BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 20 2002 NUMBER 2

CONTENTS

Articles

Berkeley Journal of International Law

Volume 20 | Issue 2 Article 1

2002

The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary

Christoph Henkel

The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary

By
Dr. Christoph Henkel, LL.M.*

TABLE OF CONTENTS

I. INTRODUCTION

The allocation of powers remains one of the most controversial subjects in the integration process of the European Union. The European Union is no longer linked just to economic integration; it has increasingly become more

* Visiting Professor of Law, Concordia International University Estonia School of Law; Assessor iur., Germany, 1994; LL.M. University of Wisconsin, 1995; S.J.D. University of Wisconsin, 1999.

state-like and political. In fact, after one of the latest Intergovernmental Conferences of the Member States at the Nice European Council in December 2000,[1] the European Union adopted a Charter of Fundamental Rights.[2] Additionally, the European Union is preparing for its fifth enlargement, with the goal of nearly doubling the Union's membership.[3]

The increasing integration of the European Union continues to cause Member States to fear the proliferation of European competences. The increasing use of majority voting has dramatically diminished the influence of each individual Member State; the Member States no longer retain an unlimited veto power over the decision-making process or the depth of integration throughout the Community. Similar to the debate in the United States over the extent to which the Tenth Amendment limits the powers of the federal government, the Member States of the European Union continue to seek means by which the unrestricted growth of Community powers can be limited. Moreover, in response to increasing disapproval rates of European integration among European Union citizens, the Member States also try to ensure national identity within the Union.

In an attempt to address these concerns, the Member States resolved to include additional provisions in the Community Treaties. The goal was to prevent further distance between the Union and its citizens while at the same time recognizing the importance of cultural differences among the Member States.[4] The result was the Principle of Subsidiarity, which was first incorporated in the European Community Treaty through the Maastricht Treaty.[5] At the Nice European Council in December 2000, the principle was also included in the newly adopted Charter of Fundamental Rights of the European Union.[6]

---

1. *See* Presidency Conclusions: Nice European Council Meeting, 7, 8, and 9 December 2000, http://europe.eu.int/council/off/conclu/dec2000/dec2000_en.htm#1 [hereinafter *Presidency Conclusions*]; Treaty of Nice, Dec. 22, 2000, http://ue.eu.int/cigdocs/en/cig2000-EN.pdf (Dec. 22, 2000) (provisional text approved by the intergovernmental conference on institutional reform). For the consolidated version of the Treaty of Nice, see Mar. 10, 2001 O.J. (C 80) 1.

2. *See* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364). The legal status of the Charter of Fundamental Rights must still be decided by the Member States.

3. *See* Presidency Conclusions, *supra* note 1, ¶¶ 4-10.

4. *See* Preamble of the TREATY ON EUROPEAN UNION [hereinafter TEU], May 1, 1992, http://europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf, July 29, 1992 O.J. (C 191), consolidated version incorporating changes made by the Treaty of Amsterdam amending the Treaty on European Union, Oct. 2, 1997 O.J. (C 340), which states: "[The leaders and political representatives of the Member States], CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them . . . RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity . . . ."; *see also* TEU art. 2(3) which states: "The Union shall set itself the following objectives . . . to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union . . . ."; furthermore, *see* TEU art. 6(3) stating: "The Union shall respect the national identities of its Member States."

5. TREATY ESTABLISHING THE EUROPEAN COMMUNITY (signed in Rome on March 25, 1957), consolidated version, Nov. 10, 1997, art. 5 (ex art. 3(b)), O.J. (C 340) 173 [hereinafter EC TREATY].

6. Charter of Fundamental Rights of the European Union art. 51, 2000 O.J. (C 364) 8, 21.

The Principle of Subsidiarity was intended to be a federal principle by which legislative decisions in the European Union would be taken at the most appropriate level. However, since the introduction of the Principle of Subsidiarity, many questions continue to surround the meaning of subsidiarity in Community law. For example, how can the Principle of Subsidiarity be applied? Which Community institution should interpret and review compliance with subsidiarity? Is the Principle of Subsidiarity justiciable and enforceable? It is the thesis of this article that the Principal of Subsidiarity, despite its broad and abstract structural concept, is a positive and applicable rule of law in the legal context of the European Union. In fact, the Principle of Subsidiarity must be considered a functional principle, which cannot consist of a material determination or a strict enumeration of Community powers. A different issue is, however, the question whether the interpretation of the Principle of Subsidiarity may be pursued in an objective manner. Indeed, the interpretation of subsidiarity may be determined by changing national self-interest and specific bargaining positions of the Member States.

In the first section this article examines the different meanings of subsidiarity, its character as a doctrine of social philosophy and the origins of the concept of subsidiarity in the Community Treaties. The second section of this article describes the community approach to application, interpretation and review of compliance with subsidiarity. In this context, the Principle of Proportionality and the procedural requirement to Show Sufficient Grounds are considered as tools for judicial review and first developments in the case law of the European Court of Justice are discussed. Finally, against the background of political economic theory, the article will highlight a number of contradicting perspectives and limitations within the Principle of Subsidiarity.

II.
THE PRINCIPLE OF SUBSIDIARITY

A. *Differences in Meanings and General Understanding of Subsidiarity*

Since the Maastricht Treaty, Community institutions are obliged to abide by the Principle of Subsidiarity in the application of the European Community Treaties. In addition, the Nice European Council extended the application of the Principle of Subsidiarity to the Charter of Fundamental Rights of the European Union. The Treaty on European Community explicitly states:

> In areas which do not fall within the exclusive competence, the Community shall take action, in accordance with the Principle of Subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community.[7]

7. EC TREATY art. 5(2) (ex art. 3b(2)). With regard to the wording of the Subsidiarity Clause, one is compelled to notice the similarities to the Tenth Amendment of The U.S. Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, clear differences must be noticed as well. For example, one obvious difference is the finality in which the Tenth Amendment

This clause sets forth the basis of subsidiarity in the European Union.

Subsidiarity cannot be explained in a simple fashion; it continues to have a variety of meanings. In its theological meaning, subsidiarity is understood as a structural principle concerning the relationship between the society and the state or the individual and the state.[8] The Principle of Subsidiarity thereby broadly refers to the limits of the right and duty of the public authority to intervene in social and economic affairs.[9] It is the integrating element of an idealistically contemplated constitution of state and society. The principle clearly distinguishes between the actions of different levels of authority in a society or state, whereby the highest or most centralized level should only take actions if and insofar as a subordinate level cannot achieve the same goal in a better or equally sufficient way.[10]

In legal terms, the Principle of Subsidiarity is considered to determine the relationship between different legal provisions. For instance, if a number of legal provisions apply to one statement of affairs or if a single action violates more than one statute, those provisions which are less specific or apply only in the alternative are not applicable to the case and must be rejected. The latter provisions only enjoy subsidiary validity. It is only this meaning of subsidiarity that seems to be common among the different European legal systems.

When taking the different meanings of subsidiarity into account, it is difficult to determine which specific meaning was utilized in the execution of the concept in Community law. Nevertheless, it can be argued that the Principle of Subsidiarity must be interpreted in terms of a structural principle. The aim of a structural principle of that kind is a clear regulation of the distribution of powers between the Community and the Member States. This conclusion places the Principle of Subsidiarity in relation with one principle with which it is often confused, federalism.

It cannot be denied that many correlations exist between subsidiarity and federalism.[11] In German constitutional scholarship, this was recognized in the

---

appears to determine the reservation of powers on the state level. In contrast, the Subsidiarity Clause allows the European Communities to act under certain preconditions even if the actions to be taken do not fall within the exclusive competences of the Community.

8. Roman Herzog, *Subsidiaritätsprinzip, in* EVANGELISCHES STAATSLEXIKON col. 3564 (Hermann Kunst et al., eds., 1987); Roman Herzog, *Subsidiaritätsprinzip und Staatsverfassung,* DER STAAT 399, 399-411 (1963); Walter Schöpsdau, *Subsidiaritätsprinzip, in* EVANGELISCHES KIRCHENLEXIKON: INTERNATIONALE THEOLOGISCHE ENZYKLOPÄDIE, col. 539-40 (Erwin Fahlbusch et al. eds., 1997).

9. R.E. Mulcahy, *Subsidiarity, in* NEW CATHOLIC ENCYCLOPEDIA 762 (Cath. Univ. of America, 1981).

10. While this definition seems clear, one troubling aspect is apparent. Although not extremely prevalent with regard to the European Communities, in its general and abstract meaning, the Principle of Subsidiarity raises questions as to the basis or starting point of its comparison of different levels of authority. Specifically, the principle poses the question of which levels of authority must be placed in juxtaposition or serve as comparative figures.

11. The U.S. Supreme Court Case *Cooley v. Philadelphia* illustrates such a correlation. The *Cooley* doctrine maintains that "states are free to regulate those aspects of interstate and foreign commerce so local in character as to demand diverse treatment" *See* Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. 299 (1851), Yet, the *Cooley* doctrine did prove to be inadequate. Accordingly, after *Cooley* the U.S. Supreme Court increasingly focused on the method and context

late 19th century and founded on the acknowledgment that both principles share the synthesis of two primary facts of human culture, individualism and unity as well as independence and community.[12] While both subsidiarity and federalism attempt to achieve this goal, they are distinguished by their different approaches. The goal of subsidiarity is the definition of different levels of authority in state and society as well as the appropriate distribution of powers thereof. In contrast, the necessary connection of state and society is the aim of federalism. Thus, on one hand federalism presupposes and follows subsidiarity. On the other, federalism provides the frame in which subsidiarity is exercised. In its broadest sense, federalism involves the linking of individuals, groups, and polities in a lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrity of all parties.[13]

B. Subsidiarity as a Structural and Ontological Principle in Theology

For a full understanding of the Principle of Subsidiarity, it is necessary to view it in the context of the theological doctrine of social philosophy, from which it originates. As a socio-structural and ontological principle, the idea of subsidiarity is particularly rooted in the Catholic doctrine of social philosophy and the Catholic teachings on social reconstruction, in which context subsidiarity concerns the relationship between the society and the state or the individual and the state.[14]

The idea of subsidiarity was first introduced in the Catholic doctrine of social philosophy by the encyclical letters of Pope Leo XIII, *Immortale Dei*[15] and *Rerum Novarum*.[16] In the encyclical, *Rerum Novarum*, Pope Leo XIII noted that "[i]t is not right . . . for either the citizen or the family to be absorbed by the State; it is proper that the individual and the family should be permitted to retain their freedom of action, so far as this is possible without jeopardizing the common good and without injuring anyone."[17]

---

of challenged regulations. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at 1048 (3d ed. 2000).

12. KONSTANTIN FRANTZ, DER FÖDERALISMUS ALS DAS LEITENDE PRINZIP FÜR DIE SOZIALE, STAATLICHE UND INTERNATIONALE ORGANISATION UNTER BESONDERER BEZUGNAHME AUF DEUTSCHLAND (1879); *see also* MAX HÄNE, DIE STAATSIDEEN DES KONSTANTIN FRANTZ (1929). Please note that K. Frantz is cited only for reference, not to advocate his ideas on nationalism or his role in Nazi Germany.

13. DANIEL J. ELAZAR, EXPLORING FEDERALISM 5 (1987).

14. *See, e.g.*, OSCAR V. NELL-BREUNING, BAUGESETZ DER GESELLSCHAFT (Freiburg i. Br.) (1968); Karl Homann & Christian Kircher, *Das Subsidiaritätsprinzip in der Katholischen Soziallehre und in der Ökonomik, in* EUROPA ZWISCHEN ORDNUNGSWETTBEWERB UND HARMONISIERUNG: EUROPÄISCHE ORDNUNGSPOLITIK IM ZEICHEN DER SUBSIDIARITÄT 45, 45-54 (Lüder Gerken ed., 1995).

15. Leo XIII, Encyclical Letter *Immortale Dei*, November 1, 1885, http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/ff_e-xiii_enc-01111885_immortale-dei_en.html.

16. Leo XIII, Encyclical Letter *Rerum Novarum*, May 15, 1891 (St. Paul ed., Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 15, p. 24; s. 48, p.69 (St. Paul ed., Boston); *see also* Mulcahy, *supra* note 9, at 762.

17. Leo XIII, Encyclical Letter *Rerum Novarum*, May 15, 1891, s. 52, p. 32 (St. Paul ed., Boston).

In the understanding of the Catholic doctrine, the Principle of Subsidiarity was, however, most distinctly enunciated by Pope Pius XI in his encyclical letter *Quadragesimo Anno*, in 1931.[18] Pope Pius XI asserted:

> It is indeed true, as history clearly proves, that owing to the change in social conditions, much that was formerly done by small bodies can nowadays be accomplished only by large corporations. Nonetheless, just as it is wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so, too, it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable, and it retains its full truth today. Of its very nature the true aim of all social body, but never to destroy or absorb them.[19]

In turning from the negative emphasis of his formulation to positive thought, Pope Pius XI then concludes:

> The state should leave to . . . smaller groups the settlement of business of minor importance. It will thus carry out with greater freedom, power and success the tasks belonging to it, because it alone can effectively accomplish these, directing, watching, stimulating and restraining, as circumstances suggest or necessity demands. Let those in power, therefore, be convinced that the more faithfully this principle be followed, and a graded hierarchical order exist between the various *subsidiary* organizations, the more excellent will be both the authority and the efficiency of the social organizations as a whole and the happier and more prosperous the condition of the state.[20]

Subsidiarity was thereby defined in the context of the reconstruction of the social order and the authority of the church in the social and economic sphere, conferred to the Christian constitution of the state. Toward the end of the 19th century, and the early 20th century, the Catholic doctrine was particularly critical of increasing individualism in contrast to a well-developed social life, which, in the past, was characterized by the organic linkage of institutions.[21] Following 19th century liberalism, the church saw the social order to be in jeopardy; society had reached a point at which it was composed for the most part of individual members and the state, while intermediate bodies to regulate juridical and economic conditions were lacking at best.[22] In other words, as a result of the deterioration of the structures within society, the state proved increasingly unable to

18. Pius XI, Encyclical Letter *Quadragesimo anno,* May 15, 1931, 39 (St. Paul ed., Boston).

19. *Id.*

20. *Id.* at 40-41 (textual emphasis added by the author).

21. Isaiah Berlin describes this development throughout Europe convincingly with the conception of "man as demiurge." *See* Isaiah Berlin, *European Unity and its Vicissitudes, in* THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 175, 190 (Henry Hardy ed., 1991). According to Berlin, this concept, expressed by Fichte, Carlyle and Nietzsche, shattered the unitarian European world. "Independence – capacity to determine one's own course—[became] as great a virtue as interdependence once was." *Id.* at 190-91. Following the program of Enlightenment and utilitarianism, the conflict and interplay between the older universal ideal founded upon reason and knowledge, and the new romantic ideal which ultimately led to extreme nationalism and to Fascism. *Id.* at 192-94.

22. Pius XI, Encyclical Letter *Quadragesimo Anno*, May 15, 1931, 40 (St. Paul ed., Boston); John XXIII, Encyclical Letter *Mater et Magister*, May 15, 1961, s. 10-40, p. 6-13 (St. Paul ed., Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 4-11, p. 11-18 (St. Paul ed., Boston).

protect public welfare. In terms of the reconstruction of the state, the church believed that the solution was a more social life.

As a result, the focus shifted from the interest of the individual to the community, one represented by appropriate public and private institutions and governed by justice and charity as the principal laws of social life.[23] Although this explains the background and goal of the reconstruction of the state in Catholic doctrine, the merits of the Principle of Subsidiarity remain somewhat obscure. For a full understanding of subsidiarity, it is important to further examine the Church's underlying definition of the relationship between state and society.

According to the social doctrine of the Catholic Church, society consists of a form of subjectivity,[24] which holds that "the social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy."[25] Social life in a community at large is, however, not understood as disposing of an end in itself,[26] rather the ulterior motive remains the individual member at all times.[27] In short, men and women are defined as social beings whereby society and community enable them to "more fully and more readily . . . achieve their own perfection."[28] This definition correlates with the grammatical meaning of the word *subsidium*, aid or help.

In Catholic doctrine these indirect conditions are characterized as the common good, which stands for the sum total of the conditions of social living.[29] The common good can only be achieved when personal rights and duties are guaranteed.[30] This is where the Catholic Church determines the task of the state. The state as an institution oversees and directs the exercise of rights and intervenes where necessary. In addition, the state may also exercise a substitute function when social sectors or business systems are too weak. Nonetheless, the primary responsibility "belongs not to the state but the individuals and the various groups and associations which make up society."[31] In this understanding, the socio-structural concept of the Principle of Subsidiarity is further promul-

23. John XXIII, Encyclical Letter *Mater et Magistra*, May 15, 1961, s. 38-40, p. 12-13 (St. Paul ed., Boston).

24. John Paul II, Encyclical Letter *Sollicitudo Rei Socialis*, Dec. 30, 1987, s. 15, p. 25, s. 28, p. 47-50 (St. Paul ed. Boston); John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 13, p. 21 (St. Paul ed., Boston).

25. John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 13, p. 21 (St. Paul ed., Boston).

26. *See* the original text of the encyclical in Latin: "socialis quaevis opera vi naturaque sua subsidium afferre membris corporis socialis debet." Pius XI, Encyclical Letter *Quadragesimo anno*, May 15, 1931, p. 203, Acta Apostolicae Sedis, XXIII (1931).

27. *See, e.g.*, Leo XIII, Encyclical Letter *Immortale Dei*, *supra* note 16, ¶¶ 2-3.

28. Pope John XXIII, Encyclical Letter *Mater et Magistra*, May 15, 1961, s. 65, p. 21 (St. Paul ed., Boston).

29. Mulcahy, *supra* note 9.

30. John XXIII, Encyclical Letter *Pacem in terris*, Apr. 11, 1963, s. 60, p. 20 (St. Paul ed., Boston); Pius XII, Radio Message, *Pentecost*, June 1, 1941, Acta Apostolicae Sedis, XXXIII, 1941, p. 198-203.

31. John Paul II, Encyclical Letter *Centesimus Annus*, May 1, 1991, s. 48, p. 68 (St. Paul ed., Boston).

gated. The community at large renders service to lower and smaller bodies; it outlines conditions which enable them to function more effectively.

The Principle of Subsidiarity, in the context of the Catholic Church, does not define an auxiliary or subsidiary means. Nor does it provide a substitute for deficient powers or lack of efficiency on the level of lower bodies of authority. Yet, even where the state as the community at large must intervene, it must be remembered that intervention is only an aid to the lower society or individual. Such intervention cannot destroy the different levels of society by permanently taking over their functions or preempting their sovereignty.

In sum, subsidiarity in its theological context illustrates two main characteristics. First, in activities of society and state, subsidiarity cannot be understood as an alternative means of intervention where individuum and smaller bodies are unable to perform their duties. Therefore, subsidiarity does not convey the necessary and often problematic substitute for missing powers or the lack of efficiency on lower levels of society or state. Second, subsidiarity can only serve as a political guideline or a mere principle. As a rule of law open and susceptible to enforcement, the Principle of Subsidiarity would require the additional step of its incorporation or transfer into a legal system.[32]

C. Origins of Subsidiarity in the EEC Treaty, Article 130r Sec. 4

In the context of the European Communities, the Principle of Subsidiarity is not entirely new. The principle was first introduced in the Treaties through the Single European Act and Article 130r Sec. 4 of the Treaty Establishing the European Economic Community. With regard to Community actions relating to the environment, the Treaty stated that "the Community shall take action . . . to the extent to which the objectives referred to . . . can be attained better at Community level than at the level of the individual Member States."[33] The objectives under which the Treaty allowed the Community to act focused primarily on the preservation, protection and improvement of the environment.[34]

---

32. Although the Principle of Subsidiarity is derived predominately from the Catholic doctrine of social philosophy, the idea of subsidiarity can also be found in the writings of Plato, Aristotle, Thomas Aquinas and Johannes Althusius. *See, e.g.*, PLATO, THE REPUBLIC, Book II, 369b-369c (John M. Cooper ed., 1997); ARISTOTLE, THE POLITICS, Book I 2, 1252a1-1253a29 (T. A. Sinclair & Trevor J. Saunders trans., Penguin Books 1992); Paul E. Sigmund, *Thomistic Natural Law and Social Theory, in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS: A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS 180, 184-88 (Paul E. Sigmund ed., 1988); JOHANNES ALTHUSIUS, POLITICA METHODICE DIGESTA, ATQUE EXEMPLIS SACRIS ET PROFANIS ILLUSTRATA, Chapter X-XVII, 74-86 (Frederick S. Carney trans., 1964); *see also* Otfried Höffe, *Subsidiarität als staatsphilosophisches Prinzip?, in* SUBSIDIARITÄT: EIN INTERDISZIPLINÄRES SYMPOSIUM 19-46 (Alois Riklin & Gerard Batliner eds., 1994).

33. TREATY OF ROME ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 130r(4), 298 U.N.T.S. 11 [hereinafter EEC TREATY] as amended by the Single European Act, 25 I.L.M. 506, 515 (1986) [hereinafter SEA].

34. EEC TREATY art. 130r(1), as amended by SEA, *supra* note 33.

However, the interpretation and meaning of EEC Treaty, Article 130r Sec. 4 remained controversial among the Member States.[35] The difference of opinion centered around the question of whether the article contained a rule of law or merely a political guideline. The wording of the provision and the Member States' expressed intention to improve the protection of the environment supports a binding character or legal obligation, at least with regard to environmental issues. Thus it can be argued that the applicability of EEC Treaty, Article 130r Sec. 4 and the Principle of Subsidiarity established therein might be limited.

The idea of subsidiarity in the Community Treaties is not limited to the EEC Treaty, Article 130r. It is incorporated in numerous other Community provisions. For instance, pursuant to the Treaty on European Community, Article 3(h), the approximation of laws of the Member States proceeds only to the extent required for the functioning of the common market.[36] EC Treaty Article 94 (ex Article 100) specifies that the approximation of such laws only result if they "directly affect the establishment and functioning of the common market."[37] Likewise, other provisions justify Community actions only with regard to a specific goal, such as the Internal Market or the Common Market; sufficient grounds must prove the necessity of actions for the achievement of Community objectives.[38] Finally, the legal instrument of Community directives clearly illustrates the idea of subsidiarity. Community directives are "binding, as to the result to be achieved" while leaving "the choice of form and methods" for their implementation to the Member States.[39]

These different provisions unmistakably convey the presence of the idea of subsidiarity throughout the Community Treaties. The Principle of Subsidiarity, even before its adoption through the Single European Act and the Maastricht Treaty, was acknowledged as a general principle by the Community Treaties. The explicit adoption of the Principle of Subsidiarity through the Maastricht Treaty exemplifies the distinct and unambiguous affirmation of that fact.[40] In spite of a general acknowledgment of the Principle of Subsidiarity, the meaning and importance of the Principle of Subsidiarity remained somewhat obscure. An attempt should therefore be made to interpret the meaning of subsidiarity in the context of European integration and with regard to its value as a measure for decentralization.

35. *See, e.g.*, THOMAS OPPERMANN, EUROPARECHT 745-46 (C.H. Beck) (1991); Manfred Zuleeg, *Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiet des Umweltschutzes,* NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 280 (1987).

36. EC TREATY art. 3(h) (ex art. 3(h)).

37. EC TREATY art. 94 (ex art. 100).

38. EC TREATY art. 14 (ex art. 7a) & art. 308 (ex art. 235).

39. EC TREATY art. 249 (ex art. 189).

40. It should be noted that with the amendment of the Community Treaties through the Maastricht Treaty, EEC TREATY art. 130r (4) was abolished and art. 130r reworded. As a result of the Amsterdam Treaty, art. 130r was renumbered. It is now EC TREATY art. 174.

III.
THE SUBSIDIARITY CLAUSE, APPLICATION AND JUSTICIABILITY

A. Application of the Subsidiarity Clause

The Community Treaties define the application of the Principle of Subsidiarity in a negative sense, stating that: "[T]he Community shall take action, in accordance with the Principle of Subsidiarity, only if and in so far as . . . the proposed action *cannot* be sufficiently achieved by the Member States."[41] Despite this definition, both a positive and a negative reading seem appropriate. In its negative meaning, the clause protects the prerogatives of the Member States against undue Community interference. In contrast, the positive reading indicates that the Community should be allowed to act where such action appears necessary. This interpretation clearly suggests that Community competences were the primary focus of the Member States.[42] That is, the traditional vision of federalism, characterized by the view that a clear line should be drawn between the respective competences of the center and the periphery, was at the center of the Member States' concern.

Accordingly, Article 5 Sec. 2 (ex Art. 3b Sec. 2) stresses that only "areas which do not fall within [the] exclusive competence [of the Community]" are subject to the application of the Principle of Subsidiarity.[43] This indicates that subsidiarity is only important in relation to powers that are shared between the Community and the Member States or in areas of concurrent competences.[44] While the Subsidiarity Clause does not clearly stipulate the allocation of powers between the Community and its Member States, it postulates that the Community, in addition to its exclusive powers, maintains an additional area of power which rests within the broad frame of Community goals. As such, subsidiarity in fact determines the limitation of existing, not exclusive powers, and defines the dynamics in Community integration. It is in this context that the Principle of Subsidiarity signifies more than a mere guideline; it is incorporated into the legal system of the Community Treaties and establishes a rule of law.[45]

Turning to the wording of the Subsidiarity Clause, subsidiarity envisages a twofold test. First, measures at the national level must be reviewed by the Community. This review might include the analysis of financial resources, legal in-

41. EC TREATY art. 5(2) (ex. art. 3b(2)). (textual emphasis added by author).

42. Manfred Zuleeg, *Justiziabilität des Subsidiaritätsprinzips, in* SUBSIDIARITÄT: IDEE UND WIRKLICHKEIT: ZUR REICHWEITE EINES PRINZIPS IN DEUTSCHLAND UND EUROPA 185 (Knut Wolfgang Nörr & Thomas Oppermann eds., 1997); Renaud Dehousse, *Does Subsidiarity Really Matter?, in* EUI WORKING PAPER No. 92/32, at 7 (European University Institute ed., 1992). This view is opposed by Dieter Grimm, who was a Justice on the German Supreme Court. *See, e.g.*, Dieter Grimm, *Effektivität und Effektivierung des Subsidaritätsprinzips*, 77 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 6-12 (1994).

43. EC TREATY art. 5 (ex art. 3b).

44. *See* Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 625-26 George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 334.

45. Manfred Zuleeg, *Artikel 3b EC Treaty, in* KOMMENTAR ZUM EU-/EG VERTRAG, Vol. 1, 225 (Hans van der Groeben et al. eds., 1997).

struments and possibilities of enforcement. Overall, the review must demonstrate whether "the objectives of the proposed action"[46] can be "sufficiently achieved by the Member States."[47] Second, the Community must evaluate whether "by reason of the scale or the effect of the proposed action," its objectives can be "better achieved by the Community."[48]

The relevant standard of judgment is whether a Community goal can be materialized on a Member State or national level. However, as a prior step to this judgment a valid Community goal must be determined. Community institutions cannot arbitrarily name any goal thought to be worth pursuing. A valid Community action is commanded by the objectives and goals assigned by the Treaty.[49] And so, the evaluation of the twofold test required by the Subsidiarity Clause can only be set in motion by reference to a legitimate Community goal.

While the first test of the Subsidiarity Clause aims at the evaluation of the most effective action, it is inaccurate to merely limit the application of the Principle of Subsidiarity to a comparison of effectiveness.[50] The adverb "sufficiently" illustrates the emphasis on effectiveness. However, it is highly questionable whether the determination of effectiveness in this context is justiciable. Instead, the determination of effectiveness is a political question to be answered by the legislature.[51] For example, even if a Community goal can only be achieved in part by Member State action, this does not satisfy the test of insufficiency. As indicated by the conjunction "in so far," the Community can only pursue actions to the extent to which subordinate national levels prove ineffective. In the above example, this would amount to actions limited in parts. While those parts of a Community goal which can be sufficiently achieved by the Member States must be addressed by national authorities, the remainder must be regulated by Community action.[52]

The second test of the Subsidiarity Clause aims at the "scale or effects" of proposed Community actions. Both terms are rather vague and general in their meaning, making it difficult to render a specific interpretation for the application of subsidiarity on this basis. In fact, the only interpretation follows from the grammatical use of conjunctions. The connection of "scale" and "effect" with the coordinating conjunction "or" seems to lower the standard of judgment. An alternative rather than an additional requirement is emphasized. On the other

46. EC TREATY art. 5 (ex art. 3b (2)).

47. *Id.*

48. *Id.*

49. EC TREATY art. 5 (ex art. 3b (1)).

50. This was particularly defined by the Commission as the "value added test." *See The Principle of Subsidiarity,* Communication of the Commission to the Council and the European Parliament, Parl. Eur. Annex Doc. SEC (92) 10.

51. Zuleeg, *supra* note 42, at 228 § 24; *see also* Dehousse, *supra* note 42.

52. Note that although "shared" legislation of that kind may actually improve the issue of accountability, it places the issue of efficacy into a new context. With regard to varying capacities of different Member States, it seems questionable as to which conclusions may be reached accordingly. Does this imply a patchwork of different Community regulations throughout Europe, differing by Member State? If Member States are unable to achieve Community goals alone but are able to do so together with other Member States, are bilateral or international agreements among those Member States considered sufficient?

hand, complexity is added to the test by the use of the conjunctive adverb "therefore" and the subordinate conjunction "by reason of."[53] The conjunctive adverb connects the first test of the Subsidiarity Clause with the second test in a cumulative sense. In doing so, an aspect of cause is added. This is further emphasized by the direct linkage of the conjunctive adverb and subordinate conjunction, "therefore, by reason of." The cumulative aspect and the aspect of cause affirm the requirement that both tests be applied in tandem before an ultimate judgment in accordance with the Principle of Subsidiarity may be reached.[54]

The Subsidiarity Clause does not raise any presumption of competence in favor of the Community or the Member States. The Principle of Subsidiarity constitutes a rule for the proper execution of Community powers (*Kompetenzausübungsregel*). As a decisive tool for the justification of proposed Community actions, other then those based on exclusive powers, the Subsidiarity Clause asserts a general precedence or bias of Member State actions over Community actions. In this context, subsidiarity may be viewed as a general means to distribute or allocate powers similar to that of other federal states, in which state authority is the rule and federal authority the exception.[55]

Despite this conclusion, it is nevertheless important to realize that the wording of the Subsidiarity Clause does not provide any particular guideline for its application. Nor does it fill the principle with an unambiguous meaning or any indication toward its justiciability. The wording of the clause simply suggests that a comparative assessment of national and Community measures be taken before the Community can take action. This leaves ample room for argument, as it is particularly unclear how the Community may prove the application of such comparative measures. Does a comparative assessment in the final result prove to be nothing more than a political question as it might involve delicate political choices? If so, it is questionable whether the European Court of Justice would be equipped to decide subsidiarity issues raised in a suit before the Court. Similar to the political question doctrine in the United States, this raises the additional question of whether it should be the task of the judicial body to answer political questions at all.[56] This proves troublesome with regard to the

53. EC TREATY art. 5(2) (ex art. 3b (2)).

54. According to the cumulative character of the first and second test of the Subsidiarity Clause, the Community may not take immediate action if the first test indicates that a proposed action cannot be sufficiently achieved by Member States. Regardless of the insufficiency, the Community institutions must continue to evaluate the scale or effect of their proposed actions. This is of significant importance, as it seems most unlikely that a proposed action can be achieved sufficiently at both the Community and Member State level.

55. *See, e.g.*, U.S. CONST., art. I, § 8(3); U.S. CONST, amend. X; *see also* Grundgesetz [Constitution] art. 30 (Germany): "Die Ausübung der staatlichen Befugnisse und die Erfüllung der staatlichen Aufgaben ist Sache der Länder, soweit dieses Grundgesetz keine andere Regelung trifft oder zuläßt." ["Except as otherwise provided or permitted by this Basic Law, the exercise of governmental powers and the discharge of governmental functions is a matter for the Länder."]; DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 33-35 (1994).

56. *See, e.g.*, W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1098-1103; MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 3-7 (Carolina Academic Press) (1991);

separation of powers doctrine, as well as the fact that the European Court itself is responsible for the broad extension of European powers.[57]

B. *Community Approach to the Application of Subsidiarity*

In 1992, as a direct result of national reservations toward the ratification of the Maastricht Treaty, the European Council attempted to adopt guidelines for the application of subsidiarity. In the Birmingham Declaration of October 16, 1992,[58] the European Council focused on the necessary support of the Community by its citizens. The Member States reaffirmed that "decisions must be taken as closely as possible to the citizen" and stressed that "great unity can be achieved without excessive centralization."[59] The Member States concluded that "[t]he Community can only act where Member States have given it the power to do so in the Treaties. Action at the Community level should happen only when proper and necessary. . ."[60] On its way to achieving that goal the Principle of Subsidiarity was named the most essential measure.[61]

While not spelling out particular guidelines in the Birmingham Declaration, the European Council clearly highlighted the importance of the Principle of Subsidiarity as a means to limit centralization. Furthermore, the European Council emphasized the need for Member States to retain ultimate authority over the Community Treaties, as the Community can only act where the Member States have transferred their powers.

Following the Birmingham Declaration, the European Council made an effort to express more explicit guidelines in its Conclusions of the Edinburgh meeting on December 11-12, 1992.[62] The Council affirmed that the European Union rests on the Principle of Subsidiarity, which "contributes to the respect for the national identities of Member States and safeguards their powers."[63] The Council determined that the Subsidiarity Clause in the EC Treaty, Art. 5 Sec. 2 (ex Art. 3b Sec. 2) would determine whether the Community should act in a given circumstance.[64] Furthermore, it defined subsidiarity in terms of "a dynamic concept to be applied in the light of the objectives set out in the Treaty."[65] Accordingly, expanded Community actions were allowed only where

---

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-9 (Harv. Univ. Press) (1980); FRITZ WILHELM SCHARPF, GRENZEN DER RICHTERLICHEN VERANTWORTUNG: DIE POLITICAL-QUESTION-DOKTRIN IN DER RECHTSPRECHUNG DES AMERIKANISCHEN SUPREME COURT (1965).

57. *See* Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT'L L.J. (2001)

58. E.C. Bull., no. 10, at 9, point I.8 (1992).

59. *Id.* at 9, point I.8., ¶ 5.

60. *Id.*

61. *Id.*

62. E.C. Bull., no. 12, at 7 (1992).

63. *Id.* at 12-13, point I.15., ¶ 1.

64. *Id.* at 13, point I.15., ¶ 2.

65. *Id.* at 7, point I.1. and at 13-14, point. I.15., ¶ 5.

required by the circumstances and, conversely, restricted if the circumstances no longer justified intervention.[66]

For the application of the Subsidiarity Clause of the Treaty, the European Council attempted to be more explicit by outlining three conditions.[67] However, these conditions are little more than an extensive repetition of the Subsidiarity Clause itself. In fact, the conditions spelled out by the European Council are limited to repeating the actual wording of the clause in EC Treaty, Article 5 Sec. 2 (ex Article 3b Sec. 2).

One may argue that the European Council failed to produce clarifying guidelines for the application of subsidiarity. In conjunction with its conclusions at the meeting in Edinburgh, the European Council did, however, convey a number of procedural thoughts that may serve as important steps toward a formal application of subsidiarity.[68] The European Council considered the Commission, with its right of legislative initiative,[69] the most crucial force in the implementation of the Principle of Subsidiarity. As such, the European Council found that the Commission, in accordance with the proposed systematic use of consultation, could make the subsidiarity aspects of proposed legislation part of future consultations with the Member States. Furthermore, the Commission was specifically required to submit an annual report to the European Council and the European Parliament on the application of the Treaty in the area of subsidiarity.[70]

With regard to the procedures of the Council of Ministers as the ultimate Community legislator,[71] the European Council found that the regular examination of the implementation of the Principle of Subsidiarity "should become an integral part of the overall examination of any Commission proposal."[72] Existing Council rules, such as the rules on voting, should apply to such examination. Moreover, the examination should include the Council's own evaluation of "whether [a] Commission proposal is totally or partially in conformity" with the Principle of Subsidiarity[73] followed by the evaluation of whether any change envisioned by the Council continues to conform with the principle.[74] All other

66. *Id.* at 12-14, point I.15.

67. *Id.* at 14-15, point I.18.

68. *Id.* at 15-16, points I.20-I.22.

69. EC TREATY art. 211 (ex art. 155). The Commission is the executive branch of the European Union; it formulates programs for general legislation, initiates the legislative process by drafting legislation, carries out administrative tasks assigned to it and oversees as well as enforces compliance with the law.

70. *Id.* at 16, point I.21., ¶ 3.

71. The Council of Ministers must be distinguished from the European Council. The Council of Ministers is the collective head of state of the European Union and consists of representatives of the governments of the Member States. The Council of Ministers exercises primary legislative power within the Union, does however not share the exclusive power of the Commission to initiate legislation. *See* EC TREATY arts. 202-10 (ex arts. 145-54). The European Council is the Council of Ministers meeting as heads of state or government. It is a forum which holds biannual summit meetings. *See* TEU art. 4 (ex art. D).

72. E.C. Bull., no. 12, at 16, point I.22. (1992).

73. *Id.* at 16, point I.22., ¶ 3.

74. *Id.* at 16, point I.22., ¶ 3.

Community institutions, committees and working groups participating in the legislative process of the Community, such as the European Parliament or the Permanent Representatives of the Member States,[75] are also obliged to describe how the Principle of Subsidiarity should be applied on a given proposal.[76]

To be sure, the statements of the European Council with regard to procedures and practices in the application of subsidiarity fall short of providing specific meaning. The most appropriate practice may be the earlier characterization of procedural thoughts, which puts these statements in the context of soft law, provided by political guidelines. On the other hand, the attempt of the European Council to establish a procedural standard of judgment at least suggests that the Community legislators, Commission and Council must evaluate the impact of Community legislation under the aspects of subsidiarity in a transparent manner.[77]

C. *Justiciability of the Subsidiarity Clause*

The question remains as to how to apply the Principle of Subsidiarity and how to review compliance by the Community and its institutions. The responsibility to answer these questions inevitably rested upon the judiciary, as evidenced by past developments of the Community. Indeed, the Member States themselves have advocated this very concept. In the Conclusions of the Edinburgh meeting, the European Council noted, "The Principle of Subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institution, are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned."[78] Making the Principle of Subsidiarity subject to judicial review, however, requires an applicable standard of review. The search for such a standard in Community Law leads only to

75. *See, e.g.*, EC TREATY art. 207(1) (ex art. 151).

76. E.C. Bull., no. 12, at 16, point I.22. (1992).

77. It is essential to recognize remaining limitations as well as the historical context in which these statements were made. The Community institutions, particularly the Commission, continue to have broad legislative discretion, even after the Nice European Council Meeting of December 2000. In addition, the only clear conclusion to be drawn from the Birmingham Declaration and the Conclusions of the Edinburgh meeting are the hopes that Member States associate with the Principle of Subsidiarity. Finally, both statements were intended to revitalize the ratification of the Maastricht Treaty in the Member States, particularly after the ratification had failed in Denmark and the realization of European Union seemed increasingly unlikely. *See Protocol on the Application of the Principles of Subsidiarity and Proportionality*, 1997 O.J. (C 340), 105; *Interinstitutional Declaration on Democracy, Transparency and Subsidiarity*, E.C. Bull., no. 10, at 102, point 1.6.2., at 118-19, point 1.6.2. (1993); *Interinstitutional Agreement – Observing the Principle of Subsidiarity*, E.C. Bull., no. 10, at 102, point 1.6.3., at 119-20, point 2.2.2 (1993).

78. E.C. Bull., no. 12, at 14, point I.15., ¶ 5 (1992). Leaving the interpretation of the Principle of Subsidiarity to the European Court of Justice does not take the political question doctrine into account. Instead, by making it the task of the judicial body, the European Council and Member States simply shifted the responsibility and escaped accountability. However, with a lack of existing political procedures in the European Communities, the Court might be the only institution appropriately suited to scrutinize the application and interpretation of the Subsidiarity Principle. This does not make the judiciary the ultimate and appropriate arbiter of political questions; it simply demonstrates that courts are able to decide political issues and have been relied upon to do so in the past.

the legal concept of "proportionality" and the requirement to show sufficient ground.

1. Principle of Proportionality

In European Community law, the Principle of Proportionality is based on the case law of the European Court of Justice and is one of the most important standards of interpretation and lawfulness.[79] With the Maastricht Treaty, the Principle of Proportionality was positively admitted to the EC Treaty; it states "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[80]

Proportionality is of particular significance for the protection of fundamental rights, because Community law does not provide a codified standard for the limitation of such rights.[81] The standard is primarily based on the Principle of Proportionality, developed by German Constitutional Law and the rulings of the German Supreme Court, the *Bundesverfassungsgericht*.[82] Although not identical in all its contents, the European Principle of Proportionality shares the same cornerstones and concept as the German principle.

The Principle of Proportionality may be best compared with the rational basis test developed in accordance with equal protection and the Fourteenth Amendment in the case law of the U.S. Supreme Court. Under the rational basis test of the Fourteenth Amendment, legislative or administrative acts must meet minimum rationality requirements.[83] Broadly described, legislative acts have a foundation of reasonableness—legislative requirements or classifications must

79. Case 29/69, Erich Stauder v. City of Ulm, Sozialamt, E.C.R. 419, 425, ¶ 7 (1969); Case 11/70, Internationale Handelsgesellschaft, 1125, 1136, ¶ 16 (1970). *See also* Case 11/70, *Internationale Handelsgesellschaft*, E.C.R. 1125, 1146-47 (1970) (Opinion of Advocate General Dutheillet de Lamothe).

80. EC TREATY art. 5 (3) (ex art. 3b (3)). Although only referencing the "necessity" requirement of the principle of proportionality, this cannot be interpreted as any form of restriction on "suitability" or "rationality." Instead, the premise of "necessity" annotates the codification of the principle of proportionality in its entirety. *See* Case 112/80, Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen, E.C.R. 1095, 1118-19, ¶¶ 40-41 (1981); *see also* BVerfGE 89, 155, 212. Furthermore, the term "mesures nécessaires" in the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8-11, is interpreted by the European Court on Human Rights as including the rationality test. The European Court of Justice is bound by this interpretation, *See* TEU art. 6 (2) (ex art. F (2)). *See also* Case 36/75, Roland Rutili v. Minister for the Interior, E.C.R. 1219, 1232, ¶ 32 (1975).

81. This conclusion holds true even after the Member States enacted a Charter of Fundamental Rights of the European Union in Nice. The legal status of the Charter remains undecided. *See also supra* note 80.

82. LORD MACKENZIE STUART, THE EUROPEAN COMMUNITY AND THE RULE OF LAW 31-32 (1977); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY: A COMPARATIVE STUDY 2-3 (1996). For a critical point of view, see Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?* 12 OJLS 237 (1992). The *Bundesverfassungsgericht* or German Supreme Court is the highest court in the Federal Republic of Germany and can best be compared with the U.S. Supreme Court. In the broadest sense, the Court reviews the constitutionality of legal acts and the application of such acts in Germany. The jurisdiction of the Court is regulated in Grundgesetz [Constitution] art. 93 (Germany).

83. TRIBE, *supra* note 11.

be rationally related to a legitimate governmental purpose.[84] The Principle of Proportionality attempts to achieve a similar result as the rational basis test, the difference is its attempt to do so by means of a more effective and structured approach.

In fact, the primary goal of the Principle of Proportionality is planned efficiency of Community acts. The principle requires that any Community act permitted by the provisions of the Community Treaties, be suited and necessary to achieve its legislative intent.[85] Among equally suitable measures available for the achievement of this goal, the least burdensome measure must be chosen. Furthermore, the burden imposed by the act must stand in reasonable relationship to the legislative intent.[86]

In the case law of the European Court of Justice, the execution of the Principle of Proportionality is conducted through a threefold test. A Community act that fails to fulfill any one of the three requirements must be ruled unproportional and void. The first test is the suitability of a Community act, including the determination of a goal permitted by the Community Treaties (*Geeignetheit).*[87] The suitability test is based on an empirical-prognostic evaluation of the effects a Community act might attain within its field of application. The time of enactment must be definitive because assumed suitability cannot be questionable in the retroactive sense.[88] As for the lack of certain predictions and the wide margin of discretion provided by the Community Treaties,[89] the European Court is reluctant to declare any act invalid on the basis of the absence of suitability alone.[90] In fact, the Court only examines whether the legislative intent of a Community act was "obviously inappropriate for the realization of the desired objective."[91]

The second test evaluates the necessity of the act.[92] If various suitable measures are available, necessity is determined by the least burdensome mea-

84. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985). The rational basis test was amended by additional equal protection theories, such as the conceivable basis test, the theory of legislative approximation, inclusiveness or strict scrutiny.

85. Case 265/87, Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau, E.C.R. 2237, 2270, ¶¶ 20-24 (1989); Case 127/91, Comptoir National Technique Agricole (CNTA) v. Ministère de l Agriculture, E.C.R. I-5681, 5697, ¶ 23 (1992).

86. *Id.*

87. *See, e.g.,* EMILIOU, *supra* note 82, at 191-92.

88. Case 276/809, Padana, E.C.R. 517, 551 (1982) (Opinion of Advocate-General Reischl).

89. Case 29/77, SA. Roquette Frères v. French State—Administration des Douanes, E.C.R. 1835, 1840-45, ¶¶ 12-35 (1977).

90. So far the Court has only found certain national acts based on the EC Treaty art. 36 to fail the suitability test. *See, e.g.*, Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), E.C.R. 649, 663-664, ¶¶ 12-14 (1979); Case 271/87, Commission of the European Communities v. Federal Republic of Germany, E.C.R. 229, 252-256, ¶¶ 6-23 (1989).

91. Case 40/72, I. Schroeder KG v. Federal Republic of Germany, E.C.R. 125, 142, ¶ 14 (1973). *See also* Case 256/90, Mignini SpA v. Azienda di Stato per gli Interventinel Mercato Agricolo (AIMA), E.C.R. I-2651, 2684, ¶ 16 (1992); Case 265/87, Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau, E.C.R. 2237, 2269-2270, ¶¶ 20-24 (1989); Joined Cases 279, 280, 285 and 286/84, Walter Rau Lebensmittelwerke and Others v. Commission of the European Communities, E.C.R. 1069, 1125-26, ¶ 34 (1987).

92. *See, e.g.,* EMILIOU, *supra* note 82, at 192.

sure (*Erforderlichkeit/Notwendigkeit*). The necessity test plays the most important role in the case law of the European Court of Justice. Of the measures available, each must be equally appropriate to achieve the objective pursued and the Community legislator is not required to make use of a less efficient means. If a less burdensome measure, in principal, achieves the legislative intent but does not do so with the same level of certainty, it may be equally appropriate.[93] For the final application and choice among equally suitable measures, the Community is entitled to its own discretion and its own scope of judgment (*Beurteilungsspielraum*).[94] Both the necessity and suitability test share the need for an evaluation between a desired objective and its realization. Only from this starting point is it possible to assess the burden imposed by a legislative act.[95] Nevertheless, with regard to the responsibility and area of conduct, the Community institutions often are unable to prevent wholesale or very general decisions. Under specific circumstances certain group interests may be neglected for reasons of overall integration and legal unity.[96]

The third and final test is the selected proportionality or adequacy test (*Verhältnismäßigkeit im engeren Sinne/Angemessenheit*).[97] The burden of an act must be balanced against its legislative intent and both burden and intent must stand in reasonable relationship to one another. This requires delineating and evaluating the relationships of all affected legal and individual interests based on the actual extent of the burden. The Court makes the final assessment based on the general importance of the affected interests as well as the degree and duration of the burden. The relationship between legislative intent and burden does not need to be a perfectly balanced one, but the goal is to prevent disparities. The European Court of Justice applies the selected proportionality test in a very reserved fashion. It interprets this test as a quasi-global evaluation between the advantages and disadvantages of a proposed measure.[98]

Having described the legal concept of proportionality in Community law, it remains questionable whether the Principle of Proportionality can in fact provide a sufficient standard for judicial review of subsidiarity. Indeed, a number of scholars have suggested that the Principle of Proportionality may prove to en-

93. *See, e.g.*, Case 55/56, Fédéderation Charbonnière de Belgique v. High Authority, E.C.R. 2921 (1955-56); C-55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, E.C.R. I-4165, ¶ 37 (1995).

94. Case 280/93, Federal Republic of Germany v. Council of the European Communities, E.C.R. I-4973, 5068-69, ¶ 90 (1994). Judicial review of the exercise of discretion is "thereby limited to the examination of whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion." For an example of these limits on judicial review, see Case 84/94, United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities, E.C.R. I-5755, 5811, ¶ 58 (1996).

95. If a specific aspect of a burden proves impossible, the Community must name objective standards under which the burden imposed appears less burdensome. The objective perspective of the affected party is thereby of utmost importance. *See, e.g.*, Case 352/85, Bond van Adverteerders v. The Netherlands State, E.C.R. 2085, 2135, ¶¶ 36-37 (1988).

96. Case 5/73, Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof, E.C.R. 1091, 1110-12, ¶¶ 19-23 (1973); Case 12/78, Italian Republic v. Commission of the European Communities, 1731, 1749-50 (1979).

97. *See, e.g.*, EMILIOU, *supra* note 82, at 192-94.

98. *See* Case 5/73, Balkan-Import-Export, E.C.R. 1091, 1111-12, ¶¶ 22-23 (1973).

hance justiciability of subsidiarity and reliably indicate the future direction of Court rulings on the issue of subsidiarity.[99] However, in order to decide whether this evaluation holds true, one must first review the differences and similarities between the principles. Moreover, beyond the specific characteristics of subsidiarity and proportionality, it is essential to determine whether a correlation exists between the principles.

At first glance, there seems to be no immediate interrelation between the Principle of Subsidiarity and the Principle of Proportionality, with both principles holding a broad area of application independent of and separate from each other. While fundamental rights and basic freedoms are the focus of the Principle of Proportionality, the Principle of Subsidiarity is directed at the protection of Member State powers and identity.[100] As such, the Principle of Subsidiarity is an important means for the allocation and distribution of powers between concurrent powers of the Community and the Member States. Furthermore, subsidiarity is intended to increase the awareness of the citizen's interests, thus maintaining national identity and improving accountability. In the latter context, subsidiarity must also be understood as a means to ensure grassroots politics. Conversely, the Principle of Proportionality applies to both concurrent and exclusive Community powers. It focuses on planned efficiency of Community acts in general. These differences display the distinct character of subsidiarity and proportionality.

However, the systematic placement of the Principle of Proportionality in the EC Treaty suggests a different conclusion. As the rule directly following the Subsidiarity Clause, proportionality indicates a close relationship with subsidiarity.[101] Indeed, the Subsidiarity Clause contains elements of the Principle of Proportionality. The Subsidiarity Clause, for example, must represent a necessary solution among various available alternatives.[102] Furthermore, the need to place subsidiarity in relation to a Treaty objective clearly demonstrates similarities to the suitability test provided under the Principle of Proportionality. Both require the choice of a valid Community concern, which defines the outcome of suitability. Subsidiarity and proportionality also share a common bond in their purpose and ultimate goal. The Principle of Subsidiarity and the Principle of Proportionality are used in order to regulate Community powers, with the

99. Jean Paul Jacqué & Joseph H. H. Weiler, *On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference*, 27 COMMON MKT. L. REV. 185, 202-06 (1990); Dehousse, *supra* note 42, 13-17; Bermann, *supra* note 44, at 386-90. Professor Bermann seems to misunderstand the different measures of the Principle of Proportionality. While not differentiating the various measures properly, he omits the suitability test as the first test of proportionality. In fact, in his described order of examination Professor Bermann starts with the reasonable relationship between measure and objective or the "rationality component" of the proportionality test. This, however, is the final test to be applied. Furthermore, his second and third tests are not to be considered separate; they are both part of the second test and must be considered together. What Professor Bermann describes as the "utility component" is as much a part of the necessity test as the objective of a least burdensome measure. Evidently, arguments based on such misunderstanding cannot entirely be convincing.

100. Dehousse, *supra* note 42, at 1.

101. Zuleeg, *supra* note 42, at 190.

102. HELMUT LECHELER, DAS SUBSIDIARITÄTSPRINZIP 61 (1993).

view of limiting any violation of rights or values assumed to be of higher importance.

Despite having reached this point, the question of whether proportionality can be a meaningful tool for judicial review of subsidiarity remains. Beyond differences and similarities, the Principle of Proportionality adds an established and pragmatic component to the interpretation of subsidiarity. This is important with regard to issues of suitability and necessity. As established legal concepts, the suitability and necessity requirements may make similar evaluations required by the Principle of Subsidiarity more permissive.[103] It would be wrong to argue that any Community action found unproportional cannot stand in accordance with the Principle of Subsidiarity. That argument would eliminate subsidiarity as a standard of review. In fact, proportionality would supersede subsidiarity, resulting in a conclusion that would skew both principles. It is therefore imperative to realize that while both principles manifest distinct differences, their independent spheres of application buttress one another. Proportionality can indeed function as an auxiliary means of interpretation or an additional safeguard for subsidiarity.

After complying with the Principle of Subsidiarity, any Community act must be evaluated by the standards of proportionality. While a proposed act may comply with the Principle of Subsidiarity, it may, at the same time, be found invalid under the premises of proportionality. A proposed act of that kind would fail to be enacted as a Community law, demonstrating that, on a different level, proportionality generates an additional standard of review for subsidiarity.

In short, both principles operate in turns, albeit at two different levels of Community action. The Principle of Subsidiarity determines whether action is to be set in motion, whereas the principle of proportionality defines the scope of the action. Accordingly, proportionality is to be considered in relation to actions already taken, and its purpose in ensuring compliance with the Treaty's objectives.[104] Only as part of this interplay can the Principle of Proportionality be a useful tool to enhance the justiciability of subsidiarity.

2. *The Requirement to Show Sufficient Grounds*

Perhaps the only objective standard for judicial review of subsidiarity is provided by the procedural requirement to show sufficient grounds. The sufficient grounds standard is articulated in EC Treaty, Art. 253 (ex Art. 190): "[r]egulations, directives and decisions adopted by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state

103. Nevertheless, it is important to note the clear reluctance of the European Court of Justice to invalidate Community actions based on questions of suitability alone. Likewise with regard to the necessity test, the Court acknowledges an area of broad Community discretion only subject to limited judicial review. *See* Case C-233/94, Federal Republic of Germany v. European Parliament and Council of the European Union, E.C.R. I-2405, 2461, ¶ 56 (1997).

104. Case 84/94, *United Kingdom v. Council*, [1996] E.C.R. I-5758, 5783, point 123-128 (1996) (Opinion of Advocate General Mr. Léger). *See also* Keon Lenaerts & P. van Ypersele, *Le Principe de Subsidiarité et son Context: Etude de l'Article 3B du Traité CE*, 30 CAHIERS DE DROIT EUROPÉEN, 3, 52-57 (1994).

the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."[105]

The European Court of Justice has held that in order to show sufficient grounds:

> Community measures must include a statement of the facts and law that led the institution in question to adopt them, so as to make possible reviews by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the Treaty.[106]

Despite this holding, the Court has limited the standard by further stating that the "failure to refer to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from the other parts of the measure," but that "explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis."[107]

When one applies the rules enunciated by the European Court of Justice to the Principle of Subsidiarity, it is clear that detailed reasoning to show sufficient grounds is unnecessary. While the reasoning may include the legislative intent of a Community act and the evaluations and conclusions determined by the two-fold test set forward in the Subsidiarity Clause, neither is truly required to show sufficient grounds. In fact, it is sufficient for a directive to simply indicate the legal basis or legislative intent, extrapolated from considerations of the European Parliament or other Community institutions participating in the legislative proceedings of the act.

The value of the procedural requirement to show sufficient grounds, as a standard for judicial review of subsidiarity, is highly questionable. As a minimal standard, albeit justiciable, it cannot provide the much needed tool for interpretation and review of compliance with subsidiarity. The requirement to show sufficient ground remains overly broad and ambiguous. Indeed, the Court is limited in its power of review to verifying whether reasons have even been stated or indicated.

3. Federal Republic of Germany v. European Parliament & Council: An Example of the Application of Subsidiarity in the European Court of Justice

Since the ratification of the Maastricht Treaty, the European Court of Justice has been presented with a variety of cases on the subject of subsidiarity.[108]

---

105. EC TREATY, art. 253 (ex art. 190).

106. Case 45/86, Commission of the European Communities v. Council of the European Communities, E.C.R. 1493, 1519, ¶ 5 (1987). *See also* Case 41/93, French Republic v. Commission of the European Communities, E.C.R. I-1829, 1850, ¶ 34 (1994); Case 158/80, REWE-Handelsgesellschaft Nord mbH and REWE-Markt Steffen v. Hauptzollamt Kiel, E.C.R. 1805, 1833, ¶ 25 (1981).

107. Case 45/86, Commission of the European Communities v. Council of the European Communities, E.C.R. 1493, 1519-20 (1987).

108. *See, e.g.*, Case 84/94, United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities, E.C.R. I-5755, 5810-5811, ¶¶ 54-55 (1996). *See also id.*, I-5758, 5783, point 123-128 (Opinion of the Advocate General Mr. Léger); Case 91/95P, Roger Tremblay &

Nevertheless, *Federal Republic of Germany v. European Parliament & Council*[109] was the first case that addressed the question of whether Community legislation should be annulled due to a violation of the Principle of Subsidiarity.

Germany challenged a Community directive aimed at the European banking industry. The goal of the directive was to introduce a mandatory bank deposit-guarantee scheme in all Member States and to harmonize the relevant national guarantees with a minimum deposit.[110] During the legislative proceedings, Germany tried to prevent the directive from being adopted, but failed. As a result of required majority voting, Germany was outvoted by the remaining Member States.[111] In response, it initiated an action before the Court and argued that, without the constraints set by a Community directive, the German national deposit-guarantee scheme would sufficiently achieve the objectives pursued by the Community directive.[112]

The German deposit-guarantee scheme is a voluntary insurance body, which is not under state control. At the time of the enactment of the challenged directive, all three hundred credit institutions set up in Germany belonged to a guarantee scheme with the exception of only five. Moreover, any credit institution that did not belong to an authorized deposit-guarantee body in Germany was required to inform its customers of that fact before an account was opened.[113]

The German government contended that the directive should be annulled based on three points. First, Germany challenged the legal basis of the directive, arguing that the adoption of the directive would have required a unanimous vote by all Member States.[114] In particular, Germany claimed the directive should have been based on the implied power prerogative of the EC Treaty.[115]

Second, the German government argued that there had been a breach of the obligation to show sufficient grounds under EC Treaty, Art. 253 (ex Art. 190). The German government did not claim that the directive infringed upon the Principle of Subsidiarity, but only that the Community legislature did not set out

---

Others v. Commission, E.C.R. I-5547, 5574-75, ¶¶ 20-25 (1996); Case T-5/93, Roger Tremblay & Others v. Comission, E.C.R. II-185, 209 (1995); Case 11/95, Commission of the European Communities v. Kingdom of Belgium, E.C.R. I-4115, 4168-4169 (1996); Case 415/93, Union Royale Belge Des Societes De Football Association (ASBL) and Others v. Jean-Marc Bosman, E.C.R. I-4921, 5065, ¶ 81 (1995); Cases 430 & 431/93, Jeroen Van Schijndel & Johannes Van Veen v. Stiching Pensioen Voor Fysiotherapeuten, E.C.R. I-4705, 4715, point 27 (1995) (Opinion of Advocate General).

109. Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2405(1997) (action under EC TREATY, Art. 230 (ex art. 173)).

110. 1994 O.J. (L 135) 5. *See also Commission Recommendation of 22 Dec. 1986 Concerning the Introduction of Deposit Guarantee Schemes*, 1987 O.J. (L 33) 16.

111. Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2411, 2412, point 9 (1997) (Opinion of Advocate General Léger).

112. *Id.* at 2412, point 10.

113. *Id.* at 2415-16, point 17-24; *See also* Case 233/94, Federal Republic of Germany v. European Parliament & Council E.C.R. I-2441, 2467, ¶ 78 (Judgment of the Court) (1997).

114. Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2441, 2448-49, ¶¶ 10-11 (1997) (Judgment of the Court).

115. EC TREATY art. 308 (ex art. 235).

the grounds to substantiate the compatibility of its actions with the principle.[116] In light of the Principle of Subsidiarity, Germany asserted that the Community institutions must give detailed reasons to explain why only the Community, to the exclusion of the Member States, is empowered to act in the area in question.[117] In addition, it argued that the directive did not indicate in what respect the objectives could not have been effectively met by action at the Member State level or grounds which established the need for Community action.[118]

Third, the German government argued that the directive was contrary to the Principle of Proportionality as set out in the conclusions of the Edinburgh European Council.[119] The conclusions stipulated that the Community, when adopting legislative measures, should endeavor to take account of "well-established national practices."[120]

Ultimately, the European Court rejected all arguments made by the German government. With regard to the first argument, the Court ruled that the directive was adopted in accordance with the creation of the Internal market and thus based on the correct Treaty provision, which mandated a qualified majority vote.[121] Second, concerning the obligation to show sufficient grounds, the Court relied on minimum requirements established by prior case law.[122] According to the Court, showing sufficient grounds is necessary when it is not apparent which reasons led the Community institutions to adopt certain legislation.[123] Only then can the Court exercise its power of review. The Court noted that the preamble of the directive clearly reflected the Community legislature's view that the objective could best be achieved at the Community level.[124] Further, the European Parliament and the Council stated in the preamble that any action taken by the Member States to implement a Commission recommendation would not fully achieve the desired result. As such, the Court found that the directive complied with the obligation to show sufficient grounds.[125] Moreover, the Court held that an express reference to the Principle of Subsidiarity in the directive is not required.[126]

116. Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2441, 2451-56, ¶¶ 22-24 (1997) (Judgment of the Court).

117. *Id.*

118. *Id.*

119. *Id.* at 2467, ¶¶ 76-78.

120. *Id.* at 2460-62, ¶ 77.

121. *Id.* at 2449, ¶¶ 13-14. In particular, the Court held that it was the aim of the directive "to prevent the Member States from invoking depositor protection in order to impede the activities of credit institutions authorized in other Member States," clarifying the intent to "abolish obstacles to the right of establishment and the freedom to provide service." *Id.* at 2451, ¶ 19.

122. *Id.* at 2452, ¶ 25, citing Case 41/93, French Republic v. Commission of the European Communities, E.C.R. I-1829, ¶ 34 (1994).

123. *Id.* at 2452; 2455-56, ¶¶ 35-38. *See also* Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2411, 2425, point 71 (1997) (Opinion of the Advocate General Léger).

124. Case 233/94, Federal Republic of Germany v. European Parliament & Council of the European Communities, E.C.R. I-2441, 2452-53, ¶¶ 26-28 (Judgment of the Court).

125. *Id.* ¶ 27.

126. *Id.* ¶ 28.

Finally, the Court found it unnecessary to determine the precise legal value of the conclusions of the Edinburgh European Council.[127] It pointed out that the Community legislature cannot simply respect all "well-established national practices"[128] when harmonizing legislation.[129] In fact, the Court stated that the Community may consider harmonizing legislation concerning laws such as deposit-guarantee schemes at any time and wherever deposits are located within the Community.[130]

The restraint in interpreting the Principle of Subsidiarity in more detail or in establishing additional justiciable standards is apparent in the Court's ruling. Not only did the Court refuse to set measures for a more specific interpretation of the requirement to show sufficient grounds with regard to the Principle of Subsidiarity, it clearly did not determine the legal value of a political statement by Member States or the Conclusions of the European Council in Edinburgh. It is fair to argue that the European Court of Justice will most likely continue to interpret the Principle of Subsidiarity in a rather formal and cautious fashion. To prevent damage to further European integration and the relations between the Community and its Member States, the European Court of Justice would be well advised to take seriously the Member States' concerns as expressed in the Subsidiarity Principle. The idea of subsidiarity was incorporated into the EC Treaty to diminish the widespread discontent with a political process that is too far removed from, and not responsive to, the concerns of citizens and Member States.

Despite this conclusion, the context in which the described action was brought before the Court is most significant. It reveals how a Member State that was overruled by a majority vote tried to circumvent this rather democratic outcome by challenging the legal basis of the Community legislation in question. Further, it demonstrates that Member States of the European Union remain uncertain about whether or not to commit themselves to a more democratic system that is increasingly independent from a single Member State's influence.

4. *Contradicting Perspectives and Limitations within the Principle of Subsidiarity*

Due to the difficulty of enforcement, it is not clear if subsidiarity as a rule of law or a constitutional norm will succeed in bringing together a closer union while maintaining national sovereignty. It remains particularly disputable whether, on the basis of the Principle of Subsidiarity alone, a "[g]reater union can be achieved without excessive centralization."[131] This question becomes even more significant if one considers that both advanced European integration, which undoubtedly requires a certain amount of centralization, and national sovereignty contravene one another. It is a paradox that, on one hand, the Member

127. *Id.* at 2468, ¶ 80.
128. *Id.* at 2467, ¶¶ 76-77.
129. *Id.* at 2468, ¶ 80.
130. *Id.* ¶ 82.
131. E.C. Bull. no. 10, at 9, point I.8., ¶ 5 (1992).

States advocate a closer union while, on the other hand, they are afraid to lose their national powers or identities. But this is only the most obvious paradox of subsidiarity. There are additional inherent tensions as well. For example, the principle holds two opposing perspectives or dual functions.[132]

The two opposing perspectives of subsidiarity can be described most accurately with the economic doctrine of exit and voice, as advanced by Albert O. Hirschman in his analytical work *Exit, Voice, and Loyalty*.[133] Exit and voice correlate to market and non-market forces that are economic and political mechanisms, respectively.[134] Exit as the realm of economics is impersonal and indirect. A customer who is dissatisfied with a product of one firm shifts to that of another, defending his welfare or improving his position. Market forces are set in motion by this behavior, which induce recovery on the part of the firm that has declined in comparative performance.[135] Exit is impersonal and indirect because it avoids face-to-face confrontation. In general, the customer makes decisions in the anonymity of the marketplace. The results of decisions are only transferred through statistics and not by the articulation of a voice.[136]

Voice, as the political alternative to exit, depends on direct communication, the articulation of opinion, protest and affirmation. Voice is understood as the political action *par excellence* and can graduate from faint grumbling to violent protest.[137] It is defined as any attempt to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition by various types of actions.[138]

Applied to the Principle of Subsidiarity, voice refers to the actions that citizens may use to have their concerns heard in the political process of the Community. Voice is the active participation of individuals in Community politics. Subsidiarity is the key to ensuring participation of that kind and to increasing accountability while bringing government closer to the citizens. In contrast, exit focuses on the issue of mobility between different Community jurisdictions. Exit directs attention to the individual choice of location and inter-

132. *See, e.g.*, J. H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991) and Viktor Vanberg, *Subsidiarity, Responsive Government and Individual Liberty, in* SUBSIDARITÄT: IDEE UND WIRKLICHKEIT: ZUR REICHWEITE EINES PRINZIPS IN DEUTSCHLAND UND EUROPA 253 (Knut Wolfgang Nörr & Thomas Oppermann eds., 1997).

133. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). The application of Hirschman's doctrine with regard to the European Communities is also conducted by J.H.H. Weiler and Viktor Vanberg. Weiler uses the doctrine of exit and voice to explain the paradox of European integration between the "inexorable dynamism of enhanced supranationalism" and the "counter-development towards intergovernmentalism . . . away from European integration." Vanberg directly refers to the concept of subsidiarity as a constitutional norm and distinguishes between what he calls the "communitarian" and "libertarian subsidiarity." *See* J.H.H. Weiler, *supra* note 132 at 2410-12; Viktor Vanberg, *supra* note 132.

134. HIRSCHMAN, *supra* note 133, at 15-20.

135. *Id.* at 15.

136. *Id.* at 15-16, 22-25.

137. *Id.* at 16, 30-32.

138. *Id.* at 30. Hirschman specifies: "through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion."

governmental competition. By shifting political authority to lower levels, it is easier for citizens to compare particular advantages and disadvantages of different Community jurisdictions and escape from unwanted policies.[139] Thus, the increase in the mobility of citizens and the possibility of more favorable policies elsewhere, such as lower taxes, promote intergovernmental competition. While voice aims to increase political participation with the goal of achieving improved governance at the national or lower level, exit presents mobility and intergovernmental competition as an instrument to limit the powers of government in general.[140]

At first glance both voice and exit seem to make the same promise: to make government more responsive. Voice can even be viewed as a residual to exit.[141] Some citizens who are not yet ready to escape a certain policy are more likely to exercise the voice option. In addition, voice can act as an alternative. This might be the case where the ability to influence a policy seems to offer greater results than mere escape. Once exited, the opportunity to use voice is lost. In certain settings the exit option thus becomes the *ultima ratio*. Finally, voice can also function as an alternative if exit is simply not available, such as in a monopolistic or exclusive environment.[142]

Despite these correlations, voice and exit are rather distinct options. Both achieve their goals via differing approaches, resulting in contradictions and competing paradigms. A similar observation has been made with regard to American federalism and is expressed through the terms "rights of persons" versus "rights of places."[143] These phrases refer to the tension between local self-government and individual rights in federal political structures.[144] The placement of political authority closer to the source from which it originates, namely, the people, creates the dilemma of choosing between individual and collective freedom or between consumership and citizenship. The problem is that individual freedom often diminishes collective freedom. Measures that are conducive to voice and the community in which political participation is exercised may be detrimental to exit and the individual freedom to escape.[145] To stay competitive, lower level governments depend on people and resources, not only to sustain their tax-base but simply to remain functional as a community. Accordingly, exit must be contained. It is in this context that the conflict between voice and exit becomes apparent. Voice is primarily concerned with the

139. Vanberg, *supra* note 133, at 254-55.

140. *Id.* at 254-56.

141. HIRSCHMAN, *supra* note 133, at 33-36.

142. *Id.* at 36-43.

143. Vanberg, *supra* note 133, at 259-60. *See also* John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy, in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS—EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87-114 (D. A. Kenyon & John Kincaid eds., 1991); John Kincaid, *Consumership versus Citizenship: Is there wiggle room for local regulations in global economy?, in* FOREIGN RELATIONS AND FEDERAL STATES 27-47 (Brian Hocking ed., 1992).

144. Vanberg, *supra* note 133, at 260; *See* also James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1272-80 (1994).

145. Vanberg, *supra* note 133, at 259-62.

transfer of powers to lower level government. It induces the regulatory authority to erect trade barriers against goods and services from other polities and to establish an environment in support of special interests.[146] This stands in apparent contrast to the premise of exit, which is the limitation of regulatory powers at whatever level exercised.

As inherent tensions of the Principle of Subsidiarity, the competing paradigms of exit and voice make it evident that the Member States, as lower level governments, must be prevented from using their powers for protectionist purposes. The allocation of regulatory powers through the Principle of Subsidiarity and the execution of such powers by the Member States must be constrained. That is, subsidiarity must not be interpreted as an unconditional endorsement, but rather a qualified one.[147] Where Community issues are involved, precautionary measures must be enforced in the application of regulatory powers by the Member States. Even if the Principle of Subsidiarity, as put forward in the Community Treaties, was a balanced means with which to limit the centralist drift of the Community, it would be necessary to recognize the problems that could occur on the Member State level and that could ultimately threaten the level of Community integration that has been achieved.

IV.
CONCLUSION

The complexity and dilemma of subsidiarity lies in its broad and abstract structural concept. Although the defining elements of the Principle of Subsidiarity are rather vague, its character as an applicable rule of law is not called into question. Like the vast majority of legal statutes, the principle of Subsidiarity requires interpretation by the legal community, scholars, and courts to achieve its full appreciation. Furthermore, it is important to note that concepts of law may be dynamic in character. Through different periods of historical, constitutional and social development, the understanding and interpretation of specific rules of law may change. Accordingly, it might even be argued that only a rule of law, which leaves room for and is open to interpretation, is fit for the challenge of longevity, such as the Constitution of the United States of America. In that sense it is necessary to find functional and judicial standards to adequately apply the Principle of Subsidiarity.

Subsidiarity was not limited to a reference in the preamble to the Treaty on European Union or the European Community Treaties. The Principle of Subsidiarity was specifically included in the European Community Treaty as a positive rule of law. The various anthropological and historical definitions of subsidiarity, however, render only minimal aid to the interpretation of the Subsidiarity Clause. If historical, theological or social links are drawn, one may even consider that a legal definition of subsidiarity does not exist. Even among

146. Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 286, 291-92 (1993).

147. Vanberg, *supra* note 133, at 267-68.

the different Member States of the Community, the understanding of subsidiarity was and remains manifold.[148] More importantly, however, it should be remembered that subsidiarity in the European Communities stands before the specific background of European integration. The Subsidiarity Clause is a unique response to problems arising within the process of European integration. To be sure, the European Community is a functional system aiming toward increased integration.

The Principle of Subsidiarity cannot consist of a material determination that strictly enumerates the control of the Member States. The control is meant to be functional, or in terms of American Constitutional Law subject to procedural safeguards, since the goal of subsidiarity is the allocation of powers between the Union as the center and the Member States as the periphery.[149] Whether the interpretation of subsidiarity can be pursued in an objective or unbiased manner, given the differing self-interests of the Member States, European Court of Justice, and European officials, remains questionable. Indeed, the ultimate power to fill subsidiarity with meaning may not rest with those who have the power to do so, but with those provided with the best bargaining positions. It will take unrestricted commitment to European integration by the Member States, along with political compromise and the acknowledgment of their responsibilities in this context, to achieve a meaningful allocation of powers based on the Principle of Subsidiarity.

148. *See, e.g.*, Ian Ward, *Identity and Difference: The European Union and Postmodernism, in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 15, 24-25 (Jo Shaw & Gillian More eds., 1995).

149. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in Selection and Composition of the National Government*, 54 COLUM. L. REV. 543, 546-60 (1954); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L. J. 1552 (1977); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-503 (1977); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1240-46 (1994). *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

Berkeley Journal of International Law

Volume 20 | Issue 2 Article 2

2002

Indigenous Australians and Internatonal Law: Racial Discrimination, Genocide and Reparations

Michael Legg

Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations

By
Michael Legg*

There are aspects of our history of which we are right to be proud and others of which we should properly feel ashamed. Neither should be thought to wash away the other. Even more, we have something new to be ashamed of if we try to deny what else we have to be ashamed of.[1]

I.
INTRODUCTION

History once written by the victors is now being reconsidered from the perspective of the disadvantaged and re-interpreted through the language of international law and human rights. Human rights groups and the media are forcing many members of the international community to respond to new questions of morality regarding treatment of minority groups, including indigenous peoples, by predecessor majority-controlled governments or colonizing nations.[2]

Part of this reconsideration is taking place in Australia as it confronts its own questions of morality arising out of European settlers' treatment of Indigenous Australians after settlement in 1788. Australia's record on Indigenous Australians is at best ambiguous and at worst an example of genocide by eugenics. The 1990s were especially ambiguous with the recognition of native title rights, a report into the removal of indigenous children from their families, and yet a refusal to apologize for past practices or offer any form of reparation.

---

* B.Com (Hons) (UNSW '93), M.Com (Hons) and LLB (UNSW '96), LLM (UC-Berkeley '01). Solicitor of the Supreme Court of New South Wales, Australia. An earlier draft of this paper was presented at a Berkeley Journal of International Law seminar February 28, 2001.

1. MARTIN KRYGIER, BETWEEN FEAR AND HOPE: HYBRID THOUGHTS ON PUBLIC VALUES 65 (1997).

2. *See generally* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (1999); ELAZAR BARKAN, THE GUILT OF NATIONS (2000); International Third World Legal Studies Association, New York and the Community Peace Program, School of Government, University of the Western Cape, INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS CONFERENCE, Cape Town, South Africa, Jan. 4-6, 2001. *See also* Chris Cunneen, *Review Essay: Reflections on Reparations and Reconciliation,* 12(3) CURRENT ISSUES IN CRIM. JUST. 382 (2001); Gay Alcorn, *The Business of Saying Sorry*, SYDNEY MORNING HERALD June 20, 2001, http://www.smh.com.au/news/0106/20/features/features1.html (last visited Feb. 20, 2002).

International law has had a major influence on human rights developments within Australia. Indeed, Australia generally tends to be receptive to international influence and to seek active engagement with the rest of the world as shown by its prior enthusiastic participation in the United Nations (UN). This article will explain the role of international law in the enactment of legislation under international human rights covenants, such as the Racial Discrimination Act 1975 (Cth)[3] (RDA), the recognition and reduction of native title, and the removal of indigenous children from their families giving rise to claims of racial discrimination, genocide and calls for reparations. To facilitate this discussion, the article begins with a brief history of Indigenous Australians and sets out the legal framework, including the operation of Australia's Constitution, in which rights protection and international law operate within Australia. The article concludes by highlighting the successes and limitations of Australia's application of international law in confronting past injustices and in achieving reconciliation. In particular, this article argues that although international law can operate as a source of human rights, its dependence on voluntary adherence (except in the most extreme circumstances)[4] means that ultimately rights can only be protected if they are entrenched in the Australian Constitution. The lack of an entrenched right of equality is the source of much of the mistreatment of Indigenous Australians.

II.
A Brief History of Indigenous Australians

A paper of this length cannot hope accurately to depict the history of Indigenous Australians.[5] Especially as much of that history was oral and occurred prior to white settlement in 1788, and the written history is from the perspective of white Australians. As a result, this article offers only a broad overview. The common estimate of the length of Indigenous Australians' occupation of Australia prior to white settlement is around 40,000 years. Indigenous Australians organized themselves in tribes that were typically nomadic but occupied defined areas. The tribes had sophisticated systems of kinship, law and religion, which, like the appearance of the tribes themselves, varied from place to place across the disparate parts of Australia.

3. Australian legislation is cited by its short title, year of enactment and the jurisdiction enacting the legislation. The abbreviation 'Cth' signifies Commonwealth or Federal legislation, 'SA' refers to South Australia and 'NT' refers to the Northern Territory.

4. For example the UN Security Council's decisions to authorize military force against countries engaging in ethnic cleansing and the establishment of International Criminal Tribunals.

5. Useful histories include: Council for Aboriginal Reconciliation, Reconciliation Australia's Challenge - Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament (2000) [hereinafter Car Final Report], ch. 1, http://www.reconciliation.org.au/finalreport/index.htm (last visited Feb. 20, 2002); Jared Diamond, Guns Germs and Steel 295-321 (1999); Robert Hughes, The Fatal Shore (1987); Bruce Elder, Blood on the Wattle (1988); The Struggle for Aboriginal Rights: A Documentary History (Bain Attwood & Andrew Markus eds., 1999) [hereinafter Attwood & Markus]; David Day, Claiming a Continent: A New History of Australia (1997); John Pilger, A Secret Country (1989).

Indigenous Australians had only minor contact with Europeans prior to 1788, mainly with Dutch explorers on the west and north coasts and with Captain Cook who claimed the east coast for England in 1770. The First Fleet's arrival at Sydney Cove in 1788 marked a dramatic change in Indigenous Australians' way of life:

> Within months of [the First Fleet's arrival] there was open animosity as Indigenous people protested against the Europeans cutting down trees, taking their food and game, and driving them back into others' territories. Bitter conflict followed as Aboriginal people engaged in guerilla warfare—plundering crops, burning huts, and driving away stock to be met by punitive expeditions of great ferocity in which bands of Aborigines encountered were indiscriminately killed.[6]

The settlement of Australia, which many Indigenous Australians consider an invasion, continued unabated. The settlement decimated the Indigenous Australian population with disease, starvation, intentional poisoning and rifles, to which spears and boomerangs were vastly inferior. The Europeans forcibly moved many of the remaining Indigenous Australians onto missions and government reserves. Other Indigenous Australians became unemployed fringe dwellers, or casual laborers in rural Australia. The result was that Indigenous Australians "were no longer allowed to live as they had done for tens of thousands of years, but neither were they able to become equal partners and citizens in the wider society that had taken their land."[7]

The federation of the Australian colonies in 1901 resulted in a Constitution that assumed Indigenous Australians were a dying race and there was no need to make provision for them in an enduring document. It was not until the 1960s and 70s that public awareness about the history and living conditions of Indigenous Australians started to grow. In the 1990s, reports into Aboriginal Deaths in Custody[8] and the separation of Aboriginal and Torres Strait Islander children from their families (Bringing them Home Report) highlighted the destructive ramifications of government social policy on Indigenous Australians.

The Australian community has begun to demonstrate its support for Indigenous Australians and has attempted reconciliation through an annual 'Sorry Day' and 'Walk for Reconciliation.' However, debate continues over the appropriate way to address the claims of racial discrimination and genocide stemming from the separation of indigenous children from their families.

---

6. Anne Bickford, *Contact History: Aborigines in New South Wales after 1788*, 1 AUSTL. ABORIGINAL STUD. 57 (1988), *quoted in* BRINGING THEM HOME, NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997) [hereinafter BRINGING THEM HOME REPORT] ch. 3, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/ (last visited Feb. 20, 2002).

7. CAR FINAL REPORT, *supra* note 5, at ch. 1, http://www.reconciliation.org.au/finalreport/text01.htm (last visited Feb. 20, 2002).

8. COMMISSIONER ELLIOTT JOHNSTON, QC, ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY REPORT (1991) (5 Volumes), http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/#national (last visited Feb. 20, 2002).

III.
THE OPERATION OF INTERNATIONAL LAW IN THE AUSTRALIAN LEGAL SYSTEM

A. The Australian Legal System

Australia is a constitutional democracy organized under a federal system.[9] Australia has retained its English heritage through "responsible government" and the continued presence of the monarchy, represented by the Governor-General, as the head of state.[10] Responsible government is a system of executive government accountability to the Parliament and, ultimately, to the people.[11] Australia adopted a written constitution to turn the six English colonies into states within a federation. That constitution did not contain a bill of rights, as the founders preferred to entrust the protection of rights to Parliament rather than the Judiciary.

The Australian Constitution creates the federal system and specifies the powers of the Federal Parliament.[12] Each State retains plenary power but a valid Federal law will override a State's inconsistent legislation.[13] The Constitution also creates the Federal Executive[14] and Judiciary.[15] There is strict separation of power between the Judiciary and the other arms of government, whilst the Executive is largely drawn from the ruling party in the Legislature. The Legislature and Executive also include the Governor-General. A literal reading of the Constitution would suggest that the Governor-General exerts significant power, but in operation the Governor-General acts only on the advice of his or her ministers. The main exception to this is the rare occasion when the Governor-General exercises the "reserve powers" allowing for the dismissal of a government and the calling of elections.

The peak court[16] is the High Court of Australia, which has original jurisdiction to interpret the Constitution and appellate jurisdiction from Federal and

9. An overview of Australia's system of government can be found at the Commonwealth Parliament's website, at http://www.aph.gov.au (last visited Feb. 20, 2002), and an overview of the operation of the High Court can be found on the Court's website, at http://www.hcourt.gov.au (last visited Feb. 20, 2002).

10. On Nov. 6, 1999, Australian voters defeated a referendum to alter the Constitution to remove the monarchy and create a republic with an appointed President.

11. *See* Federated Engine-Drivers' and Firemen's Ass'n of Australasia v. Adelaide Chem. and Fertilizer Co. Ltd. (1920) 28 C.L.R. 1 (Austl.); *see also* Lange v. Austl. Broad. Corp. (1997) 189 C.L.R. 520, 557 (Austl.).

12. AUSTL. CONST. ch. I, §§ 51, 52 (setting out the powers of the Parliament).

13. *Id.* at ch. V, § 109 (dealing with the inconsistency of laws).

14. *Id.* at ch. II.

15. *Id.* at ch. III.

16. The hierarchy of courts in Australia involves two prongs, one for Federal Courts and one for State Courts. In the Federal Court system the hierarchy starting at the bottom is the Federal Court, with a single judge, Federal Court of Appeals, which is usually three judges and then the High Court. The Federal hierarchy also includes the Family Court of Australia. In the State Court system the names of Courts vary with the state, but they usually involve three levels. Starting at the bottom will be a Local Court/Magistrate's Court/Court of Petty Sessions that deals with small civil and criminal matters. At the intermediate level is a District Court/County Court that deals with civil matters below a certain dollar amount and more serious criminal matters. Above those courts is a Supreme Court with a single judge sitting that usually has unlimited jurisdiction and then the Su-

State courts.[17] As a result, whilst there are differences in the statutory law between States, the High Court's decisions tend to create uniformity in the common law and in judicial interpretation of statutes using similar wording. The lack of a bill of rights has meant that whilst the High Court regularly engages in judicial review it has only a small number of individual rights to protect. Those rights include section 51(xxxi), which allows the Parliament to make laws for the acquisition of property on just terms; section 80, which guarantees a trial by jury for indictable Commonwealth offences; section 116, which provides for freedom of religion; and section 117, which prevents discrimination on the basis of a person's residency in a particular State. Some High Court judges have also developed rights by implication from the separation of powers, and responsible and representative government that the Constitution embodies.[18] The only lasting implied right is freedom of political communication, but its scope is uncertain as the Court has expressed the right in varying ways.[19]

B. The Relationship between International and Domestic Law

The Australian Constitution addresses itself to international relations by granting the Federal Parliament the power to make laws with respect to "trade and commerce with other countries" and "external affairs," pursuant to section 51(i) and (xxix), respectively, and by giving the High Court original jurisdiction in all matters "arising under any treaty" pursuant to section 75.

The High Court has held that the Federal Executive has exclusive power to enter into treaties without parliamentary approval.[20] Those treaties, however, can only be enacted into domestic law pursuant to a constitutional head of power of which section 51(xxix) is the most obvious.[21] In addition, the States may not enter into treaties. These arrangements flow more from Australia's common law heritage than its Constitution. The High Court relied on English practice that a treaty cannot affect private rights under domestic law so that implementing legislation is required.[22] At various times, the government of the day has made

---

preme Court's Court of Appeals which is made up of three judges. Appeals from the State Court of Appeals can then be heard by the High Court. Judges are referred to as Chief Justice Brennan or Justice Brennan, as the case requires, which may be abbreviated to Brennan CJ or Brennan J. *See* RICHARD CHISHOLM & GARTH NETTHEIM, UNDERSTANDING LAW (5th ed. 1997).

17. AUSTL. CONST. at §§ 73(ii), 76(i); Judiciary Act 1903 (Cth), § 30(a).

18. As the Australian Constitution does not contain an express bill of rights some High Court judges have drawn on the underlying principles and structure of the Constitution to imply rights. A limited version of freedom of speech, referred to as freedom of political communication, was implied from responsible and representative government requiring the exchange of political viewpoints to be able to function. *See* Austl. Capital Television Pty. Ltd. v. Commonwealth, (1992) 177 C.L.R. 106 (Austl.); *see also* Nationwide News Pty. Ltd. v. Wills (1992) 177 C.L.R. 1 (Austl.).

19. GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 165-97 (1999) (discussing each of the express and implied rights).

20. R v. Burgess; Ex parte Henry (1936) 55 C.L.R. 608, 681-82 (Austl.).

21. The areas granted to the Australian Federal Legislature for it to make laws are denominated as 'heads of power,' similar to the U.S. nomenclature of power in 'commerce power', 'taxing power' and 'spending power'.

22. *See* Walker v. Baird [1892] A.C. 491 (Eng.); *see also* G.P.J. McGinley, *The Status of Treaties in Australian Municipal Law: The Principle of* Walker v. Baird *Reconsidered,* 12 ADEL. L. REV. 367 (1990).

administrative arrangements requiring itself to consult parliament before signing treaties.[23]

The two-step process is necessary as otherwise the signing of a treaty that was self-executing would mean that the Executive, rather than Parliament, would have the power to enact laws. It follows that the main way for international law based upon treaties to affect domestic relations is if Parliament enacted enabling legislation. The Court has broadly interpreted the external affairs head of power so that, providing that the legislation is "capable of being reasonably considered appropriate and adapted" to carrying out the purposes of the treaty, it will be held valid.[24]

International law may also influence domestic law through rules of construction. In *Minister of State for Immigration and Ethnic Affairs v. Teoh,*[25] the High Court considered the effect of a treaty, the UN Convention on the Rights of the Child, that had been ratified but not implemented. Chief Justice Mason and Justice Deane set out two fundamental rules:

> Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party. . . . The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[26]

The High Court's position on the relationship between customary international law and Australian domestic law is less clear. The issue has traditionally involved consideration of two schools of thought—one adopting the doctrine of incorporation and the other the doctrine of transformation. The doctrine of incorporation provides that domestic law incorporates customary international law unless the international law conflicts with an Act of Parliament. The doctrine of transformation requires that common law or legislation adopt customary international law for international law to become part of domestic law.[27] Thus, where no legislation exists, the doctrine of incorporation automatically makes the international law part of domestic law, whilst the doctrine of transformation requires the court to determine whether the rule is inconsistent with existing legislation, common law, or public policy.

The Australian approach does not fit neatly into either of the above schools of thought, but at present customary international law would not appear to be automatically adopted in Australia. Instead, customary international law is one

23. For an overview of the treaty making process in Australia, see TREATY-MAKING AND AUSTRALIA: GLOBALISATION VERSUS SOVEREIGNTY (Philip Alston & Madelaine Chiam eds., 1995), and see Jan Linehan, *The Law of Treaties, in* PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 111-17 (Sam Blay et al. eds., 1997).

24. Commonwealth v. Tas. (1983) 158 C.L.R. 1, 259 (Austl.); *see also* Richardson v. Forestry Comm'n (1988) 164 C.L.R. 261 (Austl.).

25. Minister of State for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273 (Austl.).

26. *Id.* at 287.

27. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 42-46 (5th ed. 1998).

of the sources of the common law, and when the applicability of customary international law is in question, the judge's role is to determine if that law has been received into the common law.[28] Exactly how the judge should perform that role has not been spelt out, but the approaches of Justice Brennan in *Mabo v. State of Queensland [No 2],*[29] and Justice Merkel in *Nulyarimma v. Thompson,*[30] discussed below, provide some guidance.

Either way, a clear legislative provision in contravention of international law principles must be applied and enforced.[31] This approach flows from the Federal Parliament possessing legislative supremacy in the areas in which the Constitution grants it power.

The above rules of construction do not fetter Parliament's constitutionally bestowed legislative power.[32] For example, in *Horta v. The Commonwealth,*[33] the plaintiff contended that Australia's treaty with Indonesia over the development of petroleum resources in the Timor Sea between East Timor and northern Australia conflicted with international law and so rendered the domestic enabling legislation void. The High Court unanimously rejected the contention and held that "Neither s.51(xxix) itself nor any other provisions of the Constitution confines the legislative power with respect to 'External affairs' to the enactment of laws which are consistent with . . . the requirements of international law."[34]

The supremacy of Parliament means that international human rights norms remain vulnerable to conflicting domestic legislation. As a result the rights of minority groups such as Indigenous Australians are vulnerable to discriminatory legislation.

IV.

THE AUSTRALIAN CONSTITUTION AND INDIGENOUS AUSTRALIANS

The starting point for any consideration of Australia's treatment of its indigenous population is the Australian Constitution.[35] The Constitution gives the Federal Parliament power to legislate for Indigenous Australians pursuant to section 51(xxvi), or what is colloquially known as, "the race power." Under the

28. *See* Chow Hung Ching v. The King (1949) 77 C.L.R. 449, 477 (Austl.) (per Dixon, J.); Nulyarimma v. Thompson (1999) 165 A.L.R. 621, 651-53 (Austl. F.C.A.) (per Merkel, J.); Sir Anthony Mason, *International Law as a Source of Domestic Law in* INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM 218 (Brian Opeskin ed., 1997). *See also* Rosalie Balkin, *International Law and Domestic Law in* PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 121-27 (Sam Blay et al. eds., 1997).

29. (1992) 175 C.L.R. 1 (Austl.) [hereinafter *Mabo [No 2]*].

30. (1999) 165 A.L.R. 621 (Austl. F.C.A.).

31. *See* Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168, 204 (Austl.); *see also* Kartinyeri v. The Commonwealth (1998) 195 C.L.R. 337, 384 (Austl.).

32. *See* Polites v. The Commonwealth (1945) 70 C.L.R. 60 (Austl.).

33. (1994) 181 C.L.R. 183 (Austl.).

34. *Id.* at 195.

35. For a detailed account of the drafting of section 51(xxvi), its amendment, and the High Court's approach to its interpretation, see John Williams & John Bradsen, *The Perils of Inclusion: The Constitution and The Race Power,* 19 ADEL. L. REV. 95 (1997). *See also* Robert Sadler, *The Federal Parliament's Power to Make Laws "With Respect to . . . The People of Any Race. .,"* 10(2) SYDNEY L. REV. 591 (1982).

race power, Parliament has power to make laws with respect to: "The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws."

In 1967, the Australian people passed a referendum[36] amending section 51(xxvi) by deleting the words in italics. Prior to the referendum, only the States could legislate regarding Indigenous Australians. The force of international opinion in helping to foster the amendment was clearly expressed by the "Vote Yes Campaign," which stated that, "Australians are held collectively responsible for the treatment and conditions of the Aboriginal people by world opinion."[37] The comments of the President of the Aborigines Advancement League that, "The image of Australia throughout the world is at stake. If it is not passed, Australia will be held up to ridicule,"[38] indicate that Indigenous Australians campaigning for the amendment recognized the force of international opinion.

On May 27, 1967, the Australian people as a nation, and in each of the six states, voted overwhelmingly to amend section 51(xxvi) and delete section 127 (which explicitly excluded Aborigines from the census).[39] It was, and still is, the referendum that attracted the most support from voters of all the referenda in the history of Australia.

Since the amendment of section 51(xxvi), the High Court has had to interpret whether the race power authorizes laws prohibiting racial discrimination, establishing native title legislation, and, most recently, the validity of the Hindmarsh Island Bridge Act 1997 ("Bridge Act"). In doing so, the Court considered but did not have to decide whether section 51(xxvi) could be used for adverse discriminatory laws against Aboriginal people or could only be used in a beneficial manner. The Judge's opinions were largely dicta up until considering the Bridge Act as they chiefly relied on the external affairs power.

In *Koowarta v. Bjelke-Petersen,*[40] the High Court rejected the Queensland Government's constitutional challenge to the enactment of Federal anti-racial discrimination legislation. Justice Wilson in dicta noted that:

> The existence of racial barriers is repugnant to the ideals of any human society. In substance the preamble [of the International Convention on the Elimination of All Forms of Racial Discrimination] testifies to the view that it is essential to the peace and well-being of the international community that the laws of a community apply to all the members of that community regardless of race. In these days,

36. The process to amend the Australian Constitution is contained in section 128 and requires a referendum at which the amendment is passed by a national majority and a majority in four of the six states.

37. The National Directorate, Vote Yes Campaign, Referendum on Aborigines (Background Notes), (Mar. 31, 1967), *in* ATTWOOD & MARKUS, *supra* note 5, at 214.

38. *No Vote Fear On Rights Issue*, THE AGE, Apr. 11, 1967, *in* ATTWOOD & MARKUS, *supra* note 5, at 215.

39. Yes - 89.34% No – 9.08% Informal 1.58%. *See* TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY 1183-88 (2d ed. 1998). Voting is compulsory in Australia, so the figures have a high correlation with actual public sentiment.

40. (1982) 153 C.L.R. 168 (Austl.).

> one would not readily contemplate the use of the [race] power to the detriment of the people of a race.[41]

Of the other judges that considered the race power, Justice Stephen saw the power as allowing laws which could be either benevolent or repressive, but commented that there was a new global concern for human rights and the suppression of racial discrimination.[42] Justice Murphy interpreted the word "for" in section 51(xxvi) as meaning "for the benefit of."[43] Chief Justice Gibbs felt that it would be a mistake to think that the race power could only be used for the protection of a particular race.[44]

In *The Commonwealth v. Tasmania* (Tasmanian Dam case),[45] the Court considered the Federal Parliament's ability to enact legislation to prevent a World Heritage listed piece of wilderness being flooded by the State of Tasmania damming the Franklin River. Justice Murphy spoke strongly for the race power being interpreted on the basis that the 1967 amendment took place so that Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people,[46] that is, for their benefit. Justice Brennan commented that the 1967 Referendum demonstrated "an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial."[47] The dicta from *Koowarta* and the Tasmanian Dam case thus formed the precedent for the crucial case of *Kartinyeri v. The Commonwealth* (Hindmarsh Island Bridge case),[48] where the race power was the central question.

In the Hindmarsh Island Bridge case, a group of the indigenous Ngarrindjeri people sought to prevent the construction of the Hindmarsh Island Bridge by invoking the Aboriginal and Torres Strait Island Heritage Protection Act 1984 (Cth) (Heritage Protection Act) to protect a sacred site. The Heritage Protection Act gave the Minister power to make declarations that preserved significant Aboriginal areas and objects. The Bridge Act prevented the Minister from declaring the area associated with the Hindmarsh Island Bridge.

The question for the High court was whether the Bridge Act was invalid because it was not supported by the race power or any other head of power. In the Hindmarsh Island Bridge case, the High Court found that the passing of the Bridge Act, which amended the Heritage Protection Act, was a valid exercise of power.

Chief Justice Brennan and Justice McHugh held in a joint judgment that, because Parliament had the power to enact the Heritage Protection Act under section 51(xxvi) of the Constitution, it had power to amend or restrict the operation of that same Act. That, they held, was what the Bridge Act did. They rea-

41. *Id.* at 244.
42. *Id.* at 209, 220.
43. *Id.* at 242.
44. *Id.* at 186.
45. (1983) 158 C.L.R. 1 (Austl.).
46. *Id.* at 180-81.
47. *Id.* at 242.
48. (1998) 195 C.L.R. 337 (Austl.).

soned that "the power to make laws includes a power to unmake them,"[49] or repeal them.

Justice Gummow and Justice Hayne found that the enactment of the Bridge Act was a valid use of the race power. They found that the power could support laws that conferred both benefits and disadvantages. It was for Parliament to determine what measures were necessary for a particular race. The very nature of the power was discriminatory in that the requirements for special laws meant that a particular race would be subject to a law that had a differential operation on them as opposed to other races. Parliament's ability to make such a decision may be limited where the law is enacted in manifest abuse of the power or is in conflict with the rule of law.[50] Justice Gummow and Justice Hayne agreed with Chief Justice Brennan and Justice McHugh on the operation of the Bridge Act on the Heritage Protection Act.

Justice Gaudron decided the question on the same basis as Chief Justice Brennan and Justice McHugh. The judgment reviewed both the original constitutional conventions that produced the Constitution as well as the surrounding materials from the 1967 referendum. In conducting this review, Justice Gaudron pointed out that the original intent of the race power was to authorize Parliament to make laws that discriminated against people of colored and alien races.[51] Justice Gaudron considered that the effect of the 1967 referendum, as a minimalist change, was only to place Aboriginal people in the same constitutional position as people of other races.[52]

However, Justice Gaudron also observed that the words "for whom it is deemed necessary to make special laws" limits the scope of the race power. The race power is broad enough to authorize laws that operate either to the advantage or disadvantage of the people of a particular race. The test of constitutional validity is not whether it is a beneficial law, but rather whether the law in question is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference, which the Parliament might reasonably judge to exist.[53] Whether a law would be necessary requires consideration of the current circumstances in which Aboriginal Australians find themselves. Justice Gaudron described these circumstances as being "circumstances of a serious disadvantage, which disadvantages include the material circumstances and the vulnerability of their culture."[54] As a result, only laws directed to remedy that disadvantage could reasonably be viewed as appropriate and adapted to the current circumstances of Aborigines.

Justice Kirby found that the law was outside of the race power because it was detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race. Justice Kirby conducted a simi-

49. *Id.* at 355.
50. *Id.* at 363.
51. *Id.* at 361.
52. *Id.* at 366.
53. *Id.* at 367.
54. *Id.* at 378, 381.

lar analysis to Justice Gaudron's by reviewing the historical enactment and amendment to the race power. Justice Kirby differed from Justice Gaudron in finding that the 1967 referendum required that the power only be used to benefit a particular race.[55] Justice Kirby further expressed his view that the manifest abuse test, which was the mechanism by which the court was to protect the people from racist laws, was unworkable. Justice Kirby viewed the manifest abuse test as inadequate to prevent the enactment of laws such as those in Germany during the Third Reich or in South Africa during Apartheid.[56]

Justice Kirby went on to state that, where the Constitution is ambiguous, the Court should adopt a meaning that conforms to principles of universal and fundamental rights.[57] Justice Kirby pointed out that the international law of fundamental rights prohibits detrimental distinctions on the basis of race. The Constitution should not allow the enactment of laws that violate fundamental human rights and human dignity. Justice Kirby's approach to constitutional interpretation does not appear to have the support of any of the other members of the Court.

The Court's propensity to state fundamental values that oppose racism towards Aborigines, which was present in *Koowarta* and the Tasmanian Dam case, gave way in the Hindmarsh Island Bridge case to the simple repeal argument. In phrasing the question in terms of power rather than rights and by adopting a traditional interpretation of the relationship between constitutional heads of power and international law, the majority of the High Court avoided the explicit determination of rights. However, the Court's decision also proved immensely significant in the context of native title and its extinguishment by legislation, which is discussed below. The Australian Constitution's race power thus remains inherently discriminatory in nature and with the limits of allowable discrimination still to be determined.

V.
RACIAL DISCRIMINATION ACT

The enactment of the RDA was the first major federal initiative to address the discrimination experienced by Indigenous Australians. Whilst the RDA made all racial discrimination unlawful, the Attorney-General, Lionel Murphy, on introducing the original bill commented, "Perhaps the most blatant example of racial discrimination in Australia is that which affects Aboriginals."[58] The RDA was the legislative response to the Executive's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.[59]

55. *Id.* at 413.

56. *Id.* at 414-16.

57. *Id.* at 417-19. *See also* Amelia Simpson & George Williams, *International Law and Constitutional Interpretation,* 11 PUB. L. REV. 205 (2000).

58. JOHN CHESTERMAN & BRIAN GALLIGAN, CITIZENS WITHOUT RIGHTS 196 (1997).

59. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, (entered into force Jan. 4, 1969).

Australia became a signatory to the convention in October 1966 and ratified it in September 1975.

The RDA's main operative provisions are sections 9 and 10, which are reproduced in appendix 1. Section 9 makes unlawful discrimination on the basis of race, color, descent or national or ethnic origin so as to nullify or impair the enjoyment of the rights set out in Article 5 of the Convention. Section 10 makes laws that limit individual rights on the basis of race, color, descent or national or ethnic origin, as compared to persons from outside the group, function so that all citizens enjoy equal rights.

The Queensland government attacked the RDA on constitutional grounds in *Koowarta*. In addition to its discussion of the race power, set out above, the High Court held the legislation valid by reference to the external affairs head of federal power, section 51(xxix). Justice Stephen cited a number of international law covenants, texts and cases to support his finding that human rights were a legitimate subject of international concern and that racial equality was one of the human rights most in need of protection. Consequently, racial discrimination was within Australia's external affairs and the Federal Parliament could legitimately legislate to prevent it.[60] Justice Murphy, who had introduced the legislation into parliament when he was the Attorney-General, noted the ambiguous attitude towards human rights in general: "[D]uring this century we have witnessed the greatest recognition of and also the greatest denial of human rights in all history." Justice Murphy highlighted the ambiguity with regard to Australia, which condemned racial discrimination, but was also subject to complaints for violating human rights due to "discrimination against Aborigines." Justice Murphy concluded that Australia had an international obligation and an expectation from the Australian people to use the external affairs power to enact the RDA.[61]

Section 8 of the RDA provides that the prohibition on racial discrimination does not apply to "special measures" as discussed in the Convention on the Elimination of All Forms of Racial Discrimination Article 1, paragraph 4.[62] Special measures are means by which formal equality may be diminished or avoided to achieve effective and genuine equality. The Court considered the operation of special measures in *Gerhardy v. Brown*.[63] In *Gerhardy*, the Pitjantjatjara Land Rights Act 1981 (SA) granted a large tract of land in South

60. *Koowarta*, 153 C.L.R. at 219-20. *See also id.* at 234 (Mason, J.); *id.* at 240-42 (Murphy, J.); *id.* at 260-61 (Brennan, J.). *Koowarta* was later affirmed in the *Tasmanian Dam case*, *supra* note 24. *See also* Andrew Byrnes & Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT'L L. 622 (1985).

61. *See Koowarta*, 153 C.L.R. at 238-40.

62. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 59, at art. 1, para. 4, provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

63. (1985) 159 C.L.R. 70 (Austl.).

Australia to its traditional indigenous owners, but also prohibited non-Pitjantjatjara persons from entering the land without permission from its owners. The Court held valid the right to exclusion as a special measure. Justice Mason reasoned that "indigenous peoples may require special protection as a group because their lack of education, customs, values and weaknesses, particularly if they are a minority, may lead to an inability to defend and promote their own interests in transactions with the members of the dominant society."[64] In addition, Justice Brennan reviewed decisions by the International Court of Justice, Supreme Court of India and the United States Supreme Court to demonstrate the acceptance of the need for special measures. The essence of all these decisions was that real equality sometimes required treating some people differently.[65] Justice Brennan concluded that, "Aborigines with traditional relationships with their country may reasonably be thought to need protection from an inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society."[66]

The availability of the external affairs power to enact legislation to protect human rights meant that international law could be the basis for creating legislation to provide Australians with a pseudo-bill of rights, provided the legislation did not conflict with other aspects of the Australian Constitution. The main difference between legislation protecting rights and a bill of rights is that the latter is entrenched. The former can be altered or repealed through legislation by Parliament.

VI.
FURTHER PROTECTION OF HUMAN RIGHTS

In addition to the RDA and common law claims, Australia has instituted other procedures that provide avenues for seeking remedies for human rights contraventions. Two procedures are of particular note because they have been invoked in relation to alleged human rights abuses against Indigenous Australians.

A. Human Rights and Equal Opportunity Commission Act

Further protection of human rights in Australia was achieved through the enactment of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act), which established a Commission[67] with broad surveillance of, and report making functions on, compliance with the human rights standards articulated in the International Covenant on Civil and Political Rights (ICCPR)

64. *Id.* at 105.

65. *Id.* at 128-31 (Brennan, J.) (citing Advisory Opinion on Minority Sch. in Alb. [1935] Ser A/B No.64; S. W. Afr. Cases (Second Phase) [1966] I.C.J.R. at 305-06; Kerala v. Thomas [1976] 1 S.C.R. 906, 951 (Ind.); and Univ. of Cal. Regents v. Bakke 438 U.S. 265, 407 (1978)).

66. *Gerhardy*, 159 C.L.R. at 143.

67. For information on the Commission's functions and activities, see http://www.hreoc.gov.au (last visited Feb. 20, 2002).

and a number of United Nations declarations.[68] The Commission also has responsibility for inquiring into alleged infringements under the RDA, the Sex Discrimination Act 1984 (Cth), and the Disability Discrimination Act 1992 (Cth).

In 1993, Parliament amended the HREOC Act to provide for an Aboriginal and Torres Strait Islander Social Justice Commissioner who has specific functions under the HREOC Act and the Native Title Act 1993 (Cth). A primary function of the new Commissioner is to monitor enforcement of the rights of Indigenous Australians. The Commission has played a leading role in generating reports on Australia's treatment of Indigenous Australians to the Federal Parliament and the UN.[69] Under section 46C(3)(c) of the HREOC Act, the Commissioner is allowed to consult international organizations and agencies. Section 46C(4) of the HREOC Act requires that the Commissioner in performing his or her functions consider the Universal Declaration of Human Rights, the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child, as well as any other instruments relating to human rights that the Commissioner deems relevant.

B. Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

The Optional Protocol[70] gives individuals who claim to have suffered a human rights violation the opportunity to challenge their government's actions through a communication to the United Nation's Human Rights Committee (HRC). For the HRC to accept a communication for review, there must be an identified victim who claims the violation of a specific right under the ICCPR and the claimant must have exhausted available domestic remedies.[71] The Op-

68. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). *See also* Convention Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (entered into force June 15, 1960); Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959); Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1975); Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 3447 (XXX), U.N. GAOR, 26th Sess., Supp. No. 34, at 88, U.N. Doc. A/8429 (1971); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981).

69. For information on the Aboriginal and Torres Strait Islander Social Justice Commissioner and various reports submitted, see http://www.hreoc.gov.au/social_justice/index.html (last visited Feb. 20, 2002).

70. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force Mar. 23, 1976). *See generally* Elizabeth Evatt, *Reflecting on the role of international communications in implementing human rights,* 5 (2) AUSTL. J. HUM. RTS. 20 (1999).

71. ICCPR Optional Protocol Art. 1, 2. *See also* Jane Hearn, *Individual communications under international human rights treaties: an Australian Government perspective,* 5 (2) AUSTL. J. HUM. RTS. 44 (1999) (setting out the operation of the optional protocol's procedures in Australia);

tional Protocol also provides for the HRC to bring the complaint to the government's attention and require written explanations clarifying the matter and setting out whether any remedy has been provided by the government.[72]

Australia ratified the ICCPR on August 13, 1980 and the First Optional Protocol on September 25, 1991.[73] Australia has also accepted the procedures for individual complaint under Article 22 of the Convention Against Torture[74] and under Article 14 of the Racial Discrimination Convention[75] by lodging declarations with the United Nations on January 28, 1993.

The creation of HREOC and the ratification of international instruments allowing individual complaint to the HRC and other UN committees provide an accountability mechanism for human rights. Although available to Indigenous Australians the effectiveness of the mechanisms are largely determined by the government's willingness to act upon complaints.

VII.
NATIVE TITLE

Australia first recognized Indigenous Australians' claim to native title[76] in 1992, 204 years after white settlement of Australia, in *Mabo [No 2].*[77] *Mabo [No 2]* dealt with Murray Island in the Torres Strait and whether Queensland's sovereignty over the island was subject to the Murray Islanders' claims to land rights.

Justice Brennan delivered the lead judgment, with Chief Justice Mason and Justice McHugh concurring, and considered whether principles of international law supporting the recognition of native title could be incorporated into Austra-

---

Wayne Morgan, *Passive/aggressive: the Australian Government's responses to Optional Protocol communications,* 5 (2) AUSTL. J. HUM. RTS. 55 (1999).

72. ICCPR Optional Protocol Art. 4. An example of Australia's response to a request for explanation is Toonen v. Austl., Communication, No. 488/1992, CCPR/C/50/D, which involved a breach of ICCPR Art. 17 (right to privacy) where the Federal government used section 51(xxix) of the Constitution to enact legislation to override the offending Tasmanian legislation.

73. *See* Christopher Caleo, *Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights,* 4 PUB. L. REV. 175 (1993); *see also* Hilary Charlesworth, *Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights,* 18 (2) MELB. U. L. REV. 428 (1991).

74. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

75. International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

76. Native title means the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs, that are recognized under Australian law. The native title of a particular group will depend on the traditional laws and customs of those people. Native title may also change over time. See the National Native Title Tribunal website, *at* http://www.nntt.gov.au/ntf_html/ntf_1a.html (last visited Mar. 15, 2002).

77. Comments on the case can be found in ESSAYS ON THE MABO DECISION (1993); Gerry Simpson, Mabo, *International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence,* 19 MELB. U. L. REV. 195 (1993); Julie Cassidy, *Observations on* Mabo v Queensland, 1 (1) DEAKIN L. REV. 37 (1994). *See also* PETER BUTT & ROBERT EAGLESON, MABO, WIK & NATIVE TITLE (3d ed. 1998) (providing a plain English explanation of the Court's reasoning).

lian law. Justice Brennan's discussion of international laws' influence on Australian common law proceeded as follows:[78]

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.[79]
>
> The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[80]

The non-recognition of native title in Australia originated in the international law that existed at 1788 and recognized three effective ways of acquiring sovereignty over territory: (1) conquest, (2) cession, and (3) occupation of territory that was *terra nullius* (belonging to no one). Under the international law of the time the colonization of Australia was considered an occupation of uninhabited territory or *terra nullius* on the basis that:

> English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were "an uninhabited country . . . discovered and planted by English subjects."[81]

If the first or second methods of acquisition were used then the territory's laws remained in force until changed by the new sovereign.

Justice Brennan then explained that the theory of *terra nullius* had more recently been discredited within international law. The International Court of Justice in its *Advisory Opinion on Western Sahara*[82] was of the opinion that as indigenous peoples populated the Western Sahara at the time of colonization by

78. The actual text of Justice Brennan's reasoning is quoted verbatim as it was central to the overturning of 200 years of precedent.

79. *Mabo [No 2], supra* note 29, at 29.

80. *Id.* at 30.

81. *Mabo [No 2],* 175 C.L.R. at 37-38 (referring to Lord Watson in Cooper v. Stuart [1889] 14 App. Cas. at 291 (Eng.)); *id.* at 39 (Brennan, J.) (referring to *In re* S. Rhodesia [1919] A.C. at 233-34 (Eng.), where the English Court of Appeals applied *terra nullius* to lands inhabited by indigenous peoples on the basis that: Some native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.").

82. Advisory Opinion on W. Sahara [1975] I.C.J. 12, 39 (Oct. 16).

Spain in 1884 it was not a territory belonging to no one (*terra nullius*). Justice Brennan reasoned that the Court should discard the doctrines of the common law, which depended on the notion of *terra nullius*, and added:

> If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[83]

Justice Brennan went on to explain that "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[84] Justice Brennan supported his view of legitimate influence by specifically referring to Australia's accession to the Optional Protocol to the ICCPR, which gave individuals access to international remedies and therefore brought to bear on the common law the Covenant and the international standards it imports.

To arrive at the conclusion that Australian law could and should recognize native title, Justice Brennan also conducted a detailed analysis of Crown sovereignty and ownership of land, which will not be discussed here.

Justices Deane, Gaudron, and Toohey pointed out that whilst native title was not an entrenched right, extinguishment would be subject to the Constitution section 51(xxxi), which allowed acquisitions of property to occur only on just terms, and to the RDA.[85] Regarding the RDA, their Honors referred to *Mabo v. Queensland [No 1]*,[86] where the Queensland Government passed legislation to extinguish the native title the subject of *Mabo [No 2]*, but the legislation was inconsistent with section 10(1) of the RDA, and therefore ineffective under the Constitution, section 109 (equivalent to U.S. Constitution's supremacy clause).[87]

The High Court in a 6-1 majority held that native title could exist but that the sovereign, subject to the Constitution and other valid laws, may extinguish native title. The land on the Murray Island under consideration in *Mabo [No 2]* had not had the plaintiffs' native title extinguished. However, the *Mabo [No 2]* decision left undecided exactly when native title was extinguished pre-*Mabo*, where it may continue to exist within Australia, and how existing native title could be claimed or extinguished. This dilemma called for a legislative response.

---

83. *Mabo [No 2],* 175 C.L.R. at 41-42.

84. *Id.* at 42.

85. *Id.* at 111-12 (per Deane and Gaudron, JJ.); *id.* at 214-16 (per Toohey, J.).

86. Mabo v. Queensl. [No 1], (1998) 166 C.L.R. 186 (Austl.) [hereinafter *Mabo [No 1]*].

87. *Id.* at 219 (per Brennan, Toohey, and Gaudron, JJ.); *id.* at 231 (per Deane, J.).

A. *Native Title Act 1993 (Cth)*

As a result of this perceived uncertainty, the Federal Government passed the Native Title Act 1993 (Cth), pursuant to the race power. The enactment of Federal legislation meant that the States were unable to pass inconsistent legislation without it being struck down by the courts on Constitutional grounds, under section 109.

The Native Title Act defined native title, and set out a procedure for claiming native title and determining its existence (including the creation of the National Native Title Tribunal whose decisions are appealable to the Federal court). It validated Commonwealth issued-titles occurring prior to January 1, 1994 (called past acts) that may have been invalidated by the RDA, and provided a mechanism for State and Territory titles from the same period to be validated. The Act also defined past acts that extinguish or do not extinguish native title, set out permissible future acts, provided native title holders and claimants with a right to negotiate before future acts are taken, and specified when compensation was payable for past and future acts that extinguished native title.[88]

The aspect of the Native Title Act that is of greatest concern from an international law perspective is its relationship to the RDA. The Federal Government chose to validate all acts between the enactment of the RDA in 1975 and the Native Title Act by suspending the operation of the RDA for that period, and affording the protection of the RDA to native title holders prospectively.[89] In addition, effective validation also required just terms for any acquisitions within section 51(xxxi) of the Constitution. The Native Title Act effectively increased the time period in which native title could be extinguished from 1975 to January 1, 1994. The government's explanation was that this formed part of a larger framework for securing the position of native title holders.

The Native Title Act was subject to constitutional challenge in *State of Western Australia v. Commonwealth*.[90] The Court held that the Act was a valid use of the race power.[91] The majority, in considering the interaction between the Native Title Act and the RDA, commented:

> [I]t is not easy to detect any inconsistency between the Native Title Act and the Racial Discrimination Act. . . . But if there were any discrepancy in the operation of the two Acts, the Native Title Act can be regarded either as a special measure under s.8 of the Racial Discrimination Act or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of All Forms of Discrimination. . . . The general provisions of the Racial Discrimination Act

88. For a more detailed explanation of the legislation, see PETER BUTT, LAND LAW 892-911 (3d ed. 1996), and see Justice R.S. French, *A Hitchhiker's Guide to the Native Title Act* 25 (2) MONASH U. L. REV. 375, 378-86 (1999).

89. State of W. Austl. v.The Commonwealth (1995) 183 C.L.R. 373, 462 (Austl.).

90. *Id.* at 420-21; *see also* Samantha Hepburn, *Native Title Legislation under attack: The West Australian Challenge*, 1 (1) NEWCASTLE L. REV. 39 (1995).

91. *State of W. Austl.*, 183 C.L.R. at 462.

must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation.[92]

The High Court's 265 page decision in *Wik Peoples v. Queensland*[93] undermined the Native Title Act's attempt at certainty. Two groups of native title claimants, the Wik and Thayorre Peoples, claimed that pastoral leases had not extinguished their native title. By a majority of four votes to three, the High Court agreed. The majority found that pastoral leases did not give the lessee a right of exclusive possession; rather, the rights and obligations of the pastoralist depend on the terms of the lease and the law under which it was granted. The pastoral lease was not a "lease" in the usual sense understood by property lawyers but a statutory invention for unique Australian circumstances.[94] Justice Toohey's conclusions reveal the Court's reasoning that, "There is nothing in the statute which authorized the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title."[95] In contrast, the minority decision by Chief Justice Brennan effectively held that the legislation creating pastoral leases created a legal interest in land, which is in substance the same as a common law lease that gives the lessee a right of exclusive possession, which is inconsistent with, and therefore extinguishes, native title.[96]

The majority further held that if there is any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the native title holders must yield. If there is no conflict, the rights of each co-exist. Justice Toohey explained the finding as follows:

> Inconsistency can only be determined, in the present context, by identifying what native title rights in the system of rights and interests upon which the appellants rely are asserted in relation to the land contained in the pastoral leases. This cannot be done by some general statement; it must "focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right." Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail. It is apparent that at one end of the spectrum native title rights may "approach the rights flowing from full ownership at common law." On the other hand they may be an entitlement "to come on to land for ceremonial purposes, all other rights in the land belonging to another group."[97]

The *Wik* decision created uncertainty as to what could be done on pastoral leases without impinging on native title rights. Some States had granted interests, including mining tenements, over former pastoral leases that were also sub-

92. *Id.* at 483-84.

93. (1996) 187 C.L.R. 1 (Austl.).

94. Henry Reynolds & Jamie Dalziel, *Aborigines and Pastoral Leases – Imperial and Colonial Policy, 1826 – 1855* (1996) 19 U. N.S.W. L.J. 315 (reproducing the expert evidence provided to the High Court); *see also* Jonathan Fulcher, *The* Wik *Judgment, Pastoral Leases and Colonial Office Policy and Intention in NSW in the 1840s,* 4 (1) AUSTL. J. LEGAL HIST. 33 (1998) (assessing the historical evidence before the High Court in *Wik*).

95. *Wik,* 187 C.L.R. at 122.

96. *Id.* at 70-88.

97. *Id.* at 126-27.

ject to uncertainty. This uncertainty then led to another round of calls for government action—some rational and some misinformed.

B. The Ten Point Plan

The government responded to *Wik* with the "Ten Point Plan." The Ten Point Plan reconsidered how to balance the competing interests of Indigenous Australians on one side, with pastoralists and miners on the other side. The Federal Parliament enacted the Plan as the Native Title Amendment Act 1998 (Cth) and its main effects were:

- Validation of acts/grants between the passage of the Native Title Act, January 1, 1994 and the *Wik* decision, December 23, 1996 (referred to as intermediate period acts) so that native title would be extinguished for this further period.[98]
- Permission for States and Territories to confirm that exclusive tenures, such as freehold, residential, commercial and public works in existence on or before January 1, 1994 extinguished native title.
- Increase in pastoralists' rights to conduct various activities (such as tourism) under their leases. Native title rights over current or former pastoral leases were permanently extinguished to the extent that those rights were inconsistent with those of the pastoralists.
- Reduction of native title claimants' ability to negotiate in relation to mining activity and compulsory acquisition of native title rights.
- Increase in the difficulty of registration of native title claims, which, in turn, makes access to the right of negotiation more difficult.[99]

Although the above amendments significantly reduced the rights of Indigenous Australians, the legal relationship between the Native Title Act and RDA remained the same as explained in *State of Western Australia*, the RDA must yield to the specific provisions of the Native Title Act. In addition, any constitutional challenge on the basis that the Native Title Act had ceased to be beneficial and was now adversely discriminatory would probably fail on the reasoning set forth in the Hindmarsh Island Bridge case.

---

98. After the amendments, the Native Title Act section 7 provided:
(1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.
(2) Subsection (1) means only that:
(a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would remove the ambiguity.
(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act." Native Title Act, 1993, § 7.

99. Justice R.S. French, *A Hitchhiker's Guide to the Native Title Act,* 25 (2) MONASH U. L. REV. 375, 387-420 (1999) (providing detailed analysis of the Ten Point Plan and enabling legislation); *see also* Richard Bartlett, *A Return to Dispossession and Discrimination: The Ten Point Plan,* 27 (1) U. W. AUSTL. L. REV. 44 (1997); *see also* Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth),* 22 (2) U. N.S.W. L.J. 564 (1999).

C. *An International Law Solution Through the Prohibition of Genocide?*

The low likelihood of success of a constitutional challenge prompted challenges based on international law. In *Nulyarimma*, the appellants sought the issue of arrest warrants against four Commonwealth parliamentarians, including the Prime Minister, for their role in formulating the Ten Point Plan and its subsequent enactment as the Native Title Amendment Act 1998 (Cth) on the basis that their involvement amounted to the crime of genocide.[100]

Before a Federal Court of Appeals, the appellants contended that: first, the international crime of genocide's status as *jus cogens* or a peremptory norm gave States universal jurisdiction; and second, the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide. The appellants then relied on Lord Millet's approach in *R v. Bow Street Magistrate, Ex parte Pinochet (No. 3),*[101] and *Attorney-General of Israel v. Eichmann,*[102] to contend that, third, universal jurisdiction was an independent source of jurisdiction for an Australian court to try the crime of genocide.

Justices Wilcox and Whitlam accepted the first and second contentions but rejected the third, which was essential for the crime of genocide to exist under Australian domestic law without specific legislation. Justice Merkel dissented on the third contention. In considering the third issue, the Federal Court of Appeal had to determine if Australian domestic law recognized an offence of genocide. As no legislation creating such an offence had been passed, the Court had to determine the relationship between customary international law and Australian common law.

Despite the *jus cogens* nature of genocide, Justice Wilcox and Justice Whitlam both held that the crime could not be prosecuted domestically unless Parliament enacted legislation.[103] Both relied on Justice Brennan's judgment in *Polyukhovitch v. the Commonwealth*[104] that a municipal law may provide for the exercise of a universal jurisdiction recognized by international law, but that "a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court."[105] Their Honors distinguished Lord Millet's approach in *Pinochet* and his interpretation of *Eichmann* that customary international law was part of the common law, by finding that both Pinochet and Eichmann engaged in

100. *See* Andrew Mitchell, *Genocide, Human Rights Implementation and the Relationship between International and Domestic Law:* Nulyarimma v. Thompson, (2000) 24 MELB. U. L. REV. 15 (2000).

101. (1999) 2 W.L.R. 827 (Eng. H.L.).

102. (1962) 36 I.L.R. 277 (Isr.).

103. Kruger v. The Commonwealth (1997) 190 C.L.R. 1, 70-71, 87 (Austl.) (restating the need for legislation to validly incorporate a treaty into municipal law in relation to the Genocide Convention). The Court did not directly decide that issue, but instead limited its holding to whether to imply a right to be free from genocide into the Australian Constitution, which is discussed below.

104. (1991) 172 C.L.R. 501 (Austl.).

105. *Id.* at 576 (holding that legislation providing for the trial in Australia of persons alleged to have committed war crimes outside Australia during the Second World War was a valid exercise of the Commonwealth Parliament's power to make laws with respect to external affairs).

conduct that was a criminal offence under domestic statutes rather than pursuant to customary international law.[106]

Justice Merkel, in dissent, found that in Australia the Court's could determine that the common law could adopt international law that amounts to *jus cogens* as part of domestic law without the need for legislation, provided such adoption is not inconsistent with legislation or overarching common law principles or policies.[107] His Honor further observed that, "The significance of *Eichmann* . . . [is] that under customary international law jurisdiction vested in Israel as a common law state directly *or* by municipal statute. Lord Millett arrived at the same conclusion in *Pinochet*."[108]

Justice Merkel went on to find that a decision to incorporate crimes against humanity, including genocide, as part of Australia's municipal law at the end of the 20th century satisfies the criteria of experience, common sense, legal principle and public policy. However, Justice Merkel denied appellants relief on the basis that formulation of legislative policy was protected from criminal prosecution and the necessary intent (discussed further below) needed to prove genocide had not been shown.

In *Nulyarimma,* the Federal Court determined that genocide was not a crime within Australia. This would appear to place Australia in breach of the Genocide Convention which at Article V requires the enactment of legislation to give effect to the provisions of the Convention.[109] As a result, a person found in Australia who was accused of committing genocide would have to be extradited for trial as the offence does not exist under domestic law. It also highlighted the difficulty with determining when customary international law becomes part of the common law. As a result of the majority's interpretation, the chief means for bringing international standards to bear on domestic conduct is through the Parliament enacting legislation. The willingness of the Government of the day to protect human rights thus becomes a central factor in whether human rights are afforded protection or not.

D. An International Law Solution Through the Prohibition of Racial Discrimination?

The other challenge to the Ten Point Plan was through the UN Committee on the Elimination of Racial Discrimination's (CERD) early warning procedures. Pursuant to these procedures, the Committee adopted Decision 1(53) on Australia on August 11, 1998 (A/53/18, paragraph 22), and requested information on the proposed changes of policy as to Aboriginal land rights, and in particular the amendments to the Native Title Act.

106. *Nulyarimma,* 165 A.L.R. at 630-31, 635-36. Pinochet was to be extradited pursuant to the Extradition Act 1989 (UK) which required the conduct to be criminal under UK law at the date of commission. Torture became a crime in the UK pursuant to the Criminal Justice Act 1988 (UK). Eichmann was prosecuted pursuant to the Nazi and Nazi Collaborators (Punishment) Law 1950.

107. *Id.* at 653-55.

108. *Id.* at 661.

109. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

Australia responded with a detailed written reply and delegation to the Committee's 1323rd and 1324th meetings. In addition, the Acting Aboriginal and Torres and Strait Islander Social Justice Commissioner from HREOC and the Aboriginal and Torres Strait Islander Commission provided information on the effects that they perceived the Ten Point Plan would have on Indigenous Australian's ability to make native title claims.

The Committee made the following observations:

> 6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title-holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.
>
> 7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title-holders to negotiate non-indigenous land uses.
>
> 8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the *Mabo [No 2]* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.
>
> 9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. . . .[110]

In short, the report found Australia in breach of Articles 2 and 5 of the Racial Discrimination Convention.[111] The Committee further called on Australia to suspend the implementation of the Ten Point Plan and re-open discussions with Indigenous Australians. No such suspension or discussions took place. The HRC's review in July 2000 of Australia's compliance with the ICCPR again raised the issue of native title. The HRC expressed concern over the 1998 amendments to the Native Title Act and recommended that Australia "take further steps . . . to secure the rights of its indigenous population under article 27 of the Covenant."[112]

---

110. Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, (54th Session), Mar. 18, 1999, U.N. Doc. CERD/C/54/Misc.40/Rev.2 (unedited version). The decision is included in Appendix 2 of ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, NATIVE TITLE REPORT 1999, (1999) HREOC, http://www.hreoc.gov.au/ pdf/ social_justice/native_title_report_99.pdf [hereinafter NATIVE TITLE REPORT] (last visited Feb. 20, 2002).

111. Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, 23 MELB. U. L. REV. 372 (1999).

112. Human Rights Committee, *Consideration of Reports Submitted under Article 40 - Concluding Observations of the Human Rights Committee: Australia*, (69th session), July 28, 2000, U.N. Doc. CCPR/CO/69/AUS.

The HRC and CERD reported that, under the Ten Point Plan, the amendments disproportionately disadvantaged Indigenous Australians. The CERD Committee's finding that the amended Native Title Act discriminates and can no longer be characterized as a special measure under the Racial Discrimination Convention led HREOC to conclude that the amended legislation may not fall within the scope of the external affairs power as it was not implementing the Convention.[113] Even if HREOC's view is correct, the Native Title Act would survive constitutional challenge on the basis of the race power and the reasoning in the Hindmarsh Island Bridge case discussed above.

The Australian government did not follow the UN's reports and recommendations, and even called for an overhaul of the UN committee system and conditioned further cooperation with the committees on such an overhaul.[114] Australia has also stated that it will not sign or ratify the new Optional Protocol to the Convention of the Elimination of All Forms of Discrimination Against Women which entered into force on December 22, 2000.[115] The UN's focus on the sensitive issue of native title in Australia that provoked a negative reaction from the government highlights the extent to which the effectiveness of international bodies are subject to the whims of a country's preparedness to comply.[116] This is particularly so when the alleged breaches are not of the type that attracts economic sanctions or military intervention.

E. Native Title Disputes Continue

Although the current Australian government has not acted on the UN's reports on native title, the Courts have continued to adjudicate native title disputes. In *Commonwealth v. Yarmirr,*[117] the High Court considered the application of native title to seas, sea-bed and sub-soil. The majority held that native title that conferred exclusive possession, occupation, use and enjoyment of the relevant area of sea conflicted with common law public rights to navigate and to fish and the international right of innocent passage. As a result, the Indigenous groups were limited to the lower court's original finding of native title rights encompassing the right to fish, hunt and gather for the purpose of their communal needs and to be able to access the relevant areas for cultural and spiritual purposes.[118]

---

113. *See* NATIVE TITLE REPORT, *supra* note 110.

114. Commonwealth Minister for Foreign Affairs, The Hon. Alexander Downer MP, Attorney-General, The Hon. Daryl Williams AM QC MP, Minister for Immigration and Multicultural Affairs, The Hon. Philip Ruddock MP, *Improving the Effectiveness of UN Committees*, Press Release No. FA 97, Aug. 29, 2000.

115. Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess., Supp. No. 49, at 5, U.N. Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

116. *See* Elizabeth Evatt, *How Australia "Supports" the United Nations Human Rights Treaty System,* 12 PUB. L. REV. 3, 7-8 (2001). *See also* Rochelle Haller, *UN Reports: Australia's Cold-Shoulder: Setting a Dangerous Precedent for Human Rights Violators*, 17 N.Y.L. SCH. J. HUM. RTS. 937 (2001).

117. (2001) 184 A.L.R. 113 (Austl.).

118. *Id.* at [94] (Gleeson, CJ.; Gaudron, Gummow, and Hayne, JJ.).

Justice Kirby took a different approach in his dissenting judgment. His Honor relied on international law making discrimination impermissible and Australia's adoption of that norm through the RDA and *Mabo [No 2]* to inform how the common law should define the content of native title.[119] As a result, although the Indigenous group must demonstrate a continuing connection with the area claimed, the nature of that connection pre-settlement does not confine how they may use the area in the present day.[120] Instead, they should receive qualified exclusive possession, which yields to the international right of innocent passage, common law rights to navigate and statutorily licensed fishing, but otherwise is theirs to do with as they please. Any other outcome would be discriminatory because Indigenous Australians' property rights are frozen in time whilst other Australians' property rights are not. This means that although the Indigenous group may only have used the area for fishing and spiritual purposes pre-settlement that is not how the area must be used today. Instead native title affords them the entitlement to allow or withhold the use of the area for tourism, resource exploration and the like.[121] Thus, international law continues to be a source of guidance in the development of native title jurisprudence even if it is not adopted by a majority of the High Court.

VIII.
THE STOLEN GENERATION

The Stolen Generation refers to Indigenous Australians whom Australian governments removed from their parents and extended family as part of a social-Darwinian policy that grew out of the belief that Indigenous Australians were a dying race and that those of mixed descent should be assimilated into the white population.[122]

Each colony, or each State, after 1901, created 'protective' legislation that allowed government officials to remove an Indigenous child without having to establish to a court's satisfaction that the child was neglected. Consequently, there was no judicial oversight of the executive's actions. Despite this mechanism, the government officials did not achieve the objective of assimilation to the degree planned and Indigenous Australians did not die out as expected.

On May 11, 1995, the Federal Attorney-General referred the issue of past and present practices of separation of Indigenous children from their families to HREOC and an Inquiry chaired by retired High Court judge, Sir Ronald Wilson. The Inquiry had four main objectives:

1. to examine the past and continuing effects of separation of individuals, families and communities.

119. *Id.* at [294]-[96], [318]-[20].

120. *Id.* at [307], [309].

121. *Id.* at [294]-[296], [320].

122. PETER READ, THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NSW 1883 TO 1969 (photo reprint 1998) (1981). *See also* Malcolm Fraser, *The Past We Need to Understand,* 11 PUB. L. REV. 265, 268 (2000).

2. to re-unite families and otherwise deal with losses caused by separation, by recommending changes in laws, policies and practices.
3. to find justification for, and the nature of, any compensation that should be made to those affected by separation.
4. to look at current laws, policies and practices affecting the placement and care of Indigenous children. This included looking into the welfare and juvenile justice systems, and advising on any changes in the light of the principles of self-determination.

The Inquiry's findings are contained in the Bringing them Home Report.[123] The Bringing them Home Report contains extensive testimony from Indigenous Australians who were subject to the separation regimes, and recommendations to deal with the past practices and to prevent a re-occurrence of those practices. The main findings of the report were that:

- Nationally, government officials forcibly removed between one in three and one in ten Indigenous children from their families and communities between 1910 and 1970.[124]
- Indigenous children were placed in institutions or church missions, were adopted or fostered, and were at risk of physical and sexual abuse. Many never received wages for their labor.
- Welfare officials failed in their duty to protect Indigenous wards from abuse.
- Under international law, from approximately 1946 the policies of forcible removal amount to genocide; and from 1950 the continuation of distinct laws for Indigenous children was racially discriminatory. Further, that the Commonwealth should legislate to implement the Genocide Convention with full domestic effect.
- The removal of Indigenous children continues today. Indigenous children are six times more likely to be removed for child welfare reasons and 21 more times likely for juvenile detention reasons than non-Indigenous children.
- For the purposes of responding to the effects of forcible removals, 'compensation' be broadly defined to mean 'reparation'; that the government should make reparation in recognition of the history of gross

123. BRINGING THEM HOME REPORT, *supra* note 6, http://www.austlii.edu.au/au/special /rsj-project/rsjlibrary/hreoc/stolen/ (last visited Feb. 20, 2002).

124. This finding and the label 'stolen generation' have been subject to criticism on the basis that the evidence presented to the Inquiry was not rigorously tested and therefore overstates the number of Indigenous children removed. *See, e.g.*, SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, HEALING: A LEGACY OF GENERATIONS: THE REPORT OF THE INQUIRY INTO THE FEDERAL GOVERNMENT'S IMPLEMENTATION OF THE RECOMMENDATIONS MADE BY THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION IN *Bringing Them Home* [hereinafter HEALING REPORT], Submission No. 36 (Mar. 2000) (federal government submission by Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs), at 2, http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2002); *see also* John Herron, *A generation was not stolen*, SYDNEY MORNING HERALD Apr. 4, 2000, http://www.smh.com.au/news/0004/04/pageone/pageone09.html (last visited Feb. 20, 2002).

violations of human rights; and that the van Boven principles (reproduced in appendix 2) should guide the reparation measures.

- State and Territory Governments should ensure that primary and secondary school curricula include substantial compulsory modules on the history and continuing effects of forcible removal.
- No records relating to Indigenous individuals, families or communities or to any children, Indigenous or otherwise, removed from their families for any reason, whether held by government or non-government agencies, should be destroyed. Additionally, the relevant governments should fund all government record agencies as a matter of urgency to preserve and index records relating to Indigenous individuals, families and/or communities and records relating to all children, Indigenous or otherwise, removed from their families for any reason.

The Inquiry implicated three main areas of international law: genocide, racial discrimination and the use of United Nations' recommendations on reparations for human rights abuse victims. This article sets out the Inquiry's findings on each of these issues and the Australian government's response.

A. Genocide

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide[125] (reproduced in part in appendix 3) was the first international document to define "genocide" in detail. Australia ratified the Convention in 1949 and it came into force in 1951. The Inquiry used the Convention as its starting point for evaluating the legal ramifications of removing Indigenous children from their families.

The Inquiry pointed out that genocide can be committed by means other than actual physical extermination. According to the Inquiry, the forcible transfer of children can be considered genocide, pursuant to Article 2(e) of the Convention, provided the other elements of the crime are established. The Inquiry adopted the United Nations Secretary-General's explanation that "the separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time."[126]

The Inquiry found that the predominant aim of the forcible removal of Indigenous babies and children was to absorb or assimilate the children into the wider, non-Indigenous community so that their unique cultural values and identities would disappear.[127] For instance, Dr. Cecil Cook, Northern Territory

125. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

126. UN Secretary-General, *Draft Convention on the Crime of Genocide: Commentary,* U.N. Doc. E/447, art. I(II)(3)(a), 2 (1947).

127. The Inquiry focused on the policies put forward by the government officials administering the 'protective' legislation, the Chief Protectors of Aborigines, who actively promoted a goal of assimilation. *See* BRINGING THEM HOME REPORT, *supra* note 6, at ch. 2, http://www.austlii .edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Heading23 (last visited Feb. 20, 2002).

Chief Protector of Aborigines from 1927 to 1939, said, "The problem of our half-castes will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white."[128]

This finding about the government's intent in enacting the removal policy has been criticized on the basis that the actual policy behind removal was governmental concern for the welfare of the half-caste children. Those who take this view argue that Aboriginal communities rejected half-caste children and thus the children had to be taken into government care. They also argue that the removal was not forced, but instead parents willingly gave their children up as they lacked the resources to care for them.[129]

In this context, the use of the term genocide is controversial as it connotes the planned destruction of the physical existence of a group. More precisely, under Article 2 of the Convention, it required "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The Inquiry considered the issue of mixed motives, that is, children who were removed so as to provide them with education, training, protection from malnutrition, neglect or abuse, even though it also furthered a policy of assimilation. The Inquiry found that multiple motivations did not prevent an act from being genocide if one of the intentions was to destroy the group.[130]

The crime of genocide and the intent underlying government action were considered by the High Court in *Kruger v. The Commonwealth*,[131] and by a Federal Court of Appeals in *Nulyarimma*. *Kruger* addressed the issue of genocide indirectly as it dealt with constitutional challenges to a Northern Territory Ordinance that allowed Indigenous Australians to be removed from their families. The case is discussed in greater detail below in relation to reparations. On whether the Northern Territory Ordinance breached the Genocide Convention, the High Court found that the Ordinance did not authorize the commission of acts with the intent to which the Convention referred. Justice Dawson pointed out that the Ordinance required that the powers it bestowed be exercised in the best interests of the Aboriginals concerned or of the Aboriginal population.[132] It is necessary to keep in mind, as Justice Toohey pointed out, that the holding

128. *Id.* at ch. 9, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen15.html#Heading57 (last visited Feb. 20, 2002); *see also* Tony Stephens, *Terra nullius of the spirit*, SYDNEY MORNING HERALD Apr. 4, 2000, http://www.smh.com.au/news/0004/04/pageone/pageone02.html (last visited Feb. 20, 2002).

129. HEALING REPORT, *supra* note 124, Submission No. 87 (May 2000) (submission by Peter Howson, Minister for Aboriginal Affairs, 1971-72), http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Feb. 20, 2002); *see also* Peter Howson, *The truth about the 'stolen generation'*, THE AGE, Apr. 14, 2000, http://www.theage.com.au/news/20000414/A2719-2000Apr13.html (last visited Feb. 20, 2002).

130. BRINGING THEM HOME REPORT, *supra* note 6, at Part 4: Reparations, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103 (last visited Mar. 2, 2002). *See also* Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 22-23 (1994).

131. (1997) 190 C.L.R. 1 (Austl.).

132. *Id.* at 70.

applied only to the validity of the Ordinance and not any governmental exercise of power under the Ordinance.[133]

In *Nulyarimma*, the Federal Court engaged in a more detailed discussion of genocide. Justice Wilcox commented that:

> [I]t is possible to make a case that there has been conduct by non-indigenous people towards Australian indigenes that falls within at least four of the categories of behaviour mentioned in the Convention definition of "genocide": killing members of the group; causing serious bodily harm or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and forcibly transferring children of the group to another group. . . .
>
> However, deplorable as our history is, in considering the appropriateness of the term "genocide", it is not possible too long to leave aside the matter of intent. As already mentioned, it is of the essence of the international crime of genocide that the relevant acts be intended to destroy, in whole or in part, a national, ethnical, racial or religious group.[134]

Justice Wilcox reviewed some of the activities that could satisfy the requisite intention but added:

> Nonetheless, it remains true that the biggest killers were diseases unintentionally introduced into Australia by whites and the consequences of denying Aboriginals access to their traditional lands. With the benefit of hindsight, we can easily see the link between denial of access and those consequences; but it is another matter to say they were, or should have been, foreseen by the first Europeans who settled on the land (with or without official approval), whose main objective was to make settlement pay.[135]

In essence, European settlement was about surviving in a new land and creating a profitable colony. The harm that this caused to Indigenous Australians as a group was not intentional, but rather a side-effect of the way settlement proceeded.

Justice Wilcox concluded that the harm experienced by Indigenous Australians was not the product of any sustained or official intention to destroy the Aboriginal people, but rather the result of circumstances, attitudes and actions of many individuals, often in defiance of official instructions.[136]

Justice Merkel also discussed the issue of intention by explaining the special nature of intent within the crime of genocide so as to highlight the malevolence of genocide as compared to other harms. His Honor explained:

> [I]t is desirable that I make certain observations as to the dangers of demeaning what is involved in the international crime of genocide. Undoubtedly, a great deal of conduct engaged in by governments is genuinely believed by those affected by it to be deeply offensive, and in many instances harmful. However, deep offence or even substantial harm to particular groups, including indigenous people, in the community resulting from government conduct is not genocide . . . As was stated in a recent decision of the International Criminal Tribunal for Rwanda:
>
> > Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention,

133. *Id.* at 88.
134. *Nulyarimma,* 165 A.L.R. at 624-26.
135. *Id.* at 626.
136. *Id.*

> required as a constitutive element of the crime, which requires that the perpetrator clearly seek to produce the act charged. The special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[137]

Justice Merkel went on to say:

> I have made the above observations as I am conscious of the danger of raising unrealistic expectations about what might be achieved by recourse to the law to secure what might be perceived to be just outcomes for the Aboriginal people of Australia. Whilst, understandably, many Aboriginal people genuinely believe that they have been subjected to genocide since the commencement of the exercise of British sovereignty over Australia last century, it is another thing altogether to translate that belief into allegations of genocide perpetrated by particular individuals in the context of modern Australian society.[138]

Both Justice Wilcox and Justice Merkel made their comments in the context of Native Title Act amendments rather than the removal of children from their families. The latter is a clearer violation of a category of behavior mentioned in the Convention. Nonetheless, the comments in *Nulyarimma* and *Kruger* suggest that specific intent is required for a finding of genocide as opposed to the Bringing them Home Report's findings that general intent is sufficient.[139]

In addition, the Convention's drafters appear to have intended to adopt a requirement of specific intention,[140] and the recent decisions of the Rwanda International Criminal Tribunal[141] also support such a requirement. Specific

---

137. *Id.* at 671 (quoting Prosecutor v. Akayesu [1998] 37 I.L.M. 1399, 1401, 1406).

138. *Id.* at 672.

139. AUSTRALIAN SENATE LEGAL AND CONSTITUTIONAL COMMITTEE, HUMANITY DIMINISHED: THE CRIME OF GENOCIDE (June 2000) [hereinafter HUMANITY DIMINISHED REPORT], ch. 2, ¶¶ 2.14-2.15, at 8-9, http://www.aph.gov.au/senate/committee/legcon_ctte/anti_genocide/index.htm (last visited Feb. 20, 2002). The HREOC commented: "On another view, it is sufficient to establish general rather than specific intent to destroy the group. This view is consistent with the proposition of Anglo-American criminal law that an accused cannot avoid liability for the foreseeable consequences of a deliberate course of action. Intent is established if the foreseeable consequences are, or seem likely to be, the destruction of the group. The virtue of this approach is that it covers a situation in which intent has not been express." *Id.* at 8 n.11 (citing HEALING REPORT, *supra* note 124, Submission No. 4, at 38). HREOC further argues that, in the case of forcible removal of Aboriginal children, there is considerable contemporary and official expression of destructive intent (with the inference that this satisfies a general, rather than specific, intent requirement). *Id.* at 8 n.12 (citing HEALING REPORT, *supra* note 124, Submission No. 4, at 28).

140. The Senate Legal and Constitutional Committee found that, "[t]he drafters of the Convention appear to have regarded the crime of genocide as requiring specific intent. For example, UN Doc. A/AC 6/SR 72 (1948), page 87 (per Mr Armado of Brazil) states: 'Genocide was characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the Convention, that act still could not be called genocide . . . it was important to retain the concept of *dolus specialis*.' Patrick Thornberry, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, (1991) Clarendon Press, pp. 73-74 states: 'It was pointed out in the Sixth Committee that the intention to destroy the group was what distinguished genocide from murder. Genocide was characterised by the factor of particular intent, *dolus specialis*, to destroy a group. In the absence of this factor, whatever the degree of atrocity of an act and however much it resembled acts described in the Convention, that act could not be called genocide." HUMANITY DIMINISHED REPORT, *supra* note 139, at 8 n.11.

141. Asoka De Z. Gunawaradana, *Contributions by the International Criminal Tribunal for Rwanda to Development of the Definition of Genocide,* 94 AM. SOC'Y INT'L L. PROC. 277, 277 (Apr. 2000). The Rwanda International Tribunal held in *The Prosecutor v. Bagilishema,* ICTR-95-1A-T, June 7, 2001, at [60]-[62]:

intent requires that "in addition to the intent to commit the underlying enumerated acts of [forcibly transferring children of the group to another group] the prosecution must also establish that the accused has an ulterior intention or secondary element of *mens rea* or the desire to achieve a particular objective,"[142] to destroy the group.

This is not the first time that the intention element has been debated.[143] The issue has been argued in relation to the bombings of Dresden, Hiroshima, and Nagasaki from World War II and the US bombing strategy during the Vietnam War.[144] In those instances, as here, that an element of the offence is missing does not detract from the horror of the events and their effects. The most atrocious outcome does not qualify as genocide without the requisite intent. Genocide is not simply the result, but the intended result. If a finding of genocide only required general intent, genocide could lose its "emotional and political potency."[145]

As a matter of law, and on the facts as reported in the Bringing them Home Report, the removal of Indigenous children from their families does not appear to be genocide. Nonetheless, the unwarranted removal of children from their families based on racial prejudice or misunderstanding of indigenous lifestyles should be condemned.

"The *dolus specialis* of the crime of genocide is found in the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

> For one of the underlying acts to be constitutive of the crime of genocide, it must have been committed against a person because this person was a member of a specific group, and specifically because of his or her membership of this group. Consequently, the perpetration of the act is in realisation of the purpose of the perpetrator, which is to destroy the group in whole or in part. It follows that the victim of the crime of genocide is singled out by the offender not by reason of his or her individual identity, but on account of his or her being a member of a national, ethnical, racial, or religious group. This means that the victim of the crime of genocide is not only the individual but also the group to which he or she belongs.

"On the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in *Akayesu*:

"[. . .] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

142. Payam Akhavan, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 AM. SOC'Y INT'L L. PROC. 1, 10 (Apr. 1-4, 1998).

143. *See generally* Alexander Greenwalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999); Lawrence le Blanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 77 AM. J. INT'L L. 341 (1983); LEO KUPER, THE PREVENTION OF GENOCIDE (1985); Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, July 2, 1985, U.N. Doc. E/CN 4/Sub 2/1985/6.

144. *See generally* STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 33 (1997).

145. *Id.* at 42-43; *see also* Akhavan, *supra* note 142, at 7.

The final point to note on genocide is that the Inquiry's recommendation of enacting legislation beyond the Genocide Convention Act 1949 (Cth) to make genocide a crime within Australia has been picked up by the Federal Parliament. The Australian Senate's Legal and Constitutional Committee concluded, in June 2000, that anti-genocide legislation in Australia is both necessary and timely. Whilst such legislation is a welcome development, it must deal with difficult issues such as the scope of the acts that fall within the definition of genocide, the type of intent required and whether the Act should operate retrospectively.[146] A general intent requirement and retrospective adoption could see a number of lawsuits filed by members of the stolen generation.

Whilst retrospective legislation may be desirable to ensure Australia could prosecute acts committed in places like East Timor, it is not essential because Australia could extradite alleged offenders. However, retrospective criminal legislation is not unconstitutional in Australia[147] and some argue that it would only be giving effect to a crime that existed in international law since the 1946 UN General Assembly resolution 96(1), or alternatively, the 1948 Convention.[148] Although international law forbids retrospective crimes, Universal Declaration of Human Rights Article 11 refers to no one being held guilty of penal offences that did not exist under "national or international" law at the time the offence was committed, and so the existence of the crime of genocide under international law would also allow enactment of retrospective genocide legislation.

The specific intent associated with genocide is what distinguishes it from homicide and has prevented previous suggestions of general intent or gross negligence standards being adopted.[149] In addition, a change in the intent requirement would put Australia out of step with the rest of the world, which is particularly undesirable for a crime with *jus cogens* status. This concern was behind the statute of the recently created International Criminal Court retaining the existing Convention's definition of genocide because any change would have put the new Court out of step with the International Court of Justice, Yugoslavian and Rwandan Criminal Tribunals.[150]

B. Racial Discrimination

The Inquiry found that UN members recognized racial discrimination as contrary to international law at least at the establishment of the United Nations in 1945. The inclusion of Article 55, which provides for "universal respect for,

146. HUMANITY DIMINISHED REPORT, *supra* note 139, at ch. 4 ¶¶ [4.37]-[4.50]; *see also* Ben Saul, *The International Crime of Genocide in Australian Law*, 22 (4) SYDNEY L. REV. 527 (2000).

147. R v. Kidman (1915) 20 C.L.R. 425 (Austl.); *Polyukhovich*, 172 C.L.R. at 535-40; *id.* at 608 (Deane, J., dissenting); *id.* at 705 (Gaudron, J., dissenting). However, the Court found *in obiter*, in *Polyukhovich*, that bills of attainder would be unconstitutional.

148. Saul, *supra* note 146, at 567-69.

149. Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L 467, 485 (2001).

150. *Id.* at 521; *see also* Timothy McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, MELB. U. L. REV. 635, 647-49 (1999).

and observance, of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,"[151] illustrates this recognition. Further, in 1948, the UN adopted the Universal Declaration of Human Rights, which at Article 2 provided, "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[152]

As a result, from at least 1950 the international community recognized the prohibition of systematic racial discrimination on the scale experienced by Indigenous Australians as a rule binding on all members of the UN. The subsequent International Convention on the Elimination of All Forms of Racial Discrimination, finalized in 1965 and ratified by Australian in 1975, provided greater definition to what international law already prohibited. The Inquiry found that discriminatory legislation aimed at Indigenous children continued until 1954 in Western Australia, 1957 in Victoria, 1962 in South Australia, 1964 in the Northern Territory and 1965 in Queensland.[153]

A breach of international law prohibiting racial discrimination, as compared to genocide, seems less controversial legally, as the elements are more easily met, but it is still very difficult for an individual to prove. Indeed, there was no statutory cause of action under domestic Australian law until the RDA was enacted in 1975. Prior to that date a plaintiff would have encountered the same arguments as in *Nulyarimma* over whether a cause of action existed absent legislation.

C. Commemoration, Reparations and an Apology

In 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Professor Theo van Boven with a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Professor van Boven made a number of reports to the UN Commission on Human Rights[154] that recommended that victims of human rights contraventions receive reparation.

---

151. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

152. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

153. BRINGING THEM HOME REPORT, *supra* note 6, at ch. 13, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading102 (last visited Feb. 20, 2002).

154. Theo van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report submitted by Mr Theo van Boven, Special Rapporteur*, July 2, 1993, U.N. Doc. E/CN.4/Sub 2/1993/8; *see also* Theo van Boven, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr Theo van Boven pursuant to Sub-Commission resolution 1995/117*, May 24, 1996, U.N. Doc. E/CN.4/Sub 2/1996/17. *See also* M. Cherif Bassiouni, *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43*, Feb. 9, 1999, U.N. Doc. E/CN.4/1999/65.

The Bringing them Home Inquiry's main findings on reparations, consistent with van Boven's report, were that:

- Reparation should consist of: (1) acknowledgment and apology, (2) guarantees against repetition, (3) measures of restitution, (4) measures of rehabilitation, and (5) monetary compensation, which was in accordance with van Boven principles 12 to 15.
- Government should make reparation to all who suffered because of forcible removal policies including: (1) individuals who were forcibly removed as children; (2) family members who suffered as a result of their removal; (3) communities which, as a result of the forcible removal of children, suffered cultural and community disintegration; and (4) descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land. This implemented van Boven principle 6.
- Government should provide monetary compensation to people affected by forcible removal under the following heads: (1) Racial discrimination; (2) Arbitrary deprivation of liberty; (3) Pain and suffering; (4) Abuse, including physical, sexual and emotional abuse; (5) Disruption of family life; (6) Loss of cultural rights and fulfillment; (7) Loss of native title rights; (8) Labor exploitation; (9) Economic loss; and (10) Loss of opportunities. This was an elaboration of van Boven principle 12.
- The Aboriginal and Torres Strait Islander Commission, in consultation with the Council for Aboriginal Reconciliation, should arrange for an annual national 'Sorry Day' to commemorate the history of forcible removals and its effects, in accordance with van Boven principle 15(f).

The Inquiry went further on compensation by recommending that the Council of Australian Governments establish a joint National Compensation Fund. An Indigenous person who was removed from his or her family during childhood by compulsion, duress or undue influence would be entitled to a minimum lump sum payment from the National Compensation Fund in recognition of the removal. The government could defend on the ground that the removal was in the best interests of the child. Any person proving particularized harm and/or loss resulting from forcible removal, on the balance of probabilities, would be entitled to monetary compensation from the National Compensation Fund. The proposed statutory monetary compensation mechanism would not displace claimants' common law rights to seek damages through the courts, but a claimant successful in one forum would not be entitled to proceed in the other. No legislation has sought to put these detailed recommendations into practice.

Just after the publication of the Bringing them Home Report, the High Court handed down its decision in *Kruger*.[155] *Kruger* involved constitutional challenges by seven Indigenous Australians removed from their families and the

155. *See* Sarah Joseph, Kruger v Commonwealth*: Constitutional Rights and the Stolen Generations*, 24 (2) MONASH U. L. REV. 486 (1998).

mother of a child removed pursuant to Aboriginals Ordinance 1918 (NT). The Parliament enacted the Ordinance pursuant to its power to make laws for the government of territories, in this case the Northern Territory, under the Constitution section 122.

Section 7 of the Ordinance provided for a Chief Protector to undertake the care, custody or control of any Aboriginal or half-caste child if they believed it was necessary or desirable to do so in the interests of the child. To give effect to that role, the Chief Protector could enter premises to take custody of the Aboriginal or half-caste children and could force them to live on reserves or in Aboriginal institutions.

The Constitutional challenges in Kruger were:

1. breach of the doctrine of separation of powers by granting a non-judicial body, the Chief Protector, judicial powers in the form of a power of detention;
2. breach of an implied constitutional right to substantive legal equality;
3. breach of an implied constitutional right to freedom of movement and association;
4. breach of an implied constitutional right to be free from genocide;
5. breach of the constitutional right to freedom of religion, guaranteed by section 116.

All of the challenges failed. This article will not review the detailed reasoning behind the failure of each challenge, but certain themes are important for the role that international law may play. First, and most obviously, is the lack of constitutional rights for individuals. Only one of the challenges found expression in the text of the constitution, while all the others relied on minority judgments in previous High Court decisions, or on creative pleading. Second, the Ordinance was for a territory rather than a State, which led three judges, Chief Justice Brennan, Justice Dawson and Justice McHugh to find that section 122 gave the Federal parliament plenary power that was not subject to constitutional limitations. Whether this view would command a majority of the current Court is uncertain as three judges in *Newcrest Mining (WA) v. The Commonwealth*[156] found that section 122 was subject to the acquisition on just terms provision, section 51(xxxi). However, it does indicate that a significant part of Australia could be without protection of existing constitutional rights, and if individual rights were implied or the Constitution amended they may not extend to the territories. Third, there was no remedy for the plaintiffs.

Compensation from a government-created fund has not been forthcoming for two main reasons: first, an inability to quantify what compensation involves, and, second, resentment. How are fair and just terms for compensation determined? How much money should be paid out? Should it be paid to individuals or used for the benefit of indigenous people as a whole? The Prime Minister, John Howard, has advocated 'practical reconciliation' aimed at improving health, education and housing standards but without individual compensation.[157]

156. (1997) 190 CLR 513 (Austl.).

157. John Howard, OPENING SPEECH AUSTRALIAN RECONCILIATION CONVENTION, May 26, 1997, http://www.austlii.edu.au/au/other/IndigLRes/car/1997/3/speeches/opening/howard.htm (last visited Oct. 29, 2001).

Some sections of the community resent the payment of money to people that do not look like the stereotypical Indigenous Australian or others regard compensation as "a lushly funded gravy train" going to people that have not earned it.[158]

The lack of guidelines means that a hypothetical negotiation between members of Australian society will have wildly disparate starting points. The negotiation is about determining the value of pain, anguish, disruption of family life, loss of cultural rights and fulfillment. It means putting a dollar amount on van Boven's principle 12. A discussion between the Inquiry and the Croker Island Association, an indigenous group, starkly illustrated the difficulty of compensation. The Inquiry asked whether a minimum lump sum payment of $2000 would be accepted. The response was: "[H]ow much is a mother worth?"[159]

The payment of compensation requires that it be somehow proportional to the harm done and yet not be of such a magnitude that it poses a risk to the dominant group's identity and prosperity.[160] The trade-off is about making moral judgments more concrete through paying compensation, but also ensuring that both Indigenous and white Australians accept the moral judgment. Apologies and other symbolic acts that are heart-felt acknowledgements of past injustices sometimes achieve the trade-off that dollar amounts could never achieve.

The Australian Government specifically commented on the Bringing them Home Report's heavy reliance on the van Boven principles, and rejected their application in the Australian context because:

> (1) the forcible removal of Indigenous children did not amount to a gross violation of human rights and accordingly the principles are of no application, particularly if the laws were not genocidal; and
>
> (2) the van Boven principles did not have any formal status in international law.[161]

HREOC responded to the government's reasons by arguing that prohibition against genocide and racial discrimination existed at the time Indigenous children were being separated from their families[162] and further, that the van Boven principles are a synthesis of international practice.[163]

As the Parliament did not enact legislation giving effect to the Inquiry's recommendations, and as Constitutional challenges had failed, Indigenous Australians were left with only common law claims. A representative example of such a claim is that of Lorna Nelson Cubillo and Peter Gunner who were removed from their families pursuant to Aboriginals Ordinance 1918 (NT) (the subject of *Kruger*), in the case of Cubillo, and Welfare Ordinance 1953 (NT)

158. BARKAN, *supra* note 2, at 237.

159. HEALING REPORT, *supra* note 124, at ch. 8, para. 8.112, http://www.aph.gov.au/senate/committee/legcon_ctte/stolen/ (last visited Feb. 20, 2002).

160. BARKAN, *supra* note 2, at 328-29.

161. HEALING REPORT, *supra* note 124, Submission No. 36, http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2002).

162. *Id.*, Submission No. 93, paras. 3.88- 3.106 (submission by William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner), http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2001).

163. *Id.*, paras. 3.68-3.83, http://www.aph.gov.au/senate/committee/submissions/lc_stolen. htm (last visited Mar. 22, 2001).

that replaced the 1918 Ordinance but provided similar powers, in the case of Gunner.

In *Cubillo v. The Commonwealth*,[164] the plaintiffs brought suit in the Federal Court and alleged that their removal and detention constituted wrongful imprisonment, was in breach of fiduciary and statutory duties, and the duty of care that the government owed them. The Commonwealth denied the claims and relied on the Northern Territory statute of limitations and the equitable defense of laches. Whilst the determination as to whether the government owed a duty to the applicants turned largely on the law, the questions of breach and policies of removal were mainly factual matters that both applicant and respondent could not prove or disprove due to the loss of witnesses to death or other causes and the lack of documentary evidence. Justice O'Loughlin, in reviewing the evidence, commented that in relation to the removal of Cubillo and other part-aboriginal children "neither the applicants nor the respondent could produce a single document in respect of that removal,"[165] and in relation to the existence of a government policy of removing part aboriginal children to destroy their association with their mothers and culture "there were . . . no documentary records or oral evidence from competent witnesses that could justify a finding that such a purpose existed in 1947 when [Cubillo] was removed."[166] On examining the applicants' requests for extensions of time under the statute of limitations, and arguing that their equitable claims should not be barred by reason of laches, Justice O'Loughlin denied the applicants' claims on the basis that the Commonwealth suffered "irreparable prejudice through the absence of material witnesses and the infirmities of others."[167]

Justice O'Loughlin also considered standards by which to evaluate the conduct of the relevant administrator who oversaw the government department responsible for the removal of Aboriginal and part-Aboriginal children. His Honor held that any exercise of the power to remove and detain the applicants by the Director of Native Affairs must be determined by reference to standards, attitudes, opinions and beliefs prevailing at the time of its exercise and not by reference to contemporary standards, attitudes, opinions and beliefs.[168]

In reaching this conclusion, Justice O'Loughlin followed the reasoning of the High Court in *Kruger*, as represented by the findings of Chief Justice Brennan and Justice Gummow. Chief Justice Brennan held that ". . . it would be erroneous . . . to hold that a step taken in purported exercise of a discretionary power was taken unreasonably . . . if the unreasonableness appears only from a change in community standards."[169] Additionally, Justice Gummow accepted that the provisions of the relevant legislation indicated a concern by the Execu-

164. (2000) 174 A.L.R. 97 (Austl. F.C.). *See also* Cubillo v. The Commonwealth (1999) 163 A.L.R. 395 (Austl. F.C.) (rejecting the Commonwealth's motion for summary dismissal).

165. *Cubillo*, (2000) 174 A.L.R. at 129.

166. *Id.* at 453.

167. *Id.* at 542.

168. *Id.* at 137-38.

169. *Kruger*, 190 C.L.R. at 36-37.

tive at the time "to assist survival rather than destruction, [but such a philosophy] now may appear entirely outmoded and unacceptable."[170]

The evidentiary difficulties, statutes of limitations and the requirement that actions be judged by the standards of the time, demonstrate the difficulty of deciding a case arising from events of the 1940s and 50s, and equally the low likelihood of success of Indigenous Australians' claims.

Despite finding that the applicants had no sustainable causes of action, Justice O'Loughlin assessed damages in the event that an Appeal Court overturned the decision at first instance. In doing so, his Honor found that the applicants could recover for cultural loss[171] and psychiatric injuries flowing from removal and detention.[172] The claim also highlighted that the removal of children from their families prevented them from enjoying the rights of Indigenous Australians. For instance, they could not make a native title claim as they could not meet the requirement of continued connection with the land they claimed.[173] In the case of the applicants, and the stolen generation generally, that connection was broken through forcible removal by the government.[174] In the case of Gunner, he lost the opportunity to undergo the initiation process at age 13 which marked the commencement of the male ritual career which was essential for his induction into ceremonial life and acquisition of status in traditional terms.[175] Also, the applicants were expected to mitigate their losses by trying to re-establish aspects of their Aboriginal past and background. However, Justice O'Loughlin made no deduction for any benefits received, such as education, while the applicants were detained.[176]

The types of damage claimed and the determination of those claims using legal principles highlights the difficulty in placing a monetary value on what is effectively impossible to value. This is not to suggest that such a process is novel, courts are called on to do this every day. It merely highlights that litigation is an unsatisfactory method for obtaining relief in such circumstances. If the litigation process is the only avenue for redress then the final conclusion of Justice O'Loughlin—"I remain satisfied that the Commonwealth of Australia is not obliged, as a matter of fact and law to compensate [the applicants] for their

170. *Id.* at 158.

171. The Court followed decisions in *Napaluma v. Baker,* (1982) 29 S.A.S.R. 192 (Austl. S.A.), *Dixon v. Davies,* (1982) 17 N.T.R. 31 (Austl. N.T.), *Weston v. Woodroffe,* (1985) 36 N.T.R. 34 (Austl. N.T.), and *Milpurrurru v. Indofurn Proprietary Ltd.,* (1994) 130 A.L.R. 659 (Austl. F.C.), dealing with Indigenous Australians' inability to take part in their culture. *Cubillo,* 174 A.L.R. at 564.

172. *Id.* at 575-77.

173. Cubillo's claim was that she had lost the right to be recognized as a traditional land owner under the Northern Territory's Land Rights Act. The importance of the connection with the land is quoted from R v. Toohey (1982) 158 C.L.R. 327 (Austl.), 356-57.

174. *Cubillo,* 174 A.L.R. at 567-68. *See also* BARKAN, *supra* note 2, at 248.

175. *Cubillo,* 174 A.L.R. at 570.

176. *Id.* at 570-71, 576-77.

losses"[177]—will mean that many members of the stolen generation will receive no compensation.[178]

Outside of the litigation process, the Australian Senate on November 24, 1999, referred the establishment of an alternative dispute resolution tribunal for resolving claims for compensation and potential mechanisms for establishing procedures to address the broader issue of reparations to the Senate Legal and Constitutional References Committee.[179] The Committee recommended the adoption of alternative dispute resolution, but the Government stated that any form of tribunal would not gain Government support unless it involved the 'rigorous testing of claims,' in which case, the Commonwealth stated that it did not see that a tribunal would provide any advantage over the 'normal litigation process.'[180]

The Government's refusal to make compensation payments highlights that, "What is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability."[181] The UN's van Boven principles can set out the components of reparation, but without a nation having the will to apply them domestically, they remain an aspiration.

To date, many Australians have commemorated a National 'Sorry Day,' but the Federal Government has offered neither an apology nor compensation.[182] In August 1999, the Federal government expressed "deep and sincere regret" for past injustices but did not use the words 'apology' or 'sorry.' Some State governments, State police forces, and churches have delivered apologies for their roles in the removal of Indigenous children from their parents. The Federal Government has denied an apology on the basis that the current generation of Australians is not accountable for the actions of their forebears, and that the removal of children took place with 'mixed motives,' that is to say that some children were removed to prevent neglect rather than to achieve a policy of assimilation.

Proponents of an apology, like Aboriginal leader Mick Dodson at Corroboree 2000, have pointed out the absurdity of denying reparation because of events occurring in the past, when that past (1910 to 1970) was part of many peoples' lifetimes:

---

177. *Id.* at 582.

178. Plaintiffs' appeal was unsuccessful. *See* Cubillo v. The Commonwealth of Austl. (2001) 183 A.L.R. 249 (Austl. F.C.A.). The appeal's main significance was in the plaintiffs' decision not to challenge the trial judge's finding that there was no policy of removal of part-Aboriginal children. *Id.* Even with a more conventional approach to the litigation, the lapse of time giving rise to evidentiary difficulties and statutes of limitations problems prevented recovery. *Id.* The plaintiff's request for special leave to appeal to the High Court was refused on May 3, 2002.

179. SENATE, OFFICIAL HANSARD 10587-99 (Nov. 24, 1999), www.aph.gov.au/hansard.

180. HEALING REPORT, *supra* note 124, ch. 8, para. 8.73, http://www.aph.gov.au/senate/committee/legcon_ctte/stolen.

181. Regina Graycar, *Compensation for The Stolen Children: Political Judgments and Community Values,* 4 (3) U. N.S.W. L.J. Forum 253, 254 (1998).

182. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS—FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 113 (1998).

> Who is this generation that took my grandmother, my father, my mother and my grandfather and my two sisters? Who is this generation that tried to take me from my family in 1960? What generation do we look to, if Mr Howard says it wasn't this one? Where is this mythical group of Australians who made these laws, adopted these policies, put them into practice, who took the kids?[183]

IX.
International Law's Successes and Limitations–The need for Australia to act

The discussion of Indigenous Australians' experience with rights protection demonstrates the successful use of international law to provide the impetus for the enactment of the RDA, HREOC Act and creation of HREOC. International Law has also served as a measuring stick or standard by which acts and omissions may be judged. The HREOC Submission on the Government response to the Bringing them Home Report stated that, "A . . . significant type of accountability of the federal government is to the international community through the upholding of human rights standards and compliance with treaties to which Australia is a signatory. These instruments reflect minimum standards of behaviour commonly accepted by the international community." HREOC also recommended compliance with international human rights standards as a key measure of the adequacy and effectiveness of the government's response to the recommendations of the Bringing them Home Report.[184]

In addition, international law may provide the basis for legal reform as the recognition of native title in *Mabo [No 2]* demonstrates. International law may also provide a remedy when there are no domestic remedies or domestic procedures are exhausted without an adequate remedy through the Optional Protocol to the ICCPR and similar communications procedures for individual complaint under the Convention Against Torture and the Racial Discrimination Convention.

However, the success of international law in creating and protecting rights is subject to the political will of the elected representatives in individual countries such as Australia. This is because the domestic legal system determines the effect of international obligations, both treaties and customary international law. In Australia, international law becomes part of, or influences, municipal law through:

1. Legislation;
2. Rules of construction if a statute is ambiguous; and
3. Its role in guiding the development of the common law.

Australia's legal system places the main responsibility for implementing international obligations domestically with the Federal Parliament. Parliament deter-

183. *Mick Dodson at Corroboree 2000* (Australian Broadcasting Corporation radio broadcast, June 11, 2000), http://www.abc.net.au/rn/relig/enc/stories/s140755.htm (last visited Feb. 20, 2002).

184. Healing Report, *supra* note 124, paras. 2.14, 2.16, http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2001); Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 1999, HREOC, Sydney, 10 (2000).

mines the content of legislation and can override the Court's interpretations of statutes or adoption of customary international law through further legislation. Parliament's supremacy means that the Court cannot strike down legislation that conflicts with international law. The only limitation is that imposed by the Australian Constitution, which without the main protections of individual's rights, such as equality, is of little limitation. In addition, the existence of the arcane race power specifically allows the enactment of racially detrimental laws. The result is native title legislation that can extinguish Indigenous Australians' land rights and override protections against racial discrimination.

The lack of remedies for human rights contraventions was of central concern to the UN Human Rights Committee, which in its Year 2000 report made the following observation and recommendation:

> The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the [ICCPR], there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.
> The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated shall have an effective remedy (article 2).[185]

A change in government[186] may see reparations for the Stolen Generation and the enactment of domestic legislation criminalizing genocide. It may even see the Native Title legislation revisited. Although a new government might establish greater statutory rights and remedies, these rights and remedies will remain subject to amendment and repeal under the current Australian Constitution.

Indigenous Australians' experience with international law provides three main lessons: first, the protection of human rights in Australia can be precarious; second, Australia's approach to human rights protection affects its international standing; and, third, whilst laws can improve human rights protection, reconciliation requires more than just laws.

Some rights are so basic and so precious that they should be invulnerable to repeal and easy amendment. Australia's current Chief Justice of the High Court, Murray Gleeson has stated that, "The whole point of having a constitutional right is to put it beyond the reach of Parliament."[187] Equality, with all its vagaries and problems of implementation[188] is one of those rights. The current Australian Constitution does not adequately protect the right of equality, and in

185. Human Rights Committee, *Consideration of Reports Submitted under Article 40 - Concluding Observations of the Human Rights Committee: Australia*, (69th session), July 28, 2000, U.N. Doc. CCPR/CO/69/AUS.

186. Australia held a Federal election on Nov. 10, 2001, that returned the ruling Liberal-National party Coalition, led by John Howard, to power so that the policies illustrated in this article are likely to continue for the next 3 years.

187. CHIEF JUSTICE MURRAY GLEESON, THE RULE OF LAW AND THE CONSTITUTION 69 (2000).

188. A right to equality needs to include the concept of 'special measures' or means by which formal equality may be diminished or avoided to achieve effective and genuine equality as set out in the Convention on the Elimination of All Forms of Racial Discrimination art. 1, para. 4 and *Gerhardy*, 159 C.L.R. 70.

relation to Indigenous Australians and other minority races, the Constitution positively allows inequality through the race power.

Entrenching a right to equality will not be easy. Australia has voted without success on the amendment of the Constitution to create rights at a number of referenda.[189] Australia's reluctance to entrench rights is the result of a combination of factors.[190] A majority of Australians have not suffered any human rights contravention and so do not see the need for rights protection. Australia has not been subject to the type of upheavals that typically generate the need for bills of rights, such as the American and French Revolutions or the end of Apartheid in South Africa. Other parts of Australia will oppose rights that are stated as necessary to protect a particular group, such as Indigenous Australians, because they equate the extension of rights to those groups as somehow pandering to interest groups and thus disadvantaging them. There is also argument over which rights should be included and which should not. Once a right that is perceived as undesirable for entrenchment becomes part of the bill of rights being debated then the entire bill loses support. This is illustrated by Australians' approach to the U.S. bill of rights, agreeing with free speech but fearing the prevalence of guns. Times may change so that what is seen as a desirable right today may be a social problem of the future.

The experience of Indigenous Australians is a warning against a lackadaisical approach to a right of equality. If the suffering of Indigenous Australians can prompt the creation of entrenched rights against discrimination, and for equality, then those rights will be for the protection of everyone. The amendment of the Constitution requires a referendum at which all Australians must compulsorily vote. The average Australian, not just politicians, judges, lawyers and human rights activists, must feel the urgent need for a right to equality. International law, particularly the Universal Declaration of Human Rights and twin International Covenants on Economic, Social and Cultural Rights, and Civil and Political Rights, provides a host of rights that could form the foundation of an Australian bill of rights. However, the bill must focus on the most central rights so as to attract sufficient votes at a referendum. Equality is a fundamental right, and therefore could attract bi-partisan support, as shown by Parliament's commitment "to the rights of all Australians to enjoy equal rights and be treated with equal respect regardless of race, colour, creed or origin."[191]

In addition, Australia's respect, or lack thereof, for international law and bodies like the United Nations is not only a matter of domestic concern. Australia's ability to appeal to international law and human rights in dealing with other nations is severely restricted if it fails to comply. Australia's position on Indigenous Australians compromises its previous credibility on human rights with the

189. TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY 1183-88 (2d ed. 1998).

190. GEORGE WILLIAMS, A BILL OF RIGHTS FOR AUSTRALIA 33-41 (2000) (summarizing the arguments for and against adopting a bill of rights).

191. HOUSE OF REPRESENTATIVES, OFFICIAL HANSARD 6156-96 (Oct. 30, 1996) www.aph.gov.au/hansard.

rest of the world. A country like Australia that must rely heavily on persuasion for conducting foreign relations needs an unblemished human rights record if it is to be an effective player in world politics.

Finally, it must be remembered that law in general, and international law in this particular context, cannot provide all the answers. Reconciliation with Indigenous Australians is a moral or ethical issue for Australians in resolving their view of themselves as fair-minded and tolerant, or in Australian parlance 'giving everyone a fair go.' International law and human rights can provide the means for dialogue but reconciliation requires Australia to come to terms with its own history. Law may give moral imperatives greater clarity and concreteness, but when the law cannot vindicate a particular morality as with the failed lawsuits brought by members of the Stolen Generation, opponents of reparations may also use the law to deny the validity of those moral claims. The fact that Australian jurisprudence does not currently recognize or enforce this obligation in a legal sense does not remove the moral obligation. Australia's history of mistreatment of, and discrimination towards, Indigenous Australians requires more than just a constitutional right to equality.

Reconciliation is multi-faceted. The Australian Parliament needs to embrace reparations. In the Australian context, this means taking the symbolic step of offering a formal apology for past wrongs, following through on John Howard's 'practical reconciliation' of addressing Indigenous Australians' health and education, and providing some form of compensation. A right to equality is essential as a guarantee against repetition but not sufficient for reconciliation. International law may light the path towards equality and reconciliation, but the Australian people must choose to walk it.

APPENDIX 1
EXTRACTS FROM RACIAL DISCRIMINATION ACT 1975 (CTH)

Section 9 - Racial discrimination to be unlawful

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Where:

(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

(b) the other person does not or cannot comply with the term, condition or requirement; and

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.[192]

---

192. Article 5 provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

Section 10 - Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

APPENDIX 2
THE VAN BOVEN PRINCIPLES

Commission on Human Rights
Sub-Commission on Prevention of Discrimination and
Protection of Minorities
E/CN.4/Sub.2/1996/17

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

The duty to respect and to ensure respect for human rights and humanitarian law

1. Under international law every State has the duty to respect and to ensure respect for human rights and humanitarian law.

Scope of the obligation to respect and to ensure respect for human rights and humanitarian law

2. The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law.

Applicable norms

3. The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable.

Right to a remedy

4. Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.

5. The legal system of every State shall provide for prompt and effective disciplinary, administrative, civil and criminal procedures so as to ensure readily accessible and adequate redress, and protection from intimidation and retaliation.

Every State shall provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law.

Reparation

6. Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.

7. In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. Every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations.

9. Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.

10. Every State shall make readily available to competent authorities all information in its possession relevant to the determination of claims for reparation.

11. Decisions relating to reparations for victims of violations of human rights and humanitarian law shall be implemented in a diligent and prompt manner.

Forms of reparation

Reparations may take any one or more of the forms mentioned below, which are not exhaustive, viz:

12. Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Restitution requires, inter alia, restoration of liberty, family life, citizenship, return to one's place of residence, employment of property.

13. Compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity;

(e) Costs required for legal or expert assistance.

14. Rehabilitation shall be provided and will include medical and psychological care as well as legal and social services.

15. Satisfaction and guarantees of non-repetition shall be provided, including, as necessary:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim;

(d) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(e) Judicial or administrative sanctions against persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting the legal profession and human rights defenders;

(v) Improving, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

APPENDIX 3
THE GENOCIDE CONVENTION

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Berkeley Journal of International Law

Volume 20 | Issue 2 Article 3

2002

The Special Court for Sierra Leone: Overview and Recommendations

Celina Schocken

The Special Court for Sierra Leone: *Overview and Recommendations*

By
Celina Schocken*

We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[1]

I. INTRODUCTION

A. *Overview*

The civil war in Sierra Leone was one of the most brutal and most overlooked wars in recent memory. Of the 4.2 million citizens of Sierra Leone, over one million are internally displaced, 500,000 are refugees, and upwards of 400,000 people have survived the amputation of one or more limbs. Thousands of children were killed, raped, mutilated, or conscripted as soldiers.

A peace agreement signed in Lomé, Togo in 1999 by the Government of Sierra Leone (GOSL) and the Rebel United Front (RUF) eventually led to the cessation of hostilities in January 2002. The agreement included a complete amnesty for the RUF and its leader, Corporal Foday Sankoh, and called for the creation of a Truth and Reconciliation Commission (TRC). On January 16, 2002, the United Nations signed an agreement with the GOSL to create a Special Court for Sierra Leone (SCSL), which will be similar to the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY).

The SCSL is supported by the GOSL as well as by international human rights groups, the United Nations Security Council, the United States, and the European Union. Establishing such a court in Sierra Leone will help the country reach some closure about the war, and bring to justice some of the defendants for their horrific crimes.

* Celina Schocken, J.D., Boalt Hall School of Law (University of California, Berkeley), 2002; M.P.P., Goldman School of Public Policy (University of California, Berkeley), 2001; A.B., University of Chicago, 1995. The author wishes to thank Professor David D. Caron for his support, advice, and inspiration on this paper and throughout her time at Boalt Hall. She would also like to give thanks to Michael and Jennifer Lysobey, and to her entire family, for their love, support, and patience.

1. Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR, 1992, at 168 (quoting Robert Jackson, Opening Statement in the Nuremberg Trials).

The SCSL also envisions a new model for international justice. It will be the first international criminal tribunal to sit in the country where the war crimes took place. National judges will sit alongside international judges. Moreover, the agreement itself is innovative, because it is an agreement between the U.N. and Sierra Leone, rather than an agreement by the Security Council imposed upon Sierra Leone. These changes may make the SCSL more relevant to the lives of ordinary Sierra Leone citizens trying to put their lives back together after the war than the ICTR and ICTY have proven to be for victims in Rwanda and Yugoslavia.

At the same time, the SCSL will lack many of the resources of the ICTR and the ICTY. The bilateral nature of the SCSL may make it as effective as other ad hoc tribunals, but it may lack the financial and institutional support necessary to achieve its goals. It remains to be seen if international criminal tribunals can operate with less funding than the ICTR and the ICTY. It will also be interesting to see if an ad hoc tribunal can work cooperatively with a Truth and Reconciliation Commission. The answers to these questions will point the way for future war crimes tribunals.

The SCSL presents an opportunity for Sierra Leone to punish the worst human rights offenders from the civil war, and an opportunity for the U.N. to prove that the ad hoc tribunal model can be expanded and improved upon, as it considers creating tribunals in Cambodia, East Timor and elsewhere. However, there are serious constraints that could cripple the SCSL. Implementers of the Special Court for Sierra Leone agreement from the U.N. and the GOSL must recognize the most serious problems of the Statute; in particular those dealing with funding provisions for the tribunal, trying juveniles, the abandonment of the Lomé Accord amnesty provisions, the lack of third-party extradition procedures, and the conflicts between the SCSL and the TRC. If they wish to create an effective model for international justice, solutions to these problems must be found.

The Statute of the SCSL and the plans for the Court must be viewed against the backdrop of the peace plans signed in Abidjan and Lomé. Many terrible crimes took place between the two Accords, but the latter granted amnesty for those crimes, while undertaking the creation of a TRC. The SCSL intends to target many of the crimes committed between the two agreements, thus implicating the amnesty agreement.

This paper begins with background information on the civil war. Parts II and III describe the Statute of the SCSL and outline how the Court will operate. Part IV examines other issues related to the establishment of the Court. Part V makes recommendations to the organizers of the SCSL in order to ameliorate some of the anticipated problems.

B. Background

Sierra Leone gained independence from the United Kingdom in 1961. Despite diamonds and other natural resources, as well as excellent farmland, approximately 70 percent of the government's budget comes from international

assistance programs.[2] Sierra Leone ranks last on the United Nations Development Program's Human Development Index, with a life expectancy of only thirty-four years in 1999.[3]

Since independence, politics in Sierra Leone have been rife with corruption and mismanagement. In 1985, military commander Joseph Momoh became President when dictator Siaka Stevens, in his late eighties and facing a student uprising, retired.[4] Initially, Momoh was quite popular, but problems with student activists and dissidents such as Foday Sankoh, who were trained and funded by Libya, persisted.[5]

In March 1991, with the support of Mohamar Qaddafi of Libya[6] and Charles Taylor of Liberia,[7] the new Rebel United Front (RUF) entered Sierra Leone from Liberia. GOSL troops, loyal to Momoh, fought RUF troops on the Liberian border. After several months, a group of soldiers on the front line, upset about not being paid, went to Freetown to protest. On April 29, 1992, these soldiers overthrew President Momoh, establishing the National Provisional Ruling Council (NPRC) under 29-year-old Army Captain and paymaster Valentine Strasser.[8] The NPRC entered into talks with the RUF to end the civil war, but these talks failed.[9]

Strasser held onto power for four years, despite the civil war, until he was overthrown in 1996. In elections held shortly after this coup, Ahmed Tejan Kabbah was elected President.[10] At the same time, peace talks began in Abidjan, Ivory Coast. The RUF seemed willing to discuss peace terms. The NPRC had recently brought in fighters from Executive Outcomes, a South African mercenary company, who were successfully retaking RUF-held diamond mines.[11] The diamond mines provided essential funding for the war, and without access to them, the RUF would be unable to support their troops.[12] Thus, during the peace talks, the RUF appeared a spent force.

The Abidjan Agreement lasted for about nine months. Under the Agreement, Executive Outcomes was expelled from Sierra Leone and replaced by

---

2. The World Bank, *2001 World Development Indicators*, at 350.

3. U.N. Development Programme, *Human Development Report: Human Development Index 1999*, *at* http://www.undp.org/hdro/HDI.html.

4. David Pratt, *Sierra Leone: The Forgotten Crisis*, *at* http://www.sierra-leone.org/pratt042399.html (last modified April 23, 1999). This paper includes a very cursory overview of the civil war. For a detailed history, see Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391 (2001).

5. Pratt, *supra* note 4.

6. Qaddafi has been involved in Sierra Leone since at least 1985, when he began training students in "the art of revolution". Qaddafi is widely involved in politics throughout Sub-Saharan Africa, through both funding development programs and influencing governments. *Id.*

7. Taylor first attacked Sierra Leone in 1989 with the support of Qaddafi. He is also supported by political and business connections in Cote d'Ivoire and Burkina Faso. *Id.*

8. Akinrinade, *supra* note 4, at 396.

9. *Id.*

10. Pratt, *supra* note 4.

11. *Id.*

12. Ian Smillie, Lansana Gberie & Ralph Hazelton, *The Heart of the Matter: Sierra Leone, Diamonds, and Human Security*, PAC (2000), *at* http://www.sierra-leone.org/heartmatter.html.

Nigerian peacekeepers.[13] The RUF also achieved increased political legitimacy, and it looked like they might become a political party. However, because the RUF never adequately articulated any political position, the widespread assumption was that they were fighting for control of the diamonds, rather than for political change.[14] In 1997, President Kabbah was overthrown by Johnny Paul Koroma of the Armed Forces Revolutionary Council (AFRC), which soon after joined with the RUF to form the AFRC/RUF.[15] The AFRC/RUF proved a particularly brutal regime. To help protect civilians, the Economic Community of West African States (ECOWAS), with the support of the U.N. Security Council, increased the number of Nigerian troops stationed in Sierra Leone.[16]

The AFRC/RUF signed an agreement with Kabbah's deposed government, and with ECOWAS support, President Kabbah was returned to Freetown. The RUF continued to commit war crimes in the East, rebuilding their war chest through diamond sales to President Taylor of Liberia.[17] During this time, Foday Sankoh was captured in Nigeria and returned to Freetown, where he was tried and sentenced to death for his role in the civil war.[18]

In January 1999, the RUF again attacked Freetown, this time defeating the peacekeepers in "Operation No Living Thing."[19] Thousands of children were forcibly conscripted into the RUF army, drugged, killed, burned alive, or raped, before the rebels were eventually driven outside the city limits of Freetown.[20]

In early 1999, there was essentially a stalemate. Economic Community of West African States Monitoring Group (ECOMOG) peacekeepers protected the capital (although they also stood accused of summary executions, rapes, and murders), but seemed unable to defeat the RUF and its allies. The RUF seemed content holding only the diamond-mining districts, as they had never seemed as interested in political power as they were in controlling access to the mines.[21]

---

13. Pratt, *supra* note 4.

14. *Footpaths to Democracy,* (1995) *at* http://www.sierra-leone.org/footpaths.htm. (This is the only political pamphlet ever released by the RUF. It contains populist slogans cribbed from Mao, Amilcar Cabral, and others, and was never taken seriously in Sierra Leone.)

15. Pratt, *supra* note 4.

16. U.N. SCOR, 3889th mtg., U.N. Doc S/RES/1171(1998).

17. *See* Pratt, *supra* note 4.

18. *Id.* at 11-12.

19. Pratt, *supra* note 4.

20. *Getting Away with Murder*, (Human Rights Watch), July 1996, *at* http://www.hrw.org/reports/1999/sierra/SIERLE99.htm.

21. Smillie, Gberie and Hazelton note that the war has little in common with most conflicts in Africa, in that there were few ethnic undertones and that the RUF has generally avoided stating its political agenda. They also note that "[t]he point of the war may not actually have been to win it, but to engage in profitable crime under the cover of warfare." *Supra* note 12. More recently, the diamond trade has been linked to the al Quaeda terrorist network. The Washington Post reported in November 2001 that RUF rebels sell diamonds for about one tenth their value to traders linked to Charles Taylor in Liberia. In return, the RUF is supplied with weapons. The diamonds are especially desirable to Hezbollah and al Quaeda, among others, because these groups fear having bank assets frozen. According to the Post, Antwerp is awash in Sierra Leonean diamonds, with amounts increasing rather than decreasing. Douglas Farah, *Al Quaeda Cash Linked to Diamond Trade: Sale of Gems from Sierra Leone Rebels Raised Millions, Sources Say*, THE WASH. POST, Nov. 2, 2001, at A1.

C. *The Lomé Peace Accord*

A peace accord, brokered with the assistance of the Reverend Jesse Jackson, was signed in July 1999 in Lomé, Togo.[22] The peace agreement, with generous provisions to the RUF, was controversial, but generally supported by the U.K., the U.N., and the U.S.[23] Under the Accord, the RUF would share power with the Kabbah government, and RUF leader Foday Sankoh would become Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development.[24] The agreement gave Sankoh an immediate and absolute pardon.[25] Having been sentenced to death, he was released from jail to fly to Lomé for the signing of the Accord.

The Lomé Accord created a timetable for disarming combatants and called for the U.N. to organize a peacekeeping force.[26] It also called for new elections and for a review of the Constitution.[27] In addition, the Accord established two new bodies: the Human Rights Commission and the Truth and Reconciliation Commission (TRC).[28]

Most controversially, the Lomé Accord granted complete amnesty to all combatants. Article IX reads in part:

> 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
> 3. 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, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former 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 their reintegration within a framework of full legality.[29]

---

22. Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, July 7, 1999, *at* http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Accord].

23. *See Prospects for Peace in Sierra Leone: Hearings Before the House International Relations Committee*, 106th Cong. (1999) (Statement of Susan Rice, Assistant Secretary of State for African Affairs); *See* H.R. Res. 199, 106th Cong. (1999); S. Res. 54, 106th Cong. (1999) (calling for a negotiated settlement).

24. Lomé Accord, *supra* note 22, art. V. This Chairmanship is generally regarded as the most powerful ministry, as Sankoh would be in charge of the diamond mines.

25. *Id.* at art. IX, para. 1 ("In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.").

26. Up to this point, peacekeeping had been performed nearly exclusively by Nigerians and supported by ECOWAS. There have been many complaints that Nigerian peacekeepers committed war crimes as well, such as summary executions, rapes, and banditry. *See Getting Away with Murder*, *supra* note 20, at ch.5, *available at* http://www.hrw.org/reports/1999/sierra/SIERLE99-04.htm#P1106_182912.

27. Lomé Accord, *supra* note 22, arts. X, XI.

28. *Id.* at arts. XXV, XXVI, para. 1.

29. *Id.* at art. IX.

The amnesty provisions were debated both outside and within Sierra Leone.[30] Many Sierra Leoneans, including amputees and refugees, believed the amnesty was the only way to avert further war.[31] This internal support, and the reluctance of the U.S. and U.K. to expend many resources in Sierra Leone, led to the approval of the flawed agreement. The Government of Sierra Leone, pressured by the international community, negotiated the agreement, knowing its cooperation would help secure U.N. peacekeepers and international assistance.[32]

The agreement was signed by Corporal Sankoh, representing the RUF, and President Kabbah, representing the GOSL. At the last minute, the U.N. representative added a reservation that, "[f]or the U.N. the amnesty cannot cover international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[33] The reservation was added so late that it is not found in the text of the treaty or in public copies of the treaty. While the U.N. was not a party to the treaty, it signed as a "Moral Guarantor" under Article XXXIV of the Lomé Accord, along with the Economic Community of West African States (ECOWAS), the Organization of African Unity (OAU), and the Commonwealth of Nations.[34] The validity of this reservation will be addressed later in this paper.

D. The Establishment of the Special Court for Sierra Leone

The international response to the Lomé Accord was mixed. Human rights groups criticized the agreement for giving impunity to war criminals.[35] Mary Robinson, U.N. High Commissioner for Human Rights, said that the amnesty should apply only to national, not international, laws although this distinction is not made in the text of the accord.[36] The U.S. and the U.K. generally supported the agreement, largely avoiding the amnesty issue.[37] The U.N. representative who signed the Accord and made the reservation called human rights groups "sanctimonious" for not recognizing that without the amnesty, the war would likely have continued, resulting in more civilian casualties.[38]

30. *See* Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149 (2000).

31. Eleanor Bedford, *Sierra Leoneans Hope for Peace*, REFUGEE REPORTS, No. 9, Sept./Oct. 1999 (quoting one refugee: "The harm has already been done. It cannot be undone. We can just hope for a brighter future."); Corinna Schuler, *Children Practice Forgiveness on Heels of Cruel Civil War*, CHRISTIAN SCIENCE MONITOR, Sept. 16, 1999.

32. Gallagher, *supra* note 30.

33. *Seventh Report of the Secretary-General, Observer Mission in Sierra Leone*, S/1999/836, para. 54 (July 1999); *See The Sierra Leone Amnesty Under International Law*, (Human Rights Watch), Aug. 3, 1999, *at* http://www.hrw.org/campaigns/sierra/int-law-2.htm.

34. Lomé Accord, *supra* note 22, art. XXXIV.

35. Corinna Schuler, *A Wrenching Peace: Sierra Leone's 'See No Evil' Pact*, CHRISTIAN SCIENCE MONITOR, Sept. 15, 1999.

36. *U.N. Human Rights Commissioner Wants International Probe into Sierra Leone*, AGENCE FRANCE PRESSE, July 9, 1999.

37. *See Prospects for Peace*, *supra* note 23, for the U.S. response. Declaration of the European Union on the Sierra Leone Peace Agreement, July 15, 1999, *at* http://www.reliefweb.int.

38. Schuler, *supra* note 35, at 9.

Seeking to take power from the AFRC, the RUF did not fully comply with the Lomé Accord. In May 2000, RUF rebels took 500 U.N. peacekeepers hostage, prompting intervention by British soldiers.[39] During the chaos in Freetown, Foday Sankoh, guarded by U.N. peacekeepers, was captured by the AFRC and is currently being held by the Government of Sierra Leone. He is now in jail awaiting trial.[40] There is a strong case against him and he is likely to be tried by the SCSL.[41]

Because of the continued hostilities in Sierra Leone and common discontent with the amnesty provisions of the Lomé Accord, the U.N. began to consider the creation of an International Criminal Tribunal for Sierra Leone similar to those of Rwanda and the former Yugoslavia. Security Council Resolution (SCR) 1315 authorized U.N. Secretary-General Kofi Annan to begin negotiations with the Government of Sierra Leone aimed at creating a Special Court.[42] SCR 1315 recommends that the Court have subject matter jurisdiction for crimes against humanity, war crimes, and other serious violations of international humanitarian law.[43] Jurisdiction should be targeted at those "persons who bear the greatest responsibility for the commission of the crimes [listed above]. . . ."[44] Unlike the war crimes tribunals for Rwanda and the former Yugoslavia, the SCSL will not try defendants for genocide because the combatants did not target any specific ethnic group.[45]

On October 4, 2000, the Secretary-General issued a report detailing his negotiations with the Government of Sierra Leone and laying out both a draft bilateral agreement and a draft Statute for the SCSL.[46] The finalized bilateral agreement and the Statute of the Special Court were signed in Freetown on January 16, 2002.[47]

II.
STATUTE OF THE COURT

A. The Legal Basis of the SCSL

The ICTR and the ICTY are U.N. subsidiary organs, established by Security Council Resolutions 955 and 827, respectively.[48] While called for by Security Council Resolution (SCR) 1315, the SCSL was created by an agreement

39. Alison Stewart and Nathan Thomas, *Peace Process Deteriorates in Sierra Leone as Rebels Continue to Hold UN Peacekeepers Hostage*, ABC NEWS: WORLD NEWS NOW, May 9, 2000.

40. *A War Criminal in Custody*, THE WASH. POST, May 18, 2000, at A26.

41. Chris McGreal, *Unique Court to Try Killers of Sierra Leone: Those Who Were Enslaved, Raped and Mutilated Demand Justice*, THE GUARDIAN (LONDON), Jan. 17, 2002, at 15.

42. U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000) [hereinafter SCR 1315].

43. *Id.*

44. *Id.*

45. *Judging Genocide*, THE ECONOMIST, June 16, 2001.

46. *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, U.N. Doc. S/2000/915 (2000) [hereinafter SCR 915].

47. *Sierra Leone News*, Jan. 16, 2002, *at* http://www.sierra-leone.org/slnews.html [hereinafter Sierra Leone News].

48. U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955 (1994); U.N. SCOR, 3217 mtg., U.N. Doc. S/RES/827 (1993).

between the Government of Sierra Leone and the United Nations.[49] "The Special Court for Sierra Leone is different from earlier *ad hoc* courts in the sense that it is not being imposed upon a state," according to Under-Secretary-General for Legal Affairs Hans Corell, who signed the agreements for the United Nations. "It is being established on the basis of an agreement between the United Nations and Sierra Leone—at the request of the Government of Sierra Leone."[50]

As a result of the treaty-based nature of the Court, there are three primary ways in which the SCSL will differ from the ICTR and the ICTY. First, the SCSL will be held inside Sierra Leone rather than in a third country and, thus, the Government of Sierra Leone will have significant involvement with its administration. The GOSL will have partial control over the hiring of judges, administrators, and other staff for the Court. Under the Statute of the Special Court, the GOSL will appoint one judge to the Trial Chamber, while the Secretary-General will appoint two.[51] The Appellate Chamber will have two judges picked by the GOSL and three selected by the Secretary-General.[52] Likewise, the Prosecutor, after consultation with the GOSL, will be selected by the Secretary-General.[53] The Deputy Prosecutor will be selected by the GOSL.[54] The SCSL does not intend to rely on the financial and administrative mechanisms of the U.N. to the same extent as the ICTR and the ICTY.[55] Perhaps this will make the SCSL more efficient, but it will also require creating new accounting and administrative systems, which could prove difficult.

The second primary difference between the SCSL and the ICTR and the ICTY is that the Statute of the SCSL will use both international and Sierra Leonean law. Thus, the Court will need to be incorporated into the law of Sierra Leone.[56] Some of the crimes defined in the Statute, further detailed below, are crimes identified in Sierra Leonean law, but not in international humanitarian law.[57] This will inevitably lead to some confusion. The international crimes will have a different temporal jurisdiction than the Sierra Leonean crimes because the Sierra Leonean crimes are covered by the Lomé Accord amnesty provisions, while the international crimes are not.[58] Briefly, international crimes such as crimes against humanity will have jurisdiction from November 30, 1996 forward, while crimes under Sierra Leonean law will have jurisdiction from July 1999 onward.

---

49. SCR 1315, *supra* note 42.

50. Sierra Leone News, *supra* note 47.

51. Statute of the Special Court for Sierra Leone, August 14, 2000, art. 12(1)(a), U.N. - S.L. *at* http://www.sierra-leone.org/specialcourtstatute.html [hereinafter SCSL Statute].

52. *Id.* at art. 12(1)(b). Sierra Leone requested that it be able to select judges of any nationality, rather than being required to select Sierra Leonean judges. SCR 915, *supra* note 46, at 14.

53. SCSL Statute, *supra* note 51, art. 15(3).

54. *Id.* at art. 15(4)

55. SCR 915, *supra* note 46, paras. 68, 69.

56. *Id.* para. 9.

57. SCSL Statute, *supra* note 51, art. 5. Article 5 crimes include abuse of girls and arson, which are crimes of municipal, rather than international, law.

58. Michaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857, 859 (2000).

The Statute calls for the general use, with the possibility of amendment, of the ICTR's Rules of Procedure and Evidence.[59] Rule 89 of the ICTR's Rules of Procedure and Evidence states that the ICTR should not use national rules of evidence,[60] but this will need to be changed to allow for the use of Sierra Leonean rules of evidence in instances in which Sierra Leonean crimes are being tried.[61]

The third significant difference is that the SCSL will be less able to count on the support of the Security Council and the U.N. system than the ICTR and the ICTY. Payments to the Court will be voluntary, as opposed to the mandatory method of assessing payments for the ICTR and the ICTY.[62] The Secretary-General added the SCSL to the consolidated appeal for funds, making funding dependent upon gifts from U.N. members.[63] Already, this has meant that the size and funding of the Court have been scaled down, as evidenced by reduced staffing plans and the decision to try only twenty defendants.[64] Funding issues are further addressed later in the paper. There is, however, nothing in the bilateral nature of the SCSL requiring the Court to be funded voluntarily; rather it suggests that the U.N. is trying to adopt an arms-length relationship to the SCSL. The Security Council does not want the SCSL to be a U.N. organ, so it is requiring that the Court be funded voluntarily.[65] Some of the reasons for this may be that the Security Council believes war crimes courts will be more cost effective if independent of the U.N. system, that the Council does not want to be closely associated with the Court for lack of confidence in it, or that the Council is wary of being responsible for too many international tribunals.

The SCSL will have concurrent jurisdiction with Sierra Leonean Courts, although it has the power to request that a Sierra Leonean Court defer its proceedings and transfer a defendant to the SCSL.[66] This differs from the statutes of the ICTR and the ICTY, which have primacy over national courts.

---

59. SCSL Statute, *supra* note 51, art. 14.

60. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, as amended (May 31, 2000), Rule 89, *at* http://www.ictr.org. ("The Rules set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.").

61. Frulli, *supra* note 58, at 860.

62. *Letter Dated 12 January 2001 from the Secretary-General Addressed to the President of the Secretary Council*, U.N. SCOR, U.N. Doc. S/2001/40 (2001) [hereinafter January 12, 2001 Letter].

63. *Id.*

64. *U.N. War Crimes Court to Try 20 Suspects in Sierra Leone*, N.Y. TIMES, Jan. 4, 2002, at A8.

65. SCR 1315, *supra* note 42, art. 8 ("Requests the Secretary-General to include recommendations on the following: (c) the amount of *voluntary contributions*, as appropriate, of funds, equipment and services to the Special Court. . . ." (emphasis added)).

66. SCSL Statute, *supra* note 51, art. 8(2).

B. Provisions of the Statute

1. Jurisdiction, Article 1

a. Temporal Jurisdiction

If the amnesty granted under the Lomé Accord is valid, the SCSL will only have jurisdiction over crimes committed after July 7, 1999. However, the U.N. and many NGOs have consistently maintained that an amnesty cannot be given for war crimes.[67]

If the amnesty is invalid, temporal jurisdiction can extend to the pre-Lomé period. However, deciding exactly when the civil war began is somewhat complicated. In an effort not to over-burden the Prosecutor, the Secretary-General decided to begin jurisdiction on November 30, 1996, when the Abidjan Peace Agreement failed.[68] According to the Secretary-General, this date also coincides with a general escalation of war crimes, and will allow for inclusion of RUF crimes committed in the countryside as well as in Freetown.[69] Amnesty International protested, arguing that the Prosecutor should have the ability, and the resources, to try defendants dating back to the beginning of the conflict, in 1991.[70]

Temporal jurisdiction of the Court will be open-ended, to accommodate the possibility of continued fighting. This differs from the ICTR, which limits jurisdiction to the period of the genocide, from January 1994 through December 1994,[71] but is similar to the unlimited jurisdiction of the ICTY.[72] The variances in temporal jurisdiction are explained in that at the time of the creation of the tribunals the conflicts in Sierra Leone and the former Yugoslavia were longer-lasting and less contained than the genocide in Rwanda.

---

67. *U.N. Must Clarify Position on Sierra Leonean Amnesty*, (Human Rights Watch), July 12, 1999, *at* http://www.hrw.org/press/1999/jul/s10712.htm; *Sierra Leone: A Peace Agreement but No Justice*, (Amnesty International), July 9, 1999, *at* http://www.amnesty-usa.org/news/1999/15100799.htm (calling the peace accord "unacceptable."). In a September, 2001 report, Amnesty International wrote, "although the amnesty contained in the agreement is now part of Sierra Leonean law, it is contrary to international law, which stipulates that there can be no amnesty for serious breaches of international humanitarian law and for human rights abuses which may amount to crimes against humanity. Each state which is party to the Geneva Convention is under an obligation to bring to justice in its own courts those who have committed or ordered grave breaches of the Conventions, to extradite them to another country willing or able to do so or to transfer them to an international criminal court." *Sierra Leone: Renewed Commitment Needed to End Impunity*, (Amnesty International), Sept. 24, 2001, *at* http://www.web.amnesty.org/ai.nsf/print/AFR510072001.

68. SCSL Statute, *supra* note 51, art. 1(1).

69. SCR 915, *supra* note 46, at 6, para. 27.

70. *Sierra Leone: The U.N. Security Council Must Make the Special Court Effective and Viable*, (Amnesty International), Feb. 13, 2001, *at* http://www.web.amnesty.org/ai.nsf/index/AFR510012001.

71. UN SCOR, 3453 mtg., U.N. Doc. S/RES/955 (1994), art. 7, *available at* http://www.un.org/Docs/scres/1994/9443748e.htm (creating the International Criminal Tribunal for Rwanda) [hereinafter ICTR Statute].

72. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, annex, art. 8, UN SCOR, 48th Sess., Res. & Dec., at 29, U.N. Doc. S/INF/49 (1993), *available at* http://www.un.org/icty/basic/statut/stat2000.htm [hereinafter ICTY Statute].

b. Personal Jurisdiction

The Security Council and the Secretary-General engaged in an extended debate about the language of Article 1, which establishes personal jurisdiction for the Court. SCR 1315, calling for the establishment of the Court, recommended that personal jurisdiction apply to those "who bear the greatest responsibility for the commission of the crimes."[73] The Secretary-General suggested the more general "persons most responsible" language,[74] which gives the Prosecutor more authority to decide whom to try. "Persons most responsible," according to the Secretary-General, "denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime."[75]

In response to the Secretary-General's report, the Security Council proposed major changes to Article 1. While holding to their "greatest responsibility" language, the Security Council wrote that they did not wish to limit the prosecution to only those with leadership roles.[76] The Security Council proposed that all peacekeepers or related personnel accused of war crimes should be tried by their sending state, rather than by the SCSL. Should the sending state be unable or unwilling to investigate or prosecute, the Security Council could grant the SCSL jurisdiction.[77]

As the debate between the Security Council and the Secretary-General continued,[78] the language of Article 1 remained unresolved until the signing of the agreement. Both sides worried that the language of Article 1 raised the possibility that the Court would try juveniles and peacekeepers. The Security Council believed that its "greatest responsibility" language reduced the likelihood of these events occurring, while the Secretary-General argued for greater discretion for the Prosecutor through the use of the "persons most responsible" language.[79] In the final version of the statute, the "persons who bear the greatest responsibility" language was used.[80] The Security Council also succeeded in including jurisdiction over peacekeeping personnel who committed war crimes, but only when authorized by the Security Council.[81] It is unlikely that peacekeepers will be tried, if only for the politically necessary reason that trying peacekeepers risks a chilling effect on the recruitment of peacekeepers for future operations.

The individual criminal responsibility language in the Statute is nearly identical to that of the ICTR and the ICTY,[82] with the exception that individual

73. SCR 1315, *supra* note 42, para. 3.
74. SCSL Statute, *supra* note 51, art. 1(1); SCR 915, *supra* note 46.
75. SCR 915, *supra* note 46, para. 30.
76. *Letter Dated 22 December 2000 from the President of the Security Council Addressed to the Secretary-General*, U.N. SCOR, para. 1, U.N. Doc. S/2000/1234 (2000).
77. SCSL Statute, *supra* note 51, arts. 1 (2) & (3).
78. *See* January 12, 2001 Letter, *supra* note 62; *Letter Dated 31 January 2001 from the President of the Security Council Addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/2001/95 (2001).
79. January 12, 2001 Letter, *supra* note 62.
80. SCSL Statute, *supra* note 51, art. 1(1).
81. *Id.* at art. 1.
82. *Id.* at art. 6; ICTR Statute, *supra* note 71, art. 6; ICTY Statute, *supra* note 72, art. 7.

criminal responsibility under Article 5 (Crimes under Sierra Leonean Law) is to be determined in accordance with Sierra Leonean law. No such domestic legal provisions exist in the ICTR and the ICTY.[83]

Article 6 of the Statute of the SCSL holds that if the superior "knew or had reason to know that the subordinate was about to commit to such acts [as defined in Arts. 2-4] and the superior had failed to take the necessary and reasonable measures to prevent such acts," the superior will be held responsible.[84] Article 6 of the Statute of the SCSL mirrors Article 6 of the ICTR, Article 7 of the ICTY, and Article 28 of the Rome Statute of the International Criminal Court (ICC).[85]

c. Extraterritorial Jurisdiction

Unlike the ICTR and the ICTY, which have the power to request extradition from other states,[86] or the ICC which can request extradition from any member of the treaty,[87] the SCSL will not have the power to demand extradition from a third country.[88] This could prove to be a major weakness for the Court if a defendant or evidence is outside Sierra Leone. In his report on the SCSL, the Secretary-General suggested that the problem could be avoided if the Security Council endowed the SCSL with Chapter VII of the U.N. Charter powers[89] for the purpose of requesting extradition or evidence from outside the jurisdiction of the Court.[90]

How problematic this lack of extradition power will be is not yet clear. Foday Sankoh was apprehended in Nigeria and presumably other members of the RUF or other groups could escape to Liberia or other neighboring countries. However, few combatants appear to have made enough money during the war to

83. ICTR Statute, *supra* note 71; ICTY Statute, *supra* note 72.

84. SCSL Statute, *supra* note 51, art. 6(3).

85. SCSL Statute, *supra* note 51, art. 6; ICTR Statute, *supra* note 71, art. 6; ICTY Statute, *supra* note 72, art. 7; Rome Statute of the International Criminal Court, July 12, 1999, art. 28, U.N.-I.C.C. *at* http://www.un.org/law.icc/statute/99_corr/l.html [hereinafter ICC Statute].

86. ICTR Statute, *supra* note 71, art. 8; ICTY Statute, *supra* note 72, art. 9. Article 8 (2) of the ICTR states, "The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda." The ICTY Statute contains similar language.

87. ICC Statute, *supra* note 85, art. 13.

88. SCSL Statute, *supra* note 51.

89. Under Chapter VII of the U.N. Charter, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", the Security Council could pass a measure requiring member states to comply with requests to extradite suspects and provide evidence. Such an action could be justified under Article 41 of the Charter, which authorizes the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions . . .," or under Article 49, "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." Both the ICTR and the ICTY were established by the Security Council acting under Chapter VII. U.N. CHARTER arts. 41, 49.

90. SCR 915, *supra* note 46, para. 10.

be able to afford to leave Sierra Leone.[91] Most, at this point, probably remain in the country.

d. Ne bis in idem

Another repercussion of the bilateral nature of the Court is that a defendant can be tried in a court outside of Sierra Leone and also by the SCSL. In addition, a defendant can also be retried for a crime by the SCSL under Articles 2 through 4 even if he was already tried in a Sierra Leonean national court (should the crime be classified as an ordinary crime, rather than as a war crime, or should the national court proceedings be found biased or under external influence).[92] Therefore, the SCSL will have the power to try defendants already tried in Sierra Leone if the Prosecutor believes there was a sham trial or a weak investigation. This *limited primacy*[93] is less than the complete primacy held by the ICTR and the ICTY. There the Tribunals can request that a national court defer prosecution of individuals if the Tribunal is interested in trying them as well.[94]

2. Definition of Crimes, Articles 2 to 5

The subject matter jurisdiction of the SCSL is similar to the Statutes of the ICTR and the ICTY. Article 2 of the Statute of the SCSL lists the crimes against humanity that the SCSL will have the power to prosecute. These include crimes such as murder, extermination, enslavement, imprisonment, torture, rape, or other inhumane acts, if they were committed as "part of a widespread or systematic attack against any civilian population."[95]

Article 3 covers Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The crimes in Article 3 are defined exactly the same as those in Article 4 of the Additional Protocol for Non-International Armed Conflict.[96] These crimes include mutilation, torture, collective punishments, hostage-taking, terrorism, pillage, summary executions, and outrages on personal dignity.[97]

Article 4 lists Other Serious Violations of International Humanitarian Law, including intentional attacks on civilian targets, intentional attacks on humanitarian and peacekeeping personnel, and abduction and recruitment of children under the age of fifteen into armed groups.[98]

Not included on this list of crimes is genocide, since the attacks on civilians in Sierra Leone do not appear to have had an ethnic element. There are two

91. Farah, *supra* note 21.
92. SCSL Statute, *supra* note 51, art. 9(2).
93. Frulli, *supra* note 58, at 860.
94. ICTR Statute, *supra* note 71, art. 8(2); ICTY Statute, *supra* note 72, art. 9(2).
95. SCSL Statute, *supra* note 51, art. 2.
96. Geneva Convention Additional Protocol for Non-International Armed Conflict, art. 4 *at* http://www.icrc.org/eng; SCSL Statute, *supra* note 51, art. 3.
97. SCSL Statute, *supra* note 51, art. 3.
98. *Id.* at art. 4.

primary ethnic groups in Sierra Leone, the Mende and the Temne, and both suffered during the war.[99]

In addition to the crimes against humanity, war crimes, and other serious violations of international humanitarian law, Article 5 of the Statute provides jurisdiction for Crimes under Sierra Leonean law. This covers abuse of girls and wanton destruction of property.[100] These crimes are included in the Lomé amnesty provisions because they are not included in the U.N.'s reservation.[101] Hence there will be two different temporal jurisdictions for the SCSL. Article 5 only applies to crimes committed after the 1999 Lomé Accord, while the jurisdiction for Articles 2 through 4 begins on November 30, 1996.

Crimes under Sierra Leonean law are included in the Statute according to the unique bilateral arrangement of the Court. The ICTR and ICTY do not provide jurisdiction for Rwandan and Yugoslavian crimes.

3. Article 7, Jurisdiction Over Persons of 15 Years of Age

Children were active combatants in the civil war. They were abducted by both the rebels and the Government-sponsored Kamajors and Civil Defense Forces (CDF).[102] Boys as young as eleven were kidnapped and trained to commit extreme violence—often they were perpetrators of amputations, sexual assaults, and summary executions. The boys were drugged and trained by older leaders, who sought to instill in the boys a sense of family.[103] Young boys often held leadership positions, up to the rank of Brigadier. Girls were abducted to become sex slaves, cooks, and spies, and were often mutilated after working for the RUF.[104] Many Sierra Leoneans would like to see juveniles tried for their crimes,[105] but it seems unlikely that this will happen because of objections from human rights groups and the United Nations Children's Fund (UNICEF).[106]

Trying juveniles poses particular problems for the SCSL. Though many are clearly guilty of terrible crimes, they are also victims themselves. UNICEF, Amnesty International, and Human Rights Watch, among others, have actively campaigned against the inclusion of juveniles under the SCSL.[107]

The Statute creates a special regime for youthful offenders who were between fifteen and eighteen at the time of the alleged crime.[108] The Secretary-

99. *See* http://www.sierra-leone.org.

100. SCSL Statute, *supra* note 51, art. 5.

101. The UN Reservation is for amnesties in "respect of the crimes referred to in articles 2 to 4" of the Statute. "Crimes under Sierra Leonean Law" are referred to in article 5 of the Statute. The text of the Reservation does not appear in official copies of the Lomé Accord. SCR 915, *supra* note 46, para. 22; SCSL Statute, *supra* note 51, art. 5.

102. Pratt, *supra* note 4.

103. *Id.* One method used to instill loyalty was to force the boys to mutilate their own families and people from their villages.

104. *Id.*

105. Chris McGreal, *Unique Court to try killers of Sierra Leone: Those who were enslaved, raped and mutilated demand justice*, THE GUARDIAN (London), Jan. 17, 2002, at 15.

106. Barbara Crossette, *Sierra Leone to Try Juveniles Separately in U.N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

107. *Id.*

108. SCSL Statute, *supra* note 51, art. 7.

General included Article 7, he says, because of the desire of Sierra Leoneans to see judicial accountability for child combatants.[109] Article 7 lays out the special procedures and protections under which juveniles can be tried for the crimes defined in Articles 2 through 5.[110]

In recent testimony in a U.N. Security Council Debate on Children in Armed Conflict, fourteen-year-old Alhaji Sawaneh described the challenges of fitting back into society after being abducted and forced to fight for the RUF:

> The community school children were not friendly to us [the freed child-soldiers]. . . In school I suffered resentment from other children. They looked at me differently like an evil person. Maybe they had good reason. After all, we used to do horrible things to them, their families, friends and communities. But we suffered just as they because we were forced to do so by our commanders. . . With family members I have faced a lot of distrust. Some doubt whether I will ever be a 'normal' child again.[111]

Under Article 7, there are several protections for minors. The accused "shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society."[112] A convicted youthful defendant cannot serve jail time, but instead can be sentenced to training, counseling, foster care, reintegration programs or community service.[113] In the Draft Statute, there were plans to create a special juvenile chamber to hear these cases, with qualified juvenile judges, but such plans were likely scrapped as part of cost-cutting measures by the drafters of the agreement.[114] The question must be asked why these services cannot be provided without the necessity of a trial. If a proceeding is desirable to discern the nature of the juvenile's participation in war crimes, use of the Truth and Reconciliation Committee is preferable.

4. Article 10, Amnesty

Article 10 of the Statute of the SCSL provides, "[a]n Amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."[115]

The U.N. maintains that it made a reservation objecting to Article IX of the Lomé Accord, as an "amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of

---

109. SCR 915, *supra* note 46, para. 35.

110. SCSL Statute, *supra* note 51, art. 7.

111. *UN Security Council Debate on Children in Armed Conflict*, Nov. 20, 2001, *at* http://www.sierra-leone.org/alhajisawaneh112001.htm (Statement of Alhaji Babah Sawaneh, former child combatant).

112. SCSL Statute, *supra* note 51, art. 7(1).

113. *Id.* at art. 7(2).

114. SCR 915, *supra* note 46, annex, art. 7(3)(b) (Draft Statute of the Special Court for Sierra Leone).

115. SCSL Statute, *supra* note 51, art. 10.

international humanitarian law."[116] However, the U.N. was a moral guarantor, not a party, to the Lomé Accord. The Government of Sierra Leone's consent to Article 10 of the Statute directly contradicts their obligations under the Accord, as the Accord drew no distinctions between national and international legal violations.

The amnesty was legally binding, at least between the GOSL and the RUF. It is permissible under international law to make such an amnesty, and there appears to be no customary international law requiring that perpetrators of war crimes be prosecuted.[117] However, because NGOs like Amnesty International and Human Rights Watch also do not support the amnesty, it seems as though the GOSL will be allowed to break its commitment. Perhaps the GOSL could argue that because the RUF has not honored the Lomé Accord, they do not need to honor it either. However, this argument has not been advanced as a justification for breaking the amnesty provisions. Karen Gallagher, in *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, suggests another way out: that the amnesty extend only to crimes committed while pursuing military objectives, and the atrocities committed against civilians not count as a military objective.[118] To date, this argument has not been advanced by those who justify breaking the amnesty agreement.

Although amnesties for human rights violations have been granted in Argentina, Algeria, Romania, Haiti, El Salvador, Mozambique and South Africa,[119] international criminal tribunals were not established in these conflicts and perhaps those amnesties only applied to national prosecution of war crimes. The Sierra Leonean people supported this amnesty. The U.N. and international human rights NGOs objected to the amnesty at the time, but the U.S., the U.K., and others supported it.[120] Therefore, the Sierra Leonean amnesty, and its use in the SCSL, is not analogous to the other amnesties.

The implications of breaking the amnesty could be problematic in the future. The Lomé Accord worked for at least a year, and successfully slowed the commission of atrocities in Sierra Leone. In the next civil war, however, it is questionable as to whether revolutionaries or rebel groups will agree to a complete amnesty in exchange for a cessation of hostilities, if they have little reason to believe that the amnesty will have legal effect. Amnesty has been a useful tool in ending conflicts, but it may not be viewed the same way in the next conflict. On the other hand, victims may not trust a legal system that grants amnesties to war criminals, so perhaps the victims' wishes should also be a factor in such decisions. This points to the conclusion that amnesties should be

116. SCR 915, *supra* note 46, para. 22.

117. Gallagher, *supra* note 30.

118. *Id.* at 163.

119. *See* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996); Emily Schabacker, *Reconciliation or Justice in Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1 (1999).

120. *See* S. Res. 54, *supra* note 23.

made deliberately, after weighing the wishes of the victims against the possibilities of creating a lasting peace, and amnesty decisions, once made, should be final.

III.
How the SCSL will Operate

A. *Organization of the Court and Rules of Procedure*

The structure of the Court and the rules of procedure will be similar to the ICTR and the ICTY. The U.N. expects that the two established tribunals will help with the selection and training of judges, prosecutors, and staff, as well as help build a library and answer questions as they arise.[121]

The Rules of Procedure and Evidence will be adopted from the ICTR, although they can be amended as necessary.[122] The appellate chamber will be guided by decisions of the appeals chambers of the ICTR and ICTY, as well as by the decisions of the Supreme Court of Sierra Leone in the application of the laws and legal principles of Sierra Leone.[123]

Imprisonment is to be carried out in Sierra Leone, if the prisons meet U.N. requirements, or in any third country that has signed an agreement with the ICTR or the ICTY.[124] Enforcement of sentences is a difficult problem because any prison that meets U.N. requirements will likely have better health care, food, and accommodations than most Sierra Leoneans currently experience. It will be difficult to make arrangements for a prison that is actually seen as punishment. The only true punishment inflicted by such a prison may be holding a convict far from his family and tribal lands. Many Sierra Leoneans are disappointed that the accused will face life imprisonment, rather than hanging, which is imposed in Sierra Leone for murder.[125]

The SCSL also faces the problem of where to locate the Court and detention facilities. After evaluating the High Court of Sierra Leone and a few other locations, the U.N. believes it will be necessary to construct a new building, as no location is secure enough or large enough for the Court.[126] The cost of building the prefabricated courthouse and renovating a prison will cost about $3.5 million.[127] These costs are unknown to the ICTR and the ICTY. Should fighting escalate in Sierra Leone, the SCSL will likely be moved to an English-speaking nation in West Africa.[128]

The working language of the SCSL will be English,[129] as English is the official language in Sierra Leone. However, some defendants and witnesses are

121. SCR 915, *supra* note 46, para. 65.
122. SCSL Statute, *supra* note 51, art. 14 (1).
123. *Id.* at art. 20 (3).
124. *Id.* at art. 22.
125. McGreal, *supra* note 41.
126. SCR 915, *supra* note 46, para. 60.
127. *Id.* at paras. 61 & 62.
128. *Id.* at paras. 51-54.
129. SCSL Statute, *supra* note 51, art. 24.

likely to speak only Krio, the lingua franca of Sierra Leone, or a tribal language.[130] Because there are relatively few languages spoken in Sierra Leone, it would not be a large burden for the SCSL to provide translation services to both defendants and witnesses, as do the ICTR and ICTY. Under Article 17(4)(f) of the Statute of the SCSL, the accused has the right to an interpreter "if he or she cannot understand or speak the language used in the Special Court." However, witnesses have no such right.[131]

B. Funding

1. Problems Funding the Court

Security Council Resolution 1315 recommended that the SCSL be funded voluntarily.[132] Because the ICTR and ICTY are funded by mandatory assessments, they have a stable funding source.[133] They also have considerably larger budgets.[134] The change in U.N. policy may suggest that it is reluctant to add another court to its mandatory funding structure or that it is trying to keep an arms-length relationship with this Court.

Initially, the U.N. planned to fund the Court with $30.2 million for the start-up and the first year of the Court, and $84.4 million for the subsequent two years.[135] Due to severe difficulties raising this money, the U.N. dramatically scaled back the budget to $16.8 million for the first year and a total of $57 million for the first three years of the Court.[136] Of this, nearly the entire first year costs have been raised, but a $20 million shortfall for the next two years of the SCSL remains.[137] The only in-kind contributions collected thus far have been furniture.[138]

In contrast to the ICTR and the ICTY, the SCSL will clearly be operating on a shoestring budget. The ICTR has an annual budget of $80 million and a staff of 800,[139] and the ICTY's 2001 budget was $96.4 million, with a staff of 1,188.[140] In addition, the ICTY receives many in-kind contributions from neighboring countries that Sierra Leone cannot expect.[141]

One advantage of voluntary contributions is that the Court will be more accountable to its donors because it will have to earn its own money. However, it will be very difficult for this Court to look productive given the constraints it will have operating in Sierra Leone. The Secretary-General does not believe

130. See http://sierra-leone.org for more information about Sierra Leone.
131. SCSL Statute, *supra* note 51, art. 17(4)(f).
132. SCR 1315, *supra* note 42, art. 8.
133. Judging Genocide, *supra* note 45.
134. *Id.*
135. *Letter dated 12 July 2001 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/693 (2001).
136. *Id.*
137. *Id.*
138. Author's conversations with U.N. employees in New York.
139. http://www.ictr.org/.
140. *ICTY Key Figures*, *at* http://www.un.org/icty/glance/keyfig-e.htm.
141. Judging Genocide, *supra* note 45. The ICTY receives an amount roughly equal to that of it's annual funding in gifts in kind and one-off bilateral payments.

that voluntary contributions will work. He wrote, "In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding."[142] The Security Council has not agreed to this request. Under Article 6 of the Agreement of the U.N. and the GOSL on the establishment of the Court, the Secretary-General and Security Council are authorized to "explore alternate means of financing the Special Court"[143] if voluntary contributions prove insufficient for the Court to meet its mandate. In light of the continuing problems raising funds, the Secretary-General should advocate this option sooner rather than later.

2. *The Effects of Funding Limitations*

The decision to fund a smaller Court than originally envisioned has affected the planning considerably. Rather than two trial chambers, as originally planned, there will only be one.[144] The U.N. also scaled back the grade level of employees who will work at the Court, thereby reducing the qualifications of Court personnel.[145] The most significant decision, though, was the admission that the smaller Court would only seek to try twenty defendants.[146]

Considering that the Court will cost over $150 million by the time it is finished,[147] this is a high price for justice. The cost of trials in Arusha and The Hague are equally, if not more, expensive. As of December 2001, the ICTR had indicted one hundred people, begun trials for forty-one,[148] and convicted eight[149] at a cost of $470 million.[150]

Several factors explain these seemingly extraordinary expenses. U.N. employees are very expensive, especially accounting for the transportation, health, and safety costs associated with living in places such as Freetown or Arusha. The trials are held to an international standard that would not be afforded in Sierra Leonean or Rwandan Courts. The prisons where indicted defendants and those convicted will live must also meet international standards that most housing in Sierra Leone does not.

---

142. SCR 915, *supra* note 46, para. 71.

143. *Id.* at art 6.

144. SCSL Statute, *supra* note 51, art. 11.

145. Author's conversations with U.N. employees in New York.

146. Daniel B. Schneider, *New War Crimes Tribunal for Sierra Leone*, N.Y. TIMES, July 25, 2001, at A10; *See U.N. War Crimes Court to Try 20 Suspects in Sierra Leone*, N.Y. TIMES, Jan. 4, 2002, at A8.

147. It is impossible to know how long the SCSL will last or how much it will cost. However, the ICTY was the first tribunal, established in 1993, and it is only now operating at full capacity. It must be assumed that the SCSL will last for six to ten years, and this will conservatively cost at least $150 million.

148. http://www.ictr.org/ (last visited Dec., 2001).

149. As of June 16, 2001. *See*, Judging Genocide, *supra* note 141.

150. *Supra* note 148.

IV.
OTHER ISSUES RAISED BY THE STATUTE AND THE CREATION OF THE COURT

A. Is this "Victor's Justice"?

The RUF is singled out for committing the worst war crimes, and there is no question that its members should be held accountable for "Operation No Living Thing" and other acts. However, the Kamajors, the Civil Defense Forces (CDF), and other armies also committed war crimes,[151] as did the Nigerian peacekeepers.[152]

War crimes tribunals have a reputation for dispensing "Victor's Justice." The post-World War II Nuremberg trials did not consider possible crimes committed by the Allies. The Serbs claim that the ICTY unfairly singles them out, while the Hutus in Rwanda charge that the Tutsis should be investigated.[153]

The RUF has a legitimate claim that they are being singled out for attention, and are refusing to testify in the TRC until they are granted testimonial immunity, so that their statements to the TRC are not used against them at the SCSL.[154] It is unclear how the Prosecutor for the SCSL will deal with this problem. The Prosecutor is also certain to face pressure from the GOSL not to try AFRC or Kamajor soldiers, and from U.N. members not to try peacekeepers. The creation of the SCSL, in fact, will create huge pressure on the fragile government because of competing pressures to try or not to try its supporters.

B. Relationship of the SCSL to the Truth and Reconciliation Commission

The United Nations Mission in Sierra Leone (UNAMSIL) has been working to set up the TRC called for in the Lomé Accord. The National Truth and Reconciliation Act became law in Sierra Leone in 2000 and the first commission has been set up in Makeni, in Eastern Sierra Leone.[155] The purpose of the TRC, according to Rodolfo Mattarolo of UNAMSIL's Human Rights Section, is to "gather a historical record and provide a balanced account of the Sierra Leonean conflict."[156]

---

151. Amnesty International and other groups have urged that the SCSL not be used to only try the RUF. According to Amnesty, other groups such as the AFRC and CDF should be investigated "regardless of any individual's current political position or allegiance." *Sierra Leone: Renewed Commitment Needed to End Impunity*, *supra* note 67, at 5.

152. ECOMOG peacekeepers have been accused of extrajudicial executions, rapes, and other crimes. They were also known for publicly humiliating, beating, and whipping civilians, and for stealing equipment belonging to aid organizations. *See id.*; *see also* Pratt, *supra* note 4.

153. Susan Stamberg and Sylvia Poggioli, *Slobodon Milosevic Mounts Surprisingly Skillful Defense During His Trial in The Hague*, NPR NEWS, March 12, 2002.

154. *Rebel Group Fears Being Target of Truth and Reconciliation Court*, BRITISH BROADCASTING CORPORATION, Aug. 19, 2001.

155. The Truth and Reconciliation Commission Act 2000, *at* http://www.sierra-leone.org/trcacat2000.html.

156. *UN Launches Reconciliation Commission in S. Leone's Northern Town*, XINHUA NEWS, Aug. 5, 2001.

However, there is nothing in the TRC Act preventing testimony given at the TRC from being used in a prosecution by the SCSL or a national court. The RUF claims it supports the TRC, but worries that it will be unfairly targeted.[157]

To be effective, the TRC will likely need to give testimonial immunity to those who appear before it, as the South Africa Truth and Reconciliation Commission did.[158] The TRC will be most effective if it seeks testimony from lesser commanders who will not be indicted by the SCSL, so as not to create a conflict between the two bodies. Another good use of the TRC would be to solicit testimony from child soldiers, rather than sending them to the SCSL. In this case, juveniles would be required to describe their crimes and help create an accurate historical record, but would not face prosecution. With only twenty defendants to try, the SCSL should focus on those adults most responsible for the crimes, while the TRC should focus on those who played a role, but were also victims.

C. U.S. Support for the Special Court

The Bush Administration pledged $5 million for the SCSL.[159] The Administration supports special tribunals being proposed in places such as Sierra Leone, Congo, Sudan and Cambodia, rather than the establishment of a permanent court. According to Pierre-Richard Prosper, Ambassador-at-Large for War Crimes and himself a former ICTR Prosecutor, tribunals should be located in the country where the abuses occurred so that they are able to focus on the specific crimes that took place there. According to Prosper, each conflict is different, and the court should reflect these differences.[160]

In reality, it appears the Bush Administration is supporting these ad hoc tribunals as a way of showing that there is no need for a permanent criminal court.[161] Establishing ad hoc tribunals might work in many countries, but it will be difficult to establish them in places that do not have strategic importance or other compelling reasons of interest to the Security Council. Certainly establishing three or four such panels a year would likely create donor fatigue, considering how difficult it has been to fund the SCSL.

Another appealing aspect of the SCSL for the U.S. State Department is the bilateral nature of the Court. According to the War Crimes Office, there will be much less U.N. involvement in its staffing and operation.[162] This is appealing to State Department officials who complain about the U.N. bureaucracy.[163]

---

157. *Rebel Group Fears Being Target of Truth and Reconciliation Court*, *supra* note 154.

158. Paul Lansing & Julie King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L. & COMP. LAW 753, 760-61 (1998).

159. *Annan Will Meet Cash Target for War Crimes Court*, AFRICA NEWS, July 25, 2001.

160. Norman Kempster, *U.S. May Back Creation of Special Atrocity Tribunals*, L.A. TIMES, Aug. 2, 2001, at A4.

161. *Id.*

162. Letter from Jonathan Crock, State Department Office of the Ambassador-at-Large for War Crimes Issues (Sept. 17, 2001) (on file with the author).

163. *See id.*

D. Implications for the ICC

Some of the provisions of the Statute come directly from the Rome Statute of the ICC. The language "persons who bear the greatest responsibility" that the Secretary-General supported for Article 1 of the Statute of the SCSL came from the Rome Statute.[164] Unlike the ICTR and the ICTY Statutes, but like the Statute of the SCSL, sexual crimes are defined as crimes against humanity by the Rome Statute.[165] Article 4(b) of the Statute of the SCSL mirrors Article 8(2)(b)(iii) of the ICC Statute. Both protect humanitarian assistance and peacekeeping missions.[166] These uses of the ICC Statute show gradual development in international criminal law, as the ad hoc tribunals move towards the ICC.

The ICC officially came into existence July 1, 2002.[167] It is expected to begin its work this fall.[168] With the terrorist attacks of September 11, 2001, many states ratified the Statute of the ICC sooner than expected, hoping to use international law to address the problems of terrorism.[169]

The ad hoc tribunals are seen as temporary. Most regional variations in international criminal justice will likely end with the creation of one unified criminal court. At this point, it seems likely that the ICTR, the ICTY, and the SCSL will not be folded into the ICC, but this could change if the ad hoc tribunals continue their work for many years, at high cost and without an exit strategy.

V.
RECOMMENDATIONS FOR THE SCSL

The SCSL has not yet begun work, hence there are procedural and policy decisions that the implementers of the Statute should make to increase the Court's likelihood of success.

A. Acknowledge and Reconcile the Amnesty Provisions of the SCSL with the Lomé Accord.

The most serious problem with the SCSL is that it violates Article IX of the Lomé Accord. The U.N. has not provided an adequate justification for this, because it could have blocked ratification of the Lomé Accord if it truly opposed

164. SCSL Statute, *supra* note 51, art. 1.

165. SCSL Statute, *supra* note 51, art. 2(g); ICC Statute, *supra* note 85, art. 7(1)(g); *The Prosecutor v. Akayesu*, No. ICTR-96-4-T, *available at* http://www.ictr.org/wwwroot/ENGLISH/cases/index.htm. The Tribunal held that rape is a crime against humanity. Therefore, the jurisprudence of the ICTR and the ICTY now allows for the prosecution of sex crimes, however they have only been defined statutorily in the ICC, and now the SCSL, thus far.

166. SCSL Statute, *supra* note 51, art. 4(b); ICC Statute, *supra* note 85, art. 8(2)(b)(iii).

167. http://www.iccnow.org.

168. *Id.*

169. *ICC Establishment Pushed by Experts*, BUSINESS WORLD, Oct. 17, 2001 at 10 (discussing international legal experts' views that in the wake of Sept. 11 states are ratifying the Statute of the ICC at a faster rate than had been expected, in part because they believe the ICC will be used to try terrorists).

Article IX. The SCSL will be greatly constrained if it can only try defendants for crimes committed after July 1999.

The U.N. should make a deliberate decision, rather than hiding behind the cloak of its problematic reservation. The U.N. must acknowledge that the Lomé Accord was flawed and decide not to participate in such agreements in the future if they have such broad amnesties. Making this decision will reduce the room for negotiating with future groups like the RUF, but the rule of law is harmed when amnesties are withdrawn after they have been made. In this case, if the SCSL is to be created, Article IX must be violated.[170]

B. Grant Testimonial Immunity to Those Testifying Before the TRC.

The South African TRC, upon which the Sierra Leone TRC is modeled, provides immunity to those testifying before it.[171] The immunity is important, because otherwise people will not tell the full truth for fear of self-incrimination. The purpose of the TRC is to promote national reconciliation and healing, not to punish criminals.[172] Those who the Prosecutor believes should be tried by the SCSL should not be called to the TRC.

Most importantly, TRCs are not a panacea. Many people believe that those who commit war crimes should be punished, regardless of the testimony they give at a TRC. The South African TRC, one of the best models, required strong leadership from Bishop Desmond Tutu.[173] Charles Villa-Vicencio, Former Director of Research for the South African TRC, describes the duty to prosecute and the non-prosecutorial initiatives such as amnesty and the TRC as a Scylla and Charybdis:

> The duty to prosecute . . . can shipwreck non-prosecutorial initiatives by nations seeking seriously to move away from past gross violations of human rights. The unbridled affirmation of national sovereignty, which may allow nations to devise a form of amnesty that bypasses the demands of international human rights, has, in turn, the capacity to negate the important advances made in the affirmation of human rights. . . .[174]

There has not been enough information provided to the people of Sierra Leone about the TRC. Without support, it is likely to fail, as did the proposed TRC for Rwanda.[175] If the U.N. is serious about creating a joint tribunal-TRC

170. It should be noted that the U.N. has further amnesty problems on the horizon. Ieng Sary of the Khmer Rouge was given amnesty from prosecution, and Hun Sen, the Prime Minister, is not willing to have him tried, despite the U.N.'s insistence that amnesties not be recognized in the proposed Cambodian Tribunal. *See Masters of the Killing Fields*, BBC NEWS ONLINE, Jan. 2, 2001, *available at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_135000/.

171. Charles Villa-Vicencio, *Essay: Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205 (2000); Lansing and King, *supra* note 158; Kerry O'Shea Gorgone, Book Note: *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, 24 SUFFOLK TRANSNAT'L L. REV. 211 (2000).

172. Lansing & King, *supra* note 158.

173. *Id.* at 762.

174. Villa-Vicencio, *supra* note 173, at 220.

175. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE, (1998).

system, it must clearly lay out the boundaries of each. The experience of South Africa shows that a TRC will only work if it is adequately funded, if it is supported by the population, and if it provides immunity to the participants rather than allowing them to incriminate themselves.

C. *Disregard Article 7, Which Gives the SCSL Jurisdiction to Try Juveniles.*

As described in section II (B)(3) above, UNICEF and international NGOs oppose trying juveniles in the SCSL. Most experts do not believe the SCSL will actually try them.[176] The punishments available under Article 7 do not include jail time, so it would be more appropriate to subpoena juveniles to the TRC and provide counseling.

Since the SCSL will only try twenty people, the Prosecutor should choose people who forced children to commit crimes, as these are the "persons who bear the greatest responsibility."[177]

D. *Strengthen the Funding Mechanisms of the SCSL.*

The Secretary-General acknowledges that the voluntary funding mechanism will not be reliable enough for the SCSL.[178] The Security Council, if it truly wants the Court to succeed, must create a mandatory funding mechanism, even if it provides for lower funding levels than those of the ICTR and the ICTY. It is possible that the SCSL can be operated more cheaply than the existing tribunals, but it must be secure in its funding. Article 6 of the agreement between the U.N. and GOSL allows the Secretary-General and the Security Council to consider other funding mechanisms. Acknowledging the funding problem immediately will help ensure the continued funding and smooth operation of the Court.

E. *Ensure Third-Nation Extradition and Evidence Retrieval Capability Through the Security Council.*

Because the primacy of the SCSL is limited to Sierra Leone, unlike the ICTY and the ICTR, the Court will not have the power to demand extradition and evidence from third nations.[179] The Secretary-General has already recommended that the Security Council should grant the Court U.N. Chapter VII powers for the purpose of requesting the extradition of suspects from third nations.[180] This decision would increase the power of the Court, and should be adopted by the Security Council.

176. UNICEF and other children's advocacy groups have been critical of the decision to try juveniles. *See* Barbara Crossette, *Sierra Leone To Try Juveniles Separately in U.N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

177. SCSL Statute, *supra* note 51, art. 1(1).

178. SCR 915, *supra* note 46, para. 70.

179. SCSL Statute, *supra* note 51.

180. SCR 915, *supra* note 46, para. 10.

F. Translate Court Proceedings into Krio, Mende, and Temne Where Necessary.

As it is presently written, all Court proceedings will be in English. This does not reflect the true linguistic nature of Sierra Leone, although most educated people speak English, as it is the national language. The Court should offer its services in Krio, Mende, and Temne where necessary, just as the ICTR translates into Kinyarwanda and the ICTY translates into Croatian, Serbian, and Bosnian.[181] The official language of the Court can remain English, as long as those who appear before it understand the proceedings.

Translating into more accessible languages increases the likelihood that the population will understand, and thus support, the work of the SCSL. Under Article 17(4)(f), the accused has the right to an interpreter "if he or she cannot understand or speak the language used in the Special Court."[182] While this is a good beginning, translation should be expanded so that ordinary Sierra Leoneans can be informed about the Court and understand its proceedings.

G. Create a Public Relations Bureau to Disseminate Information About the SCSL to the Public.

Although the SCSL will have a tight budget, the Court should consider creating a public relations bureau. One reason for the creation of the Court is to help the nation heal and move past the civil war, and this will be facilitated if people know and understand what is happening in the Court. In Sierra Leone (as in many places in Africa) radio is an excellent, and inexpensive, medium for spreading information. The SCSL should consider broadcasting a regular radio program in local languages.

VI.
CONCLUDING REMARKS

Wars in Africa have long failed to receive the attention focused on wars elsewhere in the world. The civil war in Sierra Leone devastated the country, killing thousands and leaving thousands of mutilated victims who will bear their wounds for the rest of their lives. The Special Court for Sierra Leone may help the country deal with its past and punish some of those most responsible for the death and destruction.

The SCSL also presents an opportunity for the U.N. to expand the use of ad hoc tribunals, thereby increasing the prosecution of war crimes and crimes against humanity around the world. However, courts cannot be built nor run without significant funding—they require qualified personnel, adequate resources, and institutional support. The SCSL will operate largely like the ICTR and the ICTY, but with new innovations. Some of these, like the TRC and the establishment of the Court in the country where the crimes were committed,

181. *See* http://www.icty.org; *See* http://www.ictr.org.
182. SCSL Statute, *supra* note 51, art. 17(4)(f).

may reflect good future directions for ad hoc tribunals. Others, however, like the provisions to try juveniles, the voluntary funding mechanisms, the decision not to honor the Lomé Accord amnesty, and the lack of third party extradition procedures, are likely to create problems.

If the United Nations wishes to create an effective model for international justice, it must devise solutions to these fundamental problems.

Berkeley Journal of International Law

Volume 20 | Issue 2 Article 4

2002

A Case Study of Third World Jurisprudence - Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society

Robert Terris

Vera Inoue-Terris

A Case Study of Third World Jurisprudence—Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society

By
Robert Terris and Vera Inoue-Terris*

PREFACE

The following true story demonstrates in a colorful manner Palestinian legal culture.

Eating in a restaurant one afternoon, Taher,[1] a thirty-seven year old Palestinian living in the Gaza Strip, was distracted from his meal by the sound of a loud crash. Upon exiting the restaurant, he discovered shattered glass strewn

* The authors wish to thank Dr. Nazmi Al-Jubeh for his time and effort in overseeing our research and Sara Folchi and Ian Eliasoph for ushering us to the finish.

1. Interview with Taher, in Gaza (Feb. 26, 2001) [hereinafter Taher]. Actual name has been changed.

about the street and two cars enmeshed in a tangle of steel. In one car, a policeman cursed his bad luck. A crowd slowly extricated an elderly man from the other. To Taher's shock and amazement, the policeman did not exit his car to offer help to this injured man. Taher's indignation increased with the suspicion that the policeman caused the accident, as it was his experience that Palestinian security vehicles speed through Gaza's streets at a reckless pace. The bystanders seemed to have come to a similar conclusion.[2]

As Taher relates the story: "His behavior really shocked us. We told him to get out of the car because he was conducting himself in a shameful manner. He behaved as if he didn't care at all about the injured person. But he wouldn't get out. So we pulled him out. He then slapped my friend, the owner of the restaurant, in the face. At this point, I saw him [the policeman] pull out his gun." In a display of misjudged bravado, Taher said to the policeman: "Ah, you think you're tough? Either put away the gun or be a real man and shoot." The policeman shot two rounds. The first bounced off the pavement and hit a person in the crowd. The second lodged itself in Taher's knee.

An ambulance rushed Taher to the hospital. The shooter went to the police station and handed himself in. Because the shooter was a policeman (a personal bodyguard to Ghazi El-Jabali, the Gazan Chief-of-Police), his case was submitted to a military court. The shooter pleaded self-defense, claiming that he shot at the ground to protect himself because the crowd had become uncontrollable. The court sentenced him to a year in prison and released him from his duties on the police force.[3]

While the military trial took place, Taher lay in the hospital with a serious leg injury. The day after the shooting, the shooter's relatives began the reconciliation process required by customary law and commissioned a neutral delegation (a *jaha*) to approach Taher's family.[4] This delegation consisted of about 15 people, including respected elders and members of the police force. The *jaha* called on Taher's extended family and pleaded for a three-day truce (an *atwa* or a *wijh*). Taher's family agreed and promised not to attack or retaliate in any way during this period, despite their right to do so under traditional law.[5] After three days, the *jaha* returned once again, seeking to extend the truce until Taher recovered his health.

Taher was released from the hospital after three months of recuperation, and only then did he inform the shooter's family that he was willing for the *utwa* phase (during which Taher's family puts a monetary price on reconciliation) to begin. Taher's family opened the negotiations by demanding of 20,000 Jordanian Dinars (approximately 30,000USD) compensation, an exorbitant price

2. *Id.*

3. *Id.*

4. It is traditional that no direct contact be made between the aggrieved and the aggressor's families during this initial, sensitive period. *Id.*

5. This right falls under the general rubric of "an eye for an eye; a tooth for a tooth." *Koran, Sura 5:46.* In Bedouin desert culture, the right is known as *akhaza assar wa nafa el'ar*, which literally means "he took revenge and did away with the shame." AREF EL-AREF, BEDOUIN LOVE, LAW, AND LEGEND 86 (1974).

beyond the means of the shooter's extended family.[6] Through negotiating, the *jaha* persuaded Taher's family to reduce the amount to 5000 Jordanian Dinars (about 7,500USD), which the shooter's relatives promptly collected and delivered.

Taher, however, was not ready to sign any sort of reconciliation (*sulha*) agreement. He knew that the Palestinian National Authority (hereinafter PNA) police were accustomed to releasing prisoners from their jails once they had proof that the perpetrator and victim's families had made *sulha* and he wanted the shooter to suffer for the pain and torment he had inflicted. Thus, Taher continually extended the *utwa* period, postponing final reconciliation. For four months, he staved off the social pressure building around him. As Taher relates: "[The shooter's] buddies approached me, and his friends from all over [Gaza] were coming, to ask me to put this behind me, saying that he didn't mean to shoot me and that it wasn't personal. At the end of this four-month period, I finally decided to make *sulha*."

Taher's family, the policeman's relatives, and the *jaha* gathered in Taher's family's *diwan* (traditional tribal meeting place) for the symbolic ceremony. When they were seated, Taher's oldest and most respected family member, Sheikh Wajih, gave a short speech during which he said: "I am sorry that this event has occurred between our two families and I hope this will never happen again. We have forgiven and all is forgotten."[7] Spokesmen from both the *jaha* and the shooter's family rose next and lavished thanks and praises on Taher's family for being so generous, forgiving, understanding, wise, and honorable. All three speakers quoted various Koranic verses that address the role of forgiveness.

Sheikh Wajih then seized the moment to return the much bargained for 5000 Jordanian Dinars to the policeman's family.[8] In a further gesture, Taher's family consented to the shooter returning to his previous employment as a policeman. The two families signed the reconciliation agreement and sealed the occasion with a cup of coffee. Soon after, the shooter's relatives presented the formal letter of reconciliation to the police whereupon, as Taher had predicted, the shooter was released from jail (after serving only six months of his sentence).

According to Taher, the process described above typifies how Palestinian Arabs resolve their civil and legal conflicts.[9]

---

6. The average income in Gaza is about $1,000 a year. Counsel for the National Interest, *December 2001: A Fact Sheet on Israel and Palestine,* http://www.cnionline.org/decfsht.htm (last visited on Apr. 4, 2002). Time Magazine reports that the unemployment rates in Gaza and the West Bank are 48.5% and 30.3% respectively. TIME, March 25, 2002, at 41.

7. Taher, *supra* note 1.

8. According to interviews, this is not an uncommon occurrence. Returning the *firash el-atwa* money has a two-fold significance. The first is social, in effect signifying that the family's honor has no price. What Taher's family forfeited in cash, it subsequently gained in social prestige. The second is religious, affirming that real punishment is in God's sole domain. *Id.*

9. After being told the details of the case above, Ibrahim Shehada, director of the Gaza Center for Rights and Law, said that he, too, thought that all the proceedings described above were

I.
INTRODUCTION

The investigation of Palestinian customary law is important to those in the international community who seek to incorporate Western-style institutions in developing countries, in general, and are interested in "democratizing" and "stabilizing" the Middle East, in particular. On the face of it, the prevalence of customary law is a curious phenomenon, since the PNA (dependent on international aid) is under close European and American scrutiny to adapt its bureaucracy to Western notions of democracy and justice.[10] Therefore, it is important to remind U.N. and international field workers that the Palestinian judiciary did not develop in a vacuum. Rather, the Palestinians' long history of judicial techniques, and ongoing sociological conditions, perpetuate a customary law system. Understanding these factors is critical for those advocates hoping to create a fundamental change that does not disrupt the social fabric, or offend the cultural values, of Palestinian society.

Furthermore, this Comment rests on the conviction that any comprehensive peace in the Middle East entails both a formal and substantive process of reconciliation between the Palestinian and Israeli peoples. Peace and development researchers interested in facilitating coexistence in the Middle East need to understand the cultural roots, language, and actions of both these partners.[11] Effective communication is only possible when there is a deep appreciation of the social variables that are critical to one's partner-in-dialogue. In this case, the field of conflict resolution has much to gain from an understanding of Palestinian notions of reconciliation and justice.

Taher's story typifies the legal dynamics of modern Palestine, where the legal culture accommodates tribal law in conjunction with a nascent Western jurisprudence. For a variety of reasons, the PNA appears to be incorporating customary law into its fledgling bureaucracy. This Comment endeavors to understand the factors that have created this unique hybrid of Arab and Western legal practice.

In Part II, we will provide an overview of customary law as practiced and developed over centuries by the area's desert-dwelling Bedouins. We will de-

typical of a criminal case involving two families in Gaza. Telephone interview with Ibrahim Shehada, Gaza Center for Rights and Law (Feb. 8, 2001).

In Taher's opinion, the only atypical element was the fact that, as a result of the shooter's family's connections and clout, the policeman was released from jail early. Taher believes that, had this case not involved a policeman defendant, the perpetrator would have remained incarcerated for the duration of his one-year sentence. Taher, *supra* note 1.

10. Rex Brynen, *Buying Peace? A Critical Assessment of Internal Aid to the West Bank and Gaza*, 25:3 J. OF PALESTINE STUD. 80 (1996).

11. For a further discussion of this subject, see GREGORY TILLER, RESOLVING CONFLICT: A PRACTICAL APPROACH (1991); *see also* RAYMOND COHEN, NEGOTIATING ACROSS CULTURES, COMMUNICATION OBSTACLES IN INTERNATIONAL DIPLOMACY (1991). Both authors discuss the importance, in diplomatic negotiations, of fathoming the cultural differences between conflicting parties. Tiller emphasizes the importance of realizing that each conflict has a very specific cultural context. And since most conflict resolution facilitators come from a white, Western, educated background, cultural fluency is essential to the ability to facilitate effective communication.

scribe how socio-ecological conditions were instrumental in creating fierce tribal affiliation that, in turn, molded a judicial philosophy wherein individuals were not perceived as legal entities unto themselves, but rather as constituents of the larger, responsible clan. We will then briefly outline how this customary law dynamic persisted in Palestine throughout 500 years of foreign rule, including the advent of quasi-independence.

In Part III, we will explore the sociological underpinnings and patriarchal characteristics of Palestinian society that appear to be encouraging the incorporation of customary law into the PNA. We will argue that the neopatrimonial character of modern Palestine perpetuates traditional dynamics despite the institution of Western modes of government and civil bureaucracy. The manifestations of neopatrimonialism in modern Palestine are numerous, and the political framework, economic structure, and security apparatus all serve to perpetuate clientelism by strengthening tribal politics to the detriment of democratic modes of government organization.

In Part IV, we will provide a contemporary description of Palestinian legal culture. The Palestinian judiciary is beset by many problems inherent in the chaos and bureaucratic shortcomings inevitable to any new state. Customary law has stepped into the void to provide a viable recourse for the local populace to resolve their differences. Consequently, not only do the Palestinian judiciary and customary law exist side-by-side in an often symbiotic relationship, but the PNA appears to be encouraging the incorporation of customary law into its fledgling bureaucracy and officially facilitating the tribal law dynamic.

In Part V, we will conclude that customary law serves a dual function in Palestinian society. For the public at large, customary law supplements a legal system fraught with problems. In addition, this age-old tradition maintains social balance between the clans—an important function for neopatrimonial societies and one which Western legal jurisprudence does not fulfill. For Yasser Arafat, customary law is one of the building blocks augmenting clan politics and empowering clan heads who, because they are also dependent on Arafat for allocation of resources and political prestige, remain loyal to his rule. But by not allowing the judiciary to demarcate clearly its jurisdiction and enforce its rulings, this cultivation of tribal loyalty comes at the expense of democracy.

In the Afterword, we will hypothesize what lies in store for customary law in Palestine's near future and briefly propose some questions for further investigation and research.

II.
CUSTOMARY LAW

A. Overview

Palestinian customary law is based on the socio-judicial traditions developed over centuries by the area's desert-dwelling Bedouins. In the absence of central government, Bedouins used customary law as a way of resolving their

inter-personal and inter-tribal conflicts.[12] From a sociological perspective, the harsh reality of the Arabian deserts dictated that bigger and more united tribal clans had a better chance of survival. The ethos which developed, and which lingers to this day in traditional Arab societies, is that individuals never face trials alone. They always have the support of the wider clan.[13]

Because tribal (or *hamula*) affiliation within Bedouin culture revolved around the ability of the group to defend the life of its members and to protect their honor and property, Bedouins developed a legal system that preserved the clan's strong bond and mutual commitment.[14] No area of social life fell outside the jurisdiction of customary law. Every facet of Bedouin culture was regulated by this system and every conflict resolved through the mediation of its administrators.[15]

Unlike Western judicial philosophy, customary law does not put the rights and obligations of the individual at the epicenter of its legal culture. Rather, the onus of responsibility for any infraction by one of its members is on the entire clan. Thus, for instance, when one individual has a grievance against another, the "plaintiff's" extended family seeks redress as a unit and holds the "defendant's" whole clan accountable.[16] If the defendant is found guilty, the defendant's whole family must make restitution. Individuals are perceived as part of a greater unit, not as separate legal entities unto themselves. During any legal

12. AUSTIN KENNETT, BEDOUIN JUSTICE: LAW AND CUSTOMS AMONG THE EGYPTIAN BEDOUIN 13 (1968).

13. *See* Dan Soen and Mustafa Mashour, *The Influence of the Clan in the Political Life of an Arab Village in Israel*, 25:2 ORIENT (Hamburg) 257, 258-59 (1981).

14. KENNETT, *supra* note 12, at 27.

15. Historically, the Bedouin legal system was influenced by Islamic (or *sharia*) law, which deals with a wide range of issues such as property laws, crimes, torts, and family law. The basis of these laws stems from the Koran, the *sunna* (the ways of the Prophet Muhammed), the *hadith* (the sayings of the Prophet), various *fatwas* (authorized edicts issued after the death of the Prophet), *ijma* (problems solved by consensus among learned Islamic jurists), and *qiyas 'aql* (logical deductions made by Islamic judges when there is no appropriate legal text or precedent). For in-depth explication of *sharia* law, see SAYED HASSAN AMIN, ISLAMIC LAW IN THE CONTEMPORARY WORLD (1985), and ALHAJI A.D. AJIJOLA, INTRODUCTION TO ISLAMIC LAW (1989).

It is important to keep in mind, however, that customary and *sharia* law are distinct. While customary law is molded by the tenents of the Islamic faith, customary law incorporates many elements pertinent and specific to clan culture and politics, and its manifestations often vary according to locale.

16. The above may help to explain why some Palestinians can justify "terrorism." Palestinian society as a whole, if not actively supporting terrorists, displays a considerable amount of sympathy with their acts. This is evident in both the fiscal support and well-documented public honor these *shahids* and their families receive within the community. Assuming that Palestinians are not "moral monsters," one is left with the question: How can these people give both tacit and outward approbation to a phenomenon that is so roundly condemned by the international community? The answer may lie in this ingrained, social sense of collective responsibility. According to customary law, it is "just" to seek vengeance on those not necessarily directly responsible for a given crime but who belong to and identify with the aggressor. Within the tribal framework, such a legal philosophy allows an aggrieved tribe to demand retribution (or, in the case of manslaughter, even to kill an innocent member) from the aggressor's clan. AREF, *supra* note 5, at 87. It is reasonable to posit that, on a national scale, the Palestinians view themselves as the aggrieved party in the face of initial Israeli aggression (be it the *nakba*, the refugee situation from '48 and '67, house demolitions, land expropriations, or casualties from the Intifadas). Thus, Israeli society as a whole is collectively responsible, without any "innocent" parties.

proceeding, the honor and social standing of the defendant's entire clan is on trial.[17]

The primary administrators of this legal system are the clan heads, *kibar el-'a ila*, the elders of the tribe. For any problem necessitating an intermediary, clan members will first turn to their clan heads to mediate a solution.[18] If the problem is too difficult for the elders to resolve, they will pass it on to one of the various judges specializing in the matter at hand. Due to his charismatic personality, integrity, and wisdom, such a judge has an honorary status and quasi-legal standing bestowed upon him by the members of the clan.[19] While customary law judges do not have the discretion to impose a death sentence or even imprisonment, punishments can range from heavy fines to expulsion of a clan from a certain geographic area.[20] Usually a judge will specialize in a particular legal area, such as land disputes, debts, or litigation concerning dowries.[21] While judges are entitled to fees for their services, paid for by the relatives of the disputants, these judges often come from wealthy families and have the leisure to attend to the affairs of the *hamula*.[22]

B. The Persistence of Customary Law through 500 Years of Foreign Rule

Palestine has inherited many different legal legacies over the course of 500 years of foreign rule.[23] Throughout, Palestinians have persistently distrusted

---

17. *See* KENNETT, *supra* note 12, at 12-31.

18. These individuals are always powerful men. They might include the local mukhtar and they may be religiously ordained. *See* KATHERINE WING, DEMOCRACY, CONSTITUTIONALISM AND THE FUTURE STATE OF PALESTINE 13-15 (1994).

19. Shimon Haat and Avshalom Shmueli, *Customary Law Among the Bedouin Tribes of the Judean Desert who Settled in the Region of Bethlehem* (Hebrew), within a collection of articles written for the Prime Minister's Office on Bedouin Affairs, Israel (1971), 89-90.

20. *Id.* at 61. For example, during September 2000, in the West Bank village of El-Azariye, a man from the Mnazen family stabbed to death an individual from the Shweike family, when the two got embroiled in a heated argument while traveling along a narrow road. Apparently, the killer asked the victim to back up his car so that he could drive his tractor through an alley. The Shweike family member insisted on staying put. Eventually, the argument escalated to the point where the victim said: "Come down and fight if you want to solve the problem." The killer descended from his tractor and stabbed the Shweike family member repeatedly until he died. Interview with Nasser Khamees (a thirty-eight-year-old male from East Jerusalem), in East Jerusalem (Sept. 28, 2000).

The Palestinian police arrested the killer and put him in jail. Despite this arrest, the Mnazen family knew the murder would spark violent emotions and that they would have to act quickly to prevent the Shweike family from attacking them in revenge. They traveled to the surrounding towns and villages to entreat various clan heads to help ward off the Shweike family's vengeance. Tribal judges interposed and instructed the Mnazens to pack up all their belongings immediately and move (*jalla*) the murderer's whole family at least 50 km. away for an indeterminate amount of time while the truce negotiations took place. *Id.*

This relocation should have ushered in a "time-out" period (or *hudna*), ending any reprisal attacks until a truce could be reached. Apparently, however, the Mnazen family did not relocate quite quickly enough and the murder victim's family set fire to the Mnazen home, burning it to the ground. The Mnazen family moved to ward off further attacks and, at the time of the interview, were still in exile waiting for reconciliation. *Id.*

21. Haat, *supra* note 19, at 56.

22. *Id.* at 91.

23. For a complete overview of the judicial legacies inherited by Palestine, see John Quigely, *Judicial Autonomy in Palestine: Problems and Prospects,* 21 UNIVERSITY OF DAYTON LAW REVIEW, 697 (1996) and also ANNIS KASSIM, LEGAL SYSTEMS AND DEVELOPMENTS IN PALESTINE (1984).

their various occupiers' legal systems, which they have seen as tools of control and suppression.[24] During those different periods of rule, Palestinians preferred and relied on their own customary law system, which they regarded as an expression of their independence.[25] In general, foreign rulers turned a blind eye to this assertion of local, legal autonomy, thereby enabling customary law to persist.

The Ottomans ruled over Palestine from 1517-1917.[26] Up until 1839, (*sharia*) religious law formed the foundation of the empire's legal system.[27] In 1839, the Ottomans instituted a far-reaching legal reform, based largely on European models of jurisprudence, limiting the *sharia* courts' jurisdiction to matters of personal status, such as marriage and divorce.[28] Unofficially, however, the Ottoman rulers allowed Palestinians to continue to resolve their personal conflicts through the customary law framework.[29] To a large extent, this was due to the decentralized nature of the Ottoman Empire and the symbiotic relationship that developed between the local *mukhtars* and clan heads.[30]

Despite its declared intention to leave the local Ottoman law in place, when Great Britain occupied Palestine in 1917, it gradually began modifying the legal system.[31] The British transformed the national legal system into one that suited their own culture and convenience, and often legislated and implemented decisions without heeding the wishes or criticism of the people.[32] However, "it was [also the] British policy to leave local practice and traditional custom undisturbed as far as possible, where it did not intervene with the needs of the public order and good administration."[33] While the Palestinians were alienated by a new legal system that did not reflect their own traditions and values, they were left to their own devices to resolve local issues as they deemed fit. As a result, customary law continued to thrive, often functioning in parallel to, or in conjunction with, the ruling civil court system.[34]

Under Jordanian rule (1948-1967), the intermingling of the established and customary law intensified.[35] While Palestinians in the West Bank utilized the Jordanian legal system, (especially for civil issues), they often used both sys-

24. Interview with Dr. Nazmi Al-Jubeh, Birzeit University, in the West Bank (Feb. 20, 2001) [hereinafter Jubeh].

25. Ifrah Zilberman, *Customary Law as a Social System in the Jerusalem Area* (Hebrew), in 39 HAMIRAH HAHADASH, 71 (1991).

26. *Id.*

27. VIKTORIA WAGNER, PALESTINIAN JUDICIARY AND THE RULE OF LAW 30 (2000).

28. *Id.*

29. Zilberman, *supra* note 25, at 71. For more on the Ottoman's judiciary rule over Palestine, *see* WAGNER, *supra* note 27, at 30-31.

30. Hillel Frisch, *Modern Absolutist or Neopatriarchal State Building? Customary Law, Extended Families, and the Palestinian Authority*, 29 INT'L J. MIDDLE EAST STUD. 345 (1997).

The nature of this relationship will be elaborated on later in this Comment.

31. *See* WAGNER, *supra* note 27, at 32.

32. *Id.* at 33, 35-36.

33. *Id.* at 32.

34. For more background, *see also* H. E. BAKER, THE LEGAL SYSTEM OF ISRAEL, (1968) and GEORGE BISHARAT, PALESTINIAN LAWYERS AND ISRAELI LAW: LAW AND DISORDER IN THE WEST BANK (1989).

35. Frisch, *supra* note 30, at 345.

tems simultaneously.[36] This was particularly true for criminal issues, whose resolution necessitated not only punitive measures, an aspect well-suited to the intervention of British-modeled Jordanian law, but also required the resolution of a social component—the reconciliation of two extended families—a component best mediated through customary law. The Jordanian government viewed customary law as a legitimate complement to the official corpus of law in the Hashemite kingdom.[37] This was due, in part, to the influence of the Bedouins east of the Jordan River, as well as the growing power of the traditional Hebronite clans in Amman and Jerusalem.[38]

The Israeli military occupation of the West Bank and Gaza in 1967 brought about far-reaching structural changes to the court system established under the Jordanian and Egyptian administrations, as the existing law was substantially overhauled by new military orders.[39] Concurrently, a considerable portion of Palestinian lawyers and judges went on strike to protest against the occupation.[40] Israeli military officers, entitled to assume all powers formerly vested in the Ministry of Justice, soon controlled the entire civilian judicial system.[41] Israeli military officials staffed the courts and military tribunals superceded the criminal and civil jurisdiction of the Palestinian courts.[42] Consequently, after the Israeli occupation in 1967, use of customary law in the West Bank increased dramatically. The reasons for this were threefold: (1) the absence of a local police force to handle criminal and civil cases; (2) a total lack of faith and trust in the Israeli military judicial system; and (3) the utilization of customary law as an expression of the Palestinians' independence from Israel and an extension of their fight against the occupation.[43]

When the first Intifada erupted in 1988, the Palestinian leadership called on the local populace to boycott the local courts and civil administration altogether.[44] In the midst of rebellion and patriotic fervor, Palestinians refrained from asking the Israeli military to execute court judgments against other Palestinians, and instead resorted to other methods of conflict resolution, such as

36. The Egyptians ruled over the Palestinians in Gaza, but retained the prevailing legal system largely intact, mainly because they viewed themselves as the temporary administrators of a future Palestinian state. *See* WAGNER, *supra* note 27, at 37.

37. Frisch, *supra* note 30, at 346.

38. In these cities, for instance, the Hebronites developed the Khalil al-Rahman Association, which functioned as both a bureaucracy for the resolution of conflicts, mediated through customary law, as well as a structure by which to broker political prestige with the Jordanian government. At this time, customary law became part and parcel of the centralized state, incorporated into the country's laws and viewed by the Jordanians (and the Palestinian people under their control) as an integral part of their social and legal order. *See id.* at 345; *see also* Zilberman, *supra* note 25, at 78-79.

39. WAGNER, *supra* note 27, at 38-39.

40. *Id.* at 44. Once the Intifada began in the late 1980s, almost all resigned. *Id.*

41. *Id.*

42. *Id.* at 42. For an in-depth look at the structural changes of the legal system in the West Bank and Jerusalem after 1967, *see* RAJA SHEHADEH, THE WEST BANK AND THE RULE OF LAW (1980).

43. Jubeh, *supra* note 24.

44. WAGNER, supra note 27, at 44. The "Intifada" is the name given by Palestinians to their uprising against the Israeli occupation in the late 1980s.

traditional mediation.[45] Moreover, "the resulting social unrest of the Intifada devastated the functional operation of the courts by divesting the Palestinians of institutional resources, preventing the development of professional expertise, and halting the development of modern civil and criminal justice processes."[46] The jurisdiction of customary law expanded during the Intifada, both as a result of the paralysis of the Palestinian civilian judicial system and because customary law was regarded as an important nationalistic instrument abetting separation from Israeli rule.[47]

Customary law thrived despite the fact that young, progressive activists, a dominant force during the Intifada, tried to undermine its traditional authority.[48] The young Intifada leadership emphasized political affiliation more than clan affiliation, and they had many complaints about the system of customary law. Among other things, they felt it was increasingly run by corrupt clan heads who were swayed by money and power and upon whom they were no checks or balances.[49] Attempts were made to establish "national conciliation committees" (*lijan al-islah*) to usurp the power of customary law and mediate conflicts in a more centralized manner.[50]

The young, nationalistic Intifada leadership in the West Bank were not the only ones to oppose customary law. Radical Islamic forces, particularly Hamas, were also unhappy with the clan heads' degree of control, especially since these clan heads did not always behave in accordance with *sharia* law.[51] The prevalence of customary law stood as a barrier to the Islamists' desire to expand their political and judicial influence. However, both the Islamists and Intifada leadership had to bow to customary law's indispensable function during this critical period. People needed mediation more than ever, as economic and social pressures multiplied (due to the sanctions imposed by Israel) and no viable alternative existed for solving their problems.[52] Eventually, both leaderships accepted customary law as a necessary evil that obviated the need for Israeli police intervention.[53]

III.
NEOPATRIMONY

With the advent of quasi-independence, the Palestinians have begun state-building measures. With the international community looking over their shoul-

45. *Id.* at 44.

46. Hiriam E. Chodosh and Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38:2 HARVARD L. J. 377 (1997).

47. Jubeh, *supra* note 24.

48. Frisch, *supra* note 30, at 346.

49. Zilberman, *supra* note 25, at 82.

50. Frisch, *supra* note 30, at 346; Zilberman, *supra* note 25, at 87.

51. Zilberman, *supra* note 25, at 82-83. Islamic leaders often voiced their criticism by calling the clan heads corrupt and illiterate. Interview with Dr. Salim Tamari, Institute of Palestine Studies, in East Jerusalem (Aug. 28, 2000).

52. Zilberman, *supra* note 25, at 84, 87.

53. *Id.* at 88. Soon, customary law even informed the penalties meted out by the "national conciliation committees" and was used to adjudicate labor disputes. Frisch, *supra* note 35, at 347.

der expecting the implementation of Western modes of government, one might assume that the PNA would instill a centrally organized judiciary within Palestine. But Palestinian society is a neopatrimony, clinging to traditional methods of social organization despite the tides of contemporary change swirling around it.

The term neopatrimony connotes the integration of modernity with a patrimonial or patriarchal society.[54] In the sociological literature, neopatrimonies are societies that seem to have adopted (or are in the active process of adopting) Western modes and notions of governmental organization and civil bureaucracy, but whose social, economic, and political lives still revolve around patron-client relations, segmented lineages, and patriarchal hierarchy. In order to better understand this phenomenon, one must first understand the political and social nature of its predecessor—patrimonialism.

A. *Patrimonialism*

Political clientelism lies at the very root of a patriarchy's social contract. In societies based on patron-client relationships, power is based on the fact that the ruler, or "patron," is the dispenser of resources within the greater community.[55] The essence of the patron-client relationship revolves around the exchange of resources between the patron and the strategically located "client," in exchange for which the patron receives the political support of the client and his family.[56] The recipient, in turn, then uses these resources for his[57] own political and economic advancement and as a way to increase his network of alliances.[58]

According to Eisenstadt and Roniger, the core analytical characteristics of patron-client relations are as follows:

> The interaction on which they are based is characterized by the simultaneous exchange of different types of resources, above all instrumental, economic, as well as political ones (support, loyalty, votes, protection), on the one hand, and promises of solidarity and loyalty on the other . . . Solidarity is often closely related to conceptions of personal identity, especially of personal honor and obligations. At the same time, the relations established are not fully legal or contractual; they are often opposed to the official laws of the country and are based more on informal—although tightly binding—understandings. These relations are undertaken between individuals or networks of individuals in a vertical fashion rather than between organized corporate groups . . . These relations are based on very strong elements of inequality and power differences. The crucial element of this inequality is the monopolization by the patron of certain positions that are of

54. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947). Weber distinguishes between patriarchal society (one in which authority is found within the household) and patrimonial society (wherein authority is found within more complex political systems, extending through a network of functionaries and subordinates). Later scholars have blurred this distinction, maintaining that patrimonialism is an extension of patriarchy sustained by patron-client relationships. Patrimonialism is used in this article with the latter meaning.

55. JOHN PIERRE ENTELLIS, CULTURE AND COUNTERCULTURE IN MOROCCAN POLITICS 48 (1989).

56. *Id.*

57. The male pronoun will be used, as Arabs' traditional political culture is in the almost exclusive domain of male society.

58. ENTELLIS, *supra* note 55 at 48.

vital importance to the clients; especially, as we shall see later, to the access of the means of production, major markets, and centers of society.[59]

The allocation of resources is the patron's most effective lever of political control.[60] Compounding the patron's leverage is the fact that patrimonial societies are often socially segmented in regard to lineage (exemplified by the very strong *hamula*, or family clan, system predominant in Palestine) and are factionalized politically.[61] The lineage system provides the structure for political and social consolidation, as individuals in patrimonial societies view familial relationships in a manner in which the element of mutual advantage is essential.[62]

The development of segmented lineages is suggested by some general ecological conditions, as when the mode of production involves repetitive or periodic use of restricted, localized resources (such as with irrigation agriculture and pastoralism).[63] The restricted means of subsistence or wealth necessitates the clan's cohesiveness and contributes to their interdependence.[64]

Traditionally, the collective, pan-clan unit, consisting of various segments, is held together by some interclan (or intersegment) marriage and religious institutions. But the pan-clan unit often lacks a strong, cohesive, organic solidarity.[65] When, in the course of daily contact, the need to trade and settle feuds arises, segmented patriarchies resort to a legal culture conducive to their "nationally" fragmented condition. This structure falls short of an organized confederation between the clans, but is a system for resolving conflicts.[66] In Palestine, this necessity culminated in the development of tribal, or customary, law.

B. Neopatrimonialism and the Perpetuation of Clientelism

Many patriarchal societies founded on clientelism have undergone a political and bureaucratic transformation toward "modernity." Such a formal, politi-

59. S. N. Eisenstadt and Luis Roniger, *The Study of Patron-Client Relations and Recent Developments in Sociological Theory, in* POLITICAL CLIENTELISM, PATRONAGE, AND DEVELOPMENT (S. N. Eisenstadt and René Lemarchand, eds.) 276-279 (1981).

60. ENTELLIS, *supra* note 55, at 49.

61. PETER B. HAMMOND, CULTURAL AND SOCIAL ANTHROPOLOGY 183-84 (1964).

62. Such societies are mediated by what Clifford and Hildred Geertz have called the "person-centered ethic," in which the most important cultural norms are highly personalistic and sensitive to situational conditions and in which the guiding principle is the mutual advantage to individual, family, and clan. *See* CLIFFORD GEERTZ ET. AL., MEANING AND ORDER IN MOROCCAN SOCIETY 317 (1979).

63. HAMMOND, *supra* note 61, at 188.

64. Palestine may, some time in the future, be integrated into an Arab regional, or perhaps European/international, economy. At present, European aid notwithstanding, Palestine's resources are still very much "restricted" and "localized." Palestinians primarily rely on agriculture and day labor in Israel for their economy. The latter has been severely constricted due to Israeli security concerns. In a good year, unemployment in Gaza hovers around 25%. *Palestine Economic Forum, "Recent Economic Developments", at* http://www.palecon.org/update/jun98/developments.html. The U.N. puts the combined unemployment in the West Bank and Gaza at 12% before the second Intifada and 40% after. *Israeli Ban Tripled Palestinian Unemployment, Says U.N. Report, at* http://www.cnn.com/2000/WORLD/meast/12/05/mideast.economy. At least one third of Palestinians live below the poverty line. *Id.*

65. HAMMOND, *supra* note 61, at 182-89.

66. *Id.* at 184.

cal transition often emerges from the process of political and bureaucratic Westernization imposed during the course of colonialization or occupation.[67] When these societies achieve independence, the structural and bureaucratic vestiges of the West remain in a makeshift marriage with the traditional modes of self-rule. The resulting political system is known as neopatriarchy or neopatrimonialism.[68]

While modern, Western political systems champion the rights of the individual vis-à-vis the state, in a neopatriarchal system, the lines between state, society, and family are blurred. Primary dimensions of such a system are "a central bureaucracy that is increasingly subject to rational criteria of organization, recruitment, and training, and political elites that, in terms of education, exposure to outside currents of thought, mental outlook, and career expectations, are 'somewhat' removed from the traditionalistic, clientelistic, and particularistic ethos of the patrimonial regime."[69]

However, characteristic of the neopatriarchal society is the fact that, whatever the accoutrements of the legal, political and bureaucratic systems, the internal structures remain rooted in the patriarchal values and social relationships of kinship, clan, and religious and ethnic groups.[70] Thus, modern and patriarchal elements are wed together in an odd union. Ironically, rather than fundamentally changing, the patriarchal structures of Arab society remain strong in such a union, even if the patriarchal elements now inhabit the guise of a modern bureaucracy.

Neopatrimonies are political cultures still run on the basis of patron-client relationships, superimposed on the facade of Western, democratic political culture.[71] Neopatriarchies differ from patriarchies in that they variously combine and overlay the informal social structures of patrimonialism with the formal and legal structures of the state. However, the "modern" changes have more to do with form and style than substance, because these societies lack the inner force, organization, and consciousness that characterize truly modern formations.[72] Moreover, "neopatrimonialism, in general, and neopatrimonial corruption, in particular, are generally corrosive of political institutionalization, since they suggest the primacy of 'connections' rather than the formal structures of law, constitutionalism, and bureaucratic procedure."[73] Patronage and clientelism overwrite formal lines of accountability.

Economics propels the perpetuation of clientelism. Neopatriarchies generally take root in underdeveloped and dependent socioeconomic societies. Thus, the redistribution of resources becomes focal in controlling clan heads and the

67. HISHAM SHARABI, NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN ARAB SOCIETY 21, 61-83 (1988).
68. *Id.*
69. ENTELLIS, *supra* note 55, at 49.
70. SHARABI, *supra* note 67, at 8.
71. Brynen, *supra* note 10, at 25.
72. *Id.*
73. *Id.*

social elite and in molding subsequent political organization.[74] Some researchers, such as Nelson and Brynen, claim that corruption is at the very heart of the neopatrimonial system.[75] In Morocco,[76] for example, during King Hassan's rule in the mid-1980s, "the view remain[ed] prevalent that power and politics were the monopoly of the few, that political institutions are rather insignificant, and that government service is an opportunity to advance private and family interests, not to work for the betterment of society as a whole."[77]

The observation about Morocco is true of neopatrimonial societies in general, where public office represents an important mechanism of private rent-seeking.[78] The state's ability to extract resources and regulate behaviors creates conditions under which the supply of, and access to, scarce goods can be manipulated. Thus, state resources (and the state's ability to shape resource flows) are used to lubricate patron-client networks—the fundamental foundation of the power of patronage.[79] In turn, families maintain control "over their members by maintaining their importance as sources of capital accumulation in the absence of modern intermediary financial institutions, as a social support system, and as an important link to state-directed patronage."[80]

Despite the allure of democracy, Arabs in neopatriarchal societies are mostly distrustful of Western-style governments and are threatened by the theoretical and practical notion that they are "individual" citizens—legally and culturally "independent" from the family, clan, or religious group.[81] For many Arabs, this distrust is partially rooted in their history of occupation, imperialism, or colonialism. Moreover, dependency on the clan is fostered on an economic dynamic built around agrarianism, pastoralism, and limited trade.[82] In such a precarious financial environment, loyalty to kinship easily supercedes any potential benefits inherent in an abstract, Western concept of nationhood or civil society.

Arab societies are built on the lubricant of the patronage system, known as *wasta*—the distribution of favor and protection.[83] This, in real terms, is what decides the professional and economic fate of citizens in a patriarchal society

74. SHARABI, *supra* note 67, at 1-7.

75. "Corruption" here is defined as "the sharing of spoils available through the linkage of the traditional patronage system with a modern administrative system." MOROCCO: A COUNTRY STUDY (Harold D. Nelson, ed.) (1978). This is "corruption" as defined in the Western sense. A member of a patriarchal society may very well see this as the fair and normal distribution of resources – in many ways no different than the control big corporations in Western countries have over politicians by dint of the social network, business connections, or lobbying power they can afford to buy.

76. Within the body of sociological literature, post-colonial Morocco has been extensively studied and is commonly cited as one of the models of neopatrimonialism.

77. ENTELLIS, *supra* note 55, at 55.

78. Brynen, *supra* note 10, at 25. "Rent-seeking" is when a group or individual extracts money or privilege from the state which is not justified on utilitarian or efficiency grounds for the polity as a whole.

79. *Id.*

80. Frisch, *supra* note 30, at 344.

81. SHARABI, *supra* note 67, at 45-46.

82. *Id.* at 31.

83. For a full discussion, *see* ROBERT CUNNINGHAM AND YASIN SARAYRAH, WASTA: THE HIDDEN FORCE IN MIDDLE EAST SOCIETY (1993).

and consolidates their sense of identity. Confronted with a feeling of impotence against dire economic and social forces, patronage allows even the lowliest individual the possibility to survive and the recourse to be heard and considered through a network of extended family and friends.[84]

C. Neopatrimonialism in the Palestinian National Authority

Measuring the extent of the patron-client dynamic in Palestine is not an exact science, particularly since the very nature of clientelism is closed, informal, and personal. However, since the 1990s, articles on the subject have proliferated, particularly by those dissatisfied with what they see as corruption within the PNA. It is important to note that there are many contextual factors that create, sustain, and encourage neopatrimonialism in the PNA. Some of these can be directly linked to Arafat's personal leadership. However, neopatrimonialism did not begin with the creation of the PNA. Rather, Palestine's neopatrimonial character has been a process in the making as far back as Ottoman rule.

1. Historical Underpinnings

During their rule, the Ottomans created the official post of the *mukhtar* to maintain control over a vast empire and to mediate between the state and the local inhabitants. Ottoman rulers formed alliances with these *mukhtars*, who were clan heads, and used them as intermediaries between the local people and the Ottoman authorities.[85] In this manner, the Ottoman authorities co-opted sheikhs from powerful clans by entrusting them with various administrative tasks, including the collection of village taxes.[86] In return, the Ottomans allowed the clan heads to retain control over their own tribal practices and to set aside a percentage of the taxes for their personal revenue.[87] As Rex Brynen states, by empowering the *mukhtars* to perform certain official functions, the central Ottoman administration essentially franchised state power in exchange for political loyalty and local influence.[88]

During the Mandate period, the British administration also sought to co-opt the social elites by granting or withholding political access and by awarding loyal notables with administrative powers. After 1948, the Jordanians strengthened this dynamic in the West Bank by continuing the role of the village *mukhtars* and by giving leading Palestinian families cabinet appointments.[89] Even the Likud in the early 1980's, in an effort to establish control over the local Palestinian population, attempted to nurture patron-client relationships with a new breed of social elites (the "Village Leagues"), providing them with funds,

84. Sharabi, *supra* note 67, at 46.
85. Frisch, *supra* note 30, at 345.
86. Abner Cohen, Arab Border-Villages in Israel 5 (1965).
87. Frisch, *supra* note 30, at 345.
88. Brynen, *supra* note 10, at 26.
89. Brynen, *supra* note 10, at 27. It is interesting to note that, even after 1967, Jordan continued to pay civil services salaries (particularly those relating to the Religious Authority) in an effort to maintain influence.

arms, and an intermediary policing role between the local population and the military government. The Israeli civil administration viewed this alternative leadership as vital in weakening the power base of the PLO in the West Bank.[90]

Foreign governments are not the only "culprits." The PLO itself, in its capacity as a government-in-exile, also encouraged patron-client relationships. With the external funding provided by the oil-producing Arab states, the PLO fostered fealty and consolidated its control by allocating resources and extending services, first in Lebanon and, later, in northern Africa and Palestine. Some estimates put total PLO expenditures in Lebanon between the years 1975 to 1982 at 400 USD million, an amount rivaling the Lebanese state budget.[91] It is estimated that prior to the establishment of the PNA, about 500 USD million was funneled into the territories between the years 1977 to 1985.[92] Some of this went to support housing, agriculture, and education, but an equally sizable amount took the form of patronage—money for nationalist institutions and personalities (the primary beneficiary being Fatah) at the expense of the burgeoning civil society. During the Intifada, the PLO compensated riot casualties and supported families of prisoners. This created gratitude and fidelity to Arafat and solidified a chain of patronage all the way through to small rural villages.[93]

Modern institution-building notwithstanding, clientelism exists in the PNA today as well. Evidence of present-day neopatrimonialism in Palestine may be separated into three categories: (1) politics; (2) economics; and (3) security apparatus.

2. *Contemporary Politics*

Its democratic nature notwithstanding, the results of the 1996 elections in Palestine fall primarily into a neopatrimonial pattern. Prior to the vote, the Palestinian election commission decided on a simple majority system with open lists. Palestine was divided into sixteen electoral districts, which voted on eighty-eight seats in the Palestinian Legislative Council (hereinafter PLC).[94]

As clans in Palestine tend to congregate in certain cities and regions, the decision to hold the elections according to districts (rather than on a national basis, as is done in neighboring Israel) encouraged voting along tribal lines. The majority system gave better chances to candidates relying on their personal reputation, family relations, or tribal connections rather than on political programs or party affiliations.[95] Another factor working against strictly political affiliated voting was a recent decrease in PLO influence in the West Bank and Gaza after a PLO economic crisis (following their much-maligned support of Iraq during the Gulf War), which necessitated that individuals once again look to their ex-

90. Salim Tamari, *In League With Zion: Israel's Search For a Native Pillar*, 12:4 J. OF PALESTINE STUD. (1983).

91. Brynen, *supra* note 10, at 28.

92. *Id.*

93. *Id.* at 29.

94. *See* Lamis Andoni, *The Palestinian Elections: Moving Toward Democracy or One-Party Rule*, 25:3 J.OF PALESTINIAN STUD. 9 (Spring 1996).

95. MOHAMMED DAJANI, PALESTINIAN ELECTIONS (1998).

tended families for support.[96] And the contemporaneous fact that the main party opposition, Hamas, boycotted the elections, leaving voters without a serious ideological alternative, was also influential.[97] According to Dr. Nabil Kukali (from the Palestinian Center for Public Opinion): "I was a candidate in the 1996 elections for the PLC. I can tell you from my own experience that people didn't vote according to political affiliations or according to the candidate's knowledge—people voted according to clans."[98]

Many of the leadership returning from exile won seats in the elections, even though this countered the notion that there was strong resentment against this imported leadership.[99] One possible explanation for their success in the elections could be that "the officials returning with Arafat relied heavily, perhaps even more than most Fatah candidates, on the PNA's structures (including security) in their campaigns. In some areas they were called the 'Authority's candidates.'"[100] These winners represent a quasi-clan whose allegiance revolves around Arafat and who are indebted to him for their seats in the Legislative Council. They are political elites, socialized in Arab countries, who are interested in patron-client norms rather than democratic agendas.

As for the PNA, most of the important ministries were given to Arafat's subordinates from Tunis and members from big clans.[101] These individuals are very influential in Fatah and often have academic backgrounds, which allowed Arafat to combine two symbols in one (family association and academic prestige). A more significant indicator of neopatrimonialism is how Arafat handled

96. Brynen, *supra* note 10, at 29.

97. Interview with Jamil Hillal, Palestinian researcher, in Ramallah (Mar. 22, 2001).

98. Interview with Dr. Nabil Kukali, Director of Palestine Center for Public Opinion, in Bethlehem (Mar. 22, 2001).

The voting patterns within each of these districts substantiate the theory that the local populace voted according to clan affiliation and loyalties. The eight members from the Nablus district who won seats on the Palestinian Legislative Council serve as an example. At least four were Arafat-appointed Fatah/PLO returnees and important clan members.

Dr. Maher El-Masri (now the Minister of Finance and Trade) is originally from Nablus and comes from a large, rich, established clan whose power extends to both the Ottoman period and, in a more pronounced way, to Jordanian rule. The second Nablus representative, Mu'aweh El-Masri, is related to Dr. Maher El-Masri and won because of his tribal affiliations. Ghassan Ash-Shakaa (the mayor of Nablus) is also from a large, wealthy and established clan. Fayez Zeidan, a returnee and Arafat appointee originally from Tel village near Nablus, is not from a large clan. His election is due to his affiliation and loyalty to Arafat himself. Jubeh, *supra* note 24.

The other four PLC members from the Nablus district represent a particular constituency—the refugee camps and the Samaritans—and represent a counter-vote to traditional clan politics. The elected PLC members are Hussam Khader, Kamel Al-Afghani, and Dalal Salameh, from Balata refugee camp, who won the "refugee camp" vote in the area of Nablus (such as Balata, El-Ein, Askar and Fara). Their election embodies that animosity felt towards the well-to-do residents in Nablus and the hope that they will fight to improve the refugee camps' historically ignored predicament and to ease their hardships. The Samaritan sect in Nablus was allocated one seat, which Saloum Al-Kahen won due to this quota. *Id.*

It should be noted that only five of the total eighty-eight PLC seats went to women.

99. Andoni, *supra* note 94, at 15.

100. *Id.*

101. Jubeh, *supra* note 24. The latter include Nabil Shaath, Minister of Planning and International Cooperation; Ahmed Qrei' (Abu Ala), Palestinian Legislative Council Speaker; and Muhammed Zuhdi Nashashibi, Minister of Finance. *Id.*

the charges of corruption levied against his ministers by the PLC in 1998. After an investigative committee was set up to examine the affair, and after its members issued a preliminary report, Arafat suddenly "promoted" the most prominent members of that committee to the rank of ministers.[102] None of the ministers involved in the alleged corruption lost their positions.

Institution-building on the local level is still very vague and in the nascent stages of structuring. The primary principle informing the appointment process appears to be tribal accommodation, as it is of paramount importance to preserve the balance between the major clans in the cities.[103] Accordingly, municipal officials are appointed by the agreement and consensus of the large clans,[104] and the individuals who occupy local and municipal council seats are usually representatives from the various large families. (However, the choices do have to be formally approved by the Minister of Local Affairs.) The official explanation for the lack of citywide, democratic elections for these posts is that these areas are in "Area B" and, therefore, not fully under Palestinian control.[105] But perhaps the real reason is that, since the Minister of Local Affairs has to approve the appointment, Arafat can have better control of officials who are under the constant and looming threat of dismissal.

3. *Modern Economics*

The PNA's dependence on Western aid to finance its fledgling state, and the consequent donations that have poured in from abroad, have maximized the executive branch's potential for patronage. Western donor countries have high expectations about the accountability and transparency of PNA financial dealings, and Arafat's (mis)management is hotly debated.[106] Meanwhile, the PNA has inflated its bureaucracy beyond the reach of any rational, objective criteria. For instance, it did not fire the 21,000 Palestinians who worked for the Israeli civil administration, but instead added 20,000 more clerks, who came from Tunis, and another 40,000 policemen and security apparatus officers. These employees all depend on the government for their salaries.[107]

Many Palestinian academics and officials have gone on record bemoaning the misappropriation of PNA funds sacrificed to the altar of patronage. For instance, Dr. Hisham Awartani, one of the top experts on the Palestinian economy, said: "The inflation of the bureaucracy is a disaster for the economy . . . In

102. Co-opting the opposition with the lure of access to power and resources is a typical trait of neopatrimonialism. As of September 10, 1998, there were 24 ministers in the PNA government, out of a total of eighty-eight PLC members.

103. An interesting twist on this principle occurred in Bethlehem when, after much deliberation, the various sides could not agree on a governor (since there was no dominant clan in the city). Eventually, Arafat appointed a governor from a prominent Hebronite tribe in order to keep the delicate balance between the Bethlehemite clans.

104. Jubeh, *supra* note 24.

105. "Area B" is territory under the civilian administration of the PNA, but the military/security control of Israel.

106. Brynen, *supra* note 10, at 79-84.

107. Ronen Bergman and David Ratner, *The Man Who Swallowed Gaza*, HA'ARETZ Weekend Supplement, Apr. 4, 1997.

reality, no one can be fired . . . Arafat needs these people as a political power base, and therefore he pays salaries out of the slush fund."[108]

The economic corruption in the PNA has also been much commented upon in the West and by human rights groups in Palestine. This phenomenon is perhaps best summarized in an article in the Israeli weekly, *Kol Hazman*, on January 2, 2001 (describing a rare crackdown on corruption by the paramilitary Tanzim during the most recent "Al-Aqsa" Intifada):

> SENIOR PA FIGURES FEAR FOR THEIR LIVES
>
> *Kol Hazman* (p. 31) by Hanan Shlein—Senior PA [Palestinian Authority] officials involved in corruption, and in hiding millions of dollars in their private accounts, now fear for their lives. Palestinian sources in Gaza said that some of them have fled from the PA, while some have found shelter in Arab countries. Others have fled to the U.S. and Europe, where they prepared themselves an economic shelter by means of the money they put in their private pockets over the years from money that belongs to the Palestinian Authority.
>
> Senior Fatah Tanzim officials take credit for the initial steps to cleanse the PA of the taint of corruption, which international figures believe has reached hundreds of millions of dollars embezzled from the PA since Arafat arrived in Gaza seven years ago.
>
> The signal to launch the campaign for cleansing the corruption plague was given two weeks ago when masked men in Gaza assassinated Hisham Maki, the director general of Palestinian television. Gazans claimed that Tanzim activists committed the assassination. A month and a half before this killing, a leaflet was published in the city accusing Maki of embezzling millions of dollars. It was said that Yasser Arafat had given him a month's time to return the money, but he ignored the warning and was consequently eliminated.
>
> The same leaflet accused Ghazi Al-Jabali, the Palestinian chief of police, of corruption. Last Tuesday, Yasser Arafat informed Jabali of his dismissal from the chief of police and of his appointment as PLO ambassador overseas. Senior sources in the PA said that Jabali did not have a lot of choice, what with the leaflet and Maki's liquidation reverberating in the background. That same day he left Gaza for Egypt on his way to his new posting. A senior Palestinian source said that Jabali was protected by his special relations with Yasser Arafat and with the heads of the Palestinian security services.
>
> Ever since Maki's execution, the personal safety of senior PA officials has been undermined. For example, reports from Gaza say that one of those who fled to the U.S. was the person responsible for appointing functionaries in the PA. "This was one of the most sensitive positions, and there is suspicion that this senior personage exploited his position to do favors on a large scale," a senior PA official said. Senior PLO Tanzim figures, which are riding the wave of the Intifada's success, want to make the most of this success to force Arafat to clean the stables, a move that would also be chalked up to their credit. Ever since Maki's elimination, senior Tanzim members have not stopped talking about the need to eradicate corruption[. . .][109]

This article illustrates how economic neopatrimonialism occurs: access by an elite few to government funds; misappropriation of those funds; and re-

108. *Id.*

109. Hanan Shlein, *Senior PA Figures Fear for Their Lives*, KOL HAZMAN, Jan. 2, 2001 (Robert Terris, trans.), at 31.

warding loyal aides, not only with financial resources but by turning a blind eye to their corruption.

The key economic monopolies in the PNA (the fuel, tobacco, and cement monopolies) are all headed by government ministers who are close and loyal Arafat aides dating back to his days in Tunis.[110] The heads of these monopolies buy products from Israeli manufacturers or importers, and sell them in Palestine for much higher prices. The profits finance PNA operations that international donor nations refuse to fund (such as the enlarged security establishment) or disappear into private pockets (according to some allegations).[111]

It could be posited that one reason why the monopolies may be in the hands of a select few is that income tax has yet to be widely implemented in Palestine and government revenues must flow via these monopolies. But such allocation of resources has the inherent danger of corruption. And, because the PNA issues import licenses, few applicants outside of the loop are allowed to operate. Many Palestinian merchants discovered, to their chagrin, that the monopolies led to the elimination of competition and the closing of markets and contracts that had been open under Israel's administration. At present, there is usually only one supplier from whom the populace can buy imported goods.[112]

PLC member Hussam Khader, from Nablus, says of this phenomenon:

> They cut up the pie among themselves. The Palestinian leaders thought that our economy was some sort of inheritance due to them and their children. Every senior official got himself a fat slice of the imports into the Authority. One got the fuel, another got the cigarettes, yet another the lottery, and his crony the flour. Gravel is a monopoly belonging directly to the security apparatuses, and the fortune they earn from it finances their operations.[113]

The above patterns are symptomatic characteristics of neopatrimonialism. Asymmetrical power relations and discriminatory access to scarce and desired private goods characterize the very essence of patronage and elite control over resource distribution.[114] The clientelistic model is predicated on the tension between the free flow of resources, on the one hand, and attempts to limit this flow

110. Jubeh, *supra* note 24. The tobacco monopoly, for instance, is headed by Abu Ala, Mohammed Rashid (Arafat's close advisor on economic affairs), and Finance Minister Muhammed Zuhdi Nashashibi. *Id.* Rashid, Nashashibi, and Minister of Civil Affairs Jamil Tarifi head the cement monopoly. *Id.* The fuel monopoly is headed by Nashashibi, Rashid, Chief of Preventive Security Services in the West Bank Jibril Rajoub, and Harbi Sarsour (another long-time close associate of Arafat). Bergman, *supra* note 107. Note that Rashid is involved as a partner in each of these three major monopolies.

111. Bergman, *supra* note 107. Thus, for example, Jibril Rajoub, the Chief of Preventive Security Services in the West Bank, directs both the casino in Jericho, which profits about 12.5 million dollars a month, and the fuel monopoly. In his capacity as head of the fuel monopoly, Jibril Rajoub announced right after the PNA took control of the territories that, henceforth, gasoline service station owners would be required to pay an additional tax, at a rate based on their daily sales. Preventive Security "fuel patrols" took daily measurements at the service stations and these funds were funnelled into his security branch. *Id.*

112. These monopolies also filter down to the children of Arafat confidantes. For instance, Paltech, an importer of consumer electronic entertainment (such as television and VCRs) is owned by Yasser Abbas, the son of Abu Mazen. *Id.*

113. *Id.*

114. John Waterbury, *An Attempt to Put Patrons and Clients in their Place*, *in* PATRONS AND CLIENTS IN MEDITERRANEAN SOCIETIES (Ernest Gellner and John Waterbury, eds.) 334 (1977).

on the other. Patron and brokers try to control access to such economic centers. As Eisenstadt writes: "It is the combination of potentially open access to the markets with continuous semi-institutionalized attempts to limit free access that is the crux of the clientelistic model."[115]

The availability of external resources via donations from the international community has increased the phenomenon of clientelism within the PA, for it has provided more opportunities within the government bureaucracy to reward family members and those loyal to the patrons and to maintain a dominant political coalition. It would appear that Arafat is eager to see the funds from the international community channeled directly through the PA, without the restrictions of earmarking, so as to maximize the potential for patronage and prevent other groups from bypassing his control over these resources.[116] He also appears to be keeping tight control over the reins of political and economic decision-making in order to prevent both the elites and the mass constituencies from gaining power. Thus, corruption perpetrated by subordinates is tolerated so long as they remain loyal.[117]

4. Security Apparatus

Often the most developed and well-organized aspect of a neopatriarchal state is its large internal security apparatus. Ultimately, the civil and political arenas are subordinate to this secret police structure.[118] This is certainly true in the Palestinian Authority.

Despite the fact that the Oslo Accords limit Palestine to a 15,000 member police force, most reports claim that the PNA has far exceeded that number (now around 40,000) by setting up "non-police" security organizations such as the *mukhbarat*.[119] Many of the Fatah former cadres and the PLO's Diaspora military fighters have been integrated into this police force, both as a means of rewarding them for their support and affiliation and as a way of incorporating them into a quasi-military organization.[120]

The proliferation of security forces is an important element in neopatrimonialism, as it decreases the power of any one security agency by increasing the competition among many forces all working in a show of allegiance to one leader (in this case Arafat). Graham Usher states that there are anywhere from four to nine PA intelligence forces operating in the West Bank and Gaza, including the General Intelligence Service, the Preventive Security Service, the Presidential Guard, and the Special Security Guard. The most ominous feature of this division is that it makes it impossible to clearly delineate the separate do-

115. Eisenstadt, *supra* note 59, at 280.
116. Brynen, *supra* note 10, at 83-84.
117. Brynen, *supra* note 10, 32-33.
118. SHARABI, *supra* note 67, 8.
119. Graham Usher, *The Politics of Internal Security*, 25:3 J. OF PALESTINE STUD. 22-23 (Winter 1996).
120. *Id.* at 28-29.

main of each apparatus. Ultimately, the blurred lines of responsibility increase Arafat's power leverage.[121]

What is marked about the Palestinian security forces is their loyalty to their commanders and Arafat at the expense of civil society. This abiding allegiance can be partly explained by the fact that the plethora of competing security forces gives Arafat enormous scope for influence. The "one boss but a thousand franchises" syndrome consolidates Arafat's rule by increasing the conflict among the various security forces that are in constant contention for Arafat's patronage.[122] This forestalls the coalescing of any alternative power centers. And, in the context of this Comment, the fealty to Arafat undermines the judiciary's ability to enforce its rulings.

IV.
CONTEMPORARY PALESTINIAN LEGAL CULTURE

Palestinian judicial culture is an amalgamation of *sharia* law (whose jurisdiction, while historically encompassing every aspect of Islamic society, is today primarily relegated to family law), customary law, official *islaah* committees (quasi-official institutionalizations of the customary law forums), and a mosaic of civil and criminal law that is based on Ottoman, British, Jordanian, Egyptian, Israeli, and Palestinian precedents.[123] Compounding the problem of overlapping and inconsistent legal sources is the fact that, as mentioned above, from 1967, the Palestinians have been divested of operational authority. During Israeli occupation, this took the form of military rule circumventing Palestinian judicial autonomy. During the social unrest of the first Intifada, the development of professional expertise and institutional resources halted altogether. When the PA eventually signed the Cairo Accords, they inherited a barely functioning legal process.[124]

In late 1995 and 1996, Palestinians finally had autonomy over their court system, but they were confronted with a dearth of institutional and human resources, which impeded the adoption of Western modes of jurisprudence.[125] In part, this was due to the fact that, for nearly three decades, no local law schools existed. Aspiring lawyers had to pursue their education in foreign countries. If

121. *Id.* at 22-24. Usher states that another reason for absorbing the Fatah Hawk and Panther wings (which were disbanded in September 1993) into the Preventive Security Forces was to prevent them from "feeling excluded and possibly forming an oppositional constituency. Their absorption into Preventive Security Forces not only pays them a wage, it affords them a political and social status commensurate with their former role as fighters." Moreover, to further decrease the development of rival factions, many of the former "chieftains," as well as some of the former dissident cadres, have been patronized with promotional rankings such as "general" and "colonel." *Id.* at 28.

122. *Id.* at 29.

123. It should be further noted that the legal precedents and codes in the West Bank and Gaza are not identical, due to previously separate Jordanian and Egyptian administrations. However, this Comment will not differentiate between the two so as to focus on the development of customary law among the local populace.

124. Chodosh, *supra* note 46, at 377.

125. *Id.* at 379.

and when they returned, no certification process or regulatory bodies existed.[126] Currently, there are only two law schools in the West Bank and Gaza, one of which engages only in research. There are around 800 lawyers employed in the West Bank and, in Gaza, only 100 of approximately 400 attorneys are considered professionally competent.[127] Palestinian courts do not guarantee indigent defendants the right to counsel.[128] Even when counsel is appointed, there exists no institutional training for attorneys and a severe shortage of funds for appointed counsel.[129] Few with legal experience are willing to take such jobs.[130]

Court resources, in general, are very poor. Gaza employs only about twenty-five judges and twenty prosecutors for a population in excess of one million.[131] The West Bank similarly employs approximately forty-five judges and prosecutors for a population in excess of 1.4 million.[132] Judges are not only poorly compensated for their work (making them potentially susceptible to corruption) but must shoulder the burden of much of the administrative work in their courts (such as that of research clerks, court reporters and administrators).[133] Thus, very few qualified lawyers will even consider offers to become judicial officers.[134] Palestinian legal analyses reveal both an increasing backlog in the Palestinian courts and poor quality of judicial disposition.[135]

Court proceedings are further encumbered by the fact that Palestine's multiplicity of legal sources, reflecting the numerous layers of foreign influence, combined with the lack of published legal texts and judicial decisions within Gaza and the West Bank, creates confusion as to which authorities have precedence in any given case. Moreover, the diversity of foreign training among Palestinian lawyers and the general unavailability of legal education at home cause many lawyers to be uneducated about Palestinian law.[136]

In addition to procedural inefficiency and administrative shortcomings, the justice system has been hampered by interference from the executive branch of the PNA. For instance, the executive branch allows a military court system to function independently of the civilian courts. The various members of the Palestinian police force are answerable only to that system. Moreover, Yasser Arafat has established state security courts, a legal remnant of the British Mandate's emergency laws formally based on the 1979 Revolutionary Penal Code, a

126. *Id.* at 380.

127. This is in the opinion of leading legal authorities in Gaza. *Id.* at 430-31, note 394.

128. The court will appoint counsel to a defendant only if the crime in question carries a possible sentence of three years or more (in Gaza) or twenty-five years or more (in the West Bank).

129. *Id.* at 419, 423.

130. *Id.* at 423.

131. Chodosh, *supra* note 46, at 428.

132. *Id.*

133. *Id.*

134. *Id.* at 427.

135. For instance, a typical court calendar schedules thirty-five to forty-five cases per day. However, judges typically work five or six hours in court, and each case requires approximately an hour of their court time. For more systemic problems, *see id.* at 408-431.

136. Chodosh, *supra* note 46, at 431.

code which the PLO originally drafted in order to discipline and regulate its military forces dispersed around the Arab world.

The establishment of these military and state security courts has encroached on and stripped the civil judiciary of many of its powers and jurisdictions. For instance, cases which should be in the purview of the state courts (such as bouncing checks, taxation, fraud, drugs, and murder) are sometimes transferred to military courts.[137] And state security courts, which ostensibly only have jurisdiction over crimes which infringe on internal and external national security, are more often used to try alleged members of opposition groups (such as Hamas and Islamic Jihad) and to silence human rights activists.[138] Exacerbating the lack of public confidence in such a judiciary is the fact that the procedures in the state security courts violate minimum safeguards for a fair trial: hasty procedures do not allow the defendant to sufficiently prepare for trial; technical reports, such as those provided by a forensics unit, are not incorporated into trials; and sentences may not be appealed.[139]

A. The Role of the Police

An important component of any legal system is its coercive element, that which enforces the ruling of the judiciary. In traditional societies, this may constitute social pressure, the fear of ostracism, or the threat of war by a rival family or clan. In modern legal cultures, police fulfill this function.

The role of the police in the young PNA, however, is problematic. The PNA's excessive militarization tends to encroach on the judicial establishment, both actively and passively interfering with the civil judiciary. For instance, Palestinian police are often reluctant to involve themselves in what they perceive to be minor criminal matters.[140] This is due to the deference shown to customary law, to the lack of professional training in this fledgling police force, and to the fact that many PNA police view themselves primarily as freedom fighters—a paramilitary whose main concern is ending Israeli occupation.[141] People who want to find legal recourse through the state courts may be hesitant to do so for fear that they will meet with the indifference of the Palestinian police.

Police passivity is not the only problem. The security services, which see themselves as the long arm of the executive authority, also actively undermine

137. Apparently this occurs when members of the security services are being prosecuted for the aforementioned crimes. *See LAW Calls for the Compliance with the Court Decisions and the Refrain from Undermining the Judiciary by the Executive Authority,* PEOPLE'S RIGHTS, Mar. 2000, at 35; *How Can We Stop the Decline of the Judiciary?,* PEOPLE'S RIGHTS, May 2000, at 38.

138. WAGNER, *supra* note 27, at 134, 137.

139. *See The State Security Court and Alan Nahel's Case,* PEOPLE'S RIGHTS, Feb. 2000, at 37. Recently, Arafat tried to co-opt civil court members by pushing through the appointment of Attorney General Khalid el-Qidreh as the Attorney General of the State Security Court, a move that was vociferously protested by human rights watch groups. *See Undermining Judicial Independence,* PEOPLE'S RIGHTS, Dec. 1999, at 38.

140. Jubeh, *supra* note 24.

141. Indeed, most police recruits took an active role in the last Intifada and are now on the front lines in skirmishes with the Israeli Defense Forces during the present Intifada.

the judiciary by blatantly disregarding proper procedure and court orders. In some cases, police forces have taken it upon themselves to

> fight crime, solve clan or family disputes, and mete out punishment to those accused of "moral offences" such as drug-taking and prostitution. In Gaza and Jericho, these actions occur in the shadow of the PNA's [Palestinian Authority's] jurisdiction; in the West Bank, often in the name of Fatah. In both areas, they are being carried out illegally and beyond any remit of judiciary scrutiny.[142]

The police not only act independently of the civil judiciary, but sometimes actively disregard its rulings as well.[143] The Palestinian law journal, *People's Rights*, cites numerous examples of the Palestinian High Court futilely ordering the release of political detainees who remain in detention, uncharged and untried, for periods ranging from two months to two years.[144] Neither the executive nor the security apparatus had complied with any of these Palestinian High Court decisions.[145]

The above provides one reason why the local populace continues to rely on customary law to resolve its differences. As one prominent lawyer said:

> People need a proper trial system they can have faith in. When the PNA first came, Palestinians initially thought that the legal system being set up would be good. But soon there was so much interference in the legal system, especially by the Executive, that people soon lost faith in the system and were forced to rely again, solely, on tribal laws.[146]

---

142. Usher, *supra* note 119, at 25. In part, this "police state mentality" may be due to a clash of two cultures—the rule of the law and that of the rifle. The latter culture may originate with the thousands of Palestinians from the Diaspora, affiliated to different military wings of the PLO, who view themselves as the "liberators" of Palestine and consider themselves above the law. For more on this theme, *see* Iyad Saraj, *Human Rights Under the PA*, PEOPLE'S RIGHTS, Jan. 1999, at 23-25 [hereinafter Saraj]; *see also Visits Banned to Detainee Abed Al Faltah Ghonem*, PEOPLE'S RIGHTS, Aug. 2000, at 24 (reporting a case where the Palestinian police illegally detained a suspect and banned visits by lawyers or relatives for one month).

143. WAGNER, *supra* note 27, at 132.

144. *See, e.g.*, Samih Muhsen, *Last But Not Least: Political Detention*, PEOPLE'S RIGHTS, Dec. 1999 at 40.

145. For example, on July 11, 2000, the Palestinian High Court of Justice issued an order demanding the immediate release of Dr. Abdel Sattar Qassem (who was one of the signatories on a petition, known as the "Petition of the 20," condemning the rampant corruption in the PNA). Despite the fact that Dr. Qassem had been in continued illegal detention since February 18, 2000, Police Chief Ghazi Al Jabali disregarded the order and only released Qassem two and a half weeks later. The Human Rights and Oversight Committee reported to the PLC that more than fifty High Court orders requesting the release of political detainees were not complied with. *Police Princes Control the Public*, PEOPLE'S RIGHTS, Sept. 2000, at 19, 20. *See also On Non-compliance with the Palestinian High Court Orders*, PEOPLE'S RIGHTS, Jan. 1999, at 19 [hereinafter *On Non-compliance*].

146. Interview with Jonathan Kuttab, Esq., in East Jeruslaem (Jan. 28, 2001). The people's frustration with the fledgling judiciary has received a prominent voice in the human rights law journal *People's Rights*:

> To form a State Security Court in the PA-controlled areas was a mistake. . . It undermines the authority of the regular judiciary. . . Furthermore, it is highly frustrating for the people, who have spent lifetimes yearning to see a strong and fair national judiciary replace the ragged remains of a justice system long ago shattered by the Israeli occupation. Events and trials such as these serve very little purpose other than to undermine public confidence in the national judiciary. . . People avoid courts and tend to seek tribal solutions to problems.

However, there are sectors of the Palestinian population that are not entirely satisfied with customary law as a social mechanism for conflict resolution. Featured most prominently among them are the intellectual elite, businessmen, and individuals who do not belong to powerful or large clans.[147] Many among the intellectual elite yearn for a Western-style democracy with clear separation of power between the judiciary, executive, and legislative branches and an emphasis on individual liberties. Businessmen require objective, contractual criteria and proper enforcement in order to do business and encourage foreign investment. And members of small, uninfluential clans often lack the clout to achieve what they believe is the most equitable resolution.[148] The fact that customary law has no clear documented rules, relying instead on decisions of tribal judges who can be swayed by tribal politics and the active intervention of a clan, potentially undermines the just outcome of traditional proceedings.[149]

B. The Intermingling of Customary and Civil Law

Pockets of dissatisfaction with this process notwithstanding, a cursory glance at the local, daily newspapers provide evidence that the use of customary law is rampant within Palestinian-controlled areas. Even the most prominent newspapers, such as *Al-Quds,* are filled with announcements publishing the successful conclusion of reconciliation between families.[150] Tribal settlements

---

Anis Quasem, *How Can Major Al-Jibali Grant or Withdraw "Patriotism" from the People?*, PEOPLE'S RIGHTS, Oct. 1999, at 35, 36.

> Disregarding High Court orders is not a new occurrence, but the Executive Authority's complete indifference to the decisions of the highest-ranking court is very sad. It has embarrassed itself and undermined the Judiciary. The people are not likely to have faith in an authority that openly scorns the concepts of judicial independence and the rule of law.

Muhsen, *supra* note 144. *See also On Non-compliance*, *supra* note 145.

147. Jubeh, *supra* note 24.

148. *Id.*

149. Tribal judges often feel the need to appease the stronger party in a conflict, the party whose family has more social clout and is apt to wreak havoc on the weaker party until it receives satisfaction. Judges want to prevent such disorder and, therefore, often feel compelled to side with the party that has brought the most pronounced delegation, both in terms of numbers and in terms of the prestige attributed to the different notables. Interview with Salah Eisah Mousa Qassem, member of Bethlehem's reconciliation committee, in Bethlehem (Sept. 11, 2000).

Of course, one could argue that Western jurisprudence is not immune from such influences. A judge has discretion to maneuver through precedent and the rules of interpretation, and often his or her decision is consciously or unconsciously swayed by political affiliation and the biases of social class.

150. For instance, the announcement below appeared in the newspaper *Al-Quds*:

> Tribal Reconciliation and Arab Noble Honor
> From the Abu-Sneineh Family of Jerusalem
> Jerusalem—Yesterday afternoon, on Thursday the 1/2/2001, a Reconciliation Delegation, consisting of important personages such as Abu Ali Ashami [goes on to give the names of about 20 sheikhs] went to the home of the Abu-Sneineh family, who live in the A-Tour neighborhood, on account of the sad accident that occurred when their child, Salim Othman Abu-Sneineh, drowned in the Babay Amusement Park, as decreed by fate, around a year ago. Haj Muhammed Abu-Sneineh [et al.] and a big crowd from the Abu-Sneineh family came out to meet our delegation. After welcoming our delegation, Abu Ali A'shami stood and made the condolence prayers for the boy and announced in front of all those present that the delegation was prepared to do

commonly appear in local newspapers, next to business advertisements and sundry solicitations, and are published at the initiative and expense of the family seeking conciliation.[151]

Sometimes, the announcements published reveal an opt-out attitude towards the civil courts. For instance, there is an option, built into modern, customary law agreements, wherein the aggrieved party formally waives the right to pursue the case in the civil courts.[152] On the other hand, sometimes the customary law dynamic directly impacts civil proceedings, one example being that the aggrieved family must consent before a suspect can make bail.[153]

The interview below further illustrates the unique intermingling of the legal courts and customary law:

> Two months ago, I got into a fight with someone [after a car crash] and I hit him and he had to get six stitches. We both were put in prison until my grandfather (who is the head of my clan) went to the village clan head and, together with his family [of the person he got into a fight with], they wrote up a *waraqat suluh* [a reconciliation paper]. They gave it to the police and the police let us out [of jail]. Then we had to show up for court where they asked us if we had made up [written

---

> anything that was asked of them and that the accident was predestined. After this, Haj Abu-Sneineh Abu el-Abed stood up and announced in front of the delegation that the Abu-Sneineh family decided to forgo [any compensation] and allow for God, the Almighty and all Powerful, to exact the payment for the transgression. The Abu-Sneineh family forfeited payment honorably for the sake of God, the Prophet, and the respected delegation. The family returned the whole sum given to them. Coffee was drunk and thus the meeting with the owners of the Babay park, and with all those that had committed themselves as guarantors"[here there are many names], came to an end.
>
> On this occasion, we, the owners of the Babay Gardens of Jericho, call on God to be with the Abu-Sneineh family and may there be many more people like that family. We also would like to thank the [reconciliation] delegation and all those who helped us achieve such an honorable outcome. May God reward them with well-being and may there be many more people like them. He is all-hearing and all-granting.
>
> Said Agha and Adel Alan
>
> The Babay Gardens' administration —Jericho

Tribal Reconciliation and Arab Noble Honor From the Abu-Sneiheh Family of Jerusalem, AL-QUDS, Feb. 2, 2001 (Vera Inoue-Terris, trans.), at 4. In general, local custom dictates that family and clan feuds be aired in public. Palestinian newspapers are full of public apologies, thanks, and even threats appearing in small advertisements throughout the newspaper. The elements of public exposure and social pressure still play a focal role in resolving conflicts in Palestinian society.

151. *See* AL-QUDS, Oct. 9; *see also* AL-QUDS, Oct. 10, 2000

152. For example, *Al-Quds* published an announcement that the Zamari family, from Kalikilya, had reconciled with a family from Gin-saa-fut after losing a relative in a car accident. *Reconciliation Agreement*, AL-QUDS, Jan. 19, 2001. According to the announcement, the Zamari family waived its "legal and tribal" rights against the driver, Akif Nubhaan. *Id.* ["Tribal rights" meaning the right to exact blood revenge— "a life for a life."] The announcement states that the aggrieved family also conditionally returned the *diya* (or blood money, paid to redeem the life of their dead relative) with which it was compensated, provided that Akif Nubhaan submit all the necessary documents to the insurance company so that the Zamaris could recover their loss. *Id.* However, according to the agreement, if the insurance company decided not to reimburse the Zamaris, the family would require the driver, Akif Nubhaan, to return the $1,250 *diya* to the mourning family. *Id.*

153. This is evident in the tribal reconciliation agreement reached between the Sawafta family (whose three-year-old daughter was killed in a car accident) and the Daraghma family, where the Sawaftas agreed to the driver's release on bail. In this particular case, however, they did not waive their right to pursue further legal recourse. AL-QUDS, Nov. 8, 2000.

a *suluh*]. We said: "Yes" and each of us had to pay 100 shekels to the court and 20 shekels each to the police station for having been arrested.[154]

There are many interesting aspects to the above anecdote. The first is that the police were willing to let the two antagonists out of jail after receiving the *suluh* paper, demonstrating how the police have, in a semi-official manner, recognized the status of the traditional document. Ibrahim Shehada (director of the Gaza Center for Rights and Law) reports that police officers have the formal discretion to release someone within forty-eight hours if a reconciliation agreement is brought to them.[155] After this period, the case goes to the courts. According to Shehada, the accused benefits from this reconciliation agreement once the case goes to the courts, because judges see it as a mitigating circumstance for lessening the sentence.[156] Attorney Jonathan Kuttab concurs with Shehada on this point, noting "the regular courts always ask if the tribal responsibility has taken place first, especially in every case of blood and honor (*damm* and *ardd*)."[157]

The degree of judicial and police intervention in the customary law dynamic seems to be in proportion to the severity of the crime at hand. The more serious the crime, the more likely the police will become involved.[158] For instance, in typical murder or manslaughter cases, defendants are tried by civil courts (in conjunction with customary proceedings).[159] While a clan delegation intermediates in the traditional process, which is meant to lead up to reconciliation, the police hold the killer for a preliminary twenty-four hours. The prosecutor remands it automatically for another fifteen days, after which the prosecution starts to determine whether the murder was committed with or without intent. A case could take months or years to prosecute, and a defendant convicted of murdering with intent usually receives a twenty-five year sentence.[160] While the reconciliation process may not affect the sentence, it does maintain social balance and prevent the aggrieved relatives from exacting revenge on the murderer's extended family.

---

154. Interview with Ashraf El-Masri (twenty-seven years of age), in Gaza (June 26, 2000).

155. Shehada, *supra* note 9.

156. This might reflect a retributive principle that punishing the accused is for the satisfaction of the aggrieved party or family, and less for the benefit or satisfaction of society-at-large. *See* KENNETT, *supra* note 12, at 30.

157. Kuttab, *supra* note 146.

158. According to Ibrahim Shehada, however, probably 95% of rape cases do *not* reach the courts. These cases are very sensitive socially and it is shameful for a family to make them known to the public. The raped victim, as well, will be afraid to make such a case public, for she would most likely be killed for dishonoring the family. There are a few cases which reach the courts, but these proceedings are then always held behind closed doors. Shehada, *supra* note 9.

159. However, it is important to remember that the Palestinian legal mosaic is not relegated to the interplay between the civil courts and the traditional tribal dynamic. Religious authority is very prominent in Palestine, evidenced by the fact that much of family law (marriage, divorce, etc.) is still under the jurisdiction of the *sharia* courts. In his article, Hillel Frisch cites an example in which Arafat even allowed a homicide (normally under the jurisdiction of the state courts) to be adjudicated by an arbitration committee headed by the *mufti* (religious leader) of Gaza, who issues a ruling based on *sharia* law. Frisch, *supra* note 30, at 350.

160. Shehada, supra note 9.

However, in cases where there is no intent to kill, the reconciliation paper can play a focal part in the sentencing, as a judge will often lessen sentences when a reconciliation has been reached.[161] Unfortunately, like clan judges, civil judges, whether consciously or not, have difficulty separating the notion of reconciliation with the parties or clans who need to be reconciled. Because all of this occurs in a fiercely tribal culture, the civil judges must contend not only with the social value of conciliation but also with the social players who wield various levels of influence.[162] Judges are thus susceptible to influence and to the danger of trying to appease certain clans. This leaves the system open to the vagaries and injustices of tribal politics, evident in the early release of Taher's assailant as well as in numerous other anecdotes.[163]

According to Ibrahim Shehada, when lesser offenses have been committed (non-capital crimes and civil disputes, such as accidents, fights, etcetera) about sixty precent of the antagonists will try to settle their differences out of court, in accord with traditional tribal intervention.[164] However, *urf* or tribal law has difficulty enforcing decisions regarding cases relating to money, loans, land issues, etcetera. Often, to remedy this, the aggrieved party will approach the police directly and ask them to arrest the individual who is behind in payments. According to the Director of the Palestinian Association for Legal Sciences, Abu Musa, the police are in the habit of apprehending the perpetrator without a court order and holding him for a day or two in jail, thereby putting pressure on the incarcerated individual, or his clan, to pay back the debt.[165] Alternatively, the police do not serve as intermediaries but only act as advocates for tribal solutions. For instance, when citizens approach the station with small claim grievances, the police often encourage them to solve their own problems through customary law before bringing their case to court.[166]

The Palestinian executive and judiciary branches are also making an active effort to incorporate the practice of customary law into their bureaucratic fold.

---

161. *Id.*

162. *Id.*

163. Taher, *supra* note 1. For example, Lieutenant Hassona was killed by a barrage of bullets on his way home. It turned out that his killers were three neighbors from a rival clan (the Bheissis) and relatives of a young man killed by Lieutenant Hassona a few years earlier during the Intifada (on suspicion of being a spy). Hassona's murder alarmed his comrades in the Fatah party who had also killed collaborators during the Intifada and were now officers in the Palestinian Preventive Security forces. Two hundred of them, armed, went to the scene of the crime and threatened to wipe out the whole Bheissi clan. Police intervened and averted the massacre, whereupon a military court was convened and, within three days, the killers were sentenced to death and twelve others to various prison sentences. PALESTINE REPORT, 5-13, Sept. 11, 1998, at 10-11.

This article bemoans the fact that "the military judge defended the speedy trial and the sentences as important elements in appeasing the burning rage of the security forces and showing that the Authority can protect its own" and is worried by the fact that "the Palestinian Authority has chosen to rule through tribal politics. A person has to be from a big family or belong to Fatah, the ruling party, to get anywhere . . . in such an environment, people can only rely on their families for protection. The danger is compounded by the fact that thousands of soldiers, whose loyalty is tribal, are heavily armed . . . ." *Id.*

164. Shehada, *supra* note 9.

165. Interview with Adnan Abu Musa, Director of Palestinian Association for Legal Sciences, in Gaza (Feb. 6, 2001).

166. *Id.*

For instance, the magistrates in the courts have been directed by the executive branch to encourage mediation and arbitration.[167] And in the wake of the PNC passing the Arbitration Law in January 2000 (*qawnewn el-tahkeem*), approving the formal development of Alternative Dispute Resolution Centers, the Palestinian judiciary can avail itself of institutional arbitration. These centers are modeled on modern, Western legal arbitration, but are a mixture of civil jurisprudence and local notions of conflict resolution. Because it retains traditional elements, and because there is a backlog of cases in the court system, ADR has become a popular alternative.

During a typical court hearing, the judge will review the complaint and ask the parties whether they wish to arbitrate or mediate their disputes (mediation defined as a traditional *sulha*). If the parties wish to arbitrate, they must sign an arbitration agreement to be affirmed by the court. Arbitration sessions are carried out locally and, when a decision is reached, the court is approached to confirm the arbitral awards and deliver an order of execution to the police.[168]

The PNA's efforts to incorporate traditional forms of mediation are also evident in bureaucratic moves, such as the 1995 establishment of the Office of the President for Tribal Affairs (headed by Dr. Gheith Abu Gheith), created to adjudicate problems between families.[169] Consequently, there are over 200 reconciliation offices throughout Palestine. Volunteers run most of these offices, but the main office in Gaza is fully funded by the PNA. By creating such an office, the executive branch has instituted a paid position for regulating and overseeing tribal disputes and decisions.[170] This simultaneously gives legitimacy to the tribal framework and provides the executive with leverage in regard to tribal affairs.[171]

The official facilitation of customary law, however, is most prominently evidenced by the participation of PNA dignitaries in *sulha* mediation and cere-

167. The decision to sanction extra-judicial, conflict resolution alternatives was also encouraged by many studies of the Palestinian legal situation, as a solution to relieve the judiciary's tremendous backlog. *See* Chodosh, *supra* note 46, at 408.

168. *Id.* at 403.

169. Frisch, *supra* note 30, at 349.

170. *Id.*

171. The state has also organized the tribes in their specific geographic regions. For instance, in the Beersheva region, the Association of the Confederation of the Sons of the Tribes of Beersheva (*Jam'iyyat Abna' Wa-Qaba'il Bir Al-Sab'*) was founded by the Palestinian Ministry of Interior to regulate the tribes in that area. The ministry granted official bureaucratic status to the clan heads, reflected in the formation of an executive committee and the publication of the participants various positions and telephone numbers. In many ways, this official recognition replicates the formal alliances forged during Ottoman rule, when the clan heads were used as intermediaries between the local people and the authorities.

The official legitimacy of their rule does not go unappreciated or unacknowledged by the clan heads, and helps to foster the type of loyalty to Arafat discussed in the section on neopatrimonialism. In regard to the newly founded Beersheva association, the members responded to their incorporation into the state building efforts with a public letter in which they thanked "President Yasir Arafat for placing precious trust [in the association] that enables [it] to take a role in the service of the Palestinian people so that it may be forever a constructive organ in building our Palestinian state." *Id.* (quoting AL-QUDS, Nov. 7, 1995).

monies.[172] Official authorities are often included in the final, ceremonial stages of these legal proceedings, invited by the family members to lend more weight and authority to the public display of the traditional framework's legal outcome. The authorities, for their part, are interested in participating in the ceremony so as to have a measure of influence over a dynamic which is so focal to public life.

V.
CONCLUSION

While the Palestinian judiciary is beset by many problems inherent in the chaos and bureaucratic shortcomings inevitable to any new state, the country's legal culture is primarily a symptom of its socio-political culture. The blurring of lines between the civil and traditional judiciary is characteristic of societies that fall under the sociological rubric of neopatrimonies. While Palestinians may be on their way to realizing full independence and enjoying all of the manifestations of modern statehood, their political and economic situations are precarious and still enmeshed in the patterns of the past.

Nonetheless, one might ask why Arafat does not at least try to subordinate customary law and tribal politics to his regime. What does Arafat have to gain by this blurring of jurisdictional boundaries? It appears that this legal pluralism facilitates Arafat's solidification of his personal power. The absence of formal jurisdiction in neopatrimonies creates competition between individuals and organizations. Perpetuating clientelism, while coming at the expense of democracy, nurtures the patron-client relationship and fosters loyalty to his rule.[173] Strengthening the judiciary would strengthen the rights and position of the individual and, in turn, empower civil society as a whole. But by not allowing the judiciary to clearly demarcate its jurisdiction and enforce its rulings, Arafat strengthens the role of tribal politics and empowers the clan heads, who in turn are dependent on him for employment, finances, and political power. As Haider Abdel Shafi (former PLC member) has said: "Clan culture was decreasing in the past,

---

172. For instance, the *Al-Quds* newspaper reported:

> "[a]fter Friday prayers, an honorable procession composed of notables from the Bethlehem district and notables from the Hebron district proceeded to the *Diwan of Ahl al'Hadaiqa* in the village of Shuyukh in order to complete the rites of tribal conciliation (*sulh ashairi*) in the wake of a sad car accident." Among the important dignitaries in the procession, invited by the family of the bereaved, was Colonel Abu Khalid al-Lahham, a former officer in the Palestinian Army and currently an adviser to President Yasir Arafat.

Id. at 341 (quoting AL-QUDS, Sept. 29, 1995). Another example:

> On September 30, 1995, customary-law reconciliation took place in the headquarters of "Quwwat al-17 [Force 17]," one of the five security agencies of the PA, in the presence of leading security personnel and personalities. At the end of the meeting, two Jericho families, the Qaysiyya and the Nisan, concluded the *sulha* "with the blessing of the Authority and the Quwwat al-17."

Id. (quoting AL-QUDS, Oct. 24, 1995). *See also* AL-QUDS, Nov. 2, 1995.

173. In this regard, Iyad Saraj, a prominent human rights activist in Gaza, in one of his treatment proposals for building a Palestinian democratic society that has regard for the rule of law, advocates "overthrowing the tribal symbols that have for so long manipulated leadership and politics. This should be replaced by a unified Arab symbol." *See* Saraj, *supra* note 142, at 25.

but now it is being encouraged again, at the expense of the legal system of course . . . Arafat is encouraging clan culture because it is to his advantage to favor the group over the individual."[174]

Rather than resist customary practice, Arafat wants to take advantage of and contain the strong forces of tribalism. He prefers that tribal practices remain under his auspices. By encouraging clan heads to work within the PNA system, he allows the tribal dynamic to continue unimpeded (which it might do for some time regardless) and gains power and influence in the community. He co-opts the clan heads into the PA and thus avoids any potential rivals for power. The coupling of the PNA with tribalism works well for both sides: Arafat gains power and control by patronizing the clan heads, and the clan heads benefit from receiving access to the formal channels of power and having the security establishment "officially" backing them in carrying out tribal resolutions.

As far as local communities are concerned, customary law has remained an abiding conflict resolution mechanism through volatile periods in Palestinian when partially implemented civil institutions left a legal vacuum. At present, sociological factors are not ripe for the Palestinians to relinquish their customary law practices. Not only is the PNA judiciary rife with problems, but customary law safeguards family honor and maintains the social balance between the clans. Western legal traditions do not serve these functions still so deeply rooted in Palestinian culture.

AFTERWORD

What lies in store for Palestine society is unclear. Neopatrimonialism may succumb to the tides of change when populations grow, political bases expand, and the material resources at the disposal of the political hegemony dwindle. Moreover, when non-elite sectors of society become more educated and politically aware, increasingly disgruntled, and exposed to other democratic cultures, they may pose a threat to the ruling hierarchy and its power base structure.

In addition, if and when economic conditions improve within the PNA, we can assume that the weakening of clanship ties will accelerate. Palestinians, on the whole, are no longer tied to the village farming life of half a century ago. There are signs of a slow move toward a more nuclear-oriented family, especially in the larger Palestinian cities where married children sometimes opt to move away from their family home. The Israeli-Arab sector already shows prevalent signs of such a dynamic.[175] If peace develops, economic conditions improve, and the middle class grows, nepotism and patron-client relations may give way to meritocracy and competition and the bonds of the tribal clan may slowly unravel.

174. Interview with Dr. Haider Abdel Shafi, former PLC member and Palestinian negotiator, in Gaza (June 27, 2000).

175. See Soen, *supra* note 13, at 261-263, for a discussion of the historical process of the demise of the traditional clan regime within Arab villages in Israel as a result of the infiltration of Western customs and rapid modernization since 1967.

Conversely, a more radical scenario is also possible. The very nature of clientelism, with its propensity for favoritism, nepotism, and corruption, may fall prey to mass cynicism and distrust towards the elite class.[176] Militant, religious Islamists (such as Hamas in the West Bank and Gaza) may gain even wider support then they enjoy now and develop into a political counterculture. Such forces are already evident.

However, at present, with the Al-Aqsa Intifada now in full force, a significant rise in neopatrimonialism can be expected. Once again, Palestinian areas are fraught with havoc and chaos; law and order are secondary to maintaining the semblance of normality in a war-like atmosphere. The police and law-enforcing bodies have been conscripted to the "national struggle," which has been dubbed the "Palestinian war of independence." With the police dealing with national priorities, we can expect that Palestinians will fill the legal void with an accelerated use of customary law.[177]

---

176. This would particularly be the case with individuals who are not well-connected to powerful families.

177. Substantiating the above, recent tribal reconciliation announcements have appeared in the newspapers with references to the "need for unity and concordance" during the current Intifada. Palestinians think it a national priority to reconcile with each other in order to withstand the "siege and subjugation" of the Israelis. For example, see the announcements below from the May 5, 2001, edition of *Al-Quds*, (Vera Inoue-Terris, trans.) [italics added]:

> *Tribal Reconciliation Between the Uncles of the Doudeen Family*
> Karza—Dura—Hebron—Yesterday afternoon, a big [reconciliation] committee. . .headed to Karza village to reach a tribal truce in the wake of a family fight that occurred between two uncles from the Doudeen family a couple of days ago. This incident led to the death of Wasfi Ali Doudeen and the injury of a number of family members. When the committee reached the Karza schoolyard, they were greeted by hundreds of members from the Darabee and Doudeen tribes, as well as notables from the magistrate. After being welcomed by Ahmed Shaker Doudeen, Haj Zuheir Marqa spoke, during which he sent condolences to the Doudeen family and wished for speedy recoveries for all those who were injured. *He called for unity and the removal of disagreements amongst ourselves, especially during these difficult times that the Palestinian peoples are living through. He stressed the readiness of the [reconciliation] committee members to work for whoever needs them.* Immediately after, the deceased's brother, Khalaf Ali Doudeen, stood up and welcomed the committee and thanked them for their good efforts to remove the bad and bring in reconciliation between the people. He then gave the committee a tribal truce agreement valid for a year after the sum of 1,025 [Jordanian] dinars was paid as compensation. This truce was shown to the guarantor, Hamzeh Abu A'lan [etc.]. And so Arabic coffee was drunk by the [reconciliation] committee notables.
> The Doudeen Family
>
> *Tribal Reconciliation and Genuine Arab Honor Between the Al-Haymouni Family and the Al-Tarwa Tribe*
> Hebron—Sa'ayer—Yesterday was a historic date in establishing genuine Arab honor. Notables from the tribal reconciliation committee in the Hebron district, headed by the Haj Zuheir Marqa,. . .and many more notables from Hebron, went to the town of Sa'ayer to carry out tribal reconciliation activities in the aftermath of the tragic traffic accident that occurred five years ago in which the driver, Fallah Abdul Fattah Al-Haymouni, caused the death of Raid Khalil Al-Tarwa. The arriving notables were received by Sa'ayer notables and notables from the Al-Tarwa tribe . . .and many people from the town and from the tribes.
> *After the greeting, the Al-Tarwa family requested that the [reconciliation] committee announce their intent to forgo all legal and tribal rights for the honor of Allah the Almighty and for the respected notables, to be done in appreciation of the situation*

The authors suggest the following topics for further research:

- What is the role that *honor* plays in the tribal dynamic, both in regard to social balance and the Palestinian concept of justice?
- To what extent do the stronger clans receive preferential treatment in customary law procedures?
- Are there meaningful differences in the ways various types of crimes (such as criminal vs. civil, violent vs. monetary, domestic vs. urban) are handled through modern customary law channels?
- How do demographic and socioeconomic factors (such as West Bank vs. Gaza, rural vs. urban, poor vs. rich) influence the character and prevalence of tribal and customary law practices?
- To what degree have tribal and customary law remained entrenched in other Arab nations' legal systems? If these countries' judicial systems have weeded out such influences, what are the social and political factors that have characterized the transition?
- Is there an innovative judicial model that can guarantee civil rights, individual liberties, and due process and yet still be culturally sensitive to Third World, tribal dynamics? Are customary law and a Western-style judiciary mutually exclusive, or can a model be developed that incorporates the best of both systems?

---

that our Palestinian people are living under—subjugation and siege. The Al-Tarwa family then proceeded to return the tribal compensation monies that were previously paid to them. Haj Zuheir Marqa spoke persuasively when the [reconciliation] notables first reached the town of Sa'ayer. In his speech, he emphasized the honor due the Al-Tarwa tribe and the town of Al-Sa'ayer. He spoke about unity and concordance and doing away with disagreements that exist between our people. Omar Al-Zugheiyer spoke and thanked Al-Tarwa tribe and the Sa'ayer notables for their noble stand towards the [reconciliation committee] elders and the Al-Haymouni family. The Haymouni family embraced Al-Tarwa tribe members and Arabic coffee was drunk. This was the beginning of the truce whereupon good took place of bad, and the white flags were raised. With this event, the Al-Haymouni family wants to warmly thank their brothers from the Al-Tarwa tribe for the honor and genuine forgiveness and also thank the tribal reconciliation committee members for all their efforts.

May God Bless All Who Have Goodness and Forgiveness

The Al-Haymouni Family—Hebron