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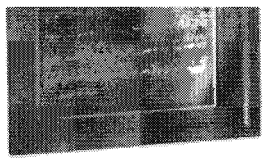

M. Cherif Bassiouni

We are honored to dedicate this issue of the *Journal* to an indefatigable champion of human rights, Cherif Bassiouni.

Professor Bassiouni was born in Egypt in an aristocratic family of distinguished lawyers. During his formative years, he prepared himself for a life of dedication and commitment to the cause of human rights and peaceful resolution of international disputes. As a teacher, a scholar and an activist, Professor Bassiouni has touched many lives and inspired many to follow his path. And, he has consistently remained true to the cause of peace, justice and human rights.

Professor Bassiouni began his teaching career at DePaul University College of Law in 1964. He specialized in international criminal law and has taught the subject since 1974. He published his first book on criminal law in 1969 and since then he has been a prolific writer, having authored or edited 65 books and over 200 law review articles in scholarly journals published in many countries and in several languages. His works have been relied upon by the highest courts in several countries and the United Nations as definitive authority.

Among Professor Bassiouni's stellar accomplishments, which are many and varied, we will highlight a selected few. He served as chair of the UN Commission of Experts to investigate violations of international humanitarian law in the former Yugoslavia; the Commission's exemplary work was done, although underfunded and understaffed by the UN, with his own efforts to raise the necessary resources from governments and private foundations. The Commission served as a model for the later Rwanda Commission. Professor Bassiouni was the youngest Secretary-General of the prestigious International Association of Penal Law and now serves with distinction as its President. He founded the International Institute of Higher Studies in Criminal Sciences in 1972 in Siracusa, Sicily, which has become a premier center for conferences, seminars and training sessions for jurists from all over the world. It was there that, in 1977, he co-chaired a Meeting of the Committee of Experts that drafted what subsequently became the 1984 UN Convention Against Torture. Since the 1980s the Institute has trained over 2000 jurists from almost every Arab country, Central and Eastern European Countries, and Russia, on human rights and international criminal law and criminal procedure.

In 1990, Professor Bassiouni founded the DePaul International Human Rights Law Institute and he serves still today as its President. The Institute has been particularly active in support of the UN's work for establishment of the International Criminal Court (ICC), a cause that he has long advocated. Even in the Cold War era, when most observers thought it was hopeless to seek the establishment of an ICC, Professor Bassiouni was its most ardent proponent. Later he was unanimously elected to chair the drafting committee of the UN diplomatic conference that produced the treaty and statute for the ICC.

Professor Bassiouni has served as a Special Rapporteur for the United Nations

Commission on Human Rights and has been a consultant with the US Department of State and the United Nations. He has actively sought peaceful settlement of the Israeli - Palestinian conflict since the 1960s. In 1975 he and Professor Morton Kaplan of the University of Chicago presented the guiding principles of peace for a comprehensive framework agreement to be implemented in peace agreements between Israel and Egypt, Jordan, Syria, Lebanon, and the Palestinians. Since that time, he has vigorously and ceaselessly continued his efforts, working with the White House, the Department of State, and several governments and leaders in the Middle East.

Cherif Bassiouni has a warm, charming, energetic, and engaging personality. In 1999 he delivered the distinguished McDougal Lecture at the University of Denver College of Law. In introducing him, Ved Nanda, Professor of International Law at DU and faculty advisor to this *Journal,* paid tribute to his longtime friend Professor Bassiouni as "a man of vision, a man of courage, and a man of action." We salute Professor Bassiouni with this dedication.

WORLD WAR I: "THE WAR TO END ALL WARS"AND THE BIRTH OF A HANDICAPPED INTERNATIONAL CRIMINAL JUSTICE SYSTEM

M. CHERIF BASSIOUNI*

"Strategy is a system of stop-gaps."

—Moltke[1]

INTRODUCTION

The words of Von Moltke, Germany's well-known general, are an apt prelude to the strategy of justice pursued by the Allies after World War I. It was, indeed, a "system of stop-gaps."

World War I, commonly referred to as the "Great War" and "the war to end all wars," took place between 1914 and 1918 and "was the first general war, involving all the Great Powers of the day, to be fought out in the modern, industrialized world."[2] The trigger for the war was an incident that occurred in the volatile Balkans[3] on June 28, 1914, in which Archduke Franz Ferdinand and his wife were assassinated by Gavrilo Princip as they rode in a car in Sarajevo.[4] The

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* Professor of Law, President, International Human Rights Law Institute, DePaul University College of Law; President, International Association of Penal Law; President, International Institute for Higher Studies in Criminal Sciences.

1. ERICH VON MANSTEIN, LOST VICTORIES 367 (1958). *See* Gunter E. Rothberg, *Moltke, Schlieffen & the Doctrine of Strategic Envelopment, in* MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 299 (Peter Paret ed., 1986).

> Moltke believed that war, given its uncertainties and changing circumstances, was more an art than a science. Consequently, there could be no "general rules" or "precepts." Instead, strategy could be no more than a "system of expedience" based on the strength of character and experience of the commander and his ability to make rapid decisions under stress. [C]ommon sense and opportunity, based on the honing of personal judgment were in fact his recipe for a commander's strategic decisions.

Id. See also EBERHARD KESSEL, MOLTKE (1957).

2. DAVID STEVENSON, THE FIRST WORLD WAR AND INTERNATIONAL POLITICS 1 (1988).

3. The First and Second Balkan Wars had just been fought in the region in 1912 and 1913. *See* M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 10 (1996) [hereinafter BASSIOUNI, LAW OF THE ICTY] ("The two Balkan wars involved ethnic conflict on a massive scale. The worst atrocities appear to be related to efforts to unite the peninsula's Serbian population."). *Cf.* M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994).

4. JOHN KEEGAN, THE FIRST WORLD WAR 49 (1999).

plot to assassinate the heir to the Hapsburg throne was planned by a secret Serbian nationalist organization known as the Black Hand.[5] Bosnia, which had been annexed into the Austro-Hungarian Empire in 1908, was viewed by such nationalist groups as an extension of Serbia.[6] On July 28, 1914, following a Hapsburg ultimatum and the Serbian government's refusal to allow Austro-Hungarian representatives to participate in its official investigation of the assassinations, Austria-Hungary declared war on Serbia.[7]

What began as nothing more than a local Balkan conflict, however, soon escalated into a continental one.[8] Following Russia's general mobilization on July 30, 1914, and France's refusal to declare its neutrality in the event of a Russo-German confrontation, Germany declared war on Russia and France on August 1 and August 3, respectively.[9] Then, on August 4, 1914, Great Britain declared war on Germany after the latter invaded Belgium.[10]

The Allied and Associated Powers included the major powers of the *Triple Entente*, namely: Russia; France; and Great Britain; as well as, Belgium; Serbia; Japan; Italy; and numerous other nations.[11] The United States did not officially enter the conflict until April 6, 1917, when it declared war on Germany and joined the Allied and Associated Powers.[12] The Central Powers' alliance comprised

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5. *See id.* ("[T]hough the terrorists were all Austrian subjects, they had been armed in Serbia and smuggled back across the Austrian border by a Serbian nationalist organization."); STEVENSON, *supra* note 2, at 11-12.

6. *See* KEEGAN, *supra* note 4, at 48-49; *see also* STEVENSON, *supra* note 2, at 12 ("After the annexation a loosely organized group of secret societies, the Young Bosnians, turned to assassination as a means of touching off a revolutionary movement that would attain their goal of an independent federation uniting the South Slavs. From this milieu the Sarajevo conspirators came."). This was the basis for Serb ultra-nationalists in 1992 to claim portions of Bosnia as being part of "Greater Serbia." *See* BASSIOUNI, LAW OF THE ICTY, *supra* note 3, at 33, 37; *see also* MISHA GLENNY, THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS, 1804-1999, at 635-36 (2000).

7. *See* KEEGAN, *supra* note 4, at 55-56, 58; STEVENSON, *supra* note 2, at 11. It is interesting to note that if Serbia had pursued an effective and transparent investigation, World War I may not have commenced. Thus, legal accountability could have prevented war.

8. *See* STEVENSON, *supra* note 2, at 11. Influences that helped to catapult this localized conflict into a war of global proportions included antagonism between the great alliances of the Triple *Entente* and the Triple Alliance (weakened, in part, by Italy's secret defection), nationalism, an accelerated arms race, economic rivalry between Britain and Germany, bitterness over the German annexation of Alsace-Lorraine following the Franco-Prussian War of 1870, and Russian designs on the Straits. *See id.* at 18-22; HARRY ELMER BARNES, THE GENESIS OF THE WORLD WAR: AN INTRODUCTION TO THE PROBLEM OF WAR GUILT 43-90 (Howard Fertig, Inc. 1970) (1926). *See generally* BARBARA W. TUCHMAN, THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890-1914 (1966).

9. *See* STEVENSON, *supra* note 2, at 17-29. Germany's declaration of war on Russia was particularly revealing of inter-European shifting alliances in view of Kaiser Wilhelm II's personal friendship with Czar Nicholas II. *See* CORRESPONDANCE ENTRE GUILLAUME II ET NICOLAS II: 1894-1914 (1924) (revealing how close that the two leaders were, as they referred to each other as "Willy" and "Nikki").

10. *See* STEVENSON, *supra* note 2, at 35.

11. *See* FRANCIS A. MARCH, HISTORY OF THE WORLD WAR: AN AUTHENTIC NARRATIVE OF THE WORLD'S GREATEST WAR 73-74 (1919). The other countries comprising the Allied and Associated Powers were Brazil, China, Cost Rica, Cuba, Greece, Guatemala, Haiti, Honduras, Liberia, Montenegro, Nicaragua, Panama, Portugal, Romania, San Marino, and Siam. *See id.*

12. *See* MARCH, *supra* note 11 at 74; Joint Resolution Declaring that a State of War Exists

Austria-Hungary, Germany, the Ottoman Empire, and Bulgaria.[13] In total, twenty-eight countries entered the war.[14]

The number of casualties from the war was unprecedented - totaling 33,434,443.[15] The final tally of the dead was 7,781,806, in addition to 18,681,257 persons who were wounded,[16] and no one knows how many among the latter died of their injuries or related illnesses. Russian, German, and French deaths due to combat or disease were estimated at 4,696,404.[17] World War I was the first time that asphyxiating gas and mustard gas were utilized as weapons in warfare.[18] These chemical agents not only caused painful deaths and immediate illness, but permanent injuries as well.[19] In time, many of the chemical agents' victims died of their injuries or of health complications.[20] In addition, there were many allegations of atrocities being committed by combatants against civilians, including claims that women and children had been used as human shields, mutilated, and systematically executed.[21]

After four years of brutal trench warfare characterized by the Napoleonic-era strategy of massive frontal attacks,[22] which caused so many senseless casualties,

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Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same, Apr. 6, 1917, *reprinted in* JAMES BROWN SCOTT, A SURVEY OF INTERNATIONAL RELATIONS BETWEEN THE UNITED STATES AND GERMANY, AUGUST 1, 1914—APRIL 6, 1917, at xxi-xxii (1917).

13. *See* MARCH, *supra* note 11, at 73-74.

14. *Id.* at 21. *See supra* notes 11-13 and accompanying text.

15. *See* MARCH, *supra* note 11, at 32.

16. *Id.*

17. *Id.* at 31-32.

18. KEEGAN, *supra* note 4, at 197-99.

19. *See id.* at 197, 199.

20. This led to the adoption in 1925 of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65, 26 U.S.T. 571.

21. *See* MARCH, *supra* note 11, at 97-98; *cf.* JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 9-10 (1982). In Annex I to its 1919 *Report*, the Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties cited to the following examples of offenses alleged to have been committed by the Central Powers: "A German infantry captain put three children round him to protect him from Belgian fire;" "[f]requent tortures—before murder; tearing out eyes, cutting off nose and ears, also breasts of women;" "[w]omen undressed and nailed to the ground;" and "[c]ivilians compelled to march in front of Austro-Hungarian troops as a shield." 6 DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32, VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 32-33 (photo. reprint 2000) (1919) [hereinafter VIOLATION OF THE LAWS AND CUSTOMS OF WAR].

22. *See* KEEGAN, *supra* note 4, at 175-80, 182. Trench warfare in "no man's land" was dominated by the British policy of "redigging trenches closer to the enemy's and staging frequent trench raids." *Id.* at 182. As described by Sir John Keegan:

> The first trench raid appears to have been mounted on the night of 9/10 November 1914 near Ypres by the 39th Garwhal Rifles of the Indian Corps. Fierce irruptions into enemy positions under cover of darkness was a traditional feature of Indian frontier fighting and this first murderous little action may have represented an introduction of tribal military practice into the "civilised" warfare of western armies. The event set a precedent of

the war finally ended on November 11, 1918, when a German delegation, led by Secretary of State Matthias Erzberger, signed the armistice agreement on behalf of Germany in an isolated railway car located in the Compiègne Forest near Paris.[23] Unfortunately, rather than promoting lasting European stability, the harsh terms of the armistice[24] and the Carthaginian peace dictated by the Allies at Versailles sowed the seeds that brought about the Second World War two decades later.[25] Thus, the "war to end all wars" was a prelude to another war whose consequences were even more devastating than the first one.

The Treaty of Versailles forced upon Germany draconian reparation measures. For example, the treaty required Germany to cede to the Allies all of its merchant ships over 1,600 tons, plus one-quarter of its fishing fleet;[26] to deliver huge quantities of coal to numerous Allied nations, as well as Benzol, coal tar, and ammonium sulfate to France;[27] and, despite the existence of famine conditions in

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> which the British were to make a habit and which the Germans were to copy. The French, despite their long experience of tribal warfare in North Africa, never found a similar enthusiasm for these barbaric flurries of slash and stab. *Id.*

23. *See* 12 AMERICANIZATION DEP'T, VETERANS OF FOREIGN WARS OF U.S., AMERICA: GREAT CRISES IN OUR HISTORY TOLD BY ITS MAKERS 158-65 (1925) [hereinafter AMERICA: GREAT CRISES]. After Germany defeated France in 1940, Adolph Hitler, in an act of symbolic irony, dictated armistice terms to the French in the very same railroad car. DAVID IRVING, HITLER'S WAR 295 (1990). Hitler retrieved the dining car from its permanent display in Paris and placed it in the identical location in the Compiègne Forest in which it sat in 1918. *Id.*

24. *See* C. PAUL VINCENT, THE POLITICS OF HUNGER: THE ALLIED BLOCKADE OF GERMANY, 1915-1919, at 162-65 (1985) (noting potential connection between armistice's continuation of Allied hunger blockade of Germany and the rise of National Socialism).

25. *See* LEON DEGRELLE, HITLER: BORN AT VERSAILLES 532 (1987) ("The inequity of the Versailles Peace Treaty created the exceptional circumstances that paved Hitler's road to power. All the obstacles that would have stood in his way were swept away by the treaty. Hitler as a political man was born at Versailles."); KEEGAN, *supra* note 4, at 3 ("The Second World War, five times more destructive of human life and incalculably more costly in material terms, was the direct outcome of the First."); *cf.* IRVING, *supra* note 23, at 234-35 ("[President Roosevelt] himself recognized that the real reason for the war lay in the one-sided *Diktat* of Versailles which made it impossible for the German people to acquire a living standard comparable with that of their neighbors in Europe.").

In fact, Hitler wrote publicly about the significance of the Treaty of Versailles for revitalizing Germany:

> In 1919, when the Peace Treaty was imposed on the German nation, there were grounds for hoping that this instrument of unrestricted oppression would help to reinforce the outcry for the freedom of Germany. Peace treaties which make demands that fall like a whip-lash on the people turn out not infrequently to be the signal of a future revival.
>
> . . . .
>
> Each point of that Treaty could have been engraved on the minds and hearts of the German people and burned into them until sixty million men and women would find their souls aflame with a feeling of rage and shame; and a torrent of fire would burst forth as from a furnace, and one common will would be forged from it, like a sword of steel. Then the people would join in the common cry: "To arms again!"

ADOLPH HITLER, MEIN KAMPF 347-48 (James Murphy trans., photo. reprint n.d.) (1939).

26. *See* Degrelle, *supra* note 25, at 509; U.S. DEP'T OF STATE, THE TREATY OF VERSAILLES AND AFTER: ANNOTATIONS OF THE TEXT OF THE TREATY 490-99 (photo. reprint, Greenwood Press 1968) (1944) [hereinafter VERSAILLES AND AFTER] (reprinting and providing commentary on Annex III to Part VIII of the Versailles Treaty).

27. *See* DEGRELLE, *supra* note 25, at 511; VERSAILLES AND AFTER, *supra* note 26, at 508-15 (reprinting and providing commentary on Annex V to Part VIII of the Versailles Treaty).

Germany, to provide the Allies with a substantial portion of its remaining livestock.[28] In addition, in April 1921, the Reparation Commission set the total amount of damage on which reparations were due at 132 billion gold marks.[29] In the assessment of Lenin, who was certainly no friend to Germany: "A peace of usurers and executioners has been imposed on Germany. This country has been plundered and dismembered . . .. All its means of survival were taken away. This is an incredible bandits' peace."[30]

Reparations and collective sanctions are fundamentally unfair. They punish not only the innocent of the time, but also generations of innocents to come. Such injustice breeds the call for revenge and can always be counted on to bring about renewed conflict. Indeed, injustice is never conducive to peace. The economic benefits that accrued to the Allies as a result of the Versailles Treaty produced dire economic conditions in Germany and fed the hungry the desire for redress. This led to the formation of the German National Socialist Labor Party, a labor-oriented movement dedicated to combating the indignities forced upon Germany by the treaty.[31] It was that party under Hitler's leadership that brought about World War II and all its related tragedies, the worst of which was the Jewish Holocaust.[32]

The Allies needed to personify the cause of this brutal and humanly costly war to satisfy the masses' desire for revenge or justice, as the case may be. The German Kaiser was easily identifiable as such a figure and was to be tried;[33] however, because of the blood relations between the German and English monarchies, England's desire to prosecute the Kaiser, even though professed, remains suspect. The government of the Kingdom of the Netherlands, whose royal

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28. *See* DEGRELLE, *supra* note 25, at 511-12; VERSAILLES AND AFTER, *supra* note 26, at 499-508 (reprinting and providing commentary on Annex IV to Part VIII of the Versailles Treaty).

29. *See* VERSAILLES AND AFTER, *supra* note 26, at 433. The lessons are unfortunately seldom remembered, and in the aftermath of the Gulf War in 1991, the United Nations Security Council, led by the United States, imposed harsh economic sanctions on Iraq that in a decade destroyed its economy and caused the death of an estimated 1 million children and elder persons due to lack of medicine and food. There is no escaping the responsibility of these consequences, which can only be deemed criminal. *See* IRAQ UNDER SIEGE: THE DEADLY IMPACT OF SANCTIONS AND WAR (Anthony Arnove ed., 2000).

30. DEGRELLE, *supra* note 25, at 528.

31. *See* Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 520 (1945) ("It is well known that the political responsibility for the Treaty of Versailles was a main cause for the breakdown of the Weimar Republic and the rise of national socialism."); *supra* note 25 and accompanying text; *see also* HITLER, *supra* note 25, at 193.

> The reservoir from which the young movement has to draw its members will first of all be the working masses. Those masses must be delivered from the clutches of the international mania. Their social distress must be eliminated. They must be raised above their present cultural level, which is deplorable, and transformed into a resolute and valuable factor in the folk-community, inspired by national ideas and national sentiment.

HITLER, *supra* note 25, at 193.

32. *See, e.g.*, M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202 (1979).

33. *See infra* note 46 and accompanying text.

family was also related to the Kaiser, gave him refuge after he abdicated.[34] The Allies' public opinion also demanded war crimes trials of the defeated Germans. But the Allied governments' will to do so dissolved between 1919-1922 and the desire to "let bygones be bygones," accompanied by the fear of internal revolution due to fierce German opposition to war crimes trials, led the Allies to acquiesce in Germany's request to conduct in 1923 only a limited number of trials before the national Supreme Court at Leipzig.[35] The experience was disastrous.

Lastly, Allied attempts to prosecute Turkish officials for the Armenian massacres committed during World War I were aborted.[36] This was due to changing political circumstances in the region, particularly after the 1917 Russian Revolution under Lenin's ruthless leadership and the establishment of what the Allies called the Bolshevik Regime. This led the Allies to assuage the new Turkish government and to avoid causing it embarrassment through prosecutions for crimes against the Armenians, especially in light of Turkish claims that the Armenians had sided with the "Bolsheviks" during the War.

PRELUDE TO PARIS

The Paris Peace Conference held its first plenary session on January 18, 1919.[37] The purpose of the Conference was to effect peaceful settlements of the disputes arising out of World War I.[38] At the Conference the British Empire, France, Italy, Japan, and the United States had five delegates each.[39] Belgium, Brazil, and Serbia had three delegates apiece.[40] Australia, Canada, China, the Czecho-Slovak Republic, Greece, India, the Kingdom of the Hedjaz, Poland, Portugal, Romania, and South Africa were each allotted two delegates.[41] The countries of Cuba, Guatemala, Haiti, Honduras, Liberia, Montenegro, New Zealand, Nicaragua, Panama, and Siam each had one delegate.[42] The Conference officially ended on January 21, 1920.[43] Numerous treaties were negotiated as a result of the efforts of the Paris Peace Conference,[44] the most influential being the Treaty of Versailles with Germany. However, before examining the negotiations that took place at the Paris Peace Conference in connection with war crimes prosecutions, it is instructive to briefly describe the fervent political climate in which such deliberations took place.

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34. *See infra* notes 246-256 and accompanying text.

35. *See infra* notes 257-305 and accompanying text.

36. *See infra* notes 306-334 and accompanying text.

37. *See* F.S. MARSTON, THE PEACE CONFERENCE OF 1919: ORGANIZATION AND PROCEDURE 235 (photo. reprint, Greenwood Press 1981) (1944).

38. *See id.* at 84.

39. *See* MARCH, *supra* note 11, at 739.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* MARSTON, *supra* note 37, at 246.

44. *See id.* at 234-46.

At the end of World War I, there was a great outcry from the *Entente*, and especially from Great Britain, for the trial of Wilhelm II of Hohenzollern, Emperor of Germany.[45] The factors that contributed to this demand to indict the Kaiser included the general public's aversion to the horrors of a protracted war, the success of newly developed wartime propaganda techniques,[46] and the desire of Allied politicians to advance their public standing by acting on their wartime pledges to bring to trial the Germans responsible for the war and those who committed war crimes.[47] This led American Secretary of State Robert Lansing, who served as chairman of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties established on January 25, 1919, during the Paris Peace Conference, to argue that the Europeans' plan to place the Kaiser on trial was nothing more than an exercise in political pandering.[48]

Nevertheless, the passion of the times pervaded deep into legal circles. For example, one author, writing in 1919 on the subject of the Kaiser's status under international law, stated: "The Germans, by their ferocious and bestial methods, have acted in a manner without precedent in the conduct of this Society of Nations for over three centuries. We are consequently entitled, in maintaining our rule of law, to act without precedent under that law . . . ."[49] The writer then proposed, "[u]nder the extraordinary conditions of the problem" with the Kaiser,[50] to ignore the *ex post facto* principle *nulla poena sine lege* and to instead prescribe a penalty that was not established prior to the war[51] - in the words of this attorney, "the

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45. It was none other than David Lloyd George, Britain's Prime Minister, who, towards the end of the Great War, exclaimed, "Hang the [K]aiser!" DEGRELLE, *supra* note 25, at 17. *See also* James Brown Scott, *The Trial of the Kaiser, in* WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, at 231, 240 (Edward Mandell House & Charles Seymour eds., 1921) ("Mr. Lloyd George appeared to be bent on trying the kaiser.").

46. *See* DEGRELLE, *supra* note 25, at 17 ("[W]ilhelm's reputation was effectively hanged by the war propaganda of the day . . . .") ("[L]arge numbers of people still believe the German emperor to have been a particularly baneful species of ogre . . . ."); WILLIS, *supra* note 21, at 41 (describing film entitled "The Kaiser, the Beast of Berlin," which portrayed alleged German atrocities in Belgium).

> British propaganda mills had devised horror stories to suit each country's population. They were to be the cannon fodder, and they had to be convinced. For four years the concoctions of the London propagandists would ceaselessly fill the ears of millions of gullible people. In big headlines the press kept pouring out enormous lies about Belgian Red Cross nurses being shot by Hun firing squads; it depicted little girls praying to the Virgin Mary to replace hands that had been savagely chopped off by barbaric Teutons.

DEGRELLE, *supra* note 25, at 522. For an exposé of wartime propaganda tales, *see* ARTHUR PONSONBY, FALSEHOOD IN WAR-TIME: CONTAINING AN ASSORTMENT OF LIES CIRCULATED THROUGHOUT THE NATIONS DURING THE GREAT WAR (1928).

47. WILLIS, *supra* note 21, at 69.

48. *See id.* (noting that Lansing felt that "the scheme to try the kaiser was solely the result of Lloyd George's election campaign").

49. R. Floyd Clarke, *The Status of William Hohenzollern, Kaiser of Germany, Under International Law*, 53 AM. L. REV. 401, 414 (1919). It should be noted that many of the casualties occurring in the war resulted from the archaic strategy of frontal attacks; however, it was much easier to simply blame these casualties on German "militarism." *See supra* notes 22, 46 and accompanying text.

50. *See* Clarke, *supra* note 49, at 425.

51. *See id.* at 416-17.

Kaiser must die."[52] "Th[is] penalty," the author added, "we are entitled to add by reason of our victory . . .."[53] Fortunately, other legal scholars of the period addressed the question of the legal propriety of trying the Kaiser with cooler heads and more rational legal arguments.[54]

In early January 1919, leaders of the Allies met to determine an outline for the upcoming peace conference.[55] At that meeting, Lloyd George, Prime Minister of Great Britain, suggested that a special commission be established to consider questions pertaining to the responsibilities for the causes of the war.[56] President Wilson responded that a committee was unnecessary because the leaders themselves could resolve such a problem.[57] Wilson apparently had in mind the realistic prospect of exiling the Kaiser in the same manner that Napoleon had been banished to St. Helena almost a century before.[58] Lloyd George, however, failed to follow Wilson's lead and insisted on the committee approach.[59] James Willis, in his leading study on the subject, described this decision as "Lloyd George's single most important error."[60]

By insisting on a commission, Lloyd George unleashed a process that, due to bitter disputes between the Allies, not only disinclined the Dutch to cooperate with

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52. Clarke, *supra* note 49, at 415.

53. *Id.* at 417.

54. *See, e.g.*, James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920); Quincy Wright, *The Legal Liability of the Kaiser*, 13 AM. POL. SCI. REV. 120 (1919).

55. *See* WILLIS, *supra* note 21, at 68. It was very unusual to hold a pre-conference meeting; likewise, it was peculiar to have the conference's investigative commission issue its decision prior to the signing of the peace treaty. In addition, such proceedings were conducted without all parties being present, were directed specifically against the Germans, and, like Nuremberg, represented the viewpoint of only one side of the conflict.

56. *Id.*

57. *Id.*

58. *See id. Cf.* L.C. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENV. J. INT'L L. & POL'Y 285, 302-03 (1996).

> As early as 1815 it was suggested that Napoleon should be brought to trial for having violated the 1814 agreement exiling him to Elba. After his escape and return to France where he again raised an army, he was declared by the Congress of Vienna "to have destroyed the sole legal title upon which his existence depended . . . placed himself outside the protection of the law, and manifested to the world that it can neither have peace nor truce with him . . . [and placed himself] outside the civil and social relations, [so] that, as Enemy and Pertubator of the World, he has incurred liability to public vengeance."

While Blücher would have had him shot as an "outlaw," Napoleon was regarded "by the Powers as their Prisoner" and placed in the custody of the British who exiled him to St. Helena. Green, *supra* (quoting 2 JAMES GARNER, INTERNATIONAL LAW AND THE WORLD WAR 438-39 (1920)).

59. *See* ARTHUR WALWORTH, WILSON AND HIS PEACEMAKERS: AMERICAN DIPLOMACY AT THE PARIS PEACE CONFERENCE, 1919, at 214 (1986).

> At Paris, Wilson suggested that the question of national and individual crimes against decency be settled in the comparative privacy of the Supreme Council; but when Lloyd George brought up the matter in that body for a second time, it was decided to place the subject on the agenda of a plenary session. As a result the Peace Conference decided . . . to create a commission to study the question. *Id.*

60. WILLIS, *supra* note 21, at 68.

the victorious powers,[61] but ultimately sounded the death knell for the establishment of an international tribunal to try the Kaiser. Although Lloyd George may simply have been seeking to set new international precedent with respect to aggressive warfare,[62] the referral of significant issues of political import to committees, which can be mired in endless discussions and fail to reach effective and timely decisions, often evidences *realpolitik* at its finest.[63] Such a subterfuge permits *realpoliticians* to publicly announce their purported goals of justice while in fact burying them in a bureaucratic maze from which they will never emerge or emerge as otherwise intended.[64]

The continuous clamor in the French, Belgian, and British press for war crimes prosecutions[65] represented the rise in influence of modern world public opinion—similar to the present-day international civil society clamoring for accountability for international crimes.[66] The demand for war trials following the First World War, therefore, constituted a mixture, rather than a convergence, of domestic political pressures for accountability and the realization of the political goals of the Allied governments. Thus, while the war crimes issue was utilized to satisfy popular opinion in France, Belgium, and Britain, it was also used by the Allied governments to extract exorbitant reparations from Germany.[67]

As with any conflict, its end brings about a feeling of relief which, after the original impulse for accountability, historically asserted by the victors against the defeated, is followed by a certain lassitude. This weariness, which may well be the product of a socio-psychological condition arising out of war's trauma, leads to the desire to forget the pain and to move beyond the events that brought about these feelings. Governments, however, tend to view such matters from the perspective of state interests and, more often than not, use the public's desire to psychologically "move on," or the sense of lassitude that sets in after the heat of passion following war has abated, to manipulate justice for political ends.[68]

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61. *See* WILLIS, *supra* note 21, at 68..

62. *Cf. id.*

63. The use of multiple committees, different mandates, different venues, and divergent schedules serve to dilute public opinion, erode focus, and cause people to forget the significance of the issue at hand. In addition, by making the process very costly, *realpoliticians* can justify the eventual cessation of the committee process and thereby derail any final resolution.

64. It was Field Marshal Von Blücher, the aged Prussian commander whose timely arrival at the Battle of Waterloo led to Napoleon's defeat, who stated, following the famous battle, "May the pens of the diplomats not ruin again what the people have attained with such exertions." JOHN BARTLETT, FAMILIAR QUOTATIONS 469 (14th ed. 1968) (quoting Gebhard Leberecht von Blücher).

65. *See* WILLIS, *supra* note 21, at 141-42.

66. *See* M. Cherif Bassiouni, *The Need for International Accountability*, *in* 3 INTERNATIONAL CRIMINAL LAW 3, 3-30 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, *The Need for International Accountability*]; M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000) [hereinafter Bassiouni, *Combating Impunity*].

67. *See* WILLIS, *supra* note 21, at 127, 141-43.

68. *See, e.g.*, Bassiouni, *Combating Impunity*, *supra* note 66, at 409-11; M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 17-21 (1997) [hereinafter Bassiouni, *From Versailles to Rwanda*].

ALLIED COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES

On January 25, 1919, exactly one week after the formal opening of the Preliminary Peace Conference at Paris, the Allied and Associated Powers appointed a commission to inquire into the causes and responsibilities for the recently concluded war.[69] The rapid establishment of the commission was in harmony with the demands of Britain's Lloyd George and French Premier Georges Clemenceau that the subject of war crimes be given first priority at the Peace Conference,[70] thus evidencing the rise of the value of justice in the context of post-conflict settlements.

This commission, which was the first modern international investigative body of its kind,[71] was named the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission).[72] It was composed of fifteen members, including two members from each of the respective Great Powers, the United States, Britain, France, Italy, and Japan, and one member from each of the following countries: Belgium, Greece, Poland, Romania, and Serbia.[73] The Commission met in secret for two months before issuing its final report.[74]

The mandate presented to the Commission sought inquiry into the following areas: (1) the responsibility for the causes of the war; (2) the facts relating to violations of the laws and customs of war committed by the Central Powers; (3) the degree of responsibility that should attach to individual members of the enemy forces, "however highly placed;" and (4) the constitution and procedure for a

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69. VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at v. The Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, March 29, 1919 [hereinafter 1919 Commission Report], is reprinted at pages 4-27 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21. The Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919 [hereinafter U.S. Dissenting Report, 1919] is included as Annex II to the 1919 Commission Report and is reprinted at pages 58-79 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21. The Reservations by the Japanese Delegation, April 4, 1919 [hereinafter Japanese Dissenting Report, 1919], are included as Annex III to the 1919 Commission Report and are reprinted at pages 79-80 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21.

70. *See* WILLIS, *supra* note 21, at 68.

71. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 14. The commission was established five months prior to the signing of the Treaty of Versailles. However, in 1474, Peter von Hagenbach was put on trial and convicted by an *ad hoc* tribunal for crimes against the citizens of Breisach. *See* 2 GEORGE SCHWARZENBERGER, INTERNATIONAL LAW 462-66 (1968). The Breisach trial has been described as "the forerunner of contemporary international war crimes trials." 2 *id.* at 462.

72. *See* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 1.

73. *See id.* The Commission was composed of the following representatives: United States of America—Robert Lansing, James Brown Scott; British Empire—Gordon Hewart or Ernest Pollock, W.F. Massey; France—André Tardieu, F. Larnaude; Italy—Mr. Scialoja, Mr. Raimondo (later Mr. Brambilla and Mr. M. d'Amelio); Japan—Mr. Adatci, Mr. Nagaoka (later Mr. Tachi); Belgium—Mr. Rolin-Jaequemyns; Greece—Mr. N. Politis; Poland—Mr. C. Skirmunt (later Mr. N. Lubienski); Roumania—Mr. S. Rosental; and Serbia—Slobodan Yovanovitch. *Id.* at 1-2.

74. *See* WILLIS, *supra* note 21, at 68.

tribunal to try such offenses.[75] Following some highly incendiary ideological clashes during the preliminary deliberations, the Commission divided up into three sub-commissions, which dealt respectively with the questions of war crimes, the legal ramifications of war guilt, and the prospects for prosecution before a tribunal.[76]

On March 29, 1919, the Commission formally submitted its *Report Presented to the Preliminary Peace Conference* (*Report*).[77] The *Report* presented conclusions regarding the authorship of the war, the personal responsibility of the Kaiser, war crimes, violations of the "laws of humanity," and the establishment of a High Tribunal to try offenses committed by the Central Powers.[78]

On April 4, 1919, the American delegation to the Commission, which consisted of Robert Lansing and Dr. James Brown Scott, an eminent scholar in international law, submitted its *Memorandum of Reservations* (*Memorandum*) in response to the Commission's *Report*.[79] By means of this *Memorandum*, the United States, whether on account of political or legal reasons,[80] effectively

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75. VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 1.

76. *See id.* at 2-3; WILLIS, *supra* note 21, at 69-74.

77. 1919 Commission Report, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 4-27. The Commission's *Report* was 27 pages in length and contained four annexes. In preparing its extensive Summary of Examples of Offences committed by the Central Powers, the Commission relied upon official Allied government publications and memoranda, as well as upon reports issued by commissions of enquiry from various Allied nations. *See* Summary of Examples of Offences Committed by the Authorities or Forces of the Central Empires and their Allies Against the Laws and Customs of War and the Laws of Humanity, *in* 1919 Commission Report, *supra* note 69, Annex I [hereinafter Summary of Examples], *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 28-57.

78. *Infra* notes 86-150 and accompanying text.

79. *See* U.S. Dissenting Report, 1919, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 58-79.

80. *See* KLAUS SCHWABE, WOODROW WILSON, REVOLUTIONARY GERMANY, AND PEACEMAKING, 1918-1919: MISSIONARY DIPLOMACY AND THE REALITIES OF POWER 248-49 (Rita Kimber and Robert Kimber trans., 1985) ("Wilson's reasons for differing so markedly from his Associates in th[e] question [of the Kaiser's trial] were not only legal but political as well.") ("The moderate line which the Americans took in the Commission on Responsibility clearly reflected Wilson's desire for a peace which would be both liberal and at the same time unassailable in terms of international law."); WILLIS, *supra* note 21, at 77 ("The conclusion is inescapable that disagreement about a trial of Wilhelm II resulted as much from political as from legal differences.").

The United States was subject to the presence of isolationists, whose ideology ultimately succeeded. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20 ("[T]he United States was in the throes of isolationism, with its rejection of President Woodrow Wilson's internationalist views, evidenced by Congress' refusal to have the United States become part of the League of Nations.").

Although the Americans would have, as a matter of justice, agreed with the result sought by the Commission, their state policy was directly contrary to such an outcome. In fact, the position taken by the American delegation following World War I, which is analogous to that presently being asserted by the United States with respect to the Rome Statute of the International Criminal Court (ICC). *See* James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 124-54 (2000); Cheryl K. Moralez, *Establishing an International Criminal Court: Will it Work?*, 4 DEPAUL INT'L L.J. 135, 147-64 (2000) (describing the United States' position regarding the Rome Treaty); *see also* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], *reprinted in* 37 I.L.M. 999 (1998).

undermined the Europeans' plan to try the Kaiser, to recognize crimes against "the laws of humanity" as a basis for the prosecution of Turkish officials, and to establish an international criminal court.[81] Robert Lansing deliberately employed every available tactic to frustrate the aims of the Europeans during both Commission and subcommittee meetings;[82] moreover, according to Lansing, President Woodrow Wilson "approved entirely of my attitude, only he is even more radically opposed than I am to th[e] folly [of trying the Kaiser]."[83]

In addition to the *Memorandum* submitted by the Americans, the Japanese delegation to the Commission likewise tendered its own *Reservations* on April 4, 1919.[84] Specifically, the Japanese challenged the propriety of the overall concept of victor's justice, stating: "A question may be raised whether it can be admitted as a principle of the law of nations that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side . . . ."[85]

As discussed below, the American-Japanese position foreclosed the opportunity of prosecuting Turkish officials and would have done the same for the Kaiser's prosecution, except that the Netherlands' act of granting him refuge solved that problem. In the end, the only two questions left were those of war crimes prosecutions and setting up an international tribunal to do so. The result was the failure of both efforts, as set forth below.

A. Responsibility of the Authors of the War

With respect to the authorship of the war, the Commission hastily concluded, in what would become "the most controversial legacy of the peace conference,"[86] that the responsibility for the Great War rested "first on Germany and Austria, secondly on Turkey and Bulgaria."[87] The Commission further determined that Germany, in concert with Austria-Hungary, "deliberately worked to defeat all the many conciliatory proposals made by the *Entente* Powers and their repeated efforts to avoid war."[88] Not only were the Commission's conclusions unjustified by the available evidence,[89] but they serve as an excellent example of the undesirability of having such momentous questions, best left to historians, decided by an investigative panel composed entirely of the victors.

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81. *Infra* note 342 and accompanying text.

82. *See* WILLIS, *supra* note 21, at 69-70, 73-75, 76-77.

83. *Id.* at 70.

84. *See* Japanese Dissenting Report, 1919, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 79-80.

85. *Id.*, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 80.

86. WILLIS, *supra* note 21, at 72.

87. 1919 Commission Report, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 4.

88. *Id.*, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 11.

89. *See* WILLIS, *supra* note 21, at 72 ("[T]he evidence available to the subcommittee did not justify its strong conclusions."); *see* DEGRELLE, *supra* note 25, at 521 ("There is not a serious historian today who would dare attribute the sole guilt for World War I to Germany.").

The question of responsibility, of course, was not predicated on the pursuit of international criminal accountability or the pursuit of international justice. Rather, such a determination represented an attempt to justify harsh provisions on reparations. In this way, the Allies established a necessary legal bridge between the responsibility for the war and reparations, which, due to their severity, were quasi-penal in nature.[90] The eventual trial of the Kaiser was the frosting on the cake. But because there existed no legal basis for state criminal responsibility,[91] the Allies were hard pressed to justify the reparations under existing international law. Articles 227 to 230 of the Versailles Treaty addressed only individual criminal responsibility,[92] though Article 227, which addressed the criminal responsibility of the Kaiser for waging a war of aggression, as it would now be called, did not exist at the time in international criminal law.[93] Compensation, however, as recognized under international law principles of state responsibility, extended to actual damages, but it was questionable whether it included, under the circumstances, such punitive damages.[94] There was no principle in international law that satisfied the goals of the Allies.

Interestingly, the Commission's declaration of Germany's responsibility for the war did not constitute the basis for the controversial war-guilt clause, Article 231,[95] contained in the Treaty of Versailles.[96] Because this clause followed immediately after Articles 228 to 230, the war crimes clauses, the Germans assumed that Article 231 was based upon the Commission's *Report*.[97] Article 231, however, actually stemmed from a compromise in the Commission on Reparation of Damage.[98]

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90. *Cf.* Fritz Munch, *State Responsibility in International Criminal Law*, *in* A TREATISE ON INTERNATIONAL CRIMINAL LAW 143, 152 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) ("The Peace Treaties of 1919/1920 stipulated a responsibility for damages caused by the war, but war was not considered a delinquency at that time, and the articles in question read rather like political motivations for the constitution of a debt.").

91. *See* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, *in* 1 INTERNATIONAL CRIMINAL LAW 3, 28-29 (M. Cherif Bassiouni ed., 2d ed. 1999); Munch, *supra* note 90, at 148; John Dugard, *Criminal Responsibility of States*, *in* 1 INTERNATIONAL CRIMINAL LAW 239, 239 (M. Cherif Bassiouni ed., 2d ed. 1999).

92. *See* Munch, *supra* note 90, at 148.

93. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 26.

94. *See* Munch, *supra* note 90, at 151-53.

95. *See* Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, art. 231, 2 BEVANS 43, 137-38 [hereinafter Treaty of Versailles]. Article 231 states:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies. *Id.*

96. *See* Willis, *supra* note 21, at 72 ("The Allies did not include [the Commission's] accusation in the peace treaty.").

97. *See id.*

98. *See id.*; SCHWABE, *supra* note 80, at 289; MARC TRACHTENBERG, REPARATION IN WORLD POLITICS: FRANCE AND EUROPEAN ECONOMIC DIPLOMACY, 1916-1923, at 56-57 (1980). Article 231 is contained in Part VIII of the Treaty of Versailles, which is entitled "REPARATION"; in contrast, the "Kaiser clause," Article 227, and the war crimes clauses, Articles 228 to 230, are contained in Part VII

B. The Personal Criminal Responsibility of the Kaiser

After finding that the Central Powers and their allies had conducted the war "by barbarous or illegitimate methods,"[99] the Commission declared that all guilty persons from the enemy nations, including heads of state, were individually liable for such war crimes and, therefore, were subject to criminal prosecution:[100]

> [T]here is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. *This extends even to the case of Heads of States.* An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a Sovereign of a State. . .. However, even if, in some countries, a Sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[101]

The Commission further remarked that a bar against prosecuting heads of state who were guilty of war crimes and violations of the laws of humanity "would shock the conscience of the civilized world."[102]

Concerning those individuals responsible for causing the outbreak of the war, the Commission concluded that such persons, most notably the former Kaiser, should not be subjected to criminal charges in front of a tribunal for breaching the peace.[103] The Commission proclaimed that any member of the Central Powers

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of the Treaty, which is entitled "PENALTIES." *See* Treaty of Versailles, *supra* note 95, arts. 227-230, 231, at 136-38. For a discussion of the origins of Article 231, see *infra* notes 205-215 and accompanying text.

99. 1919 Commission Report, *supra* note 69, at 19.

100. *See id.* at 20.

101. *Id.* at 19 (emphasis added).

102. *Id.* at 20. The announcement of such a principle of individual criminal responsibility for heads of state was unprecedented. Admittedly, a head of state could be found politically responsible and, as in the case of Napoleon, punished by removal from power and by exile. But this new concept was a throwback to earlier times when the defeated head of state was subjected to death or torture, though irrespective of any wrongful conduct. Most contemporary writers erroneously focus on Article 7 of the Nuremberg Charter, by which the Allies refused to recognize the defendants' official positions as "freeing them from responsibility or mitigating punishment," as the first time in history that the immunity of heads of state was removed. Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 82 U.N.T.S. 284, 288, 59 Stat. 1546, 1548 [hereinafter Nuremberg Charter], *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544. The ICC Statute provides for it in Article 27(1):

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

ICC Statute, *supra* note 80, art. 27(1), *reprinted in* 37 I.L.M. 999, 1017 (1998).

103. 1919 Commission Report, *supra* note 69, at 23. The debate concerning *jus ad bellum* had gone through a long historical evolution, mostly influenced by the arguments of canonist writers on the differences between just and unjust wars; however, no resolution was reached. *See* Remigiusz Bierzanek, *War Crimes: History and Definition, in* 3 INTERNATIONAL CRIMINAL LAW 87, 87-88 (M.

who violated the laws and customs of war or the "laws or humanity," whatever his rank or position, should be subject to trial.[104]

In its *Memorandum*, the United States took issue with the Commission's conclusions on a number of critical points. First of all, the Americans objected to the concept of placing a chief of state on trial:

> But the law to which the head of State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.[105]

The British, however, opined that the Americans were afraid "to create the possibility of their President ever being incriminated."[106]

Similarly, the American delegation, as well as the Japanese delegation,[107] refused to assent to the Commission's adoption of the doctrine of "negative criminality."[108] "It was frankly stated that the [Commission's] purpose was to bring before this [international] tribunal the ex-Kaiser of Germany, and that the jurisdiction of the tribunals must be broad enough to include him even if he had not directly ordered the violations."[109]

Cherif Bassiouni ed., 2d ed. 1999); Geoffrey Parker, *Early Modern Europe*, *in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 40, 42-44 (Michael Howard et al. eds., 1994).

Following World War II, the Allies tried the leading members of the Axis at Nuremberg for crimes against peace, which the Charter of the International Military Tribunal defined as "planning, preparation, initiation or waging of a war of aggression." Nuremberg Charter, *supra* note 102, art. 6(a), 82 U.N.T.S. at 288, 59 Stat. at 1547. Yet, there was nothing in positive law at the time upon which to predicate such a charge. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 26 ("Prosecution for 'crimes against peace' was without legal precedent . . . ."). Presently, there is no convention defining aggression. M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace*, *in* 1 INTERNATIONAL CRIMINAL LAW 313, 334 (M. Cherif Bassiouni ed., 2d ed. 1999). On the other hand, the ICC, although it did not define aggression, does include the crime within its jurisdiction. *Id.* at 346; *see* ICC Statute, *supra* note 80, art. 5, *reprinted in* 37 I.L.M. 999, 1003-04 (1998).

104. 1919 Commission Report, *supra* note 69, at 23-24.

105. U.S. Dissenting Report, 1919, *supra* note 69, at 66.

106. WILLIS, *supra* note 21, at 77. A position that seems to prevail in connection with the ICC. *See* Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF., Nov.-Dec. 1998, at 20, 22, 23.

107. *See* Japanese Dissenting Report, 1919, *supra* note 69, at 80.

108. *Id.* (footnotes omitted). *See also* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 573 (1999).

Despite United States and Japanese dissent, the latter arguing that high-ranking officials could not be held personally accountable under international law in accordance with the abstention theory of responsibility, trials instituted at the German Supreme Court in Leipzig recognized the existence of concrete duties pertaining to military commanders. Undoubtedly, two precursors to the *Leipzig* proceedings, the Hague Conventions IV (1907) and X (1907) created affirmative command duties in relation to the conduct of subordinate persons, establishing the doctrine of "command responsibility."

109. U.S. Dissenting Report, 1919, *supra* note 69, at 60. Since then, the doctrine of command responsibility has been well established in international criminal law. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 439 (2d rev. ed. 1999) [hereinafter

In this regard, until its final revision, the majority *Report* proposed that a High Tribunal was the appropriate forum in which to try charges against all enemy authorities, military or civil, including chiefs of state, who "abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war."[110] The United States expressed its opposition to this formulation of criminal responsibility as follows:

> It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission.[111]

Ironically, it was this very concept of command responsibility[112] that the United States selectively employed after World War II in convicting and executing General Tomoyuki Yamashita, the former commander of the Japanese armed forces in the Philippines.[113]

The American representatives, however, were in agreement with the Commission's recommendation that no criminal charges could be brought based upon acts that provoked the war, including breaches of neutrality alleged against the Kaiser;[114] yet, this position changed drastically with the advent of World War II.[115] As a matter of fact, it was then the United States that took the lead in

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BASSIOUNI, CRIMES AGAINST HUMANITY]; *see* L.C. Green, *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT'L L. 167 (1989).

110. U.S. Dissenting Report, 1919, *supra* note 69, at 72.

111. *Id.* at 72.

112. A failure to act to prevent unlawful conduct may provide the basis for imposition of criminal responsibility under the doctrine of command responsibility. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 19. To effectively further the goal of deterrence, however, a showing of actual intent is required. *Id.* at 423.

> No one can be deterred from conduct beyond the control of the person whose responsibility may be called into question. To hold a superior accountable on the basis of omission for the conduct of a subordinate, therefore, requires intent or knowledge that the omission can actually or reasonably and foreseeably lead to a violative act and that the superior is in a position or has the ability to act in the prevention of the violative act. *Id.*

113. In spite of General Yamashita's assertion that he neither ordered nor committed any of the atrocities perpetrated by his troops, the United States Supreme Court held that he had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." In re Yamashita, 327 U.S. 1, 16 (1946). *See also* RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949).

114. *See* U.S. Dissenting Report, 1919, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 67.

115. The United States could have justified a change in position by claiming that the inclusion of Article 227 in the Versailles Treaty reflected an emerging custom that had ripened by the time World War II ended. But then, the United States has never been known for legal and diplomatic subtleties.

establishing "crimes against peace" as an international crime[116] under the Nuremberg and Tokyo Charters.[117] The United States did not employ the concept of a head of state's personal criminal responsibility against Japan's Emperor Hirohito.[118]

Significantly, while arguing for the inclusion of crimes against peace at the International Conference on Military Trials in London, Robert H. Jackson, the American representative, pointed out that "sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the first World War .... I don't think we can take the 1918 view on matters of war and peace."[119] Justice Jackson, however, conveniently omitted reference to the more explicit views of Lansing and Scott, acting on behalf of the United States, regarding crimes against the laws of humanity.[120] Thus, although the Commission was against prosecuting the Kaiser for initiating the war, the drafters of the Versailles Treaty took the opposite position.[121]

C. War Crimes

As a means of classifying violations of "the laws and customs of war," the Commission prepared the following categorical listing:[122]

(1) Murders and massacres; systematic terrorism.

(2) Putting hostages to death.

(3) Torture of civilians.

(4) Deliberate starvation of civilians.

(5) Rape.

(6) Abduction of girls and women for the purpose of enforced prostitution.

(7) Deportation of civilians.

(8) Internment of civilians under inhuman conditions.

(9) Forced labour of civilians in connection with the military operations of the enemy.

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116. *See* WILLIS, *supra* note 21, at 174; Bassiouni & Ferencz, *supra* note 103, at 319.

117. *See* Nuremberg Charter, *supra* note 102, art. 6(a), 82 U.N.T.S. at 288, 59 Stat. at 1547; Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, art. 5(a), T.I.A.S. No. 1589, 4 BEVANS 27, 28 [hereinafter IMTFE Amended Charter].

118. RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 110-17 (1971); *see also* JAMES WEBB, THE EMPEROR'S GENERAL (1999).

119. Minutes of Conference Session of July 19, 1945, *in* U.S. DEP'T OF STATE, PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 299 (1949).

120. *See infra* notes 141-143 and accompanying text.

121. *See infra* notes 159-193 and accompanying text.

122. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 34-35 (1948) [hereinafter UNWCC].

(10) Usurpation of sovereignty during military occupation.

(11) Compulsory enlistment of soldiers among the inhabitants of occupied territory.

(12) Attempts to denationalise the inhabitants of occupied territory.

(13) Pillage.

(14) Confiscation of property.

(15) Exaction of illegitimate or of exorbitant contributions and requisitions.

(16) Debasement of the currency, and issue of spurious currency.

(17) Imposition of collective penalties.

(18) Wanton devastation and destruction of property.

(19) Deliberate bombardment of undefended places.

(20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments.

(21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew.

(22) Destruction of fishing boats and of relief ships.

(23) Deliberate bombardment of hospitals.

(24) Attack on and destruction of hospital ships.

(25) Breach of other rules relating to the Red Cross.

(26) Use of deleterious and asphyxiating gases.

(27) Use of explosive or expanding bullets, and other inhuman appliances.

(28) Directions to give no quarter.

(29) Ill-treatment of wounded and prisoners of war.

(30) Employment of prisoners of war on unauthorised works.

(31) Misuse of flags of truce.

(32) Poisoning of wells.[123]

The violations catalogued by the Commission fell within the meaning of war crimes under law and custom and the 1907 Hague Convention;[124] yet, the Commission also cited to examples of violations of the "laws of humanity,"[125] which did not fall under the same legal norms.

In addition, the Commission stated that "civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have

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129. 1919 Commission Report, *supra* note 69, at 17-18.

130. *See* UNWCC, *supra* note 122, at 35; *see also* Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 [hereinafter 1907 Hague Convention].

131. *See* UNWCC, *supra* note 122, at 35; *see also infra* notes 128-129 and accompanying text.

been convicted of the same offense."[126] In so doing, the Commission was attempting to limit the defense of obedience to superior orders; otherwise, in the telling words of the *Report*, "the trial of the offenders might be seriously prejudiced."[127]

D. Crimes Against the "Laws of Humanity"; Prosecuting Turkish Officials

In an Annex to its 1919 *Report*, the Commission, under the category of "Murders and Massacres: Systematic Terrorism," made specific reference to the "Massacres of Armenians by the Turks."[128] More specifically, the Commission made the following notation: "More than 200,000 victims assassinated, burned alive, or drowned in the lake of Van, the Euphrates or the Black Sea."[129] This finding was in harmony with the Triple *Entente*'s earlier May 24, 1915, Declaration condemning the Armenian massacres as "crimes against humanity and civilisation" and promising retribution.[130]

The Commission also recommended the establishment of a High Tribunal to try the enemy offenders.[131] The Tribunal was to be composed of persons appointed by the Allied and Associated Powers and was to set its own procedures.[132] Significantly, the law to be applied by the High Tribunal was to consist of "'the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the

132. 1919 Commission Report, *supra* note 69, at 20.

133. *Id.* at 20. As stated in note 102, most contemporary authors erroneously attribute to the Nuremberg and IMTFE Charters, articles 8 and 6, respectively, the originality of limiting the defense of obedience to superior orders. *See* Nuremberg Charter, *supra* note 102, art. 8, 82 U.N.T.S. at 288, 59 Stat. at 1548; IMTFE Amended Charter, *supra* note 117, art. 6, 4 BEVANS at 28; *see also* NICO KEIJZER, MILITARY OBEDIENCE (1978); LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 15-242 (1976); YORAM DINSTEIN, THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW 5-20 (1965); EKKEHART MÜLLER-RAPPARD, L'ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSIBILITÉ DU SUBORDONNÉ 185-251 (1965).

134. Summary of Examples, *supra* note 77, at 28, 30.

135. *Id.* at 30. It has now been estimated that more than one million Armenians were exterminated:

> During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in the world's history, slaughtering huge portions of its minority Armenian population. The Armenian genocide followed decades of persecution by the Ottomans and came only after two similar but smaller round of massacres in the 1894-96 and 1909 periods had resulted in two hundred thousand Armenians deaths. In all, over one million Armenians were put to death.

Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 223 (1989) [hereinafter Dadrian, *Genocide*].

136. Dadrian, *Genocide*, *supra* note 129, at 262 & n.129; UNWCC, *supra* note 122, at 35-36 ("The warning thus given to the Turkish Government on that occasion by the Triple *Entente* dealt precisely with one of the types of acts which the modern term 'crimes against humanity' is intended to cover, namely, inhumane acts committed by a government against its own subjects."). *See* Bassiouni, *The Need for International Accountability*, *supra* note 66, at 3-4 (noting that the number of victims always increases in time).

137. *See* 1919 Commission Report, *supra* note 69, at 24-25.

138. *See id.*

dictates of public conscience.'"[133] This language was taken directly from the concluding paragraph of the Preamble to the 1907 Hague Convention.[134]

The 1907 Hague Convention endeavored to set forth the general laws and customs of war, but due to a lack of specificity, failed to encompass all conduct that qualified as war crimes. In an effort to address this shortcoming, the drafters inserted the following language in the Preamble:

> It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;
>
> On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.
>
> Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[135]

This language became known as the Martens Clause, so named for Fyodor Martens, the Russian diplomat who penned it.[136] Thus, customary international law did establish a basis for individual war crimes prosecutions as envisioned by the Commission.[137]

The inclusion of this particular wording in the Commission's *Report* was designed to enable the Allies to prosecute leading members of the Ittihad party, commonly known as the Young Turks, who were believed to be responsible for the massacre of hundreds of thousands of Armenians perpetrated under the guise of wartime deportations.[138] Because the Commission's mandate was technically restricted to violations of the laws and customs of war, the Commission invoked the Martens Clause in the hopes of expanding the Tribunal's ability to prosecute

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139. 1919 Commission Report, *supra* note 69, at 24.

140. *See infra* notes 135-136 and accompanying text.

141. 1907 Hague Convention, *supra* note 124, preamble, 36 Stat. at 2279-80, 1 BEVANS at 632-33.

142. *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 60 & n.81.

143. *See id.* at 71. On the other hand, violations attributable to the state resulted only in a "civil" responsibility. *See* Munch, *supra* note 90, at 153; Dugard, *supra* note 91, at 239 ("[T]he only remedy for a wrong committed by a state was reparation of the kind associated with compensation in civil, delictual claims.").

144. *See* Dadrian, *Genocide*, *supra* note 129, at 252, 272-77, 279-81. *See also* Vahakn N. Dadrian, *Documentation of the Armenian Genocide in Turkish Sources*, *in* 2 GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 86 (Israel W. Charny ed., 1991). *See generally* VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS (1995) [hereinafter DADRIAN, HISTORY OF ARMENIAN GENOCIDE] (tracing religious and cultural roots of Turkish-Armenian conflict).

Turkish officials for acts committed against their own nationals[139] that are now recognized as "crimes against humanity."[140]

The Americans, however, vigorously protested the Commission's attempt to assign criminal responsibility on the basis of violations of the "laws of humanity." As a technical matter, the United States asserted that the Commission had gone beyond the express terms of its mandate, which was restricted to violations of the laws and customs of war.[141] As a theoretical matter, the American delegation argued that "the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."[142] Because such considerations "vary with the individual," the *Memorandum* concluded that they should not be within the province of criminal law.[143]

In addition, the Americans objected at length to the creation of an international criminal court "for which there is no precedent, precept, practice, or procedure," and, instead, proposed the use of military commissions or tribunals.[144] Relying upon the seminal decision of *United States v. Hudson*,[145] in which the United States Supreme Court reaffirmed its commitment to upholding the principles of legality, namely, that there can be no crime without a law (*nullum crimen sine lege*) and no punishment without a law (*nulla poena sine lege*),[146] the delegates declared:

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145. *See* Bierzanek, *supra* note 103, at 91 ("[T]he Commission also took note of the atrocities committed on the territory of the Central Powers against their own nationals such as the massacres of the Armenian population perpetrated by the Turkish authorities . . . ."); Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 16-17; Dadrian, *Genocide*, *supra* note 129, at 279-81. As explained by Willis:

> To assure prosecution of such atrocities as the Armenian massacres and other outrages not clearly prohibited by the laws of war, the Europeans, anticipating the idea of crimes against humanity and genocide, wanted reference to the laws of humanity that were mentioned in the preamble to the Hague convention of 1907 as supplementing the laws of war.

WILLIS, *supra* note 21, at 75.

146. "Crimes against humanity" represent a jurisdictional extension from war crimes:

> The essential difference between acts deemed war crimes and those deemed "crimes against humanity" is that the former acts are committed in time of war against nationals of another state, while the latter acts are committed against nationals of the same state as that of the perpetrators. Thus, the [Nuremberg] Charter took a step forward in the form of a jurisdictional extension when it provided that the victims of the same types of conduct which constitutes war crimes, were protected without the requirement that they be of a different nationality than that of the perpetrators.

BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 72.

147. *See* U.S. Dissenting Report, 1919, *supra* note 69, at 73.

148. *Id.* at 73.

149. *Id.* at 64.

150. *Id.* at 70-71.

151. 11 U.S. (7 Cranch) 32 (1812).

152. *See id.* at 34 ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

> What is true of the American States must be true of this looser union which we call the Society of Nations. The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence.[147]

In sum, the Americans asserted that the establishment of an international criminal tribunal that applied new laws and new penalties would be directly contrary to the United States Constitution's prohibition against *ex post facto* laws.[148]

In keeping with the recommendations of the Commission, provisions to bring the perpetrators of the Armenian massacres to justice were later included in the Treaty of Sèvres, but this treaty was never ratified.[149] Shortly thereafter, however, such retributive efforts were nullified by the amnesty declaration that accompanied the Treaty of Lausanne.[150]

E. Final Recommendations

In an effort to facilitate implementation of the recommendations included in its *Report*, the Commission proposed a set of draft articles for inclusion in peace treaties with the Central Powers.[151] These articles provided, *inter alia*, that the enemy government: (1) admit the right of every Allied State, even after peace was concluded, to try and punish any enemy or former enemy who came into the Allies' custody; (2) recognize the right of the Allies to establish a High Tribunal, with judges appointed by the Allies, to try and punish enemies for war crimes and violations of the laws of humanity; (3) agree that trials conducted and sentences imposed by enemy tribunals would not bar subsequent trial by the High Tribunal or by Allied national courts; (4) deliver to the Allies any accused sought for trial; and (5) furnish to the Allies any documents that might be necessary for identification purposes or that might be utilized as evidence.[152] However, as discussed below, these recommendations were only partially integrated into the Treaty of Versailles.

THE TREATY OF VERSAILLES

Following the work of the 1919 Commission, the Allies proceeded to deliberate on the Treaty of Versailles, which took into account the Commission's work, but only in part. It did not include crimes against the laws of humanity,

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153. U.S. Dissenting Report, 1919, *supra* note 69, *reprinted in* VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 74-75.

154. *See id.* at 76; U.S. CONST. art. I, § 9, cl. 3.

155. *See infra* notes 306-312 and accompanying text.

156. *See infra* notes 313-322 and accompanying text.

157. *See* 1919 Commission Report, *supra* note 69, at 27.

158. *See* Provisions for Insertion in Treaties with Enemy Governments, *in* 1919 Commission Report, *supra* note 69, Annex IV [hereinafter Provisions], at 81-82.

which the Commission eventually recommended and the United States opposed, and it included the prosecution of the Kaiser, which the Commission rejected. The Treaty did, however, include war crimes, which the Commission recommended.

A. Applicable Treaty Provisions

The Treaty of Versailles was signed on June 28, 1919, and contained the following provisions relating to criminal responsibility for wartime conduct:

> Article 227
>
> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.
>
> Article 228
>
> The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
>
> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.
>
> Article 229
>
> Persons guilty of criminal acts against the nationals of one of the Allied and

> Associated Powers will be brought before the military tribunals of that Power.
>
> Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned.
>
> In every case the accused will be entitled to name his own counsel.
>
> Article 230
>
> The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.[153]

In addition, following directly after the war crimes clauses was the contentious war-responsibility clause, Article 231, which played a central role in German negotiations with the Allies over the acceptance of Articles 227 to 230. This clause, known throughout Germany as the "*Schuldartikel*," or article on guilt,[154] provided as follows:

> Article 231
>
> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.[155]

These provisions of the Versailles Treaty introduced several major innovations into international criminal law. First of all, Article 227 set a historical basis in precedent for prosecution of a head of state for what Article 6(a) of the Nuremberg Charter called "crimes against peace."[156] For the first time in history, a treaty established the individual criminal responsibility of heads of states for initiating and conducting what was later called a war of aggression. Secondly, the war crimes clauses provided for the trial of Germans, including military and civilian personnel, in the courts of their wartime opponents for violations of the laws and customs of war or before jointly established Allied tribunals.[157] "For the first time, a major international peace treaty had established the principle in

159. Treaty of Versailles, *supra* note 95, arts. 227-230, at 153.

160. VERSAILLES AND AFTER, *supra* note 26, at 414.

161. Treaty of Versailles, *supra* note 95, art. 231, at 153.

162. *See* Bassiouni, *Combating Impunity*, *supra* note 66, at 411.

163. *Id.*; UNWCC, *supra* note 122, at 44 ("[T]he Peace Treaties of that period sanctioned the principle that any persons, civilians or members of the Armed Forces, accused of violations of the laws of war, could be tried and punished for such violations by the courts of the adversary.").

international law that war crimes [criminal responsibility] was a proper conclusion of peace, that the termination of war did not bring a general amnesty as a matter of course."[158]

B. The "Kaiser Clause"—Article 227

After abdicating the throne on November 9, 1918, the Kaiser went to the Netherlands where he received asylum after giving assurances that he would not engage in any political activity. Thus, any prosecution would require his extradition from Holland.

The idea of holding the Kaiser accountable originated with the British and was introduced for a variety of political purposes, though not necessarily with the expectation that it would be carried out.[159] In 1918, the British Imperial War Cabinet received a recommendation from legal officers of the British crown suggesting that Wilhelm II be arraigned in front of an Allied tribunal after being extradited from Holland.[160] Specifically, an international war crimes trial was proposed by Lord Curzon at the War Cabinet meeting of November 20, 1918.[161] On November 28, 1918, the War Cabinet unanimously adopted this recommendation, stating that "so far as the British Government have the power, the ex-kaiser should be held personally responsible for his crimes against international law."[162] The proposition was novel and could have far-reaching implications in the future.

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164. WILLIS, *supra* note 21, at 85. *Cf.* Bierzanek, *supra* note 103, at 89 ("[I]t was the general practice to insert in peace treaties an amnesty clause for persons guilty of wrongful acts during the war.").

165. *See* WALWORTH, *supra* note 59, at 213. Interestingly, during the course of their deliberations on the fate of the Kaiser, the British commissioned a detailed study on their earlier decision to exile Napoleon to St. Helena. *See* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 37 (2000).

166. WALWORTH, *supra* note 59, at 213.

167. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 17 (2000). On this occasion, Lord Curzon referred to the Kaiser as "the arch-criminal of the world." BASS, *supra* note 159, at 65. Lloyd George forcefully contended that Wilhelm II should stand trial. *Id.* at 66. At this initial meeting, however, Curzon and Lloyd George were unable to persuade the cabinet. *Id.* In fact, their proposals were met with numerous objections. For example, the Australian prime minister noted that it was not illegal to make war, as such was the prerogative of sovereigns. *Id.* at 66-67. Churchill was concerned that an inquiry into the Kaiser's responsibility might lead to embarrassing revelations about Russia's role in the crisis that led to war in 1914. *Id.* at 68. Austen Chamberlain feared that singling out the Kaiser might create a "Napoleonic legend" and—rather prophetically—might lead to a nationalistic uprising in Germany. *Id.* at 67. By way of historical footnote, Hermann Göring first heard Adolph Hitler speak at a rally held in opposition to French demands to try Germans as war criminals. *See* BASS, *supra* note 159, at 60, 92.

168. WALWORTH, *supra* note 59, at 213. *See* BASS, *supra* note 159, at 69-73. During this meeting, Attorney General Smith asserted that Wilhelm II was responsible on the basis of the doctrine of command responsibility. *Id.* at 69-70. Smith then suggested that the Kaiser could be punished, like Napoleon, without a formal trial or, in the alternative, could be prosecuted before an international tribunal. *Id.* at 70-71. Gary Bass described the ironic circumstances surrounding the historic outcome of this meeting as follows:

> At the end of the greatest war in history to date, the decision about the fate of Britain's

On December 2, 1918, this resolution was approved by French Premier Georges Clemenceau and Italian Premier Vittorio Orlando during their meeting in London with British Prime Minister Lloyd George.[163] Shortly thereafter, Great Britain informed the United States about the *Entente*'s adoption of the resolution proposing a trial for the Kaiser and his "accomplices."[164] Prior to this time, however, no serious thought had been given by the government of the United States to the concept of conducting war trials before an international court.[165]

In late January 1919, United States State Department legal experts James Brown Scott and David Hunter Miller submitted a memorandum representing the American position on the British proposal.[166] Their study found that there was no legal justification for trying the German government for authoring the war because such an act did not constitute a violation of existing international law.[167] Next, Scott and Miller concluded that the Kaiser was not legally responsible because of his status as a sovereign.[168] Finally, the experts noted that, even if the Germans had transgressed certain of the Hague rules, it would be impossible to extradite them.[169]

Following Lloyd George's refusal to restrict discussion of the Kaiser's fate to the Supreme Council[170] and in light of the subsequent impasse on this question reached by the Commission and the American delegation,[171] the Council of Four finally tackled the issue at Paris. On April 8, 1919, the Big Four extensively discussed the propriety of trying the Kaiser.[172] During these deliberations, President Wilson repeatedly opposed the *Entente* plan. Not only did he believe that "the evidence would be lacking," but he also feared that any physical punishment of Wilhelm II would turn him into a martyr and could revitalize the Hohenzollern dynasty. Furthermore, Wilson objected to the thought of transgressing existing legal norms just to satiate public sentiment.[173] In this latter demur, he received the support of Italian Premier Orlando.[174]

In response, French Premier Clemenceau argued that the law of responsibility superseded all others and that the Council had a unique opportunity to enlarge this rudimentary principle of national law into one of an international character.[175] British Prime Minister Lloyd George declared that the English people would not

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chief adversary had not been made on the basis of the arguments of the general staff, or foreign secretary, or war secretary. It had been made on the authority of the attorney general and a committee of lawyers. *Id.* at 73.

169. WALWORTH, *supra* note 59, at 213.
170. SCHWABE, *supra* note 80, at 164.
171. *Id.* at 163-64.
172. *Id.* at 164.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See supra* notes 55-60 and accompanying text.
177. *See supra* notes 100-106 and accompanying text.
178. WALWORTH, *supra* note 59, at 215-16.
179. *Id.* at 215.
180. *Id.*
181. *Id.*

accept a treaty that did not resolve this critical question.[176] The British prime minister then proposed that the Kaiser be tried only for violating the 1839 Treaty of London that guaranteed Belgian neutrality.[177]

Under the pressure of this unified opposition and cognizant of his upcoming meeting before the Commission on the League of Nations to get approval for an amendment regarding the United States' Monroe Doctrine,[178] President Wilson consulted that evening with Secretary Lansing in order to prepare compromise proposals.[179] In fact, President Wilson's draft articles were, in essence, dictated by Lansing—"recommendations that Lansing must have known would undermine the proposed prosecution of the kaiser."[180] In the words of Dr. Scott, the State Department legal advisor:

> The original draft prepared as a compromise by President Wilson himself—for he was adverse to any proceeding against the kaiser—contained an express denial that the offense was criminal, but at the suggestion, it is believed, of Mr. Lloyd George, this was omitted. Arraigning the kaiser solely for an offense against international morality and the sanctity of treaties, and declaring that the judgment of the tribunal would be guided by the highest motives of international policy, were in effect an admission that law, in the legal sense of the word, did not exist for either offense, or that its violation was not a crime in the sense of criminal law.[181]

The following morning, April 9, 1919, Wilson presented his draft articles to the Allied Supreme Council, and they were approved.[182] These proposals provided the specific basis for Articles 227 and 229[183] and for the Treaty of Versailles'

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182. WALWORTH, *supra* note 59, at 215.

183. *See* WILLIS, *supra* note 21, at 79. The Commission's *Report* contained a discussion of Belgian neutrality, including reference to Article 1 of the Treaty of London of April 19, 1839 and subsequent Prussian declarations in relation thereto. *See* 1919 Commission Report, *supra* note 69, at 12-15. The need to anchor such a concept of responsibility to an existing international treaty was evident in the Nuremberg and Tokyo charges of "crimes against peace." The treaty in these cases was the 1928 Kellogg-Briand Pact, which benignly stated: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." General Treaty for Renunciation of War as an Instrument of National Policy, *signed at Paris* Aug. 27, 1928, art. 1, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57, 63.

184. WALWORTH, *supra* note 59, at 216. The Monroe Doctrine was officially enunciated by President James Monroe in a message to Congress on December 2, 1823. The doctrine forbade European interference in the affairs of the Americas and asserted, "[a]s a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." 5 AMERICA: GREAT CRISES, *supra* note 23, at 288, 293.

185. WALWORTH, *supra* note 59, at 216; WILLIS, *supra* note 21, at 80.

186. WILLIS, *supra* note 21, at 80.

187. Scott, *supra* note 45, at 237.

188. SCHWABE, *supra* note 80, at 294; WALWORTH, *supra* note 59, at 216; WILLIS, *supra* note 21, at 80.

189. WALWORTH, *supra* note 59, at 216.

penalty provisions, Articles 227 to 230, in general.[184] Pursuant to Wilson's draft articles, under which the Kaiser would be tried by a special tribunal for violating the neutrality of Belgium, "[i]t was assumed that the tribunal would pronounce a verdict of guilty in a political and moral sense, but it would not be conducting actual criminal proceedings against the Kaiser, that is, the possibility of a death sentence was precluded."[185] On May 1, 1919, however, Lloyd George influenced the Council to strike the language from Wilson's proposal that explicitly prevented the Kaiser from being tried on criminal charges.[186]

In its final form, Article 227 charged the Kaiser with having committed "a supreme offence against international morality and the sanctity of treaties." This accusation, however, did not constitute a violation of existing international law and, instead, simply expressed a "political" transgression and not an international crime.[187] Said another way, Article 227 articulated a "moral", rather than a "legal", offense.[188] Not coincidentally, the political nature of this provision corresponded directly with the position championed by the American delegation during the Commission's deliberations, namely:

> that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offences were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.[189]

Additional considerations indicating that Article 227 was not actually intended to produce a trial include the fact that the charge, as phrased, likely failed to satisfy existing extradition standards,[190] namely, the principle of "double criminality," which requires that the offense for which extradition is sought constitutes a crime in both countries,[191] since such a crime did not exist in Dutch criminal law. The realization that the provision's principal proponents, the British, "were not eager to prosecute a crowned head, particularly when the family lineage of that crowned head was related to their own monarchy."[192] In this latter regard, Secretary of State Lansing was of the opinion that the British were forced by

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190. *See* SCHWABE, *supra* note 80, at 294; WILLIS, *supra* note 21, at 80.

191. SCHWABE, *supra* note 80, at 294.

192. *Id.*

193. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19; UNWCC, *supra* note 122, at 44; *see* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 502-83 (4th rev. ed. 2002). *See generally* CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER (1980).

194. UNWCC, *supra* note 122, at 44.

195. U.S. Dissenting Report, 1919, *supra* note 69, at 58-59.

196. *See* Scott, *supra* note 45, at 240-41; WILLIS, *supra* note 21, at 66.

197. For a discussion of extraditable offenses and double criminality, *see* BASSIOUNI, *supra* note 187, at 388-96.

198. Bassiouni, *supra* note 66, at 411.

public pressure to champion the trial of the Kaiser and were actually relying on the Americans to prevent the occurrence of such a proceeding.[193]

The British also knew that the Netherlands, which had granted asylum to the Kaiser, would not subsequently surrender him for trial. Thus, the British government could represent itself to world public opinion, particularly its own, as supporting the French and Belgian position, with the reasonable expectation that the Kaiser's trial would never take place. The blame for that outcome could therefore be placed on others. Indeed, in the course of time, the literature on that subject blamed the Netherlands for refusing to extradite the Kaiser. For some unknown reason, the role of the United States was not included in subsequent legal commentaries on the failure to prosecute the Kaiser.

C. War Crimes Clauses—Articles 228 to 230

The origins of Articles 228 and 229 of the Treaty of Versailles can be found in a memorandum submitted to the Commission by the American delegation.[194] In this memorandum, the United States advocated the use of military commissions or tribunals, in contrast to the creation of a new international criminal court, that had jurisdiction to try violations of the laws and customs of war.[195] The American memorandum provided as follows:

> 1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;
>
> 2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;
>
> 3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;
>
> 4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and
>
> 5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus

199. WALWORTH, *supra* note 59, at 215.

200. *See* Scott, *supra* note 45, at 250.

201. *See* U.S. Dissenting Report, 1919, *supra* note 69, at 70-71.

> forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.[196]

These principles, which were incorporated into Articles 228 and 229, brought nothing new to international law. Prior to the First World War, it was well established that a belligerent nation had the right to try persons charged with violating the laws and customs of war if they fell into its custody and had committed such offenses on its soil or against its nationals or their property.[197] Military tribunals traditionally had the jurisdictional competence to entertain such war crimes prosecutions.[198] In addition, although Article 229 provided for a mixed tribunal composed of individuals from more than one of the member nations, the Allies did not contemplate a supranational, or even an international, court. Accordingly, the transition to the Leipzig trials was relatively easy.[199]

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202. U.S. Dissenting Report, 1919, *supra* note 69, at 70-71.

203. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 706 (1994) ("This doctrine could hardly be regarded as novel or revolutionary even before the First World War."); Bierzanek, *supra* note 103, at 89.

> It was generally accepted that international law permitted the trial of persons charged with breaches of the customs of war if they fell into the hands of the country whose citizens had been the victims of their offenses. For this purpose special courts might be set up. The right of a victorious power to bring to trial individual members of enemy armies accused of violating the laws of war was recognized by international custom.

Bierzanek, *supra* note 103, at 89.

204. Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, *in* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 65, 72 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

205. This is probably why Grand-Admiral Karl Dönitz, who was appointed by Hitler as Reich President during the final days of World War II, issued an ordinance directing the Supreme Court at Leipzig to adjudicate war crimes cases—just as the tribunal had done following the First World War. *See* DAVID IRVING, NUREMBERG: THE LAST BATTLE 49-50 (1996). Pursuant to this precedent, there would be criminal responsibility for Germans who had committed violations of national law.

Significantly, the Allies initially recognized the legitimacy of Dönitz's government, which had withdrawn to Flensburg, when negotiating the instruments of surrender. *Id.* On May 7, 1945, Colonel-General Alfred Jodl signed the initial surrender instrument at General Eisenhower's headquarters in Rheims. *Id.* at 50. This surrender, however, was not to go into effect until May 9; the delay was designed to allow hundreds of thousands of German civilians and military personnel to escape the rapidly advancing Soviet army. *Id.* On May 9, 1945, the overall instrument of surrender of the General High Command was signed by Field-Marshall Wilhelm Keitel at Soviet headquarters in Berlin-Karlshorst. *Id.* As one commentator noted, "[I]t is important to keep in mind that there has never been an unconditional surrender of Germany, but only of the German armed forces." Max Rheinstein, *The Legal Status of Occupied Germany*, 47 MICH. L. REV. 23, 23 (1948).

Then, on May 15, 1945, Dönitz issued the aforementioned ordinance calling for war crimes trials to be conducted before the Supreme Court at Leipzig. *Id.* at 50. A copy of this pronouncement was sent to Eisenhower, but he did not reply. When Eisenhower next sent his advisors to meet with Dönitz, the latter suggested a joint Allied-German effort against the Soviets. *See id.* Within less than a week after this proposal, Dönitz and his entire government at Flensburg were arrested by the Allies. *See id.* at 51. In so doing, the Allies effectively "dissolve[d] the German government." Rheinstein, *supra*, at 24. *See* Kelsen, *supra* note 31, at 519 ("By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state."). In sum,

> [N]o matter what the Allies did, Germany at that time had a legitimate government which was briefly recognized by the Allies when it suited them and that very German

When Article 228 was finalized,[200] prosecutions were restricted to "violation[s] of the laws and customs of war." This eliminated trials predicated upon the "laws of humanity," as well as reliance upon the doctrine of "negative criminality" - both substantial concerns that the United States had addressed in its *Memorandum of Reservations*.[201] In addition, by providing for trials "before military tribunals" in Articles 228 and 229, the Americans, by means of one of President Wilson's April 9, 1919, compromise proposals,[202] were able to prevent the creation of an international criminal court, as envisioned by the Commission.[203]

On the other hand, Article 230, which required the German government to furnish the Allies with information and documentary evidence to facilitate war trials, appears simply to have been a condensation of Articles V and VI from the Commission's recommended draft articles.[204]

D. War-Guilt Clause—Article 231

Article 231, although not textually linked to Articles 227 through 230, became inextricably intertwined with these penalty provisions during German negotiations with the Allies over the Versailles Treaty.[205]

The provision that became famous as the "war-guilt" clause actually stemmed from a compromise proposal originally made by John Foster Dulles in February 1919,[206] which was then submitted to the Commission on Reparation of Damage.[207] Dulles' draft proposals were designed to conceptually acknowledge Germany's responsibility for reparations (Article 231), while restricting its actual

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government wanted to prosecute war criminals. The Allies could not accept such a proposition because it would have legitimized the Dönitz government and precluded the Four Major Allies to claim that there was no legitimate government of Germany and hence assume the role of Germany's government. Thus, they ignored the Dönitz proposal and proceeded with their own plans.

BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 84.

Interestingly, the subsequent trials that occurred in the Allied zones of occupation could properly be classified as domestic, rather than international, prosecutions because of the Allies' exercise of sovereign authority in Germany. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 30; *cf.* Rheinstein, *supra*, at 25.

206. The phrase "punishments laid down by military law" in the May 7, 1919 text of the first paragraph was changed in the final version to read "punishments laid down by law." *See* VERSAILLES AND AFTER, *supra* note 26, at 376.

207. *See* WILLIS, *supra* note 21, at 80; *see also supra* notes 107-111, 141-143 and accompanying text.

208. *See supra* notes 182-184 and accompanying text. The first clause of Wilson's proposal "provided for trial before Allied national or mixed military tribunals of persons accused of violating the laws and customs of war." WILLIS, *supra* note 21, at 80.

209. *See* WILLIS, *supra* note 21, at 80.

210. *See* Provisions, *supra* note 152, arts. V, VI, at 82.

211. *See infra* notes 216-245 and accompanying text.

212. At the time, John Foster Dulles was considered a "leading American representative" on the Commission on Reparation of Damage. TRACHTENBERG, *supra* note 98, at 56-57. He was later appointed Secretary of State under President Eisenhower.

213. *See* SCHWABE, *supra* note 80, at 289; VERSAILLES AND AFTER, *supra* note 26, at 413; WALWORTH, *supra* note 59, at 288; *see also supra* note 98 and accompanying text.

liability to Germany's limited ability to pay (Article 232).[208] Similarly, Norman Davis, President Wilson's chief financial advisor in Paris, recommended: "It can be said that Germany was *morally* responsible for the war and all the consequences thereof, and legally that she is responsible in accordance with the formula adopted for damage to property and to persons."[209]

In short, the United States wanted Article 231, the foundation for reparations, to remain "purely theoretical and have no binding character in either a legal or practical way if it was to be included in the treaty at all."[210] In fact, during the initial discussion on the subject of reparations, Wilson had the reference to Germany's guilt stricken altogether.[211] The other *Entente* powers, however, ultimately prevailed and thus, in its final form, Article 231 represented a decidedly British and French formulation.[212]

In the view of the Allies:

> Article 231 was regarded . . . as establishing th[e] basis for the assessment of reparation. The question of responsibility for the war, as distinguished from the damage resulting from it, was considered elsewhere in the peace conference and the conclusions were exhibited in Part VII, Penalties, of the treaty. Those provisions were narrowed down to the responsibility of individuals and afforded slight ground for argument on the broad question. Article 231 was a general statement, modified by article 232.[213]

On the other hand, the Germans construed Article 231 as forming the basis upon which the threatened war crimes prosecutions were based,[214] universally denounced the clause as the "war-guilt lie," and saw the provision as a blank check by which the Allies could make unlimited reparation demands.[215]

E. German Negotiations on the Provisions of the Treaty of Versailles

When the Germans first learned of the harsh terms of the Versailles Treaty, mass demonstrations erupted.[216] Articles 227 to 231 met with nearly unanimous

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214. *See* TRACHTENBERG, *supra* note 98, at 56; WALWORTH, *supra* note 59, at 288; *cf.* VERSAILLES AND AFTER, *supra* note 26, at 414 ("It was perfectly clear from the discussion that this form was chosen simply to establish the potential extent of responsibility in clause 1 (art. 231) and to define its limitations in clause 2 (art. 232) . . . .").

215. TRACHTENBERG, *supra* note 98, at 56-57 (quoting 1 REPARATION AT THE PARIS PEACE CONFRENCE FROM THE STANDPOINT OF THE AMERICAN DELEGATION 826 (Philip Mason Burnett ed., Columbia Univ. Press 1940) (emphasis added)). *See* WALWORTH, *supra* note 59, at 288.

216. SCHWABE, *supra* note 80, at 289-90 (citing PAUL MANTOUX, 1 DES DELIBERATIONS DU CONSEIL QUATRE 83 1955).

217. *Id.* at 290.

218. *Id.*

219. VERSAILLES AND AFTER, *supra* note 26, at 414.

220. *Id.* at 372 ("The German delegation linked th[e] issue of penalties to the question of responsibility for the war.").

221. *See id.* at 414-19; WILLIS, *supra* note 21, at 72; WALWORTH, *supra* note 59, at 288.

222. WILLIS, *supra* note 21, at 83.

opposition.[217] The war-guilt clause, Article 231, caused particular outrage.[218] In fact, when the Treaty was given to the German delegation at Versailles on May 7, 1919,[219] Count Brockdorff-Rantzau, President of the German peace committee, retorted, "It is demanded of us that we shall confess ourselves to be alone guilty of the war. Such a confession from my lips would be a lie."[220] In addition, he made the following reply:

> Crimes in war may not be excusable, but they are committed in struggle for victory, and in defense of national existence, and under the influence of passions which deaden the conscience of peoples. The hundreds of thousands of non-combatants who have perished since the 11th of November by reason of the blockade, were killed with cold deliberation after our adversaries had conquered and victory had been assured them. Think of that when you speak of guilt and of punishment.[221]

Brockdorff-Rantzau was, of course, referring to the Allied hunger blockade, "a measure contrary to the law of nations,"[222] which, pursuant to Article 26 of the

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223. WILLIS, *supra* note 21, at 82.

224. *Id.* at 84.

225. *Id.* at 83.

226. Address of Count Brockdorff-Rantzau, May 7, 1919, *reprinted in* GERMAN WHITE BOOK CONCERNING THE RESPONSIBILITY OF THE AUTHORS OF THE WAR 3 (Div. of Int'l Law, Carnegie Endowment for Int'l Peace trans., 1924) [hereinafter GERMAN WHITE BOOK].

227. *Id.* at 4.

228. Note of Count Brockdorff-Rantzau, President of the German Delegation, to Georges Clemenceau, President of the Peace Conference (May 24, 1919), *reprinted in* GERMAN WHITE BOOK, *supra* note 220, at 10. Britain's "distant" blockade of Germany was in violation of the Declaration of Paris of 1856, which directed that "[b]lockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Declaration Respecting Maritime Law (Declaration of Paris), Apr. 16, 1856, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 699, 700 (Dietrich Schindler & Jiri Toman eds., 1981). *See* VINCENT, *supra* note 24, at 34.

Armistice agreement of November 11, 1918,[223] was maintained with tragic consequences long after the Germans had laid down their arms.[224]

Because the Allies refused to negotiate in person with the Germans at Versailles, the German peace delegation was left with no other option but to submit its counterproposals in writing.[225] In response to Article 227, the German delegation stated that there was no legal basis upon which to prosecute the Kaiser, especially in light of the fact that there was no penalty prescribed for the political conduct alleged against him at the time the act was committed.[226] Similarly, the delegation pointed out that the German code prevented the surrender of individuals subject to prosecution under Article 228.[227]

The Germans, however, expressed their desire to see violations of international law punished severely and, to that end, proposed that questions pertaining to offenses against the laws and customs of war be submitted to "an international tribunal of neutrals competent to judge all violations by nationals of all the signatories."[228] Punishment, according to this plan, would remain the province of the national courts.[229]

On May 13, 1919, Brockdorff-Rantzau, quoting Article 231, requested that the Allies provide the German Peace Delegation with a copy of the Allied *Report of the Commission on Responsibility*.[230] One week later, Georges Clemenceau, President of the Peace Conference, wrote a response in which he refused to provide

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229. Armistice with Germany, Nov. 11, 1918, art. 26, *reprinted in* 2 BEVANS 9, 14. Article 26 provided as follows:

> The existing blockade conditions set up by the allied and associated powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture. The Allies and United States contemplate the provisioning of Germany during the armistice as shall be found necessary.

Id. at 14.

In their Declaration that accompanied the Armistice, the German Plenipotentiaries pointed out that "the carrying out of this agreement must throw the German people into anarchy and famine." Declaration of German Plenipotentiaries, Nov. 11, 1918, *reprinted in* 2 BEVANS 18, 18. The delegation further noted that, "[a]ccording to the declarations which preceded the armistice, conditions were to be expected which, while completely insuring the military situation of our opponents, would have ended the sufferings of women and children who took no part in the war." *Id.*, *reprinted in* 2 BEVANS 18, 19.

The November 11th armistice terms, which included the continuation of the hunger blockade, were renewed on a number of successive occasions. *See* Prolonging of Armistice with Germany, Dec. 13, 1918, *reprinted in* 2 BEVANS 23; Prolonging of Armistice with Germany, Jan. 16, 1919, *reprinted in* 2 BEVANS 24; Prolonging of Armistice with Germany, Feb. 16, 1919, *reprinted in* 2 BEVANS 28.

230. For a discussion of the Allied hunger blockade and its aftermath, *see generally* VINCENT, *supra* note 24.

231. *See* WILLIS, *supra* note 21, at 83.

232. VERSAILLES AND AFTER, *supra* note 26, at 371-72.

233. *Id.* at 372.

234. *Id.*

235. *Id.*

236. Note of Count Brockdorff-Rantzau, President of the German Delegation, to Georges Clemenceau, President of the Peace Conference (May 13, 1919), at 6.

the Germans with a copy of the Commission *Report*, referring to it as a document of "an internal character."[231]

Despite being denied the Allied *Report*, the Germans assembled a panel, which included the renowned sociologist Max Weber, to challenge the Commission's findings.[232] Forced to rely solely on news reports,[233] the expert panel prepared a response by May 27, 1919.[234] The panel began its *Observations* by emphasizing the need for a neutral commission to decide such grave questions as war guilt:

> [T]he question of the responsibility for the outbreak of war can not be decided by one side which was itself a party to the war, but that only a commission of inquiry, recognized by both sides as impartial, to which all records are accessible and before which both parties alike can state their case, can venture to pronounce judgment . . ..[235]

The panel took special note of the Commission's failure to mention the significance of the general Russian mobilization or the Pan-Slavist plans to annex the Bosporus and Dardanelles Straits.[236] According to the panel, Germany, faced with the reality of a war to be fought on both fronts, was forced by necessity to engage in a defensive war.[237]

In reply to German assertions that justice in the victors' tribunals would be one-sided, the Allies stated that it would be "impossible to entrust in any way the trial of those directly responsible for offences against humanity and international right to their accomplices in their crimes."[238] In addition to rejecting the remainder of the German arguments *in toto*,[239] the Allied reply contained an ultimatum demanding an agreement to sign the treaty as it stood; otherwise, the Allies promised to "take such steps as they think needful to enforce their Terms."[240]

On June 22, 1919, with just one day remaining under the Allied ultimatum, the German delegation sent a note to Clemenceau stating its intention to fulfill all of the conditions imposed by the Versailles Treaty, except those contained in

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237. Note of Georges Clemenceau, President of the Peace Conference, to Count Brockdorff-Rantzau, President of the German Delegation (May 20, 1919), *reprinted in* GERMAN WHITE BOOK, *supra* note 226, at 7.

238. WILLIS, *supra* note 21, at 84.

239. *See id.*; VERSAILLES AND AFTER, *supra* note 26, at 372 (noting that "somehow the report got into the press").

240. *See* Observations on the Report of the Commission of the Allied and Associated Governments on the Responsibility of the Authors of War, May 27, 1919 [hereinafter Observations], *reprinted in* GERMAN WHITE BOOK, *supra* note 226, at 31-43.

241. *Id.* at 31.

242. *See id.* at 35, 37, 40; *cf.* DEGRELLE, *supra* note 25, at 6.

243. Observations, *supra* note 234, at 36-37.

244. UNWCC, *supra* note 122, at 44-45.

245. *See* VERSAILLES AND AFTER, *supra* note 26, at 372.

246. Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, and Ultimatum, Letter of Georges Clemenceau, President of the Peace Conference, to President of the German Delegation, Covering the Reply of the Allied and Associated Powers (June 16, 1919), *reprinted in* VERSAILLES AND AFTER, *supra* note 26, at 44, 54.

Articles 227 and 231;[241] moreover, the note concluded with the following declaration:

> The Government of the German Republic is ready to sign the treaty of peace without . . . undertaking any responsibility for delivering persons in accordance with Articles 227 to 230 of the treaty of peace.[242]

In response, the Allies issued a new ultimatum threatening to invade Germany the next day.[243] Lacking sufficient military resources, the German government unconditionally accepted the Allied terms just several minutes before the expiration of the ultimatum on June 23.[244] Five days later the treaty was opened for signature in the Versailles Hall of Mirrors.[245]

OUTCOMES

A. Attempted Arrest and Extradition of Kaiser Wilhelm II

At the end of the war, Kaiser Wilhelm II and the crown prince sought asylum in the Netherlands. Queen Wilhelmina sympathized with the Emperor, who was then housed in the country estate of Count Bentinck at Amerongen.[246] It was from this chateau that the Kaiser formally abdicated on November 28, 1918, and asked that German officials and members of the military "protect the German people against the menacing dangers of anarchy, famine, and foreign domination."[247]

At the beginning of the following year, a bold attempt was made to arrest the Kaiser in Holland - a fascinating, but forgotten, footnote of history, the accuracy of which has been obscured by the passage of time and colored by the brush of legend. Willis relates an incident involving a United States Lieutenant Colonel Luke Lea, a former United States senator:

> Lea led six soldiers to Amerongen just after New Year's Day. They planned to seize the kaiser by surprise and roar off to Paris, daring the Dutch to shoot while the kaiser was held prisoner in their car. Near Amerongen, however, they came upon a washed-out bridge and saw that capture was inevitable at that point in a return trip. What had begun as a serious undertaking consequently turned into a semicomic confrontation. The Americans determined to persuade the kaiser to go with them voluntarily to face his accusers manfully. They continued on to the Bentinck estate on the night of January 5, bluffed their way inside the house, and demanded to see Wilhelm II. After a two-hour standoff, during which the kaiser

247. *See* VERSAILLES AND AFTER, *supra* note 26, at 373.
248. *Id.*
249. WILLIS, *supra* note 21, at 85.
250. *See id.*
251. STEVENSON, *supra* note 2, at 281.
252. *See* WILLIS, *supra* note 21, at 66.
253. 12 AMERICA: GREAT CRISES, *supra* note 23, at 187-88.

> refused to meet with the Americans, Dutch troops surrounded the estate with spotlights and machine guns, forcing Colonel Lea and his men to depart.[248]

No further attempts were made to apprehend the Kaiser.

Several weeks after the attempted arrest of Wilhelm II, the Allies submitted a request to the Netherlands to turn over the Kaiser for trial.[249] The Allied demand stated, in part:

> In addressing this demand to the Dutch Government the powers believe it their duty to emphasize its special character. It is their duty to insure the execution of Article 227 without allowing themselves to be stopped by arguments, because it is not a question of a public accusation with juridical character as regards its basis, but an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognized in public law.[250]

This request, however, was in the nature of a diplomatic note, and the Dutch were informed that the Allies would not press for the Kaiser's extradition.[251] Dr. Scott commented on the Supreme Council's demand as follows: "In endeavoring to impose a duty upon Holland [to surrender Wilhelm II] and to bring that country to a realization of this duty, as the supreme council saw it, the note dwelt upon the peculiar nature of the offense, and in so doing supplied Holland with an answer which would defeat the purpose, if indeed the Allied Governments wished at this time the surrender of the former German kaiser."[252]

On January 23, 1920, the Dutch denied the Allies' request, citing Holland's long tradition of providing political refuge, Dutch national law, and the fact that Holland had not signed, and was thus not subject to, the Treaty of Versailles.[253] But it was the very wording of Article 227 that gave substance to the Dutch argument. The idea that there existed a "supreme offence against international morality and the sanctity of treaties" was simply not a valid legal basis for extradition; furthermore, the choice of these words evidenced the political nature

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254. WILLIS, *supra* note 21, at 100-01. *See also* Bassiouni, *Combating Impunity*, *supra* note 66, at 411-12.

255. *See* WILLIS, *supra* note 21, at 107. Lord Birkenhead, the lord chancellor, was sent to Paris by Lloyd George to assist in the preparation of the demand. Birkenhead, who was formerly known as Sir F.E. Smith, had advised the British prime minister from the start regarding the Kaiser's trial. *Id.* The formal request was filed 15 Jan. 1920, and was submitted to the government of the Queen of The Netherlands on behalf of the 26 Allied Powers who signed the treaty of peace. The response of The Netherlands denying the request was signed on behalf of Her Majesty the Queen of The Netherlands by Mr. Herman Von Karnebeek on 23 Jan. 1920. It was followed by a protest by David Lloyd George on behalf of the Allied Powers. *See* Weekblad van Hetrech, nos. 10511 and 10529. Also reported in 47 REVUE DE DROIT INTERNATIONALE ET DE LEGISLATION COMPARÉ 37-45 (1920); and in A. MÉRIGNAC & E. LEMONON, LE DROIT DES GENS ET LA GUERRE DE 1914-1918 580 (Paris, 1921).

256. Scott, *supra* note 45, at 243.

257. WILLIS, *supra* note 21, at 107.

258. Scott, *supra* note 45, at 242-43.

259. *See id.* at 243-44; WILLIS, *supra* note 21, at 107-08; *see also* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 18 & n.21.

of the conduct charged as a "crime," which neither existed in Dutch law, nor in international law.

On February 14, 1920, the Allied council of ambassadors sent a second demand to Holland.[254] In early March, the Dutch government, as before, refused to honor the Allies' petition - this time replying that compliance would be "incompatible with the national honor if [Holland] consented, at the request of the powers, to violate the[] laws by abolishing the rights which they accord to a fugitive finding himself within the country's territory."[255]

It was well understood in political circles that these impotent requests, predicated upon Article 227, were made as a concession to the *Entente* masses, who still anticipated a trial, and, on behalf of the French and Belgian governments, as a means of humiliating the Hohenzollern dynasty.[256]

B. War Crimes—The Leipzig Trials

After signing the Versailles Treaty, Germany prepared to deal with the anticipated Allied request for the surrender of war criminals.[257] On November 5, 1919, in an effort to prevent such a calamitous event, and sensing an ambivalence of the part of the Allies, Baron von Lersner proposed that Germans be permitted to conduct the trials of accused war criminals in their own courts.[258] Toward this end, on December 13, 1919, the German legislature passed a special law (*Reichsgesetzblatt*) that granted jurisdiction to the *Reichsgericht*, the German Supreme Court, at Leipzig to try the defendants selected by the Allies.[259]

On February 3, 1920, pursuant to Article 228, the Allies presented the German ambassador, von Lersner, with a list of 895 persons [260] to be surrendered as war criminals - a sharp contrast from the 20,000 originally named by the Commission.[261] The publication of this list, which included such German military leaders as Hindenburg and Ludendorff, caused immediate outrage in Germany.[262] The German ambassador threatened to resign, and the German government responded by warning the Allies that the surrender of such national heroes could

260. Scott, *supra* note 45, at 244.

261. *Id.* at 245.

262. *See* WILLIS, *supra* note 21, at 107; Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19.

263. WILLIS, *supra* note 21, at 113; *See also*, Bierzanek, *supra* note 103, at 92 ("As soon as the Treaty of Versailles was ratified, the Germans embarked on diplomatic action to prevent the surrender of their war criminals . . . .").

264. *See* WILLIS, *supra* note 21, at 118.

265. *See* CLAUD MULLINS, THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY 35 (1921); WILLIS, *supra* note 21, at 118.

266. The sources conflict as to the specific number of persons listed. *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 520 (895 persons); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 17 (1992) (854 persons); *cf.* UNWCC, *supra* note 122, at 46 (896 persons); WILLIS, *supra* note 21, at 113 (854 persons); Bierzanek, *supra* note 103, at 92 (901 persons).

267. Bassiouni, *Combating Impunity*, *supra* note 66, at 412.

268. *See* UNWCC, *supra* note 122, at 46.

imperil the stability of the weak Weimar Republic.[263] This struck a particular note with the Allies, who, with good reason, were already fearful of a Bolshevik takeover in Germany.[264]

After appointing a commission, the Allies accepted Germany's offer to conduct the trials before the *Reichsgericht*, with the caveat that if the Allies found the prosecutions to be unsatisfactory, they reserved the right to try the defendants before their own tribunals.[265] Under this arrangement, the Allies had to submit their cases, including their evidence, to the Procurator General of the Supreme Court, who retained prosecutorial discretion as to which cases would be brought.[266]

In addition, after further negotiations, the Allies agreed to drastically reduce the number of persons subject to prosecution.[267] Based on this reaction, on March 31, 1920, an Inter-Allied Commission submitted a much shorter list of only forty-five individuals,[268] but even that number was resisted by the Germans. In the end, only twelve military officers were tried by the *Reichsgericht*.[269] Six of the cases were submitted by the British, five by the French, and one by the Belgians.[270] The Allies lost control of the situation when, in agreeing to have the German Supreme Court try these offenders under German law, they were subject to the Procurator General's discretion in initiating these prosecutions. The French and Belgians were outraged and withdrew from the process; the British, however, remained engaged in it with the intention to see it through no matter how symbolic the outcome.

The trials finally commenced on May 23, 1921, some two and one-half years after the signing of the Armistice.[271] Of the twelve prosecutions undertaken, six resulted in convictions.[272] The British cases resulted in a greater than 80% conviction rate; the cases submitted by the French enjoyed only a 20% success rate; and the lone Belgian case ended in an acquittal.[273] The cases of greatest interest today were those brought by the British,[274] and all three involved the defense of obedience to superior orders.

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269. *See* UNWCC, *supra* note 122, at 46; William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996)*, *in* 3 INTERNATIONAL CRIMINAL LAW 171, 172 (M. Cherif Bassiouni ed., 2d ed. 1999); Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19.

270. *See* WILLIS, *supra* note 21, at 113; *See also* DEGRELLE, *supra* note 25, at 339-55, 375-91 (discussing the violent Communist activities taking place in Germany during this period). *Cf.* ADOLF EHRT, COMMUNISM IN GERMANY: THE COMMUNIST CONSPIRACY OF THE EVE OF THE 1933 NATIONAL REVOLUTION 9-26 (photo. reprint 1990) (1933).

271. Bierzanek, *supra* note 103, at 93; UNWCC, *supra* note 122, at 46.

272. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19-20.

273. *See* Bassiouni, *Combating Impunity*, *supra* note 66, at 413.

274. *See* WILLIS, *supra* note 21, at 128.

275. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20. In addition, a case was prosecuted against Dr. Oskar Michelsohn, who was accused of deliberately contributing to the deaths of hospitalized French prisoners. WILLIS, *supra* note 21, at 141. Dr. Michelsohn was acquitted. *Id.*

276. MULLINS, *supra* note 259, at 191.

277. *See* UNWCC, *supra* note 122, at 47.

278. MULLINS, *supra* note 259, at 191.

279. *See id.*

280. *See* GERMAN WAR TRIALS: REPORT OF PROCEEDINGS BEFORE THE SUPREME COURT IN

In *Robert Neumann's Case*, a prison guard at a chemical factory at Pommerensdorf was charged with brutalizing prisoners of war.[275] On one occasion, a group of British prisoners refused to work.[276] After Trienke, the defendant's superior, unsuccessfully tried to peaceably persuade the prisoners to do their work, he called the Commandant for instructions.[277] Thereafter, Trienke ordered his sentries, including Neumann, to "set about the prisoners."[278] The defendant admitted to using his fist against one prisoner during the incident.[279] The court held that Neumann was not responsible:

> He was covered by the order of his superior which he was bound to obey. According to §47 of the Military Penal Code a subordinate can only be criminally responsible under such circumstances, when he knows that his orders involve an act which is a civil or military crime. That was not the case here. . . . As matters stood there could be no doubt of the legality of the order.[280]

In other instances, however, the defendant was convicted of assault.[281]

In the *Dover Castle Case*, a submarine commander, Lieutenant-Captain Karl Neumann, was charged with torpedoing a British hospital ship in violation of the 10th Hague Convention.[282] The commander admitted to torpedoing the ship, but stated that he was only acting in obedience to orders.[283] Specifically, because the German government was convinced that the Allies were using hospital ships for military purposes, the Admiralty had issued two memoranda to the Allies notifying them that, unless enemy hospital ships kept to a certain course in the Mediterranean and fulfilled other conditions, the vessels would be treated as ships of war.[284] The defendant believed that these orders constituted legitimate reprisals.[285] The court acquitted Neumann:

> It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible . . ..

LEIPZIG (London 1921) (providing an official overview of the British cases, including the complete judgments rendered by the *Reichsgericht*).

281. MULLINS, *supra* note 259, at 88-89.

282. *Judgment in Case of Robert Neumann* (1921), 16 AM. J. INT'L L. 696, 697 (1922).

283. *Id.* at 697-98, 699.

284. *Id.* at 699.

285. *Id.* at 698.

286. *Id.* at 699.

287. MULLINS, *supra* note 259, at 97.

288. *Id.* at 99, 103-04.

289. *Id.* at 99-100.

290. *See Judgment in Case of Commander Karl Neumann Hospital Ship "Dover Castle" (1921)*, 16 AM. J. INT'L L. 704, 706 (1922).

291. *Id.* at 707.

> The Admiralty Staff was the highest authority over the accused. He was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility.[286]

In contrast, in the *Llandovery Castle Case*, the defendants' superior order defense was unsuccessful.[287] In *Llandovery Castle*, a hospital ship was torpedoed by a German U-boat in the Atlantic Ocean, in an area in which such ships were not barred from traveling.[288] The commander of the U-boat, Helmut Patzig, incorrectly believed that the ship was being used to transport troops and munitions.[289] After three lifeboats were successfully deployed from the sinking hospital ship, the U-boat fired shells at the lifeboats and caused the destruction of two of them and the death of their occupants, according to the finding of the court.[290] Because Patzig was not in custody, the court tried two first lieutenants, Ludwig Dithmar and John Boldt, who were with Patzig when the shells were fired.[291] The defendants refused to give evidence at trial because of a promise of silence they made to Patzig.[292]

In finding the accused guilty as accessories, the court stated:

> Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible . . .. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law . . .. They [the defendants] should, therefore, have refused to obey. As they did not do so, they must be punished.[293]

In sentencing the defendants, however, the court did consider the existence of the superior order in mitigation.[294]

In contrast to the British, the French and Belgians unwisely named high-ranking individuals, especially in the case of German war hero General Karl

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292. *"Dover Castle", supra* note 290, 16 AM. J. INT'L L. 704, 707.

293. *See Judgment in Case of Lieutenant Dithmar and Boldt Hospital Ship "Llandovery Castle" (1921)*, 16 AM. J. INT'L L. 708, 721-22 (1922).

294. *See id.* at 710.

295. *See id.* at 710, 712-14.

296. *Id.* at 711, 718-19. Although there were no witnesses to either the intended target or the effect of the firings, the court concluded "beyond all doubt that . . . Patzig attained his object so far as two of the boats were concerned." *Id.* at 718-19.

297. *See* MULLINS, *supra* note 259, at 107-08.

298. *Llandovery Castle*, *supra* note 293, at 716.

299. *Id.* at 721-722.

300. *See id* at 728.

Stenger, and failed to authenticate their evidence.[295] As a consequence, only one defendant was convicted in these cases.[296]

In particular, after N.C.O. Max Randohr was acquitted of having maltreated and imprisoned Belgian children, the Belgian delegation left Leipzig in protest and withdrew evidence it had previously submitted.[297] Similarly, after failing to secure the desired convictions of General Stenger and Lieutenant Laule, the French Mission abruptly departed for Paris during the middle of the trial of Generals von Schack and Krushka, following which the French issued a forceful protest to the Germans.[298] By way of comparison, following the acquittal of General Stenger, the one-legged war veteran was showered with flowers by a crowd of admiring German spectators.[299]

On January 15, 1922, the Commission of Allied Jurists (Allied Jurists) declared that the *Reichsgericht* had failed in carrying out its mandate and that "some of the accused who were acquitted should have been condemned and . . . in the case of those condemned the sentences were not adequate."[300] The Allied Jurists also recommended that Germany be required to extradite its war criminals as provided for in Article 228.[301] Although no further action was taken by the Allies toward this goal,[302] it should be noted that the French and Belgians did prosecute accused German war criminals *par contumace* (in absentia).[303]

In assessing the failure of the Allies to enforce Articles 228 to 230 of the Versailles Treaty, the United Nations War Crimes Commission cited to the following factors: (1) the failure to promptly commence the war crimes trials, when public support was still high; (2) lack of unity among the Allies; (3) the world "was not internationally mature;" and (4) improper drafting of the war crimes clauses.[304] To these may be added the most significant influences of all, namely, the priority of the Allies in maintaining peace and in fulfilling their domestic political agendas over the quest for retributive justice.[305]

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301. *See* WILLIS, *supra* note 21, at 134; *see also* MULLINS, *supra* note 259, at 191 (noting that "the Belgian and French evidence did not impress the Court as being impartial and credible").

302. *See* WILLIS, *supra* note 21, at 134.

303. UNWCC, *supra* note 122, at 47; WILLIS, *supra* note 21, at 134-35.

304. *See* UNWCC, *supra* note 122, at 47; WILLIS, *supra* note 21, at 135-36.

305. UNWCC, *supra* note 122, at 50; WILLIS, *supra* note 21, at 135, 136.

306. UNWCC, *supra* note 122, at 48.

307. Bierzanek, *supra* note 103, at 94.

308. *See id.*

309. *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 522; WILLIS, *supra* note 21, at 142-45; *see also* Garner, *supra* note 54, at 81-82 (discussing the propriety of *condemnation par contumace*).

310. UNWCC, *supra* note 122, at 52. President Wilson remarked that the war crimes clauses were "the weak spot in the Treaty of Peace." BASS, *supra* note 159, at 100.

311. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20. Popular German reaction to the trials was overtly hostile. For example, after General Stenger's acquittal, he was met by cheering crowds and was showered with flowers; in contrast, the crowd "taunted and spat upon members of the French mission." WILLIS, *supra* note 21, at 136. Similarly, the German press, almost without exception, highlighted the arguments of defense counsel. *Id.* at 131. In addition, the viability of the principle of the defense of obedience to superior orders was strongly reaffirmed. *See supra* notes 275-

C. Crimes Against the Laws of Humanity—Efforts to Prosecute Turkish Officials for the Armenian Massacres

The 1919 Commission recommended that guilty persons from the Central Powers be tried for crimes against the "laws of humanity."[306] On August 10, 1920, the Allies and Turkey signed the Treaty of Sèvres.[307] In an attempt to ensure prosecution of the perpetrators of the Armenian massacres, the Allies inserted, in addition to war crimes clauses virtually identical to Articles 228 to 230 of the Versailles Treaty,[308] a special provision that addressed the mass killings. Article 230 of the Treaty of Sèvres provided, in pertinent part:

> The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.
>
> The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish government undertakes to recognise such tribunal.
>
> In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.[309]

Although the Advisory Committee of Jurists shortly thereafter recommended the establishment of a High Court of International Justice to "try crimes against international public order and the universal law of nations,"[310] the League of Nations ignored the proposal.[311] In any event, the Treaty of Sèvres was not ratified, and Article 230 was therefore never implemented.[312]

British and Turkish domestic attempts to bring the suspects to trial were similarly unsuccessful.[313] For example, in May 1919, the British seized a large

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294 and accompanying text.

312. *See supra* notes 128-140 and accompanying text.

313. Tripartite Agreement Between the British Empire, France and Italy Respecting Anatolia (Treaty of Sèvres), Aug. 10, 1920, *reprinted in* 15 AM. J. INT'L L. 153 (Supp. 1921).

314. *Cf. id.*, arts. 226-228.

315. *Id.*, art. 230.

316. James Brown Scott, Report on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Sept. 17, 1920 [hereinafter 1920 Advisory Committee Report], *reprinted in* 7 DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 35, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS 139 (photo. reprint 2000) (1920) [hereinafter PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE].

317. WILLIS, *supra* note 21, at 158.

318. UNWCC, *supra* note 122, at 45; Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 17.

319. *See* Dadrian, *Genocide*, *supra* note 129, at 281-317; *see also* BASS, *supra* note 159, at 106-46.

number of detainees from a Turkish military prison and took them to Malta to await trial by the Allies.[314] Political conditions, however, soon changed drastically. Domestically, the nationalist movement headed by Mustafa Kemal was rapidly gaining strength.[315] Internationally, the French and the Italians began to secretly negotiate with Kemalists and thereby undermined British efforts to bring the suspects to trial.[316] Eventually, in October 1921, the British agreed to an "all for all" exchange of its remaining Turkish prisoners for British hostages held by the nationalists.[317]

In addition, following the nationalists' recovery of Izmir and Kemal's bold confrontation with the British,[318] the victorious Turks were able to set the terms of a peace.[319] Accordingly, on July 24, 1923, the Allies and Turkey signed the Treaty of Lausanne.[320] Unlike the earlier Treaty of Sèvres, this treaty contained no war crimes clauses;[321] furthermore, it was accompanied by a "Declaration of Amnesty" covering offenses committed during the wartime period.[322] Such concessions were also predicated upon the Allies' desire to ensure that Turkey, the master of the Bosporus and Dardanelles Straits, remained friendly to the western powers, as well as upon their concomitant fear of the potential naval mobility of the nearby Communist regime in Russia.[323]

Instead, the Allies negotiated with Turkey to prosecute offenders, much as they had done with Germany with the resulting Leipzig Trials. Ottoman authorities eventually agreed to conduct domestic trials of those deemed responsible for the Armenian massacres because they thought that by doing so Turkey would be treated less severely at the Paris Peace Conference.[324] On November 23, 1918, the Administration's Inquiry Commission (Inquiry Commission) was established to investigate the misdeeds of Turkish officials.[325] By January 1919, the Inquiry Commission had compiled 130 dossiers on suspects.[326] On March 8, 1919, the Sultan authorized statutes for a new Court Martial, which was charged with inquiring into the massacres.[327] The Key Indictment that was issued was directed against the leaders of the Ittihad party.[328] On July 5, 1919, a verdict was entered in which a number of ruling Ittihad

320. Dadrian, *Genocide*, *supra* note 129, at 285.

321. *Id.* at 286.

322. *Id.* at 286, 291.

323. *Id.* at 288-89.

324. *See* HANNS FROEMBGEN, KEMAL ATATURK: A BIOGRAPHY 186-97 (1937).

325. *See* WILLIS, *supra* note 21, at 162.

326. Treaty with Turkey and Other Instruments Signed at Lausanne, July 24, 1923 (Treaty of Lausanne), *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924).

327. *See id.*; UNWCC, *supra* note 122, at 45.

328. *See* Declaration of Amnesty and Protocol, July 24, 1923, *reprinted in* 18 AM. J. INT'L L. 92, 94 (Supp. 1924).

329. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 17.

330. Dadrian, *Genocide*, *supra* note 129, at 292.

331. *Id.* at 295.

332. *Id.* at 295.

333. *Id.* at 296.

334. *Id.* at 298.

members were condemned to death in absentia.[329] The Courts Martial were, however, abolished by January 1921, and numerous prosecutions were never undertaken.[330]

In sum, the Istanbul Trials, which were conducted between 1919 and early 1921, failed to secure justice for the slain Armenians. Like the later Leipzig Trials, these proceedings before the Turkish Courts Martial were plagued by absent defendants, light sentences, and a lack of popular support.[331]

The Turks, however, deny that events involving the Armenians during 1915-1917 constituted crimes against humanity. They suggest that such claims were wartime propaganda and point out that the Turks and the Armenians both died in approximately the same proportion *vis-à-vis* the population size.[332] Turkey denies that there was a preconceived plan to exterminate the Armenians and attributes their deaths, as well as the deaths of millions of Turks, to the famine, disease, and breakdown in civil society that accompanied World War I:

> There was no plan to destroy Armenians, but only the wartime necessity of relocating them for the sake of military security. Those deported ... were generally treated humanely and all necessary provisions were made for their safety and well-being (though, admittedly this broke down at times). Some Armenians were killed by criminals and roving tribes; others were killed as the result of the civil war they were waging against Turkey within a global war.[333]

Professor Dadrian, one of the foremost scholars on the Armenian genocide, has, in the context of the post-war experience in Turkey, aptly summarized the *realpolitik* of the Allies following the First World War:

> As World War I ended, the Allies focused attention on punishment for the war crimes committed against the Armenians. At first, the Allies attempted to apply principles of international law to the perpetrators of the massacres. The initial impulse to seek justice, however, faded in the months after the war and eventually gave way to political expediency. The Turkish government's attempts to bring its own nationals to justice also faltered. The rise of nationalism, and the Turkish populace's increasingly defiant attitude toward the Allies, weakened the government's resolve in its quest for justice. This weakened resolve and the Allies' own waning interest sabotaged the efforts to punish those responsible for the genocide.[334]

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335. Dadrian, *Genocide*, *supra* note 129, at 309.

336. *Id.*

337. *See id.* at 309-10, 312-14.

338. Roger W. Smith, *Denial of the Armenian Genocide*, *in* 2 GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 63, 67 (Israel W. Charny ed., 1991).

339. *Id.* at 68.

340. Dadrian, *Genocide*, *supra* note 129, at 278.

CONCLUSION

Although the Allies secured the inclusion of specific war crimes clauses in the Treaty of Versailles, the treaty's two major penalty provisions, Articles 227 and 228, were never implemented.[335] This was due in no small part to the efforts of the United States to limit the work of the Commission, whose substantive recommendations were, for the most part, disregarded.[336] As one of the American delegates on the Commission later wrote, "I am bold enough to say that the American commission rendered a service to the world at large in standing as a rock against the trial of the kaiser for a legal offense . . .."[337]

It is important to note that the Treaty of Versailles began with the Covenant of the League of Nations (Covenant).[338] Article 14 of the Covenant provided, in pertinent part:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.[339]

In light of this mandate, approximately one year after the signing of the Versailles Treaty, an Advisory Committee of Jurists (Advisory Committee) was assembled to formulate plans for the establishment of such a court.[340] On September 17, 1920, Dr. James Brown Scott formally tendered the Committee's *Report on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (*Committee Report*).[341] In a veiled indictment of Allied *realpolitik* at the Paris Peace Conference, the *Committee Report* referred to the following statement uttered by Baron Descamps, the President of the Advisory Committee:

> [T]he failure of the Conference at Paris to create such a tribunal, due to the opposition of the American and Japanese representatives in the Commission on Responsibilities, prevented the punishment of Emperor William II for the invasion of Belgium and of the German officers for the crimes and violations of

341. Bassiouni, From *Versailles to Rwanda*, *supra* note 68, at 18.

342. *See* Bierzanek, *supra* note 103, at 92 ("The Allied Powers ultimately followed the recommendations of the Commission only to a limited extent in drafting the Treaty of Versailles."); *cf.* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 18 ("The Treaty of Versailles did not link the 1919 Commission to eventual prosecutions recognized under its Articles 228 and 229, resulting in an institutional vacuum between the investigation and prosecution stage.").

343. Scott, *supra* note 45, at 245.

344. *See* Treaty of Versailles, *supra* note 95, at 48.

345. *Id.*, Covenant, art. 14, at 52.

346. *See* 1920 Advisory Committee Report, *supra* note 310, *reprinted in* PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 2, 5.

347. Letter from James Brown Scott, Secretary and Director of the Division of International Law, to Board of Trustees of the Carnegie Endowment for International Peace (Sept. 17, 1920), *reprinted in* PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 1.

> international law which they were alleged to have committed in the course of the World War.[342]

This weighty assessment accompanied the Advisory Committee's draft proposal for a High Court of International Justice.[343]

On two separate occasions following "the war to end all wars" the Allies failed to establish an international tribunal to try crimes committed by belligerents. The Paris Peace Conference rejected the 1919 Commission's recommendation to set up a High Tribunal to prosecute violations of both "the laws and customs of war" and "the laws of humanity."[344] Likewise, the League of Nations ignored the proposal of the Advisory Committee of Jurists to create a Permanent Court of International Justice to try "crimes against international public order and the universal law of nations."[345]

Thus, apart from helping to lay the legal foundations for international criminal justice in the future, the Allies' experiment in retributive justice following the First World War was a dismal failure. Despite ample Allied resources, the availability of the exhaustive investigative findings of the Commission, and an enemy prostrate from war, hunger, and internal revolution, very few prosecutions were ever undertaken, and of those that were, the sentences handed down were either comparatively light or never fully executed. The value of justice had not penetrated the practices of *realpolitik.*

It was only after being exposed to the total warfare of World War II that the Allies finally began to travel down the road to justice that led to Nuremberg,[346] Tokyo, and other Allied and national prosecutions, some of which persist to date.

As the time approached for the World War II Allies to pursue post-war justice, the First World War precedent acquired more significance and even the failures of the time served as a basis for what was to come. In time, the failures of post-World War I justice were transformed into a partially valid precedent because that was what was needed to justify the rising expectations of the international society. And so it was also for the post-World War II precedent, whose weaknesses were omitted in favor of the positive aspects that international society wanted to buttress. History's revisionism, or selective memory, has its way of

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348. 1920 Advisory Committee Report, *supra* note 310, *reprinted in* PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 139.

349. *See id., reprinted in* PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 139.

350. *See supra* notes 131-140 and accompanying text.

351. *See supra* notes 310-312 and accompanying text.

352. As a transition between the wartime massacres in Turkey and World War II, reference is often made to Adolph Hitler's purported rhetorical query, "Who after all is today speaking of the destruction of the Armenians?" This statement, which is cited as evidence of genocidal intent on the part of the Nazis, was allegedly uttered by Hitler at Obersalzberg on August 22, 1939 to his leading generals in anticipation of the invasion of Poland. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 138, at 403. The document from which this remark is taken, however, was rejected by the Nuremberg Tribunal as not being authentic. *Id.* at 47. Yet, the debate surrounding the statement continues to the present day. *See id.* at 403-12.

shaping the future even when it deforms the past. Niccolò Machiavelli's adage is confirmed - the ends justify the means.[347]

353. *See* NICCOLÒ MACHIAVELLI, THE PRINCE (Peter Bondanella ed., Oxford Univ. Press 1984) (1532).

RECENT DEVELOPMENTS IN EUROPEAN UNION SECURITIES LAW

SAMUEL WOLFF*

I. OVERVIEW

The European Union (EU) is engaged in a major effort to develop the single financial market. The oddly named "Committee of Wise Men" ("Committee") published an influential report in February 2000 calling for reform of the law-making procedures in the EU.[1] One of the Committee's main objectives is to speed up legislative action needed to bring new life to the single financial market.[2] Despite the considerable and impressive work that the EU has already done in the area of listings and public offerings, true integration of European capital markets is not yet achieved, particularly in the area of corporate finance and capital formation.[3] In May 2001, the European Commission ("Commission") submitted a proposal to the European Parliament and the Council of Ministers for a new directive that would represent a combined version of the Prospectus[4] and Listing Particulars Directives,[5] which would later be repealed.[6] In March 2002, the European Parlia-

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1. *See* Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets (Nov. 7, 2000), *available at http://www.europa.eu.int/comm/internal_market/en/finances/banks/report.pdf* (last visited Nov. 19, 2002). [hereinafter Nov. 7 Committee of Wise Men].

2. *See* id. at 7.

3. *See* id. at 9-19.

4. Council Directive 89/298/EEC of 17 April 1989 Coordinating the Requirements for the Drawing-Up, Scrutiny and Distribution of the Prospectus to be Published When Transferable Securities are Offered to the Public, 1989 O.J. (L124) [hereinafter Council Directive 89/298/EEC].

5. Council Directive 80/390/EEC of 17 March 1980 Coordinating the Requirements for the Drawing-Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to the Official Stock Exchange Listing, 1980 O.J. (L100) [hereinafter Council Directive 80/390/EEC]. In May 2001, the Listing Particulars Directive was consolidated with the Listing Conditions Directive (79/279/EEC), another Directive (82/121/EEC) on periodic reporting, and a fourth Directive (88/627/EEC) on disclosure of major shareholdings. The Consolidated Directive is hereinafter referred to as Council Directive 2001/34/EC, 2001 O.J. (L184/1) [hereinafter Council Directive 2001/34/EC]. References to the "Listing Particulars Directive" or "Listing Conditions Directive" have been retained for purposes of this article, but such directives are now technically components of Council Directive 2001/34/EC; accordingly, citations are to Council Directive 2001/34/EC unless otherwise indicated.

6. *See* Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading, COM(01)280 final at 16 [hereinafter Revised Prospectus Directive or RPD].

ment approved its own version of a new Prospectus Directive[7] and the measure was before the Council when the Commission, "to speed up the legislative process" published an amended proposal in August 2002.[8] Significantly, the new system would substantially rely upon the International Disclosure Standards promulgated by the International Organization of Securities Commissions ("IOSCO") in 1998.[9] The Commission also proposes to enact a registration system similar to shelf registration in the United States.[10] In addition, under the Prospectus/Listing Particulars Directive, as proposed, the host state would have less power to interfere with a prospectus that has been approved by the home state, which should facilitate cross-border securities offerings within the EU.[11] No longer would the prospectus necessarily have to be translated into the language of the host country, although it would be required to be drawn up in a language accepted by the competent authority in the home Member State.[12] In certain cases, it may be necessary to translate the prospectus into a language "customary in the sphere of international finance."

The Commission also proposes to revise the mutual recognition provisions of the Prospectus and Listing Particulars Directives.[13] Although the current Prospectus and Listing Particulars Directives already contemplate the possibility of reciprocity for issuers located outside of the EU, both in the context of listings and public offerings, recognition throughout the EU on the basis of a prospectus of a non-EU issuer has failed to materialize. The proposed directive lays the foundation for an issuer from outside the EU to make an offering or effect a listing throughout the EU on the basis of a prospectus prepared in accordance with IOSCO standards and approved by one EU Member State.[14] Presumably, the exercise of this privilege will also depend upon the issuer's use of accounting standards acceptable to the member country supervising the offering.[15] In February 2001, the EU Commission presented a proposal, which will require a mandatory application of International Accounting Standards for listed companies in the EU by 2005.[16] Under the legislation, all companies listed on a regulated market in the EU, or offering securities publicly in tandem with a listing, must prepare their accounts in accordance with

7. European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading (COM) (2001) 280-C5-0263/2002-2001/0117 (COD), March 14, 2002.

8. Amended Proposal for a Directive of the European Parliament and of the Council on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading (Aug. 9, 2002), 2002/0117 COD, COM (2002) 460 Final (hereinafter 2002 RPD).

9. *See* Report of the Technical Committee, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (May 1998), available at http://www.iosco.org/docs-public/1998-intnl_disclosure_standards.htm (last visited 12/10/02). *See generally* Samuel Wolff, *Implementation of International Disclosure Standards*, 22 U. PA. J. INT'L ECON. L. 91 (Spring 2001).

10. *See* RPD, *supra* note 6; 2002 RPD *supra* note 8, at arts. 5, 12.

11. *See* Council Directive 2001/34/EC, *supra* note 5, at art. 7, at 14.

12. *See id.* at ch. III, art. 103 at 59.

13. *See id.* at 3; 2002 RPD, *supra* note 8, at art. 17.

14. 2002 RPD, *supra* note 8, at art. 20.

15. *See id.*

16. *See* Proposal for a Regulation of the European Parliament and of the Council on the Application of International Accounting Standards, COM(01)80 final at 2.

International Accounting Standards.[17] The proposal for mandatory applications of International Accounting Standards for listed companies in the EU was endorsed by the European Parliament, with amendments, in March 2002, and adopted in July 2002.[18] Conceivably, someday, an issuer from outside the EU preparing its prospectus in accordance with IOSCO standards will be able to make an offering throughout the EU on the basis of a single prospectus.

A legislative dialogue is also being conducted in the EU with respect to amending the Investment Services Directive.[19] The most important area of reform in this regard is the diminution of power on the part of host member countries to impose conduct of business rules on investment firms authorized by their home states. In November 2002, as this article went to press, the Commission published a proposal for a new directive on investment services and regulated markets. In May 2000, the Commission issued a proposal for a new directive on insider dealing and market manipulation.[20] The main effect of this directive is to set minimum standards for market manipulation in the EU.[21] The EU already has a directive on insider trading, but a new one has been adopted to apply to it the same framework for allocation of responsibilities and enforcement as would apply to market manipulation and to simplify administrative matters. As this article went to press, the European Parliament approved the Commission Proposal on Insider Dealing and Market Manipulation, with substantial amendments, and the measure subsequently was adopted.[22] In early 2002, the EU adopted new directives on investment companies, amending prior EU legislation[23] on this subject. [24] The Undertakings for Collective Investment in Transferable Securities (UCITS) directive is beyond the scope of this article. The proposed Takeover Directive, also beyond the scope of this article, died by tie vote in the European Parliament in July 2001.[25]

II. BACKGROUND

The EU is a supranational organization, its activities and relations governed

17. *See* Proposal for a Regulation of the European Parliament and of the Council on the Application of International Accounting Standards, COM(01)80 final at 2.

18. European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Regulation on the Application of International Accounting Standards, COM(01)80.

19. *See infra* note 50, at § V.

20. *See infra* note 284 and accompanying text.

21. *See id.*

22. *See* European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on Insider Dealing and Market Manipulation, COM(01)281.

23. Council Directive 85/611/EEC, 3, 1985, O.J. (L 375).

24. *See* Council Directive 2001/107/EC, 2002 O.J. (L 41/20) (amending Council Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities [UCITS] with a View to Regulating Management Companies and Simplified Prospectuses); Council Directive 2001/108/EC, 2002 O.J. (L 41) (amending Council Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to UCITS, with regard to Investments of UCITS).

25. *See* R. Karmel, *The Failed European Union Takeover Directive*, N.Y. L. J., Aug. 16, 2001, at 3.

by a system of European law.[26] The Council of Ministers, the principal decision-making body of the EU, consists of ministers from each Member State.[27] The Council may consider legislative proposals, which the European Commission presents, must consult with the Parliament, and is subject to review by the European Court of Justice.[28] The Commission is composed of members, at least one from each state, appointed by mutual agreement of Member States.[29] The members of the Commission may not receive instructions from any national government and are subject to the supervision of the European Parliament which is the only body that can force them collectively to resign.[30] The Commission proposes legislation to the Council, implements EU policies, and attempts to ensure that the rules of the EU are followed.[31] The EU's law making procedure is expedited through the "comitology" procedure described *infra* section IV, C.[32]

There has been considerable discussion regarding both the merits and difficulties of creating an EU securities regulator to oversee the entire community. In a November 1999 "action plan," the European Commission discussed several of the shortcomings of the current regulatory environment.[33] The Commission recognized that the creation of a formal regulatory committee could be in the best interest of the EU securities markets and indicated a desire that further study should be made in this area.[34] The influential "Committee of Wise Men," however, did not endorse the idea of a "European SEC."[35] Some commentators, however, have argued in favor of an SEC-type institution for Europe, on grounds that a European SEC is necessary to foster a true pan-European securities market.[36] There also is the development of the Forum of European Securities Commissions ("FESCO"), but to date, this is merely an advisory body with no actual regulatory authority over the EU as a whole.[37]

The major securities laws in the EU are comprised of a number of directives, which seek to harmonize the laws of the EU Member States by providing minimum standards to be followed by each Member State in the regulation of securities

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26. *See generally* The European Union Online, *at http://www.europa.eu.int* (last visited December 1, 2002).

27. *See generally id.*

28. *See id.* at 22.

29. *See generally* The European Union, *supra* note 26.

30. EC TREATY arts. 213-16, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons-treaty_en.pdf (last visited Dec. 23, 2002).

31. *See* Reynolds, *Introduction to the European Economic Community: Its History and Institutions*, 8 LEGAL REFERENCE SERVICES Q. 7, 10 (1988).

32. *See* Council Decision 1999/468/EC, *infra* note 165.

33. *See* Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM (99)232 final at 14 [hereinafter referred to as Financial Services Action Plan]; *see also Action Plan, available at* http://europa.eu.int/scadplus/leg/en/lvb/l24210.htm (last visited Dec. 23, 2002).

34. *See id.* at 30.

35. *See* Bengt Ljung, *International Developments: EU "Wise Men Group" Cool to Creating SEC-Style Agency to Streamline System*, 32 SEC. REG.& L. REP., 1588 (Nov. 20, 2000).

36. *See, e.g.*, Gilles Thieffry, *Comment: European Securities Regulation*, 20 INT'L FIN. L. REV. 5 (May 2000) (arguing that European SEC is best response to consolidation of securities markets, exchanges and clearing systems in Europe).

37. *See Securities Regulators Start Euro Forum*, INSTITUTIONAL INVESTOR, 2 (1997).

within its borders.[38] The principal EU securities directives are those, which govern stock exchange listing, prospectuses, reporting requirements, banking, investment services, capital adequacy, investment funds and insider trading.[39] The EU's two stock exchange directives are the Listing Conditions Directive[40] and the Listing Particulars Directive.[41] The Listing Conditions Directive sets forth minimum conditions for the admission of securities to listing on a stock exchange located in the EU.[42] The Listing Particulars Directive aims to coordinate the differences in Member State disclosure requirements applicable to stock exchange listing and to ensure that disclosure is made to the extent that it enables investors to make informed decisions regarding the financial position and prospects of the issuer.[43] The Prospectus Directive[44] provides that Member States must require that any offer of securities to the public be subject to the publication of a prospectus by the offeror,[45] which must be published or made available no later than the time when the offer is made to the public.[46]

The Second Banking Directive[47] establishes a single license applicable throughout the EU for the provision of banking and other financial services.[48] Banks operating under the Second Banking Directive may provide a wide variety of financial services, including investment services, authorized by the home Member State, without obtaining an additional license.[49] The Investment Services Directive[50] provides for a home state license that allows investment firms to provide, in any Member State, the investment services that are authorized by the home Member State.[51] Under this directive, an investment firm is able to provide in-

38. The purpose of the directives is to establish "the minimum regulatory foundation necessary for the correct operation of the markets and for the protection of investors," while leaving the application of the directives and the enforcement of securities laws to the individual regulatory authorities of the Member States. *See also,* Completing the Internal Market: White Paper from the Commission of the European Council, COM (85)310 final at 8; Fabrice Demarigny, *One Year After the Euro: What Type of Regulation for the European Financial Market?*, No. 19, 10 FUTURES & DERIVATIVES L. REP. 11 (2000).

39. *See* Completing the Internal Market: White Paper from the Commission of the European Council, COM (85)310 final at 8; Demarigny, *supra* note 38.

40. Council Directive 79/279/EEC of 5 March 1979 Coordinating the Conditions for the Admission of Securities to Official Stock Exchange Listing, 21, 1979 O.J. (L 66), replaced by Council Directive 2001/34/EC, *supra* note 5.

41. Council Directive 80/390/EEC, *supra* note 5, replaced by Council Directive 2001/34/EC, *supra* note 5.

42. *See id.*

43. *See id.*

44. Council Directive 89/298/EEC, *supra* note 4.

45. *See id.* at art. 4.

46. *See id.* at arts. 9, 16.

47. Council Directive 89/646/EEC of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions, 1, 1989 O.J. (L 386) (amending Council Directive 77/780).

48. *See id.*

49. *See id.*

50. Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, 27, 1993, O.J. (L 141) [hereinafter Council Directive 93/22/EEC, Investment Services Directive or ISD].

51. *See* Council Directive 93/22/EEC, *supra* note 50 at art. 3.

vestment services directly or by establishing a branch in another Member State.[52] The Capital Adequacy Directive[53] requires both investment firms and credit institutions to maintain a specified amount of capital for risks associated with certain activities, including trading.[54]

The Insider Dealing Directive[55] prohibits specified persons who possess "inside information" from using that information "with full knowledge of the facts" by purchasing or selling transferable securities of the issuer to which the information relates.[56] This prohibition applies to any person who possesses inside information by virtue of his membership in the structure of the issuer, his share ownership, or his access to information through his employment, profession or duties.[57]

III. THE REPORT OF THE COMMITTEE OF WISE MEN

In the Communication from the Commission-Risk Capital Action Plan,[58] and the Communication from the Commission, Implementing the Framework for Financial Markets Action Plan,[59] the European Commission published a program for completing the internal market for financial services and facilitating capital formation in the EU. The Financial Services Action Plan serves as a guide toward development of the single financial market.[60] In July 2000, the Council of Ministers formed the Committee of Wise Men on the Regulation of European Securities Markets ("Committee").[61] The Committee released its initial report in November, 2000[62] and its final report in February, 2001.[63] In its Final Report, the Committee set forth the following priority items: a single prospectus for issuers with a system of shelf registration; modernization of listing standards; mutual recognition for wholesale markets; modernization of rules for investment funds and pension plans; adoption of international accounting standards; and a single passport for recognized stock markets.[64]

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52. *See id.* at art. 14, § 1.

53. Council Directive 93/6/EEC of 15 March 1993 On the Capital Adequacy of Investment Firms and Credit Institutions, 1, 1993 O.J. (L 141).

54. *See id.* at art. 4.

55. Council Directive 89/592/EEC of 13 November 1989 Coordinating Regulations on Insider Dealing, 30, 1989, O.J. (L 334) [hereinafter Council Directive 89/592/EEC or Insider Dealing Directive].

56. *Id.* at art. 2.

57. *See id.*

58. SEC (1998) 552 final.

59. Financial Services Action Plan, *supra* note 33.

60. *Id.*

61. *See generally* Financial Services: Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets, *at http://europa.eu.int/comm/internal_market/en/finances/banks/wisemen.htm* (last visited Nov. 19th, 2002).

62. *See* Nov. 7 Committee of Wise Men, *supra* note 1.

63. Final Report of the Committee of Wise Men on the Regulation of European Securities Markets (2001), *available at http://europa.eu.int/comm/internal_market/en/finances/general/lamfalussyen.pdf* (last visited Nov. 22, 2001).

64. *See id.* at 13.

IV. PUBLIC OFFERINGS

A. Prospectus Directive — Current Law

The Council adopted the Prospectus Directive on April 17, 1989 to coordinate the requirements for the "drawing-up, scrutiny and distribution" of a prospectus to be used when securities are offered to the public.[65] Member States must require (absent an exemption) that any offer of securities to the public "within their territories" be subject to the publication of a prospectus by the offeror.[66] The prospectus must be published or made available no later than the time when an offer is made to the public.[67]

The Prospectus Directive approaches public offerings on the basis of whether the securities in question will be listed in a Member State.[68] If a public offer of transferable securities is made in a Member State and at the time of the offer the securities are the subject of a listing application in the same state, prospectus requirements must be determined in accordance with the Listing Particulars Directive, as distinguished from Article 11 of the Prospectus Directive.[69] This rule applies to both the prospectus content requirements and the procedures for reviewing and distributing the prospectus, subject to "adaptations appropriate to the circumstances of a public offer."[70] Thus, in effect, the Prospectus Directive incorporates the Listing Particulars Directive to establish the content of and review procedures relating to the prospectus.[71] If a public offer is made in one Member State and listing is sought on a stock exchange in another Member State, the individual making the public offering must have the possibility of using, in the offering, a prospectus governed by the Listing Particulars Directive as opposed to the Prospectus Directive, both in terms of content and procedure, and subject to any changes necessary to reflect the circumstances of the public offer.[72]

Article 11 of the Prospectus Directive applies to public offerings of securities for which listing is not sought.[73] Article 11 sets forth the minimum prospectus disclosure requirements Member States must adopt with respect to prospectuses, for a public offer of securities not to be officially listed on an exchange in a Member State.[74] Article 11 requires a prospectus to contain information concerning, among other things:

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65. *See* Council Directive 89/298/EEC, *supra* note 4, at preamble.

66. *Id.* at art. 4.

67. *See id.* at arts. 9, 16.

68. *See* RPD, *supra* note 6.

69. *See* Council Directive 89/298/EEC, *supra* note 4, at art. 7.

70. *Id.*

71. *See id.* at preamble.

72. *See id.* at art. 8(1). This possibility shall exist only in Member States, which in general provide for the prior scrutiny of public offer prospectuses. *Id.* at art. 8(2).

73. *See id.* at art. 7.

74. *See id.* at § III, art. 11.

(1) Those responsible for the prospectus;[75]

(2) The offer to the public and the transferable securities being offered;[76]

(3) The issuer[77] and its principal activities;[78]

(4) The issuer's assets and liabilities, financial position and profits and losses; interim accounts if any have been published since the end of the previous financial year;[79]

(5) The issuer's administration, management and supervision.[80]

Prospectuses for unlisted securities must be published or made publicly available pursuant to procedures established by each Member State.[81] The Member States may provide, however, that the person making the offering may prepare the prospectus, in terms of its content, and subject to appropriate adaptation, in accordance with the Listing Particulars Directive, even though the securities in question are not subject of a listing application.[82] In this event, authorities designated by the Member States must make prior scrutiny of the prospectus.[83] A prospectus so prepared and approved by a Member State in the three months preceding application for listing must be recognized, *subject to translation*, as listing particulars in the Member States in which application for listing is made.[84] A prospectus so prepared in accordance with the Listing Particulars Directive must also be deemed to satisfy the prospectus requirements of other Member States in which the same securities are, simultaneously or within a short time period, offered to the public.[85]

A Member State may choose to allow issuers not proposing to apply for official listing to comply with Article 11 disclosure rather than compelling them to satisfy the same disclosure standards applicable to issuers concurrently applying for

75. *See* Council Directive 89/298/EEC, *supra* note 4, at art. 11(2)(a).

76. *See id.* at art. 11(2)(b).

77. *See id.* at art. 11(2)(c). In the case of shares, in so far as they are known, indication of the shareholders who directly or indirectly exercise or could exercise a determining role in the management of the issuer. *See id.*

78. *See id.* at art. 11(2)(d).

79. *See id.* at art. 11(2)(e). In addition, the name of the person responsible for auditing the accounts should be included. *See id.*

80. *See id.* at art. 11(2)(f) (including names, addresses, functions; in the case of an offer to the public of shares in a limited-liability company, remuneration of the members of the issuer's administrative, management and supervisory bodies).

81. *See id.* at art. 15.

82. *See id.* at art. 12(1).

83. *See id.* at art. 12(2).

84. *See* Council Directive 90/211/EEC of 23 April 1990 in Respect of the Mutual Recognition of Public Offer Prospectuses as Stock Exchange Listing Particulars, art. 2, 1990 O.J. (L 112) (amending the Listing Particulars Directive, *supra*, note 5, at art. 24(b)(1)) [hereinafter Council Directive 90/211/EEC].

85. *See* Council Directive 89/298/EEC, *supra* note 4, at art. 21(1).

admission to official listing on an exchange in a Member State.[86] Further, a Member State is not compelled to give such issuers the alternative of complying with the more stringent disclosure standards of the Listing Particulars Directive.[87] Under the Prospectus Directive, a Member State has no obligation to recognize a prospectus meeting the requirements of another Member State that satisfies only the Article 11 requirements.[88]

Where public offers are made within short intervals of one another in two or more Member States, a public offer prospectus prepared and approved in accordance with the Prospectus Directive (other than an Article 11 prospectus) must be recognized as a public offer prospectus in such Member States.[89] The Member States may not impose any approval requirement or require additional information to be included in such prospectus, other than certain country-specific information.[90] Specifically, Member States may require that the prospects include "information specific to the market of the country in which the public offer is made concerning in particular the income tax system, the financial organizations retained to act as paying agents for the issuer in that country, and the way in which notices to investors are published."[91] The directive permits Member States to limit the reciprocity requirement to issuers having their registered offices in a Member State.[92] The EU may negotiate agreements with non-EU countries pursuant to which it would recognize, for purposes of the Prospectus Directive, prospectuses prepared and reviewed in accordance with the foreign law of non-member countries, provided such foreign law gives equivalent protection, even if it differs from the directive.[93] This possibility, however, is subject to "reciprocity,"[94] meaning subject to acceptance by the foreign country involved of prospectuses prepared in accordance with EU law.[95]

The Prospectus Directive is expressly inapplicable to certain types of offers, including offers of securities to a "restricted circle of persons," or to "persons in the context of their trades, professions or occupations," offers where the selling price of all the securities offered does not exceed ECU 40,000, or finally, where the securities offered can only be "acquired for a consideration of at least 40,000 euros per investor."[96] Various types of securities also are excluded from the directive's provisions including, among others:

(1) Transferable securities offered in individual denominations of at least ECU

86. *See* Council Directive 89/298/EEC, *supra* note 4, at III, art. 11.
87. *See id.* at art. 12(1).
88. *See id.* at art. 21(1).
89. *See id.* at art. 21.
90. *See id.* at art. 21(1).
91. *Id.*
92. *See id.* at art. 21(4).
93. *See id.* at art. 24.
94. *Id.*
95. *See id.* at arts. 12(1), 13.
96. *Id.* at art. 2(1).

40,000;[97]

(2) Transferable securities issued by a state or by one of a state's regional or local authorities or by public international bodies of which one or more Member States are members;[98]

(3) Transferable securities offered in connection with a take-over bid;[99]

(4) Transferable securities offered in connection with a merger;[100]

(5) Shares allotted free of charge to the holders of shares;[101]

(6) Shares or transferable securities equivalent to shares offered in exchange for shares in the same company if the offer of such new securities does not involve any overall increase in the company's issued shares capital;[102]

(7) Transferable securities offered by their employer or by an affiliated undertaking for the benefit of current or former employees;[103]

(8) Transferable securities resulting from the conversion of convertible debt securities or from the exercise of the rights conferred by warrants or to shares offered in exchange for exchangeable debt securities, provided that a public offer prospectus or listing particulars relating to those convertible or exchangeable debt securities or warrants was published in the same Member State;[104]

(9) Transferable securities issued, with a view to their obtaining the means necessary to achieve their disinterested objectives, by associations with legal status of non-profit bodies recognized by the Member State;[105] and

(10)Euro-securities, which are not the subject of a generalized campaign of advertising or canvassing.[106]

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97. *See* Council Directive 89/298/EEC, *supra* note 4 at art. 2(2)(a).

98. *See id.* at art. 2(2)(c).

99. *See id.* at art 2(2)(d).

100. *See id.* at art. 2(2)(e).

101. *See id.* at art. 2(2)(f).

102. *See* Council Directive 89/298/EEC, *supra* note 4 at art. 2(2)(g).

103. *See id.* at art. 2(2)(h).

104. *See id.* at art 2(2)(i).

105. *See id.* at art. 2(2)(j).

106. *See id.* at art. 2(2)(l). "Eurosecurities" are transferable securities which are to be underwritten and distributed by a syndicate, at least two of the members of which have their registered offices in different states; are offered on a significant scale in one or more states other than that of the issuer's registered office; and may be subscribed for or initially acquired only through a bank or other financial institution. *Id.* at art. 3(f).

B. Listing Directives — Current Law

The Listing Conditions Directive sets forth minimum conditions for the admission of securities to listing on a stock exchange located in the EU.[107] These listing conditions involve matters such as the size of the issuer, its period of existence, and the distribution of its shares in the market.[108] With regard to specific quantitative thresholds, the directive requires that: (1) the company's market capitalization, or capital and reserves from the financial year preceding the year in which listing is sought, be at least equivalent to one million euro; (2) its annual financial accounts must have been published for the three financial years preceding the application for official listing; and (3) a sufficient number of shares must have been issued to the public no later than the time of admission to official listing.[109] Additionally, the directive imposes numerous responsibilities on issuers of listed securities, including reporting obligations.[110] The directive does not prohibit the listing of shares from non-EU countries, but provides that if shares of such a company are not listed in the issuer's home country or principal market, they may not be listed in an EU country unless the authorities are satisfied that the absence of the home country/principal market listing "is not due to the need to protect investors."[111] Non-EU issuers listing in an EU country are required to meet the minimum conditions and obligations of the directive as enacted into national law in the particular country involved.[112]

The purpose of the Listing Particulars Directive is to coordinate the differences in Member State disclosure requirements applicable to stock exchange listing.[113] The directive requires Member States to ensure that the listing of securities upon a stock exchange in their territory is contingent upon the publication of a disclosure document referred to as "listing particulars."[114] The disclosure document must contain the information necessary to enable investors to make an "informed assessment" of the financial position and prospects of the issuer, as well as the rights attaching to the securities at issue.[115] In addition to basic information regarding the person responsible for the listing particulars, the directive requires certain information concerning the characteristics of the shares sought to be listed.[116] The admission to official listing must contain information concerning the number, price or nominal value and rights or restrictions attaching to all shares, as well as the information detailing the methods and time of delivery of the shares and the intended application of the proceeds accruing to the issuer as a result of the is-

107. *See generally,* Council Directive 89/298/EEC, *supra* note 4.
108. *See* Council Directive 2001/34/EC, *supra* note 5, at tit. III.
109. *See id.* at arts. 43, 44, 49.
110. *See id.* at tit. IV.
111. *Id.* at art. 51.
112. *See id.* at art. 50.
113. *See id.* at preamble.
114. *Id.* at art 20.
115. *Id.* at art 21.
116. *Id.*

sue.[117] The issuer must also identify any persons who "directly or indirectly, severally or jointly, exercises or could exercise control over the issuer, and particulars of the proportion of the capital held giving a right to vote."[118] Additionally, the issuer is required to identify any shareholders who hold a portion of the issuer's capital, the precise amount being determined by the Member States, but in no event to exceed twenty percent.[119] Under the terms of the Listing Particulars Directive, the issuer must also provide the last three balance sheets and profit and loss accounts, as well as notes on the annual accounts for the most recent financial year.[120] The issuer must provide the name, address and function of all members of the company's administrative, management or supervisory bodies.[121] The information provided by the issuer must include the total remuneration paid to members of the administrative, management or supervisory bodies.[122] The issuer need disclose only total amounts for each category of body, not amounts paid on an individual basis.[123] Disclosure must also be made of the "total number of shares in the issuing company held by the members of its administrative, management and supervisory bodies and options granted to them on the company's shares."[124] In addition, information must be given about the nature and extent of the interests of members of the administrative, management and supervisory bodies in transactions affected by the issuer, which are unusual in their nature or conditions during the preceding and current financial years.[125]

Listing particulars may not be published until they have been approved by the appropriate authorities,[126] at which time they must be published for use by the investing public.[127] Listing particulars may be published either by insertion in one or more newspapers circulated throughout the Member State or as a brochure made available to the public.[128]

The Listing Particulars Directive provides that when applications for listing the same securities on stock exchanges in several Member States are made within short intervals of each other, the authorities in each state should cooperate with each other and make arrangements to expedite and simplify the listing proce-

117. *See* Council Directive 2001/34/EC, *supra* note 5, at sched. A, ch.2. The disclosure schedules in Council Directive 2001/34/EC appear to restate the disclosure schedules from the 1980 Listing Particulars Directive, and have not been revised to reflect the International Disclosure Standards (IDS) of the International Organization of Securities Commissions (IOSCO). *See* International Disclosure Standards, *infra* note 143.

118. *See id.* at sched. A, § 3.2.6.

119. *See id.* at sched. A, § 3.2.7.

120. *See id.* at sched. A, § 5.1. This report must include a detailed breakdown of the profit or loss per share, the amount of dividend per share, and a table showing the sources and application of funds for the last three financial years. *See id.* §§ 5.1.2, 5.1.3, 5.1.4.

121. *See id.* at sched. A, § 6.1.

122. *See id.*

123. *See id.* at sched. A, § 6.2.

124. *Id.* at sched. A, § 6.2.1.

125. *See id.* at sched. A, § 6.2.2.

126. *See id.* at art. 35.

127. *See id.* at art. 20.

128. *See id.* at art. 98.

dure.[129] In 1987, the Council adopted a directive requiring significantly more reciprocity in the listing process.[130] This directive applies when applications are made to list securities on two or more exchanges located in the EU, in which event listing particulars are to be prepared in accordance with home state rules and approved by home state authorities.[131] These provisions are now codified in Articles 38 through 41 of Directive 2000/34/EC.[132] Once so approved, "listing particulars must, subject to any translation, be recognized by the other Member States in which admission to official listing has been applied for, without it being necessary to obtain the approval of the competent authorities of those States and without their being able to require that additional information be included in the listing particulars."[133] The authorities of any EU country may, however, compel the inclusion of certain limited information specific to the country in which listing is sought.[134] The host state may require that the listing particulars include information specific to the market of the host country concerning in particular the income tax system, the financial organizations retained to act as paying agents for the issuer in that country, and the way in which notices to investors are published.[135] If the issuer's registered office is not located in a Member State, it must choose an EU country to supervise its listing.[136] The directive allows EU countries to restrict application of the foregoing mutual recognition rules to listing particulars of issuers having their registered office in a Member State.[137] Member States may allow the competent authorities to exempt from the requirement to publish full listing particulars where: (1) the securities or the shares of the issuer have been officially listed in another Member State for not less than three years before the application for listing; (2) during such period (or such shorter period that the issuer's securities have been listed), "the issuer has complied with all the requirements concerning information and admission to listing imposed by Community Directives on companies the securities of which are officially listed;" and (3) a simplified disclosure document is published.[138]

C. *2001 Proposal for New Prospectus/Listing Directive*

On May 30, 2001, the Commission, following up on the Committee's Report, submitted a proposal for a new, combined Prospectus and Listing Particulars Directive that would replace and repeal the existing Prospectus Directive and Listing

129. *See* Council Directive 2001/34/EC, *supra* note 5, at art. 13.

130. *See generally* Council Directive 87/345/EEC of 22 June 1987 Coordinating the Requirements for the Drawing Up, Scrutiny and Distribution of the Listing Particulars to be Published for the Admission of Securities to Official Stock Exchange Listing, 81, 1987 O.J. (L 185) (amending Council Directive 80/390/EEC).

131. *See id.*

132. *See* Council Directive 2001/34/EC, *supra* note 5, at arts. 38-41.

133. *Id.* at art. 38.

134. *See id.*

135. *See id.* art. 37.

136. *See id.*

137. *See id.* at art. 38, no. 5.

138. *Id.* at art. 23(4).

Particulars Directives.[139] The Commission issued an amended proposal on August 9, 2002.[140] In November 2002, as this article went to press, the Council of Ministers reached political agreement on the prospectus proposal. Because the proposed directive was and is highly controversial, and has been under consideration by both the Parliament and a Council Working Party, it is unclear whether the final legislation, if adopted, will more closely resemble the first Commission proposal (the 2001 proposal), with Parliament's amendments, or the second Commission proposal.[141] Therefore in many instances both the 2001 and 2002 Commission proposals, as well as Parliament's amendments, are set forth below. The principal purpose of the proposed amendment is to introduce a "single passport" for issuers offering securities in the EU.[142] Among the features of the new system are the following: (1) the prospectus would be based to a large degree upon the International Organization of Securities Commissions' (IOSCO) International Disclosure Standards;[143] (2) issuers would be entitled to use a registration system similar to U.S. shelf registration, by virtue of this system, issuers would have the possibility of effecting an offering or a listing "on the basis of a simple notification of the prospectus approved by the home competent authority;"[144] (3) the host state would have diminished power to influence the disclosure document; (4) the disclosure document (except a summary) would not necessarily have to be translated into the language of the host country; (5) the provisions governing recognition of prospectuses from issuers outside the EU would be changed, potentially increasing the possibility for recognition of prospectuses from outside the EU, provided they are prepared in accordance with IOSCO standards; (6) issuers will be entitled to use incorporation by reference; (7) the prospectus must be made publicly available in electronic form; and (8) the existing Prospectus Directive and Listing Particulars Directive would

139. *See* RPD, *supra* note 6.

140. *See* 2002 RPD, *supra* note 8.

141. The Commission stated in its second proposal that, "[t]o speed up the legislative process and meet the expectations expressed at the Barcelona Council on the early adoption of a directive on prospectuses, the Commission wishes to put forward an amended proposal for a Directive that takes account of many of Parliament's and the Council's wishes and concerns. The presentation of the proposal has been changed as regards form to make the text more understandable and readable." 2002 RPD, at Explanatory Memorandum, General Comments.

142. *See* Opinion of the European Central Bank, 2001 O.J. (C344/5). [hereinafter European Central Bank Opinion]. "The main goal of the proposal adopted by the Commission on 30 May 2001 is to create a true European passport for issuers by giving community-wide validity to the prospectus approved by the issuer's home supervisor." Council of the European Union Progress Report on the RPD (Nov. 30, 2001), 2001/0117 (COD) [hereinafter Progress Report].

143. *See* International Organization of Securities Commissions, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers, Final Communique of the 23rd Annual Conference of the International Organization of Securities Commissions, *available at* www.iosco.org/iosco.html (Sept. 18, 1998) [hereinafter International Disclosure Standards] (for purposes of the Revised Prospectus Directive [RPD], a "prospectus" serves as both a prospectus for a public offering and listing particulars for a listing; these are essentially one and the same document, though the disclosure may vary somewhat based upon whether a public offering, listing, or both are contemplated).

144. "[N]o role is assigned to the host supervisors any longer (except in certain exceptional emergency situations)." Progress Report, *supra* note 142, at 14275/1/01, rev. 1.

be repealed.[145]

The European Central Bank fully endorsed the concept behind the RPD, even though it had specific comments on certain issues.[146]

> On account of the new language regime for multinational offerings and admissions to trading, costly translation will be significantly reduced. Regulatory compliance will be simplified, since host Member States will be deprived of the possibility of requiring adherence to additional national rules. As a consequence, raising capital should become easier and cheaper for companies of all sizes. The introduction of harmonized and enhanced disclosure standards in line with international standards for public offer of securities and admission to trading is likely to increase investor confidence, in particular as regards investing on an EU-wide basis.[147]

Nonetheless, the publication of the proposed RPD led to a torrent of criticism throughout Europe.[148] As initially proposed, the RPD applies equally to all public offers of securities and listings, irrespective of the size of the offering, the nature of the issuer or whether the securities are to be admitted to the official list or a second- or third-tier market.[149] Numerous market participants, including the London Stock Exchange, objected strenuously to this approach. The London Stock Exchange argued, for example, that the RPD would destroy "Europe's second markets, including AIM in the United Kingdom."[150] "European second markets, such as AIM, would be virtually impossible to sustain in the framework set out in the Directive."[151] The controversy generated by the RPD was taken up by the European Parliament, in particular, the European Parliament's Committee on Economic and Monetary Affairs (EMCA)[152] The EMCA's proposals, spearheaded by Rapporteur Chrisopher Huhne, surfaced in a Draft Report in late November 2001.[153] The Committee voted in a number of amendments designed generally to ease regulation on small businesses and Euromarket transactions.[154] Subsequently, the

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145. *See* Progress Report, *supra* note 142, at 14275/1/01, rev. 1.

146. *See* European Central Bank Opinion, *supra* note 142.

147. *See id.*

148. *See e.g.*, Dickson, et al., *Passport to Discord*, FIN. TIMES, Nov. 22, 2001; *FSA's Howard Criticizes EU Prospectus Rules*, DOW JONES INT'L NEWS, Sept. 13, 2001; W. Wright, *Bankers Warn EU Could Cripple Eurobond Market*, FIN. NEWS, June 25, 2001.

149. *See* RPD, *supra* note 6.

150. Comments from the London Stock Exchange on the Proposed Prospectus Directive, *available at* www.londonstockexchange.com/newsroom/pdfs/pdwebstory.pdf [hereinafter London Stock Exchange Comments].

151. *Id.* at para. 2.7.

152. *See generally* www.europarl.eu.int/committees/econ_home.htm (last visited Nov. 21, 2002).

153. *See* European Parliament, Committee on Economic and Monetary Affairs, Draft Report on the Proposal for a European Parliament Directive on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading, Provisional 2001/0117(COD).

154. *See* Chris Huhne, *Key Parliamentary Amendments Remove Threats to Small Companies, available at* www.chrishuhnemep.org. *See also* Kit Dawnay, *MEP Huhne Praised for Role in EU Prospectus Directive Amendments*, THE FIN. NEWS (Mar. 4, 2002); Committee on Economic and Monetary Affairs, Draft Report on the Proposal for a European Parliament and Council Directive on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading (2001),

European Parliament approved the Commission proposal on the basis of dozens of substantive amendments.[155] Although it is too early to predict with certainty, it is likely that the institutions of the EU will be responsive enough to the concerns of market participants that the RPD will eventually become law in the EU.

The RPD would apply to securities offered to the public in one or more Member States, or admitted to trading (or subject to a procedure for admission to trading) on a regulated market in a Member State.[156] As with the current Prospectus Directive, under the RPD, Member States must ensure that "any offer of securities to the public within their territories is subject to the publication of a prospectus by the person making the offer."[157] The obligation to publish a prospectus would not apply to certain offers, "excluding any subsequent resale to the public,"[158] namely:

> where securities are offered to qualified investors for their own account;[159]
>
> where the offer is addressed to fewer than 100 persons per Member State, other than qualified investors;

2001/0117(COD); Committee on Economic and Monetary Affairs, Amendments 60-138, *Draft Report*, P.E. 307.441/60-138 (2002).

155. *See* European Parliament Legislative Resolution on the Proposal for to the Public or Admitted to Trading, COM(01)280, *available at http://www.europarl.eu.int/meetdocs/committees/juri/20011121/449285en.pdf* (last visited August 30, 2002).

156. *See* RPD, *supra* note 6, at art. 1(2). The RPD does not apply to offerings by open-end investment companies; securities issued by a Member State or subdivision thereof; securities issues by public international bodies of which a Member State is a member; or by the European Central Bank. *Id.* at art. 1(3). A "regulated market," in general, means a market for securities, money market instruments, financial futures, interest rate forwards, swaps, and options that functions regularly, is characterized by the fact that regulations issued by the competent authorities define conditions for the operation of the market, for access to the market and, where applicable, conditions governing admission to listing, and requires compliance with certain reporting and transparency rules. *See id.*, at art. 2(1)(f); Council Directive 93/22/EEC, *supra* note 50, at art. 1(13).

157. RPD, *supra* note 6, at art.3(1). An "offer of securities to the public" means any communication "presenting sufficient information on the terms of the offer and the securities to be offered, that might enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries." *Id.*, art. 2(1)(b). The 1989 Prospectus Directive did not contain a definition of "public offer," but, instead, left this matter to the Member States.

158. As this article went to press, the exclusions set forth below from the obligation to publish a prospectus were substantially amended by the European Parliament on March 14, 2002. *See* European Parliament Legislative Resolution, *supra* note 155, at amend. 20.

159. *See* RPD, *supra* note 6, at art. 3(2)(a). A "qualified investor" is a bank, investment firm, other authorized or regulated financial institution, insurance company, investment company, pension fund, commodity dealer, supernational institution, or government or central administrative authority. *See id.* at art. 2(1)(c). The definition of "qualified investor" was substantially revised in amendments passed by the European Parliament on March 14, 2002. *See* European Parliament Legislative Resolution, *supra* note 155, at amend. 15. The definition in the 2002 RPD extends to other legal entities authorized or regulated to operate in financial markets, as well as entities not authorized or regulated whose corporate purpose is solely to invest in securities. 2002 RPD at art. 2(1)(e). In addition, "qualified investors" includes other legal entities which are not small and medium-sized enterprises (as defined) and natural persons meeting specified standards.

where the securities can only be acquired for at least 50,000 Euro per investor per discrete offer.[160]

securities offered in the Euromarket or otherwise would be exempted if offered in individual denominations of at least EUR 50,000.[161]

an offer of securities with total consideration of less than Euro 2.5 million calculated over a twelve-month period

Exemptions are also provided in the RPD for certain types of securities, *to-wit:*

securities offered in connection with a merger or takeover bid, provided a disclosure document containing information regarded by the competent authority as equivalent to that of a prospectus is available;

securities offered to existing or former directors or employees provided a disclosure document meeting certain specification is published;"

shares issued in substitution for shares already traded on the same regulated market, if the issuance does not involve any increase in capital;

shares offered to existing shareholders or allotted free of charge, provided a disclosure document meeting specified conditions is published.

shares offered in exchange with no overall increase of capital to existing shareholders or allotted free of charge.[162]

The EMAC voted to give the Member States authority to exempt companies with a market capitalization below 350 million euros from the requirement to publish a full prospectus.[163] The revision was adopted in substance by the European Parliament.[164] The Commission may clarify the foregoing exemptions in accordance with Article 22(2) of the RPD, which reflects the so-called "comitology" procedure set forth in a 1999 Council Decision.[165] In its August 2002 re-proposal,

160. *See* RPD, *supra* note 6 at art. 3(2)(c).

161. *See* European Parliament Legislative Resolution, *supra* note 155. It appears that the RPD, as initially published, would regulate Eurobond transactions only to the extent that they involve an "offer to the public or an admission to trading." Progress Report, *supra* note 142, at 14275/1/01, rev. 1.

162. *See* RPD, *supra* note 6 at arts. 3(2) & (3).

163. *See* Huhne, *supra* note 154.

164. *See* European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading (COM) (2001) 280-C5-0263/2002-2001/0117 (COD), Mar. 14, 2002, Amendment No. 35.

165. *See* 1999/468/EC, Council Decision of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, O.J. L 184 (July 17, 1999) [hereinafter Council Decision 1999/468/EC].

the Commission did not include this provision although it would exempt small offerings (under Euro 2.5 million) and contemplates a more abbreviated prospectus for small and medium sized enterprises.

The Commission may clarify the foregoing exemptions in accordance with Article 22(2) of the RPD, which reflects the so-called "comitology" procedure set forth in a 1999 Council Decision.[166] This procedure essentially allows the Council to delegate implementing powers to the Commission.[167] The Commission is advised by a comitology committee consisting of representatives of the Member States.[168] Pursuant to the 1999 comitology decision of the Council, the comitology committee responds to a proposal of the Commission, by delivering its opinion on the measure within a specified time frame.[169] The Commission then adopts the measures "if they are in accordance with the opinion of the committee."[170] During the comitology process the European Parliament performs a supervisory role.[171] If the measure is not in accord with the opinion of the comitology committee, the Commission submits the measure to the Council as a Commission proposal and informs Parliament.[172]

Under the RPD, Member States must ensure that any admission of securities to trading on a regulated market in their territory is subject to the availability of a prospectus.[173] The RPD thus extends the Listing Particulars Directive to lower-tier markets, as the Listing Particulars Directive only applies where securities were subject to admission to the official list of the stock exchange.[174] The prospectus is essentially the same document as the public offering prospectus although the disclosure may vary somewhat depending upon which action the issuer is taking. The version adopted by the European Parliament would provide an exception for an issuer with a market capitalization of less than EUR 350 million, where an offering or listing is to be restricted to the home Member State, and where the home Member State provides for an exception from the prospectus requirements. The provision is not in the Commission's second proposal. Under the 2001 RPD, an issuer is considered to have fulfilled its obligation to publish a prospectus if it files a "registration document" with its home country's competent authority, has filed "where necessary, the securities note," and updates the registration document in accordance with Article 9 of the RPD.[175] Under the 2002 RPD, the issuer may

166. *See* Council Decision 1999/468/EC, *supra* note 165.

167. *See* Nov. 7 Committee of Wise Men, *supra* note 1.

168. See *id.*

169. *See* RPD, *supra* note 6, at art. 3(2).

170. Council Decision 1999/468/EC, *supra* note 165, at art. 5.

171. *See id.* at art. 7(3)

172. *See id.* at art. 5(1).

173. *See* RPD, *supra* note 6, at art. 4. A "regulated market," in general, means a market for securities, money market instruments, financial futures, interest rate forwards, swaps and options that functions regularly, is characterized by the fact that regulations issued by the competent authorities define conditions for the operation of the market, for access to the market and, where applicable, conditions governing admission to listing, and requires compliance with certain reporting and transparency rules. RPD, art. 2(1)(f) and Investment Services Directive 93/22/EEC (May 10, 1993), at art. 1(13).

174. *See* Council Directive 80/390/EEC, *supra* note 5, at art.1(1).

175. *See* RPD, *supra* note 6, at art. 4.

choose whether the prospectus will consist of such documents or simply will be composed of a single document. The disclosure requirements will be amplified by detailed rules to be adopted by the Commission, but these rules must be consistent with IOSCO standards.[176] The registration document is filed with and reviewed by the competent authority of the home Member State.[177] Note that under the current prospectus and listing directives, the issuer need not choose the home country authority for scrutiny of the document.[178] The issuer may apply for approval of the prospectus by a competent authority in another member state under specified circumstances.

Significantly, the European Commission proposes to rely upon the IDS promulgated by the IOSCO to satisfy the disclosure requirement of prospectuses for both public offerings and listings.[179] In this regard, the Commission explained as follows:

> Disclosure requirements provided for by Directive 80/390/EC are no longer sufficient to meet the needs of investors in modern global financial markets. Increasingly, investors want to make decisions on the basis of a continuum of standardized company financial and non-financial information. The current requirements need to be replaced by new European disclosure standards. Fostering best practices will enhance market confidence and attract capital. The upgrade of EU disclosure standards shall be in accordance with the International Disclosure Standards approved in 1998 by the IOSCO (International Organization of Securities Commissions). This new approach is designed to provide key information on certain topics such as risk factors, related party transactions, corporate governance or management's discussion and analysis, which are not currently dealt with at EU level.[180]

March 2002 revisions passed by the European Parliament would give the European Commission authority to implement disclosure requirements with reference to the IOSCO Standards.[181] Further, under the revisions, the competent authority of the home Member State could authorize the omission from the prospectus of information required by the RPD under certain circumstances.[182] This latter provision was carried over in the 2002 Commission proposal. Under Article 7 of the 2002 proposal, specific disclosure standards are to be developed pursuant to the comitology procedure but shall be based on IOSCO standards (and on the ANNEXES to the RPD).

Under the 2001 RPD, a prospectus may be published as a single document or

176. Since IOSCO International Disclosure Standards only relate to equity securities, it will be necessary for the Commission to promulgate further disclosure standards for debt and other securities.

177. *See id.* at art. 4.

178. *See* Giovanni Nardulli & Antonio Segni, *EU Cross-Border Securities Offerings: An Overview*, 19 FORDHAM INT'L L. J. 887, 896 (1996).

179. *See* RPD, *supra* note 6, at explanatory memorandum (1), general comments.

180. *Id.*

181. *See* European Parliament Legislative Resolution, *supra* note 155, at amend. 23.

182. *Id.* at amend. 25.

may be composed of separate documents.[183] Companies trading on a regulated market in the EU (or which are applying for a listing) would have been required to publish a prospectus composed of separate documents.[184]A prospectus composed of separate documents includes a "registration document," a "securities note" and a "summary note," and the disclosure requirements applicable to each of the segments are included in Annex II, Annex III and Annex IV to the RPD, respectively.[185] The registration document is intended to contain information about the issuer, whereas the securities note is intended to provide information about the offering, the plan of distribution, and the market (as well as certain information about the issuer that is duplicative with the registration document), all on the basis of the IOSCO standards.[186] The summary note must give "in a few pages" the most important information included in the prospectus concerning the various disclosure items otherwise covered in the registration document and securities note.[187] The Commission must adopt detailed rules regarding specific information, which must be included in the prospectus, in the form of models for different types of securities and issuers.[188] Such rules must be in accordance with IOSCO's International Disclosure Standards.[189] Since IOSCO International Disclosure Standards only relate to equity securities, it will be necessary for the Commission to promulgate further disclosure standards for debt and other securities.[190] As indicated, under the 2002 RPD, the issuer can choose whether to prepare the prospectus as a single or separate document.

Under current law, in keeping with the mutual recognition provisions of the Directives, an issuer from one Member State seeking to use in another Member State listing particulars or a prospectus approved in one Member State would be required to translate the disclosure document into the language of the host country.[191] Under the 2001 RPD, the prospectus "shall be drawn up in a language accepted by the competent authority in the home Member State."[192] This provision should reduce translation costs in multinational offerings and admissions to listing.[193] Host authorities can, however, require the translation of the summary note into their local language.[194] The 2002 RPD has a more complex scheme, in terms

183. *See* RPD, *supra* note 6, at explanatory memorandum 1(15).

184. *See id.*

185. *Id.* at art. 5(4).

186. *See id.*

187. *See id.* at annex IV.

188. *See id.* at art. 6(1).

189. *See id.*

190. *See* London Stock Exchange Comments, *supra* note 150 at §1.3.

191. *See* Council Directive 87/345/EEC 1987 O.J. (L 185) 81, art. 24(a) (amending Directive 80/390/EEC) [hereinafter Council Directive 87/345/EEC]; Council Directive 90/211/EEC, *supra* note 82 (prepared in accordance with Listing Particular Directive must be recognized, subject to translation, as listing particulars in other Member States); Council Directive 89/298/EEC *supra* note 4, at art. 21 (prepared in accordance with Listing Particulars Directive is deemed to satisfy prospectus requirements of other Member States subject to translation, if required by host Member State).

192. RPD, *supra* note 6, at art. 7(1).

193. *See* European Central Bank Opinion, *supra* note 142, at §§ 4-5.

194. *See* RPD, *supra* note 6, at art. 7(1).

of language requirements, but reduces the instances of translation compared to current law. Where an offering is made in the home state and other member states, the prospectus must be published in a language accepted by the home state and also in the language accepted in the host states or a language customary in the sphere of international finance.

As indicated above, issuers may publish a prospectus composed of separate documents, or may prepare a prospectus as a single document if they choose. If an issuer has already filed a registration document, when preparing a securities offering it only has to file the securities note and the summary note. The securities note must provide information that would typically be included in a registration document if there were a material change or recent developments since publication of the registration document.[195] Under the 2001 RPD, the registration document must be updated annually.[196] Under the 2002 RPD (art. 10), issuers admitted to trading on a regulated market must update issuer information annually. Under the 2001 RPD, the registration document is filed with and reviewed by the competent authority of the home member state.[197] Under the 2002 RPD, the competent authority of the home member state has primary jurisdiction, but approval authority may be assumed by other member states under certain circumstances.[198] The 2001 RPD provides that EU countries may allow the issuer to use the registration document to satisfy the annual report requirements of the Fourth Directive on Accounting (Directive 78/660/EEC, Art. 46) and the Seventh Council Directive (Directive 83/349/EEC, Art. 36).[199] The 2002 RPD contains a similar provision.[200]

The RPD will allow incorporation by reference to documents that have been

195. *See* 2002 RPD, *supra* note 8, at art. 12.

196. RPD, *supra* note 6, at art. 9(1). Under a proposed amendment adopted by the Economic and Monetary Affairs Committee of the European Parliament, this provision would be made optional, rather than mandatory. The Council also discussed concerns about annual updating of the registration document, and is considering a proposal to limit the mandatory nature of the registration document to issuers whose shares are admitted to trading. Under revisions passed in March 2002 by the European Parliament, annual updating is required only in order to use the document in the future for a public offer. "Accordingly, an issuer wishing to be able to offer its securities at any time shall update its registration document and obtain its approval by the competent authority of its home Member State at intervals of not more than twelve months." *See European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading* (COM) (2001) 280-C5-0263/2002-2001/0117 (COD), Mar. 14, 2002, Amendment No. 32.

197. *Id.* Under amendments passed by the Economic and Monetary Affairs Committee of the European Parliament, the issuer would have its choice as to which competent authority would receive and review the document. *See Key Parliamentary Amendments Remove Threats to Small Companies* (Feb. 26, 2002), www.chrishuhnemep.org. In March 2002, the European Parliament passed amendments designed to allow registration documents to be filed with the Member State where the issuer has its registered office, where it was admitted to trading for the first time, or where it intends to offer the subject securities, at the choice of the issuer. *See European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Directive on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading* (COM) (2001) 280-C5-0263/2002-2001/0117 (COD), Mar. 14, 2002, Amendment No. 16.

198. 2002 RPD, *supra* note 8, at art. 13.

199. RPD, *supra* note 6, at art. 9(2).

200. 2002 RPD, *supra* note 8, at art 10(4).

filed and published in accordance with the RPD.[201] The Commission is instructed to adopt detailed rules concerning the privilege of incorporating by reference.

A prospectus may not be published until it has been approved by the competent authority of the home Member State.[202] The proposed Directive contains deadlines for approval of the prospectus by the competent authority. The home state authority must act within fifteen days of the submission of a draft prospectus, unless the submission is incomplete or the competent authority requires further information, in which case it must respond within fifteen days of the issuer's supplying the required information.[203] Under the 2001 RPD, if the regulator does not act within the specified time periods, the company's application shall be deemed to have been rejected and "such rejection shall give right to apply to the courts."[204] Under the 2002 RPD, if the competent authority fails to comment on the prospectus within the prescribed time, it shall be deemed approval of the application.

After receiving approval from the competent authority, the issuer must make the prospectus available to the public immediately, by publication in a newspaper of general circulation in the states in which the offer is made or admission to listing is sought, in the form of brochures to be made available to the public, or in electronic form on the websites of the company and the underwriters or placement agents. The competent authority of the home state must also make the prospectus available on its website, or provide a list of approved prospectuses. The Commission must adopt detailed technical rules on publication and availability of the prospectus in accordance with Article 22(2) comitology procedures.[205]

Orally conveyed information concerning the offer or admission to trading must be consistent with that in the prospectus. Further, information delivered to qualified investors or special categories of investors, including information disclosed in the context of meetings, must also be disclosed to the public.[206]

The issuer must file a prospectus supplement to disclose every significant new factor capable of affecting assessment of the securities which arises in the interval following approval of the prospectus and preceding the closing of the offering or the time when trading begins. The prospectus supplement must be filed with and reviewed by the home state and subsequently published in accordance with the rules that apply to the original prospectus.[207]

The revised prospectus directive contains mutual recognition provisions establishing the right to make offers or listings on a Community-wide basis under specified circumstances. Where an application has been made for a public offering

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201. 2002 RPD, *supra* note 8, at art. 11(1); RPD, *supra* note 6 at art. 10(1).

202. 2002 RPD, *supra* note 8, at art. 13(1); RPD, *supra* note 6, at art. 11(1). As indicated above, a key committee of the European Parliament recommends that the issuer be allowed to choose which competent authority would approve the prospectus.

203. 2002 RPD, *supra* note 8, at art. 13; RPD, supra note 6, at art. 11(2).

204. RPD, *supra* note 6, at art. 11(4).

205. 2002 RPD, *supra* note 8, at art. 12(7). Concerning Article 22(3) procedures, *see* RPD, *supra* note 6, at art. 12(7).

206. 2002 RPD, *supra* note 8, at art. 15(5); *see* RPD, *supra* note 6, at art. 13(4).

207. 2002 RPD, *supra* note 8, at art. 16; RPD, *supra* note 6, at art. 14.

or listing on a regulated market in one or more Member States, and a prospectus for the security has been approved by the home-Member State in the three months preceding the application, the competent authority of the host-Member State shall accept the prospectus for public offer or admission to trading.[208] This may generate some after-the-fact, inter-agency squabbling as to the adequacy of the prospectus, but if the RPD is enacted as proposed, EU law will require that the host country accept the prospectus as approved by the home state, provided the host state competent authority is properly notified.

A key purpose of the RPD is to reduce instances where the host state may object to use of a prospectus within its territory or require further information or a translation. Under the 2001 RPD, where an offer is made or admission to trading on a regulated market is sought in more than one Member State, the prospectus (or the registration document and securities note) "shall also be made available in a language customary in the sphere of finance which is generally accepted by the competent authority of the host Member State."[209] The host Member State may, however, require that the *summary note* be translated into the language used in the host state. The 2002 RPD has a more complex scheme, in terms of language requirements, but reduce the instances of translation compared to current law. Where an offering is made in the home state and other member states, the prospectus must be published in a language accepted by the home state and also in the language accepted in the host states or a language customary in the sphere of international finance.

The RPD contains provisions for the recognition of prospectuses of companies from outside the EU. Under current law, if the issuer's registered office is not located in a Member State, it may ask an EU country to supervise its listing.[210] However, EU countries may restrict application of the mutual recognition provisions to listing particulars of issuers having their registered office within a Member State.[211] Similarly, under current law, the Prospectus Directive permits Member States to limit reciprocity to issuers having their registered offices in a Member State.[212] Under the current regime, the EU is authorized to negotiate agreements with non-EU countries pursuant to which it would recognize, for purposes of the Prospectus Directive, prospectuses prepared and reviewed in accordance with the foreign law of non-member countries, provided such foreign law gives equivalent protection if it differs from the Directive.[213]

Under both the 2001 and 2002 RPD, the competent authority of the home state responsible for approving prospectuses of issuers from third countries may allow such an issuer to use a prospectus prepared under non-EU law provided that the prospectus has been prepared according to IOSCO's International Disclosure Standards (or, under the 2002 RPD, standards set out by other "international secu-

208. 2002 RPD, *supra* note 8, at art. 17; RPD, *supra* note 6, at art. 15(1).
209. RPD, *supra* Note 6, at art. 16.
210. *See* Council Directive 87/345/EEC, *supra* note 187, at arts. 24-24a.
211. *See id.* at art. 24a(5).
212. *See* Council Directive 89/298/EEC, *supra* note 4, at art. 21.
213. *See id.* at art. 24.

rities commission organizations") and the information requirements are equivalent as decided by the Commission to the requirements of the RPD.[214]

In general, the RPD places authority to supervise irregularities in the offering process on the home Member State. If a host country discovers irregularities or breaches of company obligations resulting from public trading, it must refer the matters to the home state. If the issuer persists in violating "the relevant legal or regulatory provisions," the host state may take enforcement action.[215]

V. INVESTMENT SERVICES

A. Investment Services Directive — Current Law

In 1993, the Council adopted the controversial directive on investment services.[216] The Investment Services Directive (ISD) provides for a home state license that will allow investment firms to provide in any Member State the investment services that are authorized by the home Member State.[217] An investment firm will be able to provide investment services directly or by establishing a branch in another Member State.[218] The following are "services" encompassed within the directive: receiving and transmitting, on behalf of investors, orders for securities (and other specified instruments); dealing in such securities or instruments for the firm's own account; portfolio management; and underwriting or placements.[219] The investment firm may render only those services specified in its

214. *See* RPD, *supra* note 6, at art. 18(1). Under amendments passed by the European Parliament in March 2002, an issuer from outside the EU could file with the Member State where it intends to offer the securities or apply for a listing. *See* European Parliament Legislative, *supra* note 155, at amend. 16. The 2001 RPD establishes a procedure, ultimately involving the Article 22(2) comitology procedure, to resolve disputes concerning the equivalence of foreign disclosure requirements. 2001 RPD, art. 18. Under Article 18 of the RPD, member states must notify the Commission and other member states of rules adopted applicable to issuers from third countries. The Commission or other member states may raise an objection to the equivalence of the rules of third country. In this event, the Commission must subject the matter to the comitology procedure specified in Article 22(2), described above. Depending upon the outcome of this procedure, the RPD would extend the mutual reciprocity provisions of the RPD to issuers having their registered office in a third country who follow IOSCO standards. "In the case of offer or admission to trading of securities issued by an issuer incorporated in a third country in another member state the requirements set out under articles 15 [mutual recognition], 16 [language regime] and 17 [notification] shall apply." 2001 RPD, art. 18.

215. *See* RPD, art. 21(2), *supra* note 6; 2002 RPD, art. 23, *supra* note 8.

216. *See* Council Directive 93/22/EEC, *supra* note 50.

217. *See id.* at arts. 3, 12. An "investment firm" is any legal (as opposed to natural) person whose regular occupation or business is to provide any "investment service." *Id.* at art. 1, no. 2. Member states may consider natural persons to be "investment firms" under certain circumstances. *See id.*
"Investment service" is defined below. The "home Member State" is the Member State where the investment firm has its registered office, or its head office if it does not have a registered office. *See id.* at no. 6. If the investment firm is a natural person, the home Member State is the Member State where that person's head office is situated.

218. *See id.* at art. 14, no. 1. The procedures for establishing a branch and for providing services are set forth in Article 17 and 18, respectively.

219. Concerning services, which may be rendered, the exact language of the directive should be con-

authorization. If an investment firm is licensed to render any of the services indicated above (i.e., those referenced in Annex A to the ISD), the home state may also authorize the firm to provide certain "non-core services" (i.e., those specified in Annex C to the ISD).[220] The investment firm may provide the foregoing services with respect to transferable securities; units in undertakings for collective investment in transferable securities; money market instruments; financial futures contracts (including cash-settled instruments); forward interest-rate agreements; interest rate, currency and equity swaps; options on any of the foregoing, including options on currency and interest rates.[221] A controversial provision requires host Member States to grant access by investment firms from other Member States to membership of stock exchanges and "regulated markets" in their country.[222] This provision applies to banks as well as non-bank investment firms.[223] This provision also applies to regulated markets that operate without a physical presence.[224] As section one stipulates, "Member States shall abolish any national rules or laws or rules of regulated markets which limit the number of persons allowed access thereto."[225] Investment firms must have the choice of becoming members of regulated markets or having access thereto either directly, by setting up branches in the host state, or indirectly, through subsidiaries or acquisitions.[226]

Investment firms are required to be authorized by their home state but not the

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sulted. *See id.* at A.

220. *See* RPD, *supra* note 6, at art. 3(1). The non-core services include custodial, safekeeping and administrative services with respect to securities and other specified financial instruments; extending margin under certain circumstances; financial, investment and M&A advice; services related to underwriting; foreign exchange services related to investment services. For the precise non-core services, *see* Section C to the ISD Annex. "Authorization within the meaning of this Directive may in no case be granted for services covered only by Section C of the Annex." *Id.* at art. 3(1).

221. *See id.* at Section B. As stated above, pursuant to the Second Banking Directive, credit institutions will be able, among other things, to trade securities and participate in stock issues on the basis of their banking license, if authorized by the home state. A bank may provide these services on the basis of its banking license (if covered in its authorization) without obtaining additional authorization under the Investment Services Directive. Certain provisions of the Investment Services Directive would apply to such activities, however, *see id.* at art. 2, no. 1. For example, the "prudential" rules of the Investment Services Directive would apply to all institutions doing securities business, whether banks or non-banks. *See id.* at arts. 10, 11 (conduct of business), 2, no. 1.

222. *See id.* at art. 15. The right of access applies when investment firms are authorized for brokerage (execution of orders other than for own account) and dealing (dealing for own account). *See id.* The host state must also ensure that such investment firms have access to membership of clearing and settlement systems of the host state exchanges or markets which are available to members of such exchanges and markets. *See id.* A "regulated market" is a market for securities or certain other financial instruments that is so designated by the home state, functions regularly, and is regulated as described in Article 1, no. 13. *See id.* at art. 1, no. 13.

223. *See id.* at art. 2. Article 15 (among others) applies to credit institutions the authorization of which covers one or more of the investment services listed in Section A of the Annex. *See id.* at art. 2, no.1.

224. *See id.* at art. 15, no. 4.

225. *Id.* at art. 15, no. 1. "If, by virtue of its legal structure or its technical capacity, access to a regulated market is limited, the Member State concerned shall ensure that its structure and capacity are regularly adjusted." *Id.*

226. *See id.* at art. 15, no. 2.

host state prior to providing investment services.[227] To obtain home state authorization, a person must apply to the home state, furnish a plan of operations, satisfy capital requirements,[228] and disclose the names of principal owners who must satisfy home state suitability requirements.[229] While the directive allows Member States to license subsidiaries of companies governed by the law of non-EU countries, it establishes a procedure similar to that of the Second Banking Directive for monitoring the treatment of EU investment firms in third countries.[230] Member States, subject to review by the Council, may limit or suspend the licensing of firms from third countries, except for the establishment of subsidiaries by investment firms already authorized in the EU or the acquisition of shares of EU firms by such previously authorized firms.[231] The ISD expressly allows Member States to license subsidiaries of companies governed by the law of non-EU countries.[232] Member states may not apply to branches of non-EU investment firms provisions that result in more favorable treatment than that accorded to branches of Member State investment firms.[233]

One of the purposes of the ISD was to ensure that non-banks not covered by the Second Banking Directive were not put at an unfair competitive disadvantage in relation to banks, which had the benefit of the European passport.[234] Indeed, many of the provisions of the ISD reflect the provisions of the Second Banking Directive.[235]

The ISD as adopted allows Member States to require transactions to be carried out in a "regulated market."[236] However, in this event, Member States must give residents the right not to comply with the requirement (subject to certain conditions), "and have the transactions carried out away from a regulated market."[237]

B. Possible Amendments to ISD

In November 2000, the Commission issued a Communication to the European Parliament and the Council regarding upgrading the ISD.[238] In the Communication, the ISD received a mixed report card. On one hand, the ISD has "eroded

227. *See* RPD, *supra* note 6, at art. 3.

228. Capital requirements that will be applicable to investment firms are treated in the Capital Adequacy Directive.

229. *See* RPD, *supra* note 6, at arts. 3, 4.

230. *See id.* at art. 7.

231. *See id.* at art. 7, no. 5.

232. *See id.* at art. 7.

233. *See* Council Directive 93/22/EEC, *supra note* 50, at art. 5.

234. *See* The Securities Association, *Investment Services Directive: A Commentary and Analysis*, 16 (1989) [hereinafter Securities Association].

235. *See* Proposal for a Directive on Investment Services in the Securities Field, COM (88)778, at explanatory memorandum I.

236. *See* Council Directive 93/22/EEC, *supra* note 50, at art. 14, no. 3.

237. *Id.* at art. 14, no. 4.

238. *See* Communication from the Commission to the European Parliament and the Council, Upgrading the Investment Services Directive (93/22/EC), COM (00)729 final [hereinafter ISD Communication or Communication].

market segmentation at the level of investment firms and access to 'regulated markets.' Large numbers of firms have made use of the single passport."[239] According to the Communication,[240] there have been over 5,885 "notifications" under Article 18 of the ISD, which requires investment firms desiring to provide investment services in another Member State to notify its home Member State; the home state forwards the notification to the host Member State.[241] The ISD has also "dismantled official restrictions to membership of or access to regulated markets. . ."[242]

On the other hand, the Commission believes there are structural limitations at work which undermine the effectiveness of the ISD.[243] For example, it believes that the ability of the host country to intervene and regulate investment services should be much more circumscribed than it presently is.[244] In addition, the Commission observes numerous discrepancies in interpretation among the Member States, with respect to matters such as core service definitions, conduct of business principles, and designation of "regulated markets."[245] Accordingly, a "wide-ranging overhaul of the ISD is required to overcome these difficulties so as to seize unprecedented opportunities and rise to the challenges of the new securities trading environment."[246]

The Commission recommends a number of amendments to the ISD. First, it believes that the exemptions from the ISD set forth in Articles 2(2)[247] and 2(4)[248] should be reconsidered. Article 2(2) currently lists multiple exemptions from the ISD,[249] meaning that Member States are not required to recognize the passport for firms providing such services. In addition, the Commission calls for a re-assessment of whether any of the non-core services set forth in the ISD (i.e., Annex C to the ISD) should be upgraded to core services (i.e., those referenced in Annex A to the ISD).[250] Investment firms authorized by their home state to provide core services may provide such services directly or by establishing a branch

239. *See* ISD Communication or Communication, *supra* note 238, at art. 2.1.1.

240. *See id.* at annex, fig. 1a.

241. Under Article 18, the investment firm may then start to provide investment services in the host Member State, subject to conditions, including rules of conduct, established by the host Member State. *See id.* at art. 18.

242. *Id.* at art. 2.1.2.

243. *See id.* at art. 2.1.

244. *See* ISD Communication, *supra* note 238, at art. 2.2.

245. *See id.*

246. *Id.*

247. Council Directive 93/22/EEC, *supra* note 50, at art. 2(2).

248. *Id.* at art. 2(4). Article 2(4) exempts their central banks or other governmental bodies performing similar functions from the passport services provided to other Member States.

249. The Investment Services Directive does not extend to, among others, insurance companies, investment services rendered in an incidental manner in the course of other regulated professional activities, investment services rendered in the administration of employee participation schemes, central banks and other governmental bodies, investment companies, commodities traders who provide investment services ancillary to their main business, and brokerage firms which function as order-takers, do not hold client funds or securities, and provide brokerage services only to certain institutional customers. *Id.*

250. *See id.*

throughout the EU.[251] If an investment firm is licensed to render core services, the home state may also authorize the firm to provide certain non-core services.[252] However, a home state may not purport to authorize solely non-core services for purposes of the single passport for financial services.[253] Accordingly, upgrading activities which currently constitute non-core services to core services would allow sole authorization for such services.[254]

Another key area of Commission concern, as expressed in the Communication from the Commission, has to do with the application of conduct of business rules by the host country.[255] The Commission believes that host country authority must be more strictly confined, especially with respect to investment services provided to professional investors.[256] "Henceforth," the Commission stated "residual host country responsibilities must be strictly demarcated and should be confined essentially to conduct of business rules for fair dealing with retail clients."[257] The Commission also believes that it is time to reconsider the regulation of alternative trading systems in the EU.[258] Currently within the EU, alternative trading systems are authorized and regulated as investment firms.[259] It may be necessary to revise the ISD to supplement regulation of alternative trading systems with principles applicable to regulated markets (e.g., reporting, transparency and disclosure).[260] The ISD, in its current form, allows Member States to require transactions to be carried out on a "regulated market."[261] This provision is known as the "concentration rule."[262] The Commission believes it may be an appropriate time to review the continued rationale for this controversial rule.[263] The Commission also sought comments in several other areas relating to market regulation, such as whether ISD provisions on transparency can be upgraded.[264]

The European Parliament responded to the Commission Communication on

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251. *See* Council Directive 93/22/EEC, *supra* note 50, at annex A & C.

252. *See id.*

253. "Authorization within the meaning of this Directive may, in no case, be granted for services covered only Section C of the Annex." *Id.* at art. 3, no. 1.

254. *See id.* at art. 3.

255. *See id.*

256. *See* ISD Communication, *supra* note 238, at art. 3.2.

257. *Id.* at art. 3.2.

258. *See* Forum of European Securities Commissions (FESCO), Consultative Paper on Proposed Standards for Alternative Trading Systems, (2001).

259. *See* ISD Communication, *supra* note 238, at art. 3.3. This generally parallels historical treatment in the United States. Although historically, determinations were made on a case-by-case basis, the Commission tended to regulate alternative trading systems as broker-dealers. Ultimately, the Commission adopted new rules designed to regulate alternative trading systems. Exch. Act Release No. 40,760 (Dec. 8, 1998), 1998 WL 849548.

260. *See* ISD Communication, *supra* note 238, at art. 3.3.

261. *See* Council Directive 93/22/EEC, *supra* note 50, at art. 14, no. 3. However, in this event, Member States must give residents the right (subject to certain conditions) not to comply with the requirement "and have the transactions carried out away from a regulated market." *Id.* at art. 14, no. 4.

262. *Id.*

263. *See* ISD Communication, *supra* note 238, at art. 4.1.

264. *See id.* at list of issues for comment.

the ISD with a ringing endorsement.[265] The Parliament made the following points, among others, in its resolution endorsing revisions to the ISD.[266] In many respects, the Parliament's recommendations go significantly beyond those of the Commission in its Communication. In the resolution, among other things, the Parliament:

> strongly supports the Commission's intention to upgrade the ISD, although it opposes "any attempt at wholesale redrafting of the original text". . .
>
> suggests that the European passport system be extended to the "non-core services" set forth in Annex C to the ISD;
>
> proposes that credit derivatives be added to the list of instruments as to which investment firms may provide services;
>
> recommends in general home country regulation for both wholesale and retail investors, including in the case of conduct of business rules; host country restrictions should be introduced "parsimoniously";
>
> suggests that with respect to wholesale investors, a "light regulatory system, applied exclusively by the country-of-origin, should be introduced immediately";
>
> suggests that the EU agree upon a set of core standards applicable to retail investors;
>
> recommends that a home country system for regulating conduct of business for retail customers be in place by January 1, 2002;
>
> suggests the development of high level rules for the integrity of securities markets which would apply to institutions "whose character involved responsibility for the integrity of a trading system" (e.g., ATSs);[267]
>
> recommends that the revised directive authorize regulatory authorities to apply portions of regulations for investment services firms or regulated markets to "institutions of mixed character, or to novel situations";
>
> "demands that Article 14(3) of the Investment Service Directive be deleted." (i.e., the concentration rule).[268]

Given the positions of the European Commission and the Parliament, it is

265. *See* European Parliament Resolution on the Commission Communication to the European Parliament and the Council on Upgrading the Investment Services Directive (93/22/EEC) COM (00)729.

266. *See id.*

267. *See* European Parliament Legislative Resolution, *supra* note 155.

268. *See id.*

highly likely that the ISD will be revised.[269] It is likely that the EU will move further toward home state regulation of investment services firms and away from host state regulation, particularly in the case of wholesale investors.[270] It is also likely that the EU will seek to change the "concentration rule," although this will probably remain controversial. In November 2002, as this article went to press, the Commission published a proposal for a new directive on investment services and regulated markets.

VI. INSIDER TRADING

A. Insider Dealing Directive — Current Law

In November 1989, a directive on insider trading was adopted[271] which required Member States to prohibit specified persons who possess "inside information" from using that information "with full knowledge of the facts" by purchasing or selling transferable securities of the issuer to which the information relates.[272] This prohibition applies to any person who possesses inside information by virtue of his membership in the structure of the issuer, his share ownership, or his access to information through his employment, profession, or duties.[273] The directive also applies the prohibition to other persons who possess inside information the source of which "could not be other than" one of the previously enumerated persons.[274] The Member States must prohibit any such person from disclosing inside information to third parties outside the normal course of his employment or professional duties, or procuring another person on the basis of such information to purchase or sell securities admitted to trading on a securities market as specified in the directive.[275]

"Inside information" is defined in the directive as non-public information "of a precise nature" relating to an issuer or to securities, which, if public, "would be likely to have a significant effect on the price" of the securities in question.[276] The directive is applicable only to securities admitted to trading on a market which is regulated by "public bodies," that "operates regularly," and "is accessible directly or indirectly to the public."[277] The Member States must apply the prohibitions of the directive, at a minimum, to actions undertaken "within its territory" if the securities in question are admitted to trading on a market in a Member State.[278] The

269. *See* European Parliament Legislative Resolution, *supra* note 155.

270. *See id.*

271. Council Directive 89/592/EEC, *supra* note 55.

272. *See id.* at art. 2.

273. *See id.*

274. *Id.* at art. 4.

275. *See id.* at art. 3.

276. *Id.* at art. 1.

277. *Id.* art. 1.

278. *See* Council Directive 89/592/EEC, *supra* note 55, at art. 5. A transaction will be deemed to be within the territory of a Member State if carried out on a regulated market (operated regularly and accessible to the public) situated or operating within such territory. *See id.*

directive only applies to purchases or sales affected through a professional intermediary,[279] and it specifically permits Member States to exclude transactions effected without a professional intermediary outside a regulated market.[280]

The Insider Dealing Directive (IDD) also adopts a disclosure provision applicable to issuers of transferable securities. Article 7 applies one of the disclosure requirements of the Listing Conditions Directive[281] to all companies and undertakings, the transferable securities of which are admitted to trading on one of the markets covered by the IDD.[282] This provision specifies that the issuer must inform the public of any major new developments in its activities that are not public knowledge and which may lead to substantial movements in the prices of its shares.[283]

B. 2001 Proposal for New IDD/Manipulation Directive

On May 30, 2001, the Commission issued a proposal for a directive on insider dealing and market manipulation (market abuse).[284] The principal purpose of the new Directive is to establish common standards throughout the EU for market abuse, which includes market manipulation and insider trading.[285] Currently, there is no EU Directive concerning market manipulation, although there is a Directive concerning insider trading.[286] Although many European countries regulate market manipulation at the national level, national rules are inconsistent.[287] The purpose of proposing a new insider-trading directive is to apply to insider trading the same framework for allocation of responsibilities and enforcement applicable to manipulation.[288] In addition, it would be "administratively simpler and reduce the number of different rules and standards across the EU" to treat both topics under the same directive.[289] The newly proposed insider-trading directive is similar in substance to the current directive, although several provisions have been changed.[290]

The proposed IDD requires Member States to prohibit any person who possesses insider information from taking advantage of that information by acquiring

279. *See* Council Directive 89/592/EEC, *supra* note 55, at art. 2(3).

280. *See id.*

281. Council Directive 2001/34/EC, *supra* note 5, at annex, sched. C.5(a).

282. *See* Council Directive 89/592/EEC, *supra* note 51, at art. 7.

283. *See* Council Directive 2001/34/EC, *supra* note 5, at sched. C.5(a).

284. *See* Proposal for a Directive of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse), COM(01)281 final [hereinafter Proposed Insider Dealing Directive" or IDD]. *See also* Opinion of the European Central Bank, 2002 O.J. (C24/8). As this article went to press, the European Parliament approved the Commission's *Proposal on the Insider Dealing and Market Abuse Directive*, subject to substantial amendments, *see New Curbs on Insider Trading, Market Abuse Agreed to EU Parliament*, 34 SEC. REG. AND LAW REP., 32 (2002), and the measure subsequently was adopted.

285. *See* IDD, *supra* note 284 at General Comments.

286. *See* Council Directive 89/592/EEC, *supra* note 55.

287. *See* IDD, *supra* note 284, at Explanatory Memorandum, § 1(b).

288. *See id.* at Explanatory Memorandum, § 1(c).

289. *Id.*

290. *See* IDD, *supra* note 284, at Description of Arts., arts. 2-4.

or disposing for his own account or that of a third party financial instruments to which such information relates.[291] This prohibition applies irrespective of whether the person has obtained the information by being an officer, director, or shareholder of the company,[292] or by having access to the information through the exercise of his employment, profession, or duties.[293] The prohibition also applies to any other person "who with full knowledge of the facts possesses inside information."[294] Article 1 of the IDD sets forth the following definition of inside information:

> "Inside information" shall mean information which has not been made public of a precise nature relating to one or more issuers of financial instruments or two one or more financial instruments, which, if it were made public, would be likely to have a significant effect on the price of the financial instruments or on the price of related derivative financial instruments.[295]

Member States must prohibit a person in any of the categories set forth above (officer, director, shareholder, or other person "with full knowledge of the facts") from disclosing inside information to a third party unless made in the normal course of his employment, profession or duties, or from procuring the third party to trade in financial instruments to which that information relates.[296]

If an issuer or its agent discloses inside information to another party in the ordinary course of his employment, profession or duties, the issuer must disclose such information, simultaneously in the case of an intentional disclosure, or promptly in the case of a non-intentional disclosure.[297] This provision, which might be called "European FD," does not apply where the recipient of the information owes a duty of trust to the issuer or expressly agrees to maintain such information in confidence, or if the recipient of the information is a rating agency.[298] An issuer may delay disclosure of such information provided it is not misleading to do so and the issuer is able to maintain confidentiality of the information.[299] Member States must require persons responsible for research to "take reasonable care to ensure that information is fairly presented and disclose their interests or indicate conflicts of interest in the financial instruments to which that information relates."[300]

The proposed IDD would regulate market manipulation in addition to insider trading. Specifically, Member States must prohibit any person from engaging in "market manipulation,"[301] which is defined as follows:

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291. *See* IDD, *supra* note 284, at art. 2(1).

292. Actually, the IDD uses the terminology of the IOSCO International Disclosure Standards, referring membership in the "administrative, management or supervisory of the issuer." *Id.*

293. *See id.*

294. *See* IDD, *supra* note 284, at art. 4.

295. *Id.* at art. 1(1).

296. *See id.* at art. 3.

297. *See id.* at art. 6(2).

298. *See id.*

299. *See id.* at art. 6(3).

300. *Id.* at art. 6(4).

301. *Id.* at art. 5.

> Transactions or orders to trade, which give, or are likely to give, false or misleading signals as to the supply, demand, or price of financial instruments, or which secure by one or more persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, or which employ fictitious devices or any other form of deception or contrivance.
>
> Dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply, demand, or price of financial instruments, including the dissemination of rumors and false or misleading news.[302]

Annex B to the Directive provides a non-exclusive list of methods used for market manipulation.[303]

The IDD would require a Member State to apply the provisions specified therein "at least to actions undertaken within its territory whenever the financial instruments concerned are admitted, or going to be admitted, to trade in a Member State."[304] The IDD would repeal the Insider Trading Directive,[305] which the Council had adopted in 1989.[306]

302. *See* IDD, *supra* note 284, at art. 1(2).
303. *See id.* at annex B.
304. *Id.* at art. 10.
305. Council Directive 89/592/EEC, *supra* note 53.
306. *See* IDD, *supra* note 284, at art. 19.

THE HUMAN RIGHTS APPROACH TO PEACE IN SIERRA LEONE:

THE ANALYSIS OF THE PEACE PROCESS AND HUMAN RIGHTS ENFORCEMENT IN A CIVIL WAR SITUATION

LAURENCE JUMA*

INTRODUCTION

The idea that perpetrators of human rights abuses should be made accountable for their action has gained currency in international law and practice.[1] Nascent from the general principles of human rights protection and state obligation decreed by international instruments such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[2] the 1949 Geneva Conventions,[3] and the International Covenant on Civil and Political Rights (ICCPR),[4] the idea has crystallized into an expanded scheme of action that calls for the avoidance of blanket amnesties for past violations, imputation of individual criminal responsibility, and the exercise of extraterritorial jurisdiction to try and punish human rights violators.[5] The argument that past violations may be excusable for reason of democratic consolidation, for societal healing or for merely bringing the belligerents to a negotiation table is becoming unpopular even within nations that have experienced

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1. *See generally* Juan E. Méndez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 ETHICS AND INT'L AFF., 25 (2001); *see also* Kristin Henrad, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L., 595 (1999).

2. The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter the Genocide Convention]. (recognizing individual criminal responsibility for the crime of genocide). *See also* Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

3. *See generally* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1969 (primarily concerned with situations of armed conflict, it imports the notion of punishment for "grave breaches" of international humanitarian law).

4. International Covenant on Civil and Political Rights 21 G.A. Res. 2200, U.N. GAOR, Supp. No. 21 at 52 [hereinafter ICCPR (*adopted* 16 Dec. 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976), U.N. Doc. A/6316 (1966) (requiring state parties "to ensure to all individuals" the enjoyment of all rights recognized by the covenant). *See also* Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q 255, 259 (1997) (interpreting the duty to "ensure" to mean the obligation to "take specific steps to redress the wrong committed by each violation of a right").

5. *Id.*

great political and social upheaval.[6] However, the development of appropriate enforcement mechanisms that would be in tandem with the unrelenting mood of the international community against human rights violations has been very slow.[7] The difficulty of marshalling the consensus necessary for treaty formation and the general political suspicion against the diminishing sovereignty privileges has impacted negatively on such an enterprise.[8] The result has been a pathetic recourse to ad hoc measures meant to bridge the gap between the genuine concerns for the eradication of human rights abuses and the political desires to retain sovereignty and block interference with so called "internal affairs."[9]

One area in which such a policy has become evident is with the prosecution and punishment of war criminals through the ad hoc international war crimes tribunals.[10] The tribunals are a compromise between two competing forces – a creature of convenience crafted to satisfy the overwhelming demand for response against massive violations of human rights, but with restricted temporal and substantive jurisdiction to match the cynicism of the western political influence.[11] As one scholar has observed:

> The Yugoslav and Rwanda Tribunals were not established because of the United Nations, or the powerful states that control it. They were not established because of an intrinsic value on punishing war criminals or upholding the rule of law. Rather, the mobilization of shame by non-governmental organizations and especially the grisly pictures beamed to the world by the television camera created a public relations nightmare and made liars of the centers of Western civilization.[12]

Because of the restrictions placed on them by their constitutive statutes, lack of uniformity and the fact of their temporary presence, the tribunal's practical effect as a deterrent measure has been negligible - a fact conceded by even their most ardent of supporters.[13] Despite this, the United Nations Security Council has persisted in this endeavor, making such tribunals the most preferred method of dealing with international crimes and human rights abuses.[14] The Nuremberg and Tokyo tribunals have thus created an enduring framework for a watered down international response to gross violations of human rights.[15] The Yugoslavia and Rwanda tribunals have followed in this tradition and the proposed Sierra Leone tribu-

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6. *See* Juan Méndez, *Latin American Experience of Accountability*, *in* THE POLITICS OF MEMORY: TRUTH HEALING AND SOCIAL JUSTICE 127 (Ifi Amadiume & Abdullahi An-Na'im eds., 2000).

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997).

13. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 50, (1998). *See generally* Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169 (1995).

14. *See* Genocide Convention, *supra* note 2, at 277.

15. *See* JOHN R. CARTWRIGHT, POLITICS OF SIERRA LEONE 1947-67 156 (1970).

nal/court may be no different.[16]

Whereas the institution of war crimes tribunals in relatively "peaceful" times has achieved some measure of "success," the viability of such schemes in the face of an ongoing civil war, as well as their perceived incompatibility with peace processes, reveals a consistent contradiction in the implementation of international human rights law.[17] One reason could be the unpredictability of outcomes, given the inherent weaknesses in the normative structure of the current web of international human rights regimes.[18] Obviously, these weaknesses are augmented by the incongruent policy objectives of the determinate authorities and by the exigencies of international politics.[19] The other could be that the threat of punishment as an object of an international criminal process excites emotions and evokes fear amongst warring parties, thereby diminishing any chances of seeking a negotiated solution to a civil war.[20] But perhaps what is germane to this discourse is whether the propagation of these international schemes, especially those that investigate, prosecute, and punish individuals responsible for international crimes, is consistent with the overall objective of creating peace. While conceding that the punishment of human rights violations is essential to the promotion of international peace and security,[21] designing an appropriate mechanism for its enforcement, especially in conditions of conflict, is a task that has received very scant normative attention. However, one fact remains undisputed: for societies in turmoil, the promotion of human rights as part and parcel of a holistic framework for peace, reconstruction, and overall societal development presents a better opportunity for its enforcement than the piecemeal approach favored by some powerful nations.

This article questions whether the establishment of a hybrid war crimes tribunal is an appropriate response to the current civil war in Sierra Leone. It analyzes the Sierra Leone problem in the context of its historical evolution and draws the conclusion that what is best for the country is an integrated program of action that will address the peremptory factors inhibiting the maturation of the peace process. Further, this article discounts the ad hoc interventionist programs propagated by the UN and its collaborators upon their obvious inability to bring the war to an end, bolster development of institutions of democracy, and eradicate violations of human rights abuses.[22] The article examines the relationship that exists between the peace process and human rights so as to provide context to the discussion on the nature of the proposed 'special international criminal court' now in the process of being established in Sierra Leone.

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16. *See* CARTWRIGHT, *supra* note 15, at 156..

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See* Preamble to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, 74-75, adopted Nov., 26 1968, entered into force Nov., 11 1970, *reprinted in* 8 ILM 68 (1969).

22. *See* CARTWRIGHT, *supra* note 15, at 158.

I. BACKGROUND TO THE SIERRA LEONE CONFLICT

In 1961, Sierra Leone gained its independence from the British.[23] The dispensation of power was not immediately followed by elections, but rather adopted the political structure that had been in place since the 1957 election.[24] This created tension between the powerful Sierra Leone Peoples Party (SLPP) led by Sir Milton Magai, who, by virtue of being a majority leader in the colonial legislature, had assumed the post of prime minister, and the bulwark of opposition leaders.[25] This was indeed a false start in the long path towards democratic self-governance. The uneasiness generated by squabbling amongst political leaders and the fear that such morose political atmosphere may erode public confidence in the government, prompted Milton Magai to dissolve parliament on April 17, 1962 and to call for general elections on May 25 of the same year.[26] It was not surprising that the mainstream political parties were unable to secure majority votes.[27] In fact, the independent candidates secured 42.6 percent of the votes against the SLPP 34.7 percent, All Peoples Congress (APC) 17.2 percent, Sierra Leone Progressive Independence Movement (SLPIM) 5.2 percent and UPP 0.3 percent; SLPP was, however, allowed to form the government because it had the majority of seats amongst the organized political groups.[28]

On taking leadership, the SLPP sought to consolidate its hold on power by intimidating and weakening opposition groups.[29] Rural chiefdoms were encouraged to harass and intimidate opposition politicians.[30] At the same time, the SLPP enticed leaders of opposition parties to abandon their parties and join its ranks.[31] Though the long-term benefit of this strategy was doubtful, it succeeded in temporarily eliminating threats against its leadership.[32] Magai pursued policies aimed at cutting the electoral base for the opposition parties, as well as debilitating their efforts to consolidate their internal structures.[33] By the time of his death on April 28, 1964, Magai had created a strong central government controlled by a small clique of wealthy African elites.[34] His management style had encouraged and indeed sanctioned the use of the state instrumentality to convert political power and posi-

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23. *See* CARTWRIGHT, *supra* note 15, at 158.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.* at 170. Janneh, an APC supporter, was jailed by the Native Court in Samu Chiefdom, Kambu district, for incitement and undermining the authority of the paramount chief. *See* CARTWRIGHT, *supra* note 15.

31. CARTWRIGHT, *supra* note 15, at 168. A prominent APC supporter, Samura Sesay, announced on October 20, 1962 that he was abandoning APC because it had "no substantial political ideology." *See id.*

32. *See id.*

33. *See id.* at 170. For example, an APC candidate was deported back to Liberia after winning council elections in Freetown on a very flimsy allegation of being a Liberian. *See id.*

34. *See id.* at 156.

tions into economic wealth for the privileged minority group.[35] To a large extent, this explains the decay of state economic power in the years that followed, despite the abundance of mineral and other natural resources within the territory of Sierra Leone.[36] It also explains why the endemic problems of corruption and other malfeasance became defining characteristics of successive regimes, let alone a justifying epithet for the military coups the country was to endure in the following decade.[37] In many ways, the stage had been set for Sierra Leone's descent into turmoil and political quagmire.[38]

After Milton Magai's death, his brother, one Albert Magai, thence occupied the office of the Prime Minister.[39] His reign was characterized by high levels of corruption, mismanagement, and political highhandedness, an all too familiar pattern of postcolonial administration in most African countries.[40] Freedom of speech was nonexistent as the government cracked down hard on pro-opposition newspapers.[41] Political rallies were strictly regulated by law:[42] before any gathering could be allowed, the conveners were required to obtain licenses from regional government officials.[43] The judiciary was equally muzzled.[44] In 1965, the Chief Justice of Sierra Leone, Sir Samuel Bankole-Jones, was removed from office and appointed the President of the Court of Appeal.[45] His removal was attributed to his unwavering belief for the independence of the judiciary.[46] He refused to be compromised into being an SLPP stooge and often times acquitted persons who were perceived to be anti-government.[47] Albert Magai also sought to destroy opposition parties and impose a one-party state.[48] On March 30, 1965, he told APC members of parliament that "the tide was ebbing fast" and that it would soon be easy to eliminate them:

> Now coming to the one party system in this country, if my interpretation is correct the question of one party is a reality within this house. . .In the past when we

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35. CARTWRIGHT, *supra* note 15, at 156.

36. *See id.* at 170.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.* at 201. In one such case, a local newspaper reported that the Prime Minister had condemned corruption in the Produce and Marketing Board. According to the paper, the managing director and other senior managers of the Board had used the Boards assets for their own development. When a private criminal prosecution was instituted, the Attorney General hurriedly entered a *nolle prosequi* on the grounds that the move had been accentuated by political reasons. The editor and the reporter who did the story were arraigned in court on charges of sedition. *See id.*

42. *See id.* at 242.

43. *See* CARTWRIGHT, *supra* note 15, at 243. The Public Order Act, its subsequent amendments in 1966, and especially Section 24, gave the chiefs absolute discretion to allow or forbid any meeting of twelve or more persons within their area of jurisdiction. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.* at 242.

> speak of a two party system we had a government and a recognized opposition. . .I am sure that the word "recognized" would not apply to you for long.[49]

The government and other SLPP operatives justified the one party system on several grounds.[50] First, it was argued that it was in the national interest to have a one-party state because multi-partyism encouraged tribal polarization that in turn affected negatively foreign investments.[51] Second, the constant criticism of the government by the opposition denigrated government image.[52] Third, a one-party state would eliminate an organized nucleus around which the Prime Minister's personal opponents would rally.[53] Though the idea of a one-party state was later dropped, the government's performance never improved and the relentless criticism and attack by the opposition leaders further diminished its support amongst the citizens.[54] It is against this backdrop that the general election of 1967 was called.[55]

More than anything else, the outcome of this election revealed sharp political divisions based on tribal or ethnic allegiances.[56] The APC, which won the majority of votes, secured all seats in the Northern and western provinces mainly inhabited by the *Temne*.[57] The SLPP, the ruling party, won seats in *Mende* country.[58] In all, the APC secured 286,585 (44.3 percent) votes against 231,567 (35 percent) of the SLPP.[59] The Governor-General proposed that the two parties form a coalition government.[60] The APC leader Siaka Stevens rejected this proposal outright.[61] A day later, the Governor-General summoned him to state house and swore him in as Prime Minister.[62] The events that followed were very dramatic. On the same day, military commander Brigadier David Lansana, on instigation by the besieged leader of the SLPP, Albert Magai, proclaimed martial law.[63] On March 23, a group of army officers led by Major Charles Blake arrested Lansana, suspended all

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49. CARTWRIGHT, *supra* note 15, at 210.
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.* at 210.
58. *See id.*
59. *See id.* at 249-50.
60. *See id.* The Governor-General could exercise considerable discretion under the Constitution. For example, Section 58(6)(a) provided that the office of Prime Minister become vacant when "after any dissolution. . .the person holding that office is informed by the governor-general that the governor general is about to re-appoint him as Prime Minister or to appoint someone else as Prime Minister". However, he can only do so if "it appears to him that the Prime Minister no longer commands the support of the majority". Whether or not this proviso limits the discretion of the Governor-General or widens it, is really a matter of interpretation. *See* CARTWRIGHT, *supra* note 15, 156.
61. *See id.*
62. *See id.*
63. *See id.* at 252.

political activities,[64] and announced the formation of the "National Advisory Council" to take charge of the country.[65] A year later another military coup took place and the military junta comprised of non-commissioned officers invited Siaka Stevens, a civilian leader, to become President.[66] Siaka Stevens retired in 1985 to give way to Joseph Momoh, whose first test of leadership came with the violent labor and student unrest.[67]

It was during the Momoh regime that the current civil war started.[68] The history of Sierra Leone before this period testifies to the fact that the signs of dissatisfaction amongst the populace and inherent spite for government had emerged early enough to allow for action, both from the government of Sierra Leone and the international polities.[69] Early warning signs included "the abysmal performance of the economy, the emergence of a disaffected intelligentsia, the gulf between senior and junior military officers, and the prospect that the Liberian civil war might spillover into Sierra Leone."[70] Ethnic hatred, accentuated by economic and social differentiation and fanned by political competition within the dysfunctional state, catalyzed the insurgency.[71] But, as in other African states, the incumbency took advantage of the uncertain political atmosphere to line its pockets with the country's wealth, completely oblivious to the plight of the masses.[72]

Thus, when the Revolutionary United Front (RUF) invaded the country in 1991, most Sierra Leonians welcomed the effort to rid the country of corrupt and ineffective leadership.[73] The civil war in Sierra Leone rages even today.[74] Many efforts to resolve it have failed because of the international community's unwillingness to come to terms with the deeply engrained social differentiation that the leadership in Sierra Leone has imprinted over the four decades since the country's independence.[75] The lack of political will, coupled with incongruent policy formulations, has resulted in inept interventionist programs aimed at fulfilling short-term goals.[76] This article suggests that such programs have had the effect of prolonging the war and maintaining a weak and ineffective state structure, which at best serves the interests of smugglers and international business concerns which benefit from contraband goods.

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64. *See* CARTWRIGHT, *supra* note 15, at 252.
65. *See id.* at 254.
66. *See id.*
67. *See id.*
68. *See id.*
69. *See id.*
70. Alfred B. Zack-Williams, *Sierra Leone: The Political Economy of Civil War, 1991-98*, 20 THIRD WORLD Q. 143, 159 (1999).
71. *See id.*
72. *See* Zack-Williams, *supra* note 70, at 159.
73. *See id.*
74. *See* CARTWRIGHT, *supra* note 15, at 255.
75. *See id.*
76. *See id.*

II. THE REALITY OF THE SIERRA LEONE CIVIL WAR

As witnessed from most writings on the subject of peace and conflict, the reality of a conflict is often overshadowed by the subaltern concern for its consequences.[77] The latter presents to academia, mainstream media, and political organizations an amiable platform from which to configure their response.[78] Concern for refugees, incarceration of war criminals, provision of humanitarian aid, and rehabilitation of child soldiers and many other reactive programs of this type have assumed prominence at the expense of integrated and pragmatic approaches capable of not only satisfying the exigencies of the moment, but creating an enduring framework for societal reconstruction, support, and accommodation.[79] The reason is understandable. Most politically motivated responses define their constituency in terms of what is achievable in the short term. The UN Security Council for example, will pass resolutions that mandate action within a specific period.[80] After expiry of that period, concerned parties must seek a fresh mandate.[81] It is ironic that while politicians are quick to proclaim success measured in terms of the short term strategies, they are nevertheless slow to commit to a long-term program of sustaining the fruits of that success, if any.[82]

The above notwithstanding, addressing the consequences of a conflict could provide a window through which the underlying forces responsible for its eruption could be discerned and ultimately remedied. Interventionist programs in conflict situations must thus incorporate and indeed define their constituency in a more elaborate, flexible, and inclusive fashion so as to be able to evolve pragmatic responses. Obviously, the overall objective must be right and the political climate favorable. The absence of such expansive programs has in many ways undermined the ability of the UN and indeed other regional and sub-regional organizations to resolve African conflicts.[83] Interventionist programs heralded by international legal institutions find themselves in a rather awkward position in this regard. Their preoccupation with punishment or retribution based on the sancrosanctity of extant norms is questioned by the prevalence of violations of human rights and other internationally recognized principles all over the globe.[84] Further, in conflict situations, both sides violate one norm or the other. After all, war is all about gains. The war crimes tribunals, whenever they are established, end up punishing the losers even if the victors were just as guilty.[85]

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77. *See* CARTWRIGHT, *supra* note 15, at 255.

78. *See id.*

79. *See id.*

80. *See e.g.*, U.N. SCOR, 98th Sess., Doc. 1156/98, 1162/98, 1171/98, and 1181/98. The UN Security Council has passed more than six resolutions extending the mandate for UN keeping forces in Sierra Leone. In 1998 alone, there were four extensions. *See* U.N. SCOR, 98th Sess., Doc. 1171/98.

81. *See id.*

82. *See* Laurence Juma, *Regional Initiatives for Peace: Lessons from IGAD and ECOWAS/ECOMOG*, 40 AFR. Q. 85, 87 (2000).

83. *See id.*

84. *Id.*

85. *See generally* Zack-Williams, *supra* note 70, at 159.

In the case of Sierra Leone, the difficulty of pursuing such an objective may be compounded by the fact of a continuing civil war. Moreover, the catalogue of causality factors exemplified through the consequences of the war attests to the fact that an appropriate approach far more than the envisaged war crimes tribunal may be required.[86] Improper governance structure, ethnicity, abuse of human rights, economic mismanagement, and the evolution of a lumpen proletariat - all these factors combined to constitute a substantial base for the eruption of violence and conflict in Sierra Leone.[87] Interventionist programs that fail to address these factors will no doubt fail to make a positive impact towards the resolution of the conflict. The lop-sided approach actuated by ad hoc programs may in fact prolong the war. In the following section, I attempt a discussion of the most salient of these factors with the view of showing that the envisaged war crimes tribunal may indeed be a far cry from an integrated international response that may foster the resolution of the ongoing civil war and restore peace in Sierra Leone.

Improper Governance Structures:

Sierra Leone's descent into war was a result of the progressive weakening of the state structure due to inept leadership.[88] Throughout its history, Sierra Leone never constructed legitimate political institutions capable of generating legitimate political leadership.[89] Instead, its leadership evolved a predatory functionality, re-directing the use of political power towards pillage, massification of society, and the acquisition of wealth by the ruling elite.[90] A dysfunctional state, incapable of exercising political power towards maintaining national cohesion, proved helpless in the face of a deadly struggle for access to the country's mineral resources.[91] Because the state's autonomy was completely eroded and legitimate political order lacking, infiltration into the government by corrupt and incompetent personalities became a matter of political expediency.[92] During his reign, Siaka Stevens turned over the entire diamond and fishing industry to his friend and business associate, an Afro-Lebanese named Jamil Said Mohammed,[93] who became so powerful that he "attended cabinet meetings though he was not a minister, on occasion vetoed ministerial appointments, reversed ministerial decisions and routinely violated government foreign exchange regulations."[94]

The country's leadership was controlled by elites who were not only steeped in massive corruption, but also used their wealth to propagate terror.[95] President

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86. *See* Zack-Williams, *supra* note 70, at 159
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. Jimmy D. Kandeh, *Ransoming the State: Elite Origins of Subaltern Terror in Sierra Leone,* 81 REV. AFR. POL. ECON. 349, 351 (1999).
95. *See id.*

Ahmed Tejan Kabba, on being reinstated to power on March 10, 1998, lamented at the collaboration of prominent leaders with rebels:

> [T]he people we forgave and those whose misdeeds we overlooked were the key collaborators with those who raped our women and children, killed unarmed men and women and almost destroyed our country. . . While we unreservedly condemn the junta and its RUF allies, we must not forget to ask ourselves why it happened. Where did we go wrong as a nation?. . .[G]reed and treachery. . .were the underlying causes of this tragedy. . .Some of the collaborators were the very people who presided over this system of corruption and incompetence.[96]

Despite the rhetoric, Kabba's government has failed to rid itself of the so-called "corrupt and incompetent politicians."[97] The inclusion of former war criminals into the cabinet[98] and the invitation of two Lebanese businessmen, Musa K. Suma and Jamil Said Mohammed, back into the country, have irked many Sierra Leonians.[99] Kabba has also been criticized for overlooking corruption in the government.[100] A crisis of leadership exists in Sierra Leone. The crisis, reminiscent of the systematic destruction of legitimate political institutions capable of generating democratic leadership structures, needs to be remedied by the establishment of democratic institutions based on civil authority.[101]

Ethnicity

The civil war in Sierra Leone has not been categorized as an "ethnic conflict" because it manifests no ethnic, religious, or communal challenge to the government.[102] Kaufman observes that ethnic groups in conflict "hold irreconcilable visions of identity, borders and citizenship of the state."[103] Because the RUF and other rebel organizations in Sierra Leone are neither homogeneous in terms of their ethnic composition nor do they propagate ethnic claims to territory or power, the ethnic question, though potent, has been largely ignored.[104] The civil war in Sierra Leone may not be an ethnic conflict in the popular conception of the term, but the factors responsible for its eruption have ethnic bearing.[105] Further, the resolution of the ongoing civil war may ultimately depend on how the Sierra Leone society will be able to deal with ethnic cleavages that have become so manifest during the

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96. Kandeh, *supra* note 94, at 349.

97. *Id.* at 349

98. *See id.*

99. *See Kabbah's Comeback*, AFR. CONFIDENTIAL, Feb. 10, 1998, at 7.

100. *See id.*

101. *See id.*

102. *See* JOHN DARBY, SCORPIONS IN A BOTTLE: CONFLICTING CULTURES IN NORTHERN IRELAND 111 (1997) (noting that the term "ethnic conflicts" now describes a specific area of study that has acquired its own academic space).

103. Chaim Kaufman, *Possible and Impossible Solutions to Ethnic Conflict*, 20 INT'L SECURITY 136, 174 (1996).

104. *See id.*

105. *See id.*at 175.

war.[106] By examining the evolution of the problems of ethnic diversity in Sierra Leone, a little light may be shed on how international responses to the civil war situation could take cognizance of ethnic polarities and hopefully convert such tensions into useful synergies for societal transformation and development.

Ethnicity is a term that has often been associated with conflict and intrastate violence.[107] The genocide in Rwanda, the civil wars in Congo and Somali, and the problems in the Balkans have all been attributed to ethnic differences.[108] Ethnicity has become a term of art used to describe cultural identities of groups in conflict.[109] The term derives meaning from a somewhat misleading precept that ethnic identities are primordial and that such identity difference motivates people into war.[110] Scholars who support this view argue that human persons have a primordial need for group affiliations that can only be satisfied by the maintenance of identity.[111] In their view, ethnic contests are inherent to human nature and cannot be explained merely in terms of political competition in a modern society.[112] For example, Shills argues that the group concern based on primordial attachments is "unresponsive to the symbols of a larger society."[113] According to him, "the ethos and tone necessary for the maintenance of civil society is seen to be inimical to the fervour and passion of the primary group."[114] This assertion has been discredited on many counts.[115] Van Den Berghe summarizes the tenuity of this position as follows:

> Primordial position on ethnicity is vulnerable on two scores. 1. It generally stopped at asserting that fundamental nature of ethnic sentiments without suggesting any explanations of why that should be the case. . .What kind of mysterious and suspicious force was this "voice of blood" that moved people to tribalism, racism, and ethnic intolerance? 2. If ethnicity was primordial, then was it not so ineluctable and immutable? Yet, patently, ethnic sentiments waxed and waned according to circumstances. . .How are all these circumstantial fluidity reconcilable with primordialist position?[116]

Ethnicity refers to the entire cultural attributes of a person or group of persons.[117] An ethnic group shares a language, tradition, and customs unique from

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106. *See* Kaufman, *supra* note 103, at 175.

107. *See id.*

108. *See* John Mueller, *The Banality of Ethnic War*, 25 INT'L SECURITY 42, 62 (2000) (arguing that even in the cases of Yugoslavia and Rwanda ethnicity was not the cause of the conflict but a mere "ordering device or principal."). In his view, ethnicity in these cases "proved essentially to be simply the characteristic around which the perpetrators and politicians who recruited and encouraged them happened to array themselves." *See id.*

109. *See id.*

110. *See* John Bowen, *Ethnic Relations: Ethnicity: Pluralism*, CURRENT, January 1997, at 16.

111. *See generally* Edward Shils, *Primordial, Personal, Sacred and Civil Ties*, 8 BRIT. J. SOC. 130 (1957).

112. *See id.*

113. *Id* at 143.

114. *Id* at 144.

115. *See* PIERE VAN DEN BERGHE, ETHNIC PHENOMENON 16 (1981).

116. *See id.*

117. *See id.*

other groups.[118] It is thus a segment of a larger society whose members are perceived, by themselves or others, as having "a common origin and. . .shar[ing] important segments of a common culture" and also "participat[ing] in shared activities in which the common origin and culture are significant ingredients."[119] Ethnicity is not necessarily negative. In all societies, aspects of ethnic culture, tradition, dressing, and food are a source of great pride.[120] One scholar has observed:

> Attitudes towards ethnicity have changed dramatically over the years to the point when to be lacking in an ethnic background is to be perceived as culturally disadvantaged. . .Today ethnic identity is not a shameful thing: In fact its absence is. Ethnic pride is not limited to the group itself: It is the heritage of each and every member. It is the savor and remembrance of the past. More important, it's the promise of the future.[121]

Moreover, recent studies have shown that liberalization and democratization can both take place in situations of great ethnic diversity.[122] Advancing this *instrumentalist* notion of ethnicity, Glickman has written:

> [D]espite the persistence of ethnic conflict in the politics of all African states, significant liberalization and democratization are possible. . .[C]ertain constitutional and democratic practices permit the expression and demonstration of ethnic differences in relatively constructive ways. Ethnic conflict is not incompatible with institutions of democratic government if it finds expression as a group interest among other interests, and if the means of expression provide openings for rewards and not merely sure defeats.[123]

This is a radical departure from the hitherto common understanding that democracy was impossible to nurture in multiethnic conditions.[124] J ohn Stuart Mills thought that democracy could not exist in such societies because "free institutions are next to impossible in a country made up of different nationalities."[125] Bingham Powell believes that government instability correlates with ethnic fractionalization.[126] In his work, *Contemporary Democracies*, he argues that there is indeed a positive relationship between increasing fractionalization and high rates of death by violence.[127] In a more recent discourse, Arend Lijphart has written that the optimal number of groups for peaceful ethnic conflict management is three to four with the conditions becoming less favorable as the numbers increase.[128]

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118. PIERE VAN DEN BERGHE, ETHNIC PHENOMENON 16 (1981).

119. YINGER J. MILTON, ETHNICITY, SOURCE OF STRENGTH? SOURCE OF CONFLICT? 3 (1994).

120. *See id.*

121. A.P. ROYCE, ETHNIC IDENTITY: STRATEGY OF DIVERSITY 231-32 (1982).

122. *See* ETHNIC CONFLICT AND DEMOCRATIZATION IN AFRICA 2 (Harvey Glickman ed., 1995).

123. *Id.* at 3.

124. *See id.* at 4.

125. JOHN S. MILLS, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 230 (1958).

126. G. BINGHAM POWELL JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY AND VIOLENCE 44-46 (1982).

127. *See id.*

128. *See* AREND LIJPART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 56

Generally speaking, the peoples of Africa are divided into "tribes,"[129] a term coined by early European ethnographers in an attempt to show that the members of the primitive society had unique ethnic identities.[130] During the "scramble for Africa," European powers curved out spheres of influences in the African continent declaring them colonies and protectorates.[131] In the process, Africa was partitioned into over fifty separate territories.[132] Administrative regions set up by the colonizers did not necessarily respect the ethnic boundaries of the African people. In many cases, groups found themselves living on either side of the administrative boundary.[133] The African peoples stiffly resisted the imposition of colonial rule.[134] The resistance was a crucial factor in the evolution of colonial administrative policies.[135] The policy of indirect rule, for example, emerged out of the need to minimize African opposition to colonial administration at the local level.[136] The policy, considered to have been largely responsible for the pacification of the Africans and the sustenance of the colonial hegemony, owed its success to the "tribalization" of the Africans.[137] In essence, the policy of indirect rule relied on the succinct recognition of the difference between the British and their colonial subjects as well as that between the various African groups.[138] Thus, it advocated for the use of African institutions to govern the Africans as progress was made to civilize and transform African cultures to modernity.[139] Through this process, tribes were made or unmade depending on the administrative convenience of the colonizers.[140] Manning observes that:

> [E]thnicity was sometimes simply a matter of administrative convenience; the government labelled a group or combined several groups to fit its convenience,

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(1977).

129. LEWIS H. MORGAN, ANCIENT SOCIETY 40 (1964). In this paper, "tribe" is used interchangeably with "ethnic group." "Tribe" is given a wider meaning than the original reference to a division of the Roman people. In some discourses "tribe" has been used to make reference to a small, preliterate and pre-industrial, relatively isolated, endogamous (with exogamous sub-tribal divisions), united mainly by kinship and culture and strongly ethnocentric. *See id.* at 42. "Tribe" has also been defined as a group with "a common territory, a tradition of common descent, common language, common culture, a common name." CAROLE E. DUPRÉ, THE LUO OF KENYA: AN ANNOTATED BIBLIOGRAPHY 2 (1968). From "tribe" comes the word "tribalism," a pejorative inscription of the differences amongst African peoples based on culture, language, social structure and political organization. *See id.*

130. *See* PATRICK MANNING, FRANCOPHONE SUB-SAHARAN AFRICA 1880-1995 41 (1998).

131. *See id.*

132. *See id.*

133. *See id.* For example, the Ewe were divided between Gold Coast and Togo, Ibo between Nigeria and Cameroon and the Somali between Ethiopia, Kenya, and Somali. *See* THE FUTURE OF THE CENTRALIZED STATE: INSTITUTION AND SELF-GOVERNANCE IN AFRICA 35 (Dele Oluwu & James S. Wunsch, eds., 1990).

134. *See generally* WEST AFRICAN RESISTANCE: THE MILITARY RESPONSE TO COLONIAL OCCUPATION (Michael Crowder ed., 1971).

135. MANNING, *supra* note 130, at 41.

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

> and the label stuck. Many of the labels by which African ethnic groups are known today were given to them in the beginning of this century by the colonial officials who wrote studies of these groups in hopes of learning how better to rule them.[141]

Like many social processes, ethnic relations have always been influenced by historical factors.[142] The transition to modern statehood and the onset of colonial hegemony was initially characterized by the discrimination of subordinate groups.[143] This subordination was facilitated by the stigmatization of the said groups, whose ethnic tendencies and way of life were considered sub-human.[144] The identities often ascribed to the subordinate groups were artificial and not primordial.[145] The impact of colonialism in the ethnic relations in many African countries can be summarized as follows. First, the boundaries created by colonial administrations defied the primordial geographical structure of the African communities.[146] Technically, the ethnic groups were unified (in a very informal sense) in the state system.[147] Second, the colonial policy incorporated ethnic flavor in its administrative system.[148] Third, it created a system of uneven development, thus magnifying ethnic cleavages.[149] Finally, it encapsulated Christian religious tendencies by allowing missionary activity to "pacify" the ethnic groups so as to ease political domination.[150] The interplay of these factors raised ethnic consciousness to be part and parcel of the African political life.[151] In the post-colonial era, ethnicity is perceived as the opposite of a national culture, and thus inimical to the propagation of civic unity.[152] The trend in Africa has been to downplay the importance of ethnicity and to devise institutions that would minimize its impact.[153] "Tribalism," or allegiance to ethnic grouping, is discouraged in public and yet privately manipulated for political mileage.[154] Political manipulation of ethnic differ-

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141. MANNING, *supra* note 130, at 42-43.

142. *See id.* at 43.

143. *See id.*

144. *See id.*

145. *See id.* at 41.

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.* For example, in Rwanda the colonial rule helped shape the state building processes that propagated the "corporate vision of the ethnic groups." Catherine Newbury, *Ethnicity and Politics of History in Rwanda*, 45 AFRICA TODAY 7, 11 (1998).

150. *See* MANNING, *supra* note 130, at 94. Archbishop Desmond Tutu in his acceptance speech of the Nobel Peace Price in 1984 said, "when the missionaries came, they had the bible and we had the land. They said, 'Let us pray.' They taught us to close our eyes to pray and when we opened them again, we had the bible and they had the land." BILL RAU, FROM FEAST TO FAMINE: OFFICIAL CURES AND GRASS ROOTS REMEDIES TO AFRICA'S FOOD CRISIS 31 (1991).

151. *See* MANNING, *supra* note 130, at 41.

152. *See id.*

153, *See id.* For example, the African Charter on Human and Peoples Rights, OAU Doc. CAB/LEG/67/3/Rev. 5(1981) *reprinted* in 21 ILM 59 (1982), also known as the 'Banjul Charter,' avoided the mention of ethnic groups and instead used "peoples" as constituent members of society. *See* Richard Kiwanuka, *The Meaning of People in the African Charter on Human and Peoples Rights*, 82 AM. J. INT'L L. 80 (1988).

154. *See* MANNING, *supra* note 130, at 35.

ences may well be the major cause of African intrastate conflicts.[155]

According to a 1995 study, ethnic divergences will become disruptive if several risk factors exist.[156] T hese include a history of lost political autonomy, active economic and political discrimination against groups, and a history of state repression.[157] The risk posed by these factors is compounded by a group's capacity to sustain collective action and the availability of opportunity for such action.[158] Recent discourse suggests that ethnic conflicts are a creature of the post cold war era.[159] This may not be entirely true; ethnic contests and skirmishes have been with us all along.[160] In Africa, tribal wars predate the arrival of the European colonizers.[161] Yet in all these cases, the wars were not as disruptive as the civil wars experienced today.[162] Sources of conflict were clearly delineated and, once resolved, the ethnic groups lived together in peace.[163] Whatever differences existed between the various ethnic groups were submerged during the independence struggles, but only resurfaced after independence.[164] This indicates that ethnicity can be responsive to civic nationalism and hence foster peace. In the words of Bowen, "states do make choices, particularly about political processes, that ease or exacerbate inter-group tensions. . .What the myth of ethnic conflict would say are ever-present tensions, are in fact the product of political choices."[165]

When Sierra Leone was declared a British protectorate in 1896, the country was inhabited by the *Temne*, *Mende*, the *Limba*, *Kono,* and about 12 other indigenous African tribes.[166] Significant populations of the "Creole" were also in occupation.[167] Comprised of Africans liberated from slaving ships, those coming from England, refugees fleeing the American Revolution, and the Maroon from Jamaica and Nova Scotia,[168] the Creole were by far the most politically articulate segment of the African community.[169] They were also the most educated and economically

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155. *See* MANNING, *supra* note 130, at 35.

156. *See* Ted Robert Gurr & Monty G. Marshall, *Assessing Risks of Future Ethnic Wars, in* PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 1, 7 (Gurr eds., 1998).

157. *See id.*

158. *See id.*

159. *See id.* at 9.

160. *See* MANNING, *supra* note 130, at 35.

161. *See id.* These wars were predicated upon the need to secure grazing lands or merely retrieve stolen cattle. The rules of war were definite and everybody involved knew of the methods of bringing it to an end. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. John R. Bowen, *The Myth of Global Ethnic Conflict,* 7 J. DEMOCRACY 4, 12-13 (1996).

166. *See generally* CHRISTOPHER FYFE, A HISTORY OF SIERRA LEONE (1962).

167. *See* ARTHUR T. PORTER, CREOLEDOM: A STUDY OF THE DEVELOPMENT OF FREETOWN SOCIETY 3-16 (1963). "Creole" is a collective name given to former African slaves who were resettled along the Sierra Leone coast. *See id.*; *see also* ALEXANDER PETER KUPP, SIERRA LEONE: A CONCISE HISTORY 114 (1975).

168 *See generally* MAVIS C. CAMPBELL, BACK TO AFRICA: GEORGE ROSS AND THE MAROONS: FROM NOVA SCOTIA TO SIERRA LEONE (1993).

169. *See* PORTER, *supra* note 167, at 12.

active.[170] The British colonial administration used them as a medium through which policies could be propagated amongst the indigenous communities.[171] They were "sufficiently westernized" as compared to the people of the interior and could, therefore, "act as spearheads of the western cultural advance."[172] The African suspicion of the Creole was widespread and within two years of the declaration of the protectorate, it erupted in the Hut Tax War of 1898.[173] During the independence movements, the involvement of the Creole was highly detested.[174] Dr. Margai, while in parliament in 1947, lamented thus:

> Sierra Leone, which has been the foremost of all west African colonies, is still saddled with archaic constitution with official majority. The reason for this backwardness is evidently due to the fact that that our forefathers, I regret very much to say, had given shelter to a handful of foreigners [i.e., Creoles] who have no will to cooperate with us and imagine themselves to be our superiors because they are aping the western mode of living, and have never breathed the true spirit of independence. . .We are very much unfortunate to have with us in this country a handful of foreigners whose leaders, whatever one may do, can never bring themselves to wipe off the superiority complex, and they imagine themselves more like Europeans than Africans, which is indeed a very sad state of affairs; moreover they have never impressed us as being sincere in their actions towards us.[175]

The ascendancy of indigenous Africans to leadership after the declaration of independence in 1961 accentuated bitter political rivalry amongst them.[176] Political party competition, coupled with corruption and inept leadership, magnified the claims to power based on ethnic allegiance.[177] The SLPP, mainly a *Mende* outfit, formed government amidst great mistrust by other parties.[178] The UPC, a rival party having support amongst the northerners - mainly the *Limba* and *Temne* -[179] succeeded in dislodging the SLPP from power after the 1967 elections.[180] At the beginning of the UPC reign, tribal rioting between the *Mende* and *Temne* occurred in many parts of the country.[181] Though these riots were eventually suppressed by

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170. *See* PORTER, *supra* note 167, at 12.

171. *See id.*

172. *Id.*

173. *See id.* About 1,000 Creoles were slaughtered by the Mende in this war. *See* CARTWRIGHT, *supra* note 15, at 16. *See also* FYFE, *supra* note 166, at 558-559.

174. *See* PORTER, *supra* note 167, at 13.

175. MARTIN KILSON, POLITICAL CHANGE IN A WEST AFRICAN STATE: A STUDY OF THE MODERNIZATION PROGRESS IN SIERRA LEONE 169 (1966).

176. *See* MANNING, *supra* note 130, at 52.

177. *See id.*

178. *See* CARTWRIGHT, *supra* note 15, at 61. The SLPP was formed in 1951 after the dissolution of the Sierra Leone Organization Society (SOS), a representative body created for the purposes of advancing educational goals. The leaders of SLPP were Dr Magai, a grandson of a *Mende* warrior chief and son of a wealthy merchant, his brother Albert, Chief Julius Gulama, AJ Momoh, Arthur Masally, and William Fitzjohn, all of whom were from the *Mende* ethnic group. *See* CARTWRIGHT, *supra* note 15, at 61.

179. *See id.*.

180. *See id.*

181. *See id.*

the government, "the Mendes remained un-reconciled to the change of the regime."[182]

With the onset of the civil war, things have become worse.[183] The conflict itself is not without its share of ethnic influence.[184] Bangura makes a befitting summation of the situation that "even though the RUF rebellion is not ethnic, and the RUF (more eastern and southern composition) and AFRC (more northern and western area) formed an alliance in pursuing a common goal, the conflict had strong ethnic overtones among key political elites."[185] While addressing a London Conference in 1997, President Kabba acknowledged that "tribal differences" were the biggest cause of the Sierra Leone problems.[186] But his regime has done little to obviate this calamitous state of affairs.[187] His recruitment of the ethnic Kamajor to be part of the national security apparatus and his failure to ensure equitable distribution of civil service jobs has not made it any better.[188] Ethnic problems continue to bedevil Sierra Leone's political development and may diminish any gains made so far in the peace process.[189]

Economic Depravity and the Rise of Lumpen Proletariat

By the time Siaka Stevens hand picked Momoh to succeed him, the state was already on the verge of collapse.[190] The gross domestic product (GDP) had fallen from $1.1 billion in 1980 to a paltry $857 million and the annual growth rate from 3 percent to 1 percent, while international reserves stood at only $5 million.[191] No single economic sector or activity registered any growth.[192] The export sector had been utterly ruined by closure of iron mines and diamond smuggling by rogue politicians.[193] The economy was hard hit by the massive debt burden, with external debt alone amounting to $723 million.[194] With the dismal performance of the economic sector, the government's grip of power slowly drifted from state bureaucracy to a consortium of corrupt politicians and businessmen financed by mineral riches, especially diamonds.[195]

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182. CARTWRIGHT, *supra* note 15, at 62.

183. *See id.*

184. *See id.*

185. Yusuf Bangura, *Strategic Policy Failure and Governance in Sierra Leone*, 38 J. MODERN AFR. STUD. 4, 551-553 (2000).

186. *See A Recipe for Anarchy*, WEST AFRICA, Oct. 29, 1997 at 1671.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See* Zach-Williams, *supra* note 70, at 153.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.* Sierra Leone is currently listed as one of the poorest countries on earth. Its life expectancy is estimated at 40, literacy at 30 percent and infant mortality rate at 179 per 1000 births. Less than a third of the population have access to health services, safe drinking water, and sanitation. It has a GNP of $180. *See id.*

Long before the war, economic deprivation had created a lumpen class amongst the youths in Sierra Leone.[196] This group of urban youth, for whom combat appeared to be the only viable means of survival, formed a reservoir from which the RUF could recruit soldiers.[197] According to some analysts, recruitments into the RUF occurred heavily amongst lumpen youth living in Freetown who were then taken to Libya for military training.[198] Bangura has noted:

> Majority of those trained in Libya were either from the loosely structured "lumpen" classes or those with troubled educational history. . .drawn from a stratum of Sierra Leonean society that is hooked on drugs, alcohol and street gambling. They have a very limited education and are prone to gangster type of activities – sometimes acting as clients of "strong men" in society or leading political figures and government officials.[199]

In every aspect of the RUF campaign, the lumpen culture has manifested itself.[200] The ruthlessness exemplified by the human rights abuses, theft, and pillage of resources are all deeply engrained into the culture of the lumpen youth in many cities of Africa.[201] No wonder that they were attracted by the "simplistic emancipatory rhetoric" of the RUF commanders and motivated by the acquisition of wealth through extralegal means:

> The "freedom fighter" mantle - idealized in *pote* culture and given resonance by the RUF's appeal and initial success - coupled with the reversal of social hierarchy through the possession of the means of violence, had long been perceived in the lumpen world view as a necessary route to heroism and self-actualization.[202]

Sierra Leonians need to revitalize their economy and international assistance towards this objective may indeed be necessary. The IMF structural adjustment strategies, which have in the past contributed to the impoverization and lumpenization of Sierra Leone society, do not speak well of past involvement by the international community.[203] Moreover, the overt dealings in the mining industry by international conglomerates, despite condemnation of trade in contraband diamonds from Sierra Leone and other conflict areas, valorizes the hope that globalization trends may catalyze economic development and hence foster peace.[204]

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196. *See* Yusuf Bangura, *Understanding the Political and Cultural Dynamics of Sierra Leone War: A Crtique of Paul Richards Fighting for the Rain Forest*, XXII AFR. DEV. 114, 117 (1997).

197. *See id.*

198. *See id.*

199. *Id.* at 126.

200. *See id.*

201. *See id.*

202. Ibrahim Abdullah & Patrick Muana, *The Revolutionary United Front of Sierra Leone, in* AFRICAN GUERILLAS 178 (1998).

203. *See id.* at 179.

204. *See id.*

III. THE SIERRA LEONE PEACE PROCESS

The primary objective of any peace process is to bring the conflict to an end. As described by one treatise, peace processes represent the "state of tension between the custom of violence and the resolution of differences through negotiation."[205] They defy any uniform definition, as the methods that may be employed in instigating and conducting negotiations will always depend on the nature of the conflict.[206] The process may involve a range of activities, from discreet night meetings to visible and high-level political talks, both of which may culminate in agreements between the parties (often referred to as Accords).[207] There may be several of such activities in any one conflict, spanning over a long period of time. The Israel/Palestine peace process is still continuing,[208] while the peace process to the Liberian civil war may have ended with the election held in 1998.[209] Both the protracted nature of peace processes and the fluidity of the parties' commitment to the Accords have fuelled skepticism on their viability as proper instruments of conflict resolution.[210] In some instances, the government in power, in complete disregard of the effects of the conflict, may seek to use the peace process as an alternative to a military campaign against the rebels.[211] They may perceive the process as a means of legitimizing their retention of power.[212] In other cases, the peace process may merely slow the momentum of the conflict without altering its eventual outcome.[213] In Rwanda, for example, the peace process and the concomitant Accords signed in Arusha failed to forestall the military takeover by the RPF and may have catalyzed the genocide.[214] Lemarchand observes:

> The transition bargain in Rwanda emerges in retrospect as a recipe for disaster; not only were the negotiations conducted under tremendous external pressures, but partly for this reason, the concessions made to the FPR were seen by the Hutu hard-liners as a sell out imposed by outsiders. For the Tutsi "rebels" to end up claiming as many cabinet posts in the transitional government as the ruling MNRD (including interior and communal development) as well as half of the field-grade officers and above, was immediately viewed by extremists in the so

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205. John Darby and Roger Mac Ginty, *Conclusion: The Management of Peace*, *in* THE MANAGEMENT OF PEACE PROCESSES 260 (John Darby & Roger Mac Ginty eds., 2000).

206. *See id.*

207. *See id.*

208. *See id.*

209. *See* Laurence Juma, *Regional Initiatives for Peace: Lessons from IGAD and ECOWAS/ECOMOG*, 40 AFR. Q. 85 (2000).

210. *See* GEORGE B.N. AYITTEY, AFRICA IN CHAOS 76 (1998). Ayittey's observation that negotiations can help solve conflicts only "if *both* parties are willing to sit down and talk, *both* show good faith in the deliberations and *both* are willing to abide by the results" may indeed be true of all peace processes. But commitments to the process can also be induced or forced through military action or sanctions. *See id.*

211. *See* AYITTEY, *supra* note 210, at 76.

212. *See id.*

213. *See id.*

214. *See id.*

called "*mouvance presidententielle*" as a surrender to blackmail.[215]

The disparity in the methods, structure, and even the product of negotiations in the many peace processes that have been studied, indicate the near impossibility of drawing an accurate and uniform methodology for negotiating peace.[216] However certain general characteristics are imbibed in many peace processes.[217] The immediate cessation of hostilities (generally referred to as a ceasefire), the inclusion of all parties to the negotiations, and the disarmament and reform of the army and other government security apparatus are all factors which peace processes seek to address at the first available opportunity.[218] The complex issues of government and sharing of power, as well as human rights concerns, if any, usually come later.[219]

When the Sierra Leone civil war broke out in 1991, the country was greatly divided between proponents of the All Peoples Party (APC) regime and the growing number of embittered political and business rivals.[220] However, it was a small force of the little known Revolutionary United Front (RUF), led by Foday Saybana Sankoh, who crossed the Manu River from Liberia into the southern Pejehun district of Sierra Leone to begin a military campaign against the government.[221] The Momoh regime dismissed the insurgence as inconsequential, believing they posed no threat to his hold on power.[222] In 1992, disgruntled army generals overthrew Momoh and Captain Valentine Strasser became chairman of the National Provisional Ruling Council (NPRC).[223] Despite the NPRC's claim that one of its principal objectives was to end the war, no tangible efforts were made to negotiate peace with the RUF.[224] Instead, the NPRC directed its military efforts towards securing Kono, the mineral rich district, from the rebel infiltration.[225] The government acquired the services of Executive Outcomes (EO), a South African mercenary outfit, to help ward off rebel advances to the mineral-rich areas.[226] While

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215. R. Lemarchand, *Managing Transition Anarchies: Rwanda, Burundi and South Africa in Comparative Perspective*, 32 J. MOD. AFR. STUD. 4, 581 (1994).

216. *See id.* at 582.

217. *See id.*

218. *See id.*

219. *See id.* at 583.

220. *See id.*

221. *See id.*

222. *See* Lemarchand, *supra* note 215, at 584.

223. *See id.*

224. *See id.*

225. *See id.*

226. *See* David J. Francis, *Mercenary Intervention in Sierra Leone: Providing National security or International Exploitation*, 20 THIRD WORLD Q. 319, 328 (1999). Executive Outcomes (EO) came on the scene in March 1995 after Gurkha Security Guards Ltd., a UK based mercenary outfit, had failed to completely wipe out the RUF threat in the diamond mining areas. EO is part of Strategic Resources Corporation, a multinational firm which also owns Branch-Heritage Group, a mining and exploration company. There is no coincidence that EO was involved in the Angolan civil war, another diamond rich nation. Its deployment in Sierra Leone cost the government $ 1.225 million a month in salary and huge concessions to Branch-Heritage Company. In return, EO would provide 150-2000 soldiers fully equipped with helicopter support, train a national army, and assist in the war against RUF. *See id.*

widespread looting, corruption, and opulence became evident amongst the higher echelons of military leadership, the lower cadre military personnel and the public were not happy with the government.[227] On January 16, 1996, Strasser's deputy carried out a military coup that sent Strasser to exile and installed Julius Maada Bio as the new head of state.[228]

The new government was more receptive to the idea of peace negotiations with the rebels.[229] Bio made public announcements calling for peace and asking Sankoh to agree to meet him, assured Sankoh and his supporters of a "safe travel passage," and decreed amnesty to all combatants to facilitate their participation in peace talks.[230] A public demonstration in Freetown and the constitutional conference affirmed the public support for the peace initiative.[231] The RUF responded to these gestures positively and indeed confirmed their willingness to participate in the peace talks.[232]

The Abidjan Accord (1996)

The events leading to the Abidjan Accord affirm the view that parties to a conflict may be ready for a negotiated settlement when they become aware that their objectives may no longer be tenable through violence - a condition which commentators have referred to as a "mutually hurting stalemate" or "ripe moments."[233] At this stage, both sides to the conflict are expected to choose the path of negotiation so as to convert their weakness into strength and to conserve whatever gains they had previously made.[234] In Sierra Leone, by the time of the Abidjan Accord, the combined force of the government, the Kamajors, and the mercenaries (EO) had severely overrun the RUF strongholds and pushed them away from the diamond-rich regions.[235] At the same time, the general public and the civil society were disenchanted with the military leadership.[236] Strong appeals were made for the restoration of democratic government and the disbanding of the Kamajor forces.[237]

The "hurting stalemate" scenario may not solely explain the drive towards the Abidjan Accord.[238] Moreover, the mere acknowledgement of the necessity of a ceasefire and the desire for negotiations may not be effectuated without the help of an impartial arbiter who, apart from facilitating negotiations, may also provide

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227. *See* Francis, *supra* 226, at 328.
228. *See Sierra Leone: Strasser Ousted in Palace Coup*, WEST AFR., Jan. 28, 1996 at 102.
229. *See id.*
230. *See* K-Roy Steven, *Whitter Sierra Leone*, WEST AFR., Feb. 4, 1996 at 137.
231. *See id.*
232. *See Sierra Leone on the Brink*, NEW AFR., Mar., 1996 at 15.
233. *See* HUGH MIALL, ET AL., CONTEMPORARY CONFLICT RESOLUTION 162-63 (1999).
234. *See id.*
235. *See Sierra Leone on the Brink, supra* note 233, at 15.
236. *See id.*
237. *See id.*
238. *See* MIALL, *supra* note 234, at 162.

support and police compliance.[239] In the case of Sierra Leone, the powerful intervention of various organizations exerted considerable pressure on both sides to concede to a negotiation.[240] Through the efforts of the International Committee of the Red Cross (ICRC), London-based International Alert (IA), OAU, and the Ivorian Foreign minister Amara Essy, Sankoh agreed to meet with the NPRC in Abidjan.[241] The talks, which began on February 1996, coincided with the general elections in which Ahmed Tejan Kabba was elected president.[242] After nine months of negotiations between the government and the RUF, a peace agreement was formally drawn in November 1996.[243] President Kabba signed the peace agreement on behalf of the government, while Foday Sankoh did so on behalf of the RUF.[244]

The Accord proclaimed an immediate end to the war and the immediate withdrawal of mercenary and regional forces.[245] A disarmament process was to be initiated with the stipulation that the RUF forces would be integrated into the national security apparatus.[246] The agreement also dealt with electoral issues, judicial reform and human rights protection, improved health care, housing and educational services, job creation, and the protection of the environment.[247] A commission for the consolidation of peace was created in order to oversee the implementation of the Accord with the assistance of a "neutral Monitoring group from the international community."[248] The Accord however failed to provide adequate measures for resolving conflicts within the Commission.[249] Other than stating that the Commission was expected to consult with the RUF and government at the top most levels, no mention was made of the need to establish or streamline the internal judicial process.[250] This was indeed crucial because after the coup of May 25, most lawyers, magistrates, and judges had fled the country, leaving judicial functions in the hands of ad hoc military tribunals which were far from being impartial.[251]

Perhaps the most controversial aspect of the Accord was its grant of immunity

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239. *See* MIALL, *supra* note 234, at 162.

240. *See ECOWAS Intervenes to Restore Democracy*, AFRICA TODAY, July/Aug. 1997 at 24.

241. *See id.*

242. *See id.* The first elections held in February failed to produce clear winners. The Sierra Leone Peoples Party (SLPP) candidate, Dr. Ahmed Tejan Kabba who came out on top failed to secure 55 percent of the total votes and instead had only 35.8 percent. In second place was the United Peoples Party (UPP) candidate, Dr. John Karefa Smart who received 22 percent, followed by Thaimu Bangura of the Peoples Democratic Party (PDP) with 16 percent. In the run off between SLPP and UPP, the former emerged the winner. *See id. See also SLPP Makes Comeback*, WEST AFR., Mar. 17, 1996 at 385.

243. *See* Abidjan Accord, *available at* http://www.c-r.org/Accord9/keytext.htm (last visited on June 6, 2001).

244. *See id.*

245. *See* Abidjan Accord at preamble.

246. *See id.* at art. 5.

247. *See id.* at art. 18.

248. *Id.* at art. 11.

249. *See id.*

250. *See id.*

251. *See* Zack-Williams, *supra* note 71, at 158.

to RUF members.[252] Article 14 of the Accord provided that:

> To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement. In addition, legislative and other measures necessary to guarantee former RUF/SL combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to reintegration within the framework of full legality.[253]

In essence, the Commission would not have the powers to investigate the atrocities and human rights violations committed during the war.[254] While commentators have acknowledged that the threat of prosecution of the RUF or any other parties of war crimes may have jeopardized the peace process, the need for some form of public revelation of such atrocities may have been necessary.[255] Bangura called for the establishment of some form of "truth commission" in which there would be public acknowledgement of the human rights violation by those responsible:

> Our society cannot make progress in the area of human rights if we do not squarely face these atrocities and try to understand why people who claim to be liberating or defending society from oppression and exploitation had to slit the throats of innocent villagers, sever their heads, cut their hands, pluck their eyes off, disembowel pregnant women, abduct and rape women, burn down whole villages and enlist children as young as ten into the war.[256]

The Accord failed to guarantee a power sharing arrangement between the constitutionality elected government of President Kabba and the RUF.[257] Other than the military and the National Electoral Commission, RUF participation in most institutions of government was completely avoided.[258] The RUF was locked out of parliament, was not given any post in government, and would not control any local government, district or province.[259] One analyst has argued that the elections of 1996, in which the RUF never participated, were considered a great success and thus disturbing its institutions would have attracted a lot of ire from the sponsors of the Accord.[260] It also brought in a new set of players who were not as-

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252. *See* Abidjan Accord, *supra* note 244 at art. 14.

253. *Id.*

254. *See id.*

255. *See* Yusuf Bangura, *Reflections on the 1996 Sierra Leone Peace Accord, at* http://www.unrisd.org/engindex/media/articles/bang/toc.htm (last visited on June 6, 2001).

256. *Id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *See id.*

sociated with the causes of war.[261]

The ceasefire never materialized as both sides continued fighting.[262] Within a very short period, the bright glow of political fervor and hope that had greeted the signing of the Accord faded into the dull gray of skepticism and doubt.[263] The UN Security Council failed to back a plan of sending 720 peacekeeping troops, 60 military observers, and about 276 civilian staff, drawn by the UN Secretary General in January 1997.[264] Foday Sankoh had equally opposed the creation of a UN peacekeeping mission in Sierra Leone.[265] The RUF chief argued that the Accord had no mention of the UN peacekeeping arrangement and that a force of this nature may end up getting involved in the conflict.[266] He called for efforts and finances to be directed towards the reconstruction of the country.[267] But a visible UN presence was indeed necessary at this stage of the peace process, not only for the assistance of the demobilization process, but also to affirm the international community's commitment to the peace process.

The problems of implementing the Accord were further compounded by the arrest of Foday Sankoh in March 1997 in Nigeria.[268] In May 1997, President Kabba was deposed by a military junta headed by Paul Koroma and went into exile in Guinea.[269] Ironically, Koroma claimed in his takeover that the government's failure to bring peace was one of the major reasons for the coup, blaming the Kabba government for polarizing the country into "regional and tribal factions."[270] The army's loss of political power and marginalization from lucrative political and economic processes by the civilian government may have prompted this action.[271] Furthermore, Kabba's preferred use of the Kamajors instead of the regular army did not sit very well with military officers and soldiers alike.[272] A flurry of international condemnation followed the coup.[273] The OAU ministers meeting in Harare issued a strong communiqué condemning the coup and calling for "the immediate restoration of constitutional order."[274] UN Secretary General Kofi Annan, while addressing the same meeting, made a similar appeal: "Where democracy has

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261. *See* Bangura, *supra* note 256.

262. *See id.*

263. *See id.*

264. *See* Mark Twain, *UN Failure in Sierra Leone Feeds Recrimination*, THE GUARDIAN, May 29, 1997. The failure of the Clinton administration to support this move was largely responsible for this inaction. At the time the US congress was involved the "delicate" discussion of the payment of its arrears to the UN amounting to over US $1 billion. *See id.*

265. *See* Bangura, *supra* note 256.

266. *See id.*.

267. *See Sierra Leone: Sankoh Sticks Out*, AFRICA CONFIDENTIAL, Vol. 38, No. 5, Feb. 28, 1997 at 5.

268. *See The Sankoh Affair*, NEW AFR., June 1997 at 12.

269. *See Sierra Leone: Koroma's Coup*, AFRICA CONFIDENTIAL, Vol. 38, No.12, June 6, 1997 at 1.

270. *Id.*

271. *See id.*

272. *See id.*

273. *See id.*

274. OAU Council of Ministers 66th Ordinary Session, at Harare, Zimbabwe, May 28-30, 1997, Draft Decisions, CM/Draft/Dec. (LXVI) Rev. 1 at 18.

been usurped, let us do all in our power to restore it to the people."[275] He called on "neighboring states, regional groups and international organizations" to play their part in restoring Sierra Leone's constitutional and democratic government.[276] The United States government and the United Nations equally called for the restoration of democratic government.[277]

The military leadership of the Junta spurred deep hatred from the populace.[278] The wanton killings of opposition personalities and persons suspected of being allied to the Kabba regime were widespread.[279] The ethnic rivalry between the *Limba* (from the north) and the *Mende* (from the south, Kabba's tribe) was heightened by open hostility towards the *Mende*.[280] The murder of three persons, all *Mendes*, at a military camp just outside Freetown exemplified the distrust and hatred with which the Junta viewed their ethnic rivals.[281]

The Conakry Peace Plan (1997)

The collapse of the Abidjan Accord and the subsequent change of government in Sierra Leone ushered in new challenges to the peace process.[282] New actors came onto the scene, some of whom had a completely different agenda.[283] Amongst the new actors was the sub-regional organization ECOWAS and its peace keeping forces known as ECOMOG.[284] The notable ECOMOG peace involvements in Liberia in 1990 had given it credibility as a viable regional approach to peace and security.[285] The ECOWAS foreign ministers meeting on June 26, 1997, one month after the coup, recommended a three-pronged approach to the Sierra

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275. OAU Council of Ministers 66th Ordinary Session, at Harare, Zimbabwe, May 28-30, 1997, Draft Decisions, CM/Draft/Dec. (LXVI) Rev. 1 at 18.

276. Andrew Meldrum, *Annan and OAU Leaders Endorse Intervention Against Usurpers*, THE GUARDIAN, June 3, 1997.

277. *See id.*

278. *See id.*

279. *See id.*

280. *See id.*

281. *See* AFR. CONFIDENTIAL, Vol. 38, No. 23, Nov. 21, 1997

282. *Id.*

283. *Id.*

284. *See* Treaty of Economic Community of West African States (ECOWAS), May 28, 1975, 1010 U.N.T.S. 17, 14 I.L.M. 1200 (1975). ECOWAS was founded in 1975 as a prime vehicle for the promotion of regional cooperation and economic development primarily in industry, communication, energy, natural resources, and monetary and fiscal management. *See id.* ECOWAS member states are Nigeria, Mali,Togo, Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Guinea, Guinea-Bissau, Liberia, Mauritania, Niger, Senegal and Sierra Leone. *See* S.K.B. ASANTE, POLITICAL ECONOMY OF REGIONALISM: A DECADE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (1985). ECOMOG (ECOWAS Ceasefire Monitoring Group) was established in August 1990 by the ECOWAS Standing Mediation Committee in response to the Liberian crisis. *See* ECOWAS Standing Mediation Committee, Decision A/DEC.11/8/90, on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia, August 7, 1990, *reprinted in* REGIONAL PEACE KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 32-33 (M. Weller ed., 1994).

285. *See* Juma, *supra* note 83. at 85.

Leone problem: negotiations, embargo, and the possible use of force.[286] Upon request by the deposed President, and also under the SOFA arrangements, Nigeria unilaterally sent troops into Sierra Leone.[287] These were in addition to the Nigerian Forces Assistant Group (NIFAG), who were already on the ground, and the ECOMOG forces who had used the country as a base for their operations in Liberia.[288] In August, the ECOWAS heads of state declared a blockade on Sierra Leone and established what they called a sub-regional force for Sierra Leone, mandated to enforce the embargo.[289] The United Nations Security Council strongly supported ECOWAS and encouraged it "to continue to work for the peaceful restoration of constitutional order including through the resumption of negotiations."[290] The Security Council also imposed an arms and petroleum embargo on the military Junta.[291]

Amidst the growing strength of the sub-regional forces, and the mounting international support of a military action against the Junta, the Junta invited the RUF to join it.[292] The absent RUF leader Foday Sankoh was named vice-chairman to the ruling Junta.[293] But the AFRC/RUF alliance was met with civil disobedience and widespread international condemnation.[294] Following the economic sanctions on Sierra Leone, the economic situation deteriorated to the extent that there was hardly any petrol in Freetown.[295] Essential drugs were running low and Government revenues fell by ninety percent due to a lack of foreign monetary support.[296] There was little option left other than to negotiate the future return of democracy.[297] The Junta also saw this as a window of opportunity to gain legitimacy in the eyes of the international community and to seek relaxation of economic restric-

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286. *See* Abass Bundu, *Beyond Peace Keeping*, WEST AFR., Dec. 6, 1999 at 15.

287. *See* Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMPLE INT'L & COMP. L.J. 333, 366 (1998).

288. *See id.*

289. *See id.*

290. U.N. SCOR,. 1132, Oct. 8 1997, UN doc. S/RES/1132 (1997).

291. *See id.* Despite the embargo, the British government later in the year supplied arms to Sierra Leone through a London based mercenary organization, Sandline Ltd., which helped to restore Kabba to power. The scandal generated a lot of publicity in the British press with some sections calling for the resignation of foreign secretary Robin Cook and Tony Lloyd, minister of State for Africa. *See* Richard Norton-Taylor, *Cook Rocked by Coup Row*, THE GUARDIAN, May 7, 1998; *See also Observer Investigator*, THE OBSERVER, May 10, 1998, at 5; Stephen Castle, *Nasty Little War in Whitehall*, THE INDEPENDENT, May 10, 1998, at 3. The fiasco begun when Sandline Ltd. was put under 'criminal' investigation on alleged charges of shipping arms to Sierra Leone despite UN Security Council Resolution 1132 (sponsored by Britain). Prime Minister Tony Blair exonerated British officials saying that the whole matter was an "overblown hoohah'. He later explained the British position as follows:

> Don't let us forget that what was happening was that the UN and the UK were both trying to help the democratic regime restore its position from an illegal military coup. They were quite right in trying to do it.

Baffour Ankomah, *Sierra Leone: How the 'Good Guys' Won*, NEW AFR., July/Aug. 1998 at 8.

292. *See Jump or be Pushed*, AFR. CONFIDENTIAL, Vol. 39, No 3, 1998 at 7.

293. *See id.*

294. *See id.*

295. *See id.*

296. *See id.*

297. *See id.*

tions.[298] In the estimation of the Junta leaders, their hold on power for a little longer might give them ample opportunity to transform themselves into a political unit capable of winning election and thus retaining leadership of the country.[299]

The sub-regional forces, spearheaded by Nigeria, exerted extreme military pressure to match the frantic diplomatic efforts to persuade the Junta to give up power.[300] It was against this background that the AFRC/RUF alliance agreed to participate in a peace plan signed in Conakry on October 23, 1997.[301] The peace plan was a purely ECOWAS initiative heavily sponsored by Nigeria.[302] It set out a six-month peace plan that called for an immediate end to the fighting, disarmament and demobilization of troops, resumption of humanitarian aid, return of refugees and displaced persons, and the restoration of the civilian government.[303] The plan also contained a clause granting unconditional immunity from prosecution to the plotters of the May 25 coup.[304]

There seemed to be no likelihood that the Junta would peacefully relinquish power to the Kabba government despite their undertaking at Conakry.[305] Instead, Koroma announced his intention to remain in leadership until fresh democratic elections were held.[306] He also called for the immediate withdrawal of all Nigerian troops from the territory of Sierra Leone.[307] The RUF, for its part, announced that its soldiers would not succumb to any disarmament process until Foday Sankoh was unconditionally released.[308] Thus, despite the peace plan, ECOMOG continued its military campaign against the AFRC/RUF alliance.[309] On February 5, 1998, ECOMOG, with the assistance of arms and ammunition supplied by Sandline Ltd.[310] and a strong force of 5,000 Kamajor militias,[311] launched a major

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298. *See Jump or be Pushed*, AFR. CONFIDENTIAL, Vol. 39, No 3, 1998 at 7.

299. *See id.*

300. *See id.*

301. *See The Conakry Peace Plan, available at* http://www.c-r.org/Accord9/keytext.htm (last visited on June 13, 2001). The Peace Plan was signed by Chief Tom Ikimi (Minister of Foreign affairs, Federal Republic of Nigeria), Lamine Kamara (Minister of Foreign Affairs Republic of Guinea), Abdul Karim Sesay (Secretary General AFRC), and Alimamy Pallo Bangura (Secretary of State Foreign Affairs). The two witnesses to the agreement were Ibrahim Fall of the UN and Adwoa Coleman of the OAU. *See id.*

302. *See id.*

303. *See id.*

304. *See id. at* art. 8.

305. *See id.* According to the Accord, the Junta agreed to hand over power by April. *See id.*

306. *See Jump or be Pushed, supra* note 292, at 7.

307. *See Sankoh Sticks Out, supra* note 267, at 5.

308. *See* Sheku Saccoh, *Sierra Leone: Cry the Beloved Country*, NEW AFR., Jan. 1998 at 23.

309. *See id.*

310. *See* David J Francis, *Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?*, 20 THIRD WORLD. Q. 319 (1999). The Sandline operation cost the government of Sierra Leone an estimated £10 million and mining concessions worth $150 million to Rakesh Saxena, an Asian-born individual wanted for defrauding a bank of £55 million in Thailand, and on bail from a court in Vancouver on charges of traveling on a false passport. It is alleged that a memorandum of understanding between Kabba and Saxena was signed in London in September 1997. The meeting between the two that took place at St. James Court Hotel in London and was arranged through Dr. Amrit Sarup, Saxena's mother and a senior official at the Commonwealth Secretariat. *See id.*

offensive that led to the removal of the Junta from power on February 12, 1998, and the restoration of Kabba in March of the same year.[312] The UN Security Council commended ECOMOG for restoring peace in Sierra Leone and authorized the deployment of UN personnel to assist ECOMOG in the disarmament and demobilization of the rebel forces.[313]

The return of Kabba and the restoration of the democratically elected government in Sierra Leone have raised the question of the extent to which external forces influence the political development in Sierra Leone. This issue is crucial to the understanding of the general management of peace processes in Africa. After the military takeover of the government, the country was completely torn apart with no single army dedicated to the defense of the country.[314] Regions were locally controlled by whoever had the guns and power to do so.[315] The rich mining fields were in the hands of external companies with strong private security arrangements, with remnants falling to the RUF, belligerent government soldiers, and ECOMOG.[316] The government's inability to formulate a coherent policy on national security has impacted negatively on the peace process.[317] The initial program of training and engaging former RSLMF soldiers to constitute a new national army seems to have withered.[318] Thus, while the government continues to rely on foreign troops, the RUF and other rebel organizations have continued to abduct young men and children to fill their military ranks.[319] The folly of its reliance on foreign armies is no less exemplified in the surrender of the country's mineral wealth to the control of international companies whose interests in making profits surpass the mere stability of government.[320] Crucial to the enterprise for peace is the apparent inability of the government to make decisions as the bona fide representative of the people of Sierra Leone. Kabba has become a stooge whose action is dictated by power wielders who are by no means controlled by the wishes of the Sierra Leonians.[321] Conflicting interests of these power wielders, and the scramble for minerals and other wealth, has dictated the pace of the peace process.[322]

The collapse of the state system wrought difficulty in the process of creating viable political leadership capable of commanding support from all sections of Sierra Leone society.[323] It also created a vacuum, which, in the eyes of powerful ex-

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Sandline's military personnel were also directly involved in the January/February military offensive against the Junta. They provided intelligence gathering facilities, logistical support, and controlled ECOMOG's air operations. *See id.*

311. *See Kabba Return to Crisis Country*, NEW AFR., April 1998 at 9.
312. *See id.*
313. *See* U.N. SCOR, 3872d mtg., UN Doc. S/RES/1162 (1998).
314. *See* Bangura, *supra* note 185, at 558.
315. *See id.*
316. *See id.* at 560-61.
317. *See id.* at 564.
318. *See id.* at 554.
319. *See id.*
320. *See id.* at 561.
321. *See id.* at 562.
322. *See id.*
323. *See id.* at 566.

ternal interests, needed to be filled if the lucrative mining industry in Sierra Leone were to be maintained.[324] In this respect, the activities of the international conglomerates involved in the Sierra Leone mining industry are no different from the complicity of corporate organizations to the apartheid era in South Africa or the exploitation of human and physical resources during the colonial period.[325] The peace process has become became a game of legitimizing economic interests while maintaining a favorable international image.

The Lomé Accord (1999)

The negotiations towards the Lomé Accord occurred against a backdrop of waning public support for the sub-regional military activity and great anxiety due to the possibility of an RUF overrun of Freetown.[326] Amidst growing international pressure on the government to open negotiations with the AFRC/RUF alliance, President Kabba announced that he would pursue a "two track approach" - fighting the rebels while at the same time attempting to negotiate with them.[327] With presidential election campaigns going on in Nigeria (and each presidential hopeful promising to withdraw forces from Sierra Leone), the Malian contingent withdrawing to Freetown after suffering heavy losses in Port Loko, and the general weariness and fear on the part of neighboring leaders that the endless war was devastating the economies of their countries, pursuing peace seemed to be the only available option for Kabba.[328] As for the AFRC/RUF alliance, the talks would present an opportunity to acquire freedom for its leaders, amnesty for war crimes and legitimate political power through negotiation.[329] The RUF requested a "a negotiated settlement to the crisis in the country" in a letter dated May 12, 1998, sent to Tony Blair, UN Secretary General Kofi Annan, President Nelson Mandela of

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324. *See* Bangura, *supra* note 185, at 571.

325. *See id.*

326. *See* Will Reno, *No Peace for Sierra Leone*, ROAPE 325 (2000). An RUF offensive on the capital in January 6 had briefly sent Kabba to exile and provoked speculation that the government may be unable to bring the war to an end without negotiating peace with the rebels. The attack was seen as a total humiliation to the Nigerian led ECOMOG forces and it resulted in the firing of its commander, General Shelpidi. *See id. See also* Baffour Ankomah, *Why General Shelpidi was Fired*, NEW AFR., May 1999, at 18.

327. *See* Ankomah, *supra* note 327, at 18. Kabba was merely echoing the British official position. *See id.*

328. *See* Ismail Rashid, *Paying the Price – The Sierra Leone Peace Process: The Lomé Peace Negotiations, available at* http://www.c-r.org/Accord/Accord9/peace.htm (last visited on June 6, 2001).

329. *See* Sheku Saccoh, *Sierra Leone: Agonizing Recovery*, NEW AFR. 26 (June, 1998). After its reinstatement in March, the Kabba government undertook systematic prosecution of RUF soldiers captured during the war. About 59 persons were charged with treason for collaborating with the Junta, among them former president Joseph Momoh, Junta spokesman Alieu Kamara, former secretary to Kabba Alhaji Bayoh, former Central bank governor Christian Kargbo, and a member of parliament Victor Foh. On April 8, 1998, the government suspended the Criminal Procedure Act so as to allow for speedy trials under emergency regulations. On August 25, 1998, 16 of the accused, among them five journalists, were sentenced to death. *See* Balffour Ankomah, *Oh, so they are All Criminals*, NEW AFR. 7 (October, 1998). Foday Sankoh, who had been detained in Nigeria, was extradited to Sierra Leone, tried for treason, and sentenced to death. *See* Reno, *supra* note 327, at 325.

South Africa, Konan Bedie of Côte d'Ivoire, and General Sani Abacha of Nigeria.[330] The talks, held in Lomé, culminated in the signing of a peace agreement on July 7, 1999.[331]

The centerpiece of the Accord was the power-sharing arrangement between the RUF and the government.[332] In the first place, the RUF was allowed to transform itself into a political party and its members allowed to hold public offices.[333] Sankoh was appointed Chairman of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD), and was to "enjoy the status of Vice President," answerable only to the President.[334] The government also granted to the RUF one senior ministerial position, three other cabinet positions and four deputy ministerial posts.[335] As far as security issues were concerned, the agreement recognized the role of the United Nations Observer Mission in Sierra Leone (UNOMSIL) in monitoring the ceasefire.[336] ECOWAS was requested to revise ECOMOG's mandate to include peacekeeping, security, protection of UNOMSIL, and disarmament/demobilization of personnel.[337]

Human rights were dealt with as a post-conflict management issue.[338] In its Preamble, the Accord noted the commitment of all the parties to the promotion and respect of "human rights and humanitarian law."[339] In Article XXIV, the Accord provided that:

> The basic civil and political liberties recognized by the Sierra Leone legal system and contained in the declarations and principles of Human Rights adopted by the UN and OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights, shall be fully protected and promoted within Sierra Leonean society.[340]

Particular emphasis was placed on the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of the country.[341] A human rights commission was established to address the grievances of the people in respect to

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330. Ankomah, *supra* note 327, at 18. The letter was signed by Major Paul Koroma, Brigadier Sam Bokarie of RUF and a Mr. SYB Rogers. *See id.*

331. *See id.*

332. *See* Lomé Agreement, *available at* http://www.c-r.org/Accord9/keytext.htm (last visited on June 6, 2001).

333. *See id.* at art. III.

334. *Id.* at art. V(2). The CMRRD was given the responsibility of "securing and monitoring the legitimate exploitation of Sierra Leone's gold and diamonds, and other resources determined to be of strategic importance for national security and welfare." *Id.* at art. VII(1).

335. *See id.* at art. V.

336. *See id.* at art. II.

337. *See id.* at art. XIII.

338. *See id.* at art. VI.

339. *Id.* at preamble.

340. *Id.* at art. XXIV.

341. *See* Lomé Agreement, *supra* note 332, at art. XXIV(2).

alleged violations.[342] The commission was to function as a quasi-judicial organ.[343] The Accord did not specify its temporal mandate, but from the reading of the agreement as whole, one gets the impression that the commission was intended to deal with violations occurring after the signing of the Accord.[344]

The Accord dealt with past human rights violations in two ways.[345] First, it provided for a blanket amnesty against violations to members of the RUF and other forces.[346] As a condition precedent to the negotiation, Foday Sankoh was pardoned of his past misdeeds.[347] The government was mandated in Article IX of the Accord to "take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon."[348] Similarly, all combatants were granted reprieve against any acts that they may have committed in "pursuit of their objectives up to the time of signing of the agreement."[349] In order to promote peace and national reconciliation, the government committed itself to ensuring that no "official or judicial action" was taken against any member of RUF/SL, ex AFRC, ex SLA or CDF in respect of any of their actions prior to the signing of the agreement.[350] The grant of amnesty did not sit very well with the UN special representative present at the meeting.[351] A handwritten disclaimer was attached to the final draft to the effect that the UN interpretation of the amnesty clauses in the agreement did not include "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[352] International human rights organizations openly criticized the grant of amnesty to the RUF and called for justice.[353] The United States and British governments supported the Accord.[354] In their view, the Accord presented the most practical way of ending the fighting and restoring democracy in Sierra Leone.[355]

Secondly, the Accord established a Truth and Reconciliation Commission to "deal with the question of human rights violations since the beginning of the Sierra Leonian Conflict in 1991."[356] The Commission was to provide a forum in which

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342. *See* Lomé Agreement, *supra* note 332, at art. XXV.

343. *See id.*

344. *See id.* at preamble.

345. *See id.* at art. XXVI.

346. *See id.*

347. *See id.* at art. IX.

348. *Id.*

349. *Id.* at art. IX(2).

350. *See id.* at art. IX(3).

351. *See id.* at art. XXXIII.

352. U.N. Seventh Report of the Secretary General on the UN Observer Mission in Sierra Leone, UN Doc. S/1999/836 (1999) at 2; *see also* Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, N.D. J. L. ETHICS & PUB. POL'Y 391 (2001).

353. *See* Amnesty International, *Sierra Leone: Peace Agreement but no Justice*, Amnesty International News Release - AFR 51/07/99, July 9, 1999, *available at* http://www.amnesty.org/news/1999/151000799.htm (last visited Feb. 27, 2002).

354. *See* Steven Mufson, *US Backs Amnesty in Sierra Leone*, WASH. POST, October 18, 1999 at A13.

355. *See id.*

356. Lome Agreement *supra* note 332, at art. XXVI(2).

victims and perpetrators alike would narrate their stories so as to promote national reconciliation.[357] The Commission was expected to complete its work within twelve months of its establishment and to prepare a report detailing its findings and recommendations for government action.[358] The idea of a Truth Commission was not a bad one. After all, they do provide ample opportunity for recording international crimes and allowing society to learn from "its past in order to prevent a repetition of such violence in the future."[359] However, they are a poor substitute for prosecution because they are vulnerable to political manipulation and often parties do not enjoy the full array of rights that a court proceeding may provide.[360]

The framework for peace drawn by the Lomé Accord had considerable shortcomings that became apparent immediately after it was signed. The organs upon which the enterprise for peace was anchored were only loosely connected. Take, for example, the Joint Implementation Committee (JIC).[361] Apparently it was envisaged that the JIC, chaired by ECOWAS and comprised of the CCP and diplomatic representatives of the OAU, UN, and the Commonwealth, could oversee the implementation of the Accord.[362] Each of the members was a bureaucratic organization controlled from abroad.[363] Their mandate in the Sierra Leone peace process was part of a larger program of action drawn by their governing authorities.[364] Generally speaking, the JIC was comprised of independent organs each of which pursued goals consistent with their interests.[365] The UN function was mandated by the Security Council while ECOMOG continued to get its command from the Nigerian authorities.[366] Soon after the signing of the Accord, the roles of some of the JIC member organs began to conflict.[367] Similarly, financial resources were not jointly shared.[368] The poorer organizations, especially those based in Sierra Leone, were left incapable of making any meaningful contribution to the process.[369] The upshot of the matter was that the JIC could not function as a single unit, but rather became a mouthpiece of the most financially endowed organizations.

The problem of implementing the Accord was compounded by the lack of political will to accommodate former rivals and work together towards the realization of peace.[370] As observed by Barbara Watter, a peace accord will succeed if "it consolidates the previously warring factions into a single state" and creates a sys-

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357. *See* Lome Agreement *supra* note 332, at art. XXVI(1).

358. *See id.*

359. Priscilla B. Hayner, *Fifteen Truth Commissions 1974-1994: A Comparative Study in Transitional Justice*, US INSTITUTE OF PEACE 220, 225 (1994).

360. *See id.*

361. *See* Lome Agreement, *supra* note 332, at art. XXXII.

362. *See id.*

363. *See id.*

364. *See id.*

365. *See id.*

366. *See id.*

367. *See* Barbara F. Watter, *DesigningTtransition From Civil War*, 24 INT'L SECURITY 127, 133 (1999).

368. *See id.*

369. *See id.*

370. *See id.*

tem of government that will cater to the interests of all the parties.[371] The RUF leadership refused even to acknowledge the role of the UN peacekeepers.[372] On May 1, 2000, RUF soldiers seized 500 UN peacekeepers and killed four of them.[373] The RUF also continued to appropriate diamonds in complete disregard of Article XX of the Accord.[374] In February 2000, Sankoh was quoted as saying that the RUF "was not going to give up diamonds or guns to anybody."[375] With the RUF refusing to meet their end of the bargain, the Kabba government opted to intensify its military campaign against the rebels.[376] The British government supported the move and sent thirteen hundred troops to Sierra Leone.[377]

As already mentioned, the Accord was not backed by adequate finances. In any peace process, the availability of resources to compensate for the loss of income for former combatants, the revival of the economy, and the establishment of infrastructure destroyed by the war is crucial to its success.[378] John Darby calls it the "peace dividend."[379] In the case of Sierra Leone, the international community had pledged to give a total of £45 million.[380] The United Kingdom was to provide £10 million of that amount.[381] According to Solomon Berewa, Kabba's Minister for Justice, the international community had pledged the money in exchange for the ministerial seats given to the RUF in the Lomé arrangements.[382] Despite the provisions for anti-poverty programs in the Accord, a proper framework for the raising and management of funds was not laid out.[383] Reconstruction and general development of institutions in the post-war period would require enormous financial intervention from the international community.[384] A cue should have been taken from the Mozambiquean example where various international organizations, including the UN, lobbied for the relaxation of fiscal commitments to the IMF.[385]

Despite their earlier defiance of the Accord, the RUF does not appear poised to continue fighting.[386] Though this augurs well for the peace initiatives, it does not signify a quick end to the civil war. It may very well be that violence by the splinter groups or renegade soldiers will not end until some successful arrangements for permanent peace are made. As matters now stand, a number of events

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371. Barbara F. Watter, *DesigningTtransition From Civil War*, 24 INT'L SECURITY 127, 133 (1999).

372. *See* Muzondwa Banda, *Sierra Leone: What went Wrong?*, NEW AFR., June 2000 at 10.

373. *See id.* Those killed were part of the Kenyan contingent. *See id.*

374. *See id.*

375. Sheryl Dickey, *Sierra Leone: Diamonds for Arms*, 7 HUM. RTS. BR. 9, 10 (2000).

376. *See id.*

377. *See* Banda, *supra* note 372, at 10.

378. *See* DARBY, *supra* note 102, at 111.

379. *Id.*

380. *See* Banda, *supra* note 372, at 10.

381. *See id.*

382. *See* Sheku Saccoh, *When Money Matters*, NEW AFR., October 1999 at 7.

383. *See id.*

384. *See id.*

385. *See* Yusuf Bangura, *Whither Peace Accord*, WEST AFR., Feb., 23, 1997 at 269.

386. *See id.*

seemed to have worked against the RUF.[387] First was the capture of Foday Sankoh in May 2000.[388] While many analysts had predicted the diminishing authority of Sankoh as the acclaimed head of the RUF, his departure from the scene has demoralized many of his supporters and given voice to splinter groups hitherto unknown and unrepresented in the peace process.[389] The threat of his indictment for war crimes has had a chilling effect on the organization military commanders and affirmed the likelihood of the RUF loosing support among the international community if the war is not negotiated to an end.[390]

Second, the RUF connection with the Liberian leader Charles Taylor seems to be under a lot of strain.[391] The relationship dates back to the days of the Liberian civil war, when the RUF was formed by soldiers who had fought along side the SPLF.[392] During its campaign in Sierra Leone, Liberia acted as a clearinghouse for all the diamonds illegally acquired. It was these diamonds that financially sustained RUF operations.[393] The RUF soldiers also enjoyed sanctuary in Liberia whenever they were escaping from the government or ECOMOG onslaught.[394] During the peace process, the United Nations, the US, and Britain put a lot of pressure on Charles Taylor to stop dealing Sierra Leone's diamonds.[395] Economic and other sanctions were imposed on Liberia by the United Nations and other leading world governments.[396] For example, at the behest of Britain, the European Union blocked the $50 million grant to Liberia.[397] To this end, Taylor became a key player in persuading the RUF to participate in the Lomé peace process.[398]

Third, the military capacity of the forces fighting against the rebels had been considerably revamped.[399] UNOMSIL, established by the UN Security Council in June 1998,[400] received a further mandate in October 1999 to establish UNAMSIL in its stead - a larger mission with 6,000 military personnel and 260 military ob-

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387. *See* James Rupert, *Rebels Free 180 More Hostages; Sierra Leonean President says RUF V Chief will be put on Trial*, WASH. POST, May 27 (2000) at A01.

388. *See id.*

389. *See id.*

390. *See id.*

391. *See id.*

392. *See id.*

393. *See* Dickey *supra* note 376, at 9.

394. *See* William Reno, *Failure of Peace Keeping in Sierra Leone*, 100 CURRENT HISTORY 219, 222 (2000). In 2001,Taylor had allowed a RUF commander, Sam 'Maskita' Bockaire, to recruit fighters in Liberia. In October 1997, Taylor had detained an ECOMOG plane carrying South African mercenaries and 'Kamajor' fighters who were fighting against the military Junta. *See Junta Versus Junta*, in 38 AFR. CONFIDENTIAL, Oct. 24, 1997 at 8.

395. *See* Reno, *supra* note 395, at 223.

396. *See id.*

397. *See* Francois Miser, *Knives Out for Taylor*, NEW AFR., Sept., 2000 at 11; *see also Does Britain Produce Diamonds*, NEW AFR., Nov., 2000 at 28.

398. *See* Miser, *supra* note 398, at 10.

399. *See id.*

400. *See* U.N. SCOR, 4099th mtg. at 1270, U.N. Doc. S/Res/1270 (2000). Initially UNOMSIL was to last for only six months. Special envoy Okelo of Uganda was named head of its operations by the UN secretary-General. *See id.*

servers.[401] In February 2000, the Security Council, by its resolution 1289, further revised the UNAMSIL mandate and expanded its military component to 11,100 persons.[402] In May 2000, a further increment to 13,000 was affected.[403] To date, there are about 17,500 military personnel under the UNAMSIL command.[404] Apart from the UN, the British force's continued presence in Sierra Leone affirms its government's commitment to the campaign against the RUF and other rebel forces.[405] The announcement by Jonathan Riley, the British force commander in Sierra Leone that, "we will leave when the war is either won or resolved in favorable terms" is an indication of this commitment.[406]

Despite these developments, the disarmament process has not fully taken place.[407] Sporadic surrenders of weapons have been reported by UNAMSIL in some parts of the country.[408] UNAMSIL continues to hold that it is implementing the terms of the Lomé Accord.[409] Kabba, on the other hand, maintains that his hold on power is based on the constitution.[410]

IV. THE HUMAN RIGHTS APPROACH TO PEACE

Understanding the Human Rights - Peace Nexus

The concept of human rights encapsulates notions of justice and fairness to all humans. They are the benefits that are deemed essential for the individual's well being, dignity, and fulfilment and that reflect a common sense of justice, fairness and decency. Human rights evolved from the concept of "natural rights" and the "rights of man," both of which have their origins in the pre-modern natural law doctrines of Greek stoicism.[411] Natural law was seen as the embodiment of duties imposed upon society by God.[412] These duties were to become the natural rights of persons.[413] The belief that there was a higher law superior to the law of humans later became associated with liberal theories and natural rights.[414] After the Middle Ages, these ideas fermented resistance to religious intolerance and political oppression. [415] Notions of freedom and equality became pervasive not only within

401. *See* U.N. SCOR, 4099th mtg. at 1270, U.N. Doc. S/Res/1270 (2000).
402. *See id.* at 1289.
403. *See id.* at 1299.
404. *See id.* at 1346.
405. *See* Reno, *supra* note 325 at 395.
406. *See id.*
407. *See id.* at 397.
408. *See id.* at 397-98.
409. *See id.*
410. *See id.*
411. *See* Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 258 (1984).
412. *See id.*
413. *See id.*
414. *See id.*
415. *See id.*

the realm of politics but also with regard to the use and ownership of property.[416]

However, political commitment to human rights came only after the First World War.[417] The Peace Conference held after this war established a Labor Commission under the leadership of Samuel Gompers, the President of the American Federation of Labor.[418] It was this Commission that drafted the first Charter establishing the present day International Labor Organization (ILO).[419] Amongst the underlying principles that informed this Charter's formulation was that of social justice -[420] that it would not be possible to achieve sustainable peace unless the rights of working men, women, and children were protected.[421] After the Second World War, the nations of the world, desiring to put an end to further wars, established the United Nations and enacted the Universal Declaration of Human Rights (UDHR).[422] It not only incorporated several of those rights contained in the ILO document, but also decreed that the rights were to be enjoyed by everyone "without distinction of any kind such as race, color, sex, language, religion political or other opinion or social origin property, birth or other status."[423] The UDHR is the force behind the International Covenant on Civil and Political Rights (ICCPR)[424] and the International Covenant on Social and Cultural Rights (ICSCR),[425] the three

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416. *See* Weston, *supra* note 411, at 259.

417. *See id.*

418. *See id.*

419. *See generally,* E.A. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE (2d ed., 1995); *see also* Thomas Wolf, *ILO Experience in Implementation of Human Rights,* 10 J. INT'L L. ECON. 599 (1975); Jean-Michel Servais, *ILO Standards on Freedom of Association and their Implementation,* 123 INT'L LAB. REV. 765 (1984); N. VALITICOS & G. VON POTOBSKY, INTERNATIONAL LABOUR LAW (2d ed. 1995).

420. *See generally,* WILFRED JENKS, HUMAN RIGHTS, SOCIAL JUSTICE AND PEACE: THE BROADER SIGNIFICANCE OF THE I.L.O. EXPERIENCE 21 (1968); WILFRED JENKS, SOCIAL JUSTICE IN THE LAW OF NATIONS: THE ILO IMPACT AFTER FIFTY YEARS (1969).

421. *See Universal Declaration of Human Rights,* G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), *available at* http://www.ilo.org/public/english/about/iloconst.htm. [hereinafter UNDHR]. This was the embodiment of the principals contained in the Philadelphia Declaration of 1944, which was incorporated into the ILO constitution in 1946. *See id.* art. I. The Declaration reemphasized the belief on the observance of the right of "all human beings, irrespective of race, creed or sex. . .to pursue their material well being. . .in conditions of freedom and dignity, of economic security and economic opportunity" and further that "the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy." *See id.* at Annex. It also affirmed the ILO principles that labor is not a commodity; that freedom of association are essential to sustained progress; and that poverty anywhere constitutes a danger to prosperity everywhere. *See* UNDHR.

422. *See* UNDHR, *supra* note 421.; *see also* U.N. Centre for Human Rights, Human Rights: A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev. 5, U.N. Sales No. E.94.XIV.1 (1994) *available at* http://www.umn.edu/humanrts/bibliog/BIBLIO.htm. The UNDHR is a declaration of the UN General Assembly (UNGA) adopted in Paris France, on December 10, 1948, the date that has been subsequently proclaimed as the human rights day of the United Nations and it is annually celebrated as such. *See id.* at preamble *See generally* NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION (1958).

423. UNDHR, *supra* note 421, at art. 2, *available at* http://www.unhchr.ch/udhr/lang/eng.htm.

424. *See* ICCPR, *supra* note 4, at 52.

425. *See International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200A, U.N.

of them comprising what can be termed the "International Bill of Rights."

The dynamism of the international community has inspired the adoption of many treaties in the field of human rights and it may not be feasible to discuss all of them in this paper. It should, however, be mentioned here that international regimes currently define human rights as comprising civil and political rights on the one hand and social and economic rights on the other, thus creating the erroneous impression that some rights are more important than others.[426] Human rights are interrelated, indivisible, and highly interdependent; the so-called civil and political rights are just as important and urgent as the social, economic, and cultural rights.[427]

The juridical conception of human rights provides an amiable avenue through which states may minimize if not completely eliminate the causes of internal conflicts. Civil and political rights guarantees, as contained in the ICCPR, encapsulate norms basic to any democratic practice which ensure generic standards of non-discrimination in all spheres of life.[428] For example, the right to free speech under Article 19(1) of ICCPR emphasizes that "everyone shall have the right to hold opinion without interference."[429] Free speech is central to democratic governance, which in turn influences the attainment of peace or reduction of political violence. Economic and social rights address issues of human welfare that are a precondition for the enjoyment of life in dignity and for the harmonious and non-violent development of national and international society.

In 1984, the UN General Assembly made a declaration on the right of people to peace.[430] Though made largely in reaction to the threat of nuclear war, it equally befits the current spate of internal conflicts.[431] In its Preamble it expresses "the will and the aspiration of all people to eradicate war from life of mankind and, above all, to avert a world wide nuclear catastrophe."[432] The Annex states that each State;

> [s]olemnly proclaims that the peoples of our planet have the sacred right to peace;. . .[e]mphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of the States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the UN.[433]

GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICESCR], *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

426. *See* ICESCR.

427. *See id.*

428. *See* ICCPR, *supra* note 4, at 52.

429. ICCPR, *supra* note 4, at art. 19; *see also* ICESCR, *supra* note 425, at art. 19(2) (providing for the right to freedom of expression).

430. *See* U.N. GAOR, 39th Sess., 57th mtg, Doc. A/Res/39/11 (1984), *available at* gopher://gopher1.un.org/00/ga/recs/39/11.

431. *See id.*

432. *Id.*

433. *Id.*

The desire for peace runs through the entire spectrum of international human rights regimes.[434] The Human Rights Committee, while commenting on the right to life, has observed:

> It is a right which should not be interpreted narrowly. . .The committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. . .The committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life.[435]

In all, a vast body of legal norms establishes a veritable human rights code that gives meaning to the phrase "human rights and fundamental freedoms" and clarifies the obligations of member states imposed by the UN Charter.[436] Today, despite any controversies in which the concept of human rights may be enmeshed,[437] it is generally accepted that human rights are universal: they are inalienable and inherent birthrights that are due and applicable to every human being in any society regardless of any distinction.[438]

Human Rights Question in the Sierra Leone Civil War

The greatest tragedy of the Sierra Leone civil war is the widespread violations of human rights.[439] It is estimated that since 1991, over 20,000 Sierra Leonians have been killed as a result of the civil war and more than one third of the popula-

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434. *See* U.N. GAOR, 39th Sess., 57th mtg, Doc. A/Res/39/11 (1984), *available at* gopher://gopher1.un.org/00/ga/recs/39/11.

435. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 851 (1993), *available at* http://www.umn.edu/humanrts/peace/docs/hrcom6.htm.

436. *See* NOWAK, *supra* note 435.

437. *See generally* MAURICE CRAMSTON, HUMAN RIGHTS, REAL OR SUPPOSED IN POLITICAL THEORY AND THE RIGHTS OF MAN 43 (1967) (arguing against the expansion of traditional human rights which are civil and political in nature, into social and economic rights); F.E. DOWRICK, HUMAN RIGHTS: PROBLEMS, PERSPECTIVE, AND TEXTS: A SERIES OF LECTURES AND SEMINARS PAPERS DELIVERED IN THE UNIVERSITY OF DURHAM IN 1978, WITH SUPPORTING TEXTS (1979); HUMAN RIGHT: FROM RHETORIC TO REALITY (1986) (offering an analysis of various human rights issues such as reproductive rights, medical treatment, criminal procedure and labor issues); INTERNATIONAL PROTECTION OF HUMAN RIGHTS: PROCEEDING OF THE SEVENTH NOBEL SYMPOSIUM, OSLO, SEPTEMBER 25-27, 1967 (Asbjorn Eide & August Schou eds., 1968) (acknowledging the need to deliberate an expansive implementation of human rights measures worldwide).

438. *See* U.N. GAOR, 48th Sess., 22nd mtg. at 20, U.N. Doc. A/Conf.157/24 (1993), *available at* http://www1.umn.edu/humanrts/instree/11viedec.html, *see also* FRANCESCO FRANCIONI, THE JURISPRUDENCE OF INTERNATIONAL HUMAN RIGHTS ENFORCEMENT: REFLECTIONS ON THE ITALIAN EXPERIENCE, IN ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (1997); Kofi A. Annan, *Strengthening United Nation in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1 (1997); Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582 (1981).

439. *See* Alahji Bah, *Exploring the Dynamics of the Sierra Leone Conflict*, 29 PEACEMAKING & INT'L REL. 1 (2000).

tion of 4.5 million people have been displaced.[440] There is no question that human rights violations, as defined by international law, have characterized the RUF campaign against the government forces since 1911 when it first began its operations.[441] Analysts agree that the intensity of violations increased after the May 25 coup that ousted President Kabba and brought to power the AFRC/RUF coalition.[442] The military junta that assumed power suspended the constitution and established a Kangaroo court system – the Peoples Revolutionary courts manned by civilians – to supplement the Military courts.[443] The situation was no doubt exacerbated by the confrontation between the AFRC/RUF and the Nigerian-led ECOMOG forces.[444] Human Rights Watch has summarized it as follows:

> The rebel occupation of Freetown was characterized by the systematic and widespread perpetration of all classes of gross human rights abuses against the civilian population. Civilians were gunned down within their houses, rounded up and massacred on the streets, thrown from upper floors of buildings, used as human shields, and burned alive in cars and houses. They had their limbs hacked off with machetes, eyes gouged out with knives, hands smashed with hammers, and bodies burned with boiling water. Women and girls were systematically sexually abused and children and young people abducted by hundreds.[445]

But atrocities in the Sierra Leone civil war have not been limited to rebel activity.[446] The mercenary forces, Nigerian led ECOMOG forces, Kamajors,[447] and the government forces have been equally guilty of violations.[448] The South African mercenary outfit EO was reputed for putting land mines in diamond mining areas to deter unauthorized mining.[449] On October 19, 1998, the Nigerian ECOMOG soldiers executed twenty-four army officers, including former chief-of-staff Conteh and Colonel SFY Koroma, who had been convicted by a military tribunal but denied the right to appeal.[450] A Human Rights Watch report has criticized the shelling of civilian areas by ECOMOG in 1996 and also castigated the Kamajors for killings, torture, and the obstruction of humanitarian assistance.[451] In a 1999 report, Human Rights Watch documented the spate of executions carried

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440. *See* Bah, *supra* note 439, at 1.

441. *See* Zack-Williams, *supra* note 71, at 158.

442. *See id.*

443. *See id.*

444. *See Sierra Leone: Getting Away with Murder, Mutilation, Rape*, HUM. RTS. WATCH, July 1999, *available at* http://www.hrw.org/reports/1999/sierra/index.htm.

445. *Id.*

446. *See id.*

447. *See id.* These were groups of youth mobilized by the government to support civilians. The units were organized in such away that combatants were posted only to their chiefdoms. The esoteric Mende cult of "invincible and heroism" was revived to imbue the units with a sense of responsibility and courage, necessary for ensuring safety of their locality from the intrusion of the rebels. *See id.*

448. *See id.*

449. *See Sierra Leone: Human Rights Crisis*, WEST AFRICA, Dec/Jan 1996, at 1994.

450. *See* Andrew McGregor, *Quagmire in West Africa*, 3 INT'L J. 482, 499 (1999).

451. *See Sierra Leone Sowing Terror: Atrocities against Civilians in Sierra Leone*, HUM. RTS. WATCH, July 1998, *available at* http://www.hrw.org/reports98/sierra.

out by the joint ECOMOG, CDF, and Kamajor militias.[452] The report points to the difficulty of ascertaining whether the ECOMOG high command was aware of these activities.[453] It is likely that this was so because the executions were usually carried out in public places and in front of large crowds.[454] In February 1999, the UN released a report in which it blamed ECOMOG for summarily executing rebels and their sympathizers.[455] The report singled out one occasion when about forty people were executed and their bodies disposed of by ECOMOG.[456]

Human rights violations in the Sierra Leone civil war are a reflection of the emerging trends in modern warfare – what has been termed the "wars of the third kind."[457] Looked at in this context, the violations are more than just the "flagrant disobedience of legal norms," but a product of an acculturation process that defines the means through which groups assert their needs.[458] Unfortunately, international law and the institutions that foster it are not equipped to deal with sociological problems which give rise to discordant and culpable actions/omissions, and therefore are non-suited to remedy complexities that such sociological trends engender.[459] But the overwhelming desire to do something about the conduct of war which causes such widespread human suffering has led to the recognition that certain kinds of activities may be categorized as international crimes, including genocide,[460] war crimes, and crimes against humanity.[461] This development has sig-

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452. *See* HUM. RTS. WATCH, *supra* note 445.

453. *See id.*

454. *See id.*

455. *See* Fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, March 4, 1999, U.N. Doc. S/1999/237, *available at* http://www.un.org/Docs/sc/reports/1999/s1999237.htm; *see also* Sheku Saccoh, *Nigerians Execute Sierra Leone Coupists*, NEW AFR., Dec. 1998 at 24.

456. *See id.*

457. K.J. HOLSTI, THE STATE, WAR, AND THE STATE OF WAR, 19-40 (1996). "Wars of a third kind" involve non-combatants in far larger proportions than has previously been witnessed, engenders the politicization of the masses, have fluid battle lines, and magnify identity as a key factor of differentiation. Theses characteristics are a manifestation of how the cultural and social linkages underpin the evolution of the phenomenon of war and violence. The linkages are profound because they define, characterize, and provide windows through which the phenomenon of war and violence can be amiably understood and studied. Human rights discourse, and particularly international human rights law, can benefit from this analysis because it presents a powerful paradigmatic shift from the conception of law as an extant, immutable, phenomenon incapable of bending to the demands of societal interrelation and cultural evolution. *See id.* at 36.

458. David J. Scheffer, *The International Criminal Tribunal Forward: Deterrence of War Crimes in the 21st Century*, 23 MD. J. INT'L L. & TRADE 1, 2 (1999). Acknowledging these changes, the US Ambassador at large for war crimes, David J. Scheffer, while addressing the International Military Operations and Law Conference in Honolulu, Hawaii on February 23, 1999, observed that, "conventional warfare has been transformed in our lifetimes. Armed conflict has become increasingly identified not with clash of armies across sovereign borders, or between 'isms,' but with the assault by government and its military on its own population, or by a rebel force bent on terrorizing its own society, or by use of weapons that have as their aim indiscriminate mass murder." *See id.*

459. *See id.*

460. *See* Genocide Convention G.A. Res. 260, U.N. GAOR, at art. 2 (1948), *available at* http://yale.edu/cgp/dccam/genocide.htm (defining genocide to mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such: (a)

naled a further erosion of state sovereignty principles[462] and called for the expansion of international mechanisms for ensuring the full operation of law in circumstances of both internal and international conflicts.

As already adumbrated, the development of conventional international law to cover civil war situations has not been complemented by effective enforcement machinery at the international level.[463] Therefore, the problem is not the lack of law, "but how this law can be applied in the absence of enforcement provisions."[464] The UN Security Council has attempted to fill this vacuum by creating ad hoc international criminal tribunals.[465] Under Article 39 of the UN Charter,[466] the Security Council has power to determine whether any action or activity poses a threat to world peace and to make a recommendation in accordance with Article 41 and 42.[467] It is undisputed that internal civil wars such as the one in Sierra Leone threaten world peace.[468] The question remains as to whether the ad hoc tribunals do help to bring about peace.

The Politics of AD HOC International Criminal Tribunals

The ad hoc war crimes tribunals began with the Nuremberg[469] and Tokyo[470] tribunals that were set up after World War II to try war criminals. Since then, the UN Security Council has established two other tribunals, the Yugoslavia and the Rwanda tribunals.[471] The process for the establishment of the fourth tribunal in

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killing members of the group; (b) causing serious bodily harm. . .(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction. . .(d) imposing measures intended to prevent births. . .and (e) forcibly transferring children of the group to another group).

461. *See* Genocide Convention G.A. Res. 260, U.N. GAOR, at art. 2 (1948).

462. *See* U.N. CHARTER art. 2, para. 7, *available at* http://www.un.org/Overview/contents.html (asserting that the doctrine of state sovereignty militates against the intrusion into matters that occur within the territorial borders of any state). Article 2(7) of the United Nations Charter excludes any UN action in "matters which are essentially within the jurisdiction of any state." *See* U.N. CHARTER art. 2, para. 7

463. *See* David Turns, *War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts*, 7 AFR. J. INT'L COMP. L. 804, 805 (1995).

464. *Id.*

465. *See* U.N. CHARTER, *supra* note 464, at art. 39.

466. *See id.*

467. *See id.*

468. *See International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion (Applicability of the Grave Breaches Provisions of the Geneva Convention of 1949; Laws of War; Crimes Against Humanity*, 36 I.L.M. 908 (1997).

469. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279, 284.

470. *See* The International Military Tribunal for the Far East at Tokyo, established by Charter of the International Military Tribunal for Far east at Tokyo (1946), Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, TIAS No 1589, *reprinted in* 4 Treaties and Other International Agreements of the United States of America 27 (1946). The tribunal was established by an executive order of General Douglas McArthur and not by the multilateral treaty. He also appointed the judges and the prosecutor for the tribunal. *See id.*

471. *See* Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 14 (1997).

Sierra Leone has just begun.[472]

It was the revulsion against the atrocities committed by the Nazis during the war and the desire to rid the world of any such calamity in the future that inspired a major political campaign for the establishment of some form of judicial institution to try and punish war offenders.[473] The promulgation of the Nuremberg Charter and the establishment of the tribunal was the culmination of an ages-long quest for international action against violations of the rules of war.[474] The unsuccessful attempts to prosecute German military personnel pursuant to the Treaty of Versailles,[475] and the very mediocre trials at Leipzig by the German Supreme Court[476] after World War I, evaporated hopes of establishing an international justice system free from political subjugation. The defeat of Germany by the Allied powers provided an opportunity in which Germany's military aggression and the heinous conduct of some of its military officers could be put to trial.[477] Indeed, when the four Allied powers met on August 8, 1945, an agreement for the prosecution and punishment of the major war criminals of the European Axis was made.[478] A Charter was also drawn creating an international tribunal with jurisdiction to try crimes against the peace, war crimes, and crimes against humanity.[479]

The anachronism of applying international law to non-state actors (established by the Nuremberg process), while seeking individual accountability for crimes of war has become a benchmark for the enforcement of international human rights law.[480] The process has, however, generated a fair share of criticism. To some observers, the symbolism of Nuremberg remains as an affirmation of the complete

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472. *See* Bassiouni, *supra* note 471, at 14.

473. *See id* at 11-12.

474. *See id.* at 20.

475. Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919, 2 Bevans 43.

476. *See* Bassiouni, *supra* note 471, at 20.

477. *See id.* at 25.

478. *See id.* Article 6 provided as follows: The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European axis countries shall have the power to try and punish persons who, acting in the interests of the European axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

> The following acts, or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility:
>
> Crimes against peace: namely, planning, preparation, initiation or waging of war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> War crimes: namely violations of custom of war.
>
> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of a country where perpetrated. *Id.*

481. *See id.*

defeat of Germany by the Allied powers, rather than the triumph of international law over abhorrent conduct of war.[481] Chief Justice Harlan Fiske Stone of the US Supreme Court observed:

> So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war. . .I dislike extremely to see it dressed up with false façade of legality. The best that can be said for it is that it is a political act of the victorious states which may be morally right.[482]

Recently, the tribunal has been described as "a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe."[483] Viewed against the opposition to the establishment of a permanent court by the United States and others,[484] such criticisms are not misplaced. Moreover, time and again, the idiosyncrasies of moral superiority professed by powerful nations have never been translated into an articulate program of rescue, especially when calamity strikes in poor nations of the south.[485] The tribunals have thus been seen as a mere apologia for the international community's inaction in situations of flagrant human rights abuses.[486] The Rwandan case is perhaps the best example in this regard. On April 21, 1994, just when the genocide was beginning, the United Nations passed a resolution that reduced its peacekeeping force to a paltry two hundred and seventy persons.[487] According to one observer, the apparent lack of interest in the Rwandan genocide "can be attributed single-handedly to the United States."[488] Since the debacle in Somali, the United States has been keen to avoid any involvement in peacekeeping operations in Africa.[489] Congress had in this regard drafted Presidential Decision Directive 25, urging that "the US should persuade others not to undertake the missions it wished to avoid."[490]

No matter the perception, the Nuremberg process established a legacy that was followed in Tokyo and most recently in Yugoslavia and Rwanda.[491] Lessons from these tribunals reveal a litany of conceptual and structural difficulties, thus

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481. *See* Bassiouni, *supra* note 471, at 25.

482. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 715 (1956).

483. M. Mutua, Never Again: Questioning the Yugoslav and the Rwanda Tribunals, 11 TEMP. INT'L & COMP. L.J. 167, 170 (1997).

484. *See* Robert Johansen, US Opposition to the International Criminal Court: Unfounded Fears, Policy Brief, No. 7, JOAN B. KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES, NOTRE DAME (2001), *available at* http://www.nd.edu/~krocinst/polbriefs/pbrief7.html. According to Johansen, "the reason for US opposition is simple. All the temporary tribunals that the US has supported were limited to investigating others; they would not hold US citizens accountable." *Id.*

485. *See id.*

486. *See* Nehal Bhuta, *Paved With Good Intentions – Humanitarian War, The New Interventionism and Legal Regulation of the Use of Force*, 25 MELB. U. L. REV. 843, 858 (2001).

487. *See* S.C. Res. 912, U.N. SCOR, 49th Sess., 3368th mtg. P 4, U.N. Doc. S/RES/912 (1994).

488. MANNING, *supra* note 130, at 150.

489. *See id.*

490. *Id.*

491. *See id.*

relegating their significance to mere acknowledgement of the necessity for a more robust system of legal intervention.[492] Secondly, they have been bedevilled by lack of finances, impacting negatively in their pursuit of witnesses and staffing.[493] Thirdly, pure logistical problems of apprehending culprits have not been resolved. For example, while the arraignment of Milosevic before The Hague tribunal is commendable, known perpetrators of the massacre at Suva Reka in southern Kosovo are still at large.[494]

From a more ideological standpoint, some nations have opposed the creation of these tribunals because the permanent members of the Security Council can use them to insulate themselves and their allies from investigation.[495] When the Security Council debated the establishment of the Yugoslavia and Rwanda tribunals, China expressed fear that the tribunals may set precedent for the creation of yet another tribunal.[496] The prediction has indeed come true with the now proposed Sierra Leone Court. Questions have also arisen as to why tribunals should be created in certain cases and not in others.[497] The hue against "tribunal fatigue" impacted rather positively on the movement towards the creation of a permanent court.[498] The feeling that the process of establishing a tribunal is slow and expensive has added impetus to claims that a permanent institution is probably what the world needs.[499]

The "Special Court" for Sierra Leone

On August 14, 2000, the UN Security Council unanimously voted for the establishment of a war crimes tribunal for Sierra Leone.[500] After the Yugoslavia and Rwanda tribunals, this will be the third tribunal created in two decades to deal with war crimes.[501] Unlike the Rwandan tribunal, the resolution for the establishment of this tribunal was fully supported by the Sierra Leone government.[502] Indeed, it

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492. *See* MANNING, *supra* note 130, at 150.

493. *See id.*

494 *See* Roy Gutman and Rod Nordland, Yugoslavia: A Massacre and the Case Against Milosevic, NEWSWEEK 34-38, Jun. 23, 2001.

495. *See* Jelena Pejic, *Creating a Permanent International Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 298 (1998).

496. *See* VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA 200 (1995). China abstained from voting on Security Council Resolution 955 establishing the Rwanda Tribunal. *See* U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 11 (1994).

497. *See* Bartram S. Brown, *Primacy or Complimentarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 386 (1998).

498. *See id.*

499. *See id.*

500. *See* U.N. SCOR, 54th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000).

501. *See id.* The Yugoslavia tribunal was set up in May 1993 as a reaction to the crimes committed during the war in Bosnia-Herzegovina between Muslims, Serbs, and Croats. The Rwanda tribunal, set up in November 1994, was a response to large-scale massacres of the Tutsis by Hutus immediately after the killing of the Rwanda president Juvenal Habriyimana. *See id.*

502. *See* Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court For Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 404 (2001).

was the request made by President Ahmad Tejan Kabba of Sierra Leone to Secretary General Kofi Annan in June 2000 that ignited the UN process.[503] The government of Sierra Leone sought international assistance in establishing a special court to try members of Foday Sankoh's RUF.[504] A court created by the United Nations, Kabba had stated, would "have the advantage of strong enforcement powers that will call for cooperation from states in the investigations, arrest, extradition and the enforcement of sentence."[505]

The proposed tribunal is set to try "crimes against humanity, war crimes and other serious violations of international humanitarian law as well as crimes under relevant Sierra Leone law committed within the territory of Sierra Leone."[506] The special court will have jurisdiction to try persons who have the greatest responsibility for the commission of such crimes.[507] As a follow-up procedure to Resolution 1315, the Security Council authorized the Secretary General to commence consultation with the Sierra Leone government with a view to setting out recommendations as to the court's jurisdiction, its appellate procedures, and matters relating to its physical location.[508]

In October 2000, the Secretary General presented his report to the Security Council.[509] According to this report, the special court in Sierra Leone will not be anything close to the Yugoslavia and the Rwanda tribunals, but will instead be a hybrid tribunal whose composition and general mandate, while remaining specific to the circumstances of Sierra Leone, may come directly under the control of the Kabba government.[510] The Sierra Leone government will be allowed to appoint one judge each for the two trial chambers and two judges in the appeals chamber.[511] Secondly, unlike the Rwanda and the Yugoslavia tribunals, the special court in Sierra Leone will be constituted out of an agreement between the UN and the government of Sierra Leone.[512] The court will thus have concurrent jurisdic-

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503. *See* Fritz, *supra* 502, at 400.

504. *See generally id.*

505. Barbara Crossette, *Sierra Leone Asks UN for Role in War Court*, N.Y. TIMES, Jun. 21, 2000. The British and US government supported the move though not exactly on the same terms. The US was initially opposed to the idea of a UN tribunal akin to Yugoslavia and Rwanda, asserting that the process of establishing such a tribunal may take a long time. *See id.* It nevertheless supported the creation of some kind of "international war crime umbrella to cover these odious people." *Id.* The British, on the other hand, supported the proposal by Kabba for a hybrid court which would be under the control of Sierra Leone government, would try members of the RUF, would apply international law as well as Sierra Leone law, and would enjoy monetary support of the UN Trust Fund. *See id.* Both countries were able to garner international support for the establishment of the tribunal. *See id.*

506. U.N. SCOR, supra note 500.

507. Draft Statute for the Special Court for Sierra Leone, art. 1(1), *available at* http://www.specialcourt.org/ documents/statute.html (last visited March 12, 2002).

508. *See* U.N. SCOR, supra note 500, at para. 7.

509. *See* Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1055 (2000) at 34.

510. *See* Seventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, U.N. Doc. S/2000/1055 (2000) at 34.

511. *See* Draft Statute, *supra* note 507, at art. 12(1)(a).

512. *See id.* at preamble.

tion and even primacy over the local courts in Sierra Leone, but will lack "power to assert its primacy over national courts in third states in connection with crimes committed in Sierra Leone."[513] Similarly, the court will lack the power to "request the surrender of suspects from any third states" or to "induce the compliance of its authorities with any such request."[514] The fact that the court will have jurisdiction to try offences under the domestic law lends credence to its diminished international character; the possibility of manipulation by the government of Sierra Leone, to ensure the incarceration of its political rivals, cannot be ruled out.[515]

The court will only deal with crimes committed after November 30, 1996.[516] The narrow temporal jurisdiction of the court may limit its ability to deal effectively with crimes committed throughout the civil war. Since the war begun in 1991, the level of involvement of the various personalities may have changed. Foday Sankoh, the proclaimed leader of the RUF, having been out of prison for only 4 months after November 1996, may escape prosecution for crimes committed before that time. Setting the temporal jurisdiction of international criminal tribunals has always been controversial. When the Rwanda tribunal was set up, the Security Council limited its jurisdiction to the period between January 1, 1994 and December 31, 1994.[517] The government voted against the resolution and sought an amendment to extend the jurisdiction of the tribunal to cover the entire period of the civil war, arguing that the genocide committed in 1994 was the result of "a long period of planning" and that the refusal of the international tribunal to take account of such planning may be disastrous towards the process of creating a climate conducive for national reconciliation.[518]

The argument that stretching the jurisdiction to cover the entire period of the war may overburden the court is not plausible enough to allay fears that the court is representative of the international community's lukewarm response to African problems.[519] Indeed, such a stance is consistent with the United States policy towards Sierra Leone, which has advocated all along for negotiations with the RUF, despite the poor human rights record of the latter.[520] Moreover the idea that the United Nations, and indeed the international community, may not be prepared to take the full burden of dealing with war crimes and crimes against humanity sends a wrong signal and slows down the momentum towards the support for the international criminal court.

The above notwithstanding, the establishment of a special court affirms the

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513. Draft Statute, *supra* note 507, at art. 12(1)(a).

514. *Id.*

515. *See id.*

516. *See* Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237, 244 (2001).

517. *See* S.C. Res. 955, U.N. Doc. S/RES/955 (1994) (with annexed Statute). *See also* Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996).

518. *See* U.N. SCOR, *supra* note 496.

519. *See* U.N. SCOR, *supra* note 496.

520. *See id.*

international community's revulsion against war crimes, crimes against humanity, and the general abuse of human rights. The constitutive statute sets out the legal competence of the court to deal with four sets of crimes, namely, crimes against humanity, violations of Article 3 common to the Geneva Conventions, serious violations of international humanitarian law, and crimes under Sierra Leone law.[521]

(a) Crimes Against Humanity

According to Article 2 of the statute, the special court shall have the power to prosecute crimes against humanity.[522] These crimes are specified as murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence, persecution on political racial, ethnic or religious grounds, and other inhumane acts.[523] The acts that constitute crimes against humanity have their origins in the Nuremberg Charter.[524] Since then, rape and torture have been added to the list by the Yugoslav Statute. The Rome Statute of the International Criminal Court (ICC)[525] has added to the list the enforced disappearance of persons and crime of apartheid. Such acts will constitute the offense if they are committed against civilian population and are "widespread or systematic."[526]

(b) Violations of Article 3 common to the Geneva Conventions and Additional Protocol II

The Geneva Conventions are an embodiment of a set of rules guiding humanitarian action in armed conflict situations. Central to the Conventions is the principle that persons not actively involved in warfare should be treated humanely.[527] Common Article 3 introduces the application of this principle to "armed conflicts not of an international character"[528] and sets out minimum guarantees for the pro-

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521. *See* S.C. Res. 955, *supra* note 517.

522. *See id.*

523. *See id.*

524. *See id.* at art. 6.

525. Rome Statute of the International Criminal Court, July 17, 1998, UN Doc A/CONF. 183/9 (1998) [hereinafter ICC Treaty].

526. *Id.* at art. 7.

527. *See id.*

528. *Id.* at art. 3. In Prosecutor v. Jean-Paul Akeyesu, the ICTR observed that an armed conflict may be said to exist "whenever there is. . .protracted armed violence between governmental authorities and organized groups or between such groups within a state." See International Criminal tribunal for Rwanda, Case No. ICTR-96-4-T, Sept. 2, quoted in Babafemi Akinrinade, "International Humanitarian Law and the Conflict in Sierra Leone", LLM University of Notre Dame Law School Thesis 2000, at 32. Note, however, that by virtue of Article 1(4) of Protocol I, 1977, armed conflict of an international character is defined to include wars against colonial domination, alien occupation and racist regimes. *See* David P. Forsyth, *Legal Management of International War*, 72 AM. J. INT'L L. 272 (1978). Non-international conflicts, on the other hand, may be difficult to define. They may range from full-scale civil wars to relatively minor disturbances. Article I of Protocol II prevents the application of its provisions from internal unrest including "riots, isolated and sporadic acts of violence and other acts of similar nature as not being armed conflicts." *Id.*

tection of non-combatants, providing in pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflicts shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[529]

The article delineates acts that are prohibited to include murder, torture, mutilation and all forms of cruel and inhuman treatment, the taking of hostages, humiliating and degrading treatment, and the passing of sentences and carrying out executions without due process.[530] Protocol II reaffirms the rules set out in Common Article 3 and expands the protection to include prohibitions against slavery, pillage, rape, and acts of terrorism, as well as the threat to commit such acts.[531] The statute of the Special Court draws from the Convention to create offenses that the court will have jurisdiction to try.[532] In Article 3, the following offenses are listed: violence to life including murder and cruel treatment, collective punishments, the taking of hostages, terrorism, rape, indecent assault and other forms of degrading punishments, pillage, the passing of sentences and executions without recourse to court and judicial guarantees, as well as threats to commit those offences.[533]

The Sierra Leone Special Court statute adopts the innovation created by the Rwanda statute where, for the first time, the UN Security Council criminalized breaches against the Geneva Convention.[534] Generally speaking, breaches to the provisions of Common Article 3 and the additional Protocol II do not attract penal sanctions unless individual member states enact such provisions into their domestic criminal legislation.[535] Questions thus arose as to whether the inclusion of Common Article 3 and the additional Protocol II provisions into the statute of the Rwanda tribunal established individual criminal responsibility of the violators.[536] In his report on the Rwanda tribunal, the UN Secretary General noted that the Security Council had adopted a more expansive approach to the subject matter juris-

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529. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, Article 3 [hereinafter Common Article 3].

530. *See id.*

531. *See id.* at art. 4

532. *See id.*

533. *See id.*

534. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 558 (1995).

535. *See id.*

536. *See* Tara Sapru, *Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into Rwanda Crisis*, in 32 TEX. INT'L. L. J. 329 (1997).

diction of the tribunal and thus included in the treaty "international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime."[537] No scholar less venerable than Theodore Meron has asserted that since Nuremberg, there has never been any doubt that certain kinds of conduct, violating norms of international order as it were, should attract individual criminal sanctions.[538] To determine which kinds of conduct should be considered for such sanctions, he suggests that the test should be as follows:

> Whether international law creates criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, states, groups or other authorities, and/or to all these. The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community are all relevant factors in determining the criminality of various acts.[539]

Like the Rwanda statute, the Sierra Leone statute has specifically affirmed that persons who plan, instigate, order, commit, aid and abet in the planning or execution of crimes provided for under the statute will bear individual criminal responsibility.[540] The statute does not absolve actions carried out in official capacity, nor does it grant reprieve to superiors for actions committed by their subordinates, provided that such superior knew of the acts and never took any reasonable step to prevent or stop them.[541]

(c) Other Violations of International Humanitarian Law

Apart from the Geneva Conventions, the Special Court has been accorded jurisdiction to try several other breaches against humanitarian law, including deliberate attacks on civilians and humanitarian personnel, installations, materials, or vehicles involved in "humanitarian assistance or peacekeeping missions."[542] The inclusion of these acts into the category of international crimes to be tried by the court is largely a reaction to the rampant incursions against peacekeeping and humanitarian activities by soldiers of the RUF, which have variously been reported as holding UN peacekeepers hostage, confiscating their weapons, and even killing them.[543] Also included in this category is the offence of abduction and forced recruitment of children below age 15 into armed forces.[544]

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537. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, U.N. SCOR, 50th Sess., 134th mtg., U.N. Doc. S/1995/134 (1995) at para. 12.

538. *See* Meron, *supra* note 534, at 554.

539. *See id.* at 562.

540. *See* Draft Statute, supra note 507, at art. 6.

541. *See id.* at art. 6(2)-(3).

542. *See id.* at art. 4(b).

543. *See id.*

544. *See id.* at art. 4(c).

(d) Crimes Under Sierra Leone Law

The only Sierra Leone offenses over which the court will exercise jurisdiction are those created under sections six, seven, and twelve of the Prevention of Cruelty to Children Act of 1926 (Chapter 31 of the Laws of Sierra Leone)[545] and section two, five, and six of the Malicious Damages Act of 1861.[546] The first set of offenses relates to the abuse and abduction of girls below the age of fourteen, while the second set includes prohibitions against wanton destruction of property (particularly buildings).[547]

Problems and Prospects

On passing the resolution establishing the court, the Security Council acknowledged that the civil war in Sierra Leone was indeed a threat to international peace and security in terms of Article 39 of the UN Charter, thus necessitating action under Chapter VII of the Charter. [548] The establishment of the court may indeed be a milestone towards ensuring international justice, but whether it may influence the resolution of the ongoing civil strife in that country and other regions in Africa is a matter that is open to debate. When the Rwanda and Yugoslavia tribunals were set up the proclaimed purpose was to "put an end" to unconscionable violations of human rights and to bring the perpetrators of such violations to justice.[549] Clearly the purpose of the intended tribunal in Sierra Leone is not different, except that in this case, the war has not ended. The question to ask is whether the commitment to punish human rights violations and war crimes is matched by an appropriate interventionist program capable of ending hostilities and restoring complete democracy.

The United Nations, as a world government, is often faced with restricted choices in view of the legal construction of its mandate. In the first place, its jurisdiction extends over states, not individuals.[550] Second, the bureaucracy inherent in its internal structure and the consensual prerequisites in all its decision-making processes often diminishes its ability to make a timely response to any issue.[551] Treaties take ages to ratify, appointments face immeasurable political hurdles, and finances are perpetually unavailable. Be that as it may, the UN has attempted to make some contribution to the process of conflict resolution in almost all parts of the world, including peacekeeping initiatives such as those in Kosovo, Rwanda, Angola, Sierra Leone, East Timor and Congo, and including refugee assistance, election monitoring and other humanitarian programs just to mention a few.[552] But these initiatives have more often than not been a patchwork of uncoordinated activ-

545. *See* Draft Statute, supra note 507, at art. 5(a).
546. *See id.* at art. 5(b).
547. *See id.* at art. 4-5.
548. *See id.*
549. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (1993).
550. *See id.*
551. *See id.*
552. *See id.*

ity mandated by Security Council Resolutions. The UN has never been in the habit of laying down a five or ten-year conflict resolution action plan in respect to each conflict situation in which it chooses to become involved. The result has been disastrous. The ad hoc measures often resorted to end up prolonging the conflict instead of remedying it. The debacle in Somali and the now ended civil war in Liberia are good examples. Somali is now a "failed state" while the Liberia civil war took seven years to resolve.[553] In cases where the UN has chosen to get involved after a civil war, it has most certainly rewarded the victors with political support and assisted in the punishment of the losers.

In either case, human rights are treated as a separate agenda and are never integrated into the economic and other humanitarian programs undertaken by the UN and its collaborators. In almost all cases where ad hoc tribunals have been created, the violation of human rights is treated as unconnected to other aspects of societal life. The tribunals function as mechanical vehicles for punishing acts committed within a set period, without enjoying any flexibility at all, and thus cannot adjust their mandates to deal with new circumstances as they arise. The Rwanda tribunal now sitting in Arusha does not have the mandate to try *Tutsi* militias who massacred *Hutus* living in refugee camps after 1994 - yet these cases were widely reported.[554] The tribunal *raison d'etre* notwithstanding, the general perception that it supports the *Tutsi*-led regime in Rwanda tampers its stature as an impartial organ of international justice.

In Sierra Leone, similar questions arise. How impartial will the court be considering that the Kabba government is taking part in the creation and appointment of judges? Given that the government sponsored militia – Kamajors, ECOMOG, international mercenary groups, and even government soldiers – have committed some form of human rights violations,[555] what is the likelihood that they may face trial? Since the war is still going on, the consequences of the court, if established, may be different but probably more calamitous. In the first place, it will diminish any chances of getting the belligerents to comply with the Lomé Accord, especially the disarmament provisions which are currently being enforced by UNAMSIL. Obviously everybody will fear arrest and prosecution. Second, it may legitimize the Kabba government despite the government's ineffectiveness. Third, it may create an aura of political uncertainty as belligerents may scheme for complete victory in the civil war to avoid prosecution. It is perhaps because of these reasons that most processes, for example the Northern Ireland peace process and even the South African negotiated transition, begin with a blanket declaration of amnesties for past violations.[556] For Sierra Leone, much effort should be directed towards the complete cessation of hostilities and the restoration of democracy. Thereafter, seeking justice becomes a natural component to the process of societal healing and reconstruction.

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553. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (1993).

554. *See* Christina Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda*, 18 B.U. INT'L L.J. 163, 185 (2000).

555. *See* Juma, *supra* note 82, at 86.

556. *See* Lemarchand, *supra* note 215, at 581.

Whereas human rights regimes define an important constituency in the foray of conflict resolution processes, the methods of its enforcement have remained too restricted. Violations of human rights, such as those witnessed in Sierra Leone, demand much more than an ad hoc war crimes tribunal with a restricted mandate. The argument could have been different if, at the time the war began, there was an international criminal court exercising extraterritorial jurisdiction. The approach, therefore, favors the establishment of a permanent international court capable of exercising a wide jurisdiction, supervising regimes and institutions whose conduct is found wanting, and, above all, of establishing linkages with other forums working towards peace. The permanency will allow for long-term planning and integration, obviate naivety in the whole process of determining the culpability of an insurgency, and may keep governments warned of the consequences of their indiscretion. In the words of Bassiouni:

> The ICC is the most appropriate international mechanism through which the proscriptive norms against genocide, crimes against humanity and war crimes can become more effective instrumental norms as opposed to being essentially the embodiment of intrinsic values reflecting international social expectation.[557]

CONCLUSION

In this article, I have traced the political developments of Sierra Leone since independence. I have demonstrated that the civil war that began in 1991 did not occur in a vacuum, but was the culmination of the process of decay enunciated by poor leadership from the time of Sir Milton Magai to the present. In the trajectory, different factors, some inextricably intertwined with the cultural and sociological milieu in which the country found itself, have emerged to explain why the intractable civil war has survived to this day. I have argued that the international response to this conflict must take cognizance of these factors. Indications give little hope that the UN or its collaborators will do so. The proposed war crimes tribunal is probably not the best strategy for resolving the war at this point in time. Designing a more integrated plan capable of dealing with all the poignant issues of the Sierra Leone civil war may be a good starting point. The plan should address issues of economic disparity and ethno-political contests and should help Sierra Leonians build a true democratic society capable of nurturing good political leadership and respect for human rights.

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557. M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of an International Criminal Court*, 52 J. INT'L AFF'S, 795, 805 (1999).

THE UNFINISHED "CRIMINAL PROCEDURE REVOLUTION" OF POST-DEMOCRATIZATION SOUTH KOREA

KUK CHO*

I. INTRODUCTION

The nationwide June Struggle of 1987 led to the collapse of Korea's authoritarian regime and opened a road toward democratization.[1] Under the authoritarian regime, the "crime control" value dominated over the "due process" value in regards to criminal procedure.[2] The Constitution's Bill of Rights was merely nominal, and criminal law and procedure were no more than instruments for maintaining the regime and suppressing those dissident. It was not a coincidence that the June Struggle was sparked by the death of a dissident student tortured during police interrogation.[3]

The new 1987 Constitution brought a significant change in the theory and practice of the Korean criminal procedure. Explicitly stipulating the idea of due process in criminal procedure,[4] the Bill of Rights in the Constitution has become a living document.[5] The 1988 and 1995 amendments to the Korean Criminal Procedure Code[6] [hereinafter "CPC"] have also strengthened the procedural rights of criminal suspects and defendants to some degree. The newly established Korean Constitutional Court and the Korean Supreme Court have made important

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1. For information regarding the June Struggle, see James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence, in* HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 221 (1991).

2. For information regarding these two competing values in criminal process, see HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 151 (1968).

3. *See* CARTER J. ECKERT ET AL., KOREA OLD AND NEW: A HISTORY 381-82 (1990).

4. *See* THE CONSTITUTION OF THE REPUBLIC OF KOREA [*heonbeop*] art.12(1)(3), *available at* www.assembly.go.kr/english/laws/constitution/constitution2.htm (last visited Mar. 27, 2002) [hereinafter "THE KOREAN CONST."].

5. *See* Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 73-75 (1997).

6. *See generally* The Korean Criminal Procedure Code [*hyeongsa sosongbeop*] (Law No. 341, Sept. 23, 1954, last revised Dec. 13, 1997 as Law No. 5454) [hereinafter "CPC"].

decisions for such rights.

However, a number of problems still remain which disturb the change in the Constitution and overshadow the constitutional procedural rights. Police practices of avoiding the warrant requirements for arrest and search-and-seizure have continued. Guarantees of procedural rights for criminal suspects in police interrogation still remain incomplete and fragile. Investigators enjoy their dominant role in the criminal procedure scheme, while citizens are often treated merely as an object of the investigation. The judiciary is reluctant to exclude illegally obtained confessions and physical evidence in trials.

This article examines the basic system of Korean criminal procedure after democratization, and analyzes its problem from the standpoint of the "constitutionalization of criminal procedure." First, it starts with a brief review of the implication of the shift brought by the 1987 Constitution. Second, it outlines the basic system of Korean criminal procedure, focusing on the advancement of the guarantee of procedural rights. Third, it explores the legal provisions of the CPC, the Police Duty Law, and police practices which block the further advancement of Korean criminal procedure. Finally, this article reviews the passive position of the Korean Supreme Court on the exclusionary rule.

II. OUTSET OF THE "CONSTITUTIONALIZATION OF CRIMINAL PROCEDURE" AFTER THE 1987 KOREAN CONSTITUTION

Under the authoritarian regime established after the May 16th military coup in 1961, democracy in South Korea was nominal, and the Korean Constitution was akin to the "Emperor's new clothes." Illegal police practices including torture, illegal arrest and detention were widespread in the criminal process. Beating, threatening, and torture by water or electricity were routinely applied to political dissidents.

Let us turn to some highly profiled cases in the 1980s (although there are many other similar cases under the regime). Supporters for President Kim Dae-Jung, a political dissident at that time, were severely tortured when arrested for their alleged conspiracy to overthrow the state in 1980.[7] In particular, those who violated the National Security Law were brutally tortured, and accused of being "pro-enemy leftists."[8] For instance, Presidential Secretary Lee Tae-Bok and Congressman Kim Geun-Tae, who were then leaders of the democratization movement, were brutally tortured when arrested for the violation of the National

7. Henry Scott Stokes, *Seoul's Censors and Press Distort Dispatches From U.S.*, N.Y. TIMES, September 4, 1980, at A9.

8. *Torture Claimed in Dissident Case*, FACTS ON FILE WORLD NEWS DIGEST, May 7, 1982, at 332 B3; Henry Scott Stokes, *Ex-General Becomes a Key Figure in Seoul Politics*, N.Y. TIMES, May 1, 1982, § 1, at 4.

9. *See* Stokes, *supra* note 8. *See also*, Jun Kwan-Woo, *S. Korean 'Torturer' Gives Himself Up After 11 Years On the Run*, AGENCE FRANCE-PRESSE, October 29, 1999; John Larkin, *Found: Torturer Who Hid In a Toilet*, SYDNEY MORNING HERALD, November 6, 1999, at 19.

Security Law in 1980 and in 1983 respectively.[9] In 1987, Professor Kwon In-Sook, then a labor movement activist, was sexually abused by a policeman when arrested, and Park Jong-Chul, a dissident student, was suffocated to death in the bathtub during police torture.[10] Besides political dissidents, ordinary people also had to go through the cruel investigation process. Illegally-obtained confessions and physical evidence were usually admitted by the Court to prove a defendant's guilt.[11] From the standpoint of human rights, it was no more than a "Dark Age," when the procedural rights of criminal suspects and defendants were nothing but meaningless rhetoric.

The June Struggle of 1987 opened a new era of democracy and gave birth to the 1987 Constitution. The Constitution established a blueprint for the "constitutionalization of criminal procedure" in Korea and created the Korean Constitutional Court as a watchtower to monitor unconstitutional laws and police practices.

First, Article 12 (1) and (3) of the Constitution have explicitly incorporated the principle of due process in criminal procedure. According to the Constitutional Court, the principle is "to guarantee not only the legality of the procedure but also the legitimateness of the procedure."[12] The Court made sure that the principle of due process was a core value to penetrate and control all stages of criminal procedure, stating:

> The principle of due process requires that both the formal procedure described by the law and the substantial content of the law be reasonable and just.... In particular, it declares that the whole criminal procedure should be controlled from the standpoint of guaranteeing the constitutional basic rights.[13]

Second, the Bill of Rights in the 1987 Constitution provides very detailed provisions regarding criminal procedural rights, including strict requirements for obtaining judicial warrants for compulsory measures,[14] the right not to be tortured,[15] privilege against self-incrimination,[16] right to counsel,[17] right to be

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10. *Former Policemen Arrested on Sexual Harassment Charges*, UNITED PRESS INT'L, April 9, 1988e; *Court Sentences Former Police Officer For Sexual Harassment*, UNITED PRESS INT'L, July 23, 1988; AFP-AP-Seoul, *Seoul Student Water Tortured Police Admit*, TORONTO STAR, January 19, 1987, at A5; AP-Seoul, *2 S. Korean Policeman Charged with Murder in Student Death*, L. A. TIMES, January 19, 1987, at 12.

11. *See, e.g.* Decision of Nov. 9, 1988, 88 *Kohap* 548 (Pusan District Court); Decision of Oct. 13, 1981, 81 *Do* 2160 (Korean Supreme Court); Decision of Mar. 13, 1984, 84 *Do* 36 (Korean Supreme Court).

12. *See* Decision of Dec. 24, 1992, 92 *heon ka* 8 (Korean Constitutional Court); Decision of July 29, 1993, 90 *heon ba* 35 (Korean Constitutional Court).

13. Decision of Dec. 26, 1996, 94 *heon ba* 1 (Korean Constitutional Court).

14. KOREAN CONST. [*heonbeop*], *supra* note 4, at arts. 12(3), 16.

15. *Id.* at art. 12(2).

16. *Id.*

17. *Id.* at art 12(4).

informed of the reason of arrest or detention,[18] right to request judicial hearing for arrest or detention,[19] exclusionary rule of illegally obtained confession,[20] protection against double jeopardy,[21] right to fair trial,[22] right to speedy and open trial,[23] presumption of innocence,[24] and right to compensation for the suspect and defendant found innocent.[25] These rights incorporated in the Constitution reflect the Korean people's desire to guarantee their human rights which had been nominal under authoritarian regime.

Besides these changes, it is noteworthy that in 1995, two former presidents, Chun Doo-Hwan and Roh Tae-Woo, were prosecuted and found guilty for leading the December 12th coup of 1979, and for killing many civilians in Kwangju in 1980. The case was symbolic of the change in Korean society.[26]

In brief, the new Constitution has required that criminal procedure be under the control of the Constitution and has provided the detailed Bill of Rights to guarantee the procedural rights of criminal suspects and defendants. In this context, the "constitutionalization of criminal procedure" had begun.

III. THE OUTLINE OF THE REFORMED KOREAN CRIMINAL PROCEDURE AFTER DEMOCRATIZATION

Following the constitutional request in some degree, the CPC was revised in 1988 and 1995. Section III outlines and reviews the principles of the revised Korean criminal procedure.

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18. *Id.* at art. 12(5).
19. *Id.* at art. 12(6).
20. KOREAN CONST. [*heonbeop*], *supra* note 4, at art. 12(7).
21. *Id.* at art. 13(1).
22. *Id.* at art. 27(1).
23. *Id.* at art. 27(3).
24. *Id.* at art. 27(4).
25. *Id.* at art. 28.
26. In 1995, two retroactive laws were passed to overcome the statute of limitations which prevented the prosecution of them. The first is the Act on the Non-Applicability of the Statutory Limitations to Crimes Destructive of the Constitutional Order (*heuncheongchilseo pakoepeomchoe eui kongsosihyo e kwanhan teukrye peop*), Law No. 5028, Dec. 21, 1995. It excludes the application of the statutory limitations to crimes of insurrection, rebellion, and benefiting the enemy. The second is the Special Act on the May 18 Democratic Movement (*5.18 minchuhwa wundong deung e kwanhan teukboel peop*), Law No. 5029, Dec. 21, 1995. It allows prosecution of the leaders of the 1979 *coup* and the Kwangju massacre by the military junta in 1980. Although the constitutionality of the second Act was challenged in the Korean Constitutional Court, the Court ruled that the laws were constitutional since *lex praevia* pertains to punishability, not prosecution. In addition, the law was held to be in the public interest since it punishes anti-democratic criminal behavior and restore justice. *See* Decision of Feb. 16, 1996, 96 *heon ka* 2 (Korean Constitutional Court). The Seoul District Court sentenced Chun to death while Roh received 22-and-a-half year imprisonment. On appeal to the Seoul High Court, Chun's sentence was reduced to life imprisonment and Roh's prison sentence was reduced to 17 years. After the election of Kim Dae-Jung in 1997, President Kim Young-Sam pardoned Chun and Roh just before leaving office. *See* David Holley, *Jailed South Korean Ex-Presidents To Get Pardons, Politics: Kim Young Sam and His Elected Successor Agree to Release Chun Doo Hwan and Roh Tae Woo in Bid for "National Harmony,"* L. A. TIMES, December 20, 1997, at A10.

A. Investigation

1. The Investigative Authorities

The investigative authorities are composed of two bodies. First, police are a subsidiary organ of the prosecution, lacking independent powers of investigation. They conduct investigations under the direction and supervision of prosecutors.[27] Some minor offenses, which are punishable by fines of not more than 200,000 Won (currently equivalent to about U.S. $170) or detention for less than thirty days, may be brought by the chief of police before the court without a formal indictment.[28] The police have attempted to gain more autonomy, but have failed both because there exists deep-rooted public distrust of the police, and because prosecutors, who were reluctant to share investigative powers, strongly opposed the change.[29]

Second, prosecutors retain full authority for both investigation and prosecution in Korea,[30] under a "principle of monopoly" [Anklagemonopol]. They are also assumed to be semi-judicial agents [Justizbehörde] in Korea.[31] Although democratization after 1987 led to the weakening of the police and the intelligence agency's powers, the power of prosecutors has not been damaged under the Kim Young-Sam and Kim Dae-Jung governments.[32] This is probably because, like the authoritarian government, the two civilian governments were not free of the temptation to use the prosecution for their political purposes.

There has been criticism of the organizational principle of prosecutors after democratization. It is called the "principle of the uniformity of prosecutors" [Einheit und Unteilbarkeit der Staatsanwaltschaft], which guarantees uniformity and fairness of the investigative and prosecutorial authority. The problem occurs because according to the principle, "prosecutors shall obey the prosecutors in higher office in prosecutorial affairs."[33] In the cases involving powerful politicians or high-ranking government officials, prosecutors in charge had to unwillingly quit their investigation, often facing pressure or persuasion from prosecutors in higher office, and through the Supreme Prosecutor's Office, the ruling political party has

27. *See* CPC, *supra* note 6, at art. 196(1).

28. *See* Speedy Trial Procedure Act [*cheukkyeolsimpan cheolchabeop*], Law No. 4131, June 16, 1989, at arts. 14(2), (3) (according to Article 14 (1), the defendant is entitled to request a regular trial if the defendant is not satisfied with the judgment in the "Speedy Trial").

29. *See* JUKAN HANKUK [Korea Weekly], May 20, 1999 (No. 1777), *available at* http://www.hk.co.kr/whan/last/990520/w615215.htm (last visited Nov. 14, 2002).

30. *See* Prosecutors' Office Law [*keomchalcheongbop*], Law No. 3882, Dec. 31, 1986, *revised by* Law No. 5430, Dec. 13, 1997, at art. 4(1).

31. *See* Ahn, *supra* note 5, at 112 (describing the Korean system in which prosecutors share the same position as judges, and that the same rules apply to both prosecutors and judges in promotions, transfers and salary).

32. *See* In Sup Han, *A Dilemma of Public Prosecution of Political Corruption, in* RECENT TRANSFORMATION OF KOREAN SOCIETY AND LAW 369 (Yoon Dae-Kyu ed., Seoul National University Press, 2000).

33. *See* Prosecutors' Office Law, *supra* note 30, at art. 7(1).

kept a substantial influence on the prosecutors in charge of the cases.[34] Consequently, public distrust of the prosecution has increased.

Many academics and civic organizations such as "People's Solidarity for Participatory Democracy" (PSPD or *Chamyeoyeondae*)[35] have strongly requested to revise the principle, and the request was partly accepted by the Ministry of Justice. In 2001, the Ministry of Justice announced that the Prosecutor's Office Law would be revised to guarantee the protest right of prosecutors against an improper order of the prosecutor in higher office.[36]

2. Reshaped Judicial Warrant System for Custody

The CPC provides two types of warrant systems for the custody of persons. First, the 1995 amendment of the CPC has established a new "arrest warrant" system, which aims to abolish the illegal police practice of evading the "detention warrant" system. If there is "probable cause" to believe that a suspect has committed a crime and would not cooperate with the investigative authorities' request to come to the police station, the authorities can only arrest the suspect with a warrant issued by a judge.[37]

Three exceptions to the warrant requirement are: (i) emergency arrests exceptions,[38] (ii) flagrant offenders exceptions,[39] and (iii) semi-flagrant offenders exceptions.[40] These exceptions are legitimizing rules[41] which bring them into line with pre-existing police practice. If a suspect has been arrested without a warrant, a detention warrant should be filed within forty-eight hours or, if not, the suspect must be released immediately.[42]

Second, the CPC also provides the conventional "detention warrant" for both suspects and defendants, which has stricter requirements and longer periods of duration than an "arrest warrant." Upon the requests of prosecutors,[43] judges will issue a detention warrant if the suspect or the defendant has no domicile or if there

34. *See* In Sup Han, *supra* note 32, at 369.

35. *See generally,* http://www.pspd.org (stating that the PSPD, founded in 1994, has served as a watchdog against abuses of power and has led the movement towards prosecutorial reform in Korea).

36. *See* DONG-A ILBO [hereinafter "Dong-A Newspaper"], Oct. 13, 2001; HANKYOREH [hereinafter "Hankyoreh Newspaper"], Oct. 13, 2001.

37. *See* CPC, *supra* note 6, at art. 200-2(1) (providing that only the prosecutor may request the issuance of a warrant, police officers can submit the request for issuance of a detention warrant to the prosecutor, not directly to a judge).

38. *See* KOREAN CONST., *supra* note 4, at art. 12(3); CPC, *supra* note 6, at art. 200-3(1).

39. *See* KOREAN CONST., *supra* note 4, at art. 12(3); CPC, *supra* note 6, at art. 212.

40. *See* CPC, *supra* note 6, at art. 211(2), which covers:

> (i) persons being pursued as an offender with hue and cry; (ii) persons carrying criminally acquired goods, weapons, or other objects which apparently appear to have been used for the offense; (iii) persons who bearing on their bodies or clothing conspicuous traces of the offense; and (iv) persons who flee when challenged.

41. *See* ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE 21 (1994).

42. *See* CPC, *supra* note 6, at arts. 201(4),(5), 207(1),(2).

43. *See id.* at arts. 202, 203 (providing, as does the arrest system, that only the public prosecutor may request the issuance of a detention warrant).

is "probable cause" to believe that the suspect or defendant may destroy evidence or attempt to escape.[44]

A detained suspect must be released by the police if he/she is not transferred to the prosecutor within ten days.[45] At the end of the ten days of detention, the prosecutor may request another additional ten days to a judge before he/she must either prosecute or release the suspect.[46] In brief, including the forty-eight hours in case of the warrantless arrest, the investigative authorities have up to thirty-two days to detain a suspect before filing prosecution.[47]

3. Bolstered Rights to Silence and Counsel—Korean Version of *Miranda* and *Massiah*

The rights to silence and counsel have been strengthened. Upon arrest or detention, suspects and defendants are entitled to be informed of the right to remain silent and the right to counsel.[48] The Korean Supreme Court has bolstered these two rights since democratization. In 1992, the Court made a landmark decision, which is often called the Korean version of *Miranda*.[49] It held as follows:

> Article 200 (2) provides that prosecutors or policemen should inform a present suspect of the right to silence before interrogation. The right is based on the privilege against self-incrimination, which is guaranteed by the Constitution. Therefore, the statements elicited without informing of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, even if they are disclosed voluntarily.[50]

In two National Security Law violation cases in the 1990s,[51] the Court also

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44. *See* CPC, *supra* note 6, at arts. 70, 201(3).

45. *See id.* at art. 202.

46. *See id.* at arts. 202, 203, 205.

47. *See* National Security Law, No. 3318 (1980) (S. Korea) [hereinafter "NSL"]. Korea's National Security Law adds 20 days to the periods listed in the CPC. Article 19 of the NSL allows the judges to give permission of extension of the period to the police one more time, and to prosecutor two more times. Such extensions have been almost automatic in NSL cases, commonly leaving the suspects detained for a total of 50 days before prosecution begins. The Constitutional Court held Article 19 unconstitutional if it applies to the crimes of Articles 7 and 10 of the NSL. *See* Decision of Apr. 14, 1992, 90 *heon ma* 82, at 5 *Da* (Korean Constitution Court). *See generally* Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?*, 15 B. U. INT'L L. J. 125, 173 (1997) (asserting that, in Korea, criminal suspects are subject to a very lengthy pre-indictment detention and interrogation in contrast to other industrial countries).

48. *See* THE KOREAN CONST., *supra* note 4, at art. 12(5); CPC, *supra* note 6, at art. 200(2); Rules for Criminal Procedure [*hyeongsasosong kyuchik*], at art. 127.

49. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

50. *See* Decision of June 26, 1992, 92 *Do* 682 [Korean Supreme Court]. This case is popularly called the "20th Century Faction Case" because the defendant was a leader of a criminal organization called "20th Century Faction" [*yisip seki pa*].

51. *See* Decision of Aug. 24, 1990, 90 *Do* 1285 [Korean Supreme Court]. This case is popularly called the "Legislator Seo Kyeong-Weon Case"; Decision of Sept. 25, 1990, 90 *Do* 1586 [Korean Supreme Court]. This case is popularly called the "Artist Hong Seong-Dam Case".

made benchmark decisions, which may be called the Korean version of *Massiah*.[52] In these cases, the defendants requested to meet their attorney when they were detained but the National Security Agency officers rejected their request. Then the defendants were referred to and interrogated by the prosecutor. The Court held that the defendants' self-incriminating statements were illegally obtained for violating their right to counsel, and so excluded, holding as follows:

> Article 12(4) of the Constitution provides people with the right to assistance from counsel when arrested or detained, accordingly Articles 30 and 34 of the Criminal Procedure Code prescribe the right of suspects or defendants to appoint counsel and communicate with counsel when they are in custody. The right to counsel like this constitutes the nucleus of the constitutionally guaranteed right to assistance from counsel. . . . The limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be excluded, and the exclusion means a substantial and complete exclusion.[53]

The exclusionary rules of *Miranda* and *Massiah* are received in Korea from across the Pacific, although they are often criticized as truth-impairing and pro-criminal in their home country.[54] The reason may be that the Korean judiciary has faced problems that the Warren Court, not the Burger-Rehnquist Courts, did in the United States.

It would be a "legalistic notion"[55] to expect that these landmark decisions automatically lead to change of the police. Criminal justice is a social as well as a legal institution. The instrumental value in controlling the police has not been confirmed yet. It is certain, however, that the decisions cannot be explicitly rejected by the police, although they can be tacitly distorted. Now the police must adjust themselves to them in any way. Although they alone cannot enhance the guarantee of the individual's procedural rights, they provide legal grounds for individual suspects to challenge the police misconduct.

4. Newly Established "Substantial Review" and *Habeas Corpus* Systems

To remove the abuse of detention, the 1995 amendment of the CPC newly introduced the preliminary hearing system for issuing a detention warrant. Before

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52. *See generally* Massiah v. U.S., 377 U.S. 201 (1964).

53. *See* Decision of Sept. 25, 1990, *supra* note 51.

54. *See* OFF. OF LEGAL POL'Y, DEP'T OF JUSTICE, *'Truth in Criminal Justice' Series Office of Legal Policy: The Law of Pretrial Interrogation*, 22 U. MICH. J. L. REF. 437, 535-36, 618 (1989); Akhil Reed Amar, *Twenty-fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 GEO. L. J. 641, 644 (1996). *See generally* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995); JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993).

55. *See* David Dixon, *Common Sense, Legal Advice and the Right to Silence*, 1991 PUBLIC LAW 233, 253.

issuing a detention warrant, the judge, upon his/her own initiative, can schedule a hearing for a substantial review of the necessity of the detention of the suspect, arrested or not, in which the suspect must participate.[56] Before 1995, there was no hearing system. Rather, the judge issued the detention warrant after reviewing only the documents referred by the prosecutor.

Because of strong resistance from the investigative authorities, however, the new system was revised in 1997 to work only upon the request of the suspect or his/her lawyer.[57] The investigative authorities are required to inform the suspect or defense lawyer that the suspect is entitled to request the hearing.[58]

The CPC also provides *habeas corpus* for the arrested or detained suspect to review the legality and properness of the arrest or detention.[59] The 1997 amendment newly established the bail system for suspects who have requested *habeas corpus.*[60] Although it is limited because it is not available for suspects who have not requested *habeas corpus,* it is certainly an important advancement.

5. Search-and-Seizure and Inspection Warrant

The CPC requires a judicial warrant for search-and-seizure and inspection.[61] The exceptions to the warrant requirement are: search-and-seizure and inspection incident to arrest on warrant, emergency arrest, arrest of flagrant offenders, detention on warrant,[62] emergency search-and-seizure, and inspection on the spot of committed crimes.[63]

B. Prosecution

1. Discretionary Prosecution

At the conclusion of the investigation, the prosecutor has discretionary power whether or not to prosecute. It is called the "principle of opportunity" [Opportunitätsprinzip]. The prosecutor can exercise his/her discretionary power not to bring the case to court when he/she believes that the alleged facts do not constitute a crime or that there is insufficient evidence to prove the case. The prosecutor is also authorized to suspend prosecution in consideration of the suspect's age, character, motive of crime, or other circumstances, even if incriminating evidence against the suspect is sufficient for prosecution.[64] With

56. *See* CPC, *supra* note 6, at art. 201(3).

57. *See infra* text accompanying notes 98-102. *See also* CPC, *supra* note 6, at 201(4).

58. *See* CPC, *supra* note 6, at art. 201(2).

59. *See* THE KOREAN CONST., *supra* note 4, at art. 12(6); CPC, *supra* note 6, at arts. 201(1), 214.

60. *See* CPC, *supra* note 6, at arts. 201(4), 214.

61. *See id.* at art. 215.

62. *Id.* at art. 216(1), (2).

63. *Id.* at art. 216(3).

64. *Id.* at art. 247(1). Like the Japanese criminal justice system, the Korean system as a Continental system did not adopt the German principle of compulsory prosecution (*Legalitäsprinzip*).

neither a grand jury system nor private prosecution, the prosecutor has the exclusive authority to institute prosecution.

Because of the monopoly of investigative power and wide discretion in the prosecution, the Korean criminal justice system is often called a "prosecutorial justice" system. As noted above, Korean prosecutors have often been criticized for their reluctance to investigate corruption cases involving powerful politicians or high-ranking government officials, or for their politically biased investigation of the cases. For the last decade, the opposition party and civic organizations have argued for establishing independent counsel to investigate such cases.[65]

In particular, two cases in 1999 aggravated the criticism of the prosecution. The first was the case engaging the national security section of the prosecution attempting to induce a strike to suppress the labor union, inflicting significant damage on the idea of the neutrality of prosecution.[66] The second was the case involving an attempted lobby to the Prosecutor General' wife, provoking considerable doubt of the prosecutor's determination for investigation.[67] As a result, the U.S style "special prosecutor" system for investigation and prosecution of the cases was adopted.[68] In 2001, another case relating to an illegal lobby toward politicians and government officials[69] led to the legislation of another "special prosecutor" act.[70] It is another example that an American legal invention, which is not welcomed in its home country,[71] is implanted in Korea across the Pacific.

For more information regarding the German principle, see Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); John H. Leingbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 400-04 (1980). For more information regarding the discretionary prosecution in Japan, see Shigemitsu Dando, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L. 518 (1970); B. J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 LAW IN JAPAN 42 (1984); Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L. J. 16 (1986).

65. *See* Kuk Cho, *A Study on the Adoption of the Special Prosecutor System* [teukbyeolkeomsache doip e kwanhan ilko], 12 Criminal Law Review [hyeongsabyob yonku] 421, 422-25 (1999).

66. *See* Dong-A Newspaper, Jun. 8, 1999; Hankyoreh Newspaper, Jun. 8, 1999.

67. *See Calls for Special Prosecutor Intensify After Fruitless Hearing on 'Fur-gate,'* THE KOREA HERALD, Aug. 27, 1999.

68. *See*Act for Appointment of Special Prosecutors for the Investigation of the Strike Inducement Case and the Lobby to Prosecutor General's Wife Case [*hankukchopyegongsa payeip yudo sagein mit keomchalchongjang buin e daehan dotlobby sageon euhok sageon chinsang kyumyeong eul wihan teukbyeolkeomsa eui immyeong e kwanhan peopryul*] (Law No. 6031, Sept. 30, 1999).

69. *See Assembly Faces Dispute Over Lobbying Scandal*, THE KOREA HERALD, Oct. 4, 2001.

70. *See* Act for the Appointment of Special Prosecutors for the Investigation of the Mr. Lee Yong-Ho Gate [*hjusikhoesa GNG daepyoisa Lee Yong-Ho eui chukajojak hoengryeong sakeon mit ewa kwanryeon toen cheongkwankye lobby euihok sakeon teungeui chinsangkyumyeong eul wihan teukbyeolkeomsa eui immyeong teung e kwanhan peopryul*] (Law No. 6520, Nov. 26, 2001).

71. *See* Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting); Julie R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996); Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299 (1998); Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L. J. 2119 (1998).

Prosecutors robustly have opposed the "special prosecutor" system because the system allows exceptions for their monopolized authority of investigation and prosecution.[72] To restore the public trust, however, the Ministry of Justice recently announced it would establish the "Special Office of Investigation" for the corruption cases involving politicians or high-ranking government officials, which is located in the hierarchy of prosecutors, but not under the direct command of the Prosecutor General.[73]

2. Defendant's Right to Bail

Upon prosecution, the accused has the right to be released on bail.[74] A request for bail is permitted, except in a number of circumstances prescribed in article 95 of the CPC.[75] The court may also permit a release on bail of its own accord regardless of the exceptions in the CPC.[76]

C. Trial by Professional Judge[77]

Because the Korean criminal justice system adopts neither the U.S. jury system nor the German mixed judge system [Schöffengericht], a defendant is found guilty and given a sentence solely by a professional judge.[78] Although some academics argued for the adoption of the citizen's participation system in the court,[79] the Korean judiciary has been reluctant to adopt it.[80]

Cases which involve offenses punishable by capital punishment, life imprisonment, or an imprisonment for not less than one year, are tried by a three-judge court.[81] All other cases are heard by a single judge.[82] Trials are open to the public, except in those rare instances where national security, public morals, or the

72. *See generally,* O'Sullivan, *supra* note 73. *See also*, DiGenova, *supra* note 73.

73. *See* Dong-A Newspaper, *supra* note 31; Hankyoreh Newpaper, *supra* note 31.

74. *See* CPC, *supra* note 6, at art. 95. *See also infra* text accompanying notes 91-94.

75. *See* CPC, *supra* note 6, at art. 95.

76. *Id.* at art. 96.

77. *See id.* at arts. 448(1), 450, 453(1). The CPC provides for a "Summarized Trial" when the offense is punishable by a fine and the procedure begins upon the prosecutor's request. The judge may either give summary judgment without holding any hearing, or transfer the case for regular trial procedure. Either the prosecutor or the defendant can request a formal trial within 7 days from the date of receiving a summary judgment.

78. *See* THE KOREAN CONST., *supra* note 4, at art. 27(1).

79. *See* PARK HONG-KYU, DEMOCRATIZATION OF THE JUDICIARY: JUDGING THE TRIAL [*sabeop eui minjuhwa: chaepan eul chaepan handa*] (1994); PARK HONG-KYU, CITIZENS MUST JUDGE![*simin i chaepan eul*] (2000) (Professor Park Hong-kyu is a rigorous advocate for the system). In 2001, the Korean Criminology Association also held a symposium to check up the issue of the citizens' participation in the court. *See generally* 13 KOREAN J. CRIMINOLOGY [*hyeongsa cheongchaek*] 265-380 (2001).

80. *See* Ahn, *supra* note 5, at 115.

81. *See* Court Organization Law [*beopweonchojikbeop*] (Law No. 3992, Dec. 4, 1987), at art. 32(1).

82. *Id.* at art. 7(4).

privacy of individuals are at risk.[83]

A trial cannot proceed in the absence of defense counsel when the defendant has been charged with an offense punishable by the death penalty or a prison sentence of more than three years.[84] In addition to the above situations, the trial judge must also appoint defense counsel when the defendant is a minor, seventy years or older, suspected of mental illness, or when he/she is indigent.[85] The defendant has the right to remain silent during the trial,[86] and the judge should inform the defendant of that right.[87]

IV. RESTRICTION ON THE CONSTITUTIONAL REQUEST IN THE INFERIOR LAWS AND POLICE PRACTICES

This section examines the main provisions of the CPC, the Police Duty Act,[88] and police practices which disturb the change in the Constitution and overshadow constitutional procedural rights.

A. "Voluntary Accompaniment" under the Police Duty Law

In addition to the warrantless arrest exceptions in the Constitution and the CPC, Korean police have depended on a more convenient way to avoid the warrant requirement: "voluntary accompaniment" under the Police Duty Act.

The Act is the Korean version of the U.S. *Terry* stop system.[89] The police may stop and question a suspicious individual and request him or her to go voluntarily to a nearby police station, if there is probable cause to believe that the individual has committed or is about to commit a crime, or knows of committed crimes or crimes which are about to be committed.[90] Since the "voluntary accompaniment" is not officially a compulsory measure, the constitutional restrictions for warrants do not attach.

However the standard to decide the "probable cause" in the Police Duty Law is not clear.[91] In police practice, to use American terminology, it can be easily observed that the stop-and-question is made on "vague suspicion"[92] or "inchoate

83. *See* THE KOREAN CONST., *supra* note 4, at art. 109, Court Organization Law, *supra* note 81, at art. 57(1).

84. CPC, *supra* note 6, at arts. 282, 283.

85. *Id.* art. 33.

86. *Id.* art. 289.

87. *See* Rules for Criminal Procedure, *supra* note 48, at art. 127.

88. *See* Police Duty Act [*kyeongchalkwan chikmujiphaengbeop*], Law No. 3427, Apr. 13, 1981.

89. Terry v. Ohio, 392 U.S. 1 (1968).

90. Police Duty Act, *supra* note 88, at arts. 3(1) & (2).

91. Despite the identical terminology, it is generally accepted that the "probable cause" in the Police Duty Law is less strict than that of the arrest and detention system in the CPC. *See* LEE JAE-SANG, CRIMINAL PROCEDURE LAW [*hyeongsasosongbeop*] 182 (5th ed., 1998); BAE JONG-DAE & LEE SANG-DON, CRIMINAL PROCEDURE LAW [*hyeongsasosongbeop*] 191 (3rd ed., 1998).

92. *See* Brown v. Texas, 443 U.S. 47, 48 (1979); U.S. v. Sokolow, 490 U.S. 1, *passim* (1989).

and unparticularized suspicion or 'hunch',"[93] which *Terry* does not permit. In particular, the individual who is asked to voluntarily accompany the officer to the police station is not often given the "freedom to leave" [94] at any time. Thus, as a practical matter, the "voluntary accompaniment" in many cases is an illegal arrest.

B. Possible Abuse of Emergency Arrest

The Constitution and the CPC provide the emergency arrest exception for the warrant requirements.[95] The emergency arrest is a warrantless arrest, but the CPC requires that the detention warrant, not the arrest warrant, be filed within 48 hours.[96] Furthermore, the CPC does not provide a time limit for the judge to issue the warrant.

In the case of an emergency arrest, therefore, the warrantless arrest without any judicial control[97] is legitimatized for more than 48 hours. As a result, the police tend not to pursue the arrest on the warrant, but depend on the emergency arrest because it is free of any warrant requirement and gives them much time to interrogate the suspect without any judicial control.

C. Limitation of the Judicial "Substantial Review" for the Detention Warrant

The newly established "substantial review" for the detention warrant is a significant step for removing the abuse of detention. However, upon the 1997 amendment, a hearing is available only upon the request of the suspect or his/her lawyer.[98] In light of the Article 12(3) of the Constitution, which requires that judicial warrants be obtained in due process, the amendment is nevertheless retrogressive.

On the other hand, the 1997 amendment is against Article 9(3) of the International Covenant on Civil and Political Rights,[99] which the Korean government ratified in April 1990. The Article stipulates that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge."[100] The Covenant requires a mandatory and immediate preliminary hearing. The 1997 amendment also does not match with the hearing systems in contemporary democratic countries. For instance, in the United States, arrested suspects are entitled to a post-arrest probable cause hearing within forty-eight hours.[101] In

93. *See* Sokolow, 490 U.S. at 14.

94. *See* U.S. v. Mendenhall, 446 U.S. 544-45, 554, 560 (1980).

95. THE KOREAN CONST., *supra* note 4, at art. 12(3); CPC, *supra* note 6, at art. 200-3(1).

96. CPC, *supra* note 6, at arts. 200-2(5), 200-4(2).

97. *Id.* at art. 200-3(2) (suggesting that the police should get the prosecutor's approval after, not before, the emergency arrest).

98. *See* CPC, *supra* note 6, at art. 201-2(1).

99. *See generally* G. A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). The Korean government made a reservation of Articles 14-5, 14-7, 22.

100. *Id.*

101. *See* Gernstein v. Pugh, 420 U.S. 103 (1975); County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

Germany, arrested suspects must be released or brought before a magistrate by the end of the day following the arrest.[102]

D. "Arrest on Separate Crimes": Police Tactic to Extend Detention

Besides voluntary accompaniment, Korean investigative authorities have contrived a hidden trick to extend the detention of the arrestee: "arrest on separate crimes," which literally means arrest for a separate incident.[103] It is a technique in which the police extend the period of detention for their initial investigation of a serious crime by first obtaining an arrest warrant for relatively minor crimes. During the period of interrogation given by the arrest warrant on the minor crimes, the police continue interrogating the suspect regarding the initially pursued crime.

In brief, "arrest on separate crimes" is an illegal device for obtaining custody of a suspect and eliciting the desired confession when there is insufficient evidence for arrest on the crime in chief and a means of circumventing the warrant requirement.[104]

E. Limited Release on Bail

The current bail system is very limited. First, only suspects who have requested *habeas corpus* are eligible for bail.[105] As a result, a suspect who has not requested *habeas corpus* may be detained by the police for up to ten days,[106] which is too long when compared to other democratic countries. However, the basic purpose of bail is different from that of *habeas corpus*. The former, based on the legal and proper warrant, is for operating reasonably the detention system and giving the suspect the full chance to prepare for a trial. The latter is for judicial control of illegal or improper detention.[107] Thus there cannot be found any reason why the bail system is limited to the suspects who have requested *habeas corpus*.

Second, the defendant's right to bail is substantially circumscribed by a number of potential exceptions. The exceptions are as follows: (i) the defendant has committed a crime punishable by capital punishment, life imprisonment or an imprisonment for more than ten years; (ii) the defendant is a habitual or chronic offender; (iii) there are sufficient grounds to believe that the defendant may destroy evidence; (iv) there are sufficient grounds to believe that the defendant may attempt to escape; (v) the defendant's domicile is not clear; or (vi) there are sufficient grounds to believe that the defendant may inflict harm on the life, body and property of the victim, possible witness or their relatives.[108] Because of the wide range of exceptions, the right to bail has become fragile.

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102. *See* The German Criminal Procedure Code [StPO] [hereinafter GCPC] art. 128(1).

103. *See* LEE, *supra* note 91, at 238; BAE JONG-DAE & LEE SANG-DON, *supra* note 91, at 230; SHIN DONG-WOON, CRIMINAL PROCEDURE LAW I [*hyeongsasosongbeop*] 184 (2nd ed., 1997).

104. *Id.*

105. *See* CPC, *supra* note 6, at art. 214-2(4).

106. *Id.* at art. 202.

107. *See* LEE, *supra* note 91, at 257; SHIN DONG-WOON, *supra* note 103, at 220-21.

108. CPC, *supra* note 6, at art. 95.

F. Insufficient Guarantee of the Right to Counsel

First, like other Continental criminal justice systems,[109] the Korean criminal justice system is not equipped with the public defender system. The Constitution provides a state-appointed counsel only for the criminally accused persons after the institution of prosecution.[110] Suspects before the institution of prosecution, who are financially poor or otherwise unable to retain counsel, are not entitled to the right to counsel at public expense.

Second, according to the investigative practice, the counsel retained by suspects once formally arrested is not permitted to attend interrogation sessions although the right to counsel provision in either the Constitution or the CPC does not provide any implication to prohibit the counsel's participation. This is a striking contrast to *Miranda*, which made it clear that the suspect has a right to have present an attorney during the police interrogation.[111] As a result, the suspect, even if he/she gets an attorney, is cast without any professional aids in the critical stage of criminal procedure.

In a recent announcement in 2001, the Ministry of Justice expressed their scheme for providing state-appointed counsel for indigent suspects before the institution of prosecution and for the counsel's participation in police interrogation with some exceptions in 2002.[112] If the scheme is accomplished, *Miranda* would materialize in Korea in a full version.

V. THE KOREAN SUPREME COURT'S RELUCTANCE TO EXCLUDE THE TAINTED CONFESSION AND PHYSICAL EVIDENCE

A. Confession

The Constitution and the CPC provide explicit legal provisions regarding the exclusion of an involuntary confession. Article 12(7) of the Constitution provides for the exclusion of involuntary confessions made under torture, battery, threat, deceit or after prolonged custody.[113] Following Article 12(7), the CPC also

109. *See* GCPC, *supra* note 87, at § 141(1). *See also* KLEINKNECHT/MEYER-GOBER, STRAFPROZESSORDNUNG § 163, no. 16. (43 ed., 1997); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solution?*, 18 B.C. INT'L & COMP. L. REV. 317, 334 (1995).

110. *See* THE KOREAN CONST., *supra* note 4, at art. 12(4).

111. *See Miranda*, 384 U.S. at 444-45.

112. *See* Dong-A Newspaper, Nov. 1, 2001; *Hankyoreh Newpaper*, Nov. 1, 2001.

113. *See* THE KOREAN CONST., *supra* note 4, at art. 12(7).

provides an exclusionary rule for confessions whose voluntariness is doubtful.[114]

In 1994, the Korean National Congress also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15 of which provides "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."[115]

Relying on these provisions, the Korean Supreme Court has excluded involuntary confessions in a number of cases.[116] After democratization, as reviewed above, self-incriminating statements elicited without informing of the right to silence or while violating the right to counsel have also been excluded as illegally obtained confession by the Court as well.[117] Barbaric torture in interrogation seemed to disappear after democratization, and Lee Geun-Ahn, who was a notorious torture specialist, known for cruelly torturing Kim Geun-Tae and other democratization movement activists under the authoritarian regime, was sentenced to a seven-year imprisonment in 2000.[118] However, illegal methods of interrogation, including all-night sleepless interrogation, still exist.[119]

The Korean Supreme Court often does not listen to the defendant's statement of being mistreated by the police unless bodily injury has been proven or witnesses have testified.[120] The Court does not regard the surroundings of police interrogation as inherently coercive, holding that "[s]uch circumstances which make statement involuntary are specially exceptional, so we should understand that the voluntariness of the statement is presumed."[121]

Consequently, the defendant, in a practical sense, is often required to satisfy the burden of proof to prove the existence of illegal police conduct. It is a positive advancement that the Court recently imposed upon prosecutors the burden of proof when the voluntariness of confession is in dispute.[122] On the other hand, illegal

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114. *See* CPC, *supra* note 6, at art. 309.

115. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at art. 15.

116. *See, e.g.*, Decision of Apr. 26, 1977, 77 *Do* 210 (Korean Supreme Court); Decision of Jan. 31, 1978, 77 *Do* 463 (Korean Supreme Court); Decision of July 28, 1981, 80 *Do* 2688 (Korean Supreme Court); Decision of Oct. 13, 1981, 81 *Do* 2160 (Korean Supreme Court); Decision of June 8, 1982, 82 *Do* 850 (Korean Supreme Court); Decision of Mar.13, 1984, 84 *Do* 36 (Korean Supreme Court); Decision of May 9, 1984, 83 *Do* 2782 (Korean Supreme Court); Decision of Feb. 26, 1985, 82 *Do* 4213 (Korean Supreme Court); Decision of Jan. 31, 1989, 88 *Do* 680 (Korean Supreme Court); Decision of Feb. 26, 1985, 82 *Do* 2413 (Korean Supreme Court); Decision of Mar. 10, 1992, 91 *Do* 1 (Korean Supreme Court); Decision of Nov. 24, 1992, 92 *Do* 2409 (Korean Supreme Court); Decision of Sep. 28, 1993, 93 *Do* 1843 (Korean Supreme Court); Decision of Jun. 27, 1997, 95 *Do* 1964 (Korean Supreme Court).

117. *See supra* text accompanying notes 37-42.

118. *See* Dong-A Newspaper, Sep. 27, 2000; Hankyoreh Newspaper, Sep. 27, 2000.

119. *See* LEE, *supra* note 91, at 486; BAE & LEE, *supra* note 103, at 528.

120. *See* PARK SANG-KI & TAK HWEE-SUNG, A STUDY ON CONFESSION RULES 200-01 [*jabaek eui emeuseong kwa cheungkeoneongryeok e kwanhan yonku*] (1997).

121. Decision of Mar. 8, 1983, 82 *Do* 3248 (Korean Supreme Court); Decision of June 26, 1984, 84 Do 748 (Korean Supreme Court).

122. *See* Decision of Apr. 10, 1998, 97 *Do* 3234 (Korean Supreme Court); Decision of Jan. 21,

police conduct itself does not lead to the exclusion of the confession. The Court does not always exclude the tainted confession even if illegal police conduct was found, but rather requires that the illegal conduct be a direct cause of the confession.[123] Accordingly, the deterrent effect of Article 12 (7) of the Constitution and the Article 309 of CPC is significantly diminished.

B. Physical Evidence

The Korean Supreme Court has consistently declined to exclude the physical evidence obtained by illegal search-and-seizure, and has provided the following rationale, "[e]ven though the procedure of seizure was illegal, the value as evidence does not change because the procedure did not affect the quality and shape of the substance itself."[124]

The Court clearly rejected the U.S. Fourth Amendment *Mapp* exclusionary rule.[125] Unless the illegally-obtained evidence is excluded, the constitutional requirement for the search-and-seizure warrant is left without strong teeth. There are no other effective remedies for illegal police misconduct in Korea. Criminal or civil liability and internal discipline have not shown promise to deter the police misconduct in Korea, like in the United States.[126]

Neither the Constitution nor the CPC has a provision regarding the exclusion of illegally obtained physical evidence. However it is necessary to note that, despite the same lack of a provision for an exclusionary rule, the Japanese Supreme Court made a "legislative" decision in *Japan v. Hashimoto* in 1978,[127] accepting the deterrence rationale of the *Mapp*. Without an exclusionary rule, the constitutional requirement for the search-and-seizure warrant would remain virtually unenforced because the Constitution and the CPC lack any means to restrain unreasonable search-and-seizure by government officials.[128] Considering this situation, the Korean Legislature should add a provision of the exclusionary

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2000, 99 *Do* 4940 (Korean Supreme Court)

123. *See* Decision of Nov. 27, 1984, 84 *Do* 2252 (Korean Supreme Court); Decision of Feb. 8, 1985, 84 *Do* 2630 (Korean Supreme Court).

124. *See* Decision of Sept. 17, 1968, 68 *Do* 932 (Korean Supreme Court); Decision of June 23, 1987, 87 *Do* 705 (Korean Supreme Court); Decision of Feb. 8, 1994, 93 *Do* 3318 (Korean Supreme Court).

125. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

126. *See* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970); Hans W. Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of A Classical Mismatch*, 51 TEXAS L. REV. 1325, 1349 (1973); Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980).

127. *See* Decision of Sept. 7, 1978, Saikosai (Japanese Supreme Court), 32 Keishu 1672. This case is called the "Osaka Tenno Temple Drug Seizure Case." Its English translation is available in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 427-34 (1996). For more information regarding the Japanese criminal justice system, *see* Kuk Cho, *Japanese "Prosecutorial Justice" and Its Limited Exclusionary Rule*, 12 COLUM. J. ASIAN L. (1998).

128. *See* LEE, *supra* note 91, at 493; SHIN DONG-WOON, *supra* note 103, at 153; BAE & LEE, *supra* note 91, at 507.

rule in the CPC like the U.K. Parliament,[129] or the Korean Supreme Court should take *Mapp* more seriously like the Japanese Supreme Court.

In this context, it is worthwhile to pay attention to the newly legislated "Communication Secrecy Protection Act,"[130] which explicitly provides for the exclusion of illegally obtained mails and electronic communications.[131]

VI. CONCLUSION

The 1987 Constitution has provided a new perspective for the constitutionalization of criminal procedure. The institutional reform of criminal procedure and the progressive decisions of the Court may be called the Korean "criminal procedure revolution."[132] However the domination of the crime control value under the authoritarian regime was not easily overturned. Although the 1988 and 1995 amendments of the CPC have provided the new system with procedural rights for criminal suspects and defendants, they do not represent the one-sided victory of the due process value over the crime control value, but a compromise between the two values. Particularly with regard to pre-indictment detention and interrogation, the imbalance between the rights of individuals and the power of the law enforcement authorities is institutionalized in favor of the latter. The provisions made based on the due process are also curbed by the conventional police practice.

The "criminal procedure revolution" has been launched, but it is undoubtedly not finished in Korea. To advance the "revolution," the rights of criminal suspects and defendants should be taken more seriously in Korean society, and the legislative and judicial endeavors to control the overgrown power of the investigative authorities should be reinforced.

129. *See* PACE at § 78(1) (providing that "the court may refuse to allow evidence ... if it appears to the court that ... the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.") The exclusionary rule of section 78(1) is called the "unfairness test." *See* Kuk Cho, *Reconstruction of English Criminal Justice and Its Revigorated Exclusionary Rules*, 21 LOYOLA L.A. INT'L & COMP. L. REV. 259 (1999).

130. *See* The Communication Secrecy Protection Act [*tongshinbimil bohobeop*], Law No. 4650, Dec. 27, 1993.

131. *See id.* at art. 4.

132. *See* Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 16-18 (1988) (stating that there were three themes in the U.S. "criminal procedure revolution" led by the Warren Court: (i) pursuit of equality, which is the effort to stamp out not only racial discrimination but also to insure fair treatment for rich and poor alike, (ii) concern with the dangers of unchecked executive power and reinforcement of adversarial procedure and (iii) a preoccupation with practical implementation beyond declaring new rights).

CORPORATE GROUPS AND STRATEGIC ALLIANCES:

NEW REFORM INSTRUMENTS TO THE CHINESE

YUWA WEI*

INTRODUCTION

The advent of corporate groups is the result of corporate development.[1] A corporation can become a shareholder of other corporations by purchasing their shares.[2] By the holding and cross-holding of shares,[3] a number of companies connected together may form a corporate group.[4] The controllers of the group "may plan, instigate and co-ordinate its managerial, operational and financial activities on a group basis, while implementing [these activities] through individual group companies."[5] In doing so, the corporation can enjoy the advantages of maximizing financial returns, limiting commercial risks and expanding markets. However, the practice adds new complexities to the already complicated corporate system, which stems from the fact that the fundamental norms and legal framework of the corporation had been built up prior to the emergence of corporate groups in the early-industrialized countries. As a result, the use of corporate groups inevitably brings certain contradictions and challenges to the well-established corporate notions and practice.[6]

Today, most companies of the corporate world belong to different corporate groups in one way or another.[7] Efforts have been made by different legal systems in favor of developing an effective legal framework to deal with the problems presented by corporate groups. Basically, two strategies have been predominant. The first is to create or build a separate legal regime to regulate the operation of corporate groups.[8] German corporate law falls into this class.[9] The second

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1. *See* ROBERT I. TRICKER, INTERNATIONAL CORPORATE GOVERNANCE: TEXT, READINGS AND CASES 326 (1994).

2. *Id.*

3. *Id.* at 327.

4. *Id.* at 326.

5. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), CORPORATE GROUPS DISCUSSION PAPER 1.3 (1998).

6. *See* Cashel, *Groups of Companies – Some US Aspects*, *in* GROUPS OF COMPANIES 20-23 (Clive M Schmitthoff & Frank Wooldridge ed. 1991).

7. *See* Tunc, *The Fiduciary Duties of a Dominant Shareholder*, *in* GROUPS OF COMPANIES 1 (Clive M Schmitthoff & Frank Wooldridge ed. 1991).

8. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.43-1.48. *See generally* D.D. Prentice, *Groups of Companies: The English Experience*, *in* GROUPS OF COMPANIES IN EUROPEAN LAWS 36 (Klaus J. Hopt ed. 1982).

involves conditionally abandoning traditional principles of corporate law and applying specially designed legal structures for corporate groups, upon the occurrence of certain events. This principle is generally applied by Anglo-American systems.[10]

Since the 1970s, the People's Republic of China has undertaken a great deal of effort to establish a network for enterprise cooperation for the purpose of enhancing the competitive ability of its enterprises.[11] Various trials were carried out, including setting up various enterprise alliances (*lian ying*), enterprise groups (*qi yie ji tuan*) and corporate groups (*ji tuan gong si*).[12] China's 1994 *Company Law*[13] only addresses the terminology of parent companies and subsidiaries, but has no further provisions specific to corporate groups.[14] The 1986 *Civil Code*[15] does not contain a definition of corporate group, but only defines an enterprise alliance as 'a joint operation between enterprises or an enterprise and an institution.'[16] Such a joint operation may result in the establishment of a new legal entity or a partnership, or may be simply based on a cooperative contract.[17] With the development of corporate practice, the patchy provisions relating to enterprise alliances in the 1986 *Civil Code* become less and less relevant. China urgently needs to develop an effective legal framework to guide the practice of corporate groups, because more and more state-owned enterprises are being "corporatized" and most newly established firms take the form of a company.

This article will first examine the theoretical challenges and difficulties brought by corporate groups. Part II of this article will introduce the development of corporate groups and other forms of business alliances in China. Finally, Part III will discuss how the problem of corporate groups has been tackled by other jurisdictions so as to provide some wisdom and inspirations for the Chinese government's legislative and practical efforts in this arena.

I. THE THEORETICAL ISSUES CONCERNING CORPORATE GROUPS

A. The Abuse of Separate Personality and Limited Liability

Separate personality and limited liability form the basis for the modern corporation.[18] The vitality and attraction of the corporate structure rest on its predictability to investors.[19] It makes it possible for investors to evaluate their

9. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.49.

10. *See id.* at 1.27-1.31.

11. *See* YIPENG LIU ET AL., COMPLETE WORKS ON THE COMPANY LAW OF THE PEOPLE'S REPUBLIC OF CHINA FOR PRACTICE 18 (1994) [hereinafter "COMPETE WORKS"].

12. *See id.*

13. *See* Company Law of the People's Republic of China (1994) [hereinafter "Company Law"].

14. *See id.* at arts. 12 & 13 (1994).

15. *See* General Principles of Civil Law (1986).

16. *See id.* at arts. 51, 52 & 53 (1986).

17. *Id.*

18. *See* L.B.C. GOWER, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 88 (1992).

19. *See generally* C.A. COOKE, CORPORATION TRUST AND COMPANY 39-50 (1950).

business risks and liabilities.[20] These qualities were foreseen by those founding fathers of modern corporate law. In designing corporate laws, they had the clear view of designing a business form that would protect individual investors through preventing their investment from triggering unlimited personal liability. As the holding of shares of other companies was generally forbidden by laws at that time, the doctrines of separate personality and limited liability were, for a time, thought to be sufficient.[21] However, problems arose when limited liability was needed to extend to holding companies.[22] This then introduced limited liability within limited liabilities.[23]

Portfolio investment by corporations was generally permitted by the end of nineteenth century, as a means of pooling resources and sharing profits.[24] The conventional concepts of separate personality and limited liability began to apply to holding companies and started to experience crises.[25] Since the purpose of the existence of groups of companies is to achieve an optimal performance of the group as a whole,[26] this goal sometimes necessitates the sacrifice of an individual company's benefits in order to maximize the gains of the whole group.

For example, to implement a strategy that is good for the group, a parent company may instruct a particular subsidiary to sell raw materials to another subsidiary at a low price and to buy the products manufactured by the first company at a high price. In doing so, the group makes gains at the expense of the interests of outside shareholders and creditors of that particular subsidiary. In such cases, business is fragmented among the component companies of the group, and limited liability and separate personality are used to "protect each fragment of the business from liability for the obligations of all the other fragments".[27] Hence, it becomes evident that the traditional doctrines of corporate separate personality and limited liability are no longer adequate in dealing with corporate groups.

In relation to corporate governance, corporate groups pose the question of how the directors of the companies of the same group direct their loyalties. How do they comprehend and judge the concept of "for the best interests of the company" when they make their business decisions, especially in a situation where there is a conflict of interest between the group as a whole and the individual companies to which they owe their duty of loyalty? With the increasing

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20. *See* Cashel, *supra* 6, at 24.

21. The power to purchase other companies' shares, without specific authorization to do so, was firmly forbidden by the common law at the early stage of corporate history. *See* PHILLIP I BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 56, 61 (1987). *See also* Great Eastern Ry. v. Turner, 8 L.R. Ch. App. 149, 151-152 (1872); In re William Thomas & Co. v. Sully, 1 Ch. 325, 329-330 (1915).

22. *See* Cashel, *supra* note 6, at 24.

23. *See* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 58-59 (1993).

24. *See* BLUMBERG, *supra* note 23, at xl.

25. *See generally id*, at 3-61.

26. *See* GOWER, *supra* 18, at 334.

27. *See* BLUMBERG, *supra* note 23, at 59.

domination of corporate groups in the world and the national economies, every corporate system has to give adequate attention to the issues posed by corporate groups, such as remedial mechanisms for outside shareholders (e.g., non-group members) and duties of controlling companies.

B. The Strategies of Regulating Corporate Groups

In the conventional sense, corporate groups disturb the balance of power between management and the companies concerned. As a result, the fate of the subsidiary companies is decided by someone other than their direct management and board of directors. This is a problem that every corporate system has to face. Different strategies have developed. While some systems regulate a corporate group as a single entity, others adopt the approach of conditionally disregarding the separate personality of individual companies of the group. While some systems allow greater freedom to the controlling companies, others may have stricter rules relating to the exercise of power by parent companies.[28] The best example of this could be the divergence between German law and the common law.

Germany was the first country to have a separate legal regime, here in the form of the *Aktiengesetz*, as a way of regulating groups of companies.[29] The law stipulates strict rules of disclosure.[30] It defines the situations of contractual group relations, *de facto* group relations and integrated group relations.[31] Once a company falls into the category of group companies, it is regulated by a different and self-inclusive set of rules in terms of liabilities and corporate governance.[32] The rules clarify the responsibility of holding company managers to the subsidiaries, and the liability of a holding company to the debts of the subsidiaries.[33] While a parent company enjoys the freedom of directing its subsidiaries, it has to fully indemnify the subsidiaries' losses caused by its decisions within the next accounting period.[34] In other words, the German law treats a corporate group as a single entity. Hence, it is a logical conclusion that this entity exists to pursue the interests of the group as a whole. Later, German courts also developed a body of leading cases, which has further enhanced the potential of the German law in relation to the regulation of corporate groups.[35]

In common law jurisdictions, groups of companies are gradually brought under effective control by extensively introducing statutory rules concerning

28. *See* Eddy Wymeersch, *A Status Report on Corporate Governance Rules and Practices in Some Continental European States*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 1066-1067 (Klaus J. Hopt et al. eds. 1998).

29. The separate legal regime, Aktiengesetz, was produced in 1965.

30. *See* Aktiengesetz at §§ 20-21, *available at* http://www.aktiengesetz.de.

31. *See* BLUMBERG, *supra* note 23, at 161.

32. *See id.*

33. *See* Aktiengesetz, *supra* note 29, at sec. 309, 317 & 322.

34. *See* Wymeersch, *supra* note 28, at 1066.

35. *See* Hopt, *Legal Elements and Policy Decisions in Regulating Groups of Companies*, in GROUPS OF COMPANIES 84 (Clive M Schmitthoff & Frank Wooldridge ed. 1991

corporate groups.[36] In the early stages, traditional law, based on the doctrine of separate personality and limited liability, was unable to deal effectively with corporate groups.[37] As a result, equity jurisprudence developed the concept of "piercing the corporate veil". "Piercing the corporate veil" refers to the situation where courts disregard the principle of separate personality by treating companies within a group as a single entity.[38] However, the remedy was still inadequate, as it was only available in "rare" and "exceptional" situations.[39] The situation did not improve until a sophisticated doctrine of "control" was generally adopted by the common law jurisdictions.[40] The United States has taken the lead in this process. The concept of "control" typically refers to situations where a company has the power to direct or command the direction of management or policies of another company. It is used to determine the demarcation of selective abandonment of the traditional principle of corporate personality, and the demarcation of selective application of enterprise principles, a system of rules specially designed for regulating corporate groups. Once a company satisfies certain conditions, it is assumed to have control over another company.[41] Thus, the relationship between the companies should be regulated by the enterprise principles.[42] Enterprise principles impose "legal obligations upon [the] parent corporation or other affiliated corporations of the group for acts of a subsidiary participating in the collective conduct of a common integrated enterprise."[43] When enterprise principles apply, the corporate group is treated as a single entity.

The difference between the German approach and the Anglo-American approach lies in the fact that the Anglo-American model persists in the separate entity approach. In this system, "each company in a corporate group is a separate legal entity with its own rights and duties."[44] Therefore, parent companies do not

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36. *See generally* Prentice, *supra* note 8, at 99-129.

37. *See* Phillip I. Blumberg, *National Law and Transnational Groups and Transactions: Survey of the American Experience*, 5 AUSTL. J. CORP. L. 295, 297 (1995).

38. *See* Prentice, *supra* note 8, at 101.

39. *See* Blumberg, *supra* note 37, at 298.

40. *See* BLUMERG, *supra* note 233, at 153-61.

41. "Control" is universally used to determine group relationship. However, different systems have different interpretations regarding its content. For example, in the USA, "control" means "the power, directly or indirectly, to exercise a controlling influence over the management and policies of a company." It can be exerted either by the ownership of voting securities, or one or more intermediary persons, or by contract, etc. A person who, alone or jointly with others, owns or has the power to vote more than twenty-five percent of the outstanding voting securities of a company is presumed to have the control over that company. *See* 15 U.S.C. § 80a-2(a)(9)(2001). In the UK, a company is assumed to have control or influence over another company, if it is a member and controls the composition of the latter's cord of directors, or if it controls half the nominal value of the latter's voting share capital. *See* Prentice, *supra* note 8, at 99.

42. *See* PHILLIP I. BLUMERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 24-25 (1983).

43. *See* Blumberg, *supra* note 377, at 296. For a comprehensive overview of the areas of American law in which enterprise principles have superseded traditional entity concepts of corporate law, *see generally* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996).

44. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.28.

automatically become parties to contracts entered into by subsidiaries with external parties, nor do they become automatically liable for the debts of the subsidiaries.[45] Directors owe their primary duties to their individual companies and they should make business decisions for the good of their own companies.[46] Directors can take the group's welfare into consideration only if there is no conflict of interest, and may be liable if they make a decision that benefits the group as a whole but detriments their own individual companies. This doctrine has been firmly accepted by the courts of Anglo-American jurisdictions. For instance, in the English case *Charterbridge Corp., Ltd. v. Lloyds Bank*,[47] Justice Pennycuick rejected the view that the directors in a subsidiary could have acted with a view to the benefit of the group as a whole, without giving separate consideration to the interests of their own company. His Lordship said, "[e]ach company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors."[48] In the Australian case *Equiticorp Fin. Ltd. (in liq) v. Bank of New Zealand*,[49] Justices Clarke and Cripps took an even stricter view in relation to breach of directors' duties, stating that "[a] preferable view may be that where the directors have failed to consider the interests of the relevant company they should be found to have committed a breach of duty. If, however, the transaction was objectively viewed in the interests of the company, then no consequences would flow from the breach."[50]

Single enterprise principles apply where there is the possibility of victimizing creditors and minority shareholders. The general view is that single enterprise principles supersede separate entity principles upon the occurrence of certain events stipulated in a jurisdiction's corporate legal regime. Comparatively, the single entity model of Germany is generally perceived as advantageous in coping with the problems of corporate groups.[51] One certainty is that this approach is definitely closer to economic reality,[52] and the adoption of this model is beneficial in terms of reducing practical and theoretical complexities associated with providing an appropriate legal system to govern corporate groups.

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45. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.28.

46. A clear example can be found in the UK company law and Australian company law. The UK has developed the principle in its case law that directors of each company should, in deciding what transactions their company should enter into, consider the interests of that company rather than the interests of the group as a whole. The leading case is *Charterbridge Corp., Ltd. v. Lloyds Bank* [1969] 2 All E.R. 1185. *Charterbridge Corp.* is applied by Australian courts. In their leading case, *Walker v. Wimborne* (1976) 137 CLR 1, Mason, J. insisted that in the group context, it is a fundamental principle that directors must consider the interests of the separate entity and further, they must consider its interest alone.

47. *See* Charterbridge Corp., Ltd. v. Lloyds Bank [1969] 2 All E.R. 1185.

48. *See* Charterbridge, *supra* note 477, at 1193.

49. *See* Equiticorp Fin. Ltd. (in liq) v. Bank of New Zealand (1993) 11 A.C.S.R. 642.

50. *See* Equiticorp Fin. Ltd., *supra* note 49, at 1019.

51. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.44 – 1.48. *See also* ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 82-83 (1976).

52. *See* COMPANIES & SECURITIES ADVISORY COMMITTEE (AUSTRALIA), *supra* note 5, at 1.44.

II. THE ISSUES OF CORPORATE GROUPS IN THE CHINESE CONTEXT

A. The Historical Development of Corporate Groups in China

The Chinese leadership has long had the intention of establishing an efficient business network in China in order to foster economies of scale and to improve firm performance.[53] However, the aspiration of establishing enterprise groups was constantly frustrated by political and other reasons. As early as in 1948, Liu Shaoqi, the first vice-president of the PRC, made the suggestion of establishing a corporate system that nurtured enterprise alliances in China.[54] When Liu Shaoqi and Deng Xiaoping were in charge of economic development in the early 1960s, they frequently made a point of learning from the experience of establishing trusts and economic monopoly in developed countries so as to enhance the productive capacity of the state-owned enterprises.[55] In 1964, the first twelve trusts were put in trial use.[56] Some trusts were made up of enterprises making the same products for the purpose of unification of management. Some trusts comprised enterprises of main products and by-products for the purpose of comprehensive utilization of resources. As China strictly held the economic doctrines of the planned economy at that time, a trust was defined as an economic organization of socialist public ownership with a central management.[57] In other words, a trust was an economic unit with independent accounts that carried out business activities under state plans.[58] The historical situation determined that these trusts were established as a result of the state's administrative arrangement, rather than voluntary coalitions among enterprises.[59] Although the goal of establishing the trust system was to increase managerial efficiency, it was questionable whether it could significantly reduce administrative intervention at a time when state plans penetrated every aspect of economic activities.[60] Before the trial was completed, the Cultural Revolution began, which put the practice of trusts to an end.[61]

Since the economic reforms in 1970s, enterprises were given a certain degree of autonomy.[62] As the enterprises were allowed to retain part of the profits they generated, it became possible for the enterprises to freely form their business alliances. As a result, various forms of enterprise alliances appeared.[63] The Chinese government believed that the development of these enterprise alliances

53. *See* JIANMIN DOU, RESEARCH ON THE CORPORATE IDEOLOGY IN CHINA 96 (1999).

54. *See* LIU SHAOQI, THE SELECTIVE WORKS OF LIU SHAOQI 429 (1981).

55. *See* DOU, *supra* note 53, at 96-97.

56. *See id.* at 98.

57. *See* STATE ECONOMIC COUNCIL, *Report on Establishing Trusts in Industry and Transportation Sectors* 1964, *in* THE COLLECTION OF INDUSTRIAL AND ECONOMIC LAWS AND REGULATIONS OF THE P.R.C. 1949-1981 (1981).

58. *See id.*

59. *See* PING JIANG & XUDONG ZHAO, THE SYSTEM OF LEGAL PERSON 364-365.

60. *See* DOU, *supra* note 53, at 99.

61. *See id.* at 100.

62. *See* Jiang & Zhao, *supra* note 59, at 365.

63. *See id.*

served the purpose of its economic reforms, and thus provided legal and policy support for the exercise.[64] At a time when the planned economy was still playing the dominant role and the market economy only played a supplementary role,[65] this type of free combination among enterprises was helpful in relation to improving the situation of self-isolation in different areas and different sectors caused by the planned economic structure. Because of a lack of legal definitions, all kinds of alliances were generally called horizontal economic alliance (*lian ying* or *heng xiang jing ji lian he*), in contrast with the vertical relationship between administrative departments and their controlled enterprises in traditional enterprise system.[66]

Later, the 1986 *Civil Code*[67] classified different types of economic alliances.[68] According to the *Civil Code*, there were three types of economic alliances: first, economic alliances that create a new legal entity (legal entity alliance); second, economic alliances that do not create a new legal entity (partnership alliance); and third, economic alliances based on a contract (contractual alliance).[69] Strictly speaking, the three economic alliances described were, in fact, not corporate groups, but special types of business cooperations that were a joint product of China's planned economy and the economic reforms being undertaken. Apart from some provisions in the *Civil Code*, there were also few legal documents regulating these economic alliances.[70] Since these provisions and regulations attempted to use uniformed rules to regulate different types of economic alliances, they were obviously inadequate and defective. If this were to happen in Western systems, these different economic alliances would had been regulated by different sets of laws. For example, while legal entity alliances should be regulated by corporate laws, partnership alliances and contractual alliances would be governed by partnership laws, contract laws and joint venture laws.

Furthermore, there are other defects in Chinese legislation concerning economic alliances. For instance, the economic alliance creating a new legal entity was bound by limited but rigid rules.[71] The binding tie of the alliance was not shareholding or interlocking directorship, but a cooperative contract.[72] The alliance ceased to exist once the contract was terminated.[73] The parties to the

64. *See* Jiang & Zhao, *supra* note 59, at 365.

65. This composed the macro-economic structure at the early stage of the economic reforms.

66. *See* Jiang & Zhao, *supra* note 59, at 365.

67. *See* General Principles of Civil Law, *supra* note 15.

68. *See id.* at arts. 51-53.

69. *Id.*

70. These legal documents include: STATE COUNCIL, Provisional Regulations Concerning Promoting Economic Alliances (1980); STATE COUNCIL, Regulations concerning Problems of Further Promoting Economic Alliances (1986); STATE ADMINISTRATIVE BUREAU OF INDUSTRY AND COMMERCE, Administrative Procedure of Registering Economic Alliances (1986); and MINISTRY OF FINANCE, Regulations Concerning Accounting Problems in Economic Alliances. *See* Jiang & Zhao, *supra* note 59, at 366.

71. *See* Jiang & Zhao, *supra* note 59, at 373.

72. *See id.*

73. *See* Supreme Court's Answers to the Questions Arisen from the Trials Involving Co-operative Contracts, art. 7 (1990).

alliance had no duty to disclose the contents of the contract to the third party, but had the right to freely withdraw their invested funds.[74] Moreover, there were no requirements on consolidated accounts and unified management of the group. As a result, the third party was left unprotected in the transactions with the economic alliance.[75] The arrangement also created uncertainties in the cooperation, as parties could terminate their contract at any time.[76]

The rules regulating China's partnership alliances brought even more confusion. *The Civil Code* distinguished between partnerships consisting of individuals and partnerships consisting of enterprises (partnership alliance).[77] While individual partners took unlimited liabilities, enterprise partners only did so if there were clear statements about their joint and unlimited liabilities in laws or in the cooperative contracts. This provided the opportunity for the parties to such alliances to avoid liability and to victimize the creditors and other third parties.[78]

With the deepening of China's economic reforms, the need to further advance the cooperation between enterprises increased. The existing economic alliances were not competent enough to accommodate the increasingly comprehensive enterprise cooperation and consequently, a new type of economic alliance, enterprise groups, emerged.[79] In China, the practice of enterprise groups started at the end of 1980s and the beginning of 1990s, and soon became dominant.[80] In the beginning, there was no clear definition of an enterprise group.[81] An enterprise group was generally perceived as a form of business alliance that could deliver larger scale cooperation among enterprises.[82] It was an aggregation of a large number of individual enterprises. The advantages of enterprise groups were several, and included accelerating the enterprise specialization, promoting technology development, and reducing informational asymmetries by facilitating the flow of information among enterprises.[83]

Although the enterprise groups have served important practical purposes in China and have been used as leverage by the Chinese government to assist enterprise reforms, little legal attention has been given to them. Up to now, there is no definition of enterprise groups contained in any Chinese legislative sources. However, academic discussions concerning enterprise groups have gradually produced a sophisticated understanding of the term. In the early stages, an enterprise group was defined as an "economic alliance consisting of a number of enterprises of different areas and different trades," or "an economic organization

74. *See* STATE COUNCIL, Regulations Concerning Problems of Further Promoting Economic Alliances, art. 5 (1986).

75. *See* Jiang & Zhao, *supra* note 59, at 374.

76. *See id.* at 375.

77. *See* General Principles of Civil Law, *supra* note 15, at arts. 30-35 & 52.

78. *See* Jiang & Zhao, *supra* note 59, at 378.

79. *See id.* at 383.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* at 384.

with multiple levels to answer the need of large scale of economy".[84] It is clear that the above descriptions do not capture the essence of the relationship. Later works provide clearer views on the nature of enterprise groups. Some point out that the essential characteristic of an enterprise group lies in its central management.[85] Therefore, an enterprise group has come to be defined as an economic alliance consisting of a number of legal entities and based on a central management.[86]

The lack of legal regulation relating to the practice of enterprise groups may soon end. The Chinese government is aware of the urgency of producing a legal framework to control the practice of enterprise groups. With the launching of the enterprise reform, the corporation becomes the focus of the country's economic activities.[87] It is predictable that China will head in the direction of standardizing the activities of its economic alliances by introducing the practice of corporate groups into its legal system.

B. The Perception of Corporate Groups

Both the Chinese government and the country's intellectuals are well aware of the importance of business groups to an economy.[88] Based on models from the United States, Germany, and Japan, the government and intellectuals have seen how business groups function to increase economic efficiency by internalizing market transactions within corporate groups. They are also aware of the fact that business groups have facilitated the rapid industrialization in some late-industrialized countries such as Japan and South Korea.[89] Hence, it is believed that developing China's large business groups with similar structural features of those in the above-above mentioned countries will speed up the process of economic modernization in China.[90]

The practice of business groups in China is still in a primitive stage. The country's existing enterprise groups, in fact, amount to joint ventures in a loose sense. They are small in size and lack stability. As discussed in the previous section, the tie binding individual enterprises to an enterprise group is a contractual agreement, rather than shareholdings.[91] In China, it is common for the individual enterprises of an enterprise group not to comply with the decisions of the central

84. *See* Guan Xiaofeng, *About the Nature and Legal Position of Enterprise Groups*, 3 Zheng Fa Lun Tan 51-55 (1988).

85. *See* Jiang & Zhao, *supra* note 59, at 390.

86. *See id.* at 391.

87. *See* XIANGYI XU, ORGANIZATION AND MANAGEMENT OF MODERN COMPANIES 242 (1999).

88. *See* DOU, *supra* note 533, at 148-50.

89. *See* Lisa A. Keister, *Engineering Growth: Business Group Structure and Firm Performance in China's Transition Economy*, 104 AM. J. SOC. 404, 404-06 (1998). *See generally* Eun Mee Kim, *The Industrial Organization and Growth of the Korean Chaebol: Integrating Development and Organizational Theories*, *in* BUSINESS NETWORKS AND ECONOMIC DEVELOPMENT IN EAST AND SOUTHEAST ASIA 272-99 (Gary Hamilton ed.) (1988), *available at* http://gsis.ewha.ac.kr/faculty/faculty6.htm (last visited January 19, 2002).

90. *See* Keister, *supra* note 89, at 404.

91. *See* Jiang & Zhao, *supra* note 59, at 392.

management of the group.[92] Some hold that the situation of lack of compliance will change, if the enterprises of a business group are brought together through the holding and cross-holding of shares among the enterprises of the group.[93] Hence, it is necessary to introduce a stockholding mechanism into China's enterprise groups.[94] This will become reality before long, as the current enterprise reform is a process of achieving general "corporatization."[95] Upon the completion of the reform, most Chinese enterprises will be transferred into companies.[96] The enterprise groups will certainly be replaced by corporate conglomerates.[97]

It is believed that the Chinese government should take the responsibility for designing an effective corporate group system for the country.[98] The experience of Japan and South Korea demonstrates that governmental guidance and support have been important in fostering the dynamic corporate group systems of those two countries, which, in return, have remarkably enhanced the competitive capacity of their corporations in the international market.[99] In China, most large and important enterprises are state-owned enterprises which, after the "corporatization," have remained and will remain as state-owned or controlled companies. The situation makes the government's role become even more significant in the process of establishing a corporate group system.[100] The enterprise reform may enable the government to kill two birds with one stone, by "corporatizing" state-owned enterprises on one hand, and assembling them into corporate groups on the other.

Companies should be bound to a group by the shareholding mechanism and by contracts. Shareholding is a crucial mechanism of sustaining control in the group structure.[101] It is recommended that the vertical and horizontal shareholding relationships should all be introduced into the Chinese enterprise system.[102] By establishing holding or parent companies, a corporate group forms a hierarchical chain of control among companies. This is the so-called vertical shareholding group. Meanwhile, it is suggested that the experience of cross-shareholding widely exercised by the Japanese *keiretsu* is also worth emulating.[103] The Chinese

92. *See* Jiang & Zhao, *supra* note 59,. at 393. *See also* Li Su, *Reforming the Enterprise Groups by Introducing Shareholding Mechanism Is Inevitable*, 4 LEGAL COMMENTS 51-57 (1987).

93. *See* Jiang & Zhao, *supra* note 59, at 393.

94. *See* XU, *supra* note 87, at 250.

95. The Fifteenth National Congress of the Communist Party of China (1997) pointed out that further economic reforms should focus on reforming large and medium-sized state-owned enterprises into normative corporations, so as to set up a modern enterprise system in China. This indicated the initiation of the "Big Bang" package of China's enterprise reform. Since then "corporatization" has carried out at an ever-larger scale in China.

96. *See* The Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-owned Enterprises, September 22, 1999, *available at* http://english.peopledaily.com.cn/other/archive.html (last visited Sept. 27, 1999).

97. *See id.*

98. *See* XU, *supra* note 87, at 228-229.

99. *See id.*

100. *See id.*

101. *See* XU, *supra* note 87, at 228-229.

102. *See id.*

103. *See id.*

call this type of shareholding structure a "horizontal shareholding structure" and intend to utilize the method to form the marriages between core companies, so as to achieve a "strong and strong combination" (*qiang qiang lian he*).[104]

The 1994 *Company Law*[105] is primarily drafted to regulate single companies.[106] There are nearly no provisions about corporate groups, except articles 12 and 13 which permit a company to establish subsidiaries.[107] Producing legal guidance for the practice of corporate groups should be the top priority of the government. At the moment, academic discussions have not yet reached an agreement on the legislative method for doing so. While some suggest having a separate law to regulate corporate groups, others recommend inserting special provisions for corporate groups.[108] An alternative view is to regulate corporate groups by the joint work of all relevant laws including company law, taxation law, and anti-trust law.[109]

Although it is not clear whether China will take the single entity approach or separate entity approach, the control test in Anglo-American systems is well-received in academic discussions.[110] Attention is also directed to the issue of protecting minority shareholders. On December 21, 1999, during the 13th Session of the National People's Congress (NPC) Standing Committee, China's top legislature examined and deliberated on the *Draft Amendments to the Corporate Law*.[111] It is expected that the forthcoming amended *Company Law* will provide indications about the direction of future development of the Chinese law on corporate groups.

III. THE EXTENSION OF CORPORATE GROUPS: COOPERATIVE STRATEGIES - STRATEGIC ALLIANCES AND NETWORKS

The corporate group is a device of resource allocation in a market economy. It is the third transaction mechanism after markets and the firm. Markets and the firm are alternative choices for transactions. Depending on their comparative efficiency or advantages, people can choose to execute their transactions either cross-markets or within a firm.[112] While firms have developed to reduce the transaction costs occurred in the market by internalizing transactions, they can also be costly due to scale diseconomies or control losses.[113] Thus, corporate groups are used to fill the

104. *See* XU, *supra* note 87, at 228-229.

105. *See* Company Law, *supra* note 13.

106. *See* PING JIANG & LIUFANG FANG, NEW CORPORATE LAW TEXTBOOK 221 (1998).

107. *See id.*

108. *See* Jiang & Zhao, *supra* note 11, at 405.

109. *See id.* at 409-411.

110. *See id.* at 392-411. *See also* XU, *supra* note 87, at 250-253.

111. Chinese lawmakers attending the ongoing 13th session of the National People's Congress (NPC) Standing Committee, China's top legislature, examined and deliberated the Draft Amendment to the Corporate Law on December 21. *See Chinese Lawmakers Deliberate Draft Amendment to Corporate Law*, PEOPLE'S DAILY ONLINE, December 23, 1999, at http://english.peopledaily.com.cn/special/soe/ 1999122300S101.html (last visited Nov. 11, 2001).

112. *See* Akira Goto, *Business Groups in a Market Economy*, 19 EUR. ECON. REV. 53, 60 (1982).

113. *See id.* at 61.

gap. Using corporate groups to execute transactions can avoid the transaction costs that would have been incurred by using markets and the costs caused by expansion of the firm.[114] Firms have strong incentives to form or join a group, when the benefit of forming or joining a group exceeds that of using the market and firm mechanisms.[115]

However, business groups are not the only alternative of markets and the firm. In fact, hierarchical relationships within firms and explicit market relations between firms are just "the extreme points of an organizational spectrum," and "hybrid forms of organization [which] occupy the intervening space."[116] These hybrid forms include not only business groups but also cooperative strategies comprising strategic alliances and business networks. In certain circumstances, for certain business purposes, strategic alliances and business networks have advantages over corporate groups.

A corporate group, in essence, is a formal cooperative arrangement. There have to be some kind of formal or binding links existing between the members of the corporate group, including common parent, cross shareholdings, and interchange of directorships. Costs are incurred in the process of establishing, maintaining and effectively using these binding links to achieve business purposes. Furthermore, forming or joining a corporate group is not the desirable solution for achieving certain business purposes in certain business environments. For example, to enter into an industry or regional sector by acquiring or establishing subsidiaries may be infeasible according to a country's law.[117] In this situation, it is desirable to do business through strategic alliances and networks.

Strategic alliances are defined as to include "joint ventures, collaborations, and consortia."[118] A joint venture is usually either a partnership or something closely allied to partnership, although it can take the form a joint venture company. Compared with a joint venture, other types of alliances are looser forms of cooperation such as product swaps, production licenses and technology alliances.[119] A network is also a loose form of business cooperation. To distinguish a network from other types of alliances, one needs to look at the purpose of using networks and alliances.

Firms go into a joint venture or an alliance for avoidance of the uncertainty inherent in market transactions and the costs of establishing hierarchies. The strength of joint ventures and alliances lies in their ability of promoting organizational learning.[120] By joining joint ventures and alliances, technological

114. *See* Goto, *supra* note 112 at 61.

115. *See id.*

116. *See* BUREAU OF INDUSTRY ECONOMICS (AUSTRALIA), NETWORKS: A THIRD FORM OF ORGANIZATION 7 (1991). *See also* the detailed discussions and analyses on this issue in OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 206-39 (1985).

117. *See* JOHN CHILD & DAVID FAULKNER, STRATEGIES OF COOPERATION: MANAGING ALLIANCES, NETWORKS AND JOINT VENTURES 2 (1998).

118. *See id.* at 6.

119. *See* CHILD, *supra* note 117, at 9.

120. *See id.* at 66.

and managerial know-how and knowledge are transferred and exchanged among partners, new product researche and development are jointly carried out, and employees are jointly trained. In addition, firms are motivated by the challenge of entering into international market to set up joint ventures and alliances.[121] This is because the choices of doing business in a target market are limited. In some situations, apart from direct exporting, a firm has to make a choice between licensing, counter-trade, product swap, or setting up a joint venture.[122]

Contrasting strategic alliances, the strength of networks lies in their specialization, adaptability and flexibility, not necessary in learning opportunities.[123] Networks exist for the reason that members of a network are complementary and synergistic in relation to functions and contribution.[124] A typical scenario is that a firm finds its customers, distributors or suppliers in its network. The bonds of the network are usually friendship, trust and interdependence.[125] Consequently, a network suggests close but non-exclusive relationships.

Recently, the function and advantage of cooperative strategies including strategic alliances and networks have been increasingly acknowledged.[126] This is because the economic globalization requires more effective business devices for global competition, and the technology development has provided opportunities for more flexible business arrangements by reducing the costs of communication.[127] It is interesting to see, with increasing exploitation of these strategies, what influence the practice may impose on corporate development.

Since opening up, China has effectively used many types of strategic alliances to assist its economic reforms.[128] These strategies have proven to be remarkably successful in attracting foreign investment to serve the purpose of the reforms.[129] Chinese-foreign joint ventures and other types of Chinese-foreign alliances play an important role in China's rapid economic development.[130] Internally, the Chinese government has also encouraged enterprise cooperation. Recently, discussions about enhancing enterprise strength by promoting enterprise cooperation have increased.[131] However, more attention has been paid to the formation of corporate groups and some close forms of cooperation. It seems the importance of informal cooperative arrangements, particularly business networks, has not been sufficiently addressed in China.

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121. *See* CHILD, *supra* note 117, at 67.

122. *See id.*

123. *See id.* at 7.

124. *See id.* at 113.

125. *See* BUREAU OF INDUSTRY ECONOMICS (AUSTRALIA), *supra* note 116, at 9.

126. *See id.* at 14.

127. *See id.* at 1 & 14-15.

128. *See generally* YUWA WEI, INVESTING IN CHINA: THE LAW AND PRACTICE OF JOINT VENTURES 73-81 (2000).

129. *See* WEI, *supra* note 128, at 10-13.

130. *See id.*

131. *See* XU, *supra* note 87, at 238.

CONCLUSIONS

The development of corporate groups is the choice of economic development. Firm production reduces the transaction costs of using the market mechanism. However, there is an organizational cost for using firms. Business groups offer an alternative transaction mechanism that, under certain circumstances, is more efficient than the market mechanism and internal organization.[132] Corporate groups have shown power in terms of facilitating economies of scale. To exist in groups makes corporations become fitter and more adapted to encountering the challenges brought about by increasing market competition and globalization.

The formation of corporate groups is one of the most significant components of China's enterprise reform. The Chinese government is planning a corporate system with strong corporate groups to ensure that the existing enterprises can survive the pressure from further opening up and to gain a share in international competition. The practice and the law making are still progressing. The experience of corporate groups in different systems provides rich resources for the Chinese to selectively take in suitable practice and make appropriate legal transplants. In today's China, apart from the focus on corporate groups, adequate attention should also be paid to the issue of how to foster informal cooperation among Chinese firms, such as strategic alliances and networks. In a fast changing environment fueled by economic globalization and rapid technologic innovation, it is important to be aware that "informal cooperative arrangements are fundamental to the success of decentralized economic organization".[133]

132. *See* Goto, *supra* note 112, at 61.

133. *See* BUREAU OF INDUSTRY ECONOMICS (AUSTRALIA), *supra* note 116, at 1.

THE 2002 JOHANNESBURG WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT:

INTERNATIONAL ENVIRONMENTAL LAW COLLIDES WITH REALITY, TURNING JO'BURG INTO "JOKE'BURG"

GEORGE (ROCK) PRING*

"Betrayal,"[1] "disaster,"[2] "shameful, disgraceful, and for American citizens . . . an embarrassment"[3] are but some of the negative assessments of the recent United Nations World Summit on Sustainable Development (WSSD a.k.a. "Earth Summit" or "Rio+10"), held August 26-September 4, 2002, in Johannesburg, South Africa.[4] Even its UN promoters damn it with faint praise, for example UN Environment Programme Executive Director Klaus Toepfer's statement that "Johannesburg is less visionary and more workmanlike [than Rio] . . . ,"[5] and UN Secretary-General Kofi Annan's apologetic (and historically inaccurate), "We have to be careful not to expect conferences like this to produce miracles . . . . This is just a beginning . . . ."[6]

The more accurate assessment of the 2002 Earth Summit lies between these extremes of acid and apologetics. At Jo'burg, the expanding field of International

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1. Friends of the Earth International, http://www.rio-plus-10.org (last visited Mar. 5, 2003) [hereinafter Friends of the Earth].

2. Greenpeace International, http://www.greenpeace.org/features/details?features_id=25094 (last visited Mar. 5, 2003).

3. Sierra Club, http://www.sierraclub.org/ssc/wssd/article.html (last visited Mar. 5, 2002); *see* Carl Pope, *Alone in the World: Bush Ends an Era of Environmental Treaties*, SIERRA, Jan./Feb. 2003, at 6, *available at* http://www.sierraclub.org/sierra/200301/ways.asp (last visited Mar. 5, 2003).

4. *See* NANDA & PRING, *supra* Introductory Note, at 110. A valuable range of views and research tools on the Earth Summit can be found on the web, including http://www.johannesburgsummit.org (the official UN website); http://www.epa.gov/international/WSSD (the official USA website); http://www.iied.org/wssd (the International Institute for Environment and Development); http://www.worldsummit.org.za (the WSSD Civil Society Global Forum); http://www.worldsummit2002.org (the Heinrich Böll Foundation); http://wssd.info (the International Institute for Sustainable Development), and other websites footnoted herein (last visited Mar. 5, 2003).

5. James Dao, *Protesters Interrupt Powell Speech as UN Talks End*, N.Y. TIMES, Sept. 5, 2002 at A10.

6. John Sullivan, *World Summit Adopts Development Plan, Political Declaration as Meeting Concludes*, 33 ENV'T REP. (BNA) 1909 (Sept. 6, 2002).

Environmental Law (IEL) ran headlong into the hard reality of the world's existing economic order, and the economic order did not give . . . much. What resulted was indeed a shamefully wasted opportunity for expanding IEL, but at least it avoided rolling back thirty years of progress, as at times it seemed it might. The US Government and some other nations worked against virtually all positive change at Jo'burg, sought rollbacks in existing law, and were very effective.[7] The best view of the Summit is, if it did not move IEL forward, at least it did not give up serious ground, did flush the nay-sayers out of the political backrooms and expose them to intense worldwide scrutiny, and did not foreclose possibilities for progress in IEL in the years to come.

It started out well-intentioned enough. The UN General Assembly resolution authorizing the Johannesburg Conference envisioned a "summit . . . to reinvigorate the global commitment to sustainable development," to "focus on the identification of accomplishments and areas where further efforts are needed," to carry out the pledges made ten years earlier at the UN Conference on Environment and Development in Rio de Janeiro, Brazil (UNCED or "Rio Conference").[8] Thus, as originally envisioned, the Johannesburg Conference was to carry on the tradition of precedent-setting UN environment and development conferences begun with the 1972 UN Conference on the Human Environment in Stockholm Sweden (UNCHE or "Stockholm Conference") and the 1992 Rio Conference.

The now-legendary 1972 Stockholm Conference was the "dawn" of IEL, the largest and best-attended international conference on any topic to that point.[9] It produced a consensus declaration of twenty-six "principles" governing international environmental protection,[10] notably groundbreaking ones like the human "right" to a quality environment,[11] the "responsibility to protect and improve the environment,"[12] and the famous no-harm rule against significant transboundary environmental pollution or damage.[13] A number of these Stockholm Principles have become accepted as legally binding over the years.[14]

The "North-South" environment-vs.-development split, which has become such a fixture of IEL today, first manifested itself in the leadup to this conference, as the developing nations (the "South") served notice that the environmental protection standards of the developed, industrialized world (the "North") should not be imposed so as to block needed economic development of the poorer

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7. *See, e.g.*, Rachel Swarns, *World Development Forum Begins with a Rebuke*, N.Y. TIMES, Aug. 27, 2002 at A7; Rachel Swarns, *U.S. Is Not the Only Nation Resisting a Strong Pact at the Summit Meeting on Global Warming*, N.Y. TIMES, Aug. 31, 2002 at A4; and websites *supra* notes 1-4.

8. G.A. Res. 9848, U.N. GAOR, 55th Sess., at ¶¶ 1, 3, U.N. Doc. A/RES/55/199 (Dec. 20, 2000), *available at* http://www.johannesburgsummit.org/web_pages/resolution.htm (last visited Mar. 5, 2002).

9. *See* NANDA & PRING, *supra* Introductory Note, at 80.

10. Stockholm Declaration of the UN Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14/Rev. 1 at 3 (1973); U.N. Doc. A/CONF.48/14 at 2-65 and Corr. 1 (1972); 11 I.L.M. 1416 (1972).

11. *Id.* at Prin. 1.

12. *Id.*

13. *Id.* at Prin. 21.

14. NANDA & PRING, *supra* Introductory Note, at 80.

nations.[15] The split was assuaged with a few references in the Stockholm Principles (such as "economic and social development is essential")[16], but the North kept Stockholm's overall focus on environmental protection.

When the UN began planning a second global environmental conference, in recognition of the twentieth anniversary of Stockholm, it was clear the South would not to be so easily appeased. Diplomatic disaster was averted by the expedient of inventing a new legal paradigm – "sustainable development" – that promises to merge the twin aspirations of protecting the environment while pursuing the development of the South.[17] While still largely undefined, the term's best-known formulation is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" environmentally, socially, and economically.[18] (Thus, development interests won the all-important noun, and all other interests – environment, society, culture, governance, human rights, etc. – had to be content with being relegated to the adjective.) With this new vision, the 1992 Rio Conference was a blockbuster success in terms of IEL "deliverables," producing a new declaration of principles,[19] a 500-plus-page Agenda 21 plan for implementing them,[20] two new global treaties for climate change[21] and biodiversity protection,[22] and non-binding principles for the world's forests.[23] The Rio Principles introduced many notable new concepts of IEL, including the "right to development,"[24] "common but differentiated responsibilities,"[25] reduction and elimination of "unsustainable patterns of production and consumption,"[26] "public participation" in environmental decision-

15. George (Rock) Pring, James Otto & Koh Naito, *Trends in International Environmental Law Affecting the Minerals Industry*, 17 J. ENERGY & NAT. RES. LAW 39, 45 (1999).

16. Stockholm Declaration, Prin. 8, *supra* note 10; *also see* Principles 9, 10, 11, 12 and 23.

17. For more detailed history of the term, *see* NANDA & PRING, *supra* Introductory Note at ch. 2; George (Rock) Pring, *Sustainable Development: Historical Perspectives and Challenges for the 21st Century*, PROCEEDINGS OF THE WORKSHOP ON THE SUSTAINABLE DEVELOPMENT OF NON-RENEWABLE RESOURCES TOWARDS THE 21ST CENTURY 13 (UN Development Programme & UN Revolving Fund for Natural Resources Exploration 1998). A very comprehensive treatise on the subject is STUMBLING TOWARD SUSTAINABILITY (John C. Dernbach ed., 2002).

18. UN WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (BRUNDTLAND COMMISSION), OUR COMMON FUTURE 43 (1987).

19. Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151.26 (vol. I) (1992); 31 I.L.M. 874 (1992).

20. AGENDA 21, June 13, 1992, U.N. Doc. A/CONF. 151/26 (vols. I-III) (1992); a copy with an excellent historical and critical analysis can be found in IV AGENDA 21 & THE UNCED PROCEEDINGS (Nicholas A. Robinson *et al.* eds., 1993).

21. UN Framework Convention on Climate Change, May 9, 1992, entered into force March 21, 1994, U.N. Doc. A/CONF.151/26, 31 I.L.M. 849 (1992).

22. Convention on Biological Diversity, June 5, 1992, entered into force Dec. 29, 1993, 31 I.L.M. 818 (1992).

23. Nonlegally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, June 13, 1992, U.N.Doc. A/CONF. 151/26 (Vol. III); 31 I.L.M. 881 (1992).

24. Rio Declaration, Prin. 3, *supra* note 19.

25. *Id.* at Prin. 7.

26. *Id.* at Prin. 8.

making,[27] trade-environment linkage,[28] the "precautionary" principle for dealing with scientific uncertainty,[29] the "polluter-pays" principle,[30] promotion of "environmental impact assessment,"[31] protection of "indigenous people" and "local communities,"[32] and a reaffirmation of the no-transboundary-harm rule.[33] Half of its principles contained the norm "sustainable development."

Rio was a "watershed in mainstreaming environmental concerns."[34] It succeeded in crystallizing progressive IEL norms, created a new body of international law treaties, launched new supranational structures and processes, set up machinery for multilateral environmental decisionmaking, and encouraged national-level sustainable development planning. However, in the years following, most of this momentum was neutralized by economic globalization, governmental inertia, and inadequate funding, with little to show for the Rio rhetoric.[35]

So, as Rio's tenth anniversary loomed, "it was hardly a secret – or even a point in dispute – that progress in implementing sustainable development has been extremely disappointing since the 1992 Earth Summit, with poverty deepening and environmental degradation worsening."[36] In response, the UN specifically created the Johannesburg Summit to "reinvigorate" the process of implementing Agenda 21 and the Rio Declaration.[37]

But a funny thing happened on the way to that forum – en route, the UN's vision was taken hostage by both the South and the North. The South reconceived Johannesburg in its own image – to be a development rather than an environmental summit, one that would focus on poverty alleviation and wealth redistribution to their betterment.[38] Meanwhile, elements of the North – particularly the USA under the George W. Bush Administration and some other nations – sought desperately to avoid that fiscal focus by insisting the agenda produce no new multilateral goals, no new IEL treaties, mandatory agreements, or even legal principles of substance, and no fixed targets, percentages, or timetables for accomplishing Agenda 21's ten-year-old promises. The US excuse for this stand was to assert that it would take "concrete projects" not "paper agreements" to get results,[39] but its approach was widely viewed as complete obstructionism and provoked "a relentless storm of

27. *Id.* at Prin. 10.
28. *Id.* at Prin. 12.
29. *Id.* at Prin. 15.
30. *Id.* at Prin. 16.
31. *Id.* at Prin. 17.
32. *Id.* at Prin. 22.
33. *Id.* at Prin. 2.
34. Heinrich Böll Foundation, *The Jo'burg Memo – Fairness in a Fragile World – Memorandum for the World Summit on Sustainable Development* 10, *available at* http://www.worldsummit2002.org/publications/memo_en_without.pdf (last visited Mar. 5, 2003) [hereinafter *The Jo'burg Memo*].
35. *See id.*at 6, 10.
36. United Nations, *The Johannesburg Summit Test: What Will Change?*, *at* http://www.johannesburgsummit.org/html/whats_new/feature_story41.html (last visited Nov. 11, 2002) [hereinafter *The Johannesburg Summit Test*].
37. G.A. Res. 9848, *supra* note 8, at ¶ 1 and 13th Preamble.
38. *See The Jo'burg Memo*, *supra* note 34, at 6.
39. Alexandra Zavis, *Progress reported in eco-summit talks*, DENV. POST, Sept. 2, 2002 at 8A.

criticism."[40] It is disheartening to see the world's only superpower turn its back on multilateralism, cooperation, and international law, as the Bush Administration has since entering office.[41] However, in IEL, this is not a new posture for the USA – of the sixteen major, global IEL treaties that have entered into force in the last three decades, the US has joined only half.[42]

Not surprisingly, pre-Johannesburg negotiations on "whether or not the rich nations of the world would come up with the cash to pay for the implementation of the Rio agreements," broke down without final resolution,[43] leaving the delegates scrambling on how to put a good face on the summit with only months to go. The face-saving solution was of the "if-you-can't-lick-'em-join-'em" variety, given the USA's stonewalling against negotiated global treaties, principles, targets, and timetables. In a fit of doublespeak that would have made Orwell blush, the delegates began calling these progressive steps "Type 1 deliverables" ("Type I outcomes") and denigrating them (since they were not going to happen). To replace them, suddenly the focus was on creating "Type 2 deliverables" ("Type II outcomes") – so-called "concrete partnerships aimed at practical implementation of Agenda 21,"[44] also described as "commitments and action-oriented coalitions" of individual countries, private sector companies, or non-governmental organizations (NGOs) or groups of them "focused on deliverables [that] would contribute in translating political commitments into actions." [45]

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40. Rachel L. Swarns, *U.S. Shows Off Aid Projects at U.N. Development Meeting*, N.Y.TIMES, Aug. 30, 2002 at A6.

41. Examples include abandoning the treaties on global warming and ballistic missile defense; rejecting agreements on banning germ warfare, creating an international criminal court, curtailing strategic nuclear weapons, banning all nuclear tests, biological weapons, land mines, and small arms; and threatening withdrawal from others such as the UN's landmark family planning agreement. *See* Bill Nichols, *Critics decry Bush stand on treaties*, USA TODAY, July 26, 2001; *Issues that trouble White House*, USA TODAY, July 26, 2001; Thom Shanker, *White House Says the U.S. Is Not a Loner, Just Choosy*, N.Y. TIMES, July 31, 2001 at A1; James Dao, *U.S. May Abandon Support of U.N. Population Accord*, N.Y. TIMES, Nov. 2, 2002 at A6; Pope, *supra* note 3.

42. *See* J.W. Anderson, *U.S. Has No Role in U.N. Treaty Process; Senate Reluctant to Ratify*, RESOURCES 12 (Summer 2002). The US has *not* become a party to 1979 Bonn Convention on Conservation of Migratory Species, 1982 Convention on the Law of the Sea, 1989 Basel Convention on Transboundary Movements of Hazardous Waste and Their Disposal, 1992 Convention on Biological Diversity, 1997 Kyoto Protocol to the Climate Change Convention, 1997 Convention on Non-navigational Uses of International Watercourses, 1998 Rotterdam Convention on Prior Informed Consent for Hazardous Chemicals and Pesticides, or the 2001 Stockholm Convention on Persistent Organic Pollutants. It has become a party to the 1972 London Convention on Prevention of Marine Pollution, 1973/78 MARPOL Convention for Prevention of Pollution from Ships, 1973 Convention on International Trade in Endangered Species, 1979 Convention on Long-Range Transboundary Air Pollution, 1985 Vienna Convention for the Protection of the Ozone Layer, 1987 Montreal Protocol to the same, 1992 Framework Convention on Climate Change, and 1994 Convention to Combat Desertification. *See id.* at 15.

43. Greenpeace, *Rich Countries Refuse to Pay Their Environmental and Social Debt, at* http://archive.greenpeace.org/earthsummit/news_june7b.html (last visited Mar. 5, 2003).

44. US Environmental Protection Agency, *What Are Type 2 Deliverables?, available at* http://www.epa.gov/international/WSSD/type2.html (last visited Mar. 5, 2003).

45. *Background Information on Type II Outcomes: Explanatory Note by the Chairman of the [World Summit on Sustainable Development] Preparatory Committee, available at*

In effect, when it became clear that US obstructionism would not let the Johannesburg Summit live up to its creators' ambitious vision of truly implementing Agenda 21, governments defaulted back to the former, failed system of uncoordinated "foreign aid" projects.[46] Ominously, the UN sponsors themselves conceded this switch "marked a major departure from previous UN conferences. . .that could have a major effect on the way the international community approaches problem solving in the future."[47] US Johannesburg delegate John Turner, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, attempted to justify the switch: "I think goals are important, but they're only lofty rhetoric without the commitment of resources."[48] But critics condemned the switch as a blatant attempt to divert attention from the reluctance of wealthy nations to reduce trade subsidies and commit new resources for the South and pointed out that most of the money will come from already existing programs.[49]

Some 220 of these "public-private partnerships" (totaling $235,000,000 in promised resources) were announced at the summit.[50] The US announced 25 partnerships valued at $125,000,000 in one briefing – including a "water for the poor" project, a "clean energy initiative," an "initiative to cut hunger in Africa," a "Congo basin forest partnership," and efforts to combat AIDs, TB, and malaria – although it did not say how many of the initiatives were new or already under way before Johannesburg.[51] Confusingly, in another announcement, the US claimed it would provide more than $1 billion over the next four years.[52]

One youth leader at Johannesburg pinpointed the problems with this approach:

> Some of the partnerships that were showcased in Johannesburg may not be so bad. Some are steps in the right direction, and involve good NGO's doing quality work on the ground . . . . But many dangers exist with making partnerships the centerpiece of a once-every-ten-years Earth Summit. First among them: in the

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http://wssd.info/partnerships.html (last visited Mar. 5, 2003).

46. Nathan Wyeth, *Final Thoughts on the WSSD, available at* http://www.sierraclub.org/ssc/wssd/article.html (last visited Mar. 5, 2003). Such "partnerships" have been sponsored or encouraged by the UN for nearly 20 years. *See* Eric J. Lyman, *State Department Proposes Partnerships to Address Environmental, Health Issues*, 33 ENV'T REP. (BNA) 1913 (Sept. 6, 2002).

47. *The Johannesburg Summit Test, supra* note 36.

48. Swarns, *World Development Forum Begins with a Rebuke, supra* note 7.

49. *See* Swarns, *supra* note 40.

50. UN, *Key Outcomes of the Summit, available at* http://www.johannesburgsummit.org/html/documents/summit_docs/2009_keyoutcomes_commitments.doc (last visited Mar. 5, 2003) [hereinafter *Key Outcomes of the Summit*].

51. Lyman, *supra* note 46.

52. Swarns, *supra* note 40. In fairness, the US has promised to increase its overseas development assistance (ODA); at the 2002 Monterrey Finance Ministers' meeting, President Bush pledged to increase US ODA by 50%, from $10 billion per year to $15 billion. Ved Nanda, *Lending a Helping Hand, Foreign aid policy shift must be applauded,* DENV. POST, April 21, 2002. The UN-recommended level of ODA for wealthy nations is 0.7% of GNP. The US is presently giving only 0.1% of its GNP, compared to the EU at 0.33%. Even Japan currently gives out $3 billion more ODA dollars a year than the US. *Id.*

> absence of any accountability or guidelines for partnerships . . . , they provide an opportunity for multinationals [business entities] to continue with business as usual and wrap their operations in the flag of the U.N. and sustainability to inoculate themselves against criticism. The bigger threat, though, is the way that partnerships take the focus away from governmental agreements at the WSSD, and distract media and public scrutiny from the abject failures in that area. When it comes to issues like climate change, it's clear that partnerships are incapable of making the necessary global corrections. Commitments and leadership from governments are the only solution.[53]

One could wish the politicians had shown as much maturity.

The US delegation's position at Johannesburg was negative and reactionary on virtually every issue, from renewable energy, safe drinking water, sanitation, trade, and foreign aid to women's reproductive health, agricultural subsidies, and human rights. But it was not alone. On renewable energy, Saudi Arabia, Canada, Japan, and Australia joined it in opposing deadlines for a 10-15% conversion from fossil fuels to solar, wind, and other renewables; the European Union joined it in opposing elimination of agricultural subsidies that make it next to impossible for poor countries to export to the US and EU; developing countries joined it in watering down a commitment to reducing the threat of dangerous chemicals; and Australia joined it in initially refusing to support a timeline for reducing the number of people who lack adequate sanitation.[54]

So, what accomplishments can Johannesburg claim? Of the customary "Type 1 deliverables" (paper) not much of substance. First, delegates produced a pious "Political Declaration"[55] (*e.g.*, "We commit ourselves to build a humane, equitable and caring global society . . . ."[56]) which avoids setting any standards or making any real commitments. Second, despite Agenda 21's existence and non-fulfillment, they drafted a new "Plan of Implementation"[57] (only fifty-four pages, compared to the detailed Agenda 21, which is more than ten times that long). The good news is that Rio and progeny survive this pap – the delegates "strongly reaffirm our commitment to the Rio principles, the full implementation of Agenda 21 . . . the United Nations Millennium Declaration and . . . the outcomes of the

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53. Wyeth, *supra* note 46. This is not to deny that "partnership" projects may be a necessary, if not sufficient, means to achieve sustainable development; the President and CEO of the Wildlife Conservation Society argues that "the anemic official conservation agenda" can and should be overcome by collaborative projects among individuals, companies, civic institutions, and conservation NGOs without reliance on governments, pointing to an estimate that an annual global investment of $30 billion could halt "nature's decline." Steven Sanderson, *The Future of Conservation*, 81 FOREIGN AFF. 162, 164, 171 (2002).

54. Swarns, *U.S. Is Not the Only Nation Resisting a Strong Pact at the Summit Meeting on Global Warming*, *supra* note 7.

55. The Johannesburg Declaration on Sustainable Development (Sept. 4, 2002), *available at* http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm (last visited Mar. 5, 2003).

56. *Id.* at ¶ 2.

57. World Summit on Sustainable Development Plan of Implementation (revised, Sept. 23, 2002), *available at* http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm (last visited Mar. 5, 2003) [hereinafter WSSD Plan of Implementation].

major United Nations conferences and international agreements since 1992."[58] What a relief.

The major "commitments"[59] in the Plan of Implementation include:

- Water and sanitation – halve the proportion of the world's people who are without access to basic sanitation[60] and safe drinking water by 2015;[61]
- Energy – increase access to modern energy services,[62] increase energy efficiency,[63] and renewable energy use,[64] phase out energy subsidies where appropriate,[65] and support access to energy for at least 35% of the African population by 2022;[66]
- Health – aim to achieve use and production of chemicals that lead to minimization of significant adverse effects on human health and environment by 2020,[67] enhance cooperation to reduce air pollution,[68] and improve developing countries' access to environmentally sound alternatives to ozone-depleting chemicals by 2010;[69]
- Agriculture – call on the Global Environmental Facility (GEF) to consider inclusion of desertification as a new focal area for funding[70] and develop food security strategies for Africa by 2005;[71]
- Biodiversity – significantly reduce biodiversity loss by 2010,[72] reverse the current trend in natural resource degradation as soon as possible,[73] restore fisheries to their maximum sustainable yields by 2015,[74] establish representative marine protected areas by 2012,[75]

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58. *Id.* at ¶ 1.

59. While there are many vague, contentless "commitments" in the Plan, this list contains the ones the UN thought serious enough to be mentioned in its 2½-page *Highlights of Commitments and Implementation Initiatives* initially posted on the official UN Johannesburg website and revised on Sept. 12, 2002 (copy with author), but then removed and replaced by a much more face-saving and detailed 7-page *Key Outcomes of the Summit* in October, *supra* note 50 (at least until the next level of puffery comes along). *Also see* John Sullivan, *"Plan of Implementation" Seeks to Aid Poor, Spur Growth Without Harming Environment*, 33 ENV'T REP. (BNA) 1909 (Sept. 6, 2002).

60. WSSD Plan of Implementation, *supra* note 57, at ¶ 7.

61. *Id.*

62. *Id.* at ¶ 8.

63. *Id.* at ¶ 19(d).

64. *Id.*

65. *Id.* at ¶¶ 19(p), (q).

66. *Id.* at ¶ 56(j)(i).

67. *Id.* at ¶ 22.

68. *Id.* at ¶ 37.

69. *Id.* at ¶ 37(d).

70. *Id.* at ¶ 39(f).

71. *Id.* at ¶ 61.

72. *Id.* at ¶ 42.

73. *Id.* at ¶ 23.

74. *Id.* at ¶ 30(a).

75. *Id.* at ¶ 31(c).

undertake initiatives to reduce land-based ocean pollution by 2004;[76]

- Cross-cutting issues – recognize that opening up access to markets is a key to development,[77] support phase out of export subsidies,[78] establish a 10-year program on sustainable consumption and production,[79] promote corporate responsibility and accountability,[80] and improve natural disaster preparedness and response.[81]

An impressive list? A closer look shows three things detracting from that. First, these are the same type of *empty promises* that the same countries made ten years ago in Agenda 21 and have never put up the money to achieve. Second, *only two are new promises* – sanitation and marine reserves – the rest are existing commitments already made in previous post-Rio UN conferences.[82] And third, a number of the old promises that are included are subtly and not so subtly *diluted, delayed, or denied.* Examples of the latter include making it only an "aim" to eliminate dangerous chemicals by 2020 (contrary to the thrust of current chemical treaties),[83] backing off to just "a significant reduction" in loss of biodiversity (clearly undercutting the 1992 Convention on Biological Diversity),[84] and promoting "clean" fossil fuels (despite the Climate Change treaty regime).[85]

As one disgusted environmental NGO put it: "We could go on, but the list of weasel words and lost promises is nearly endless. Do not believe Government spin doctors who claim success for the Summit. It is by any objective test a failure."[86] Another environmental NGO issued an amusing "report card" grading the summit with an "F" for the following:

- Energy and climate – only "urged" countries to ratify the Kyoto Protocol;
- Forests – failed to recommit to measures agreed to six months ago to halt all biodiversity loss by 2010;
- Agriculture – silent on genetic engineering, granting patents on life, only "invites" countries to ratify the Cartegena Biosafety Protocol;
- Toxics – weak support for the precautionary principle, adopted good language on corporate accountability which the US killed;
- Oceans – made fisheries restoration voluntary and only "where possible";

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76. *Id.* at ¶ 52(e).
77. *Id.* at ¶¶ 6(i), 41(e).
78. *Id.* at ¶ 86(c).
79. *Id.* at ¶ 14.
80. *Id.* at ¶¶ 45.ter, 122(f).
81. *Id.* at ¶¶ 35(g), 59, 99(e), 119.noviens.
82. Friends of the Earth, *Earth Summit: Betrayal. . .*, *available at* http://www.rio-plus-10.org/en/info/rio+10/129.php (last visited Mar. 5, 2003).
83. WSSD Plan of Implementation, *supra* note 57, at ¶ 22.
84. *Id.* at ¶ 42.
85. *Id.* at ¶ 19(e).
86. Friends of the Earth, *supra* note 82.

- Trade and development – failed to deal with globalization, failed to ensure free-trade rules do not preempt multilateral environmental agreements (MEAs).[87]

Another NGO evaluated the summit's performance in 10 different categories (maximum 10 points each) and gave it a failing score of only 22 points out of a possible 100:[88]

1. Corporate accountability (5 points out of 10) – opened the door to binding international standards for multinational corporations, but without any follow-up compliance mechanism;
2. Trade and globalization (only 2 points) – Free trade and globalization dominated over the environment, and the authority of MEAs over trade rules got sent back to the World Trade Organization for resolution!;
3. Ecological debt (0) – No formal recognition of the ecological debt the developed countries owe to the developing world, a backward step from Rio where the North agreed it had caused most environmental harm to date and had to take lead responsibility in the clean up;
4. Energy and climate change (3) – The Kyoto Protocol was reaffirmed, but efforts to commit to a 10% target for renewable energy failed;
5. Water and sanitation (3) – Weasel words weaken the much-ballyhooed commitment to halve the number of people without access to clean water and sanitation, and delegates failed to ensure water remains a public good and to safeguard against the problems of privatization;
6. Biodiversity (3) – Weakened biodiversity by only aiming to reduce the rate of loss, not eliminate loss, but modest progress on marine protected areas;
7. Aid and debt (1) – No new aid or debt relief targets; merely reiterates the UN-recommended 0.7% of GDP as the benchmark for nation's foreign aid, which is largely ignored;
8. Subsidies (1) – Useful progress on fisheries subsidies, but not on the critical farm, fossil fuel, and nuclear subsidies;
9. Consumption and production (2) – The Rio commitment for a ten-year action program to address over-consumption and

87. Greenpeace, *Earth Summit 2002: It's Time to Stop the War on the Earth, available at* http://archive.greenpeace.org/earthsummit/report_card (last visited Mar. 5, 2003).

88. Friends of the Earth International, *Earth Summit End of Term Report, available at* http://www.rio-plus-10.org/en/info/rio+10/118.php (last visited Mar. 5, 2003).

over-production was dropped in favor of a weaker "framework";

10. Rio Principles (2) – After much disagreement (led by the US), the good news is in the end there was no backsliding on key principles such as the "precautionary approach" and "common but differentiated responsibilities" of developing vs. developed states. The bad news is there was no progress.

So is the environmentalists' analysis overly harsh? It seems not, since even the UN sponsors' were tepid in their assessment:

> By any account, the Johannesburg Summit has laid the groundwork and paved the way for action . . . there were no silver bullet solutions to aid the fight against poverty and a continually deteriorating natural environment. In fact, there was no magic and no miracle – only the realization that practical and sustained steps were needed to address many of the world's most pressing problems.
>
> As an implementation-focused Summit, Johannesburg did not produce a particularly dramatic outcome – there were no agreements that will lead to new treaties and many of the agreed targets were derived from a panoply of assorted lower profile meetings. But some important new targets were established [citing the four targets for sanitation access, chemical safety, fish stocks maintenance, and biodiversity loss reduction].[89]

This was certainly a sad conclusion for the first international sustainable development conference of the 21st century. Time will tell whether the US-led selfishness of Johannesburg represents the sad wave of the future or only an embarrassing blip on our progress toward ensuring a safe, healthy environment, society, and economy for the world in the years ahead.

89. *The Johannesburg Summit Test, supra* note 36.