INTRODUCTION

ARTICLES
American Military Justice from the Revolution to the UCMJ: The Hard Journey from Command Authority to Due Process
   Michael Bryant

NOTES
Disputing the Dispute: Amending International Arbitral Tribunals to Require Secondary Consent for Class Arbitration
   Danny C. Leavitt

The Extraordinary Chambers in the Courts of Cambodia: Gauging the (In)Effectiveness of a Locally-Run Tribunal
   Kyla M. Ehrisman

The Push for International Uniformity: The WTO’s Detrimental Effect on the Global Economy
   Dallin B. Call

Tipping the Scale from Mass Murder to Genocide: What Does it Take?
   Katie A. Sellers
INTRODUCTION

In this volume of the Creighton International and Comparative Law Journal, we bring readers scholarly articles that focus on a variety of topics relating to international tribunals. Through this topic, we have encompassed a diverse range of legal issues within the international community to gain a better understanding of the history and expansion of these unique, powerful international tribunals. From genocide to patent law, we hope that these articles, which focus on events from history and around the world, will inform and appeal to a diverse group of readers. This volume features an article written by Professor Michael S. Bryant, Bryant University, who is an expert on Modern European History, as well as articles from four of our own talented student writers.

We attribute the success of this Journal to the hard work and dedication of its writers, staff, and faculty at Creighton University School of Law. I hope you enjoy this issue of the Creighton International and Comparative Law Journal.

Katie A. Sellers
Editor-in-Chief Elect, 2013-14
AMERICAN MILITARY JUSTICE FROM THE REVOLUTION TO THE UCMJ:
THE HARD JOURNEY FROM COMMAND AUTHORITY TO DUE PROCESS

MICHAEI SCOTT BRYANT

There were three members of the Action Board: the bloated colonel with the big fat mustache, Lieutenant Scheisskopf, and Major Metcalf, who was trying to develop a steely gaze. As a member of the Action Board, Lieutenant Scheisskopf was one of the judges who would weigh the merits of the case against Clevinger as presented by the prosecutor. Lieutenant Scheisskopf was also the prosecutor. Clevinger had an officer defending him. The officer defending him was Lieutenant Scheisskopf.

- Joseph Heller, Catch 22

Second Lieutenant Sidney Shapiro was sure the government witnesses could not identify his client as the would-be rapist. Shapiro, an army officer, had been appointed during World War II to defend a soldier charged in a general court-martial with assault and intent to commit rape. In any criminal accusation—especially one as serious as sexual assault—the victim’s ability correctly to identify the accused was central to the prosecution’s case. Shapiro doubted the ability of the victim to make this crucial identification of his client as the attacker.

Impeaching a victim of sexual assault, however, is always a dangerous tactic for a defense counsel, insofar as it risks alienating the jurors. Such a concern may have underlain Shapiro’s decision to use an inventive strategy of defense: he substituted another person for the defendant at counsel’s table. The trial went forward through the findings phase of the court-martial, during which the impostor was identified as the perpetrator. After both sides had presented their cases, the impostor was duly convicted of assault with intent to commit rape. Shapiro no doubt felt a thrill of accomplishment as he revealed the identity of his client’s substitute to the court.

Any sense of triumph Shapiro may have had quickly vanished, however, when the commander promptly ordered his client to be court-martialed, a proceeding that ended with his conviction. Not satisfied with prosecuting Shapiro’s client, the commander also prosecuted Shapiro himself for violating the 96th Article of War, which made it a criminal offense under military law to “delay the orderly progress” of a court-martial. Shapiro received notice of the charges at 12:40 p.m.; at this time, he was informed he would be tried at 2:00 p.m. that same day. All requests to delay the trial were

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1 Walter T. Cox, The Army, the Courts, and the Constitution: The
denied. By 5:30 p.m., he had been convicted and dismissed from the service. Thereafter, he was drafted back into the Army as a private.¹

The case of 2nd Lieutenant Shapiro is a microcosm of the abuses within the US military justice system during World War II. Most prominently, these included assignment of court members untrained in law, harsh sentences disproportionate to the offense, and despotic control of the proceedings by the commander. A case like Lieutenant Shapiro’s may seem tame compared with the monstrous verdicts rendered by Wehrmacht courts during the war, which pronounced between 20- and 30,000 death sentences (at least 20,000 of these were carried out), often for vague or relatively harmless offenses like “subverting military strength” (Zersetzung der Wehrkraft).² These cases often reflected distinct overtones of National Socialist ideology.³ While US military justice may not have sunk to the depths of injustice that characterized its German counterpart, it still offended many Americans both during and after


² On the checkered history of German military justice both before and during World War II, see MANFRED MESSERSCHMIDT, DIE WEHRMACHTJUSTIZ 1933-1945 (Paderborn: Ferdinand Schöningh, 2008); WALTER MANOSCHEK, OPPFER DER NS-MILITÄRJUSTIZ: URTEILSPRAXIS – STRAFVOLLZUG – ENTSCÄDIGUNGSPOLITIK IN ÖSTERREICH (Vienna: Mandelbaum, 2003); Steven R. Welch, Harsh but Just? German Military Justice in the Second World War: A Comparative Study of the Court-Martial of German and US Deserters, 17 GER. HISTORY 369-99 (1999); ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : Soldaten und Zivilisten vor Gerichten der Wehrmacht (2008). “Subverting military strength” was a provision of the Special Wartime Military Decree (Kriegssonderstrafrechtsverordnung, or KSSVO), which came into effect in August 1939. It criminalized the actions of anyone—soldiers and civilians alike—who “publicly sought to impair or undermine the will of the German or allied peoples to able-bodied self-assertion.” Such offense was punishable by death or (in milder cases) imprisonment; as the war ground on, defendants convicted under the KSSVO were increasingly sentenced to death, particularly after the German defeat at Stalingrad. See Welch, Harsh but Just? 378-79 (noting Welch mistakenly translates Verordnung as “Code,” rather than “decrees”); See also, ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : Soldaten und Zivilisten vor Gerichten der Wehrmacht 67-68 (2008) (quoting ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : Soldaten und Zivilisten vor Gerichten der Wehrmacht 67-68 (2008) (quoting MICHAEL S. BRYANT AND ALBRECHT KIRSCHNER, “POLITIK UND MILITÄRJUSTIZ: DIE Rolle der Kriegsgerichtsbarkeit in den USA und Deutschland im Vergleich”:


³ On National Socialist military justice, see infra.
World War II. Americans did not compare US military justice with German military justice, a comparison that, from the viewpoint of minimizing harm to defendants’ rights, certainly redounds to the advantage of the US system; rather, Americans compared it with the criminal procedure they were most familiar with—a civilian judicial process hedged round with constitutional protections.

In the civilian criminal trial, the official who drafted charges against a defendant was different from the one who considered the merits of the defendant’s appeal when convicted, unlike military trials, in which the commander as convening authority both referred the charges against the defendant and reviewed the charges after conviction. In the civilian criminal trial, all members of the court were trained lawyers, in contrast with military proceedings, in which few, if any, of the court members had legal training. In the civilian criminal trial, the defendant could hire a vigorous advocate to present his case to an impartial jury without fear of retaliation. This, too, differed from military courts-martial during the war, in which commanders freely meddled in the proceedings and sometimes punished court members disinclined to convict. In this respect, former Vermont governor Ernest W. Gibson’s account of his experiences with U.S. military justice during World War II is revealing:

I was dismissed as a Law Officer and Member of a General Court-Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted—yet the evidence didn’t warrant it. I was called down and told that if I didn’t convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared off and said that wasn’t my conception of justice and that they had better remove me, which was done forthwith.\(^3\)

Finally, in the civilian criminal trial, punishments had to fit the severity of the offense; by contrast, military courts-martial frequently meted out 25 or more years to first-time offenders for “crimes” unknown in the civilian world, like desertion and being absent without leave. As one important postwar Congressional Committee found in its assessment of US military justice during the war, 75 year sentences for disciplinary infractions were not uncommon.\(^4\) In hearings before a House of Representatives Subcommittee on amending the Articles of War in April 1947, a report submitted by the Committee on Military Law of the War Veterans Bar Association cited the prosecution of an 18-year-old raw recruit in the 5th week of his basic training for willful disobedience to the lawful command of his superior officer. He was convicted and sentenced to a

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\(^4\) Id. at 41.
dishonorable discharge, total forfeitures of his income, and confinement at hard labor for 55 years.\(^5\)

The abrasive encounter of American soldiers with US military justice in World War II was a form of “culture shock.” More than 1,700,000 courts-martial were convened during the war, or one for every eight service members. Most of these trials ended in convictions. In the Army, 20,392 soldiers were convicted of desertion, yielding a conviction rate of nearly four per 1,000 soldiers per year during the conflict. By the war’s end, more than 45,000 military members were in military jails, serving out their sentences. The defendants were largely regular citizens who had either volunteered for or been drafted into the Army.\(^6\) According to a board appointed by the Secretary of War in 1946 to investigate unfair treatment of service members, these ordinary citizens with little prior military experience were dismayed by the inequities of military culture. Regarding inequalities based on rank, the investigators commented:

> Americans look with disfavor upon any system which grants unearned privileges to a particular class of individuals and find distasteful any tendency to make arbitrary social distinctions between two parts of the Army . . . . There is need for a new philosophy in the military order, a policy of treatment of men, especially in the “ranks” in terms of advanced concepts in social thinking. The present system does not permit full recognition of the dignities of man. More definite protection from the arbitrary acts of superiors is essential.\(^7\)

Sociologists working for the Research Branch of the US Army conducted a four-year study of American attitudes in World War II that powerfully corroborated the conclusions of this postwar investigation. Published in 1949, their findings confirmed the clash between an American citizenry accustomed to a society based on legal equality and a military judicial system that often discriminated against enlisted members:

> Americans look with disfavor upon any system which grants unearned privileges to a particular class of individuals and find distasteful any tendency to make arbitrary social distinctions between 2 parts of the Army . . . . The present system does not permit full recognition of the dignities of man. More definite

\(^5\) Congress, Senate, Subcommittee of the Committee on Armed Services, *Amending the Articles of War: Hearings before the Subcommittee of the Committee on Armed Services*, 80th Congress 2166-2175 (1947).


\(^7\) Id. at 30. The board became one of the leading postwar bodies inquiring into allegations of unfairness toward soldiers. Its name, the Doolittle Committee, was derived from the committee chairman, General James Doolittle.
protection from the arbitrary acts of superiors is essential.\textsuperscript{8}

What American soldiers were experiencing was a collision with a 160-year military tradition of sacrificing individual rights to the overriding interests of the commander in maintaining “good order and discipline.” The disconcertment aroused by the gap between civilian and military justice reflected a basic tension in American legal history with roots buried deep in the country’s formative years. On the one hand, the pre-Revolutionary colonial authorities distrusted military rule detached from civilian control. In their view, rules and regulations established by the legislature had to temper military discretion. In June 1775, for example, the Continental Congress instructed George Washington (newly appointed as commander of the continental army) to follow the “rules and discipline of war” and the Congress’s direct orders.\textsuperscript{9} In that same month, the Congress adopted 69 “Articles of War” based on British models, which erected courts-martial for the prosecution of mutiny, desertion, and other military offenses, and stipulated punishments for them in the form of whippings, fines, and imprisonment. Such action demonstrated Congress’s refusal to entrust matters of military discipline solely to command discretion, but to subordinate it to the rule of law as defined by the civilian legislature. The Declaration of Independence of July 1776 was the acme of colonial attitudes toward unaccountable military power: in that founding document, the revolutionaries declared that one of the chief reasons for breaking with England was King George III’s effort “to render the Military independent of and superior to the Civil Power.”\textsuperscript{10}

Likewise, the Articles of Confederation (ratified in 1781) subjected the military to civilian control by enabling Congress to enact regulations for its governance. As successor to the Articles, the US Constitution reaffirmed this commitment to civilian dominance of the military by vesting the war power in Congress and empowering that body to define offenses against the “law of nations” (Art. I, §8). Moreover, the recognition of the president as “commander in chief” of the military was designed to guarantee civilian preeminence. As Abraham Lincoln’s attorney general, Edward Bates, averred in 1861, the Constitution designates the president the “commander” of US forces not on account of his martial prowess, but because he was a “civil magistrate.”\textsuperscript{11}

This emphasis on civilian control of the military, however, was at odds with a persistent counterpoint in American history—the view that the ordinary legal system must yield to military commanders and executive power in times of war. Interestingly, this countervailing notion that prized command discretion above

\textsuperscript{8} Samuel A. Stouffer, et. al., The American Soldier: Adjustment During Army Life 373 (1949); See also Sherman, supra note 6, at 30.
\textsuperscript{9} 2 J. Cont’l Cong. 90 (1905).
\textsuperscript{11} 10 Op. Att’y Gen. 74, 79 (1861).
individual rights may be found at the very origins of the American Republic, intertwined and coexisting with the founders’ belief in civilian control of the army. The Articles of War adopted in 1776 and 1806 already recognized the unique needs of military culture by limiting freedom of speech (they criminalized the use of “contemptuous or disrespectful words” directed at the president, vice-president, or Congress). Ardent democrats like John Adams and Thomas Jefferson asserted that military necessity outweighed the due process of military members. For Adams, the overriding need for discipline set the “militia” apart from civil society. Without adequate command control, “the ruin of our cause and country must be the consequence,” Adams wrote in a diary extract that anticipated Jefferson’s remarkable avowal decades later that “scrupulous adherence to written law” must yield to “the laws of necessity, of self-preservation, of saving our country when in danger.” For Jefferson, a heightened concern with legal forms that ignored imminent danger to the Republic would “lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the ends to the means.”12

These perspectives on the primacy of command authority over ordinary law, especially in times of war or national emergency, are a recurrent theme in 19th century American attitudes toward military justice. For the populist Andrew Jackson, legal protections must sometimes be suspended during a crisis because adhering to them would “lose the substance [of law] forever, in order that we may, for an instant, preserve the shadow”—a statement lifted with surgical precision from Jefferson’s earlier warning. We encounter a similar view in Lincoln’s defense of his decision to suspend the writ of habeas corpus in 1861, in which he chided would-be critics of his decision with a blunt rhetorical question: “Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?”13 Taken as a whole, the views of Adams, Jefferson, Jackson, and Lincoln express a 19th century American tendency to treat the military as a unique institution in American life. Without a strong army to defend it, the experiment in democracy might fail, thereby rendering democratic government and Constitutional practice moot. Hence, the military stood beyond ordinary due process requirements that protected civilians in their relations with the State.

In view of such attitudes, it is unsurprising that the review of court-martial judgments under the 19th century Articles of War elevated command authority above soldiers’ due process rights. The Articles provided for a review process internal to the military structure: a court-martial verdict was automatically reviewed by the “convening authority” (i.e., the commander who convened the court-martial) and the Judge Advocate General. In some cases, such as those involving general officers, the death penalty, or dismissal of an

13 Id. at 14.
officer, the president served as the final confirming authority.\textsuperscript{14} No appellate procedure existed as such under the 19\textsuperscript{th} century Articles of War: a defendant convicted in a court-martial was entitled only to automatic review by the reviewing and (where appropriate) confirming authorities. Moreover, the Articles of War did not address whether civilian courts could review the verdicts of military courts, a question that remained open until the landmark US Supreme Court case of \textit{Dynes v. Hoover} (1858).\textsuperscript{15} In \textit{Dynes}, a seaman convicted by naval court-martial of attempted desertion and sentenced to six months at hard labor appealed his conviction to a civilian court, alleging that the military court had lacked jurisdiction over him (inasmuch as the offense he was convicted of did not appear in the Articles for the Government of the Navy). In affirming Dynes’s conviction, the high court held that “no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts” over cases on appeal from courts-martial, so long as the court that issued the verdict was properly convened. Reflecting the widely held view that the needs of military discipline were beyond civilian judicial review, the \textit{Dynes} verdict remained the dominant paradigm of US military justice until Congress’s adoption of the Uniform Code of Military Justice in 1950.\textsuperscript{16}

For influential post-Civil War military leaders like William T. Sherman, a celebrated Civil War general and later Commanding General of the Army (1869-1883), civilian justice and military justice were entirely separate, non-overlapping spheres of law that had little to do with one another. In an 1879 address to a congressional committee, Sherman expounded a minimalist conception of military justice representative of his era, stating that it would “be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in civil courts, which belong to a totally different system of jurisprudence.” He continued:

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the

\textsuperscript{14} See, e.g., Articles of War 105, 106, and 107; Sherman, supra note 6, at 14. On action by the reviewing and confirming authorities under the 19\textsuperscript{th} century articles: \textit{See also William Winthrop, Military Law and Precedents}, 447 (Vol. I, 1920).

\textsuperscript{15} 61 U.S. 65, 65 (1857).

principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.\footnote{Sherman, \textit{supra} note 6, at 4-5.}

In Sherman’s words, we can see the two major discontinuities between civilian and military law that would scandalize the American public during and after World War II: (1) the curtailment of due process rights for military members and (2) their complete subordination to command authority in furtherance of the “good order and discipline” necessary for combat readiness. Even after the alarming revelations of post-World War II Congressional investigations, the former Commander of US Forces in Europe, Dwight Eisenhower, could affirm in November 1948 the unavoidable necessity of a double standard where the rights of service members in military courts were concerned. For Eisenhower, military justice “was never set up to insure justice,” but to “to perform a particular function,” which required “a violation of the very concepts upon which our government is established.”\footnote{\textit{Id.} at 35.} Eisenhower’s perspective evokes those of Adams, Jefferson, Jackson, Lincoln, and Sherman, with whom he shared the belief that the aim of military justice was not, paradoxically, to serve justice, but to ensure the discipline required to defend American democracy from its enemies. As Lincoln had framed the issue in defending his suspension of habeas corpus, “are all the laws, but one, to go unexecuted, and the government go to pieces, lest that one be violated?”

The prevailing model of American military justice, then, presents us with a singular puzzle of democracy: in order to preserve American democracy, the country had to be defended by a robust and efficient military force; but, in order to maintain the vigor of the military, command authority over service members had to be absolute, leaving little regard for the rights of individual soldiers. Antidemocratic means, in other words, had to be used to preserve democracy. The USA has confronted this strange conundrum at various points in its history, most recently in denying basic rights to persons caught in the traps of the former Bush Administration’s “war on terror.” The clash between civilian and military legal norms was concealed from most Americans until times of war, when average civilians had their first brush with a system of total control that existed only in the shadows during peacetime. It is not coincidental that the two most vocal periods of civilian protest against military justice occurred after World Wars I and II (particularly World War II), which exposed millions of civilians for the first time to the military law and its hierarchy based on rank. In the years after World War I, a reform movement originating in the Judge Advocate General’s office called for aligning military justice with civilian legal norms. The
result was a cosmetic change in the Manual for Courts-Martial in 1928, in which the commander was stripped of his power to reverse an acquittal or to return a lenient verdict to the court members for redetermination of the sentence. Despite this minor change in the Manual, the commander still enjoyed the right to reprimand any participants in the court-martial who offended him. Furthermore, he was free to advise court members that, while he could not overturn an acquittal or increase a sentence given a defendant, he was allowed to reduce sentences if he deemed it appropriate. Prior to sentencing a convicted defendant, the jurors received a set of confidential instructions published by the War Department. These instructions contained what may be described as “mandatory minimum” punishments for certain kinds of offense. The result was to steer court members toward meting out harsh sentences, on the supposition that they were under orders to do so and that the commander could always reduce punishment later on.19

Heading into World War II, then, commanders retained significant freedom to interfere with the administration of military justice, notwithstanding the modest reforms undertaken after World War I. Unlike World War I, however, military justice in World War II triggered a wave of public protest that led to meaningful enhancement of the rights of court-martialed defendants. We can speculate about the reasons for the differing outcomes in these two episodes of protest. One possible explanation is the sheer number of American civilians subject to military justice in World War II. The numbers are staggering: some 12,300,000 Americans were in the armed services at the peak of mobilization—a number almost equal to the country’s population in 1830. At this time, the US armed forces processed roughly one-third of all criminal cases tried in the USA. The sheer volume of cases processed by military courts ensured high visibility in the public eye.20

A second explanation for the success of military justice reform after World War II is more abstract, but perhaps no less real, than pure demography. In the 1940s the USA was on the cusp of a revolution in extending greater constitutional liberties to individual citizens. Public rejection of a military legal system prone to procedural laxity and reckless interference by military commanders, all to the detriment of the accused’s due process rights, may have foreshadowed the country’s new emphasis on individual civil rights in the postwar era. It is striking that the most tumultuous era in the history of military justice reform coincided with this seismic shift in US constitutional law. The pro-business conservatism of the Supreme Court gradually yielded by the 1930s to a more progressive ethic, one that led the Court to uphold federal labor regulations and

state minimum wage laws against constitutional challenges. Well before the Warren court of the 1950s and '60s revolutionized American civil liberties with its distinctive brand of judicial activism, the Court had already begun to tilt strongly toward protecting the rights of minorities against suppression by state and local government. This epochal transformation of American law, conditioned by the nation's suffering during the Great Depression and its encounter with anti-individualist autocracies in World War II, must have contributed to Americans' dissatisfaction with the abuses of American military justice after the war. 21 Regardless of the reasons, by 1945 Americans would no longer tolerate a system that seemed so obviously unfair.

The culmination of this development was the Uniform Code of Military Justice, adopted by Congress in 1950. The new code sought to minimize the risk of command influence by requiring "a thorough and impartial investigation" before referral of charges to a general court-martial. It also established the U.S. Court of Military Appeals, consisting of three civilian judges appointed by the president to terms of 15 years. These reforms were intended to eliminate the potential for abuse in unrestrained command authority and inadequate appellate review of court-martial verdicts. In other words, the Uniform Code of Military Justice was designed to "civilianize" a body of law that, prior to 1950, was regarded as separate and distinct from civilian legal norms. 22

In the face of this history, what are we to make of American military justice before the sweeping reforms of the late 1940s? First, it should be noted that American military justice, whatever its failures in guaranteeing the rights of the accused, was an integral component of a military system whose very purpose was to defend a democratic society. If military justice sacrificed a defendant's rights to good order and discipline, then such sacrifice was considered necessary in order to preserve the Republic. As Lincoln memorably phrased it during the Civil War, should we maintain a criminal defendant's rights in wartime at the cost of losing the government—a government that was the very source of all rights and freedoms enjoyed by Americans? Insofar as its final cause was the preservation of democracy, American military justice before and


during World War II was qualitatively different from its German counterpart. At no time during the war could it be said that participants in German military justice conceived of its ultimate purpose as the defense of democratic government. Quite the contrary: German military justice was imbued with the racist-eugenic tenets of the Nazi Party. An illustrative case involves a German sailor court-martialed for desertion in September 1941. Although the two factors supporting infliction of the death penalty were lacking (namely, cowardice in the face of the enemy and preservation of discipline), the military court sentenced him to death. In addition to the defendant’s “undignified conduct,” the court cited in support of its verdict his “career and history,” which proved him to be an “inferior person” (minderwertiger Mensch). As Ulrich Baumann and Magnus Koch have written in their analysis of this case, the court’s emphasis here was less on the objective features of his act than on his character—a character branded by National Socialist ideology as defective and hence fit for destruction. The chief military judge authored a “statement” (Äußerung) for the confirming authority (Gerichtsherr) on the same day as the sentence was announced, arguing against pardoning the defendant:

Ich spreche mich gegen eine Begnadigung des Marine Artilleristen . . . aus. Sein Leben, das bisher keinen Wert hatte, wird dann vielleicht nicht nutzlos gewesen sein, wenn er jetzt durch seinen Tod anderen Kameraden ein abschreckendes Beispiel gibt.\(^{24}\)

The case cited above was not an aberration. In March 1943, a military court gave a death sentence to a marine artillery man for declaring to his comrades his pleasure at the crises in Stalingrad and Woronesch. In assessing the defendant’s liability to punishment, the military judge wrote:

Mit Rücksicht auf den in zahlreichen Vorstrafen hervorgetretenen asozialen Charakter des Verurteilten und sein freches widerspenstiges Verhalten sind die zersetzenden Äußerungen als besonders schwerwiegend anzusehen . . .. Das Todesurteil wird ohne Gnade volstrecken sein. Das Bronchialasthma, unter dem der Verurteilte leidet, bietet keinen Grund zu Begnadigung . . .. Die psychosomatische Veranlagung bietet keinen Milderungs-, sondern nur einen Strafschärfungsgrund . . .. Im übrigen würde der

\(^{23}\) Adolf Hitler announced these two criteria for capital punishment in military courts in April 1940.

\(^{24}\) ULRICH BAUMAN AND MAGNUS KOCH, WAS DAMALS RECHT WAR . . . : SOLDATEN UND ZIVILISTEN VOR GERICHTEN DER WEHRMACHT 56 (2008) (noting “. . . kommt es auf Einzelheiten insoweit auch nicht an.‘ Drei Fallstudien in zeitgenössischer und erinnerungspolitischer Perspektive.” The sentence was confirmed, the petition for clemency rejected, and the convict shot on December 4, 1941.

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Verurteilte bei einer Begnadigung nur fortlaufend weiter der Volksgemeinschaft als Schädling zur Lasten fallen. Die Ausmerzung dieses Übeltäters ist zur Verhütung einer Gegenauslese dringend geboten.25

This text is replete with familiar Nazi eugenic and racial terminology: “asocial character,” “predisposition,” “people’s community,” “pest,” “eradication,” “prevention,” and “counterselection.”26 Cumulatively, they constitute a National Socialist offender profile (Tätertyp), which justified elimination of certain individuals based less on their injurious acts than their dangerous personalities. For the presiding judge, the death penalty was “urgently” required in order to prevent a “counterselection” that might fill the “people’s community” with racial “pests.” As one scholar of Nazi military justice has observed, the verdicts in these trials are not explicable in terms of the “escalating barbarism” of the war: rather, they were the natural outgrowths of the German military justice system during the war, a system steeped in Nazi ideology and dedicated to achieving its purposes.27

As the previous cases show, German military justice, far from serving the final end of democracy, was harnessed to the Nazis’ goal of creating a racial utopia through eradication of dysgenic persons. Where American military justice traversed a dynamic force field between two immensely powerful vectors, command authority and a democratic society founded on the rule of law, German military justice was dominated by a single organizing principle: the establishment of the racially pure Volksgemeinschaft. This critical difference between US and German military justice during World War II may account for their substantial differences in conviction rates and death sentences.28

Furthermore, it is important to grasp that abridging the rights of defendants in courts-martial was repugnant to many Americans at the time. The outcomes of U.S. military trials may seem less harsh when compared with Nazi military justice, but they were perceived at the time, and rightly so, as extreme in comparison with American civilian proceedings. In the tug-of-war between the

25 Quoted in Manfred Messerschmidt, Das System Wehrmachtrecht. Aufgaben und Wirken der deutschen Kriegsgerichte; see also Bauman, supra note 24, at 36 (quoting “Was damals recht war[,]”)

26 German jurists reconceived the threat posed by deserters during the war: where previously desertion was considered a threat to military discipline, the Nazis refashioned the offense to emphasize the “asociality” of the offender. The threat he posed was not in undermining combat efficiency, but infecting the Volksgemeinschaft with his racial inferiority. The military court’s function was to cleanse the people’s community of this toxin by liquidating the deserter as an “asocial” and “degenerate.” See the discussion on this subject in Welch, “German Military Justice,” 382. See also Heinz Pietzner, Die Fahnenflucht im Wehrstrafrecht (Wurzburg, 1940), 75-76.


28 Id. at 385 (addressing the statistical differences).
command authority and due process models of military justice after 1945, the latter ultimately won out, and military justice was to a significant degree “civilianized” thereafter. Under growing popular pressure to address excessive verdicts, the Secretary of War appointed a clemency board in the summer of 1945 to review all general courts-martial in which the defendant was still imprisoned. This board either remitted or reduced the sentence in 85% of the 27,000 cases under review. Such efforts to mitigate the harshness of military verdicts are inconceivable in the context of Nazi military justice. Arguably, it was the existence of a fundamentally democratic culture that enabled the modification of harsh verdicts in the American example, pushing an anti-libertarian, commander-dominated system slowly but inexorably toward civilian legal protections.

The role of public opinion is essential in charting the libertarian influence of democratic culture on American military justice. In the mid-1940s, US politicians were deluged by their constituents with demands for reforming military justice. According to Rear Admiral Robert J. White, “the emotions suppressed during the long, tense period of global warfare were now released by peace, and erupted into a tornado-like explosion of violent feelings, abusive criticism of the military, and aggressive pressures on Congress for fundamental reforms in the court-martial system.” Public protest set in motion a train of investigations and federal laws that ended with the passage of the Uniform Code of Military Justice in 1950. The American military justice system, despite its resistance to ordinary due process norms before 1945, proved its vulnerability in the final analysis to democratic calls for reform. I would suggest that the American political identity fashioned during the Revolutionary era infused into US law (including military justice) a long-term receptivity to public opinion. Like the French Revolution, the American Revolution was based on the belief that the government’s chief responsibility was the protection of its citizens’ natural rights. On this view, society was a voluntary association of individuals who carried their natural rights with them into their social relations.

29 Sherman, supra note 6, at 28-29.
30 Id. at 29.
31 The provisions of Revolutionary period legal documents underscore the centrality of natural rights thinking to the country’s founders, along with the related belief that government was the servant of the people. The Virginia Bill of Rights of June 1776, for example, asserted that “all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.” If found lacking, then “a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish [the government], in such manner as shall be judged most conducive to the publick weal.” Virginia Bill of Rights, June 12, 1776, available at http://www.constitution.org/bor/vir_bor.htm; see also Massachusetts Constitution of 1780, where we read: “The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever these great objects are not obtained
Citizens expressed their collective judgment about the government’s actions through public opinion, a distillation of the consensus views of a majority of the population (excluding at that time women and slaves). Where government failed to protect natural rights, the “people” were authorized to either change it or discard it altogether. Although American history is marred with numerous failures in the realization of this civil libertarian ideal, at key moments it has furnished a basic blueprint for far-reaching legal reform: among others, the incorporation of the Bill of Rights into the 14th Amendment in order to restrain local discrimination against minorities, the recognition of federal and state regulation of business activities considered inimical to the public good, the Warren era’s judicial activism on behalf of individual rights, and the due process revolution in military justice. None of these major legal reforms would have been possible without the responsiveness of the American political system to public opinion.

In the absence of democratic pressure on judicial process, US military justice most likely would have lapsed into widespread abuse as the basic due process of military members accused of crimes was sacrificed to command authority. Comparison of the American and German examples during World War II does not ennoble the US example so much as highlight the importance of democratic culture in tempering the intrinsic disregard of military justice—of whatever nationality—for the rights of the individual.

the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.” For its framers, society consisted of “a voluntary association of individuals: it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them: that every man may, at all times, find his security in them.” Massachusetts Constitution of 1780, available at http://www.nhinet.org/ccs/docs/ma-1780.htm.
DISPUTING THE DISPUTE: AMENDING INTERNATIONAL ARBITRAL TRIBUNAL RULES TO REQUIRE SECONDARY CONSENT FOR CLASS ARBITRATION

DANNY LEAVITT

I. INTRODUCTION

Foreign investments involve high risk taking and leave contracting parties vulnerable to biases in unfamiliar jurisdictions. Since the late 1950’s, an increase of arbitral tribunals has proved effective in providing impartial forums that enable contracting parties to engage in “swift, simple, and pragmatic bilateral procedures with few witnesses, documents, or formalities.” Awards from arbitral tribunals, generally honored by foreign states based on treaties, can represent international legislation and provide clarity to private and public actors. But these tribunals can also exceed jurisdictional power, adapting or modifying certain procedural protocols provided for in existing arbitral frameworks. To this effect, contracting parties may experience international embarrassment that can deter future investments and damage economic development.

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1 See David A. Lopina, The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s, 4 Ohio St. J. on Disp. Resol. 107, 117 (1988) (discussing why private investors see ICSID arbitration as beneficial because it allows them to “avoid[] litigation in that host state’s courts.”).


Such has been the case regarding Article 25 § 1 of the International Centre for Settlement of Investment Disputes (ICSID) Convention that deals with consent of the contracting parities in allowing disputes to be heard before an independent arbitral tribunal. In particular, the “consent” of the contracting parties presents difficult issues when dealing with class arbitration.

This Article will first discuss international investments and their purpose within the context of the ICSID and its structure. It proceeds to discuss the ICSID Convention, specifically looking at Article 25 § 1 regarding consent as a requirement for arbitral-tribunal jurisdiction, as described in Abaclat v. Argentine Republic. This Article then purports that the existing assumption, as a result of Abaclat, is flawed, which assumes “consent” to individual arbitration simultaneously (and magically) constitutes class arbitration. This Article also presents objections to this proposition, holding the view that “consent” to individual claims is essentially the same as consent to class arbitration claims, and any other holding would be contrary to an “effective protection” public policy. Finally, this Article concludes with a simple solution that urges the Administrative Council for the Centre to modify the ICSID Regulations and Rules to require explicit secondary consent for class arbitration, or at the least tribunals should sharply curtail their capacious reading of “consent” regarding class arbitrations.

II. BACKGROUND

A. INTERNATIONAL INVESTMENTS AND THE ICSID

See infra notes 14-23 and accompanying text.

See infra notes 24-41 and accompanying text.

See infra notes 42-70 and accompanying text.

See infra notes 71-74 and accompanying text.

See infra notes 75-81 and accompanying text.
Private and public investors play an important role in the international economy. The investors seek to diversify their investments and get a higher return, while foreign states also seek to acquire lower interest rates. One problem exists, however, for the investors: if a dispute arises between contracting parties, the forum for adjudication will undoubtedly be in the host state, creating political and judicial risk to the investors. Accordingly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provided an impartial forum that “depoliticizes the settlements of investment disputes and provides a climate of mutual confidence between investors and states favorable to increasing the flow of resources to developing countries under reasonable conditions.”

International Investments are unique in this sense because they have substantive and procedural protection. Contracting parties find substantive protection in a bilateral investment treaty (“BIT”). “BITs create a set of substantive legal protections similar to the broad guarantees of fairness and due process found in many states’ domestic constitutions[,]” prohibiting “expropriation without just compensation and [guaranteeing] fair and equitable treatment, a sort of covenant of good faith and fair dealing that binds the state even as a regulatory sovereign.” Contracting parties also find procedural protection within the ICSID. The “resulting system of adjudication has played out within a shifting universe of ad hoc tribunals, each typically comprising three arbitrators drawn from a substantially recurring roster of experts.” Substantive and procedural immunity are not perfect, however, as sovereign immunity may protect host-state assets and domestic law may protect against ICSID awards.

B. Consent Requirement for ICSID Jurisdiction

15 Id.
16 Id. at 117.
17 Id. at 108 (citation omitted).
19 Id.
20 Id. at 263 (Internal quotations omitted).
21 Id.
22 Id. at 264. (noting that “[o]ver time, these tribunals have come to act more like formal international courts than like traditional commercial arbitrators” writing long, reasoned opinion, but, of course, insisting that “there is no doctrine of stare decisis in international law.”). See generally ICSID Convention, Regulations and Rules, art. 25, § 1, April 2006, ICSID/15., at 26 (annulment of arbitral decisions is granted only under an extremely deferential standard of review).
23 Mortensen, supra note 18, at 265-66: see also ICSID Convention, supra note 22, at 28.
Chapter II of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") defines the scope of ICSID arbitral tribunal jurisdiction regarding consent: Article 25 § 1 provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.24

“First, consent must exist by the time ICSID is seized, and second, it must be in writing.”25 The term “seized” means “to endow (a governmental agency of deliberative body [ICSID]) with the responsibility for action on a matter by placing it on an agenda.”26 Both parties must consent to arbitration in writing;27 however, it is unclear what the definition of “writing” means,28 hence the serious inquiry in Abaclat whether the respondents (Argentina) consented to class arbitration with the claimants (Italian investors).29 Host-states

24 ICSID Convention, supra note 22, at 18 (emphasis added); see also LUCY REED, ET AL., GUIDE TO ICSID ARBITRATION 35, 2d ed. 2011 (observing the executive directors of the World Bank, who were instrumental in the formation of the ICSID, stated emphatically: “Consent of the parties is the cornerstone of the jurisdiction of the Centre.”); see also Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (noting that the United States’ foundational principle of the Federal Arbitration Act is a matter of consent).

25 Lopina, supra note 14, at 113.

26 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1961).

27 ICSID Convention, supra note 22.

28 See Abaclat (formerly Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 258 (Aug. 4, 2011), available at http://italaw.com/documnets/AbaclatDecisionJurisdiction.pdf (hereinafter Abaclat Award); see also American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), available at www adr.org/sp.asp?id=21936 (attempting to resolve this issue by stating “These Supplementary Rules for Class Arbitrations (“Supplementary Rules”) shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (“AAA”) where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.”).

29 Id.: See S.I. Strong, Mass Procedures as a Form of “Regulatory Arbitration”—Abaclat v. Argentine Republic and the International Investment Regime, 38 J. OF CORP. L. 259, 266 (2013) (discussing Issue 2 in Abaclat Award which dealt with whether eight major Italian banks forming an associazione non riconosciuta under the name l’Associazione per la Tutela
and investors utilize BITs to constitute a valid written offer for ICSID class arbitration by the relevant state. This kind of offer may be validly accepted by an investor through the initiation of ICSID proceedings. But jurisdictional challenges inexorably follow when evidence of the other contracting party’s consent is not verified before pursuing dispute resolution with the ICSID.

This kind of mistake was made in the majority award of *Abaclat*. After Argentina experienced a terrible debt crisis, Italian investors threatened to take the debts owed by Argentina to the ICSID for arbitration, because years of attempted repayment proved unsuccessful. But the investors pursued arbitration with a representative party, the Task Force Argentina (“TFA”), instead of what the investors and Argentina represented in the BIT. The majority differed significantly with the dissent on whether the language of the BIT constituted “consent” from Argentina to arbitrate class arbitration claims as opposed to individual claims, thus satisfying the jurisdictional requirement for the ICSID as mandated in Article 25 § 1.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, the Supreme Court of the United States raised this same issue. The Court in *Stolt-Nielsen* found that class arbitration changed the nature of one party’s original consent to arbitrate, demonstrating to international tribunals that consent in the context of class arbitration, at the very least, is controversial:

> [a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may

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20 *Abaclat Award, supra* note 28, ¶ 258.  
21 *See REED, ET AL., supra* note 24, at 35.  
22 *Id.* at 37.  
23 *See Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion, ¶ 130 (Oct. 28, 2011), available at http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf (hereinafter *Abaclat Dissent*) (finding the majority award erroneously classified the proceedings as a hybrid mass proceeding so as to not tie its hands when in fact Argentina did not explicitly consent to class arbitration).  
24 *Abaclat Award, supra* note 28, ¶ 58 (noting over $100 Billion worth of sovereign debt was owed to non-Argentine and Argentine creditors).  
25 *Id.* ¶ 84.  
26 *Id.* ¶ 270 (citing Article 8 of the BIT between Italian investors and Argentina, which includes that “Any dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement shall be settled, if possible, by means of amicable consultation between the parties to the dispute. . . . With this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration.”).  
27 *Compare Abaclat Dissent, supra* note 33, ¶¶ 130-174, with *Abaclat Award, supra* note 28, ¶¶ 467-503.  
28 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).
infer solely from the fact of the parties’ agreement to arbitrate. This is so because class arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their [bilateral] disputes to an arbitrator. . . . We think that the differences between bilateral and class-action arbitrations are too great for arbitrators to presume . . . that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. 39

But class arbitration does not deal with “primary consent,” as the contracting parties have already agreed to arbitrate per the BIT; rather, class arbitration focuses on “secondary consent,” meaning the nature of the arbitration claim has changed substantially to require further consent. 40 And the Court in Stolt-Nielsen required more than mere silence, invoking the idea that explicit secondary consent regarding class arbitration should be required. 41

III. ARGUMENT

The Administrative Council for the Centre should modify the Arbitration Rules for the Convention to read that it rejects consent to class arbitration, even if arbitral tribunals title them as “hybrid” interactions such as the one found in Abaclat, unless the contracting parties explicitly agree to such arbitration. 42 Potential risks are involved from allowing class arbitration to progress to arbitral tribunals—and ultimately awarded—without a clear statement requiring “consent” to be express. 43

A. FLAWED ASSUMPTION

After the majority in Abaclat awarded jurisdiction to arbitrate Italian investors’ claims as a class arbitration via the TFA, the flawed assumption arose that existing BITs, which remain unclear whether class arbitration is consented to, become susceptible to class arbitration without explicit host-state consent. 44 One reason for this flawed assumption is because the Arbitration Rules remain unclear

41 Stolt-Nielsen, 130 S. Ct. 1758 at 1775-76, 176 L. Ed. 2d 605.
42 See infra note 65.
43 Id.
about what constitutes “consent” if a class dispute occurs.\textsuperscript{45} The Administrative Council for the Centre amended the Arbitration Rules in 2006; during the course of the revisions, the issue of “consent” in the context of multi-party arbitration was brought up\textsuperscript{46} but not expressly stated in the revisions, leaving the issue of “consent” in the context of class arbitration effectively untouched.\textsuperscript{47}

More significant reasons for this current assumption explain higher risk to contracting parties, lower adherence to the preamble of the ICSID Convention, and blatant disregard for ICSID tribunal power.\textsuperscript{48} First, host states, previously having entered into BITs with foreign investors, run the risk of having their rights to the BIT neglected at the expense of “effective protection” for the investors, thus allowing the treaties to become unilateral contracts.\textsuperscript{49} Second, the preamble to the ICSID Convention “[d]eclares that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit\ldots arbitration.”\textsuperscript{50} In other words, the drafters of the ICSID Convention did not yet foresee class arbitrations at the inception of the Centre and were simply providing a foundation for arbitral tribunals at that time, which was understood to include only consensual claims.\textsuperscript{51} And third, it has become incumbent upon tribunal arbitrators that somehow each has been endowed with superior power which comes from beyond the parties to render arbitration awards; that is, the power of \textit{ad hoc} arbitral tribunals should come from the disputing parties, not from subjective policy preferences like judicial disputes where judges receive power from the state and, arguably, have more flexibility in constructing outcomes based on policy preferences.\textsuperscript{52}

\section*{B. UNINTENDED CONSEQUENCES}

Consequences occur when this kind of ambiguity remains in a set of Rules, which prevents host states and investors from entering

\begin{itemize}
\item \textsuperscript{45} \textit{Abaclat} (formerly \textit{Beccara} v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion, ¶ 175 (Oct. 28, 2011), \textit{available at} http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf (hereinafter \textit{Abaclat Dissent}).
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} See infra notes 49-52 and accompanying text.
\item \textsuperscript{49} See \textit{Abaclat Award}, supra note 44, ¶ 155; see also \textit{Abaclat Dissent}, supra note 45, ¶ 157.
\item \textsuperscript{50} ICSID Convention, Regulations and Rules, Preamble, April 2006, ICSID/15 (emphasis added).
\item \textsuperscript{51} \textit{Abaclat Dissent}, supra note 45, ¶ 165.
\item \textsuperscript{52} \textit{Id.} ¶ 147.
\end{itemize}
into investment treaties because of unpredictable risks involved.\footnote{53} First, because arbitration claims like the ones in \textit{Abaclat} initially were considered individual claims,\footnote{54} they can continue as individual claims and be heard in front of a tribunal as individual claims.\footnote{55} Genetically engineering the claims from individual claims to class claims only disrupts the integrity and purpose of the ICSID Convention.\footnote{56}

Second, as a matter of principle, the flawed assumption following \textit{Abaclat} alters the existing boundaries of bilateral agreements.\footnote{57} On the one hand, the defendant loses its rights to defend each claim individually, which should ensure each award is accurate and justified.\footnote{58} On the other hand, the claimants expand their rights by allowing nuances to go unnoticed and potentially receive larger awards.\footnote{59} The majority’s claim in \textit{Abaclat} to protect claimants was an obvious benefit to the investors, but a tremendous burden to the respondent host states.\footnote{60} This unilateral vision contradicts the object and purpose of the ICSID Convention, which strikes a balance of interest between the parties.\footnote{61}

Third, allowing class arbitration claims based on a “homogeneity” argument avoids the claims’ details, but the details are what matter, and avoiding the details can potentially skew the arbitration award.\footnote{62} The reason for this is because a “homogeneity” argument focuses on abstractions and avoids details like what the assets were at the time of the BIT, the price of the various investments, and the type of currency used in the investment.\footnote{63} This consequence directly contradicts the Supreme Court of the United States’ recent decision in \textit{Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.},\footnote{64} which avoided such draconian changes to the nature of claims.\footnote{65}

C. \textbf{Workable Solution}

\footnote{53} See infra notes 54-63 and accompanying text: see also \textit{AT&T Mobility LLC v. Concepcion}, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011) (mentioning that “[a]rbitration is poorly suited to the higher stakes of class litigation[,]” because defendants cannot appeal an arbitral award the same way it is possible to do in litigation).
\footnote{54} \textit{Abaclat Award}, supra note 44, ¶¶ 483, 488.
\footnote{55} \textit{Abaclat} Award, supra note 44, ¶ 139.
\footnote{56} Id. ¶ 165.
\footnote{57} Id. ¶ 166.
\footnote{59} Id. (implying the inverse effect).
\footnote{60} Id.
\footnote{61} \textit{Abaclat} Award, supra note 44, ¶ 159.
\footnote{62} Id. ¶ 143. The “homogeneity” argument assumes that all the claims are homogenous in nature: therefore, class arbitration is no different than individual arbitration. Id. at 55-56.
\footnote{63} Id.
\footnote{64} 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).
\footnote{65} Id.
As a solution, the Administrative Council for the Centre should carefully craft an amendment to the Arbitration Rules for Arbitration Proceedings to require explicit secondary consent from contracting parties as to class arbitration, much like the American Arbitration Association has done. The amendment should indicate that contracting parties should “carefully” and “patiently” negotiate a stipulation regarding consent, including potential class arbitrations. Because the drafters of the Convention could not forecast the need for class arbitration claims, just like the United States did not forecast the need for it until the 1980’s, and the drafters only created a general framework for ad hoc arbitration (as noted in the Preamble of the ICSID Convention), contracting parties must explicitly consent to class arbitration. Amending the Arbitration Rules to permit potential class arbitration claims based on explicit secondary consent would provide at least a working solution to the rise of international class claims. If the Administrative Council debates but does not revise the Arbitration Rules to include clearer standards of “consent,” this Article urges tribunal arbitrators to sharply curtail their capacious reading of “consent” from the ICSID Convention, Rules, and BITS, in consideration of the foregoing consequences.

Without question, objections exist pertaining to this simple solution, namely the contracting parties, like the Italian investors in Abaclat, risk not obtaining an arbitration claim against the host state, because arbitration is often considered “binary,” meaning it is or is not arbitration. The claim in Abaclat, for example, began with 180,000 investors but is now reduced to 60,000—an enormous burden on any arbitral tribunal to process so many claims. If in a situation like this the investors may not pursue arbitration because of lack of jurisdiction, they can be subject to processes that are not “arbitration” and lose the advantage of avoiding judicial review. Therefore, public policy requires “effective protection” of investors’ arbitration claims by submitting them to class arbitration.

But to these objections, the Supreme Court of the United States has indicated that class arbitration reinforces the need for secondary consent. This Article’s proposition to amend the

67 Id.
68 Strong, Change the Nature of Arbitration, supra note 46 at 205-06.
69 Abaclat Dissent, supra note 45, ¶ 165: see also supra notes 40-41 and accompanying text (discussing “primary consent” and “secondary consent”).
70 Id. ¶ 166 (discussing the need for secondary consent regarding class arbitration).
71 See supra notes 53-64 and accompanying text.
72 Strong, Change the Nature of Arbitration, supra note 46, at 247.
73 See Abaclat Award, supra note 44, ¶¶ 294, 537 (indicating that rejecting the claims as a class may deny justice to individual claims).
75 Abaclat Award, supra note 44, ¶¶ 490, 518, 538.
76 Strong, Change the Nature of Arbitration, supra note 46, at 254. The U.S. Court decisions are only persuasive; however, it is debatable to what extent the U.S. decisions are given in this context because class actions are a
Arbitration Rules to include secondary consent regarding class arbitration protects individual investors because it does not diminish their right to bring individual arbitration claims, thus protecting investors and host states; by amending the Arbitration Rules to require secondary consent (consent as to class arbitration), the fundamental nature of arbitration is not violated and the “object and purpose” of the ICSID Convention is manifested.  

IV. CONCLUSION

This Article provided a brief discussion of foreign investments in foreign states, and how the ICSID was created to protect the flow of these investments. It then discussed the “consent” requirement for ICSID arbitral-tribunal jurisdiction in the context of class arbitration. This Article recognized the complexity of this issue, specifically discussing the flawed assumptions following Abaclat v. Argentine Republic. It provided the following solution: amend the Arbitration Rules to require explicit secondary consent to bring an arbitration claim before an ICSID arbitral tribunal.

Although this solution does not solve the problem perfectly, as class disputes in their various complexities will inevitably continue to rise, it will at least follow the steps taken by the United States to resolve class arbitration problems. This approach further guarantees to uphold the purpose of the ICSID Convention. Such a position requires arbitrators to interpret contracts as they were written and intended, not with policy considerations. And yet it still guarantees investors the right to arbitration, thereby avoiding host states’ regulatory authority over investments. If the American Arbitration Association has implemented this solution relatively recently, and the Supreme Court of the United States has upheld using the explicit language in an arbitration agreement, it follows that the advent of class arbitration for foreign investments will also profit from a clear change in the rules to require explicit secondary consent for class arbitration. This approach is both reasonable and feasible in terms of following U.S. case law, policy considerations, and protecting procedural and substantive rights of investors and foreign states.

species of claims of which the U.S. has already taken a position. See Strong, supra note 8, at 500.

77 Abaclat Dissent, supra note 45, ¶ 53.
78 See supra notes 14-23 and accompanying text.
79 See supra notes 24-41 and accompanying text.
80 See supra notes 44-65 and accompanying text.
81 See supra notes 66-71 and accompanying text.
The Extraordinary Chambers in the Courts of Cambodia: Gauging the (In)Effectiveness of a Locally-Run Tribunal

Kyla M. Ehrisman

I. INTRODUCTION

The Khmer Rouge’s control of Cambodia lasted less than four years (three years, eight months, and twenty days, to be exact), but in those four years almost a fifth of the country’s population was slaughtered. Between forced labor initiatives (which led to disease and starvation) and mass executions, nearly two million Cambodian citizens died under the Khmer Rouge regime. While the Khmer Rouge was ousted from power in 1979, its leaders lived as free men for 25 years, and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) was not formed until 2003. The ECCC differs from other international criminal tribunals in that the majority of the ECCC’s judges are Cambodian nationals, which has led many observers to suspect the tribunal could be susceptible to influence from the Cambodian government.

This Article proceeds in three sections. First, the Background examines a brief history of the Khmer Rouge regime and the inception of the ECCC. This Article then advances the Argument that the ECCC is ineffective because it is a domestic tribunal rather than an international tribunal. Finally, this Article concludes with a brief synopsis of the argument and proposes options that could provide a more independent, confidence-inducing tribunal.

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5 Glaspy, supra note 2, at 146.
6 Id. at 146-47 (noting the concern regarding members of the Khmer Rouge who were members of the Cambodian government).
II. BACKGROUND

A. THE KHMER ROUGE’S RISE TO POWER

From 1863 to 1953, Cambodia was, in effect, a French colony. From 1863 to 1953, Cambodia was, in effect, a French colony. The French were already occupying South Vietnam and were seeking even more control over Southeast Asia, while Cambodia was looking for protection. During the fifty years preceding France’s colonization of Cambodia, Cambodia had suffered from, “[c]ivil wars, rebellions, invasions from Siam, and a prolonged Vietnamese protectorate. . . .” During the same time period Cambodia also bore witness to fighting between Thai and Vietnamese soldiers that took place on Cambodian soil.

For 90 years, Cambodia remained a French protectorate; however, France’s control over Cambodia began to weaken in 1947 when Cambodia was finally given the right to promulgate a Cambodian constitution and have its own political parties. While Cambodia gained more power from this agreement, France still maintained control over Cambodia’s defense, foreign affairs, and finances. Cambodia’s first constitution was finished in 1947, which established a constitutional monarchy with King Norodom Sihanouk serving as Cambodia’s leader. Although the constitution limited King Sihanouk’s powers to those granted to him in the constitution, he quickly became more dictatorial in style and pronounced that he was not limited by the new constitution. King Sihanouk declared Cambodia’s independence from France in 1953 and Cambodia was recognized as an independent country during the 1954 Geneva Convention, with the stipulation that Cambodia must hold elections before the end of 1955.

King Sihanouk renounced the throne in 1955 to form a political party, which won every seat in a national election that was observed to be “fraught with fraud and violence.” Sihanouk was elected Prime Minister of Cambodia in this election, and ruled Cambodia until 1970. Although he was actually the Prime Minister of Cambodia, Sihanouk was generally referred to as ‘Prince Sihanouk’ due to his royal pedigree.


Id.

Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.

Montesano, supra note 11, at 78.

Id.

Id.

Montesano, supra note 11, at 78 n.55.
of the Khmer Kingdom had been treated as deities, and Sihanouk received the same treatment. Sihanouk was a brutal ruler who arranged to have political rivals beaten and arrested anyone who disagreed with him all while still estimated to have the support of 80% of the Cambodian people. Unhappiness with Sihanouk began to grow during the mid-1960s, especially among the more-educated citizens of Cambodia.

During the same period in which Cambodia was gaining its independence from France, Cambodia’s communist movement – the Communist Party of Kampuchea (the formal name of the Khmer Rouge) – was forming. The Khmer Rouge was influenced by the communist Vietnamese forces, and was pro-North Vietnam in the Vietnam War. Pol Pot, a Cambodian citizen who spent time in France and was a member of the French Communist Party before coming back to Cambodia in 1953, became leader of Khmer Rouge in 1963. On March 18, 1970, while Sihanouk was out of the country, a coup engineered by General Lon Nol, and backed by the United States, overthrew Sihanouk. After the coup, the National Assembly voted to give Lon Nol emergency Prime Minister powers. The United States backed Lon Nol out of concern that Cambodia would follow North Vietnam’s lead and become a Communist nation. When Sihanouk was ousted from power, many Cambodians were upset with Lon Nol and the United States for ousting a member of the royal family. Sihanouk quickly aligned himself with the Khmer Rouge and began fighting to regain power. Between 1969 and 1973 the United States and South Vietnam bombed regions of Cambodia in an attempt to fight off the communist forces. This only added to Lon Nol’s unpopularity in Cambodia. By 1973, the Khmer Rouge had gained control of 85% of Cambodian territory with the help of North Vietnam, despite the fact that Lon Nol’s government had U.S. support. The United States withdrew its support of Lon Nol’s government in January of 1975, and on April 1, 1975 Lon Nol left

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20 Id. at 79.
21 Id.
22 Id. at 80.
23 The Group of Experts for Cambodia, supra note 2, at 8.
24 Montesano, supra note 11, at 78.
25 Luftglass, supra note 4, at 898.
26 Chandler, supra note 18.
28 Scully, supra note 1, at 308.
29 Montesano, supra note 11, at 80.
30 Scully, supra note 1, at 308.
31 Id. at 309.
32 Id. at 308-09.
33 Luftglass, supra note 4, at 898.
34 Chandler, supra note 18.
35 Scully, supra note 1, at 309.
Less than three weeks later on April 17, 1975, the capital city of Phnom Penh fell to Khmer Rouge forces. 

B. **THE KHMER ROUGE'S BLOODY REIGN**

Once the Khmer Rouge had control of the capital city, Pol Pot gave the Khmer Rouge leadership (known as the “Angkar Loeu”) an eight-point plan for Cambodia: “(1) evacuate the people from the cities; (2) abolish all markets; (3) abolish currency; (4) defrock all monks; (5) execute leaders of Lon Nol’s army and government; (6) establish cooperatives across Cambodia, with communal eating; (7) expel the entire Vietnamese population; and (8) establish firm and guarded borders.”

The Khmer Rouge wasted no time in carrying out Pol Pot’s orders, and quickly revealed themselves to be a violent government as soon as they took power: soon after they had taken over Phnom Penh, the remaining members of Lon Nol’s cabinet were summarily executed. Much of Khmer Rouge’s support came from citizens of rural areas (rather than citizens of the cities, who tended to be more educated), so the Khmer Rouge’s first priority upon taking over the country was to evacuate all of the residents of cities in Cambodia. The Khmer Rouge and Pol Pot wished to implement an “agrarian utopia” and the citizens that were pushed out of the cities were forced into agricultural cooperatives. Besides needing more workers for their agricultural communes, emptying the cities also served as a means: “to dilute the power of those viewed as counterrevolutionaries.” A United Nations (“U.N.”) Report estimates that thousands from Phnom Penh died solely from the forced marches alone. The report goes on to say, “[w]itnesses reported numerous instances of hospital patients being dragged from their beds and dying on roads out of the city.” Before the forced evacuations, the population of Phnom Penh was over two million; after the forced marches, only 20,000 residents were left in the capital city.

Once in the rural cooperatives, life did not improve for Cambodian citizens. Citizens were forced to grow crops for long hours each day, in excess of 12 hours everyday, without any days off. Agricultural communes caused the largest number of deaths under
Khmer Rouge leadership. The communes lacked adequate food, medicine, and sanitation, and starvation alone led to an estimated 726,000 deaths during the Khmer’s Rouge’s short four-year reign. Pol Pot even admitted that 20 to 30 percent of the population was suffering from starvation. The starvation of so many of its citizens became even more brutal when one learned that Cambodia was producing more than enough rice to feed its citizens, but Pol Pot chose to export it instead. In 1975, an estimated 3.36 million tons of rice were produced in Cambodia. Approximately one million tons of rice would have been needed to adequately feed all of Cambodia’s citizens, but the Khmer Rouge government only allotted 600,000 tons to feeding the people of Cambodia, and exported the rest. Citizens who attempted to supplement their food supplies by foraging were put to death. Khmer Rouge overseers also killed those who refused to continue working, or physically could not work, as well as their families.

In addition to trying to survive on inadequate food and medicine while working long hours, Cambodian citizens also had to deal with the Khmer Rouge’s attack on the traditional family unit. Children were often separated from their families, and married citizens who did not have approval of Khmer Rouge authorities could be put to death if they were caught having sexual relations. Families were not allowed to have meals as a unit; instead, all meals were prepared and eaten as a community. Forced labor was not the only dramatic action taken by the Khmer Rouge; in order to implement their vision of a communist society: the government “abolished money, free markets, normal schooling, private property, foreign clothing styles, religious practices, and traditional Khmer culture.” The Khmer Rouge also turned all government buildings, churches, schools, and shops into jails, “reeducation camps,” and granaries. Pol Pot was an intelligent leader: he realized that even though outside forces had helped him gain leadership, outside forces were now a danger to his regime. In order to insulate Cambodia, he cut off international communication by “exiling all journalists and reporters, end[ing] international

47 The Group of Experts for Cambodia, supra note 2, at 10.
48 Montesano, supra note 11, at 84.
49 Id.
50 Id.
51 Id.
52 Id. (Pol Pot acknowledged in 1978 that up to a third of his population was starving).
53 Id.
54 The Group of Experts for Cambodia, supra note 2, at 10.
55 Id.
56 Id.
57 Chandler, supra note 18.
58 Id.
59 Luftglass, supra note 4, at 899.
telephone, telegram, cable, and mail connections, terminating all commercial flights, and sealing the borders.”

Forcing its citizens into agricultural communes and cutting off communication with the outside world was not enough for Pol Pot. The Khmer Rouge also instituted mass imprisonment, torture, and killings. While no one was completely safe from torture and execution, some groups were singled out with greater suspicion. These groups included officials from Lon Nol’s regime; ethnic minorities such as Cham, Vietnamese, and Chinese; educated individuals such as students and teachers; and religious leaders. One of the most notorious of the Khmer Rouge’s prisons, Tuol Sleng (codenamed S-21) saw between 16,000 and 20,000 prisoners get tortured, interrogated, and executed during the Khmer Rouge’s brief reign. Of those 16,000 to 20,000, only seven people are known to have survived the atrocities committed there. At Tuol Sleng, “[m]ethods of interrogation included, but were not limited to, electric shocks, severe beatings, removal of toenails and fingernails, submersion in water, cigarette burnings, needling, suffocation, suspension, and forced consumption of human waste.” Within a year of taking over the country, paranoia began to spread within the Khmer Rouge, leading to massive internal purges. No one within the party was safe as party leaders were executed and entire units of soldiers. An estimated one million Cambodian citizens died on account of executions. By the time the Khmer Rouge was ousted from power in 1979, an estimated 1.7 million to 2 million Cambodians had lost their lives.

C. THE FALL OF THE KHMER ROUGE

Although North Vietnam and the Khmer Rouge had initially been allies, once the U.S. withdrew from Vietnam and the Khmer Rouge successfully took over Cambodia, relations between the two countries went downhill. Between 1975 and 1977, the two countries engaged in numerous low-level conflicts near their shared border. The fighting slowly escalated until December 24, 1978, when Vietnam invaded Cambodia. Less than two weeks later on January 6, 1979,
Vietnam forces reached and overtook Phnom Penh, installing a new government after forcing the Khmer Rouge out. The remaining Khmer Rouge leadership fled to the jungles near the Cambodia-Thailand border where they re-established themselves and continued to fight against Vietnam and the new Vietnamese-supported Cambodian government. Due to the international community's animosity towards Vietnam, the United Nations continued to recognize the Khmer Rouge government as the holder of Cambodia's seat in the General Assembly. The United States, China, and Thailand all supported the Khmer Rouge in its fight against the Vietnamese-controlled government.

Ten years after its occupation began, Vietnam announced in 1989 that it was withdrawing its troops from Cambodia. This announcement led to the Paris Conference on Cambodia, where four Cambodian delegates (including the Khmer Rouge) met and eventually agreed to the Paris Agreements on October 23, 1991. Under the peace agreement, the four factions agreed to demobilize and disarm and the United Nations Transitional Authority in Cambodia (“UNTAC”), which was formed to hold elections in Cambodia. Unfortunately, in June of 1992, the Khmer Rouge reneged on the agreement and refused to demobilize and refused to cooperate throughout the rest of the process. The Khmer Rouge was not done killing just yet and attacked UNTAC and massacred ethnic Vietnamese still living in Cambodia. The Khmer Rouge finally disbanded in 1993, with its remaining members joining the Cambodian Army or rejoining civilian life in the country. Cambodia’s newly elected legislature outlawed the Khmer Rouge in 1994.

D. BRINGING THE KHMER ROUGE TO JUSTICE

On June 21, 1997, Cambodia’s co-Prime Ministers: First Prime Minister, Prince Norodom Ranariddh (son of King Norodom Sihanouk), and Second Prime Minister, Hun Sen, sent a letter to U.N. Secretary General, Kofi Annan, requesting the U.N.’s assistance in prosecuting the Khmer Rouge for genocide and crimes against humanity. Unfortunately, less than a month later, Hun Sen ousted Ranariddh in an internal coup, which temporarily derailed talks with

75 Id.
76 Id. (the Khmer Rouge received support from other countries, which gave them the means to continue fighting).
77 Id.
78 Scully, supra note 1, at 311.
79 The Group of Experts for Cambodia, supra note 2, at 14.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id. at 14.
85 Id.
A few months later, Hun Sen and the new First Prime Minister, Ung Huot, sent a letter to President Bill Clinton which seemed to affirm their commitment to bringing the Khmer Rouge to justice. The letter specifically requested help in setting up an “international criminal tribunal.” In 1998 Pol Pot, the former leader of the Khmer Rouge, died before he could be brought to justice.

The U.N. Security Council discussed extending the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia to encompass the Khmer Rouge era of Cambodia, but some members preferred an independent tribunal for Cambodia. In April of 1998, the U.S. circulated a proposal that would establish the International Criminal Tribunal for Cambodia, which would be a subsidiary of the Security Council and would be headquartered in the Netherlands. The U.N. decided to send a team of experts into Cambodia to examine their options and propose a course of action for bringing the Khmer Rouge to justice: the report returned by the experts has been used in preparing this article. When the U.N. requests an expert report, it holds off on further discussion of the issue until the report has been delivered, so further discussion of an international tribunal for Cambodia was put off until the report was issued in March of 1999.

When the U.N. report was issued, it recommended an ad hoc international tribunal and discouraged U.N. involvement in a Cambodian domestic tribunal. When discouraging a domestic tribunal, the experts cited three main factors that were lacking for Cambodia to provide fair trials: “a trained cadre of judges, lawyers, and investigators; adequate infrastructure; and a culture of respect for due process.” Under the Khmer Rouge reign, lawyers and judges were routinely executed because of their education or fled the country, so very few trained lawyers were left in Cambodia. Furthermore, the Report found that Cambodia’s legal system was “routinely” subjected to political influence, which was especially troublesome because former Khmer Rouge members were still working in the Cambodian government – Hun Sen, the current prime minister, had been a Khmer Rouge member before defecting to Vietnam. The Group also discouraged a hybrid tribunal made up of both

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87 Id.
88 Id.
89 Id. at 222.
91 SChEffer, supra note 85, at 222.
92 Id.
93 The Group of Experts for Cambodia, supra note 2.
94 SChEffer, supra note 85, at 223.
95 The Group of Experts for Cambodia, supra note 2, at 39.
96 Id. at 36.
97 Id.
98 The Group of Experts for Cambodia, supra note 2, at 39.
99 Id. at 29.
international and Cambodian personnel for the same reason that it would lack independence by needing the Cambodian government’s permission for most actions it wanted to undertake.  

At this point it became apparent that Hun Sen did not actually want an ad hoc international tribunal, despite what he had said in earlier letters. Within five days of the release of the Group of Experts Report, Hun Sen rejected its recommendations. According to one Cambodian official, the Cambodian government had decided to reject the report before it was even released. A few days later, one of Khmer Rouge’s two military commanders during Pol Pot’s reign, Ta Mok, was captured and the Cambodian Foreign Minister publically announced that Khmer Rouge leaders would be tried in Cambodia’s courts.

At this point, international actors started to shift discussions to a mixed tribunal in an attempt to continue working with Hun Sen. The U.N. drafted a new proposal which included Cambodian and international judges, with international judges making up the majority, as well as an international chief prosecutor and investigator. Once again, Hun Sen rejected the U.N. proposal. Hun Sen met with Kofi Annan on September 20, 1999, and gave Annan three options: 1) the U.N. could send a legal team which would participate in legal action taken within Cambodia’s existing courts, 2) the U.N. could send a legal team that would observe rather than participate, or 3) withdraw completely. As negotiations for a tribunal went forward, Hun Sen continued to insist that a majority of the judges be Cambodian – something the U.N. opposed. Prolonged negotiations continued for years until the U.N. finally withdrew from talks in early 2002, due to a failure to find acceptable compromises. The U.N. made an announcement that a tribunal based on Cambodia’s demands could not guarantee justice or independence.

Negotiations resumed in December of 2002, when the General Assembly passed Resolution 57/228 requesting Annan to resume tribunal talks with Cambodia. An agreement was finally reached in March 2003, ignoring most of the recommendations from the Expert Report. The ECCC, as finally negotiated, is headquartered in Cambodia, a majority of its judges are Cambodian rather than international, and follows Cambodian tribunal procedures rather

100 Id. at 39.
101 Luftglass, supra note 4, at 909.
102 Id. at 909-10.
103 SCHEFFER, supra note 85, at 226.
104 Id. at 227.
105 Id.
106 Id. at 228.
107 Id. at 229.
108 SCHEFFER, supra note 85, at 230.
109 Id. at 235.
110 Id.
111 Id. at 236.
112 Luftglass, supra note 4, at 916.
than international law.\textsuperscript{113} The Trial Chamber is composed of three Cambodian judges and two international judges, while the appellate court has seven judges, four of whom are Cambodian.\textsuperscript{114} Any judicial decision requires a supermajority vote, which helps ensure that one side (national or international) cannot take unilateral action.\textsuperscript{115} Each case has two prosecutors, one international and one Cambodian, and the same structure is followed for investigators.\textsuperscript{116} However, Cambodia has considerable say in the international judges and attorneys: the Cambodian Supreme Council of the Magistracy chooses each of the international participants from lists created by the U.N. Secretary-General.\textsuperscript{117} The judges and attorneys were sworn into office in 2006, commencing the start of a tribunal ten years in the making.\textsuperscript{118}

\section*{III. ARGUMENT

From the beginning, the domestic–international mixed nature of the tribunal has led to problems for the ECCC. It took the judges almost a year to pass internal rules for the tribunal: when the judges disagreed during drafting sessions, it was often Cambodian judges versus the international judges.\textsuperscript{119} In the almost seven years since the ECCC was established, only one person (a man known as “Duch,” who oversaw a notorious prison) has undergone a trial and been sentenced for his crimes.\textsuperscript{120} His “sentence” for being responsible for the deaths of 14,000 to 20,000 Cambodian citizens was a paltry 35 years of imprisonment.\textsuperscript{121} While three other cases are pending, one of the accused in Case 002 is no longer being prosecuted and the Cambodian government is putting pressure on the tribunal to stop proceedings in Cases 003 and 004.\textsuperscript{122}

Case 001, the only case thus far to be completed in the ECCC, saw Kaing Guek Eav, known as ‘Duch,’\textsuperscript{123} put on trial for his leadership of Tuol Sleng (S-21) prison, where an estimated 16,000 to 20,000 people were sent, with only seven people surviving.\textsuperscript{124} Prior to being detained by the ECCC, Duch had been in the custody of the Cambodian Military Court since May of 1999.\textsuperscript{125} Voluminous evidence was heard against Duch, and given by Duch: he admitted that “interrogators were permitted to use four violent interrogation

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Scheffer, supra note 85, at 246.
  \item \textsuperscript{116} Luftglass, supra note 4, at 917.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Scheffer, supra note 85, at 238.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{122} Scheffer, supra note 85, at 238.
  \item \textsuperscript{123} Scully, supra note 1, at 320.
  \item \textsuperscript{124} Luftglass, supra note 4, at 901.
  \item \textsuperscript{125} Prosecutor v. Kaing Guek Eav alias Duch, supra note 116, at 245.
\end{itemize}
techniques: beating, electrocution, asphyxiation with a plastic bag and ‘water-boarding.’” Prisoners of S-21 had no chance of survival: the ECCC found that, “[e]very individual detained within the S-21 complex was destined for execution.” Execution methods included, “being beaten, hanged, or cut apart and fed to farm animals.” Other S-21 prisoners died by having blood drawn from them until they died; the blood was then used for transfusions into wounded Khmer Rouge soldiers. A recitation of the horrors committed under Duch’s leadership could span an entire article, but suffice to say, there was plenty of evidence to convict him of crimes against humanity.

Despite the volumes of evidence against him, Duch only received a 35 year sentence, and must only serve 18 years of his sentence (Duch was given a five year reduction of his sentence for his illegal detention by the Cambodian Military Court and credit for time served). In contrast to other tribunals: the Tokyo Tribunal sentenced 92% of the individuals convicted to life sentences or death; the Nuremburg Trials resulted in 79% of those convicted receiving life sentences or death. To be fair, Duch’s sentence is the only one to be passed down thus far, but if the man responsible for running the most notorious Khmer Rouge prison only receives a 35 year sentence, what hope is there for sentencing of other responsible individuals?

The Cambodian government has also proven correct predictions made by observers that the government would attempt to exert influence over the ECCC. In 2007, the government issued a statement saying that the ECCC would be terminated if it attempted to “illegally” prosecute King Sihanouk. This statement could easily be seen as a not-so-subtle warning to the ECCC not to cross the government. In 2009, co-prosecutors disagreed on whether to investigate more Khmer Rouge leaders beyond the five indicted in Cases 001 and 002, with the Cambodian prosecutor refusing to sign new Introductory Submissions, which are the documents used to bring charges against an individual. The divide among Cambodian and international counterparts continued in the Pre-Trial Chamber, with the Cambodian judges voting the investigation should

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126 Id. at 85.
127 Id. at 65.
129 Prosecutor v. Kaing Guek Eav alias Duch, supra note 116, at 78.
130 Id. at 216.
132 Scully, supra note 1, at 320.
Due to the supermajority voting requirements of the Chamber, the investigation did continue at that point. In November 2010, when the ECCC had just recently finished sentencing in Case 001, Hun Sen, the Prime Minister, made a public announcement that no more trials should be pursued after Case 002. Not surprisingly, the Co-Investigating Judges reached the same impasse as the prosecutors and Pre-Trial Chamber, with the Cambodian co-investigator refusing to sign the necessary document to allow for investigation. The investigation continued forward due to the clause in the ECCC providing that if prosecutors or co-investigators disagreed, the investigation would continue. The agreement that the Cambodian government got to choose the international personnel on the ECCC from a list created by the U.N. was helpful to the Cambodian government; after choosing a new international Co-Investigative Judge in 2011, the Co-Investigative Judges announced in April 2011 that they were closing the investigation into Case 003. This led to the resignation of at least five members of the U.N. personnel working at the ECCC in protest of the Co-Investigative Judges’ decision. The international co-prosecutor appealed the decision, and as of December 2, 2011, the investigation was re-opened, but a review of the ECCC official website shows that only twelve court documents regarding Case 003 have been filed in the past year. Also worrisome is the fact that Cambodia could again influence the judges into dropping the case altogether. The international co-investigative judge resigned in protest over the debacle, citing political interference for his resignation, including statements by a Cambodian official that, “If they want to go into Case 003 and 004, they should just pack their bags and leave.” This means that a new Co-Investigative Judge

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135 Scully, supra note 1, at 327.
136 Id.
137 Id. at 326.
141 Scully, supra note 1, at 328.
144 Scully, supra note 1, at 331.
will be appointed by the United Nations, and Cambodian officials can attempt to continue their improper influence and intimidation.

IV. CONCLUSION

The Cambodian government has clearly managed to influence the ECCC, even getting Case 003 dismissed at one point. The lenient sentence of Duch also leads to questions of whether the ECCC judiciary is being influenced by the government (which contains ex-members of the Khmer Rouge). In order to dispel the view that the ECCC is being influenced by the Cambodian government, the ECCC needs to amend its operating documents to more closely follow the recommendations set forth in the U.N. Report. Having a majority of the judges and attorneys hail from Cambodia is not working. At the very least the majority of the ECCC needs to be international, and chosen by the U.N. Secretary General instead of by the Cambodian Prime Minister. The best reform would involve amending the ECCC into a traditional ad hoc international tribunal with its headquarters located outside of Cambodia, and all of the judges and attorneys being international rather than Cambodian citizens. Unfortunately, time is running out to bring the remaining Khmer Rouge leaders to justice. Some have already died, including Pol Pot and Ta Mok, and the surviving leaders are growing old and infirm. In the interest of time, amending the majority requirements to be international is a more feasible solution than revamping the entire tribunal into an ad hoc international tribunal.

\[146\] Scully, supra note 1, at 318.
THE PUSH FOR INTERNATIONAL UNIFORMITY: THE WTO’S DETERIMENTAL EFFECT ON THE GLOBAL ECONOMY

DALLIN CALL

I. INTRODUCTION

The World Trade Organization (“WTO”) is a significant force in the international arena; it possesses the power to effect stability, or cause harm to the global economy. With the push for international uniformity, the WTO has shown its ability to do harm rather than effect stability. No area of international law has felt the impact of this harm greater than international patent laws.

This Article is not meant to be an in-depth analysis of current international patent laws or their effects on the economy or society in general; rather, this Article attempts to show a few examples of how the current push for international uniformity may have a detrimental effect upon our global community. First, this Article introduces the WTO and provides a brief overview of its dispute resolution procedures. Then, the Article shows the types of harm that the current push for international uniformity is causing. It moves further to show that despite this detrimental effect, some nations do not give legal weight to WTO determinations. Finally, this article attempts to provide an alternative solution that the problem of legal uniformity presents. This solution is also accompanied herein with a practical application.

I. BACKGROUND

First, what is the WTO and how does it relate to patent law? The WTO is not a group of individuals deciding the fate of international trade and economy. It is not a branch or an agency of a government. It is a platform, a system, or a negotiating forum. It is likened to a kitchen table—a place where representatives of different governments can meet to discuss and resolve trade

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1 See infra note 21-50 and accompanying text.
2 See infra note 21-47 and accompanying text.
3 Id.
4 Id.
5 Id.
6 See infra notes 7-13 and accompanying text.
7 See infra notes 21-47 and accompanying text.
8 See infra notes 58-66 and accompanying text.
9 See infra notes 81-83 and accompanying text.
10 See infra notes 84-92 and accompanying text.
12 Id.
13 Id.
concerns. How the discussions proceed and the procedures that result when discussions fail are governed by rules born out of international negotiations occurring since 1948.

The way disputes are settled at the WTO is fairly established now: first, the countries involved in the dispute are encouraged to discuss their issues with each other and see if the dispute can be worked out between each other before other actions are taken. Next, if an agreement is not reached, the complaining party usually asks for a panel of three to five experts to be formed. The panel prepares a report, which is passed to the Dispute Settlement Body to help in making rulings and recommendations. The panel's report is usually very persuasive on the Dispute Settlement Body's decisions because the report can only be overturned by consensus.

The rules governing WTO discussions and dispute settlement were first found in an international agreement called the General Agreement on Tariffs and Trade ("GATT"). Originally, the negotiations regarding the GATT also contemplated an International Trade Organization ("ITO"). However, the world was not ready for international governance of trade, and because the ITO contemplated taking on too much too soon, the ITO failed. Nevertheless, uncontrolled tariff fluctuation remained a global problem without a solution; because the GATT addressed this problem, it succeeded in spite of the failure of the ITO.

Further global negotiations ensued as the success of the GATT became apparent. Among these was a round of negotiations held in Punta del Este, Uruguay, or the "Uruguay Round" negotiations, which resulted in a separate series of interrelated agreements that addressed different facets of international trade. The Uruguay Round negotiations formulated the WTO, which

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15 Id. (discussing the General Agreement on Tariffs and Trade (GATT)).
17 Id.
18 Id.
19 Id.
22 Id.
23 Id.
24 Id.
25 See MILLS, supra note 20.
replaced the GATT as an international organization. The WTO appeared as the main forum for various international disputes, including disputes involving patent law, and other intellectual property issues through the adoption of the Trade Related Aspects of Intellectual Property Rights (“TRIPS”).

To comply with the TRIPS agreement, many nations, including the United States, resolved to modify their existing patent laws in order to increase international uniformity. In line with the push for international uniformity, on September 16, 2011, the United States enacted a landmark decision, marking a significant reform to existing U.S. patent law. The short form title for this enacted law, Public Law 112-29, is the Leahy–Smith America Invents Act (“AIA”). One of the more significant changes that resulted from the enactment of the AIA is the “first-to-file” rule, enacted to replace the “first-to-invent” rule.

I. ARGUMENT

A. THE FOCUS ON GLOBAL UNIFORMITY IN PATENT LAW IS CAUSING SIGNIFICANT HARM TO MANY NATIONS

At one time, Indian pharmaceutical companies created a major portion of the generic drugs used to battle HIV/AIDS and other fatal diseases in India and Africa. With the adoption of patent laws

27 See Mills, supra note 20.
31 Id. at 284.
that conform to the WTO and TRIPS, Indian patent law forced many of these generic pharmaceutical producers to raise prices on these invaluable generic drugs.\textsuperscript{34} Millions of people were negatively affected due to the adoption of new patent laws and their resulting price increases, which meant that fewer people could afford the drugs they once used to sustain their quality of life.\textsuperscript{35} Furthermore, it is not only in the pharmaceutical arena that new Indian Patent law could prove detrimental, but it is also possible that the agricultural industry in India may suffer a negative impact as a result of the WTO's TRIPS conformity laws, which would increase the difficulty of an already difficult way of providing subsistence.\textsuperscript{36}

Conformity to the WTO and TRIPS also harmed—and continues to harm—even smaller, developing countries.\textsuperscript{37} These developing countries faced—and will continue to face—similar problems as those facing India.\textsuperscript{38} Furthermore, some studies show that with TRIPS conformity, developing countries will experience large net economic welfare losses due to the rising cost of generic drugs.\textsuperscript{39}

India and developing countries are not the only countries affected by the push for TRIPS' uniformity; Americans also have cause for concern, because entrepreneurialism is a large part of the American economy.\textsuperscript{40} The United States created approximately 550,000 small businesses every month between the years 1996 and 2004.\textsuperscript{41} However, the passing of the AIA caused serious debate over the fate of entrepreneurialism in America.\textsuperscript{42} Some believe that the AIA means the end of American entrepreneurialism and consequently,

\textsuperscript{34} Id. See also generally The Patents Act, No. 39 of 1970, INDIA CODE (1970), vol. 14 (As amended by Patents (Amdt.) Act, No. 15 of 2005 INDIA CODE (2005). http://nbaindia.org/uploaded/Biodiversityindia/Legal/14.%20The%20Patents%20Act,%201970.pdf. (Can new citations be used in the Argument section that weren’t used in the Background section? See Writer’s Guide p.11? He does this a lot throughout the Argument Section, which I think we’ll just have to go with given our time crunch.)

\textsuperscript{35} Kumara, supra note 33.

\textsuperscript{36} Id. (discussing the potential effect the new patent laws may have on seeds in India).


\textsuperscript{38} Id. at 23.

\textsuperscript{39} Id.


\textsuperscript{41} Id.

the ‘American Dream.’ The next argument discusses some specific examples where the AIA might affect small businesses, entrepreneurialism, and the American Dream.

B. THE AIA: A SIGNIFICANT HINDRANCE TO THE AMERICAN DREAM?

The AIA brought about changes that may significantly harm the American people and entrepreneurialism while helping big business. The main example of harm discussed herein is increased time and money for patent prosecution. One of the first areas contributing to the increase is the new procedure of Post Grant Review (“PGR”). PGR allows almost anyone to challenge a patent after it is issued or reissued. Not only does PGR allow for this challenge to take place, but PGR also broadens the type of materials allowed to challenge the patent—more than just patents and publications are allowed. Thus, the time required to review patent applications is likely to increase in order to review the increased amounts of material. With increased time under review, costs will go up. Most individuals and small businesses likely will be unable to endure the financial sinkhole, leaving only big businesses with deep pockets remaining. Even though the goal is to have this process completed in one year, one year of additional legal fees adds up.

The preceding argument of increased time and money for patent prosecution is equally applicable to the new Inter Partes
Another area that has the potential to harm entrepreneurialism is the change the AIA made to Prior User Rights ("PUR"). A PUR defense means that as long as an entity used an invention for at least one year prior to that invention becoming a patent application, even if that patent application becomes a valid patent, the prior user has a valid defense against infringement, just by virtue of the prior use. To put this into perspective, a prior user could be anyone who copied or invented a patent applicant’s invention, and commercialized that invention, before the patentee was able to secure a patent. Thus, it is possible that an inventor finally secures a patent only to find that the opportunities to market their invention are limited, because of a prior user who has already saturated the market place.

C. SOME NATIONS DO NOT GIVE WTO DETERMINATIONS LEGAL BINDING EFFECT

Like TRIPS, despite the serious consequences that WTO agreements can have on different nations, some nations refused to give substantial weight to WTO decisions. For example, the United States enacted federal law stating that in the presence of opposing federal authority WTO dispute settlement decisions will not be binding authority. As a result of this leniency, a number of U.S. courts refused to uphold determinations by the WTO that were inconsistent with challenged federal agency action.
On an international level, many nations have found ways to contract around WTO agreements, thus making their legal effect illusory. Since the 1960's countries have entered into agreements outside the sponsorship of the WTO, benefitting the parties to the agreements and increasing the tariffs on countries not a party to these agreements. These agreements are called regional trade agreements (“RTAs”). These RTAs allow countries to draft a new set of rules, which challenge the WTO's authority on international trade policy. Because there are now approximately 500 RTAs worldwide, it is safe to say that in spite of only a 9.75% noncompliance proceeding rate, nations are finding other ways of noncompliance.

D. NATIONS MIGHT GIVE WTO DECISIONS MORE LEGAL WEIGHT IF THE NATIONS TOOK MORE TIME DEVELOPING THE WTO DISPUTE PROCESS AND PROVIDED FOR BETTER REPRESENTATION THROUGHOUT THE PROCESS

It is generally understood that when the WTO is effective as an international trade regulator, it is effective due to the WTO's characterization as a hard law regime as opposed to soft law regime. This means that the WTO imposes formal, legal penalties for noncompliance with formal, legal obligations. The penalties can and do come in the form of limited trade sanctions on parties not in compliance with WTO decisions.

Although some scholars have reported that the WTO is a success story in terms of effectiveness achieved through sanctions, the overall effectiveness of the WTO is still under debate. The view

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64 Langille, supra note 63 at 1489-90.

65 Id.

66 Id.

67 Id.


69 Langille, supra note 63, at 1482-83.

70 Id.


72 Donald McRae, Measuring the Effectiveness of the WTO Dispute Settlement System, 3 ASIAN J. OF WTO & INT'L HEALTH LAW AND POL'Y 1, 6-11
that the WTO generally works well and is a success story is a view held by most developed countries. However, underdeveloped countries are not using the WTO dispute settlement process, and as mentioned earlier even some developed countries are not giving legal effect to WTO decisions.

One may ask what is to be done to improve the effectiveness of the WTO, considering (1) the effectiveness of the WTO’s sanctions and remedies, (2) the nations avoiding the legal effects of the WTO decisions, (3) the WTO’s push for legal uniformity, and (4) the harm that push may be causing. Is the WTO to suffer the same fate as the ITO because the WTO is trying to take on too much? The problem has been identified and might be best understood by the following quote:

In principle, lawyers register only a confusing variety of autonomous legal fields, self-contained regimes and highly specialized tribunals. By this token, they identify a danger to the unity of international law because the conceptual-doctrinal consistency, the clear hierarchy of norms and the effective judicial hierarchy that was developed within the nation-states, is lacking.

The problem, as pointed out above, is the limitation of lawyers and their ability to register various legal fields, and the fact that the “hierarchy of norms” that took years to develop within nation states is not available on an international level.

Because the mental capacity of lawyers is something that cannot increase very readily, it is obvious that the problem which needs addressing is the establishment of a “hierarchy of norms” on an international level. The WTO should pause and focus on internal procedural improvement before continuing to push for more international uniformity.

(Mar. 2008) (discussing the adequacies and inadequacies of remedies and sanctions employed by the WTO).

73 Id. at 2.
74 Id. at 11-12.
76 Langille, supra note 63, at 1489-90.
77 Id. See also Dunoff, supra note 68, at 301.
78 Kumara, supra note 28.
79 Dunoff, supra note 21.
80 Fischer-Lescano & Teubner, supra note 28, at 1002 (discussing the oversimplification of the manner in which norm conflicts are understood).
81 Id.
82 Fischer-Lescano, supra note 28, at 1002. (Notably, these norms took years to develop, and the solution may lie in a popular English idiom: “Good things come to those who wait.”). See Id.
83 Sherwinter, supra note 29, at 47.
Although the advice to ‘wait’ may not be appealing to some, and may not sound very practical, one must ask if time, error, experience, and constant adjustments are what brought about the “hierarchy of norms” that protect the laws of our nation states, should not the same process be applied to international laws? For example, the grand jury has played an important role under the American legal regime; however, that role has evolved over time. The process of evolution was necessary to obtain its current role and effectiveness.

The example of the grand jury and how its effectiveness evolved over time was not chosen arbitrarily; the choice was made because it helps provide a practical example wherein the WTO can improve its internal procedures. Currently the WTO uses a panel of three to five experts to resolve disputes that have international significance. The grand jury is composed of 16-23 members, and it was recognized as such an important aspect to the law that it was included in the Fifth Amendment to the Constitution of the United States. The Framers recognized that the grand jury had a role in matters of great weight. Likewise, the disputes being resolved by the WTO are matters of great weight.

Thus, the next suggestion, in addition to letting the WTO policies and procedures develop overtime before pushing for legal uniformity, is that the number of panelists be increased from the current number of three to five, to a number like that of grand juries—16 to 23. There is a need for greater representation of developing nations in WTO proceedings. As mentioned above, current panelist reports are, in effect, binding on the Dispute Settlement Body. With an increased number of panelists, perhaps more member states might be further assured that they will be more

85 See United States v. Cox, 342 F.2d 167, 186, n.1 (5th Cir. 1965) (discussing how “[t]he Grand Jury is both a sword and a shield of justice[.]”).
86 McRae, supra note 72, at 14-16.
87 WORLD TRADE ORGANIZATION, supra note 71.
89 U.S. CONST. amend. V (stating “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]”).
90 Id.
92 McRae, supra note 72, at 14. (discussing the substantial number of developing nations that do not use the WTO dispute settlement system and the lack of information about why developing countries are not using that system).
93 WORLD TRADE ORGANIZATION, supra note 71.
fully represented and may be more motivated to use the WTO’s dispute settlement system.\textsuperscript{94}

II. CONCLUSION

The WTO is a powerful tool in bringing about global stability.\textsuperscript{95} It is also a force that when used improperly can bring about, and has brought about, significant harm.\textsuperscript{96} Despite its possibilities for bringing about such significant, global effects, some nations choose not to give legal effect to WTO determinations.\textsuperscript{97} The problem lies in the lack of ‘hierarchal norms’ in the international legal arena.\textsuperscript{98}

With the problem identified, the solution is the same concept that developed the hierarchal norms that currently exist in the nation states. That concept is time. If WTO members adopt specific, practical solutions that address current needs, like increasing the number of panelists, over time such practical solutions will increase the effectiveness of the WTO. With increased effectiveness, the WTO will not need to push for legal uniformity, as the nations of the world will want to conform because they will recognize that uniformity is no longer the problem, but is the solution.

\textsuperscript{94} McRae, supra note 72, at 11-14 (discussing developing nations reluctance to use WTO dispute settlement).
\textsuperscript{95} See supra note 79 and accompanying text.
\textsuperscript{96} See supra notes 35-43 and accompanying text.
\textsuperscript{97} See supra notes 60-68 and accompanying text.
\textsuperscript{98} See supra notes 80-85 and accompanying text.
TIPPING THE SCALE FROM MASS MURDER TO GENOCIDE: WHAT DOES IT TAKE?

“Genocide is the responsibility of the entire world.”

“For the dead and the living, we must bear witness.”
— Elie Wiesel

KATIE SELLERS

I. INTRODUCTION

Genocide has long been described as the “deliberate and systematic extermination of an ethnic, racial, religious, or national group.” In the wake of the Holocaust, the Convention on the Prevention and Punishment of the Crime of Genocide (“Convention”) was established to hold States accountable for the well being of their citizens. Since its entrance into international law, the world has witnessed this atrocity on several accounts, specifically, the mass killings in Cambodia. From 1975 to 1979, nearly two million Cambodians were exterminated under the Khmer Rouge in an “extreme plan to turn Cambodia into an agricultural utopia.” This bookmark in history sheds light on the limitations of the definition of genocide, as this campaign was politically motivated rather than ethnically, religiously, nationally, or racially.

This Article will first discuss the history of genocide by addressing the Nuremberg Trials, Raphael Lemkin’s role in its
definition, the establishment of the Convention, and its application into international law. Next, this Article will describe the events that took place in Cambodia and the establishment of the Extraordinary Chambers in the Courts of Cambodia. This Article will then discuss “auto-genocide” and argue why expanding on the definition of genocide would prevent mass killings, such as the one in Cambodia, from going unaccounted for in the future. Finally, this Article will conclude with a summary of the Argument and support the position that the definition of genocide should be expanded to include politically motivated mass killings.

II. BACKGROUND

A. THE NUREMBERG TRIAL

Today, “[t]he Holocaust is still considered the ultimate example of genocide because of the massive numbers involved and the administrative efficiency of such systematic murder.” The Holocaust began in 1933 when Adolf Hitler ordered the implementation of the “Final Solution” which called for the extermination of Jews throughout Europe. Upon the conclusion of World War II in 1945, more than six million Jews had been murdered based on the German’s racial belief that Jews, “deemed inferior”, were an alien threat to the so-called German racial community. Once the Allies uncovered the enormity of the atrocities that had occurred in Nazi Germany, it was determined that the high level German leaders needed to be held responsible for the crimes they had committed. Accordingly, on August 8, 1945, the International Military Tribunal for the Trial of German Major War Criminals (“IMT”) was officially established pursuant to The London Agreement.

The IMT indicted twenty-four Nazi leaders on charges of war-crimes. The Nazi leaders were charged with “conspiracy to commit war crimes . . . planning, preparing, initiating or waging aggressive war . . . violation of the laws and customs of war . . . and . . . crimes against humanity.” On October 1, 1946, twelve of the leaders were

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8 See infra notes 12-45 and accompanying text.
9 See infra notes 46-71 and accompanying text.
10 See infra notes 72-101 and accompanying text.
11 See infra notes 11-101 and accompanying text.
12 Stoett, supra note 6, at 595.
14 Id.
16 Id.
18 Quincy Wright, The Law of the Nuremberg Trial, 41 AM. J. INT’L L. 38, 41 (1947) (The Americans prosecuted every defendant on the charge of
convicted and sentenced to death; seven were sentenced to imprisonment for various terms; three were acquitted; one committed suicide prior to trial; and one was convicted and sentenced to death in absentia. As such, the result of the Nuremberg Trials set international precedent for years to come.

Warren R. Austin, Chief Delegate of the United States, addressed the General Assembly of the United Nations on October 30, 1946, stating:

Besides being bound by the law of the United Nations Charter, twenty-three nations, members of this Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.

While the indictment did not specifically mention genocide, it was the first to encompass the idea as the major war criminals were accused of “conducting deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations . . . in order to destroy particular races and classes of people and national, racial or religious groups.” Thus, following the conclusion of the Nuremberg Trials, the United Nations (“UN”) began the daunting task of enforcing genocide as a punishable crime under international law.

B. RAFAEL LEMKIN’S ROLE IN THE ESTABLISHMENT OF “GENOCIDE”

While the IMT Charter essentially covered genocide, that element of the crimes committed by the major war criminals was ultimately classified as “crimes against humanity.” It was Raphael Lemkin (“Lemkin”) who first devised the word “genocide” in his book *Axis Rule in Occupied Europe.* Lemkin “introduced a new term ‘to denote an old practice in its modern development,’ derived from the concept of ‘genocide’ as it was understood in the context of war crimes. The British prosecuted sixteen defendants on the charge of planning, preparing, initiating, or waging aggressive war. The French prosecuted defendants in the West on charges of violating the laws and customs of war and crimes against humanity, while the Soviets prosecuted defendants in the East.”

19 Schaack, *supra note 15,* (describing the charges and sentences of the twenty-four Nazi leaders brought before the IMT). (see also Wright, *supra note 18,* at 38)
20 Wright, *supra note 18,* at 38.
21 *Id.*
22 Schaack, *supra note 15,* at 449. (referencing Indictment of Herman Göring et al., 1 Trial of the Major War Criminal before the International Military Tribunal 43-44 (1947). (internal citations omitted)
23 *Id.*
25 *Id.*
Greek word for race or people, genos, and the Latin caedere, or cide, which means to kill.”

Lemkin, who fled to Sweden after Germany invaded Poland, believed that genocide was more than “the individual acts, though they may be crimes themselves... [he believed] that the broader aim [of genocide was] to destroy entire human collectivities.” It was not until the UN drafted a resolution following the Nuremberg Trials in 1946 that genocide would be punishable under international law. The General Assembly affirmed that the “civilized world” condemns genocide whether it is religious, political, racial, or otherwise motivated. Lemkin’s push to punish those guilty of genocide led to the establishment of a Genocide Convention where the definition would undergo a serious of amendments before becoming enforced as international law.

C. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

On December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide through Resolution 260 (III) A. The objective of the Convention was to affirm that genocide, under international law, is a crime in times of peace or in times of war. The latter was included to distinguish it from crimes against humanity. The Convention went into effect on January 12, 1951 after it obtained the required twenty ratifications as defined under Article XIII.

It took three steps to create the Convention. Initially, the UN Secretariat drafted a collection of “concepts meant to assist the General Assembly.” Second, an ad hoc committee was established as part of the Economic and Social Council to take the Secretariat’s draft and transform it into a document to be used by the Convention. Finally, the Sixth Committee of the General Assembly
used the draft to finalize the text of the Convention.\textsuperscript{38} The draft described genocide as the “destruction of racial, national, linguistic, religious, or political groups of human beings.”\textsuperscript{39} However, it was during the third phase that the definition of genocide underwent several changes and redactions.\textsuperscript{40} The final text under Article II of the Convention adopted the definition of genocide:

Any of the acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group \textit{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;
e) Forcibly transferring children of the group to another group.\textsuperscript{41}

Article III then made the following acts punishable:

a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.\textsuperscript{42}

The Convention put the power of policing in the hands of individual States to prevent and punish those who have committed genocide by “trying suspects ‘in the territory of which the act was committed,’ or turning to the international community.”\textsuperscript{43} The International Criminal Court (“ICC”) has included the language of the Convention in its statutes, which applies to its \textit{ad hoc} tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).\textsuperscript{44} However, the redaction of protected groups in the final text, most

\textsuperscript{38} Schabas, \textit{supra} note 24, at 1.
\textsuperscript{40} Schabas, \textit{supra} note 24 at 1-2.
\textsuperscript{44} Schaack, \textit{supra} note 15, at 450.
notably political groups, has proved to be a critical change, limiting
the liability of war criminals that have violated the Convention.45

III. CAMBODIA 1975-1979: THE NEED FOR CHANGE

A. CONFLICT IN CAMBODIA: A BRIEF HISTORY

While communist roots began taking hold in the early 1900s, it wasn’t until the 1970s that things really began to change in Cambodia.46 On April 17, 1975 the Communist Party of Kampuchea (“CPK”) took control of Cambodia in what would lead to a spree of radical changes throughout the country over the next four years.47 The CPK, also known as the Khmer Rouge, established “policies that disregarded human life and produced repression and massacres on a massive scale.”48

Cambodia gained its independence from France in 1954 under the leadership of the King Norodom Sihanouk for the next sixteen years.49 In 1970, General Lon Nol created an army to seize power in order to combat communism in the country.50 Lon Nol had full support from the United States “in order to obtain a geopolitical ally who both adamantly opposed communism and would lend support in the Vietnamese conflict.”51 However, Lon Nol’s reign was cut short when in April 1975 the Khmer Rouge, under the leadership of Pol Pot, seized control of the Cambodian government.52

The Khmer Rouge turned Cambodia into the state of Democratic Kampuchea and remained in power until 1979.53 It was during this four-year period that the country was turned into an enormous “detention center”54 in an effort to create a “New Cambodia.”55 The Khmer Rouge sought to “dismantle Cambodian society and install a brutally repressive state.”56 To do so, the Khmer Rouge established three categories in which they would purify the new state: “waves of massacres: individual executions following imprisonment and interrogations; and arbitrary and summary

45 Stoett, supra note 6, at 601-02.
47 Id.
48 Id.
50 Id.
51 Id.
52 Schaack, supra note 15, at 162.
54 Id.
55 Schaack, supra note 15, at 163.
56 Schaack, supra note 15, at 163.
executions.” Summarily, the Khmer Rouge believed that doing so would purge Cambodia of those who were deemed “tainted and corrupted.”

These measures were put into effect to rid Cambodia, first, of those who were loyal to the Lon Nol army. The officers of the defeated army were identified, isolated, and executed, followed by high-ranking civil servants, and some of the individuals’ entire families. However, as the Khmer Rouge identified a growth in class struggles, it was their objective to rid the society of the elite and educated. After a series of city evacuations, destruction of public centers, and abolition of the economy, the Khmer Rouge determined it needed to purge the state of those who were “real or political opponents.” The most notable purge occurred in the Eastern Zone where the majority of those massacred were victims simply based on their residence as the regime deemed this territory to be a disloyal political jurisdiction. Ultimately, transformation, as a result of the “systematic and deliberate torture and murder of Cambodian citizens,” led to the death of nearly two million Cambodians, amounting to nearly thirty percent of the population.

The reign of the Khmer Rouge finally came to an end in 1979 after liberation by the Vietnamese. Once the Vietnamese established a new Cambodian government, the country turned to hold former leaders of the Khmer Rouge accountable for their actions. Pol Pot, the leader of the Khmer Rouge and his accomplice Ieng Sary were tried in what has been regarded as a poor attempt at bringing the two to justice. “The two leaders were tried in abstentia without a defense presented, found guilty of the commission of genocide, and sentenced to death by a domestic tribunal.” Because of the improperness of the proceedings, the U.N. called for the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea to ensure a fair and impartial trial. Ultimately, however, charges of genocide could not be brought against Pol Pot because his intentions were not ethnic, religious, racial, or nationally motivated. As a result, most of the killings

58 Id.
59 Schaack, supra note 15, at 163.
60 Hannum, supra note 57 at 89-90.
61 Schaack, supra note 15, at 163: see also Hannum, supra note 57, at 90.
63 Hannum, supra note 57, at 90.
64 Luftglass, supra note 49, at 900.
66 Luftglass, supra note 49, at 902.
67 Id.
68 Id.
70 Stoett, supra note 6, at 602.
qualify as auto-genocide because the “executions were based on political or educational affiliation[s].”

B. REDEFINING GENOCIDE

During the negotiations between the UN and Cambodia to establish the ECCC, Cambodia strongly pursued a new definition of genocide to be presented at the trials of the Khmer leaders. This definition added political and economic groups to the list of protected groups. However, if the definition was constructed to specifically fit the crimes of the Khmer Rouge this would involve retroactivity, which directly violates international agreements. The jurisdiction of the ECCC existed between the years of 1975 to 1979 and governed accordingly by the Genocide Convention of 1948. Although genocide could not be founded for much of the killings, the Assistant Secretary of the UN pointed out that the crimes would fall under crimes against humanity.

In the international community there is a strong argument, that like what was resolved in the Cambodian conflict, auto-genocide is “more akin to a crime against humanity” and should keep “genocide limited to the most extreme atrocities and retain it as a distinct crime.” Further, during preparations of the Genocide Convention, it was perceived that only “stable” groups should be considered to fall under the definition of genocide, thus, excluding political groups. For these reasons, among others, the definition of genocide has withstood calls for expansion and has remained true to the intent of the Convention.

In spite of the longstanding definition of genocide, scholars still strive to advance a new definition to encompass Lemkin’s original intent. One such scholar, Barbara Harff of the U.S. Naval Academy, has advanced the term “politicide” to address instances where there politically defined victims concluding that “mass killings of political groups show similarities in their causes, organization and

73 Luftglass, supra note 49, at 911.
74 Etcheson, supra note 72, at 511-2.
75 Luftglass, supra note 49, at 925 (noting that since the Genocide convention does not protect political groups, the term “crimes against humanity” is used to focus on the intent of the perpetrator rather than the victims).
76 Kelly, supra note 43, at 149.
77 Id. at 158.
78 Schabas, supra note 24, at 3.
79 See generally Eng, supra note 3.
moters.” Harff has expanded on the Convention’s definition of genocide to include cases that arise out of civil wars when a “territorially based nationalist or revolutionary movement” pursues to destroy, in whole or in part, an ethnic or political group. For this reason, Harff has advanced the definition of genocide and politicide as: “[t]he promotion, execution, and/or implied consent of sustained policies by governing elites or their agents – or, in the case of civil war, either of the contending authorities – that are intended to destroy, in whole or part, a communal, political, or politicized ethnic group.”

Another concern regarding the status quo of the definition of genocide is its close ties with the Holocaust. Because the idea of genocide came about in the aftermath of the Holocaust, it carries with it the “symbol of the world awakening to indiscriminate mass murder against a group.” There is fear that by separating the connection between genocide and the Holocaust, the significance of genocide, and politicide alike, may be impaired. While the Holocaust may be viewed as the “ultimate model of genocide,” it must be acknowledged that genocide against political groups was occurring long before the Holocaust. There were approximately two million victims killed in Pakistan in 1971: over 500,000 in Sudan between 1956 and 1972: at least half a million in South Vietnam from 1965-1975: and nearly 20,000 in Rwanda from 1963-1964.

Yet, the exclusion of political groups from the list of protected groups was itself political in nature. At the Convention the parties compromised on the inclusion of political groups to ease concerns of the Great Britain delegates and former Soviet Union Republics who feared that its inclusion would weaken the entirety of the Convention. Ultimately, they were concerned that doing so would “expose nations to external intervention in their domestic concerns.” Scholar P.N. Drost viewed the exclusion of political and social groups as a means for governments to “exploit this obvious loophole” in the future. Drost believed that victims of genocide should not be limited

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83 Id.
84 Eng, supra note 4, at 4.
85 Id.
86 Id.
88 Harff, supra note 82, at 60 (referencing Table 1. Genocide and Politicide 1955-2001).
89 Simeon Sungi, Redefining Genocide: The International Criminal Court’s Failure to Indict on the Darfur Situation, 1 J. THEORETICAL & PHILOSOPHICAL CRIMINOLOGY 63, 64 (2011).
90 Id.
91 Id.
92 Id. at 67.
to the four protected groups, he proposed that the definition of genocide should read as “the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such.”

The devastating events took place in Cambodia are no less tragic than the Armenian death marches from 1915 to 1918 which resulted in over one million deaths by the Turkish government, the six million Jews exterminated during the Holocaust, the events in Rwanda, or the seven million Ukrainians from 1932 to 1933 under Stalin’s orders. Regardless of the group to which the victims belonged or the time and place which the atrocities occurred, these events were rooted in “the indiscriminate and systematic destruction of the members of a group, simply because they belonged to that group.” Simply put, as scholar Helen Fein believes, genocide it none other than “organized state murder.”

Accordingly, the UN missed an opportunity to expand on the definition of genocide during negotiations with the Cambodians to establish the ECCC. The UN reasoned that the need for redefining genocide in this matter was unnecessary because those executions that were political in nature would be captured under the charges of crimes against humanity. However, the purpose of establishing the Genocide Convention was to establish that genocide could occur in both times of peace and war, unlike crimes against humanity, which are unlikely to occur outside of an armed conflict. As such, to successfully advance charges against the Khmer Rouge for crimes against humanity, the prosecution would have to overcome the heavy burden of proving that 1975-1979 was a time of war or was an armed conflict. Ultimately, this is a risk regarding whether or not the crimes of the Khmer Rouge would be brought to justice.

IV. CONCLUSION

Since the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and other serious offenses, precedent will be greatly impacted by the proceedings before the ECCC. The issue of retroactivity, which is prohibited in international law, prevented the Cambodians from seeking justice for the massacres of political affiliates at the hands of the Khmer Rouge. However, the UN had the opportunity to use the events that took place in Cambodia to expand on the definition of genocide to include political groups to the list of protected groups, but failed to do so. Doing so would have set precedent for years to come so that the travesty that occurred in

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94 Eng, supra note 4, at 5.
95 Id.
96 Stoett, supra note 6, at 603.
97 Schaack, supra note 15, at 164.
98 Luftglass, supra note 49, at 925.
99 Schabas, supra note 24, at 2.
100 Luftglass, supra note 49, at 922.
101 Id. at 923.
Cambodia may be deterred in the future. In the unfortunate event that political genocide would occur in the future, as it likely will, the international community could have benefitted from the expansion to hold war criminals accountable for their actions. The basic premise of genocide is a “denial of the right of existence of entire human groups.”\textsuperscript{102} The Khmer Rouge denied the “right of existence” to at least two million citizens through a series of massacres, which will largely escape a genocide conviction.\textsuperscript{103} It is time for the international community to evolve with the events and atrocities occurring around the world and protect the lives of innocent victims.

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\begin{enumerate}
\item[\textsuperscript{102}] Schaack, \textit{supra note 15}, at 450.
\item[\textsuperscript{103}] \textit{Id.}
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