on-site oversight in order to avoid overwhelming local bureaucracies as the country's charitable sector expands. In addition, China should adopt a more objective standard of charitable purpose, which would create freedom and promote the establishment of charities tailored to needs of China's people, whether or not the government recognizes those needs. Finally, in order to prevent taxpayer abuse, China should adopt the United States' disqualified person definition, which has been crafted over a long period of time in response to known taxpayer behaviors.

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145 *See* Evelyn Brody, *Submission in Response to June 2004 Discussion Draft of the Senate Finance Committee Staff Regarding Proposed Reforms Affecting Tax-Exempt Organizations*, 2004 TAX NOTES TODAY 143-92 (July 26, 2004) (suggesting that increased IRS powers and privatization of charitable oversight are not desirable because current laws suffice); Mark Pacella, *Statement of the National Association of State Charity Officials to the United States Senate, Committee on Finance*; 2004 TAX NOTES TODAY 121-37 (June 23, 2004) (supporting increased reporting requirements and information sharing with state regulators); Derek Bok, *Statement to Senate Finance Committee*, 2004 TAX NOTES TODAY 121-36 (June 22, 2004) (urging that "excessive administrative burdens may well outweigh the positive results that a more cautious, incremental approach can achieve").

146 *See* Fred Stokfeld, *EO Reps Respond to Finance Draft of Charity Reform Proposals*, 2004 TAX NOTES TODAY 142-1 (July 22, 2004).

147 *See JCT Describes Current Law on Exempt Organizations*, 2004 TAX NOTES TODAY 121-9 (June 22, 2004).

IV. Conclusion

While the United States and China have divergent political cultures, they are both faced with the difficult task of governing large economies. Both have realized that the nonprofit sector plays an important role in such economies, and both have developed comprehensive systems of oversight for charitable organizations. The United States' past experience has provided it with a detailed set of requirements but a hands-off style of enforcement. China, in contrast, has had little experience with preventing taxpayer manipulation in a market economy, so its law is weak in detail but strong on enforcement.

In spite of these differences, the similarity of the two laws, and the strikingly Chinese proposal of the Committee, paint a picture of two countries moving toward the center on issues of charitable governance. The United States has adopted stricter laws, as well as a more national and less federal view of charitable organizations. China has become more permissive, giving its imprimatur to nongovernmental charitable institutions for the first time in over forty years. Both have reached an understanding on the importance of altruism in organized form, and both societies should benefit from their newly-found common ground.

RELEASING ACCUSED GENOCIDAL PERPETRATORS IN RWANDA: THE DISPLACEMENT OF PREVENTIVE JUSTICE

George S. Yacoubian, Jr., Ph.D.[†]

Introduction

In addition to the International Criminal Tribunal for Rwanda ("ICTR"),[1] established by the United Nations ("UN") during the early 1990s to prosecute individuals accused of committing genocide and other crimes against humanity, the Rwandan government has also prosecuted accused genocidal perpetrators for their alleged participation in the 1994 Rwandan Genocide. To date, the ICTR has prosecuted and convicted twenty offenders, while national Rwandan authorities have prosecuted approximately 200 offenders,[2] and another 80,000 persons are still awaiting trial in Rwanda.[3] Unfortunately, the unmanageable quantity of accused offenders awaiting trial before the national courts has forced authorities to release thousands of detainees in an effort to ease prison overcrowding.[4] By any objective standard, this is an unsatisfactory resolution to the Rwandan Genocide since the prevention of genocide is partly contingent on the successful prosecution and punishment of perpetrators.[5] As a result, the international community is now at a greater risk of succumbing to new genocidal events.

A review of the situation in Rwanda and the current state of international criminal law suggests that there may be alternative solutions that could balance the practical quagmire of prison overcrowding and the need to bring genocidal perpetrators to justice. Part I of this essay provides a brief historical assessment of genocide in the Twentieth Century. Part II summarizes the events that culminated in the 1994 Rwandan Genocide and reviews the investigations and prosecutions conducted to date at the ICTR and in Rwanda. Part III presents a history of the International Criminal Court ("ICC"),[6] established in the summer of 2002, and reviews the work undertaken by the ICC to date. Part IV discusses

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[1] S.C. Res. 955, U.N. Doc. S/1994/1168 (Nov. 8, 1994).

[2] Amnesty International, *Amnesty International Report 2005* (Amnesty Int'l. 2005), *available at* http://web.amnesty.org/report2005/rwa-summary-eng.

[3] *Rwanda to Speed up Genocide Trials*, SYDNEY MORNING HERALD, Jan. 17, 2005, *available at* http://www.smh.com.au/news/World/Rwanda-to-speed-up-genocide-trials/2005/01/16/1105810774432.html (last visited Jan. 19, 2006).

[4] Press Release, Amnesty International, *Rwanda: End of Provisional Release of Genocide Suspects* (Apr. 23, 2003), *available at* http://web.amnesty.org/library/Index/ENGAFR470052003.

[5] LEO KUPER, THE PREVENTION OF GENOCIDE 193-94 (1985).

[6] *See generally* International Criminal Court, http://www.icc-cpi.int/ (last visited Jan. 19, 2006).

the problems and potential alternative solutions to the Rwandan prison overcrowding and the impact that the release of accused genocidal perpetrators will have on the international community. A thoughtful analysis of these alternatives suggests that releasing thousands of suspected genocidal perpetrators for the sole purpose of easing prison overcrowding is an inadequate resolution to a criminal phenomenon that has consistently plagued the global community for the past century.

I. Genocide

The Armenian Massacres of 1915 are widely considered to be the first principal genocide of the Twentieth Century.[7] During the second half of the nineteenth century, Armenia fell under Ottoman Turk rule.[8] In 1908, the Young Turks, the ruling political party of the Ottoman Empire that was comprised of army officers,[9] adopted a credo of pan-Turanism, which alleged a mythic unity among Turanian peoples based on the concept of 'Turkification.'[10] Motivated by a feverish sense of jingoism, the Young Turks sought an empire that stretched from central Asia to China.[11] Between 1908 and 1914, the seemingly democratic Young Turks became xenophobic nationalists intent on eliminating the Armenian people.[12]

By the end of April 1915, the stage had been set for the Armenian Massacres. Men, women, and children were led to secluded areas and murdered.[13] Those who were not killed immediately were killed as a result of the conditions surrounding the Ottoman deportation orders.[14] As Dadrian stated, "the Ottoman authorities ordered . . . the wholesale deportation of the Armenian population of the empire's Eastern and Southeastern provinces."[15] By the time the killings ceased, more than one and a half million Armenians had been slaughtered.[16]

At the time of the Armenian Massacres, neither the crime nor the definition of genocide had been conceptualized. As I have written, "[t]here were certain rules of war to protect civilian populations, but these regulations failed to cover a gov-

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[7] *See generally* JAY WINTER ET AL., AMERICA AND THE ARMENIAN GENOCIDE OF 1915 (Jay Winter ed., 2004); SAMANTHA POWER, "A PROBLEM FROM HELL" AMERICA AND THE AGE OF GENOCIDE 1-16 (2002); VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE (Berghan Books 6th rev. ed. 2003).

[8] DADRIAN, *supra* note 7, at 45.

[9] *Id.* at 45.

[10] JOSEF GUTTMANN, THE BEGINNINGS OF GENOCIDE (Armenian Historical Research Assn. 1965).

[11] DADRIAN, *supra* note 7, at 185.

[12] *Id.* at 180-184.

[13] *Id.*

[14] *Id.*

[15] DADRIAN, *supra* note 7, at 219.

[16] DADRIAN, *supra* note 7, at xiviii.

ernment's persecution of its own people."[17] Rather, France, Great Britain, and Russia referred to the Armenian Massacres as "crimes against humanity."[18]

The term "genocide" was ultimately coined and defined in 1944 by Raphael Lemkin, a Polish-Jewish jurist, to denote "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[19] Lemkin's efforts culminated in the Convention on the Prevention and Punishment of the Crime of Genocide,[20] which officially came into effect as a binding piece of international law on January 12, 1951.[21] Today, 137 states have ratified or acceded to the Convention, including all member states of the European Union and all permanent members of the UN Security Council ("SC").[22] Article II of the Genocide Convention defines genocide as:

> Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
>
> a) Killing members of the group;
>
> b) Causing serious bodily or mental harm to members of the group;
>
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> d) Imposing measures intended to prevent births within the group; and
>
> e) Forcibly transferring children of the group to another group.[23]

No state has ever asserted that genocide is not a crime, and the definition contained in Article II is considered to be binding international law.[24]

Despite the ratification of the Genocide Convention and an increased awareness of the potential for unparalleled destruction since the end of the Second World War, genocide has been perpetrated repeatedly during the past four decades. I have observed that "its contemporary manifestation has indicated a ca-

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[17] George Yacoubian, *Underestimating the Magnitude of International Crime: Implications of Genocidal Behavior for the Discipline of Criminology*, 14 WORLD BULL. 23 (1998), *available at* http://www.habermas.org/yacoubiandoc.htm.

[18] Roger S. Clark, *Crimes Against Humanity*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 177 (George Ginsburg & V.N. Kudriavtsev eds. 1990).

[19] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION – ANALYSIS OF GOVERNMENT – PROPOSALS FOR REDRESS 79 (1944).

[20] Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. GAOR, 3rd Sess., 179th plen. mtg., U.N. Doc. A/810 (Dec. 9, 1948) [hereinafter Genocide Convention].

[21] University of Minnesota: Human Rights Library, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (Jan. 12, 1951), *available at* http://www1.umn.edu/humanrts/instree/x1cppcg.htm.

[22] *See* Office of the United Nations High Commissioner for Human Rights, Convention on the Prevention and Punishment of the Crime of Genocide, http://www.ohchr.org/english/countries/ratification/1.htm (last visited Jan. 19, 2006).

[23] Genocide Convention, *supra* note 20, at 174.

[24] EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 690 (2d ed. 2004).

pacity for atrocity on an unprecedented scale."[25] Victimized groups include 400,000 civilians during the Vietnam War,[26] more than one million Bengalis in Bangladesh in 1971,[27] 150,000 Hutu in Burundi in 1972,[28] 1.5 million Cambodians between 1975 and 1979,[29] 200,000 Bosnian Muslims and Croats in the Former Yugoslavia in 1992,[30] and 800,000 Tutsi in Rwanda in 1994.[31] It was the genocidal events that took place in Rwanda that ultimately yielded legal responses in the form of both national prosecutions and the creation of an international criminal tribunal.[32]

II. Rwanda

The popular but dangerously simplistic version of Rwanda's catastrophe is that tribal rivalry led to an eruption of savagery. This description erroneously allows the international community to dismiss not only its complexity, but also its significance in the development of international criminal law. The events in Rwanda illustrate how the coexistence of different social groups can evolve into problems with overwhelmingly racial dimensions. As Destexhe affirmed, "archaic political divisions were progressively transformed into racial ideologies . . . which then brought them into the political arena."[33]

During the second decade of the Twentieth Century, Germany colonized the region in Africa that now encompasses Rwanda and Burundi.[34] Three ethnic groups inhabited the area: the Twa, the original denizens comprising one percent of the population; the Hutu, who entered the area during the fourth and seventh centuries comprising eighty-five percent of the population; and the Tutsi, the newest inhabitants, comprising fourteen percent of the population.[35] Belgium

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[25] George Yacoubian, *The Efficacy of International Criminal Justice: Evaluating the Aftermath of the Rwandan Genocide*, 161 WORLD AFFAIRS 186, 186 (1999).

[26] GUENTER LEWY, AMERICA IN VIETNAM 443 (1978).

[27] FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 396 (Yale U. Press 1990); LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 79 (1981).

[28] LEO KUPER, THE PITY OF IT ALL: POLARISATION OF RACIAL AND ETHNIC RELATIONS 91 (1977).

[29] George Yacoubian, *Countdown to a Permanent International Criminal Court— Toward a Rapprochement of the Cambodian Genocide*, 1 J. STUDY PEACE & CONFLICT 4 (1999); Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, *in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 191-228 (G. J. Andreopolus ed., U. Pa. Press 1994).

[30] M. CHERIF BASSIOUNI, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, *in* THE PROSECUTION OF INTERNATIONAL CRIMES 11, n.28 (1996).

[31] LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 250 (2004); ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 1959-1994 265 (1995); *See generally* Jean Mukimbiri, *The Seven Stages of the Rwandan Genocide*, 3 J INT'L. CRIM. JUST. 823 (2005).

[32] WISE ET AL., *supra* note 24, at 570; *see also* S.C. Res. 955, *supra* note 1, para. 1.

[33] DESTEXHE, *supra* note 31, at 47.

[34] PRUNIER, *supra* note 31, at 23-26.

[35] DESTEXHE, *supra* note 31, at 37.

annexed the colonies after the First World War, when the Tutsi were the more dominant group, despite larger numbers of Hutu.[36]

Three years before Rwanda gained independence from Belgium, in 1962, a Hutu uprising resulted in the deaths of more than 20,000 Tutsi refugees who were fleeing the country for Tanzania, Uganda, Kenya, and the Congo.[37] The Belgians, responding to pressures for democratization within its colonies, supported the Hutu.[38] Although evidence suggests animosity between the Hutu and Tutsi began prior to Belgian rule, colonial intervention greatly exacerbated these difficulties.[39] Ethnic tensions heightened due to the favoritism of the Tutsi by the Belgians throughout their colonial rule and because of their subsequent support of the Hutu coup.[40] This ultimately created conditions that expedited the path toward genocide.[41]

The Hutu party, led by General Juvenal Habyarimana, came to power through a military coup in 1973.[42] For the next twenty years, Hutu rule dominated Rwanda.[43] Although Habyarimana claimed to have established a nation of balanced resources and job distribution, the President and his National Revolution Movement for Democracy and Development ruled Rwanda as a one-party state.[44] The new government initially sought to accommodate the Tutsi, giving them a place in Rwandan society in proportion to their population (fourteen percent).[45] This transition meant quotas throughout the government and the economy. Throughout Habyarimana's rule, Rwandan Tutsi in neighboring countries tried to return to their homeland, but the Rwandan government denied repatriation.[46] Then, in the fall of 1990, the Rwandan Patriotic Front, which consisted of Tutsi who had fled Rwanda years before, entered northern Rwanda from Uganda.[47] They now demanded democracy and power sharing from what they claimed was a corrupt Habyarimana regime.[48]

Though several concessions were made to the Tutsi rebels, the government's more extreme Hutu elements became increasingly organized and the government took steps to consolidate their power.[49] In response to the overwhelming political frustration, Tutsi rebels attacked President Habyarimana's airplane on April

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[36] *Id.* at 40.

[37] *Id.* at 78.

[38] *Id.* at 43.

[39] *Id.* at 41.

[40] PRUNIER, *supra* note 31, at 26-35.

[41] *Id.*

[42] DESTEXHE, *supra* note 31, at 45.

[43] *Id.*

[44] PRUNIER, *supra* note 31, at 76-79.

[45] *Id.*

[46] DESTEXHE, *supra* note 31, at 46.

[47] PRUNIER, *supra* note 31, at 90-94.

[48] DESTEXHE, *supra* note 31, at 45.

[49] *Id.* at 46.

6, 1994.[50] Everyone on board was killed.[51] The annihilation of all Tutsi began instantaneously.[52] By July, Hutu soldiers, police officers, and militia members, recurrently aided by civilians, killed approximately 800,000 Tutsi in several well-coordinated waves of mass killing.[53]

III. International Criminal Tribunal for Rwanda ("ICTR")

The crisis in Rwanda was initially interpreted as a humanitarian catastrophe affecting hundreds of thousands of refugees, and eliciting international compassion. Surprisingly, the crisis failed to give due attention to the genocide that had already run its course. As Destexhe observed, "humanitarian action provided a way of responding to the crisis while continuing to conveniently overlook the fact that genocide had taken place until the situation had evolved to the point where it could be forgotten altogether."[54] In a belated response to the atrocities, the SC established a Commission of Experts in July 1994 to investigate violations of international humanitarian law in Rwanda.[55] In its first interim report, the Commission concluded that there was evidence of genocide as defined by the Genocide Convention.[56] Having confirmed that genocide and other flagrant violations of international humanitarian law had been committed, the SC established the ICTR[57] in 1994.[58]

The international community has traditionally relied on five ways of responding to violations of international criminal law: (1) doing nothing; (2) granting amnesty; (3) creating a truth commission; (4) foreign prosecutions; and (5) creating *ad hoc* international tribunals.[59] The Genocide Convention states that, "persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or* by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[60] Therefore, three options exist to prosecute accused genocidal perpetrators in Rwanda. Domestic officials can prosecute individuals accused of genocidal behavior internally, a foreign state can intervene

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[50] *Id.* at 31.

[51] MELVERN, *supra* note 31, at 133-136; MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA 95 (2003).

[52] DESTEXHE, *supra* note 31, at 31.

[53] MELVERN, *supra* note 31, at 164-220.

[54] DESTEXHE, *supra* note 31, at 58.

[55] BARNETT, *supra* note 51, at 142-152; MELVERN, *supra* note 31, at 248-249.

[56] *Id.*

[57] S.C. Res. 955, *supra* note 1.

[58] *Id.*

[59] *See generally* M. CHERIF BASSIOUNI, *The Prosecution of International Crimes and the Establishment of an International Criminal Court, in* 3 INTERNATIONAL CRIMINAL LAW, 3-11 (M. Cherif Bassiouni ed., 2d ed. 1999).

[60] Genocide Convention, *supra* note 20, at Art. VI.

and prosecute an accused perpetrator,[61] or the United Nations can convene an *ad hoc* criminal tribunal. To date, four such international *ad hoc* criminal tribunals have convened: the International Military Tribunal at Nuremberg in 1945,[62] the International Military Tribunal for the Far East at Tokyo in 1946,[63] the International Criminal Tribunal for the Former Yugoslavia at The Hague in 1992,[64] and the ICTR.[65]

The creation of the ICTR supported Rwandan efforts to allocate individual responsibility for genocide and other crimes against humanity by offering an objective forum for investigating genocidal events.[66] The SC decided to create the ICTR to bring to justice those persons responsible for acts of genocide and violations of humanitarian law in Rwanda between January 1 and December 31, 1994.[67] As such, the ICTR is authorized to prosecute four clusters of offenses: grave breaches of the Geneva Conventions, violations of the laws or customs of war, the crime of genocide, and crimes against humanity.[68]

The first trial at the ICTR started in January 1997.[69] Fifty persons have been indicted to date.[70] As of March 2005, there have been seventeen judgments against twenty-three accused perpetrators.[71] Twenty of the twenty-three accused (eighty-seven percent) were convicted, including one prime minister, four ministers, one prefect, five burgomasters and several others who held leadership positions in 1994.[72] Eight trials were in progress as of March 2005, involving a total

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[61] While the Genocide Convention does not specifically permit foreign states to prosecute accused genocidal perpetrators, foreign states can assume jurisdiction via the principle of universal jurisdiction. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim, or any other connection to the state exercising the jurisdiction. Universal jurisdiction can be exercised by a competent judicial body of any state to prosecute a person accused of committing a serious crime under international law, like genocide. *See* CrimC (Jer) 40161 Israel v. Eichman [1962] IsrsC [5](1-70) (discussing a brief history and application of universal jurisdiction against a defendant prosecuted for assisting the Nazi regime in genocide outside of Israeli borders).

[62] The International Military Tribunal at Nuremberg was established pursuant to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, *available at* http://www1.umn.edu/humanrts/instree/imt1945.htm.

[63] Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 Jan. 1946, *available at* http://www.yale.edu/lawweb/avalon/imtfech.htm (giving full text of the Tribunal's Constitution).

[64] S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

[65] S.C. Res. 955, *supra* note 1.

[66] Erik Mose, *Main Achievements of the ICTR*, 3 J. INT'L. CRIM. JUST. 920, 939-40 (2005); George Yacoubian, *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 3 WORLD AFFAIRS 133, 135 (2002).

[67] Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L. L. 501, 502 (1996).

[68] *Id.* at 502-3.

[69] *See* International Criminal Tribunal for Rwanda, http://www.ictr.org/ENGLISH/factsheets/detainee.htm (last visited Jan. 19, 2006).

[70] *Id.*

[71] *Id.*

[72] *Id.*

of twenty-five accused, including eight ministers, one parliamentarian, two prefects, three burgomasters, one councilor, and three military officers.[73]

Trials in Rwanda

In December 1996, the genocide prosecutions in Rwanda began.[74] To date, Rwandese courts have concluded approximately 200 trials, with an additional 80,000 suspected perpetrators still awaiting trial.[75] Not surprisingly, the sheer magnitude of genocide cases has placed a severe strain on Rwanda's criminal justice system.[76] That said, general amnesty was out of the question at the time the prosecutions began because the new government, the Rwandan people, and the international community believed that "those responsible for the genocide should be held accountable for their acts in order to eradicate the culture of impunity, reinforce respect for the law and uphold the principle of punishment for crimes."[77] Because the possibility of amnesty had been dismissed, national authorities attempted to ease the pressure by categorizing the detainees according to the crimes for which they were accused and adopted an alternative justice system—the *Gacaca* institution.[78]

National Rwandese officials created four categories of people accused of genocide.[79] Category One consists of the "planners, organisers, and framers of genocide or crimes against humanity."[80] Category Two includes persons who committed homicide or attempted homicide.[81] Category Three includes persons who committed "serious attacks without the intent to cause the death of the victims."[82] Category Four includes "crimes against property."[83]

The *Gacaca* law was adopted in March 2001.[84] The law gives a role to the community in the trial and sentencing process because the Government believes that community involvement can contribute significantly to reconciliation.[85] The primary principle of the *Gacaca* courts is to bring together all parties (i.e., perpe-

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[73] *Id.*

[74] *Id.*

[75] *Rwanda to Speed up Genocide Trials*, *supra* note 3.

[76] *See id.*

[77] Penal Reform International, *Gacaca Courts in Rwanda*, http://www.penalreform.org/english/theme_gacaca.htm (last visited Jan. 19, 2006).

[78] *See* Mark A. Drumbl, Lecture, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41, 55 (2005).

[79] William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L. CRIM. JUST. 879, 892-93 (2005); *Gacaca Courts in Rwanda*, *supra* note 77; *see also* Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L. CRIM. JUST. 896, 909-10 (2005) (discussing how Article 51 of Organic Law no. 16/2004 of June 19, 2004 redefined the different categories of alleged perpetrators for the third time, after the laws of 1996 and 2001).

[80] Schabas, *supra* note 79, at 893.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 891-92; *see also Gacaca Courts in Rwanda*, *supra* note 77.

[85] *See Gacaca Courts in Rwanda*, *supra* note 77.

trators, victims, and witnesses) at the location of the crime for the purposes of establishing the truth and identifying the guilty.[86] The *inyangamugayo*, or non-professional judges elected from the community, will chair the proceedings.[87] These judges are also responsible for imposing the sentences on those convicted.[88]

There are four primary advantages to the *Gacaca* institution: (1) an expedited process, which should provide closure to victims, offenders, and the international community and begin to foster national reconciliation; (2) the reduction of prison maintenance costs, enabling the government to concentrate on more pressing needs; (3) the participation of every member of the community, facilitating the establishment of the truth; and (4) innovative criminal justice methods created by the new courts particularly with sentencing and community reintegration.[89] Unfortunately, the establishment of the *Gacaca* jurisdictions has been delayed until 2006.[90] Contributing to the problem of judicial resolution to the genocide of 1994 is the release of 36,000 suspected genocidal perpetrators during the summer of 2005 to reduce prison overcrowding.[91] This is an unsatisfactory resolution to one of the most horrific genocidal events of the Twentieth Century. The prosecution and punishment of accused perpetrators of genocide is necessary to achieve global justice and peace.[92] By not punishing perpetrators of genocide, the international community is now at a greater risk of succumbing to new genocidal events.

IV. International Criminal Court

The international legal community worked toward the creation of a permanent international criminal court for most of the Twentieth Century.[93] The goal of

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *See Rwanda to Speed up Genocide Trials*, *supra* note 3.

[91] *See* Integrated Regional Information Networks, *Rwanda: Release of thousands of prisoners begins*, Aug. 1, 2005, http://www.irinnews.org/report.asp?ReportID=48373 (last visited Mar. 2, 2006).

[92] *See* HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 214 (1999).

[93] *See* Elizabeth Chadwick, *A Tale of Two Courts: The 'Creation' of a Jurisdiction?*, 9 J. CONFLICT & SEC. L. 71, 72 (2004); M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52 J. INT'L. AFFAIRS 795, 795-96 (1999); Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L. L. 1, 4-14 (1998); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 49-57 (1997); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 50-53 (1995); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L. L. 151, 152-58 (1992); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L. L. 375, 382-390 (1992); William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L. L. J. 88, 92-98 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L. & COMP. L. REV. 1, 2-11 (1991); M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J.

establishing a permanent institution to prosecute the most egregious violations of international criminal law culminated with the formation of the International Criminal Court ("ICC").[94] The Rome Statute, which came into force during the summer of 2002, includes four categories of offenses: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[95] The ICC prosecutes these categories of offenses because they violate fundamental humanitarian principles and constitute the most serious crimes of international concern.[96]

The Twentieth Century demonstrated the harsh reality that the global community failed to create a mechanism to enforce international humanitarian law. Most violations of the established norms of international behavior, such as the crime of genocide, war crimes, and crimes against humanity, are committed with the complicity of the state and its leadership.[97] The Hague Conventions of 1899 and 1907 were the first significant codifications of the laws of war in an international treaty.[98] However, these Conventions failed to create a permanent international criminal court with jurisdiction transcending national boundaries, primarily because sovereign nations were unwilling to be bound by the judgments of an international judicial authority.[99] The United States, for example, persistently claimed that it "reserved the right to resolve any purely American issue."[100]

Between 1946 and 1996, the United Nations led the efforts to codify certain international crimes.[101] Immediately after the Second World War, the United States sponsored Resolution 95(I), which recognized the principles of international law contained in the Nuremberg Charter.[102] In 1947, the United Nations General Assembly ("GA") directed the International Law Commission ("ILC") to formulate the principles of international law in a draft code of offenses, while a special rapporteur was assigned to formulate the Draft Statute for the Establishment of the International Criminal Court.[103] While many nations supported the establishment of a permanent international criminal court, it was clear that none

INT'L. L. 27, 33-34 (1983); Vespasian Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L. L. 37, 41-42 (1950); Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROB. 263, 264 (1950).

94 *See* International Criminal Court: About the Court, http://www.icc-cpi.int/about.html (last visited Jan. 19, 2006).

95 Rome Statute of the International Criminal Court art. 5(1), July 7, 1998, U.N. Doc. A/CONF.183/9, *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm [hereinafter Rome Statute].

96 *See* International Criminal Court: About the Court, *supra* note 94.

97 BENJAMIN B. FERENCZ, NEW LEGAL FOUNDATIONS FOR GLOBAL SURVIVAL: SECURITY THROUGH THE SECURITY COUNCIL 67 (1994).

98 *Id.* at 1-2.

99 BALL, *supra* note 92, at 16.

100 *Id.*

101 M. Cherif Bassiouni, *The Draft Code of Crimes Against the Peace and Security of Mankind, in* 1 INTERNATIONAL CRIMINAL LAW 293, (M. Cherif Bassiouni ed., 2d ed. 1999).

102 *Id.*

103 *Id.* at 293-94.

of the world's superpowers were ready to support the establishment of an international criminal court.[104]

Various draft reports were produced between the 1950s and 1980s, but it was not until 1989 that the GA was faced again with the question of an international criminal court when Trinidad and Tobago sought to address international drug trafficking.[105] The ILC persevered in developing the limited 1989 mandate related to illicit drug trafficking, which eventually evolved into the Draft Statute for an International Criminal Court.[106] It was this draft that served as the basis for the GA's decision to establish the *ad hoc* Committee on the Establishment of an International Criminal Court and later the Preparatory Committee for the Establishment of an International Criminal Court.[107]

On July 17, 1998, the Rome Statute was adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[108] Of the more than 150 nations in attendance, 120 voted in favor of the court, and 7 against, with 21 abstentions.[109] As of May 12, 2005, ninety-nine nations, not including Rwanda, have ratified the treaty and thus became parties to the Rome Statute of the International Criminal Court.[110]

There are two primary reasons why states have elected not to ratify the ICC Statute. First, countries that do not value democracy and human rights, like China and the Sudan, have little or no incentive to cede criminal jurisdiction to an international entity whose primary offenses address human rights violations.[111] By ceding jurisdiction to the ICC, they would potentially be turning over their own nationals for prosecution before the international community. Second, states that purport to value human rights, like the United States, argue that their sovereignty is better protected by rejecting the Court than by joining it.[112] This is a clear paradox, for those states that purport to value human rights have the greatest incentive to promote an institution dedicated to the realization of international peace. In the case of Rwanda, the refusal to ratify the Rome Statute was philosophical. Capital punishment is not an eligible sanction for any offense falling under the subject matter jurisdiction of the ICC. The maximum

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104 *Id.* at 295.

105 *Id.* at 295-99.

106 *Id.* at 301.

107 *Id.*

108 Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. L/ROM/22 (July 17, 1998), *available at* http://www.un.org/icc/pressrel/lrom22.htm.

109 *Id.*

110 The International Criminal Court: The States Parties to the Rome Statute, http://www.icc-cpi.int/asp/statesparties.html (last visited Jan. 19, 2006).

111 Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INTL. LAW & COM. REG. 407

112 *See* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 385-86 (2002); *see also* Scheffer, *supra* note 93, at 17-19 (discussing the flaws the United States saw in the statute).

punishment permitted by the Rome Statute is life imprisonment.[113] Because Rwanda favored the death penalty for convicted genocidal perpetrators, they declined to recognize the Court's jurisdiction.[114]

There are four significant jurisdictional components to the Rome Statute. First, the Rome Statute entered into force on July 1, 2002.[115] This means that only acts perpetrated after July 1, 2002 are eligible for prosecution. Second, all nations that are party to the Rome Statute must accept its jurisdiction.[116] This is the cornerstone of a cooperative, international legal community. Third, states that have not ratified the Statute may, by special declaration, accept the temporary jurisdiction of the ICC for crimes covered by its subject matter jurisdiction.[117] Finally, the Court can exercise jurisdiction if a SC referral is made to the prosecutor.[118]

The subject matter jurisdiction of the ICC includes four categories of offenses:[119] the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[120] The definition of genocide articulated in the ICC Statute follows the definition in the Convention on the Prevention and Punishment of the Crime of Genocide.[121] Crimes against humanity include enslavement,[122] deportation or forcible transfer of population,[123] torture,[124] the crime of apartheid,[125] and other acts "committed as part of a widespread or systematic attack directed against any civilian population."[126] War crimes include any of the following acts against persons or property protected under the Geneva Conventions: torture or inhumane treatment,[127] taking of hostages,[128] intentionally directing attacks against civilian populations that are not part of the hostilities,[129] killing or wounding a combatant who has surrendered,[130] pillaging,[131] using asphyxiating

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113 Rome Statute, *supra* note 95, art. 77(1)(b).

114 MELVERN, *supra* note 31, at 249.

115 Rome Statute, *supra* note 95, art.11(1).

116 *Id.* art. 12(1).

117 *Id.* art. 12(3).

118 *Id.* art. 13(b).

119 *Id.* art. 5(1).

120 *Id.; see also id.* art. 5(2) (which states that while aggression falls under the subject matter jurisdiction of the ICC, a definition of the crime must be finalized before jurisdiction can be exercised).

121 *Id.* art. 6.

122 Rome Statute, *supra* note 95, art. 7(1)(c).

123 *Id.* art. 7(1)(d).

124 *Id.* art. 7(1)(f).

125 *Id.* art. 7(1)(j).

126 *Id.* art. 7(1).

127 *Id.* art. 8(2)(a)(ii).

128 *Id.* art. 8(2)(a)(viii).

129 *Id.* art. 8(2)(b)(i).

130 *Id.* art. 8(2)(b)(vi).

131 *Id.* art. 8(2)(b)(xvi).

gases,[132] sexual slavery and forced sterilization.[133] The Court will have jurisdiction over the crime of aggression after it has been formally defined.[134]

It is also important to note that the ICC will not operate on the basis of primary jurisdiction, but will be subject to the principle of complementarity.[135] The principle of complementarity provides that the ICC will exercise jurisdiction only when a national judicial system is unable to investigate or prosecute transgressors.[136] In other words, the ICC is a subsidiary mechanism to handle the prosecution of crimes within its jurisdiction. Some states, fearing the possibility of sham investigations or trials protecting perpetrators, argue that the Court should go further and intervene where a national judicial system would be ineffective or unavailable.[137]

To date, four cases have been referred to the Office of the Prosecutor. The state parties themselves referred three of these situations—in the Republic of Uganda on January 29, 2004,[138] the Democratic Republic of Congo on April 19, 2004,[139] and the Central African Republic January 7, 2005.[140] The fourth situation in Darfur, Sudan was referred by the Security Council on March 30, 2005.[141] Of these four, the Prosecutor initiated investigations into the situations in the DRC on June 23, 2004[142] and in the Republic of Uganda on July 29, 2004.[143]

V. Discussion

Prison overcrowding is a significant concern for criminal justice officials and policymakers across the world. It has been shown to cause increased arousal and

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132 *Id.* art. 8(2)(b)(xviii).

133 *Id.* art. 8(2)(e)(vi).

134 *Id.* art. 5(2).

135 *Id.* arts. 17, 18.

136 John T. Holmes, *The Principle of Complementarity, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 41, 42 (Roy S. K. Leed ed., Kluwer Law Int'l 1999).

137 *Id.*

138 Press Release, International Criminal Court, President of Uganda Refers Situation Concerning Lord's Resistance Army (LRA) to the ICC, http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (last visited Jan. 19, 2006).

139 Press Release, International Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, http://www.icc-cpi.int/pressrelease_details&id=19.html (last visited Jan. 19, 2006).

140 Press Release, International Criminal Court, Prosecutor Receives Referral Concerning Central African Republic, http://www.icc-cpi.int/pressrelease_details&id=87.html (last visited Jan. 19, 2006).

141 S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

142 Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html (last visited Jan. 19, 2006).

143 Press Release, International Criminal Court, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda, http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html (last visited Jan. 19, 2006).

stress among inmates,[144] inmate illness complaints,[145] violence and disciplinary problems,[146] resentment among correctional officers,[147] and homicide[148] among inmates. Several approaches to overcrowding have been implemented, including the construction of larger facilities,[149] diversion programs for non-violent offenders,[150] and the release of offenders back into the community earlier than their sentences have warranted.[151] The Supreme Court of the United States has also weighed in on prison overcrowding. In *Rhodes v. Chapman*, the Court ruled that the housing of two inmates in a single cell did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[152] While in *Wilson v. Seiter*, in addition to tightening the requirements needed to prove cruel and unusual punishment, the Court held that inmates must prove deliberate indifference on the part of prison officials to succeed with an Eighth Amendment claim.[153]

When determining what might constitute an appropriate strategy for reducing prison overcrowding, it is critical to distinguish between types of offenders. For non-violent offenders or offenders with substance abuse or mental health problems, diversion programs have had positive results.[154] There is also a distinction between offenders awaiting trial and offenders who have already served part or most of their sentence. Offenders in the latter classification have been formally punished by the criminal justice system for the crimes they committed.

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144 *See* Claire Lawrence & Kathryn Andrews, *The Influence of Perceived Prison Overcrowding on Male Inmates' Perception of Aggressive Events*, 30 AGGRESSIVE BEHAVIOR 273, 281 (2004); Frank J. Porporino, *Managing Violent Individuals in Correctional Settings*, 1 J. INTERPERSONAL VIOLENCE 213, 229-30 (1986); Verne C. Cox, Paul B. Paulus, & Garvin McCain, *Prison Crowding Research: The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 AM. PSYCHOL. 1148, 1156 (1984); Paul B. Paulus & Garvin McCain, *Crowding in Jails*, 4 BASIC & APPLIED SOC. PSYCHOL. 89, 105 (1983).

145 Garvin McCain, Verne C. Cox, & Paul B. Paulus, *The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment*, 8 ENV'T. & BEHAV. 283, 288 (1976).

146 D. Farrington, & C. Nuttal, Prison Size, *Overcrowding, Prison Violence and Recidivism*, 8 J. CRIM. JUST. 221, 230 (1980).

147 *See* Helsingin Sanomat, *Prison Overcrowding Source of Stress for Inmates and Guards*, http://www.helsinginsanomat.fi/english/article/Prison+overcrowding+source+of+stress+for+inmates+and+guards%0D%0A/1101981260600 (last visited Jan. 19, 2006).

148 George B. Palermo, Mark T. Palermo & Douglas J. Simpson, *Death by Inmate: Multiple Murder in a Maximum Security Prison*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIM. 181, 182 (1996).

149 Thomas B. Marvell, *Is Further Prison Expansion Worth the Costs?*, FED. PROBATION, Dec. 1994, at 59; P.L. Dressel, . . . *and We Keep on Building Prisons: Racism, Poverty, and Challenges to the Welfare State*, 21 J. SOC. & SOC. WELFARE 7 (1994)

150 DEAN CHAMPION, CORRECTIONS IN THE UNITED STATES, A CONTEMPORARY PERSPECTIVE 109 (Pearson/Prentice Hall, 4th ed. 2004).

151 *Id.*

152 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

153 Wilson v. Seiter, 501 U.S. 294, 301 (1991).

154 Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substance Use Disorders*, 23 BEHAV. SCI. & L. 163, 168 (2005); M. Alexis Kennedy, Carolin Klein, Boris B. Gorzalka, & John C. Yuille, *Attitude Change Following a Diversion Program for Men Who Solicit Sex*, 41 J. OFFENDER REHAB. 41, 58 (2004); Cassia Spohn, R.K. Piper, T. Martin, & E.D. Frenzel, *Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism*, 31 J. DRUG ISSUES 149, 150-176 (2001).

They are convicted offenders, and theories of deterrence and retribution have, to a significant degree, been implicated. In contrast, offenders incarcerated pre-trial have not been subjected to formal sanctioning, and theories of deterrence and retribution have not been implicated.

The release of suspected genocidal perpetrators fails both the Rwandan and international communities on three levels. First, the strength of the Genocide Convention is compromised. If genocide is indeed one of the most reprehensible crimes that can be committed,[155] then all persons accused of participating in genocidal events should be brought to justice. While "justice" does not necessarily mean convictions and incarceration, the timely initiation of a criminal trial would certainly suffice. Practical problems inherent to correctional facilities, like overcrowding, should not hinder the need to prosecute those accused of having orchestrated or perpetrated genocidal events.

Second, the domestic trials were originally actualized because Rwandan officials believed that justice and reconciliation could only be served if the accused were prosecuted and judged by Rwandan society.[156] Not only does the release of suspected offenders fail to accomplish the goals of justice and reconciliation, but it compromises the legitimacy of Rwanda's criminal justice process. Moreover, released offenders will likely return to the communities where the atrocities were committed. Without a formal resolution to the genocidal campaigns, Rwanda's national security is likely to be jeopardized and the reintegration of the accused will be considerably more difficult.[157]

Third, future acts of genocide cannot be prevented if perpetrators are permitted to elude responsibility for their crimes. On April 7, 2004, in a speech commemorating the tenth anniversary of the Rwanda genocide, UN Secretary General Kofi Annan announced the Five Point Action Plan to Prevent Genocide.[158] The first point was prevention of armed conflict which usually provides the context for genocide; second, protection of civilians in armed conflict including a mandate for UN peacekeepers to protect civilians; third, ending impunity through judicial action in both national and international courts; fourth, information gathering and early warning through a UN Special Advisor for Genocide Prevention; and fifth, swift and decisive action along a continuum of steps, including military action.[159]

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155 *See generally* ROMÉO A. DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2004); WILLIAM HEWITT, DEFINING THE HORRIFIC: READINGS ON GENOCIDE AND HOLOCAUST IN THE 20TH CENTURY (Pearson Edu. 2003); KURT JONASSOHN, GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS IN COMPARATIVE PERSPECTIVE (1998); GEORGE J. ANDREOPOULOS, GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS (1994); ISRAEL W. CHARNY & CHANAN RAPAPORT, HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE, THE HUMAN CANCER (1982).

156 WISE ET AL., *supra* note 24, at 540.

157 *See generally* Carter Hay, *An Exploratory Test of Braithwaite's Reintegrative Shaming Theory*, 38 J. RES. CRIME & DELINQ. 132, 133-34 (2001); JOHN BRAITHWAITE, CRIME, SHAME & REINTEGRATION 1-15 (1989) (arguing that the key to crime control is cultural commitments to shaming that is reintegrative).

158 Press Release, United Nations, Secretary-General Observes International Day of Reflection on 1994 Rwanda Genocide, http://www2.unog.ch/news2/documents/newsen/sg04003e.htm (last visited Nov. 2, 2005).

159 *Id.*

His third point affirmed comments by leading scholars that future acts of genocide are best deterred by the prosecution of suspected perpetrators.[160]

The world community has already witnessed the aftermath of failed prosecutions of genocidal perpetrators. The Cambodian genocide is a prime example of inadequate international criminal justice. The Khmer Rouge, headed by Pol Pot, gained control of Cambodia in April of 1975.[161] Although most Cambodians welcomed the new regime, the initial enthusiasm faded as the Khmer Rouge began to institute some of the most radical policies ever experienced by a post-revolutionary nation.[162] Within days of its victory, the Khmer Rouge began evacuating the country's major cities.[163] Money was abolished and symbols of Western technology, such as automobiles and refrigerators, were destroyed.[164] The Khmer Rouge severed contact with the outside world, cutting off international telephone lines, telegrams, and international mail service.[165]

Between 1975 and 1979, the Pol Pot regime systematically subjected the Cambodian population to forced labor, starvation, and murder.[166] The genocide in Cambodia was perpetrated against three categories of victims: religious groups, ethnic groups, and a part of the majority national group.[167] During Pol Pot's effort to remold society, eradicate individualism, and create "total communism," Cambodia was subjected to what was likely the world's most radical political, social, and economic revolution.[168] As Kiernan affirmed, "the country was cut off from the outside world; . . . schools and hospitals were closed; . . . families were separated; . . . and one and a half million of its nearly eight million people were starved to death or massacred."[169]

Three decades later, the international community still thirsts for justice for the Khmer Rouge atrocities.[170] In 2003, the UN and Cambodia drafted an agreement

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[160] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7, 12 (2001); Helen Fein, *Introduction* to GENOCIDE WATCH 14 (Helen Fein ed., 1992); LEO KUPER, THE PREVENTION OF GENOCIDE 101-02 (1985).

[161] Kiernan, *supra* note 29, at 191.

[162] *See* ELIZABETH BECKER, WHEN THE WAR WAS OVER 178 (Simon & Schuster 1986).

[163] *Id.* at 176.

[164] *Id.* at 182, 184.

[165] *Id.* at 180.

[166] Kiernan, *supra* note 29, at 191.

[167] *Id.* at 197-202.

[168] *Id.* at 191.

[169] *Id.*

[170] *See* Daniel K. Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L. L. J. 551, 575 (2003); Mann Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense*, 74 S. CAL. L. REV. 1581, 1583 (2001); Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137, 138 (2000); Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?* 15 ARIZ. J. INT'L. & COMP. L. 833, 834 (1998); *See generally* Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L. & COMP. L. 507 (2000)

to convene a Khmer Rouge tribunal.[171] Though no trials have yet begun, approval by the GA effectively cleared the way for an international tribunal. The efforts made by the Cambodian government and the international community to bring genocidal perpetrators to justice were significant, not only for the political stability of Cambodia, but also for the legitimacy of the international criminal law regime. The fact that international legal scholars and government officials worked for three decades to secure some resolution to the genocide in Cambodia suggests how important a resolution must be. A curious irony befalls us when persons work for decades to secure some justice for Cambodian victims, while others dismantle the redress in Rwanda for the sake of easing prison overcrowding.

There are six potential solutions to the prison overcrowding dilemma currently faced by the Rwandan government, each with various advantages and disadvantages. First, government officials could release non-genocide-related offenders from prison whose crimes were innocuous or whose sentences are close to completion. This is not a novel idea,[172] and it would continue to secure the most violent convicts and genocidal detainees. Given finite prison space, this alternative offers economic pragmatism and is consistent with recent efforts at penal reform.

Second, a plea bargaining system could be instituted for Category Four offenders. For those genocidal detainees whose prison sentences would not be significant or whose sanction would involve immediate release into the community, the reliance on plea bargaining would provide legitimate dispositions for what could potentially be thousands of cases.

Third, additional prisons can be built. While this is not an inexpensive solution, it can address problems related to capacity relatively expeditiously. Given the hundreds of millions of dollars expended to date by the United Nations for creating and sustaining the ICTR,[173] funds for new prison construction would likely pale in comparison, and may also assist Rwanda's economy with an influx of perdurable employment.

Fourth, other nations can assume the prosecutions of the offenders. Because the Rwandan detainees have been charged with violating the Genocide Convention, other nations can intervene based on the principle of universal jurisdiction, which permits states to assume jurisdiction over those offenses that are so egregious to mankind (e.g., genocide) that custody of the offender is enough.[174] Unlike the principles of territoriality (jurisdiction over criminal acts committed within a state's territory),[175] nationality (jurisdiction over a state's own nation-

[171] Press Release, United Nations, General Assembly Approves Draft Agreement between U.N., Cambodia on Khmer Rouge Trials, U.N. Doc. GA/10135, http://www.un.org/News/Press/docs/2003/ga10135.doc.htm (last visited Jan. 19, 2006).

[172] Marvell, *supra* note 149, at 61.

[173] Yacoubian, *supra* note 66, at 137.

[174] WISE ET AL., *supra* note 24, at 62-63; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 836 (1988).

[175] WISE ET AL., *supra* note 24, at 47-51; Randall, *supra* note 174, at 836.

als),[176] or passive personality (jurisdiction if the crime's victims are nationals of the state),[177] the principle of universality focuses on the category of offenses. While the assumption of jurisdiction over genocidal events committed more than a decade ago is neither a logistically straightforward nor inexpensive task, it is certainly within the realm of possibility that more stable nations could assume responsibility for the prosecution of some of these crimes.

Fifth, the ICTR could assume jurisdiction. While the logistical and pecuniary capabilities of the ICTR are already strained,[178] the ICTR could assume jurisdiction over Category One offenders to assure that the most serious offenses are tried before a competent tribunal with considerable experience prosecuting genocide-related offenses.

Sixth, the proceedings in Rwanda could continue at their current pace until 2009, at which time the Rome Statute becomes eligible for revision. Article 123 of the Rome Statute calls for its review seven years after entry into force.[179] This means that the ICC could assume jurisdiction of the Rwandan genocide prosecutions even though the Statute went into force during the summer of 2002, eight years after the crimes were committed.[180] Such a retroactive revision would "guarantee lasting respect for and the enforcement of international justice."[181] Given the inconceivable alternative of releasing accused genocidal perpetrators, a temporary revision of the Rome Statute to accommodate prosecutions of the Rwandan genocide seems appropriate.

Genocide is distinguishable from all other crimes by the motivation behind it. Toward the end of the Second World War, when the full horror of the Third Reich was revealed, Winston Churchill stated that the world was being confronted with a "crime that has no name."[182] Indeed, history was of little use in finding a recognized word to fit the nature of Nazi Germany's crime. With the possible exception of the Armenian Massacres of 1915,[183] there simply were no precedents with respect to either the nature or the degree of this crime.

While the prosecution of 80,000 suspected genocidal perpetrators is a colossal undertaking, the solution currently being undertaken by the Rwandan Government is ineffective and incomprehensible. What effectively amounts to a general pardon for suspected genocidal victimizers is inconsistent with what presumably is the foundation of international criminal law—that the most pernicious offenders are found criminally responsible for their actions before a tribunal recognized by the world community. The lessons learned by the release of genocidal detainees are dangerous ones. Persons committed to the rule of law should not be

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176 WISE ET AL., *supra* note 24, at 51-53.

177 *Id.* at 59-62.

178 Yacoubian, *supra* note 66, at 138.

179 Rome Statute, *supra* note 95, art. 123(1).

180 *Id.* art. 11(1).

181 *Id.* Preamble.

182 Jack N. Porter, *Introduction* to GENOCIDE AND HUMAN RIGHTS: A GLOBAL ANTHOLOGY 2, 5 (Univ. Press of America 1982).

183 DADRIAN, *supra* note 7, at 302-05.

disheartened that the international criminal justice system is incapable of addressing the prosecutorial needs for the type of crime it was created to litigate. Potential perpetrators, in turn, can take comfort in the knowledge that if their genocidal campaigns are implemented by enough persons and on a large enough scale, the global community will be ill-equipped to address the legal ramifications.

Conclusion

As the international criminal enterprise increases in both scope and severity, it is the responsibility of the global community as a whole to develop adequate legal protections against these transgressions. There can be no dispute that consistent enforcement of the Genocide Convention is imperative to the deliverance of international criminal justice. Close to a decade after the horrors of 1994, the ICTR and the domestic prosecutions have not been particularly successful in their mandate to prosecute the accused and punish the guilty. In 1946, the GA recognized that the denial of the right to existence of entire human groups "shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations."[184] Today, genocide is generally recognized as the paramount violation of international criminal law. As such, enforcement of the Genocide Convention should be shouldered by all nation-states. Because the ICC cannot yet assume jurisdiction, it is strongly recommended that states step forward and provide national prosecutions for those offenses that constitute the "most serious crimes of concern to the international community as a whole."[185]

[184] G.A. Res. 96, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1947).

[185] Rome Statute, *supra* note 95, art. 5(1).

RASUL V. BUSH: A COURAGEOUS DECISION BUT A MISSED OPPORTUNITY

Sameh Mobarek[†]

I. Introduction

On September 11, 2001, terrorists flew three commercial airplanes into the twin towers of the World Trade Center in New York City and the Pentagon in Washington, D.C.[1] A fourth plane, headed towards Washington, D.C., was destroyed by the heroic acts of its passengers before it reached its destination—likely saving many lives and avoiding further destruction to our nation's capital.[2] The nation watched this tragedy unfold on its television screens as almost 3,000 people lost their lives in New York alone.[3] In response to the September 11th attacks, Congress passed a joint resolution authorizing President George W. Bush to pursue those persons, organizations, or nations that had planned, authorized, or aided in the attack.[4] Pursuant to this authority, President Bush ordered the U.S. military to commence military operations against al-Qaeda and its supporters, the Taliban regime in Afghanistan.[5]

During this campaign, the United States captured Taliban and al-Qaeda members in Afghanistan and labeled them "enemy or unlawful combatants."[6] The significance of such a designation was to deprive those captured of the "Prisoners of War" status, and to leave the grant or denial of all the rights associated with such designation under the Geneva Convention to the discretion of the President.[7] The President also ordered that these prisoners be detained, either inside

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[1] Cable News Network, *September 11: Chronology of Terror* (Sept. 12, 2001), http://archives.cnn.com/2001/US/09/11/chronology.attack (last visited Jan. 17, 2005).

[2] *Id.*

[3] British Broadcasting Corporation, *A Nation's Pain and Loss* (Sept. 13, 2002), *available at* http://news.bbc.co.uk/2/hi/americas/2255068.stm (last visited Jan. 17, 2005).

[4] Authorization for Use of Military Force, 50 U.S.C. § 1541 (2001).

[5] Steven Swanson, *Enemy Combatant and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 939 (2003).

[6] *Id.* at 939-40.

[7] *See Guantanamo Bay—Camp X-Ray*, *at* http://www.globalsecurity.org/military/facility/guatanamo-bay_x-ray.htm (last visited Jan. 17, 2005). The Geneva Convention was developed by a majority of states to govern the conduct of war after the tremendous suffering and bloodshed of two World Wars. K. Elisabeth Dahlstrom, *Between Empire and Community: The United States and Multilateralism 2001-2003; A Mid-Term Assessment: Humanitarian Law: The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662, 663 (2003). The Convention consists of four separate conventions each governing a distinct aspect of humanitarian law including "the amelioration of the sick and wounded of the armed forces in the field; the amelioration

or outside the United States, at locations designated by the Secretary of Defense.[8] Reportedly, 650 of these prisoners, representing as many as 33 nationalities, were transferred to the U.S. naval base at Guantanamo Bay, Cuba, where they were held without charge or trial for more than two years.[9] The prevailing government view was that it could hold these prisoners at Guantanamo Bay indefinitely and without access to any independent tribunal to review the facts leading to their designation as enemy or unlawful combatants.[10]

Rasul v. Bush[11] represents the first attempt by any of these prisoners to challenge before the Supreme Court their continued detention. Part II of this article discusses the background leading up to *Rasul.* Specifically, it discusses the remedial means available to prisoners to challenge their detention under U.S. law, as well as case law applying these means to nonresident alien prisoners.[12] Part III explores the Court's decision in *Rasul* where it determined that nonresident alien prisoners held at Guantanamo Bay do have the right to challenge their detention through a writ of habeas corpus.[13] Part IV analyzes the Court's holding, as well as the dissenting opinion, and argues that, although the Court reached the correct conclusion, it did not go far enough in determining the extent of the prisoners' rights under the Constitution.[14] Finally, Part V discusses the impact of the Court's ruling on changing the status of the prisoners' detention and on subsequent polices by the Executive in prosecuting the War on Terror.[15]

II. Background

Under U.S. law a prisoner can challenge his or her detention by filing a writ of habeas corpus.[16] This writ traces its ancestry to early thirteenth century England

of the wounded, sick, and shipwrecked members of the armed forces at sea; the treatment of prisoners of war; and the treatment of civilian persons in time of war." *Id.*

[8] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833-34 (Nov. 13, 2001). The order covered any non-citizen who (1) is or was a member of al-Qaeda, (2) aided or assisted in any way in a terrorist act against the United States, its citizens, national security, foreign policy, or economy, or (3) knowingly harbored one or more persons described in (1) or (2). *Id.*

[9] Kim Barker, *Kabul Frees 18 Held in Cuba; Ex-Guantanamo Inmates Go Home*, CHI. TRIB., Mar. 26, 2003, at C12; *see also* Roy Gutman & Sami Yousafzai, *The Madman of Guantanamo*, NEWSWEEK, May 27, 2002, at 50.

[10] Michael Sniffen, *Details of Guantanamo Detention Emerge*, AP, Dec. 29, 2004, *available at* http://www.boston.com/news/nation/washington/articles/2004/12/29/details_of_guantanamo_detentions_emerge/ (last visited at Nov. 10, 2005) (noting that the government's position is that it can detain foreigners who aided al Qaeda at Guantanamo Bay indefinitely even if such aid was unintentional or evidence of it was obtained by torture).

[11] Rasul v. Bush, 542 U.S. 466 (2004).

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

[16] Swanson, *supra* note 5, at 945 (quoting Justice Story as explaining that the writ is "justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge").

where it was used to ensure that a party to a suit appeared before the court.[17] It was eventually adopted by the American colonies and was reflected in the Constitutional provision that prohibited Congress from passing any laws that might abridge one's right to file the writ.[18] Originally, the writ was limited to cases of federal prisoners held in state facilities, but the Judiciary Act of 1789 expanded its scope to apply to prisoners held in federal facilities.[19] Subsequently, the Habeas Corpus Act of 1867 expanded the writ's scope even further by granting federal courts the authority to hear a prisoner's appeal where his or her detention was in violation of either the Constitution or U.S. law.[20]

This Part discusses 28 U.S.C. § 2241 (hereinafter referred to as "§ 2241" or the "Habeas Statute") governing the grant of the writ as well as some of the historical context in which it has developed.[21] Although case law addressing enemy combatants' access to the writ is sparse,[22] this Part discusses three of the seminal cases dealing with the issuance of the writ to this class of prisoners.[23] As will be noted, the Court seems to draw a bright line in such an application, based on whether the detention was inside or outside the territorial sovereignty of the United States.[24] As such, this Part explores the history of Guantanamo Bay and the determination of U.S. sovereignty over the territory.[25]

A. The Habeas Corpus Statute – 28 U.S.C. § 2241

In 1867, Congress expanded the federal courts' authority to hear habeas corpus appeals by granting the courts the authority to hear such appeals in all cases where any person may be restrained of his or her liberty.[26] This language is the direct ancestor of the current 28 U.S.C. § 2241(c)(3) ("§ 2241(c)(3)").[27] In addition, Congress added 28 U.S.C. § 2241(a) ("§ 2241(a)"), limiting the grant of the writ by federal district and circuit judges to their respective jurisdictions.[28] This language reflected a congressional compromise satisfying concerns voiced

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[17] *Id.* at 946.

[18] *See* U.S. CONST. art. I, § 9, cl. 2 (stating that "the privilege of the writ shall not be suspended"); *see also* Swanson, *supra* note 5, at 946.

[19] Swanson, *supra* note 5, at 946.

[20] Felker v. Turpin, 518 U.S. 651, 659 (1996). Until Congress expanded the scope of the federal court's power to issue the writ of habeas corpus, the court's power was limited, by Section 14 of the Judiciary Act of 1789, to granting the writ to prisoners in custody, under or by color of the authority of the United States, or who were committed for trial before some federal court. *Id.*

[21] *See infra* Part II.A.

[22] Swanson, *supra* note 5, at 947.

[23] *See infra* Part II.B.

[24] *See infra* Part II.B.2 (discussing the *Eisentrager* opinion).

[25] *See infra* Part II.C.

[26] Felker v. Turpin, 518 U.S. 651, 659 (1996).

[27] 28 U.S.C. § 2241(c)(3) (2004) (stating that a prisoner has the right to habeas appeal if "[h]e is in custody in violation of the Constitution or laws or treaties of the United States").

[28] 28 U.S.C. § 2241(a) (2004) (stating that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions").

by Senator Johnson at the time of the statute's enactment.[29] Senator Johnson was troubled that the statute's broad grant of power to issue the writ may give federal judges the right to assert authority over jailers in remote districts, even if such districts were outside the territorial reach of the issuing court.[30] To address this concern, Senator Trumbull, the statute's sponsor, added the words "within their respective jurisdictions" to circumscribe the courts' authority to issue the writ.[31] This language survived several amendments to the statute over the years and is still reflected in § 2241(a) as language similar to that introduced by Senator Trumbull.[32]

B. Jurisdictional Limitations on Habeas Appeals

Over the years, the meaning of this jurisdictional limitation was the subject of much attention by the Court.[33] Traditionally, as the Court found in *Ahrens v. Clark*, federal courts could not assert *in personem* jurisdiction over a habeas appeal unless both the prisoner and custodian were physically within the court's territory.[34] This decision was heavily criticized as impractical and not compelled by the express language of the Habeas Statute.[35] The Court then decided *Johnson v. Eisentrager*,[36] holding that federal courts did not have jurisdiction to hear the habeas appeals of enemy aliens who lacked any connection to the United States beyond their capture, trial, and subsequent incarceration.[37] *Eisentrager* was decided largely based on the authority of *Ahrens*, although the Court went to great lengths to discuss the limitations on the extraterritorial application of the protections of the Bill of Rights to nonresident aliens.[38] Finally, in *Braden v. 30th Judicial Circuit Court of Ky.*,[39] the Court created an exception to *Ahrens* by finding jurisdiction to issue the writ for a prisoner who was physically outside the

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29 Ahrens v. Clark, 335 U.S. 188, 204 (1948) (Rutledge, J., dissenting).

30 *Id.* Senator Johnson was responding to the original language of the bill which stated "[t]hat the several courts of the United States and the several justices and judges of such courts, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States. . . ." *Id.* at 205. This language was criticized on the grounds that "it would permit a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 496 (1973).

31 Braden, 410 U.S. at 496.

32 28 U.S.C. § 2241(a) (2004).

33 *See infra* Part II.B.1 (discussing the *Ahrens* opinion); *see also infra* Part II.B.2 (discussing the *Eisentrager* opinion); Part II.B.3 (discussing the *Braden* opinion).

34 *See* Megan A. Ferstenfeld-Torres, *Who are We to Name? The Applicability of the "Immediate-Custodian-as-Respondent" Rule to Alien Habeas Claims under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 435 (2003); *see also infra* Part II.B.1 (discussing the *Ahrens* opinion).

35 Ferstenfeld-Torres, *supra* note 34, at 436.

36 Johnson v. Eisentrager, 339 U.S. 763 (1950).

37 *See infra* Part II.B.2 (discussing the *Eisentrager* opinion).

38 *See infra* Part II.B.2 (discussing the *Eisentrager* opinion).

39 Braden v. 30th Jud. Cir. Ct. of Ky, 410 U.S. 484 (1973).

court's territory.[40] The Court held that *Ahrens*'s reliance on the language of the Habeas Statute, which required the physical presence of both the prisoner and the custodian within a court's territory as a prerequisite to jurisdiction, was misplaced.[41] At least within the context of *Braden*'s facts, the Court concluded that jurisdiction over the custodian alone was sufficient to find jurisdiction to grant the writ.[42]

1. Ahrens v. Clark[43]

In *Ahrens*, the Court considered whether a prisoner must be located within the territorial jurisdiction of a federal court to invoke that court's power to issue the writ of habeas corpus.[44] The petitioners were 120 German citizens who were held at Ellis Island, New York, for deportation back to Germany.[45] Their deportation was ordered by the Attorney General upon a determination that they were dangerous to the public and safety of the United States.[46] The Attorney General drew his authority from Presidential Proclamation 2655 of July 14, 1945, pursuant to the Alien Enemy Act of 1798.[47]

The petitioners filed a Petition for a Writ of Habeas Corpus in the District of Columbia's district court challenging the Attorney General's authority to order their removal.[48] The petitioners argued that the Attorney General lacked the statutory authority to effect such removal because actual hostilities with Germany had ceased.[49] The government moved to dismiss the petition because the petitioners were detained in New York, thus they were outside the territorial jurisdiction of a court sitting in the District of Columbia.[50] The district court granted the government's motion and the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the decision.[51]

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[40] *See infra* Part II.B.3 (discussing the *Braden* opinion).

[41] Ferstenfeld-Torres, *supra* note 34, at 436; *see also infra* Part II.B.3 (discussing the *Braden* opinion).

[42] *See infra* Part II.B.3 (discussing the *Braden* opinion).

[43] Ahrens v. Clark, 335 U.S. 188 (1948).

[44] *Id.* at 189.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* The predecessor of § 2241 was 28 U.S.C. § 452, in effect at the time of the *Ahrens* decision, which provided:

> The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district. . ..

28 U.S.C. § 452 (1940).

[49] *Ahrens*, 335 U.S. at 189.

[50] *Id.*

[51] *Id.*

The Supreme Court first noted that the jurisdictional limitation on federal courts' power to issue the writ was a matter of first impression.[52] The Court also stated that as a matter of legal principle the federal district courts' jurisdiction was territorial unless Congress expressly created an exception to extend such jurisdiction.[53] As such, the Court reasoned that the presence of a jailer within a district court's jurisdiction was not, by itself, sufficient to establish that court's jurisdiction over that jailer's prisoner.[54] Furthermore, the Court pointed out that the Habeas Statute contemplated procedures which may require the appearance of a petitioner before the court.[55] In the case of a prisoner, this requirement may involve significant travel and administrative expenses, as well as a risk of escape if the prisoner is being transported from remote locations, perhaps thousands of miles from the court's location.[56] The Court also discussed the legislative history associated with the Habeas Statute and found that Congress was primarily concerned with circumscribing the federal courts' territorial jurisdiction to issue the writ.[57] Thus, the Court concluded that Congress could not have contemplated such a requirement if it intended to extend the courts' jurisdiction to issue the writ beyond its territorial limits.[58] Therefore, the Court held that the district court sitting in the District of Columbia did not have jurisdiction to hear a habeas appeal from a petitioner located in New York.[59]

Justice Rutledge, with whom Justices Black and Murphy joined, dissented.[60] Justice Rutledge noted that the Court's holding essentially elevated the place of physical custody to the level of exclusive jurisdictional criteria when one applies the Habeas Statute.[61] He found that such a restriction greatly contracted the writ's historical scope and was contrary to the Court's own precedent.[62] He further found that the Court had already determined that jurisdiction over the jailer,

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[52] *Id.* at 190.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 190-91.

[56] *Id.* at 191.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 193. However, the Court expressly noted that its holding did not "determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*

[60] *Id.*

[61] *Id.* at 196.

[62] *Id.* at 195. To highlight his concerns, Justice Rutledge asked:

> For if the absence of the body from the jurisdiction is alone conclusive against the existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise?

Id.

and not the prisoner, was controlling in ascertaining a particular court's jurisdiction to issue the writ.[63] In addition, Justice Rutledge noted that the legislative history of the Habeas Statute, while suggesting clear congressional intent to limit the scope of federal courts to issue the writ, did not indicate that Congress intended to limit a court's personal jurisdiction to its territorial limits.[64] Thus, he found no support for the Court's conclusion that the absence of a prisoner from the territorial jurisdiction of a court was fatal to that court's ability to issue the writ even when the court had such jurisdiction over the jailer.[65]

2. *Johnson v. Eisentrager*[66]

In *Eisentrager,* the Court was asked to determine whether federal courts had jurisdiction to hear habeas appeals filed by enemy aliens detained by the U.S. military outside the sovereign territory of the United States.[67] The petitioners in this case were twenty-one German nationals captured in China by the U.S. military after the Japanese surrendered at the end of the Second World War.[68] They were charged with violating the laws of war by engaging in, permitting, or ordering continued military activity against the United States after the surrender of Germany and before the surrender of Japan.[69] They were tried and convicted by a military commission instituted in China by the Commanding General of the United States Forces, China Theater, pursuant to the authority granted by the Joint Chiefs of Staff of the United States.[70] After their convictions, their sentences were reviewed and approved by a military reviewing authority and the petitioners were then transported to a prison under the control of the U.S. Army in Landsberg, Germany to serve out their sentences.[71]

The prisoners petitioned the district court in the District of Columbia for a writ of habeas corpus challenging their detention.[72] The prisoners alleged that they were civilian contractors working for the German government when they were captured.[73] As such, they claimed that their trial, conviction, and imprisonment by the U.S. military violated, *inter alia*, Articles I and III of the U.S. Constitution as well as the Fifth Amendment.[74] Relying on *Ahrens*, the district court dis-

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[63] *Id.* at 196-97; *see also Ex parte* Endo 323 U.S. 283, 306 (1944) noting that:
[t]here are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner (internal citations omitted).

[64] *Ahrens*, 335 U.S. at 205.

[65] *Id.* at 206.

[66] Johnson v. Eisentrager, 339 U.S. 763 (1950).

[67] *Id.* at 765.

[68] *Id.*

[69] *Id.* at 766.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 765.

[73] *Id.*

[74] *Id.* at 767.

missed the petitions for lack of jurisdiction, causing the prisoners to appeal to the D.C. Circuit.[75]

In considering the appeal, the D.C. Circuit distilled the case down to three main issues: (1) whether the prisoners were entitled to the writ as a matter of substantive law; (2) if so, whether the Habeas Statute divested them of that right; and (3) if they were entitled to that right, which court had jurisdiction to hear the habeas petition.[76]

To answer these questions, the court resorted to the fundamental principles underlying the Constitution.[77] First, the court reasoned that the Fifth Amendment's protections extended to any person and not just to American citizens.[78] By implication, the court reasoned that the protections of the Fifth Amendment's due process clause extended to enemy aliens deprived of life, liberty, or property by official action under the color of U.S. law.[79] In other words, since the Fifth Amendment acted as a limitation on the conduct of the federal government, the only jurisdictional nexus required to extend Fifth Amendment protections was an action by the federal government, irrespective of the status or location of the persons upon whom this action operated.[80] Furthermore, since the writ of habeas corpus was the best defense of personal freedom, the use of the writ to challenge violations of the Fifth Amendment was indispensable.[81]

Second, the court reasoned that Congress' power to suspend the writ was limited to times of rebellion or invasion when public safety may require it.[82] If the Habeas Statute was interpreted to condition the application of the writ on court jurisdiction, such a limitation, if interpreted within the rubric of *Ahrens*, could operate to deny an American citizen's access to a habeas appeal simply because he or she may be held by the U.S. government outside the jurisdiction of any federal court.[83] Since Congress was not empowered by the Constitution to effect

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[75] *Id.*

[76] Eisentrager v. Forrestal, 174 F.2d 961, 963 (D.C. Cir. 1949), *rev'd sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950).

[77] *Forrestal*, 174 F.2d at 963.

[78] *Id.* Although the D.C. Circuit did not expressly indicate which provision of the Fifth Amendment was implicated by the case, it is reasonable to assume that the court impliedly relied on the Fifth Amendment's due process clause to support its holding. *See* U.S. CONST. amend. V (stating that no "person shall . . . be deprived of life, liberty, or property, without due process of law").

[79] *Forrestal*, 174 F.2d at 964 (noting that the "constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory").

[80] *Id.*

[81] *See id.*

[82] *See* U.S. CONST. art. I, § 9, cl. 2 (stating that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); *see also Forrestal*, 174 F.2d at 965.

[83] *Forrestal*, 174 F.2d at 964. The D.C. Circuit seems to be echoing Justice Rutledge's concern in his dissent in *Ahrens*, namely that a geographical limitation on the application of the writ could operate to deny it to those entitled to its protection under the Constitution. *See* Ahrens v. Clark, 335 U.S. 188, 195 (1984).

such a deprivation, the court reasoned that the Habeas Statute must be interpreted to allow such access or impliedly be rendered unconstitutional.[84]

Accordingly, the D.C. Circuit concluded that when a person was outside the territorial jurisdiction of any district court and deprived of his or her liberty by official action of the U.S. government, that person's habeas petition would lie in the district court which had territorial jurisdiction over the officials with directive power over the immediate jailer.[85]

The Supreme Court disagreed with the D.C. Circuit's decision and reversed. Justice Jackson, in his opinion for the majority, noted that the Court had been at pains to point out that extending constitutional protections to aliens depended on the aliens' presence within the territorial jurisdiction of the United States.[86] Even when such jurisdiction was found, those protections could be further circumscribed by the status of the alien.[87] For example, if the alien was a citizen of a country with which the United States was at war, the alien could be constitutionally subject to summary arrest, internment, and deportation.[88] In such a case, courts would entertain challenges to the detention of that person by the U.S. government only to the extent necessary to ascertain the existence of a state of war or to determine whether he or she was an enemy alien.[89] Once these jurisdictional elements were established, courts would not inquire further into internment issues.[90] Deprivation of other constitutional protections afforded to aliens within the territorial jurisdiction of the United States would thus be a temporary incident of war and not an incident of alienage.[91]

However, in the case of an enemy alien located outside U.S. territorial jurisdiction that remained in the service of the enemy, Justice Jackson reasoned that even this limited review was unavailable.[92] He noted that it was a well-established common law tradition that a nonresident enemy alien could not maintain an action in the courts of a country with which his country of residence maintained a state of war.[93] This principle was borne out of the practical considera-

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[84] *Forrestal*, 174 F.2d at 964. The D.C. Circuit reasoned that the other solution would be to interpret the statute as requiring a distinction in its application between American citizens and aliens. *Id.* The court impliedly rejected this approach finding that the writ of habeas corpus was deeply rooted in a common law tradition that used the writ to test the authority of one who deprives another of his liberty. *See Id.*

[85] *Id.* at 967.

[86] Johnson v. Eisentrager, 339 U.S. 763, 771 (1950).

[87] *Id.*

[88] *Id.* at 775.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 772.

[92] *Id.* at 776; *see also Ex parte* Quirin, 317 U.S. 1, 45-46 (1942); *In re* Yamashita, 327 U.S. 1, 25-26 (1946). The prisoners argued that they should be, at least, granted review based on the Court's decisions in *Quirin* and *Yamashita* where the habeas petitions of nonresident enemy aliens were reviewed but denied on the merit. *Eisentrager*, 339 U.S. at 779. Justice Jackson distinguished both *Quirin* and *Yamashita* by noting that, in both cases, the petitioners were within the territorial jurisdiction of American courts. *Id.* at 780.

[93] *Eisentrager*, 339 U.S. at 776.

tions that such access could hamper the war efforts and give aid to the enemy.[94] As such, Justice Jackson found the fact that the prisoners in this case were (1) nonresident enemy aliens (2) captured and held as prisoners-of-war outside the United States, (3) tried for crimes committed outside the United States, and (4) remained at all times afterwards outside of the United States, to be determinative.[95]

Furthermore, Justice Jackson found the D.C. Circuit's broad application of the Fifth Amendment to the *Eisentrager* prisoners to be untenable.[96] He reasoned that if the Fifth Amendment's use of "any person" could be construed to extend Fifth Amendment protections to nonresident enemy aliens, such interpretation would extend more protections to enemy aliens than available to American soldiers in time of war.[97] Moreover, if the term "any person" in the Fifth Amendment was interpreted so expansively, then the Sixth Amendment's use of "accused" would logically extend the Sixth Amendment to enemy aliens as well.[98] For that matter, because the civil-rights amendments were similarly unlimited by territory or person, courts would have to extend to enemy aliens the First Amendment's protection of freedom of speech, religion, press, and assembly; the Second Amendment's right to bear arms; the Fourth Amendment's protection against unreasonable searches and seizures; and the Fifth and Sixth Amendment's right to jury trials.[99] In short, Justice Jackson flatly rejected such expansion and found that the Fifth Amendment did not confer any rights onto the *Eisentrager* prisoners.[100]

Accordingly, Justice Jackson concluded that the prisoners did not have the right to a habeas appeal.[101] He concluded that the prisoners did not have a constitutional right to access federal courts; thus, there was no need to determine where such access could be had.[102]

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[94] *Id.*

[95] *Id.* at 777.

[96] *Id.* at 782.

[97] U.S. CONST. amend. V (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger*") (emphasis added); *see also Eisentrager*, 339 U.S. at 783.

[98] *Eisentrager*, 339 U.S. at 782.

[99] *Id.* at 784.

[100] Justice Jackson's opinion for the majority of the Court seems to have considered the extent of an alien's rights under the Constitution as dependant first upon the alien's presence in the United States as a threshold matter and second on the duration of this presence. He stated:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Id. at 770.

[101] *Id.* at 790-91.

[102] *Id.* at 791.

Justice Black, with whom Justices Douglas and Burton joined, dissented primarily for three reasons.[103] First, he noted that the gravamen of the Court's majority opinion was based on the conclusion that the prisoners were nonresident enemy aliens, in the service of an enemy, and in violation of the laws of war.[104] However, he argued that the prisoners alleged enough facts to raise doubt as to the conclusion that they violated the laws of war.[105] Irrespective, he noted that the only question presented to the Court was limited to jurisdiction and not to the validity or sufficiency of the pleadings with respect to the relevant facts, which the district court never reached or considered.[106]

Second, Justice Black reasoned that the question whether enemy combatants could contest trial and conviction for war crimes by habeas appeal was addressed twice by the Court in *Ex parte Quirin*[107] and *Yamashita v. United States*.[108] He noted that, in *Quirin*, the Court held that the designation of "enemy combatant" did not foreclose consideration by the courts of a prisoner's claim that his or her detention was in violation of the Constitution or U.S. law.[109] It was only after the Court upheld jurisdiction to consider the prisoner's habeas appeal that the Court denied the appeal on the merits.[110] Similarly, in *Yamashita*, the Court determined that a Japanese general tried and convicted for war crimes after hostilities with Japan at the end of the Second World War had the right to challenge the authority of the military tribunals determining such conviction.[111] Thus, Justice Black concluded that the status of the *Eisentrager* prisoners as enemy combatants was not, by itself, sufficient to deny them access to courts through habeas appeals.[112]

Third, Justice Black noted that the Court's majority opinion did not deny that if the prisoners were held within the United States, there would be no question as to the courts' jurisdiction to hear challenges to the prisoners detention through habeas appeal.[113] He also noted that, although the prisoners in both *Quirin* and *Yamashita* were held as prisoners in the United States or territories under the control and authority of the United States, the Court's decisions in both cases did

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[103] *Id.* (Black, J. dissenting).

[104] *Id.* at 792-93.

[105] *Id.* at 793.

[106] *Id.* at 792.

[107] *Id.* (citing *Ex parte* Quirin, 317 U.S. 1 (1942)).

[108] *Id.* (citing *In re* Yamashita, 327 U.S. 1 (1946)).

[109] *Id.* (citing *Quirin*, 317 U.S. at 25).

[110] *Id.* (citing *Quirin*, 317 U.S. at 48).

[111] *Id.* 794 (citing *Yamashita*, 327 U.S. at 9). In *Yamashita*, the Supreme Court affirmed its ruling in *Quirin* and held that the fact that Congress sanctioned trials of enemy combatants by military commissions indicated that Congress recognized the accused's right to a defense, and, thus, the Executive branch could not deny the courts' power to review the authority of these commissions. *Yamashita*, 327 U.S. at 9. At the same time, the Court also noted that the commission's rulings on evidence and on the mode of conduct of the proceedings against an enemy combatant were reviewable by the appropriate military reviewing authority and not the courts. *Id.* at 23.

[112] *Eisentrager*, 339 U.S. at 795.

[113] *Id.*

not rely on any territorial nexus.[114] Thus, he concluded that the majority's opinion in *Eisentrager* fashioned a dangerous rule that could allow the Executive to deprive all federal courts of their power to protect against illegal incarcerations simply by deciding where federal prisoners would be tried and imprisoned.[115]

3. Braden v. 30th Judicial Circuit Court of Kentucky[116]

In *Braden*, the Supreme Court revisited its interpretation in *Ahrens* of the jurisdictional limitations on federal courts' authority to hear habeas appeals. In this case, Braden was serving a sentence in an Alabama prison.[117] Prior to his arrest and conviction in Alabama, he was indicted for storehouse breaking and safebreaking in a Kentucky court on facts unrelated to his crimes in Alabama.[118] However, since the Kentucky indictment was likely to prejudice his opportunity for parole from his Alabama prison, Braden demanded that his trial in Kentucky proceed.[119] When Kentucky refused, he filed a habeas appeal with the federal district court sitting in the Western District of Kentucky alleging that Kentucky's refusal violated his constitutional right for a speedy trial.[120] The district court granted the petition and held that Kentucky must arrange for Braden's return to the state to stand trial on the charges against him.[121] On appeal, the U.S. Court of Appeals for the Fifth Circuit reluctantly reversed, recognizing that its decision may result in Braden being denied a forum in which to assert his constitutional claim.[122]

The Supreme Court noted that developments since *Ahrens* raised serious questions as to the continued vitality of that decision.[123] The Court further noted that *Ahrens* was predicated on the view that the expenses and risks associated with the production of prisoners from remote locations before the issuing court were of paramount concern to Congress when it imposed a jurisdictional limit on the power of federal courts to issue the writ.[124] However, the Court found that Congress had since amended the Habeas Statute in such a way as to indicate that these concerns were no longer valid.[125] For example, Congress allowed collateral attacks on federal sentences to be brought in the sentencing court rather than

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114 *Id.*

115 *Id.*

116 Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484 (1973).

117 *Id.* at 485.

118 *Id.* at 486.

119 *Id.* at 487.

120 *Id.*

121 *Id.*

122 *Id.* Pursuant to the Rules of the U.S. Court of Appeals for the Fifth Circuit in effect at the time and where Braden was incarcerated, he could only file a habeas appeal in the district court sitting in the state that filed the challenged indictment. *Id.* at 488. In other words, Braden could not file his appeal in a federal district court in Alabama because he was challenging an indictment issued by Kentucky.

123 *Id.* at 497.

124 *Id.* at 496.

125 *Id.* at 497.

the district in which the prisoner was incarcerated.[126] Congress also allowed a prisoner convicted in state court in a state with two or more federal districts to challenge his conviction on federal habeas grounds in either the district court of his confinement or his conviction, if different.[127] The Court also noted that in *Burns v. Wilson*,[128] it implicitly held that an American citizen held outside the territory of any district court could not be denied habeas relief.[129] Thus, the Court concluded that *Ahrens* should not be viewed as instituting a rigid jurisdictional rule requiring a choice of an inconvenient forum, even in a class of cases the Court did not consider when it decided *Ahrens*.[130]

Instead, the Court held that the writ of habeas corpus did not act on the prisoner who sought relief.[131] Rather, the writ acted upon the custodian responsible for the challenged detention.[132] The Court further reasoned that § 2241(a), when read literally, required nothing more than the issuing court having jurisdiction over the custodian.[133] In other words, so long as the custodian can be reached by process, a federal court could properly issue the writ "within its jurisdiction" under § 2241(a).[134]

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126 *Id.*

127 *Id.*

128 *Id.* at 498 (citing Burns v. Wilson, 346 U.S. 137 (1953), *reh'g denied*, 346 U.S. 844, 851-52 (1953)). In *Burns*, the Supreme Court considered denial of habeas appeal to American citizens convicted by a military court-martial on the Island of Guam for murder and rape. *Burns*, 346 U.S. at 138. In considering the prisoners' appeal, the Court stated that the

> statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases.

Id. at 139. In his opinion denying rehearing, Justice Frankfurter noted that while the Court's opinion in the case spoke only of jurisdiction as the proper scope of review, the Court had reviewed decisions by military commissions for procedural errors in the past. *Id.* at 846. Thus, he concluded that the scope of review of military commissions actually extended beyond geographic jurisdiction and into the constitutional underpinnings necessary for legitimacy of the commission's decision. *Id.*

129 *Id.* at 498.

130 *Id.* at 499-500. The Court noted that, in *Ahrens*, there was no indication why the district court sitting in the District of Columbia was more convenient than the district court sitting in the Eastern District of New York or why the government should be required to incur the expense of transporting 120 detainees from New York to the District of Columbia for the hearings. *Id.* at 500. Without reasonable justification, the rule remained that the proper venue in such a case was the Eastern District of New York as decided by the Court at the time. *Id.*

131 *Braden*, 410 U.S. at 494.

132 *Id.* at 495-96 (citing *In re* Jackson, 114 U.S. 564 (1885)), quoted with approval in *Ex parte* Endo, 323 U.S. 283, 306 (1944):

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

133 *Braden*, 410 U.S. at 495; *see also Endo*, 323 U.S. at 306 (noting that the writ of habeas corpus may be issued by a court that could reach a respondent who was custodian of the prisoner petitioning for such relief).

134 *Braden*, 410 U.S. at 495

Consequently, the Court held that because Alabama, as custodian, could be considered Kentucky's agent, and because Kentucky was within the territorial jurisdiction of the district court sitting in Kentucky, the federal court in Kentucky had jurisdiction to hear Braden's habeas appeal.[135]

C. Extent of Constitutional Protections Afforded to Aliens

One of the key issues involved in aliens' access to habeas appeal is the extraterritorial scope of the rights guaranteed by the Constitution. It is of little consequence that an alien prisoner can petition the courts for a writ of habeas corpus if that prisoner has no rights, save the right to the appeal itself, that the court could enforce. Because the writ allows a prisoner to challenge his or her detention as a violation of the Constitution or U.S. laws, it would be illogical to argue that a right to the writ existed when the Constitution and U.S. law did not confer to such prisoner any right in the first place. This is precisely the point that Justice Jackson made in his majority opinion in *Eisentrager* with respect to alien enemies outside the territorial jurisdiction of the United States.

The Supreme Court's pronouncements on the extraterritoriality of constitutional protections are instructive, though not definitive.[136] However, it is well settled that the Constitution is the basis for federal government authority.[137] Thus, the government cannot act beyond its Constitutional authority and the limitations imposed upon it.[138] In other words, the question at issue in determining constitutional extraterritoriality is the interpretation of the individual provisions and the determination of their application in particular situations.[139]

In *Reid v. Covert*,[140] the Supreme Court considered whether American citizens tried and convicted by a military court-martial overseas had the right to a trial by jury as mandated by the Fifth[141] and Sixth Amendments.[142] The Court first

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[135] *Id.* at 498-99.

[136] *See* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 44 (2004) (noting that the Supreme Court's previous pronouncements on the extraterritorial application of constitutional rights may not be conclusive in the case of prisoners held within the context of military action).

[137] *See* Reid v. Covert, 354 U.S. 1, 6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The Government may act only as the Constitution authorizes.").

[138] *Reid*, 354 U.S. at 74 (Harlan, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."); *see also* Neuman, *supra* note 136, at 45. Justice Harlan argued that constitutional protections should not be considered to automatically protect Americans overseas. *Reid*, 354 U.S. at 74. Rather, factors of practicality and reasonableness must be considered when ascertaining which constitutional rights afforded by the Constitution could be extended to protect Americans in anomalous situations overseas. *Id.*

[139] Neuman, *supra* note 136, at 45.

[140] Reid v. Covert, 354 U.S. 1 (1957).

[141] U.S. CONST. amend. V.

[142] U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

noted that the language of the Constitution must be given its plain meaning, unless the language was unclear and ambiguous.[143] The Court also noted that the Constitution required criminal trials to be by jury and to be held within the state in which the crime had been committed or, when the crime was not committed within a state, in a place directed by Congress.[144] The Court reasoned that jury trials and indictment procedures were enshrined in the Constitution to protect their abridgement for expediency or convenience.[145] The Court rejected the notion that a treaty with a foreign country could give the Executive branch the authority to ignore the mandates of the Constitution with respect to conduct within the treaty's scope.[146] While the Constitution gave Congress the power to authorize the trial of members of the military without all the constitutional safeguards given an accused, this power did not extend to civilians.[147] Thus, the Court concluded that the Constitution in its entirety does apply to American citizens held outside U.S. territorial jurisdiction.[148]

But the Court was more circumspect when extending constitutional protections to aliens subject to actions by the United States overseas. In *United States v. Verdugo-Urquidez*, the Supreme Court considered whether the Fourth Amendment protection against unreasonable searches and seizures extended to an alien overseas.[149] The defendant-alien involved was a Mexican citizen and resident believed to be the leader of an organization that smuggled narcotics into the United States.[150] Agents of the Drug Enforcement Agency ("DEA") obtained a warrant for his arrest and, with the help of Mexican authorities, apprehended him in Mexico, and moved him to the United States where he was formally arrested.[151] Subsequently, DEA agents, in association with Mexican police, searched the defendant's residence in Mexico without any judicial authorization.[152] The defendant motioned the court to suppress the evidence discovered in his residence as a violation of the Fourth Amendment and, as such, excluded by operation of the fruit-of-the-poisonous tree doctrine.[153] The district court granted

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of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

143 *Covert*, 354 U.S. at 8 n.7; *see also* United States v. Sprague, 282 U.S. 716, 731-32 (1931): The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.

144 *Reid*, 354 U.S. at 7 (citing U.S. CONST. art. III, § 2 cl. 3).

145 *Id.* at 10.

146 *Id.* at 16-18.

147 *Id.* at 19-21.

148 *Id.* at 21.

149 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

150 *Id.* at 262.

151 *Id.*

152 *Id.*

153 *Id.* at 263.

the motion, and the U.S. Court of Appeals for the Ninth Circuit affirmed that decision.[154]

In a sharply divided 5-4 decision, the Supreme Court noted that the Fourth Amendment, like the First, Second, Ninth, and Tenth Amendments, used the term "the people" as the object of its protections as opposed to "persons" or "accused" in the Fifth and Sixth Amendments.[155] The Court reasoned that such terms referred to a class of persons who were part of a national community or have otherwise developed a sufficient connection with the country considered to be part of that community.[156] The Court also found that such a conclusion was supported by the history of the Fourth Amendment's drafting, which suggested that the framers intended it to be limited to domestic matters within the United States.[157] Thus, the Court concluded that Fourth Amendment protections did not extend to nonresident aliens overseas.[158]

However, the Court's decision in *Verdugo-Urquidez* was more sweeping than its holding may initially convey. In concluding that Fourth Amendment protections did not extend to aliens, the Court analogized the operation of the Fourth Amendment to that of the Fifth Amendment in *Eisentrager*.[159] The Court reasoned that *Eisentrager* stood for the proposition that Fifth Amendment protections do not extend to aliens outside the sovereign territory of the United States.[160] The Court also narrowly interpreted its holding in *Reid* and found that it applied only to American citizens stationed abroad.[161]

Justice Kennedy, who supplied the crucial fifth vote for the majority in *Verdugo-Urquidez,* argued for a different approach.[162] He advocated the approach adopted by Justice Harlan's concurring opinion in *Reid*, and disagreed that there was an express, textual limitation on the scope of the constitutional protections in the Bill of Rights.[163] Instead, he reasoned that the extraterritorial extension of the Bill of Rights should be determined based on a contextual analysis of the due process clause of the Fifth Amendment.[164] Only where the adoption of a particular right in the Bill of Rights proved to be impracticable and anomalous should it be held inapplicable to government action overseas.[165] Because Justice Kennedy considered the application of the Fourth Amendment's

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154 *Id.*

155 *Id.* at 265 (citing U.S. CONST. amend. IV, stating that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

156 *Id.*

157 *Id.* at 266.

158 *Id.* at 273-75.

159 *Id.* at 269.

160 *Id.*

161 *Id.* at 270.

162 *Id.* at 277 (Kennedy, J., concurring).

163 *Id.*; *see also* discussion in *supra* note 138.

164 *Verdugo-Urquidez,* 494 U.S. at 278; *see also* Neuman, *supra* note 136, at 46.

165 *Verdugo-Urquidez,* 494 U.S. at 278; *see also* Neuman, *supra* note 136, at 46.

protections against unreasonable searches and seizures in *Verdugo-Urquidez* to be impracticable and anomalous, he agreed with the majority's conclusion.[166]

D. The Status of the Naval Base at Guantanamo Bay, Cuba

1. History

In 1898, a battalion of U.S. Marines were stationed in Guantanamo Bay, Cuba, as part of the war with Spain.[167] On March 2, 1901, Congress enacted a law authorizing the President to buy or lease land from the government of the Republic of Cuba ("Cuba") to establish a naval station in that country.[168] In implementing this mandate, the President entered into two lease agreements and a treaty over 33 years.[169]

The first agreement, signed on February 16, 1903, involved both the lease of specifically identified areas to be used for the base and the granting of rights to the adjacent water and waterways.[170] The base was expressly limited to coaling or naval stations only, and for no other purpose.[171] The agreement also acknowledged the continued ultimate sovereignty of Cuba over the leased land, but stipulated that the United States had complete jurisdiction and control over the area during the term of the lease.[172]

The second agreement was signed on July 2, 1903.[173] This agreement provided that the United States would pay Cuba the sum of 2,000 gold coins every year as payment for the leased land and water rights.[174] It also provided that any fugitives from Cuban law taking refuge in the base would be delivered by the United States to Cuban authorities upon demand; likewise, any fugitives from U.S. law taking refuge in Cuba would be delivered by Cuba to U.S. authorities upon demand.[175]

The foregoing agreements were further modified by a treaty signed between the United States and Cuba on May 29, 1934.[176] This treaty provided that the

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166 *Verdugo-Urquidez,* 494 U.S. at 278.

167 Bird v. United States, 923 F. Supp. 338, 340 n.2 (D. Conn. 1996).

168 M.E. MURPHY, THE HISTORY OF GUANTANAMO BAY, Chapter III (U.S. Naval Base, District Publications and Printing Office Tenth Naval Dist. 1953). Specifically, the law stated:

> That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling and Naval stations at certain specified points to be agreed upon by the President of the United States.

Id. An appendix to the constitution of the Republic of Cuba promulgated on May 2, 1902, contained identical language. *Id.*

169 *Id.*

170 *Id.* at Appendix D.

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

two lease agreements would continue in full force and effect so long as (1) the United States did not abandon its naval station on the leased land or (2) the governments of the United States and Cuba agree to terminate the agreements.[177]

2. *The Legal Status of the Naval Base at Guantanamo Bay*

The Supreme Court never directly addressed the status of the naval base at Guantanamo Bay before it faced the issue in *Rasul v. Bush*.[178] However, in *Vermilya-Brown Co. v. Connell*,[179] the Supreme Court considered the collateral issue of whether military bases overseas constitute U.S. possessions, and thus subject to the jurisdiction of federal courts with respect to tort claims arising from base operations. The base at issue in the case involved a ninety-nine-year lease of land in Bermuda that was recognized as the sovereign territory of the United Kingdom.[180] The Court noted that, while recognizing that the determination of sovereignty over an area was a political matter that should be left to the Executive and Legislative branches, it had authority to determine the status of prior action by the government.[181] The Court acknowledged that nothing in the case caused it to differ from the Executive branch's determination that the lease in question did not confer sovereignty to the United States over the leased land.[182] However, the Court reasoned that Article IV, section 3, of the Constitution authorized Congress to make all rules and regulations governing U.S. territory and property.[183] The Court also noted that the lease agreement with the United Kingdom provided the United States with all the rights, power, and authority to affect its control over the leased territory, thereby concluding that such authority did not depend on sovereignty over the territory.[184]

The Court then noted that the scope of the Fair Labor Standards Act, which was at issue in the case, extended to any U.S. state, as well as the District of Columbia, and to any U.S. territory or possession.[185] The Court also noted that the term "possession" included Puerto Rico, Guam, the Guano Islands, Samoa, and the Virgin Islands.[186] Thus, the Court reasoned that it was logical to expect

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177 *Id.*

178 Rasul v. Bush, 542 U.S. 466 (2004).

179 Vermilya-Brown v. Connell, 335 U.S. 377 (1948).

180 *Id.* at 378-79; *see also* Seth J. Hawkins, *Up Guantanamo Without a Paddle: Waves of Afghan Detainees Drown in America's Great Habeas Loophole*, 47 ST. LOUIS L.J. 1243, 1255 (2003) (noting that the terms of the lease involved in *Vermilya-Brown* resembled leases for military bases in the Philippines, Panama, and Guantanamo).

181 *Vermilya-Brown*, 335 U.S. at 380.

182 *Id.*; *see also* Hawkins, *supra* note 180, at 1255 (noting that the Court in *Vermilya-Brown* rejected that notion that the terms "all rights, power, and authority" in a lease agreement gave the United States sovereignty over the leased land).

183 *Vermilya-Brown*, 335 U.S. at 381 (citing U.S. CONST. art. IV, § 3, cl. 2.).

184 *Id.* at 383. The Court also noted that such provision was similar to provisions in other lease agreements signed by the United States for military bases overseas, including the lease agreement with Cuba for Guantanamo Bay. *Id.* at 383-84.

185 *Id.* at 379.

186 *Id.* at 388.

that the term "possession" also included areas vital to our national interest where the United States had sole power, such as the naval base in Bermuda.[187] Accordingly, the Court held that the scope of the Fair Labor Standards Act extended to the base.[188]

In *Cuban American Bar Association v. Christopher*,[189] the U.S. Court of Appeals for the Eleventh Circuit directly considered the status of the naval base at Guantanamo Bay when it was asked to determine the rights of Cuban and Haitian refugees held at the base.[190] The Eleventh Circuit found, just as the Supreme Court did in *Vermilya-Brown*, that complete jurisdiction and control over Guantanamo Bay was not the functional equivalent to sovereignty.[191] However, unlike the Court's conclusion in *Vermilya-Brown*, the Eleventh Circuit refused to recognize the naval base at Guantanamo Bay as a possession of the United States or any like territory to which the Bill of Rights extended. Thus, the court concluded that if the Cuban and Haitian migrants had any rights while being held in Guantanamo Bay, it would depend on the extraterritorial application of statutory or constitutional provisions.[192] Finding no provisions with such application, the court held that the migrants could not claim constitutional or other statutory protections to challenge their detention.[193]

Similarly, the United States District Court for the District of Connecticut followed the reasoning of the Eleventh Circuit in *Christopher* when it decided *Bird v. United States*.[194] In *Bird*, the plaintiff sued a military doctor at Guantanamo Bay for medical malpractice for failing to properly and timely diagnose her medical condition, a brain tumor.[195] The plaintiff based her suit on the Federal Tort Claims Act ("FTCA").[196] The court first noted that, while the FTCA granted a limited waiver to the government's sovereign immunity for complaints involving negligence by government employees, it expressly exempted claims arising in foreign countries from taking advantage of this limited waiver.[197] The court then

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187 *Id.* at 390.

188 *Id.*

189 Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995).

190 *Id.* at 1424-25; *see also* Hawkins, *supra* note 180, at 1257.

191 *Christopher*, 43 F.3d at 1425 (referring to the extent of control the United States had over Guantanamo Bay as agreed in the lease agreements with Cuba); *see also* MURPHY, *supra* note 168 (discussing the lease agreements and treaty between the United States and Cuba giving the United States the right to establish the naval base at Guantanamo).

192 *Christopher*, 43 F.3d at 1425; *see also* Hawkins, *supra* note 180, at 1257.

193 *Christopher*, 43 F.3d at 1428-29 (noting that "unadmitted and excludable aliens 'cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the Executive's exercise of its parole discretion'" (internal citations omitted)).

194 Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996).

195 *Id.* at 339; *see also* Hawkins, *supra* note 180, at 1258.

196 *Bird*, 923 F. Supp. at 339-40; *see also* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2000):

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

197 Federal Tort Claims Act, Exceptions, 28 U.S.C. § 2680(k) (2000) ("The provisions of this chapter and section . . . shall not apply to . . . (k) Any claim arising in a foreign country.").

found that because the lease agreements giving the United States jurisdiction and control over Guantanamo Bay unequivocally left sovereignty of the land to Cuba, Guantanamo Bay must be considered a foreign country for the purposes of applying FTCA.[198] Thus, the court concluded that it did not have jurisdiction to hear the plaintiff's claim.[199]

III. Discussion

In *Rasul v. Bush*, the Supreme Court held that the Petitioners were entitled to access U.S. courts to challenge their detention at the naval base at Guantanamo Bay.[200] The District Court and the U.S. Court of Appeals for the District of Columbia Circuit, relying on *Eisentrager*, found that the Petitioners were barred from accessing U.S. courts.[201] However, after the Petitioners successfully petitioned for certiorari, the Court reversed in a 6-3 decision.[202] Justice Kennedy filed a concurring opinion, while Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.[203]

A. Facts

Rasul consolidated *Rasul v. Bush*[204] ("*Rasul I*") and *Odah v. United States*.[205] In *Rasul I*, petitioners in the case included Shafiq Rasul and Asif Iqbal, citizens of the United Kingdom, and David Hicks, a citizen of Australia (together the "*Rasul* Petitioners").[206] Petitioner Rasul alleged that he took a hiatus from his studies in the United Kingdom to visit his home country of Pakistan to see relatives and explore its culture.[207] He then decided to stay in Pakistan after September 11, 2001 to continue his education for less than it would have cost him to take similar courses in the United Kingdom.[208] He further alleged that while traveling in the country, forces fighting against the United States kidnapped him.[209] Similarly, petitioner Iqbal alleged that he traveled to Pakistan after September 11, 2001 to get married.[210] Shortly before his wedding, forces fighting

198 *Bird*, 923 F. Supp. at 342-43 (noting that the U.S. Supreme Court defined the term "foreign country" in *United States v. Spelar*, 338 U.S. 217, 218 (1949) as a "territory subject to the sovereignty of another nation").

199 *Id.* at 343.

200 Rasul v. Bush, 542 U.S. 466, 485 (2004).

201 *See infra* Part III.B (discussing the lower courts' opinions).

202 *See infra* Part III.C.1 (discussing the Supreme Court's majority opinion).

203 *See infra* Part III.C.2 (discussing Justice Kennedy's concurring opinion); *see also* Part III.C.3 (discussing Justice Scalia's dissent).

204 Rasul v. Bush, No. 02-299, mem. (D.D.C. July, 2002), http://www.dcd.uscourts.gov/02-299.pdf.

205 Odah v. United States, No. 02-828, mem. (D.D.C., Aug. 13, 2004), http://www.dcd.uscourts.gov/02-828.pdf.

206 Rasul v. Bush, 215 F. Supp. 2d 55, 57 (D.D.C. 2002).

207 *Id.* at 59.

208 *Id.*

209 *Id.*

210 *Id.*

against the United States kidnapped him while he was traveling outside his home village.[211] With respect to petitioner Hicks, there was little known about the reasons for his presence in Afghanistan except that he was living in the country at the time of his capture.[212]

The *Rasul* Petitioners were all captured in Afghanistan after the United States commenced military operations against the Taliban in that country.[213] The circumstances of Rasul and Iqbal's capture were unknown, except that they were captured by an undetermined third party and transferred into U.S. custody in early December, 2001.[214] Hicks was captured in Afghanistan by the Northern Alliance, a group funded and supported by the United States in the fight against the Taliban, and was transferred to U.S. custody in mid-December, 2001.[215]

The *Rasul* Petitioners filed an action in the District of Columbia District Court to challenge their detention, to allow them unmonitored access to counsel, and to enjoin the United States from interrogating them any further.[216] They claimed that they did not voluntarily join a terrorist force nor do anything that would be considered outside of their protected religious and personal rights.[217] They further claimed that if they took up arms against the United States, they did so only as a spontaneous reaction to resist an approaching invading force and without sufficient time to organize themselves into regular armed units subject to the internationally recognized rules of war.[218]

In *Odah*, the petitioners included twelve Kuwaiti citizens captured in Afghanistan and Pakistan, and transferred to U.S. custody (hereinafter referred to as the "*Odah* Petitioners" and, together with the *Rasul* Petitioners, hereinafter referred to as the "Petitioners").[219] They alleged that they were in those countries on volunteer charitable missions supported by the Kuwaiti government.[220] They further alleged that the Kuwaiti government encouraged such charitable work by continuing to pay its employees while engaged in this type of volunteer service abroad.[221] They filed an action in the District of Columbia District Court seeking an injunction prohibiting the United States from denying them access to their families, and to force the United States to inform them of the charges against them and grant them access to U.S. courts or some other independent tribunal to hear their grievances.[222] They alleged that they had never been combatants or belligerent against the United States, nor were they ever supporters of the Taliban

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211 *Id.*

212 *Id.*

213 *Id.* at 60.

214 *Id.*

215 *Id.*

216 *Id.* at 57.

217 *Id.* at 60.

218 *Id.*

219 *Id.*

220 *Id.* at 61.

221 *Id.*

222 *Id.* at 58.

or any terrorist organization.[223] They further claimed that they were captured in Afghanistan or Pakistan by villagers seeking bounty or other financial rewards.[224]

In the consolidated complaint, the Petitioners raised three theories to support their challenges.[225] First, they contended that their continued detention violated their due process rights under the Fifth Amendment.[226] Second, they claimed that the actions of the United States violated the Alien Tort Claims Act.[227] Third, they alleged that the actions of the United States were arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act.[228] In response, the United States filed a motion to dismiss the entire complaint on the basis that the District of Columbia District Court lacked jurisdiction to hear it.[229]

B. Lower Courts' Decisions

1. District Court

Initially, the District of Columbia District Court noted that in considering the Government's motion to dismiss, the court must accept the Petitioners' allegations in their pleadings as true, but that the Petitioners carried the burden to prove that the court had jurisdiction.[230] The court also noted that the Petitioners claimed that the court had jurisdiction under, among other laws, the Habeas Statute.[231]

In addition, the court noted that the writ of habeas corpus had long been held as the only means an individual could use to challenge his or her custody as a violation of the Constitution or U.S. law.[232] Consequently, because the Petitioners sought relief from their detention, the court found that the claims under the Alien Tort Claims Act and the Administrative Procedure Act were actually habeas appeals.[233] Furthermore, the court found that, although the *Odah* Petitioners did not directly join the *Rasul* Petitioners in seeking relief from their detention, the *Odah* Petitioners were indirectly challenging their detention.[234] To support this finding, the court noted that the *Odah* Petitioners expressly stated that their purpose for seeking a hearing in an independent forum was to challenge

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223 *Id.* at 61.

224 *Id.*

225 *Id.* at 58.

226 *Id.*

227 *See* 28 U.S.C. § 1350 (2005); *see also Rasul*, 215 F. Supp. 2d at 58.

228 *See* 5 U.S.C. §§ 555, 702, and 706 (2005); *see also Rasul*, 215 F. Supp. 2d at 58.

229 *Rasul*, 215 F. Supp. 2d at 61.

230 *Id.*

231 *Id.* at 62.

232 *Id.*

233 *Id.*

234 *Id.* at 62-63.

their detention.[235] Thus, the court concluded that the Petitioners' entire consolidated complaint must be viewed as a habeas petition.[236]

With this conclusion, the court reasoned that *Eisentrager* was directly applicable to the Petitioners.[237] The court noted that *Eisentrager* distinguished between citizens and aliens when determining the extent of protections allowed under the Constitution.[238] The court also noted that *Eisentrager* further distinguished between aliens inside and outside U.S. territorial sovereignty.[239] The court found that aliens within U.S. territorial sovereignty were afforded qualified rights under the Constitution.[240] On the other hand, aliens outside U.S. territorial sovereignty were afforded a limited review only in cases where they applied for and were denied U.S. citizenship.[241] Moreover, the court declined to accept the Petitioners' reasoning that *Eisentrager* turned on the determination that the prisoners in that case were enemy aliens.[242] Instead, the court reasoned that *Eisentrager* turned on the presence of the prisoners outside U.S. territorial sovereignty, finding such prisoners without any rights under the Constitution.[243] The court found that the designation of "enemy" versus "friendly alien" was immaterial under such circumstances.[244] As such, the court concluded that the status of the naval base at Guantanamo Bay, Cuba, was the controlling issue in determining whether the court had jurisdiction to hear the Petitioners' complaint.[245]

In determining the status of the naval base, the court noted three facts. First, the court found that the Petitioners did not deny that the base was outside U.S. sovereign territory, though the court also noted that this alone was not determinative of the base's status.[246] Second, the court reasoned that only *de jure* sovereignty over a territory was a sufficient basis to extend constitutional protections to Guantanamo Bay.[247] Thus, even if the court accepted the Petitioners' argument that the extensive control the United States exercised over Guantanamo Bay was equivalent to *de facto* sovereignty, it was not enough.[248] The court noted that the *Christopher* and *Bird* courts had already determined as much.[249] Third, the court found that the lease agreement between the United States and Cuba for

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[235] *Id.* at 63.

[236] *Id.* at 62.

[237] *Id.* at 65.

[238] *Id.* at 65-66 (discussing Johnson v. Eisentrager, 339 U.S. 763 (1956)).

[239] *Id.* (citing *Eisentrager*, 339 U.S. at 770).

[240] *Id.* at 66 (citing Chin Yow v. United States, 208 U.S. 8, 13 (1908)).

[241] *Id.* at 67 (citing Zadvydas v. Davis, 553 U.S. 678, 693 (2001)).

[242] *Id.* (citing *Eisentrager*, 339 U.S. at 777-78).

[243] *Id.* (citing *Zadvydas*, 553 U.S. at 693).

[244] *Id.* at 67.

[245] *Id.*

[246] *Id.* at 69.

[247] *Id.* at 71.

[248] *Id.*

[249] *Id.* at 71-72 (citing Bird v. United States, 923 F. Supp. 338, 343 (1996) and Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995)).

Guantanamo Bay expressly reserved *de jure* sovereignty over the territory to Cuba.[250] Thus, the court concluded that the United States did not exercise sufficient sovereignty over Guantanamo Bay to put the Petitioners outside the ambit of *Eisentrager*.[251] Therefore, the court held that the Petitioners were barred by *Eisentrager* from accessing U.S. courts and could not rely on the provisions of the Habeas Statute to challenge their detention.[252]

2. *U.S. Court of Appeals for the D.C. Circuit*

The D.C. Circuit agreed with the District Court's conclusion.[253] The court also agreed that *Eisentrager* applied to bar the Petitioners' habeas appeal on jurisdictional grounds.[254] Like the District Court, the court reasoned that the enemy alien designation of the *Eisentrager* petitioners was immaterial to the *Eisentrager* holding.[255] The court also reasoned that *Eisentrager* deprived the Petitioners of any rights under the Constitution upon which to base their habeas appeal.[256] The court found that such a conclusion was supported by the Supreme Court's express rejection in *Eisentrager* of the extraterritorial application of the Fifth Amendment to aliens irrespective of their location outside of U.S. territorial sovereignty as well as the affirmation of that rejection in *Verdugo-Urquidez*.[257]

The D.C. Circuit also rejected the Petitioners' contention that *Eisentrager* required *either* sovereignty or territorial jurisdiction to trigger Fifth Amendment protections.[258] The court noted that *Eisentrager*'s use of "territorial jurisdiction" did not imply that something less than sovereignty was required to extend Fifth Amendment protections.[259] Instead, the court reasoned that *Eisentrager*'s reference to territorial jurisdiction was intended to describe the extent of federal court jurisdiction and not as a trigger of constitutional protections.[260] The court concluded that nothing short of U.S. sovereignty over Guantanamo Bay was sufficient to trigger Fifth Amendment protections.[261] Because the lease agreement made clear that Cuba retained sovereignty over Guantanamo Bay, the court found that the Petitioners did not have any defendable constitutional rights upon which to base their habeas appeal.[262]

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250 *Id.* at 71 (citing Bird, 923 F. Supp. at 343).

251 *Id.* at 72-73.

252 *Id.*

253 Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. 2003).

254 *Id.* at 1140.

255 *Id.* at 1141 (citing Johnson v. Eisentrager, 339 U.S. 763, 765-66 (1950)).

256 *Id.*

257 *Id.* (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990)).

258 *Id.* at 1142.

259 *Id.* at 1143.

260 *Id.*

261 *Id.* at 1144.

262 *Id.* at 1145.

C. U.S. Supreme Court Decision

In a 6-3 opinion written by Justice John Paul Stevens, the Supreme Court reversed the decision of the D.C. Circuit.[263] The majority implicitly held that territorial jurisdiction over the place of custody was sufficient to trigger Fifth Amendment protections and as such the Petitioners could challenge their detention through a writ of habeas corpus.[264] Justice Anthony Kennedy concurred with the majority's conclusion, but argued that the background and circumstances of detention should control whether Fifth Amendment protections should be extended.[265] In a scathing dissent, Justice Antonin Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, argued that nothing less than sovereignty over the place of custody was required for application of the Fifth Amendment.[266] Because it was indisputable that the United States did not have sovereignty over Guantanamo Bay, Justice Scalia argued that the Petitioners were without any rights under the Constitution or U.S. law, and therefore could not invoke the writ of habeas corpus.[267]

1. The Majority Opinion

The majority held that the Petitioners had the right to a habeas appeal to challenge their detention by the United States in Guantanamo Bay.[268] To reach this conclusion, the Court first reasoned that the writ of habeas corpus was intended to be a last resort for a prisoner to challenge his detention by the Executive.[269] The Court also acknowledged that, in the case of aliens detained outside U.S. territorial sovereignty, its decision in *Eisentrager* was implicated.[270] However, the Court distinguished *Eisentrager*, noting that its holding relied on constitutional rather than statutory grounds.[271] The Court found that the appellate court's opinion in *Eisentrager* granted the *Eisentrager* prisoners access to federal court because they had a constitutional right to due process under the Fifth Amendment.[272] This, the Court reasoned, was what *Eisentrager* reversed.[273] As such, the *Eisentrager* decision did not determine, for example, whether the *Eisentrager*

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263 Rasul v. Bush, 542 U.S. 466, 485 (2004).

264 *Id.* at 476.

265 *See generally id.* at 488.

266 *Id.* at 488 (Scalia, J., dissenting).

267 *Id.* at 504 (Scalia, J., dissenting).

268 *Id.* at 483.

269 *Id.* at 474-75. The Court framed the issue in the case as "whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty." *Id.* (internal quotations omitted).

270 *Id.*

271 *Id.* at 474-79 (citing Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)) (noting that the Court reversed the D.C. Circuit's opinion in *Eisentrager*, which was based on constitutional grounds).

272 *Id.* at 474; *see also supra* Part II.B.2 (discussing the D.C. Circuit's decision in *Eisentrager*).

273 *Rasul*, 542 U.S. at 474.

prisoners were barred by the Habeas Statute from filing a habeas appeal.[274] Thus, because the only issue raised in *Rasul* was statutory in nature, *Eisentrager* had no application to bar the Petitioners' habeas appeal.[275]

Furthermore, the Court explained that six keys facts in *Eisentrager* were essential to its holding.[276] Specifically, the *Eisentrager* prisoners were (1) enemy aliens, (2) not residing in nor been to the United States, (3) captured and held by military authorities outside the United States, (4) tried and convicted by a military commission sitting outside the United States, (5) for war crimes committed outside the United States, and (6) at all times imprisoned outside the United States.[277] The Court reasoned that the Petitioners were distinguishable from the *Eisentrager* prisoners in that the Petitioners were not nationals of a country with which the United States was at war and denied that they engaged in any acts of aggression against the United States.[278] In addition, unlike the *Eisentrager* prisoners, the Petitioners were denied access to any tribunal and were not even charged with any wrongdoing for more than two years at a detention center over which the United States exercised exclusive jurisdiction and control.[279] Thus, the Court concluded that the Petitioners' circumstances were sufficiently distinguishable to make *Eisentrager* inapplicable as a bar to the Petitioners' habeas appeal.[280]

Of particular significance, the Court reasoned that *Eisentrager* could not apply when the detention at issue took place at a location within U.S. territorial jurisdiction.[281] The Court reasoned that, while there was no dispute that the naval base at Guantanamo Bay was outside U.S. sovereign territory, sovereignty was not key to the operation of the Habeas Statute.[282] Rather, the extent and nature of control exercised over a territory could also be sufficient to extend the reach of the Statute.[283] Because the United States exercised complete jurisdiction and control over Guantanamo Bay, the Court concluded that such control was sufficient to justify the Statute's application to prisoners held at the naval base.[284] To strengthen this conclusion, the Court noted that there was no dispute that federal courts had jurisdiction over claims by American citizens held at the base.[285] As

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274 *Id.*

275 *Id.*

276 *Id.*

277 *See id.* (citing *Eisentrager*, 339 U.S. at 777); *see also supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

278 *Rasul*, 542 U.S. at 474.

279 *Id.*

280 *See generally id.* at 474-75.

281 *See generally id.*

282 *Id.* at 480.

283 *Id.* (noting that historically, early English cases "confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown") (internal quotation marks omitted).

284 *Id.*

285 *Id.*

such, since the Habeas Statute did not make any distinction based on alienage in its application, the Court reasoned that Congress did not intend to create a limitation on the extent of the Statute's reach based on a prisoner's citizenship.[286]

Having addressed the application of *Eisentrager*, the Court next determined that the language of the Habeas Statute itself did not bar the Petitioners' appeal.[287] While the Statute conferred authority to issue the writ to federal courts only within their respective territorial jurisdiction, it did not bar courts from issuing the writ so long as the custodian was within the issuing court's territorial reach, even if the prisoner was not.[288] The Court reasoned that *Ahrens*, which required that the prisoner be present within the territorial jurisdiction of the issuing court, was effectively overruled by *Braden*, where the Court held that such a requirement was not a prerequisite to the court's exercise of jurisdiction.[289] Consequently, the Court concluded that the fact that the Petitioners were detained in a location over which no federal court had jurisdiction was of no importance if a federal court had jurisdiction over their custodian, namely the U.S. military.[290] In other words, the Habeas Statute's jurisdictional requirement would be satisfied if the Petitioners filed their habeas appeal in a federal court that could reach the U.S. military with process.[291]

2. *Justice Kennedy's Concurring Opinion*

Justice Kennedy agreed with the majority's conclusion but differed on the reasoning behind it.[292] He reasoned that *Eisentrager*'s holding should be viewed as denying judicial interference in matters reserved by the Constitution to the Executive and the Legislative branches.[293] In other words, the Separation of Powers Clause prevented courts from considering the *Eisentrager* prisoners' habeas petition because, absent some connection to the United States, there was no nexus to invoke such authority.[294] Justice Kennedy interpreted this approach as recognizing a realm of political authority over military affairs where judicial authority should not interfere.[295] He further reasoned that such an approach required an inquiry into the circumstances of the detention to determine whether courts could entertain a habeas petition and thus grant relief.[296] Because the *Eisentrager* prisoners were proven enemy aliens and were detained outside the United States, and

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286 *Id.*

287 *Id.* at 483.

288 *Id.* (citing Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 495 (1973)).

289 *Id.*; *see also supra* Part II.B.1 (discussing the *Ahrens* decision); Part II.B.3 (discussing the *Braden* decision). In a bizarre twist, the Court reasoned without further explanation that *Braden* also overruled "the statutory predicate to *Eisentrager*." *Rasul*, 542 U.S. at 476.

290 *Rasul*, 542 U.S. at 483.

291 *See generally id.*

292 *Id.* at 484 (Kennedy, J., concurring).

293 *Id.*

294 *See generally id.*

295 *Id.* at 486.

296 *Id.*

because the existence of jurisdiction would have undermined the authority of the military commanders on the field of battle in a time of war, Justice Kennedy reasoned that the matter in *Eisentrager* was appropriately left to the Executive, and thus no jurisdiction to hear the prisoners' claims was found.[297] However, as a corollary to this approach, he also reasoned that where the facts and circumstances of detention were different, a different conclusion could be reached.[298]

Applying this approach to the Petitioners, Justice Kennedy determined that the facts of *Rasul* were sufficiently distinguishable from *Eisentrager*, rendering *Eisentrager* inapplicable as a bar to the Petitioners' habeas appeal for two reasons.[299] First, he agreed with the majority's reasoning that the extent of the United States' jurisdiction and control over Guantanamo Bay justified the reach of the Habeas Statute over it.[300] Second, he found that the indefinite nature of the Petitioners' detention coupled with the total denial of access to any tribunal in which to challenge such detention called for judicial review.[301] He reasoned that such confinement could result in detaining both friends and foe alike without any recourse, and could not be justified by any military exigency, particularly when custody was outside any zones of active combat.[302]

Thus, Justice Kennedy concluded that because of the particular facts of *Rasul*, jurisdiction over the Petitioners' habeas petition should be found.[303] He reasoned that this approach was preferable to the majority's approach which, by basing such authority on jurisdiction over the custodian, would have granted automatic statutory jurisdiction over claims of persons held outside the United States.[304]

3. Dissenting Opinion

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.[305] In a scornful opinion, he disagreed with the Court's reasoning and found that the Habeas Statute should not be extended to aliens held by the military outside U.S. sovereign territory and outside the territorial jurisdiction of any court.[306]

Justice Scalia first noted that, while the *Eisentrager* opinion was largely devoted to the determination that the *Eisentrager* prisoners did not have a constitutional right to a habeas appeal, it implied that there was also no statutory source

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297 *See generally id.*

298 *Id.* at 486.

299 *Id.*

300 *Id.* Justice Kennedy found the unchallenged and indefinite nature of United States' control over Guantanamo to be key to this conclusion. *Id.* He reasoned that such control "produced a place that belongs to the United States, extending the "implied protection" of the United States to it." *Id.*

301 *Id.*

302 *Id.*

303 *Id.* at 488.

304 *Id.* at 486-87.

305 *Id.* at 490 (Scalia, J., dissenting).

306 *Id.*

for such a right.[307] He also noted that the appellate court in *Eisentrager* found jurisdiction to hear the prisoners' habeas appeals because it had, for one, determined that the prisoners had a constitutional right to such an appeal, and secondly, because it was trying to avoid declaring the Habeas Statute unconstitutional for denying such a right.[308] In other words, the prisoners' constitutional right was the source of the appellate court's finding of jurisdiction.[309] Justice Scalia reasoned that once the *Eisentrager* Court rejected this source, it was reasonable to presume that the *Eisentrager* Court did not find any other source for jurisdiction.[310] Otherwise, the Court would have agreed with the appellate court's conclusion, but disagreed with the reasoning behind it.[311] Thus, Justice Scalia concluded that *Eisentrager*'s rule was that the Habeas Statute did not confer court jurisdiction to hear habeas appeals by aliens held outside U.S. sovereign territory.[312]

Furthermore, Justice Scalia argued that *Braden* did not overrule *Ahrens*, but, instead, it merely distinguished it.[313] He found that *Braden* stood for the proposition that, where a prisoner was held in multiple jurisdictions within the United States, he or she may seek a writ of habeas corpus in the jurisdiction of his legal confinement.[314] This was the case even if such location was not the location of his physical confinement.[315] However, outside of this limited circumstance, *Ahrens*'s jurisdictional rule limited a federal court's authority to hear habeas appeals from prisoners detained within the court's territorial reach.[316] As such, since the Petitioners were not held in multiple jurisdictions in the United States, their petition did not justify application of *Braden*'s limited exception to the *Ahrens* rule.[317] Thus, Justice Scalia concluded that *Ahrens* required the Petitioners' presence within the territorial reach of a federal court before that court could have jurisdiction to hear their habeas appeal.[318]

Justice Scalia also disagreed with the Court's finding that complete jurisdiction and control over Guantanamo Bay was sufficient to extend the reach of the

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307 *Id.* at 492 (Scalia, J., dissenting).

308 *Id.*

309 *Id.*

310 *Id.*

311 *See generally id.*

312 *Id.* at 493-94 (Scalia, J., dissenting).

313 *Id.*

314 *Id.*

315 *Id.* Justice Scalia further distinguished Braden on the basis that it focused solely on the choice of forum in which the Braden prisoner could file his habeas appeal. *Id.* at 495-96. He reasoned that Braden was concerned with the expense and inconvenience of transporting prisoners, witnesses, or records long distances to the issuing court. *Id.* This, he reasoned, was at odds with the *Rasul* decision since this decision required domestic hearings for prisoners held abroad and dealing with events that transpired abroad. *Id.* Justice Scalia further reasoned that the *Rasul* holding, in essence, allowed the Petitioners to forum-shop, which the Habeas Statute was expressly promulgated to prevent. *Id.* at 497-99.

316 *Id.* at 494 (Scalia, J., dissenting).

317 *Id.* at 494-96 (Scalia, J., dissenting).

318 *Id.*

Habeas Statute to the naval base there.[319] He reasoned that such jurisdiction and control could also be achieved by lawful force of arms, which would imply that the Habeas Statute could logically extend to parts of Iraq and Afghanistan under U.S. control.[320] In fact, the statute could also extend to the prison in Landsberg, Germany, where the *Eisentrager* prisoners were held.[321] Therefore, Justice Scalia found that such logic was untenable and could result in an unreasonable expansion of the scope of the Habeas Statute.[322]

In summary, Justice Scalia concluded that the extension of the Habeas Statute was unjustified by logic or case law.[323] Particularly, he found such an extension during wartime to be judicial adventurism of the worst kind.[324] He reasoned that the Executive was justified in relying on the Court's prior precedent to expect that detaining the Petitioners in Guantanamo Bay would shield military affairs from the cumbersome machinery of domestic courts.[325] Instead, the Court's decision would effectively allow the Petitioners to choose any one of ninety-four federal courts to file their habeas petition.[326]

IV. Analysis

The Supreme Court correctly concluded that the Petitioners had the right to the writ of habeas corpus to challenge their detention.[327] However, in reaching this conclusion, the Court misconstrued its own precedent in *Eisentrager* and the extent to which *Braden* applied to the Petitioner's appeal.[328] The key to the Court's holding in *Rasul* was its implicit finding that the Habeas Statute did not require U.S. sovereignty over the place of detention in order to grant a prisoner the right of a writ to challenge such detention.[329]

Furthermore, the *Rasul* holding leaves untouched the question of the Petitioners' rights under the Constitution.[330] The Court avoided the issue by refusing to recognize that its *Eisentrager* holding was largely based on its finding that a connection with the United States is a *sine qua non* for the extraterritorial appli-

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319 *Id.* at 500-01 (Scalia, J., dissenting).

320 *Id.*

321 *Id.*

322 *Id.* Justice Scalia also found no support for extending the reach of the Habeas Statute in case law. *Id.* at 502-504. He found that the cases noted by the Court in support of its holding were clearly distinguishable on the basis that the prisoner was held in a territory over which the United States had clear authority by treaty or was himself an American citizen. *Id.*

323 *Id.* at 493-95 (Scalia, J., dissenting).

324 *Id.*

325 *Id.* at 504-06 (Scalia, J., dissenting).

326 *Id.* at 506 (Scalia, J., dissenting).

327 *See infra* Part IV.A (discussing the *Rasul* holding within the context of the dissenting opinion's rationale).

328 *The Supreme Court, 2003 Term Leading Cases,* 118 HARV. L. REV. 396, 396 (2004) ("The majority misread its precedents in concluding that the habeas statute conferred jurisdiction independent of what the Constitution requires."); *see infra* Part IV.A.

329 *See infra* Part IV.A.

330 *See infra* Part IV.B.

cation of the Fifth Amendment's due process clause.[331] By so refusing, the Court only delayed addressing the issue and guaranteed that the Petitioners would remain incarcerated for years to come or until the President, at his own discretion, decides to free them.[332]

A. The Jurisdictional Approach Adopted by the *Rasul* Court

1. Analysis of Historical Precedent

The first step in understanding the Supreme Court's decision in *Rasul* is to analyze the full implications of the Supreme Court's decisions in *Ahrens*, *Braden*, and *Eisentrager*.[333] In *Ahrens*, the Court was asked to interpret the extent of federal courts' jurisdiction to hear habeas appeals by aliens.[334] The issue in *Ahrens* involved a procedural question as to the proper forum for the detained aliens to file their habeas appeal.[335] At no point did the *Ahrens* Court question the aliens' right to file such an appeal.[336] Moreover, at no point did the *Ahrens* Court conclude, for example, that the *Ahrens* prisoners could not file their petition in the district court sitting in New York.[337] Although Justice Rutledge's dissent in the case focused on the fact that the Court's decision created a jurisdictional threshold that could defeat a habeas petition on purely procedural grounds, there was nothing in the Court's opinion to indicate that such procedural grounds are sufficient to completely deny a petitioner's right to the writ.[338] In other words, because the petitioners could have filed their petition in the district court sitting in New York, there were no substantive constitutional implications to override the procedural defect that the Court found.[339]

Next, the Supreme Court considered *Eisentrager* and the application of the Habeas Statute to alien prisoners that were at no time within U.S. territorial juris-

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331 *The Supreme Court, 2003 Term Leading Cases, supra* note 328, at 396 ("[t]he Supreme Court recognized the perils of allowing courts to hamper wartime security, and set forth specific limits on the jurisdiction of federal courts over claims brought by nonresident or resident aliens. These limits followed the common law tradition of excluding alien combatants and prisoners of war from access to the writ of habeas corpus."); *see also infra* Part IV.B.

332 *See infra* Part IV.B.

333 *See generally* Rasul v. Bush, 542 U.S. 466, 476-79 (2004); *see also supra* Part III.C.1 (discussing the *Rasul* majority opinion).

334 *See supra* Part II.B.1 (discussing the *Ahrens* decision).

335 *See* Rachel E. Rosenbloom, *Is The Attorney General the Custodian of an INS Detainee? Personal Jurisdiction and the "Immediate Custodian" Rule in Immigration-Related Habeas Actions,* 27 N.Y.U. REV. L. & SOC. CHANGE 543, 552 (2001).

336 *See generally* Ahrens v. Clark, 335 U.S. 188 (1948).

337 *See* Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 500 (1973) ("On the facts of *Ahrens* itself . . . petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district."); *see also supra* Part II.B.1 (discussing the *Ahrens* decision); *see also supra* Part II.B.3 (discussing the *Braden* decision).

338 *Braden,* 410 U.S. at 499-500 (noting that in view of the developments since *Ahrens, Ahrens* could not be viewed as imposing an inflexible jurisdictional rule, forcing the choice of an inconvenient forum even in a case that could not have been foreseen when *Ahrens* was decided).

339 *Id.* at 500.

diction.[340] The Court reversed the D.C. Circuit's opinion that found jurisdiction based on constitutional grounds.[341] In so doing, the Court reasoned that the right to due process was conditioned on the alien's presence within a U.S. territorial jurisdiction.[342] The underlying rationale behind this decision was two-fold. First, the Court impliedly concluded that the petitioners lacked Fifth Amendment rights, or any other constitutional rights, upon which a habeas appeal could be based because they had no connection with the United States, outside the facts of their incarceration.[343] Second, because the petitioners lacked a sufficient constitutional basis to invoke the power of the judiciary in any district, there was no need to consider the operation of the jurisdictional limitations of the Habeas Statute to determine the appropriate forum in which the petitioners could file their habeas appeal.[344]

The Supreme Court reached the clash between the procedural and substantive requirements of the writ of habeas corpus in *Braden*.[345] In *Braden*, the jurisdictional limitation on habeas appeals enunciated by the Court in *Ahrens* would have effectively barred the petitioner from exercising his constitutional right to a speedy trial.[346] In other words, the Court faced the same choices that the D.C. Circuit in *Eisentrager* faced: declare the Habeas Statute unconstitutional as applied to the *Braden* petitioners or construe the statute as vesting jurisdiction in the district court in Kentucky.[347] The Court chose the second approach and found that the language of the Habeas Statute required nothing more than the issuing court having jurisdiction over the custodian responsible for the challenged detention.[348] In essence, the Court impliedly indicated that it would bypass the procedural rule from *Ahrens* only if it was an impediment to a petitioner's exercise of his or her constitutionally-guaranteed substantive right.[349]

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[340] Charles I. Lugosi, *Rule of Law or Rule by Law: The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225, 254 (2003) (discussing the importance of the location of the German enemy aliens).

[341] *See supra* Part II.B.2 (discussing the D.C. Circuit's opinion in *Eisentrager*).

[342] Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights . . ."); *see also supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

[343] *See Eisentrager*, 339 U.S. at 776.

[344] *Id.* at 790-91 ("Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed.").

[345] *See supra* Part II.B.3 (discussing the *Braden* decision).

[346] *Id.*

[347] *See* Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484 (1973).

[348] *See id.* at 494-95; *see also* Christopher M. Schumann, *Bring It On: The Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A.F. L. REV. 349, 358 (2004) ("[t]he Rasul Court found that the Braden decision held that application of the writ does not necessarily depend upon the location of the party invoking it, but rather upon the location of the government actor who has orchestrated the detention.").

[349] *See* Rasul v. Bush, 542 U.S. 466, 493-95 (2004) (Scalia, J., dissenting); *see also supra* Part III.C.3 (discussing Justice Scalia's dissenting opinion in *Rasul*).

2. *Application of Historical Precedent*

The *Rasul* Court's interpretation of *Braden* as overruling *Ahrens*'s jurisdictional rule may be an overstatement of *Braden*'s impact.[350] As Justice Scalia argued in his dissent, *Braden* distinguished *Ahrens* by conferring authority on federal courts to hear a habeas appeal based on jurisdiction over the custodian when reliance on territorial jurisdiction alone would have deprived the *Braden* petitioner of his constitutionally-guaranteed right to a speedy trial.[351] In other words, the determination that the petitioner in *Braden* had a constitutionally-guaranteed right to enforce in federal court was the predicate to the Court's determination that the Habeas Statute could not deprive him of that right on procedural grounds.[352] To interpret *Braden* in any other way would be tantamount to giving federal courts worldwide jurisdiction over any claims by federal prisoners or detainees.[353] There was nothing in *Braden* to indicate that the Court intended such expansive result.[354]

In addition, as Justice Scalia argued, the Court's conclusion that *Braden* overruled the statutory predicate to *Eisentrager* may be inaccurate.[355] The *Eisentrager* Court never reached the statutory question addressed by *Braden* and did not determine the impact of the jurisdictional limitations in § 2241(a) to the petitioners in the case.[356] The *Eisentrager* Court concluded that because the petitioners did not have cognizable constitutional or statutory rights, the question of the choice of forum in which to enforce these rights was irrelevant.[357] In other words, the Court impliedly concluded that the petitioners could not file a habeas appeal under § 2241(c)(3) because their detention was not in violation of the

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350 *See Rasul*, 542 U.S. at 478-79 (majority opinion) (arguing that *Braden* impliedly overruled *Ahrens's* jurisdictional rule in all circumstances).

351 *See id.* at 492-94 (Scalia, J., dissenting) (noting that the *Braden* Court was careful to distinguish the exception it was creating in *Braden* from the general rule of *Ahrens*); *see also* Schumann, *supra* note 348, at 363 (noting that the key of *Braden* was the fact that the Court recognized that it would serve no useful purpose to apply the *Ahrens* general rule to the *Braden* petitioner who was being incarcerated in Alabama when it was Kentucky directing his detention, which was the basis of his habeas appeal).

352 *See Rasul*, 542 U.S. at 496 (noting that *Braden*'s analysis was based on forum inconvenience, something that did not play a part in the *Eisentrager* decision); *see also supra* Part III.C.3 (discussing Justice Scalia's dissent in *Rasul*); *see also* Rosenbloom, *supra* note 335, at 553-54 (noting that while state and federal convictions were no longer governed by *Ahrens* as a result of the *Braden* decision, other types of cases, including cases of military confinement, extradition, immigration, interstate detainers, and challenges to the legality of prison term, were subject to *Ahrens's* territorial limitation).

353 *See Rasul*, 542 U.S. at 499-500; *see also supra* Part III.C.3 (discussing Justice Scalia's dissenting opinion in *Rasul*).

354 *See generally* Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484 (1973).

355 *See Rasul*, 542 U.S. at 492-94 (Scalia, J., dissenting) (noting that even if *Braden* overruled parts of *Ahrens*, the fact that *Braden* did not touch any of the statutory issues considered by *Eisentrager* makes it hard to accept the proposition that *Braden* overruled any part of *Eisentrager*).

356 *See Braden*, 410 U.S. at 488 (stating that the *Braden* petitioner was entitled to raise his constitutional challenge for a speedy trial and that the issue before the Court was the choice of forum in which to review such challenge).

357 Johnson v. Eisentrager, 339 U.S. 763, 790-91 (1950) ("Since in the present application we find no basis for invoking federal judicial power in any district, we need not debate as to where, if the case were otherwise, the petition should be filed.").

Constitution or any laws of the United States.[358] Thus, it is difficult to see how *Braden*'s conclusion, based upon the interpretation of the procedural limitations in § 2241(a), could have had any impact on *Eisentrager*'s holding—which was based on the substantive limitations in § 2241(c)(3).[359]

However, contrary to Justice Scalia's conclusion, the Court's holding in *Rasul* did not overturn *Eisentrager*.[360] *Eisentrager* was premised on two key facts.[361] First, the prisoners in the case were found guilty of war crimes against the United States by a military tribunal.[362] However, even enemy aliens had a limited right of review of their enemy designation so long as they had sufficient connection with U.S. territorial jurisdiction.[363] Second, and more importantly, although the Court reached this conclusion based solely on factual allegations in the pleadings and not on any factual findings by the trial court, the Court found that the prisoners did not have any connection with the United States.[364] This fact alone was the basis for the Court's conclusion that the prisoners did not merit even the limited review afforded to enemy aliens who possess sufficient connections to the United States.[365] Without any cognizable rights under the Constitution or

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358 *Id.* at 790.

359 *Id.* The Court noted that both the district and appellate courts in *Eisentrager* decided the case based on case law where the petitioner's right to habeas appeal was unquestioned and the only issue left to resolve was where to make such appeal. *Id.* However, the *Eisentrager* Court found that petitioners in that case did not have a constitutional claim to support their right to a habeas appeal and, therefore, the issue of which forum to make this appeal was irrelevant. *Id.* at 790-91.

360 *See* Rasul v. Bush, 542 U.S. 466, 492-495 (2004) (Scalia, J., dissenting), (discussing Justice Scalia's dissenting opinion in *Rasul*). Justice Scalia argued that because *Braden* did not deal with the issues involved in *Eisentrager*, *Braden* did not overturn *Eisentrager*. *Rasul*, 542 U.S. at 493-95. Thus, by finding jurisdiction to hear the *Rasul* Petitioners' habeas appeal, the Court must logically reverse *Eisentrager* whose holding would be directly contrary to the holding of *Rasul*. *Id.*

361 *Eisentrager*, 339 U.S. at 777. While the *Eisentrager* Court listed six key facts that it found relevant to its analysis, these facts can be summarized to the petitioners' status as friendly or enemy alien and the level of connection they had with the United States. *Id.*

> To support [the assumption that the petitioners are entitled, as a matter of constitutional right, to sue in federal court] we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Id.

362 *Id.* at 776.

363 *Id.* at 775.

> The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.

Id.; *see also supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

364 *Eisentrager*, 339 U.S. at 778 ("[A]t no relevant time were [the *Eisentrager* petitioners] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

365 *Id.*

U.S. law, the *Eisentrager* prisoners did not have sufficient grounds to invoke the protections of the Habeas Statute under § 2241(c)(3).[366]

As such, the Court's finding in *Rasul* that Guantanamo Bay was effectively within U.S. territorial jurisdiction, and, by implication that the *Rasul* prisoners had sufficient connections to the United States, put them outside the ambit of *Eisentrager*.[367] The *Rasul* Court determined that the United States exercised complete jurisdiction and control over the land and could retain such jurisdiction and control for as long as it desired.[368] In addition, the Court expressly refused to consider applying the Habeas Statute to prisoners in Guantanamo Bay as an extraterritorial application of the statute, considering such application to be within U.S. territorial jurisdiction.[369]

It is wholly unclear what criteria the Court found to be controlling in its designation of Guantanamo Bay as within U.S. territorial jurisdiction.[370] It is also unclear how the Court's decision in *Rasul* comports with its decision in *Vermilya-Brown* where the Court concluded that complete jurisdiction and control were not sufficient to find that the United States exercised sovereignty over a territory.[371] What *is* clear is that the Court decided that territorial jurisdiction, not sovereignty, is sufficient to trigger the Habeas Statute.[372]

This approach has merit in light of the nature of control the United States exercises over Guantanamo Bay.[373] The lease between the United States and Cuba gave the United States extensive control over Guantanamo Bay, although it reserved ultimate sovereignty for Cuba.[374] Unlike the Bermuda lease the Court considered in *Vermilya-Brown*, the Guantanamo Bay lease does not impose a durational requirement upon its validity.[375] In fact, it vests complete discretion

366 *Id.* at 790-91; *see also supra* Part II.B.2 (discussing the majority opinion in *Eisentrager*).

367 Rasul v. Bush, 542 U.S. 466, 480-81 (2004). Although the Court noted that the Petitioners' claims "unquestionably describe" acts in violation of the Constitution and the laws of the United States, the Court did not really explain how the Petitioners could have any rights to enforce them unless the location of the Petitioners' detention was such that the protections of both the Constitution and the laws of the United States extended there. *Id.* at 483-84.

368 *Id.* at 480-81; *see also supra* Part III.C.1 (discussing the majority's opinion in *Rasul*).

369 *Rasul*, 542 U.S. at 480-81.

370 *See id.*; *see also The Supreme Court, 2003 Term Leading Cases*, *supra* note 328, at 402 (noting that both the majority and concurring opinions in *Rasul* downplayed the canon that some physical connection between the prisoner and the United States was required to trigger the prisoner's constitutional right to access U.S. courts).

371 *See supra* Part II.D.2 (discussing the legal status of Guantanamo Bay).

372 *Rasul*, 542 U.S. at 480-81; *see also supra* Part III.C.1 (discussing the majority's opinion in *Rasul*). While the Court did not expressly state that the level of control the United States exercises over Guantanamo Bay was sufficient to extend operations of the Habeas Statute to the territory, it clearly establishes that the doctrine of extraterritoriality "has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." *Rasul*, 542 U.S. at 480. At the same time, the Court acknowledged that Cuba retained sovereignty over Guantanamo Bay. *Id.* at 469-73. Read together, one can reasonably conclude that territorial jurisdiction was a concept less than full sovereignty and sufficient by itself for the operation of the Habeas Statute.

373 *See generally Rasul*, 542 U.S. at 480-81.

374 *See id.* at 469-72; *see also supra* Part II.D.1 (discussing the history of Guantanamo Bay).

375 *Rasul*, 542 U.S. at 480-81; *see also supra* Part II.D.2 (discussing the legal status of Guantanamo Bay).

in the United States to determine if and when control of the land should revert back to Cuba.[376] Furthermore, unlike the base in Bermuda, the base at Guantanamo Bay effectively operates outside the constraints of Cuban law.[377] The base is separated by 50,000 mines planted in Cuban territory around the base to prevent anyone from entering the base without the express authorization of the United States.[378] In fact, the United States, not Cuba, controls all entry and exit points to the base.[379] Moreover, unlike any other U.S. overseas military base, there is no Status-of-Forces Agreement defining the allocation of civil and criminal jurisdiction over military and other personnel at Guantanamo Bay.[380] Indeed, in recent years, the United States exercised criminal jurisdiction over both citizens and aliens on the land to the exclusion of Cuban law.[381] Criminal defendants were brought to the United States for trial and were given the full panoply of constitutional protections.[382] In sum, while Cuba retained ultimate jurisdiction over the land on paper, in reality, Cuban sovereignty over Guantanamo Bay was nothing more than a legal fiction unsupported by any measure of recognized sovereignty.[383]

B. The Constitutional Approach

The Court's jurisdictional approach provides the prisoners at Guantanamo Bay with a venue in which they could challenge their designation as enemy aliens.[384] While this solution addresses the immediate issue of the Prisoners' access to federal courts, it leaves untouched the core issue regarding the extent of the Prisoners' rights under the Constitution.[385] In addition, this solution ignores the deliberate and methodical manner by which the Executive went about depriving prisoners in the War on Terror from the fundamental protections which lie at the core of our legal system and tradition.

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376 *Rasul*, 542 U.S. at 480-81; *see also supra* Part II.D.1 (discussing the history of Guantanamo Bay).

377 *See supra* Part II.D.1 (noting that the lease agreement between the United States and Cuba, while recognizing Cuban sovereignty over the territory, gave the United States complete jurisdiction and control over the territory and its affairs).

378 *See* Eddie Dominguez, *Mines Removed at Guantanamo Base*, AP, para. 1-2 (Jan. 17, 1998), http://www.cubanet.org/CNews/y98/jan98/17e6.htm.

379 *Id.* at para. 4 (noting that the naval base at Guantanamo Bay is surrounded by 4,000 Cuban soldiers and protected from within by only 400 Marines).

380 Neuman, *supra* note 136, at 39.

381 *Id.* at 43.

382 *Id.* at 43-44.

383 *See generally supra* Part II.D.1. This approach has support in recent case law. The Ninth Circuit in *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *reversed and remanded*, 542 U.S. 952 (2004), *vacated and remanded to the Ninth Circuit for further consideration,* followed the same logic. The Ninth Circuit concluded that even if Guantanamo Bay was not considered within U.S. sovereign territory, it must be considered within U.S. territorial jurisdiction by virtue of the level of control the United States exercised over it. *Gherebi*, 352 F.3d at 1299. The court then relied on *Braden* to find that the jurisdictional limitation in § 2241(a) allowed federal court authority to be found based on jurisdiction over the custodian. *Id.* at 1301.

384 *Gherebi,* 352 F.3d at 1301.

385 *The Supreme Court, 2003 Term Leading Cases*, *supra* note 328, at 400 ("Justice Stevens did not take a position on whether his statutory holding was also constitutionally compelled . . .").

Some of our nation's core values were expressed by our founding fathers in the Declaration of Independence.[386] Our founding fathers recognized that there are certain rights that transcend national borders or ethnicity, including the right to life, liberty, and the pursuit of happiness.[387] Thus, it would seem logical that these ideals would also be reflected in the Constitution. It is the Constitution that limits actions of the federal government that could potentially infringe upon these inherent rights. Indeed, the Bill of Rights contains an enumeration of the limitations the drafters of the Constitution imposed on the federal government. Among these limitations are the mandates of the Fifth Amendment.

Unlike any other right included in the Bill of Rights, the Fifth Amendment extends its mandate to "any person."[388] It requires that no person will be tried on a capital or "infamous" crime without being indicted by a grand jury, except in cases arising in the military during times of war or public danger.[389] It also protects any person from being tried for the same crime twice and from being compelled to provide self-incriminating evidence at a criminal trial.[390] It further provides that no person shall be deprived of life, liberty, or property without due process of law.[391] Lastly, it protects private property from public use without just compensation.[392]

Because the Constitution operates as a limit on federal government authority, it would seem reasonable to conclude that the instructions of the Fifth Amendment prohibit the government from undertaking any action that would deny those enumerated rights to any person. Indeed, this conclusion formed the basis of Justice Black's dissenting opinion and the D.C. Circuit's opinion in *Eisentrager*.[393] Both Justice Black and the D.C. Circuit relied on the fact that the protections of the Fifth Amendment required only one thing: action by the federal government.[394] Fifth Amendment protections are triggered by such action to protect any person affected. As such, the D.C. Circuit reasoned that because the prisoners in *Eisentrager* were captured, tried, convicted, and incarcerated by the

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386 *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776), *available at* http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html (last visited Nov. 13, 2005).

387 *Id.* at para. 2. The Declaration of Independence states, in relevant part:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Id. (emphasis added).

388 *See generally* U.S. CONST. amend. V.

389 U.S. CONST. amend. V.

390 *Id.*

391 *Id.*

392 *Id.*

393 *See supra* Part II.B.2 (ii) (discussing the D.C. Circuit's opinion in *Eisentrager*); *see also supra* Part II.B.2 (iv) (discussing Justice Black's dissenting opinion).

394 *See supra* Part II.B.2 (ii) (discussing the D.C. Circuit's opinion in *Eisentrager*); *see also supra* Part II.B.2 (iv) (discussing Justice Black's dissenting opinion).

military, the requisite nexus to trigger the protections of the Fifth Amendment was present. Thus, the court concluded that the prisoners could invoke the Habeas Statute to challenge their detention as a violation of due process.

Of course, this view was expressly rejected by the Court where Justice Jackson's majority opinion made clear that the Fifth Amendment did not have such a broad scope. Justice Jackson reasoned that if the Fifth Amendment was given such a broad scope, the other protections of the Bill of Rights would also extend to the *Eisentrager* prisoners and all enemy aliens in any theater of war. In particular, Justice Jackson expressly referenced the First Amendment's right to freedom of speech, press, and assembly; the Second Amendment's right to bear arms; the Fourth Amendment's right to be free from unreasonable searches and seizure; the Fifth Amendment's right to indictment by a grand jury; and the Sixth Amendment's right to trial by jury.[395]

However, both the Court's later decision in *Verdugo-Urquidez* and the express language of the Constitution bring into question the continued vitality of Justice Jackson's approach. In *Verdugo-Urquidez*, the Court determined that the Fourth Amendment did not apply to aliens subject to official action outside the territorial jurisdictions of the United States. To reach this conclusion, the Court noted that the First, Second, and Fourth Amendments restricted their protections to "the people." The Court reasoned that such a term implied a national connection with the United States that a nonresident alien, subject to official action outside of the United States, does not have. In other words, the Court interpreted the term "the people" to limit the application of the First, Second, and Fourth Amendments to persons with sufficient connection to the United States.

Furthermore, while the language of the Sixth Amendment confers the right to a jury in a criminal prosecution, it also calls for jurists to be selected from the state or a district previously defined by law wherein the crime was committed. The clear implication of these selection criteria is that the drafters of the Sixth Amendment did not intend its protections to extend outside the United States. Thus, contrary to Justice Jackson's conclusion, the First, Second, Fourth, and Sixth Amendments have no application to aliens without a national connection to the United States.

Moreover, unlike the First, Second, and Fourth Amendments, the plain language of the Fifth Amendment indicates that its protections will extend to any person. In this regard, it is obvious that the Fifth Amendment does not distinguish between citizens and aliens or between resident and nonresident aliens when imposing its limitations on government action. Furthermore, this interpretation comports with the intent expressed in the Declaration of Independence which recognizes that the right to life, liberty, and happiness are inalienable rights guaranteed to "all persons" without regard to citizenship. No other right has been expressed in such an expansive way in the Declaration of Independence. Thus, despite Justice Jackson's finding, the only reasonable conclusion is that the Fifth Amendment requires only government action to trigger its protections, and

[395] Johnson v. Eisentrager, 339 U.S. 763, 784 (1950); *see also supra* Part II.B.2 (discussing Justice Jackson's majority opinion).

is intended to apply to aliens and citizens alike as impliedly stated in the Constitution.

Justice Jackson's innate fear that such application would hinder the government's efforts in times of war is not without merit.[396] Indeed, one cannot reasonably consider the text of the Constitution and the Declaration of Independence without regard to the practical realities facing our nation. Nor can one reasonably argue that the myriad of constitutional protections afforded to American citizens should be extended to our declared enemies. However, the judicial process exists as an independent check on the actions of the other branches of government to ensure that the principles upon which this nation was founded do not give way to expediency. There must be a framework through which the courts could fulfill this independent role by balancing the government's interest in the public good with the liberty interest of individuals protected by the Fifth Amendment.

Although the scope of substantive due process afforded to aliens outside U.S. territorial jurisdiction must be developed over time, the Court has already determined that the test set forth in *Mathews v. Eldridge*[397] is sufficient to balance these competing interests.[398] In *Mathews*, the Court determined that procedural due process of the Fifth and Fourteenth Amendments imposed constraints on the government when depriving an individual of a protected right.[399] The Court further found that the government must provide the individual with some form of a hearing before depriving him or her of such a right.[400] In determining the scope of this protection, the Court reasoned that three factors must be balanced: (1) the individual interest at stake,[401] (2) the fairness and adequacy of existing procedures and the probable value of additional procedural safeguards,[402] and (3) the public interest at stake.[403] For example, in a theater of war, the fairness and adequacy of procedures would likely be evaluated from the prospective of military exigency, and the public interest at stake would likely be at its maximum. Indeed, Justice Black's dissenting opinion in *Eisentrager* called for exactly such an approach.

Perhaps a better approach would be to adopt Justice Kennedy's reasoning in his concurring opinion in *Verdugo-Urquidez*. Justice Kennedy concluded that

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396 *See infra* Part II.B.2 (discussing Justice Jackson's majority opinion in *Eisentrager*).

397 *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

398 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004). The Court relied on *Mathews* to conclude that a U.S. citizen was entitled to the protections of due process despite the government's compelling interest in securing the nation.

399 *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

400 *Id.* ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

401 *Id.* at 341 (noting that the length of deprivation is also a factor in the private interest at stake).

402 *Id.* at 343.

403 *Id.* at 347-48 (stating that the financial costs alone are not determinative of the public interest, but they are a factor to consider).

there was no express textual limitation on the scope of the Bill of the Rights, and elected, instead, to rely on a contextual analysis of the Fifth Amendment's due process clause to determine the extraterritorial scope of constitutional rights. Implicit in Justice Kennedy's conclusion is that the due process clause is applicable outside the territorial jurisdiction of the United States. The only question to be resolved, then, is the scope of constitutional protections when procedural violations are alleged in cases involving overseas government action. Such approach would focus judicial attention not on whether the due process clause is applicable in a particular situation, which is assumed to apply in all situations, but rather on the much more substantive question of what exactly does due process mean within the circumstances of individual cases. The powerful simplicity of this approach, in comparison to the *Mathews* balancing test, is even more amplified in cases originating in Guantanamo Bay, which the Court has already concluded to be within U.S. territorial jurisdiction.

In conclusion, the *Rasul* Court should have expressly overruled part of its reasoning in *Eisentrager* and found that aliens, even enemy aliens, affected by federal government action are protected by the Fifth Amendment. At the same time, the Court could have preserved the ultimate conclusion in *Eisentrager* by finding that, although the prisoners had cognizable rights under the Constitution which would support their challenge under § 2241(c)(3), no due process violation existed. This result would be supported by the fact that (1) there were adequate procedural safeguards in the case, given a properly constituted military tribunal to consider the charges, (2) there were sufficient mechanisms to review the tribunal's conviction of the prisoners, and (3) there were no claimed violations of the Geneva Convention. Admittedly, these findings directly implicate the merits of the prisoners' claims in *Eisentrager*. However, the fact that the *Eisentrager* Court based its conclusion on the merits of the case necessitates such an approach.

By taking this approach, however, the *Rasul* Court would have determined once and for all that the Constitution stands above all three branches of government, and that its power and effectiveness is not beholden to the ingenuity of the Executive in devising schemes to circumvent it. Furthermore, the Court would have provided clear guidance to the lower courts to determine the extent of the prisoners' rights in the case.

V. Impact

By adopting the jurisdictional approach to resolving the prisoners' rights to a habeas appeal, the Court addressed only the initial question of the prisoners' right to access federal courts. However, without clarifying exactly what rights the prisoners have, the lower courts are left without any guidance as to whether there is actually any violation of the Constitution or U.S. law if prisoners are detained indefinitely and without trial at Guantanamo Bay.[404] This will unavoidably cre-

[404] *See generally* Nat Hentoff, *More Lawlessness at Guantanamo Bay*, DUNKIN DAILY DEMOCRAT (Nov. 30, 2004), http://www.dddnews.com/story/1081711.html ("'Guantanamo remains a legal black hole.'").

ate confusion in the lower courts and result in conflicting opinions on a threshold matter that the Court could have easily resolved in *Rasul*.

For example, in *In re Guantanamo Detainees*, Judge Green found that "[t]here would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment."[405] Yet, Judge Leon in the same court concluded that *Rasul* did not confer on the Guantanamo detainees any substantive rights and was, instead, limited to whether these detainees had a right to judicial review of the legality of their detention under the Habeas Statute.[406] Judge Leon then found that the detainees had no substantive rights,[407] effectively limiting their rights under *Rasul* to simply filing papers with courts to raise claims that are bound to be dismissed for failure to state a claim upon which relief can be granted.

In *Hamdan v. Rumsfeld*,[408] which is currently under consideration by the Court, the Court once again has an opportunity to address the substantive issues that it avoided in *Rasul*. In *Hamdan*, the petitioner was denied the limited right for review of his status as an enemy combatant that *Eisentrager* held he is entitled to. He was detained in Guantanamo Bay without a hearing by any competent tribunal or the opportunity to effectively contest his designation as an enemy combatant.[409] In his continuing trial for war crimes by a military commission, the petitioner was denied the rights and protections of the Geneva Convention (III) Relative to the Treatment of Prisoners of War on the Executive's unreviewed finding that the Convention does not apply to the petitioner or other similarly situated detainees. In essence, the Executive asserted the sole and exclusive authority to determine whether the detainees are subject to international treaties, what criminal process they will face,[410] what rights they will have,[411] who will judge them,[412] how they will be judged,[413] upon what crimes they will be sentenced,[414] and how the sentence will be carried out.[415] Nothing in the Constitution gives the Executive such complete and unfettered authority over the life,

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405 *In re* Guantanamo Detainees, 355 F. Supp. 2d 443, 465 (D.D.C. 2005).

406 Khalid v. Bush, 355 F. Supp. 2d 311, 322 (D.D.C. 2005).

407 *Id.*

408 Hamdan v. Rumsfeld, 415 F.3d 33 (2005), cert. granted by 126 S. Ct. 622 (2005).

409 *Id.* at 35.

410 *See* Dep't of Defense, Military Commission Order No. 1 (Revised), § 11 (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf (last visited Jan. 23, 2006) [hereinafter MCO No. 1]. The President formed a military commission for the sole purpose of trying the *Hamdan* petitioner and other similarly situated detainees.

411 *Id.* § 6D. For example, the Military Commission adopts neither the Federal Rules of Evidence nor the Military Rules of Evidence, which have been painstakingly developed through decades of experience and public comment. Instead, the Commission's only rule governing, for example, admissibility of evidence is the arbitrary "probative value to a reasonable person" standard. *Id.* The Commission also has no prohibition on admissibility of evidence obtained by torture or unlawful coercion.

412 *Id.* § 6H(4). The Executive can appoint and remove members of the Military Commission's panel as well as members of the panel that was designed to review the final judgment of the Military Commission. *Id.*

413 *Id.* § 3.

414 *Id.*

liberty, or property of a human being, alien or citizen, within the territorial jurisdiction of the United States.[416]

The Supreme Court also missed an opportunity to define the Guantanamo detainees' rights under the Constitution before Congress essentially suspended the detainee's right for the writ of habeas corpus in December 2005.[417] Unless the Court determines the issue in *Hamdan*, the detainees are likely to remain deprived of their freedom without an understanding of exactly what crimes they committed or an opportunity to hear and rebut the evidence against them in a competent and independent forum. Sadly, the process now afforded to the detainees is defined in terms over which the United States has consistently criticized other countries.[418]

VI. Conclusion

If the events surrounding the Abu Ghraib prison in Iraq reveal anything, it is that the Executive is incapable of creating sufficient internal checks and balances to ensure that the rule of law, which is deeply rooted in our nation's consciousness, is followed.[419] There is no dispute that the War on Terror has been thrust upon us because of the senseless death of thousands of our fellow Americans. There is also no dispute that we are justified in taking all reasonable measures to protect ourselves following this act of barbarism. However, the moral righteousness of our cause is measured not only by the purity of our objectives but also by the means we use to achieve them. While expediency and convenience can be helpful in addressing our short-term objectives of catching those who would

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[415] *Id.* §§ 6H(2)-(4). The President has sole and exclusive authority to accept, reject, or modify the findings of the commission. *Id.*

[416] *See generally Ex Parte* Quirin, 317 U.S. 1 (1949). Even in *Quirin* where the Supreme Court affirmed the President's authority to have such unfettered authority over the lives of enemy combatants within the territorial jurisdiction of the United States, this authority was limited by the *Quirin* prisoners undisputed status as enemy combatants. *Id.* at 7. In *Hamdan*, the petitioner's status as an enemy combatant was disputed, and the dispute was never resolved by a competent tribunal.

[417] *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005). Section 1005(e)(1) of that Act amends the habeas statute to provide that "no court, Justice, or judge shall have jurisdiction to hear or consider" any action filed by or on behalf of an alien held in Military custody at Guantanamo Bay for a writ of habeas corpus or any other form of relief, except pursuant to Exclusive statutory review procedures established by the Act. *Id.* at § 1005(e)(1), 119 Stat. 2741. The Act further states that this provision "shall take effect on the date of the enactment of this Act." *Id.* at § 1005(h)(1), 119 Stat. 2743.

[418] *See* U.S. State Dep't, Egypt: Country Reports on Human Rights Practices 2000, *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm (last visited Jan. 23, 2006). The State Department criticized Egypt's use of military courts to try defendants accused of terrorism. *Id.* The report stated that Egypt's military courts have "deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge." *Id.* It went on to criticize the military courts' lack of independence, noting that they "do not ensure civilian defendants due process before an independent tribunal" since military judges are appointed by the Minister of Defense and subject to military discipline. *Id.*

[419] *See* T.A. Badge, *Soldier Gets 10 years for Iraq prison abuse,* DET. NEWS, Jan. 16, 2005, at 1A; *see also* Pasiley Dodds, *FBI letter on Guantanamo Says Army Told of Abuses*, VENTURA COUNTY STAR (Cal.), Dec. 7, 2004, at 10; (noting that the FBI may have warned the Pentagon about physical abuse and "aggressive" interrogation methods of the detainees at Guantanamo Bay more than a year before the prison abuse scandal in Iraq broke); *see also* Paisley Dodds, *Special Forces Accused of Pressuring Others,* VENTURA COUNTY STAR (Cal.), Dec. 8, 2004, at 12.

wage war against us, it cannot and must not be the controlling factor in our decision-making process. Instead, fortitude and perseverance must be at the core of our efforts to root out those who would seek to harm us and those who have already inflicted unimaginable pain upon us.

The *Rasul* Court's decision made clear that the Judiciary will not abdicate its duty as an independent check on the actions of the Executive and the Legislature in their prosecution of the War on Terror. It also made clear that, while we will remain resolute in defending our nation and our way of life, we will not do so at the expense of who we are. We are a nation of laws that represent the values and morals that make us Americans, and our democratically-elected government is the political and legal embodiment of these laws. Our government's actions, whether in the national or international arenas, are a reflection of these laws and, as such, the limits that we place upon these actions are a reflection of our nation's ideals. It is foolhardy to believe that the Executive derives its power from these laws and, at the same time, insist that the Executive can act completely unconstrained simply because such action would occur outside of our physical borders.[420] As former British Prime Minister William Pitt said in a speech before the House of Common on November 18, 1783: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."[421]

[420] *See generally supra* Part II.B.2 (discussing the *Eisentrager* opinion); *see also supra* Part III.C (discussing the majority, concurring, and dissenting opinion in *Rasul*). There is no dispute that indefinite detention and total denial of access to an independent tribunal would be unlawful if it occurred within the United States. *See generally* Johnson v. Eisentrager, 339 U.S. 763, 795-96 (1950). While there is no serious argument that nonresident aliens should be afforded the protection of the entire Bill of Rights, it is illogical to believe that they do not have any protections at all against actions by the Executive. *Id.* at 796-97.

[421] JOHN BARTLETT, FAMILIAR QUOTATIONS 412 (Emily Morison Beck ed., Little, Brown, & Company 1980) (1855).

WHY DO SOME AMERICAN COURTS FAIL TO GET IT RIGHT?

Francesco G. Mazzotta†

I. Introduction

Many commentators on the United Nations Convention on Contracts for the Sale of Goods ("CISG" or "Convention")[1] reading the recent decision rendered by the United States District Court for the Northern District of Illinois in *Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG ("RMI")*[2] probably could not believe their eyes. The court, after holding that the CISG would be the substantive law applicable to the dispute, also ruled that "in applying Article 79 of the CISG, the Court will use as a guide caselaw interpreting a similar provision of § 2-615 of the UCC [Uniform Commercial Code]."[3] In reaching this ruling, the court adopted the plaintiff's (Raw Materials, Inc.) contentions that while no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ("UCC") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79.[4] Furthermore, the court stated that "[t]his approach of looking to caselaw interpreting analogous provisions of the UCC has been used by other [American] federal courts,"[5] citing as examples, the *Delchi*[6] and *Chicago Prime Packers*[7] decisions. The court noted that, in any case, the defendant not only failed to dispute this point, but even pointed to case law interpreting the UCC.[8]

The analysis in this article will focus on the court's reasoning in *RMI* and the possible consequences arising therefrom. Based on relevant case law and leading commentaries, one can conclude that the court erred in relying on the UCC to interpret the CISG. In fact, this is a "consummate illustration of a court unwittingly seeing a provision of the Convention through a domestic lens . . . ."[9] This

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1 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980. U.S.C.A. app. at 332-94 (West Supp. 1996), 19 I.L.M. 668 (1980) [hereinafter CISG].

2 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), *available at* http://cisgw3.law.pace.edu/cases/040706u1.html [hereinafter *RMI*].

3 *Id.*

4 *Id.* at *12.

5 *Id.*

6 Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

7 Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html.

8 *RMI*, 2004 U.S. Dist. LEXIS 12510 *13.

9 John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 370 (1998).

article ultimately addresses whether the *RMI* court, notwithstanding the application of a wrong standard, eventually reached a conclusion in line with the CISG rules. It will argue that even if the court ultimately reached such a conclusion, it sets forth a poor example of how courts should deal with CISG cases.

II. The RMI case[10]

A. Facts

Raw Materials, Inc. ("RMI") is an American corporation in the business of purchasing, processing, and converting used railroad rails into new products that are then resold. Manfred Forberich GmbH & Co., KG ("Forberich") is a German limited partnership in the business of selling used railroad rails. On February 7, 2002, Forberich and RMI entered into an agreement whereby Forberich would supply RMI with 15,000-18,000 metric tons of reroll quality Russian railroad rail. The rail was to be loaded and shipped from St. Petersburg, Russia. The contract provided for a June 30, 2002 delivery date, Free On Board to RMI's plant in Chicago, Illinois. It usually takes three to four weeks for cargo to travel from St. Petersburg to Chicago.

In June, Forberich sought an extension of the delivery date, because its supplier, Imperio Trading, defaulted on its contractual obligation to provide rails to Forberich. It seems that the extension was granted, but it was not clear what the new delivery date was, nor whether the goods were to be actually received or simply shipped by the new date. In its motion for summary judgment, RMI argued that the contract would have been fulfilled if Forberich had delivered the goods to any port in the United States by December 31, 2002. It was not disputed that Forberich never delivered the goods to RMI.

Forberich asserted that its failure to deliver was due to the fact that the port of St. Petersburg unexpectedly froze over at the beginning of December 2002. RMI contended that the port did not freeze until mid-December and that, regardless, Forberich was already in breach of contract at that time because it could not have possibly delivered the goods by December 31, 2002, considering the normal three to four week delivery time. However, as noted above, it was not clear whether Forberich had to deliver by December 31, 2002, or merely ship the goods by that date.[11] If Forberich had to deliver by December 31, 2002, Forberich was in breach. If Forberich simply had to load and ship by December 31, Forberich may have had a viable defense.

The parties did not dispute that the port of St. Petersburg does not normally freeze over until late January and, in any event, ships can make it through even when the water is frozen. It seems, however, that the winter of 2002 was more severe than anyone expected. One of Forberich's ships left St. Petersburg on November 20, 2002, but no evidence was offered of any other ship that left St.

[10] *RMI*, 2004 U.S. Dist. LEXIS 12510 at *1-10.

[11] *See* Def.'s Manfred Forberich GmbH & Co.'s Resp. to Raw Material Inc.'s Rule 56.1(a)(3) Statement of Material Facts in Support of Its Mot. for Summ. J. at 3, ¶ 11, *RMI*, 2004 U.S. Dist. LEXIS 12510 (No. 03 C 1154), 2003 WL 23927331.

Petersburg after that day. RMI, however, contended that an experienced shipping merchant should or could have foreseen that such harsh winter conditions would occur in late 2002. On January 10, 2003, "Forberich notified RMI that it was unable to deliver RMI's goods because the port of St. Petersburg . . . had been frozen over since the middle of December 2002."[12]

B. Procedural History

In 2003, RMI sued Forberich alleging breach of contract for its undisputed failure to meet its contractual obligation to deliver used railroad rails. Forberich responded by raising, *inter alia*, a *force majeure* defense. RMI then moved for summary judgment on the breach of contract claim, arguing that it was entitled to summary judgment because the undisputed facts showed that (i) while Forberich "ignored" its contractual obligations with RMI, it nonetheless entered "into at least 14 contracts and shipped over 145,000 metric tons of Russian rail to U.S. customers other than RMI, all the while reaping the benefits of higher prices it charged those other customers for rail that Forberich should have rightfully delivered to RMI,"[13] and that (ii) Forberich's *force majeure* argument based "on the St. Petersburg port freezing in mid-December 2002 strains credulity"[14] because "it hardly could come as a surprise to any experienced shipping merchant (or any grammar school geography student) that the port in St. Petersburg might become icy and frozen in the Russian winter months."[15] Forberich replied arguing that (i) "RMI's reliance on Forberich's other contracts and shipments made to other customers, during 2002 . . . is without merit. These shipments, the last of which was in November 2002, are irrelevant because RMI had agreed to extend the time period for performance under the contract with Forberich until December 31, 2002,"[16]and that (ii) there was sufficient evidence "on Forberich's *force majeure* affirmative defense so that a jury could reasonably find that *force majeure* is a viable defense."[17]

The court noted that although the contract did not provide for a *force majeure* clause, CISG Article 79 would apply to the matter: "A party is not liable for failure to perform any of his obligations if he proves that failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences."[18]

Although it was undisputed that Forberich failed to ship 15,000-18,000 metric tons of rail to RMI, as required by the contract, the court deemed that Forberich's

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[12] *Id.* at 4, ¶ 15.

[13] *See* Pl. Raw Material Inc.'s Mot. for Summ. J. on Count I of Its Am. Compl., 2004 U.S. Dist. LEXIS 12510, (No. 03 C 1154), 2003 WL 23927319.

[14] *Id.*

[15] *Id.*

[16] *See* Def. Manfred Forberich GmbH & Co.'s Resp. to Raw Material Inc.'s Mot. for Summ. J., 2004 U.S. Dist. LEXIS 12510, (No. 03 C 1154), *available at* 2003 WL 23927325.

[17] *Id.*

[18] *RMI*, 2004 U.S. Dist. LEXIS 12510 at *11-2 quoting CISG Article 79.

force majeure argument effectively defied RMI's Motion for Summary Judgment. The court, relying on UCC §2-615, ruled that the defense, in order to be successful, required Forberich to produce evidence showing that;[19] (1) a contingency had occurred; (2) the contingency had made performance impracticable; and (3) the nonoccurrence of that contingency was a basic assumption upon which the contract had been made.[20] As to the first element, the court concluded that Forberich presented evidence that "the frozen port prevented it from meeting this obligation."[21] The court also noted that RMI failed to rebut the evidence by showing that other vessels left the port after November 20, 2002, and to show affirmatively on what terms the parties had agreed to postpone the delivery of the goods.[22] As to the second and third elements of the defense, the court noted that Forberich "presented evidence that the severity of the winter in 2002 and the early onset of the freezing of the port and its consequences were far from ordinary occurrences."[23] Moreover, the court noted that it was undisputed that the St. Petersburg port typically freezes in late January and that Forberich testified that during the winter of 2002 even the icebreakers were unable to break the ice.[24] On the other hand, the court noted that RMI had merely stated (without citation to any supporting records) that "it hardly could come as a surprise to any experienced shipping merchant (or any grammar school geography student) that the port in St. Petersburg might become icy and frozen in the Russian winter months."[25]

Because Forberich was able to show that questions of fact existed as to whether or not the early freezing of the port prevented performance of the contract or whether the freezing of the port was foreseeable, the district court denied RMI's motion for summary judgment.[26]

C. Summary Judgment

Because the *force majeure* defense was raised in the context of a motion for summary judgment, a basic understanding of the summary judgment mechanism is important to fully appreciate the court's decision. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[27]

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[19] As to the burden of proof under Article 79, *see infra* note 123.

[20] U.C.C. § 2-615 (1998). Note that U.C.C. § 2-615 also requires the seller to seasonably notify buyer of delay. However, the parties did not really raise any issue as to the notification requirement.

[21] *RMI*, 2004 U.S. Dist. LEXIS 12510, at *16.

[22] *Id.* at *16-17.

[23] *Id.* at *20.

[24] *Id.*

[25] *Id.*

[26] *Id.* at *21

[27] FED. R. CIV. P. 56(c).

Under this rule, a claimant may move for summary judgment at any time after the expiration of 20 days from the commencement of the action or after being served by the other party with a motion for summary judgment. The defending party may move at any time for summary judgment. Such motions for summary judgment are usually made after adequate time for discovery.[28] "Summary judgment should not be entered 'if reasonable minds could differ as to the import of the evidence.' Yet, an issue is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[29] In other words, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue' for trial," and summary judgment is appropriate.[30] The court must draw all reasonable inferences against the moving party in assessing whether a genuine issue of fact exists.[31] However, the nonmoving party may not simply rest on the allegations in its pleadings, but must designate specific facts based upon personal knowledge or evidence that is otherwise admissible to show that there is a genuine issue for trial.[32]

III. Notes on the consummated American way[33] of resorting to domestic case law for purposes of interpreting "similar" CISG provisions

The practice in American courts of resorting to domestic case law for purposes of interpreting "similar" CISG provisions is troubling. It is particularly difficult to pinpoint the reasons for U.S. courts to adopt this approach.[34] Is it because those American courts are not at ease with international treaties?[35] Is it because it is much easier to deal with something familiar rather than going through the trouble of finding out what foreign courts have said about the issue at trial? Is it

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[28] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

[29] Claude E. Atkins Enter., Inc. v. United States, No. 96-15074, 1997 U.S. App. LEXIS 6393 at *6 (9th Cir. Apr. 2, 1997) (citation omitted).

[30] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[31] *See, e.g.*, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

[32] *See* FED. R. CIV. P. 56(e).

[33] *See* Murray, *supra* note 9, at 370.

[34] *Compare* Genpharm, Inc. v. Pliva-Lachema, No. 03-CV-2835, 2005 U.S. Dist. LEXIS 4225 (E.D.N.Y. Mar. 19, 2005):

> There are only a handful of American cases interpreting the CISG. . .The Second Circuit [*Delchi Carrier*, 71 F.3d 1024 at 1027-28] has recognized that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC"), may also inform a court where the language of the relevant CISG provisions tracks that of the UCC. However, UCC caselaw 'is not per se applicable'". Here, the Court finds that caselaw interpreting contract formation under Article 2 of the UCC is helpful. (internal quotations omitted).

[35] *See* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 280-81 (1999):

> While other reasons may contribute to this lack of awareness [of the CISG in secondary legal sources], the treaty's character under U.S. law as a self-executing treaty is probably the main reason U.S. parties are unaware of its existence. Hence, as it currently exists under U.S. law, the CISG does not bring uniformity to the law of international sales but instead fosters disharmony based on ignorance (footnote omitted).

still the case, as suggested by Professor Murray, that "[r]eflecting on the experience under the CISG, we now face the reality that it suffers from neglect, as well as ignorance and even fear?"[36] Is it only a matter of passive reliance on questionable rulings? What is it that ultimately prevents many U.S. courts from correctly applying the CISG?

There are authors that seem to suggest that, in general, "it is difficult to imagine a [U.S.] court deferring to the decisions of foreign legal systems to interpret a convention of which that court's country is signatory,"[37] especially if the decision comes from, as they seem to suggest, second tier jurisdictions, such as Uganda[38] or Lithuania.

Why should it be "difficult to imagine" an American court considering decisions from foreign legal systems?[39] Arbitral tribunals,[40] and to a lesser extent courts, around the world, do take into consideration foreign decisions in deciding CISG issues. Consider, for example, what courts do in Germany,[41] France,[42]

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[36] *See* Murray, *supra* note 9, at 365.

[37] CLAYTON P. GILLETTE & STEVE D. WALT, SALES LAW – DOMESTIC AND INTERNATIONAL 6 (rev. ed. 2002).

[38] There must be quite a distrust toward Ugandan courts, *see* Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 66 (2000) ("U.S. courts may find that decisions from Germany and the United Kingdom are particularly persuasive, while decisions from Chilean or Ugandan courts may carry less weight."), *see also* Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 304 (2004).

[39] *See generally* Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 709 (N.D. Ill. 2004):

> In light of the Convention's directive to observe the CISG's international character and the need to promote uniformity in its application, [courts should look] to foreign caselaw for guidance in interpreting the relevant provisions of the CISG . . . . Although foreign caselaw is not binding on [courts], it is nonetheless instructive.

Amco Ukrservice & Prompriladamco v. Am. Meter Co., 312 F. Supp. 2d 681, 686-87 (E.D. Pa. 2004); Usinor Industeel v. Leeco Steel Prod., Inc., 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344, 2002 U.S. Dist. LEXIS 5096 at *8 (S.D.N.Y. Mar. 26, 2002); Asante Technologies, Inc., v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001); Medical Marketing Int'l, Inc. v. Internazionale Medico Scientifica, No. 99-0380 SECTION "K"(1), 1999 U.S. Dist. LEXIS 7380 at *6 (E.D. La. May 17, 1999). As to American case law dealing with the CISG, *see generally* Elizabeth D. Lauzon, *Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. 541 (2005). The CISG is an international instrument that might look familiar to U.S. courts. It is not, however, intended to be read through a domestic lens. For an excellent (and critical) review of the American courts' methodology, *see* Harry M. Flechtner, *The CISG in American Courts: The Evolution (and Devolution) of the Methodology of Interpretation, in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS 91 (Franco Ferrari ed., 2005).

[40] *See* Neth. Arb. Inst., No. 2319, Oct. 15, 2003, *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

[41] *See* Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Mar. 2, 2005, VIII ZR 67/04, (F.R.G.) available at http://cisgw3.law.pace.edu/cases/050302g1.html where the Court held the following:

> [t]he principles developed there [domestic decisions] cannot simply be applied to the case at hand, although the factual position - suspicion of foodstuffs in transborder trade being hazardous to health - is similar; that is so because, in interpreting the provisions of CISG, we must consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG). Only insofar as can be assumed that national rules are also recognized internationally - where, however, caution is advised - can they be considered within the framework of the CISG.

Belgium,[43] Switzerland,[44] and Spain.[45] Italian courts have been, particularly in the last few years, the ultimate model for a sound approach in dealing with foreign cases.[46]

While none of the domestic courts of the countries mentioned above are bound by foreign precedent,[47] they recognize foreign precedent and treat it with the respect and consideration it deserves. This is precisely what the United States Supreme Court has stated that American courts should do when interpreting the text of a treaty. Foreign precedents should not simply be considered, but be given "considerable weight."[48] In any event, some commentators argue that even if simply considered, foreign precedents, taken together, constitute the international backdrop against which CISG decisions should be made.[49]

See also Bundesgerichtshof [BGH] [Fed. Ct. of Justice] June 30, 2004, VIII ZR 321/03, (F.R.G.) *available at* http://cisgw3.law.pace.edu/cases/040630g1.html where in its reasoning, the Court acknowledges that:

> [t]he question as to the burden of proof within the framework of Art. 40 CISG has also been the subject of a number of foreign rulings; Arbitral Panel of the Stockholm Chamber of Commerce, decision of 5 June 1998, www.cisg-online.ch 379; Roermond/Netherlands, Arrondissementsrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht] 19 December 1991, CISG-online 29, 900336 (Neth.); ICC International Court of Arbitration, CISG-online 705; Ontario Superior Court of Justice (Canada), IHR 2001, 46.

Bundesgerichtshof [BGH] [Fed. Ct. of Justice], Mar. 24, 1999 VIII ZR 121/98, (F.R.G.).

[42] *See* Cour d'appel [CA] [regional ct. of appeal] Grenoble, Oct. 23, 1996, 94/3859 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/961023f1.html.

[43] *See* Rechtbank van Koophandel [Court of Commerce] Hasselt, Mar. 6, 2002 A.R. 01/2671, (Belg.), *available at* http://www.law.kuleuven.ac.be/ipr/eng/cases/2002-03-06s.html.

[44] *See* Obergericht des Kantons [cantonal ct. of appeal] Luzern, Jan. 8, 1997, 11 95 123/357, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html.

[45] *See* S Audiencia Provincial de Valencia, June 7, 2003, (142/2003) (Spain), *available at* http://cisgw3.law.pace.edu/cases/030607s4.html; *but see* S Juzgado de primera instancia [Court of First Instance] instrucción no. 3 de Tudela, March 29, 2005 (Spain), *available at* http://cisgw3.law.pace.edu/cases/050329s4.html.

[46] *See* Tribunale di Vigevano [District Court Vigevano], 405, 12 July 2000 (Italy), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Tribunale di Padova, 40552, 25 Feb. 2004 (Italy), *available at* http://cisgw3.law.pace.edu/cases/040225i3.html. *See* Italdecor SAS v. Yiu's Industries (H.K.) Ltd., Corte di appello di Milano [Ct. of Appeal, Milan], 790, 20 Mar. 1998 (Italy), *available at* http://cisgw3.law.pace.edu/cases/980320i3.html.

[47] *See Chi. Prime Packers,* 320 F. Supp. 2d at 709; Tribunale di Vigevano, 405, (Italy), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Tribunale di Pavia, Dec. 29, 1999 (Italy), *available at* http://cisgw3.law.pace.edu/cases/991229i3.html. *See also* Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters*?, 17 J.L. & COM 245-261, 260 (1998); DiMatteo, *supra* note 39, at 303 n.11; Joseph Lookofsky, *Digesting CISG Foreign Case Law: How Much Regard Should we Have?*, 8 VINDOBONA J. OF INT'L COM. L. & ARB. 181 (2004); Camilla Baasch Anderseen, *The Uniform International Sales Law and the Global Jurisconsultorium, available at* http://CISG-online.ch/CISG/The_Unifor_International_Sales_Law_And_The_Global_Jurisconsultorium.pdf.

[48] Olympic Airways v. Husain, 540 U.S. 644, 658, (2004) ("When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'") *Id.* (quoting Air France v. Saks, 470 U.S. 392, 404, (1985)).

[49] *See* Professor Kritzer's Comments on *Raw Materials Inc. v. Manfred Forberich*, Feb. 2005, *available at* http://cisgw3.law.edu/cisg/biblio/kritzer3.html (relevant to [Article 79] case law is the rule cited by the Solicitor General of the United States. He quotes the U.S. Supreme Court as follows in his brief in the case of *Zapata Hermanos v. Hearthside Baking*, 540 U.S. 1068 (2003) page 10, "[J]udicial decisions from other countries interpreting a treaty term are 'entitled to considerable weight.'" El Al Israel Airlines Ltd. v. Tsui Yan Tseng, 525 U.S. 155, 176 (1999)); *See also* United States v. Diebold, Inc., 369 U.S. 654 (1962); *See generally* Peter Schlechtriem, *Uniform Sales Law—the Experience with Uniform*

These same commentators also suggest that it would be unlikely for an American court to adopt "an interpretation of a CISG provision favored by a Lithuanian court or a Ugandan court."[50] What is the problem in doing that, if the decision correctly applies the CISG? A correct statement of the law from a Lithuanian or Ugandan court is preferable to a clear misapplication of the CISG by a more "trusted" domestic court.[51] Foreign decisions should be taken into consideration for "the force of the reasoning in the (foreign) opinion and the apparent soundness of the result."[52] Whether "the decision has support in other jurisdictions"[53] is another factor that clearly indicates if the decision is well-reasoned.

However, other factors, such as the prominence of the court,[54] should have only limited relevance.[55] Prominence serves no purpose when it is not accompanied by sound application of the law.[56] Finally, given that prior decisions have persuasive value and are not part of a hierarchical, worldwide CISG court system, prior decisions must be considered for their analysis, not for their chronological properties.[57]

Some commentators[58] complain about access to foreign decisions. This was a major problem in the past and, although the situation has improved greatly, access to foreign decisions may still be a problem today. The United Nations Commission on International Trade Law ("UNCITRAL") introduced the Case Law on UNCITRAL Texts System ("CLOUT") for collecting and disseminating international CISG court decisions and arbitral awards in English. However, not all

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Sales Laws in the Federal Republic of Germany, 2 Juridisk Tidskrift 1-28 (1991/92), *available at* http://cisgw3.law.pace.edu/cisg/biblio/schlech2.html; Supplemental Brief for the Petitioner [Zapata Hermanos Sucesores] on Pet. for a Writ of Cert. to the U.S. Ct. of App. for the Seventh Cir. at 3, Zapata Hermanos Sucesores v. Hearthside Baking Co., *cert. denied* 540 U.S. 1068 (2003) (No-1318) [hereinafter Zapata Supplemental Brief]:

> To 'promote uniformity in [the CISG's] application,' courts *must* be required, at a minimum, to discuss precedents from other nations addressing similar issues. As Justice O'Connor has explained, while foreign decisions 'are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.

(quoting Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law – Key Note Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002)).

50 *See* GILLETTE & WALT, *supra* note 37, at 5.

51 *See* Lookofsky, *supra* note 47, at 187.

52 Lookofsky, *supra* note 47, at 187 (quoting E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 52-57 (3d ed. 1996)).

53 *Id.*

54 *See* Lookofsky, *supra* note 47, at 186.

55 *See* Zapata Supplemental Brief, *supra* note 49, at 3-4:

> The Solicitor General openly defends the Seventh Circuit's disregard of foreign decisions construing Article 74 because 'those decisions were rendered by courts and arbitration panels in only three countries (Germany, Switzerland, and France)' and because 'none was [sic] rendered by the country's highest court'- as if the views of appellate courts and other tribunals in these important signatory nations simply don't count . . . But that is plainly wrong.

(quoting Solicitor General's Brief (footnote omitted)).

56 *See* Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

57 *See* GILLETTE & WALT, *supra* note 37, at 4-5.

58 *Id.*

such decisions are reported in CLOUT.[59] Pace University School of Law compiles a CISG database that includes, among other things, hundreds of English translations and abstracts.[60] UNILEX is another useful and convenient source of CISG information.[61] Fortunately, the number of Internet portals offering information about the CISG is growing rapidly. All of these useful sites offer, free of charge, abstracts, translations, and full texts of CISG decisions.[62]

This is not to say that reliance on domestic cases is *per se* wrong, but rather, that it is incorrect to rely on the UCC's case law to interpret the CISG.[63] In other words, the meaning of the CISG should not be determined by reference to similar domestic legal concepts.[64] It would not be a problem to rely on domestic cases

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[59] UNITED NATIONS, COMM'N ON INT'L TRADE, *User Guide*, U.N. Doc. A/CN.9/SER.C/GUIDE/1/Rev.1 (2000), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V00/507/65/PDF/V0050765.pdf?OpenElement (last visited on Mar. 7, 2005).

[60] For more information, visit http://cisgw3.law.pace.edu. In 1998, the U.S. Ct. of App. for the Eleventh Circuit defined Pace University's CISG database as a "promising source." *See* MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d 1384, 1390 (11th Cir. 1998), *available at* http://cisgw3.law.pace.edu/cases/980629u1.html.

[61] As stated on their home page, UNILEX is "[a] database of international case law . . . on . . . CISG and . . . UNIDROIT . . . the most important international instruments for the regulation of international commercial transactions." *See* UNILEX, http://www.unilex.info/ (follow "About UNILEX" hyperlink). Consider what the court said in Chi. Prime Packers, Inc. v. Northam Food Trading Co., 320 F. Supp. 2d 702, 712 (N.D. Ill. 2004):

> That decision [Fallini Stefano & Co. s.n.c. v. Foodic BV, No. 900336, Arrondissementsrechtbank Roermond, Netherlands (Dec. 19, 1991), UNILEX 1991] and the other foreign decisions cited in this opinion have not been translated into English and, as a result, cannot be cited directly by this court. Instead, this court relies upon the detailed abstracts of those decisions provided by UNILEX, an "intelligent database" of international case law on the CISG.

[62] THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION (Ronald A. Brand, Franco Ferrari & Harry M. Fletchner, eds. 2004); *See also* Lookofsky, *supra* note 47, at 233 warning:

> I would caution courts (and arbitrators), as well as lawyers and other readers, not to rely on the Digest as their sole source of CISG law, since in many, if not most instances—the selected sources in the Digest cannot provide courts and arbitrators (or anyone else) with a balanced and realistic picture of CISG law.

[63] *See, e.g.*, *MCC-Marble Ceramic Ctr.*, 144 F.3d at 1391 (11th Cir. 1998):

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply . . . Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

See Caterpillar, Inc. v. Usinor Industeel, (U.S.A.), Inc., No. 04 C 2474, (N.D. Ill. Mar. 30, 2005), *available at* http://cisgw3.law.pace.edu/cases/050330u1.html, (completely ignoring foreign case law dealing with promissory estoppel). It is very likely that the court decided that foreign law did not apply because it merely relied on the American Law Reports, which limits its collection of cases interpreting the CISG to only U.S. cases. Again, some U.S. courts believe that only American decisions count for purposes of determining the meaning of the CISG.

[64] *See, e.g.*, Kritzer, *supra* note 49; Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction on Price Under Article 50*, 14 J.L. & COM. 153, 176 (1995):

> [A]lthough knowledge of the Convention and its significance for international transactions continues to grow, U.S. courts still sometimes fail to appreciate the changes it works. To comprehend those changes, judges must transcend their usual perspective shaped by familiar domestic

that correctly apply the relevant CISG provisions, as long as foreign decisions are also taken into consideration.[65] It is a problem, however, to rely on domestic CISG case law which clearly misapplies the CISG.

Therefore, resorting to domestic law for purposes of interpreting the CISG should be limited to those situations indicated by CISG Article 7(2), keeping in mind CISG Article 7(1).[66] Professor Honnold reminds us that:

> Article 7(2) permits recourse to "the law applicable by virtue of the rules of private international law" only as a last resort - *i.e.*, when questions are "not expressly settled" by the Convention and cannot be "settled in conformity with the general principles on which it is based." The fact that a provision of the Convention presents problems of application does not authorize recourse to some one system of domestic law since this would undermine the Convention's objective "to promote uniformity in its application." (Art. 7(1)).[67]

So, why do some American courts consistently neglect foreign case law? It would be one thing if the American decisions explained their refusal to consider foreign court decisions on grounds that those courts did not correctly interpret and apply the CISG.[68] Unfortunately, this is not the case. There is reason to believe that the answer is normally a matter of mere administrative convenience. After all, why waste the court's time and resources in finding out what the CISG really entails and requires, given that some American courts and commentators plainly state that the CISG is similar to the UCC?[69]

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sales concepts. Only that will satisfy the mandate of Article 7(1) - the promotion of uniformity in the application of CISG.

But see Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995), *available at* http://cisgw3.law.pace.edu/cases/951206u1.html.

[65] An ideal approach would be a recent Italian decision: Tribunale di Padova, 31 Mar. 2004, 40466, (Italy) *available at* http://cisgw3.law.pace.edu/cases/040331i3.html. *See also Chi. Prime Packers,* 320 F. Supp. 2d at 702. (holding that in any case, a court's reliance on its own domestic CISG's case law should not be used to elevate domestic practices to international ones). *See* Clayton P. Gillette, *The Empirical and Theoretical Underpinnings of the Law Merchant: The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 171 (2004).

[66] CISG, Article 7:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

[67] *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 429 (3d ed. 1999).

[68] *Id.* Similarly, *see* Zapata Supplemental Brief, *supra* note 49, at 3:

While U.S. courts may not be bound by foreign decisions, U.S. courts must at least be required to explain why they are rejecting foreign precedents when they choose to do so. Without such dialogue, it will be impossible to foster the sort of 'uniform interpretation' of the CISG that Article 7 requires.

[69] Although not expressly mentioned by any U.S. court, another explanation of why American courts do not rely on foreign decisions could be that those decisions are not formally published according to U.S. standards. Thus, foreign decisions have no precedential value and, in some circuits, it is a violation

The American CISG decisions where case law from other jurisdictions is neglected, follow the same path first established by the court in *Delchi*. These decisions first, passively recite that American cases applying the CISG are "scant," are only a "handful" in number, or "sparse,"[70] suggesting that only American case law is relevant; then, state that it is appropriate to resort to domestic case law to interpret similar CISG provisions,[71] suggesting that the two sets of rules are similar and, therefore, their case law is freely interchangeable. Both assumptions patently display disregard of the CISG, particularly of Article 7, and of hundreds of commentaries clearly indicating that courts should not read the CISG through a "domestic lens."[72] Moreover, both assumptions clearly show that many American courts are unwilling to critically read the source of all mistakes in approaching the CISG, probably because they mistakenly believe its reasoning is "good law."

However, a few American courts have been able to read the *Delchi* decision critically and free themselves from the convenient approach created by the *Delchi* court. Consider, for example, what the court stated in *Chicago Prime Packers*:

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of the court rules to even cite them. I believe, however, that this approach is a hold over from when "unpublished" meant that the case was virtually unavailable to the average lawyer. With the advent of the Internet, the situation has changed, but many of the court rules have not. Although, it is quite unlikely that courts are not relying on foreign decisions because of that, it is still a possible explanation. *See* Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed. Appx. 687 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html ("Unpublished opinions are not binding precedent in this circuit. *See* Local Rule 36(c).").

[70] *See, e.g.*, Helen Kaminski v. Marketing Australian Products, No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630 at *8 (S.D.N.Y. July 21, 1997), *available at* http://cisgw3.law.pace.edu/cases/970721u1.html ("there is little to no case law on the CISG in general, and none determining whether a distributor agreement falls within the ambit of the CISG"); Mitchell Aircraft Spares v. European Aircraft Serv. AB, 23 F. Supp. 2d 915, 919 (N.D. Ill. 1998), *available at* http://cisgw3.law.pace.edu/cases/981027u1.html:

> This court was unable to find any case from the Seventh Circuit or a district court in the Seventh Circuit which has addressed the issue of whether a court can consider parol evidence in a contract dispute governed by the CISG. This is not surprising because 'there is virtually no case law under the Convention.'

(citing Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995)); Calzaturificio Claudia s.n.c. v. Olivieri Footwear, No. 96 Civ. 8052 (HB)(THK), 1998 U.S. Dist. LEXIS 4586 at *13 (S.D.N.Y Apr. 6, 1998), *available at* http://cisgw3.law.pace.edu/cases/980406u1.html ("The case law interpreting and applying the CISG is sparse") (citing Helen Kaminski, No. M-47 (DLC), 1997 U.S. Dist. LEXIS 10630and Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992), *available at* http://cisgw3.law.pace.edu/cases/920414u1.html); Supermicro Computer Inc. v. Digitechnic, 145 F. Supp. 2d 1147, 1151 (N.D. Cal. 2001), *available at* http://cisgw3.law.pace.edu/cases/010130u1.htm: "The case law interpreting and applying the CISG is sparse," citing *Delch, 71* F. 3d 1024; *Schmitz-Werke*, 37 Fed. Appx. at 691 ("Case law interpreting the CISG is rather sparse") citing *Calzaturificio Claudia*; Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., No. 01 C 5938, 2003 U.S. Dist. LEXIS 1306 at *7 (N.D. Ill. Jan. 29, 2003), *available at* http://cisgw3.law.pace.edu/cases/030129u1.html ("As Judge Lindberg pointed out, "federal caselaw interpreting and applying the CISG is scant.'") (citing Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002), *available at* http://cisgw3.law.pace.edu/cases/020328u1.html); Genpharm Inc. v. Pliva-Lachema a.s., 361 F. Supp. 2d 49, 54 (E.D.N.Y. 2005), *available at* http://cisgw3.law.pace.edu/cases/050319u1.html. ("There are only a handful of American cases interpreting the CISG").

[71] *See infra* notes 99, 100.

[72] *See* Lauzon, *supra* note 39 and Flechtner, *supra* note 39.

> In light of the Convention's directive to observe the CISG's international character and the need to promote uniformity in its application, this court has looked to foreign case law for guidance in interpreting the relevant provisions of the CISG in this case. Although foreign caselaw is not binding on this court, it is nonetheless instructive in deciding the issues presented here.[73]

Why then did the *RMI* court resort to domestic case law to interpret the CISG? We can exclude one possible explanation: the *RMI* court was not acting under the assumption that U.S. law is superior to foreign sources.[74] Instead, the court's reliance on the UCC to determine the meaning of the CISG is likely due to the court's desire to decide the case as quickly as possible, carefully avoiding entering any unfamiliar field that would require additional court time or resources. However, by doing that, while the court may not have wasted its time and resources in arriving at the decision under proper standards, it exposed itself to valid criticism.[75]

The same kind of critique, of course, should equally apply to the attorneys who dealt with the case.[76] In *RMI,* the court stated that Forberich did not object to the use of UCC § 2-615 case law to interpret CISG Article 79. Similarly, it seems unlikely that RMI strategically decided not to raise the issue whether Forberich had satisfied the requirements set forth by CISG Article 79.[77]

Apparently, however, some American commentators seem to suggest that after all, the *RMI* decision does not deserve so much criticism. Consider the following:

> The Raw Materials case has been criticized [footnote omitted]. This criticism is somewhat unfair. The court's decision was a summary judgment motion. When important issues, such as the very terms of the contract delivery, remain open, there was no need to engage in exhaustive scholarly analysis. Certainly the court would have been wise to apply the language of Article 79. Nonetheless, a court with a heavy docket must manage its resources. Arguably the result would not likely change regard-

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[73] Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122, 709 n.11 (N.D. Ill. May 25, 2003); *see also* Lauzon, *supra* note 160 and Flechtner, *supra* note 39.

[74] Gillette, *supra* note 65, at 170 stating ("One need not attribute willfulness or jingoism to judges who exhibit this bias.").

[75] Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25Years?*, 9 VINDOBONA J. OF INT'L COM. L. & ARB. 199, 202 (2005).

[76] *Id.* at 208.

[77] Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 147-87 (Cornell Int'l L.J. eds. 1995). Ten years later, Professor Kritzer must still be right:

> Despite this attention [to the CISG], there are many attorneys are not aware of the CISG. A still larger number do not have experience in researching the CISG and are unfamiliar with its interpretation and application in the international setting for which it is designed. As a consequence, many lawyers faced with international commercial law problems are not prepared to properly counsel their clients. In addition, some courts have applied the CISG as though it were domestic law, thereby undermining its value as uniform international law.

less of whether the CISG or the UCC applied: questions of fact precluded summary judgment.[78]

If the CISG governs a dispute, then the CISG applies to the dispute regardless of the domestic procedural instance which gave rise to the CISG issue and regardless of the court's docket. To my knowledge, there is nothing in the CISG that would allow courts to disregard the Convention on such grounds. The *RMI* court was not required to entertain any scholarly analysis. The court was merely required to apply the appropriate standard. It is more than an academic issue; it is about a clear and extensive misapplication of the CISG. It is also about a bad precedent that other American courts may be tempted to follow and that could discredit the good work done by other American courts. The mere fact that the result might be similar under both the CISG and the UCC does not redeem either the decision or the court from its faulty approach to the CISG.

This article is not meant to deal with the general theme of judicial interpretation of international law, but merely with the reprehensible *RMI* decision. But, one could ask, "Why it is so important to consider CISG precedents?" One easy answer could be that the Convention says so and that the United States signed it. However, if the court stumbles to the right decision, why should we be so concerned about the methodology? Because it is the courts' duty to have regard of the Convention's international character and the need for uniformity. The *RMI* decision is questionable because it did not have regard for prior foreign decisions and mostly because it did approach the CISG not through the CISG, but through the UCC.

While researching, accessing and fully understanding a foreign decision may require extra time and resources—which in no event justify foregoing them, comprehending the CISG is a professional obligation for both courts and lawyers.

It is a reality that a domestic judge engaged in the interpretation of an international text may tend, consciously or unconsciously, to rely on his/her experiences and sense of the domestic version of the legal issue, whatever formal methodology he/she might espouse in the text of the opinion. It is a complication that renders Professor Honnold's call for an autonomous, independent interpretation problematic. But problematic as it might look and be, it is our duty to counter the overdeveloped homeward biased attitude of certain domestic courts in relation to CISG interpretation.

Uniformity in law, whether it refers to results or methodology or both, has an inescapable, illusory quality. For example, while we might all agree on the abstract understandings of what "impediment" is supposed to be under Article 79, the real question always becomes whether the particular narrative in the case is a story of an "impediment." The inescapable discretion that resides within that act of interpretation severely limits any imagined meaningful uniformity.

Interpreting and applying the Convention with regard to its international character is an obligation arising from the Convention, but it is also a matter of respect for the other "players" and a way to show our commitment to the success of

[78] VED P. NANDA & DAVID K. PANSIUS, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS 12 34 (2d. 2005).

the CISG. The very possibility of international law depends on the willingness of autonomous courts to cede a degree of authority. It may be that, with regard to the CISG, the reality is that the authority ceded is going to be less than that which the Convention pretends to demand. But the willingness of many courts to actively and correctly apply the Convention may depend in part on the formal signs of respects that other courts give to the Convention.

The mere fact that the *RMI* court may have ultimately reached the correct result does not help it. The decision is a disgraceful display of contempt for the Convention, its interpretative methodology and for the courts of the other CISG states.

IV. Analysis of the *RMI* decision

The *RMI* court's reasoning relies on several grounds, which as we will see, are all questionable. First, the *RMI* court said, "No American court has specifically interpreted or applied Article 79 of the CISG."[79] Second, the court stated "caselaw interpreting the UCC's provisions on excuse provides guidance for interpreting the CISG's excuse provision."[80] Third, the court noted that " [caselaw interpreting the UCC's provisions on excuse] contains similar requirements as those set forth in Article 79."[81] Lastly, the court said "Forberich does not dispute that this is proper and, in fact, also points to caselaw interpreting the UCC."[82]

A. No American Court Has Specifically Interpreted or Applied Article 79 of the CISG[83]

The mere fact that there are no domestic decisions dealing with the CISG on this specific issue should not prevent the court from doing the "right thing:" to

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[79] Raw Materials Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 at *12 (N.D. Ill. July 7, 2004), (quoting the Pl.'s pleadings).

[80] *Id.*

[81] *Id.*

[82] *Id.* at *13.

[83] U.S. Courts are very familiar with such an attitude, as pointed out by the *RMI* court. In addition to those cases referred to by the court (Delchi v. Rotorex, 71 F.3d 1024 (2d Cir. 1995) and Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html), *see generally*, Helen Kaminski v. Marketing Australian Prods., No. M-47 (DLC), 1997 U.S. Dist Lexis 4586 (S.D.N.Y. July 21, 1997), *available at* http://cisgw3.law.pace.edu/cases/970721u1.html; Kahn Lucas Lancaster v. Lark Int'l Ltd., No. 95 Civ. 10506 (DLC), 1997 U.S. Dist. LEXIS 11916, at *16 (S.D.N.Y. Aug. 6, 1997), *available at* http://cisgw3.law.pace.edu/cases/970806u1.html; Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 Fed. App. 687, 691 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html. For other decisions whereby courts similarly neglected CISG's case law resorting instead to the domestic law, see two Canadian examples: Kellogg Brown & Root, Inc. v. Aerotech Herman Nelson Inc. et al., [2004] 238 D.L.R. (4th) 594 (Can.), *available at* http://cisgw3.law.pace.edu/cases/040504c4.html, and Nova Tool & Mold Inc. v. London Indus., Inc., Windsor 97-GD-4131 1, Dec. 16, 1998 (Can.), *available at* http://cisgw3.law.pace.edu/cases/981216c4.html. For a critical assessment of the Canadians courts' treatment of the CISG, *see* Peter J. Mazzacano, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada*, PACE REV. OF THE CISG (forthcoming 2004-2005), *available at* http://cisgw3.law.pace.edu/cisg/biblio/mazzacano.html#18; and Jacob S. Ziegel, *Canada's First Decision on the International Sales Convention*, 32 CANADIAN BUS. L.J. 313, 325 (1999). For an Australian 'bad' example, *see* Summit Chemicals Pty. Ltd.v. Vetrotex Espana S.A., (2004) 2003

read and correctly apply the CISG provisions dealing with the interpretation of the Convention. This statement by the *RMI* court may lead one to believe that it lacked awareness of the mechanics of the CISG text as well as of the hundreds of commentaries on the CISG (many of them freely accessible). However, this statement by the court in *RMI* is truly only a matter of its administrative convenience.

The *RMI* court had the opportunity to avoid the same mistake previously made by the *Delchi* court. Unfortunately, not only did the court fail to rectify this error, it reiterated the mistakes in the *Delchi* opinion by misapplying the CISG. Several CISG commentators concluded that the *Delchi* court's approach is erroneous.[84] The *RMI* court passively accepted and relied on the approach taken by the *Delchi* without bothering to get into a more critical reading of the decision.

The *Delchi* court first stated that in the interpretation of the CISG provisions, due regard should be given to the international character of the Convention, to the need to promote uniformity in its application, and to the observance of good faith in international trade.[85] However, it did not follow through on its own statements when it later stated, among other questionable rulings,[86] that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code may. . . inform a court where the language of the relevant CISG provisions tracks that of the UCC."[87] The *RMI* court applied a very similar approach to the *Delchi* court. The *RMI* court first stated that: (i) there is no American case law on Article 79 and that (ii) it is appropriate to rely on UCC case law to interpret the CISG,

WASC 182 (Supreme Court of Western Australia), *available at* http://cisgw3.law.pace.edu/cases/040527a2.html; *see also* Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods (CISG)—A Leap Forward Towards Uunified International Sales Laws*, 12 PACE INT'L L. REV. 79 (2000) (commenting on the Australian courts' approach).

[84] *See, e.g.*, V. Susanne Cook, *The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 260-63 (1997); Jeffrey R. Hartwig, *Schmitz-Werke GmbH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & COM. 77, 78 (2003) ("As a result, Delchi Carrier has become questionable precedent on which to rely. [footnote omitted] Schmitz-Werke's use of this precedent appears only to perpetuate a flawed interpretive principle"). *See generally* John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 115-265 (Pace Int'l L. Rev. eds. 2000-2001), *available at* http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html. *See also, e.g.*, Murray, *supra* note 9, at 370; Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT'L BUS. L. 618,668 (1995); Zeller, *supra* note 83, at 88; Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & COM. 221, 235-36 (2000); Bailey, *supra* note 35, at 288 ("The Second Circuit's decision in Delchi Carrier SPA v. Rotorex Corp. is an excellent example of the errors that result from the failure to interpret and apply the Convention as an international, rather than a domestic, body of law" (footnote omitted)).

[85] Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995).

[86] *See* Felemegas, *supra* note 84, at n. 86:

> The Delchi decision has received extensive and strong, but valid criticism regarding the court's failure to grasp the Convention's spirit of internationalism. This is evident in the methodology it followed in resolving most of the issues at hand, from the applicability of CISG and its discussion of concepts of 'fundamental breach' and 'foreseeability,' to its damages and pre-judgment interest award [footnotes omitted].

See also Bailey, *supra* note 35, at 289.

[87] *See Delchi*, 71 F.3d at 1028.

because the excuse requirements under the CISG are similar to the UCC.[88] How useful can it be to adopt the reasoning of *Delchi*, which unleashed hundreds of pages of contemptuous comments? Would it not be better to do what the decision in *Delchi* preached (UCC case law is not *per se* applicable) rather than what the court actually did (relied on UCC case law since the language of the CISG tracks that of the UCC)? Such an approach would finally redeem the American courts from much of the criticism raised by many commentators.[89]

The *RMI* court, although it cited the *Chicago Prime Packers* for the purposes of reinforcing its approach with regard to UCC case law, it neglected to take into consideration how the *Chicago Prime Packers* court confronted the absence of American case law concerning the CISG. In *Chicago Prime Packers,* the court did not follow the practice set forth by the *Delchi* court, but instead it followed what the *Delchi* court preached.[90] A more careful reading of the *Chicago Prime Packers* decision shows that it sets forth a commendable example of how American courts should deal with foreign decisions. Seven foreign decisions are considered by the *Chicago Prime Packers* court in dealing with the issues at trial.[91] For this reason it has been noted that:

> In *Chicago Prime Packers, Inc.* the Court promotes uniformity in the application of the CISG by looking to more foreign cases than any other available secondary authority. In fact, this case cites more foreign cases than any other previous American decision on the CISG. The decision represents great progress in the development of the Convention.[92]

Finally, the *Chicago Prime Packers* court cites *Usinor Industeel v. Leeco Steel Products, Inc.*,[93] which stated that "federal caselaw interpreting and applying the CISG is scant,"[94] but also noted that "[w]hile this case [an Australian case] is far in distance from the present jurisdiction, commentators on the CISG have noted that courts should consider the decisions issued by foreign courts on the CISG."[95] Thus, the cases cited by the *RMI* court in support of the ruling concerning the use of domestic law for purposes of interpreting the CISG quite clearly are not in accord with the actual outcome.

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[88] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), at *13.

[89] *See, e.g.*, Flechtner, *supra* note 64.

[90] *Delchi*, 71 F.3d at 1028. The Court stated that "[t]he Convention directs that its interpretation be informed by its international character and . . . the need to promote uniformity in its application and the observance of good faith in international trade." (internal quotations omitted).

[91] *See* Chi. Prime Packers, Inc. v. Northam Food Trading Co., 01 C 4447, 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. May 25, 2003), *available at* http://cisgw3.law.pace.edu/cases/030529u1.html

[92] *See* Annabel Teiling, *CISG: U.S. Court Relies on Foreign Case Law and the Internet*, Uniform Law Review/Revue de droit uniforme 431-435 (2004), *available at* http://cisgw3.law.pace.edu/cisg/biblio/teiling.html.

[93] Usinor Industeel v. Leeco Steel Prods., Inc., 209 F.Supp.2d 880 (N.D.Ill. 2002).

[94] *Id.* at 884.

[95] *Id.* at 886.

B. Caselaw Interpreting the UCC's Provisions on Excuse Provides Guidance for Interpreting the CISG's Excuse Provision[96]

Once again, this approach directly contradicts the plain language of CISG Article 7(1).[97] The approach is erroneous for two reasons: First, the CISG in general should be interpreted "autonomously";[98] second, the excuse provision under the UCC is quite different from CISG Article 79, both in terms of its requirements and its consequences. This section discusses the first of the mistakes made by the *RMI* court. The following sections will discuss the second.

The following material contains extensive quotations from several authors. The quoted material is self-explanatory and does not require elaboration on what the cited authors say. The goal is to provide some evidence that it is not accurate to imply that U.S. courts resort to UCC case law because it is difficult to access CISG material and that U.S. courts should not rely on the UCC at all in interpreting CISG provisions. The following material is readily available, whether through databases such as Westlaw or Lexis or, free of charge, from the Pace University database, to judges and practitioners who really want to know more about the CISG. The approach taken by the *RMI* court is so disrespectful to the CISG and the other courts that directly quote well-known legal authorities, best highlight the court's missteps. In essence, what the sources herein cited all say is the very same thing, in different ways: the CISG should not be construed and interpreted through domestic concepts. With this in mind, we can now read what these authors have to say about the CISG-UCC relationship.

Professor Ferrari is very clear about the dangers that may result from reading the CISG through the UCC:

Although the UCC has greatly influenced the CISG, it is impossible and even perilous to assert that the aforementioned sets of rules are similar in content, or, even worse, that they "are sufficiently compatible to support claims of overall consistency." An awareness of the UCC's influence might aid in understanding the CISG, especially with respect to issues that the Convention's legislative history demonstrates as influential. It is, however, impermissible and dangerous to assert that the concepts of the CISG and UCC are analogous. The comparison is

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[96] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004), at *12.

[97] Listing commentaries that reach the very same conclusion would be too extensive to report. *See, e.g.*, HONNOLD, *supra* note 67, at § 87("[T]he reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character"); *see also* John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 114-121 (2003).

[98] Consider, for example, Richteramt Laufen des Kantons Berne [RA] [District Court], May 7, 1993 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/930507s1.html ("[T]he CISG requires uniform interpretation on grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG). Therefore, it is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum"); Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Apr. 3, 1996 VIII ZR 51/95, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960403g1.html ("The CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)"); Handelsgericht des Kantons Aargau, [Commercial Court] Dec. 19, 1997, OR.97.00056 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/971219s1.html.

dangerous because it makes one believe – erroneously – that the concepts of the CISG correspond to those of the UCC and can therefore be interpreted in light of the UCC. But this is impermissible since a similar approach conflicts with the principle, expressly laid down in Article 7(1) of the CISG, that the CISG and its concepts must be interpreted in light of its international character and the need to promote uniformity on its application [footnotes omitted].[99]

Similar concerns were recently reiterated by the American Law Institute and National Conference of Commissioners on Uniform State Laws in a note on Amended UCC Article 2:

> When parties enter into an agreement for the international sale of goods, because the United States is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Convention may be the applicable law. Since many of the provisions of the CISG appear similar to provisions of Article 2, the committee drafting the amendments considered making references in the Official Comments to provisions in the CISG. However, upon reflection, it was decided that *this would not be done because the inclusion of such references might suggest a greater similarity between Article 2 and the CISG than in fact exists* (emphasis added).[100]

The note also explains:

> The principle concern was the possibility of an inappropriate use of cases decided under one law to interpret provisions of the other law. This type of interpretation is contrary to the mandate of both the Uniform Commercial Code and the *CISG* (emphasis added). Specifically, Section 1-103(b) of the Code directs courts to interpret it in light of its common-law history. This was an underlying principle in original Article 2, and these amendments do not change this in any way. On the other hand, the *CISG* specifically directs courts to interpret its provisions in light of international practice with the goal of achieving international uniformity. See

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[99] Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021 (1996). *See also* Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 9.02 (Nina M. Galston & Hans Smit eds., Juris Pub. 1984), *available at* http://www.cisg.law.pace.edu/cisg/biblio/ziegel6.html:

> The general drafting style of the Vienna provisions follows the familiar civilian models in its succinctness and brevity, and in its emphasis on broad statements of principle and general lack of situational settings. To those familiar with the baroque style of Article 2 of the Uniform Commercial Code the contrast will be striking.

Louis F. Del Duca & Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders*, 29 UCC L.J. 99, 157 (1996), *available at* http://www.cisg.law.pace.edu/cisg/biblio/delduca.html ("Many similarities between the CISG and the UCC are readily observable . . . Nonetheless, serious pitfalls await those who assume that the differences between the CISG and otherwise applicable law, such as the United States' UCC, are of no moment.").

[100] AMERICAN L. INST. & NAT'L CONFERENCE OF COMM'R ON UNIFORM STATE LAWS, UCC § ART. 2, NOTE, AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 2. (2004).

> *CISG* art. 7. This approach specifically eschews the use of domestic law, such as Article 2, as a basis for interpretation.[101]

It seems clear, therefore, that many secondary legal authorities expressly warn against the dangers of relying on UCC case law and, in general, on UCC concepts, for purposes of construing and applying the CISG.

C. Caselaw Interpreting the UCC's Provisions on Excuse Contains Similar Requirements as Those Set Forth in Article 79[102]

A better, more informed approach to Article 79 suggests quite the opposite conclusion from that reached by the *RMI* court. With reference to Article 79, several authors have noted that "interpretation of the concept 'impediments' in Article 79 ought not be guided exclusively by (sometimes too narrow) notions of Anglo-American law."[103]

To better illustrate that the two provisions are simply not similar, it is useful to first read the actual language of Article 79 and then compare it with UCC § 2-615. Article 79 provides that:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
> (a) he is exempt under the preceding paragraph; and
> (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who

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101 *Id. See also* Flechtner, *supra* note 64. *See* Calzaturificio Claudia s.n.c. v. Olivieri Footwear, Ltd., 96 Civ. 8052 (HB)(THK), 1998 U.S. Dist. LEXIS 4586 at *14 (S.D.N.Y Apr. 6, 1998): ("Where controlling provisions are inconsistent, it would be inappropriate to apply UCC caselaw in construing contracts under the CISG.").

102 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *12 (N.D. Ill. July 6, 2004).

103 *See* HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 32 (2d ed. 2003); *see also* FRITZ ENDERLEIN & DEITRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 319 (1992), *available at* http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html#art79:

> It is in our view important to stress that the Convention has developed a *concept of its own in regard to impediments*, which cannot be directly traced back to any national law. This saves from borrowing from a domestic law in interpretation, which could be very misleading, especially when it comes to one's own domestic law.

Id.

> fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.[104]

UCC § 2-615, on the other hand, provides as follows:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[105]

Even a very quick reading of the provisions reveals that the two provisions are not similar at all. In this regard, in comparing them, consider Professor Honnold's comments on Article 79. He expressly warns against the temptation of reading Article 79 through domestic concepts. Article 79's requirements, although resembling domestic concepts, are to be read in the context of the CISG, not through domestic law. It is not only that Article 79 has its own requirements, but also that the CISG expressly provides for the interpreter to read and apply the CISG in light of the CISG's principles.

> Domestic rules in this area often bear a family resemblance to each other and to Article 79 of the Convention but a penetrating study by Professor Nicholas exposes the hazards of relying on "superficial harmony which merely mutes a deeper discord" [footnote omitted]. The Convention (Art. 7) enjoins us to interpret its provisions "with regard for its international character and . . . the need to promote uniformity in its application." This goal would be served if we could (as by a draft from Lethe) purge our

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[104] CISG Article 79, 52 Fed. Reg. 6262-80, 7737 (1987), *available at* http://www.cisg.law.pace.edu/cisg/text/e-text-79.html.

[105] U.C.C. § 2-615 (1998).

> minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade. In the absence of such innocence, the preconceptions based on domestic law may be minimized by close attention to the differences between domestic law and the Convention.[106]

Interestingly, even the UNCITRAL recently addressed the problem of reading the CISG relying on domestic concepts, with an express reference to Article 79. The wording of Article 79 deliberately avoided referencing concepts that might induce interpreters to apply their own set of legal concepts. Thus, in approaching Article 79, judges and practitioners should bear in mind that:

> Article 79 of CISG offers an example of this drafting style [aimed at avoiding the use of legal concepts typical of a legal tradition], as it does not refer to terms typical of the various domestic systems such as "hardship", "force majeure" or "Acts of God", but provides instead a factual description of the circumstances that may excuse failure to perform. The choice of breaking down sophisticated legal concepts, often bearing elaborate domestic interpretative records, into their factual components is evident in the replacement of the term "delivery of goods" with a set of provisions relating to performance and passing of risk. Similarly, the use of the notion of "avoidance of the contract" in the Convention introduces a legal concept that may overlap on a number of well-known domestic concepts and calls for autonomous and independent interpretation.[107]

Fortunately, the scope and the content of Article 79 is described in several authoritative writings, and is easily accessible by everyone, even those with little familiarity of the American legal system. In general, the main differences between Article 79 and UCC § 2-615 can be summarized as follows:

> [Article 79] differs in several ways from the approach of the Uniform Commercial Code. UCC § 2-615 provides excuse only for the seller, and only as to two aspects of performance: "delay in delivery" and "non-delivery" [footnote omitted]. Under CISG Article 79(1), on the other hand, *either* party may be excused from liability for damages, 'for failure to perform any of his obligations.' Thus, while the threshold test for excuse under the CISG may be stricter than that found in the UCC, its benefits are available in a wider set of circumstances. At the same time, however, paragraph (5) of Article 79 limits these benefits to escaping the obligation to pay damages and does not prevent the other party 'from exercising any [other] right' available under the CISG.[108]

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106 HONNOLD, *supra* note 67, at § 425; *see also* Peter Schlechtriem, *Interpretation, Gap-filling and Further Development of the U.N. Sales Convention*, 16 PACE INT'L L. REV. 279, 289 (2004).

107 U.N. Comm'n on Int'l Trade Law, *Introduction to the Digest of Case Law on the United Nations Sales Convention, Note by the Secretariat*, ¶ 5, U.N. Doc. A/CN.9/562 (Jun. 9, 2004), *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

108 Ronald A. Brand, *Article 79 and a Transaction Test Analysis of the CISG*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION

In particular, compare the consequences of the occurrence of the contingency under the two sets of rules. "UCC § 2-615 operates to make the relevant non-performance 'not a breach.' Thus, it provides full excuse. On the contrary, CISG Article 79 provides relief only from the obligation to pay damages. Other obligations remain intact [footnote omitted]."[109]

D. Forberich Does Not Dispute that this is Proper and, in Fact Points to Caselaw Interpreting the UCC[110]

It is very interesting that the *RMI* court specifically includes in its reasoning for justifying its reliance on UCC case law the fact that Forberich did not complain about the court's approach. The *RMI* court noted that (1) Forberich had not disputed the mistake made by the court in relying on UCC's case law, and (2) that Forberich itself had referred to UCC case law.[111] This final piece of justification is debatable as well. The mere fact that the party, mistakenly or strategically, did not raise the issue, does not shield the court from criticism for its faulty approach.

One final comment: in line with the erroneous approach taken, the *RMI* court even cites a case from the Louisiana Court of Appeals dealing with the freezing of the Mississippi River.[112] In order to appreciate the seriousness of the questionable reference made by the court, one should consider: (1) the Louisiana Court of Appeals is a state court that applied domestic state law, not the CISG; (2) Louisiana has not even adopted UCC Article 2, which means that Louisiana case law on impracticability may be different from UCC Article 2 case law; and (3) the Louisiana Appellate Court was called to interpret a contractual *force majeure* clause.

V. What the Court Should Have Done

The *RMI* court should have read Article 79. Although Article 79 may not be the best example of clarity,[113] a court may not simply ignore it and apply domestic concepts to CISG provisions, unless the requirements set forth in Article 7 are met.[114]

CISG Article 7(1) provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in

392-407, 393 (Ronald A. Brand, Franco Ferrari, & Harry Flechtner eds., 2004); *see also* HONNOLD, *supra* note 67, at § 423.4 et seq.

[109] *See* Brand, *supra* note 108, at 398; *see also* BERNSTEIN & LOOKOFSKY, *supra* note 103, at 138 nn. 149-50.

[110] Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

[111] *Id.*

[112] *Id.* at *21 (citing Louis Dreyfus Corp. v. Cont'l Grain Co., 395 So.2d 442 (La. Ct. App. 1981)).

[113] *See* HONNOLD, *supra* note 67, at § 432.1; *see also* Brand, *supra* note 108, at 394 (citing JACOB S. ZIEGEL & CLAUDE SAMSON, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 150-151 (1981)).

[114] HONNOLD, *supra* note 67, at § 429.

its application and the observance of good faith in international trade."[115] The provision "amounts to a (public international law) command to all Contracting States and their courts: you shall have regard to the character of the treaty, and you shall undertake an independent (autonomous) interpretation."[116] In order to comply with the requirements of CISG Article 7(1), a court should interpret the CISG autonomously, which means that a court should consider the text of the law, legislative history,[117] scholarly writings,[118] and case law[119] together in making its ruling. Professor Honnold explains this duty as follows:

> Consistent with this basic obligation of fidelity, the Convention's general rules for a diverse, complex and developing field should not be applied narrowly but should be given full effect to achieve their underlying purpose as shown by the structure of the Convention and its legislative history. [footnote omitted] At this point several of Article 7's rules of interpretation converge: (1) Regard for the Convention's 'international character' requires a sensitive response to the purposes of the Convention in the light of its legislative history rather than the preconceptions of domestic law; (2) Response to the 'need to promote *uniformity* in . . . *application*'", which calls for consideration of interpretations developed in other countries through adjudication *(jurisprudence)* and scholarly writing *(doctrine)*; (3) Regard for "the observance of *good faith* in interna-

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[115] *See* CISG Article 7.

[116] *See* St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, No. 00 Civ. 9344 (SHS), 2002 U.S. Dist. LEXIS 5096 *8 (S.D.N.Y. Mar. 26, 2002):

> The CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language . . . To that end, it is comprised of rules applicable to the conclusion of contracts of sale of international goods . . .. In its application regard is to be paid to comity and interpretations grounded in its underlying principles rather than in specific national conventions [internal citations omitted].

See generally BERNSTEIN & LOOKOFSKY, *supra* note 103; Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS §§ 2.1 to 2.04 (Nina M. Galston & Hans Smit eds., 1984); Michael Joachim Bonell, *Comments on Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 65-94, 73 (Cesare Massimo Bianca & Michael Joachim Bonell eds. 1987). Bruno Zeller, *The Development of Uniform Laws – An Historical Perspective*, 14 PACE INT'L L. REV. 163, 167 (2002).

[117] For the legislative history of CISG Article 79, *see* Text of Secretariat Commentary on Article 65 of the 1978 Draft [draft counterpart of CISG Article 79] *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html; *See also* Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and UNIDROIT Principles of International Commercial Contracts*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 221 (Pace Int'l L. Rev. eds. 1999-2000) (Although the legislative may be useful, many times "recourse to such materials must not be overestimated"); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales*, 24 GA. J. INT'L & COMP. L. 183, 206.

[118] For selected bibliography concerning CISG Article 79, visit Unilex web site at http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13359 or Pace University CISG database at http://cisgw3.law.pace.edu/cisg/text/e-text-79.html#schol. *See* Lookofsky, *supra* note 47, at 221 (Professor Lookofsky indicates that "CISG scholarly writing *(doctrine)* . . . May sometime provide the *only* reliable available information as to why courts and arbitrators have ruled as they do" (alterations in the original)).

[119] *See* Mot. for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Int'l Assoc. of Contract and Comm. Managers and the Inst. of Int'l Comm. Law of the Pace Univ. School of Law on Pet. for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, at 4-5, Zapata Hermanos Sucesores v. Hearthside Baking Co., cert. denied 540 U.S. 1068 (2003) (No. 02-1318).

> tional trade", a principle that . . .can resist stultification and circumvention of the Convention's rules; and (4) Questions not expressly settled by the Convention should be answered, when possible, "in conformity with the *general principles* on which it is based," an approach that reinforces regard for both the Convention's '*international* character' . . .and "the need to promote *uniformity*."[120] (emphasis in the original)

Having in mind these guidelines, pursuant to CISG Article 79, the *RMI* court was required to establish: (i) whether the contingency that occurred met the "impediment" requirements under Article 79; (ii) whether Forberich's failure to perform was due to an "impediment" that was "beyond [its] control;" (iii) whether Forberich could not have been reasonably expected to take the impediment into account at the time of the conclusion of the contract; (iv) whether Forberich could not reasonably be expected to avoid or overcome the impediment or its consequences; (v) whether Forberichs's failure to perform is due to the impediment; and (vi) whether the notice requirements have been met.

A. Whether the Contingency that Occurred Met the "Impediment" Requirements Under Article 79

The first issue that the *RMI* court should have been concerned with should have been whether the event that occurred met the "impediment" requirements under Article 79. The *RMI* court, instead, by applying case law related to UCC § 2-615, applied the "impracticability" test. Relevant CISG case law, however, seems to suggest that "exemption under Article 79 requires satisfaction of something in the nature of an 'impossibility' standard."[121] Now, even under U.S. law, the two concepts are different.[122] A contingency that causes a performance to become an impediment under Article 79 does require something more than the contingency making the performance impracticable.[123] The kind of event re-

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[120] *See* HONNOLD, *supra* note 67, at § 103.2.

[121] Harry M. Flechtner, *Article 79, in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 818, 819 (Ronald A. Brand, Franco Ferrari, & Harry Flechtner eds., 2004), citing Oberlandesgericht Hamburg [OLG] [Court of Appeals] July 4, 1997, 1 U 143/95 and 410 O 21/95, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/970704g1.html; Rechtbank van Koophandel [district court] Hasselt, AR 1849/94, May 2, 1995 (Belg.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract; Oberlandesgericht Hamburg [OLG] [Court of Appeals] Feb. 28, 1997, 1 U 167/95, (F.R.G.) *available at* http://cisgw3.law.pace.edu/cases/970228g1.html; *See, also, e.g.*, Cour de Cassation, June 30, 2004 Y 01-15.964, (Fr.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=981&step=Abstract *aff'g* Cour d'Appel de Colmar, June 12, 2001 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/010612f1.html; Bundesgerichtshof [BGH] [Fed. Ct. of Justice] Mar. 24, 1999, VIII ZR 121/98, (F.R.G.); *See also.*, DiMatteo, *supra* note 38, at 425; Dionysios Flambouras, *Remarks on the Manner in Which the PECL may be Used to Interpret or Supplement Article 79 CISG, available at* http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html.

[122] Mineral Park Land Co. v. Howard, 172 Cal. 289, 293 (Cal. 1916). The California Supreme Court states, "[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." *Id.*

[123] Bundesgericht [BGer] [Fed. Ct.], Sept. 15, 2000, 4P.75/2000 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s1.html:

> In effect, in order for a supplier to be exempt from liability for a failure to perform any of his obligations in the terms of [CISG Article 79], he must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside his sphere of control, or due to an

quired for purposes of meeting the requirements of Article 79 is an event that "must render proper performance impossible from an objective point of view. It is not the obligor's subjective view that counts."[124]

B. Whether Forberich's Failure to Perform was Due to an "Impediment" that was "Beyond [its] Control"

The impediment must be an event whose occurrence was beyond Forberich's control. This means that "[i]t is necessary to differentiate between external obstacles and those occurring within the obligor's sphere of responsibility. Only external impediments over which he has no influence can exonerate the obligor."[125]

Case law concerning this CISG requirement focuses mainly on two kinds of situations: cases where failure to perform resulted from some kind of governmental action[126] and cases where a third party failed to supply the seller.[127] The facts of the case do not give rise to any issue of whether the contingency was beyond Forberich's control.[128]

The requirement, although not expressly set forth by UCC § 2-615, is implied as a normal requirement applied by American courts.[129] The Restatement (Second) of Contracts, in explaining what could be an event that can give rise to impracticability and/or frustration of purpose defense, states as follows:

> Events that come within the rule stated in this Section [Impracticability of Performance and Frustration of Purpose] are generally due either to 'acts of God' or to acts of third parties. If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a

overwhelming obstacle, which is not the case in situations within his sphere of control and facts could be attributed to him personally, especially events that affect the supply of the goods.

See also Bundesgericht [BGer] [Fed. Ct.], 4C.105/2000, Sept. 15, 2000 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html. "The determinative facts do not reveal the existence of circumstances that may constitute an unforeseeable or unavoidable impediment, or an obstacle that the [seller] could not reasonably have overcome (*cf.* Neumayer/Ming, op. cit., n. 2 et 4 ad art. 79 CISG)." *Id.*

124 *See* Ulrich Magnus, *Force Majeure and the CISG, in* THE INTERNATIONAL SALE OF GOODS REVISITED 1-33, 14 (Petar Šarcevic and Paul Volken eds. 2001).

125 *Id.*

126 Bulgarska turgosko-promishlena palata [Bulgarian Chamber of Commerce and Industry] Apr. 24, 1996, 56/1995 (Bulg.), *available at* http://cisgw3.law.pace.edu/cases/960424bu.html; Trib. of Int'l Comm. Arb. at the Russian Fed. Chamber of Commerce and Industry, 155/1996, Jan. 22, 1997 (Russ.), *available at* http://cisgw3.law.pace.edu/cases/970122r1.html.

127 Bundesgerichtshof [BGH] [Fed Ct. of Justice] Mar. 24, 1999, VIII ZR 121/98 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html.

128 Lookofsky & Flechtner, *supra* note 75, at 206. "We might expect the buyer (RMI) in Manfred Forberich to acknowledge that the impediment to performance alleged in this case - the extreme weather leading to the freezing of the harbor in St. Petersburg - lay beyond [Manfred Forberich 's] control [internal quotation omitted]." *Id.*

129 *See* Sink v. Meadow Wood Country Estates, 559 A.2d 725, 728 (Conn. App. 1989), *cert. denied* 564 A.2d 1072 (Conn. 1989); Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 267-68 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979); Liner v. Armstrong Homes, 579 P.2d 367 (Wash. Ct. App. 1978); Nodland v. Chirpich, 240 N.W.2d 513 (Minn. 1976); Lowenschuss v. Kane, 520 F.2d 255 (2d Cir. 1975), *on remand*, 72 F.R.D. 498 (S.D.N.Y. 1976); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975).

> breach by the latter and the situation will be governed by the rules stated in Chapter 10, without regard to this Section . . . If the event is due to the fault of the obligor himself, this Section does not apply. As used here 'fault' may include not only 'willful' wrongs, but such other types of conduct as that amounting to breach of contract or to negligence.[130]

The issue of whether or not the breach on the part of the supplier could be construed as an impediment was not considered by the *RMI* court because, regardless of the reason behind the postponement of the delivery date, Forberich and RMI agreed that the term was in fact extended.

C. Whether Forberich Could Not Have Been Reasonably Expected to Take the Impediment into Account at the Time of the Conclusion of the Contract

The standard set forth by Article 79 requires that the party claiming the exemption was *reasonable* in failing to take into consideration (foresee) the occurrence of the impediment at the time of the conclusion of the contract.[131] On the other hand, UCC § 2-615 seems to focus the analysis on whether the nonoccurrence of the supervening event was a basic assumption of the parties to the contract and whether the event was *unforeseen* so as to give rise to impracticability.[132] Some U.S. courts seem not to "cling to that characterization"[133] but rather believe that "[f]oreseeability or even recognition of a risk does not necessarily prove its allocation."[134] Pursuant to this view, an event, even if foreseeable, makes an agreement commercially impracticable if the contingency was not expected by the parties. This test focuses on the particular party's ability to perform, and on whether the performance itself is practicable.

The *RMI* court discussed this issue briefly, concluding that the contingency may not have been *foreseeable* to Forberich. The court did not expressly say that it was unforeseeable, but it came very close when it stated that "the freezing over [of] the upper Mississippi River has been the basis of a successful force majeure defense."[135] The showing made by Forberich that the event was "unexpected" was good enough for the *RMI* court. For the purposes of ruling, the court held that there was a question of material fact to be decided by the jury and dismissed the motion.

Under the CISG, given the status of United States case law, the conclusion likely would be the same. Again, the extent of the contingency apparently could

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130 RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d. (1979)

131 *See* Magnus, *supra* note 124, at 17.

132 *See* U.C.C. § 2-615, cmt. 1 ("Unforeseen supervening circumstances not within the contemplation of the parties") and U.C.C. Section § 2-615, cmt. 4 ("Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance"). *See also* Waldinger v. C.B.S. Group Eng'rs., Inc., 775 F.2d 781, 786 (7th Cir. 1985).

133 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 640 (3d ed. 1990).

134 Opera Co. of Boston v. Wolf Trap Found. For Performing Arts, 817 F.2d 1094 (4th Cir. 1987).

135 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

not have been foreseeable to anyone.[136]Similarly, even if the relevant time was the time when the delivery date was changed, and not the time the original agreement was concluded, the contingency/impediment was not foreseeable.

D. Whether Forberich Could Not Reasonably be Expected to Avoid or Overcome the Impediment or its Consequences

The standard set forth by Article 79 requires that the party claiming the extension could not be reasonably expected to avoid or overcome the impediment or its consequences.[137] The requirements set forth by Article 79 once again focus on the party's objective inability to avoid or overcome the event or its consequences. "Even if an unforeseen impediment hinders performance, the obligor is not allowed to simply give up. He must take reasonable steps to effect performance or find an agreeable substitute if possible."[138]

Under UCC § 2-615, with reference to the performance, "[t]he issue of impracticability should no doubt be an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor's capability of performing as agreed."[139] Thus, the focus of the impracticability analysis is on the nature of the agreement and the expectations of the parties.[140]

In any event, under the circumstances of *RMI,* even if Forberich was only required to load the goods by December 31, 2002, at the beginning of December the port was completely frozen, no vessel could either enter or leave the port, and because this had not occurred in the previous sixty years, it did not leave much room to believe that Forberich could have avoided non-performance or tried alternative ways of performing.[141]

E. Whether Forberichs's Failure to Perform is Due to the Impediment

Although the issue of whether domestic law or a "uniform notion of causality . . . under the CISG"[142] should determine the causation requirement, generally, Article 79 and UCC § 2-615 require a causal connection between the event and

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136 Lookofsky & Flechtner, *supra* note 75, at 207. "The fact that the (early winter) weather conditions in St. Petersburg were (as described by [*Manfred Forberich*]) the 'worst in 50 years', the district court might - consistently with foreign CISG precedents on the foreseeability issue - classify the impediment in question as 'unforeseeable' at the time of contracting." *Id.*

137 *See* Magnus, *supra* note 124, at 18.

138 *Id.*

139 Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir.1966).

140 Alimenta (U.S.A.), Inc. v. Cargill, Inc. (Canada), 861 F.2d 650 (11th Cir. 1986).

141 *See* Arrondissementsrechtbank [Rb] [district court] Rotterdam, July 12, 2001, HA ZA 99-529 (Neth.) *available at* http://cisgw3.law.pace.edu/cases/010712n1.html:

> The Court orders the [Seller] to evidence these factors. More specifically, it will have to show that, as a result of the enduring frost, during the relevant period, no other Ellendales [mandarins] were available which met the agreed standard, and also, that the [Seller] could not reasonably be expected to have taken the enduring frost and the possibility that it may not be able to fulfill its obligation to deliver these mandarins into account at the time of the conclusion of the contract.

142 *See* Magnus, *supra* note 124, at 18.

the obligor's failure to perform; therefore, similar results are likely to result under both. Issues related to the alleged default by Forberich's supplier (Imperio Trading) were not really put forward by Forberich. Thus, there is no reason to get into this line of "defenses," which are quite common under Article 79.[143] So, the only impediment we are left with is that the St. Petersburg port was frozen some time at the beginning of December 2002. Assuming that Forberich was merely required to load the goods on the ship by December 31, 2002, the facts lead us to reasonably believe that Forberich's failure to perform was due to the impediment. However, if Forberich was required under the amended terms of the contract to *deliver* the goods by December 31, 2002, then the port's conditions would not excuse Forberich from its failure to perform because Foreberich would have had to load the goods at least 3-4 weeks prior to delivery to account for the shipping time.

F. Article 79 Notice Requirement

Article 79 requires the obligor to promptly notify the obligee about the impediment and its effects.[144]

Notice requires no special form; however, the obligor must specify the type of impediment and its impact on performance, especially whether it is final or temporary, partial or complete. Furthermore, notice must be given to the obligee within a reasonable time after the obligor knew or ought to have known about the impediment.[145] Failure to give the notice within a reasonable time may result in liability for those damages incurred by the other party, which a timely notice could have avoided.[146] Similarly, UCC § 2-615, provides that "[t]he seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required . . . of the estimate quota thus made available for the buyer."[147]

In *RMI*, the requirement was met when Forberich, on January 10, 2003, informed RMI that it could not ship the rails because the port had been frozen for the previous three weeks, preventing it from fulfilling its obligations.[148]

VI. Assuming the Court Applied the Wrong Standard, as in fact it did, is the Ultimate Outcome Nonetheless in Line with the CISG Provisions?

The difference between the approaches of UCC § 2-615 and CISG Article 79, under the facts of *RMI,* does not impact the outcome resulting from the application of requirements of the two sets of rules. It must be said, in fact, that the

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143 *See id.* at 17.

144 *See id.* at 22.

145 *Id.* at 22.

146 *Id.*

147 U.C.C. § 2-615(c) (1998).

148 Raw Materials, Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 *13 (N.D. Ill. July 6, 2004).

outcomes resulting from the application of the CISG or the UCC in this case would be similar.[149] It must be clearly understood, however, that it is only because the event that occurred in the present case was so severe as to meet the more stringent requirements of Article 79 that the two results are the same.[150] In the present case, performance[151] was not only impracticable, but also objectively impossible. So, at least at this stage, the court ended up getting the correct result even though it applied the wrong standard.

This conclusion, however, must be qualified for another reason. Given the particular phase in which the dispute is presented to the court, a major point that was not fully developed concerns the terms of the extension of the delivery date (the actual date set for the delivery and whether Forberich was required to deliver the goods to the United States by that date or whether Forberich was merely required to load the goods by that date). If Forberich was required to deliver the goods by December 31, 2002, it is clear that Forberich would not be excused under the CISG nor the UCC because the good would have had to leave St. Petersburg before it froze at the beginning of December 2002. Moreover, it must be noted that the facts were not fully reviewed by the court as the impediment/impracticability issue was raised within a summary judgment motion.

Finally, another difference may arise when the courts have to determine the consequences of the occurrence of the contingency. This problem did not come up before the *RMI* court given the particular procedural posture in which the issue was raised, but it would certainly come up at a later procedural stage. As stated earlier, the CISG provides exemption for the failure to perform *any* obligation even though it does not prevent either party to the contract from exercising any right other than to claim damages under the Convention.[152] On the other hand, UCC § 2-615 operates to cure the breach of the relevant non-performance.[153] Thus, if the impracticability occurred due to a supervening event, the existing duty is discharged under the UCC.[154] On the contrary, CISG Article 79

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[149] *See* Lookofsky & Flechtner, *supra* note 75, at 205 ("We make this (very negative) assessment of [the *RMI* decision] notwithstanding the fact [the] 'apparent soundness of result.'").

[150] *See id.* at 206. ("In any event, it seems undeniable that the extreme winter conditions in St. Petersburg qualify as an 'impediment' in the Article 79 sense.")

[151] Assuming that the Seller was only required to load the goods by Dec. 31, 2002.

[152] These rights include those provided for in Articles 46, 49, 50 and 78. *See* Brand, *supra* note 108, at 394, n.4; Magnus, *supra* note 124, at 22.

[153] Magnus, *supra* note 124, at 22.

[154] *See* MURRAY, *supra* note 133, at 659; Jan Hellner, *The Vienna Convention and Standard Form Contracts*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 353 (Petar Šarcevic and & Paul Volken eds. 1986).

> According to the express provisions of Art. 79(5), nothing in the article prevents either party from exercising any right other than to claim damages under the Convention. This means that even if the seller is exempted, the buyer retains his right to declare the contract avoided if the breach is fundamental or if there is no delivery within the *Nachfrist*. The buyer may even claim performance of the contract. [footnote omitted].

Id. Whether performance can be sought and obtained is, of course, a quite different matter when the performance is impossible. PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 102 (1986).

provides relief only from the obligation to pay damages.[155] Other obligations remain intact.[156] In fact,

> Subsection (5) makes it clear that article 79 has only a limited effect on the remedies available to the party that has suffered a failure of performance for which the non-performing party enjoys an exemption. Specifically, article 79(5) declares that an exemption precludes only the aggrieved party's right to claim damages, and not any other rights of either party under the Convention.[157]

The next issue, however, is how the RMI court would deal with the legal consequences of the occurrence of an impediment? If the *RMI* court persists in the same approach of looking at the UCC to interpret the CISG, there would be little doubt that the outcomes under the rules of the UCC and the CISG differ greatly. If the *RMI* court instead returns to CISG Article 79 for purposes of determining the consequences, how is the court going to explain its approach given its previous reliance on the UCC?

At this point, a few commentators have already expressed concerns over the *RMI* court's methodology. One commentator in particular acknowledges that it might be difficult for judges not to resort to familiar concepts, but clearly condemns this practice and, particularly, with reference to the *RMI* court, it clearly disapproves of the quickness in bypassing the CISG in favor of a more familiar UCC. Consider the following clear and concise comment on the court's approach in *RMI*:

> Steeped in the traditions of their domestic law, courts naturally gravitate to a comparison of their vested domestic law principles in the interpretation of a uniform international law. This proclivity, however, threatens to undermine the essential uniformity principle that is the essential basis for CISG. It is one thing to consider an analogous application of domestic law as a guide. It is quite another to conclude without a careful analysis that the domestic law is symmetrical. While the result in this case may be clearly in accord with the governing principle of Article 79, the haste with which the court simply adopted UCC § 2-615 as identical to Article 79 suggests a judicial methodology that is not in accordance with the underlying philosophy of CISG.[158]

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[155] *See* Magnus, *supra* note 124.

[156] *See* Brand, *supra* note 108, at 394 n.4.

[157] *See* Flechtner, *supra* note 121, at 819.

[158] *See* ARTHUR L. CORBIN 14-74 CORBIN ON CONTRACTS, Supp. to § 74.8 (2005). Of course, I read the reference to resorting to "an analogous application of domestic law as a guide" as meaning that it is appropriate to resort to domestic CISG case law as a guide. If it is not what the author has meant, this is an example of how difficult it can be to truly entertain an autonomous interpretation of the CISG freed from domestic models. *See also* Franco Ferrari, *The CISG's Uniform Interpretation by Courts—An Update*, 9 VINDOBONA J. OF INT'L COM. L. & ARB. 233, 237 (2005) (stating that the RMI's approach violates CISG Article 7 as well as the very rationale behind the CISG).

VII. Conclusion

In conclusion, the *RMI* court's approach to the CISG is an example of how things should not be done. As stated by Professors Lookofsky & Flechtner:

> [T]he patently improper approach to interpreting and applying the CISG taken by the U.S. District Court in [*RMI*] is a depressing development that tends to bring international disrepute on the CISG jurisprudence of U.S. courts. We sincerely hope the case is soon buried and forgotten, except perhaps as an example of an interpretational methodology to be avoided at all costs.[159]

The mere fact that the ultimate outcome might have been correct, even though the *RMI* court applied the wrong methodology, should not somehow redeem the decision from its mistakes and implications.[160] The *RMI* decision undermines the commendable work done by other United States courts and gives the opportunity to unleash waves of valid criticism against a hard to die homeward trend that too many courts in the United States have passively displayed.

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[159] *See* Lookofsky & Flechtner, *supra* note 75, at 208.

[160] *Id.* at 205. "We make this (very negative) assessment of [RMI] notwithstanding the fact that 'apparent soundness of result' is entitled to at least some weight on our own precedential scale, *i.e.*, even though the court might have reached the 'right' result in denying plaintiff's motion for summary judgment." *Id.* As Professor Murray stated in commenting on the *Delchi* decision where the court applied the "familiar" foreseeability test of *Hadley v. Baxendale* instead of CISG Article 74, "[a]s applied to the facts of this particular case, the result would not change regardless of which test had been applied. The harm, however is to precedent." *See* Murray, *supra* note 9, at 370.

IMMIGRATION POLICY V. LABOR POLICY: AN ANALYSIS OF THE APPLICATION OF DOMESTIC LABOR LAWS TO UNAUTHORIZED FOREIGN WORKERS

Konrad Batog[†]

I. Introduction

When unauthorized foreign workers[1] are subjected to unlawful labor practices, a potential or perceived conflict between national immigration policy and national labor policy arises. This problem is especially pronounced when a central principle of a country's immigration policy is the prevention of the employment of unauthorized aliens. The apparent tension occurs because countries aim to protect all workers within their borders by enforcing labor standards. At the same time, they desire to discourage entry and employment of unauthorized workers in order to preserve jobs and wages for the country's authorized workers.[2]

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the United States Supreme Court held that combating the employment of unauthorized aliens was central to the United States immigration policy after passage of the Immigration Reform and Control Act of 1986 ("IRCA").[3] The court noted that this policy was furthered "by establishing an extensive 'employment verification system' designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States."[4] The foundation of such a system is an employer sanctions regime that punishes employers who hire unauthorized individuals or fail to determine if an employee is eligible to work in the United States.[5]

This paper will examine how the United States, the United Kingdom, Germany, and South Korea dealt with issues arising out of a possible conflict between national labor policy and national immigration policy by way of enforcing domestic labor laws for unauthorized foreign workers. These specific countries

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[1] Throughout this paper, I will use the term undocumented worker or unauthorized worker to mean a foreign alien who is illegally residing and working in a country.

[2] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984); Phillip Martin & Mark Miller, Employer Sanctions: French, German and U.S. Experiences 1 (Sept. 2000) (unpublished comment, on file with Int'l Labour Office of Geneva); Georges Tapinos, *Irregular Migration: Economic and Political Issues, in* COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS 13, 13-43 (Organization for Econ. Co-Operation and Dev., 2000).

[3] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (citing INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194, n.8 (1991)).

[4] *Id.*

[5] *See id.* at 147-48.

will be examined because they all have employer sanctions laws that punish employers who hire and employ unauthorized individuals or fail to determine if an employee is eligible to work.[6] While countries that do not have an employer sanctions regime may seek to limit unauthorized employment of undocumented workers, employer sanctions are evidence that combating unauthorized employment is central to a country's immigration policy.[7] Though the countries with employer sanctions regimes are numerous, a complete analysis of how these countries treat conflicts between immigration and labor policy in the enforcement of labor laws for unauthorized foreign workers is beyond the scope of this paper.[8] As a result, this paper's examination will be limited to the countries mentioned above.

This examination will be valuable because these states share similarities in their economies and rates of immigration.[9] The World Bank lists the four countries as "high income" economies.[10] Indeed, the United States, the United Kingdom, and Germany are three of the top four nations in gross national income and gross domestic product.[11] South Korea is ranked twelfth in gross national income and eleventh in gross domestic product.[12] In terms of immigration, in 2002 the United Kingdom admitted 513,000 immigrants,[13] and the United States admitted 1,063,732 immigrants.[14] In the same year, 842,543 immigrants entered Germany,[15] and South Korea admitted 170,873 immigrants.[16]

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[6] *Id.* at 148; Mark Miller, Employer Sanctions in France: From the Campaign Against Illegal Alien Employment to the Campaign Against Illegal Work 27-29 (1995) (unpublished comment, on file with the U.S. Comm'n on Immigration Reform).

[7] *See Hoffman*, 535 U.S. at 147.

[8] The author has identified through various sources the following countries with either civil, criminal, or both civil and criminal employer sanctions: Argentina, Australia, Austria, Belgium, Canada, Costa Rica, Denmark, Finland, France, Germany, Greece, Hong Kong, Italy, Japan, Lichtenstein, Luxembourg, Netherlands, New Zealand, Norway, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, and the United Kingdom. *See* Martin & Miller, *supra* note 2; Miller, *supra* note 6; M. Isabel Medina, *Employer Sanctions in the United States, Canada and Mexico: Exploring the Criminalization of Immigration Law*, 3 Sw.J.L. & Trade Am. 333, 340 n.28 (Fall 1996); Legal Status and Rights of Undocumented Migrants, 18/03 Op. Inter-Am. Ct. H.R. (2003).

[9] World Bank Group, Data & Statistics: Total GDP 2004, http://www.worldbank.org/data/country class/classgroups.htm#High_income (last visited Nov. 17, 2004); Office for National Statistics, International Migration: Migrant's Entering or Leaving the United Kingdom and England and Wales, 2002 (April 29, 2004), *available at* http://www.statistics.gov.uk/statbase/Product.asp?vlnk=507 [hereinafter Office for National Statistics]; U.S. Department of Homeland Security, Yearbook of Immigration Statistics 2002, U.S. Government Printing Office: Washington D.C., 2003, at 7 [hereinafter 2002 Yearbook].

[10] World Bank Group, Data & Statistics: Total GDP 2004, http://www.worldbank.org/data/country class/classgroups.htm#High_income (last visited Nov. 17, 2004).

[11] World Bank Group, Data & Statistics: Total GNI 2004, http://www.worldbank.org/data/databy topic/GNI.pdf (last visited Nov. 17, 2004); World Bank Group, Data & Statistics, http://www.worldbank.org/data/databytopic/GDP.pdf.

[12] World Bank Group, Data & Statistics: Total GDP 2004, *supra* note 10; World Bank Group, Data & Statistics: Total GNI 2004, *supra* note 11.

[13] Office for National Statistics, *supra* note 9.

[14] 2002 Yearbook, *supra* note 9.

[15] Bundesministerium des Innern et al., Migrationsbericht Im Auftrag der Bundesregierung 10 (2004), *available at* http://www.bmi.bund.de/cln_012/nn_121894/Internet/Con-

Part II will examine the United States and the United Kingdom, which do not provide the same labor protections to undocumented workers as to authorized workers. Sections II.A and II.B include an analysis of how each respective country deals with unlawful labor practices towards undocumented workers. Section II.C will evaluate how these two countries are similar in their treatment of labor laws for undocumented workers and critiques the approach adopted by both. Part III will apply the same methodology to countries that provide equivalent labor protections to undocumented workers and authorized workers, namely Germany in Section III.A and South Korea in Section III.B. The examination will focus on domestic laws and policies instead of international instruments pertaining to foreign workers because international measures have had little effect on alleviating the plight of foreign workers.[17] Part IV concludes by suggesting that national immigration policy does not have to trump or conflict with national labor policy, even when a country utilizes employer sanctions.

II. Countries that have Different Labor Protections for Undocumented Workers and Authorized Workers

A. United States of America

The United States adopted employer sanctions as part of national immigration policy through IRCA[18] and made it unlawful to: (1) hire, recruit, or receive compensation for referring an alien to work in the United States, if it is known that the alien is unauthorized; (2) continue to employ the alien in the United States, knowing the alien is (or has become) unauthorized; and (3) fail to examine documents establishing both employment authorization and identity.[19] A good faith attempt to comply with IRCA's document verification requirements provides an employer with a defense to alleged violations of the act.[20]

IRCA provides for both civil and criminal sanctions against employers.[21] An employer is subject to a fine of up to $2,000 for each undocumented worker in its employ. The fine rises to $10,000 for each undocumented worker if the em-

tent/Common/Anlagen/Broschueren/2004/Migrationsbericht__2004,templateId=raw,property=publicationFile.pdf/Migrationsbericht_2004 [hereinafter MIGRATION REVIEW 2004].

[16] Korea National Statistical Office: International Migration in 2003, http://www.nso.go.kr/eng/releases/report_view.html?num=368 (last visited Jan. 28, 2006). While South Korea appears to have admitted a great deal less immigrants than the United States, United Kingdom, or Germany, South Korea is comparatively much smaller in many respects than these other three countries. So, that, for example, as a percentage of a country's population, South Korea admitted almost exactly the same percentage as the United States. *See* World Population Prospects: The 2002 Revision, http://www.un.org/esa/population/publications/wpp2002/WPP2002-HIGHLIGHTSrev1.PDF (last visited Nov. 14, 2005). As a percentage of these four countries' populations, Germany has the highest level of immigration followed by the United Kingdom, and then the United States, and South Korea. *Id.*

[17] Martin Ruhs, Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work 13 (2002) (unpublished comment, on file with the Univ. of Cal., San Diego), *available at* http://repositories.cdlib.org/ccis/papers/wrkg56.

[18] 8 U.S.C. § 1324a (2005).

[19] *Id.* at § 1324a(a); *Id.* at § 1324a(b).

[20] *Id.* at § 1324a(a)(3).

[21] *Id.* at § 1324a(e); *Id.* at § 1324a(f).

ployer has previously violated IRCA.[22] Criminal penalties of up to six months imprisonment are available in cases where a pattern or practice of employing undocumented workers is established.[23]

U.S. Immigration and Customs Enforcement ("ICE") is the government agency responsible for investigating and enforcing the employer sanctions.[24] In 2003, ICE conducted 2,194 employer investigations and issued 162 notices of intent to fine, only 124 of which resulted in fines.[25] This is an extreme decline from 1997, when 7,537 investigations were conducted, 865 intentions to fine were issued, and 778 final orders were issued.[26] The number of work site investigation cases also declined eighty percent between 1998 and 2001.[27] Additionally, the number of undocumented workers arrested as a result of work site investigations has decreased tremendously.[28] While such investigations yielded 17,554 arrests in 1997, there were only 445 arrests in 2003.[29]

Some administrative agencies that enforce U.S. labor laws have argued that those laws apply to workers regardless of whether or not they are documented.[30] One example is the U.S. Department of Labor Wage and Hour Division ("WHD"), which is responsible for administering and enforcing labor laws such as minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act ("FLSA").[31] It also enforces employment-related protections for migrant and seasonal agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").[32] The MSPA was created to ensure that employers of migrant workers pay them wages, provide certain safety conditions, and comply with the terms of working contracts.[33] The WHD has

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[22] *Id.* at § 1324a(e).

[23] *Id.* at § 1324a(f).

[24] U.S. Department of Homeland Security, Yearbook of Immigration Statistics 2003, U.S. Government Printing Office: Washington D.C., 2004, at 144-45. [hereinafter 2003 Yearbook]

[25] *Id.* at 157. The Notice of Intent to Fine shall contain the basis for the charge(s) against the [employer], the statutory provisions alleged to have been violated, and the monetary amount of the penalty [ICE] intends to impose. If the [employer] does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, [ICE] shall issue a final order from which there shall be no appeal. 8 C.F.R. § 270.2 (2005).

[26] 2003 Yearbook, *supra* note 24, at 157.

[27] *Id.* at 147.

[28] *Id.*

[29] *Id.* at 157.

[30] There are three major types of labor laws: (i) labor relations laws that give workers rights to organize and bargain collectively; (ii) protective labor laws that establish minimum wages, maximum hours of work, and establish eligibility for work-related benefits such as unemployment insurance, and (iii) sanctions and antidiscrimination laws that prohibit employers from hiring or retaining unauthorized aliens or using prohibited criteria such as race or sex to hire, promote and lay off workers. Martin & Miller, *supra* note 2, at 2.

[31] 29 U.S.C. § 201 (2005).

[32] *Id.*

[33] 29 U.S.C. § 1801 (2005).

specifically stated that it will enforce the FLSA and the MPSA irrespective of an employee's documentation.[34]

While the WHD intends to enforce labor laws for unauthorized workers, federal courts have denied undocumented workers some of the most critical remedies under both state and federal labor laws. The most significant decision was the United States Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*.[35] *Hoffman* held that because IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,'" unauthorized workers could not receive back pay remedies under the National Labor Relations Act ("NLRA") when they were illegally discharged for organizing unions.[36] The Court reasoned that awarding back pay to an undocumented worker was contrary to the policy of IRCA, as it would condone and encourage undocumented workers to illegally stay and work in the United States.[37] The Supreme Court also concluded that the National Labor Relations Board, which enforces the NLRA laws, was "prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States."[38]

The Court's holding affected how some administrative agencies evaluate remedies available to undocumented workers. Prior to *Hoffman,* the U.S. Equal Employment Opportunity Commission ("EEOC"), which enforces employment anti-discrimination laws, unequivocally argued that "unauthorized workers who are subjected to unlawful employment discrimination are entitled to the same relief as other victims of discrimination."[39] However, after *Hoffman*, the EEOC stated in its compliance manual that while employers cannot discriminate against undocumented workers, relief for undocumented workers may be limited.[40] Additionally, one federal appellate court has ruled that IRCA completely prevents undocumented workers from any relief under federal anti-discrimination laws.[41]

Following *Hoffman,* U.S. federal and state courts have ruled that relief under other labor laws is also unavailable to undocumented workers.[42] For example, undocumented workers have been denied back pay and front pay for violations of the FLSA, which goes against the advice of the WHD.[43] In New York, one state

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34 U.S. Department of Labor: Employment Standards Administration Wage and Hour Division, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division, available at http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last updated Oct. 4, 2004).

35 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

36 *Id.* at 147 (citing Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. at 194, n. 8).

37 *Id.* at 149-51.

38 *Id.* at 145 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984)).

39 EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 622: CITIZENSHIP, RESIDENCY, REQUIREMENTS, ALIENS AND UNDOCUMENTED WORKERS 2 (2000).

40 EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 13: NATIONAL ORIGIN DISCRIMINATION 21, n.61 (2002).

41 Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998).

42 Renteria v. Italia Foods, Inc., No. 02 C 495, 2003 WL 21995190, (N.D. Ill. Aug. 21, 2003) at *6.

43 *Id.*

district court following *Hoffman* denied undocumented workers any kind of relief under state health and safety laws.[44] Undocumented workers also have been denied remuneration under state worker's compensation laws, as courts have concluded that under the *Hoffman* rationale, IRCA preempts undocumented workers from receiving certain types of relief.[45]

B. United Kingdom

The Asylum and Immigration Act of 1996, which introduced employer sanctions in the United Kingdom, went into effect on January 27, 1997.[46] Under the statute, an employer is guilty of an offense if it employs a person subject to immigration control who has attained the age of 16, and (a) the employee has not been granted leave to enter or remain in the United Kingdom, or (b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from accepting the employment.[47] The Act also requires employers to check the identity and work authorization of employees and new hires.[48] An employer can escape sanctions if it can prove that it saw and kept a copy of documentation that seemed to relate to the job applicant and appeared to prove that the applicant was entitled to work in the United Kingdom.[49]

The British statute only provides for civil sanctions. An employer found guilty of an offense is liable for a fine of up to 5,000 pounds ($9,405).[50] The U.K. Immigration and Nationality Directorate is responsible for enforcing employer sanctions. From 1998 until 2002, there were twenty-two enforcement actions against employers who employed undocumented workers, of which eight resulted in convictions.[51] In 2002, there were only two enforcement actions and one conviction.[52] While there are no official statistics for 2003, evidence shows that enforcement has not increased.[53]

There is little case law on how the United Kingdom enforces labor laws in regards to undocumented workers. One recent decision by the Court of Appeal

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44 Majlinger v. Cassino Contracting Corp., 766 N.Y.S.2d 332, 333 (N.Y. Sup. Ct. 2003).

45 Marjorie A. Shields, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523 (2004); Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 724 -26 (2004).

46 Martin & Miller, *supra* note 2, at 1.

47 Asylum and Immigration Act, 1996, c. 49, § 8 (Eng.).

48 *Id.*; HOME OFFICE, CHANGES TO THE LAW ON PREVENTING ILLEGAL WORKING: SHORT GUIDANCE FOR UNITED KINGDOM EMPLOYERS 4-5 (April 2004) [hereinafter HOME OFFICE, CHANGES], *available at* http://www.ind.homeoffice.gov.uk/ind/en/home/0/preventing_illegal.Maincontent.0004.file.tmp/changes_to_law.pdf.

49 Asylum and Immigration Act, 1996 c. 49, § 8(2) (Eng.).

50 HOME OFFICE, CHANGES, *supra* note 48, at 8.

51 HOME OFFICE, CONTROL OF IMMIGRATION: STATISTICS UNITED KINGDOM 2002 (Nov. 27, 2003) [hereinafter HOME OFFICE, CONTROL], *available at* www.homeoffice.gov.uk/rds/immigration1.html.

52 *Id.*

53 HOME AFFAIRS COMM., SECOND REPORT OF SESSION 2003-04: ASYLUM APPLICATIONS 77-82 (2004), *available at* www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/218.pdf.

(Civil Division) in *Vakante v. Addey & Stanhope School,*[54] [2004] EWCA (Civ) 1065 (Eng.) at para. 24, 27, indicates that the United Kingdom is also limiting labor law remedies for undocumented workers.[55] In *Vakante*, the plaintiff, a Croatian citizen, appealed a decision of an employment tribunal, which held that he was barred by his illegal immigration status from bringing a complaint of employment discrimination against the defendant secondary school.[56]

Mr. Vakante, an asylum seeker who was not permitted to take up employment in the United Kingdom, applied for a position as a teacher at Addey and Stanhope School.[57] He knowingly entered false information on his application form about his ability to be legally employed in the United Kingdom without a work permit.[58] He worked for the school for eight months before being discharged.[59] Mr. Vakante was found guilty of violating section 24 of the Immigration Act of 1971 because he did not abide by his conditional stay in the United Kingdom, which prohibited him from working.[60] Following his dismissal, Mr. Vakante filed a claim against the school, alleging race and national origin discrimination on the grounds that he was not given equal opportunities for training, benefits, services and facilities, in addition to being discharged.[61]

Because Mr. Vakante violated section 24 of the Immigration Act 1971 by obtaining and continuing employment, the claim was dismissed by the courts that heard his case.[62] The Employment Tribunal first held that Mr. Vakante was precluded from relief because the claims were "so closely connected with the deliberate illegality of that contract on Mr. Vakante's part that were the tribunal to allow the originating application to go forward to a hearing, it would appear to be endorsing the applicant's illegal actions."[63] The Employment Appeal Tribunal agreed.[64] The Court of Appeal (Civil Division) likewise held that Mr. Vakante could not pursue his complaints of discrimination where those complaints were so inextricably bound with his own illegal conduct that if the tribunal permitted him to pursue the complaints, it would give the appearance of condoning the illegal conduct.[65]

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[54] The Court of Appeal (Civil Division) is the intermediary appellate court for civil cases. The next higher appellate court would be the House of Lords which is the supreme court of appeal. Sarah Carter, *A Guide of the UK Legal System-Updated*, http://www.llrx.com/features/uk2.htm (last visited Nov. 13, 2004).

[55] *See generally* Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.).

[56] *Id.* at para. 10, 12.

[57] *Id.* at para. 12-13.

[58] *Id.* at para. 13.

[59] *Id.* at para. 14.

[60] *Id.* at para. 18.

[61] *Id.* at para. 15-16. Under the Race Relations Act 1976, it is illegal to treat a person less favorably than another person on the basis of color, race, nationality or ethnic or national origins of the person. Race Relations Act 1976, 1976 c. 74 Pt I s 1 (Eng.).

[62] Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.). at para. 24, 27.

[63] *Id.* at para. 26.

[64] *Id.* at para. 27.

[65] *Id.* at para. 36.

C. Analysis

The Court of Appeal in *Vakante* applied reasoning similar to that of the U.S. Supreme Court in *Hoffman*. Essentially both courts based their decision on the legal principle of *ex turpi causa non oritur actio*, which provides that a cause of action cannot be founded on an immoral or illegal act, or a transgression of positive law.[66] One main policy behind this principle is that the plaintiff should not be granted relief where it would enable him to benefit from his criminal conduct.[67] In the context of denying undocumented workers the protections of labor laws, the argument is that the employee cannot receive the benefits of the law because the employment that gave rise to the benefits was illegally created or could not have been created except in violation of the law.

Another major policy behind the principle of denying legal protections to undocumented workers is deterrence.[68] Nevertheless, this approach will not necessarily dissuade unauthorized employees from staying and working in countries like the United States or the United Kingdom. To begin with, it is unlikely that the undocumented workers know that they will be denied protections under domestic labor laws because of their immigration status.[69] If they do not know that they are being denied these labor law protections, denial will have no effect on whether they stay or leave.[70] Even if they were aware, undocumented workers do not come into the United States or the United Kingdom for the protection of the respective country's labor laws.[71] As one federal court has put it, "[r]ather it is the hope of getting a job — at any wage — that prompts most illegal aliens to cross our borders."[72] Undocumented workers enter the United States or the United Kingdom regardless of whether they are provided labor law protections, therefore denying them those protections will not deter them from entering and staying.[73]

Additionally, where there is "joint illegality, knowledge that the other could not make a claim could equally be an inducement to crime."[74] The courts have focused only on deterring undocumented workers, but have failed to examine what effect their decisions have had in discouraging labor law violations commit-

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66 THE LAW COMM'N, CONSULTATION PAPER NO 154 - ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY ON CONTRACTS AND TRUSTS 86 (1999) [hereinafter LAW COMM'N, ILLEGAL TRANSACTIONS].

67 THE LAW COMM'N, CONSULTATION PAPER NO 160 - THE ILLEGALITY DEFENCE IN TORT: A CONSULTATION PAPER 74-77 (2001) [hereinafter LAW COMM'N, THE ILLEGALITY DEFENCE].

68 *Id.* at 72-74. Additional policy reasons behind the principle are upholding the dignity of the courts and punishment. LAW COMM'N, ILLEGAL TRANSACTIONS, *supra* note 66, at 86-89. As neither the U.K. nor U.S. courts have used these other policy reasons for denying undocumented workers labor law protections, only the policies of deterrence and prohibiting profit from the plaintiff's own wrongdoing will be examined.

69 Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 331-32 (2003).

70 *See generally id.*

71 Patel v. Quality Inn S., 846 F.2d 700, 704-05 (11th Cir. 1988).

72 *Id.* at 704-05.

73 *See generally id.*

74 LAW COMM'N, THE ILLEGALITY DEFENCE , *supra* note 67, at 73.

ted by employers. Awarding back pay to an unauthorized employee not only compensates the employee, but also admonishes the employer who violated the law.[75] The U.S. Supreme Court itself admitted that back pay was one of the more effective remedies under the NLRA.[76] "In the absence of the back pay weapon, employers could conclude that they can violate the labor laws at least once with impunity."[77] By failing to provide effective relief to undocumented workers and by focusing on only deterring undocumented workers, the courts not only fail to deter the employer's illegal labor practices, but in fact sanction them.[78]

The undocumented worker who seeks a legal remedy does not do so for profit or benefit, but rather as compensation for the illegal act of the employer.[79] While the undocumented worker is potentially entitled to mere compensation, the employer enjoys pecuniary benefits by violating labor laws with no effective implications. Although both parties are in pari delicto, the courts ultimately punish the unauthorized employment of the undocumented employee without sanctioning the employer's unlawful conduct.[80] Thus, by refusing to provide remedies to undocumented workers, courts incorrectly overplay the potential threat posed by condoning illegal conduct by the undocumented worker in relation to the harm that results from the employer's violation of the law.

Additionally, in determining whether condoning the illegality of the undocumented employee's conduct is a significant concern, the seriousness of the misconduct must be considered.[81] In this case, the employee's illegal conduct is, in itself, his or her unauthorized employment. While both the United States and the United Kingdom have laws preventing the illegal employment of undocumented workers, data indicates that little is done to prevent or punish such practices by way of enforcement.[82] The seriousness of unauthorized employment is questionable when laws are not even enforced to prevent it.

Another similarity between the United States and the United Kingdom is that the agencies that enforce employer sanctions are different from the agencies enforcing labor laws. In the United States, immigration officers enforce sanctions with very little cooperation between the labor and immigration departments.[83] Such cooperation is rare because the labor department recognizes that interagency collaboration would make it difficult to enforce labor laws.[84] For exam-

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75 Hoffman Plastics Compounds, Inc., v. NLRB, 535 U.S. 137, 160 (2002) (Breyer, S., dissenting).

76 Sure-Tan, Inc., v. NLRB, 467 U.S. 883, 904 (1983) (Breyer, S., dissenting).

77 *Hoffman*, 535 U.S. at 154 (Breyer, S., dissenting).

78 GEN. ACCT. OFF., GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 8 (1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens).

79 LAW COMM'N, THE ILLEGALITY DEFENCE, *supra* note 67, at 75.

80 *Hoffman*, 535 U.S. at 146, 150.

81 Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.) at para. 9.

82 Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sep. 21, 2004, at 51.

83 Martin & Miller, *supra* note 2, at 1.

84 *Id.* at 34.

ple, undocumented employees would not be willing to testify against their employers if they knew that they would be arrested and deported.[85]

The divide between enforcement of labor laws and employer sanctions indicates a disconnect between labor and immigration policy in the United States and the United Kingdom. Instead of viewing illegal employment as a labor law violation, the United States and the United Kingdom consider it only an immigration violation.[86] However, the illegal employment of undocumented foreigners can be addressed as both a labor policy issue and an immigration policy issue.

III. Countries That Provide Equivalent Labor Protections To Undocumented Workers And Authorized Workers

A. Germany

The Employment Promotion Act (*Arbeitsfoerderungsgesetz* or AFG)[87] delineates employer sanctions in Germany. Employer sanctions law was first enacted in 1972 in Germany and has undergone several revisions since then.[88] Currently, the maximum fine for an employer who employs an undocumented worker is 500,000 Euros ($651,704).[89] An employer can also receive a fine of 50,000 Euros ($33,323) for obtaining a work permit for a foreign worker under false pretenses through the provision of false information on wages, work hours, or other working conditions.[90] An employer also faces criminal sanctions of up to one-year imprisonment if the employer employs more than five undocumented workers for more than thirty days.[91] For particularly serious violations, an employer may face up to three years in prison.[92] Additionally, if an employer is found to have employed undocumented workers, the employer is responsible for paying repatriation costs and any taxes or social insurance in arrears.[93] Employers who have been fined more than 5,000 Euros ($3,332) or sentenced to more than three months in prison can be excluded from public contracts for two years.[94]

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[85] *Id.* at 35.

[86] *Id.* at 1, 31.

[87] In 1998, the AFG was re-codified and the law was incorporated into Sozialgesetzbuch III (Social Insurance Code III). *Id.* at 20-21; Hubertus Schick, *Job Rotation from the Perspective of Enterprises, Employees and Political Decisionmakers– Expectations and Results Illustrated by the Example of 'Job Rotation for the Bremen Region', in* AGORA VIII JOB ROTATION 86 (Eur. Ctr. for the Dev. of Vocational Training ed., 2002).

[88] Martin & Miller, *supra* note 2, at 20-22.

[89] FEDERAL REPUBLIC OF GERMANY, NATIONAL ACTION PLAN FOR EMPLOYMENT POLICY 2003 32 (2003).

[90] Rainer Irlenkaueuser, *Combating the Irregular Employment of Foreigners in Germany: Sanctions against Employers and Key Areas of Irregular Employment, in* COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS 153 (Org. for Econ. Co-operation and Dev. 2000).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

The German Department of Labor enforces employer sanctions laws.[95] The Ministry had 184 offices in 1996.[96] Some of these offices included special enforcement teams created to prevent undocumented foreign worker employment.[97] There were about 1,600 inspectors and an additional 840 inspectors appointed specifically for inspection of construction sites.[98] Also, there were some 1,000 employees of the former West-East German customs office assigned to labor law enforcement in the mid-1990s.[99]

Germany spends five times more per worker than the United States to prevent the employment of unauthorized workers.[100] Germany spends almost $3 per worker per year in contrast to the United States, which spends about $0.66 per worker a year.[101] Some commentators have stated that this is more than any other country spends on employer sanctions enforcement activities.[102]

Germany also has passed stringent laws to prevent the exploitation of undocumented workers and to provide undocumented workers the same labor rights as authorized workers.[103] A German employer who deviates substantially in the working conditions it provides to undocumented workers as compared to similarly situated authorized workers faces punishment of up to three years in prison.[104] A prison sentence of six months to five years is available in particularly serious cases.[105]

Unlike in the United Kingdom or the United States, German authorities also try to provide back wages owed to illegal workers by employers.[106] Additionally, German prosecutors can ask courts to fine employers the equivalent of any profits they derived from employing illegal workers.[107] The intent in passing these laws has been to maintain fair competition in the labor market.[108]

Acknowledging that many undocumented workers may be exploited through small subcontracting companies, especially in the construction industry, Germany has passed even tougher laws dealing with subcontractors' failure to provide foreign workers with minimally acceptable working conditions.[109]

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95 Martin & Miller, *supra* note 2, at 21.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 22.

102 *Id.*

103 *Id.* at 21.

104 Arbeitsfoerderungsgesetz [AFG] [Employment Promotion Act] 1972, § 227a; Irlenkaueuser, *supra* note 90, at 153.

105 *Id.*

106 Martin & Miller, *supra* note 2, at 21.

107 *Id.*

108 Irlenkaueuser, *supra* note 90, at 153.

109 In 1998, most of the cases of illegal employment were in the construction industry. Martin & Miller, *supra* note 2, at 21. In June 1999, over half of the 66 foreign construction firms inspected in the

Subcontractors who employ foreign workers in violation of minimum working conditions for these workers (e.g. do not pay them minimum wage) face a fine of 1,000,000 Euros ($666,469).[110] General contractors who knowingly or negligently allow subcontractors to employ foreign workers below minimum working conditions also face a fine of 1,000,000 Euros ($666,469).[111] In order to hold general contractors liable, courts are required to find only negligence, as opposed to gross negligence.[112] Furthermore, employers must pay for their contract employees' work permits; if an employer requires reimbursement for the cost of the permit, the employer can be fined 50,000 Euros ($33,323).[113]

In fighting the illegal employment of undocumented workers, Germany focuses its enforcement efforts on employers, as opposed to employees.[114] This is due to that fact that employers make a substantial profit by exploiting undocumented workers.[115] German authorities have declared that such exploitation distorts the labor market.[116] Rainer Irlenkaueuser, Director of the Ministry of Labor and Social Affairs, wrote that "[i]n Germany the irregular employment of foreigners is considered socially harmful, undesirable from the point of view of labor market policy and as having [a] negative effect on fair competition."[117]

Statistics for 2003 indicate that there were a total of 59,630 penalties issued and criminal prosecutions initiated against employers and employees.[118] The most recent enforcement statistics the author was able to obtain relating to enforcement actions taken against employers of undocumented workers date from 1998.[119] During that year, 47,400,000 Euros ($29,197,936) in fines were levied against employers of unauthorized workers.[120] Additionally, fines totaling 580,000 Euros ($357,281) were imposed on employers who employed undocumented temporary workers, while general contractors paid 910,000 Euros ($560,526) for the indirect employment of undocumented workers.[121] Recent data on enforcement activities against employers and employees indicates a trend of increasing enforcement against employers.[122]

State of Baden-Württemberg in Southwest Germany violated German labor laws by not paying their foreign workers the legal minimum wage. Id.

110 Irlenkaueuser, *supra* note 90, at 153.

111 *Id.*

112 *Id.*

113 *Id.*

114 *See generally id.*

115 *Id.* at 152.

116 *Id.*

117 *Id.*

118 MIGRATION REVIEW 2004, *supra* note 15, at 115.

119 Irlenkaueuser, *supra* note 90, at 153.

120 *Id.*

121 *Id.*

122 *See* FEDERAL REPUBLIC OF GERMANY, *supra* note 89, at 32; MIGRATION REVIEW 2004, *supra* note 15, at 59; Martin & Miller, *supra* note 2, at 77.

B. South Korea

In South Korea, the Immigration Control Act is the primary authority detailing the country's prohibitions against the employment of undocumented workers.[123] Originally enacted on March 5, 1963, the Act has been amended twelve times, with the most recent amendment dating December 5, 2002.[124] It makes it illegal for employers to employ or solicit for employment unauthorized foreign workers.[125] The Act provides that an employer who employs or solicits for employment an undocumented worker is subject to three years imprisonment and a fine not exceeding 20,000,000 won ($19,265).[126] An employer is also liable for the repatriation costs of any undocumented workers it has employed.[127]

In a more recent legislative measure, South Korea promulgated the Act on the Foreign Workers' Employment, etc. ("Employment Permit Act")[128] on August 16, 2003. The Employment Permit Act offers amnesty to many undocumented workers in South Korea, provides more stringent enforcement for foreign workers' labor rights, and implements a temporary worker program.[129] A primary motivation in passing the law was to prevent the exploitation of both documented and undocumented foreign workers.[130]

Under the Employment Permit Act, additional penalties were created for employers of foreign workers.[131] An employer who fails to obtain the necessary work permit for a foreign worker faces a fine of 10,000,000 won ($9,632) and imprisonment for one year.[132] In order to protect the labor rights of undocumented workers, an employer may be barred from legally employing foreign workers if the employer violates either a foreign worker's contract or any labor-related laws covering undocumented workers.[133] When the employer loses this

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123 Immigration Control Act, Law No. 1289 (1963) (S. Korea), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011498.pdf.

124 *Id.* at Introduction.

125 *Id.* art. 18.

126 *Id.* art. 94.

127 *Id.* art. 90-2(1).

128 Act on Foreign Workers' Employment, etc., Law No. 6967 (2003) (S. Korea), *available at* http://www.welco.or.kr/english/e_main.asp (last visited Oct. 9, 2005).

129 *See id.;* Ki Sup Kwon, Dir. of Foreign Employment Div., Presentation Before the 3rd Meeting of the Immigration Policy Forum: The Prospects and Challenges for the Employment Permit System, at 17 (June 17, 2004) (translated Summary Report), *available at* http://www.immigration.go.kr/ipf/. ("A total of 184,000 undocumented foreign workers, or 81% of the estimated total, filed for and were granted legal working permits during the grace period from September 1, 2003, through November 30, 2003.") Dae-Hwan Kim, 2004 Labor Policies (April 19, 2004), *available at* http://152.99.129.68:8787/English/libr/sub_Content1.jsp.

130 Ki Sup Kwon, *supra* note 129, at 5; REPUBLIC OF KOREA INTERNATIONAL COOPERATION BUREAU, LABOR ADMINISTRATION 2004 17 (2003), *available at* http://152.99.129.68:8787/board/pds_view.jsp?idx=77&code=A&pageNum=0&searchWord=&searchType=null.

131 Act on Foreign Workers' Employment, etc. art. 29 (S. Korea).

132 *Id.* arts. 8(5), 29(1).

133 *Id.* art. 19. "'The Government has also declared that employers reported to have abused foreign workers are subject to criminal charges and can be disadvantaged in the Government's allocation of jobs for foreign workers.") U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2000: REPUBLIC OF KOREA, §6 (2001), *available at*

right, the foreign workers who were employed by the employer at that time may then transfer to another employer.[134] However, if the employer continues to employ foreign workers or attempts to obstruct the foreign worker's right to transfer, the employer faces a fine of 10,000,000 won ($9,632).[135] Thus, the Employment Permit Act provides the foreign worker some protection when reporting employers who violate labor laws.

The Employment Permit Act specifies both documented, and undocumented, "foreign workers in Korea are accorded the same legal rights as Korean workers, such as the right to join labor unions, minimum wage guarantees, and industrial accident insurance."[136] Government officials have added that undocumented workers who have had their wages withheld, suffered industrial accidents, or filed suits against employers will be allowed to extend their stay until these issues have been resolved.[137] However, this was not the first time that the Korean government had contemplated suspending removal proceedings to protect the labor rights of undocumented workers. Since 2000, the Ministry of Justice has periodically postponed deportations for undocumented workers waiting for back pay, medical care, compensation for industrial accidents, or the resolution of lawsuits against employers.[138] Furthermore, even if the employee returns or is removed to his or her country, an employer is still required to provide the undocumented employee any back wages due.[139] An employer who fails to pay back wages to a terminated foreign worker can be fined 10,000,000 won ($9,632).[140]

In addition to the Employment Permit Act, the Korean government has utilized other means to provide undocumented workers the same labor protections as documented workers. In fact, for several years counseling centers have heard complaints from foreign workers about overdue wages and industrial accidents.[141] Regional labor offices have also assisted foreign workers in collecting

http://www.state.gov/g/drl/rls/hrrpt/2000/eap/723.htm [hereinafter DEP'T OF STATE REPORTS 2000]; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2001: REPUBLIC OF KOREA, §6 (2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8336.htm [hereinafter DEP'T OF STATE REPORTS 2001].

134 Act on Foreign Workers' Employment, etc. art. 25 (S. Korea).

135 *Id.* art. 29(4).

136 Sean Hayes, Columnist, *New Work System Benefits Migrants,* THE KOREA HERALD, Aug. 15, 2003.

137 Press Release, Republic of Korea Ministry of Justice, Roundup of Illegal Foreign Workers to Begin (Nov. 17, 2003), *available at* http://www.moj.go.kr.

138 DEP'T OF STATE REPORTS 2000, *supra* note 133; DEP'T OF STATE REPORTS 2001, *supra* note 133; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2002: REPUBLIC OF KOREA, §6 (2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18250.htm [hereinafter DEP'T OF STATE REPORTS 2002]; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2003: REPUBLIC OF KOREA, §6 (2004) *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27776.htm [hereinafter DEP'T OF STATE REPORTS 2003].

139 Act on the Foreign Workers' Employment, etc. art. 16 (S. Korea).

140 *Id.* art. 29(2).

141 U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES for 1999: REPUBLIC OF KOREA, §6 (2000) http://www.state.gov/g/drl/rls/hrrpt/1999/292.htm [hereinafter DEP'T OF STATE REPORTS 1999]; DEP'T OF STATE REPORTS 2000, *supra*

back wages.[142] In 2000, the Ministry of Justice announced the establishment of the Foreign Workers Human Rights Commission, which was created to "address employer mistreatment of foreign workers, such as beatings, forced detention, withheld wages, and seizure of passports."[143] Since its establishment, the Commission has met several times to hear complaints and to discuss inter-agency methods to protect foreign workers.[144]

In furtherance of Korea's labor and immigration policies, several government agencies have been granted jurisdiction to enforce laws related to the employment of undocumented workers.[145] For example, the Ministry of Labor has jurisdiction to enforce the Employment Permit Act.[146] It conducts inspections and investigations, as well as sets up counseling and education services for foreign workers.[147] On the other hand, the Ministry of Justice and the Law Enforcement Agency are the primary agencies in charge of enforcing employer sanctions under the Immigration Control Act.[148] As many as five government agencies may be involved in enforcement efforts, including the Justice Ministry, the Labor Ministry, the Small and Medium Business Administration, the National Maritime Policy Agency and the National Policy Agency.[149]

Since the Employment Permit Act was promulgated on August 16, 2003, there have been large-scale enforcement efforts against undocumented workers and their employers.[150] Kwon Ki Sup, Director of Foreign Employment Division, Ministry of Labor, has stated that South Korea's strategy under the Employment Permit Act is to step up enforcement of employer sanctions.[151] In 2004, there were at least five reported major crackdowns in the construction, manufacturing, and video game parlor industries, during which hundreds of undocumented workers were arrested.[152] These large-scale enforcement efforts directed towards un-

note 133; DEP'T OF STATE REPORTS 2001, *supra* note 133; DEP'T OF STATE REPORTS 2002, *supra* note 138.

142 DEP'T OF STATE REPORTS 2002, *supra* note 138.

143 *Id.*

144 DEP'T OF STATE REPORTS 2003, *supra* note 138.

145 *See id*; Act on the Foreign Workers' Employment, etc. art. 4(4) (S. Korea).

146 *See* Act on the Foreign Workers' Employment, etc. art. 5 (S. Korea).

147 *Id.* at arts. 5, 21, 24, 26; Enforcement Decree of the Act on Foreign Workers' Employment, etc., Presidential Decree No. 18314 art. 23(2) (Mar. 17, 2004) (S. Korea), *available at* http://www.welco.or.kr/english/law/down_files/decree%20of%20foreign.pdf.

148 KOREA LABOUR WELFARE CORP., PUBLIC NOTICE FOR FOREIGN WORKERS AND THEIR EMPLOYERS (2004), *available at* http://www.welco.or.kr/english/news/2004/notice(040210).htm.

149 Press Release, Republic of Korea Ministry of Justice, Government Crackdown on Illegal Aliens Begins Next Week (Nov. 13, 2003), *available at* http://www.moj.go.kr.

150 *See* Press Release, Republic of Korea Ministry of Justice, Government to Crack Down on Illegal Aliens (Feb. 21, 2004), *available at* http://www.moj.go.kr.

151 Ki Sup Kwon, *supra* note 129, at 6.

152 Press Release, Republic of Koreas Ministry of Justice, Justice Ministry Uncovers 140 Illegal Foreign Workers (Aug. 23, 2004), *available at* http://www.moj.go.kr (last visited Oct. 10, 2005); Press Release, Republic of Korea Ministry of Justice, Crackdown Uncovers 305 Illegal Foreign Workers (Nov. 27, 2004), *available at* http://www.moj.go.kr.

documented workers have been coupled with doubled penalties against employers who employ those workers.[153]

IV. A System Which Combines Both Labor and Immigration Policies More Effectively Combats the Unauthorized Employment of Undocumented Workers

In contrast to the United States and the United Kingdom, South Korea and Germany have implemented and enforced employment sanctions laws in a stringent manner. Also distinguishable from the United Kingdom, both Germany and South Korea provide for imprisonment as a criminal penalty against employers who employ undocumented workers.[154] In comparison to the United States, which also provides for imprisonment penalties as a possible sanction, the potential imprisonment sentences imposed by Germany and South Korea are longer.[155] Furthermore, unlike the United States and the United Kingdom, Germany and South Korea require employers to pay the costs of repatriating the undocumented workers they once employed.[156] In terms of applying governmental resources to enforcing employer sanctions, Germany has invested much more than either the United States or the United Kingdom, obtaining millions of dollars in fines as a result.[157] Additionally, whereas the United Kingdom and the United States have decreased enforcement, South Korea has instead increased employer penalties in addition to pursuing greater enforcement actions targeting the employment of undocumented workers.[158]

The relatively minimal efforts taken by the United States and the United Kingdom in enforcing employer sanctions, when compared to Germany and South Korea, undermine one of the key rationales of the U.S. Supreme Court's decision in *Hoffman Plastics Compounds, Inc., v. NLRB*. The *Hoffman* Court held that because IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,'" undocumented workers are unable to receive the same remedies as authorized workers.[159] Although South Korea and Germany are much more forceful in combating the employment of undocumented workers than either the United States or the United Kingdom, they still provide greater access to the same labor law remedies as those afforded to authorized workers. Thus, in contrast to the Supreme Court's opinion in *Hoffman*, South Korea and Germany demonstrate that just because a country promulgates

153 Press Release, Republic of Korea Ministry of Justice, Harsher Penalties Set for Employment of Illegal Foreign Workers (Oct. 9, 2003), *available at* http://www.moj.go.kr [hereinafter Harsher Penalties].

154 Asylum and Immigration Act, 1996, c. 49, § 8 (Eng.); Irlenkaueuser, *supra* note 90, at 154; Immigration Control Act art. 94 (S. Korea).

155 Irlenkaueuser, *supra* note 90, at 154; Immigration Control Act art. 94 (S. Korea); 8 U.S.C. § 1324a(f) (1952).

156 Immigration Control Act art. 90-2 (S. Korea); Irlenkaueuser, *supra* note 90, at 153.

157 Martin & Miller, *supra* note 2, at 21, 22; Irlenkaueuser, *supra* note 90, at 152.

158 Harsher Penalties, *supra* note 153.

159 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002) (citing INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194, n. 8 (1991)).

employer sanctions does not mean that it also intends or would allow undocumented workers to be deprived of legal remedies or any additional protections afforded to documented workers.

The efforts to stop the exploitation of undocumented foreign workers by Germany and South Korea also serve to stop the illegal trafficking of people.[160] The International Labor Organization recommends that one of the necessary requirements in a comprehensive plan to halt human trafficking is the "[e]nforcement of minimum national employment conditions standards in all sectors of activity, to serve as a complementary system of criminalizing abuse of persons and of discouraging irregular employment."[161] Providing undocumented workers with the same labor law remedies as documented workers is one of the best methods of enforcing minimum working conditions and deterring the exploitation of undocumented workers.[162] Germany and South Korea exemplify the notion that immigration policy is compatible with labor policy by combining the former's policy goal of stopping illegal trafficking of human beings with the latter's aim of providing labor protection to those working inside the country.[163]

As described above, Germany and South Korea use both labor law enforcement agencies and cooperation between various types of agencies to enforce employer sanctions. This practice also occurs in many other European countries where labor department inspectors are used to both enforce labor laws and employer sanctions.[164] As these examples demonstrate, there can be compatible immigration and labor policies that work to prevent unauthorized employment while at the same time promoting labor rights for undocumented workers.

V. Conclusion

Maintaining the fight against the employment of illegal aliens as a central tenet of a country's immigration policy does not automatically lead to the conclusion that immigration policy is more important than labor policy, nor does it imply that the goals of one are incompatible with that of the other. In order to appreciate the commonality between immigration and labor policy, one must recognize the deeper policy objectives behind employer sanctions, including the

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160 *See* PATRICK A. TARAN & GLORIA MORENO-FONTES CHAMMARTIN, INTERNATIONAL LABOUR ORGANIZATION, GETTING AT THE ROOTS: STOPPING THE EXPLOITATION OF MIGRANT WORKERS BY ORGANIZED CRIME, 15 (2003) *available at* http://www.ilo.org/dyn/dwresources/dwbrowse.page?p_lang=en&p_tool_id=132.

161 *Id.*

162 *See* Sure-Tan Inc., v. NLRB, 467 U.S. 883, 904 (1984); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies* ILO's COMMITTEE ON FREEDOM OF ASSOCIATION, REPORT NO. 332: COMPLAINTS AGAINST THE GOVERNMENT OF THE UNITED STATES PRESENTED BY AMERICAN FEDERATION OF LABOR AND THE CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AND THE CONFEDERATION OF MEXICAN WORKERS (CTM), ¶ 609 (2003) *available at* http://www.ilo.org/public/english/bureau/inst/edy/cornell05/aflcio.pdf.

163 *See* Colin L. Powell, *No Country Left Behind*, FOREIGN POL'Y, Jan./Feb. 2005, *available at* 2005 WLNR 74766 (former U.S. Secretary of State calling for international partnerships to stop the illegal trafficking of persons).

164 Martin & Miller, *supra* note 2, at 1, 4.

preservation of jobs, working conditions, and wages for the country's workers.[165] As the employer sanctions systems of Germany and South Korea indicate, enforcement of labor laws actually fosters immigration policy by discouraging employers from hiring undocumented workers that they can exploit.[166]

As Ruben Garcia has observed, "[h]istorically, immigration law and labor law have not been linked in the policymaking process. This disconnect has led to a failure to see immigration as a labor issue and vice versa."[167] Accordingly, there must be an integrated approach if a country is to harmonize immigration and labor policy. Unless otherwise indicated by law, a country's courts should not assume that the policy of employer sanctions automatically disallows equal labor law remedies for undocumented workers. Countries need to recognize that enforcement of labor laws is compatible with the enforcement of immigration laws and that equal enforcement of labor laws for all workers can simultaneously further both labor and immigration policy. Taking into mind the Inter-American Court of Human Rights' advice, differential treatment between documented workers and undocumented workers is only permissible to the extent it is "reasonable, objective, proportionate and does not harm human rights."[168]

[165] *See Sure-Tan*, 467 U.S. at 893; H.R. REP. No. 99-682 (I), at 48, 90-91, 124 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5652, 5694, 5728; H.R. REP. No. 99-682 (II), at 9 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758; Martin & Miller, *supra* note 2, at 1.

[166] *See* Patel v. Quality Inn S., 846 F.2d 700, 704-5 (11th Cir. 1988).

[167] Garcia, *supra* note 162, at 740.

[168] Advisory Opinion OC-18/03, Juridical Status and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R.(ser. A) No. 18, at 119 (Sept. 17, 2003), *available at* http://www.corteidh.or.cr/seriapdf_ing/seriea_18_ing.pdf (last visited Oct 25, 2005) (holding that *Hoffman* decision violated undocumented workers' equal protection and due process rights).