

RUTGERS JOURNAL OF LAW & PUBLIC POLICY

EDITORIAL BOARD

Editor-in-Chief

SIMON SCHMITT-HALL

Executive Editors

ZACHARY CARR

KRISTINA INGERSOLL

Managing Articles Editors

MICHELLE MASON

SHAMNAZ ZAMAN

Managing Notes Editors

SALLY ABDULRAOUF

MARISSA TERWILLIGER

Submissions and Symposium Editors

ALLIE CAPECCI

PRIYA VAISHAMPAYAN

Managing Research Editor

OLGA ROMADIN

Managing Senior Editor

EMMA ROTH

Business and Marketing Editor

PAIGE KAERCHER

Managing Publications Editor

NADIA AL KHUNAIZI

Senior Staff Editors

FLORENCE HULBERT

MATT LAMORGESE

BYRON MITCHELL

RANDALL PETRONKO

YASLIN REYES

CLAUDIA SANCHEZ

AARON USCINOWICZ

3L Staff Editors

DIANA DIAZ

JIBRI DOUGLAS

RYAN FISHER

DEIDRA HOPKINS

SARAH KUSNIRAK

CHRISTINA RAMELLI

JUSTIN ZARAGOZA

2L Staff Editors

OLIVIA FARNESKI

NINA GLIKSHTERN

KRISTINA GOSHORN

CATRINA GUTESCU

TYLER HARTMAN

JOSEPH KELMON

DONISHA KENDRICK

ALEXIS MATTE

JESS MEYERS

LEIGH NASPO

BRENDALIZ POLANCO

MEGAN SHARP

THOMAS STIMSON

PATRICK WALSH

JESSICA WILLOX

PAYTON WILLIAMS

SHAHAB ALHADAD

ZACHARY BALL

TAYLOR BELLMAN

MIRANDA BOTTURA

PAMELA BREWSTER

PORSHA BRYANT

ALI CHAUDHRY

GREGORY DANCY

Faculty Advisor

ALEC WALEN

About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published two times per year by students of the Rutgers School of Law – Camden, located at 217 North Fifth Street, Camden, NJ 08102.

The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to The Bluebook: A Uniform System of Citation (21st ed. 2021).

Please cite the Rutgers Journal of Law & Public Policy as 22 RUTGERS J.L. & PUB. POL'Y __ (2025).

Copyright: All articles copyright © 2025 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at <http://www.rutgerspolicyjournal.org/>.

Manuscripts: The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The Journal accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The Journal welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to submissions.rjlpp@gmail.com.

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102.

Subscriptions: Subscription requests should be mailed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102, or emailed to info@rutgerspolicyjournal.org.

Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

RUTGERS
JOURNAL OF LAW & PUBLIC POLICY

VOLUME 22

SPRING 2025

ISSUE 2

CURRENT ISSUES
IN PUBLIC POLICY

© 2025 by Rutgers University School of Law – Camden
ISSN 1934-3736



NAVIGATING INTERNATIONAL ETHICAL COMPLEXITIES: THE FOREIGN CORRUPT PRACTICES ACT'S SHORTCOMINGS IN HIGH-RISK INTERNATIONAL OPERATIONS

*Cheryl Packwood **

* Cheryl Packwood was a Visiting Assistant Professor at Albany Law School from January 2023 through June 2024 in International Law. She was the Overseas Representative for the Government of Bermuda to the United States and Asia. She practiced law in Côte d'Ivoire and New York City. In addition, she has significant management experience internationally.

This article has been two decades in the making. I originally presented an earlier version of this paper at the Black, Indigenous, and people of color Conference held at Albany Law School in 2018. Thanks to the contributions, guidance and assistance of my research assistants over the past two years I have been able to bring this article to fruition. In particular, I would like to thank Marie-Therese Witte, J.D. 2024 at Albany Law School and Editor-in-Chief of the *Albany Law Review*, Vol. 87, Caroline Drenkard, J.D. 2025 at Albany Law School and Editor-in-Chief of the *Government Law Review*, Vol. 18, Patrick Schroeder, and Sam Poyer.

TABLE OF CONTENTS

I.	BEHIND THE CURTAIN: A GLIMPSE INTO HIGH-STAKES INTERNATIONAL OPERATIONS.....	4
	A. <i>In the Eye of the Storm: A Personal Account of Corporate Conflict in Côte d'Ivoire</i>	4
	B. <i>The Hostile Takeover: Unraveling the Motives Behind a Corporate Siege</i>	9
	C. <i>Navigating the Economic and Political Realities of Côte d'Ivoire in the 1990s and Early 2000s</i>	18
II.	EXPLORING THE APPLICABILITY OF THE RULE OF LAW.....	23
III.	THE FCPA'S REACH IN INTERNATIONAL BUSINESS CONFLICTS.....	27
IV.	REDEFINING BOUNDARIES: EXPANDING THE FCPA DURESS EXCEPTION IN UNCHARTED TERRITORIES.....	39
V.	FINAL REFLECTIONS: LESSONS LEARNED FROM THE FRONTLINES OF INTERNATIONAL BUSINESS.....	41

ABSTRACT

United States and international laws designed to prevent fraud, bribery, and corruption in business dealings seek to promote stability and economic growth. But, who do these laws protect in times of conflict? Are the exceptions and defenses to any prosecution under these laws too restrictive, impeding the eventual security of human life in an attempt to create and sustain the utopian goals of free economic markets? This article analyses the author's encounters with armed military personnel as managing director of a cellular phone company in Abidjan, Côte d'Ivoire, in May 2001 and the aftermath which eventually led to the company's closure in 2003. Part I of the article provides background information on the chain of events that led to the encounter and the economic and political state of Côte d'Ivoire at the time. Part II of this article briefly discusses the rule of law and its application in Africa. Part III explores the implications of the Foreign Corrupt Practices Act ("FCPA") and how the provisions of the Act applied to the author's situation with regard to the duress exception to the FCPA and facilitation payments. In Part IV, the author argues for an expansion to the duress exception which would take into account political and social circumstances indicating an environment of duress. The author proposes a test to be used by persons and courts faced with similar circumstances.

I. BEHIND THE CURTAIN: A GLIMPSE INTO HIGH-STAKES INTERNATIONAL OPERATIONS

A. In the Eye of the Storm: A Personal Account of Corporate Conflict in Côte d'Ivoire

"*Nous sommes un pays de droit*," asserted Michel Etté, our young lawyer, to some ten soldiers surrounding me in my office in Abidjan. There were another twenty to thirty in the hallway and reception. The first time I heard that phrase, "This is a country of laws" and fully understood the concept of "rule of law" in my gut was on May 25, 2001, in Abidjan, Côte d'Ivoire at about 7 pm GMT. Alexandre Galley, an Ivorian businessman, alleged mercenary and arms dealer, had paid for a military division of the Ivorian armed forces to invade our company, in order to force the handover of the cellular phone company of which I was the managing director. He had brought with him a *notaire*, which is a specialized lawyer in deeds and corporate documents in Côte d'Ivoire's civil law system.¹ The *notaire* would document and certify the legal handover of the company. I would do it, it was thought, because I would be scared of the armed men with AK-47s.

How did a lawyer from America end up in the middle of this standoff? As a brief background, I graduated from Harvard Law School in June 1987, studied for the New York Bar exam, spent August and September in Bermuda and weathered Hurricane Emily with my parents and friends. I began working in the litigation department of Shearman & Sterling in October

¹ See Armiel Olivier Yapi & Yao Mamoudou Ouattara, *Update: The Legal System in Côte d'Ivoire*, NYU LAW GLOBALEX, https://www.nyulawglobal.org/globalex/Cote_dIvoire1.html (describing the legal system of Côte d'Ivoire which is modeled on the French legal system); *Quel est le Rôle d'un Notaire ? [What is the Role of a Notaire?]*, VIE PUBLIQUE, <https://www.vie-publique.fr/fiches/38275-quel-est-le-role-dun-notaire> (last updated Oct. 9, 2023) (describing how, in France, Notaires help with the preparation and execution of legal documents in transactional matters).

1987, where I acquired skills that served me well for my future endeavors.

In March 1990, I married a young Mauritanian lawyer whom I had met at Harvard Law School. He had received his LLM from Harvard in June of 1987 and spent the following year as a foreign associate at Coudert Brothers in New York City. He accepted a job with the African Development Bank in 1989 and moved to Abidjan, Côte d'Ivoire in Fall 1989.

I left New York and Shearman & Sterling in April 1990 to join my husband in Abidjan. I initially worked for a small American law firm in Abidjan. I then convinced the largest firm in the country, N'Goan, Asman & Associés, that I could build an international practice for them of English-speaking clients and other non-francophone clientele. I would spend the next several years working on a variety of matters involving an array of clients from across the globe. I also represented the American Embassy, British Embassy, and South African Embassy, together with some of the Development Financial Institutions. N'Goan, Asman & Associés was an influential firm in the country by virtue of the fact that its largest client was the office of the Prime Minister and other government offices.

In 1998, while still at N'Goan, Asman & Associés, I was engaged by a New York law firm with regard to the acquisition of Comstar Cellular, SA in Côte d'Ivoire ("Comstar"). Modern Africa Growth & Investment Company, L.L.C. ("MAGIC") had approached Western Wireless International Corporation ("WWI") regarding the purchase of Comstar, which was a small, failing GSM cellular telephone company in the country. I was initially approached to do the local due diligence on the company on behalf of WWI. When the deal between MAGIC, WWI and the shareholders of Comstar was concluded, WWI—the operating company—offered me the position of Managing Director of Comstar, which I accepted eventually, effective August 1, 2000. Subsequently, Comstar changed its name to Cora de Comstar, SA and then Cora, SA ("Cora").²

² The Board of Directors included, among others, Ellen Johnson Sirleaf, the former President of Liberia, Ibrahim Keita (Chairman), and myself.

Fast forward to May 2001 and I am facing Galley's military. Instead of handing over Cora, I called company headquarters in Seattle, the U.S. Embassy, the U.S. Commercial Consular Agent, the office of the prime minister of Côte d'Ivoire, and other sundry characters in Africa, Europe and America. I resisted because this was not supposed to be happening, and I just knew that someone would show up immediately to put matters right. After all, I had already spent eleven years in Côte d'Ivoire, practicing law and facilitating business deals of all sorts. There was corruption in this developing African country, but there was also a sense of the rule of law. People followed the law; we executed contracts; we followed labor laws; there were regulators and administrative agencies. There was, above all, a highly developed judiciary with civil courts, criminal courts, and commercial courts.³ The courts issued written decisions and the parliament enacted legislation.⁴ The country worked and functioned on the basic premise of a legal system of government.⁵ Because Côte d'Ivoire had been under direct French control from 1889 to 1960, French civil law was the model for the Ivorian Constitution, resulting in a highly organized bureaucracy with the guiding philosophy that every citizen had a say in state action and, equally, was accountable to the state.⁶ At the same time, more than sixty ethnic groups lived within the borders of Côte d'Ivoire which the French colonial power had constructed for its convenience; tensions were rising between the Muslim-majority north and the Christian-majority south.⁷ Reliance on shared rule of law was holding together a country with substantial internal tensions.

That night in May 2001, I grew a backbone and said no: I would not sign over the company to Mr. Galley. The soldiers were uneasy. The *notaire* and these armed men who seemed also to be on drugs did not quite know what to do with a woman

³ Yapi & Ouattara, *supra* note 1.

⁴ *Id.*

⁵ *See generally id.*

⁶ *Id.*

⁷ *Id.*; Francis Akindès, *Côte d'Ivoire: Socio-political Crises, 'Ivoirité' and the Course of History*, 7 AFR. SOCIO. REV. 11, 15 (2003).

in this physically hostile situation. They actually said that they could not mistreat me because I was a woman. It was all quite dramatic. Michel Etté kept yelling for me to sit in my chair as the head of the company while Galley was yelling at the soldiers to remove me from the company, which he said was his. Eugene Peabody, the Chief Administrative Officer, who was Liberian, was very nervous. He had lived through civil war in his own country of Liberia. He wanted me to sign the papers and leave immediately.⁸ He felt the soldiers could start shooting at any mistaken move and suspected that they were drugged. We were at a standoff in my office for some ninety minutes in these conditions.

Nevertheless, the soldiers removed all of us, including my general counsel, my financial advisor from Seattle, and my chief administrative officer, together with the very furious Michel Etté, to the parking lot where they provided me with a chair. Two soldiers physically picked me up by the arms and removed me as I kicked and hurled legal threats and various insults in French. The U.S. Embassy security officers eventually managed to enter the premises and negotiated our safe departure. As I exited the main office at Immeuble Kharrat, I saw that Cora employees and their families had gathered on the street below. I later learned that word had spread of the disturbance at the office, and about half the company staff were now standing outside the building, talking quietly amongst themselves and waiting to see what would happen.

It took three days to regain physical control of the company, a period of time that included a ten-hour meeting with the Prime Minister and Alexandre Galley and his associates. Prior to this meeting, U.S. Ambassador Mu and one of the Consular officers had met privately with the Prime Minister and came to me with the feeble response that the Ivorian government could not intervene, but would have a word with Mr. Galley. Thus, the day started with me ordering U.S.

⁸ Indeed, I had called the President of WWI, who had told me to sign the papers. He told me that we would "get the company back." I told him we would not if I signed the papers.

Ambassador Mu back into the room with the Ministers to assert the might of the U.S. government. My backbone was growing with every hour of this crisis.

During our all-day meeting, I noticed that Galley was missing the tips of his two pinkie fingers. He was seated across the large conference room table at the *Primature* (the Prime Minister's office) from me and spent the entire day staring me down and twirling his tipless pinkies in front of me. It was a grueling day. We ate nothing and drank nothing. I remember exactly where everyone was sitting at the long conference table; images from that day are sealed into my memory. Finally, at about 5 p.m., the Prime Minister met with our group separately to tell us that he would be "reinstalling" us back in our offices. I asked him how he could do this as Galley had military guards on the premises. I actually broke down and cried right there in the large receiving room in front of the Prime Minister and the Chairman of my Board. So much for my sense of being a hard-nosed telecom warrior fighting it out. The Prime Minister arranged for another branch of the military to accompany us back to the company.⁹

We were back in business; we discovered that Galley had stolen both physical and digital files during his occupation of Cora's offices.¹⁰ Galley continued to return to the company with different military and government officials over the following two years.¹¹ He used the media and the press to intimidate us.¹² He also used the courts and judicial system, both criminal and civil, by instituting actions and bribing judges, including

⁹ Prime Minister Pascal Affi N'Guessan actually looked at me and smiled and said: "I have my own branch of the military."

¹⁰ See Complaint from Cheryl Packwood, General Director, Cora de Comstar, against Mr. Galley, Alexandre, filed at the 1st Neighborhood Police Precinct, Abidjan (Oct. 19, 2001).

¹¹ See *id.*

¹² See, e.g., Yves De Sery, *Galley: 'Le 1er Ministre Nous a Décus'* [*The Prime Minister Has Disappointed Us*], LE NATIONAL (Abidjan), Jan. 10, 2002, at 8; Frank Konaté, *Affaire Cora de Comstar-G.A. Holding – Alexandre Galley: 'Le Ministre Liabi Douayoua m'a trompé'* [*Cora de Comstar-G.A. Holding Case – Alexandre Galley: 'Minister Liabi Douayoua Deceived Me'*], L'AUREOLE (Abidjan), Apr. 15, 2002, at 8.

bringing an action specifically to unseat me from my post.¹³ He threatened the staff and me with physical harm until I was allocated bodyguards and my driver was given defensive driving instruction.

Galley was quite a colorful character, and rumors were swirling that he was involved in nefarious dealings amongst my colleagues in Côte d'Ivoire. He was allegedly the intermediary in the highly publicized sale of two helicopters to President Charles Taylor in Liberia. It was also rumored that he was wanted by one of the leaders of a central African country for reneging on various deals. When the United Nations Security Council had placed him on the list of sanctioned persons and organizations in a resolution which went into effect on May 7, 2001, just weeks before our siege erupted, the widespread rumors were validated.¹⁴ At one point during the following two years, Galley told Michel Etté, our lawyer, that it would have been nothing for him to kill my colleagues and me. He was an unsavory character to say the least.

B. The Hostile Takeover: Unraveling the Motives Behind a Corporate Siege

Cora was formally a struggling cellular phone company which had been incorporated in 1993 in Abidjan under the name Comstar Cellular S.A. by a group of American businessmen, Wireless Communications Technologies, Inc. ("WCT"), together with Ivorian business partners.¹⁵ It had

¹³ See, e.g., Société G.A. Holding v. Société Cora de Comstar Cellular-SA (Tribunal de Première Instance d'Abidjan, Apr. 17, 2001) (This decision also states that a similar suit was in proceedings in Brussels in the same time frame. While the case does not directly evidence that the decision was harassing, it shows that multiple suits were happening at the same time.).

¹⁴ See U.N. S.C. Res. 1343 (2001) ON LIBERIA; See also Press Release, Security Council, Security Council Committee Issues List of Persons Affected by Resolution 1343 (2001) On Liberia, U.N. PRESS RELEASE SC/7068 (Apr. 6, 2001), <https://press.un.org/en/2001/sc7068test.doc.htm>.

¹⁵ See Bylaws of Comstar Cellular S.A., Côte d'Ivoire, CCCI S.A. (Dec. 28, 1993).

limited infrastructure with only four cell sites in Abidjan and no short message service capability or voice message platform.¹⁶ Coverage was limited to a small part of the city and there was no service in the interior of the country, not even along the beach front just outside of Abidjan along the road to Grand Bassam where the well-heeled spent their weekends.¹⁷ There were no funds to build out a competitive network.¹⁸ It had virtually no users and had cash flow available only to keep a limited staff and meet expenses.¹⁹ As a result, the shareholders had looked for additional investors.²⁰

WCT first sold a controlling interest of their shares to Alexandre Galley for a total of more than 70 million USD, pursuant to a share purchase agreement dated November 13, 1998, by which fifty-one percent of Comstar's shares belonging to WCT would be transferred to Galley's company, G.A. Holding S.A.²¹ The whole process for the sale was rudimentary and questionable under Ivorian law.²² When I joined Comstar and reviewed its business records I was shocked to find that no due

¹⁶ See generally Cora S.A., Project Brief: Cora Management Buy-Out, US \$30 Million 3 (July 10, 2002).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Share Purchase Agreement between Wireless Communications Technology, Inc. and G.A. Holding S.A., signed and executed Nov. 13, 1998 and registered with the Clerk of the Court in Abidjan (Dec. 9, 1999) (incorporating Memorandum of Understanding of July 30, 1998 as attached exhibit).

²² See Comstar Cellular S.A., Statuts, Arts. 13C, 18 (June 6, 1994) (on file with author) (transfer of shares must be approved by Board of Directors; meetings of Board of Directors proceed by voice vote with the majority of members present or represented); 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, *Acte Uniforme Relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Économique*' ['Organization for the Harmonization of Business Law in Africa, Uniform Act Relating to the Law of Commercial Companies and Economic Interest Groups'], Article 454 (1997) (repealed 2014) (applicable to Comstar's bylaws during period of validity). Meetings of the Board of Directors must be in person and majority of the Board must be present or represented; without such a meeting, share transfer would be negated.

diligence was performed on Galley, his company, or his means to pay any money.²³

During negotiations, G.A. Holding agreed to pay \$500,000 to WCT within ten business days of the execution of the share purchase agreement, and \$200,000 to Comstar at the time of the agreement's execution. Instead, G.A. repeatedly told WCT that funds had been wired and claimed to fax WCT proof of these transfers, which WCT never received despite repeated follow-up.²⁴ In the end, WCT only received \$150,000, and G.A. Holding did not meet its other obligations to pay Comstar's outstanding bills, open a letter of credit, or pay the equipment vendor for the planned infrastructure expansion.²⁵

As a result, WCT went in search of new investors. They found MAGIC, together with WWI.²⁶ MAGIC was a direct equity investment fund established in 1997 to invest in sub-Saharan Africa.²⁷ Its "guiding investment principles include[d] investing in projects that . . . [were] private and independent of political alliances, significant to the host country, usually involving the build-out of existing infrastructure, and linked to international markets in order to generate reliable hard currency

²³ Letter from Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Sept. 10, 1998) (on file with author).

²⁴ Share Purchase Agreement between Wireless Communications Technology, Inc. and G.A. Holding S.A., (Dec. 9, 1999) (signed and executed November 13, 1998 and registered with the Clerk of the Court in Abidjan) (on file with author); Letter of Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Dec. 4, 1998) (on file with author); Letter of Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Dec. 11, 1998).

²⁵ Letter from Robert W. Livingston, Executive Vice President, Wireless Communications Technology, Inc. to Alexandre Galley, President, G.A. Holding S.A. (Jan. 7, 1999) (on file with author).

²⁶ Letter from Brad Horwitz, President of WWI, & Niles E. Hemboldt, Exec. Comm. Chairman of Mod. Afr. Fund Managers, L.L.C., to Laurent Gbagbo, President of the Republic of Côte d'Ivoire (Dec. 12, 2003) (on file with author).

²⁷ DAVID S. FICK, *ENTREPRENEURSHIP IN AFRICA: A STUDY OF SUCCESSES* 29 (2002).

revenues.”²⁸ WWI was an American cellular phone company, which invested in and operated cellular and other telephone companies around the world, including in countries such as Haiti, Ghana and Iceland.²⁹ It was a subsidiary of Western Wireless Corporation.³⁰ This new deal involved a direct investment into Comstar by MAGIC and WWI through a capital increase in the shareholdings.³¹

The transaction was completed for effective date November 30, 1999.³² Once the deal was completed and the new shareholders commenced a full-scale build-out of Comstar in 2000, Galley went to court to assert his right to own the company.³³ On December 12, 2000, he received a favorable decision in the Court of Appeals of Abidjan against Comstar requiring that his ownership of fifty-one percent of the shares be registered in the company’s registry.³⁴ Comstar appealed this decision to the Supreme Court of Côte d’Ivoire.³⁵ Just prior to the issuance of the decision in May 2001, I was approached by an intermediary from Tia Kone, a Justice of the Supreme Court of Côte d’Ivoire, for money to assure that the decision would come

²⁸ *Id.*

²⁹ See Western Wireless Corp., Annual Report (Form 10-K), 27 (Mar. 26, 2003) (“[Western Wireless International Holding Corporation], through its consolidated subsidiaries and equity investments, is a provider of wireless communications services in nine countries. [Western Wireless International Holding Corporation] owns controlling interests in six of these countries: Slovenia, Austria, Ireland, Bolivia, Haiti and Ghana.”). See also K. RIVA LEVINSON, CHOOSING THE HERO: MY IMPROBABLE JOURNEY AND THE RISE OF AFRICA’S FIRST WOMAN PRESIDENT 91 (2016).

³⁰ Western Wireless Corp., *supra* note 29, at 3.

³¹ Convertible Debt Purchase Agreement between Comstar Cellular S.A., Wireless Communications Technology, Inc., Modern Africa Two, LLC, and Western Wireless International Ivory Coast Corporation (Nov. 12, 1999) (on file with author).

³² *Id.*

³³ G.A. Holding S.A. v. Societe Comstar Cellular, Chambre Civile et Commerciale of Cour d’Appel d’Abidjan (2000).

³⁴ *Id.*

³⁵ Côte d’Ivoire Supreme Court Decision #285/01, argument held May 10, 2001, decision issued June 1, 2001, Annals de Justice [official court record] Vol. 37 Folio 10 #1353 Slip 321/1.

down in the favor of MAGIC and WWI. I refused with a decisive “No.”³⁶ The decision came down, stating that Galley was entitled to the share transfer as per his original agreement and denying Comstar’s appeal.³⁷

Instead of trying to negotiate a settlement with regard to his claims on the company, he stormed the company on May 25, 2001, with two truckloads of soldiers toting AK-47s and other weapons.

Together with my shareholders, I spent the better part of the following two years negotiating and lobbying with the Ivorian and U.S. governments in this matter.³⁸ The affair generated numerous lawsuits both in Côte d’Ivoire and Belgium.³⁹ Throughout this period, Galley would bribe different branches of the police and military to attempt at gunpoint additional take-overs of the company.⁴⁰ In the summer of 2002,

³⁶ The Foreign Corrupt Practice Act loomed large in my mind when I was approached aside from any anti-corruption statutes under local laws. As an American and employee of a US company, the sanctions for bribery of an Ivorian judge would have been significant for both WWI and me. When I reported the event back to the President, his immediate response was: “You did just walk out of the room.” On the other hand, I was rebuked and chastised by our local partners and associates, some of whom were also American, for not “fixing” the problem through bribery because I was put in charge of the company to manage local issues.

³⁷ Côte d’Ivoire Supreme Court Decision #285/01, Vol. 37 Folio 10 #1353 Slip 321/1.

³⁸ *E.g.*, Letter of Francis Nyirjesy, Modern Africa Fund Managers, LLC to Pascal D. Kokora, Ambassador of Côte d’Ivoire to the United States (April 12, 2002) (on file with author); Letter of Cheryl Packwood to Mr. Affi N’Guessan, Prime Minister, Côte d’Ivoire, June 8, 2001; Letter of Stephen D. Cashin, Managing Director, Modern Africa Fund Managers, LLC to M. Bouhoun Bouabre, Finance Minister, Côte d’Ivoire (April 30, 2002) (on file with author).

³⁹ *Société G.A. Holding et. Al. v. Société Cora de Comstar Cellular-SA et. Al.*, Tribunal de Première Instance [TPI] [Court of first instance], d’Abidjan, (April 17, 2001) (This decision also states that a similar suit was in proceedings in Brussels in the same time frame. Belgium had venue because G.A. Holding was based in Belgium).

⁴⁰ *See, e.g.*, Complaint against Mr. Galley, Alexandre, filed October 19, 2001, at the 1st Neighborhood Police Precinct, Abidjan, by Cheryl Packwood, General Director, Cora de Comstar (on file with author).

the Chairman of the Board of Cora, Ibrahim Keita, was detained in the offices of Directorate of Territorial Surveillance without any right to counsel, or, indeed, right to see anyone, including his wife and family.⁴¹ A doctor was permitted to see him to check his blood pressure from time to time. He had no bed nor any comforts associated with a regular jail cell. He was in an actual office for what would end up being months before he was transferred to a hospital because his health completely failed.⁴²

By mid-2002, I had permanent bodyguards, with my ten-year old son learning karate from one of them, working on different levels of belts. Within days of the civil war breaking out in September of that year,⁴³ I left with my three boys to go to Bermuda after five red berets (Ivorian army paratroopers)⁴⁴ climbed over the wall surrounding the Network Operating Center and fired on it. I traveled back and forth over the following year and ran the company remotely from Bermuda. Indeed, Galley gave new meaning to the term "hostile takeover."

In the fall of 2002, I finally decided to engage a private military security firm to prepare a background study of Cora, S.A. I wanted to know what was going on behind the scenes with

⁴¹ See COTE D'IVOIRE, U.S. Dep't of State, Bureau of Democracy, Hum. Rts., and Lab., County Reports on Human Rights Practices 2002 (Mar. 31, 2003), <https://2009-2017.state.gov/j/drl/rls/hrrpt/2002/18179.htm> ("On August 10, [2002] the military Rapid Intervention Unit (BIR) arrested at home Ibrahim Keita, the President of Cora de Comstar, a cellular telephone company, and took him to the DST. Keita had access to his physician and after 3 days, his lawyer. The Government accused Keita of financing destabilization efforts.").

⁴² Galley and G.A. Holding had attempted to revoke Mr. Keita's position on the board of Cora on May 16, 2001. See Memorandum of Board of Directors, G.A. Holding S.A. (May 16, 2001) (on file with author).

⁴³ *Ivory Coast Profile – Timeline*, BBC NEWS (Jan. 15, 2019), <https://www.bbc.com/news/world-africa-13287585>.

⁴⁴ See Côte d'Ivoire/ *Les Commandos Parachutistes Exhortés à Travailler "Dur" Pour Redorer L'image du Béret Rouge* [Ivory Coast/ Parachute Commandos Urged to Work "Hard" to Restore the Image of Red Berets, ABIDJAN.NET (Oct. 5, 2017), <https://news.abidjan.net/articles/623609/cote-divoire-les-commandos-parachutistes-exhortes-a-travailler-dur-pour-redorer-limage-du-beret-rouge> (defining 'red berets' as Ivorian army paratroopers).

the Ivorian government and the company. Since I had been working on this matter, first as a lawyer beginning in 1998, and then, as the managing director from 2000, the country had experienced its first coup d'état in December 1999.⁴⁵ The political and military situation was becoming less stable.⁴⁶

The Ugandan based company I engaged to do the clandestine study sent a former French intelligence agent to the country to investigate. He prepared a report which included the following details.⁴⁷ First, President Gbagbo wanted ownership of Cora, S.A. in order to establish a private means of communications with his military in the fight to maintain power.⁴⁸ He was using Galley to obtain control of the company.⁴⁹ Second, my life and the lives of my closest directors were in danger. Indeed, we had been placed on the death squad list of Madame Simone Gbagbo, the wife of President Gbagbo. Madame Gbagbo had a widely reported list of people to be killed who were considered sympathizers of the opposition leader Allasayne Ouattara, together with those who presented a threat to the current government.⁵⁰ She was alleged to have paid and financed the

⁴⁵ Agence France-Presse, *Troops Overthrow Ivory Coast's Government*, N.Y. TIMES (Dec. 25, 1999), <https://archive.nytimes.com/www.nytimes.com/library/world/africa/122599ivory-coast-afp.html>.

⁴⁶ See *infra* Part I-C.

⁴⁷ I eventually destroyed the hardcopy of the original report because I was terrified that it would be found amongst my belongings when I returned to Côte d'Ivoire. I shredded it in my hotel room in Paris the night before I boarded an Air France flight in the late winter of 2002.

⁴⁸ See also LEVINSON, *supra* note 29, at 90 ("Cora de Comstar is a strategic asset that proves to be just too attractive for the insecure Ivorian president, who lives in constant fear of a counterinsurgency. In early 2000, through a corrupt court order enforced by his presidential police, Gbagbo seizes the US-owned company.").

⁴⁹ See *id.*

⁵⁰ See Colum Lynch, *Ivory Coast First Lady Leads Death Squad, Report Alleges*, WASH. POST (Jan. 28, 2005, 7:00 PM), <https://www.washingtonpost.com/archive/politics/2005/01/29/ivory-coast-first-lady-leads-death-squad-report-alleges/924d309d-31a5-4aef-bc33-fe9f79b4225a/> (discussing how "[a] confidential U.N. report sa[id] that . . . Simone Gbagbo, ha[d] directed a death squad responsible for killing rivals of her husband's government"); see William Burke-White, *A Wife*

militia which carried out her orders to kill those on this list.⁵¹ Third, the former French intelligence agent feared for his own safety as he investigated the matter, and left the country early, fearing that he would be associated with Cora, S.A. Finally, the French expatriate “community” indicated to him that they could not believe that I was still alive.

After I read the report, I met the American owner of this Ugandan based company in a restaurant off the Champs Elysees in Paris to discuss our next steps. The recommendation was to pick Galley up and take him to the central African country where we knew a particular president would “take care of him.”⁵² In other words, the recommendation was to kill Galley. All parties at the table looked to me, as managing director, to give the order. Interestingly, the Regional Vice President asked if the situation really was as “hysterical” as the report indicated. His attempt to minimize reality were quickly stamped out by the contractor and my disgusted growl.

How do you describe all the emotions that come to you at a moment like this? How do I explain how I had hoped and prayed that this man, who lived through fraud, corruption, lies and violence would just disappear? He had threatened not just my life, but also the lives of my children, my friends, and my colleagues. This man threatened to take away the livelihood of

Accused of War Crimes: The Unprecedented Case of Simone Gbagbo, ATL. (Dec. 3, 2012), <https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/>.

⁵¹ Agence France-Presse, *Ivorian Ex-Militia Chief Says Simone Gbagbo Bankrolled Group*, DAILY MAIL, (June 28, 2016, 4:52 PM), <https://www.dailymail.co.uk/wires/afp/article-3664853/Ivorian-ex-militia-chief-says-Simone-Gbagbo-bankrolled-group.html> (Simone Gbagbo was tried twice. After her first trial, she was sentenced to twenty years in prison for “harming state security.” During her second trial, for “crimes against humanity,” former militia chief, Moise Metchro Harolde Metch, testified to the existence and financing of the death squads and militias by Simone Gbagbo.).

⁵² See LEVINSON, *supra* note 29 at 90 (This author was referring to the same central African country in which Galley was rumored to be wanted for reneging on various deals.).

some two hundred employees, each of whose salaries fed and clothed perhaps thirty other persons. How do I describe how much I wanted for Galley to die? There, I wrote it. Against these feelings, with utter fear and trepidation and, indeed, tears, I looked around at the three men sitting at the table in that Parisian restaurant, one of whom was the Regional VP and my boss, and I squeaked out "No!"

I would not order Galley's death.

The owner of the Ugandan company, who was a kind grandfatherly man, looked at me and said: "You do know that he [Galley] would not hesitate to kill you." I told him that I knew that, but I would not be able to live with myself if I gave such an order.

That meeting is emblazoned in my memory for the rest of my life. While I ultimately believe that I made the right decision from a moral and ethical point of view, I cannot help but express doubt and ask: Did I make the right choice? Did I, when it came to the inimitable question of bribery of the courts and local officials, or when it came to fighting violence with violence? Our lives were in immediate danger and sometimes "not so immediate" danger. We were not gun-toting executives. The employees were in danger. Their jobs were at risk and, eventually in October 2003, the shareholders did, indeed, close the company and left the country. They did not dissolve it or file for bankruptcy or anything. They just locked the doors with a key and removed the essential employees from the country along with the software information which would operate the network.

Looking back and contemplating the decision I had made years prior not to pay Tia Kone,⁵³ I firmly believe that had I made that simple bribe, the court's decision would have gone the other way, thus denying Galley's entitlement to Cora and removing any incentive for him to take the company by storm. Instead, it is evident that abiding by the FCPA and not bribing the justice led, ironically, to the endangerment of the employees and the eventual downfall of the business.

⁵³ See *supra* text accompanying note 36.

C. Navigating the Economic and Political Realities of Côte d'Ivoire in the 1990s and Early 2000s

At what point do anti-bribery statutes, including the Foreign Corrupt Practices Act ("FCPA"),⁵⁴ American business ethics and morals become useless in dangerous situations abroad? To answer this questions fully, an understanding of the economic and political environment is necessary to comprehend the severe pressure under which we were operating.

Abidjan, Côte d'Ivoire's largest city, was once labeled as the Paris of Africa.⁵⁵ When I arrived in 1990, the people spoke of the glory days of the 1960s to 1980s when the economy boomed, and champagne flowed in the streets.⁵⁶ By 1990, however, the country was in turmoil due to student demonstrations which led to crack downs and the death of a student.⁵⁷ The students were protesting conditions in the dormitories and other education issues.⁵⁸ These demonstrations were indicative of larger economic problems in the country.⁵⁹ The economy was no longer booming.⁶⁰ Jobs were not as plentiful and pressure from large waves of immigrants from neighboring countries, together with large numbers of war

⁵⁴ See *infra* Part III.

⁵⁵ Jean L. Comhaire, *The Arts of Côte d'Ivoire*, BRITANNICA (last visited Aug. 12, 2024), <https://www.britannica.com/place/Cote-dIvoire/The-arts>.

⁵⁶ See ROBERT EARL HANDLOFF & THOMAS DUVAL ROBERTS, *CÔTE D'IVOIRE : A COUNTRY STUDY*, (Library of Congress Federal Research Division 1991), available at <https://www.loc.gov/item/90005878/>.

⁵⁷ Kenneth B. Noble, *Unrest in Ivory Coast's Capital Turns to Violence*, N.Y. TIMES (Feb. 25, 1990), <https://www.nytimes.com/1990/02/25/world/unrest-in-ivory-coast-s-capital-turns-to-violence.html>.

⁵⁸ *Id.*

⁵⁹ See generally Cyril Kofie Daddieh, *Universities and Political Protest in Africa: The Case of Côte d'Ivoire*, 24 ISSUES AFR. HIGHER EDUC. (1996), <https://www.jstor.org/stable/1166616>.

⁶⁰ See IMF, *Côte d'Ivoire*, Country Report (May 11, 2016), <https://www.imf.org/external/pubs/ft/scr/2016/cr16148.pdf>.

refugees from the Liberian civil war contributed to a general feeling of unrest and fear.⁶¹

At that time, the first and only president and father of the country, Félix Houphouët-Boigny, had been in power for thirty years and was in failing health.⁶² Under much political pressure, he named Alassane Dramane Ouattara as Prime Minister in 1990.⁶³ Ouattara remained in this post until the death of President Houphouët-Boigny in December 1993.⁶⁴ Following his death, my family and I passed two tense days locked in the house. There were riots in the populous areas of Abidjan. More importantly, there was uncertainty about who would succeed President Houphouët-Boigny. The Ivorian Constitution provided for succession by the President of the National Assembly, who was Henri Konan Bedie.⁶⁵ However, there was some thought that Prime Minister Ouattara would attempt to succeed Houphouët-Boigny. As there was no immediate announcement and forty-eight hours of evident indecision, the population was on edge.

⁶¹ See *id.*; Akindès, *supra* note 7.

⁶² See Kenneth B. Noble, *Felix Houphouët-Boigny, Ivory Coast's Leader Since Freedom in 1960, Is Dead*, N.Y. TIMES (Dec. 8, 1993), <https://www.nytimes.com/1993/12/08/obituaries/felix-houphouet-boigny-ivory-coast-s-leader-since-freedom-in-1960-is-dead.html>.

⁶³ See Alassane Ouattara (1990-1993) : 1er Premier Ministre [Alassane Ouattara (1990-1993) : 1st Prime Minister], CABINET DU PREMIER MINISTRE DE CÔTE D'IVOIRE [CABINET OF THE PRIME MINISTER OF CÔTE D'IVOIRE], <https://primature.ci/premierministre/?pm=13>.

⁶⁴ See Noble, *supra* note 62.

⁶⁵ *Cote d'Ivoire 1999 Report on Human Rights Practices*, U.S. DEP'T OF STATE (Feb. 23, 2000), <https://2009-2017.state.gov/j/drl/rls/hrrpt/1999/242.htm> ("Upon the death in 1993 of Houphouët-Boigny, who had been President since independence, National Assembly President Bedie became President by constitutional succession and served out the remainder of Houphouët's term. Due to concerns about 1994 changes to the candidacy requirements of the electoral code that excluded a leading opposition rival to Bedie, and about irregularities in voter registration, the major opposition parties staged an 'active boycott' of the 1995 presidential election, both declining to participate and trying to interfere with the voting process; however, in 1995 President Bedie won 96 percent of the vote").

Two days after Houphouët-Boigny died, Bedie went to the television station with armed guards and the support of the French government and declared that he was President of the Republic of Côte d'Ivoire.⁶⁶ CNN reported on television at the time that this was a coup d'état.⁶⁷ I watched in horror as the events unfolded, knowing that while Bedie was supposed to succeed to power, none of the judicial processes had taken place to ensure stability.⁶⁸ We, therefore, lurched into the next phase of political uncertainty. Bedie would spend the next six years of his presidency disputing who could run for president in the next elections based on the definition of who was Ivorian.⁶⁹

On December 23, 1999, we awoke to a coup d'état and the eventual removal of Bedie and his family by the French

⁶⁶ See, e.g., Joseph Hellweg, *A History of Crisis in Côte d'Ivoire*, Soc'y FOR CULTURAL ANTHROPOLOGY (Jun. 25, 2012), <https://culanth.org/fieldsights/a-history-of-crisis-in-c%C3%B4te-divoire>. (There are conflicting reports about the timeline, with some sources suggesting that Bédié declared himself president just hours after the death of Houphouët-Boigny). See also *Henri Konan Bédié*, WIKIPEDIA, https://en.wikipedia.org/wiki/Henri_Konan_B%C3%A9di%C3%A9; Cyril K. Daddieh, *Elections and Ethnic Violence in Côte d'Ivoire: The Unfinished Business of Succession and Democratic Transition*, 29 AFR. ISSUES 14, 17 (2001). However, with a vivid memory of the suspense during those two days, this author remembers Bédié's declaration following the timeline described herein.

⁶⁷ See Daddieh, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ I was approached in the late 1990s by a close associate of President Bedie to provide a secret opinion on the eligibility requirements for presidency under the US Constitution. President Bedie, trying to use U.S. law as a prime example of nationality requirements, wanted to be able to argue that the US law required that both parents of a presidential candidate must be born in America to be able to run. He was arguing that his prime challenger, Allasane Dramane Ouattara was not eligible because one of his parents was born in Burkina Faso, or at the time of birth, the Upper Volta. Ouattara disputed this allegation claiming that both parents were indeed of Ivorian birth. Bedie wanted to be able to say that because US federal law required both parents to be born American, then the Ivorian requirement was not unreasonable. I prepared an extensive and detailed opinion on U.S. law and history on the matter but was not able to arrive at the desired conclusion of my client. On a side note, I was never paid for this work and knew somehow that I was not supposed to expect any payment.

military on a helicopter from the French military base.⁷⁰ An army general, Robert Guéï, installed himself as President on December 24, 1999.⁷¹

National elections were held in October 2000, but they were far from free. General Guéï tried to hold on to power by limiting the field to four additional candidates based on a notion of who was a real Ivorian national.⁷² As a result, Allassane Dramane Ouatarra – the candidate who would have represented at least half of the country – was deemed ineligible to run for president; his candidacy was rejected on the basis that both of his parents were not Ivorian.⁷³ The debate of his parentage and eligibility for the office of the president had raged in the media,

⁷⁰Karl Vick, *Bedie Flees Ivory Coast for Togo*, WASH. POST (Dec. 26, 1999), <https://www.washingtonpost.com/archive/politics/1999/12/27/bedie-flees-ivory-coast-for-togo/dbcc962d-f167-4480-93f6-f85e85155894/>.

⁷¹ U.S. DEP'T OF STATE, *supra* note 65 ("Retired General Robert Guei took over the Government after a mutiny that began on December 23, evolved into a major military revolt on December 24, and culminated in the dismissal and forced departure of President Henri Konan Bedie").

⁷² See *Cote d'Ivoire Presidential Ballot 2000*, INT'L FOUNDATION FOR ELECTORAL SYS. (Oct. 21, 2000), <https://www.ifes.org/tools-resources/election-materials/cote-divoire-presidential-ballot-2000> (lists candidates in the running for the presidential election as Robert Guéï, Laurent Gbagbo, and three others); *The New Racism: The Political Manipulation of Ethnicity in Côte d'Ivoire*, HUMAN RTS. WATCH (Aug. 2001), <https://www.hrw.org/report/2001/08/28/new-racism/political-manipulation-ethnicity-cote-divoire>; *Cote d'Ivoire 2001 Report on Human Rights Practices*, U.S. DEP'T OF STATE (Mar. 4, 2002), <https://2009-2017.state.gov/j/drl/rls/hrrpt/2001/af/8355.htm> ("The presidential elections followed several postponements and a controversial Supreme Court decision on October 6, 2000, disqualifying 14 of the 19 candidates, including all of the PDCI and RDR candidates.") ("Ouattara was excluded from running in the presidential and legislative elections following the Supreme Court's October 6, 2000, and November 30, 2000, rulings that he had not demonstrated conclusively that he was of Ivoirian parentage."); Douglas Farah, *Candidates Disqualified in Ivory Coast*, WASH. POST (Oct. 7, 2000), <https://www.washingtonpost.com/archive/politics/2000/10/07/candidates-disqualified-in-ivory-coast/2cb35bf1-6647-473c-af3d-1441d6ab9172/>.

⁷³ See INT'L FOUNDATION FOR ELECTORAL SYS., *supra* note 72.

public debate and the National Assembly for almost a decade at this point.⁷⁴

During the electoral count, Guéï stopped the count and declared himself the winner.⁷⁵ The people rose up and went into the streets; more than 500 people were killed.⁷⁶ The military sided with the people and, thus, Laurant Gbagbo, who did win the majority of votes in this limited election, came to power.⁷⁷ But, the legitimacy of his election would be contested over the next eleven years and would lead to the outbreak of civil war starting in September 2002, dividing the country between north and south.⁷⁸

Against this backdrop and over the coming years, there were constant riots, demonstrations, curfews, business closures for several days while fighting would break out between government forces and rebels (or regular disgruntled people).⁷⁹ Simone Gbagbo, the wife of President Gbagbo, would constitute and run a militia to kill off opposition to her husband.⁸⁰

Côte d'Ivoire presented always as an economy with significant opportunity and potential for foreign investors, even during the economic downturn of the 1990s and after the coup

⁷⁴ See *supra* text accompanying note 69.

⁷⁵ *Election Violence in Abidjan: October 24-26, 2000*, HUMAN RTS. WATCH (Dec. 20, 2000), <https://www.hrw.org/legacy/background/africa/IvoryCoastbrf.htm>.

⁷⁶ *Id.* See also INT'L FOUNDATION FOR ELECTORAL SYS., *supra* note 72 (discussing "a flawed October 22 presidential election, which was marred by significant violence and irregularities . . . According to the Ivoirian Movement for Human Rights (MIDH), during and following the October 2000 presidential elections, security forces killed more than 500 persons during clashes with protesters.")

⁷⁷ *Election Violence in Abidjan: October 24-26, 2000*, HUMAN RTS. WATCH (Dec. 20, 2000), <https://www.hrw.org/legacy/background/africa/IvoryCoastbrf.htm>; U.S. DEP'T OF STATE, *supra* note 72.

⁷⁸ BBC NEWS, *supra* note 43.

⁷⁹ See U.S. DEP'T OF STATE, *supra* note 72.

⁸⁰ See sources cited *supra* note 50.

<https://www.theatlantic.com/international/archive/2012/12/a-wife-accused-of-war-crimes-the-unprecedented-case-of-simone-gbagbo/265828/>.

d'état of December 23 and 24, 1999.⁸¹ By 1999, Côte d'Ivoire had the third largest economy in sub-Saharan Africa after South Africa and Nigeria.⁸² The economy was based primarily on coffee, cocoa, palm oil, and rubber.⁸³ Oil deposits and gold and other mineral deposits were in an early exploration and production phase.⁸⁴ For investors looking to invest in Africa, Côte d'Ivoire was considered one of the safest countries.⁸⁵ Indeed, there was a general perception that corruption was lower in Côte d'Ivoire than in other countries in the region⁸⁶ and that the banking system was more secure because of the CFA Franc, which was pegged initially to the French Franc and then to the Euro.⁸⁷

II. EXPLORING THE APPLICABILITY OF THE RULE OF LAW

The notion of the rule of law is ancient and is discussed in all forms of literature and formats.⁸⁸ The institutions tasked

⁸¹ See IMF, *supra* note 60.

⁸² U.S. DEP'T OF STATE, FY 2000 COUNTRY COMMERCIAL GUIDE: COTE D'IVOIRE 1 (1999).

⁸³ *Id.*

⁸⁴ *Id.* at 4-5.

⁸⁵ See *id.* at 1 (discussing how Côte d'Ivoire "ha[d] demonstrated strong, sustained economic growth" since 1994 and, despite anticipated slowing of economic growth, it was thought to have "a good chance of returning to the 6 or 7 percent growth rate in 2000 or 2001").

⁸⁶ See *Corruption Perceptions Index: 1998*, TRANSPARENCY INT'L, <https://www.transparency.org/en/cpi/1998> (last visited July 9, 2024) (with a Corruption Perceptions Index ("CPI") of 3.1 in 1998, Côte d'Ivoire outscored several sub-Saharan African countries—namely Uganda, Kenya, Tanzania, Nigeria, and Cameroon—and followed closely behind Ghana and Senegal.).

⁸⁷ *History of the CFA Franc*, BCEAO, <https://www.bceao.int/en/content/history-cfa-franc> (last visited July 9, 2024).

⁸⁸ The concept of the rule of law can be traced back to ancient civilizations, including Greek and Roman thought, where philosophers such as Aristotle articulated the idea that law should govern rather than individual rulers. See Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHIL. (June 22, 2016), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rule-of-law>. The rule of law is the idea

with working towards developing the African Continent have stressed prominently the establishment of good governance and the rule of law as a necessity for the advancement and full emergence of African countries into the global economy.⁸⁹ At its

that underlying law is a fundamental principle that all individuals and institutions, including the government itself, are subject to and accountable under the law. *See id.* It is a key concept in legal and political theory, representing the idea that law, rather than arbitrary power, should govern a nation. *See id.*

While medieval theorists “sought to distinguish lawful from despotic forms of kingship,” more modern discussions about the rule of law revolve around the authority of law and how it is derived. *See id.* *See e.g.*, LON FULLER, *THE MORALITY OF LAW* (1969) (discussing the necessary requirements that a legal system must have in order for it to be followed); T.R.S. Allan, *Dworkin and Dacey: the Rule of Law as Integrity*, 8 OXFORD J. OF L. STUDIES 266, 266-68 (1988) (arguing that Ronald Dworkin’s theory of Law as Integrity reinforces the rule of law as it ensures consistency in its application); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212 (Clarendon Press, 1979) (examining the necessary principles to ensure the rule of law); SCOTT HERSHOVITZ, *LAW IS A MORAL PRACTICE* 147-148 (Harvard Univ. Press 2023) (“the rule of law requires a shared moral outlook. Officials and (to a lesser extent) laypeople must see legal practices as sources of morality”); H.L.A. HART, *THE CONCEPT OF LAW* (Clarendon Press, 2d ed. 1994).

For a discussion about the rule of law in Africa in particular, Makau Mutua has written about this in depth. *See* Makau Mutua, *Africa and the Rule of Law*, 13 INT’L J. ON HUM. RTS. 159, (2016).

⁸⁹ *See, e.g.*, AFR. DEV. BANK GRP., *AT THE CENTER OF AFRICA’S TRANSFORMATION: STRATEGY FOR 2013–2022*, at 8 (discussing how African countries can promote private sector-led growth by “strengthen[ing] regulatory, institutional and financial frameworks, leading to more effective rule of law and reduced corruption”); ECOWAS BANK FOR INV. & DEV., *STRATEGIC PLAN 2010-2014*, at 17 (discussing how part of Economic Community of West African States (ECOWAS) Vision 2020 was to “[c]reate a . . . prosperous and cohesive region, built on good governance and where people have the capacity to access and harness its enormous resources through the creation of opportunities for sustainable development and environmental preservation”); *About the African Union*, AFR. UNION, <https://au.int/en/overview> (last visited Aug. 15, 2024) (discussing how the African Union (AU) vision is “An Integrated, Prosperous and Peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena,” with an aim, among others, of promoting “democratic principles and institutions, popular participation and good governance”).

best, the African Development Bank takes to heart and quotes the Abuja Declaration: "The rule of law, justice, respect for fundamental rights, and development are inextricably linked."⁹⁰

Makau Mutua has discussed in depth the applicability and the need to reconsider the interpretation of the meaning of the rule of law in Africa "to achieve sustainable development."⁹¹ He argues that it does not translate as understood in the Western context to the African continent and the very different historical context of a continent ravaged by the Atlantic slave trade and colonization.⁹²

We were, indeed, naïve that the basic premise of the rule of law could be blithely stamped on Côte d'Ivoire during the time of our decision-making process. Indeed, at its basic function, the court applies the laws of the land. In our case, it was the Supreme Court Justice, himself, who broke the notion of rule of law in Côte d'Ivoire when he requested a "little gift" that very difficult day in May 2001. Or, is the notion of the rule of law outside of the United States, indeed, different, as Makau Mutua asserts, and we, together with the United States Government, were ignorant of this actuality when we attempted to bridge the world with our American notions of how to do business and apply the law? American exceptionalism ignores the cultural realities on the ground in developing nations and, at times, risks the lives of the very people it seeks to protect. At least, in the case of Cora, this statement represented our situation.

In the end, the rule of law is a fragile notion at best. Indeed, Côte d'Ivoire on its face met the requirements of a country of laws as our lawyer Michel Ette so aptly described it. Charles Manga Fombad sets forth six "core elements of the rule of law", which include:

⁹⁰ Seward M. Cooper, *Introduction*, 1 L. FOR DEV. REV., at iv (2006) (quoting THE ABUJA DECLARATION ON LAW, JUSTICE, AND DEVELOPMENT ¶ 1 (2003) (The Abuja Declaration, authored by African jurists and lawyers at the All Africa Conference on Law, Justice and Development, speaks to the importance of the rule of law and independent, ethical judicial personnel in Africa, as well as the efforts required to attain a more equitable judicial system.)).

⁹¹ Mutua, *supra* note 88, at 159.

⁹² *See id.* at 161-62.

- (i) the principle of legality, which includes the requirement of a transparent, accountable and democratic process for enacting laws;
- (ii) the principle of non-discrimination and equality before the law, which means that government and its officials and agents as well as individuals and private entities are accountable under the law;
- (iii) legal certainty and prohibition of arbitrariness, which requires that laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property;
- (iv) the process whereby the laws are enacted, administered and enforced is accessible, fair and efficient;
- (v) justice delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve; and
- (vi) respect for human rights.⁹³

One act of a Supreme Court Justice, who was supposed to be independent and neutral, demonstrated the fragility of the legal system. While every day we work towards a more perfect system—one of transparency, equality, certainty,—what would be small acts can implode the façade that the rule of law exists. And without it, democracy fails, chaos ensues, and the very people that the law is designed to protect can die. The case of Cora was in the end a microscopic example of what the country was suffering with limited elections, coup d'états, demonstrations, riots, ethnic cleansing and much more.

⁹³ Charles Manga Fombad, *An Overview of the Crisis of the Rule of Law in Africa*, 18 AFR. HUM. RTS. L. J. 213, 217-18 (2018).

III. THE FCPA'S REACH IN INTERNATIONAL BUSINESS CONFLICTS

The United States Foreign Corrupt Practices Act, 15 U.S.C §§ 78 dd-1, et seq. (the "FCPA"), was first enacted in 1977 by the U.S. Congress in an effort to combat bribery worldwide.⁹⁴ The idea was to prevent U.S. companies and their representatives operating in foreign countries from bribing foreign officials. The U.S. government wanted to "create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace."⁹⁵ The United States government and its officials posited that bribery and corruption inhibit economic growth and development, and therefore a world without bribery would allow market forces to operate:

Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law. And it threatens stability and security by facilitating criminal activity within and across borders, such as the illegal trafficking of people, weapons, and drugs.⁹⁶

The roots of the FCPA lie in the aftermath of the Watergate Investigations.⁹⁷ Corporations and executives faced accusations of "using corporate funds for illegal domestic political contributions," which prompted the Securities and Exchange Commission (SEC) to launch its own investigation into

⁹⁴ *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act> (Jan. 9, 2025).

⁹⁵ CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 1 (2d ed. 2020) (footnote omitted).

⁹⁶ *Id.* at 1-2 (footnotes omitted).

⁹⁷ See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. REV. 930, 933 (2012); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L. L. REV. 689, 694 (2000).

the practices of corporations to protect investor interests.⁹⁸ On May 12, 1976, the SEC submitted its *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices* to the Senate Banking, Housing and Urban Affairs Committee.⁹⁹ The report revealed the existence of “slush funds” used for, *inter alia*, “questionable or illegal foreign payments . . . cast[ing] doubt on the integrity and reliability of the corporate books and records” on which the SEC relies to protect investors.¹⁰⁰

The House Subcommittee on Consumer Protection and Finance then held a series of hearings in September 1976 and April 1977 on bills to proscribe the payments described in the SEC Report.¹⁰¹ In its September 28, 1977 report, the House Committee on Interstate and Foreign Commerce recommended H.R. 3815, the bill which would eventually amend the Securities Exchange Act of 1934 in order to include prohibitions against bribery of foreign officials by U.S. corporations.¹⁰² This report cited several purposes for the bill. First, that the practice is inherently unethical and “counter to the moral expectations and values of the American public.”¹⁰³ Second, such payments are bad business because it “erodes public confidence in the integrity of the free market system,” giving an unfair advantage “to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship,” thus “reward[ing] corruption instead of efficiency.”¹⁰⁴ The practice also worsens the reputation of American corporations in general overseas, leading to lawsuits and overall loss of

⁹⁸ See U.S. SEC. & EXCH. COMM’N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976), reprinted in Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353, at 2 (May 19, 1976) [hereinafter SEC REPORT]. See also Koehler, *supra* note 97, at 932; Shaw, *supra* note 97, at 694-95.

⁹⁹ See H.R. Rep. No. 95-640, at 6 (1977). See generally SEC REPORT, *supra* note 98.

¹⁰⁰ See SEC REPORT, *supra* note 98, at 2, 8.

¹⁰¹ H.R. Rep. No. 95-640, at 6 (1977); Koehler, *supra* note 97, at 997.

¹⁰² See H.R. Rep. No. 95-640, at 3.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* at 4-5.

business and assets;¹⁰⁵ it is unnecessary, as several business leaders testified before the Committee;¹⁰⁶ and bribery of foreign officials fosters domestic “adverse competition effects.”¹⁰⁷ The Committee also cited the practice’s impact on U.S. foreign policy including “embarrass[ing] friendly governments, lower[ing] the esteem for the United States . . . and lend[ing] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.”¹⁰⁸ Finally, the Committee emphasized that a law prohibiting bribery could help U.S. companies “resist pressures and refuse those requests” when in compromising situations.¹⁰⁹

The Senate Committee on Banking, Housing, and Urban Affairs released their own report on May 2, 1977, recommending Senate Bill 305, which would amend the SEC Act of 1934 “to require companies subject to the jurisdiction of the Securities and Exchange Commission to maintain accurate records, to prohibit certain bribes, to expand and improve disclosure of ownership of the securities of U.S. companies.”¹¹⁰ Starting in 1976, during the 94th Congress, the Senate held several hearings to understand the issue of “improper payments to foreign government officials by American corporations.”¹¹¹ “[D]esigned to prevent the use of corporate funds for corrupt purposes,” the Senate’s version of the law aims to combat the same activity for the same reasons.¹¹² Citing the same SEC *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practice* as the instigating force behind the law,¹¹³ the Committee report claims that the bribing of foreign officials has besmirched the

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ H.R. Rep. No. 95-640, at 5.

¹⁰⁹ *Id.*

¹¹⁰ S. Rep. No. 95-114, at 1 (1977).

¹¹¹ *Id.*

¹¹² Koehler, *supra* note 97, at 997. Compare S. Rep. No. 95-114, at 3-4, with H.R. Rep. No. 95-640, at 4-5 (1977).

¹¹³ S. Rep. No. 95-114, at 3 (1977).

reputations of both the U.S. government and U.S. businesses abroad; it is unnecessary; it undermines a free market economy, which should be based on the “price, quality, and service” of a product, not a bribe; and, finally, it affects the “domestic competitive climate.”¹¹⁴ By requiring honest corporate recordkeeping, the bill aims to restore public confidence in U.S. businesses, the free market economy, and the U.S. government.¹¹⁵

The FCPA was the first point of reference for every American business and person doing business abroad. Côte d’Ivoire had its own series of anti-bribery or corruption laws which would have applied as well.¹¹⁶

The anti-bribery provisions of the FCPA make it unlawful for an agent of a U.S. business to “corruptly” pay, promise to pay, offer, gift, or authorize “the giving of anything of value to . . . [a] foreign official” in order to influence the foreign official.¹¹⁷

¹¹⁴ *Id.* at 4.

¹¹⁵ *See id.* at 7.

¹¹⁶ *See Anti-Corruption Laws in Côte d’Ivoire*, LEXAFRICA, <https://lexafrica.com/2014/04/anti-corruption-laws-in-cote-divoire/> (last visited Aug. 15, 2024) (before new laws adopted in the early 2010s, “the only legal framework after the Independence was the Ivoirian Code Pénal, or Penal Code, which criminalises passive and active bribery of public officials. This Code forbids the act of offering, giving and promising a bribe (active bribery), and the act of soliciting, asking for, agreeing to and accepting a bribe (passive bribery). It was, however, unclear if foreign bribery was criminalised in Côte d’Ivoire, since there was not direct reference to foreign public officials.”).

¹¹⁷ 15 U.S.C. § 78dd–1(a). On February 10, 2025, President Donald J. Trump issued an executive order directing the Department of Justice to pause enforcement of the FCPA for 180 days. Exec. Order No. 14209, 90 Fed. Reg. 9,587 (Feb. 14, 2025). However, the statute of limitations is five years for violations of the FCPA’s anti-bribery provisions; the recent executive order does not toll or change the statute of limitations for bribery violations. *Id.*; 18 U.S.C. § 3282.

As a federal law, the FCPA can be amended or repealed only by an act of Congress or declared unconstitutional by a decision by the United States Supreme Court. It cannot be amended, repealed, or declared unconstitutional by an executive order. *Terran ex rel. Terran v. Sec’y of Health & Hum. Servs.*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (power to

Specifically, the bribe—or “anything of value”—would have to be given with the purpose of either “(i) influencing any act or decision of such foreign official in [their] official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage”; or “obtaining or retaining business” through the influence of the foreign official.¹¹⁸ The term “corruptly” in the statute requires that the person paying the bribe intends to wrongfully influence the recipient.¹¹⁹ The term “is intended to connote that the offer, payment, and promise was

amend or repeal statutes is vested by the Constitution in Congress exclusively, not in the executive branch); *see* *Marbury v. Madison*, 5 U.S. 137 (1803) (Supreme Court power to declare an act of Congress unconstitutional); *see also* U.S. CONST. art. I, § 8 (Exclusive congressional powers to “regulate commerce with foreign nations” and to “make all laws which shall be necessary and proper” to executing this power); *and see* U.S. CONST. art. II, § 3 (The President shall “take care that the laws be faithfully executed.”).

A presidential directive to an executive-branch agency suspending the enforcement of a law passed by Congress implicates concerns of separation of powers between the three branches of government, particularly for an agency such as the Department of Justice with a tradition of independence and impartiality. U.S. CONST. art. I, § 1 (Congress holds the power to enact legislation); U.S. CONST. art. II, § 3; *see also About DOJ: Our Values*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> (last visited April 5, 2025). Examining this issue in full would require another article. Nevertheless, the current suspended enforcement of the FCPA does not obviate U.S. businesses’ obligation to follow the FCPA and does not relieve them of potential consequences in the event of its violation because the statute of limitations continues to run on any violation. *Compare* Exec. Order No. 14209, 90 Fed. Reg. 9,587 (Feb. 14, 2025) *with* 18 U.S.C. § 3282 *and* *Terran v. HHS*, 195 F.3d at 1312. In addition, business ethics requirements such as those embodied in the FCPA are good for global markets and U.S. businesses as determined by the U.S. Congress. *See* H.R. Rep. No. 95-640, at 4-5; *cf.* S. Rep. No. 95-114, at 4, 7. This article evaluates existing business ethics requirements in the FCPA and their inadequacies with regard to certain dangerous realities on the ground in foreign jurisdictions that are not dealt with by the law in its current form.

¹¹⁸ 15 U.S.C. § 78dd-1(a).

¹¹⁹ U.S. Dep’t of Just., Foreign Corrupt Practices Act Review Opinion Procedure Release No. 22-1 (Jan. 21, 2022), at 2-3.

intended to influence an official to misuse [their] official position.”¹²⁰ This involves more than just a general intent to commit a crime; it requires proof that the defendant acted with a purpose of achieving an unlawful result or a lawful result by unlawful means.¹²¹

The Second Circuit in *United States v. Ng Lap Seng* further elucidates this concept of intent, emphasizing that acting “corruptly” involves voluntary and intentional actions with an improper motive, aimed at influencing an official to misuse his position.¹²² In this case, where an individual was being charged with bribing UN officials,¹²³ the court did not require proof of a breach of duty; instead, it focused on the improper influence and misuse of position.¹²⁴

In the context of bribery of judges, the application of “corruptly” involves the intentional offering, giving, or promising of something of value with the intent to influence a judge’s decision or action.¹²⁵ This is akin to how the Second Circuit interpreted “corruptly” in *United States v. Alfisi*, where the court held that bribery does not necessarily require an intent to procure a breach of duty, but rather the intent to influence an official act.¹²⁶ Thus, in any case involving payments to a judge, the payments would constitute bribery if made with the intent to influence the judge’s official actions, regardless of whether those actions are legally proper.¹²⁷

The FCPA allows a “narrow exception” for facilitating payments and provides for two affirmative defenses: (1) the “local law” defense and (2) the “reasonable and bona fide business expenditure” defense. Additionally, “[s]ituations

¹²⁰ *Id.* at 3 (quoting *United States v. Kozeny*, 667 F.3d 122, 135 (2d Cir. 2011)).

¹²¹ *See United States v. Ng Lap Seng*, 934 F.3d 110, 142 (2d Cir. 2019) (quoting *Kozeny*, 667 F.3d at 135).

¹²² *See Seng*, 934 F.3d at 142 (quoting *Kozeny*, 667 F.3d at 135).

¹²³ *Seng*, 934 F.3d at 116.

¹²⁴ *See id.* at 142.

¹²⁵ *United States v. Alfisi*, 308 F.3d 144, 151 (2d Cir. 2002).

¹²⁶ *Id.* at 150.

¹²⁷ *See id.*

involving extortion or duress will not give rise to FCPA liability.”¹²⁸

In retrospect, for the past twenty odd years, I have questioned whether we could have made that payment under the various exceptions to the FCPA. Much that has been written on the FCPA involves the exception for “‘facilitating or expediting payments’ made in furtherance of routine governmental action.”¹²⁹ The act provides for making payments for the movement of goods, processing papers, providing telephone services and the like.¹³⁰ It would be of interest to posit an argument that the payment to the Supreme Court Justice would have amounted to a facilitation payment since the legally viable and supportable resolution would not be to uphold the registration of shares in G.A. Holding’s name.¹³¹ However, the interpretation of this exception has not gone beyond routine payments.

Due to the normalized business practice of bribing in Côte d’Ivoire at the time, few people in the government and community took pity on my plight or the company’s plight when the Supreme Court Justice solicited the bribe. Judges and public officials were bribed or requested bribes themselves on a regular and customary basis in Côte d’Ivoire.¹³² It was regular, normal, and a matter of business. The saying “One man’s corruption is another man’s business” is an apt description of the environment in which we operated. In various transactions,

¹²⁸ CRIM. DIV., U.S. DEP’T OF JUST., & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, *supra* note 95, at 23-28.

¹²⁹ *Id.* at 25.

¹³⁰ *Id.*

¹³¹ See Beverley Earle & Anita Cava, *When Is a Bribe Not a Bribe? A Re-Examination of the FCPA in Light of Business Reality*, 23 IND. INT’L & COMPARATIVE L. REV. 111, 116 (2013) (if facilitation payments can be made “when there is proof that any payment made is lawful under the written laws and regulations of the local country,” could a facilitation payment to ensure that the lawful outcome of a court case occurs also be allowable?).

¹³² See *Cote d’Ivoire 2001 Report on Human Rights Practices*, *supra* note 71 (“Judges serve[d] at the discretion of the executive, and there were credible reports that they submit[ted] to political pressure [and financial influence.]”).

it would be commonplace to find a family member of the President or other minister as a shareholder in the local company which would then go on to win a bid on a government contract. For example, a senior counselor to the President recounted to me once how he does not take bribes but, instead, he is willing to be a shareholder in a company and this is why he is not corrupt.¹³³ Hence, when I was approached by the Supreme Court Justice's intermediary for payment to rule on our behalf, it was viewed by others as a customary practice. Unfortunately, the differences in businesses practices between different countries was not, and is not currently, an exception to the FCPA.¹³⁴ Indeed, we were just naïve Americans trying to abide by the rules of the FCPA.

The more interesting exception to the FCPA, and the one potentially applicable in this case, is for payments made in cases of extortion or duress, or what I would refer to as the threat of bodily harm. In *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, the Department of Justice and the SEC state that "a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or

¹³³ This conversation took place while I was seeking his intervention with President Gbagbo in the Cora matter. The senior counselor did not seem to consider receipt of shares in a company as comparable to traditional monetary bribes, and he did not seem concerned that, as a government employee, his acceptance of shares from a bidding company could introduce a conflict of interest.

¹³⁴ Indeed, much of the commentary critiquing the FCPA surround this idea that "much of the difficulty that corruption presents from a regulatory standpoint is that activities that are considered improper in certain parts of the world would not be thought of as such in other regions." Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L. J. 470, 471. Such critics argue that "we should not analyze corruption in absolute moral terms; instead, we must address problems with the improper use of power in light of surrounding social, economic, and political contexts." *Id.* See also Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 238 (1997) ("[o]ne theory [in light of these cultural differences] suggests that the FCPA places unreasonable burdens on U.S. businesses and is therefore destined to fail.")

retaining business.”¹³⁵ Mere economic coercion is not enough to trigger the protections of this exception.¹³⁶ The bribe must come under such intense circumstances that the U.S. company is stripped of the ability to make a “conscious decision” whether or not to pay the bribe.¹³⁷ The Department of Justice and the courts have recognized that companies in “high-risk countries” are subject to genuine threats to freedom, life, and bodily harm.¹³⁸ Due to this focus on violence and imminence, it is no surprise that, in situations in which it was determined that the sanctions of the FCPA did not apply, actual physical threats were the precondition to the bribe.¹³⁹ *A Resource Guide to the U.S. Foreign Corrupt Practices Act* further states,

In order to establish duress or coercion, a defendant must demonstrate that the defendant was under unlawful, present, immediate, and impending threat of death or serious bodily injury; that the defendant did not negligently or recklessly create a situation where he would be forced to engage in criminal conduct . . . ; that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.¹⁴⁰

In fact, Congress gave a particularly illustrative example of this exception when it said that “a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose.”¹⁴¹

This distinction was further recognized by the court in *United States v. Kozeny*.¹⁴² In that case, the court concluded that

¹³⁵ CRIM. DIV., U.S. DEP’T OF JUST., & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, *supra* note 95, at 27 (footnote omitted).

¹³⁶ *Id.*

¹³⁷ *Id.* at 28.

¹³⁸ *Id.*

¹³⁹ See *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

¹⁴⁰ CRIM. DIV., U.S. DEP’T OF JUST., & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, *supra* note 95, at 111 n.174.

¹⁴¹ S. Rep. No. 95-114, at 11.

¹⁴² 582 F. Supp. 2d 535.

a business that pays a bribe under the threat of imminent physical harm will not be held to have violated the FCPA because they lacked the “intent to bribe the official.”¹⁴³ However, if a bribe is paid because a government official demanded the payment as a prerequisite to market entry or a contract signing, the bribe payor cannot make the same argument that they lacked the necessary intent “because [they] made the ‘conscious decision’ to pay the official.”¹⁴⁴ At the time of the proposed bribe, there was little question that paying a Supreme Court Justice of Côte d’Ivoire constituted a bribe under both the laws of Côte d’Ivoire and the U.S. FCPA, regardless of the duress exception.

First, the payment would go to a foreign government official to produce a favorable decision to a local company, which was a subsidiary of two American companies. Due to the moral implications of the bribe, I did not need a legal opinion from any lawyer to inform me of what I should do, but I also knew that the payment would be a bribe under the FCPA for these reasons. However, there was the possibility that the duress exception applied. At first glance, it is unlikely that the exception applied even though there was significant unrest in the country at the time, and therefore potential danger. In Abidjan during the spring of 2001, we were living in a heightened state of political and social unrest.¹⁴⁵ We could certainly have made the argument that we were living and working in difficult and violent circumstances. Côte d’Ivoire had undergone a military coup in December 1999 which was followed by a military dictatorship and then elections which were mired in corruption and injustice.¹⁴⁶ While it was still one of the top three economies in Sub-Saharan Africa,¹⁴⁷ the political and social instability made it economically unstable.¹⁴⁸ In addition, the shareholder of G.A. Holding, Alexandre Galley, was

¹⁴³ *Id.* at 541.

¹⁴⁴ *Id.*

¹⁴⁵ *See supra* Part I-B.

¹⁴⁶ *See supra* Part I-C.

¹⁴⁷ U.S. DEP’T OF STATE, *supra* note 82, at 1.

¹⁴⁸ *See* IMF, *supra* note 60.

a renowned bad character who would eventually find himself on the United Nations Security Council Resolution 1343 (2001) on Liberia.¹⁴⁹

Could all of these factors rise to the level of duress for the purpose of exempting the application of the FCPA to my proposed bribe? Probably not. In light of the extreme examples given by Congress and the courts of the duress exception, it is unlikely that these circumstances would have been enough for a court to rule that a bribe payment was completely void of 'conscious decision-making.' Additionally, while I was aware of the general instability throughout the country, I was unaware (at the time) of the danger that I faced. As discussed above, courts have not accepted that the term "corruptly" as used in U.S. anti-bribery statutes "requires evidence of an intent to procure a violation of the public official's duty."¹⁵⁰ In other words, even if the payment to the Supreme Court Justice would have encouraged him to conform to his duty as a public official and make a decision that was right all along, I would still have acted "corruptly" according to the FCPA.

The timing here is important to note. While the exception did not apply at the time the bribe was solicited, any potential bribe paid after Galley stormed the company would likely have met the required circumstances for duress. At the time of the storming, there was literally a gun to my head, so any potential payment would have been made to quell the potential violence, and not with the corrupt intent.¹⁵¹ Additionally, the company faced a constant state of potential danger over the next two years. At any point, in Galley's own words, it would have been nothing for him to kill me and my colleagues. Additionally, as I

¹⁴⁹ See *supra* notes 10-14 and accompanying text.

¹⁵⁰ *United States v. Alfisi*, 308 F.3d 144, 150 (2d Cir. 2002) (in relation to an anti-bribery violation under 18 U.S.C. § 201(b)(1)(A), the court was unpersuaded by the defendant's argument "that he should not be found guilty of bribery if he paid money to [a USDA inspector] solely to induce him to perform his job faithfully"; such a purpose does not vitiate the corrupt intent element.). See also *United States v. Ng Lap Seng*, 934 F.3d 110, 142-43 (2d Cir. 2019).

¹⁵¹ See *supra* notes 134-143 and accompanying text.

hired bodyguards and learned that I was on the hit-list for a person in power, I knew that there was a threat of imminent harm. Thus, any potential bribe made to ease the tensions would likely have fit the duress exception.

But, at the point that the duress exception would have applied, it was too late; the Supreme Court Justice had already issued his opinion; we had already faced potential violence; the danger was extant; and it was unlikely that a subsequent payment would have dissipated the dangerous atmosphere. Accordingly, the FCPA and its interpretation failed the company, the employees, the shareholders and me. The laws and customs did not protect us in time of conflict. Indeed, my non-payment to the Supreme Court Justice in no way enhanced economic development or fairness pursuant to the grand principle iterated by the US Senate and other government officials. In fact, the failure to pay the Supreme Court Justice accomplished the opposite. The nonpayment led to the loss in court, which created an atmosphere of danger and violence while threatening (and ultimately obliterating) the health of the company.

Truly, it is arguable that a favorable decision would have not only provided business and economic benefit to WWI and MAGIC, but job security to the employees of the company. What the laws and articles on these issues did not and do not address is that a favorable decision would have avoided the violence and threat to the personal safety of the employees. A favorable decision would have avoided the eventual closure of the company in October 2003, which happened solely because of the ongoing threat of bodily harm to individuals. In sum, a favorable decision would have allowed some 200 employees to keep their jobs, feed their families, together with the extended members of those families living outside of Abidjan. Ultimately, this is a real-life example of the FCPA having an *adverse* effect on the economic stability of the country and the safety of Americans abroad.¹⁵²

¹⁵² *Contra* CRIM. DIV., U.S. DEP'T OF JUST., & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, *supra* note 95, at 2 (stating how corruption "threatens stability and security by facilitating criminal activity within and across borders").

IV. REDEFINING BOUNDARIES: EXPANDING THE FCPA DURESS EXCEPTION IN UNCHARTED TERRITORIES

In retrospect and in light of the violent events that occurred, I would argue that the FCPA needs to be more broadly interpreted to expand the definition of *duress*. A payment to the Ivorian Supreme Court Justice, as requested through the intermediary under the circumstances described in Part I of this article above, should have been exempted from being qualified as a bribe under the duress exception to the FCPA. This example gives teeth to the critiques of the FCPA which say that there needs to be more respect in the law for other cultures and their practices.¹⁵³ In the end, there needs to be a more coherent and valid structure to determine when the rules and laws of society can be suspended in conflict.

The duress exception negates the requirement of corrupt intent.¹⁵⁴ The factual circumstances in a situation where there was no proverbial gun to the head would have to be analyzed in light of the political and social climate together with other factual circumstances to determine whether there was no corrupt intent at the time of making the bribe. In other words, the finding of no corrupt intent would also be generated out of the violent climate under which the company and its employees are operating. Judgment should be made based on the following:

- a. Is the bribe solicited? The offer of a bribe would not, by itself, indicate initial duress. On the other hand, if the party receiving the bribe is the one to initially request payment, particularly if this request is accompanied by an implicit or explicit threat, this could be an indicator of duress. In the situation of Cora described above, the Supreme Court Justice solicited the bribe. Neither the company executives nor I sought out the Justice in an attempt to influence his decision. Any payment would

¹⁵³ See sources cited *supra* note 134 and accompanying text.

¹⁵⁴ See *supra* Part III.

have been made in response to a request which would then trigger an analysis of the following four questions.

- b. Is there civil and military unrest in the country? Are people demonstrating? Was there any attempt in the past two years to overthrow the government? If the political environment is unstable, especially if this rises to the level of habitual violence, ordinary channels of business may be blocked, and there may be an imminent need to secure the physical safety of a company's employees, even if no one is holding a gun to anyone's head at that instant. Additionally, solicitation of a bribe in this context may indicate an implicit threat of violence.
- c. What is the economic condition of the country? Is the country an emerging market? Is it a frontier market? Less stable and less established markets may have more informal commercial norms, tying into the facilitation payments exception to the FCPA. Payment of bribes may also be an unwritten local norm where commercial law has not been formalized or where conditions on the ground do not match the laws on the books.
- d. What is the country's ranking on the Corruption Perceptions Index? A country with a low ranking, where the norms of doing business involve payment of bribes to public officials, is an environment where violence and harm is likely to result when local norms are not followed. The Corruption Perceptions Index is a particularly useful metric because it is based on the confidential ratings of international business executives and focuses on public sector corruption.
- e. Other factors could include, among other things, the reputation of the parties involved, any applicable sanctions, criminal behavior or prosecutions. Parties with a particularly violent reputation may solicit a bribe under duress without needing to hold a gun to anyone's head. Environments where there will be no legal consequences for bribe solicitation, and particularly environments where people who refuse to pay bribes

could be subject to negative legal consequences, may contribute to an atmosphere of duress.

V. FINAL REFLECTIONS: LESSONS LEARNED FROM THE FRONTLINES OF INTERNATIONAL BUSINESS

I spent two years fighting against Alexandre Galley in Côte d'Ivoire. We used the courts.¹⁵⁵ We lobbied the U.S. government with the now infamous firm BKSH & Associates, formerly BMSK which belonged to Paul Manafort, through his far more ethical associate, Riva Levinson.¹⁵⁶ We eventually were successful in having the United States government revoke Côte d'Ivoire's much-wanted African Growth and Opportunity Act Designee status, the first time any country had lost that trade preference.¹⁵⁷ I spent an enormous amount of time with the U.S. Embassy and Department of State officials, and Ivorian officials of every rank and status, trying to fix not just the judicial decision but regulatory issues and tax issues. I myself had been locked in police stations and government ministry offices in attempts to intimidate me, to make me go home. In the end, the problems of Cora were larger than could be managed. The country would break out in full-scale civil war in September

¹⁵⁵ See, e.g., *G.A. Holding S.A. v. Societe Comstar Cellular et. al.*, Chambre Civile et Commerciale of Cour d'Appel d'Abidjan (Côte d'Ivoire 2000); Supreme Court Decision #285/01, argument held May 10, 2001, decision issued June 1, 2001, *Annals de Justice* [official court record] Vol. 37 Folio 10 #1353 Slip 321/1.

¹⁵⁶ LEVINSON, *supra* note 29, at 90-91.

¹⁵⁷ *AGOA Country Eligibility: Background*, AGOA.INFO, <https://agoa.info/about-agoa/country-eligibility.html> (last visited June 18, 2024) ("[O]n May 16, 2002 the Ivory Coast (Côte d'Ivoire) was designated as the 36th AGOA eligible country (the Ivory Coast subsequently lost, and later regained beneficiary status)."); *Ivory Coast Seeks to Requalify for AGOA*, AGOA.INFO (Nov. 23, 2007), <https://agoa.info/news/article/4000-ivory-coast-seeks-to-requalify-for-agoa.html>; K. RIVA LEVINSON, *supra* note 29, at 90-91. See also *Bilateral Meeting, Côte d'Ivoire-United States*, Final Communique (Jan. 25, 2002) [this is a joint diplomatic press release] (on file with author).

2002 and many lives would be lost. Stability came finally with the election of Alassane Dramane Ouattara almost 10 years later, but only after much pain and suffering for the country. Cora was perhaps a microcosm of the greater and larger issues affecting a country at war with itself.