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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE 14: A COMPARATIVE STUDY OF EXCLUSION OF EVIDENCE ON THE GROUNDS OF THE MEANS BY WHICH IT WAS OBTAINED

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SPRING 2003

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I. Introduction and Summary of Conclusions*

A. Issues

This memorandum addresses exclusion of evidence on the grounds of the means by which it was obtained by assessing the position taken by the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the United States, England, Canada, and France. Part II of this memorandum gives a factual background on the ICTR statute involved in this issue. Part III of this memorandum gives a general legal overview of the exclusion of evidence. Part IV of this memorandum looks specifically at how varying legal systems address the issue of exclusion of evidence. Finally, Part IV of this memorandum formulates a legal test to apply to the ICTR.

B. Summary of Conclusions

The ICTR should adopt a legal test for exclusion of evidence that is similar to Canada's approach to the exclusion of evidence. The Canadian approach falls in between the strict American exclusionary rule and the lax approach of exclusion of evidence used by France. This approach will be a good fit for the ICTR because it will allow the judges to apply their judicial wisdom in each individual case to determine if exclusion of evidence is necessary. More importantly, this type of system will help ensure that a person's fundamental right to privacy is protected without compromising the ability of the ICTR to prosecute war criminals.

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* ISSUE 14: Compare and contrast the approach taken in the common law jurisdictions of USA, Canada, Britain, the mixed jurisdictions of Israel, Scotland and South Africa and the civil code systems of France and Belgium to the exclusion of evidence on the grounds of the means by which it was obtained. Assess and evaluate current ICTR cases, holding, and dicta, on the exclusion of evidence (see Rule 95 of the Rules of Procedure and Evidence). Assess and evaluate ICTY decisions on this issue. Formulate a legal test to apply in the international criminal law jurisdictions.

II. Factual Background

The International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 95 (Exclusion of certain evidence) states: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[1]

The Rwanda Tribunal Rules contains the amended version of the Yugoslavia Tribunal Rules which is consistent with the United States exclusionary rule in criminal proceedings involving evidence obtained outside of the United States.[2] Under what has become known as the "international silver platter doctrine," U.S. courts will not exclude illegally obtained evidence by foreign officers in a foreign country unless the conduct of the foreign officials during the search and seizure "shocks the judicial conscience."[3]

The Rwanda Tribunal's exclusionary rule is intended to achieve four important objectives: (1) to discourage human rights violations in the gathering of evidence; (2) to exclude evidence obtained by illegal means, such as torture, for reasons of unreliability; (3) to avoid tainting the judicial process; and (4) to protect the fundamental interests of justice with respect to due process and the rule of law.[4] At the same time this exclusionary rule does not require that evidence gathered by human rights organizations

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[1] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, U.N. Doc. ITR/3/REV.1 (1995). [Reproduced in the accompanying notebook at Tab 1.]

[2] 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 567 (1998). [Reproduced in the accompanying notebook at Tab 39.]

[3] JORDAN J. PAUST, M. CHERIF BASSIOUNI, SHARON A. WILLIAMS, MICHAEL SCHARF, JIMMY GURULE, & BRUCE ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 527 (2000). Reproduced in the accompanying notebook at Tab 40.]

[4] MORRIS AND SCHARF, *supra note 2*, at 567. [Reproduced in the accompanying notebook at Tab 39.]

or national authorities meet all the technical requirements of the Rwanda Tribunal Rules, provided that the means used to obtain such evidence are not so shocking as to seriously damage the integrity of the proceedings.[5]

III. General Legal Discussion of Exclusion of Evidence

A. The Search and Seizure Right to Privacy

The definition of "right to privacy" must be appreciated before examining the search and seizure right to privacy. The "right to privacy" is not easy to define.[6] Generally, the right to privacy concerns the degree to which a person is or is not "left alone," a person is mandated to or restricted from existing or interacting with or without others, or a person's identity, integrity, autonomy, intimacy, sexuality, or emotions are interfered with against their desires.[7] A different view is that notions of privacy may be determined within the context of a particular society at a particular point in time, and that the extent of the privacy changes with a society's norms, values, and expectations, and any such shifts would not negate the existence of the right to privacy.[8]

The right to privacy in the context of searches and seizures, as developed in domestic and international justice systems, in its simplest form, provides that all persons

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[5] *Id.*

[6] Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398, 1401. [Reproduced in the accompanying notebook at Tab 54.]

[7] Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737 (1989) (discussing the need for privacy rights) [Reproduced in the accompanying notebook at Tab 55.]; Samuel Warren & Lois Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing the need for privacy rights). [Reproduced in the accompanying notebook at Tab 56.]

[8] Krotoszynski, *supra note 6*, at 1401-02 (referring to privacy as "a realm of individual autonomy in recognized and accepted social contexts" that is defined in relation to a particular society at a particular point in time"). [Reproduced in the accompanying notebook at Tab 54.]

shall be free from unreasonable, arbitrary, or unlawful searches or seizures of their persons or effects.[9] Common characteristics of the various definitions of the search and seizure privacy right include the following: a respect for the purity of the home; some permissible limitations on the right; recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose; rejection of arbitrary and unlawful interference with privacy and free-for-all discretion to search and seize; respect for human dignity, as privacy invasions can be degrading and can undermine public trust; effective external supervision of law enforcement authorities; balancing of law enforcement needs against the right to privacy; judicially independent authorization of searches and seizures, and legally enforceable safeguards regulating the use of police powers.[10]

B. Exclusion of Evidence: A Remedy for Privacy Breaches

The Rome Statute for the International Criminal Court contains a two-part "mandatory" exclusionary rule. Article 69(7) provides:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity the proceedings. [11]

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[9] George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT'L L. 323, 331 (2001). [Reproduced in the accompanying notebook at Tab 57.]

[10] *Id.* at 385-410. (discussing customary international law and general law). The search and seizure privacy right is found in the law and practice of jurisdictions in all major legal systems of the world.

[11] The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9, article 69(7). [Reproduced in the accompanying notebook at Tab 2.]

If either prong of this exclusionary rule is satisfied, evidence acquired through violations of the privacy right, as an "internationally recognized human right," may be excluded from use against the accused at trial.[12] If the prosecutor seeks to introduce evidence obtained during a questionable search or seizure, the accused may petition the Court, which has broad power over the nature and scope of evidence admitted at trial, to exclude the evidence or grant another appropriate remedy.[13]

The International Criminal Court's exclusionary rule mimics rules existing in many national legal systems. For example, exclusionary rules are expressly incorporated into national Constitutions [14] and appear elsewhere within the general and criminal laws of other countries. For example, the French Constitutional Court ruled in 1994 that the right of privacy is implicit in the French Constitution. International tribunals, such as the ICTY[15] and the ICTR,[16] have exclusionary provisions built into their rules.

The exclusionary rule[17] helps ensure that the privacy interests of suspects are upheld, as the Court balances the competing interests of victims and the accused,

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[12] *Id.*

[13] *Id.*; Report of the Preparatory Commission for the International Criminal Court—Addendum: Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.2 (2000), at Rule 63.

[14] David Banisar and Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 41 (1999). [Reproduced in the accompanying notebook at Tab 63.]

[15] The ICTY exclusionary rule provides: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." Rules of Procedure and Evidence as Amended 30 January 1995, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Rule 95, 5th Sess., U.N. Doc. IT/32/Rev.3/Corr.1 (1995). [Reproduced in the accompanying notebook at Tab 3.]

[16] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, U.N. Doc. ITR/3/REV.1 (1995). [Reproduced in the accompanying notebook at Tab 1.]

[17] The exclusionary rule is not the only remedy theoretically available to accused persons who are victims of unlawful searches and seizures. Remedies in some jurisdictions could include civil tort remedies against

discourages human rights violations in evidence-gathering, maintains the Court's integrity and legitimacy, and furthers the Court's goals of educating the global population on criminal justice issues and setting an example for States to follow in their national criminal justice systems.[18]

C. State Practice as an Element of Customary International Law (Search and Seizure Privacy Right)

(1) Duration of the Search and Seizure Privacy Right

A practice need not have been in place for centuries in order to satisfy the duration element of a customary international law proof;[19] nevertheless, the search and seizure privacy right easily qualifies as satisfying this element. The concept of the inviolability of the home is traceable to biblical times, for example, in the decree that "[t]heir houses are safe from fear."[20] States have employed the search and seizure privacy right for centuries. In the fourteenth century, England enacted laws governing searches and forfeiture of contraband.[21] In 1763, the Parliamentarian William Pitt

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the offending governmental agents or private individuals; criminal prosecution of the offending government agent or private individual; governmental sanctions of offending governmental agents; and internal discipline within police departments for offending officers. A discussion of remedies, other than exclusion, is beyond the scope of this memo.

[18] Edwards, *supra note 9*, at 339. [Reproduced in the accompanying notebook at Tab 57.]

[19] F.R.G. v. Den.; F.R.G. v. Neth., 1969 I.C.J. 3, 44 (Feb. 20) (North Sea Continental Shelf Cases) (passage of only a short period of time is not necessarily a bar to the formation of a new rule of customary international law, but the practice must be "both extensive and virtually uniform") [Reproduced in the accompanying notebook at Tab 58.]; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (4th ed. 1990) (discussing that no particular duration required so long as consistency and generality present). [Reproduced in the accompanying notebook at Tab 41.]

[20] BROWNLIE, *supra note 19*, at 3 (discussing the concept of inviolability). [Reproduced in the accompanying notebook at Tab 41.]

[21] Miller v. United States, 357 U.S. 301, 307 (1958) (quoting 18th Century English Parliamentarian's cries for sanctity of the home from invasions by all, even by the King, as a "man's home is his castle"). [Reproduced in the accompanying notebook at Tab 17.]

observed the virtues of the privacy rights and the inviolability of the home.[22] The Fourth Amendment to the United States Constitution, passed in 1791, prohibited unreasonable searches and seizures and called for search warrants based on probable cause.[23]

In the twentieth century, numerous international instruments maintain the search and seizure privacy right. These instruments include the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the European Convention on Human Rights ("ECHR"), and other international instruments that articulate the right to privacy in family, home and correspondence.[24] In addition, some aspect of the right to privacy can be found in nearly every constitution of the world, and into the general laws and jurisprudence of those countries without written constitutions.[25] Both civil law and common law systems boast incorporation of the right, though the right may be construed differently in each of the two systems.[26]

(2) Uniformity and Consistency of the Search and Seizure Privacy Right

The second element of customary international law is that a showing of substantial uniformity and consistency must be shown.[27] The search and seizure privacy

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[22] *Id.* at 307 (discussing that though the English Parliamentarian Pitt decried the Crown's uninvited entry into the shabby homes of the poor, his words can apply equally to rights of alleged perpetrators of war crimes).

[23] U.S. CONST., amend. IV. [Reproduced in the accompanying notebook at Tab 4.]

[24] *See generally* Edwards, *supra note 9*, at 368-400 (discussing the right to privacy provided for in UDHR, ICCPR, ECHR, and other long-standing international and regional human rights instruments and in jurisprudence of international tribunals). [Reproduced in the accompanying notebook at Tab 57.]

[25] *Id.* at 385-405 (discussing the right to privacy in relation to world constitutions).

[26] *Id.* at 391 (discussing that in civil law systems where the search and seizure protections are deemed more procedural than substantive, the concept does not offer the substantive standard (for example, probable cause) that is applied in common law jurisdictions. However, this interpretation distinction should not detract from the existence of the right in those two major legal systems.

[27] BROWNLIE, *supra note 19*, at 3. [Reproduced in the accompanying notebook at Tab 41.]

right has appeared substantially, uniformly, and consistently in various international instruments over the last fifty years.[28] The foundation of the right can be extracted from the international instruments and domestic constitutional documents containing the right, and can be summarized as follows: (1) a person's home is inviolable, and (2) interference with that right must be lawful, reasonable and not arbitrary.[29]

(3) Generality and Empirical Extent: Treaties and Other Instruments as Evidence of State Practice of the Search and Seizure Privacy Right

Generality complements the uniformity and consistency requirement. Evidence must be submitted to show that the practice in question is widespread, with minimal abstention or objection by states.[30] Evidence of generality can take the form of the quantum of treaties and other international instruments that provide for the search and seizure privacy right.[31] The argument that the search and seizure privacy right has risen to the level of customary international law is bolstered by the inclusion of the right in numerous international and regional human rights treaties, and by the enforcement of that right by international and domestic tribunals.[32]

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[28] *See generally* Edwards, *supra note 9*, at 370-405. [Reproduced in the accompanying notebook at Tab 57.]

[29] *Id.* at 331.

[30] BROWNLIE, *supra note 19*, at 6. [Reproduced in the accompanying notebook at Tab 41.]

[31] Edwards, *supra note 9*, at 392. [Reproduced in the accompanying notebook at Tab 57.]

[32] *Id.*

D. International Human Rights Instruments: Interpretations of the Right to Privacy

(1) Universal Declaration of Human Rights

The Universal Declaration of Human Rights ("UDHR"), which was produced in 1948 to give meaning to the general human rights provision of the 1945 U.N. Charter, applies to all members of the United Nations.[33] The rights expressed in the UDHR have been invoked, frequently verbatim, in many United Nations, regional, and bilateral human rights treaties, and in national legislation and many world constitutions.[34]

Article 12 of the UDHR provides for privacy rights as follows: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."[35] This provision, which was the first modern international illustration of the search and seizure privacy right, is echoed in the ICCPR, and many other international and regional human rights instruments.[36]

(2) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ("ICCPR"),[37] which was adopted by the United Nations in 1966 to render UDHR rights enforceable, came into

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[33] The Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (1948) (stating "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence"). [Reproduced in the accompanying notebook at Tab 5.]

[34] Edwards, *supra note 9*, at 393. [Reproduced in the accompanying notebook at Tab 57.]

[35] Universal Declaration of Human Rights, *supra note 33*, art. 12. [Reproduced in the accompanying notebook at Tab 5.]

[36] Edwards, *supra note 9*, at 393. [Reproduced in the accompanying notebook at Tab 57.]

[37] International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 17, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) (stating "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence"). [Reproduced in the accompanying notebook at Tab 6.]

force in 1976, and currently binds 144 State Parties that have adhered to it.[38] In addition, rights contained in the ICCPR have risen to the level of customary international law, and thus binds all States, including those that have not ratified the treaty.[39]

Article 17 of the ICCPR provides: (1) no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation; (2) everyone has the right to the protection of the law against such interference or attacks.

(a) Human Rights Committee General Comment on Article 17

Pursuant to article 28 of the ICCPR, a committee of independent experts, known as the Human Rights Committee,[40] was formed to oversee implementation of the ICCPR within State Parties to that treaty.[41] Pursuant to ICCPR article 40(4), the Human Rights Committee may issue "general comments," which are distributed to States Parties,[42] and which are deemed to be "authoritative interpretations" of the relevant parts of the ICCPR that the particular comments address.[43] The Human Rights Committee issued a General

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[38] United Nations Multilateral Treaties Deposited with the Secretary General, http://www.unhchr.ch/pdf/report.pdf (updated Dec. 9, 2002). [Reproduced in the accompanying notebook at Tab 65.]

[39] M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 249 (1993). (stating "When a significant number of states representing the major legal systems of the world have adhered to a given convention, it may become part of customary international law. . .and therefore become binding upon nonsignatory states under Article 38(1)(b) of the Statute of the International Court of Justice"). [Reproduced in the accompanying notebook at Tab 59.]

[40] International Covenant on Civil and Political Rights, *supra note 37*, art.28. [Reproduced in the accompanying notebook at Tab 6.]

[41] *Id.*, art. 40 (calling on ICCPR State Parties to submit periodic reports to the Human Rights Committee on implementation of ICCPR rights in their territories).

[42] *Id.*, art. 40(4).

[43] Edwards, *supra note 9*, at 394. [Reproduced in the accompanying notebook at Tab 57.]

Comment on ICCPR article 17,[44] which focuses additionally on the "right to respect of privacy, family, home and correspondence."[45] The General Comment on Article 17 ("General Comment") gives an outline of how the ICCPR search and seizure requirement should be interpreted.

The first instance of clarification contained in the General Comment, is the explanation of the term "home" found in article 17. The General Comment says that "home" is to be given a broad meaning and includes not only a place where a person resides, but also where the person works.[46] The General Comment specifically states: "The term 'home' in English, 'manzel' in Arabic, 'zhuzhai' in Chinese, 'domicile' in French, 'zhilishche' in Russian, and 'domicilio' in Spanish, as used in article 17 of the [ICCPR], is understood to indicate where a person resides or carries out his usual occupation."[47]

The second point of clarification is that though the ICCPR does not expressly place limitations on the privacy right through its language, the General Comment concludes that privacy rights are not absolute.[48]

The third point of clarification found in the General Comment is the explanation of the term "unlawful":[49] "The term 'unlawful' means that no interference can take place

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[44] General Comment, U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 181, U.N. Doc. A/43/40 (1988) (discussing the meaning and ramifications of certain terms in ICCPR, article 17). [Reproduced in the accompanying notebook at Tab 7.]

[45] *Id.*

[46] *Id.* ¶ 5.

[47] *Id.*

[48] *Id.* ¶¶ 7-9 (stating "As all persons live in society, the protection of privacy is necessarily relative … Even with regard to interferences that conform to the [ICCPR], relevant legislation must specify in detail the precise circumstances in which such inferences may be permitted … State parties are under a duty themselves not to engage in interferences inconsistent with article 17").

except in cases envisaged by law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[50]

The fourth and last point of clarification is the explanation of the term "arbitrary interference." The General Comment defines the term "arbitrary interference" as an expression that can "extend to interference provided for under the law," and "[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances."[51]

It can be concluded that the Human Rights Committee recognizes the existence of a search and seizure privacy right.[52] The right requires that State Parties adopt legislative and other measures to prohibit interference with privacy rights related to the home or business, that no interference to the privacy of home or business should occur unless foreseen by law, and that the national law and any interference with the right must be in accordance with the ICCPR.[53]

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[49] *Id.* ¶ 3.

[50] *Id.*

[51] *Id.* ¶ 4 (noting that "[s]earches of a person's home should be restricted").

[52] *Id.* ¶ 8.

[53] Edwards, *supra note 9*, at 395. [Reproduced in the accompanying notebook at Tab 57.]

E. Regional International Human Rights Law Systems and Instruments

(1) The European Human Rights System

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[54] has been ratified by many European nations and provides for a search and seizure privacy right. Article 8(1) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence."[55]

The European Convention is governed by decisions of the European Court of Human Rights. The European Court of Human Rights has ruled that the right to privacy in the home is inviolable, and has defined parameters of the right.[56] In *Huvig v. France*,[57] the European Court recognized the right to privacy in the criminal procedure context as it applied article 8 of the European Convention to a search (telephone tap) and seizure (the tapped conversation) pursuant to a search warrant in France. *Huvig* involved a French couple under investigation for tax evasion. A French judge issued a warrant calling for monitoring and transcription of the couple's telephone conversations. The monitoring spanned twenty-eight hours over two days. The couple challenged the telephone taps before the European Commission, which held that the phone taps violated article 8.[58]

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[54] European Convention on the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, 1953. [Reproduced in the accompanying notebook at Tab 8.]

[55] *Id.*

[56] The European Court has ruled that the right to privacy of the "home" extends to "business premises." Niemietz v. Germany, 251 Eur. Ct. H.R. (ser. A) (1992) (discussing that respect for private life must encompass the right to develop relationships with others, including relations of a business or professional nature). [Reproduced in the accompanying notebook at Tab 18.]

[57] Huvig v. France, 176-B Eur. Ct. H.R. (ser. A) (1990). [Reproduced in the accompanying notebook at Tab 19.]

[58] *Id.*

The European Court applied a two-step process in the *Huvig* case. First, the Court determined whether the alleged interference with article 8 rights was "in accordance with law," and second, the Court examined the permissible limitations or restrictions on the right to privacy contained in article 8(1). The Court found that though the warrant issued was authorized by law, article 8 was violated as the contested French law permitted the police too much discretion to determine the scope of the interference.[59]

In *Cremieux v. France*,[60] the European Court again found a breach of the article 8 search and seizure privacy right. Over three years, pursuant to the French Customs Code, government officials conducted eighty-three investigative searches of Mr. Cremieux's home, office, and other locations, and seized papers sought to be used in criminal proceedings against Mr. Cremieux. The court noted the French government's concession "that there had been an interference with Mr. Cremieux's right to respect for his private life" and acknowledged the European's Commission's earlier finding that "there had been an interference Mr. Cremieux's right to respect for his home."[61] The court then turned to article 8(2), which details limitations on the rights articulated in article 8(1). Under article 8(2), the court examined whether the interference under article 8(1) was "in accordance with the law" as required by article 8(2), and found it unnecessary to answer that question as the interference complained of was "incompatible with Article 8 in other respects."[62] The court found that the interference was in furtherance of legitimate

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[59] *Id.*

[60] Cremieux v. France, 256-B Eur. Ct. H.R. (ser. A) (1993). [Reproduced in the accompanying notebook at Tab 20.]

[61] *Id.* at 373.

[62] *Id.* at 357.

government interests in "the economic well-being of the country."[63] However, the court still found a breach of article 8 because "in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law…appear too lax and full of loopholes for the interferences with Mr. Cremieux's rights to have been strictly proportionate to the legitimate aim pursued." Such searches might be permissible for prosecutorial purposes, but they could only be conducted in accordance with the French Constitution. Article 66 of the French Constitution renders the judiciary responsible for protecting the liberty of the individual regarding the inviolability of the home.[64] The court went further to add that legislation and procedures governing searches and seizures must afford "adequate and effective safeguards against abuse."[65]

(2) The Inter-American Human Rights System

The Americas also have protections for a person's right to privacy. The regional system is based primarily on three instruments: the Charter of the Organization of American States;[66] the American Declaration of the Rights and Duties of Man;[67] and the American Convention on Human Rights.[68] Both the American Declaration and the American Convention contain provisions protecting the right to privacy. Article IX of

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[63] *Id.* at 358.

[64] *Id.* at 376.

[65] *Id.* at 358.

[66] Charter of the Organization of American States, 2 U.S.T. 2394, 119 U.N.T.S. 3. [Reproduced in the accompanying notebook at Tab 9.]

[67] American Declaration of the Rights and Duties of Man , O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). [Reproduced in the accompanying notebook at Tab 10.]

[68] American Convention on Human Rights, O.A.S.T.S. No. 36, OEA/Ser. L/V/II.23 doc. rev. 2, 1978. [Reproduced in the accompanying notebook at Tab 11.]

the American Declaration provides that "every person has the right to the inviolability of his home,"[69] and article X provides that "every person has the right to the inviolability and transmission of his correspondence."[70] The American Convention was promulgated subsequent to the American Declaration to give binding force to the rights contained in the declaration. Article 11 of the American Convention[71] provides:

> Every person has the right to have his honor respected and his dignity recognized; No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; Everyone has the right to the protection of the law against such interference or attacks.

The Inter-American Commission on Human Rights has addressed search and seizure privacy rights issues. In *Garcia v. Peru*,[72] it was alleged that on April 5, 1992, the date on which Peruvian President Alberto Fujimori announced to the public that he had suspended the constitution, soldiers, with no search warrant, forcibly entered the home of former Peruvian President Dr. Alan Garcia Perez, held his family under house arrest for several days, and seized some of his private family papers.[73] The Commission recognized the existence of the right to privacy and the inviolability of the home, but also acknowledged limitations, in that privacy must "give way" in the face of a well-

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[69] American Declaration of the Rights and Duties of Man , O.A.S. Res. XXX, Article IX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). [Reproduced in the accompanying notebook at Tab 10.]

[70] American Declaration of the Rights and Duties of Man , O.A.S. Res. XXX, Article X, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). [Reproduced in the accompanying notebook at Tab 10.]

[71] *Id.*

[72] Garcia v. Peru, Report No. 1/95, Case 11.0006, Inter-Amer. Cm.H.R. 71, OEA/Ser.L/V/II.88, Doc. 9 rev. (1995). [Reproduced in the accompanying notebook at Tab 21.]

[73] *Id.*

substantiated search warrant issued by a competent judicial authority, specifying the reasons for the measure being adopted, the place to be searched, and the objects to be seized.[74] The 1979 constitution of Peru provides that homes and private papers shall be inviolable except "when an order has been issued by a competent judicial authority authorizing the search, explaining its reasons and, where appropriate, authorizing the seizure of private papers, while respecting the guarantees stipulated by law," but no warrant was issued in this case. The Commission found a violation of the right to the inviolability of the home.[75]

Also, the Inter-American Commission on Human Rights found a violation of the right to privacy in the case of *Ms. X and Y v. Argentina*,[76] in which the complainants (mother and daughter) contended that their right to privacy was violated by body-cavity searches, to which the complainants were subjected when they visited their husband and father in an Argentine prison. The Commission ruled that article 11 of the Inter-American Convention protects the physical and moral integrity of the person and specifically that article 11(2) prohibits "arbitrary or abusive interference" with a person's private life.[77]

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[74] *Id.*

[75] *Id.*

[76] Ms. X and Y v. Argentina, 81st Sess. Annual Report 1996, Inter-American Commission on Human Rights, Washington, D.C., Mar. 14, 1997, Case 10.506, Rep. No. 38/96 (1997). [Reproduced in the accompanying notebook at Tab 22.]

[77] *Id.*

F. States Internal Law as Evidence of State Practice: Constitutions of the World

Safeguarding the search and seizure right is not a Western Concept, but a concept that reflects laws in place in every corner of the globe, regardless of the countries' respective regions or political or economic systems."[78] Additionally, according to Edwards, almost all of the constitutions of the world safeguard the right to privacy in the home. Some constitutions generally forbid arbitrary or unlawful entries, while other countries have adopted an "unreasonableness" model based on the Fourth Amendment to the U.S. Constitution.[79]

The following general principles can be drawn about the search and seizure right to privacy from constitutions of the World: a respect for the sanctity and inviolability of the home; acceptable limitations on the right, rendering the right not absolute; recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose; rejection of arbitrary and unlawful interference with privacy and unfettered discretion to search or seize; effective external supervision of law enforcement authorities; balance of prevention and detection of crime versus the right to privacy; call for supervision by judicially independent persons before a search or seizure, and not after; and legally enforceable safeguards regulating use of police powers.[80]

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[78] Edwards, *supra note 9*, at 401. [Reproduced in the accompanying notebook at Tab 57.]

[79] *Id.* at 404.

[80] *Id.* at 405.

IV. Different Approaches of Varying Legal Systems

A. International Criminal Statutes

(1) The ICTY Statute

The ICTY, in the case of *Prosecutor v. Mucic*,[81] addressed the issue of whether an accused person is to be given search and seizure privacy rights. In that case, the accused were charged with perpetrating international crimes in Celebici, in Bosnia and Herzegovina. One of the accused persons, Mr. Mucic, had moved to Austria. ICTY Prosecutors had requested that Austrian authorities search for evidence related to the alleged crimes. Austrian authorities, upon a warrant issued by an Austrian court, searched Mr. Mucic's Vienna apartment and seized incriminating evidence, including various travel documents, which they sought to use against him at trial. Though conceding that "a number of irregularities" occurred in the search of Mr. Mucic's apartment and that "actions were taken" that violated Austrian law,[82] the prosecution contended that the search itself was lawful.

Judge Karibi-Whyte stated in the *Mucic* case that its rules provide a "liberal and less technical rule relating to the admissibility of evidence,"[83] and that the court would adhere to the general rule contained in the ICTY Rule 89(c)[84] that calls for the admission

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[81] Prosecutor v. Mucic, Case No. IT-96-21, Decision on the Tendering of Prosecution Exhibits 104-108 (1998). [Reproduced in the accompanying notebook at Tab 23.]

[82] *Id.* ¶ 2.

[83] *Id.*

[84] Rules of Procedure and Evidence as Amended 30 January 1995, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Rule 89(c), 5th Sess., U.N. Doc. IT/32 Rev.3/Corr.1 (1995) (stating "A Chamber may admit any relevant evidence which it deems to have probative value"). [Reproduced in the accompanying notebook at Tab 12.]

of any evidence that is relevant and has probative value. However, the court stated that it "reserves the right to exercise its discretion to exclude any evidence admitted if it is satisfied that it was obtained by means contrary to internationally protected human rights."[85] Though the trial chamber admitted the evidence that had been seized in a manner contrary to Austrian law,[86] Judge Karibi-Whyte confirmed that accused persons shall be afforded the search and seizure right to privacy, and that it is appropriate for the trial chamber to determine whether that right had been violated.

(2) The ICTR Statute

The ICTR recently faced a search and seizure privacy issue involving the prosecution of genocide suspect Mr. Jerome Bicamumpaka, former Rwandan Minister of Foreign Affairs.[87] In April 1999, he was arrested in Cameroon on charges that he used his position to organize and perpetrate massacres against the Tutsi minority in Rwanda during the 1994 genocide. During the arrest, certain documents belonging to him were seized by Cameroonian authorities. Though the documents were not turned over to the prosecution and were not used against him in his ICTR prosecution, the existence of search and seizure privacy rights was arguably reaffirmed. In March 2000, the ICTR ruled, inter alia, that the accused person had waived his search and seizure rights during the seizure.[88]

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[85] *Mucic*, Case No. IT-96-21 ¶ 23. [Reproduced in the accompanying notebook at Tab 23.]

[86] *Id.* ¶ 20.

[87] Prosecutor v. Jerome Bicamumpaka, Case No. ICTR-99-50-I (1999). [Reproduced in the accompanying notebook at Tab 24.]

[88] Edwards, *supra note 9*, at 401. [Reproduced in the accompanying notebook at Tab 57.]

B. Common Law Jurisdictions

(1) The United States

The exclusion of evidence in the United States is based upon the Fourth Amendment to the United States Constitution. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[89]

The Fourth Amendment is a result of offensive British practices prior to the American Revolution.[90] It was written into the fundamental law of the land by the drafters of the Constitution, who hoped to assure that the government would respect the sanctity, dignity, and privacy of its citizens.[91]

For more than a century, the Fourth Amendment was rarely cited by the Courts. Except for *Boyd v. United States*,[92] virtually no search and seizure cases were decided by the United States Supreme Court in the first 110 years of the existence of the United States under its constitution.[93] Until 1914, the rule in American courts was the same as it

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[89] U.S. CONST. amend. IV. [Reproduced in the accompanying notebook at Tab 4.]

[90] GEOFFREY R. STONE, SEARCH AND SEIZURE 1 (1988). [Reproduced in the accompanying notebook at Tab 42.]

[91] *Id.* at 1.

[92] Boyd v. United States, 116 U.S. 616 (1886) (discussing that the Supreme Court held that to seize personal papers violated the Fourth Amendment and that to use them as evidence violated the Fifth Amendment) [Reproduced in the accompanying notebook at Tab 25.] NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 136 (1937) (to compel a person in a criminal case to furnish documents to be used against himself accomplishes the purpose of a search and seizure and violates the Fourth Amendment as to unreasonable searches and seizures and the Fifth Amendment as to compulsory self-incrimination). [Reproduced in the accompanying notebook at Tab 43.]

[93] ERWIN N. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 2 (1975). [Reproduced in the accompanying notebook at Tab 44.]

still is in British courts; the illegality of a search and seizure is irrelevant to the question of whether its fruits were admissible as evidence in a criminal trial.[94] In 1914, however, the Supreme Court decided *Weeks v. United States*.[95] In the *Weeks* case, The Supreme Court held for the first time that a violation of the Fourth Amendment by itself could justify the exclusion of evidence.[96]

The exclusionary rule is a rule of evidence which excludes, or renders inadmissible in a criminal proceeding, evidence that is illegally obtained by law enforcement officials.[97] Thus, evidence obtained by an illegal search and seizure could not, under present Supreme Court holdings, be considered admissible in any criminal prosecution.[98] It makes no difference whether the evidence was secured in a legally debatable search – one which produces close and split opinions in appellate courts – or in a blatant and willful violation of the law by police. All police procedures judged to be illegal by the courts or legislatures must be excluded.[99]

The most radical extension of the exclusionary rule took place in 1961 in *Mapp v. Ohio*.[100] In that case, the Supreme Court applied the exclusionary rule not only to federal

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[94] BRADFORD P. WILSON, EXCLUSIONARY RULE 2 (1988) (discussing how the courts relied upon common law, which regarded unlawful police behavior violating a person's privacy and property as a form of trespass against that individual). [Reproduced in the accompanying notebook at Tab 45.]

[95] Weeks v. United States, 232 U.S. 383 (1914) (this case involved the seizure of personal papers and effects, including letters, from a man's home without a search warrant). [Reproduced in the accompanying notebook at Tab 26.]

[96] *Id.*

[97] STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 1 (1977). [Reproduced in the accompanying notebook at Tab 46.]

[98] *Id.*

[99] *Id.*

[100] Mapp v. Ohio, 367 U.S. 643 (1961). [Reproduced in the accompanying notebook at Tab 27.]

courts, as it had done in 1914 in *Weeks*, but also to State courts.[101] By this time, the Supreme Court felt that the Fourth Amendment was applicable to states through the Fourteenth Amendment[102] of the United States' constitution.[103]

(a) Justifications for the United States' Exclusionary Rule

There are three basic arguments in favor of the exclusionary rule: (1) the rule protects a constitutional "right to privacy"; (2) the rule upholds the integrity of the judiciary by precluding judicial acquiescence in denial of an individual's Fourth Amendment rights; (3) the rule deters police misconduct by forbidding the use of improperly acquired evidence.[104] At some point, all of these arguments have been used by the Supreme Court.

In *Mapp v. Ohio*, the Supreme Court held that the exclusionary rule is an "essential part of the right to privacy."[105] The court further held that the right to protection of privacy and dignity can implicitly be found in the language of the Fourth, Fifth,[106] and Fourteenth amendments. Under this notion, the exclusionary rule is used as a remedy for the unlawful invasion of a person's right to privacy and dignity secured by the Fourth Amendment. Also under this concept, it is constitutionally required in order to

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[101] JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 70 (1976). The *Weeks* case ordered the exclusion of evidence seized by the federal marshal; however, the court left a wide crack in the exclusionary wall when it allowed the use of evidence seized by the local police before the marshal arrived on the scene. In other words, the rule was to apply only to evidence illegally seized by federal officials, not to evidence illegally seized by state officers which the federal government wished to use. [Reproduced in the accompanying notebook at Tab 47.]

[102] U.S. CONST. amend. XIV. [Reproduced in the accompanying notebook at Tab 13.]

[103] GRISWOLD, *supra note 93*, at 7. [Reproduced in the accompanying notebook at Tab 44.]

[104] WILSON, *supra note 94*, at 2. [Reproduced in the accompanying notebook at Tab 45.]

[105] Mapp, 367 U.S. 643, 656 (1961). [Reproduced in the accompanying notebook at Tab 27.]

[106] U.S. CONST. amend. V. [Reproduced in the accompanying notebook at Tab 14.]

prevent any additional invasion of privacy and dignity due to the use of unconstitutionally seized evidence in a criminal proceeding against the victim of an illegal search. To the adherents of this view, "an attack on the exclusionary rule is an attack on the Fourth Amendment itself."[107]

The second justification for the exclusionary rule is that it is needed to maintain the integrity of the judicial branch of government.[108] This argument is not based on the Fourth Amendment. Instead, it is based on the moral integrity of the administration of justice. Supreme Court Justice Brandeis stated in a dissenting opinion that the exclusion of illegally seized evidence "preserves the judicial process from contamination."[109] Brandeis's contention is that if courts allow people to be convicted on the basis of illegally obtained evidence, then they would become accomplices to an illegal act. Further, the argument is that courts would be teaching disobedience to the law by ignoring the purpose of the Fourth Amendment.

The third and final argument for the exclusionary rule is that it deters law enforcement from conducting illegal searches and seizures.[110] The Supreme Court has relied on this notion for the past forty years when defending the use of the exclusionary rule. The Supreme Court however, does not use this rationale based on the right to privacy argument. In *Linkletter v. Walker*,[111] the Supreme Court held that the

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[107] WILSON, *supra note 94*, at 2. [Reproduced in the accompanying notebook at Tab 45.]

[108] *Id.*

[109] Olmstead v. United States, 277 U.S. 438, 484 (1928). [Reproduced in the accompanying notebook at Tab 28.]

[110] WILSON, *supra note 94*, at 2. [Reproduced in the accompanying notebook at Tab 45.]

[111] Linkletter v. Walker, 381 U.S. 618 (1965). [Reproduced in the accompanying notebook at Tab 29.]

exclusionary rule did not have anything to do with the right of the privacy of the victim of an illegal search. The Court stated that "the ruptured privacy of the victims' homes and effects cannot be restored" by means of the exclusionary rule.[112] "Reparation comes too late."[113] Writing for the majority, Justice Clark, the author of the *Mapp* opinion, made the point that the purpose of the exclusionary rule is to compel respect for the constitutional guaranty by removing the incentive to disregard it.[114] Since *Linkletter*, the Supreme Court has reaffirmed that the "prime purpose" of the exclusionary rule is to deter unlawful police conduct, rather than "to redress the injury to the privacy of the search victim."[115]

(b) Criticisms of the United States' Exclusionary Rule

There are three basic arguments against the use of the exclusionary rule: (1) the rule is not an effective deterrent of unlawful searches and seizures; (2) the rule is morally bankrupt and corrupts the administration of justice; and (3) the rule does not rest on the U.S. Constitution and is therefore beyond the constitutional authority of the courts to invent.[116]

The first example of a criticism of the rule is that the deterrence rationale for the exclusionary rule does not work. Six of seven empirical studies of the rule's effectiveness have concluded that the rule has little or no value in deterring police

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[112] *Id.* at 637.

[113] *Id.* at 637.

[114] BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 100 (1986). [Reproduced in the accompanying notebook at Tab 48.]

[115] United States v. Calandra, 414 U.S. 338, 347 (1974). [Reproduced in the accompanying notebook at Tab 30.]

[116] WILSON, *supra note 94*, at 2. [Reproduced in the accompanying notebook at Tab 45.]

misconduct.[117] In *United States v. Janis*, the Supreme Court itself stated that it has "acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system."[118] Many observers of law enforcement have noted, however, that arrests rather than convictions are the primary measure of success of police work.[119] According to its critics, then, the exclusionary rule is well tailored to affect the life of the judge, the prosecutor, and the criminal defendant, but it has no real effect when it comes to disciplining the police.[120]

The second criticism of the exclusionary rule is that it is unjust not to use reliable incriminating evidence just because of the manner in which it was obtained.[121] Justice Benjamin Cardozo once stated "the criminal is to go free because the constable has blundered."[122] The argument made by critics of the exclusionary rule to back up Cardozo's sentiment is this: Rules of criminal procedure are meant to provide for conviction and punishment of the guilty while protecting the innocent.[123] If two offenses have been committed – one by the defendant and one by the police officer – then both should be punished.[124] The exclusionary rule departs from the truth-finding process of a

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[117] *Id.* at 3.

[118] United States v. Janis, 428 U.S. 433, 459 (1976). [Reproduced in the accompanying notebook at Tab 31.]

[119] WILSON, *supra note 94*, at 3. [Reproduced in the accompanying notebook at Tab 45.]

[120] *Id.* at 3.

[121] *Id.* at 3.

[122] People v. Defore, 242 N.Y. 13, 21 (1926). [Reproduced in the accompanying notebook at Tab 32.]

[123] WILSON, *supra note 94*, at 3. [Reproduced in the accompanying notebook at Tab 45.]

[124] *Id.* at 3.

trial by suppressing proof of guilt, and it does nothing to punish the police officer who broke the law.[125] Thus criminals often walk free while justice goes unserved.[126]

The third criticism of the exclusionary rule is that it is the Supreme Court's job to interpret law, not to make it.[127] Under this notion, the Supreme Court should only apply an exclusionary rule if it is contained in the constitution or if the legislature creates such a rule. The exclusionary rule, say its constitutional critics, is based neither in the U.S. Constitution nor in legislation but only in judicial fiat.[128] First, the Fourth Amendment is silent about how it should be enforced. Second, the ideal of judicial integrity is not well served by a rule that suppresses incriminating evidence; it is in any case an ideal not firmly rooted in any constitutional provision. Third, deterrence of unlawful police behavior is the domain of legislative and executive action, not of the judiciary acting as a legislature.[129]

(c) Recent Developments of the United States' Exclusionary Rule

Among the criticisms of the exclusionary rule as an across-the-board response to all types of Fourth Amendment violations is that it sweeps too widely.[130] Honest mistakes that are made by police officers and that constitute no great injustice to an individual are met with the same penalty as purposeful and flagrant violations of Fourth

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[125] *Id.* at 3.

[126] *Id.* at 3.

[127] *Id.* at 3.

[128] WILSON, *supra note 94*, at 3. [Reproduced in the accompanying notebook at Tab 45.]

[129] *Id.* at 3.

[130] *Id.* at 3.

Amendment right — the exclusion of evidence.[131] In the cases of *United States v. Leon* and *Massachusetts v. Sheppard*,[132] the Supreme Court created a "good faith" exception to the exclusionary rule. The Court ruled in these cases that evidence obtained by officers acting with a search warrant issued by a judicial officer should not be excluded if a judge later finds that the warrant was invalid, provided its invalidity was not obvious to the police officers. Since most Fourth Amendment violations do not involve defective warrants, the immediate effect of this ruling on the exclusionary rule is minor.[133] Nevertheless, many Supreme Court scholars expect further modifications of the exclusionary rule as other good-faith circumstances are brought before the courts.[134]

(2) England

The traditional English approach to the admissibility of illegally obtained non-confession evidence[135] is expressed by Judge Crompton's statement: "it matters not how you get it, if you steal it even, it would be admissible."[136] The admissibility of such evidence is now under the discretion of Section 78 of the Police and Criminal Evidence

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[131] *Id.* at 3.

[132] United States v. Leon, 468 U.S. 897 (1984) [Reproduced in the accompanying notebook at Tab 33.]; Massachusetts v. Sheppard, 468 U.S. 981 (1984). [Reproduced in the accompanying notebook at Tab 34.]

[133] WILSON, *supra note 94*, at 3. [Reproduced in the accompanying notebook at Tab 45.]

[134] *Id.* at 3.

[135] David Ormerod, *ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches*, Feb. 2003 CRIM. L.R. 2003 61, 65. The distinction between confession and non-confession evidence has always been crucial. The dangers of false and unreliable confessions and the element of self-incrimination justified a stricter exclusionary approach than with improperly obtained real evidence. However, the use of covert devices means that a hybrid form of evidence is now prevalent—recorded confession evidence which is presumptively reliable because the suspect is making the incriminating statements in ignorance of the police "presence." [Reproduced in the accompanying notebook at Tab 60.]

[136] *Id.* at 65.

Act of 1984 ("PACE"),[137] which expressly provides for consideration of the manner in which the evidence was obtained. Section 78 provides:

> In any proceedings the court may refuse to allow the evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[138]

The list of factors a judge would consider Section 78 of PACE include: a review of the legality of the police actions; the seriousness of the offense; the bad faith of the investigators;[139] the type of evidence and its potential reliability; the existence of other evidence; the opportunity to challenge the evidence at trial; the type of impropriety involved; and the type of right or protection infringed.[140] Basically, the ultimate Section 78 question is not whether there is a breach of a specific domestic provision or even a Convention right, but whether the breach will affect the fairness of the proceedings.[141]

The relationship between Section 78 and the common law is unclear.[142] Some English courts have taken the view that the section simply restates the common law; others suggest that it should be regarded as stating a new principle.[143] The common law

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[137] Police and Criminal Evidence Act, 1984 § 78 (Eng.). [Reproduced in the accompanying notebook at Tab 15.]

[138] *Id.*

[139] R. v. Mason, (1988) 86 Crim. App. R. 349. [Reproduced in the accompanying notebook at Tab 35.]

[140] Ormerod, *supra note 135*, at 64. [Reproduced in the accompanying notebook at Tab 60.]

[141] *Id.*

[142] RICHARD STONE, ENTRY SEARCH AND SEIZURE: A GUIDE TO CIVIL AND CRIMINAL POWERS OF ENTRY 26 (1989). [Reproduced in the accompanying notebook at Tab 49.]

[143] *Id.* at 26.

approach is governed by the House of Lords decision in *R. v. Sang*.[144] The question was: "Does a trial judge [including magistrates] have a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value?"[145] The answer was given in two parts: (1) A trial judge in a criminal trial always has a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value; (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offense, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.[146]

Some scholars took the view at the time PACE was enacted that, given the courts historic marked reluctance to exclude improperly obtained evidence, the courts would be likely to interpret Section 78 narrowly.[147] If Section 78 was followed narrowly, hardly any evidence would be excludable because it would always be possible to postulate hypothetical circumstances in which the evidence could have been obtained otherwise than by the impropriety in question.[148] What has happened under PACE shows that this is not the way courts have approached Section 78.[149] Between January 1986 and June 1990, there were more than 70 reported decisions in which the exclusion of evidence was

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[144] R. v. Sang, (1979) 69 Crim. App. R. 282. [Reproduced in the accompanying notebook at Tab 36.]

[145] *Id.* at 424.

[146] *Id.* at 437.

[147] MICHAEL ZANDOR, THE POLICE AND CRIMINAL EVIDENCE ACT 1984 201 (1990). [Reproduced in the accompanying notebook at Tab 50.]

[148] A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 354 (1989). [Reproduced in the accompanying notebook at Tab 51.]

[149] ZANDOR, *supra note 147*, at 201. [Reproduced in the accompanying notebook at Tab 50.]

considered.[150] Roughly half of the cases have been decided in favor of the defendant and half in favor of the prosecution.[151]

(3) Canada

The common law approach in Canada follows the same principle as the common law in England. That is, the manner in which evidence is obtained, no matter how improper or illegal, is not an impediment to its admission at common law.[152] The most significant change from the common law inclusionary rule in Canada is the express power vested in courts of competent jurisdiction by Section 24(2) of the Canadian Charter of Rights and Freedoms ("Charter")[153] to exclude evidence obtained through a violation of constitutional rights.[154]

Section 24 of the Charter reflects its historical background. It is a compromise between the strict Anglo-Canadian inclusionary rule and the strict American exclusionary rule.[155] Section 24 provides:

> (1) Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is

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[150] *Id.*

[151] *Id.*

[152] JOHN SOPINKA, SIDNEY N. LEDERMAN, & ALAN W. BRYANT, THE LAW OF EVIDENCE IN CANADA 379 (1992). [Reproduced in the accompanying notebook at Tab 52.]

[153] Canadian Charter of Rights and Freedoms, R.S.C. 1985, Appendix II, No. 44 Sched. B, Pt. I s. 24. [Reproduced in the accompanying notebook at Tab 16.]

[154] SOPINKA, *supra note 152*, at 380. [Reproduced in the accompanying notebook at Tab 52.]

[155] *Id.* at 388.

> established that, having regard to all the circumstances, the admission of it in the proceeding would bring the administration of justice into dispute.[156]

In *R. v. Collins*,[157] the Supreme Court of Canada set out the test for excluding evidence under Section 24(2). The court listed a number of factors to be considered concerning the Charter violation, including the question "was it deliberate, willful or flagrant, or was it inadvertent or committed in good faith."[158] It then divided those factors into three groups: those affecting the fairness of the trial, those relevant to the seriousness of the violation, and those relating to the effect of excluding the evidence.[159]

In this formulation of the issues, "good faith" is opposed to "bad faith": if the police violate Charter rights deliberately, willfully, or flagrantly, they act in bad faith; otherwise, they act in good faith.[160] Under this interpretation, "good faith" and "bad faith" fill the field: every police action will be characterized by one or the other.[161] In addition, the vast majority of police actions will properly be described as good faith, because that term really only means that the police carried out their duties in the ordinary way; the police will not be required to take extraordinary measures to protect an accused's rights in order to have acted in good faith.[162]

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[156] Canadian Charter of Rights and Freedoms, R.S.C. 1985, Appendix II, No. 44, Sched. B, Pt. I, s. 24. [Reproduced in the accompanying notebook at Tab 16.]

[157] R. v. Collins, 13 B.C.L.R (2d) 1 (1987). [Reproduced in the accompanying notebook at Tab 37.]

[158] *Id.*

[159] *Id.*

[160] Stephen G. Coughlan, *Good Faith and Exclusion of Evidence Under the Charter*, 11 CR-ART 304. [Reproduced in the accompanying notebook at Tab 61.]

[161] *Id.*

[162] *Id.*

According to *Collins*, the ultimate question – whether or not the impugned evidence should be excluded – is expressed as follows:

> The question under Section 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence. In my view, the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge, and thus the acquittal of the accused, because of a trivial breach of the Charter. Such disrepute would be greater if the offence was more serious.[163]

The court made it clear that essential evidence should not be excluded for trivial Charter breaches, which, in itself, might bring the administration of justice into disrepute.[164] The evidence is more likely to be excluded if the offense is less serious.[165] The general consensus of judicial reasoning appears to conclude that there is no rule of automatic exclusion under Section 24(2).[166] The trial judge must make a value judgment in light of all the circumstances.[167] The decision involves discretion exercised under the guidelines of Section 24(2) and in *Collins*.[168] Ultimately, it involves the application of judicial wisdom.[169]

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[163] *Id.*

[164] JAMES A. FONTANA, THE LAW OF SEARCH AND SEIZURE IN CANADA 743 (1992). [Reproduced in the accompanying notebook at Tab 53.]

[165] *Id.*

[166] *Id.* at 759.

[167] *Id.* at 763.

[168] *Id.*

[169] *Id.*

C. The Civil Jurisdiction of France

The French criminal justice system has many tiers, but trial procedure on all levels is strongly oriented towards professional judges.[170] Protections from searches and seizures of persons and property come from both France's constitution and its codes of criminal procedure.[171] These formal rules attempt to guarantee the rights of individuals against state intrusion.[172]

The French Constitution has no explicit guarantee of privacy, but its "Constitutional Court ruled in 1994 that the right of privacy was implicit in the Constitution."[173] Most of the protection from searches and seizures in France come from rules of procedure; these French versions of exclusionary rules are called "textual Nullities."[174] Article 59 requires exclusion, or "nullity," of evidence procured wrongly in domicile searches.[175] The French impose limits on identity checks and electronic surveillance as well.[176] The French have other, lesser rules guiding criminal searches, such as a requirement that "most residential searches must be witnessed by a resident or

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[170] Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 218 (2002). [Reproduced in the accompanying notebook at Tab 62.]

[171] *Id.* at 219.

[172] *Id.*

[173] David Banisar and Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 41 (1999). [Reproduced in the accompanying notebook at Tab 63.]

[174] King, *supra note 170*, at 219. [Reproduced in the accompanying notebook at Tab 62.]

[175] *Id.*

[176] *Id.*

by two persons not subject to the administrative authority of the searching official."[177] Unlike the one, broad rule of exclusion in the United States, France relies on these more specific rules to guide the execution of criminal investigations.[178]

The laws in France guarantee specific protections of privacy, and in some areas the statutes are silent as to proper police conduct.[179] Courts and the legislature have not filled the void in these areas with a provision or rule like the United States.[180] French investigations fall into four categories, each with varying powers for the investigator. These include "(1) investigation of 'flagrant' offenses; (2) 'preliminary' investigations; (3) identity checks; and (4) the formal judicial investigation conducted by an examining magistrate."[181] The investigation of flagrant offenses allows the greatest breadth for searches and seizures, but none of these four are very restrictive on the search for facts and truth.[182] In each category "there is no general legal requirement of probable cause to search, arrest, or detain … [and] no general judicial warrant requirement for search or arrest."[183] Without these probable cause or warrant limitations, the examining magistrate has almost complete discretion to select places to be searched and things to be seized.[184]

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[177] Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 580 (1990). [Reproduced in the accompanying notebook at Tab 64.]

[178] King, *supra note 170*, at 220. [Reproduced in the accompanying notebook at Tab 62.]

[179] *Id.*

[180] *Id.*

[181] Frase, *supra note 177*, at 155. [Reproduced in the accompanying notebook at Tab 64.]

[182] King, *supra note 170*, at 221. [Reproduced in the accompanying notebook at Tab 62.]

[183] Frase, *supra note 177*, at 575. [Reproduced in the accompanying notebook at Tab 64.]

[184] King, *supra note 170*, at 222. [Reproduced in the accompanying notebook at Tab 62.]

In addition to these greater allowances in practice, differences exist in the enforcement of the limits that do exist.[185] In the United States, the rule is explained through the remedy provided for it. Since French rules of evidence collection are not generally backed up with an exclusionary sanction like the one the United States Supreme Court attached to the Fourth Amendment, French investigators have virtually unregulated power to ignore them.[186]

The French rules for exclusion reflect more of a concern with propriety than deterrence of future bad actions by the police or investigating judge.[187] Evidence is generally not excludable unless the violation has caused harm to the interests of the party that it concerns, or if it affects public interest.[188] These interests are not read as broadly as those implicated in the United States' Supreme Court decision in *Weeks*,[189] so the concern is with the harm to the party wronged by the offense.[190] This is the opposite of the United States' exclusion rule, which is "calculated to prevent, not to repair."[191] Instead of deterring police conduct with the exclusion of evidence, the French rely on other disincentives, including disciplinary measures against the offending police officer, prosecutor, or JDI [juge d'instruction]; civil liability of these officials or the government

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[185] *Id.*

[186] *Id.*

[187] *Id.* at 224.

[188] *Id.*

[189] *Weeks*, 232 U.S. 383 (1914) (In this case the United States Supreme Court held for the first time that a violation of the Fourth Amendment by itself could justify the exclusion of evidence). [Reproduced in the accompanying notebook at Tab 26.]

[190] King, *supra note 170*, at 224. [Reproduced in the accompanying notebook at Tab 62.]

[191] Elkins v. United States, 364 U.S. 206, 217 (1960). [Reproduced in the accompanying notebook at Tab 38.]

itself; and sometimes criminal liability."[192] Deterrence is taken care of elsewhere, so any French efforts at exclusion are designed to provide justice to the wronged party.[193]

V. Conclusion and Recommendation

In every form of modern society in the World, there exists some form of protection of a person's right to privacy. Along those lines, the governments of these societies offer some form of protection of a person's right to privacy. The protection of this right can be found in the exclusionary rules of these governments. The exclusion of evidence ensures that a person will not lose their right to privacy at the hands of their government's authoritative arm.

It is important that the ICTR gives each accused individual the same right to privacy, no matter how horrific the crime they are accused of may be. This will ensure that the ICTR's decisions will be respected in the international community. In addition, evidence will probably be very difficult to obtain in many of the cases the ICTR will face, but the court should not grant leniency when admitting evidence that may have been obtained by improper methods. The concern should be the sanctity of the Court, not the difficulty the police authorities had gathering the evidence.

The most broad and strict of all the rules is the American exclusionary rule under the Fourth Amendment to the United States Constitution. Under this rule a violation alone of the Fourth Amendment is enough to justify the exclusion of evidence. This type of rule is probably too strict for the ICTR. On the opposite end of the spectrum is France's approach to the exclusion of evidence. This is also probably not a good system

[192] King, *supra note 170*, at 224. [Reproduced in the accompanying notebook at Tab 62.]

[193] *Id.*

for the ICTR to adopt because this type of system does little to guarantee the privacy rights of the accused. England's approach to the exclusion of evidence works fairly in their court system; however the language used in Section 78 of PACE[194] could be viewed too narrowly by the ICTR if it incorporated a similar approach and would thus not ensure the privacy rights of the accused. The approach to the exclusion of evidence in Canada seems to be a good fit for the ICTR. This system is concerned with the Court's reputation and allows the trial judge to apply judicial wisdom as to whether the exclusion of evidence is necessary based upon the conduct of the police authority. If the ICTR adopts this type of rule, it can be assured that the decision of whether or not to exclude evidence will be fairly evaluated by the ICTR's judges in light of all circumstances affecting each individual case. There is no perfect system for the exclusion of evidence, but adopting a similar approach to the Canadian system should work well for the ICTR.

[194] Police and Criminal Evidence Act, 1984 § 78 (Eng.). [Reproduced in the accompanying notebook at Tab 15.]