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The European Union's Constitutional Order - Between Community Method and Ad Hoc Compromise

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The European Union's Constitutional Order? Between Community Method and *Ad Hoc* Compromise

By
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I.
INTRODUCTION

According to the European Court of Justice, "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the Constitutional Charter of the Community based on the rule of law."[1] The Court has consistently held that the European Union ("EU")[2] treaties have established

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1. Case 294/83, Les Verts v. Parliament, 1986 E.C.R. 1339, 1365.

2. The founding treaties of the European Communities are:
- the Treaty of Paris establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY];
- the Treaty of Rome establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY]; and
- another Treaty of Rome establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 140 [hereinafter EURATOM TREATY].
European integration was reinvigorated in the 1980s through the Single European Act, Feb. 17 & 28, 1986, O.J. (L 169) 1; 25 I.L.M. 503 (1986) [hereinafter SEA]. The EU was established by the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1; 31 I.L.M. 247 (1992) [hereinafter TEU or Treaty of Maastricht]. The TEU changed the name of the EEC Treaty in Treaty establishing the European Community [hereinafter EC Treaty]. The treaties were amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]. For the consolidated version of the TEU, see O.J. (C 340) 145 [hereinafter Consolidated TEU]. For the consolidated version of the EC Treaty, see O.J. (C 340) 173 [hereinafter Consolidated EC Treaty]. For an introduction to the Consolidated TEU and Consolidated EC Treaty, see Youri Devuyst, *Introductory Note*, 37 I.L.M. 56 (1998).
The EU serves as the common roof spanning three pillars. This pillar structure was maintained by the Treaty of Amsterdam.
- Pillar I is based on the provisions of the three European Communities. The EC Treaty includes Titles on such topics as the free movement of goods; agriculture; the free movement of persons, services and capital; visas, asylum, immigration and other policies related to free movement of persons; transport; common rules on competition, taxation and approximation of laws; economic and monetary policy; employment; common commercial policy; customs cooperation; social policy, education, vocational training and youth; culture; public health; consumer protection; trans-European networks; industry; economic and social cohesion; research and technological development; environment; and development cooperation. It also contains a Title describing the composition and functions of the EC's institutions (European Parliament, Council, Commission, Court of Justice and Court of Auditors).
- Pillar II deals with the Common Foreign and Security Policy (CFSP).

a new legal order with its own institutions, decision-making mechanisms and enforcement powers "for the benefit of which the [Member] States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only the Member States but also their nationals."[3] Still, in the EU's institutional reality, Constitutionalization remains a controversial topic.[4] When launching a new round of Treaty reform in December 1999, the Helsinki European Council refused to add the Constitutionalization of the EU Treaty framework to the agenda.[5] This is not entirely surprising. A genuine Constitutional debate, implying clear choices on the goals, character and institutional conception of European integration is precisely what most Member States have been trying to avoid since the disruptive and inconclusive discussion on the Union's "federal" nature during the Maastricht negotiations.[6]

- Pillar III contains provisions on police and judicial cooperation in criminal matters.
Pillar I functions on the basis of the traditional "Community method": the exclusive right of legislative initiative for the Commission; Council voting on legislative matters by either qualified majority or unanimity; co-decision for the European Parliament in a significant number of legislative fields; jurisdiction for the Court of Justice to interpret and verify the legality of Community acts; and primacy of Community law over Member State law. Pillars II and III, while governed by the same institutions, function according to more traditional intergovernmental practices. For an introduction to the EU's structure, see Bruno de Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, *in* THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS 51 (Ton Heukels, Niels Blokker & Marcel Brus eds., 1998); Joseph H. H. Weiler, *Neither Unity nor Three Pillars - The Trinity Structure of the Treaty on European Union, in* THE MAASTRICHT TREATY ON EUROPEAN UNION: LEGAL COMPLEXITY AND POLITICAL DYNAMIC 49 (Jörg Monar, Werner Ungerer & Wolfgang Wessels eds., 1993). For a general introduction to the legal aspects of European integration, see PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES AND MATERIALS (1998); P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES: FROM MAASTRICHT TO AMSTERDAM (Lawrence W. Gormley ed., 1998).

3. Opinion 1/91, 1991 E.C.R. 6102.

4. For the academic debate regarding the Constitutional nature of the EU's Treaty framework, see JORG GERKRATH, L'EMERGENCE D'UN DROIT CONSTITUTIONNEL POUR L'EUROPE: MODES DE FORMATION ET SOURCES D'INSPIRATION DE LA CONSTITUTION DES COMMUNAUTES ET DE L'UNION EUROPEENNE (1997); J. H. H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" (1999); CONSTITUTION-BUILDING IN THE EUROPEAN UNION (Birgit Lafflan ed., 1996); Philip Allcott, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, 34 COMMON MKT. L. REV. 439 (1997); Grainne de Burca, *The Institutional Development of the EU: A Constitutional Analysis, in* THE EVOLUTION OF EU LAW 55 (Paul Craig & Grainne de Burca eds., 1999); Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 COMMON MKT. L. REV. 703 (1999); Jean-Claude Piris, *Does the European Union have a Constitution? Does it Need One?*, 24 EUR. L. REV. 557 (1999).

5. Treaty reform takes place in an Intergovernmental Conference [hereinafter IGC]. The IGC 2000 - formally opened on Feb. 14, 2000 - should "examine the size and composition of the Commission, the weighting of votes in the Council and the possible extension of qualified majority voting in the Council, as well as other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam. The incoming Presidency will report to the European Council on progress made in the Conference and may propose additional issues to be taken on the agenda of the Conference." Helsinki European Council, Presidency Conclusions, Dec. 10-11, 1999 *in* BULL. EUR. UNION at para. I.1 (12-1999). In June 2000, the European Council added the issue of "closer cooperation" to the agenda of the IGC-2000. Santa Maria da Feira European Council, Presidency Conclusion, Jun. 19-20, 2000 in BULL. EUR. UNION at Para. I. (6-2000).

6. For an interesting attempt to reinvigorate the debate on the EU's constitutional nature, see German Foreign Minister Joschka Fischer's speech of May 12, 2000 at Humboldt Univ. in Berlin entitled "From Confederacy to Federation—Thoughts on the Finality of European Integration." On

Instead, the Member States have opted to move forward one day at a time, through a series of *ad hoc* compromises that have tended to reinforce the EU's intergovernmental dimension rather than the supranational dynamic underlying the Community method of the 1950s.[7] The resulting institutional framework hangs somewhere between the strong foundations of the Community's original integration method and the complex *ad hoc* solutions of the past decade. It constitutes an institutional patchwork[8] in permanent tension:[9]

- between an expansive and a restrictive definition of the EU's powers;
- between coherence and flexibility;
- between solidarity and the promotion of narrow self-interest;
- between a functional and a thematic division of powers between the institutions;
- between a supranational integration engine and a Commission under Member State control;
- between decision-making efficiency and the unanimity trap in the Council;
- between non-hegemonic decision-making and grand power politics;
- between parliamentary control and parliamentary governance;
- between legislative harmonization, policy coordination and resource allocation;
- between a coherent and a fragmented law enforcement;
- between directly applicable rights for EU citizens and intergovernmental law; and
- between an EU of Member States and an EU of the Regions.

The EU's institutional structure is of major importance, for Member States and third countries alike. The Community method of the 1950s proved an effective instrument for reconciliation and lasting peace among the countries of Western Europe. In addition, it served as a strong framework for democracy, enabling the development of stable parliamentary regimes in Greece, Portugal

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the Maastricht debate regarding the EU's federal nature, see RICHARD CORBETT, THE TREATY OF MAASTRICHT 38 (1993); JIM CLOOS, GASTON REINESCH, DANIEL VIGNES & JOSEPH WEYLAND, LE TRAITE DE MAASTRICHT: GENESE, ANALYSE, COMMENTAIRES 115 (1994). On the absence of a similar debate during the Amsterdam negotiations, see BOBBY MCDONAGH, ORIGINAL SIN IN A BRAVE NEW WORLD: AN ACCOUNT OF THE NEGOTIATION OF THE TREATY OF AMSTERDAM at 10 (1998); Youri Devuyst, *Treaty Reform in the European Union: the Amsterdam Process*, 5 J. EUR. PUB. POL'Y 615 (1998); Andrew Moravcsik & Kalypso Nicolaides, *Federal Ideals and Constitutional Realities in the Treaty of Amsterdam*, J. COMMON MKT. STUD. 13 (European Union Annual Review 1997); Andrew Moravcsik & Kalypso Nicolaides, *Explaining the Treaty of Amsterdam: Interests, Influence, Institutions*, 37 J. COMMON MKT. STUD. 59 (1999); Jean-Claude Piris & Giorgio Maganza, *The Amsterdam Treaty: Overview and Institutional Aspects*, 22 FORDHAM INT'L L.J. 532 (1999).

7. On the Community method, see PHILIPPE DE SCHOUTHEETE, UNE EUROPE POUR TOUS: DIX ESSAIS SUR LA CONSTRUCTION EUROPEENNE (1997); J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991); Youri Devuyst, *The Community-Method after Amsterdam*, 37 J. COMMON MKT. STUD. 109 (1999).

8. Deirdre Curtin correctly referred to this patchwork as "a Europe of bits and pieces." *See* Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces* 30 COMMON MKT. L. REV. 17 (1993).

9. To a certain degree, the tension between the territorial Member State dimension and the non-territorial supranational dimension is itself a major characteristic of the Community method. *See* Alberta Sbragia, *The European Community: A Balancing Act* 23 PUBLIUS 23 (1993).

and Spain. Furthermore, where it functions according to the Community method, the EU has been able to act as an important global player, in particular in the field of external economic relations.[10] The more intergovernmental approach governing the EU's common foreign and security policy (CFSP) and cooperation in justice and home affairs (JHA) has proved much less successful.[11] There is a general recognition that the intergovernmental working methods have been an important factor in holding back developments in those areas.[12] A more general erosion of the Community method in favor of the intergovernmental approach would therefore be likely to decrease the EU's effectiveness as a whole. As former Commission President Jacques Delors recalled: "Experience shows that when we stray from this method, Europe goes nowhere."[13]

Examining the nature and method underlying European integration is topical in at least two respects. First, the EU is pursuing its historical mission of embracing the countries of Central and Eastern Europe in an enlargement process which now also includes Cyprus, Malta and Turkey. According to the Helsinki European Council, "the Union should be in a position to welcome new Member States from the end of 2002."[14] The prospect of enlargement automatically leads to questions regarding the EU's institutional adaptation and the nature of the integration process. For the European Parliament, the new pace of the enlargement process agreed upon in Helsinki required "a reform of the treaties capable of ensuring institutional stability, of creating democratic methods for constitutional reform, of safeguarding and increasing the effectiveness of the decision-making process and of strengthening democracy in order to make further progress in European integration."[15] The Commission too has long favored

10. *See* CHRISTOPHER PIENING, GLOBAL EUROPE: THE EUROPEAN UNION IN WORLD AFFAIRS 13 (1997).

11. The CFSP has grown out of European Political Cooperation (EPC), a framework established in 1970 as a way to coordinate the foreign policies of the EC Member States. It was for the first time incorporated in a legal structure in the Single European Act. For the development of EPC and CFSP, see SIMON J. NUTTALL, EUROPEAN POLITICAL COOPERATION (1992); A COMMON FOREIGN POLICY FOR EUROPE? (John Peterson & Helene Sjursen eds., 1998); EUROPEAN POLITICAL COOPERATION IN THE 1980S: A COMMON FOREIGN POLICY FOR WESTERN EUROPE? (Alfred Pijpers, Elfriede Regelsberger & Wolfgang Wessels eds., 1988); FOREIGN AND SECURITY POLICY IN THE EUROPEAN UNION (Kjell A. Eliassen ed., 1998); FOREIGN POLICY OF THE EUROPEAN UNION: FROM EPC TO CFSP AND BEYOND (Elfriede Regelsberger, Philippe de Schoutheete & Wolfgang Wessels eds., 1997). JHA too started in the mid-1970s as a cooperation effort between the Ministries of Justice and Home Affairs, known as the Trevi framework. On the institutional evolution of JHA, see STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (1999); JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION: DEVELOPMENT OF THE THIRD PILLAR (Roland Bieber & Jörg Monar eds., 1995); THE THIRD PILLAR OF THE EUROPEAN UNION: COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS (Jörg Monar & Roger Morgan eds., 1994).

12. Particularly interesting in this respect is the analysis by the Reflection Group that was asked to draft an annotated agenda for the 1996 Amsterdam Treaty negotiations, see Reflection Group Report and Other References for Documentary Purposes: 1996 Integovernmental Conference (Gen. Secr. Council EU) 49, 75 (Dec, 1995).

13. Jacques Delors, *Reuniting Europe: Our Historic Mission*, AGENCE EUROPE, Jan. 3-4, 2000, at 3.

14. Helsinki European Council, *supra* note 5.

15. European Parliament, Resolution on the Convening of the Intergovernmental Conference, para. B (Feb. 3, 2000).

the deepening of the integration process as a precondition to enlargement to "ensure that 'more' does not lead to 'less'."[16]

The second challenge concerns the need for transparency and clarity regarding the values underlying the EU's political community-in-the-making.[17] This issue was catapulted onto the EU's political agenda following the formation of the coalition government between the Austrian People's Party (ÖVP) and the Austrian Freedom Party (FPÖ) in February 2000. The FPÖ is notorious for its extreme right-wing program and for "the insulting, xenophobic and racist statements" by its leader Jörg Haider.[18] The fourteen heads of state and government of the EU's other Member States immediately "informed the Austrian authorities that there would be no business as usual in the bilateral relations with a Government integrating the FPÖ."[19] For the European Parliament, this expression of concern was fully justified by "the emergence and achievement of the political project of the European Union."[20] In the words of Belgian Minister of Foreign Affairs Louis Michel,

> the European Union is not a banal international organization. It is a community of States that places at the heart of its undertaking liberty, democracy, respect for human rights and fundamental freedoms . . . . When a Member State takes a course in contradiction with these humanistic principles and values, telling it so is not interfering in its internal affairs because these questions today no longer fall purely within European countries' internal affairs.[21]

Never before had the EU's governments been so outspoken about the nature of the EU's political community and "the values and principles of humanism and democratic tolerance underlying the European project."[22] The Austrian affair has drawn the public's attention to the fact that the EU is in the process of

16. Commission of the European Communities, Europe and the Challenge of Enlargement: Report to the Lisbon European Council, June 26-27, 1992, at para. 19 (June 24, 1992). For the Commission's updated viewpoint, see Commission of the European Communities, Adapting the Institutions to Make a Success of Enlargement: Commission Opinion in Accordance with Article 48 of the Treaty on European Union on the Calling of a Conference of Representatives of the Governments of the Member States to Amend the Treaties, COM(00) 34 final.

17. *See* DEIRDRE CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY (1997); Ian Ward, *The European Constitution, the Treaty of Amsterdam, and the Search for Community*, 27 GA. J. INT'L & COMP. L. 519 (1999).

18. This is how the European Parliament characterizes the statements by Jörg Haider. *See* European Parliament, Resolution on the Legislative Elections in Austria and the Proposal to Form a Coalition Government between the ÖVP (Austrian People's Party) and the FPÖ (Austrian Freedom Party), para. 1 (Feb. 3, 2000).

19. Statement from the Portuguese Presidency of the European Union on Behalf of XIV Member States (Jan. 31, 2000) (on file with author). The statement includes the following sanctions against the Austrian government:
- "Governments of XIV Member States will not promote or accept any bilateral official contacts at political level with an Austrian Government integrating the FPÖ;
- There will be no support in favor of Austrian candidates seeking positions in international organizations;
- Austrian Ambassadors in EU capitals will only be received at a technical level."

20. European Parliament, Resolution on the Result of the Legislative Elections in Austria, *supra* note 18, at para. A.

21. AGENCE EUROPE, Feb. 14, 2000, at 7.

22. Press Release by the Portuguese Prime Minister's Office on the Constitution of the New Austrian Cabinet (Feb. 3, 2000) (on file with author). In the Treaty of Amsterdam, the Member States had felt the need to make clear that "[t]he Union is founded on the principles of liberty,

forming a political community. While implying that such notions as interference in internal affairs must be interpreted in a different context, the controversy did not eliminate the complexity and "anomalies" that make the European integration process difficult for non-specialists to grasp. [23] In the Commission's blunt wording, today's EU still "is not understandable to the European citizens."[24]

Experts have recommended the Constitutionalization of the EU treaties as a means to make the powers of the Union more comprehensible to EU citizens. In what became known as the "Wise Men" report, former Belgian Prime Minister Jean-Luc Dehaene, former German President Richard von Weiszäcker and former UK Minister David Simon suggested a division of the EU Treaties into two separate parts:

> The Basic Treaty would only include the aims, principles and general policy orientations, citizen's rights and the institutional framework. These clauses . . . could only be modified unanimously, through an IGC [Intergovernmental Conference], with ratification by each Member State. Presumably such modifications would be infrequent.
>
> A separate text (or texts) would include the other clauses of the present treaties, including those which concern specific policies. These could be modified by a decision of the Council . . . and the assent of the European Parliament.[25]

Parliament gave its enthusiastic support to the Constitutionalization proposal.[26] The European Commission too saw considerable merit in the Wise Men's proposal and asked the European University Institute in Florence to study it.[27] During the Helsinki European Council of December 1999, however, the heads of state and government decided to launch an IGC with an agenda largely restricted to the so-called Amsterdam leftovers: the possible extension of qualified majority voting, the weighting of the votes, and the number of Commissioners.[28] The Constitutionalization of the Treaty framework was not even mentioned in the European Council's conclusions.

To clarify the EU's current Constitutional debate, Part II reviews the circumstances that have permitted the creation of the Community method which still constitutes the EU's institutional foundation. It also introduces the suprana-

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democracy, respect of human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (CONSOLIDATED TEU, *supra* note 2, art. 6).

23. *See* Commission, Adapting the Institutions to Make a Success of Enlargement, *supra* note 16, at 3.

24. *See id.*

25. Jean-Luc Dehaene, Richard von Weiszäcker & David Simon, The Institutional Implications of Enlargement: Report to the European Commission, at 12 (Oct. 18, 1999).

26. *See* European Parliament, Resolution on the Preparation of the Reform of the Treaties and the next Intergovernmental Conference, para. 57 (Nov. 26, 1999). *See also* Giorgios Dimitrakopoulos & Jo Leinen, Report on the Preparation of the Reform of the Treaties and the Next Intergovernmental Conference, EUR. PARL. DOC. (SEC A5) 0058 (1999).

27. *See* Commission, Adapting the Institutions to Make a Success of Enlargement, *supra* note 16, at 5. The European University Institute (EUI) presented its study on the reorganization of the Treaties to the Commission on May 15, 2000. The EUI report presented a better structured and easy-to-read text, without proposing any changes to the substance of the present legal situation. See <http://europa.eu.int/igc2000>.

28. *See* Helsinki European Council, *supra* note 5.

tional dynamic that the Community method engendered and its effect on the Member States. While the Masters of the Treaties, governments no longer exercise full control over their creation in the areas covered by the Community method. This has given rise to a desire on the part of some Member States to pursue the European integration process through a more intergovernmental approach. Through an analysis of the twelve dimensions of institutional tension listed above, Part III examines the degree to which the Community method has been eroded by the desire of some Member States to keep their creation under more direct control. In view of the complexity and inefficiency of the EU's current patchwork of legal texts, Part IV refers to the proposal for a reinvigoration of the European integration process through the creation of a Federation of Nation States based on a coherent Constitutional system among those European countries willing to leave behind ancient notions of sovereignty.

II.

THE MASTERS OF THE TREATIES AND THE COMMUNITY METHOD

A. *The Creation of the Community Method*

Before examining the EU's current institutional framework, it is useful to set the stage by introducing the circumstances that have allowed for the creation of the Community method. The basics of the method were developed in the 1950s, largely as a reaction to the inefficiency of the Council of Europe's intergovernmental decision-making techniques.[29] The Council of Europe, based in Strasbourg, was established in 1949 to promote European unity after World War II.[30] All Western and Northern European countries became members.[31] Attempts to give the Council of Europe an effective decision-making capacity were rejected by the United Kingdom (UK) and the Scandinavian countries, which insisted on traditional diplomatic working methods through the unanimous adoption of international conventions.[32] The Organization for European Economic Cooperation ("OEEC"), created in 1948 in response to the Marshall Plan, suffered from the same intergovernmental paralysis.[33] The need to depart from such intergovernmental working methods was most eloquently formulated by a disillusioned Paul-Henri Spaak following his resignation as President of the Council of Europe's Consultative Assembly:

> Do you really want to build Europe without creating a supranational European authority and do you really want to build Europe while maintaining your national sovereignty? If that is your goal, we are no longer in agreement, because I believe

29. On the creation of the Council of Europe and its institutional system, see A. H. ROBERTSON, THE COUNCIL OF EUROPE (1956); PETER M. R. STIRK, A HISTORY OF EUROPEAN INTEGRATION SINCE 1914 103 (1996); DEREK W. URWIN, A POLITICAL HISTORY OF WESTERN EUROPE SINCE 1945 77 (5th ed. 1987).

30. *See id.*

31. *See id.*

32. *See id.*

33. On the creation of the OEEC and its institutional system, see ROBERT MARJOLIN, MEMOIRS, 1911-1986: ARCHITECT OF EUROPEAN UNITY 191 (1989); ALAN S. MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE 1945-51 168 (1984); STIRK, *supra* note 29, at 83; URWIN, *supra* note 29, at 79; EXPLORATIONS IN OEEC HISTORY (Richard T. Griffiths ed., 1997).

> you will be blocked by an insurmountable obstacle; wanting to create a new Europe while keeping national sovereignty intact is like trying to square the circle.[34]

The European Coal and Steel Community ("ECSC") project met the demand for a change of method.[35] Only those countries that accepted the supranational principle of bringing their coal and steel industry under the governance of an independent High Authority were asked to participate in its elaboration. In the words of French Foreign Minister Robert Schuman, "the participating nations will *in advance* accept the notion of submission to the Authority . . . . They are convinced that . . . the moment has come for us to attempt for the first time the experiment of a supranational authority which shall not be simply a combination or conciliation of national powers."[36] For Schuman and his principal instigator, Jean Monnet, achieving the proper institutional framework was crucial. The cumulative sagacity of institutions was essential to Monnet, who was fond of quoting Swiss philosopher Henri Frédéric Amiel: "Each man begins the world afresh. Only institutions grow wiser; they store up their collective experience; and, from this experience and wisdom, men subject to the same laws will gradually find, not that their natures change but that their behavior does."[37] In view of his strong belief in the power of institutions, it is not surprising that, as Chairman of the Intergovernmental Conference convened in 1950 to negotiate the Treaty of Paris establishing the ECSC, Monnet urged the delegates not to saddle the embryonic Community with the shortcomings of traditional intergovernmental institutions.[38]

Although the EU's founders succeeded in creating a Community method that went beyond the unwieldy set-up of traditional intergovermental organizations, states' acceptance of this method was never based on purely idealistic motives. From the beginning, the EU's development has resulted from Member States' acceptance of institutional formulae that advance their substantive political and economic preferences.[39] This has gone hand in hand with tough inter-

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34. Paul-Henri Spaak, *Document 54: Il n'y a qu'un seul partenaire concevable pour les Etats-Unis d'Amérique: ce sont les Etats-Unis d'Europe (7 février 1952) in* LA PENSEE EUROPEENNE ET ATLANTIQUE DE PAUL-HENRI SPAAK at 297 (Paul-F. Smets ed., 1980). Translated by the author. On Spaak's disappointment with the functioning of the Council of Europe and the OEEC, see PAUL-HENRI SPAAK, COMBATS INACHEVES II: DE L'ESPOIR AUX DECEPTIONS 46 (1969); MICHEL DUMOULIN, SPAAK 433 (1999).

35. *See* WILLIAM DIEBOLD, THE SCHUMAN PLAN (1959); ERNEST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES 1950-1957 (1968); ROGER BULLEN & M.E. PELLY, THE SCHUMAN PLAN, THE COUNCIL OF EUROPE AND WESTERN EUROPEAN INTEGRATION (1986).

36. THE POLITICS OF EUROPEAN INTEGRATION: A READER 36 (Michael O'Neill ed., 1996). (Robert Schuman before the Consultative Assembly of the Council of Europe, Records of the Fourth Sitting, Aug. 10, 1950). On Schuman's viewpoint regarding European integration, see RAYMOND POIDEVIN, ROBERT SCHUMAN, HOMME D'ETAT, 1886-1963 (1986).

37. FRANCOIS DUCHENE, JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE 401 (1994).

38. *See* JEAN MONNET, MEMOIRS 323 (1978). *See also* DUCHENE, *supra* note 37, at 205 (1994).

39. On the Schuman Plan and the negotiation of the Treaty of Paris establishing the ECSC, see JOHN GILLINGHAM, COAL, STEEL AND THE REBIRTH OF EUROPE, 1945-1955: THE GERMANS AND FRENCH FROM RUHR CONFLICT TO ECONOMIC COMMUNITY (1991); MILWARD, THE RECONSTRUCTION OF WESTERN EUROPE, *supra* note 33; THE BEGINNINGS OF THE SCHUMAN-PLAN 1950/51 (Klaus Schwabe ed., 1988); Pierre Gerbet, *Les Origines du Plan Schuman: le Choix de la Méthode Com-*

state and intra-governmental[40] bargaining regarding the nature and instruments of the European integration process.

B. *The Levels of Change in the EU: Supranational Dynamic and Member State Control*

From the start, European integration has been characterized by a desire for gradual evolution or change. The Treaties of Paris and Rome merely constituted a point of departure for the step-by-step integration process.[41] At the most fundamental level, the power to bring about change in the EU is still largely in the hands of the heads of state and government. This level of change concerns broad political decisions with wide-ranging effects on the EU's functioning. Treaty reform[42] and enlargement with new Member States[43] are obvious examples.[44] The EU's discussions at this level are position games in which the gov-

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munautaire par le Gouvernement Français, in HISTOIRE DES DEBUTS DE LA CONSTRUCTION EUROPEENNE (MARS 1948-MAI 1950) 199 (Raymond Poidevin ed., 1986); William I. Hitchcock, *France, the Western Alliance, and the Origins of the Schuman Plan, 1948-1950*, 21 DIPLOMATIC HIST. 603 (1997). On the negotiation of the Treaty of Rome establishing the EEC, see HANNS JÜRGEN KUSTERS, FONDEMENTS DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE (1990); ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992); ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT (1998); Hanns Jürgen Küsters, *The Origins of the EEC Treaty, in* THE RELAUNCHING OF EUROPE AND THE TREATIES OF ROME 211 (Enrico Serra ed., 1989).

40. For an insight into the disagreements within the French and German governments during the negotiation of the Rome Treaties, see GERARD BOSSUAT, L 'EUROPE DES FRANCAIS 1943-1959: LA IVE REPUBLIQUE AUX SOURCES DE L'EUROPE COMMUNAUTAIRE; Hanns Jürgen Küsters, *The Federal Republic of Germany and the EEC-Treaty, in* THE RELAUNCHING, *supra* note 39, at 495.

41. Already in his famous Declaration of May 9, 1950, Schuman had underlined that "Europe w[ould] not be made all at once or according to a single plan. It will be built through concrete achievements." Robert Schuman, *Declaration of 9 May 1950, in* THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION: A READER AND COMMENTARY 76 (Peter M. R. Stirk & David Weigall eds., 1999). For the original French version of the Schuman Declaration, see POIDEVIN, ROBERT SCHUMAN, *supra* note 36, at 261.

42. The Treaty reform procedure can be found in CONSOLIDATED TEU, *supra* note 2, art. 48: The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

43. The accession procedure can be found in CONSOLIDATED TEU, *supra* note 2, art. 49: Any European State which respects the principles set out in Art. 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

44. For an alternative use of the level of analysis technique to EU decision-making and an excellent general introduction to the EU's political process, see JOHN PETERSON & ELIZABETH BOMBERG, DECISION-MAKING IN THE EUROPEAN UNION 10 (1999). On the EU's political process, see also DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION (1999);

ernments attempt to create a congenial institutional framework, favorable to their substantive policy preferences. As the formalization of agreements at this level usually requires a consensus by the heads of state and government in the framework of the European Council as well as ratification by each Member State, the key to success is finding a compromise among the preferences of the participating Member State governments.[45] In this sense, the Member States have always remained the Masters of the Treaties.[46]

At the same time, however, the Member States as early as the 1950s set in motion a supranational dynamic, establishing a European polity with its own powers and institutions. This supranational dynamic partly escapes direct control by the governments of the Member States. Furthermore, attempts by individual Member States to resist the outcome of the supranational decision-making process, such as the Community's secondary legislation, Commission decisions or Court rulings, are not always successful. This explains why the heads of state and government have frequently complained that the EC's adaptation process has not gone in a direction favorable to them.[47]

The creation of secondary law in the form of EC regulations and directives is a level of change characterized by the interplay between the Community institutions: the Commission has the exclusive right to take the legislative initiative, the Council of Ministers adopts the legislative texts either by unanimity or by qualified majority voting,[48] and the European Parliament is increasingly involved via the co-decision procedure.[49] Council voting by qualified majority implies that Member States in the minority are nevertheless obliged to implement the legislative texts adopted by the majority. This has, at times, given rise to high-level protests. In the case of the working time directive of 1993,[50] British Prime Minister John Major claimed that this issue should have been dealt with under the Maastricht Treaty's Social Protocol, thus excluding the UK from

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SIMON HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION (1999); NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION (1999).

45. This does not imply that the influence of the European Parliament and the European Commission can be completely neglected in the decision-making process at this level. The European Parliament, for instance, must give its assent before an enlargement can take place. Commission opinions on both enlargement and Treaty reform have often helped to set the tone for European Council debates.

46. For the expression that the Member States are the "Masters of the Treaties," see Entscheidungen des Bundesverfassungsgerichts [BVerfGE] (German federal constitutional court), Oct. 12, 1993, 1 C.M.L.R. 57 (1994), at para. 55.

47. Reference is made here to the EC — as the framework functioning according to the Community method — and not to the EU, which also includes more intergovernmental pillars where the Member States did maintain greater direct control. For a recent collection of critical comments by heads of state and government regarding the EC's evolution, see AGENCE EUROPE, July 1, 1998, at 4.

48. Qualified majority voting is defined in CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex art. 148). Where the Council is required to act by a qualified majority, the votes of the Member States are weighted. *See id.* For their adoption under qualified majority, acts of the Council require at least 62 votes out of a total of 87. *See id.*

49. The co-decision procedure is defined in CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex art. 189b). It is a legislative procedure that requires that Commission proposals must be approved by both the European Parliament and the Council. *See id.* If either of these two institutions fails to approve the proposed act, it is not adopted. *See id.*

50. *See* Council Directive 93/104/EC, 1993 O.J. (L 307) 18.

any implementation obligation.[51] However, as the European Court of Justice ruled that the working time directive had been correctly adopted by qualified majority voting under then Article 118a EC, it entered into force as planned, even in the UK.[52]

The application of EC policies forms another level of change. Its impact should not be underestimated. In 1999, the Commission on its own enacted 842 regulations, fifty-five directives and 516 decisions in application of the Treaties or of the EU's secondary legislation.[53] For example, the Commission has effectively used its regulatory powers in competition policy by adapting existing treaties to meet current needs. The expanded application of antitrust policy by the Commission in such sectors as multimedia or sports, while not requiring any change in Treaty law or secondary legislation, has caused major friction with some of the large Member States. In 1998, for instance, the Commission banned a merger between German multimedia giants Kirch and Bertelsmann[54] and brought an antitrust case against ticket sales at the World Cup in France,[55] causing great irritation to German Chancellor Helmut Kohl and French President Jacques Chirac. Similarly, the Commission's measures against the export of UK beef in the BSE crisis or of Belgian food products in the dioxin crisis were attacked by both governments as excessive and unfair.[56] Nevertheless, they had to comply.[57]

The judicial interpretation of existing primary and secondary law, including the settlement of conflicts on both procedural and substantive matters, constitutes yet another level of change. The European Court of Justice makes final decisions at this level.[58] The Court's ruling in the working time directive case constitutes a good example of supranational decision-making. While the UK protested vigorously that the Court's interpretation of laws "sometimes seem[s] to go beyond what the participating governments intended in framing" them, the Major government had to live with the Court's interpretation.[59] Through its rul-

51. *See* John Major, Statement on the Working Time Directive, Nov. 12, 1996 (on file with author). *See also* Margaret Gray, *A Recalcitrant Partner: the UK Reaction to the Working Time Directive*, 17 Y.B. EUR. L. 323 (1997).

52. *See* Case 84/94, United Kingdom v. Council, 1996 E.C.R. I-5793; GEN. REP. EU 1996 at para. 1126 (1997).

53. *See* GEN. REP. EU 1999 at 417 (2000).

54. *See* COMP. REP. 1998 at para. 155 (1999).

55. *See* GEN REP. EU 1999 at para. 192 (2000).

56. On the Commission measures in the BSE crisis, see GEN REP. EU 1996 at para. 501. On the Commission measures in the Belgian dioxin crisis, see GEN. REP. EU 1999 at para. 577 (2000).

57. The role of Comitology — the Committees of Member State representatives designed to supervise the Commission's implementing acts — will be examined in section III.E of this article.

58. The European Court of Justice "shall ensure that in the interpretation and application of this Treaty the law is observed" (CONSOLIDATED EC TREATY, *supra* note 2, art. 220, ex art. 164). The Court consists of 15 judges and is assisted by 8 advocates-general (CONSOLIDATED EC TREATY, *supra* note 2, art. 221-222, ex art. 165-166). They are appointed by common accord of the governments of the Member States for a renewable term of 6 years (CONSOLIDATED EC TREATY, *supra* note 2, art. 223, ex art. 167). Since 1988, the Court of First Instance hears and determines in first instance, subject to a right of appeal to the Court of Justice, certain classes of action (CONSOLIDATED EC TREATY, *supra* note 2, art. 225, ex art. 168a).

59. A PARTNERSHIP OF NATIONS: THE BRITISH APPROACH TO THE EUROPEAN UNION INTERGOVERNMENTAL CONFERENCE 16 (1996).

ings, the Court has gradually defined the boundaries of Community and Member State powers. During the early 1960s, the Court promulgated such fundamental principles as the direct effect and primacy of Community law.[60] This was certainly not what the governments of the Member States had envisioned. During the famous Van Gend & Loos case of 1963, the Dutch, Belgian and German governments all submitted statements to the Court arguing against the direct effect of EEC Treaty provisions.[61] Similarly, during the Costa v. ENEL pleadings, the Italian government argued unsuccessfully against the primacy of EEC law over national law.[62]

That supranational decision-making processes can bring about institutional and societal change in the EU, even if some governments object, implies that the Member States have lost direct control over their creation.[63] It also explains why certain governments have been less than eager to continue with the European integration process through the Community method since it implies giving up direct control and veto powers. Their attempt to redirect the EU in the intergovernmental direction will be examined in Part III.

III.
THE EU'S INSTITUTIONAL FRAMEWORK: BETWEEN THE COMMUNITY METHOD AND AD HOC REFORM

A. Between an Expansive and a Restrictive Definition of EU Powers

In its Preamble, the EEC Treaty announced that its signatories intended to "lay the foundations of an ever closer union among the peoples of Europe."[64] EEC Treaty Article 235[65] was designed by the Community's founders as the legal mechanism that would allow the integration process to gradually adapt to new societal needs without Treaty revision.[66] It allowed the Council to take "the appropriate measures (by unanimity) . . . if action by the Community should prove necessary to attain . . . one of the objectives of the Community [while the] Treaty has not provided the necessary powers."[67] Between 1958 and 1972 it was used infrequently and under rather restrictive constructions.[68] It was not until the October 1972 Paris Summit that the heads of state and government

60. For a more detailed treatment of the principles of direct effect and primacy see sections III.J & III.K of this article.

61. *See* Case 26/62, Van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1.

62. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585.

63. That the Court has ruled against the opinion of the Member States on such fundamental principles as the direct effect and primacy of EEC law contradicts Alan S. Milward's claim that the Member States always retained firm control over their creation. *See* MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE, *supra* note 39, at 12.

64. CONSOLIDATED EC TREATY, *supra* note 2, preamble.

65. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 308.

66. *See* Joseph Van Tichelen, *Souvenirs de la Négotiation du Traité de Rome*, 34 STUDIA DIPLOMATICA 342 (1981); Pierre Pescatore, *Les Travaux du Groupe Juridique dans la Négotiation des Traités de Rome*, 34 STUDIA DIPLOMATICA 172 (1981).

67. CONSOLIDATED EC TREATY, *supra* note 2, art. 308 (ex art. 235).

68. *See* Guiliano Marenco, *Les Conditions d'Application de l'Art. 235 du Traité CEE* 12 REVUE DU MARCHE COMMUN 147 (1970).

decided to start making full and expansive use of Article 235 for the development of regional, social, science, environmental and energy policies as well as economic and monetary integration.[69] In the succeeding years, it served as a basis for action in such areas as consumer and environmental protection, before these subjects were explicitly listed in the Treaty as Community competences.[70]

Similarly, the European Court of Justice developed an implied powers doctrine to expand Community competence in the external relations field. The doctrine took the form of a parallelism between internal and external Community competences. It strongly affected the Member States' powers to act on their own in the international field.[71] The two main principles governing the Community's implied external powers can be summarized as follows:

- whenever Community law has conferred upon the Community institutions internal powers for the purpose of attaining a specific objective, the Community is authorized to enter into the international commitments necessary for the attainment of that objective (this is the so-called Opinion 1/76 doctrine);[72]

- where Community rules have been promulgated, the member states cannot outside the framework of the Community institutions assume obligations which might affect those rules or alter their scope (this is the so-called ERTA doctrine).[73]

While the Member States regularly reaffirmed that they were "[r]esolved to continue the process of creating an ever closer union,"[74] during the 1990s the emphasis shifted towards the protection of Member State powers. Through the subsidiarity principle in the Treaty of Maastricht, the Member States underlined the need for respect of their national (and regional) identities.[75] Federal Mem-

69. *See* BULL. EUR. COMMUNITY 24 (1972). *See also* WEILER, THE CONSTITUTION, *supra* note 4, at 53; Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 J. PUB. POL'Y 95 (1994); John A. Usher, *The Gradual Widening of European Community Policy on the Basis of Art. 100 and 235 of the EEC Treaty*, *in* STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY 30 (Jürgen Schwarze & Henry G. Schermers eds., 1988).

70. The need to rely on EC Treaty Article 235 decreased following the explicit inclusion of new fields of EC comptence in the SEA and the Treaty of Maastricht.

71. For the case-law of the 1970s, see Jean Groux, *Le Parallélisme des Compétences Internes et Externes de la Communauté Economique Européenne* 14 CAHIERS DE DROIT EUROPEEN 3 (1978); Pierre Pescatore, *External Relations in the Case-Law of the Court of Justice of the European Communities*, 16 COMMON MKT. L. REV. 615 (1979). For the evolution of the case-law since the 1970s, see David O'Keeffe, *Community and Member State Competence in External Relations Agreements of the EU*, 4 EUR. FOREIGN AFF. REV. 7 (1999); Takis Tridimas & Piet Eeckhout, *The External Competence of the Community in the Case-Law of the Court of Justice: Principle versus Pragmatism* 14 Y.B. EUR. L. 143 (1994).

72. *See* Opinion 1/76, 1977 E.C.R. 741.

73. *See* Case 22/70, Commission v. Council (ERTA), 1971 E.C.R. 263. Since the beginning of the 1990s, the Court has significantly restricted the implied powers in ERTA terms by making clear that the Member States maintain a competence where the internal EC provisions determine only minimum standards as is often the case with harmonization directives. *See* Opinion 2/91, 1993 E.C.R. I-1061.

74. TEU, *supra* note 2, preamble.

75. On the subsidiarity principle, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331; Koen Lenaerts & Patrick van Ypersele, *Le Principe de Subsidiarité et son Contexte: Etude de l'Art. 3b du Traité CE*, CAHIERS DE DROIT EUROPEEN 3 (1994); David Millar, John Peterson & Andrew Scott, *Subsidiarity: A "Europe of the Regions" v. the British Constitution*, 32 J. COMMON MKT. L. REV. 47

ber States such as Germany and Belgium favored the subsidiarity principle because their regional entities refused to see their sometimes newly regionalized competences escape to the European level.[76] The UK's Conservative government also pushed for the adoption of a subsidiarity principle, for very different reasons. In line with its successful resistance to the explicitly "federal" aspirations of the draft Treaty on European Union, the UK saw subsidiarity as a means to limit the EU's scope of action, particularly in the field of legislative harmonization of social, consumer and environmental protection. For the governments of Prime Ministers Margaret Thatcher and John Major, the EU's legislative approximation proposals indicated the federalists' desire to create a "European Superstate" that would drive up the cost of doing business, thus decreasing the UK's competitiveness.[77]

As clarified by the Edinburgh European Council of December 1992, the subsidiarity principle—incorporated in Consolidated EC Treaty Article (formerly EC Treaty Article 3b)—covers three distinct legal concepts with strong historical antecedents in the treaties and the case law of the Court of Justice.[78] First, the principle of attribution of powers means that the EU can only act where given the power to do so, implying that national powers are the rule and EU powers the exception. Second, the principle of subsidiarity in the strict legal sense stipulates that, in areas that do not fall within its exclusive competences, the EU shall take action only if and in so far as the objectives of the proposed action can by reason of scale or effect not be sufficiently achieved by the Member States. Third, the principle of proportionality means that action by the EU shall not go beyond what is necessary to achieve the objectives of the Treaty.[79] Commission President Jacques Santer interpreted the introduction of the subsidiarity principle as a signal that his institution needed to stop the activism that had characterized the term in office of his predecessor Jacques Delors.[80] At the

(1994); John Peterson, *Subsidiarity: A Definition to Suit Any Vision?*, 47 PARLIAMENTARY AFF. 116 (1994).

76. *See* Juliane Kokott, *Federal States in Federal Europe: German Länder and Problems of European Integration*, *in* NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 175 (Antero Jyränki ed., 1999).

77. *See United Kingdom, Growth, Competitiveness and Employment in the European Community*, *in* COMMISSION OF THE EUROPEAN COMMUNITIES, GROWTH, COMPETITIVENESS, EMPLOYMENT: THE CHALLENGES AND WAYS INTO THE 21ST CENTURY, PART C 271 (1993).

78. *See* Edinburgh European Council, Presidency Conclusions, Dec. 11-12, 1992, *in* 12 BULL. EUR. COMMUNITIES at para. I.4 & I.15 (1992).

79. The Amsterdam Treaty Protocol on the application of the principles of subsidiarity and proportionality includes broad guidelines that further clarify the use of both principles. *See* CHRISTIAN CALLIESS, SUBSIDIARITATS — UND SOLIDARITATSPRINZIP IN DER EUROPAISCHEN UNION: VORGABEN FUR DIE ANWENDUNG VON ART. 5 (EX-ART. 3B) EGV NACH DEM VERTRAG VON AMSTERDAM (1999); Grainne de Burca, *Reappraising Subsidiarity's Significance after Amsterdam*, Jean Monnet Chair Working Paper Series, Harvard Law School (1999/07) <http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/ 990701.html>. Compliance with the subsidiarity principle may be subject to scrutiny by the Court of Justice. But this is after-the-event scrutiny. *See* Grainne de Burca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUD. 217 (1998); A. G. Toth, *Is Subsidiarity Justiciable?*, 19 EUR. L. REV. 268 (1994).

80. *See* John Peterson, *The Sonter Era: the European Commission in Normative, Historical and Theoretical Perspective*, 6 J. EUR. PUB. POL'Y 46 (1999).

informal meeting of heads of state and government at Pörtschach in October 1998, Santer—whose Commission worked under the slogan "legislate less to act better"—proudly presented the result of his strict application of the subsidiarity principle: the number of Commission proposals had dropped from 787 in 1990 to 491 in 1998; the number of consultations with both Member States and interested parties before launching new initiatives had drastically increased; and in 1998 alone the Commission withdrew 70 unnecessary legislative proposals.[81]

In preparation for the Amsterdam Treaty negotiations, the German Bundesrat and the major political parties in Denmark tried to go much further by limiting the evolutive nature of the integration project.[82] They pushed a proposal for a better demarcation between EU and national competences through the inclusion of a limitative list of EU powers in the Treaty.[83] The idea was quickly abandoned. For most Member States, a detailed list of EU powers seemed contrary to the changing, ongoing nature of European integration. Not surprisingly, those proposing a limitative list of EU powers also attempted to repeal Article 235 EC. The issue was not pursued.[84] Already in the preparatory phase of the IGC, the Reflection Group had stated it was "not in favor of incorporating a catalogue of the Union's powers in the Treaty and would prefer to maintain the present system, which establishes the legal basis for the Union's actions and policies in each individual case."[85] At the same time, the Reflection Group that had been asked to draft the annotated agenda for the Amsterdam IGC showed itself "in favor of maintaining Article 235 as the instrument for dealing with the changing nature of interpretation of the Union's objectives."[86]

One year after the conclusion of the Amsterdam Treaty, under the heavy influence of the German electoral climate of September 1998, Chancellor Helmut Kohl insisted on putting the competence and subsidiarity debate back on the agenda.[87] In their joint letter for the Cardiff European Council in June 1998, Kohl and French President Jacques Chirac emphasized that their objective had "never been . . . to build a central European State" and urged their colleagues "to clarify the limits of the competences of the [EU]."[88] With Kohl and his Austrian colleague Victor Klima arguing that "[t]he restitution by Brussels of certain powers in the area of national or regional responsibilities should not be a taboo subject,"[89] some Member States appeared to be retreating from their commitment to the "ever closer union." A few months later, on January 1, 1999, the exchange rates of the currencies participating in the final phase of Economic and

81. *See* Commission of the European Communities, Note for the Press: President Santer's Brief for the Informal Meeting of Heads of State and Government at Pörtschach (Oct. 24-25, 1998) (on file with author).

82. *See* European Parliament Intergovernmental Conference Task Force, Briefings on the 1996 Intergovernmental Conference, Volume III, 335-362 (1996).

83. *See id.*

84. *See id.*

85. Reflection Group, *supra* note 12, at para. 125.

86. *Id.*

87. *See* Devuyst, *The Community-Method, supra* note 7, at 111.

88. AGENCE EUROPE, June 9, 1998, at 5.

89. AGENCE EUROPE, July 1, 1998, at 4.

Monetary Union (EMU) were irrevocably linked, marking a fundamental new step in the European integration process.[90] While accepting a major transfer of sovereignty in the traditionally sensitive monetary field, the Member States simultaneously indicated that they were determined to remain the Masters of the integration process.

B. Between Coherence and Flexibility

EU membership involves rights, but also entails obligations. Maintaining a certain equilibrium between the Member States' rights and obligations — in the sense that they should respect the Community's coherence — has often been regarded as essential to keeping the integration project sustainable.[91] From the start, one of the Community's characteristics, was that it incorporated a degree of positive integration going beyond the free trade alternative offered by the UK.[92] The Spaak report of 1956, which formed the starting point for the negotiations leading to the Rome Treaties, underscored this point, notably on France's demand.[93] While the report emphasized the free movement of the factors of production as a way to revitalize Europe's economy, it also contained an important chapter on the correction of market distortions and the harmonization of the laws of the Member States.[94] This last element was seen as essential to prevent the Common Market from being undermined from within. The Spaak report even touched upon the correction of distortions due to divergent tax and social security systems, and the harmonization of labor laws, all topics which remain on the agenda today.[95]

During the subsequent Treaty of Rome negotiations, France aimed at making a successful harmonization of social regulations a prerequisite to the final stage of the common market.[96] In the final version of the Treaty, France's idea was watered down significantly.[97] The Treaty of Rome, while containing a concrete liberalization plan for the creation of the customs union, only provided for the possibility of harmonization of social and fiscal legislation, and this by a unanimous vote of the Council.[98] Still, the Treaty went much further in the

90. *See* GEN. REP. EU 1999 at para. 30.

91. *See, e.g.*, Commission of the European Communities, Opinion to the Intergovernmental Conference 1996: Reinforcing Political Union and Preparing for Enlargement, at 21-22 (1996).

92. *See* Ugo La Malfa, *The Case for European Integration: Economic Considerations, in* EUROPEAN INTEGRATION 64 (C. Grove Haines ed., 1957).

93. *See* Comité Intergouvernemental Crée par la Conférence de Messine, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères 60 (1956). On the drafting of this report, see SPAAK, *supra* note 34, at 84; DUMOULIN, SPAAK *supra* note 34, at 510; Michel Dumoulin, *Les Travaux du Comité Spaak (juillet 1955-avril 1956), in* THE RELAUNCHING, *supra*, note 39, at 195.

94. *See* Comité Intergovernmental, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, *supra* note 93, at 60.

95. See *id.* at 64.

96. On the limited success of French harmonization demands, see in particular MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE, *supra* note 39, at 211-217.

97. *See id.*

98. Several authors have pointed out that the imbalance between the EU's successful drive for liberalization ("negative integration") and the slow and difficult road towards harmonization ("positive integration") is therefore a direct consequence of the Treaty of Rome's original set up. *See* FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 43 (1999); Mark A. Pollack, *Ne-*

direction of positive integration than any other European agreement of the immediate post-World War II era. As such, it provided the basis for a remarkable integration *acquis* in all fields of economic and social life.[99] To underline their intention of maintaining some balance between the common market freedoms and positive integration, the founders decided to add Article 101 to the EEC Treaty.[100] It provides for the adoption, by qualified majority voting, of Community directives eliminating distortions in the common market caused by disparate national regulations.[101]

To date, the Conservative Thatcher-Major governments of the United Kingdom have posed the most significant challenge to the maintenance of the difficult equilibrium between rights and obligations principle in the EU.[102] Historically, the UK has always been reluctant to develop the EU beyond the stage of a free trade area.[103] That was one of the reasons why the UK, in the 1950s, decided not to join the Common Market of the Six, but rather to form a much looser alternative: the European Free Trade Agreement ("EFTA").[104] During the Maastricht negotiations, the Conservative government insisted that the EU would refrain from developing a single and comprehensive macroeconomic, monetary and social policy.[105] Although the UK ultimately failed to prevent its partners from going ahead, it managed to escape the constraints of the EU's social dimension through the Social Protocol.[106] Furthermore, Prime Minister Major obtained a Protocol on European Monetary Union ("EMU") stating that the UK should not be obliged or committed to participate

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oliberalism and Regulated Capitalism in the Treaty of Amsterdam, at 5 (University of Wisconsin Working Paper on European Studies No. 2, 1998).

99. Since the 1950s, the emphasis on the need for positive integration in the EU framework has only grown. It is interesting in this regard to compare the formulation of the original EEC Treaty Article 2 with EC Treaty Article 2 that emerged from the Amsterdam negotiations.

100. *See* Van Tichelen, *supra* note 66, at 340. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 96.

101. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 96 (ex EC TREATY art. 101): "Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. If Such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting by qualified majority, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty." The article has never been put into practice.

102. For a good insight into the European perspective of the Thatcher and Major governments, see MARGARET THATCHER, THE DOWNING STREET YEARS 536, 727 (1993); JOHN MAJOR, THE AUTOBIOGRAPHY 264 (1999).

103. For an historical overview of the UK's attitude towards European integration, see STEPHEN GEORGE, AN AWKWARD PARTNER: BRITAIN IN THE EUROPEAN COMMUNITY (1998). For the UK's alternative approach during the 1950s, see MIRIAM CAMPS, BRITAIN AND THE EUROPEAN COMMUNITY (1964).

104. *See* EMILE BENOIT, EUROPE AT SIXES AND SEVENS: THE COMMON MARKET, THE FREE TRADE ASSOCIATION AND THE UNITED STATES (1961); MIRIAM CAMPS, *supra* note 103.

105. For the UK's attitude during the Maastricht negotiations, see ANTHONY FORSTER, BRITAIN AND THE MAASTRICHT NEGOTIATIONS (1999); Stephen George, *The British Government and the Maastricht Agreements*, in 2 THE STATE OF THE EUROPEAN COMMUNITY: THE MAASTRICHT DEBATES AND BEYOND, at 177 (Alan W. Cafruny & Glenda G. Rosenthal eds., 1993).

106. *See* Protocol (No. 14) on Social Policy to the TEU, Feb. 7, 1992.

in the final stage of the Euro.[107] In preparation for the Amsterdam negotiations, Major seemed determined to continue with the opt-out strategy.[108] The Labor Party's election victory in May 1997, just one month before the end of the Amsterdam negotiations, enabled the Member States to integrate the Social Protocol into the Treaty's mainstream. This brought an end to what the Commission had called an example of "a 'pick-and-choose Europe' . . . which flies in the face of the common European project and the links and bonds which it engenders."[109] At the same time, incoming Prime Minister Tony Blair reversed Major's plea for "easy flexibility," foreseeing the danger that other Member States might use it to leave the UK behind.[110]

The Treaty of Amsterdam's provisions on closer cooperation reflect Blair's concerns. Closer cooperation may affect neither the competences, rights, obligations and interests of the non-participants, nor the *acquis communautaire*. As an ultimate safeguard, any Member State has the possibility of blocking the creation of a closer cooperation framework.[111] According to the initial Franco-German vision of October 17, 1996, decisions to establish frameworks of enhanced cooperation would have been made only by those Member States specifically concerned.[112] No Member State would have been able to veto such a decision. This was not only rejected by the UK, but also by Spain, Portugal, Denmark, Sweden and Ireland.[113] In its final version, the Amsterdam Treaty stipulates that the Council can, in principle, grant authorization for closer cooperation by qualified majority.[114] However, any Member State may block the vote by invoking "important and stated reasons of national policy,"[115] thus maintaining maximum national control. In its opinion for the IGC 2000, the Commission proposed "putting an end to the right of a Member State to request a unanimous decision . . . . In the larger Union such a veto would present too

107. *See* Protocol (No. 11) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland to the TEU, Feb. 7, 1992.

108. *See* John Major, Address at the *Universiteit Leiden* William and Mary Lecture (Sept. 7, 1994).

109. Commission, Opinion to the Intergovernmental Conference 1996, *supra* note 91, at 21-22.

110. *See* EUROPEAN REPORT, May 8, 1997, at I-5.

111. On the Treaty of Amsterdam's closer cooperation provisions, see FILIP TUYTSCHAEVER, DIFFERENTIATION IN EUROPEAN UNION LAW (1999); COPING WITH FLEXIBILITY AND LEGITIMACY AFTER AMSTERDAM (Monica den Boer, Alain Guggenbuhl & Sophie Vanhoonacker eds., 1998); Claus-Dieter Ehlermann, *Retrospective: Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty*, 4 EUR. L. J. 246 (1998); Giorgio Gaja, *How Flexible is Flexibility Under the Amsterdam Treaty?*, 35 COMMON MKT. L. REV. 855 (1998); Helmut Kortenberg, *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 833 (1998); Eric Philippart & Geoffrey Edwards, *The Provisions on Closer Co-operation in the Treaty of Amsterdam*, 37 J. COMMON MKT. STUD. 87 (1999); Jo Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EUR. L. J. 63 (1998).

112. *See* Youri Devuyst, *The Treaty of Amsterdam: An Introductory Analysis*, 10 ECSA REV. 12 (1997).

113. *See id.* at 13.

114. *See* CONSOLIDATED TEU, *supra* note 2, art. 40; CONSOLIDATED EC TREATY, *supra* note 2, art. 11.

115. CONSOLIDATED TEU, *supra* note 2, art. 40; CONSOLIDATED EC TREATY, *supra* note 2, art. 11.

great an obstacle to the — essential — implementation of the mechanism of closer cooperation."[116]

So far, the closer cooperation provision has been used only once, to enable the integration of the Schengen *acquis* in the EU framework without the participation of the UK and Ireland.[117] As the Wise Men's report by Jean-Luc Dehaene, Richard von Weizsäcker and David Simon notes, the Amsterdam Treaty's closer cooperation clauses "are so complex and subject to such conditions and criteria that they are unworkable."[118] Thus, the issue has been put back on the political agenda. In the words of the Wise Men's report:

> In a larger and more diverse Union, flexibility in the institutional framework is even more important than at present. Enlargement will increase diversity. This does not imply that Member States should be allowed to opt out of any policy they choose: the European Union would not survive if Member States were allowed to pick and choose among obligations of the Union. But it does imply that, in a more heterogeneous aggregate of Member States, some will wish to go further or faster than others . . . . This seems both legitimate and indispensable.[119]

C. *Between Solidarity and the Promotion of Narrow Self-Interest*

From the start, Schuman insisted that Europe had to be "built by practical actions whose first result will be to create a *de facto* solidarity."[120] In legal terms, solidarity has traditionally been associated with the general principle according to which Member States and Community institutions "are bound by a duty of mutual loyalty and cooperation."[121] This principle has been derived from what used to be EEC Treaty Article 5.[122] *Stricto senso*, this Article contains three basic obligations: the Member States must take all necessary measures to ensure fulfillment of the obligations arising out of the Treaty; they must facilitate the achievement of the Community's tasks; and they must abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.[123] The European Court of Justice, however, has come to interpret these obligations as the expression of a more general principle imposing on Member States and Community institutions mutual duties of genuine cooperation and

116. Commission, Adapting the Institutions to Make a Success of Enlargement, *supra* note 16, at 8.

117. *See* Protocol Integrating the Schengen Acquis into the Framework of the European Union, annexed to the TREATY ON EUROPEAN UNION and to the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997.

118. Dehaene et al., *supra* note 25, at 7. The complexity of the Treaty of Amsterdam's closer cooperation provisions can be explained by the fact that they form a compromise between entirely different viewpoints on flexibility. *See* Alexander C-G. Stubb, *A Categorization of Differentiated Integration*, 34 J. COMMON MKT. STUD. 283 (1996).

119. Dehaene et al., *supra* note 25, at 7.

120. Schuman, *supra* note 41, at 76.

121. Giorgio Gaja, *Identifying the Status of General Principles in European Community Law*, *in* 2 SCRITTI IN ONORE DI GUISEPPE FREDERICO MANCHINI: DIRITTO DELL'UNIONE EUROPEA 450 (1998).

122. Currently CONSOLIDATED EC TREATY, *supra* note 2, art. 10.

123. *See id.*

assistance.[124] Furthermore, since the entry into force of the Treaty of Maastricht, the EU has the explicit "task . . . to organize, in a manner demonstrating consistency and *solidarity*, relations between the Member States and between their peoples."[125]

Community solidarity is closely linked to the idea of reciprocity. When referring to Article 5, the European Court of Justice has on several occasions spoken about "the rule imposing *reciprocal* obligations of bona fide cooperation."[126] By providing assistance or making concessions to a partner that finds itself in difficulty, the other Member States and the EU institutions can expect a similar treatment whenever they appeal to the solidarity principle. While the Court has explicitly recognized that the Member States accepted the Community legal system "on a basis of reciprocity,"[127] it has strongly rejected Member State attempts to use the reciprocity or counter-measure argument to excuse their non-observance of Community obligations, emphasizing that the Community is a legal order where Member States "shall not take the law into their own hands."[128]

Solidarity is not merely a legal concept, but also something real in the EU's political practice. First, solidarity plays an important role during the EU decision-making process. Even where Council decisions can be adopted by qualified majority voting, the drafting process of Community directives and regulations is characterized by a constant attempt to avoid the marginalization of particular Member States. In the words of seasoned European Parliament official Dietmar Nickel, even in those areas where the Council is able to vote by majority, political proposals

> certainly cannot be promoted against a group of Member States, or even one Member State if it were seen as a concerted attempt to overturn the vital interests of this Member State. The solidarity between the Member States in the Council would never admit such a result. Nobody, and certainly not the Commission would seriously try. Everybody would know that this would overstretch the rules of the game.[129]

Instead, the EU's legislation is often accompanied by assurances in the form of transition periods and, less frequently, specific derogations for Member States

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124. For an excellent overview of the case-law, see Vlad Constantinesco, *L'art. 5 CEE, de la bonne foi à la loyauté communautaire*, *in* DU DROIT INTERNATIONAL AU DROIT DE L'INTEGRATION: LIBER AMICORUM PIERRE PESCATORE 97 (Francesco Capotorti et al. eds., 1987); Claire-Françoise Durand, *Les Principes*, *in* 1 COMMENTAIRE MEGRET: LE DROIT DE LA CEE: PREAMBULE, PRINCIPES, LIBRE CIRCULATION DES ARCHANDISES 25 (2d ed. 1992); John Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990); John Temple Lang, *The Core of Constitutional Law of the Community - Article 5 EC*, *in* CURRENT AND FUTURE PERSPECTIVES ON EC COMPETITION LAW 41 (Lawrence W. Gormley ed., 1997).

125. CONSOLIDATED TEU, *supra* note 2, art. 1 (ex TEU art. A).

126. Case 358/85, France v. European Parliament, 1988 E.C.R. 4821.

127. 1964 E.C.R. at 594.

128. Cases 90 and 91/63, Commission v. Belgium and Luxembourg, 1964 E.C.R. 625, 631. For more details see Geert Wils, *The Concept of Reciprocity in EEC Law: An Exploration into these Realms*, 28 COMMON MKT. L. REV. 245 (1991).

129. Dietmar Nickel, *The Amsterdam Treaty: A Shift in the Balance Between the Institutions?*, Jean Monnet Chair Working Paper Series, Harvard Law School (1998) *available at* <http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/980701.html>.

facing particular problems.[130] It is not surprising therefore that, upon leaving his post as Minister of Foreign Affairs of Luxembourg in 1999, Jacques Poos explicitly thanked his colleagues for their "unfailing support to the smallest of the Member States" and for their "spirit of solidarity which characterizes the General Affairs Council."[131]

Second, EU solidarity takes a financial form. International trade agreements concluded by the EU often go hand in hand with internal compensatory adjustment in the form of financial aid or intervention promises in such fields as agriculture and textiles. The purpose is to provide assistance to Member States that might suffer specific negative consequences from the application of the international agreements in question.[132] The best known example of financial solidarity in the EU is its extensive economic and social cohesion effort.[133] Since the SEA of 1986, the EC aims explicitly "at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas."[134] This objective is pursued through the transfer of financial means from the rich to the needy regions via the Community's Structural Funds (European Agricultural Guidance and Guarantee Fund, European Social Fund, European Regional Development Fund) and the Cohesion Fund.[135] While less than 5 percent of the budget in 1975, cohesion spending increased to 35 percent in 1999.[136] Although an expression of solidarity, the cohesion effort is also very much the result of reciprocity during the Maastricht negotiations. The Cohesion Fund was established upon the insistence of Spain and the other poorer Member States.[137] They agreed to go along with the macroeconomic convergence criteria in the EMU framework only on condition they would receive additional cohesion assistance. Reciprocity went both ways, since the actual use of the Cohesion Fund was made conditional on the respect of the Maastricht Treaty's deficit reduction objectives.[138] While significant disparities remain, the EU's cohesion efforts are having some effect: GDP per capita in the four Cohesion countries (Greece, Portugal, Spain and

130. For examples of derogations during the legislative process, see DE SCHOUTHEETE, *supra* note 7, at 103.

131. AGENCE EUROPE, June 23, 1999, at 8.

132. For examples related to the EU's conclusion of the Uruguay Round, see Youri Devuyst, *The European Community and the Conclusion of the Uruguay Round*, *in* 3 THE STATE OF THE EUROPEAN UNION 456 (Carolyn Rhodes & Sonia Mazey eds., 1995).

133. On the EU's cohesion policy see COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTILEVEL GOVERNANCE (Liesbet Hooghe ed., 1996); Liesbet Hooghe, *EU Cohesion Policy and Competing Models of European Capitalism*, 36 J. COMMON MKT. STUD. 457 (1998); James Mitchell & Paul McAleavey, *Promoting Solidarity and Cohesion*, *in* DEVELOPMENTS IN THE EUROPEAN UNION 174 (Laura Cram, Desmond Dinan & Neill Nugent eds., 1999).

134. CONSOLIDATED EC TREATY, *supra* note 2, art. 158 EC (ex EC Treaty art. 130a).

135. See the references in note 133.

136. *See* David Allen, *Cohesion and Structural Adjustment*, *in* POLICY-MAKING IN THE EUROPEAN UNION 209 (Helen Wallace & William Wallace eds., 1996).

137. *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 2, at 1024; Mark A. Pollack, *Regional Actors in an Intergovernmental Play: The Making and Implementation of EC Structural Policy*, *in* 3 THE STATE OF THE EUROPEAN UNION 363 (Carolyn Rhodes & Sonia Mazey eds., 1995).

138. *See* Gary Marks, *Structural Policy and Multilevel Governance*, *in* 2 THE STATE OF THE EUROPEAN COMMUNITY 391 (Alan W. Cafruny & Glenda G. Rosenthal eds., 1993).

Ireland) is gradually converging towards the EU average, rising from 65 percent of the EU average in 1986 to 76.5 percent in 1996.[139]

With the Agenda 2000 debate regarding the EU's financial perspectives for the period between 2000 and 2006, the solidarity theme became a hot issue on the European political agenda in 1998 and 1999.[140] Germany, backed by the Netherlands, Sweden and Austria, called for a mechanism to correct budgetary imbalances. Their purpose was to obtain a cut in their net contribution to the EU budget.[141] At the start of the debate, German Chancellor Gerhard Schröder declared that it had become necessary to change traditional German policy. "In the past," he said, "many of the necessary compromises could be achieved because the Germans have paid for them. This policy has come to an end."[142] Schröder and several of his colleagues from the richer countries tackled the debate on the basis of Commission figures calculating for each Member State the balance between budgetary contributions and receipts.[143] The view that budget contributions should be equivalent to the budget returns, the so-called *juste retour* theory, was strongly condemned in the European Parliament. Jutta Haug, Parliament's reporter on the issue, emphasized that the *juste retour* attitude was "contrary to the indivisible nature of the financial and non-financial rights, benefits and obligations deriving from Union membership and from the principle of solidarity between the Member States."[144] As budgetary calculations do not include the benefits that are derived from the internal market or the Euro, Haug noted that the net-contributor concept was methodologically extremely imprecise.[145]

While recognizing that the full benefits of EU membership cannot be measured solely in budgetary terms, the agreement on the EU's financial perspectives reached at the Berlin European Council of March 1999 did lead to a correction of the "politically unacceptable anomalies in burden-sharing," thus allowing for a reduction in the financial contributions of Austria, Germany, the Netherlands and Sweden.[146] The UK abatement was maintained. Perhaps even more significant was the overall reduction in EU funding that resulted from the Berlin European Council.[147] As a result of the Member States' eagerness to cut

139. *See* Commission of the European Communities, Sixth Periodic Report on the Social and Economic Situation and Development of the Regions of the European Union, SEC(99) 66 final at 7 (1999).

140. *See* Commission of the European Communities, Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final (1997).

141. For a critical comment see Laureano Lazaro Araujo, *La Union Europea, Entre la Cohesion y la Desintegracion*, POLITICA EXTERIOR 81 (68-1999).

142. Spiegel-Gespräch mit Gerhard Schröder, *"Uns die Last Erleichtern,"* DER SPIEGEL, Jan. 4, 1999, at 44. Translation by the author.

143. *See* Commission of the European Communities, Financing the European Union: Commission Report on the Operation of the Own Resources System, COM(98) 560 final (Oct. 7, 1998).

144. Jutta Haug, Report on the Need to Modify and Reform the European Union's Own Resources System, A4-0105/99, at 17 (Mar. 8, 1999).

145. *See id.* at 17.

146. David Galloway, *Agenda 2000 - Packaging the Deal*, 37 J. COMMON MKT. STUD. 9. *See also* Berlin European Council, Presidency Conclusions, Mar. 24-25, 1999, *in* BULL. EUR. UNION at para. I.4 (3-1999).

147. On the Berlin's budgetary results, see Brigid Laffan, *The Berlin Summit: Process and Outcome of the Agenda 2000 Budgetary Proposals*, 12 ECSA REV. 6 (1999).

their contributions to the EU budget, the Berlin financial perspectives include a general decrease in the transfer of budgetary means from the Member States to the EU. In 1999, the ceiling for total appropriations for payments for the EU stood at 1.24 percent of the EU's combined GDP.[148] The Berlin financial perspectives aim at reducing this level from 1.13 percent in 2000 to 0.97 percent in 2006. This caused sharp criticism from the European Parliament, which regretted that, at a time when more action was expected from the EU in a host of areas, the financial perspectives made no provision for realistic levels of funding.[149] Parliament particularly noted the significant reduction of budgetary means for the fight against long-term unemployment. It also feared that the lack of funding would prevent the EU from taking urgent action to improve unforeseen catastrophic situations.[150] In view of the Member States' tendency to retreat behind their own budget walls, Parliamentarians seemed to worry that EU solidarity risked ending up as mere rhetoric.[151]

D. Between a Functional and a Thematic Division of Powers Among the Institutions

The institutional framework created by the Treaty of Rome was coherently functional.[152] The European Commission, Council of Ministers, European Parliament and European Court of Justice each received powers that applied to all thematic domains under the Community's competence and went well beyond the traditional intergovernmental setup.[153] The Commission obtained the exclusive right to take the legislative initiative, and was to act as the independent guardian of the Treaties and as the body implementing EU policies.[154] The Council was to serve as the main decision-maker, and could, in certain areas after a transition period, exercise that function by qualified majority.[155] Parliament was originally intended as a consultative body but gradually gained co-decision status on most legislative issues.[156] Finally, the Court of Justice had jurisdiction to give binding rulings on the validity and interpretation of Community acts.[157]

148. *See* Commission of the European Communities, The Community Budget: The Facts in Figures, SEC(99) 1100, table 16 (1999).

149. *See* European Parliament Resolution on the Results of the Extraordinary European Council in Berlin on March 24-25, 1999, 1999 O.J. (C 219) 191, at paras. 4 & 5.

150. *See id.*

151. *See id.*

152. *See* in particular Pierre Pescatore, *L' Exécutif Communautaire: Justification du Quadripartisme Institué par les Traités de Paris et de Rome*, 4 CAHIERS DE DROIT EUROPEEN 387 (1978).

153. *See id.*

154. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 211-219 (ex EC TREATY arts. 155-163).

155. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 202-210 (ex EC TREATY arts. 145-154).

156. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 189-201 (ex EC TREATY arts. 137-144).

157. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 220-245 (ex EC TREATY arts. 164-188).

The most important deviation from the functional scheme is the Maastricht Treaty's pillar structure.[158] While the Maastricht negotiators did incorporate Common Foreign and Security Policy (CFSP) and Cooperation in Justice and Home Affairs (JHA) as new fields of action under the EU umbrella, both areas of activity were kept separate from the Treaty of Rome's decision-making methods, continuing to function on the basis of largely intergovernmental working methods.[159] The search for consensus dominated EU activity in the two new pillars. In addition, the Maastricht Treaty maintained specific preparatory decision-making structures for both CFSP and JHA.[160] In CFSP, this centers around a network of Political Correspondents based in each Ministry of Foreign Affairs and a Political Committee composed of the Political Directors.[161] JHA is also endowed with its own Coordinating Committee of senior national officials from the Justice and Home Affairs Ministries.[162] Both the Political Committee and the JHA Committee have traditionally maintained a most uneasy relationship with the Coreper, the Committee of Permanent Representatives of the Member States to the EU that is charged with the horizontal task of preparing the work of the Council.[163]

The Amsterdam Treaty confirmed the Member States' intention to proceed in the direction of a Council-based structure for the CFSP, separate from the Community's external economic relations.[164] Amsterdam notably turned the Council Secretary General into the High Representative for the CFSP and created a CFSP Early Warning and Planning Unit in the framework of the Council Secretariat.[165] With regard to JHA, however, the Amsterdam Treaty made a step towards a "communautarization." Visas, asylum, immigration and other policies related to the free movement of persons were transferred from the third pillar to the Community pillar.[166] This, however, came with a cost to the institutional purity of the Community pillar. During a five year transitional period, decision-making on visas, asylum, immigration and free movement of persons remains largely intergovernmental. For the first time in the Community pillar's

158. *See* Weiler, *supra* note 2. For an excellent comparison between the intergovernmental structure of the CFSP pillar and French President Charles de Gaulle's Fouchet proposals, see C. W. A. Timmermans, *The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the 'Plan Fouchet'?*, LEGAL ISSUES OF EUROPEAN INTEGRATION 61 (1996). On the Fouchet proposals, see ROBERT BLOES, LE PLAN FOUCHET ET LE PROBLEME DE L'EUROPE POLITIQUE (1970).

159. *See supra* note 11.

160. *See supra* note 2.

161. The functions of the Political Committee are specified in CONSOLIDATED TEU, *supra* note 2, art. 25 (ex TEU art. J.15).

162. The functions of the Coordinating Committee are specified in CONSOLIDATED TEU, *supra* note 2, art. 36 (ex TEU art. K.8).

163. *See* PETERSON & BOMBERG, *supra* note 44, at 241.

164. *See* L'UNION EUROPEENNE ET LE MONDE APRES AMSTERDAM (Marianne Dony ed., 1999); Alan Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 35 COMMON MKT. L. REV. 1019 (1998); Jörg Monar, *The European Union's Foreign Affairs System After the Treaty of Amsterdam: A 'Strengthened Capacity for External Action'?*, 2 EUR. FOREIGN AFF. REV. 423 (1997).

165. *See* CONSOLIDATED TEU, *supra* note 2, art. 26 (ex TEU art. J.16); Declaration on the Establishment of a Policy Planning and Early Warning Unit, annexed to the Final Act of the Amsterdam Conference.

166. *See* CONSOLIDATED EC TREATY, *supra* note 2, tit. IV.

history, the right of legislative initiative is shared between Member States and the Commission.[167] The Council decides by unanimity and the role of the European Parliament is limited to consultation.[168] Following this five year period, the Commission will receive the exclusive right of initiative and the Council shall then decide by unanimity on the parts of this new EC Treaty Title which will be dealt with through the co-decision procedure, including qualified majority in the Council.[169] From the entry into force of this new Title, the European Court of Justice was granted a limited jurisdiction.[170] For the first time in the history of the third pillar, the Court also received limited jurisdiction regarding police and judicial cooperation in criminal matters for issues not related to the validity or proportionality of law enforcement in the Member States.[171] Although bringing JHA cooperation closer to Community pillar practices, the Amsterdam Treaty simultaneously helped to sustain particular thematic exceptions that are gradually contaminating the traditional functional working methods of the Community pillar.[172]

Particularly in the Community's external relations field, the Member States seem no longer inclined to accept the logic behind the Community method. While international economic transactions increasingly go beyond trade in goods, the Member States in the Maastricht and Amsterdam negotiations refused to broaden the Community's common commercial policy mechanisms to trade in services, trade-related aspects of investment and intellectual property protection.[173] With regard to EMU's external representation, the Member States

167. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 67.

168. *See id.*

169. *See id.*

170. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 68.

171. *See* CONSOLIDATED TEU, *supra* note 2, art. 35.

172. *See* Monica den Boer, *Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization*, 4 MAASTRICHT J. EUR. & COMP. L. 310 (1997); Jörg Monar, *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, 23 EUR. L. REV. 320 (1998); Ercüment Tezcan, *La Coopération dans les Domaines de la Justice et des Affaires Intérieures dans le Cadre de l'Union Européenne et le Traité d'Amsterdam*, 34 CAHIERS DE DROIT EUROPEEN 661 (1998).

173. In Opinion 1/94, 1994 E.C.R. I-5267, the European Court of Justice held that the power to conclude the Uruguay Round's General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was shared by the EC and its Member States. The Court also made clear that in areas of mixed competence, the EC and its Member States are under a duty of cooperation. This results from the requirement of unity in the international representation of the Community. *See* Jacques H. J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?*, 6 EUR. J. INT'L. L. 245 (1995); Pierre Pescatore, *Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster*, 36 COMMON MKT. L. REV. 387 (1999). During the Maastricht and Amsterdam negotiations, the Member States refused to bring their GATS and TRIPs powers under the EC's common commercial policy. *See* Youri Devuyst, *The EC's Common Commercial Policy and the Treaty on European Union: An Overview of the Negotiations*, 16 WORLD COMPETITION: L. & ECON. REV. 67 (1992); Marc Maresceau, *The Concept 'Common Commercial Policy' and the Difficult Road to Maastricht*, *in* THE COMMUNITY'S COMMERCIAL POLICY AND 1992: THE LEGAL DIMENSION 3 (Marc Maresceau ed., 1993); Magali Michaux-Foidart, *Vers une Extension de l'Art. aux Droits de Proprieté Intellectuelle?*, *in* L'UNION EUROPEENE ET LE MONDE APRES AMSTERDAM, *supra* note 164, at 217; Eleftheria Neframi, *Quelques Réflections sur la Réforme de la Politique Commerciale par le Traité d'Amsterdam: le Maintien du Statu Quo et l'Unité de la Représentation Internationale de la*

have equally refused to use the Community's common commercial policy model. For EMU matters, the Community is to be represented at both the Council/ministerial and central banking levels. The Commission, which acts as the negotiator in trade policy matters, will be involved only "to the extent required to enable it to perform the role assigned to it in the Treaty."[174]

E. Between a Supranational Integration Engine and a Commission Under Member State Control

The drafters of the Treaty of Paris establishing the ECSC emphasized the need for an independent High Authority that would function as the real engine of the integration process.[175] In Jean Monnet's own words:

> The independence of the Authority vis-à-vis governments and the sectional interests concerned is the precondition for the emergence of a common point of view which could be taken neither by governments nor by private interests. It is clear that to entrust the Authority to a Committee of governmental delegates or to a Council made up of representatives of governments, employers and workers, would amount to returning to our present methods, those very methods which do not enable us to settle our problems.[176]

From the very start, however, some Member States resisted the idea of granting independent supranational powers to the High Authority. Belgium and the Netherlands were particularly active in this regard, insisting on the creation of a Council of Ministers to exercise political control over the High Authority.[177] They feared that the High Authority would be biased towards France and Germany and would prevent the Belgian and Dutch governments from reacting appropriately to the specific problems in their coal and steel sectors.[178]

After the failure of the supranational European Defence Community ("EDC"),[179] which had been designed along the lines of the supranational ECSC, the negotiators of the Rome Treaties establishing the EEC and Euratom obtained an early consensus not to extend the ECSC High Authority's impressive decision-making powers to the EEC and Euratom Commissions.[180] Instead,

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Communauté, CAHIERS DE DROIT EUROPEEN 137 (1998); Catherine Smits, *Vers une Extension de la Politique Commerciale Commune au Commerce des Services?, in* L'UNION EUROPEENE ET LE MONDE APRES AMSTERDAM, *supra* note 164, at 193.

174. Vienna European Council, Presidency Conclusions, Dec. 11-12, 1998, *in* BULL. EUR. UNION at para. 14 (12-1998). For a detailed analysis, see Chiara Zilioli & Martin Selmayr, *The External Relations of the Euro Area: Legal Aspects*, 36 COMMON MKT. L. REV. 273 (1999).

175. *See* DIRK SPIERENBURG & RAYMOND POIDEVIN, THE HISTORY OF THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY: SUPRANATIONALITY IN OPERATION (1994).

176. THE ORIGINS AND DEVELOPMENT OF EUROPEAN INTEGRATION, *supra* note 41, at 77.

177. *See* Hanns Jürgen Kusters, *Die Verhandlungen über das institutionelle System zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl, in* THE BEGINNINGS OF THE SCHUMAN-PLAN 1950/51, *supra* note 39, at 73; Albert Kersten, *A Welcome Surprise? The Netherlands and the Schuman Plan Negotiations, in id.*, at 285; MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE, *supra* note 39, at 65, 94. The best general introduction to the balance between the ECSC institutions remains PAUL REUTER, LA COMMUNAUTE DU CHARBON ET DE L'ACIER (1953).

178. *See id.*

179. On the failure of the EDC see, EDWARD FURSDON, THE EUROPEAN DEFENCE COMMUNITY (1980); FRANCE DEFEATS EDC (Raymond Aron & Daniel Lerner eds., 1957).

180. Originally, the ECSC High Authority, the EEC Commission and the EAEC Commission coexisted. The Treaty establishing a Single Council and a Single Commission of the European Com-

a more cautious approach was chosen which left decision-making in the hands of Member State representatives in the framework of the Council.[181] The Council's decision-making powers were counterbalanced, however, by the exclusive right of legislative initiative granted to the European Commission.[182] Whenever the Council wanted to deviate from the Commission's proposal it needed unanimity.[183] As Michel Petite indicates, this last element is still essential to the EU's institutional balance.[184] The exclusive right of initiative would be a mere illusion if Commission proposals could be easily amended without its agreement and participation. In practice, the Commission has the habit of formally adopting compromise texts that amend its original proposals. This then allows the Council to vote by qualified majority on the amended proposal.[185]

Some Member States have never been enthusiastic about the Commission's independent right of initiative. During the 1960s, French President Charles de Gaulle resented the way in which Walter Hallstein, the first Commission President, operated autonomously, as if he was the head of an embryonic European government.[186] Upon de Gaulle's insistence, the Luxembourg Compromise of 1966 stated that "[b]efore adopting any particularly important proposal, it is desirable that the Commission should take up the appropriate contacts with the Governments of the Member States."[187]

Of greater impact on the Commission's role was the 1974 transformation of the old-style summit meetings of heads of state and government into formal European Council sessions.[188] Through its institutionalization in the Single European Act and the Maastricht Treaty as the body that "shall provide the Union

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munities, 1965 O.J. 152 at para. 2 [hereinafter Merger Treaty] created one Commission of the European Communities, exercising competences under the three Treaties. On the Commission and its evolution, see AT THE HEART OF THE UNION: STUDIES OF THE EUROPEAN COMMISSION (Neill Nugent ed., 1997); THE EUROPEAN COMMISSION (Geoffrey Edwards & David Spence eds., 1997).

181. *See* MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE, *supra* note 39, at 210, 216-18.

182. *See* Pescatore, *supra* note 66, at 168.

183. *See id.*

184. *See* Michel Petite, *Avis de Temps Calme sur l'Art. 189 A Paragraphe 1: Point d'Equilibre entre le Droit d'Initiative de la Commission et le Pouvoir Décisionnel du Conseil*, 3 REVUE DU MARCHE UNIQUE EUROPEEN 197 (1998).

185. Between 1986 and 1996, the Commission has in only four cases made qualified majority voting impossible by refusing to accept a compromise in Council as its own. According to Michel Petite, *Id.*, the Commission motive for not allowing majority voting was (1) to protect a minoritization of the countries with the heaviest economic interest in a dossier; (2) to avoid the lack of coherence with an already established policy; and (3) to avoid the lack of compatibility with a general Treaty principle.

186. *See* in particular CHARLES DE GAULLE, MEMOIRES D'ESPOIR: LE RENOUVEAU, 1958-1962 195 (1970).

187. BULL. EUR. COMMUNITIES at 8 (3-1966). *See also* MIRIAM CAMPS, EUROPEAN UNIFICATION IN THE SIXTIES: FROM THE VETO TO THE CRISIS (1966); HANS VON DER GROEBEN, THE EUROPEAN COMMUNITY: THE FORMATIVE YEARS: THE STRUGGLE TO ESTABLISH THE COMMON MARKET AND THE POLITICAL UNION 1958-66 (1987); John Lambert, *The Constitutional Crisis, 1965-66*, 4 J. COMMON MKT. STUD. 205 (1966).

188. On the European Council, see MARY TROY JOHNSTON, THE EUROPEAN COUNCIL: GATEKEEPER OF THE EUROPEAN COMMUNITY (1994); JAN WERTS, THE EUROPEAN COUNCIL (1992); SIMON BULMER & WOLFGANG WESSELS, THE EUROPEAN COUNCIL: DECISION-MAKING IN EUROPEAN POLITICS (1987).

with the necessary impetus for its development and . . . define the general political guidelines thereof,"[189] the European Council has, in practice, become a parallel engine of European integration, determining in large measure the speed and content of the EU's adaptation process. The regular European Council meetings have, according to several authors, introduced a heavy dose of intergovernmentalism in the EU's political process, leading to a dangerous deviation from the Community method.[190] Between 1995 and 1998, the European Council made no less than 80 requests for Commission proposals and studies. The proliferation of specialized Council compositions (numbering 21 in 1998) also contributed to a significant increase in the number of demands for Commission proposals.[191] As a result, around 20 percent of the Commission's legislative proposals in 1998 were a direct response to specific requests by (European) Council and Parliament.[192] A further 35 percent of the Commission's legislative proposals were the direct result of international agreements. Yet another 25 to 30 percent concerned amendments of existing EU law.[193] And 10 percent of legislative initiatives were required by the Treaty and secondary legislation (such as the fixing of annual agricultural prices). This left only 5 percent for genuine "own initiative" proposals.[194]

In addition, the Commission's key role in the legislative process has been eroded by the co-decision procedure which has turned the European Parliament into an equal legislative partner of the Council.[195] During the conciliation phase in the co-decision procedure, the Commission has lost the possibility of preventing a qualified majority vote in Council even if a compromise text deviates substantially from the Commission's original proposal.[196] As Parliament's *Activity Report* on co-decision states, "Parliament is now in direct contact with the Council and no longer needs the mediation and filtering role the Commission played in the past to communicate with the Council."[197] While the Commission

189. CONSOLIDATED TEU, *supra* note 2, art. 4 (ex TEU art. D).

190. *See* Pescatore, *supra* note 152, at 400; RICHARD H. LAUWAARS, CONSTITUTIONELE EROSIE: REDE UITGESPROKEN TER GELEGENHEID VAN ZIJN AFSCHEID ALS HOOGLERAAR EUROPEES RECHT AAN DE UNIVERSITEIT VAN AMSTERDAM (1994). Not everyone agrees with the assessment of the Community method purists. Jacques Delors, for instance, believes that the European Council "is well integrated in the Community architecture" and plays a useful role (AGENCE EUROPE, Sept. 16, 1999, at 5). Timmermans, *supra* note 158, at 61, points out that "without a European Council it would have even been more difficult for the Community system in the daily struggle against vested national interests preferring to be voiced through the intergovernmental bargaining process and intrinsically allergic to the supranational method." Timmermans also recalls that the creation of the European Council was a concession to the French government in order to obtain its agreement to direct elections for the European Parliament.

191. *See* Commission of the European Communities, Better Lawmaking 1998: A Shared Responsibility: Commission Report to the European Council, COM(98) 715 final at 6.

192. *See id.* at 5.

193. *See id.* at 4.

194. *See id.* at 4-5.

195. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

196. This constitutes a formal Treaty exception to the rule that the Council can only change Commission proposals by unanimity.

197. European Parliament Delegations to the Conciliation Committee, Activity Report 1 Nov. 1993 - 30 Apr. 1999: From entry into force of the Treaty of Maastricht to entry into force of the Treaty of Amsterdam, at 12.

is present at all conciliation meetings and is often requested by the other institutions to help reconcile conflicting positions, one privileged observer of conciliation practice has noted that "the Commission sometimes feels in a clear position of inferiority, whereas the other two institutions enjoy an increased sense of solidarity which in turn serves to improve the chances of an agreement being found."[198]

While the Commission's role as the engine of the integration project has been somewhat overshadowed by the European Council, it is in the area of the Commission's implementing powers that the tendency towards Member State tutelage has become particularly pronounced. The Treaty of Rome granted the Commission a number of important implementing powers, including those in the field of competition policy.[199] The Treaty also specified that the Commission would exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.[200] The Member States were eager, however, to keep an eye on the Commission's executive powers. In 1962, when delegating implementing powers to the Commission in the agricultural field, the Council devised the so-called comitology process: it established committees composed of national officials that were to be consulted by the Commission before it could take the necessary implementing decisions.[201] Since then, the number of such committees has grown considerably.

In 1986, while negotiating the SEA, the Member States made a point of strengthening their position in the implementation of Community law. They explicitly stipulated that the Council, when delegating implementing powers to the Commission, may impose certain requirements or may even reserve the right to exercise implementing powers itself.[202] It seemed that the Member States wanted to ensure that the Internal Market project, which involved the adoption of ca. 280 directives, would not lead to an exponential expansion of the Commission's executive powers with important economic and financial consequences.[203] In fact, the first legal measure adopted under the SEA's provisions was the Council's Comitology Decision of 1987, which structured the exercise of implementing powers conferred on the Commission.[204] In practice, three groups of Member State committees (advisory, management and regulatory)

198. Michael Shackleton, *The Politics of Codecision* 15 (June 1999) (unpublished paper presented at the ECSA biennial conference (on file with author).

199. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 85, 86, 88 (ex EC TREATY arts. 89, 90, 93).

200. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 211 (ex EC TREATY art. 155).

201. *See* European Parliament Task Force on the Intergovernmental Conference, Briefing on Comitology, at 3 (Mar. 17, 1997).

202. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 202 EC (ex EC TREATY art. 145).

203. *See* JEAN DE RUYT, L'ACTE UNIQUE EUROPÉEN 140 (1989); Claude Blumann, *Le Pouvoir Exécutif de la Commission à la lumiére de l'Acte Unique Européen*, *in* 1 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 23 (1988).

204. *See* Council Decision 87/373 of July 13, 1987: Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1987 O.J. (L 197) 33.

oversee the Commission's executive powers.[205] In several cases, these committees give the final word to the Member States.

The comitology procedure has been the subject of severe criticism. The Committee of Independent Experts that examined mismanagement in the Commission was particularly clear in this respect:

> [T]he pro-integration perspective of the Commission tends to create tensions with the inter-governmental perspective of the Council. These have led the Council to strengthen its own position . . . through the creation of an array of committees allowing . . . the representatives of the Member States an opportunity to exercise a high level of monitoring and supervision over the management of programmes by the Commission . . . . [I]n practice, they tend to be a mechanism through which national interests are represented in the implementation of Community policies, sometimes to the extent that they become a forum for 'dividing up the spoils' of Community expenditure and permit the Member States, at times, to use their influence in programme management committees to ensure that contractors from each Member State obtain a 'fair share' of the overall funding available.[206]

F. Between Decision-making Efficiency and the Unanimity Trap

To the Community's founders, the intergovernmental practices of the Council of Europe had demonstrated that inaction and passivity were the logical corollary of unanimous decision-making. In Paul-Henri Spaak's words, "unanimity formulae are the formulae of impotence."[207] For Spaak, the success of European integration depended largely on the willingness of the participants to leave ancient notions of sovereignty behind and accept the principle of majority voting. While the Treaty of Rome stipulated that from January 1966 the transitional unanimity rule would give way to qualified majority voting in a limited number of policy fields such as agriculture, this proved unacceptable to French President Charles de Gaulle. The reasons for de Gaulle's opposition were formulated as follows by his Foreign Minister, Maurice Couve de Murville:

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205. On the Comitology process, see SHAPING EUROPEAN LAW AND POLICY: THE ROLE OF COMMITTEES AND COMITOLOGY IN THE POLITICAL PROCESS (Robin H. Pedler & Günter F. Schaefer eds., 1996); Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARVARD INT'L L. J. 451 (1999); Kieran Bradley, *Comitology and the Law: Through a Glass, Darkly* 29 COMMON MKT. L. REV. 693 (1992); Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499 (1998); Christian Joerges & Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology*, 3 EUR. L. J. 273 (1998); Koen Lenaerts, *Regulating the Regulatory Process: "Delegation of Powers" in the European Community* 18 EUR. L. REV. 23 (1993); Ellen Vos, *The Rise of Committees*, 3 EUR. L. J. 210 (1998).

206. Committee of Independent Experts, Second Report on Reform of the Commission: Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud, at para. 7.15.3, 7.15.12 (Sept. 10, 1999). The reform of the Comitology Decision in 1999 did nothing to remove the Member States' direct influence over the Commission's implementing powers. For the currently applicable Comitology rules, see Council Decision 1999/468/EC of June 28, 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23.

207. Paul-Henri Spaak, *Document 52: Il n'y a plus un moment à perdre si nous voulons nous sauver (11 décembre 1951), in* LA PENSEE EUROPEENNE ET ATLANTIQUE DE PAUL-HENRI SPAAK, *supra* note 34, at 283. The author's translation.

> When creating a European Community, abandoning sovereignty comes with it and nobody has ever contested this . . . . It must be done at one condition, however, and without this nothing goes . . . . Unanimity is indispensable. Here is a crucial question of principle: how could anyone imagine that one would, without our agreement and *a fortiori* against our will, dispose of our sovereignty? It is also a question of good sense: who could imagine that a policy measure would be made acceptable and applicable in a country that has refused it because it believes it goes against its principles or against its political or economic interests.[208]

In an attempt to prevent qualified majority voting from entering into force, France in June 1965 brought the Community to a halt for seven months by practicing an "empty chair" policy.[209] During this period, no French representatives attended Community meetings. The crisis was resolved by the Luxembourg compromise of January 1966: Where, in the case of decisions which could be taken by majority vote, a Member State would invoke its vital interests, the Council would endeavor to reach solutions that could be adopted by all Members.[210] France, however, added that "where very important interests are at stake, the discussions *must* be continued until unanimous agreement is reached." While noting that there was a divergence of views on what should be done in the event of failure to reach unanimous agreement, the Council refrained from applying majority voting for two decades.[211]

It took the EU's Member States until the SEA of 1986 before they actually started eliminating unanimous decision-making in the Council.[212] The creation of an Internal Market by the end of 1992 - characterized by the free movement of goods, services, capital and persons - was the main goal of the SEA.[213] The Member States, including the UK's Conservative Prime Minister Margaret Thatcher, agreed that the new Market necessitated a more effective decision-making system.[214] As a result, the SEA allowed qualified majority voting in the Council for the adoption of Internal Market directives.[215] Even after the Maastricht Treaty had expanded the scope of qualified majority voting, several important fields of Community action, such as fiscal harmonization, remained under the unanimity rule.

In preparation for the Amsterdam Treaty, commentators and negotiators spoke of overcoming the joint decision trap[216] which unanimity engenders as

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208. MAURICE COUVE DE MURVILLE, UNE POLITIQUE ETRANGERE 1958-1969 297 (1971). The author's translation.

209. *See supra* note 187.

210. *See* BULL. EUR. COMMUNITIES at 9 (3-1966).

211. *See id.*

212. *See* MARTIN WESTLAKE, THE COUNCIL OF THE EUROPEAN UNION (1999); FIONA HAYES-RENSAW & HELEN WALLACE, THE COUNCIL OF MINISTERS (1996).

213. *See* DE RUYT, *supra* note 203, at 149; SEA, *supra* note 2, art. 13.

214. It is interesting to note that French President François Mitterrand and German Chancellor Helmut Kohl had already in 1984 agreed on the necessity to return to the qualified majority voting procedures foreseen in the Treaty of Rome as a way to circumvent in part Margaret Thatcher's negativism towards further European integration. *See* JEAN LACOUTURE, 2 MITTERRAND: UNE HISTOIRE DE FRANCAIS: LES VERTIGES DU SOMMET 115 (1998).

215. *See* SEA, *supra* note 2, arts. 14, 16, 18.

216. *See* Fritz Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988). On the political effects of qualified majority voting,

the key to maintaining efficiency in the context of enlargement.[217] In its opinion before the Amsterdam negotiations, the Commission argued that "the difficulty of arriving at unanimous agreement rises exponentially as the number of Members increases." As "adherence to unanimity would often result in stalemate," the Commission proposed "qualified majority voting [as] the general rule."[218] Prime Minister Major added another reason for moving to majority voting. In an attempt to put pressure on the Commission and the other Member States during the BSE crisis, he announced to the House of Commons on May 21, 1996 that the UK could not continue to cooperate "normally" in the Community legislative process as long as there was no agreement on a framework allowing a progressive lifting of the embargo on exports of British beef and veal.[219] The UK therefore reserved its position on virtually all questions requiring unanimity in the Council, leading to the temporary blocking of around 60 acts at various Council meetings.[220] Agreement on a framework was finally reached at the Florence European Council of June 21-22, 1996.[221] In spite of this, the Amsterdam negotiators did not succeed in agreeing to a significant extension of qualified majority voting.[222]

The IGC that was launched by the Helsinki European Council in December 1999 again has "the possible extension of qualified majority voting in the Council" on its agenda.[223] The Commission's position has remained largely the same: "qualified majority voting should be the rule and unanimity the exception . . . in the knowledge that unanimity in an enlarged Europe will make decision-making extremely difficult and, in the case of some policies, will mean the end of any serious prospect of deepening European integration."[224] In February 2000, Austrian FPÖ leader Jörg Haider illustrated the Commission's point by threatening to block EU decision-making if Austria would be isolated: "If no one sits around the table with us, there will be no decisions taken in Europe. Europe needs our vote," he said.[225]

While there is a certain amount of pressure to move towards a quasi-generalization of qualified majority voting in the Council of Ministers, few Member States have signaled a willingness to tackle the unanimity rule for such Constitutional questions as Treaty reform or enlargement. In the Reflection Group preparing the Amsterdam negotiations, "a few members [nevertheless] expressed concern about retaining unanimity on primary legislation in a Community en-

see Madeleine Hösli, *Coalitions and Power: Effects of Qualified Majority Voting on the Council of the European Union*, 34 J. COMMON MKT. STUD. 255 (1996).

217. *See* Reflection Group, *supra* note 12, at para. 100; Youri Devuyst, *The European Union's Future: A Preview of the Intergovernmental Conference of 1996*, 38 RES PUBLICA 21 (1996).

218. Commission, Opinion to the Intergovernmental Conference 1996, *supra* note 91, at 21.

219. *See* 1996 GEN. REP. at para. 1031 (1997).

220. *See id.*

221. *See* 1996 GEN. REP. at para. 1031 (1997); Florence European Council, Presidency Conclusions, June 21-22, 1996, *in* BULL. EUR. UNION at para. I.8 (6-1996).

222. *See* Devuyst, *supra* note 6, at 626.

223. Helsinki European Council, *supra* note 5.

224. Commission, Europe and the Challenge of Enlargement, *supra* note 16, at 22.

225. Nigel Glass and Martin Fletcher, *Haider Threatens to Paralyse EU*, THE TIMES, Feb. 5, 2000; Denis Staunton, *Haider Threatens Anti-EU Revolt*, THE OBSERVER, Feb. 6, 2000.

larged to 30 members since such a procedure would render decision-making extremely difficult, and could in the future leave the Union in a state of paralysis."[226] Commission President Prodi raised the issue for the first time at the opening ceremony of the IGC 2000.[227] In Prodi's words the question was, "How do we stop the Treaty becoming fossilized after our Conference if we keep the requirement that amendments can be made only with the agreement of 28 governments, 28 national parliaments and referendums?"[228] He added that this was an issue on which the debate was "just beginning."[229] More generally, hardly any proposals have been made in favor of changing the consensus practice that governs decision-making in the European Council. The European Council not only plays a major role in Treaty reform[230] and enlargement,[231] it also discusses strategic foreign policy questions,[232] the broad guidelines of economic policies[233] and the EU's employment situation.[234] In sum, all major political debates in the EU currently take place in an essentially intergovernmental body that is likely to continue functioning by consensus.

G. Between Non-hegemonic Decision-making and Grand Power Politics

The decision-making rules of the original Treaty of Rome were characterized by an attempt to avoid dominance or hegemony by one or a few Member States. In order to construct a suitable climate for Franco-German reconciliation and to ensure the participation of the small Benelux countries, the founders set up a delicate decision-making system aimed at preventing a return to the power politics of the inter-war period. These rules were intended to protect the smaller countries from dominance by the larger members.[235] In the words of former Vice-President of the European Commission Christopher Tugendhat:

> the beauty of the Schuman and subsequent proposals was that they held out the prospect of guarantees of equality . . . . In the Community, a system of rules, obligations and procedures of a detailed kind was laid down and has since been further developed to guarantee that the rights of all members will be respected and that reconciliation between the larger ones will not be at the expense of the smaller.[236]

In practice, the Community system contains two important guarantees against hegemonic decision-making. First, within the Council, the smaller Member States have traditionally received a relatively larger share of the votes than the big Member States. For example, Belgium has 5 Council votes for a population of 10 million inhabitants. Germany, with a population of 80 million,

226. Reflection Group, *supra* note 12, at para. 99.
227. *See* Romano Prodi, Speech at the Opening of the IGC, (Feb. 14, 2000) (on file with author).
228. *Id.*
229. *Id.*
230. *See* CONSOLIDATED TEU, *supra* note 2, art. 48 (ex TEU art. N).
231. *See* CONSOLIDATED TEU, *supra* note 2, art. 49 (ex TEU art. O).
232. *See* CONSOLIDATED TEU, *supra* note 2, art. 13 (ex TEU art. J. 3).
233. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 99 (ex EC TREATY art. 103).
234. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 128.
235. *See* MONNET, *supra* note 38, at 353-354.
236. CHRISTOPHER TUGENDHAT, MAKING SENSE OF EUROPE 36 (1986).

got only 10 votes.[237] In this sense, qualified majority voting provides a much more congenial environment for the small members than the harsh power politics typical of purely intergovernmental deal-making. Second, the Commission, as an independent body, was granted the exclusive right of legislative initiative.[238] It has the duty to exercise this function in the interest of the Community as a whole.[239] The Commission's monopoly on legislative initiative was notably intended to protect the small Member States from the undue pressure and deal-making which are typical of intergovernmental structures in which the right of initiative belongs to individual members.

This does not mean that Europe's traditional "great powers" no longer try to play a special role in EU decision-making. Each European Council meeting, for instance, is preceded by a Franco-German summit which is often crucial to the European Council's agenda-setting. The creation of the European Council was itself the direct result of a joint initiative by French President Valéry Giscard d'Estaign and German Chancellor Helmut Schmidt.[240] The "privileged friendship" linking Paris and Bonn, [now Berlin][241] has, indeed, been the real engine behind much of the European integration project. The ECSC, for instance, started as a successful attempt by France to build a new relationship with Germany. While de Gaulle and Adenauer deepened and institutionalized the Franco-German relationship in the form of the Elysée Treaty of 1963, many of the subsequent European initiatives and deals were prepared or brokered between Giscard and Schmidt or Mitterrand and Kohl.[242]

In the foreign policy field, the Contact Group on Bosnia has perhaps been the most visible recent example of the large Member States' attempt to return to the old *directoire* practice where a few large countries take decisions having wide-ranging implications, also for the other partners.[243] In preparation for the

237. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex EC TREATY art. 148).

238. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 250-52 (ex EC TREATY arts. 189a-c).

239. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 213 (ex EC TREATY art. 157).

240. *See supra* note 188.

241. The term "privileged friendship" is from François Mitterrand. *See* LACOUTURE, *supra* note 214, at 96, 118 (1998).

242. *See* ROY F. WILLIS, FRANCE, GERMANY AND THE NEW EUROPE (1968); FRANCE-GERMANY 1983-1993 (Patrick McCarthy ed., 1993); THE FRANCO-GERMAN RELATIONSHIP IN THE EUROPEAN UNION (Douglas Webber ed., 1999).

243. On the "directoire" concept in EU politics, see Pierre Pescatore, *L' Exécutif Communautaire, supra* note 152, at 396-400; Philippe de Schoutheete, *The European Community and its Sub-Systems, in* THE DYNAMICS OF EUROPEAN INTEGRATION 113-115 (William Wallace ed., 1990). Attempts to form foreign policy *directoires* are nothing new in European history. The most famous example in the post World War II era is French President Charles de Gaulle's memorandum of Sept. 17, 1958 in which he proposed "that an organization comprising the United States, Great Britain and France should be created and . . . would make joint decisions in all political questions affecting global security" as a tripartite directorate steering the Atlantic Alliance. The idea was rejected by President Dwight D. Eisenhower who argued that "[w]e cannot afford to adopt any system which would give to our other Allies, or other Free World countries, the impression that basic decisions affecting their own vital interests are being made without their participation." For the text of de Gaulle's memorandum and Eisenhower's reply see ALFRED GROSSER, THE WESTERN ALLIANCE: EURO-AMERICAN RELATIONS SINCE 1945 186-188 (1980). For the historical details, see MICHAEL M. HARRISON, THE RELUCTANT ALLY: FRANCE AND ATLANTIC SECURITY 88 (1981); MARC TRACHTENBERG, A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT 1945-1963

Amsterdam negotiations, Belgian Foreign Minister Erik Derycke had been especially critical of the *directoire* formula whereby the smaller countries were asked to contribute significant human and financial resources to the EU's peace efforts in Bosnia, but were kept ill-informed on the foreign and security policies being pursued.[244] Derycke returned to the issue in 1999 while commenting on the Rambouillet peace conference on Kosovo: "if Belgium is excluded from the deliberations . . . there is no reason why it should feel obliged to offer solidarity or to participate" in operations to guarantee the peace.[245] According to the Belgian Foreign Minister, accepting "directorates of large powers" would for the smaller Member States "mean a return to . . . the inevitable role of being cannon fodder."[246]

The division of power between large and small Member States is again playing a major role, this time during the Treaty reform process launched by the Helsinki European Council in December 1999. It is an issue that was not resolved during the Amsterdam negotiations. France in particular argued that, following the accession of several smaller Member States, the original distribution of Council votes had caused an exaggerated over-representation of the smaller countries.[247] France also proposed to reduce the number of Commissioners to about ten, each holding broad portfolios, this in order to "keep these people from creating mischief."[248] The Dutch Presidency's proposal for an Amsterdam Protocol tried to link the two French ideas.[249] Under this proposal, a re-weighting of the votes in the Council favoring the larger Member States would be counterbalanced by a new Commission composition in which the large Member States would lose their second Commissioner.[250] Ultimately, however, lengthy discussions among heads of state and government failed to produce an agreement. A proposal for the re-weighting of the current number of votes allocated to each Member States provoked heated discussion, even between traditional allies. Belgium, for instance, resented the fact that their Dutch Benelux partner had classified itself as a middle large country with more votes than its somewhat smaller southern neighbor.[251] An alternative proposal for the introduction of an entirely new double qualified majority scheme, requiring both a qualified majority of Member States and a qualified majority of the EU population, was rejected by French President Chirac as it would break the relative power parity between France and Germany (since Germany's population is larger than France's).[252]

242 (1999); Maurice Vaïse, *Aux Origines du Mémorandum de Septembre 1958*, *in* 58 RELATIONS INTERNATIONALES 253 (1989). For de Gaulle's own interpretation, see DE GAULLE, *supra* note 186, at 214.

244. *See* Erik Derycke, Address before the Symposium Austria: A New Partner in the European Union (Apr. 3, 1995) (on file with author).

245. AGENCE EUROPE, Feb. 10, 1999, at 4.

246. *Id.*

247. *See* Devuyst, *The Treaty of Amsterdam: An Introductory Analysis*, *supra* note 112, at 11.

248. French official cited in Lionel Barber, *A Punctured Image*, FIN. TIMES, June 15, 1998 at 17.

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*, at 12.

Since the heads of state and government did not feel any immediate need to make this change — enlargement was not yet imminent — the decision was simply postponed.[253]

In its opinion for the IGC 2000, the European Commission recommended adopting a more straightforward system of double simple majority, whereby a decision would stand adopted if it had the support of a simple majority of Member States and a simple majority of the EU's total population.[254] In addition to having the advantage of simplicity and transparency, the system would not have to be modified with each new accession.

H. Between Parliamentary Control and Parliamentary Governance

The European Communities were set up as a largely technocratic project. To the founders, the democratic nature of the Community seemed self-evident, since it was based on democratic Member States.[255] Nevertheless, the Treaty of Rome provided for a Parliamentary Assembly.[256] It changed its name to the European Parliament in 1962.[257] The Assembly was composed of delegates from national parliaments.[258] All members thus had a double mandate until the first direct elections of the European Parliament that took place in 1979.[259] The Assembly was mainly granted the right to control the Commission.[260] In the legislative process, it had a consultative role.[261] Since the early days, Parliament's powers have increased significantly.[262] Having started under a system of Parliamentary control, the EU has gradually moved in the direction of Parliamentary governance, with Parliament playing a major role in Community decision-making.

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253. *See id.*; Protocol on the institutions with the prospect of enlargement of the European Union, annexed to the Treaty on European Union and the Treaties establishing the European Community, the European Coal and Steel Community and the European Atomic Energy Community, Oct. 2, 1997.

254. *See* Commission, Adapting the Institutions to Make a Success of Enlargement, *supra* note 16, at 32.

255. *See* Kevin Featherstone, *Jean Monnet and the "Democratic Deficit" in the European Union*, 32 J. COMMON MKT. STUD. 149 (1994).

256. *See* EEC TREATY, *supra* note 2, art. 137.

257. *See* Resolution of Mar. 30, 1962, 1962 O.J. 1045.

258. *See* EEC TREATY, *supra* note 2, art. 138.

259. The direct elections are based on the Act concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage Annexed to the Council Decision of Sept. 20, 1976, 1976 O.J. (L 278) 1.

260. *See id.* arts. 143-144.

261. Throughout the EEC Treaty, specific articles determined when the Assembly needed to be consulted before an article could be adopted by the Council. *See id. passim.*

262. On the European Parliament and the evolution of its political powers, see RICHARD CORBETT, THE EUROPEAN PARLIAMENT'S ROLE IN CLOSER EU INTEGRATION (1998); FRANCIS JACOBS, RICHARD CORBETT & MICHAEL SHACKLETON, THE EUROPEAN PARLIAMENT (1995); Karlheinz Neunreither, *The European Parliament*, *in* DEVELOPMENTS IN THE EUROPEAN UNION, *supra* note 133, at 62. On the relationship between Parliament and Commission, see MARTIN WESTLAKE, THE COMMISSION AND THE PARLIAMENT: PARTNERS AND RIVALS IN THE EUROPEAN POLICY MAKING PROCESS (1994).

From the start, the Assembly had the right to vote a motion of censure against the Commission.[263] Once such a motion has been adopted, the Commission is obliged to resign as a body.[264] A double majority is required for a motion of censure to succeed: a majority of the component Members of Parliament and two-thirds of the votes cast.[265] Six censure motions have been tabled since Parliament was directly elected in 1979, but so far none has been adopted.[266] The motion of censure weapon has been reinforced since the Treaty of Maastricht granted Parliament the right to establish temporary Committees of Inquiry to investigate alleged contraventions or mismanagement in the implementation of Community law. [267] The BSE Committee of Inquiry charged with the examination of the Commission's attitude during the BSE crisis, for instance, had a considerable impact on the strengthening of the EU's consumer protection policy both in practice (by forcing the Commission to shift responsibility for public health risks from the Directorate General for Agriculture to the Directorate General for Consumer Affairs) and in Treaty law (via the Treaty of Amsterdam).[268] The visible impact of the Committee of Inquiry on the work of the European

263. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 201 (ex EC TREATY art. 144). *See also* Jean-Louis Clergerie, *L'Improbable Censure de la Commission Européenne*, 111 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE 201 (1995).

264. *See supra* note 263.

265. *See id.*

266. The most significant motion was tabled on Dec. 17, 1998 by Pauline Green, then Chair of the Socialist Group. The same day, Parliament had decided not to grant the Commission the budget discharge for 1996. According to Green, this meant that the Commission was not assured of the Parliament's confidence at a moment when crucial decisions on the EU's future were being prepared in such areas as enlargement, the financial perspectives for 2000-2006 and the related discussion on the reform of the EU's agricultural and cohesion policy. Green proposed a motion of censure - in lieu of a motion of confidence which is not foreseen by the Treaties - as the only way for Parliament to mark its confidence in the Commission. In the mean time, almost daily press stories accusing French Commissioner Edith Cresson of financial mismanagement, fraud and nepotism were quickly undermining the credibility of the entire College. To save itself from a defeat in Parliament, the Commission agreed with the creation of a Committee of independent experts that would examine the charges. While the creation of this Committee enabled Green to withdraw her motion, a "real" motion of censure tabled by French nationalist Hervé Fabre Aubespy nevertheless succeeded in gathering 232 votes in favour, 293 against and 27 abstentions. When on Mar. 15, 1999 the Wise Men surprisingly accused the entire Commission of a lack of responsibility, the College of Commissioners - for the first time in EU history - decided to resign collectively. While the real target of most criticism had been Commissioner Cresson, she had successfully used the "shield of collegiality" to rebuff attempts at sanctioning her individually, but the result was the resignation of the entire College. In Parliament, the Commission's resignation - just before the Parliamentary elections of May 1999 - was celebrated as a victory. Parliament kept up the pressure after the elections, during the individual hearings with the nominees for the new Commission posts. Each new Commissioner was notably asked to confirm that he or she would resign individually upon the President's request. For the background of this episode, see Laura Cram, *The Commission, in* DEVELOPMENTS IN THE EUROPEAN UNION, *supra* note 133, at 44; John Peterson, *The Santer Era: the European Commission in Normative, Historical and Theoretical Perspective*, 6 J. EUR. PUB. POL'Y 46 (1999).

267. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 193 (ex EC TREATY art. 138c). *See also* Michael Shackleton, *The European Parliament's New Committees of Inquiry: Tiger or Paper Tiger?*, 36 J. COMMON MKT. STUD. 115 (1998); Andreas Mauer, (Co-)Governing after Maastricht: The European Parliament's Institutional Performance 1994-1998: Lessons for the Implementation of the Treaty of Amsterdam, POLI 104. EN 01-99, 33.

268. *See* Reimer Böge, Report on the European Commission's Follow-Up of the Recommendations made by the Committee of Inquiry into BSE, EUR. PARL. DOC. PE 223.656: fin.2 (1997).

Commission was notably the result of Parliament's warning that a motion of censure would be tabled if its recommendations were not carried out. In addition to exercising control on the Commission's activities, the Commission's investiture is, since the Maastricht Treaty, preceded by a Parliamentary vote of approval on the Commission as a whole.[269] Before this vote, each of the candidates for Commissioner is grilled during a Parliamentary hearing.[270]

The budget is another area where Parliament's political power has been visible since the 1970s. The Council has the final say over the compulsory side of the budget, necessarily resulting from the Treaties or from acts adopted in accordance with them.[271] This compulsory budget mainly concerns agricultural expenditure.[272] In 1970, Parliament received the final word over the non-compulsory expenditures which currently cover 55 percent of the budget, including most of the non-agricultural budget lines.[273] In 1975, Parliament was granted the right to reject the budget as a whole.[274] It made use of this power in 1979 and 1984.[275] Since 1988, Parliament, Council and Commission have sought to avoid the annual repetition of budgetary fights by adopting Inter-Institutional Agreements that determine the EU's financial perspectives on a multi-annual basis.[276] Since the 1975 agreement, Parliament has also gained the authority to grant the "discharge" to the Commission in respect of the implementation of the budget. By granting the discharge, Parliament confirms that the budget has been correctly implemented.[277] The discharge procedure has become highly political. While based on an examination of the Commission's accounts and annual report by the Court of Auditors, it has turned into an opportunity for Parliament to criticize the Commission's management policies.[278]

Finally, the expansion of European Parliament's powers has been most spectacular in the legislative field. The first step was taken with the introduction

269. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 214 (ex EC TREATY art. 158). Since the Treaty of Amsterdam, the nomination of the person who the governments intend to appoint as President of the Commission must also be approved by the European Parliament.

270. These individual hearings are not explicitly foreseen in the Treaty.

271. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 272 (ex EC TREATY art. 203).

272. On the European Parliament's budgetary powers, see IAIN BEGG & NIGEL GRIMWADE, PAYING FOR EUROPE (1998); BRIGID LAFFAN, THE FINANCES OF THE EUROPEAN UNION (1997); Brigid Laffan & Michael Shackleton, *The Budget*, *in* POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 136, at 71.

273. *See* Treaty amending Certain Budgetary Provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, Apr. 22, 1970, 1971 O.J. (L 2) 1.

274. *See* Treaty amending Certain Financial Provisions of the Treaties establishing a Single Council and a Single Commission of the European Communities, July 22, 1975, 1977 O.J. (L 359) 1.

275. *See* Brigid Laffan & Michael Shackleton, *The Budget*, *in* POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 136, at 78.

276. For an analysis of the first of these Agreements, see Michael Shackleton, *Budgetary Policy in Transition*, *in* THE STATE OF THE EUROPEAN COMMUNITY: POLICIES, INSTITUTIONS AND DEBATES IN THE TRANSITION YEARS 65 (Leon Hurwitz & Christian Lequesne eds., 1991).

277. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 276 (ex EC TREATY art. 206).

278. *See supra* note 272.

of the cooperation procedure in the SEA,[279] followed by the co-decision procedure in the Maastricht Treaty.[280] During the negotiations of the Treaty of Amsterdam, Parliament succeeded in securing a significant extension of its legislative co-decision right.[281] The co-decision procedure leads to the adoption of Community legislation signed jointly by the Presidents of Parliament and the Council, for which the two institutions are equally responsible. Under the co-decision procedure, Parliament delivers its opinion on Commission proposals before the Council adopts a common position. Furthermore, Parliament can propose amendments and ultimately veto the final adoption of legislative texts. In case of a disagreement between Council and Parliament, a Conciliation Committee is set up to bridge the differences of view.[282] Bringing the co-decision procedure into practice required a profound change in the EU's legislative culture. From the 1950s until the Maastricht Treaty's entry into force on November 1, 1993, the Council had been solely responsible for law-making. This changed quickly. Between November 1, 1993 and April 30, 1999, no less than 165 co-decision procedures were completed.[283] Conciliation meetings between Parliament and Council were needed in 66 of these 165 cases, representing 40 percent of the procedures.[284] Parliament soon sent Council the message that it had an interest in negotiating seriously.[285] Of the 913 amendments adopted by Parliament in co-decision (between November 1993 and April 1999), 74 percent were accepted by the Council either unchanged or in compromise form.[286] Another 4 percent were deemed already covered by another part of the common position.[287] Under the cooperation procedure, which also allowed Parliament to introduce amendments, but without Conciliation Committee or veto right, the Council had adopted only 21 percent of Parliament's amendments (between July 1987 and July 1997).[288]

279. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 252 (ex EC TREATY art. 189c). *See also* David Earnshaw & David Judge, *The Life and Times of the European Union's Co-operation Procedure*, 35 J. COMMON MKT. STUD. 543 (1997).

280. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

281. *See supra* note 6.

282. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 251 (ex EC TREATY art. 189b).

283. For a statistical overview, see European Parliament, Activity Report of the Delegations to the Conciliation Committee, Nov. 1, 1993-Apr. 30, 1999: Codecision procedure under Article 189b of the Treaty of Maastricht presented by Vice Presidents Nicole Fontaine, Renzo Imbeni & Josep Verde i Aldea, PE 230.998 (May 6, 1999). *See also* Ricardo Gosalbo Bono, *Co-Decision: an Appraisal of Experience of the European Parliament as Co-Legislator*, 14 Y.B. EUR. L. 21 (1994).

284. *See* European Parliament, Activity Report of the Delegations to the Conciliation Committee, *supra* note 283, at 6.

285. In July 1994, Parliament vetoed the Council's position on voice telephony as the conciliation had not produced agreement. Parliament has since rejected one other Council common position (in 1995, on biotechnology, after agreement in conciliation). It once closed a file without the need to formally reject as the Council abandoned the proposal in light of Parliament's opposition (in 1998, on transferable securities). In addition, Parliament twice adopted an intention to reject, successfully threatening the Council into making the necessary concessions. *See* European Parliament, Activity Report of the Delegations to the Conciliation Committee, *supra* note 283.

286. *See id.*, at 14. These are second reading amendments.

287. *See id.*

288. *See* Maurer, *supra* note 267, at 25.

The exceptional position of Parliament in the EU's institutional framework has enabled it to gradually extend its grip on the Commission.[289] In comparison with the position of national parliaments vis-à-vis national governments, the European Parliament is a much more independent and threatening institution. Several reasons might be advanced to explain this. First of all, in most West European parliamentary systems, the parliament's ability to sack the government is counterbalanced by the executive's power to dissolve the assembly.[290] In most Western European countries, parliamentarians know that by voting down a government they might provoke early parliamentary elections, thus putting their own seat in danger. This constitutional balance is absent in the EU, giving Members of the European Parliament the freedom to criticize and censure the Commission without any fear of personal consequences.[291]

Secondly, parliamentary politics in most Western European countries is based on a majority-minority game largely absent in the European Parliament. Between 1979 and 1999, the two largest groups (the Party of European Socialists, ("PES") and the European Peoples Party, ("EPP")) determined Parliament's agenda to a large extent. In the newly elected Parliament of 1999, the EPP and the European Liberal, Democrat and Reform Party ("ELDR") formed a "coalition" for the election of the Parliament's President, to the detriment of the weakened PES. But with only 283 Members ("MEPs"), the "EPP-ELDR coalition" has no majority in a Parliament with 626 seats.[292] And there is no leftist majority either: PES, Ecologists and the other parties on the left represent 290 MEPs. During the Parliament's formal vote of investiture on September 15, 1999, President Romano Prodi's Commission could count on a large support of 414 MEPs, with only 142 against. Support for individual Commission proposals, however, will on each occasion require a new exercise of conviction.[293] In contrast with most national governments, the Commission cannot rely on the solid support of a stable majority.

Third, in most West European parliamentary systems, the majority-minority game relies on party discipline. In the European Parliament, the multinational political groups attempt to coordinate positions on a European scale, but are not marked by strong discipline. In practice, the political behavior of MEPs is still largely determined by national politics. This can be explained by the fact that national parties determine the composition of electoral lists. National parties determine who will get a position that allows candidates to get (re-)elected. Furthermore, European elections take place in a national context with election districts that do not reach beyond the traditional Member State borders. MEPs

289. *See* Renaud Dehousse, *European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?*, 35 COMMON MKT. L. REV. 595 (1998).

290. *See, e.g.*, FIVE CONSTITUTIONS: CONTRASTS AND COMPARISONS (S.E. Finer ed., 1979).

291. In the alternative constitutional system based on a genuine separation between the branches of government, neither parliament nor the executive have the ability to bring each other down. This is not the EU system either.

292. For the composition of the European Parliament elected in 1999 and the election of its President, see GEN. REP. EU 1999 at para. 1012 (2000).

293. European Parliament, Resolution on the Prodi Commission, Sept. 15, 1999; GEN. REP. 1999 at para. 1033 (2000).

who go beyond the guidelines of their own national party in an attempt to build genuine European-scale strategies face potential punishment. The fate of Wilfried Martens, a former Belgian Prime Minister who served as President of both the EPP and its Parliamentary Group (1994-1999), serves as an example. The Flemish Christian Democrats disapproved of Martens' successful strategy of turning the EPP into the most powerful group by bringing in the British Conservatives and Berlusconi's Forza Italia. As a result, Martens got into trouble with his home base and did not return to the European Parliament after the 1999 elections.

Fourth, since the daily legislative work of the European Parliament rarely makes the headlines, MEPs have a strong incentive to get into fights with the Commission to obtain media attention. The consequence of this institutional constellation is a European Parliament with a great deal of power, drawn into fights with the Commission, and neither restrained by a majority-minority discipline, nor by the risk of provoking early elections.

As late as 1993, the German Federal Constitutional Court still regarded the EU's democratic legitimization as deriving in large measure from the national parliaments.[294] It viewed the role of the European Parliament as marginal. Parliament's rapid ascension to power since 1993 has rendered the German Constitutional Court's reasoning entirely out of date.[295]

I. Between Legislative Harmonization, Policy Coordination and Resource Allocation

In contrast with most international organizations, which are merely able to produce resolutions or recommend draft treaties for ratification by their members, the Community produces binding secondary legislation that has precedence over national law. Community legislation takes the form of regulations or directives.[296] Regulations are binding in their entirety for all Member States and their citizens.[297] They are directly applicable without 'transposition' into national law and are used in areas of strong Community competence such as external trade, agriculture and competition policy.[298] Directives are only binding as to the result to be achieved.[299] National authorities have the choice of form and method in implementing directives. They are used to promote the harmonization of legislation among the Member States in such areas as environmental or consumer protection.[300]

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294. *See* Entscheidungen des Bundesverfassungsgerichts, *supra* note 46.

295. *See id.*

296. For the definition of regulations and directives, see CONSOLIDATED EC TREATY, *supra* note 2, art. 249 (ex EC TREATY art. 189).

297. For a good overview, see KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 2, at 324.

298. *See id.*

299. *See id.*

300. *See* SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY OF DIRECTIVES AND THEIR ENFORCEMENT IN NATIONAL COURTS (1995); Christiaan Timmermans, *Community Directives Revisited*, 17 Y.B. EUR. L. 1 (1999).

While the EU's traditional legislative activity continues, this legislative work has been supplemented by a move towards policy coordination. In the environmental area, the Commission has been actively pushing voluntary agreements between public authorities and industry.[301] In the difficult field of company taxation, the Commission has attempted to gradually bring the Member States closer together by aiming at policy coordination rather than harmonization through a Code of Conduct that leaves the Member States formally in charge.[302] In the attempt to build a European employment strategy, the negotiators of the Treaty of Amsterdam have even explicitly excluded the possibility of harmonization of laws and regulations of the Member States.[303] Instead, they have opted for policy coordination through annual "guidelines."[304] A similar procedure exists in the field of macroeconomic policy. The guidelines are formally adopted by the Council upon a Commission proposal. They serve as the benchmark for a peer review process during which the Council assesses the economic and employment policies of each Member State. In contrast with directives, they have no direct effect, and the Member States do not have to fear lawsuits against their national policy based on the guidelines. Still, the review process can lead to the adoption of recommendations addressed to the Member States.

Reliance on policy coordination instead of legislative harmonization in the Community pillar contrasts to some degree with the evolution in JHA. Cooperation in JHA between 1993 and 1997 had achieved only a very limited success.[305] This was blamed in part on the fact that the Treaty of Maastricht had deprived JHA of the normal Community instruments.[306] The Amsterdam Treaty therefore provided the Council with the power to adopt framework decisions for the purpose of approximating the laws and regulations of the Member States in the area of police and judicial cooperation in criminal matters.[307]

In addition to its regulatory task via legislation and policy coordination, the EU has increasingly become involved in resource allocation on a scale not foreseen by the founders. As part of the Common Agricultural Policy, the original six Member States had in 1962 set up a European Agricultural Guidance and Guarantee Fund covering expenditure incurred to finance structural adaptations (the Guidance section) and to finance interventions in agricultural markets (the Guarantee section).[308] With the start of the Social Fund in 1971 and the Euro-

301. *See* Philippe Renaudière, *Phénomènes et Instruments 'Consensuels' ou Non-Contraignants en Droit Communautaire de l'Environnement*, AMENAGEMENT-ENVIRONNEMENT 3 (Special Issue, 1997); Marc Pallemaerts, *The Decline of Law as an Instrument of Community Environmental Policy*, 9 L. & EUR. AFF. 338 (1999).

302. *See* Commission of the European Communities, Towards Tax Co-ordination in the European Union: A Package to Tackle Harmful Tax Competition, COM(97) 495 final at 5.

303. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 129; Patrick Venturini, *Social Policy and Employment Aspects of the Treaty of Amsterdam* 22 FORDHAM INT'L L.J. 594 (1999).

304. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 128 EC.

305. *See supra* note 11.

306. *See* Reflection Group, *supra* note 12, at para. 48.

307. *See* CONSOLIDATED TEU, *supra* note 2, art. 34.

308. The legal base for these funds can be found in CONSOLIDATED EC TREATY, *supra* note 2, art. 34 (ex EC TREATY art. 40).

pean Regional Development Fund in 1975, the EU began developing a policy to foster social and economic cohesion on a European scale.[309] As explained above, cohesion policy was strengthened in the Single European Act and beefed up with the Maastricht Treaty's Cohesion Fund.[310] In addition, during the 1990s, numerous important multi-annual programs have been added to the EU budget relating to both internal policies and external activities.[311] As a result, the financial management tasks conferred on the Commission grew almost exponentially. The available Commission staff — recruited for legislative, regulatory and external policy tasks — was not always fully equipped and trained to manage such significant budgets.[312] While certainly a heavy burden on the Commission, the budgetary significance of the EU's distributive policies should not be overstated. These programs are, indeed, severely constrained by the EU's restrictive budgetary ceiling. Mark Pollack's detailed analysis of the EU's activities demonstrates that it remains first and foremost an active regulator, with the pace of regulation in such areas as environmental and consumer protection only slightly diminished in comparison with the 1992 Internal Market-creation era.[313]

J. Between a Coherent and a Fragmented Law Enforcement Regime

The Community not only creates binding law, but is also equipped with an elaborate set of rules designed to ensure the correct application of Community legislation. Former Commission President Walter Hallstein was famous for his warning that, since the Community's only weapon is the law it creates, the Community's mission would be doomed if it would not be able to ensure the binding and uniform nature of Community law in all Member States.[314] In the 1950s, it was entirely uncertain how the new legal system created by the Community Treaties would function in practice. Particularly unclear was whether Community law would be uniformly binding and enforceable in all Member States.[315] Only in the Netherlands and Luxembourg was the primacy of international trea-

309. The legal base for the European Social Fund can be found in CONSOLIDATED EC TREATY, *supra* note 2, arts. 136-148 (ex EC TREATY arts. 123-125). The European Regional Development Fund was established on the basis of EC Treaty Article 235. See Regulation 724/75, 1975 O.J. (L 73) 1.

310. *See supra* note 133.

311. *See supra* note 272.

312. *See* European Commission, Reforming the Commission: Consultative Document, COM (00) 10 final.

313. *See* Mark Pollack, *The End of Creeping Competence? EU Policy-Making since Maastricht* 38 J. COMMON MKT. STUD. (forthcoming 2000).

314. *See* Walter Hallstein, Address before the European Parliament (June 17, 1965). On the importance of the concept of the rule of law in the Community's early years, see STUARD A. SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION (1965); LORD MACKENZIE STUART, THE EUROPEAN COMMUNITIES AND THE RULE OF LAW (1977). For a contemporary perspective, see MARIA LUISA FERNANDEZ ESTEBAN, THE RULE OF LAW IN THE EUROPEAN CONSTITUTION (1999).

315. On the reception of EC law in the Member States, see 1 FIDE KONGRESS: NATIONAL CONSTITUTIONAL LAW VIS-A-VIS EUROPEAN INTEGRATION (Jürgen Schwarze ed., 1996); Antero Jyränki, *Transferring Powers of a Nation-State to International Organisations: The Doctrine of Sovereignty Revisited*, *in* NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION, *supra* note 76, at 61.

ties over national law well established.[316] Germany and Italy, on the contrary, had a dualist legal tradition in which international agreements had to be transformed into the national legal order by an act of parliament.[317] Transformed treaties took precedence only over earlier national legislation, but could be superseded by later legislative acts.[318] The French Constitution recognized the supremacy of international treaty law over subsequent national legislation, but the prevailing doctrine in French courts was that they were not allowed to set aside French laws conflicting with earlier international agreements.[319] The Belgian legal situation was unclear.[320]

According to the Treaty of Rome, it was up to the Court of Justice to "ensure that in the interpretation and application of this Treaty the law is observed."[321] In terms of enforcement, the Treaty foresaw two major roads of access to the Court. Direct actions include the possibility for the Commission to bring Member States before the Court for failure to fulfil their Treaty obligations.[322] This procedure has become more threatening to the Member States since the Maastricht Treaty granted the Court the power to impose penalty payments on Member States that fail to comply with earlier judgments.[323] Furthermore, during the Maastricht negotiations, the Court of Justice held in its famous Francovich judgment that Member States are liable for loss and damage caused to individuals by breaches of Community law for which the Member States can be held responsible, such as the non-transposition of a directive within the required period.[324] Indirect actions concern questions on the validity and interpretation of Community law that are brought before the European Court of Justice by national courts or tribunals. National courts against whose decisions there is no judicial remedy under national law are obliged by the Treaty of Rome to

316. *See* Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order, in* THE EVOLUTION OF EU LAW 179 (Paul Craig & Grainne de Burca eds., 1999).

317. *See id.*

318. *See id.*

319. *See id.*

320. *See id.*

321. CONSOLIDATED EC TREATY, *supra* note 2, art. 220 (ex EC TREATY art. 164). On the role of the European Court of Justice and its impact on the EU's institutional framework, see RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION (1998); THE EUROPEAN COURT AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter, Joseph H. H. Weiler & Alec Stone Sweet eds., 1998); Alec Stone Sweet and James A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration, in* EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE (Wayne Sandholtz and Alec Stone Sweet eds., 1998); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution* 75 AM. J. INT'L L. 1 (1981).

322. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 226 (ex EC TREATY art. 196).

323. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 228 (ex EC TREATY art. 171).

324. *See* Joint Cases C-6/90 and C-9/90, Francovich v. Italy, Bonifaci v. Italy, 1991 E.C.R. I-5357. *See also* GEORGES VANDERSANDEN & MARIANNE DONY, LA RESPONSABILITE DES ETATS MEMBRES EN CAS DE VIOLATION DU DROIT COMMUNAUTAIRE: ETUDES DE DROIT COMMUNAUTAIRE ET DE DROIT NATIONAL COMPARE (1997); Ami Barav, *State Liability in Damages for Breach of Community Law in the National Courts*, 16 Y.B. EUR. L. 87 (1996); Gerhard Bebr, *Case Law: Joint Cases C-6/90 and C-9/90, Francovich v. Italy, Bonifaci v. Italy, Judgment of the Court of Justice of 19 November 1991*, 29 COMMON MKT. L. REV. 187 (1992); Roberto Caranta, *Governmental Liability after Francovich*, 52 CAMBRIDGE L. J. 272 (1993); Josephine Steiner, *From Direct Effect to Francovich: Shifting Means of Enforcement of Community Law*, 18 EUR. L. REV. 3 (1993).

bring those questions before the European Court.[325] These questions often concern a conflict between national and Community law. The Court's so-called preliminary rulings are binding on the national judges.[326] The purpose of the system of preliminary rulings is to preserve a high degree of unity and coherence in the interpretation of European law throughout Member States.

During the first half of the 1960s, the Court used the system of preliminary rulings to establish a strong Community legal order that was years ahead of European political integration. The two building blocks of the Court's Community legal order were the principles of direct effect and primacy.[327] Primacy means that in conflicts between the law of a Member State and Community law, the latter has precedence.[328] Direct effect implies that individuals (and companies) can rely on Community law before national courts to challenge the law of their Member State.[329] Both principles were enunciated in the framework of preliminary questions. While some of the Member State governments had intervened before the Court to argue against direct effect and primacy, both principles were already well-established as *acquis communautaire* when the Community went through its first enlargement from the Six to the Nine in 1973.[330] Via the system of preliminary rulings, direct effect and primacy, the Community was able to combine coherence and uniformity with a certain degree of decentralization. As John Temple Lang wrote, the "duty imposed by constitutional law of the EU on national courts and national authorities to see that Community law is applied and respected in the national legal orders makes every national court in a sense also a Community court."[331]

For the European Court of Justice, Community law also has an absolute primacy over national Constitutions. Allowing national Constitutional Courts to assess the validity of Community law on the basis of national constitutional standards would, according to the Court of Justice, gravely affect the European law's unity and efficacy.[332] For the European Court, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional struc-

325. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 234 (ex EC TREATY art. 177). *See also* ARTICLE 177 EEC: EXPERIENCES AND PROBLEMS (Henry G. Schermers, Christiaan W. A. Timmermans, Alfred E. Kellermann & J. Steward Watson eds., 1987). On the statistical importance of this provision, see Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, 5 J. EUR. PUB. POL'Y 66 (1998).

326. *See supra* note 325.

327. For an excellent overview, see de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *supra* note 316; Pavlos Eleftheriadis, *The Direct Effect of Community Laws: Conceptual Issues*, 16 Y.B. EUR. L. 205 (1996).

328. *See supra* note 327.

329. *See id.*

330. *See id.*

331. John Temple Lang, *The Duties of National Authorities under Community Constitutional Law*, 23 EUR. L. REV. 109 (1998). On the same theme, see Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice*, 31 N. Y. U. J. INT'L L. & POL. 307 (1999).

332. *See supra* note 331.

ture."[333] Still, the Italian Constitutional Court, the German Federal Constitutional Court and the Danish Supreme Court — in acts of defiance — have all declared that they would nevertheless be competent to control the consistency of Community law with the fundamental principles of their respective Constitutions.[334] As Sten Harck and Henrik Palmer Olsen have put it, the problem is that the European Court of Justice, the German Constitutional Court, the Danish Supreme Court and the Italian Constitutional Court all see themselves as the final arbiter of the validity of Community regulatory acts, each deriving its authority from a different constitutive instrument.[335] The three national Constitutional Courts continue to disagree with the European Court's view that the obligation of national courts to protect their national Constitutions is subordinate to their obligation to respect the supremacy of Community law.

Resistance to the supremacy of the European Court of Justice also arose during the negotiation of the Treaty of Amsterdam. The UK's blunt attack against the Court in wake of the dispute over the working time directive was unsuccessful.[336] Conservative Prime Minister Major had announced that he wanted to limit the impact of the Court's judgements in view of their "disproportionate costs on governments or business."[337] Still, the Amsterdam Treaty does contain a dangerous precedent with regard to the primacy of Community law. In the new Community Title on visas, asylum, immigration and other policies related to the free movement of persons, the European Court of Justice receives limited jurisdiction, which may not be related to measures concerning the maintenance of law and order and the safeguarding of internal security.[338] The Council, Commission or a Member State may request Court of Justice rulings on the interpretation of this Title.[339] However, such interpretations shall not affect judgements of Member State courts which have become *res judicata*, thus undercutting the primacy principle in practice.[340]

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333. Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 1134.

334. *See* Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, 2 MAASTRICHT J. EUR. & COMP. L. 145 (1995); Ulrich Everling, *The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union*, 14 Y.B. EUR. L. 1 (1994); Matthias Heregen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'*, 31 COMMON MKT. L. REV. 235 (1994); Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 315 (1999).

335. *See* Sten Harck & Henrik Palmer Olsen, *Decision Concerning the Maastricht Treaty, Supreme Court of Denmark, April 6, 1998*, 93 AM. J. INT'L L. 209 (1999).

336. *See supra* note 51.

337. A PARTNERSHIP OF NATIONS: THE BRITISH APPROACH TO THE EUROPEAN UNION INTERGOVERNMENTAL CONFERENCE, *supra* note 59, at 16, 17.

338. *See* CONSOLIDATED TEU, *supra* note 2, art. 68.

339. *See id.*

340. *See id.*; *see also* Albertina Albors-Llorens, *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 1273 (1998); Ole Due, *The Impact of the Amsterdam Treaty upon the Court of Justice*, 22 FORDHAM INT'L L. J. 548 (1999).

K. Between Directly Applicable Rights for EU Citizens and Intergovernmental Law

As indicated in the preceding section, Community law creates rights and obligations not only for the Member States but also for European citizens, and this in contrast to most international treaties. As early as the Van Gend & Loos judgment of 1963, the European Court of Justice explicitly recognized that the Treaty of Rome

> is more than an agreement which merely creates mutual obligations between the contracting states . . . Independently of the legislation of the Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[341]

At the end of the 1960s and the beginning of the 1970s, the Court confirmed that such rights included fundamental human rights. Although the Treaty of Rome had not explicitly referred to respect for fundamental rights,[342] the Court stated unambiguously that such rights formed an integral part of the general principles of law whose observance it protected.[343] In Maastricht and Amsterdam, the treaty basis for the link between the EU, its citizens and the protection of their fundamental rights was substantially strengthened. The Treaty of Maastricht created the concept of the "citizenship of the Union," explicitly adding that the "[c]itizens of the Union shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby."[344] The Treaty thus formalized the relationship between the citizens and the Union, complementing but not replacing the relationship between the citizens and their Member States. Even the German Federal Constitutional Court, in its famous Maastricht judgment of 1993, came to the conclusion that "with the establishment of Union citizenship . . . a legal bond is formed between the nationals of

341. Van Gend & Loos v. Nederlandse Administratie der Belastingen, *supra* note 61, at 12.

342. That the EEC Treaty of 1957 did not explicitly refer to the protection of fundamental rights is not entirely surprising. First, the EEC Treaty contained mainly economic provisions. In this framework it did provide for "the principle that men and women should receive equal pay for equal work" (EEC TREATY, *supra* note 2, art. 119). Second, the six original Member States were all also party to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. There seemed no need to duplicate the Council of Europe's advanced protection mechanism that had only entered into force in 1953.

343. *See* Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419, 425; Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 1134; Case 4/73 J. Nold Kohlen- und Baustoffgrosshandlung v. Commission, 1974 E.C.R. 491, 507-08. For the evolution of the case-law since the 1960s, see Gérard Cohen-Jonathan, *La Protection des Droits Fondamentaux par la Cour de Justice des Communautés européennes, in* IN THE NAME OF THE PEOPLES OF EUROPE: A CATALOGUE OF FUNDAMENTAL RIGHTS 44 (Roland Bieber, Karel de Gucht, Koen Lenaerts & Joseph Weiler eds., 1996); Koen Lenaerts, *Le Respect des Droits Fondamentaux en tant que Principe Constitutionnel de l'Union européenne, in* MELANGES EN HOMMAGE A MICHEL WAELBROECK 423 (1999); J. H. H. Weiler & Nicolas J. S. Lockhart, *'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51 & 579 (1995).

344. CONSOLIDATED EC TREATY, *supra* note 2, art. 17 (ex EC TREATY art. 8). On the European citizenship, see PAUL MAGNETTE, LA CITOYENNETE EUROPEENNE (1999); SIOFRA O' LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP (1996); Linda Hiljemark, *A Voyage around Article 8: An Historical and Comparative Evaluation of the Fate of European Citizenship*, 17 Y.B. EUR. L. 135 (1999).

the individual Member States which . . . provides a legally binding expression of the degree of the *de facto* community already in existence."[345]

The Treaty of Amsterdam contained further specifications of the rights and freedoms which are central to the Union's action. The Treaty lists "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" as the principles on which the EU is founded.[346] It adds that the "existence of a serious and persistent breach" of these principles may lead to the suspension of the (voting) rights of the Member State in question.[347] Respect for the principles listed above also became an explicit precondition to applying for EU membership.[348] Furthermore, the Treaty of Amsterdam granted the Community an explicit competence to take appropriate action in combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.[349]

While adding new references to citizens' rights, the Member States ensured that they would keep full control over the implementation of the anti-discrimination provision. Action can only be taken upon unanimous agreement of the Council, and therefore the anti-discrimination clause does not have direct effect.[350] Anti-discrimination was not the only field of action where the Member States explicitly excluded direct effect. It was also the case with regard to the new legal instruments (framework decisions) foreseen in the area of police and judicial cooperation in criminal matters.[351] The Member States feared actions by individuals before domestic courts against their national police and judicial practices. Furthermore, while Council, Commission and Member States may request Court of Justice rulings on the interpretation of the new Community Title on visas, asylum, immigration and other policies related to free movement of persons, individuals cannot do so.[352] While the formal recognition of the citizen's fundamental rights in the EU framework was largely the result of the Court's case law, the Member States proved reluctant to promote the further evolution of the law in areas that concern the rights and obligations of individuals via direct effect.

In a further move to establish fundamental rights, the Cologne European Council of June 1999 decided to draw up a Charter of Fundamental Rights of the

345. Entscheidungen des Bundesverfassungsgerichts, *supra* note 46, at para. 39.

346. *See* CONSOLIDATED TEU, *supra* note 2, art. 6.

347. *See* CONSOLIDATED TEU, *supra* note 2, art. 7.

348. *See* CONSOLIDATED TEU, *supra* note 2, art. 49.

349. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 13. On the basis of this new power, the European Commission on Nov. 25, 1999 came forward with a Communication and three proposals to combat discrimination in the EU. *See* Commission of the European Communities, A Step Forward for the EU - Empowering Victims of Discrimination, IP/99/89 (Nov. 25, 1999). *See also* Mark Bell, *The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?*, 6 MAASTRICHT J. EUR. & COMP. L. 5 (1999); Leo Flynn, *The Implications of Article 13 EC - After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?*, 36 COMMON MKT. L. REV. 1127 (1999).

350. *See supra* note 349.

351. *See* CONSOLIDATED TEU, *supra* note 2, art. 34.

352. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 68.

European Union.[353] The new EU Charter would contain the fundamental rights and freedoms as well as the basic procedural rights guaranteed by the European Convention and derived from the constitutional traditions common to the Member States. The Charter would also include the fundamental rights that pertain only to the Union's citizens. The Charter is currently being elaborated by a body composed of representatives of the Heads of State and Government and the Commission President, as well as of Members of the European and national parliaments. Its legal form and relationship to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms remain to be decided. Either the Charter is integrated in the EU Treaty framework, or it becomes a mere political declaration. The declaratory option would add little in substance and would not be in proportion to the magnitude of the drafting exercise. In case of a legally binding EU system for the protection of fundamental rights, however, it would be important to avoid potential conflicts with the evolving Council of Europe system.[354]

L. Between an EU of Member States and an EU of the Regions

The EU constitutes a Union of Member States that have signed and ratified the founding Treaties. As the Court of Justice has repeatedly stated, the Member States remain responsible for a failure to fulfill Treaty obligations,[355] even if the breach is actually committed by a region or agency that is independent according to national constitutional law.[356]

While a Union of Member States, the EU has in recent years made room for the participation of the Regions in the decision-making process. Since the Maastricht Treaty, Member States may be represented in the Council by any representative at Ministerial level, whether from the national or regional government, as long as the representative is authorized to commit the government of that Member State.[357] Thus, Ministers from the Regions can directly participate in Council deliberations. In Belgium, for instance, there is no national Minister for culture or education. Representation in the Council is therefore assured on a

353. *See* Cologne European Council, Presidency Conclusions, June 3-4, 1999, *in* BULL. EUR. UNION at para. I.64 (6-1999). After the Court's Opinion 2/94 of Mar. 28, 1996, the EU's direct accession to the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms had been ruled out. *See* Opinion 2/94, 1996 E.C.R. I-1759. *See* Johan Ludwig Duvigneau, *From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights Protection in the European Union*, 25 LEGAL ISSUES EUR. INTEGRATION 61 (1998).

354. For an analysis of the EU's human rights policy, see THE EU AND HUMAN RIGHTS (Philip Alston with Mara Bustelo & James Heenan eds., 1999); THE EUROPEAN UNION AND HUMAN RIGHTS (Nanette A. Neuwahl & Alan Rosas eds., 1995); Philip Alston and J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, 9 EUR. J. INT'L L. 658 (1998).

355. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 226 (ex EC TREATY art. 169).

356. *See* Case 77/69, Commission v. Belgium, 1970 E.C.R. 237, 243. *See also* Kurt Riechenberg, *Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration* 22 FORDHAM INT'L. L. J. 696 (1999). Member States may not rely on national provisions or practices to justify their failure to fulfill their obligations, see Case 30/72, Commission v. Italy, 1973 E.C.R. 667, 671-72; Case 215/85, Commission v. Belgium, 1985 E.C.R. 1039, 1054.

357. *See* CONSOLIDATED EC TREATY, *supra* note 2, art. 203 (ex EC TREATY art. 146).

rotating basis by a Minister from Belgium's Flemish, French-speaking or German-speaking language communities.[358] A coordination mechanism between the regions and the federal government ensures that a single Belgian position is determined before each Council meeting.[359]

The Maastricht Treaty also created the Committee of the Regions.[360] The Committee consists of 222 representatives of regional and local bodies.[361] It has an advisory status and must be consulted by the Council or by the Commission where the Treaty so provides.[362] It may also be consulted by the European Parliament.[363] The Committee may issue opinions on its own initiative when it considers that specific regional interests are at stake.[364] At its five plenary sessions in 1999, the Committee adopted 8 resolutions and 70 opinions, 14 in cases where consultation was mandatory under the Treaty.[365] In practice, the Committee's opinions have not seemed to carry much weight in the EU's decision-making process.[366]

The Regions themselves, however, seem to be exerting an ever greater influence on the EU's future. The German regional challenge to the European integration project has been particularly pronounced in recent years.[367] During the Amsterdam Treaty negotiations, the regional challenge was personified by Bavarian Prime Minister Edmund Stoiber.[368] While Chancellor Helmut Kohl's federal government depended on the support of Stoiber's Christian Social Union (CSU), the Bavarian Premier never made a secret of his Euro-skeptic attitude.[369] Stoiber got the help from Saxony's Kurt Biedenkopf and several other Länder whose representatives needed to approve the new Treaty in the Bundesrat.[370] During the final stage of the Amsterdam negotiations, the Länder forced Chancellor Kohl to veto any meaningful extension of qualified majority voting.[371]

358. *See* Accord de Coopération entre l' Etat Fédéral, les Communautés et les Régions, Relatifs à la Représentation du Royaume de Belgique au sein du Conseil de Ministres de l' Union Européenne, Annexe II (Supplément à la Revue de la Presse, Ministère des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement, Mar. 9, 1994).

359. See *id.*, arts. 2-6. When representing their Member State in the Council, the Regions of a single Member State have to come up with a unified position since CONSOLIDATED EC TREATY, *supra* note 2, art. 205 (ex EC TREATY art. 148) does not allow splitting the vote of a Member State.

360. *See* CONSOLIDATED EC TREATY, *supra* note 2, arts. 263-65 (ex EC TREATY arts. 198a-c).

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.*

365. *See* GEN. REP. EU 1999 at para. 1059.

366. *See* Rosarie E. McCarthy, *The Committee of the Regions: An Advisory Body's Tortuous Path to Influence,* 4 J. EUR. PUB. POL'Y 439 (1997).

367. *See* Richard E. Deeg, *Germany's Länder and the Federalization of the European Union, in* 3 THE STATE OF THE EUROPEAN UNION: *supra* note 132, at 197; Rudolf Hrbek, *The German Länder and EC Integration,* 15 J. EUR. INTEGRATION 180 (1992).

368. *See* Devuyst, *Treaty Reform in the European Union: The Amsterdam Process*, *supra* note 6, at 623.

369. William Paterson, *The German Christian Democrats, in* POLITICAL PARTIES AND THE EUROPEAN UNION 53 (John Gaffney, ed., 1996); *The FT Interview*, FIN. TIMES, June 7, 1997.

370. *See* Devuyst, *Treaty Reform in the European Union: The Amsterdam Process*, *supra* note 6, at 623.

371. *See id.*

After Amsterdam, the Länder continued their regional challenge to the Community method by threatening to block the ratification of the IGC 2000 in the German Bundesrat if the Commission continued its competition policy investigation against state aid for Germany's regional savings banks.[372]

IV.
CONCLUSION

Since the mid-1980s, European integration has made great leaps forward. The EU forms the world's largest internal market, now accompanied by the Euro as the common currency for eleven of the fifteen Member States. The development of a European Security and Defense Policy took a concrete shape at the Helsinki European Council in December 1999.[373] Only two months earlier, the Tampere European Council of October 1999 approved an ambitious action plan for cooperation in JHA that should lead to the creation of an Area of Freedom, Security and Justice.[374] Simultaneously, the EU is pursuing the most challenging enlargement process in its history.

Still, in institutional terms, the Member States have a tendency to move forward just one day at a time, through *ad hoc* solutions. While this tendency has forestalled lengthy debates between the Member States on the end-goal of European integration, it has resulted in a complex patchwork of legal texts under the EU umbrella.[375] By failing to pursue the institutional logic behind the Rome Treaty, the Member States have created a Union hanging between what remains from the Community method and a series of compromise solutions that lead in the intergovernmental direction.

It is no surprise that the Helsinki European Council failed to retain the Wise Men's idea for a Constitutionalization of the EU Treaty framework. A real Constitutionalization of the EU's political process based on method, logic and coherence will hardly be possible unless the Member State governments, which have very different preferences with regard to the EU's end-goals, are ready to make the fundamental political choices which have been hidden away or avoided in the current patchwork of Treaty provisions. In the words of Francisco Seixas da Costa, the Portuguese State Secretary for European Affairs who presided over the Treaty reform process at working level, the Member States have during the first half of 2000 opted to widen rather than deepen the European integration process:

372. *See* AGENCE EUROPE, Jan. 29, 2000, at 10; Eiko R. Thielemann, *Institutional Limits of a Europe with Regions: EC State-Aid Control Meets German Federalism*, 6 J. EUR. PUB. POL'Y 399 (1999).

373. *See* Helsinki European Council, *supra* note 5, at para. 25.

374. *See* Tampere European Council, Presidency Conclusions, Oct. 15-16, 1999, *in* BULL. EUR. UNION at para. I.2 (10-1999).

375. Complicating the picture is George Tsebelis and Amie Kreppel's conclusion that while some of the Treaty of Rome's founders (such as Paul-Henri Spaak and Walter Hallstein) and opponents (such as Charles de Gaulle) had an accurate perception of the Community method, later political actors often had a very incomplete, or plainly wrong, understanding of the institutions they were reforming. *See* George Tsebelis and Amie Kreppel, *The History of Conditional Agenda-Setting in European Institutions*, 33 EUR. J. POL. RES. 41 (1998).

> To make possible the enlargement of Europe to the Eastern European countries and to offer them political stability and economic development, the Fifteen have made an implicit choice, opting for a Union that differs from the one that has existed to date. The challenge of enlargement has changed the quality of the Union and reduced the ambition of the European undertaking. This may be regrettable but could not be avoided.[376]

Former Commission President Jacques Delors has made a similar assessment.[377] For Delors, the road chosen by the heads of state and government is leading the EU away from the federal Community method defined by the Founders. While underlining the historical importance of the accession process, Delors simultaneously emphasizes that an enlarged EU — with a multitude of Member States defending an even greater variety of viewpoints than today — will not be able to pursue the ambitious political union aims underlying the Maastricht Treaty.[378] Such an evolution, Delors maintains, is "not . . . of a nature to please those who remain faithful to the ideals and political thinking of the Fathers of Europe, Monnet, Schuman, Adenauer, Gasperi and Spaak."[379] As a way forward, Delors proposes a "two circle Europe." Under this system, the European Union would become the home of the greater Europe. A more ambitious avant-garde, open to all European countries having the necessary political determination to leave ancient notions of sovereignty behind, would form a new European Federation of Nation States. On the basis of a coherent Constitutional framework, the Federation would continue with the deepening of the European integration process.[380]

If the Member States fail to use the Community method to make a significant institutional leap forward during the IGC 2000, a new Schuman-like initiative along the lines of Delors' proposal for a Federation of Nation States should indeed be adopted. Those Member States sharing the goal of giving European integration a new dynamism based on institutional efficiency and coherence could form the new and open core of Europe. While such a scenario might be difficult to realize without a major political crisis, it could well be necessary to prevent the enlarged EU from becoming an uninspiring League of Nations.[381]

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376. AGENCE EUROPE, Jan. 14, 2000, at 3.

377. *See* Jacques Delors, *Reuniting Europe: Our Historic Mission*, *in* AGENCE EUROPE, Jan. 3 & 4, 2000, at 2; *Jacques Delors, Critique la Stratégie d'Elargissement de l'Union*, *in* LE MONDE, Jan. 19, 2000.

378. *See supra* note 377.

379. *Id.*

380. *See id.*

381. For a similar perspective, see Valéry Giscard d'Estaign and Helmut Schmidt, *Europe's Lesson*, *in* AGENCE EUROPE, Apr. 17, 2000 at 3; Joschka Fischer, FROM CONFEDERACY TO FEDERATION, *supra* note 6.

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International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention

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International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention

By
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I.
INTRODUCTION

While the recent discovery of Russian money laundering operations in American banks and businesses may have come as a "rude awakening for Americans,"[1] some experts, more familiar with Russian organized crime, foretold the boom these international criminals would enjoy following the breakup of the Soviet Union:

> [T]he Iron Curtain . . . was a shield for the West. Now we've opened the gates, and this is very dangerous for the rest of the world. America is getting Russian criminals; Europe is getting Russian criminals. They'll steal everything. They'll occupy Europe. Nobody will have the resources to stop them. You people in the West don't know our mafia yet. You will, you will.
>
> —Serious Crimes Investigator Boris Uvarov in 1992[2]

Globalization has brought prosperity not only to Russian criminal organizations, but also to all of the major transnational criminal groups around the world. Over the last decade, organized crime groups have significantly advanced in size, sophistication, and degree of transnational activity and cooperation.[3] Today's main international criminal organizations are operating with the technology of

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1. Kevin Johnson, *International Police Discuss Dirty Money*, USA TODAY, Sept. 1, 1999, at 5A. In addition to allegations that up to $15 billion has been laundered through American banks including the Bank of New York, evidence is mounting that Russian criminals have successfully set up large companies in the U.S. for the purpose of laundering the proceeds of their criminal activities, one of many examples being Semyon Yukovich Mogilevich and YBM Magnex, the company he set up in Philadelphia. *See* Raymond Bonner, *Russian Gangsters Exploit Capitalism to Increase Profits*, N.Y. TIMES, July 25, 1999, § 1, at 1.

2. CLAIRE STERLING, THIEVES' WORLD 113 (1994).

3. Some groups hire specialists as advisers and even engage in research and development programs. *See Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World*, *in* THE UNITED NATIONS AND TRANSNATIONAL ORGANIZED CRIME 31 (Phil Williams & Ernesto U. Savona eds., 1996) [hereinafter *Problems and Dangers*].

many multinational corporations, rather than the tactics employed by local gangs.[4] The same industrial advances that have allowed legitimate businesses to increase their international operations have similarly affected the activities of organized criminal enterprises.[5]

While some governmental leaders have recognized international criminal organizations as quasi-superpowers to be feared in the new world order,[6] little coordinated action has been taken to address the increasingly transnational nature of organized crime. The international community will be unable to effectively counter the threat—including the threat of nuclear terrorism—posed by international organized crime[7] unless it uses equally sophisticated, cooperative, and comprehensive tactics. As observed by Rodrigo Paris-Steffens, "just as organized crime could not exist without international cooperation, the only possibility of combating contemporary organized crime is through international cooperation."[8]

Meeting the challenge of this new breed of organized criminals requires a change in the traditional categorization of organized crime and law enforcement as matters of purely domestic concern.[9] Pursuing cooperative arrangements with one country at a time via extradition treaties and mutual legal assistance

4. *See* JOHN KERRY, THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY 19 (1997). *See also Most Effective Forms of International Cooperation for the Prevention and Control of Organized Transnational Crime at the Investigative, Prosecutorial and Judicial Levels*, *in* Williams & Savona, *supra* note 3, at 80-81 [hereinafter *Most Effective Forms*].

5. *See* Rodrigo Paris-Steffens, *The Role of the United Nations in Combating Organized Crime*, *in* INTERNATIONAL PERSPECTIVES ON ORGANIZED CRIME 15 (Jane Rae Buckwalter ed., 1990).

6. Former Russian President Boris Yeltsin called organized crime a superpower. *See* John Thornhill, *Making a Killing: Executives Are Still Being Murdered in Russia But Crime Is Down and the State Is Fighting Back*, FIN. TIMES, Jan. 17, 1998, at 7. United States President William J. Clinton also said in a speech recommending the use of force against Iraq in February 1998 that the world is likely to see more and more of the kind of threat posed by non-state actors possessing weapons of mass destruction, including organized criminals, "who travel the world among us unnoticed." *See* John F. Harris & John M. Goshko, *Clinton Makes Case for Strike Against Iraq*, WASH. POST, Feb. 18, 1998, at A1. Later in 1998, Clinton "essentially declared war" on global organized crime, calling it the "new empire" of evil, and making it the focus of a global crime-control plan he announced just prior to the G-8 summit in May of 1998. *See* Francine Kiefer, *Waging War on Global Crime*, CHRISTIAN SCI. MONITOR, May 15, 1998, at 3. The plan Clinton announced included increased cooperation with other countries, international agreements on seizing proceeds of crime, information sharing, enhanced U.S. jurisdiction to prosecute crimes committed overseas, and tighter border control. *See* Naftali Bendavid, *Clinton Envisions Global Crime Fight; Greater International Effort Called for in Plan to Combat Increase of Cross-Border Felonies*, CHI. TRIB., May 13, 1998, at 8.

7. "Because international criminal law is still in its infancy and is faced with a number of limitations, it is not adequately equipped to respond to the explosive growth of international crimes. Namely, international crime is not recognized by all nations, and no central organization has been established to monitor the enforcement of its rules." Farah Hussain, Note, *A Functional Response to International Crime: An International Justice Commission*, 70 ST. JOHN'S L. REV. 756-57 (1996).

8. Paris-Steffens, *supra* note 5, at 15.

9. "Traditionally, organized crime has been seen largely as a law and order problem rather than as something that can threaten the viability of societies, the independence of governments, the integrity of financial institutions, and the functioning of democracy. The fact that a particular problem has always been conceptualized and understood within certain parameters does not prevent it from taking on new forms that pose a novel and much more formidable challenge. Organized crime has undergone a transformation of this kind and can no longer be understood as simply a local or national phenomenon." *Problems and Dangers*, *supra* note 3, at 2.

treaties will also not adequately fortify the world against the threat of international organized crime. While there is a growing body of international criminal law relating to the various activities of organized criminals, it is time for an integrated, universal approach that addresses all aspects of organized crime throughout the world. An international convention clearly codifying the illegality of the major activities of international organized crime under international law and providing for multilateral legal assistance in apprehending and prosecuting leading international organized criminals, would go further toward matching and surpassing the sophistication and cooperation of today's criminal enterprises than any of the current national, bilateral, multilateral, regional, or piece-meal international approaches. Work on drafting an International Convention Against Organized Transnational Crime has commenced under the auspices of the Commission on Crime Prevention and Criminal Justice of the United Nations Economic and Social Council.[10] While there are certainly a host of obstacles to agreement on the provisions of the Convention, every U.N. member should join in this discussion and work toward its conclusion.

To appreciate the need for an integrated, international approach to the problem of transnational organized crime, it is important to understand the nature of the criminals and their crimes. Part I provides background on the main international criminal organizations and describes how their principal activities resemble threats traditionally dealt with under the rubric of international, rather than domestic, law. Part II provides an overview of the current legal mechanisms for addressing the problem of organized crime and their inadequacies. Part III makes the argument for an international convention on organized transnational crime and outlines the key elements of such a convention, the prospects for its conclusion, and the necessary concurrent steps.

II.
BACKGROUND: THE GROWING THREAT OF INTERNATIONAL ORGANIZED CRIME

Numerous scholars, lawyers, and social scientists have attempted to define international organized crime. Most have found that it is best defined by its attributes:[11]

10. *See Question of the Elaboration of an International Convention Against Organized Transnational Crime*, G.A. Res. 51/120, U.N. GAOR, 82d plen. mtg. (1996). *See also International Cooperation in Combating Transnational Crime: Question of the Elaboration of an International Convention Against Organized Transnational Crime: Report of the Secretary-General*, U.N. SCOR, Comm'n. on Crime Prevention and Criminal Justice, 6th Sess., Provisional Agenda Item 6(a), at 2-5, U.N. Doc. E/CN.15/1997/7/Add.1 (1997) [hereinafter E/CN.15/1997/7/Add.1].

11. The list here is a compilation from several sources. Except as specifically footnoted, most of these attributes appeared on multiple lists among these sources. *See* Anatoli Volobuev, *Combating Organized Crime in the USSR: Problems and Perspectives*, *in* Buckwalter, *supra* note 5, at 75; Cyrille Fijnaut, *Policing International Organized Crime in the European Union*, *in* CHANGES IN SOCIETY: CRIME AND CRIMINAL JUSTICE IN EUROPE II (Cyrille Fijnaut et al. eds., 1995); Michael D. Maltz, *On Defining "Organized Crime": The Development of a Definition and a Typology*, *in* ORGANIZED CRIME 17 (Nikos Passas ed., 1993); Vincenzo Ruggiero, *The Camorra: "Clean" Capital and Organised Crime*, *in* GLOBAL CRIME CONNECTIONS 141-43 (Frank Pearce & Michael Woodiwiss

- involvement in criminal operations that cross state boundaries, often in response to a demand for goods that are illegal;
- the promotion of corruption of government officials (often exploiting economically weakened states) with the goal of influencing or neutralizing the instruments of state;
- the possession of considerable resources;
- a hierarchical, rigid, or compartmentalized organizational structure[12] that uses internal discipline and thereby protects the leadership, "who carry out organizational, administrative and ideological functions,"[13] from detection or implication in commission of crimes;
- the laundering of proceeds and the use of legitimate "front" businesses to hide criminal activities;
- the use of violence;
- the capacity to "engage in a range of activities," and the "professionalism of its participants;"[14]
- "the aim of . . . the realization of large financial profits as quickly as possible;"[15]
- operation on a sustained, long-term basis; and
- "the tendency to organize international operations together with other groups of different nationalities."[16]

A. The Major International Criminal Organizations

The "Big Five"[17] international criminal organizations are the Russian "Mafiya,"[18] the Italian mafia families, the Colombian cartels, the Chinese Triads, and the Japanese Yakuza. To elaborate the best approach in combating the problem of organized crime, it is important to consider each of the groups for its differences, similarities, and links to the other groups.[19]

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eds., 1993); Donald Lavey, *Interpol's Role in Combating Organized Crime, in* Buckwalter, *supra* note 5, at 87; *Problems and Dangers*, *supra* note 3, at 3; *The Feasibility of Elaborating International Instruments, Including Conventions, Against Organized Transnational Crime, in* Williams & Savona, *supra* note 3, at 153 [hereinafter *The Feasibility of Elaborating*].

12. This aspect leads some to describe organized crime as a pyramid structure, with the base comprising the "operative block" of professional criminals, the middle section comprising the "supply group and security group," and the tip of the pyramid comprising the "elite group representing the intellectual center or leaders of the entire system." Volobuev, *supra* note 11, at 77. *See also Problems and Dangers*, *supra* note 3, at 30.

13. *See* Volobuev, *supra* note 11, at 75.

14. *See* Ruggiero, *supra* note 11, at 141-43.

15. *See* Lavey, *supra* note 11, at 87.

16. *The Feasibility of Elaborating*, *supra* note 11, at 153.

17. *See* KERRY, *supra* note 4, at 21.

18. "Mafiya" is the English transliteration of the Russian word and has been used by Stephen Handelman and others to distinguish the Russian version from the Italian. *See* STEPHEN HANDELMAN, COMRADE CRIMINAL 21-22 (1995). "Russian" is used here as shorthand to refer to organized crime in and from all parts of the former Soviet Union. *See Russian Organized Crime in the United States: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 104th Cong., 2nd Sess. 2 (1996) (opening statement of Senator Roth) [hereinafter *1996 Hearing*].

19. *See Problems and Dangers*, *supra* note 3, at 2.

1. The Russian "Mafiya"

While the Russian criminals are relative newcomers in the West and are not as numerous in the United States as other criminal groups, "the Russians stand out among their peers because they are talented enough and frightening enough to have achieved in two or three years what the others achieved in twenty or a hundred."[20] The rapid rise of the power of Russian organized crime throughout the world led the head of Italy's Parliamentary Anti-Mafia Commission to pronounce in 1993 that "the world capital of organized crime is Russia,"[21] dispelling any lingering notion that the Italians still play the central role. Russia is particularly susceptible to flourishing criminal activity because of the weak state of its government. Law enforcement bodies lack adequate funding, equipment, training, and a solid legal foundation for pursuing criminals or cooperating with foreign officials.[22] "The world's largest, busiest, and possibly meanest collection of organized hoods,"[23] the Mafiya includes as many as three million members,[24] and 8,000 groups,[25] 200 of which are operating outside Russia in fifty other countries.[26]

In terms of organizational structure, the Russian brand of organized crime deviates slightly from the standard definition. Unlike the Sicilians, the Russians are not necessarily organized around family ties, ethnicity,[27] or a centralized command. Indeed, some have disputed whether the Russian groups possess the unified, hierarchical structure that defines organized crime.[28] There does not appear to be an "overall controlling figure or body."[29] Rather, the Russian Mafiya has its "godfathers"—called *vory v zakone,* "thieves within the code," or "thieves in law"—who act as commanders and strategists.[30] A small number of these *vory v zakone* are believed to "loosely rule the Russian criminal world,"[31] and meet from time to time to plot.[32] In addition to the *vory*, modern organized

20. *See* STERLING, *supra* note 2, at 16.
21. *See id.* at 17.
22. *See id.*
23. *Id.* at 90.
24. *See id.*
25. *See* Phil Williams, *Introduction: How Serious a Threat is Russian Organized Crime, in* RUSSIAN ORGANIZED CRIME 5 (Phil Williams ed., 1997) (estimate as of 1995).
26. The number of countries in which Russian groups have established a presence increased from twenty-nine in 1994 to fifty in 1997, according to Louis Freeh, director of the U.S. Federal Bureau of Investigation. *See* CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, RUSSIAN ORGANIZED CRIME: GLOBAL ORGANIZED CRIME PROJECT 2-3 (1997) [hereinafter CSIS REPORT]. *See also Problems and Dangers, supra* note 3, at 15.
27. Only a small percentage of individual crime groups in Russia are ethnically based, whereas most criminal groups in the United States are formed along ethnic lines. *See* CSIS REPORT, *supra* note 26, at 28.
28. Joseph Serio, *The Soviet Union: Disorganization and Organized Crime, in* ENTERPRISE CRIME: ASIAN AND GLOBAL PERSPECTIVES 158-59 (Ann Lodl & Zhang Longguan eds., 1992).
29. *See Problems and Dangers, supra* note 3, at 15.
30. *See* STERLING, *supra* note 2, at 97. *But see* CSIS REPORT, *supra* note 26, at 27 (recognizing the historical role of the *vory v zakone*, but noting a recent trend of disregard for their traditional code of behavior).
31. Abraham Abramovsky, *Prosecuting the "Russian Mafia": Recent Russian Legislation and Increased Bilateral Cooperation May Provide the Means*, 37 VA. J. INT'L L. 191, 200 (1996).
32. *See* STERLING, *supra* note 2, at 98.

crime groups in Russia have coalesced around three other "centers" of criminality: former members of the Soviet power elite, or *nomenklatura*; certain national and ethnic groups such as the Chechens; and "criminal associations based on control of a particular geographical sector, a specific criminal activity, shared experiences, membership in certain athletic sports clubs, or a particular leader."[33] "What does not seem to be in dispute, however, is that groups do actively cooperate among themselves when necessary . . . . Current levels of 'organization' allow for the merging of activities in the criminal and economic spheres."[34]

The Russian Mafiya is a diversified business. Mafiya groups are engaged in "extortion, theft, forgery, armed assault, contract killing, swindling, drug-running, arms smuggling, prostitution, gambling, loan-sharking, embezzling, money laundering, and black marketing—all this on a monumental and increasingly international scale."[35] Additional activities include "systematic racketeering . . . trafficking in radioactive material . . . and the infiltration and purchase of Russian banks."[36] Unlike the Colombians, whose only business is drugs, the Russian Mafiya traffics in anything and everything: drugs, metals, weapons, nuclear materials, even body parts.[37]

If any single characteristic sets the Russian criminals apart from other organizations, it is probably their knack for business and economic crimes—such as financial fraud and money laundering[38]—both at home and abroad.[39] The launching achievement of the Russian criminals in the post-cold war world was the massive plundering of currency and national resources from the former Soviet Union.[40] Currently, organized crime controls or influences most private banks[41] and an alarming number of businesses within the former Soviet Union.[42] The Russian Mafiya has also achieved a remarkable level of control over government officials since the break-up of the Soviet Union and has the potential to achieve the same level of corruption as the Colombians have

33. CSIS REPORT, *supra* note 26, at 27-28.

34. Serio, *supra* note 28, at 159.

35. STERLING, *supra* note 2, at 91.

36. KERRY, *supra* note 4, at 34. *See also* Serio, *supra* note 28, at 159; CSIS REPORT, *supra* note 26, at 18.

37. *See Problems and Dangers*, *supra* note 3, at 15.

38. *See 1996 Hearing*, *supra* note 18, at 17 (testimony of James E. Moody, Deputy Assistant Director, Criminal Investigative Division, FBI). Mr. Moody commented that Russian criminals operating in the United States "display a remarkable aptitude for sophisticated white-collar crime." *Id.* at 18.

39. Guy Dunn, *Major Mafia Gangs in Russia*, *in* Williams, *supra* note 25, at 63, 85. *See also* Abramovsky, *supra* note 31, at 195 (attributing Russian criminals' pursuit of financial fraud schemes in the United States to their education and sophistication).

40. Including "oil, gold, timber, copper, cobalt, aluminum, titanium, steel, uranium, plutonium and rare-earth metals." STERLING, *supra* note 2, at 113.

41. *See* Abramovsky, *supra* note 31, at 197.

42. According to the Russian Ministry of Internal Affairs, "40 percent of private business, 60 percent of state-owned enterprises, and between 50 percent and 85 percent of banks are controlled" by Russian organized crime, with its total hold on about two-thirds of Russia's economy. *See* CSIS REPORT, *supra* note 26, at 2.

achieved in their home state.[43] An estimated twenty-five percent of criminal proceeds in Russia are invested in maintaining and increasing ties with corrupt officials.[44]

The development of international operations by the Russian Mafiya was facilitated by the presence of Red Army troops and large immigrant communities abroad. In Germany, activities include trafficking in drugs, weapons, radioactive materials, and stolen cars, as well as money laundering and blackmail.[45] Red Army troops stranded in Germany at the end of the Cold War provided not only a distribution network, but also a willingness to sell their weapons and other possessions and even join the ranks of the criminals.[46]

2. *Italian Mafia*

Both United States and Italian law enforcement, at times working together, have significantly diminished the activity of Italian organized crime groups within their borders. But the Italian criminals have adapted by going global: three Italian-based groups—La Cosa Nostra from Sicily, the Camorra from Naples, and 'Ndrangheta from Calabria—are engaged in a global business worth approximately $110 billion a year.[47] Together the Italian groups comprise some 374 clans and 17,500 members.[48] Activities include drug trafficking throughout the Americas and Western Europe, training of other ethnic-based organized crime groups, money laundering, loan-sharking, counterfeiting, extortion, infiltration of legitimate business, and corruption of government officials.[49]

3. *Colombian Cartels*

Notorious as the main enemy in the United States' war on drugs, the crowning achievement of the Colombians is probably their stranglehold on the power of Colombia's government. Other criminal organizations strive to emulate Colombia's narcodemocracy model, "with bribed officials now the norm, not the exception."[50] The structure of the Colombian cartels is modeled after Israeli intelligence cells, with minimal communication between separate units.[51] The cartels excel in their degree of organization, particularly for their size: "perhaps the nearest to a formal corporate structure based on a clear hierarchy, func-

43. Russia may have already become what CSIS's Global Organized Crime Project terms a "criminal-syndicalist state" where gangsters, corrupt government officials, and crooked businessmen cooperatively rule the nation. *See* CSIS REPORT, *supra* note 26, at 15. Transparency International ranked Russia as the fourth most corrupt nation in the world in 1997, behind Colombia, Nigeria and Bolivia. *See id.* at 2.

44. *See* Yuriy A. Voronin, *The Emerging Criminal State: Economic and Political Aspects of Organized Crime in Russia*, *in* Williams, *supra* note 25, at 56.

45. *See* STERLING, *supra* note 2, at 118.

46. *See id.* at 120-21.

47. *See* KERRY, *supra* note 4, at 91.

48. *See id.* at 92.

49. *See id.* at 91-92.

50. *See id.* at 23.

51. *See id.* at 78.

tional specialization, and forward integration of activities."[52] The latest technology—mobile and cellular phones, encrypted faxes, satellites, and beepers—protects what communication there is within the cells from infiltration by authorities. Communication ensures the smooth functioning of distribution networks[53] that are periodically adapted to evade beefed-up enforcement at border points.[54] Cocaine is the bread and butter of the cartels, with annual production that accounts for three-fourths of the world supply.[55] Lately, they have also branched out into marijuana and opium.[56]

4. Chinese Triads

The existence of the Triads can be traced back to their seventeenth century opposition to the Manchu dynasty.[57] Taiwan, Hong Kong, and the United States serve as their headquarters today for worldwide trafficking in a variety of illicit goods, especially heroin.[58] Growth industries for Chinese criminal groups are alien smuggling (estimated $3.2 billion per year), arms trafficking ($3 billion), trafficking in stolen cars, boats and electronics ($4 billion), and drug production and trade ($200 billion).[59] Other activities of the Triads include illegal gambling, extortion, prostitution, loan-sharking, infiltrating legitimate businesses, and real estate.[60] Like the Soviet Red Army, members of China's People's Liberation Army are willing to sell off the store to organized criminals: Kalashnikov machine guns (i.e., AK-47s), grenades, and rocket launchers.[61] They number as many as 160,000 members belonging to fifty groups.[62]

52. *Problems and Dangers*, *supra* note 3, at 12.

53. *See* KERRY, *supra* note 4, at 78.

54. Improved interdiction at the U.S.-Mexico border has prompted the Colombians to divert approximately 40% of the cocaine traffic to the U.S. through Caribbean routes—particularly Puerto Rico because of its relative freedom from customs checks as a U.S. territory. The traffickers have also used innovative methods and technology—high speed boats and Global Positioning System devices—to avoid stepped-up law enforcement. *See* Douglas Farah & Serge Kovaleski, *Cartels Make Puerto Rico a Major Gateway to the U.S.*, WASH. POST, Feb. 16, 1998, at A1. The Colombians hone in on countries where economies and politics are in a shambles so government officials are easily co-opted as allies. Haiti due to its instability, and several Caribbean islands that have been losing out in the banana trade are examples of such weak economies that have been victimized by traffickers. *See* Serge Kovaleski, *Cartels 'Buying' Haiti; Corruption is Widespread; Drug-Related Corruption Epidemic*, WASH. POST, Feb. 16, 1998, at A22; Serge Kovaleski & Douglas Farah, *Organized Crime Exercises Clout In Island Nations*, WASH. POST, Feb. 17, 1998, at A1. *See also* Laura Brooks & Douglas Farah, *New Breed of Trafficker Replacing Drug Cartels; Small Groups, Shipments Are Trademarks*, WASH. POST, Feb. 22, 1998, at A26 (describing the Colombians' trade as "robust as ever," even after arrests or deaths of many major drug lords, due to the ability of the cartels to advance mid-level managers to fill the void and change tactics, using smaller shipments, to avoid detection).

55. *See* KERRY, *supra* note 4, at 79.

56. *See id.* at 79.

57. *See* JOHN M. MARTIN & ANNE T. ROMANO, MULTINATIONAL CRIME: TERRORISM, ESPIONAGE, DRUG & ARMS TRAFFICKING 65 (1992); *see also* KERRY, *supra* note 4, at 57.

58. *See* MARTIN & ROMANO, *supra* note 57, at 65.

59. *See* KERRY, *supra* note 4, at 53.

60. *See id.* at 57. *See also* Volobuev, *supra* note 11, at 89; *Problems and Dangers*, *supra* note 3, at 17.

61. *See* KERRY, *supra* note 4, at 61.

62. *See Problems and Dangers*, *supra* note 3, at 16.

5. Japanese Yakuza

Favorite projects of the Japanese Yakuza include casinos, brothels, loan-sharking, blackmail, arms trading, and real estate.[63] The Yakuza has perfected its own style of corporate extortion called *sokiya*, whereby it purchases stock in a company so that it can send armed thugs to disrupt stockholder meetings until they are paid off.[64] In addition to Japan, the Yakuza has known operations in Costa Rica, São Paulo, Honolulu, Los Angeles, San Jose, San Francisco,[65] and other spots in the Pacific region. Methamphetamine is one of the Yakuza's chief exports from Asia and guns are one of its chief imports.[66] The Yakuza has also been a key force in developing the Southeast Asian "sex slave" business.[67] The Yakuza (also known as *Boryokudan*, or "the violent ones") includes approximately 3,000 groups and 85,000 members.[68]

6. Other Groups

The larger players have also recruited significant numbers of support staff in other parts of the world, including the Jamaican posses,[69] Nigerian traffickers,[70] Pakistani drug traders, Afghani poppy farmers, and Mexican launderers and distributors.[71] Finding new recruits becomes necessary every time law enforcement increases its focus on a particular link in the network.[72]

B. The Main Activities of International Organized Crime and Analogies to Acts of Aggression

International organized criminal activity poses a threat to world security, and in that sense, is analogous to acts of aggression that are traditionally dealt with by international organizations, such as the United Nations. International organized crime is an assault on the three pillars of state sovereignty: the control of borders,[73] the monopoly on the use of violence for enforcement,[74] and the power to tax economic activities within state borders.[75] International criminal organizations pose as an alternative to legitimate state power, thereby undermin-

63. *See* KERRY, *supra* note 4, at 22. *See also* Volobuev, *supra* note 11, at 89.
64. *See* Volobuev, *supra* note 11, at 89.
65. *See* KERRY, *supra* note 4, at 22.
66. *See Problems and Dangers*, *supra* note 3, at 18.
67. *See id.*
68. *See* KERRY, *supra* note 4, at 64.
69. *See* MARTIN & ROMANO, *supra* note 57, at 65.
70. The Nigerian groups arose after the collapse of oil prices in the 1980s and have become expert couriers for other international criminal organizations. They have benefited from the weakness and corruption of the government in their home state and have expanded into other areas such as fraud and extortion. *See Problems and Dangers*, *supra* note 3, at 19-20.
71. *See* KERRY, *supra* note 4, at 94-103.
72. *See* Kovaleski & Farah, *supra* note 54, at A1.
73. *See Problems and Dangers*, *supra* note 3, at 32.
74. *See* Alex Schmid, *Transnational Organized Crime and Its Threat to Democracy and the Economy*, *in* Fijnaut et al., *supra* note 11, at II.85-86.
75. *See id.*

ing stability and state control.[76] Their espousal of corruption in government threatens the development of democracy in many countries around the world.[77]

1. Nuclear Smuggling and Weapons Proliferation

Authorities are aware of over eight hundred attempts to transport nuclear material out of the former Soviet Union since its break-up.[78] Among the hopeful buyers have been representatives of North Korea and Iraq,[79] as well as members of Osama bin Laden's terrorist organization al Qaeda.[80] None of the individual amounts seized so far have been large enough to make more than a crude bomb.[81] Nonetheless, several potential scenarios are cause for alarm.[82] First of all, the known incidents of smuggling may be just the "tip of the iceberg,"[83] because the number of times smugglers have evaded the detection of law enforcement via less guarded borders[84] is unknown.[85] Second, buyers—most likely terrorists or rogue states—may be gradually collecting enough small amounts to build a nuclear bomb.[86] A third prospect is that the criminals themselves may be sitting on stashes, waiting for an opportune moment either to threaten to use the weapons themselves,[87] or to sell to a high enough bidder.[88]

76. *See Problems and Dangers*, *supra* note 3, at 34.

77. *See id.* at 35.

78. *See* KERRY, *supra* note 4, at 116. *See also Problems and Dangers*, *supra* note 3, at 23 (relating German law enforcement figures for incidents of attempted transactions involving nuclear materials: 176 cases in 1992; 241 cases in 1993).

79. *See* KERRY, *supra* note 4, at 116. *See also* Barry Kellman & David S. Gualtieri, *Barricading the Nuclear Window - A Legal Regime to Curtail Nuclear Smuggling*, 1996 U. ILL. L. REV. 667, 671 (1996) (describing the interdiction in 1994 of a transaction involving six grams of weapon-grade plutonium, a Bulgarian trade organization, and an Iraqi buyer).

80. *See* Steve Goldstein, *Leaky Borders Threaten World Security*, TORONTO STAR, Jan. 23, 1999.

81. *See* KERRY, *supra* note 4, at 116.

82. *But see Russian Gangsters and Nuclear Material*, NANDO TIMES (March 2, 1998) <www.nando.net/newsroom/ntn/world/030298/world7_590_body.html> (This article described comments of FBI director Louis Freeh during a trip to Russia in November 1997 in which he downplayed the security threat posed by Russian organized crime; Freeh's comments were countered by former state department official Robert Galucci, former Ambassador Jack Matlock, and other experts on Russian organized crime.).

83. *See* Kellman & Gualtieri, *supra* note 79, at 677.

84. The borders of the Former Soviet Union are particularly porous in Tajikistan and other former republics in the midst of civil unrest. *See id.* at 675. See also Goldstein, *supra* note 80 (relating the theory that nuclear smuggling occurs most frequently across the southern border of the former Soviet Union with Iran, Turkey, Afghanistan and China).

85. Rensselaer Lee, *Recent Trends in Nuclear Smuggling*, *in* Williams, *supra* note 25, at 118-19 ("Russian authorities are able to intercept only 30 to 40 percent of materials taken from Russia's nuclear facilities. The rest, the officers assume, are exported, stashed somewhere, or simply discarded.").

86. *See* Kellman & Gualtieri, *supra* note 79, at 677.

87. Lee, *supra* note 85, at 116 ("[I]n late 1995 a Chechen military commander Shamil Basayev arranged the burial and the subsequent discovery [by a Russian news team] of a canister of cesium-137 in Moscow's Izmailovsky Park. At the time the Chechen leader threatened to turn Moscow into an 'eternal desert' from radioactive waste."). *See also* Kellman & Gualtieri, *supra* note 79, at 677.

88. *See Problems and Dangers*, *supra* note 3, at 26 (suggesting that the "distinction between crimes of extortion and political terrorism will become increasingly blurred" as nuclear materials are traded by international criminal organizations and either sold to terrorists or used by the criminals themselves to blackmail governments).

Some authorities believe that nuclear smuggling was "one of the main topics at the Italian and Russian mafia summits during 1993 and 1994."[89]

So far, the known scenarios indicate a very quiet if not non-existent market for nuclear smugglers.[90] Some recent examples highlight the collaborative global nature of the nuclear smuggling trade. In 1998, Italian police interdicted a shipment of enriched uranium rods, which had been imported from Zaire but originated in the former Soviet Union.[91] Also in 1998, Turkish customs officers seized 5.4 kilograms of uranium 235 and 7.1 grams of plutonium powder from eight men asking $1 million for the material.[92] Three of the men were from Kazakhstan, one from Azerbaijan, and four from Turkey.[93] The potentially dangerous combination of poorly safeguarded nuclear sites[94] and an efficient and established network for smuggling[95] continues to loom.[96]

For the most part, existing nuclear treaty regimes did not anticipate or do not adequately address the role of non-state actors in nuclear proliferation.[97] Few would deny the argument that proliferation of nuclear materials—whether by state or non-state actors—constitutes an international crime and a crime against peace.[98] Yet there is a scarcity of international agreements explicitly confirming the status of nuclear smuggling as an international crime.[99] Only the Convention on the Physical Protection of Nuclear Material actually codifies nuclear smuggling as an international crime.[100]

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89. *See* KERRY, *supra* note 4, at 117.

90. "There's no smoking gun yet . . . of [smuggled] nuclear stuff. That doesn't mean it didn't happen," according to Dr. Vladimir Brovkin of the United Research Centers on Organized Crime in Eurasia at American University. *See* Lee, *supra* note 82.

91. *See id.* ("Italian police say they have hard evidence that the Sicilian Mafia is involved in smuggling of weapons-grade uranium . . . .").

92. *See* Goldstein, *supra* note 80.

93. *See id.*

94. There have been several reported thefts of nuclear materials from submarine bases in Russia. *See* Lee, *supra* note 85, at 116. *See also* Kellman & Gualtieri, *supra* note 79, at 673-75; *The International Black Market: Coping With Drugs, Thugs, and Fissile Materials*, *in* GLOBAL ORGANIZED CRIME: THE NEW EMPIRE OF EVIL 81, 88-92 (Linnea P. Raine & Frank J. Cilluffo eds., 1994) (statements by Rensselaer Lee and David Kay).

95. The network about which authorities know most follows former Soviet Army positions from Russia through Eastern Europe, then to Italy, Austria, and Switzerland, and lastly to destinations in the Middle East or South Asia. *See* Kellman & Gualtieri, *supra* note 79, at 675. There is less evidence, but it is logical to assume the organized criminals might also be using routes to the south which are more difficult to police, and therefore more appealing. *See id.* at 676-77.

96. Lee, *supra* note 85, at 112. *See generally* Wendy L. Mirsky, Comment, *The Link Between Russian Organized Crime and Nuclear Weapons Proliferation: Fighting Crime and Ensuring International Security*, 16 U. PA. J. INT'L BUS. L. 749 (1995) (discussing the potential threat of nuclear smuggling by organized criminal groups in Russia).

97. *See generally The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT'L L.J. 407 (1994) (describing inadequacies of the Nuclear Non-Proliferation Treaty).

98. Burrus M. Carnahan, *Symposium on Hot Spots in International Law: Nuclear Smuggling as an International Crime*, 28 AKRON L. REV. 417, 417 (1995).

99. *See id.* at 418-19.

100. Convention on the Physical Protection of Nuclear Material, Feb, 8, 1987, 18 I.L.M. 1419 (codified at 18 U.S.C. § 831 (1994) and 22 U.S.C. § 4831 (1994)). Only 24 states are parties. *See id.*

2. *Support of Terrorist Groups*

Terrorist groups turn to organized criminals as a source of funding for their activities. Many even join in the criminals' exploits—particularly drug trafficking—to pay for weapons and activities.[101] Conversely, organized criminals frequently employ terrorist-style methods, such as political assassinations.[102] The analogy to terrorism has prompted the suggestion that just as the world community sanctions state sponsorship of terrorism, state sponsorship of organized crime should be recognized and sanctioned.[103]

3. *Drug Trafficking*

The drug business holds great allure for organized criminals. In the United States and Europe combined, it is a $122 billion-a-year business.[104] By some accounts, worldwide, the drug trade may be larger than the trade in oil, with an estimated trade volume of $500 billion a year.[105] According to Paul Stares, "the rewards of the drug trade are larger than the gross national product of three-fourths of the 207 economies of the world."[106]

The effects of drug trafficking on states are tantamount to an attack on the government itself. Drug crime drains the economy, degrades governmental legitimacy, and causes increased levels of corruption by government officials.[107] One Colombian crime figure admitted the war-like impact on governments:

> The drug business is not just money—it is also political. The head of Cali, Gilberto Rodríguez Orejuela, thinks of it as a war in which he is producing a chemical poison against the United States and its people. Since the U.S. is the only threat to him, he will do all he can to weaken the country.[108]

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101. PAUL STARES, GLOBAL HABIT: THE DRUG PROBLEM IN A BORDERLESS WORLD 6 (1996) ("Separatist groups and terrorist organizations in such diverse places as Peru, Colombia, Afghanistan, Pakistan, Lebanon, Northern Ireland, Somalia, and Turkey are now believed to purchase weaponry and supplies with money derived from the drug trade."). Other examples of corrupt collaboration between terrorists and organized criminals have included the now largely defunct Shining Path in Peru, which trafficked in coca leaves in order to pay for explosives used in its terrorist campaign; Sri Lanka's Tamil Tigers, who have used kidnapping ransom money to fund their campaigns; and the Montana Freemen, "who fill their coffers with the proceeds from counterfeit financial instruments and forged checks." *See* KERRY, *supra* note 4, at 112. *See also Problems and Dangers*, *supra* note 3, at 25. Perhaps the most recent example is the Kosovo Liberation Army, which has played a major role in the heroin trade in Europe as a means of financing its separatist campaign. *See* Frank Viviano, *KLA Linked to Enormous Heroin Trade*, S.F. CHRON., May 5, 1999, at A1; Duncan Campbell et al., *Drug Smugglers' European Union; Case Uncovers New Heroin Links*, THE GUARDIAN, Dec. 12, 1998, at 12.

102. *See Problems and Dangers*, *supra* note 3, at 24-5 (suggesting a "convergence" of criminal and terrorist organizations). *See also* KERRY, *supra* note 4, at 25.

103. *See* KERRY, *supra* note 4, at 174.

104. *See* STARES, *supra* note 101, at 1.

105. *See Problems and Dangers*, *supra* note 3, at 9 (citing Louis Kraar, *The Drug Trade,* FORTUNE, June 20, 1988, at 27-38).

106. *See* Stares, *supra* note 101, at 2. In Colombia alone, profits from the drug trade are estimated at $5 billion a year, while the country's most profitable legal trade, oil, has profits of about $1.5 billion per year. *See* KERRY, *supra* note 4, at 30.

107. *See* STARES, *supra* note 101, at 96-7. In the most extreme cases, the state and the criminal organizations become collaborators. *See id.* at 98.

108. *See* KERRY, *supra* note 4, at 27.

The war has many casualties for the state: lost productivity; strains on state budgets for health care and law enforcement; and actual victims of the violence entailed in both self-protection by the criminals and irrational actions of their addicted customers.[109] There is precedent for an official U.S. war-like response to war-like activities of non-state actors.[110] It is not so far-fetched to view drug traffickers as the Barbary Pirates[111] of the modern age.

The rise and success of the drug trade has been parlayed into other lucrative trafficking enterprises: trafficking in people, whether illegal migrants, children, or sexual slaves; arms; body parts; and nuclear materials.[112] The drug business has also inspired many of the cooperative arrangements between different criminal organizations. For example, drug traffickers in Russia formed logical partnerships along geographic lines, linking the Golden Crescent (the region encompassing Afghanistan, Pakistan, and Iran) via Central Asian contacts.[113]

4. Economic Crime

Organized crime defies one of the primary powers of the state: its power of taxation.[114] "Protection money" demanded by criminal organizations takes the place of taxes[115] and increases the degree to which the shadow state of the criminal enterprise is accorded more respect than the true state. Money laundering allows organized criminals to invest the proceeds of their illicit activities into legitimate business, spreading their taint. Drug traffickers alone launder an estimated $250 billion a year.[116] In this area, the internationalization and increasing electronic accessibility of financial markets have made them susceptible to exploitation by criminal elements: "money is 'the most fungible of all commodities. It can be transmitted instantaneously . . . it can change its identity easily and can be traced only with great effort.'"[117] Criminal participation in the market undermines efforts of states and international financial institutions

109. *See Problems and Dangers*, *supra* note 3, at 33.

110. *See* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 361 (1996).

111. *Id.* at 407 ("[T]he crime of piracy, or robbery and depredation upon the high seas, is an offense against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defense, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do for any invasion of his person or personal property.").

112. *Problems and Dangers*, *supra* note 3, at 21-24, 26-29. Also mentioned are trafficking in stolen cars and auto parts, in animals and animal parts, in cultural objects and art. *See id.* at 38 (describing the ease with which a "trafficking network" in place for one type of illicit trade can be used for other kinds of traffic).

113. *See* Williams, *supra* note 25, at 18.

114. *See* Schmid, *supra* note 74, at II.86. The other main characteristic is the state's monopoly on violence. *See id.*

115. *See id.* at II.86-87.

116. *See* KERRY, *supra* note 4, at 179.

117. *Problems and Dangers*, *supra* note 3, at 8 (quoting L. Krause, *Private International Finance*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS 175 (Robert Keohane and Joseph Nye eds., 1993)).

like the International Monetary Fund (IMF) to regulate and support healthy economies.[118]

5. Domestic Activities

Even activities that fall into the traditional categories of domestic law and order problems—such as murder, theft, extortion and bribery—have international implications. By assembling their own armed enforcement bodies, international organized crime usurps another of the attributes of sovereignty: the state's monopoly on violence.[119] The Russian Mafiya, for example, frequently hires assassins and uses bombs, without regard for injury to bystanders or mistaken targets.[120] The acts of organized criminals and the corrupt officials on their payroll could be viewed as human rights violations,[121] punishable on a universal level.

C. Evidence of Cooperation Among the Main Groups[122]

Leaders of the largest international criminal organizations have formalized their collaborative relationships so that they rival strategic arrangements of legitimate heads of state or multinational corporations.[123] They form alliances and hold summits of their own. As far back as the end of World War II, the vory v zakone convened an "All-Thieves' Conference" in Lvov that included criminal colleagues from within and outside the Soviet Union.[124] In 1990, a summit convened in East Berlin (timed to coordinate with the EC summit in Dublin) which included international mafia groups, as well as Russian Mafiya leaders

118. *See id.* at 36 ("[T]hey can encourage inflationary pressures, a distorted sectoral development, and spending on luxury products by a few when the greatest need is for a wider distribution of resources within the society.").

119. *See* Schmid, *supra* note 74, at II.86.

120. *See* Scott P. Boylan, Essay, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2014 (1996).

121. *See Briefing on Crime and Corruption in Russia,* CSCE 8 (June 10, 1994) (testimony of Louise Shelley).

122. "But crime today is not simply random or local; more often it is purposeful and global. The vast poppy fields in eastern Turkey are linked to the heroin dealer in downtown Detroit; the banker laundering drug money in Vienna is in league with the thriving cocaine refineries in Colombia. The men of the Chinese triads who control gambling and extortion in San Francisco's Chinatown work the same network as the Singapore gang that turns out millions of fake credit cards. The contract hit man who flies in from Moscow to kil! an uncooperative store owner in New York, on behalf of the Organizatsiya, gets his fake papers by supplying the Sicilian Mafia with Soviet Army surplus ground-to-air missiles to smuggle into the Balkans to supply the Bosnian Serbs with the firepower to take on U.N. security forces." KERRY, *supra* note 4, at 24.

123. *See* Phil Williams, *Transnational Criminal Organizations: Strategic Alliances*, *in* ORDER AND DISORDER AFTER THE COLD WAR 235-50 (Brad Roberts ed., 1995), *cited in Review of Priority Themes: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Report of the Secretary-General*, U.N. SCOR, Comm'n on Crime Prevention and Criminal Justice, 5th Sess., Provisional Agenda Item 3, at 10, U.N. Doc. E/CN.15/1996/2 (1996) [hereinafter E/CN.15/1996/2].

124. *See* STERLING, *supra* note 2, at 51.

operating abroad and in the Soviet Union.[125] Cooperative agreements were solidified further following the dissolution of the Soviet Union:

> By the end of 1992, the Sicilian Mafia had in fact reached a secret agreement with the Russian [Mafiya] in Prague, confirmed by a high authority in Russia's Academy of Science. The pact was designed 'to protect their new illicit trade throughout Central Europe, establish a global network for the drug trade and marketing of nuclear components, and create a lethal squad of killers' made of ex-KGB agents, [a representative of the Italian Interior Ministry] said.[126]

Just as the Group of Eight industrial nations combines frequently to discuss international cooperation, the group of five main criminal organizations gathers on a regular basis to discuss global operations. French intelligence reports revealed that a 1994 gathering in Burgundy of Russian, Chinese, Japanese, Italian, and Colombian "businessmen" was really a summit of "representatives of the world's leading organized crime syndicates" in an effort "to discuss carving up western Europe for drugs, prostitution, smuggling and extortion rackets."[127] At least two similar summits took place after 1994 on chartered yachts in the Mediterranean.[128] Specifics reportedly discussed at the summits include dividing drug routes, setting drug flows to avoid flooding markets, and sharing high-tech equipment and specialists.[129]

Aside from the summits, several other alliances have been discovered in recent years. Cooperation between the Russians and Sicilians in the heroin trade began in 1985.[130] Interpol Poland reported in 1992 that Russians had agreements with German and Dutch cocaine traffickers and the Cali cartel.[131] Russian organized crime also works with Asian organized crime in heroin smuggling operations.[132] Reality appears to be approaching Italian Judge Giovanni Falcone's nightmare of a "pax mafiosi."[133]

The Russians are not the only group to reach out to the international brotherhood of criminals. The Yakuza has cooperated with the Sicilian Mafia in at least one project in Australia, infiltrating the construction company building the Sydney Harbor Tunnel.[134] In conjunction with the Chinese Triads, the Yakuza has established one of the world's largest operations for methamphetamine production, on the island of Taiwan.[135] The Triads have arrangements with the

125. *See id.*
126. *Id.* at 88.
127. Andrew Alderson & Carey Scott, *Crime Kings Meet to Carve Up Europe*, SUN. TIMES, Mar. 29, 1998.
128. *See id.*
129. *See id.*
130. *See* STERLING, *supra* note 2, at 117.
131. *See id.* at 107.
132. *See 1996 Hearing*, *supra* note 18, at 3 (opening statement of Senator Roth).
133. *See* STERLING, *supra* note 2, at 23. *See also* CSIS REPORT, *supra* note 26, at 44 (documenting links between Russian organized crime and La Cosa Nostra, Colombian drug cartels, the Sicilian Mafia, the 'Ndrangheta, the Camorra, the Boryokudan [or Yakuza], Chinese Triads, Korean criminal groups, Turkish drug traffickers, and other South American drug organizations in addition to the Colombian cartels).
134. *See* STERLING, *supra* note 2, at 129.
135. Methamphetamine is the "drug of choice for Japanese addicts, whose population is estimated at between 400,000 and 600,000." KERRY, *supra* note 4, at 65.

Colombians whereby cocaine is exchanged for heroin so that both drugs can reach East and West markets.[136] When Italian and U.S. law enforcement cooperated in "Operation Green Ice" they not only succeeded in making 200 arrests in various countries, they exposed a cooperative arrangement whereby the Sicilians traded a share of the heroin market in New York for a share of the cocaine market in Europe.[137] The Chinese criminals also cooperate with both the Russian Mafiya and the Japanese Yakuza to expand distribution networks and launder the proceeds of their trade.[138] The Triads cooperate with Medellin cartel members in money laundering operations in Europe,[139] and reach agreements with the Sicilians on how to divide up the drug trade in Europe.

The Cali cartel has also forged alliances with the Sicilian Mafia to coordinate global activities.[140] The heroin trade in Europe has become a cooperative venture involving Turkish, Bulgarian, Kosovar, and Czech criminal groups.[141] The purpose of these agreements, particularly with regard to drug trafficking, resembles the purpose of legitimate international trade arrangements: maximization of overall wealth. The parties cooperate in the global business, "to exploit comparative advantages and opportunities in different functional and geographic areas, to share and minimize risks, and generally to expand into new markets."[142]

All of the main groups have active wings within the United States, which therefore serves as a focal point for their international coordination.[143] A 1989 report of the Attorney General recognized the involvement and collaboration of various organized crime groups on U.S. soil, including Colombian, Asian, Mexican, Jamaican, and Sicilian groups.[144] The Yakuza is known to have cooperated with the Sicilian Mafia and the Colombian cartels in activities within the United States.[145] One colorful example of the U.S. serving as the meeting ground for international criminals involved the attempt by a Miami strip club owner to broker the sale of a $35 million Soviet Navy submarine by Russian organized criminals to representatives of a Colombian cocaine cartel for use in transporting large shipments of drugs to the West coast of the United States.[146]

Cooperation among the international criminal organizations has also advanced to multilateral rather than simply bilateral arrangements. Alien smuggling by Chinese Triads is channeled through organized crime capitals in Russia,

136. *See id.* at 64.
137. *See Problems and Dangers*, *supra* note 3, at 31.
138. *See* KERRY, *supra* note 4, at 64.
139. *See* STERLING, *supra* note 2, at 131.
140. *See* KERRY, *supra* note 4, at 24.
141. *See* Campbell, *supra* note 101, at 12.
142. STARES, *supra* note 101, at 4.
143. *See* MARTIN & ROMANO, *supra* note 57, at 65.
144. *See id.* at 83.
145. *See* KERRY, *supra* note 4, at 65.
146. *See* Mark Fineman, *Case Links Russian Sub, Colombian Drugs*, L.A. TIMES, June 21, 1998, at A1; James Kim, *Experts: USA Being Infiltrated; Increasingly Sophisticated Criminals Believed at Work*, USA TODAY, Aug. 24, 1999, at 3B.

Eastern Europe, and Italy,[147] with the support and participation of the criminal organizations in each country along the way.[148] In the former Soviet Union, where legitimate businesses find the vast region nearly impossible to penetrate through regular distribution channels, the "Mafiya delivery system" succeeds in connecting a variety of illicit businesses in Asia and Europe and is used by the main criminal agents of both the Chinese Triads and the Sicilian mafia.[149]

The nationalities of persons apprehended in nuclear smuggling operations also indicates the degree of international collaboration among the criminals. In 1994, in one of the largest seizures of weapons-grade nuclear material, German authorities arrested one Colombian and two Spaniards possessing 350 grams of enriched plutonium.[150] "The presence of individuals of different nationalities adds an alarming element to the issue, leading the authorities to speculate on the involvement of organized crime groups from various countries and the possibility of links and cooperation arrangements between them."[151]

III.
INADEQUACIES OF THE VARIOUS EXISTING LEGAL MECHANISMS THAT RELATE TO ORGANIZED CRIMINAL ACTIVITY

A. International Agreements and Conventions

1. The U.N. Drug Convention

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[152] (hereinafter U.N. Drug Convention) includes extensive provisions on mutual legal assistance, even between countries that do not otherwise have bilateral or multilateral agreements.[153] Although the U.N. Drug Convention ostensibly deals with only one type of transnational organized crime, it recognizes the link between the drug trade and other organized criminal activity.[154] Article 3 provides for criminalization of a broad range of activities related to the drug trade, including not only production, transport, and sale, but also organizing, managing or participating in schemes to traffic in drugs. Article 6 provides that the U.N. Drug Convention serves as an extradition treaty for countries which are parties but do not have separate extradition agreements in place. The U.N. Drug Convention also provides for gradual improvement in

147. *See* STERLING, *supra* note 2, at 130-31.

148. *See* KERRY, *supra* note 4, at 140.

149. *See id.* at 47.

150. *See Problems and Dangers*, *supra* note 3, at 24.

151. *Id.*

152. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 I.L.M. 493 (opened for signature Dec. 20, 1988).

153. *See* Kellman & Gualtieri, *supra* note 79, at 716.

154. *See* Preamble, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, E/CONF.82/15, 28 I.L.M. 497 (opened for signature Dec. 20, 1988).

international cooperation in the investigation and prosecution of drug trafficking and money laundering.[155] There are over 150 parties to the Convention.[156]

The U.N. Drug Convention offers both a model and a warning for drafters of the proposed convention against transnational organized crime. Laudable for its breadth, the Convention also provides a warning about the consequences of the failure to give teeth to this international agreement. Many signatories to the Drug Convention, including the United States, have failed to implement its measures to the full extent of its broad theoretical scope.[157]

2. *Conventions on Money Laundering*

The U.N. Drug Convention requires that all signatories criminalize money laundering, institute banking safeguards, and provide mutual legal assistance.[158] Together, the U.N. Drug Convention's money laundering provisions and the Council of Europe Laundering Convention have succeeded in "facilitat[ing] the emergence of an international anti-money laundering regime . . . [and] focus[ing] the attention of world leaders on the extent of the laundering problem."[159]

The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[160] (hereinafter Laundering Convention) provides for domestic criminalization of money laundering,[161] cooperation in investigation and prosecution,[162] and confiscation of the proceeds of crime.[163] As of September 9, 1999, twenty-seven countries had ratified the Convention, and eleven others had signed but not yet ratified it.[164] While the Laundering Convention allows signatories to criminalize laundering of proceeds from illicit activities other than drug-related crimes,[165] most parties have not

155. *See Appropriate Modalities and Guidelines for the Prevention and Control of Organized Transnational Crime at the Regional and International Levels, in* Williams & Savona, *supra* note 3, at 116 [hereinafter *Appropriate Modalities*].

156. *See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (visited Sept. 9, 1999) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/vi_boo/vi_19.html> [hereinafter List of Parties].

157. *See generally* Jimmy Gurule, *The 1988 U. N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances – A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT'L L.J. 74 (1998).

158. *See* STERLING, *supra* note 2, at 238.

159. Bruce Zagaris, *The Emergence of an International Anti-Money Laundering Regime: Implications for Counseling Businesses*, in THE ALLEGED TRANSNATIONAL CRIMINAL: THE SECOND BIENNIAL INTERNATIONAL CRIMINAL LAW SEMINAR 183 (Richard D. Atkins ed., 1995) [hereinafter Zagaris I].

160. The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1991, Europ. T.S. No. 141, 30 I.L.M. 148.

161. *Id.* at 151-52 (including national legislation on confiscation of proceeds, investigative measures, and criminalizing not just laundering, but knowing receipt of proceeds).

162. *Id.* at 153-61 (creating an obligation to assist in tracing proceeds, to enforce confiscation orders from other states, not to invoke bank secrecy as a ground for refusal to cooperate, to recognize foreign decisions, and designate a central authority to handle requests).

163. *See also* Kellman & Gualtieri, *supra* note 79, at 736.

164. *See Council of Europe: Signatures and Ratifications ETS No. 141* (last modified Sept. 9, 1999) <http://www.coe.fr/tablconv/141t.htm>.

165. *See* Zagaris I, *supra* note 159, at 145.

gone this far in their criminalization of money laundering. The Council of Europe's Laundering Convention is open to signatories outside of Europe, and the U.S. government has considered joining.[166] One non-member state—Australia—has already ratified the Convention.[167]

The Basel Declaration of Principles (1988) applies to central banks in twelve countries, requiring greater disclosure of large or otherwise suspect transactions and assistance in investigations.[168] The Principles include "know your customer" practices and full cooperation with law enforcement.[169] The Basle Committee's work also spurred the formation of regional supervisory groups in the Caribbean, Latin America, Asia, the Middle East, and Africa.[170]

The Financial Action Task Force (hereinafter FATF), formed by the G-7 in 1989 to discuss improved methods to combat money laundering,[171] has formulated the "Forty Recommendations"[172] on money laundering that have attained the status of soft law internationally.[173] The FATF includes twenty-six member countries and the IMF as an observer.[174] Among the forty recommendations are the following: ratification of the U.N. Drug Convention and other multilateral agreements on extradition and mutual legal assistance;[175] criminalization of money laundering;[176] enacting legislation allowing confiscation;[177] regulation regarding customer identification, record-keeping and diligence of financial institutions;[178] and measures to assist countries without adequate anti-money laundering regimes.[179] The FATF Recommendations also call on governments to strengthen international cooperation through exchange of information, legislative harmonization, and bilateral and multilateral agreements, such as the Council of Europe Laundering Convention.[180]

In 1994, the "International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach" convened at Courmayeur, Italy, under the auspices of the U.N.'s Crime Prevention and Criminal Justice Branch.[181] Representatives from forty-five countries

166. *See id.* at 146.
167. *See Council of Europe: Signatures and Ratifications ETS No. 141*, *supra* note 164.
168. *See* STERLING, *supra* note 2, at 238.
169. *See* Zagaris I, *supra* note 159, at 143.
170. *See id.* at 143.
171. *See* STERLING, *supra* note 2, at 238.
172. The Forty Recommendations of the Financial Action Task Force on Money Laundering, 1996, 35 I.L.M. 1291 [hereinafter Recommendations].
173. The FATF Recommendations have been called "the single most comprehensive, significant and forceful international declaration on money laundering to date." Kellman & Gualtieri, *supra* note 79, at 736 (quoting Deputy Treasury Secretary John E. Robson).
174. *See* Recommendations, *supra* note 172, at 1291.
175. *See id.* at 1293 (Recommendations 1-3).
176. *See id.* at 1293-94 (Recommendations 4-6).
177. *See id.* at 1294 (Recommendation 7).
178. *See id.* at 1296-97 (Recommendations 10-19).
179. *See id.* at 1297-98 (Recommendations 20-21).
180. *See id.* at 1298-1320 (Recommendations 22-40).
181. *See Special Double Issue on the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach*, CRIME PREVENTION AND CRIM. JUST. NEWSL. (Jan. 1996) <http://www.ifs.univie.ac.at/~uncjin/newsl24.htm>.

attended. Participants advocated establishing an international anti-money-laundering regime through the adoption by all states of the provisions of the U.N. Drug Convention, the Basel Declaration, and the FATF's Forty Recommendations.[182] In particular, the Conference stressed measures by all nations to limit bank secrecy; enact "know your customer" rules; identify and report suspicious transactions; improve regulations of all businesses (not just banks) engaged in financial operations; enact asset forfeiture measures; and establish effective international cooperation mechanisms.[183]

3. Anti-Corruption Agreements

Although official corruption represents a threat worthy of separate attention and concern from the problem of transnational organized crime, corrupt government officials and international criminals often enjoy symbiotic relationships. Thus, recent efforts to reach international agreement on the criminality of official corruption and the need for cooperation in countering it, are significant and promising signs in the fight against transnational crime. On December 17, 1997, the member nations of the Organization of Economic Cooperation and Development (hereinafter OECD), alongside five other non-OECD nations, signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter OECD Anti-Bribery Convention).[184] Article 1 of the Convention requires all signatories to criminalize the acts of offering, promising or giving a bribe to a public official, as well as attempting, conspiring or aiding in those acts.[185] In addition, signatories must make both legal and natural persons punishable for bribery of officials.[186] The Convention also contains provisions on mutual legal assistance (Article 9) and extradition (Article 10).[187] The working group that prepared the Anti-Bribery Convention is likely to continue to follow up on implementation of the Convention by "developing a system of mutual evaluation," similar to that of the FATF.[188] In addition to the OECD's Anti-Bribery Convention, the member nations of the OAS have agreed to the Inter-American Convention Against Corruption.[189]

4. Interpol

Established after World War I, the International Police Organization (Interpol) acts as a coordinating body among disparate domestic law enforcement entities, a storehouse for information on criminal activity, and a source for im-

182. *See id.*
183. *See id.*
184. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention]. *See also* Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 54-67 (1999).
185. *See* OECD Anti-Bribery Convention, *supra* note 184.
186. *See id.*
187. *See id.*
188. *See* Zagaris & Ohri, *supra* note 184, at 74.
189. *See* Section B, entitled *Other Regional Arrangements*, *infra*.

proving relationships and law enforcement techniques among domestic police forces.[190] Interpol has significantly advanced the concept of international law enforcement in three ways: first, by linking national and local police agencies from all over the world through a quick and reliable network; second, by providing an international professional association for personnel that allows them to share new law enforcement methods; and third, by increasing the degree of harmonization in tactics and concerns of law enforcement all over the world.[191] Almost every member of the U.N. is also a member of Interpol, including most former Soviet and East Bloc nations.[192] A majority (sixty percent) of Interpol's activity focuses on drug trade, but it also has task forces concentrating on international terrorism and nuclear smuggling.[193] Interpol's technical assistance programs had a particularly noticeable impact in the Caribbean and Latin America, where Interpol working groups developed model legislation on money laundering.[194]

Interpol's authority and jurisdiction, however, are limited. "Interpol does not have the power to investigate or arrest suspects."[195] Individual countries participate on a voluntary basis through separate bilateral agreements between national police forces and Interpol, rather than pursuant to an overall treaty.[196] If Interpol were given greater power—even the modest ability to share information without first obtaining express and time-consuming permission from individual states—it could serve as a valuable resource in battling transnational crime.[197]

B. Multilateral & Regional Arrangements

1. The European Union[198]

Unlike most regions of the world where cooperation typically proceeds on a bilateral basis, Europe, since 1950, adopted a largely multilateral approach.[199] The Europeans have been discussing for years the creation of a unified police and criminal prosecutorial system. The result so far is a hodgepodge of treaties

190. *See* Kellman & Gualtieri, *supra* note 79, at 720.

191. *See* NADELMANN, COPS ACROSS BORDERS 184-85 (1993).

192. *See* Kellman & Gualtieri, *supra* note 79, at 722.

193. *See id.* at 721-23.

194. *See* Zagaris I, *supra* note 159, at 136.

195. Peter J. Vassalo, Note, *The New Ivan the Terrible: Problems in International Criminal Enforcement and the Specter of the Russian Mafia*, 28 CASE W. RES. J. INT'L L. 173, 186 (1996).

196. *See* M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, *in* PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW: DOCUMENTATION OF AN INTERNATIONAL WORKSHOP IN FREIBURG, MAY 1991, 812 (Albin Eser & Otto Lagodny eds., 1992).

197. *See* STERLING, *supra* note 2, at 252-54.

198. *See generally* Francis R. Monaco, Comment, *Europol: The Culmination of the European Union's International Police Cooperation Efforts*, 19 FORDHAM INT'L L. J. 247 (1995) (describing the proposed Europol Convention as well as various other European initiatives on cooperation in combating organized criminal activity).

199. *See* Peter Wilkitzki, *Development of an Effective International Crime and Justice Programme: A European View*, *in* Eser & Lagodny, *supra* note 196, at 280.

and agreements.[200] Different groupings of members of the EU belong to each of these arrangements, and often have made reservations that affect their obligations.[201] The Council of Europe succeeded in producing several important agreements in the area of cooperation in criminal prosecution, including conventions on Extradition (1957), Mutual Assistance in Criminal Matters (1959), the International Validity of Criminal Judgments (1970), and the Transfer of Criminal Proceedings (1972).[202] But reservations and other problems encumber each of these conventions.[203]

As a supplement to the Council of Europe's Money Laundering Convention, the European Community agreed on a Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering,[204] that also requires domestic criminalization of money laundering and greater disclosure of financial transactions.[205] A significant portion of the Directive relates to international cooperation at all stages, from investigation to trial to forfeiture of proceeds.[206]

In discussions leading up to the Maastricht Treaty on European Political Union, the members agreed in principle to the establishment of a Central European Investigation Bureau—the EC's own Europol.[207] The Europol Convention was adopted by Council Act of July 26, 1995, but did not enter into force until each member state had notified the Council that its individual national government bodies had adopted the convention.[208] Europol did not officially begin operating until October 1998.[209] Europol assumes the role its predecessor, the Europol Drugs Unit (hereinafter EDU), which since 1993 has carried coordinated law enforcement efforts in the area of drug trafficking.[210] In addition to its anti-drug efforts, Europol is charged with combating trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings,

200. *See* Christine Van Den Wyngaert & Guy Stessens, *Mutual Legal Assistance in Criminal Matters in the European Union, in* Fijnaut et al., *supra* note 11, at II.137-38.

201. *See id.* at II.138.

202. *See id.* at II.139.

203. *See id.* at II.137-38. For example, the Convention on Mutual Assistance in Criminal Matters does not set out exact procedures for making and fulfilling requests for assistance and all members have made reservations limiting the conditions under which they are required to render assistance. *See id.* Even the Convention on Extradition, "probably one of the most successful conventions of the Council of Europe" is limited in that it only applies for offenses which are serious, and only six member states (Germany, Italy, the Netherlands, Denmark, Spain and Portugal) consider fiscal offenses to be serious enough to merit extradition. *See id.* at II.157. Exceptions and grounds for refusal in the Convention on Extradition include political offences, military offences, offences punishable by death, and extradition by a state of its own nationals. *See id.* at II.158-59. The Convention on the Transfer of Criminal Proceedings is a "dismal failure: only three member-states of the European Union have ratified the convention (Denmark, the Netherlands and Spain)." *See id.* at II.161.

204. Council Directive 91/308/EEC, 1991 O.J. (L 166) 77. *See also Zagaris* I, *supra* note 159, at 146.

205. *See* Van Den Wyngaert & Stessens, *supra* note 200, at II.172-73.

206. *See id.*

207. *See* Fijnaut et al., *supra* note 11, at II.186.

208. *See Convention Based on Article K.3 of the Treaty on European Union on the Establishment of a European Police Office (Europol Convention)* (visited Sept. 13, 1999) <http://europa.eu.int/eur-lex/en/lif/dat/1995/en_495A1127_01.html> [hereinafter *Europol Convention*].

209. *See* Charles Bremner, *EU Police Force Finally Ready to Fight Crime*, TIMES, Oct. 2, 1998.

210. *See* Monaco, *supra* note 178, at 249. *See also* STARES, *supra* note 101, at 119.

and motor vehicle crimes. Moreover, within two years of the entry into force of the Europol Convention, Europol is to take on the added objective of dealing with crimes committed in the course of terrorist activities.[211] Europol's main tasks are facilitating information exchange among member countries, aiding investigations by national law enforcement agencies, and maintaining a computerized database of collected information.[212]

Despite the lengthy history in Europe of attempting to pool resources for combating crime, individual governments still hesitate to give a single body independent law enforcement powers. Europol and the EDU were both preceded by the Trevi Group, consisting of members of the European Union, which coordinated national efforts to combat various international criminal activities.[213] Trevi ministers were consulted in establishing the EDU,[214] and the K.4[215] Coordinating Committee in 1993[216] officially took up the Trevi Group's Mandate. Both the EDU and Europol have failed to significantly improve upon the level of coordination established during the Trevi era, and will work primarily as channels for information exchange among national law enforcement bodies, not as independent enforcement organizations.[217] Individual nations determine their participation in Europol on a voluntary basis, as in Interpol. Thus Europol is doomed to fall short of the hopes of some EU members for stronger regional law enforcement,[218] and enforcement will still be in the hands of domestic police forces.

Notwithstanding the proliferation of European agreements on money laundering, investigative cooperation, and other law enforcement issues, collaboration in combating organized crime continues to elude the European states. As greater unification advances, this may change. For example, Article K of the Treaty of Maastricht includes several general aspirational provisions for cooperation in criminal and police matters that could be adopted into practice.[219] Nevertheless, the regulation of crime is largely left to domestic legislation, and many members of the EU have exhibited reluctance to draft legislation implementing

211. *See Europol Convention*, *supra* note 208.

212. *See id.*

213. *See* STARES, *supra* note 101, at 119. *See also* Jacqueline Klosek, *The Development of International Police Cooperation Within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L. L. REV. 599, 612-15 (1999) (discussing the history of Trevi).

214. *See* Fijnaut et al., *supra* note 11, at II.188.

215. Referring to Article K of the Treaty on European Union, Mar. 1992, 31 I.L.M. 247.

216. *See* Stares, *supra* note 101, at 119.

217. *See* Fijnaut et al., *supra* note 11, at II.189.

218. Germany, in particular, which recommended the idea of Europol in 1990, argues for the body to have executive powers and independent existence outside of the "intergovernmental framework of the EU." Fijnaut et al., *supra* note 11, at II.186-91. Measures to combat EC fraud have been taken along the lines of more centralized command and control. *See* Nicholas Martyn, *The Fight Against EC Fraud*, *in* Fijnaut et al., *supra* note 11, at II.208. The rapporteur on Europol for the Committee on Civil Liberties and Internal Affairs of the European Parliament has excused the failure to fortify Europol with independence as a result of the lack of "'the political, legal and procedural structures we need for an operational European federal police force.'" *See* Klosek, *supra* note 213, at 630.

219. *See* Van Den Wyngaert & Stessens, *supra* note 200, at II.142.

these aspirational agreements.[220] Existing European treaties allow parties to use their own laws to interpret treaty provisions—such as the meaning of the political offense exception[221] for extradition—potentially jeopardizing harmonization.[222]

Smaller groupings of nations within Europe have also attempted to reach stronger cooperative arrangements between their law enforcement programs. For example, the Schengen Convention regulates cross-border pursuit and information sharing by police forces of different countries.[223] This Convention is expected to increase the ability of law enforcement bodies to cooperate in criminal matters, in particular by establishing region-wide police communications.[224] The original parties to the Schengen Convention in 1985 were Luxembourg, the Netherlands, Belgium, France, and Germany.[225] Spain, Portugal, Italy and Greece joined in 1990 (Schengen II),[226] and Austria joined in 1997.[227]

While laudable for its attempts, the European approach demonstrates the weaknesses of a piecemeal approach to combating the various activities of organized crime:

> [T]he multitude of instruments may be in itself, problematic: the texts, because they are so multiple and complex as a result of the fact that they bind different states on different terms and conditions due to the possibility of reservations, are difficult to apply in practice . . . . What on the surface is a multilateral convention may, in reality, be more like a patchwork of bilateral conventions, due to the operation of reservations and declarations which work like a boomerang, as they have a reciprocal effect.[228]

To counter this dilemma, the Council of Europe has proposed a "Comprehensive Convention on Interstate Co-operation in the Penal Field," in the hopes of both clarifying the existing jumble of conventions and agreements and advancing and modernizing older provisions.[229] Talks have stalled due to disagreement on

220. *See id.* at II.143.

221. Most modern extradition treaties include a political offense exception, which allows the state of whom extradition is requested to decline on the ground that the offense for which extradition is requested is a political offense. Rarely do treaties define the term "political offense." For example, the extradition treaties between the U.S. and the six countries of the Organization of Eastern Caribbean States generally provide that extradition shall not be granted for political offenses, then describes three categories of offenses that will not be considered political offenses, but never defines affirmatively what constitutes a political offense. This practice is typical of extradition treaties, leaving it to the state-parties to interpret the political offense exception. *See* Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 44, 45 (1998); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 476 cmt. g (1987).

222. *See* Paul Gully-Hart, *Loss of Time Through Formal and Procedural Requirements in International Co-Operation*, *in* Eser & Lagodny, *supra* note 196, at 248.

223. Brice De Ruyver et al., *Structural Forms of Cross-Border Crime*, *in* Fijnaut et al., *supra* note 11, at II.25. *See also* Van Den Wyngaert & Stessens, *supra* note 200, at II.153.

224. De Ruyver et al., *supra* note 223, at II.28. *See also* Klosek, *supra* note 213, at 619-24 (discussing the Schengen Agreement and characterizing it as "the most broad-based effort thus far to establish a pan-European police communications system").

225. *See* Van Den Wyngaert & Stessens, *supra* note 200, at II.140.

226. *See id.* at II.141.

227. *See* Klosek, *supra* note 213, at 622.

228. *See* Van Den Wyngaert & Stessens, *supra* note 200, at II.175 (advocating that "all forms of co-operation should be dealt with in one big instrument").

229. Wilkitzki, *supra* note 199, at 282-83.

how much of an advancement over existing regimes the Comprehensive Convention should make.[230]

2. Other Regional Arrangements

No other regions have produced as voluminous a record as the Europeans have in the fight against transnational crime. But other regional efforts do exist and include the Inter-American Drug Abuse Commission (hereinafter CICAD) of the Organization of American States (hereinafter OAS), the Caribbean Financial Action Task Force (hereinafter CFATF),[231] and the various conventions entered into by League of Arab States.[232] Regional arrangements surpass bilateral ones in efficiency and effectiveness, and they can fortify weaker states against the attacks by organized criminals that typically follow heightened national enforcement.[233]

Under the OAS umbrella, countries in the Caribbean and Latin America have concluded several regional agreements aimed at increasing cooperation against organized crime. Agreements on extradition date back to the nineteenth century, with the current regime set forth in the 1981 Inter-American Convention on Extradition.[234] In practice, regional agreements are merely hortatory and separate bilateral arrangements determine whether or not cooperation will be possible in individual cases.[235] CICAD, an autonomous organization within the OAS, prepared model anti-money laundering legislation in 1991, which was approved by the OAS General Assembly for adoption by OAS members in 1992.[236] A major drawback of the Model Regulations is that they limit the scope of money-laundering offenses to proceeds from drug-related crimes.[237]

Regional efforts in the Americas seem to be modeled on the European experience and are gradually approaching an overall, hemispheric framework. At the Summit of the Americas meetings in the past several years, cooperation in fighting corruption and crime has been on the agenda, resulting in a number of agreements and initiatives.[238] In the 1994 Plan of Action, OAS members agreed to do the following: ratify the U.N. Drug Convention; enact laws on forfeiture of proceeds; implement the CFATF recommendations; implement other drug control programs and legislation; and consider an Inter-American convention on money laundering.[239] In 1996, twenty-one members of the OAS signed the In-

230. *See id.* at 283.

231. *See The Feasibility of Elaborating*, *supra* note 11, at 147.

232. *See Appropriate Modalities*, *supra* note 155, at 116.

233. *See The Feasibility of Elaborating*, *supra* note 11, at 148-49.

234. Inter-American Convention on Extradition, O.A.S. Document OEA/Ser.A/36 (SEPF), *reproduced at* 20 I.L.M. 723 (1981). *See also* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 21 (1991).

235. *See* GILBERT, *supra* note 234, at 21.

236. *See* Zagaris I, *supra* note 159, at 150-51.

237. *See id.* at 151.

238. *See* Bruce Zagaris, Essay, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888, 1892 (1996) [hereinafter Zagaris II].

239. *See id.* at 1894.

ter-American Convention Against Corruption,[240] and others have joined the Convention subsequent to its entry into force.[241] The OAS Convention Against Corruption surpasses the OECD Anti-Bribery Convention in at least one respect—it allows extradition not only of bribe-givers, but bribe takers as well.[242]

One scholar has suggested the formation of an "Americas Committee," patterned after the European Committee on Crime Problems, to review existing legislation, suggest legal measures, draft legislation, and move the region toward harmonization.[243] The U.N. organized a regional workshop in Buenos Aires in 1995 resulting in the Buenos Aires Declaration on Prevention and Control of Organized Transnational Crime (hereinafter Buenos Aires Declaration).[244] The Buenos Aires Declaration acknowledges the need for a coordinated hemispheric approach, exhorts states not yet parties to the U.N. Drug Convention to join, and proposes consideration of elaborating an international convention against organized transnational crime.[245]

In the last decade, Caribbean countries have become very active in striving for regional cooperation and seeking assistance in combating organized crime. Many Caribbean leaders recognize that the benefits of giving up some sovereignty are well worth the sacrifice because of the ravaging effects of the drug war on their countries.[246] The CFATF has convened several times since 1990 to discuss adoption of a money laundering convention.[247] In 1992, the CFATF agreed to adopt the forty recommendations of the FATF, plus twenty-one additional recommendations of its own.[248] The Caribbean Common Market and Community (hereinafter CARICOM) has also discussed developing joint strategies to protect banking systems in the region from exploitation by international drug traffickers.[249] A 1997 Summit of the United States and the Caribbean resulted in the Bridgetown Declaration of Principles and Plan of Action.[250] Part II of the Plan, labeled "Justice and Security," calls for a number of measures that include: U.S. assistance in law reform and the training of law enforcement per-

240. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724. *See generally* Zagaris & Ohri, *supra* note 184.

241. *See* Philip M. Nichols, *Colloquy: Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 267 (1999).

242. *See id.*

243. *See id.* at 1900.

244. *See Review of Priority Themes: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Report of the Secretary-General, Addendum*, U.N. SCOR, 5th Sess., Provisional Agenda Item 3, at 1-2, U.N. Doc. E/CN.15/1996/2/Add.1 (1996) [hereinafter E/CN.15/1996/2/Add.1].

245. *See id.* at 5.

246. For example, Joseph Theodore, the minister of national security for Trinidad, said: "We understand the criticism that we are giving up a lot of sovereignty in terms of the United States entering our waters and flying in our airspace. But our answer is simple . . . . This drug war has no borders, and we realized that we did not have the wherewithal to put a stop to it. We felt that giving up some sovereignty in today's world was justified in our bid to get the wherewithal to deal with the drug situation." Serge F. Kovaleski & Douglas Farah, *Organized Crime Exercises Clout in Island Nations*, WASH. POST, Feb. 17, 1998, at A1.

247. *See* Zagaris I, *supra* note 159, at 148-49.

248. *See* Kellman & Gualtieri, *supra* note 79, at 736.

249. *See* Zagaris I, *supra* note 159, at 153.

250. Bridgetown Declaration of Principles and Plan of Action, 1997, 36 I.L.M. 792.

sonnel; consideration of concluding agreements on extradition and mutual legal assistance by Caribbean countries that have not yet done so; cooperation among law enforcement in enabling information exchange and joint training; collaboration through the OAS and CICAD in strategic planning for law enforcement agencies and to enhance intelligence capabilities; and better implementation of the U.N. Drug Convention and banking regulations. The Bridgetown Plan recognizes not only the drug trafficking problem in the region, but also addresses arms trafficking, corruption, money laundering, and alien smuggling. While some Caribbean states have been reluctant to enact the FATF's forty recommendations out of concern that their financial sectors may be jeopardized by such regulations,[251] others, such as Trinidad, have led the way in developing regional initiatives and inviting international assistance.[252]

The League of Arab States has sponsored several conventions. At least nineteen states have ratified the 1983 agreement on extradition, which serves as a supplement to previous extradition conventions:[253] "It is a comprehensive extradition convention which now provides for the surrender of fugitive offenders throughout a significant portion of the world."[254]

The United Nations has attempted to bring regional initiatives to other areas of the world where the countries in the region have been less able to start discussions on their own. The Crime Prevention and Criminal Justice Programme of the U.N. has established a network of regional institutes for the purpose of gathering information from Africa, Asia, and other parts of the world on organized criminal activity.[255] In 1997, the U.N.'s Crime Prevention and Criminal Justice Division (formerly branch) held an African Regional Ministerial Workshop on Action against Organized Crime and Corruption in Dakar, Senegal. The result—the Dakar Declaration—expressed the concern of African states about the problem and called for strengthening domestic justice systems,

251. *See* Zagaris I, *supra* note 159, at 149.

252. *See* Kovalesky & Farah, *Organised Crime Exercises Clout in Island Nations*, *supra* note 54, at A6.

253. *See* GILBERT, *supra* note 234, at 21.

254. *Id.*

255. *See International Cooperation in Combating Transnational Crime: Implementation of the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime: Report of the Secretary-General*, U.N. SCOR, 6th Sess., Provisional Agenda Item 6(a), at 11, U.N. Doc. E/CN.15/1997/7 (1997) [hereinafter E/CN.15/1997/7]. The U.N.'s Interregional Crime and Justice Research Institute is affiliated with the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, the Latin American Institute for the Prevention of Crime and the Treatment of Offenders, the European Institute for Crime Prevention and Control, and the African Institute for the Prevention of Crime and the Treatment of Offenders. Associate institutes include the Arab Security Studies and Training Centre, the Australian Institute of Criminology, the International Centre for Criminal Law Reform and Criminal Justice, among others. Together, these institutes form the United Nations crime prevention and criminal justice programme network. *See Cooperation and Coordination of Activities With Other United Nations Bodies and Other Entities: Activities of the Institutes Comprising the United Nations Crime Prevention and Criminal Justice Programme Network: Report of the Secretary-General*, U.N. SCOR, 5th Sess., Provisional Agenda Item 8, at 2-3, U.N. Doc. E/CN.15/1996/21 (1996) [hereinafter E/CN.15/1996/21]. *See also Institutes of the Crime Prevention and Criminal Justice Programme Network* (visited Sept. 13, 1999) <http://www.ifs.univie.ac.at/~uncjin/unojust.htm>.

harmonizing legislation across the continent, adopting new national laws and regulations, and obtaining better training for law enforcement personnel.[256]

Conferences have been held in Eastern Europe and the former Soviet Union as well. The Crime Prevention and Criminal Justice Division co-sponsored a seminar with the Organization for Security and Cooperation in Europe (hereinafter OSCE) and the U.N. International Drug Control Programme (hereinafter UNDCP) for Central Asian states in 1995 on drugs and crime in the region.[257] In 1997, Moldova, Romania, and Ukraine signed statements on cooperation in combating organized crime, on pledging coordination of national legislation, on intensifying law enforcement measures, on cooperation between national law enforcement bodies, and on exchange of information.[258]

In Asia, the Asia Crime Prevention Foundation established a working group on extradition and mutual legal assistance in 1995.[259] The Australian government has proven to be one of the leaders in the region in addressing the problem of transnational organized crime, establishing a Sophisticated Crime Team of the Australian Institute of Criminology,[260] and ratifying the Council of Europe's Laundering Convention. Australia also hosts the FATF Secretariat for activities in Asia and the Pacific.[261]

One recent encouraging sign is the development of agreements among regional organizations. The European Community as a whole has been involved in negotiating agreements with the United States and the OAS on the control of drug precursors and chemical substances.[262] In further establishing the operating procedures for Europol, the Council of the EU has adopted rules governing external relations between Europol and "third States and non-European Union related bodies,"[263] the receipt of information by Europol from third parties,[264]

256. *See U.N. Crime Prevention and Criminal Justice Division* (Sept. 1997) <http://www.ifs.univie.ac.at/~uncjin/corrupt.htm>.

257. *See* E/CN.15/1997/7, *supra* note 255, at 10.

258. *See Statement by the Presidents of Ukraine, the Republic of Moldova and Romania on Cooperation in Combating Organized Crime*, Annex I, U.N. Doc. A/52/257 (1997).

259. *See Review of Priority Themes: Arrangements for Convening an Intergovernmental Expert Group to Examine Practical Recommendations for the Further Development and Promotion of Mechanisms of International Cooperation, Including the United Nations Model Treaties on International Cooperation in Criminal Matters and for the Development of Model Legislation on Extradition and Related Forms of International Cooperation: Note by the Secretary-General*, U.N. SCOR, 5th Sess., Provisional Agenda Item 3, at para. 17, U.N. Doc. E/CN.15/1996/6 (1996).

260. *See* E/CN.15/1997/7, *supra* note 255, at 11.

261. *See Review of Priority Themes: Control of the Proceeds of Crime: Report of the Secretary-General*, U.N. SCOR, 5th Sess., Provisional Agenda Item 3, at 15, U.N. Doc. E/CN.15/1996/3 (1996) [hereinafter E/CN.15/1996/3].

262. *See* European Community—United States Agreement on Precursors and Chemical Substances Frequently Used in the Illicit Manufacture of Narcotics Drugs or Psychotropic Substances, Notice of Other Recent Documents, Nov. 1997, 36 I.L.M. 1692.

263. *Council Act of 3 November 1998 Laying Down Rules Governing Europol's External Relations With Third States and Non-European Union Related Bodies* (visited Sept. 13, 1999) <http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499Y0130_05.html>.

264. *See Council Act of 3 November 1998 Laying Down Rules Concerning the Receipt of Information by Europol from Third Parties* (visited Sept. 13, 1999) <http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499Y0130_04.html>.

and the transmission of data by Europol to "third States and third bodies."[265] In 1995, the EU and twelve Middle Eastern countries formed the Euro-Mediterranean Partnership (hereinafter EMP), which includes a political and security agreement for the purpose of cooperating in dealing with transnational crime, money laundering, and alien smuggling.[266] The European Community has been unique in its multi-lateral approach to transnational crime; once again, it may again be setting a lead that other countries and regions will be slow or reluctant to follow.

C. *Bilateral Agreements*

1. *Extradition Treaties*

Extradition is plagued by weaknesses as a method of international cooperation:[267] "The present extradition laws belong to the 'world of the horse and buggy and the steamship, not in the world of commercial jet air transportation and high speed telecommunications.' "[268] Even countries that are parties to extradition treaties frequently refuse extradition requests on a variety of grounds: that it would violate the country's law; that it would allow punishment for a crime that is not illegal in the requested state; or simply that it involves a political issue.[269] A Model Treaty on Extradition[270] has been advanced by the Crime Prevention and Criminal Justice Branch of the U.N.[271] Should a large number of countries choose to follow the U.N. Model, greater harmonization and an increase in the number of extraditions would likely result. Currently, extradition treaties bind only a limited number of states, and criminals can simply escape prosecution by "forum living," residing in states not a party to an extradition treaty with the country seeking their prosecution.[272]

2. *Mutual Legal Assistance Treaties*

Conclusion of a Mutual Legal Assistance Treaty (hereinafter MLAT) markedly improves the ability of law enforcement officials from two different countries to directly cooperate,[273] as compared to the letters rogatory process[274]

265. *Council Act of 12 March 1999 Adopting the Rules Governing the Transmission of Personal Data by Europol to Third States and Third Bodies* (visited Sept. 13, 1999) <http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499Y0330_01.html>.

266. *See* Klosek, *supra* note 213, at 606-7.

267. *See generally* Hussain, *supra* note 7 (describing the ineffectiveness of existing extradition treaties and recommending an International Justice Commission to serve as an enforcement body of a universal extradition agreement). *See also* Kellman & Gualtieri, *supra* note 79, at 730-32.

268. *See* GILBERT, *supra* note 234, at 1 (quoting from a letter to Senator Edward Kennedy from former U.S. Attorney-General Benjamin R. Civiletti).

269. *See Most Effective Forms*, *supra* note 4, at 99.

270. *United Nations: General Assembly Resolution on a Model Treaty on Extradition*, G.A. Res. 45/116, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc A/45/49 (1991).

271. *See Most Effective Forms*, *supra* note 4, at 103.

272. *See* Hussain, *supra* note 7, at 755, 761-62.

273. *See Most Effective Forms*, *supra* note 4, at 101. *See also* Kellman & Gualtieri, *supra* note 79, at 726; Vassalo, *supra* note 195, at 188-90.

274. "Letters rogatory are the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure

typically available in the absence of such a treaty. An MLAT provides guaranteed cooperation and coordination, rather than *ad hoc* arrangements via courts and diplomats.[275] MLATs typically set forth which offenses will be covered by the agreement, what types of assistance will be rendered, what rights the requesting and requested state have to control the scope and manner of cooperation, what rights targets of investigation have, and what procedures must be followed in making and reviewing requests.[276] The United States currently has MLATs with many of the countries in which criminal organizations operate, including the Bahamas, Colombia, Italy, Jamaica, Mexico, the Netherlands, Switzerland, Thailand, the United Kingdom (including the Cayman Islands), Austria, and Hungary, among others.[277]

Some MLATs have proven successful in increasing the number of prosecutions of organized criminals. The U.S.-Switzerland MLAT (1977) has facilitated investigations and prosecutions of drug traffickers and money launderers.[278] Some of the successes of the U.S.-Italian collaboration through the MLAT process include[279] the immobilization of the "Pizza Connection" between the U.S. and Sicilian mafias[280] and "Operation Green Ice," resulting in the uncovering of a money laundering joint venture between the Sicilian and Colombian criminal groups.[281] The U.S.-Italy partnership has also successfully enlisted the participation of law enforcement in Canada, Brazil, Germany, Spain and Switzerland.[282] The Mexico-U.S. MLAT contains specific provisions aimed at organized criminals,[283] establishing a working group similar to the

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peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country . . . ." Tiedemann v. The Signe, 37 F.Supp 819, 820 (E.D. La. 1941), *quoted in* Vassalo, *supra* note 195, at 188.

275. Typical MLAT provisions include execution of requests regarding penal matters; taking testimony or statements; production of documents; service of writs, summonses, or other judicial documents; locating persons; and providing judicial records, evidence, and information. *See* Kellman & Gualtieri, *supra* note 79, at 727. *See also* Abramovsky, *supra* note 31, at 191, 207.

276. *See* Bruce Zagaris, *International Tax and Related Crimes: Gathering Evidence, Comparative Ethics, and Related Matters*, *in* THE ALLEGED TRANSNATIONAL CRIMINAL: THE SECOND BIENNIAL INTERNATIONAL CRIMINAL LAW SEMINAR 364-80 (Richard D. Atkins ed., 1995) [hereinafter Zagaris III].

277. *See* Abramovsky, *supra* note 31, at 207. *See also* Gurule, *supra* note 157, at 88.

278. *See Most Effective Forms*, *supra* note 4, at 101-02.

279. The U.S. and Italy actually have treaties on both mutual assistance and extradition, as well as a joint working group on organized crime. *See* Sara Jankiewicz, Comment, *Glasnost and the Growth of Global Organized Crime*, 18 HOUS. J. INT'L L. 215, 247 (1995).

280. The "Pizza Connection" operation resulted in 18 convictions in the U.S. and 338 in Italy. *See id.* at 248.

281. *See The Feasibility of Elaborating*, *supra* note 11, at 144-45.

282. *See id.* at 144.

283. For example, the treaty "specifically includes attempts and conspiracies to commit an offense, as well as the participation in the execution of an offense." Bruce Zagaris & Julia P. Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers - 150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U. J. INT'L L. & POL'Y 519, 579 (1997). The U.S.-Bolivia extradition treaty also specifically mentions organized crime activity. *See id.* at 615.

U.S.-Italian body that has been so successful in pursuing organized criminals.[284] In addition, the two countries signed an agreement on financial information exchange to combat money laundering.[285]

Authorities in both the U.S. and Mexico have expressed satisfaction with the results of the MLAT thus far.[286] The U.S. has collaborated in several other successful joint law enforcement activities aimed at debilitating transnational organized crime, such as joint investigations with Peruvian and Venezuelan authorities.[287]

But very few other MLATs have proven as successful as these examples, and many countries have resisted discussion or conclusion of an MLAT with the United States.[288] MLATs, as well as extradition treaties, tend not to include obligations as to the timeliness of a requested state's response, and some states have lengthy and irrational proceedings for responding.[289] Many of the MLATs entered into by the United States use discretionary language ("may") instead of mandatory language ("shall"), leaving it entirely to the discretion of the parties whether to cooperate in any given investigation.[290] Bilateral arrangements are also inefficient because usually only two countries are coordinating operations at a time, resulting in both gaps and duplication of effort.[291]

Germany and Russia concluded a bilateral cooperation agreement in 1994 in response to increasing numbers of incidents of nuclear smuggling.[292] Russian officials have held separate bilateral talks with Hungarian, Belarusan, Ukrainian, Latvian, Swiss, Polish, and Slovak authorities on the development of cooperative arrangements for combating organized crime.[293] Collaboration with Hungary's government has intensified recently as Budapest has been recognized as "a key battleground in the struggle against international organized crime" due to the attraction it has long held for criminals from Central and Eastern Europe.[294] In October 1998, the FBI announced it would be working as part of a

284. *See* Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COMP. L. 1, 54 (1997).

285. *See id.* at 70-71.

286. The U.S. has rendered at least thirty-seven suspects to Mexico since 1984, with eighteen extradition proceedings pending. In the same time period, Mexico surrendered at least twenty persons, in addition to detaining, expelling, and pursuing extradition proceedings against others. *See* Zagaris & Peralta, *supra* note 283, at 531-32.

287. *See* Bruce Zagaris, *Symposium: U.S. International Cooperation Against Transnational Organized Crime: XVI International Congress of Penal Law: Report Submitted by the American National Section, AIDP: Topic IV: International Criminal Law*, 44 WAYNE L. REV. 1401, 1417 (1998).

288. *See The Feasibility of Elaborating*, *supra* note 11, at 145.

289. *See* Gully-Hart, *supra* note 222, at 264.

290. *See* Gurule, *supra* note 157, at 93.

291. *See The Feasibility of Elaborating*, *supra* note 11, at 146.

292. *See Problems and Dangers*, *supra* note 3, at 24.

293. *See Recent Developments*, *in* Williams, *supra* note 25, at 238-44.

294. Peter Finn, *Gangs Find Budapest Appealing; Hungarian Capital Focus of Organized Crime Fight*, WASH. POST, Dec. 21, 1998, at A21 (reporting that the Hungarian police estimate there are 200 criminal organizations represented in Hungary, most of them controlled by Russian organized crime).

Hungarian-U.S. strike force against organized crime,[295] to increase the training and information exchange that had begun under U.S. auspices in 1995.[296]

Perhaps most significantly, Russia and the United States concluded a Mutual Legal Assistance Agreement (hereinafter MLAA)[297] in 1996 that is a prelude to eventual conclusion of an MLAT.[298] Legitimate concerns about the state of Russian law and law enforcement have slowed the conclusion of more binding cooperative agreements with Russia.[299] A large number of Russian officials and politicians are corrupt or belong to criminal organizations, and it is hard for U.S. law enforcement to discern whom to trust.[300] The United States has faced similar problems in other countries, such as Mexico, with which an MLAT was concluded,[301] and has been moderately successful in instituting measures to discourage corruption.[302] In Russia and the former Soviet Union, U.S. assistance such as the Freedom Support Act[303] includes funding for exchanges, training, and technical assistance for law enforcement to better combat organized crime and legal reform projects to assist in drafting legislation and training judges and prosecutors.[304] One impediment was theoretically lifted when Russia implemented new legislation criminalizing money laundering, fraud, and criminal conspiracy—many of the activities typical of organized crime—for the first time.[305]

One problem with the U.S.-Russia MLAA, as with many MLATs, is the requirement of dual criminality, whereby assistance is only possible if the alleged offense violates both countries' law.[306] Countries in the former Soviet Union and Central and Eastern Europe are still developing their legal systems, which are a long way from approaching the coverage of U.S. criminal law. In addition, the MLAA includes a narrow list of offenses to which it applies, without any catch-all category.[307] Dealing with Russia on criminal matters is also

295. *See id.*

296. *See* David Holley, *Joint Force in Hungary Targets East Bloc Gangs*, L.A. TIMES, Dec. 5, 1998, at A2.

297. Agreement on Cooperation in Criminal Law Matters, June 30, 1995, U.S.-Russia, Hein's No. KAV 4518, Temp. State Dep't No. 96-38.

298. *See* Abramovsky, *supra* note 31, at 192.

299. *See id.* at 204.

300. *See id.*

301. *See id.* at 191, 205.

302. *See generally* Jennifer M. Hartman, Note, *Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT'L L. & COM. 157 (1997) (suggesting enhanced efforts to respond to the problem of government corruption and summarizing some current initiatives).

303. 22 U.S.C.A. §§ 5801-74 (West Supp. 1998).

304. *See* Mack Reed, *Ukraine Crime Investigators Pick Up Clues on U.S. Justice; Law: Kiev Officials Visit the County FBI Office to Study the American System and Exchange Information on International Criminal Elements*, L.A. TIMES, July 21, 1998, at B14; *Crime Assistance Package for the Russian Federation*, U.S. Newswire, Sept. 29, 1994, *available in* LEXIS, News Library, Curnws File.

305. *See* Abramovsky, *supra* note 31, at 205, 211.

306. *See id.* at 208.

307. *See id.* at 210.

constrained by the lack of an extradition treaty.[308] Without the possibility of extradition, criminals within Russia are at the mercy of Russia's judicial system, which is weak and easily corrupted.[309] Russia's improved laws regarding organized criminal activities will have little effect so long as the judiciary remains in its current state.

MLATs have also proven to have minimal effectiveness in facilitating the seizure of criminals' assets. The DEA estimates that less than two percent of Colombian cocaine money is actually seized.[310] The U.N. has completed a Model Treaty on Mutual Assistance[311] as a guide to countries in concluding such agreements,[312] but few countries have hewn closely to the Model Treaty's provisions.

D. Domestic Law

Domestic legislation is a prerequisite to harmonization and cooperation in the fight against international organized crime. A survey of the leading nations' anti-organized crime legislation is beyond the scope of this paper.[313] However, it is important to note that even countries with elaborate laws against organized criminal activities encounter the limits of jurisdiction.[314] The jurisdiction of national law enforcement bodies, such as the FBI, is usually limited when criminal activity extends beyond national borders.[315]

Domestic judicial bodies are similarly constrained. Customary international law recognizes five bases of extraterritorial jurisdiction: (1) territorial; (2) nationality of the perpetrator (active personality); (3) nationality of the victim (passive personality); (4) protective; and (5) universal.[316] Three of these are of particular interest when considering possible bases for prosecuting international criminals. First, territorial jurisdiction—or its extension, objective territoriality—allows states to prosecute on the basis that the conduct alleged has harmful consequences in the state's territory or on the basis that an alleged criminal

308. The Russian Federation has signed and ratified the U.N. Drug Convention, but did so prior to the dissolution of the Soviet Union and therefore one scholar has claimed that Russia is not yet a party. *See id.* at 212. *See also* List of Parties, *supra* note 156.

309. *See* Abramovsky, *supra* note 31, at 215.

310. *See* STERLING, *supra* note 2, at 229.

311. General Assembly Resolution on a Model Treaty on Mutual Assistance in Criminal Matters, December 14, 1990, 30 I.L.M. 1419.

312. *See Most Effective Forms*, *supra* note 4, at 102-03.

313. *See* Gurule, *supra* note 157, at 97-99 (discussion of U.S. money laundering legislation). *See also* Dorean M. Koenig, *Symposium: The Criminal Justice System Facing the Challenge of Organized Crime: XVI International Congress of Penal Law: Report Submitted by the American National Section, AIDP: Topic II: Special Part*, 44 WAYNE L. REV. 1351, 1364-77 (1998) (discussing U.S. federal criminal law dealing with organized crime).

314. *See* Vassalo, *supra* note 195, at 182 (citing the Lotus Case, 1927 P.C.I.J. (ser. A) No. 9, for the principle that "a state may not exercise its power in any form in the territory of another state"). *See generally* NADELMANN, *supra* note 191.

315. *See generally* Shoshanah V. Asnis, Note & Comment, *Controlling the Russian Mafia: Russian Legal Confusion and U.S. Jurisdictional Power-Play*, 11 CONN. J. INT'L L. 299 (1996) (describing statutory limits on the FBI's ability to investigate nuclear smuggling).

316. *See* Kellman & Gualtieri, *supra* note 79, at 718-19.

conspiracy was consummated within its territory.[317] Many states could assert that international organized crime has harmful consequences within their territory and thereby arguably exercise territorial jurisdiction. Second, protective jurisdiction extends to activities, that would not be punished otherwise, having particularly grave consequences for the prosecuting state,[318] or threatening specific national interests such as security, integrity, sovereignty, or other governmental functions.[319] As the power of international organized crime increases, so does the threat posed to essential state functions, thereby giving rise to a reasonable argument for the exercise of protective jurisdiction. Third, universal jurisdiction covers particularly heinous or harmful offenses to mankind, such as piracy and war crimes.[320] Asserting universal jurisdiction as a basis for prosecuting international criminals would almost certainly be met with strong objections because of its traditional limitation to a narrow list of crimes, however the suggestion has been made.[321]

IV.
THE NEED FOR A MORE INTEGRATED APPROACH

A. Arguments for an International Convention

Without universal prohibitions and a strong enforcement regime against international organized criminal activities, these groups will simply continue to find those parts of the world where governments are unwilling or unable to control them.[322] The criminals act without respect for borders, in contrast to law enforcement, which trips over strict notions of sovereignty and domestic control.[323] "Ironically," as noted by one commentator, "the transnational trafficking organizations are able in many respects to operate more extensively and freely than state actors that have more resources and legitimacy."[324]

A single, comprehensive convention against international organized crime of all varieties is preferable to multiple conventions focusing on specific criminal activities one at a time. While the U.N. Drug Trafficking Convention and the developing anti-money laundering regime demonstrate the prospects for success at the international level, they do not adequately cover all the activities of international organized crime. For example, although the Drug Trafficking Convention contains provisions regarding anti-money laundering measures, most countries have only criminalized money laundering of proceeds from drug-re-

317. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 730 (2d ed. 1995).
318. *See id.* at 734-35.
319. *See* Kellman & Gualtieri, *supra* note 79, at 718 n. 214.
320. *See* CARTER & TRIMBLE, *supra* note 317, at 735.
321. *See* Kellman & Gualtieri, *supra* note 79, at 719 n. 215.
322. *See* Stares, *supra* note 101, at 12 (describing the ability of drug traffickers to get around "negative control measures" by adapting their routes and methods).
323. *See id.* at 13-14. *See also* KERRY, *supra* note 3, at 169-70. "We need to move beyond traditional notions of national sovereignty when those traditional notions benefit only the bad guys . . . it is the criminals who are taking advantage of national sovereignty to conduct their criminal enterprises, and the governments and the citizens whose security those governments were created to protect who are being violated by their own reluctance to respond." *Id.*
324. Stares, *supra* note 101, at 13.

lated crime, leaving out other predicate offenses.[325] All of the pursuits of international organized criminals have in common their transcendence of national boundaries, and the inability of any one state to effectively combat them alone.[326] There is a "symbiotic relationship"[327] among the different activities, as funds from one criminal enterprise are invested in pursuing another. The common attributes of organized criminal activity, of whatever kind in whatever part of the world, make an integrated approach the logical one.[328] Arguments for treating each of the main crimes of transnational groups separately make some sense with regard to nuclear smuggling,[329] due to its unique threat. But many of the measures necessary to create an effective international legal regime to counter the nuclear smuggling threat[330] are identical to measures necessary to counter other forms of smuggling and transnational crime.

A broad-based international agreement is also necessary even if bilateral or regional arrangements continue to increase. Criminal organizations have as little regard for regional divisions as they do for national ones. Furthermore, there is enough commonality among their methods and operations to make a universal approach workable.[331] Looking to world trade as a model,[332] regional organizations can operate in tandem with more universal arrangements. But the world community cannot afford to move as slowly toward harmonization in the fight against organized crime as it has in the harmonization of trade regulation. One possibility is to link control of organized criminal activities to the advancing free trade movement.[333] Rather than looking to traditional notions of sovereignty and relations among law enforcement bodies as a guide, nations should look to the level of cooperation among criminals as a model: "The challenge posed by transnational organized crime can only be met if law enforcement authorities are

325. *See* E/CN.15/1996/3, *supra* note 261, at 18.

326. *See* Stares, *supra* note 101, at 14.

327. *See id.* at 100.

328. "What criminal networks share in common is a strategy to establish and sustain their activities in the face of opposition. Whether dealing in ivory in Africa, in marijuana in the Caribbean, in portable radios in Poland, in contraband cigarettes in Naples, or in stolen securities and bonds in the United States, each crime network attempts to build a coercive monopoly and to implement that system of control through at least two other criminal activities—corruption of public and private officials, and violent terrorism in order to enforce its discipline." KERRY, *supra* note 3, at 17.

329. *See generally* Kellman & Gualtieri, *supra* note 79 (suggesting an integrated international legal regime to safeguard against nuclear proliferation by international criminal groups).

330. *See id.* at 679-81. The nineteen-point plan proposed by these authors includes some measures unique to the nuclear problem, such as prohibiting further production, reprocessing and enrichment of weapon-grade materials; universal accession to the Convention on the Protection of Nuclear Material; and better dismantling operations. But it also includes measures that would help solve other problems: improved border control, and record keeping measures; universal criminalization of smuggling activities; an unified coordinating body; better mutual legal assistance, extradition, forfeiture, transfer of proceedings, anti-money laundering, and anti-corruption provisions. *See id.*

331. Stares describes the potential for a "Colombia-style process" to occur in Central Asian republics if "extensive drug cultivation gathers momentum," meaning that the criminals would become more powerful than the state itself. The process has already repeated itself in diverse areas of the world. *See* STARES, *supra* note 101, at 7.

332. *See* KERRY, *supra* note 4, at 172. "A world moving toward a seamless web of commerce cannot protect itself without enforceable law and standards that are almost equally as seamless." *Id.*

333. *See* Stares, *supra* note 101, at 113.

able to display the same ingenuity and innovation, organizational flexibility and cooperation that characterize the criminal organizations themselves."[334] In addition, while domestic and bilateral agreements may be effective in nabbing the perpetrators of criminal acts, a multilateral agreement would be a better tool for finding and prosecuting heads of criminal organizations, rather than simply their henchmen.[335]

M. Cherif Bassiouni, one of the foremost proponents in the movement to establish an international criminal court, has explained the reluctance of national governments to accept an integrated approach to law enforcement as stemming "from the familiarity and comfort which government representatives feel toward the bilateral approach."[336] While this approach has provided an adequate solution to other problems in the past, Bassiouni cautions that the familiar, current modalities should be abandoned:

> [bilateral approaches] are clearly inadequate in coping with increased international, transnational and national criminality, particularly with respect to the new international manifestations of organized crime, drug traffic and terrorism. Consequently, international, transnational and national criminal phenomena are not controlled as effectively as possible due to unwarranted political and diplomatic considerations which limit states in their international penal cooperation.[337]

Unless all regional approaches develop at the same quick speed, advancements by law enforcement in one region will simply lead to increased activity by the criminals in other regions. Zagaris has termed this the "balloon effect": "whenever you squeeze part of a balloon, it expands elsewhere. That is, wherever regions and/or countries close loopholes in money laundering, organized criminals will be quick to invest in other jurisdictions in which opportunities exist."[338]

The Secretary General of the United Nations has expressed qualified support for an international convention asserting that it "would provide a way of augmenting resources and mobilizing mutual support and assistance for what individual states are unable to do alone." However, he stressed that "multilateral

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334. *See Most Effective Forms*, *supra* note 4, at 82.

335. *See* Vassalo, *supra* note 195, at 195. Because organized criminals use divisions of labor across boundaries, governments must respond with coordination at the national, regional and global levels. "More comprehensive strategies that target the leaders, their accrued wealth and the organization itself are likely to have much more impact." *See* E/CN.15/1996/3, *supra* note 261, at 13.

336. Bassiouni, *supra* note 196, at 817.

337. *Id.* Bassiouni recommends that "multilateralism should replace the archaic inefficient and politicized bilateralism and all modalities of inter-state penal cooperation should be integrated. Thus, multilateral treaties and national legislation should integrate the modalities of: extradition; legal assistance; transfer of criminal proceedings; transfer of prisoners; transfer of sentences; recognition of foreign penal judgments; tracing, freezing and seizing of assets deriving from criminal activity; and law enforcement and prosecutorial cooperation." *Id.* at 826.

338. Zagaris I, *supra* note 159, at 184. Another expert has analogized the organized crime business to "mercury at room temperature. If you push your finger into it, it moves out of the way – it flows to where there is less pressure. If pressure is applied in one place, it easily and quickly flows to another. As long as there are low pressure opportunities for the money laundering business to exist and to thrive, then that is exactly where the business and the activity will flow to." *Joint Hearings Before the Subcomm. on Int'l Trade of the Comm. on Finance and the Caucus on Int'l Narcotics Control of the United States Senate*, 104th Cong. 56 (1996) (statement of Alan S. Abel).

responses can only work if each party makes sacrifices commensurate with those of others."[339] That is the main obstacle—willingness of nations to part with traditionally-held notions about sovereignty and law enforcement. But sovereignty is being eroded by the transnational criminal, so what is given up in forming cooperative arrangements is potentially regained if the threat is diminished.[340] Clinging to traditional law enforcement methods makes equally little sense, according to one former deputy assistant secretary of state for narcotics:

> Get yourself into an international case that involves a drug cartel, an arms-smuggling ring, a bank fraud, you have got hundreds of thousands if not millions of documents in dozens of languages with many, many witnesses, many of who are from different cultures and different backgrounds. And now you take this mess into court and you try to prosecute . . . the jury is hopelessly, totally lost and confused . . . . So, our legal system is really not suited for complicated international crime.[341]

These are difficult obstacles to overcome. The traditional notion that law enforcement is a purely domestic matter purports that no other authority should dictate to state governments how their own instruments of force should be used.[342] States have different legal systems, different levels of sensitivity to each of the problems of organized crime, and different criminal justice systems with varying levels of efficiency and effectiveness.[343]

B. Key Elements of an International Convention

An effective convention against international organized crime should include the following elements:[344]

(1) Recognition of the threat and need for cooperation;
(2) A description and/or definition of the features[345] and activities[346] of international organized crime;
(3) Required harmonization of national legislation in prohibiting the defined activities of organized crime;

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339. *See Report of the Secretary-General: Implementation of the G.A. Res. 49/150 on the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime*, *in* Williams & Savona, *supra* note 3, at 178 [hereinafter *Report*].

340. *See* Stares, *supra* note 101, at 118. "[S]tates will have to accept that to regain some de facto control over what comes across their territorial borders and takes place within them they will have to reconsider their staunch defense of de jure principles that are becoming increasingly meaningless . . . . Just as many military forces have accepted the value if not the necessity of confronting common security threats through collective action . . . so police forces and criminal justice systems will have to see that similar practices can have benefits in their own field of work." *Id.*

341. KERRY, *supra* note 4, at 31 (quoting Bill Olson).

342. *See Most Effective Forms*, *supra* note 4, at 83.

343. *See id.* at 85.

344. *See The Feasibility of Elaborating*, *supra* note 11, at 153-55; *see also Report*, *supra* note 339, at 188.

345. *See* Part II for a list of attributes, *supra*.

346. The activities should include, at a minimum, all forms of illicit trafficking (drugs, people, arms, art objects, human organs, etc.) and their related activities: fraud; extortion; large-scale, cross-border theft operations; kidnapping; murder; corruption of government officials; nuclear smuggling; money laundering; and computer crimes. The list should include a catch-all category, or some expression that allows for the changing nature of organized crime as new technologies and circumstances allow transnational criminals to diversify their activities.

(4) Regulation of commercial and banking sectors that increases transparency, guards against money laundering, and eliminates tax havens;
(5) Required adoption of the U.N. Model Treaties on Extradition, and Mutual Assistance in Criminal Matters;
(6) Establishment of improved centralized information gathering and sharing;
(7) Measures aimed at the upper echelons of criminal organizations, including required domestic criminalization of participation, conspiracy, etc.;[347] and
(8) Freezing and forfeiture of the proceeds of organized crime.

Perhaps most crucial to the effectiveness of an international legal regime to combat organized crime is the inclusion of forfeiture provisions. Seizing criminals' assets incapacitates their operations and provides recompense for countries that have felt organized crime's effects and have made significant expenditures of money and manpower in their efforts to combat organized crime.[348]

Ideally, the convention would include provisions on the transfer of criminal proceedings in cases in which extradition is not possible. This would allow the state "deemed to be in the best position to try the case," usually the state where the accused is located, to prosecute according to the "representation principle" or subsidiary universal jurisdiction.[349] While only three members of the EU signed the European Convention on the Transfer of Criminal Proceedings,[350] more pressure would be brought on laggard legislatures to bring domestic law into harmony with an agreement if consensus were international rather than regional. A logical counterpart to transfer of criminal proceedings is transfer of enforcement of criminal judgments, allowing sentences to be served in locations other than that of the trial.[351]

The list above represents the ideal, but not the realistic outline of an international convention. Inherent to this list are several difficulties, including agreeing on an all-embracing inventory of organized crime activities, achieving consensus of a large number of countries without sacrificing the real meaning, and convincing countries to change long-standing legal methods.

C. Progress Toward an International Convention

In the past fifteen years, the United Nations has been the main venue for discussion and gradual progress toward an international convention. The prospects for a U.N. convention against transnational organized crime increased when the Group of Eight industrial nations agreed at its 1998 summit to support intensified negotiations on the text of the convention aimed at concluding talks

347. *See Report, supra* note 339, at 188.

348. *See* KERRY, *supra* note 4, at 176-77. The U.S. Department of Justice has been using an international asset-sharing program since 1989. As of December 1995, over $50 million had been paid to foreign governments for their cooperation in investigations which resulted in the seizure of approximately $125 million in illegal proceeds. *See id.* at 177.

349. *See* Van Den Wyngaert & Stessens, *supra* note 200, at II.161, II.163.

350. *See id.* at II.161.

351. *See id.* at II.165.

during the year 2000.[352] Within the U.N., the Economic and Social Council (hereinafter ECOSOC) has taken on the responsibility for advancing international cooperation in the area of crime prevention.[353] Every five years, the Committee on Crime Prevention and Control of ECOSOC convenes an international congress to discuss international crime prevention.[354] The Seventh Congress in 1985 recognized the increasingly international nature of organized crime and adopted two resolutions concerning the issue, in addition to the "Milan plan," relating to international cooperation.[355]

The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990 called for greater international coordination in the fight against transnational organized crime. The Congress recognized both the increasing sophistication of international criminals and their "highly destabilizing and corrupting influence on fundamental social, economic, and political institutions."[356] The Secretary General's remarks at the Eighth Congress suggested that organized crime of all kinds—not just drug trafficking—should be dealt with through a common solution. The Secretary-General placed a specific emphasis on combating money laundering worldwide.[357]

In 1994, the U.N. convened a World Ministerial Conference on transnational organized crime in Naples.[358] The result was the Naples Political Declaration and Global Action Plan against Organized Transnational Crime (hereinafter Global Action Plan or Naples Document),[359] an attempt to spur further development of international cooperation in combating organized crime.[360] The Preamble to the Naples Document specifically notes the regional initiatives in the European Union and the Americas.[361] The Political Declaration section pledges closer alignment of legislative texts; greater international cooperation in investigations and prosecutions; agreement on modalities for cooperation at the regional and global levels; elaboration of international agreements on organized transnational crime; and development of strategies to combat money-launder-

352. *See* Elizabeth Shogren & Tyler Marshall, *Summit's Focus Turns to International Crime, Debt Relief*, L.A. TIMES, May 17, 1998, at A14.

353. *See* Julia Heredia, *The United Nations Role in Crime Prevention, in* Lodl & Longguan, *supra* note 28, at 97.

354. *See id.* at 97-99.

355. *See* Paris-Steffens, *supra* note 5, at 14. The first resolution calls for greater harmonization in internal legislation concerning international cooperation. The second concerns drug trafficking and calls for bilateral or multilateral agreements on assistance. The "Milan plan" addresses the concerns of both resolutions and prompted further discussion of organized crime at the Eighth conference. *See id.*

356. Heredia, *supra* note 353, at 103-04.

357. *See* Wu Han, *Comparison of China's Group Crime to the West's Organized Crime, in* Lodl & Longguan, *supra* note 28, at 106.

358. *See* Phil Williams & Ernesto U. Savona, *Introduction, in* Williams & Savona, *supra* note 3, at viii.

359. *Report of the World Ministerial Conference on Organized Transnational Crime: Report of the Secretary-General*, U.N. GAOR, 49th Sess., Agenda Item 96, at 5, U.N. Doc. A/49/748 (1994) [hereinafter A/49/748].

360. *See* E/CN.15/1996/2, *supra* note 123.

361. *See* A/49/748, *supra* note 359, at 5.

ing.[362] The Global Action Plan recommends agreement on a definition of organized crime; adoption of national legislation dealing with organized crime, using the model of more experienced states' laws; development and improvement of bilateral and multilateral agreements on extradition and legal assistance; strengthened regional initiatives, including technical assistance; consideration of international instruments against organized transnational crime; and anti-money laundering measures on the national and multinational levels.[363] One-hundred and forty-two of the member states of the United Nations participated in the World Ministerial Conference at Naples, making it the best-attended conference in the field of crime prevention and criminal justice in U.N. history.[364] In conveying the results from Naples to the General Assembly, the Secretary-General noted that "a convention on transnational crime could be one of the ways to strengthen the legal instruments available to the international community," in addition to the model treaties adopted previously.[365] The General Assembly approved the Naples Document in resolution 49/159, urging states to implement its principles as matters of urgency.[366]

Subsequent to Naples, the General Assembly in December of 1998 passed resolution 53/111 establishing an Ad Hoc Committee for the purpose of elaborating an international convention against transnational organized crime and additional protocols on illegal trafficking of migrants, illicit manufacture and trafficking in firearms, and trafficking in women and children.[367] Toward the goal of concluding a draft convention by the year 2000, the Ad Hoc Committee scheduled five sessions for 1999 with further meetings tentatively planned for 2000 "depending on the pace of negotiations."[368] Prior to the first session of the Ad Hoc Committee in March 1999, representatives of forty-nine nations as well as several international and non-governmental organizations convened informal preparatory meetings in 1998.[369]

Even before the informal preparatory meetings, a draft convention had begun circulating and generating comments among U.N. members. In 1997, the Government of Poland took the initiative of drafting a U.N. framework convention against organized crime and the General Assembly requested that the Secretary General invite comments from member countries on the draft.[370] Of the twenty-four governments that initially returned comments, all but three ex-

362. *See id.* at 9.

363. *See id.* at 9-15.

364. *See id.* at 16 for list of attendees. *See also Action Against National and Transnational Economic and Organized Crime: Working Paper Prepared by the Secretariat*, U.N. GAOR, 9th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, at 16, U.N. Doc. A/CONF.169/5 (1995) [hereinafter A/CONF.169/5].

365. *See* A/49/748, *supra* note 359, at 18-19.

366. *See id.* at 16.

367. *See Draft Convention Against Transnational Organized Crime* (visited Sept. 13, 1999) <http://www.ifs.univie.ac.at/~uncjin/dcatoc.htm>.

368. *Id.*

369. *See Report of the Informal Preparatory Meeting*, A/AC/254/3 (Dec. 14, 1998).

370. *See* E/CN.15/1997/7, *supra* note 255, at 2.

pressed at least qualified support for the draft.[371] Before the Ad Hoc Committee officially began its work, the draft convention had been the subject of discussion at meetings in Warsaw in February 1998, Vienna in April 1998, and Buenos Aires in August 1998.[372] The draft convention has now evolved through substantive revisions at subsequent sessions of the Ad Hoc Committee, which have attracted increasing numbers of participants.[373]

Comparing the revised draft U.N. Convention Against Transnational Organized Crime[374] with the list of key elements of an international convention, *supra*, the draft Convention measures up to the ideal list in most respects. For example, Article 1 of the draft Convention adequately recognizes the threat of transnational organized crime and the need for international cooperation in combating that threat.[375]

Perhaps one of the most significant failings of the drafters of the U.N. Convention thus far has been the removal from the draft of any attempt to describe or define the activities of international organized crime, a key element of an effective international convention addressing transnational organized crime. Article 2 formerly contained a list of the offences considered to be indicative of transnational organized crime, but lack of consensus on the appropriate items for such a list led the Chairman of the Ad Hoc Committee to suggest that the list be included in an annex to the Convention or as part of the *travaux preparatoires*.[376] The members of the Ad Hoc Committee adopted this suggestion and the list formerly contained in Article 2 now appears in an attachment to the revised draft.[377] Placing such a defining provision of the convention in an attachment will make it easier for eventual signatories to become lax in recognizing criminal activities and operations within their borders as symptomatic of

371. Austria's position was that a convention on organized crime would not be useful because the problem is too complex and cannot be adequately covered by a document such as the draft. Japan's comments were that there were only a few provisions in the draft that were part of a common understanding and that it had reservations about many other provisions. The United States argued that the process needs to decelerate to allow greater discussion. *See* E/CN.15/1997/7/Add.1, *supra* note 10, at 2-5.

372. *See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on its First Session, Held in Vienna from 19 to 29 January 1999*, at 4, A/AC.254/9 (Jan. 29, 1999).

373. The first session of the Ad Hoc Committee was attended by representatives of 91 states (as well as representatives of international and non-governmental organizations), up from 49 at the preparatory meetings. *See id.* at 2. The second session was attended by representatives of 95 states. *See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on its Second Session, Held in Vienna from 8 to 12 March 1999*, at 2, A/AC.254/11 (Mar. 25, 1999). The third session was attended by representatives of 111 states. *See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on its Third Session, Held in Vienna from 28 April to 3 May 1999*, at 3, A/AC.254/14 (May 19, 1999). Attendance was down slightly at the fourth session as representatives of 97 states participated. *See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on its Fourth Session, Held in Vienna from 28 June to 9 July 1999*, at 3, A/AC.254/17 (July 21, 1999).

374. *See generally Revised Draft U.N. Convention Against Transnational Organized Crime*, A/AC.254/4/Rev.4 (July 19, 1999) [hereinafter A/AC.254/4/Rev.4].

375. *See id.* at 1.

376. *See id.* at 2, n. 3.

377. *See* A/AC.254/11, *supra* note 373, at 3.

the problem of transnational organized crime. While a list need not be exhaustive, a list that is at least indicative, if it were to be included in the main text of the convention, would enhance universal recognition of the most common and damaging activities of organized criminals, such as drug trafficking, trafficking in persons, counterfeiting, trafficking in cultural objects, nuclear smuggling, terrorist activities (as defined by the U.N. conventions against terrorism), trafficking in firearms, theft and smuggling of motor vehicles, and corruption of government officials.[378]

The attachment is the only provision of the draft Convention that comes close to defining organized crime, referring to previous U.N. Conventions[379] for definitions of drug trafficking, money laundering, trafficking in persons, and counterfeiting currency, which are all listed as activities of organized crime. Other activities listed include illicit traffic in cultural objects, nuclear smuggling, terrorist acts, illicit trafficking in arms and explosives, illegal trafficking in motor vehicles, and corruption of public officials.[380] The argument that other activities could be added to this list was made by several countries in comments on previous drafts. Proposals include adding offenses such as extortion, kidnapping, fraud, trafficking in human organs, murder, and environmental and computer crimes.[381] Other countries and leaders expressed concern about including terrorism on the list because other international efforts have been initiated that deal with it separately.[382] However, neither of these arguments should have been allowed to prevent inclusion of a list which aims only to be indicative, not exhaustive.

What remains as Article 2 in the revised draft is a vague statement that the Convention applies to the prevention of "serious crime" and the "offenses established in Articles 3 and 4."[383] Serious crime will be defined in Article 2 based on the maximum sentence of imprisonment associated with that crime in a signatory country, but members of the Ad Hoc Committee have yet to agree on the appropriate number of years of imprisonment required to make a crime "serious."[384] "Organized criminal group" is defined in Article 2 of the draft convention as "a structured group existing for a period of time and having the aim of committing a serious crime in order to obtain, directly or indirectly, a financial

378. These are the activities that were formerly listed in paragraph 3 of article 2 of the draft convention and have now been moved to an attachment. *See* A/AC.254/4/Rev.4, *supra* note 374, at 52-53.

379. The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949, and the International Convention for the Suppression of Counterfeiting Currency of 1929. *See id.*

380. *See id.*

381. *See id.* at 8-9 (comments of Cuba, Estonia, and Greece).

382. *See Report of the Informal Meeting on the Question of the Elaboration of an International Convention Against Organized Transnational Crime, Held at Palermo, Italy from 6 to 8 April 1997: Report of the Secretary-General*, U.N. SCOR, Comm'n on Crime Prevention and Criminal Justice, 6th Sess., Provisional Agenda Item 6(b), addendum at 3, U.N. Doc. E/CN.15/1997/7/Add.2 (1997) [hereinafter E/CN.15/1997/7/Add.2].

383. A/AC.254/4/Rev.4, *supra* note 374, at 2.

384. *See id.* at 4-5.

or other material benefit."[385] The Ad Hoc Committee has yet to agree on whether a minimum number of members of an organized criminal group should be listed, such as three or more persons, and whether the phrase "committing a serious crime" should be further modified by including the phrase "by using intimidation, violence, corruption or other means."[386] Article 2 also contains a proposed paragraph explicitly excluding from the scope of the Convention crimes that are committed entirely within a single state when its perpetrators and victims are also nationals of that particular state.[387]

Article 3 requires that parties criminalize not only the commission of serious crimes, but conspiracy to commit such crimes or aiding and abetting in their commission.[388] This provision would be more meaningful if there were a more definitive list of what constitutes serious crime, or if, as discussed above, a list of the activities of transnational organized crime were included in the text of Article 2. However, the requirement that each signatory establish as a criminal offense "organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime"[389] takes a significant step in recognizing that those chiefly responsible for organized crime are often not the perpetrators alone, but the other links in the hierarchical chains of command.

Article 4 accomplishes what is needed in the way of requiring that signatories harmonize regulation of their banking sectors to guard against money laundering. It requires that all parties proclaim money laundering a crime, no matter what the predicate offense was that generated the money.[390] Article 4 further requires regulation of financial institutions, including periodic examination, lifting of bank secrecy, keeping of clear and complete records, prohibition of secret or anonymous accounts, and reporting of suspicious transactions, *inter alia*.[391] The members of the Ad Hoc Committee are split as to whether Article 4 should mandate adoption of the forty recommendations of the FATF, or merely suggest that parties consider adopting those recommendations.[392] Article 4 also proposes "Measures against corruption," such as criminalization of the offering or giving of bribes to public officials as well as the solicitation or acceptance of bribes by such officials.[393]

Rather than simply referring to the U.N. Model Treaties on Extradition and Mutual Assistance in Criminal Matters, the drafters proposed separate and extensive articles on those two key topics. Article 10, covering extradition, commendably follows the model of the U.N. Drug Convention, making the convention itself serve as a functional extradition treaty between parties even if

385. *Id.* at 2-3.
386. *Id.*
387. *See id.* at 2.
388. *See id.* at 6-7.
389. *Id.* at 7.
390. *See id.* at 8-9.
391. *See id.* at 10-11.
392. *Compare id.* at 11 ("option 1" using the term "should consider"), *with id.* at 12 ("option 2" using the term "shall adopt").
393. *See id.* at 13.

they have not signed a bilateral agreement on extradition.[394] Other notable provisions of Article 10 include the obligation to prosecute a suspect within the country where he is located if an extradition request is refused and the consideration of transferring persons sentenced to serve their sentences elsewhere.[395]

Article 14, dealing with mutual legal assistance, lists the types of assistance which should be afforded. These include taking evidence or statements, effecting service of judicial documents, executing searches and seizures, providing evidence, information, documents, tracing proceeds of crime, facilitating the appearance of witnesses, and any other type of assistance allowed by domestic law.[396] Article 14 then includes some more stringent provisions which are made applicable only to states that are bound by separate mutual legal assistance treaties.[397] Most significantly, Article 14(6) would deny such states the ability to decline to render assistance on the basis of a lack of dual criminality.[398] This would be a significant step forward from the current status of mutual legal assistance treaties, which almost invariably require dual criminality. However, several participants in the drafting negotiations have expressed reservations about eliminating the doctrine of dual criminality from the law of mutual legal assistance.[399] Article 14 also provides that each party designate a central authority for handling requests for mutual legal assistance and sets forth the elements that should be included in such requests.[400]

The Polish draft provided a good starting point. In just two years since the Secretary-General invited initial comments, subsequent working groups have already improved upon the draft significantly, incorporating more directly some of the language from the U.N. Drug Convention and elaborating on measures for cooperation between law enforcement agencies.[401] There seems to be a consensus on the need for a more integrated, cooperative approach. At Naples, only three of the eighty-six participants who addressed the issue of an international convention expressed opposition to the elaboration of a convention.[402] Support was similarly strong among those in attendance at the Ninth Congress on the Prevention of Crime and the Treatment of Offenders.[403] At least twenty countries have committed themselves to concluding an international convention. Other countries will arrive more gradually at a consensus on the details of that approach, but it is not unreasonable to aim for a conclusion shortly after the Tenth U.N. Congress in the year 2000.

Like extradition and mutual legal assistance, several other portions of the draft Convention also pertain to enhanced efforts in bringing organized

394. *See id.* at 21.
395. *See id.* at 22-23.
396. *See id.* at 24-25.
397. *See id.* at 25.
398. *See id.* at 26.
399. *See id.* at 26, n. 136.
400. *See id.* at 27-28.
401. *See* E/CN.15/1997/7/Add.2, *supra* note 382, at addendum 6-9.
402. *See* E/CN.15/1996/2, *supra* note 123, at 21.
403. *See id.*

criminals to justice. Article 6, titled "Prosecution, adjudication and sanctions," encourages parties to ensure that enforcement powers are maximized under domestic law and that long statute of limitations periods are enacted to increase the likelihood that criminals are eventually prosecuted. Article 9 provides that each party establish as a basis for jurisdiction the territory in which the offense is committed and suggests that other bases for jurisdiction may include the residence of the criminal or victim, the place where the offense has substantial effects, or the place where the offense is committed or planned to be committed.[404] Article 15 contains a softened requirement that states institute the practice of using special investigative techniques such as controlled delivery, surveillance, and undercover operations, but only if their domestic legal principles are in accord with such measures.[405] One significant concern among developing countries is the costs associated with such techniques and the need for technical assistance from developed countries.[406] Article 16 deals with transfer of proceedings, but only encourages consideration of that possibility.[407]

Article 19 and 20 address the fifth ideal of establishing improved centralized information gathering and sharing.[408] Much of the language in Article 19 comes from the U.N. Drug Convention, and therefore should not give potential signatories any reason to pause.[409] Article 20 designates the Secretary-General of the U.N., as well as the U.N. Interregional Crime and Justice Research Institute and other institutes of the U.N. Crime Prevention and Criminal Justice Programme as the parties responsible for collecting and researching information on organized crime.[410]

As discussed above, the draft Convention adequately addresses the need to enact laws criminalizing participation and conspiracy rather than simply commission of the activities of organized crime. The draft Convention also contains key provisions regarding freezing and forfeiture of the proceeds of crime. Article 7 covers confiscation of proceeds and requires signatories to enable confiscation, specifically eliminating the obstacle of claiming bank secrecy as a ground for declining to make bank records available or allow assets to be seized.[411] Article 7 goes on to detail the procedures for making a request that another state party confiscate assets, identify, trace and freeze or seize the proceeds of a crime, and for disposing of confiscated assets by contributing them to international organizations combating organized crime or sharing them with other state parties.[412] These provisions are significant steps forward in the fight against organized crime and the scope of Article 7 should not be narrowed even in the face of concern by some countries about the breadth of its requirements.[413]

404. *See id.* at 19.
405. *See id.* at 31.
406. *See id.* at 31, n. 165.
407. *See id.* at 32.
408. *See id.* at 35-38.
409. *See id.* at 35, n. 188.
410. *See id.* at 38.
411. *See id.* at 16.
412. *See id.* at 17-18.
413. *See id.* at 16, n. 88.

Overall, the draft Convention is shaping up well in accordance with what experts have recognized as the key elements of an effective international convention against transnational organized crime. The goal of concluding the negotiations soon after the year 2000 is not unreasonable, particularly if the U.S. takes a more leading role in supporting that goal.

Significantly, the Clinton administration has indicated support for a more integrated, global approach to the problem of transnational crime. In his speech at the fiftieth anniversary of the United Nations, President Clinton focused on the advancement of initiatives against international crime.[414] The U.S. response to Poland's draft convention indicated that "the time had come to give serious consideration to the elaboration of a single new international convention in that area [of combating organized crime]."[415] President Clinton ratcheted up his support for international cooperation in fighting organized crime in his speeches prior to and at the 1998 G-8 Summit.[416] Specific U.S. backing for the U.N. Convention would go a long way toward bringing other countries to the signing table.[417]

Countries that support the general idea of a convention, but have concerns about its implementation voiced them both at the Naples Conference and in response to the draft. Some feel that a new treaty would be inappropriate until existing model treaties on extradition and mutual legal assistance and the U.N. Drug Convention have been fully implemented.[418] Other countries argued that work should begin on a convention even before all countries reached consensus. These countries assert that the process of adopting a forward-looking convention now, even with few signatories, would encourage other countries to come around to agreement with its principles in later years to come. This was the effect the U.N. Drug Convention had: winning wide acceptance of concepts which at first seemed novel to many countries.[419]

Even a somewhat watered-down convention would serve many important functions. An international convention against transnational organized crime would focus attention on the problem, legitimize stiffer domestic law enforcement measures, provide aspirational standards and expectations, facilitate smoother cooperation among states willing to make agreements by increasing harmonization, and have great symbolic force.[420] An international convention would exert a kind of "peer pressure" on countries around the world that have not yet developed effective modalities to combat organized crime.[421] A weak

414. *See* Zagaris II, *supra* note 238, at 1888.

415. E/CN.15/1997/7/Add.1, *supra* note 10, at 5.

416. *See generally* Kiefer, *supra* note 6; Bendavid, *supra* note 6.

417. "The threefold processes of regularization, accommodation, and homogenization by which states transcend the frictions of international law enforcement have hardly been equal or reciprocal. By and large, the United States has provided the models, and other governments have done the accommodating." NADELMANN, *supra* note 191, at 470.

418. *See* A/49/748, *supra* note 359, at 30.

419. *See id.*

420. *See The Feasibility of Elaborating*, *supra* note 11, at 149-53.

421. *See* E/CN.15/1996/2, *supra* note 123, at 19. Japan represents one illustration of the effectiveness of such "peer pressure" from the international community. The Japanese government's

international convention is certainly better than nothing, which is what presently exists between some governments, who are unable to reach bilateral agreements due to political hostilities or other differences.[422]

D. *Necessary Concurrent Measures*

As efforts to reach consensus on a universal convention against organized criminal activity continue, states should form more effective bilateral and multilateral arrangements in preparation for a more integrated approach.[423] Concluding an international convention does not preclude regional and bilateral arrangements. Rather, these three levels should operate in a complementary way, creating a global "net" or "web" to catch organized criminals.[424] The steps involved in this approach would involve gradual harmonization in criminal justice systems, elimination of safe-haven states, and coordination among existing law enforcement and policy-making bodies, such as Interpol, the Schengen Group, and the Commission on Crime Prevention and Criminal Justice.[425] This has been termed the "thickening web" strategy, referring to the overlapping bilateral, multilateral, and regional arrangements for combating the global problem of organized crime.[426] The hope is that these various instruments will be complementary and synergistic rather than confusing and contradictory. An international convention in tandem with these bilateral and regional arrangements will improve coordination and hopefully avoid the likelihood that the array of arrangements will become "a rather untidy mix of global, regional, and bilateral arrangements, established without a great deal of thought given to the overall pattern."[427] The thickening web approach without a concurrent international convention also means that legitimate state authorities will fail to catch up to the level of integration and cooperation that already exists among the various illegitimate criminal organizations. Another, more modest concurrent step is expansion and harmonization of domestic laws on organized crime.[428]

Other concurrent measures necessary for an effective campaign against international organized crime include technical assistance, joint training programs, and centralized repositories for information about organized crime. A convention alone will not be sufficient to end the problem of organized crime globally. Technical assistance to developing countries and countries in transition will allow them to develop laws and enforcement procedures that are up to par with

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recent efforts to pass tighter laws against organized criminal activity came in response, in part, to encouragement from foreign governments. *See* Tatsuya Fukumoto, *Gov't Looks at Bills to Fight Organized Crime*, THE DAILY YOMIURI, Mar. 11, 1999, at 3.

422. *See* NADELMANN, *supra* note 191, at 9.

423. *See Most Effective Forms*, *supra* note 4, at 87.

424. *Special Double Issue on the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach*, CRIME PREVENTION AND CRIM. JUST. NEWSL. (visited Jan. 12, 1996) <http://www.ifs.univie.ac.at/~uncjin/newsl24.htm>.

425. *See Most Effective Forms*, *supra* note 4, at 88-89.

426. *See The Feasibility of Elaborating*, *supra* note 11, at 141.

427. *Id.* at 142.

428. *See* KERRY, *supra* note 4, at 188.

internationally-approved standards.[429] As a step in this direction, the United States founded the International Law Enforcement Academy in Budapest in 1996 to provide training and allow increased interaction among law enforcement officials from Eastern Europe and Eurasia.[430] The United States and the United Nations have taken the lead in providing training for foreign law enforcement, particularly in developing countries and countries in transition.[431] The Naples Plan included setting up a task force to examine the possibility of establishing an international training center for law enforcement personnel.[432] Some efforts attempt to expand interaction and training programs to include representatives from all countries with common organized crime-related concerns[433] and to leverage assistance funds from individual countries through U.N. and international programs. In the course of negotiating the draft Convention Against Transnational Organized Crime and its protocols, representatives of many developing countries have emphasized the need for technical assistance and welcomed the provisions of the draft Convention that encourage such assistance.[434]

Within the U.N., there has been increased discussion since Naples of creating a central database containing information from all nations on their national legislation, their participation in bilateral and multilateral agreements, and their intelligence about criminal organizations, leaders, and activities.[435] The database would build on information already gathered by Interpol.[436]

Finally, a convention will only be effective if every signatory fulfills its commitment to enact provisions against international organized crime and to cooperate in investigation, prosecution, and forfeiture proceedings. Even if a majority of the U.N. members were to ratify such a convention, some states would continue to be reluctant or unable to truly combat the criminals. Myanmar, for example, acceded to the U.N. Drug Convention, yet its government continues to involve itself in the large-scale drug trade that goes on in its territory.[437] Some within the U.S. government have proposed identifying countries who fail to adhere to existing international conventions that relate to organized criminal activity and imposing sanctions on those who have failed to act for lack

429. *See Most Effective Forms*, *supra* note 4, at 96-97.

430. *See 1996 Hearing*, *supra* note 18, at 22-23 (testimony of Edward L. Federico, Jr., Director, National Operations Division, Criminal Investigation, IRS).

431. During Fiscal Year 1995, the FBI trained 4,400 foreign law enforcement personnel. During the first few months of 1996, 212 Russian police officers attended U.S. training seminars in Russia and at the FBI academy in Quantico. *See id.* at 126, 129 (statement of Jim E. Moody, Deputy Assistant Director, Criminal Investigative Division, FBI).

432. *See* A/CONF.169/5, *supra* note 364, at 17.

433. *See 1996 Hearing*, *supra* note 18, at 131 (statement of Jim E. Moody, Deputy Assistant Director, Criminal Investigative Division, FBI).

434. *See* A/AC.254/9, *supra* note 372, at 5 (representatives of Algeria spoke for members of the Group of 77 and China at the first session of the Ad Hoc Committee in expressing the need for long-term assistance).

435. *See, e.g.*, E/CN.15/1996/3, *supra* note 261, at 19.

436. *See id.*

437. *See* KERRY, *supra* note 4, at 174.

of will.[438] Those who have failed not due to a lack of will but a lack of resources would receive assistance instead.[439]

Concluding an international convention against transnational organized crime represents only one step—but an essential one—in the overall effort to create a seamless web of legal measures to counteract the growing problem. An international convention assures that resources of wealthier countries are pooled in providing technical assistance to less developed countries. A convention overarches national and regional efforts, providing a greater degree of coordination and harmonization. Finally, an international convention identifies targets for "peer pressure" by other members of the international community to join in the fight against organized crime or lose standing in the international community. The efforts so far to elaborate an international convention are encouraging and should receive continued support by states that are typically seen as world leaders. National governments should not forsake their other efforts, but should complement them with assistance and support for the elaboration of an international convention against transnational organized crime by the end of the year 2000.

438. President Clinton proposed sanctions on countries that fail to comply with the FATF's 40 recommendations on anti-money laundering actions. *See* Zagaris II, *supra* note 238, at 1889. Senator Kerry proposes dividing nations into three categories: "A normal state is one with the will, desire, and resources to cooperate in the struggle against global crime . . . others, like Russia and China, where corruption is rife . . . can be worked with, and must be . . . . [A] criminal state, like Myanmar or Noriega's Panama is one in which the government is actively involved in activities that are criminal by common international consent." For the middle category, Kerry recommends identification and assistance to the institutions that are willing to combat crime. For the last category, Kerry suggests imposing limitations on travel, trade, and access until they take measures to "justify readmittance to the community of nations." *See* KERRY, *supra* note 4, at 174-75.

439. *See id.*

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Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors

Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors

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I.
PREFACE

This study of judges and prosecutors in Bosnia and Herzegovina (hereinafter "BiH") is the first report in a multi-year study undertaken by the University of California, Berkeley, Human Rights Center regarding the relationship between justice, accountability and reconstruction in the former Yugoslavia.[1] The Human Rights Center conducts interdisciplinary research on emerging issues in international human rights and humanitarian law. The International Human Rights Law Clinic at the University of California, Berkeley School of Law (Boalt Hall) and the Centre for Human Rights at the University of Sarajevo collaborated with the Human Rights Center to conduct this study. The International Human Rights Clinic engages law students in projects designed to promote and strengthen human rights protections in national, regional and

1. This study is part of Communities in Crisis, an interdisciplinary, multi-institutional project of the Human Rights Center, University of California, Berkeley that is examining the relationship between the pursuit of international justice and local approaches to social reconstruction in the aftermath of genocide in Rwanda and the former Yugoslavia. Communities in Crisis seeks the following policy outcomes:

- To provide national and international policy makers, including those associated with the *ad hoc* tribunals and the International Criminal Court, with the first transnational study of the relationship between the pursuit of justice by international tribunals and local efforts at social reconstruction;
- To encourage transnational coalition building among university researchers and activists on issues of justice, development, and reconstruction;
- To broaden conceptions of accountability so as to foster community-based projects that combine advocacy for human rights with economic, social, and development programs; and
- To support the active participation of communities in researching their needs and developing programs.

international fora. The Centre for Human Rights seeks to build capacity within BiH to conduct human rights research as well as to integrate the study of human rights into university curricula.

Clinical Professor Harvey Weinstein, Associate Director of the Human Rights Center, Lecturer-in-Residence Laurel Fletcher, Associate Director of the International Human Rights Clinic and Ermin Sarajlija, then Acting Director of the Centre for Human Rights directed this project with the participation of Clinic interns Damir Arnaut, Daska Babcock-Halaholo, Kerstin Carlson, Brian Egan, Anne Mahle, Joyce Wan and Nazgul Yergalieva as well as Bosnian law students Edisa Peštek, Gordan Radić and Tamara Todorović. Professor Zvonko Miljko, University of Mostar (West), Assistant Elmedin Muratbegović, Univesity of Sarajevo and Professor Rajko Kuzmanović, University of Banja Luka served as faculty liaisons to the researchers during the field work portion of the study. The report was written by Professors Fletcher and Weinstein and Clinic interns Arnaut, Babcock-Halaholo, Carlson and Mahle. The researchers gratefully acknowledge the significant contribution of the staff of the Centre for Human Rights in Sarajevo, Acting Director Dino Abazović, Librarian and Archivist Saša Madackić and Progamme Officer Aida Mehiević.

II.
Executive Summary

This report describes the findings from an interview study conducted in June, July and August of 1999, of a representative sample of thirty-two Bosnian judges and prosecutors with primary or appellate jurisdiction for national war crimes trials. The purpose of this study was to assess the understanding of attitudes among these legal professionals towards the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "Tribunal") and prosecution of war crimes. We sought to clarify objections and resistance to the ICTY by examining: (1) the acceptability of international justice; (2) the factors that may contribute to misunderstandings or non-acceptance of international criminal trials; and (3) the perceptions of the relationship between criminal trials and social reconstruction. Based on our analysis of the findings we offer recommendations to strengthen the relationship between the Tribunal and the Bosnian legal community.

Our findings suggest that across national groups, participants supported the concept of accountability for those who committed war atrocities. Yet, the extent of support for the ICTY varied by national group. Participants generally lacked a clear understanding of the procedures of the Tribunal and were poorly informed about its work. However, all desired impartial information about the Tribunal with legal content, since judges and prosecutors had limited or no access to legal publications from or about the ICTY. A universal criticism of the ICTY by legal professionals was that they perceived their sporadic contact with the Tribunal as a sign of disrespect. Moreover, they expressed several areas of concern with the ICTY: its unique blend of civil and common law procedures; the way in which cases are selected; the way in which indictments are issued –

particularly sealed indictments; the length of detention and trials; and the evidentiary rules applied by the Tribunal. In some of these areas, participants of particular national groups expressed reservations unique to that national group. For example, the Bosnian Serb and Bosnian Croat participants disapproved of or questioned the use of sealed indictments. Further, virtually all participants in these two groups expressed concern that the ICTY was a "political" organization; in this context, "political" meant biased and thus incapable of providing fair trials.

Several themes and topics emerged on which participants across all national groups expressed consistent views, including:

Professionalism: Participants consistently emphasized their strong adherence to high professional standards, and associated professionalism with the strict application of legal rules to a particular case.

Justice: Participants supported the principles of justice and the impartial application of the law, even in instances in which the judicial verdict ran counter to public opinion.

Western European Legal Tradition: Participants viewed the Bosnian legal system as part of the Western European legal tradition and supported reform of the legal code to make it consistent with that of the developed European democracies.

Corruption and Decline in Standards: Participants denounced corruption – which they defined narrowly as bribery – in the legal profession in general and emphasized that they and their immediate colleagues did not engage in corrupt practices. Nevertheless, judges and prosecutors expressed grave concern about the impact on the legal profession of the loosening of professional standards during the war and the decline in the social status of the profession.

Politics: Participants cited financial dependence on the legislature as the primary threat to the independence of the judiciary. Judges and prosecutors denounced the destructive effects of political parties on the judicial system.

International Community: Participants supported efforts of the international community to strengthen the independence of judges and prosecutors. However, legal professionals criticized international organizations operating in BiH, commenting that international representatives frequently were unfamiliar with the Bosnian legal system and acted arbitrarily to impose external rule on the country and its legal institutions.

The impact of national identity clearly became evident as participants discussed their views regarding national groups; the role of the State; responsibility and accountability for the war; genocide; the role of the ICTY and the future of BiH. For example, with regard to genocide, Bosniak participants primarily believed that Serb forces had committed acts of genocide against Bosniaks while Bosnian Serb legal professionals generally stated either that they did not have sufficient information to give an opinion or that genocide was committed by all three

sides. As well, most Bosnian Croat participants stated that acts of genocide occurred on "all three sides."

The implications of these findings are considered in Discussion (§ V). Based on our findings and analysis we recommend that the appropriate authorities:

- *enact* legislation that ensures the independence of the judiciary in both entities in BiH;
- *institutionalize* regular and sustained professional contact between legal professionals in each entity;
- *adjudicate* war crimes trials in each entity by a panel of three judges, one of whom should be a judge who is not a citizen of BiH or of any of the states of the former Yugoslavia;
- *pursue* the option of conducting ICTY trials on the territory of BiH supported by a rigorous protection program for witnesses, judges and legal professionals;
- *amplify* the ICTY outreach program;
- *examine* a range of alternatives to criminal trials to promote social reconstruction through the organization of an inter-entity council sponsored by the Office of the High Representative ("OHR"); and
- *incorporate* appropriate International Criminal Court (hereinafter "ICC") mechanisms to ensure transparency and accessibility with attention paid to the needs and concerns of the directly affected communities and their legal practitioners.

III.
INTRODUCTION

"The court was formed in Nuremberg where the war criminals were tried, and after that and despite that, the war criminals appeared throughout the world. And it will be so in the future. They cannot be deterred."

Bosnian Judge

"The Hague Tribunal doesn't serve justice. Look at that war criminal, Erdemović, who received five years for killing over seventy people. It is unjust that he should receive such a light sentence."

Woman of Srebrenica

"You cannot correct The Hague when it was planted and rooted badly. It was wrong in how it was established, structured, and funded. We want to relieve [former ICTY Prosecutor Louise] Arbour and have them tried here – but in what courts? They would be obstructed by the entire structure."

Bosnian Journalist

"People do not have confidence in the Tribunal. But it is the only light at the end of the tunnel. Without it, there would be no justice and this would be the final betrayal."

Bosnian Magazine Editor

The purpose of this study was to examine issues raised in four distinct areas:

(1) Is international justice acceptable to judges and prosecutors who work within a national framework?
(2) What factors contribute to misunderstandings or non-acceptance of international criminal trials?
(3) How do judges and prosecutors in Bosnia and Herzegovina perceive the relationship between criminal trials and social reconstruction?
(4) What processes can be put into place to facilitate the acceptance by the national legal system of an international court?

A. The Problem

This report is part of a larger study examining traditional assumptions regarding justice, accountability, and reconstruction in the aftermath of mass violence and genocide. Although the international community has paid much attention to conflict resolution and diplomatic mechanisms of violence prevention, it has devoted less attention to identifying the necessary aspects of the process of rebuilding a country torn apart by sectarian strife.[2] After initial humanitarian intervention has provided the necessities for survival, long-term development traditionally has focused primarily on economic factors while ignoring the social and psychological issues that precipitated the violence or arose as its consequence. How postwar societies understand the past, assign responsibility for atrocities committed and struggle to reconstruct divided communities is a multifaceted process about which there are many opinions but little understanding. Further, although conventional wisdom holds that criminal trials promote several goals, including uncovering the truth; avoiding collective accountability by individualizing guilt; breaking cycles of impunity; deterring future war crimes; providing closure for the victims and fostering democratic institutions, little is known about the role that judicial interventions have in rebuilding societies.[3]

In May 1993, the United Nations Security Council created an ad hoc international tribunal to try alleged perpetrators of war crimes committed since 1991 in territory the former Yugoslavia.[4] As noted in an ICTY document, one of its goals is to serve "as a means to assist in reconciliation and to prevent a recurrence of conflict."[5] However, unlike the Nuremberg and Tokyo tribunals, the ICTY is not the product of "victor's justice." The Tribunal, established under the auspices of the international community, has been charged with the prosecution of war crimes committed by all parties to the conflict. Nevertheless, as we

2. CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, PREVENTING DEADLY CONFLICT (Dec. 1997).

3. MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 6-10 (1997).

4. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

5. International Criminal Tribunal for the former Yugoslavia, Office of the President, Outreach Program Proposal (1999) (unpublished report, on file with the *Berkeley Journal of International Law*)[hereinafter Outreach Program Proposal].

will indicate, many Bosnian Croat and Bosnian Serb legal professionals – members of national groups whose armed forces the international community has condemned as carrying out massive war atrocities – have dismissed the ICTY as a "political" court. Thus, the ICTY is plagued by a crisis of legitimacy in Bosnia.

Citizens of BiH from all national groups express ambivalence towards the ICTY. Many see the Tribunal as a critical step towards justice, while others see it as a manifestation of outside interference.[6] Coupled with this concern, many Bosnians and international organizations question the ability of the national judiciary, both in the Federation of Bosnia and Herzegovina (hereinafter "Federation") and in the Republika Srpska (hereinafter "RS"), competently to prosecute war criminals in a non-partisan manner. Finally, since the recently-established ad hoc Tribunals (the ICTY and the International Criminal Tribunal for Rwanda) are holding the first international trials since the Second World War, yet take place in a radically different context, their effect on domestic war crimes trials and their relationship to the domestic judiciary has still yet to be fully understood.

The ICTY procedures and rules of evidence were patterned primarily after the common law system, one unlike the civil law tradition of BiH. The international tribunals at Nuremberg and Tokyo created procedural rules that borrowed from the civil and common law systems. In contrast, the ICTY adopted a "largely adversarial" approach to its proceedings.[7] As the first president of the Tribunal explained, the judges wanted to remain "as neutral as possible" and therefore rejected most aspects of the civil law system, a system that allocates to the judge the primary task of investigating allegations and gathering the necessary evidence.[8] We postulated that the choice of procedural rules might have important implications for how accessible the Tribunal appeared to Bosnian judges and prosecutors. Yet there has been little systematic study on the impact that the choice of the rules of evidence and procedure has had on the perceptions of the international body by Bosnian legal professionals.

Despite the challenges posed by international criminal tribunals, United Nations support for international criminal prosecutions is growing, as demonstrated by the recent creation of the statute for a permanent International Criminal Court.[9] The involvement of the international community in the recent wars in the Balkans marks an important shift toward international intervention in con-

6. The Human Rights Center at University of California, Berkeley, conducted an informal survey of nongovernmental organizations (hereinafter "NGO's"), journalists, academics, survivors and representatives of international organizations in BiH in the summer of 1998 that defined the scope and nature of this project.

7. Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, Summary of Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia, Address at a Briefing to Members of Diplomatic Missions (Feb. 11, 1994) *in* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 650-51 (1995).

8. *Id.*

9. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998); also available at <www.un.org/law/icc/index.htm>.

flicts based on humanitarian reasons. Indeed, subsequent interventions in Kosovo and East Timor are recent examples of further erosion of the traditional impunity offered by state sovereignty. The question remains on what basis and where the world community will intervene, but it is apparent that state sovereignty no longer provides the shield against outside intervention that it once did.

International intervention in armed conflict has been linked increasingly to international prosecution for humanitarian law violations committed during such episodes. In addition, the opinion of world leaders and diplomats has coalesced around the idea that international criminal prosecutions are integral to the process of reconciliation in a country that has been torn apart by violence.[10] Comments by Tribunal officials and legal scholars indicate that they too have embraced this larger aspiration – an attribution of the influence of the court that moves beyond the narrowly focused legal mandate of adjudicating criminal trials.[11] Seven years after the inception of the ICTY, much and little has changed. Despite the continuing resistance of some countries and politicians to cooperate with the Tribunal, the number of arrests has increased and with additional resources, the Tribunal is now firmly established. This is an opportune time to reexamine the policies and practices instituted when the Tribunal was established in the midst of war.

B. The Bosnian Judicial System and the ICTY

The ICTY has primary jurisdiction for war crimes prosecutions. Nevertheless, a well-functioning national judicial system in Bosnia is critical to any widespread and systematic effort to prosecute accused war criminals. The sheer

10. Upon the conviction of Jean-Paul Akayesu, the Office of the Press Secretary at the White House stated: "Reconciliation, security, and regional development will take hold . . . only when the cycle of violence has been broken and accountability established." Office of the Press Secretary, The White House (Sept. 3, 1998) (visited May 9, 2000) <http//:www.pub.whitehouse.gov/>; "Reconciliation cannot begin when justice is delayed for the guilty. As long as justice remains fleeting, the perception of guilt will remain and the difficult process of national reconciliation will end before it has a chance to begin." U.S. Ambassador to the United Nations, Bill Richardson, *No Peace Without Justice*, report from the DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, Rome, Italy (July 15-17, 1999); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice*, 59 AUT LAW & CONTEMP. PROBS. 9, 23 (1996). *See also* M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia,* 5 CRIM. L. F. 279, 339 (1994); Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics,* 5 CRIM. L. F. 341, 344, 374 (1994).

11. Gabrielle Kirk McDonald, former President of the ICTY stated: "[T]hrough this process, it is our hope that we will deter the future commission of crimes and lay the groundwork for reconciliation. I do not expect the Tribunal to . . . somehow magically create reconciliation, but at least we can lay the groundwork." Interview by Eric Stover and Christopher Joyce, with Judge McDonald in The Hague, The Netherlands (July 26, 1999); "This judicial process is essential for reconciliation to begin." Richard Goldstone, *Ethnic Reconciliation Needs the Help of a Truth Commission*, INT'L HERALD TRIB., October 24, 1998. In addition, the UN Legal Counsel and Under-Secretary General for Legal Affairs Carl-August Fleichhauer stated: "These three important goals [ending war crimes, holding perpetrators accountable and breaking the cycle of ethnic violence and retribution] are intertwined in the fundamental reason for the establishment of this Tribunal . . . ." *quoted in* Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, 5 CRIM. L.F. 341, 374 n.137 (1994). *See* Theodore Meron, *Answering for War Crimes, Lessons from the Balkans (ICTY)*, FOREIGN AFF., Jan./Feb. 1997 at 2-8.

numbers of potential defendants and the resources needed to conduct such trials would overwhelm the capacity of the ICTY. Consequently, accountability for large numbers of war crimes violations will require the active participation of the national courts in BiH.[12] Yet many Bosnians and representatives of international organizations ask whether the national judicial system is able to meet this challenge.

Complicating this task is the 1996 agreement between the three signatories of the Dayton Peace Agreement (Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia) titled the "Rome Agreement" or the "Rules of the Road."[13] According to this document, Bosnian authorities must submit case files of accused war criminals to the ICTY Office of the Prosecutor (hereinafter "OTP") for review and approval before proceeding with the arrest and trial of such persons. Initially, due to lack of funding, the OTP did not have the resources to conduct an expeditious review of files. As a result, Bosnian judges and prosecutors initiating war crimes trials confronted exasperating delays. At the time of this study, the review process remained a sensitive issue. The initiation of national war crimes trials is an area in which the BiH legal system and the ICTY intersect. Given the tension surrounding this procedure, we hope to shed light on the manner in which Bosnian judges and prosecutors perceive this institutional arrangement.

Concerns about the Bosnian judicial system have come from such diverse sources as the United Nations Mission in Bosnia and Herzegovina (hereinafter "UNMIB"),[14] the International Crisis Group (hereinafter "ICG"),[15] OHR,[16] the Judicial System Assessment Programme of the United Nations (hereinafter "JSAP")[17] and the European Stability Initiative (hereinafter "ESI").[18] Criti-

12. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59-AUT LAW & CONTEMP. PROBS. 127, 133-34 (1996).

13. The Rome Agreements were signed on Feb. 18, 1996 in Rome, Italy. They can be found at <http://www.nato.int/ifor/rome/rome2.htm>.

14. In July 1999, Elizabeth Rehn was reported as saying that Bosnia was becoming: "An El Dorado of organized crime." She indicated her belief that judges were corrupt, prosecutors afraid and witnesses intimidated. RFE/RL NEWSLINE July 26, 1999. <http://www.rferl.org/newsline/1999/07/260799.html>.

15. INTERNATIONAL CRISIS GROUP, RULE OVER LAW: OBSTACLES TO THE DEVELOPMENT OF AN INDEPENDENT JUDICIARY IN BiH, ICG Report No. 72 (1999) [hereinafter ICG REPORT RULE OVER LAW]; INTERNATIONAL CRISIS GROUP, RULE OF LAW IN PUBLIC ADMINISTRATION: CONFUSION AND DISCRIMINATION IN A POST-COMMUNIST BUREAUCRACY, ICG Balkans Report No. 84 (1999).

16. *Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations*, Office of the High Representative, para. 65 (March 14, 1996); para. 113 (April 14, 1997); para. 92 (July 11, 1997); para. 69 (Jan. 16, 1998); para. 81, 82 (April 9, 1998); para. 99, 100 (July 14, 1998); para. 83 (Oct. 14, 1998); para. 68 (Feb. 12, 1999); para. 64, 68, 100 (May 7, 1999); para. 43, 48, 49 (July 16, 1999); para. 56, 57, 59, 61, 65 (Nov. 11, 1999).

17. UNITED NATIONS MISSION IN BOSNIA AND HERZEGOVINA [hereinafter UNMIB], JUDICIAL SYSTEM ASSESSMENT PROGRAMME [hereinafter JSAP], REPORT FOR THE PERIOD NOVEMBER 1998 TO JANUARY 1999 (1999); UNMIB, JSAP, THEMATIC REPORT III: ON ARREST WARRANTS, AMNESTY AND TRIALS *In Absentia* (December 1999); UNMIB, JSAP, COMMENTS ON THE INDEPENDENCE OF THE JUDICIARY (February 2000).

18. EUROPEAN STABILITY INITIATIVE, RESHAPING INTERNATIONAL PRIORITIES IN BOSNIA AND HERCEGOVINA: PART ONE, BOSNIAN POWER STRUCTURES (1999).

cisms have focused on lack of judicial accountability; corruption of judges and judicial ministries; intimidation by nationalist political parties and criminal elements; lack of enforcement of judicial decisions by police; political resistance to a unified judicial system in the Federation; poor inter-entity cooperation; financial dependence of judges on the political system; politically-influenced judicial appointments; inexperienced judges; lack of resources for efficient management and poor distribution of relevant legal material. These problems reflect the transition from the Communist system based on patronage and control as well as the profound effects of the war that damaged infrastructure and economic stability. These observations suggest that there are vulnerabilities within the Bosnian legal system that influence its relationship to the Tribunal.

Attempts to address these identified problems have been undertaken by several international organizations such as JSAP, OHR, the Council of Europe, the Central and Eastern European Law Initiative of the American Bar Association (hereinafter "ABA/CEELI"), and the International Human Rights Law Group. These initiatives have focused on education of judges on the European Convention on Human Rights and international human rights and humanitarian laws as well as monitoring of trials to assess whether they meet international standards. The success of these efforts has not been evaluated. More importantly, there has been no formalized attempt to ascertain the views of Bosnian legal professionals regarding the professional capacity and/or problems of the Bosnian judicial system, or their impressions of the educational interventions undertaken by the international community. This study represents the first attempt to gather systematic data on these important issues.

C. The ICTY Outreach Program

Effective collaboration between a national judiciary and an international tribunal depends in part on the integrity of each judicial institution and on the mechanisms of communication established between the two structures. Beginning in 1997, Judge Gabrielle Kirk McDonald, then President of the ICTY, became increasingly concerned about the gap that existed between the Tribunal and those most affected by its decisions: the peoples of the former Yugoslavia. With the realization that the Tribunal was viewed negatively by many in the Balkans, President McDonald invited a group of legal professionals to The Hague in October 1998, to observe the Tribunal and its workings first-hand.[19]

Further, in November 1998, President McDonald sent a group of ICTY staff to Bosnia to assess the problem of a lack of understanding of the Tribunal among the people. The mission members reported a "strong desire" for information and direct involvement with representatives from the Tribunal and they proposed the creation of an Outreach Program located within the Office of the Registrar and urged that the capacity of the Public Information Unit be enhanced. With a focus on disseminating accurate information and increasing dialogue, the program is "intended to engage existing local legal communities and

19. Outreach Program Proposal, *supra* note 5.

non-governmental organizations, victims' associations, and educational institutions."[20] In 1999, the Outreach Program opened offices in Zagreb, Croatia and Banja Luka, BiH.

The Outreach Program has the potential to ameliorate the schism in understanding between the ICTY and the people of the former Yugoslavia. In light of the critical role that the national legal system plays in the internationalized framework for criminal justice, it will be necessary to win the support of Bosnian judges and prosecutors. This project was undertaken, in part, to strengthen this objective.

D. Methodology

The project employed qualitative methods to allow the judges and prosecutors to discuss their views in response to a series of open and closed-ended questions. Qualitative research uses methods including observation, study and analysis that can illuminate experience in ways that surveys or more quantitative approaches do not. Data is gathered through interviews, focus groups, field observations, participant observation and analysis of published sources of information. The advantage of the approach is the richness of the information obtained; the principal disadvantage is that the sample is non-random and that careful attention must be paid to such issues as validity and bias.

(1) Study Design: The field research consisted of in-depth, semi-structured interviews of thirty-two judges and prosecutors during June, July and August of 1999, in BiH. The length of the interviews ranged from two to six hours. Trained teams of researchers conducted the interviews. There were three teams, each consisting of two researchers (one from the United States, one from BiH) and a faculty liaison. One team, based in Sarajevo, primarily interviewed participants in the Bosniak-majority areas of the Federation (the "Sarajevo Group"). The Bosnian researcher and faculty liaison were Bosniaks. Another team, based in Banja Luka, interviewed participants exclusively in the Republika Srpska and in Brčko (the "Banja Luka Group"). The Bosnian researcher and faculty liaison were Bosnian Serbs. The final team, based in Mostar, primarily interviewed participants in the Bosnian Croat-majority areas of the Federation (the "Mostar Group"). The Bosnian researcher and faculty liaison were Bosnian Croats. Faculty liaisons were recruited from the universities of Sarajevo, Banja Luka and Mostar (West).

(2) Sample: Criteria were developed to ensure a representative sample of judges and prosecutors. These criteria included:

> (a) *Jurisdiction*: For the Sarajevo Group, of the twelve interviews, seven were with judges in cantonal courts, courts of first instance for war crimes trials; two with judges from the Federation Supreme Court, which has appellate jurisdiction for such cases and one with a judge from the Federation Constitutional Court. The final two interviews were with prosecutors with jurisdiction to seek indictments for war

20. *Id.*

crimes. For the Banja Luka Group, of the ten interviews, three were with judges in the basic courts, courts without jurisdiction for war crimes cases; three were with judges in district courts, courts which have jurisdiction for war crimes cases; and two were with judges from the RS Supreme Court. The final two interviews were with prosecutors; one had jurisdiction to seek indictments for war crimes and one did not. For the Mostar Group, of the ten interviews, four were with judges in the basic court, courts of first instance for war crimes trials in the region; four were with judges in the cantonal courts, courts with appellate jurisdiction of war crimes trials in the region; and the final two were with prosecutors, one of whom had jurisdiction to seek war crimes indictments and the other was a cantonal prosecutor who represented the state in appellate review of such trials.

(b) *Geographic Distribution*: Judges and prosecutors were selected from the various regions of BiH.

(c) *Demography*: Age, level of experience and gender were considered in selection of judges. Membership in a particular national group was not a selection criterion. Nevertheless participants belonged overwhelmingly to the national group that constituted a majority in that particular area.

(3) Questionnaire: The researchers created a semi-structured questionnaire of forty-five items.[21] The items were translated into the appropriate languages and then back translated to ensure accuracy. The questionnaire was reviewed by all team members and was pre-tested. Topic areas included:

(a) Demographics: education and legal experience; personal background; national background and the impact of the war;

(b) Role of the judge/prosecutor and courtroom process in BiH;

(c) Domestic effects of the ICTY: legal definitions of accountability and the rule of law; social reconstruction and war crimes; genocide; the role of the Dayton Accords and international law; and perceptions of the ICTY, including its goals, choice of those indicted, knowledge of specific trials and Rules of the Road, sources of information about the ICTY, and its effects on the participant's legal practice as well as on the country as a whole;

(d) Domestic war crimes trials, including procedures, personal experience with war crimes trials and the effects of such trials; and

(e) Hopes for the future.

We were concerned that the sensitive nature of some of the questions would hinder open and honest responses. Therefore interviewees were assured of confidentiality in their answers and all members of the research team, including translators, signed pledges of confidentiality. Interviews were carried out in the privacy of the participants' offices except where the judge or prosecutor preferred another setting. Furthermore, we have not identified the sources of

21. *See* Appendix A.

any quotations used in this report to protect the confidentiality of the participants.

(4) Study Limitations: As a qualitative study, the data may be limited by the small size and non-random nature of the sample. The trade-off is the depth of the information reflected in almost 150 hours of transcribed interview material. By establishing clear criteria, every effort was made to assure that the sample was representative. Since the faculty liaisons contacted the interviewees, it is possible that selection bias was present. Other possible threats to validity include the small number of women interviewed, the need to work through interpreters, as well as the possible need of the legal professionals to present themselves in a favorable light to Western researchers. Cultural and national biases of interviewers, interpreters and the researchers must always be kept in mind when these data are analyzed. Since most of the legal professionals were male and five of the six interviewers were female, gender bias may have influenced the interviewee responses. The accuracy of the translation of the participants' comments was improved by the presence of a Bosnian researcher and an interpreter in every interview. Further, all taped interviews were reviewed by a native speaker to assure accuracy of translation.

(5) Analysis: Each interview was taped, transcribed and checked for accuracy. Field observations were noted and recorded. Within each team, every interview was reviewed separately by each team member and coded according to key concepts developed by the research group. In addition, the University of California project directors and a member of each team reviewed the interview transcripts of all three teams. Team members reviewed their coding together and finally, cross-team comparisons were conducted.

IV.
FINDINGS[22]

Our sample consisted of twenty-six judges and six prosecutors.[23] They were predominately of middle age and had occupied their positions for several years prior to the onset of the war. For the judges, the median number of years on the bench was 13.5. The prosecutors had occupied their positions for a median of seventeen years. Nine of the participants were Bosnian Serb, twelve were Bosnian Croat and eleven were Bosniak. The principal limitation of the study was the small number – only six – of female participants. Among the judges, forty-two percent lost their housing and seventy-three percent reported that a relative had been injured or killed during the war. Thirty-three percent of the prosecutors had lost their homes and a similar percentage indicated injury or death of relatives.

22. We have attempted to describe accurately the significant themes that emerged among participants. Where it is helpful to illustrate important differences of perception, we have provided precise numerical data regarding the responses.

23. *See* Appendix B, Tables 1 and 2.

A. *Common Themes Among Participants in the RS and in the Federation*

1. *Participants Identify as Professionals*

All participants highlighted the importance of professionalism. This theme, commonly found among participants in both entities, is an important finding because it was one of the few areas on which all agreed. Participants equated professionalism generally with pride in work, strict adherence to legal rules, impartiality, objectivity and the independence of the judiciary. Participants also used the term "professionalism" to refer to a duty to support, uphold and enforce the rule of law as well as the social norms of fairness and equity. Further, the interview data suggest that these aspirations for their professional role were intimately bound up with participants' social status and self-definition.

The judges and prosecutors described their work as involving the strict and objective application of legal rules to a particular case. Participants explained that the primary role of the judge and prosecutor in the civil law system was to determine which provision of the legal code applied to the case at hand. Judges and prosecutors frequently referred to the legal code as the basis of legal authority which they were duty-bound to apply. Thus, they viewed the essence of their professional competence as the ability solely to select and apply the appropriate law.

One example that demonstrates how judges and prosecutors understood the limits of their professional roles lies in the area of refugee returns. Participants made a clear distinction between the prerogatives of politicians to define the conditions under which refugees could return and their own roles in applying property rights for returning refugees as defined in the legal code. No participant indicated that a judge was empowered to interpret the law beyond that which was written in the code. For example, when asked what role a judge might play in facilitating refugee returns, one participant responded: "The court is an independent body and has no active role in the return of refugees. But it does have a role in the case of disputes of which I mean, personally, I can only speed up the process of bringing a person's case to court, that is all I can do."[24]

Participants defined professional status to include their external presentation and professional conduct. The role of a legal professional in the community was defined by how and where one is seen in public, adherence to high standards of morality and conduct and professional dignity. For example, several participants remarked that judges must choose "with care" the restaurants they frequented since their appearance in public reflected their degree of professionalism.

Participants also were concerned about the moral and ethical standards that enhanced the dignity of the profession. Participants described the importance of professional integrity and each averred that they met their own high standards of judicial professionalism. Participants identified lack of impartiality, corruption, lower expectations for newcomers to the legal profession, and political pressures

24. The quotes provided may have been modified through correction of grammar in order to make the meaning clear.

leading to a lack of independence on the part of legal professionals as unacceptable characteristics and problem areas in the Bosnian judiciary.

2. *Belief in the Principles of Justice*

All participants valued the ideal of justice. Many reported that the Bosnian legal system supported this principle. As proof, participants pointed to the legal code as the embodiment of this normative value. Participants generally equated justice with the equal application of law. In accordance with the principles of professionalism, they stated that the personal beliefs, attitudes or morals of the individual judge or prosecutor were irrelevant to the administration of justice. As one participant stated: "The judge acts only according to law. Only." Participants further described that the purpose of the judicial system was to promote specific and general deterrence of criminal conduct, inculcate normative values and rectify inequities. As one judge noted: "A judicial decision can effect or change people's behavior. The court has a role to prevent future behaviors."

Participants saw their capacity to be objective as paramount to the administration of justice. They saw their own opinions as objective, honest and correct. For example, when asked about genocide, one judge stated: "When you look objectively, that's [genocide] that happened." In addition, another participant noted: "[A] judge shouldn't have any complex that he is infallible. He should stand with his feet on the ground. He shouldn't have any prejudice if he is a real judge. . . . A judge should be an honest man." Other participants agreed that "good" and "correct" decisions promoted justice.

While noting the value of objectivity, participants agreed that justice was also a function of perception. Participants were aware that those affected by their decisions did not always see the outcomes as just. Or, as another participant put it: "I think our courts conduct fair trials here. However, there are many of our verdicts with which everyone is dissatisfied." Despite the fact that parties to a dispute as well as the public might disagree with a judicial outcome, participants were convinced that if they applied the law strictly to the facts, the public would perceive the judicial system as trustworthy and fair. As one participant stated: "If a judicial decision is made according to the law, this can impart a feeling of righteousness to the parties, no matter if the decision is positive or negative for them." Nevertheless, another participant noted that publicity surrounding court decisions increased public pressure on judges.

Finally, participants acknowledged that in certain cases, impartial application of the appropriate legal rule did not produce justice. Nevertheless, legal professionals reported they were constrained by their professional obligations to apply the law in these instances. As one prosecutor stated: "You always have to stick to the legal solution. The fact is that although something is legal does not mean that it is just." Another judge echoed this sentiment: "Sometimes people think that we are doing our job wrong, but we only do our work as it is prescribed by the law."

3. *Participants Identify with the Western European Legal Tradition*

Participants from all three national groups highlighted the significance that Western European culture and legal traditions have had on their work. Participants were aware that the social and economic conditions resulting from the war have increased the disparity between Bosnia and Western Europe. However, participants expressed a strong desire to integrate with Western Europe, to move toward a more Western European ideal. Participants made frequent comparisons between Bosnia and countries in Western Europe, suggesting it was not simply legal integration they desired but also the Western European standard of living. For some, such integration required changes internal to Bosnia. As one participant stated: "We can't go to Europe in peasant shoes." Clearly, it was important to these legal professionals that Bosnian laws are either integrated with, or comparable to, the laws of Western Europe.

Several participants spoke of the importance of human rights protections. Additionally, some spoke of the integration of European and international treaties into Bosnian law through the Dayton Agreement and one judge discussed the need for his colleagues to study the European Convention on Human Rights (hereinafter "European Convention") and its application to domestic criminal procedures. Another saw the incorporation of expanded due process rights in the Federation's new Criminal Code as evidence that Bosnia's legal system was rising to the standards of Western Europe: "It's a degree of a developed civilization that protects the rights of indicted or accused persons; democratic rights are the very rights of accused persons."

Participants also cited the abolition of the death penalty – brought about as a result of the application of the European Convention to BiH through the Dayton Agreement – as an example of legal reform. However, participants differed in their assessment of this development. Some who favored abolition of the death penalty welcomed the change. However, others characterized the new rule as an intrusion by the international community into domestic affairs, whether or not they supported the death penalty.

4. *Decline in Status and Professional Standards*

The once privileged status of Bosnian legal professionals is in decline. Participants acknowledged informal rules and customs in pre-war Yugoslavia that conferred influence, social status, privileges and obligations which the judges and prosecutors readily accepted. In fact, many participants reported that they had chosen the legal profession because of the social status associated with it. However, some criticized the special treatment that judges who were active members of the Communist Party received in pre-war Yugoslavia: "There was a lot of 'party' in the Party meetings! They didn't do work." Nevertheless, participants believed it remained the responsibility of the State to provide adequate material support for judges and prosecutors. "The state, the government, must provide elementary conditions. First of all, an adequate salary, an apartment, so

the judge doesn't have to think about those problems. So his basic problem can be how, in the most successful way, to perform his function."

In addition to unpaid salaries, benefits once provided by the State such as apartments for judges and prosecutors are fast disappearing and frequently those provided were seen as substandard. Thirteen participants – almost half – were displaced by the war. Several others expressed two concerns. First, they were frustrated and angry that they had been unable to reclaim their former apartments. One participant, who was living in a rented apartment, explained that he was forced to do so because he could not regain possession of his former apartment which was also located within the city in which he worked: "I have a three bedroom flat . . . which is a hundred meters away from here. And in my apartment are people who are not refugees or displaced persons." Second, participants who had been given state-owned apartments were dissatisfied with the quality of their current housing. One participant reported that he lived separately from his family because his government-provided one-room apartment was too small – thirty-eight square meters (approximately 350 square feet).

Legal professionals reported dissatisfaction with the impact of the post-war economy on their social status. For example, one participant stated: "You have people [like legal professionals] who have studied all their life . . . but their salaries are incredibly small, unlike the salaries of the people who have no schooling whatsoever, they're earning millions of marks. These are the absurdities." One participant reported that a one-night stay in a hotel in Vienna cost the equivalent of one month's salary, highlighting the discrepancy between the standard of living for legal professionals in Bosnia and those in Western Europe. In particular, two participants explicitly reported that the diminution of status, salary and benefits has led them to consider other job opportunities. One veteran legal professional stated: "This is only a transitional period for me. Most probably, I will start working as a lawyer." The other explained that being a judge in Bosnia is "not the same job that it is in the West, as it should be" and stated he might become an attorney "because it's a better-paid job, nothing more."

The war has brought significant changes to the profession, such as the impact of the decline in professional standards during the war. The qualifying test for judicial candidates reportedly was easier in the midst of the conflict. One participant reported that judges elected during the war did not have to pass the judges' examination at all.[25] Many participants reported that this loosening of requirements had denigrated the profession.

Participants stressed the importance of well-educated and well-informed legal professionals, and they equated legal experience with competence. As one judge stated: "I think it would be a good thing if more judges were more educated, had more life and work experience. This might require that they work as lawyers before becoming a judge." Many participants suggested that declining salaries and benefits attracted fewer promising candidates. In addition, partici-

25. This participant indicated that during the war the authorities sought to address the shortage of judges by passing a special law that allowed individuals to become judges with only a law degree. He stated that this practice was discontinued after the war.

pants emphasized the importance of judges serving as mentors to develop the skills of newcomers to the judiciary and noted that the loss of experienced judges since the war has decreased the number of senior judges available to perform this role. Participants also cited the migration and subsequent loss of so many experienced legal professionals due to the war as a contributing factor both to the diminished competence and lessened status of the profession. As one legal professional remarked: "There are some judges in lower courts who are just there by accident." Many participants believed that unqualified judges should be removed to maintain high standards of judicial professionalism.

5. Corruption

Participants questioned the accusations of corruption that had been leveled against the Bosnian judicial system by the international community. Participants appeared to define corruption narrowly – as taking money in exchange for a particular outcome, i.e., bribery. Using this definition, participants frequently stated that they and their immediate colleagues did not engage in corrupt practices. For example, in discussing the issue of corruption one lower court president stated simply: "not in my court."

Other participants, however, alluded to corruption around them: "I am a professional, but I cannot speak to the professionalism of my colleagues." In response to the question: "Is a fair trial possible in Bosnia?" one participant thoughtfully stated: "I don't know. There's a different person sitting behind every desk. As far as [my city] and my authority go, everything is in order. The first time it is out of order, I won't work."

Participants speculated on the impact of low or unpaid salaries for judges and prosecutors. Many participants discussed the fact that judges and prosecutors were prohibited from accepting employment outside their profession, even to augment their low state salaries. Participants related the need for adequate salaries to an independent judiciary and suggested that some colleagues engaged in outside employment, possibly compromising professional duties. One described behavioral changes that indicated to him that the professional integrity of his colleagues possibly had been compromised by accepting outside work: "They are less interested in their daily job duties; they are often absent." Another stated: "You need to . . . make a judge independent in every way. Because if you have to beg in other ways – to make money privately from a friend – it's different, there are consequences."

Several Bosniak participants noted that the objectivity of legal professionals also was compromised by threats to their personal security and that of their families. As one participant explained: "It's not easy for judges to make a judgment if before the trial they get a threat that their family will be killed." Another observed that such threats, when issued with impunity, had a chilling effect on both the targeted judges and their colleagues.

6. Politics

All participants used the term "politics" or "political" primarily to distinguish between a legal process – a process governed by a fixed set of rules that can be applied in a neutral manner – and a process by which decision-makers exercise discretion to achieve a particular policy goal or desired outcome. Frequently, judges and prosecutors adamantly reiterated the distinction between themselves, as legal professionals, and politicians. In addition, participants repeatedly expressed their personal distaste for politics and politicians and vigorously criticized the overt and indirect influence of political parties on the legal system.

Participants equated politics with bias. Participants felt that politicians operated for corrupt, personal reasons, against the interests of the populace and without transparency. As one judge stated:

> I do not trust the politicians that much. A person who is applying the law should believe in the other parts of government. But considering how many of them just came to the top and made so much money, I am afraid that there are not that many who honestly believe in the rule of law. Because if they had that honest belief, then we would not have so many problems.

Politics and political decisions were declared by some participants to be defined by nationality. One participant stated that all political parties were connected to a national group, and that the lack of a political party not tied to a nationality "forces" people into political parties according to nationality. Virtually all participants agreed that politicians played a destructive role in the war and agreed that politicians brought a war no one wanted. As one participant stated: "Who ordered this war? Who is accountable for it? It was politicians." Furthermore, participants saw the on-going political problems of the State as a reflection of the parochialism of the political parties.

Judges and prosecutors frequently declined to respond to questions regarding their personal views of the judicial system and its application of laws, stating that those were "political questions." Participants also responded to questions regarding controversial issues such as genocide or the creation of a State Supreme Court of Bosnia and Herzegovina by noting that these too were "political" questions.[26]

In pre-war Yugoslavia, virtually all judges were members of the Communist Party, including most of the legal professionals in this study. However, participants reported varied levels of more recent involvement in political parties and structures. For example, many participants served as military judges and prosecutors during the war. Others were directly involved in political structures. One participant actively supported the military efforts of the Croatian Defense Council (hereinafter Hrvatsko Vijeće Obrane or HVO). Another assisted in the formation of and served in institutional arrangements that were established to govern a portion of the Republika Srpska. Finally, others served in judicial leadership positions within the transitional government and quasi-governmental

26. *See* §§ IV, and V and Appendices D and E.

structures between 1992 and 1995. While these participants described their involvement or action in support of political parties during the war, none identified their activities as political.

Under current law, judges and prosecutors are prohibited from membership in political parties. Participants supported this rule and agreed that political involvement might compromise the objectivity of a judge or prosecutor. As one participant stated: "If you become a member of a political party, it's a matter of time before you become an object of manipulation." Participants stated that currently they were not politically active. Only one participant expressed any personal sympathy for a particular political party.

Participants deplored being targets of political influence and many felt that the independence of judges and prosecutors was undermined by the power that political parties exerted on the judicial system. One participant observed: "the judicial system is in the hands of the political oligarchy" and said, "as long as the people who are guilty and responsible for the war remain in positions of power, there will never be an adequate application of the law the way we want." A few participants stated that politicians did not want a truly independent judiciary because it did not benefit them: "Politicians don't care about us, to have the rule of law, an independent judicial system, because if these existed they could not do what they wanted to do." Some participants specifically commented on politicians' lack of education and capability. One legal professional derisively remarked that he thought a top local official "did not finish college."

Many participants often spoke emphatically about their resistance to attempts at political interference and their own resolve to apply the law. "I can certainly vouch that this court does all the things in a very professional manner. But I do have information that in other parts of the country, nationality of a party sometimes matters. But I cannot speak about that, it's just what I heard." Another stated his resolve to remain impartial: "You're always under some influence from the politics, the politicians, the parties. And we are here to be professionals, to proceed according to the law as it should be and that's difficult and hard."

Sources of pressure included government officials and international monitors. "If there is political pressure, it's coming from the cantonal or federal ministry of justice – someone who is in the government." A judge stated that he felt international monitors had sought to influence him improperly by suggesting at the close of a proceeding, but prior to the verdict, that the evidence was insufficient to convict and the judge should release the accused. Another form of political pressure cited by others was the failure of Ministry of Justice officials to support the judiciary after nationalist groups or the international community criticized Bosnian judges.

Participants specifically cited control of the legislature over judicial budgets as an essential factor that contributes to political interference in judicial matters. Many tied financial dependence to corruption. One participant observed that since the judicial budget is controlled by the legislators "of course, they can affect the work of the court."

7. Attitudes Towards the International Community

On the whole, study participants used the term "international community" broadly to refer to the United Nations, foreign governments and international governmental and non-governmental organizations. This terminology reflected a homogenization of foreign actors as well as a recognition of the power differential between Bosnian nationals and representatives from foreign-based organizations. Generally, participants expressed ambivalence toward the involvement of the international community in BiH. On the one hand, participants welcomed the role of international institutions and organizations in strengthening Bosnian governmental structures and promoting economic growth. On the other hand, they often perceived the manner in which those interventions took place to be demeaning.

Participants in each national group agreed that involvement of the international community was necessary to prevent further war, to stimulate the economy, to ensure fairness and accountability in judicial proceedings and to prosecute war criminals. Some expressed concern that in the case of national war crimes trials, judges in Bosnia might be biased or politically pressured to render a particular verdict.

Citing political pressures, participants also favored international involvement to promote an independent judicial system. In particular, participants supported the efforts of groups like OHR to secure enactment of legislation to promote the independence of the Bosnian judiciary. However, some prosecutors expressed concerns that not enough international attention had been paid to the need to strengthen prosecutorial independence and suggested that broader powers for prosecutors should be included in the criminal code.

Participants expressed mixed reactions to the legal training for judges and prosecutors provided by international organizations. Many reported that the training was not well planned, that those conducting sessions were not familiar with Bosnian legal structures and that the training covered too many topics in a limited time. One stated: "You cannot expect a seminar to be organized and in two days to know all European laws." Some reported that international seminars were not particularly relevant to their work because the trainers and attendees frequently came from different legal systems.

However, other participants noted that the value of the seminars lay less in their content than in the opportunity to renew contacts with colleagues across national lines. Judges and prosecutors reported sporadic communication with colleagues outside their area and welcomed the opportunity to reestablish professional relationships in the other entity. One participant who attended an international seminar noted its main significance as "the first meeting of judges and prosecutors from all around Bosnia-Herzegovina." Participants considered selection to participate in such meetings a professional distinction and some raised the concern that the selection process for the seminars was not transparent.

Participants expressed criticism of international organizations operating within Bosnia. Opinions varied toward international organizations such as OHR, United Nations and the ICTY[27] as well as international non-governmental organizations. Participants frequently commented that the representatives of international organizations lacked knowledge about Bosnia and seemed unprepared and uncommitted. One participant described international monitors as people without "good wishes" who were only interested in living in a foreign country for awhile. Another experienced as personally adversarial the comments of an international monitor who also was a judge: "He wanted to irritate me." This same judge described his other experiences with international visitors to his courtroom as pointless "because all trials in Bosnia are public. I was curious why they came. It's of little value."

Some participants perceived international involvement in Bosnia as an unwelcome intrusion into the country's legal system. One participant stated that he would prefer that the international community focus on assisting Bosnia in creating its own institutions rather than intervening in routine matters. Another reported that the representatives of international community within Bosnia lacked knowledge of, and respect for, the Bosnian legal system and he complained that he had to spend "half my time explaining basic laws and rules we apply here, sometimes it's boring."

In particular, participants expressed positive and negative attitudes toward OHR. Some viewed it as a thoroughly political institution and expressed frustration with OHR's changing of the laws. Nevertheless, many felt that OHR ensured political stability. One participant who criticized certain OHR actions also noted that without it "we would still be arguing about the size of the letters on passports." Another attributed judicial independence to OHR, stating:

> Fortunately we do have the OHR, which is the only body in this region that can say: "Hey, prosecutor, you are not a good prosecutor, you have done such and such." Without OHR, you would have totally dependent judges and prosecutors, because the political parties would want to make agreements and that would make judges and prosecutors dependent.

Two Bosniak participants were appalled by the comments made by the UN Special Representative in Bosnia, Elizabeth Rehn, in which she criticized the judiciary as corrupt.[28] These judges felt that Rehn's blanket criticisms unfairly damaged the credibility of the judiciary. "Mrs. Rehn openly said that the courts are corrupt. I don't think that she talks for nothing. But it would be good if she could offer concrete evidence. There are many good judges who are far from that categorization." The other judge asserted that such comments put an "enormous burden on all judges" since the judicial system was unable to initiate removal proceedings without allegations against specific judges, and thus the accusations encouraged those dissatisfied with a court judgment to claim it was the result of corruption.

27. The opinions regarding the ICTY are addressed separately, in § IV(C), below.

28. *See supra* note 14.

8. National Consciousness and Allegiance to State Structures

Although self-identification with a national group contributed significantly to participants' national consciousness, e.g., "I am Serb, I cannot be anything else," or, "I am a Bosniak. Because I feel that way," many participants expressed the idea that nationalism is anathema to the legal profession. As one participant noted, legal professionals "are not burdened with national tensions, or they shouldn't be." Some participants suggested that they, as professionals, combated tensions between national groups and did not contribute to the war: "We judges are professionals, and we did not cause this conflict."

Nonetheless, the theme of national identity, citizenship and allegiance was evident in the interviews. Participants' attitudes toward national identity were influenced by their political views. One participant expressed regret at no longer having the option to identify as a "Yugoslav." Another spoke nostalgically about the time before the war when one's identification with a national group was a private matter. A Bosnian Croat participant expressed his view with a caustic comment regarding the "so-called Herceg-Bosna" State. Other Bosnian Croat participants however, referred to the army of Bosnia-Herzegovina during the war as the "so-called BiH Army." A Bosniak participant reflected on the impact the war has had on national consciousness: "Well, before the war . . . Bosnian people were the people that were Yugoslavs. Because we felt Yugoslavia was our country. . . . [W]e had different identifications with national groups, and it was less important which group you were in . . .. [T]hat wasn't important before."

Participants spoke at great length about issues regarding the role of the State, the question of national boundaries and allegiance to State structures. Their responses revealed ambivalence towards the Dayton Agreement and its consequences for the country. These perceptions appeared to be influenced by membership in a particular national group. Therefore, we examine these responses according to the region of the country in which the participant was interviewed.

Many participants were grappling with how to reconcile nationalism with the political structures established by the Dayton Agreement. One Bosnian Croat participant discussed the relationship of the constitutions to reconstruction and reconciliation and noted: "In no State do you have two entities, three nations, four constitutions, cantonal constitutions. How can you realize the rights? It is a forest of rules that no expert can go around in." Two other participants believed that the constitutions adversely affected the rights of national minorities in Bosnia. One stated with respect to minorities such as Hungarians: "The constitution does not guarantee rights to all nations, which needs to be changed." The other observed: "I know my friends, Serbs who are natives of Sarajevo, and they feel not as a minority but as second class citizens in the territory of the Federation. They don't feel comfortable in such a legal system."

National divisions were noteworthy among the responses to questions regarding the supreme law of Bosnia and whether a Supreme Court of BiH should

be created. The Dayton Agreement established that the constitution of the State, which was an annex to the Agreement, was the supreme law of the country. Virtually all Bosniak participants reported that the Constitution of the State of Bosnia and Herzegovina was the highest source of legal authority, while virtually all Bosnian Serb participants stated that the highest authority was the Constitution of the Republika Srpska or both the constitutions of Bosnia and Herzegovina and the Republika Srpska. Only one Bosnian Serb legal professional stated unequivocally that the Constitution of Bosnia and Herzegovina was the supreme law of the land. The answers of Bosnian Croat participants were divided between the State constitution and Federation constitution.[29]

Responses similarly were divided regarding the need for a State Supreme Court with jurisdiction to hear disputes involving State laws. Currently there is no court with the ability to adjudicate such matters.[30] Bosniak legal professionals uniformly supported this proposal, while with two exceptions, Bosnian Serb participants opposed it. Bosnian Croat participants were ambivalent and gave the proposal qualified approval.[31]

In general, Sarajevo Group participants (including non-Bosniaks) expressed the desire for the re-creation of a unified and diverse Bosnia. This sentiment was illustrated by one judge who described pre-war Bosnia as a country in which "people lived together for thousands, thousands of years" and thirty percent of marriages in Sarajevo were mixed. Another spoke passionately about his beliefs in a diverse Bosnia: "Bosnia is . . . her structure, by her nature, she is really multi, multi, multi. And always we cared about that and now we also do care. And is has to be that way in Bosnia. But if it's not so then we have a problem."

Mostar Group participants were tentative in their support of a unified State. Eight qualified their opinion that it would be possible for people of different national groups to live together by noting that because of the war it would take time to achieve a multi-national state. As one described: "I think that it is possible, provided punishment of war criminals and the organization of a state, a normal state, not what we have now." Another who stated that life together was possible qualified his statement by noting that the pre-war political parties that initiated this "horrible war" remained in power. Thus, there was "no more trust" that the political process would result in normalization of relationships across national lines. However, one participant who agreed that Bosnians could live together so long as the international community was present, also advocated the further division of BiH: "I think that there should be three entities . . . . Rela-

29. For a comparison by national group of responses to the question: "What do you consider the highest law of the land?" see Appendix C.

30. The BiH Constitution does not provide for any court of general jurisdiction at the State level. The primary function of the Constitutional Court is to adjudicate disputes regarding whether entity laws violate the BiH constitution. Art. IV (3)(a). Thus, there is no State court with jurisdiction for individual violations of State laws. *See* ICG REPORT RULE OVER LAW, *supra* note 15.

31. For a comparison by national group of responses to the question: "Should a Supreme Court of Bosnia-Herzegovina be created?" see Appendix D.

tions between people would be much cleaner." Another participants said people could live "side by side," but that life together "all mixed up" was impossible.

Six Bosnian Serb participants stated that life together was possible, but their answers ranged from qualified support to outright skepticism. They said that the process would take time. As one stated: "It is possible, but we have to take time, lots of time. Hopefully life will be as it used to be. But I think that lots of time should pass." One participant stated that life *next* to one another was possible, but also circumscribed his answer:

> It's possible to create conditions, to live peacefully one beside each other, one next to each other. And to agree and solve what is common to us, and mutual to us. And to get used to it in the course of time. To change people and politics because if we could live for seventy years in Yugoslavia all together, why can't we live 1000 next to each other. But the international community contributed to all that because of their interfering with the conflict.

Two from this group of Bosnian Serb participants, while suggesting that life together might be possible in concept, noted that a unified state was impossible to achieve through external pressure. One stated: "There are a lot of common things between both of these entities" but continued that life together was not possible "if we are forced." The other discussed the challenges of refugee returns, both on a practical and a political level, and stated that it might not be practicable to implement the right of return guaranteed in the Dayton Accords given the horrors that people experienced during the war. Finally, two stated that life together was not possible. As one put it:

> It is a problem of the antagonism between Christianity and those other ones, between all three parties. The differences are too high, too great, the best solution is this one, one living next to the other for the future of children that are to be born. Who will guarantee that if we are living mixed that there would not be a war again?

It was significant that despite the variety of and often-contradictory statements among participants regarding national identity, there appeared to be a consensus among all participants that any continuation of war would be the worst thing to happen to BiH. As captured by one participant: "I am conscious that war cannot bring good to anyone. And war is the worst evil that can happen to people. Nothing can be worse than that." Another legal professional reflected on the lasting impact of the war on the judiciary:

> We have lived through a hard period, three or four years is a lot for an individual; for a nation it is only a moment. You have to understand that our judicial decisions are still connected to war, but I think that things have improved, people are and will learn about the consequences of war and everything that happened during the war. Every war is evil, and this one that took place here [was as well], however, regardless of things I am hopeful.

B. Factors That Contribute to Resistance Among Participants to International Criminal Trials and Accountability for War Crimes

Several factors emerged that contributed to reluctance of these Bosnian legal professionals to support the work of the ICTY wholeheartedly. While many accepted the Tribunal in concept, participants generally lacked clarity about its

goals. In particular, the responses of Bosnian Serb and Bosnian Croat participants indicated they did not share the goals of the ICTY as they understood them. The Security Council resolution creating the ICTY,[32] and subsequent annual reports[33] reflect the goal of the international community to create a judicial body to hold accountable those responsible for war atrocities and to promote a "sustainable peace" among the peoples of the former Yugoslavia. The participants were asked specifically on whom the ICTY should focus and whether a connection existed between the work of the ICTY and the processes of social reconstruction and reconciliation. The responses indicated a lack of consensus among participants of the differing national groups as well as within national groups. In addition, there was a gap between the expectations of Bosnian legal professionals and the goals of the international community.

Further, proximity to violence and physical destruction of the community exerted a critical influence. Participants from areas untouched by the fighting, primarily Bosnian Croats, were prepared to put the past behind them. They focused on economic reconstruction as a mechanism for social reconstruction and less on the contribution of war crimes trials to this process. In marked contrast, those participants who lived in areas of heavy fighting emphasized the atrocities of the war and questions of individual responsibility and accountability.

There was a divergence of opinion as to who was responsible for the war and who should be held accountable. This divergence was also reflected in differing opinions about individual and collective responsibility and accountability for war crimes and genocide.[34] However, at least one participant in all three national groups identified the international community as responsible for the war. They believed that the world community did nothing to stop the war, even after atrocities were discovered, resulting in an extended conflict.

Nevertheless, the divergence of perspectives regarding responsibility and accountability for the war was largely consistent among participants of the same national group. However, the views of Bosniak, Bosnian Serb and Bosnian Croat legal professionals on these topics were inconsistent among the groups and often contradictory. Since three different versions of these themes emerged,

32. *See supra* note 4.

33. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,* U.N. GAOR, 54th Sess., Agenda Item 53 at 3, U.N. Doc. A/54/187; *See also: Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, <http:www.un.org/icty/rapportan/rapport5-e.htm>; *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, <http:www.un.org/icty/rapportan/thir96tc.htm>; *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, <http:www.un.org/icty/rapportan/first-94.htm>.

34. A comparison of the responses by national group to the question: "In your legal opinion, did genocide happen anywhere in Bosnia-Herzegovina? Against whom did these acts of genocide occur?" are contained in Appendix E.

we will describe separately how each of these perspectives influenced resistance to the ICTY.

Finally, participants reported misunderstanding regarding and disagreement with the decisions by the international community regarding the location of the ICTY as well as the rules of evidence and procedure governing its work.

1. The Bosniak Perspective

All Sarajevo Group participants stated that Bosniaks were the victims of Serb aggression. They identified Slobodan Milošević, president of Yugoslavia and Radovan Karadžić, former president of the self-proclaimed Bosnian Serb Republic as those responsible for the war. Two of the Sarajevo Group – both of whom lived in areas of heavy fighting between Bosniak and Bosnian Croat forces – included Croatia as a belligerent state, and specifically named Franjo Tuđman, now-deceased president of Croatia, as the initiator of these actions. One participant reinforced the notion of individual accountability as follows:

> Believe me that I am telling you what I feel because I was here during the war and I survived with my family . . . . And I am telling you now as a human that people responsible, accountable and guilty for all those crimes should be accountable for those crimes, because people need that.

Half of the Sarajevo Group focused on the events in Srebrenica as epitomizing the aggression against, and genocide of, the Bosniaks. For example, one participant, when asked against whom genocide occurred stated: "We all know and considering Srebrenica, and starting with Srebrenica, we all know against whom." Another stated:

> If you start from the definition of genocide used by The Hague Tribunal I think that in relation to Bosniaks the genocide did happen, especially in certain parts. Especially in thinking about the Podrinje, because the Muslims – Bosniaks – were a majority in all the municipalities before the war there except in Foća. And in Foća there was a really slight majority of Serbs in relation to Bosniaks. And the war was conducted there; you had civilians, the destruction of whole Islamic monuments, mosques, mass killings of people, showing that the real goal of this was ethnic cleansing, actually, genocide. The identical of this situation was in the [Bosnian] Krajina, region.

Two Sarajevo Group participants stated that the Bosnian Croats were also victims of genocide, while one participant stated that "genocide occurred on all three sides" and another alluded to "genocide in a couple of directions."

Nearly all Sarajevo Group participants believed that there should be differing accountability for those in command responsibility and those in lower positions. They affirmed that those in command positions should be held accountable for the acts of their subordinates and cited specific examples from the ICTY trials or war anecdotes.

Sarajevo Group participants believed that the ICTY was a neutral and fair court in which to try indicted war criminals, especially those of highest rank. No one described the work of the ICTY – including the selection of indictees – as "political." All affirmed their support for its existence, while recognizing the challenges that it faced. As one stated: "I think that the ICTY is very correct. I

know it has some difficulties, some technical problems. . . . I am for that court to be stronger and to be permanent." Another felt that those who critiqued the work of ICTY did so from a nationalist perspective: "All complaints about the work of the ICTY are mostly of a political nature. . . . I want it to work, and to try everybody, not just certain people." Most of the Sarajevo Group participants agreed with one judge who stated that he believed the "ICTY is rooted in justice."

Many Sarajevo Group participants believed that the main objective of the ICTY should be to prosecute and judge those individuals responsible for carrying out the war in Bosnia. They expressed a belief that the ICTY should focus its energies on those "most responsible" or "most guilty," and that the Tribunal would be more effective if this were done. However, three participants also expressed concern that the international community lacked the "political will" to arrest the "biggest fish."

Some Bosniak participants specifically expressed relief that the ICTY assumed jurisdiction for the cases involving the most serious war crimes. One stated that the trials of the "most accountable" war criminals, those who committed the most serious crimes and who still wield tremendous power, were the ones in which the involvement of the international community was most necessary. Another stated that despite the best intentions of a good judge, it would be difficult to conduct a fair trial of such cases in Bosnia because of political pressures. By the term "political pressure" he was referring specifically to inappropriate attempts at influence from various sources such as the Ministries of Justice, individual politicians, or criminal gangs. A Bosniak judge denied any "unprofessional" aspects of the judiciary but said the ICTY was needed because it used different "standards." In contrast to this view, another judge expressed his frustration with the ICTY and suggested that the Bosnian judiciary was better able to adjudicate war crimes trials: "The ICTY is still running away from genocide. And we who are here, we know why somebody was killed. Somebody was not killed because he was a civilian, he was killed because his last name belonged to a certain [national group]." Other than this critique, Bosniak participants saw the location of the ICTY as an advantage.

Sarajevo Group participants, in general, resisted assigning collective responsibility to "all Serbs" or "all Croats." Further, participants rejected the principle that an entire national group should be held accountable for the actions of their leaders. When asked specifically about accountability for war crimes, respondents stated that "those who organized the crimes should be held accountable" and tended to reject the assignment of accountability to anyone other than specific individuals.

Sometimes, these comments regarding collective accountability were tied to reconciliation in Bosnia. Sarajevo Group participants made a connection between trials of accused Serb war criminals and the alleviation of condemnation of the "whole people," as one participant stated:

> I think that the trials like those can build some new relations between the people. I think that is making a more clear situation between people. If he is guilty he

> should be responsible for those acts. So less the whole culture be suspected for the one man's act. Every criminal act is done by an individual or many of them in a group. But never a people, whichever it is. Some punishment for those crimes can bring reconciliation and normal life in Bosnia.

Another echoed this belief, stating:

> I think there is no making up without punishing the guilty. I think it is very important that nobody's guilt is collective guilt, every guilt is individual. And because of the removing the burden of collective guilt, meaning for example, the guilt of the Serbian people, it is in their interest that accused war criminals from their ranks be punished so it is known that not the whole people as it happened committed the war crimes. And the same of course applies to the other two peoples.

The belief that reconciliation and reconstruction depended upon the successful prosecution of war criminals is most characteristic of the Sarajevo Group. Some Bosniak judges felt that the ICTY contributed to reconciliation because it lay outside the influence of domestic political structures. Some of these participants saw value in the international community's ability to name perpetrators of war crimes and to facilitate discussion of the war in Bosnia. Many thought that the prosecution of war criminals by the ICTY would contribute to reconciliation in Bosnia. Others, however, suggested that even if the ICTY did not facilitate reconciliation it served to acknowledge their status as victims in the war. Some judges said that the longer the major war criminals – such as Karadžić and General Ratko Mladić, former head of the Bosnian Serb forces – remained free, the less likely reconciliation would result from their eventual prosecution. As one judge indicated, the faster the resolution of these significant cases, the more their outcome would contribute to the process of reconciliation.

2. *The Bosnian Serb Perspective*

Universally, Bosnian Serb participants viewed the conflict as a civil war; while only three specifically referred to the war as a "civil war," none referred to it as a war of aggression or an international war. As one participant stated: "Here in Republika Srpska, we consider that it was a civil war. The other side thinks we were aggressors. How can we be aggressors in our own country?" One participant stated that the Bosnian Serbs fought to maintain Yugoslavia as a unified state and to "prevent a centralized state [in Bosnia] where one nationality would be dominant." Another participant unequivocally stated: "This was a religious civil war." This perspective contrasts sharply with that of participants of other national groups.

Dominant themes in the Banja Luka Group were that the onset of the war was inevitable, inexplicable, or that the war was due to factors beyond the control of Bosnian Serbs. "The war just had to happen. As soon as the break up of Yugoslavia took place, Bosnia-Herzegovina could not stay intact. The war was inflicted upon the Serbs. There was no aggression from any side." Two Bosnian Serb participants stated that they could not attribute responsibility for the war to anyone in particular. As one put it, this was "because we do not know

the background of the war itself, or the real cause of all this." Participants framed their understanding of the consequences of the war in terms of inexplicable events. For example, one participant termed the loss of the Muslim population in the area as "migration." He wondered what had happened to his legal colleagues: "Many of them I cannot even say where they are now. Some of them were just gone when the war happened. Many abandoned these areas. Some citizens from this area left."

Four of the nine Bosnian Serb participants stated that they did not believe or did not have sufficient evidence to confirm that genocide occurred during the conflict. "Did genocide happen? I think not. I am not aware of those facts." Or as another stated: "I don't have any evidence and information whether it happened. In our area, I have no information." Four observed that genocide was carried out by all three sides. As one remarked: "It happened throughout Bosnia. . . . To all three peoples." One legal professional declined to respond.

For the most part, Bosnian Serb participants did not assign responsibility to specific individuals for initiating the war. Rather, they assigned responsibility to larger categories, including "the people," the international community, politicians and national parties. Others responded by saying that they did not know, refusing to answer or as noted above, that the war was inevitable.

Like their Bosniak and Bosnian Croat colleagues, Bosnian Serb participants emphasized individual accountability for all who committed war crimes. As one participant stated: "I chase criminals" regardless of nationality. Another emphasized that "a war crime is a war crime no matter from which side it arises." Seven of the participants were asked specifically about command responsibility; of those, four acknowledged that commanders should be held accountable for the actions of their subordinates. Only one participant mentioned a specific individual – General Tihomir Blaškić[35] when discussing this concept. This lack of specificity mirrored responses to the question of accountability for the war for which participants named no individuals. Those who discussed this topic emphasized not rank, but bringing to justice anyone who committed war crimes.

Along with Bosniak and Bosnian Croat legal professionals, Bosnian Serb participants rejected the concept of collective accountability for war crimes. In contrast to their resistance to holding individuals responsible for the war, Bosnian Serb participants insisted that only individuals could be held accountable for war crimes. In discussing genocide, one participant stated that "genocide was done by individuals or small groups of individuals, not by a whole nation." However, even here, some participants also rejected the principle of collective responsibility of political leaders. While one Bosniak and a few Bosnian Croat

35. On March 3, 2000, Blaškić was sentenced by the ICTY after the court found him guilty crimes against humanity, war crimes and grave breaches of the Geneva Convention of 1949. The sentenced followed a 25-month trial with testimony from 158 witnesses and approximately 30,000 pages of evidence. Blaškić, 39, was commander of Croat fighters in central Bosnia during the war. He was held responsible for attacks across the Lasva River Valley that left hundreds of Bosniaks dead and sent thousands more fleeing the area. In particular, the court held that Blaškić ordered a April 1993 attack on the village of Ahmici in which more than 100 men, women and children were killed.

participants were willing to hold political leaders accountable for the war – including their own – Bosnian Serb participants were unwilling specifically to name Bosnian Serb political leaders among those responsible for the war. In fact, two participants stated that political leaders should not be held accountable because their policies reflected the will of the people. While some did blame the war on politicians, none named specific leaders of any national group, and one specifically stated that Milošević wasn't "guilty."

While few Bosnian Serb participants mentioned the international community in connection with the war in Bosnia, those who did were vehement in their opinions. Generally, they believed that the international community was unfair to the Serbs or that it did not understand what happened in Bosnia during the war. One participant characterized the opinion of Serbs by the international community as: "Serbs are the bad guys. But I think it's the reverse." This sentiment was echoed by another: "We are satanized in the world, and we are not like they said, we are an old Christian, civilized people. We are not the monsters we are presented in the media." Another participant stated: "It seems to me that many representatives of international organizations, a great number of them, are always in a trance. Maybe there wasn't an opportunity for them to learn, or maybe they gained their information from different sources, about what really happened here."

Three Bosnian Serb participants saw the actions of the international community toward them as hypocritical and openly expressed hostility toward NATO bombing of Serbia and Kosovo. They complained about the "double standard" of accountability – Bosnian Serbs were being held accountable for war crimes committed in Bosnia, while leaders of countries participating in the bombing were not held accountable although these Bosnian Serb participants saw the bombing as a violation of international law. One referenced the United States bombings of Yugoslavia and Vietnam to illustrate the hypocrisy of the international community. The other two participants supported this concept by pointing out that NATO had violated the principle of state sovereignty by initiating the bombing of Serbia.

Using this same argument, Bosnian Serb participants were highly critical of the ICTY. Many disparaged the ICTY for its apparent lack of impartiality and independence, qualities that underlie their definition of professionalism. As one participant stated: "I think that court is not a real court. I think that my court is more mature in its proceedings, and more expert and diligent in the conduct of trials." All criticized the ICTY and international organizations operating within Bosnia for being influenced by politics. "The international court in The Hague is discussed too much. It is too artificial a court and it is under the jurisdiction of powerful societies. There is no justice in that court." In addition, many stated that they did not understand the court and its workings because it is "nothing like a court we have here." The one Bosnian Serb who supported the ICTY suggested that it should "organize a round table for every judge and prosecutor who is willing to come to meet and to get familiar with The Hague Tribunal. . . .

To have an explanation why it is good for someone and not for someone else [to be indicted]. Not to be closed."

In general, participants viewed the Tribunal as a political body that was an instrument of Western influence rather than an independent judicial institution. One Bosnian Serb participant asserted that public international law has no place in courts because it concerns violations by states of their international obligations rather than individual liability. Two participants pointed to the fact that only Western judges served on the Tribunal and that no judges from the national group of the accused sat in judgment of their own.

When Bosnian Serb judges and prosecutors were asked on whom the ICTY should focus its energy, the responses were general in nature. Almost universally, they stated that the ICTY should deal with "all of those who committed war crimes" or that "all should be held accountable." When asked how the ICTY should allocate its scarce resources, participants reiterated their initial responses. For example, one Bosnian Serb judge stated: "I would choose the persons who committed war crimes." When asked to be more specific, this judge took out the Criminal Code of the Republika Srpska and proceeded to show the interviewers the provision regarding war crimes. Another participant, when asked whether the ICTY should focus on leaders, such as Milošević, responded: "I won't answer. On the persons, that's politics, and I don't want to interfere with that topic. I think that my answer is sufficient, that everyone who committed a war crime should be tried." However, one Bosnian Serb judge explicitly stated that the ICTY should focus "on those who established . . . the conditions for the war."

Many participants expressed the view that the ICTY was biased against the Serb people. Six Bosnian Serb participants stated that the ICTY only targets Serbs or that the actions of the ICTY are only focused on "one people." As one participant described: "There are some rules created in [the] world that only Serbs are criminals." In addition, two specifically mentioned that, during the course of a NATO Stability Force (hereinafter SFOR) action to arrest the former Prijedor police chief, he was killed. They described the SFOR arrest as a kidnapping and they saw this as a flagrant disregard of the judicial process. Three felt that there was "no justice" or "no righteousness" in the ICTY. Another participant raised the example of the linkage between economic assistance and cooperation with the ICTY as additional evidence for the politicization of the ICTY. Paradoxically, while all but one of the Bosnian Serb legal professionals criticized the ICTY as unfair, only two believed that it should be abolished.

Bosnian Serb participants were dubious about the impact of the ICTY on social reconstruction. Six stated that they did not believe that the ICTY and the process of social reconstruction were linked. Participants illustrated their lack of confidence in the ICTY's contribution to social reconstruction by noting "the future of the people in this area is not dependent upon the ICTY. The ICTY is not significant for the life of those people here." One participant, who was particularly vehement in this view, reasoned from his own feelings about the impact that the successful prosecution of those who burned down his house would have

on him: "It would not change [my feelings about social reconstruction]. I don't have any hope for [a multi-ethnic state] actually happening. If they were caught and tried I would have no satisfaction in that." The five other participants stated that the ICTY played no role in reconstruction because reconciliation was an extra-judicial process: "When someone wants to forgive somebody, he'll do it without a court. . . . The fate of those people here is not a matter of nationality or interest, it is not dependent upon some court. . . . If we are human, we don't need a court."

In fact, two Bosnian Serbs suggested that the ICTY and its slowness and inefficiency might be widening the gap between the peoples in Bosnia. Another described this belief more starkly, stating that the ICTY had a negative influence upon people and increased the "antagonism" between them. However, two others believed that the ICTY could, if it were more "efficient and fair," contribute to the process of reconciliation. Another stressed that it would take time to overcome their mistrust of the ICTY: "Maybe we're still under the influence of the war." Finally, one felt that economic development, and not the ICTY, would trigger social reconstruction.

Bosnian Serb participants were resistant to the Tribunal and to its primary jurisdiction for war crimes. According to the Rome Agreement, Bosnian prosecutors must seek permission from the ICTY before initiating arrest and prosecution of war criminals. Although the Bosnian Serb participants did not explicitly comment on the location of the Tribunal, nearly all stated that they did not see why war crimes trials could not be held in Bosnia. One participant suggested that the ICTY conduct its proceedings in Bosnia. Eight Bosnian Serb participants believed that national courts were competent to conduct trials of accused war criminals. Of this group, two believed that the trials should only be held in the areas where the crimes were committed. Two implied that national courts were on par with the ICTY and could conduct fair trials, but one suggested that it would be good for internationals to conduct trials in Bosnia.

3. *The Bosnian Croat Perspective*

Virtually all Mostar Group participants perceived the war as an act of the Yugoslavian People's Army (hereinafter Jugoslovenska Narodna Armija or JNA) and Serb aggression, and many specifically named Milošević and Karadžić as responsible. As one stated: "The politics of Slobodan Milošević and Serb nationalism, those started the war, others just accepted it." Mostar Group participants did not differentiate between the Yugoslav national army and the Bosnian Serb forces. "In Bosnia-Herzegovina there was Serbian aggression by Serbia and Montenegro." Another participant assigned responsibility for the war by sharing an anecdote. Prior to the war, he was in Serbia on business and saw on a kiosk a map that appeared to show Yugoslavia. On closer inspection, the map was labeled "Greater Serbia" and much of Bosnia was included in this territory. Another stated: "I think it was the policy of Slobodan Milošević. He did not understand that these countries could separate peacefully." Finally, another described the events leading up to the war: "We all voted on two options.

Becoming a state or staying in Yugoslavia. We voted for independence of Bosnia-Herzegovina. The Serbs would not abide by such decisions and so they started the war."

Many participants stated that the actions of the HVO were simply a response to the aggression of the Serbs and that the Bosnian Croats were the only ones who were ready to defend themselves:

> There were many victims except on the Croat side because people prepared to defend themselves. . . . Herzegovina knew what would happen because they saw an example of it in Croatia. The Croats in Herzegovina stopped the Serbs. While Croats were fighting the Serbs who were trying to capture Konjic, the Muslims were sitting in the cafes.

Although Bosnian Croat participants did not specifically discuss the alleged atrocities committed by the HVO, they defended their tactics by asserting that every party to the conflict, including the HVO, needed to "play by the Serbs' rules" and thus followed the lead of the Bosnian Serb forces.

Six Bosnian Croat participants stated that genocide occurred against all three peoples in Bosnia. One stated that the JNA/Serb aggression against the Bosniaks and Croats was an act of genocide; however genocide by the other sides was not as clear-cut. One Bosnian Croat judge explicitly acknowledged that Croat forces committed genocide, stating: "Genocide took place on all sides. But, as Croats, there are fewer Croat perpetrators but it seems as though they are the ones that are caught. But that does not undermine the percent of responsibility, their accountability, the very numbers are the evidence." Other participants had different views: "I don't think there was a real genocide anywhere in Bosnia-Herzegovina. In some ways there was a genocide, in others not actually, you didn't have one nation actually completely wiped out." One Bosnian Croat refused to answer the question. Interestingly, none of the Mostar Group participants talked about the collective accountability of any of the national groups involved in the war.

Mostar Group legal professionals adhered to the concept of individual accountability. However, their acceptance of the principle of command responsibility was more ambiguous. As an example, two Bosnian Croat judges referred specifically to the Blaškić trial and expressed skepticism about his control of the forces under his command. In contrast to this view, one participant believed in the application of command responsibility. "Because it is difficult to establish who murdered, the commanders of military units that did commit these crimes should be responsible, should be accountable." The lack of clarity around this issue was illustrated by a statement made by another Bosnian Croat judge. He claimed that in order to determine responsibility for war crimes, one needs to ascertain who was in control of the geographic region at the time. This contradicted his earlier statement questioning the concept of command responsibility.

Like their colleagues in the Sarajevo Group, Bosnian Croat participants expressed concerns regarding the acquiescence of the international community in the face of atrocities. As one Bosnian Croat observed: "If the international community wanted to prevent the wars, they would have prevented it. In 1992,

in 1991." Another pointed to the international arms embargo: "When Bosnia-Herzegovina was attacked, the international community imposed an embargo and allowed the Serbs to kill some three or four hundreds of thousands of people so the international community is directly responsible for it." Finally, one Bosnian Croat participant went so far as to suggest that the Dutch battalion in Srebrenica should be held accountable for the massacre of Bosniaks there.

Several Bosnian Croat participants also criticized the ICTY and international organizations operating within Bosnia as thoroughly political bodies. And one participant criticized the Federation's choice of liaison to the ICTY as politically motivated and unrepresentative of the interests of Bosnian Croats. A third described the international community as following its own agenda, yet working to promote fairness and accountability in the domestic judiciary.

Mostar Group participants had specific ideas regarding how the ICTY should focus its resources. Many argued that the ICTY should indict and try those of the highest rank, specifically Karadžić, Mladić and Milošević. A common theme among Bosnian Croat participants, frequently associated with an expression of frustration or anger, was the belief that only Croats were held in custody in The Hague. Although they never explicitly denied the culpability of Bosnian Croat indictees, many expressed concern that no indictments had been issued by the ICTY for atrocities committed in pre-war Croat-majority towns: "I think you know that no one from the army of Bosnia and Herzegovina is accused of crimes, only Croats. In places where the BiH Army operated, murders occurred, in Prusina, in Grabovica, and in Doljani. Nobody has answered for those crimes." Three participants referred to these murders and indicated that requests to arrest those involved had been sent to the ICTY in accordance with the Rules of the Road but no further action had resulted. Many of the Bosnian Croat participants expressed concern that the international community pressured Croatia to turn over its indictees or lose valuable economic assistance. However, one participant was pleased that the Croatian government had complied with ICTY requests to deliver Croatian accused war criminals to The Hague.

In addition to the criticism that Bosnian Croats were selectively prosecuted by the ICTY, participants reported concern about the way in which cases sent by Bosnian Croat authorities to the ICTY had been handled. These cases alleged war crimes against Bosnian Croats by members of the BiH army. When the ICTY returned the cases to Bosnia for trial, they were assigned to the Sarajevo Cantonal Court rather than the courts with original jurisdiction. Although the assignment of cases was not the responsibility of the ICTY, but rather that of the Federation Supreme Court, Bosnian Croat participants conflated these two mechanisms, assuming that the reassignment decision reflected the political priorities of the ICTY.

Bosnian Croat participants gave varied responses regarding the influence of the Tribunal in post-war Bosnia. Like Sarajevo Group participants, many believed that over time the work of the Tribunal could play an important role in reconciliation and reconstruction. As one participant stated: "I think that the ICTY is part of everything that has happened here," and that its work has al-

lowed "people to talk about things more openly and more honestly." Still, two others expressly stated that the ICTY had no impact on reconciliation or reconstruction and that economic development was critical to a reconstructed society: "Our people care to buy medicine and to survive. That is the answer." Or as another participant stated: "I would not ever, personally, ever connect these ideas: social reconstruction, economic reconstruction, as far as I am concerned, they have nothing to do with those who committed war crimes." However, all believed – despite the reservations of some – that the ICTY and its work ultimately would be important to the country.

Like their counterparts among the Sarajevo Group, Mostar Group legal professionals questioned why more indictees had not been arrested and called for greater SFOR action. Many believed that the lack of arrests – especially of Bosnian Serb leaders – demonstrated a lack of political will on the part of the international community.

Similar to the Sarajevo Group, Mostar Group legal professionals believed that it was important for the ICTY to conduct its work in The Hague. Six participants stated that the trials should be held in The Hague, implying that judges in Bosnia would be subject to political pressures that would compromise their ability to guarantee fair trials. Two others proposed that the more important trials be held in The Hague while those of lesser rank be tried in national courts to speed up the process and reduce costs. In addition, participants believed that the country could not withstand the instability that would be a consequence of such trials.

However, some suggested that the ICTY would be more accessible to the people if it conducted trials in Bosnia, provided that international judges adjudicated the cases. Three expressed concerns that the location of the Tribunal was a hardship for the families of those awaiting trial in terms of the emotional burden, financial cost and the difficulty to meet with the attorney for their relative. Moreover, these same three participants were concerned that no compensation was paid to those acquitted by the ICTY. As one stated: "We have the situation where some people from the community, who have spent several months there, were actually freed in the end. I don't think it's fair that [they] do not have any right to compensation."

C. Participants' Perceptions of Practices and Procedures of the ICTY

Across national groups, participants generally lacked a clear understanding of the procedures of the ICTY. They expressed several areas of concern: its unique blend of civil and common law procedures; how cases are selected; how indictments are issued – particularly sealed indictments; the length of detention and trials; and the evidentiary rules applied by the ICTY.

Judges and prosecutors across national groups reported that they did not understand how the blend of common law and civil law traditions impacted the work of the ICTY. A Bosniak judge acknowledged that this structural hybrid made it difficult for judges in Bosnia to understand the procedures of the ICTY. As one Bosnian Croat judge stated: "None of us knows the rules according to

which they work. Only a few people who have any contact with such a court know something about it, but the rest of us [do] not." In sum: "These rules are a bit foreign to us."

Participants also did not understand how the ICTY set priorities for investigations and prosecutions. Instances in which ICTY indictments did not conform to participants' expectations led them to conclude that the Tribunal and its processes were unfair. As one Bosniak judge explained his frustration with the process: "I can tell you that, as a citizen, if you have a United Nations resolution then you know who was the aggressor, then you can tell who is politically and militarily accountable, but probably the ICTY has its own way to work."

When asked about the practice of issuing sealed indictments, participants' responses fell into one of two categories. Bosnian Serb and some Bosnian Croat participants understood the practice of sealed indictments as a political tool to keep people "afraid" and to pressure politicians into desired behaviors, whereas most Bosniaks and many Bosnian Croat participants generally found the use of sealed indictments acceptable.

Bosnian Serb participants expressed concern that sealed indictments constituted an abuse of the indictee's rights, demonstrated the lack of transparency of the ICTY and were unnecessary. They asserted that war criminals could not evade justice forever. Another Bosnian Serb judge criticized the use of sealed indictments because he believed that innocent people would turn themselves in to the ICTY. However, he later noted that war criminals would not "accidentally run into SFOR soldiers." Finally, one judge noted that the lack of transparency in the indictment process creates fear among army veterans who worry that army service in this period might constitute a war crime.

Legal professionals in the Sarajevo Group generally found the sealed indictments acceptable. They recognized that under usual circumstances such procedures might violate the rights of the accused. However, in the present circumstances, they believed that the apprehension of serious war criminals warranted this deviation. One accepted the practice of sealed indictments as necessary because Bosnia was "totally undemocratic" and otherwise the capture of war criminals would be more difficult. Another stated that sufficient safeguards existed to make the use of sealed indictments acceptable. Finally, a Bosniak prosecutor saw them as necessary to bring those accused before the Tribunal. This prosecutor noted that if the procedures for sealed indictments were "written in their rules, that's okay."

Some Bosnian Croat participants echoed the views of their Bosnian Serb and Bosniak counterparts. Two stated that sealed indictments were necessary, at least temporarily: "It's okay if it will help to apprehend a criminal." Three others said that the sealed indictments were used by the ICTY "so they can manipulate" and maintain fear among the people. One Bosnian Croat prosecutor demonstrated ambivalence about sealed indictments by stating that they could be "justified" but "it is also about the political pressure."

While participants in the Sarajevo Group made no comments about pre-trial detentions, their colleagues complained that the detentions of accused war

criminals were too lengthy. Across national groups participants decried the length of the ICTY trials. As one prosecutor noted: "Is it fair to keep someone waiting for four years if he's accused of war crimes, to keep him waiting for his verdict to be announced, guilty or not guilty? The Hague Tribunal has to be more efficient, and faster." When considering the ICTY trials, participants compared the length of trials at the ICTY with those conducted in BiH, where criminal trials are generally shorter. They associated fair trials with speed and "efficiency" of the court process. "You can have justice if someone could be . . . brought to trial in a very short time. Everything that has been dragged on has a negative effect. I am not saying that anybody should be amnestied because the time has passed, but I am saying the effectiveness of a sentence [is less]." Sarajevo Group participants echoed this concern.

Several participants criticized the efficiency of the ICTY. A Bosnian Serb participant remarked: "That's so much talk and fuss about [the ICTY] and little work done. They'll fill all those prisons and they're not doing anything." Many Bosnian Croat participants and one Bosniak specifically cited the multi-year trial of General Blaškić as an example of the excessive length of trials at the ICTY. When asked what the priorities of the ICTY should be given limited resources, a Mostar Group participant questioned the limited nature of the ICTY's resources in light of the length of the trials and number of witnesses called to testify.

In contrast, a Bosnian Croat judge averred that: "Justice may be slow, but it is available." And one judge who had visited the ICTY acknowledged the competence and diligence of the ICTY staff. However, he recognized that the Tribunal and its staff required time to understand the region, its history and the various political and military organizations. Similarly, one Bosnian Croat judge suggested that the ICTY has slowed itself down by accepting "small cases" rather than focusing on the most serious war crimes. This same judge supported others' concerns that the length of the trials was costly for defendants and their families, noting further that families turned to charitable organizations for financial support.

The use of expert witnesses by the ICTY provoked strong opinions among Mostar Group and Banja Luka Group participants. For example, one Bosnian Serb participant criticized the ICTY's reliance on an historian to determine the genesis of the conflict. This participant stated that he did not understand the relationship between such general information and a particular crime. He labeled expert testimony as "unreliable statements" that had "no relation" to a criminal case and concluded that the work of the ICTY involved "imagination." He reiterated that: "My job is based on the specific case, specific acts." He was supported by a Bosnian Serb colleague who stated that the ICTY "issued decisions without real evidence. I would never try a case like that."

Bosnian Croat participants also questioned the testimony of a history professor as an expert witness. As one noted: "He might never have been to Bosnia-Herzegovina. He was explaining the history of Bosnia, and the relationship between the three nations, which had nothing to do with the Blaškić case. But if judges want to know about Bosnia, they needed to educate themselves, like my-

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self: take books and read." Two Bosnian Croat judges asserted that only "direct" evidence of a particular crime should be admitted in court, as is the case in Bosnia.

On the other hand, only one Sarajevo Group participant commented upon the use of expert witnesses. This judge, who had visited the ICTY, looked more favorably upon the use of expert testimony and saw expert witnesses as advantageous because they were neutral, were not involved in the war, and offered "the highest scientific dignity."

The participants raised additional concerns about the quality and quantity of evidence. For example, a Bosnian Croat judge suggested that there should be more evidence at trial. Another viewed the release of evidence to the ICTY as dependent on internal political forces within Bosnia. In contrast, another Bosnian Croat legal professional felt that there were too many irrelevant witnesses called to testify in the Blaškić case: "There were two or three hundred witnesses there in The Hague who really didn't have anything to do with it, no connections with the case."

Four Bosnian Serb participants questioned the Tribunal's use of evidence. And others generally questioned the role of the ICTY in the collection of evidence within the RS.

D. Participants' View of Their Treatment by the ICTY

Across national groups, legal professionals perceived their sporadic contact with the ICTY as a sign of disrespect. Bosniak and Bosnian Croat judges and prosecutors reported periodic visits from ICTY officials to collect files regarding suspected war criminals. Those participants with experience presiding over or prosecuting domestic war crimes cases reported awareness of and compliance with the Rules of the Road procedures. However, ICTY officials failed to keep their Bosnian colleagues informed of the status of the investigations, even in response to direct inquiries. As one judge explained: "They came here at the end of 1995. They took the cases with them, and said that the criminals would be brought to justice, but nothing has happened." A judge reported that after having submitted twenty-five cases and waiting eight months, the ICTY had not responded. Other judges and prosecutors stated that they too had submitted files several years before and had received no communication. A Bosnian Serb participant expressed similar frustration. He reported that ICTY investigators never responded to an indictment he submitted for approval in mid-1997. These professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials.

Some who interacted with representatives of the ICTY wanted to be respected in their own right as legal professionals. However, their attitude toward the ICTY was ambivalent and influenced by the status they believed they occupied in relation to the international community. Participants across national groups reported they perceived that the international community saw them as intellectual inferiors who did not understand the relevant law. As one participant remarked: "When all these people come from outside they think that we

absolutely do not have any knowledge; they have certain biases already when they come in." One judge remarked upon the power differential that exists between the ICTY and the Bosnian judicial system. However, one Bosnian Serb judge expressed pride in the approval by the ICTY of the legal work he had performed noting that: "Everything I did was accepted by the Tribunal with no objections." Even in instances in which the ICTY approved of their performance, the power of the Tribunal to validate Bosnian legal competence was clear.

E. Gaps in Communication Identified by Participants

With two exceptions, Bosnian legal professionals were poorly informed about the work of the ICTY. A Bosnian Serb participant questioned whether the Tribunal had ever issued a verdict. Another wondered whether it was founded on a statute. Some participants expressed concern that the information they had received had been distorted by the media. Despite this lack of information, participants did not report any self-initiated study of war crimes or the ICTY.

Legal professionals across national groups reported that virtually all the information about the ICTY they received came from the local sources. Participants in the RS and the Federation recognized that the limited source of information was problematic because of the nationalist slant of the communication industry in BiH. One Bosnian Serb legal professional noted the influence of politics on media reports stating: "There is mostly news with political features, not professional." A Bosnian Croat participant stated: "Every side gets its own version of the story." A Bosniak prosecutor remarked that Bosnian newspapers were "short on news." Another criticized the accuracy of reporting about the ICTY, stating: "nothing can be lied about too much."

Across all national groups, participants desired impartial information about the ICTY with legal content as they had limited or no access to legal publications from or about the ICTY.[36] One judge reported that he was unable to locate a copy of the Tadić judgment which he remarked was critically influential in a "legal and political sense." Two judges reported that they periodically received computer disks from the ICTY with bulletins about the Tribunal's recent work. Others cited informal "exchange of opinions" with colleagues as an additional source of information.

Participants offered suggestions to improve communication with the ICTY. One suggested that the ICTY regularly distribute its reports directly to judges and prosecutors. Another believed that more judges and prosecutors should visit the Tribunal. In addition, a judge encouraged visits by the highest officials from the ICTY to meet members of the local judiciary.

36. The ICTY website, <http://www.un.org/icty/index.html>, had not included documents in the local languages of BiH until after the survey was completed.

V.
DISCUSSION

The purpose of this study was to assess the perceptions and consequent attitudes of Bosnian judges and prosecutors involved in the adjudication of war crimes. The following discussion offers some interpretations of the major themes that emerged. In so doing, our goal is to offer a richer understanding of the impact of international criminal trials on a national judicial system. The survey results suggest that those international institutions that interact or are involved with the Bosnian legal system should take seriously the problems and resistances articulated by the study participants in formulating future directions. In addition, these perceptions may offer lessons about the ICTY's effect on Bosnian legal professionals that can be applied to the process of establishing an International Criminal Court. The findings suggest that it is essential to incorporate a context-specific understanding of an affected country and its judicial processes in order to enhance cooperation with and decrease resistance to institutions of international criminal justice.

A. Context

The legal professionals who participated in this survey were surprisingly open and candid in the interviews. However, it was apparent that certain topics provoked a significant emotional response, most clearly in the areas of war crimes and genocide. Across the board, participants avoided provocative questions that addressed the relationship of law to justice. For example, in response to questions regarding their role in refugee returns, the creation of a State supreme court for BiH or the prosecution of political leaders for war crimes, participants frequently resorted to the evasive statement that the question was "political" and therefore inappropriate. This response may reflect the traditional and narrowly defined role of the judge in a civil law system or participants' perspective on the role of law in a Communist society. It may also reflect their caution in making statements that may expose them to retaliation or retribution by the legislative and executive branches of government which wield tremendous power over the judiciary.

In addition, there was a strong association between the emotional response to particular topics and the participant's national origin. It was interesting that participants expressed few reservations regarding the confidential nature of the interview, despite the caution they displayed in answering certain questions. In fact, it became evident that a few had discussed their participation with colleagues. The researchers feel that, despite the difficult context in which these judges and prosecutors operate, their answers reflected an honest attempt to grapple with the issues raised.

B. Professional Identity

Given the ongoing criticism of the Bosnian legal system by members of international organizations such as UNMIB, JSAP and OHR, we were surprised

to observe the extent to which the notion of "professionalism" dominated the views of the participants in this study. While the international community has considered Balkan politics primarily in terms of conflict between national groups, it has paid too little attention to other factors that may influence attitudes and behaviors, like professional identity. The judges and prosecutors in the sample reported that they maintained high ideals of integrity and respect for the rule of law. These precepts were accompanied by reverence for codified law that reflect the civil law tradition. In this system, there is no concept of judicial activism. While recognizing that injustice may be caused by political decisions, judges and prosecutors did not see themselves as empowered to use the law to ameliorate the negative consequences of these decisions. It is also possible that some legal professionals may have relied on the formal structure of the civil law tradition to mask their personal support for the goals of the politicians in power, particularly since they were communicating to an international audience.

Further, the participants reported anger and confusion over the criticisms by international lawyers who did not appear to understand the legal tradition of civil law countries or, if they did, were perceived as showing disrespect for the judicial system to which Bosnian legal professionals were devoted. These attitudes, coupled with the decision of the ICTY to combine common and civil law to the great confusion of our participants, may lead to a pervasive sense of being practitioners in a second-rate system. Judges and prosecutors therefore find themselves on the defensive, powerless in the face of an international community that rejects their beliefs. Prior to the war, judges and prosecutors were people of stature – community leaders with means and position. Having lost their homes, family members, and friends, these Bosnian professionals appeared to cling to their professional identities. Unfortunately, participants perceived international criticism of the Bosnian legal system as an attack on their professional identity. This perception by participants indicates that efforts by international organizations to enhance the professionalism of Bosnian judges and prosecutors should be designed with this vulnerability in mind. If Bosnian legal professionals experience educational interventions as denigrating their competence, such well-meaning programs run the risk of promoting resistance to, rather than cooperation with, international groups.

These findings do not tell the whole story. These legal professionals are beleaguered: not only are they criticized by those outside the country but they are under pressure from those within, particularly politicians and criminal elements who act with impunity. Since they are dependent on legislative and executive branch officials for fiscal and other resources, they are pressured to render decisions that are favorable to these authorities. Compounding this, threats to them or to their families, evidenced by abductions or beatings, place them in positions of great vulnerability with minimal protections. Given these pressures, it is significant that this sample of judges and prosecutors insisted on their integrity and consistently advocated independence of the judiciary. We must also emphasize that they recognize what needs to be rectified in their system if positive change is to occur – decent salaries paid regularly, protection from harm,

competent judges, transparent decision-making and non-interference by politicians. Although they recognized that corruption (defined as bribery) was possible and perhaps even likely among some of their colleagues, they traced this to the poor pay and diminished quality of life. Further, they supported the law that prohibits judges from joining political parties.

There appears to be a disconnect between the views of Western legal experts and those of Bosnian legal professionals in this study. It centers on the question of influence or the appearance of influence on judicial and prosecutorial activities. Although it is not clear to what extent improprieties exist, the reports of such have been cited as justifications for large-scale reform of the Bosnian legal system. In order to promote an effective dialogue between these groups, Western experts need to acknowledge the expertise and strengths of Bosnian legal professionals. In addition, international representatives must articulate the justifications for the new professional standards that the international community seeks to inculcate within the national legal system.

Like the rest of the country's institutions, the legal system is coping with the transition from the pre-war Communist era. Our study suggests that the judges are open to change but the modifications required must occur within the larger context of transformation of the political system. Moreover, the influx of international lawyers and others who are perceived as promulgating a foreign system of law disempowers Bosnian professionals, heightens their ambivalence and potentially mitigates the positive effects that could result from the international presence.

There is no question that disparities in power color this process of evolution. Our findings suggest that the Western legal community may not be sufficiently sensitive to these issues in their concern to implement a "modern" system of law. Although international organizations have Bosnian nationals on staff, this level of integration is insufficient to overcome the perception among the Bosnian legal professionals we interviewed that the international community is imposing foreign values upon them. We suspect that the desired changes will require many years to implement fully. It is likely that a systematic and well-paced process – one that more completely involves the Bosnian legal community in design of training, modifications of the law and which respects the integrity of the Bosnian legal tradition – will have a more profound and sustained impact on the legal system. Power disparities generate ambivalence, and attention to the resistances that reflect this ambivalence will further the goals of a truly independent and stable judicial system.

Finally, the rejection of the political process by members in our study of this professional class is disturbing. Since the members of our sample were highly educated and relatively well informed, their rejection of the political process has implications for the development of democracy in BiH. For many, "political" has come to be reflective of nationalism and war. If these judges and prosecutors see the need to withdraw from political participation, there is a danger that legal professionals will be further disempowered as they eschew the

democratic process. If other educated individuals feel similarly, this will not augur well for an active citizenry fully engaged in democratic decision-making.

C. *Participants' Perceptions of the International Community and the ICTY*

We have described how our sample views the international community. These views influence their perspective on the ICTY as well. The international community responded to war crimes and genocide in Bosnia by establishing the first international war crimes tribunal since Tokyo. The difficulties in establishing the ICTY are well documented and include its inception in the midst of a war and a lack of financial and human resources as well as ambivalent support from world leaders. In the early years of the Tribunal its work suffered from lack of cooperation from authorities in Bosnia. Additionally, the narrow mandate of the international troops stationed as peacekeepers in Bosnia inhibited arrest of indicted war criminals. In the seven years since its creation, significant positive changes have taken place as financial support has increased, countries with peacekeeping troops on the ground have improved cooperation with ICTY prosecutors and the ICTY has clarified its practices and procedures. This study provides the opportunity to re-evaluate the practices and institutional arrangements of the ICTY in order to lessen resistance and encourage collaboration between these judicial entities.

The participants perceived the following areas of concern: location of the ICTY; judicial appointments; criticisms by international organizations of the Bosnian legal system; a misunderstanding of the hybrid nature of ICTY judicial procedures; the inherently political nature of a United Nations-sponsored ad hoc tribunal; and the lack of communication between Bosnian and Tribunal legal professionals. This constellation of factors has coalesced around a perception by Bosnian judges and prosecutors we interviewed that the ICTY, as well as those international legal organizations working in Bosnia, have contributed to the marginalization of Bosnian legal professionals. While most participants continued to support the concept of the ICTY, these concerns have placed them on the defensive and led to skepticism that undermines their support of the Tribunal.

Mass accountability for Bosnian war criminals necessarily requires the active participation of the Bosnian legal system because of the sheer numbers of suspects involved. Currently, because the ICTY assumes primary jurisdiction for war crimes, the Bosnian legal system largely has been bypassed or reduced to a subsidiary role in this process. The skeptical, even negative, attitudes of participants that we have described pose a significant risk to the long-term development of the Bosnian legal system and its integration into Western Europe. The findings indicate that current efforts of the ICTY and international institutions working to promote the Bosnian legal system have yet to overcome this negative perception. Five years after the signing of the Dayton Accords, the persistence of this skepticism is of grave concern. Greater attention needs to be paid not only to the political and financial limits on the Bosnian legal system but also to the more subtle psychosocial factors that sabotage professional identity and commitment to positive change.

In 1993, when the ICTY was created in the midst of active conflict, important choices were made regarding the location and structure of the Tribunal. At that time, it was not possible to locate the Tribunal in the Balkans or to include participation by the Bosnian judiciary in trials. Participants' concerns about marginalization lead to the question of whether the original decision regarding the location of the ICTY and the exclusion of Bosnian legal professionals in its judicial ranks should be reconsidered. These tactical decisions, taken at the Tribunal's inception, are examples of choices made in the context of armed conflict that now might be revisited.

In the findings, we have described a series of factors that have contributed to resistance to the ICTY. The synergistic effect of these factors requires closer examination. The Bosnian legal system has been under intense international scrutiny particularly since the end of the war. Bosnian legal professionals have received contradictory signals from the ICTY and international organizations. For example, under the Rome Agreement, Bosnian authorities lawfully can arrest and prosecute alleged war criminals only subject to ICTY approval. At the same time, international organizations like UNMIB, JSAP and OHR continue to criticize the Bosnian judicial system for its lack of independence, incompetence and corruption. These evaluations send the message to Bosnian judges and prosecutors that fair war crimes trials are impossible in their own country. On the one hand, international organizations have reported that local justice is vulnerable to influence; some judges may be corrupt, incompetent, and/or influenced by nationalist politics. On the other hand, this is not universal. The net effect of these mixed messages may be to amplify the negative overtones of these signals. Thus, the overwhelming impression that Bosnian legal professionals have of the ICTY and international organizations in Bosnia is that these institutions, with few exceptions, have little respect for the Bosnian legal system. In pursuing their own predetermined agendas, without meaningful input from Bosnian legal professionals, international organizations run the risk of undermining the very goals they are trying to achieve.

Moreover, many Bosnian legal professionals perceive the ICTY and its procedures as indicating that the Bosnian legal system is substandard. Bosnian judges and prosecutors perceive the choice of a hybrid set of procedures that embody primarily common law as a negative evaluation of the civil law system and a challenge to the precepts of Bosnian legal professionals. Each of these legal systems has a distinct culture. The structure of a civil law system results in a more rapid trial, fewer witnesses and the role of the judge is more narrowly defined.[37] For many Bosnian legal professionals, the common law system is inaccessible and, by extension, the ICTY.

Bosnia is a virtual protectorate of the international community. Across national groups, participants perceived that they occupied a diminutive status in this arrangement. It became clear among our sample that they did not consider themselves to be co-equal partners in the design and implementation of many of

37. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 19, 51-3 (1986).

the programs intended to rebuild their legal system and their country. The attitudes toward the international community were multifaceted and strongly colored participants' views of the ICTY: some were grateful to the world community for ending the war; others were angered by the time that it took for intervention to occur; and still others resented the support for a multicultural, unified Bosnia. Against the backdrop of the helplessness engendered by severe personal loss, the lack of information about the ICTY may compound the implicit message that the Bosnian judiciary and its prosecutors are at best, barely acceptable, and at worst, irrelevant. Bosnian legal professionals have lost status and their social contribution has been denigrated as a result of the war. Compounding the powerlessness that results from these losses, they now find themselves sidelined in the process of reconstruction. In response, nationalist perspectives are supported, myths about the ICTY's bias are perpetuated and its positive contributions are minimized.

The findings suggest that national identity influences the participants' opinions regarding the ICTY. For example, those Bosnian Croat and Bosnian Serb participants characterizing the ICTY as a "political" body simultaneously delegitimize the Tribunal and bolster their own integrity as legal professionals. Thus, to label the ICTY as "political" enables these participants to dismiss its judgments as the result of a legal charade and to reaffirm their own fealty to the principles of neutral adjudication and professionalism. Moreover, this labeling also may serve to mask the political biases of the participants and avoid acknowledgment of the consequences of their political choices. Further, it is essential that we recognize the ICTY as a political body in its inception, judicial selection and in the rules and procedures it promulgates.[38] Moreover, its activities and decisions have far-reaching effects within each national group and within the state as a whole. The absence of a frank discussion between the ICTY and Bosnian legal professionals regarding the perceived political dimensions of the ICTY may have served indirectly to enhance resistance to the Tribunal within Bosnia.

It is abundantly clear that Bosnian legal professionals did not have accurate information about the ICTY. At best, this confusion has generated misunderstanding on the part of those legal professionals who supported the ICTY. At worst, the absence of correct information has fueled suspicion and hostility among those Bosnian Croat and Bosnian Serb participants who viewed the ICTY as the authoritative and critical voice of the international community. For these, the ICTY contradicted their own understanding of the role their national group played in the war relative to that of other groups. However, all participants, even those who displayed outward hostility toward the ICTY, expressed genuine interest in receiving more and direct communication from the Tribunal.

38. Former President of the ICTY, Gabrielle Kirk McDonald, has acknowledged the political nature of the Tribunal: "First of all, we are a political court. We were established by the Security Council and that makes us political because the Security Council is a political body. And as President, I have acknowledged that. That does not mean that we act in a political way. The judges are independent." Interview with Gabrielle Kirk McDonald, *supra* note 11.

The few participants who have had personal exposure to the ICTY came away with a deep respect for the Tribunal and the professional integrity of its staff, regardless of their national identity. Their experiences provide reason to believe that negative attitudes of some Bosnian legal professionals may be changed by increased exposure to the Tribunal.

D. Accountability, Responsibility and Genocide

Participants hold strong views regarding who is responsible and who should be held accountable for atrocities committed during the conflict.[39] The cohesion of views among participants of the same national group again indicates that war experiences of participants, their self-identification with a particular national group and their exposure to dominant narratives about the role of their national group in the conflict exert a profound impact. The willingness of participants to demand accountability for particular individuals varied substantially with national group – Sarajevo Group participants being most specific. It is noteworthy that participants – Bosniaks and Bosnian Croats – who refer to atrocities that have been corroborated by international human rights groups and United Nations-sponsored bodies appear more likely to demand international accountability for the perpetrators of these crimes. Other participants – predominately Bosnian Serb – claim victimhood and yet describe no specific atrocities or war crimes. For them, accountability seems to be an abstract concept.

All participants seek to present the war experience of their national group as that of victims. However, the international community sees Bosnian Serb and Bosnian Croats as aggressors. This disparity in viewpoints may explain the responses that were defensive or evasive. The insistence of these legal professionals on recognition of the suffering or misunderstanding of their national group may have been used to deflect unspoken or presumed criticism by the researchers. While the experience of each national group provides a unique perspective on the conflict, the lack of a public discussion within each national group critical of the war atrocities carried out in the name of that national group solidifies and privileges one "truth" at the expense of all others. Although the findings indicate this pattern is observed in response to questions about accountability and responsibility in general, nowhere is it more pronounced than in the responses to the topic of genocide.

When asked their legal opinion about the occurrence of genocide during the war, participants responded by recounting the politically accepted version of events from the perspective of their national group. Bosniak participants were unequivocal and consistent in their statements that genocide against Bosniaks occurred during the war, while Bosnian Serb participants tended to state that genocide occurred against all three sides, that they had no knowledge of any acts of genocide or that genocide did not occur at all. Bosnian Croat legal profes-

39. In the local language participants spoke during the interviews, the word for "responsibility" is the same as "accountability." Nevertheless, it was possible to distinguish these two concepts based on the context in which the word was used.

sionals were willing to state that genocide occurred, but if so, that all three sides had suffered it. The statement that genocide occurred on all three sides serves indirectly to acknowledge that the armed forces of the participant's national group had committed mass war crimes while allowing the speaker to claim the status of victim for his or her national group. The diffusion of responsibility that characterized this opinion is ominous.

There are two immediate consequences to turning each national group into co-equal victims of genocide. First, it ignores the historical record that indicates that some suffered more than others. For example, this opinion implicitly trivializes events like the Srebrenica massacre. In addition, the ideal of co-equal accountability obfuscates the facts and recapitulates the pernicious historical revisionism following World War II that has haunted the former Yugoslavia. Second, this idea has radical implications for international war crimes prosecutions. If all sides to the conflict are equally guilty, then the ICTY should indict and try equal numbers of Bosniak, Bosnian Serb and Bosnian Croat war crime suspects – an expectation articulated by many Bosnian Croat and Bosnian Serb legal professionals. This perspective also acknowledges that the judges and prosecutors themselves understand the significant political ramifications of the trials. The disdain for the "political nature" of the ICTY reflects the reality that the Tribunal's prosecutorial choices validate one version of events over others. The principle of proportional prosecution, suggested by some of the participants, would lead to under-prosecution of Bosnian Serb perpetrators of war crimes and/or over-prosecution of Bosniaks and Bosnian Croats since there is a disparity in atrocities committed by members of particular national groups. Therefore, equal numbers of prosecutions do not produce equal justice.

The divergence among the groups is particularly striking considering that we asked participants to state their *legal opinion* as to whether genocide occurred. Yet, with few exceptions, participants did not refer to a legal definition of genocide. Rather their responses suggested that participants used the term "genocide" to refer generally to war atrocities. As noted, we view this generalization of the use of the term genocide as a mechanism to diffuse responsibility for the war. Their interpretation demonstrated how identity and national consciousness can color legal reasoning. The lack of legal precision in their responses may have indicated that it was difficult for participants to remain objective when they discussed this controversial issue.

The difficulty that participants had in discussing responsibility and accountability for the war raises serious implications for the ability of Bosnian legal professionals to conduct impartial trials of accused war criminals. Participants prided themselves on their objectivity and their ability to adjudicate matters before them impartially. To the extent that they expressed reservations about conducting national war crimes trials, they stated that political pressures may corrode due process protections. However, the strong association between the "legal" opinion offered on genocide and the national group identity of participants indicates that Bosnian legal professionals may not be neutral on issues regarding accountability for war crimes and genocide. These attitudes are cause

for concern. At the time of this study, there existed a gross disparity in the numbers of war crimes trials held in the Federation and the RS (where virtually none had taken place). While we recognize that war crimes trials require the active participation of police and government structures, we share the concern expressed by many participants that the Bosnian judicial system may not be prepared fairly to adjudicate the trials of those accused of war crimes.

E. Social Reconstruction and Reconciliation

The concept of reconciliation in post-war societies remains elusive. Further, the positive contribution of international criminal trials to this process, while widely and uncritically accepted, remains an empirical question.[40] Materials produced by the ICTY and comments by its supporters reiterate the importance of war crimes trials to the process of national reconciliation.[41] Generally, reconciliation refers to a process by which peoples who were formerly enemies put aside their memories of past wrongs, forego vengeance and give up their prior group aspirations in favor of a commitment to a communitarian ideal. Since "reconciliation" has theological overtones that reflect the Christian religious tradition, we have chosen to use the term "social reconstruction" to describe the evolution of social institutions, economic development, community-building and person-to-person connection that may underlie the commitment of people to live together.

Reconstruction is a contested notion. Our study suggests that the widely held belief that war crimes trials – which individualize accountability – contribute to social reconstruction may reflect more of an aspiration than a reality. In fact, our findings indicate that many Bosnian Croat and Bosnian Serb legal professionals do not view criminal trials as integral to social reconstruction. An analysis of the responses of our participants suggests that social reconstruction may not occur when people are faced with judicial decisions that do not correspond to their perceptions of what happened, i.e., their "truth." Evidence that is sufficient to produce a verdict in a court of law may not be sufficient to override solidified national group perspectives among the ranks of some legal professionals. These narratives that reflect national or "ethnic" history, whether contemporary or ancient, profoundly influence how our sample viewed individual verdicts. The participants in this study operate within a political context in which national identities are inscribed. It is possible that transformation toward a more open and democratic society will enable these judges and prosecutors to separate themselves from national group allegiances and to articulate thinking that is different from the current national stories about the war. Thus, our study highlights how war experiences and national group narratives may work in tandem to isolate and increase political distance among national groups.

40. *See* MICHAEL IGNATIEFF, THE WARRIOR'S HONOR: MODERN CONSCIENCE 164-90 (1997). Ignatieff describes the "articles of faith" that underlie the commitment of the world community to international trials for war crimes. He asks: "What does it mean for a nation to come to terms with its past?"

41. MORRIS & SCHARF *supra* note 3; Outreach Program Proposal *supra* note 5; Kritz, *supra* note 12 at 128-29. *See also supra* note 11.

For example, responses to the question of the relationship between war crimes trials and social reconstruction once again reflected national group perspectives. For Bosniak judges and prosecutors, the widely held belief that social reconstruction follows from individualizing guilt was a valid construct. However, Bosnian Serb legal professionals saw no relationship between trials and social reconstruction. In fact, they focused primarily on living amiably next door to their Bosniak and Bosnian Croat brethren but not in one geographical space. They seemed more interested in promoting the regional governmental structures that were established at Dayton within the RS rather than in strengthening the State institutions. Thus, the ICTY was perceived as irrelevant while issues of economic reconstruction and job creation were critical.

Our sample of Bosnian Croats participants showed more variation in their responses. Most were positive about the feasibility of a unified state but qualified their remarks by indicating that such a process would take many years. Two advocated a three-entity solution, living side-by-side. Most felt that the ICTY over time would contribute to the political stability of the country. While some focused on acknowledgement of their victimhood and retribution as the next step, others emphasized the importance of economic development. As the recent ESI and ICG reports suggest, the existence of the shadow state of Herceg-Bosna under the aegis of the Croatian Democratic Union (hereinafter Hrvatska Demokratska Zajednica or HDZ) has led to a de facto separation that OHR seeks to eradicate. How the judges and prosecutors see their roles in this shadow state was not apparent, although they articulated support for the full integration of the judicial systems, especially in Mostar. It is too soon to evaluate the impact of the death of Croatian president Tuđman and the defeat of the HDZ party in the recent elections, although the apparent rigidity of the HZD in Herzegovina suggests that significant changes will not occur in the immediate future.

Only a minority of Bosnian legal professionals in our sample believed that war crimes trials were a vehicle for social reconstruction. Diplomats, world leaders, ICTY officials and human rights proponents may be advocating that the ICTY achieve an objective – reconciliation – for which there is no broad-based acceptance among our participants. The data suggest that Bosnian legal professionals do not necessarily aspire to a future that is a reconstruction of pre-war social arrangements. Therefore, the contribution of the ICTY to social reconstruction is in question since it may resonate only with the beliefs of a minority of the legal profession.

Many legal commentators have urged the ICTY to use its judgments to promulgate an authoritative historical record of the conflict in the former Yugoslavia that will serve as the basis for social reconstruction.[42] In recent years,

42. Payam Akhaven, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20.4 HUM. RTS. Q. 737, 782-85 (1998); Aryeh Neier, *Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda, in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 39, 49 (Carla Hesse & Robert Post eds.,1999) [hereinafter HUMAN RIGHTS IN POLITICAL TRANSITIONS]; Ruti Teitel, *Bringing the Messiah Through the Law*, *id.* at 177-90; Naomi Roht-Arriaza, *The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with Jose Zalaqett*, *id.*, at 195-209. *See also supra* notes 10, 11;

there has been considerable debate over the necessity of a public accounting for past human rights abuses to promote the rule of law and a strong and democratic society.[43] Traditionally, this debate has been framed as choice between extremes: utter impunity v. individual trials. The dilemma is how to respond to past gross abuses in a manner that allows multiple communities with varied needs and goals to learn to live together again. Ultimately, while justice and accountability may be significant contributors to the process of social reconstruction, our findings indicate that war crimes trials should be conceptualized as but one aspect of a larger series of possible interventions.

This study underscores the need to attend to the competing claims of national groups, whether they are victims or aggressors. It is critical to reexamine the assumption that remembrance – in the form of legal record – is the foundation for social reconstruction. For some groups, forgetting may be the only avenue to community building. For others, acknowledgement of past suffering may be the cornerstone of social repair. However, our findings indicate that differing responses to the war create competing needs for avenues for recovery. In the aftermath of mass violence, there may not be a consensus about who were victims and who were perpetrators. Although international trials render verdicts based on an examination of "facts," the responses of our participants indicate that their perception of truth may outweigh the facts as determined by an international body. Consequently, for Bosnian Serb and some Bosnian Croat legal professionals, international trials were construed as privileging the needs of some voices over others.

Across national groups, participants in this study believed that all who were responsible for war crimes must be held accountable. Nevertheless, the findings suggest that the ingredients and priorities for social reconstruction are influenced by whether an individual is a member of a national group that is perceived by the international community as a victim or a perpetrator. In addition, we suggest that those who are members of victimized national groups have a different timeframe for initiation of war crimes trials from those whose political leaders initiated the war but who themselves did not directly commit atrocities. For the former, individual criminal trials are an immediate and overriding goal; for the latter, social reconstruction is a long-term process that may not involve criminal trials. We must honor the needs of victims of gross human rights abuses. However, our findings suggest that if social reconstruction is a worthwhile objective, it is important to achieve it in a framework that engages those who, while not directly acting as perpetrators, supported the aims of those who promulgated crimes of war and genocide. For the international community the question is what are the limits of amnesia.

MARTHA MINNOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER MASS GENOCIDE (1998).

43. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537. *See* Carla Hesse & Robert Post, *Introduction*, to HUMAN RIGHTS IN POLITICAL TRANSITIONS, *supra* note 42, at 13-31; Ken Roth, *Human Rights in the Haitian Transition to Democracy*, *id.* at 93-127.

VI.
RECOMMENDATIONS

These findings indicate needed improvements in the areas of judicial and prosecutorial independence, continuing education, and improved communication and collaboration among legal professionals across national groups. In addition, the findings suggest that there are several areas in which changes could be made to enhance the acceptability of international criminal trials to Bosnian legal professionals. To these ends, we make the following recommendations:

1. We support legislation that ensures the independence of the judiciary in both entities in BiH. In particular, we encourage action to establish appropriate salaries – timely paid – and adequate security measures.
2. We support the institutionalization of regular and sustained professional contact between legal professionals in each entity. In particular:
   a. continuing education programs for Bosnian legal professionals should be expanded and should include discussions of war crimes trials, international humanitarian law and international human rights standards;
   b. continuing education programs should be conducted by international professionals who have a sound knowledge of the Bosnian legal system and tradition; and
   c. continuing education programs should be conducted as soon as possible by Bosnian legal professionals and/or professionals with a thorough grounding in the civil law tradition.
3. We support the strengthening of the independent legal associations recently established. These associations should continue to promote review, development and dissemination of ethical and professional standards for lawyers and judges.
4. We strongly encourage the Tribunal to pursue the option of conducting trials on the territory of BiH.[44] We suggest that such trials be held in the region in which the alleged incidents occurred.
5. We suggest that war crimes trials in each entity be conducted by a panel of three judges, one of whom one should be a judge who is not a citizen of BiH or of any of the states of the former Yugoslavia. Appellate review of such trials should also be conducted by a three-judge panel, one of whom should be a judge who is not a citizen of BiH or of any of the states of the former Yugoslavia. Such measures are warranted because the majority of war crimes trials will be held in the domestic courts of BiH and the vulnerabil-

44. In establishing the ICTY, the Security Council, pursuant to Resolution 827, stated that "The Tribunal may sit elsewhere [outside of the Netherlands] when it considers it necessary for the efficient exercise of its functions," *supra* note 4.

ity of Bosnian judges and prosecutors to improper political influences will continue for the foreseeable future.

6. We strongly support a rigorous protection program for witnesses, judges and legal professionals involved in war crimes trials held on the territory of BiH. Adequate protection necessarily must be offered during the investigation, trial and appellate proceedings. The offer of meaningful resettlement must be offered in appropriate instances. Such a program may require the financial support and active participation of the international community.
7. We support the concept of an ICTY outreach program. This program should pay particular attention to communication with Bosnian legal professionals in the local language. In particular, the program should:
   a. establish an advisory council of Bosnian legal professionals to determine the information needs of the legal community and to cooperate with the ICTY to address those needs;
   b. focus on the on-going and rapid dissemination of accurate information regarding ICTY activities. This information should be disseminated in the local language through print, computer and videotape;
   c. offer seminars and, preferably, other forms of face-to-face interaction with legal professionals and officials of the ICTY to address areas of misunderstanding, ignorance and concern. These fora may be live or conducted through the medium of telecommunications;
   d. rotate Bosnian legal professionals through the ICTY in The Hague to provide first-hand observation of facilities, procedures and judicial processes. The criteria for selection should be transparent;
   e. emphasize content that addresses such issues as the priorities of indictments for the court, explanation of the hybrid nature of the procedures, limitation of the court's purview and the intended impact of the court's decisions in Bosnia.
8. We recommend that communication between the ICTY and the people of BiH be enhanced. Communications should be in the local language and all branches of the media should be utilized. Civil society should be encouraged to include representatives of the ICTY at community-sponsored events including professional conferences and nongovernmental organizations' meetings and events. Although press conferences are useful, officials from The Hague visibly should be present at such activities.
9. We suggest that opinion leaders and service providers such as educators, health professionals, journalists, leaders of Bosnian nongovernmental organizations, representatives of civil society, social

service providers and writers also should be rotated through the ICTY or brought together from both entities to meet in The Hague to address areas of misunderstanding, ignorance and concern. The criteria for selection should be transparent.

10. We urge the ICTY to convene and visibly be present at periodic community meetings in BiH. These meetings should be held in various locations throughout the country and include towns and villages outside of the larger cities.

11. We strongly encourage OHR to undertake the organization of an inter-entity council to examine a range of alternative mechanisms to promote social reconstruction. Since Bosnian legal professionals do not uniformly connect war crimes trials to social reconstruction, such a council should analyze and make recommendations to promote democratization, open communication and a free press, cross-entity small business development, and religious and cultural tolerance. Members of this council should reflect a balance with respect to gender and national origin and include representatives from academia, primary and secondary education, the media, nongovernmental organizations, professional associations, and the religious communities.

12. We suggest that the findings of this study may offer insights that enhance the effectiveness of the International Criminal Court. In the institutional structures and arrangements – yet to be created – procedures, positions and resources should be established and devoted to maximize the impact and understanding of the trials within the directly affected communities. In particular, procedures and programs should address the following issues:

    a. the trials should be located on or as near as possible to the territory in which the alleged incidents occurred;

    b. the goals, objectives, judicial selection, priorities for indictment and other mechanisms of the ICC should be transparent and communicated effectively in the local language of the country in which the alleged incidents occurred;

    c. the rules of evidence and procedure governing the ICC should take into account the major legal traditions. To the extent that there is flexibility in the rules, their application should be responsive to the legal culture of the country in which the alleged incidents occurred;

    d. the procedures governing the investigation, trial and appellate phases should be communicated effectively in the local language to members of the legal profession in the country in which the alleged incidents occurred;

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e. innovative ways of including representatives of the affected country's judiciary in the adjudicative process should be explored; and

f. additional interventions that are different from, but complementary to trials, such as facilitating culturally accepted mechanisms of justice, should be considered.

APPENDIX A

Justice, Accountability, and Reconstruction in the Former Yugoslavia: An Interview Study of Bosnian Judges and Other Key Informants[45]

Question coding:

Questions in plain text: demographic information.
Questions in italics: How does the work of an international war crimes tribunal contribute to local efforts at social reconstruction?
Questions in bold type: How do war and changes in identity influence the administration of justice?
QUESTIONS IN SMALL CAPS: WHAT IS THE ROLE OF JUSTICE AND THE LEGAL SYSTEM IN SOCIAL RECONSTRUCTION?

Interview Code # ____
Disclosure Read ____ Y ____ N
Subject Agreed ____ Y ____ N

I. DEMOGRAPHICS

A. Experience

How did you become a judge?
Where were you educated?
Have you ever been educated outside Yugoslavia?
How long have you been a judge?
Why did you become a judge? (motivation)
What do your professional contacts with judges in the other entity consist of?

B. Personal background

When were you born?
Where have you lived and during what time periods?

II. ROLE OF THE JUDGE

What do you see as the judge's most important role?
-Inside the courtroom?
-Outside the courtroom?
How has the 1992-1995 war affected your motivations for being a judge?
How has it affected your career path?
Are the national identities of the parties in your courtroom proportionately different than they were before the war?

45. This questionnaire was translated into the three local languages of BiH.

Is the national identity of parties included in courtroom records?
Has that changed since the war?
Do you believe that judicial decisions can play a role in changing people's attitudes? Can you give us any examples where this has happened?
In your opinion, how has law and its application changed since the war?
What is the role of the judge with respect to the return of refugees? (Should judges apply a strictly legal analysis to the return of refugees to their homes, or should they allow for the fact that there is a housing shortage and the return of refugees could produce a domino effect?)

III.
IDENTITY OF AND IMPACT OF THE WAR UPON THE JUDGE

A. National background

With which national groups do you identify and why?
With which groups do (did) your parents identify?
Before the war, did you identify with a different national group?

B. Impact of the war

What has been the most significant change in your life since the war broke out?
Has your health been affected by the war?
Did any of your family or friends die or disappear or become injured during the war?
Were you ever in any army? If so, when?
Did you serve as a military judge in the 1992-1995 war?
Have you ever been a member of a political party?
Are you politically active now?

IV.
DOMESTIC EFFECTS OF THE ICTY

A. Legal definitions

HOW DO YOU DEFINE RULE OF LAW?
WHO IN BOSNIA-HERZEGOVINA TODAY BELIEVES THAT THE RULE OF LAW IS THE BEST WAY TO RESOLVE DISPUTES? JUDGES? ATTORNEYS? THE PUBLIC? POLITICAL LEADERS?
HAS THIS CHANGED SINCE THE WAR?
DO YOU VIEW THE JUDICIAL SYSTEM IN BOSNIA-HERZEGOVINA AS AN EFFECTIVE WAY TO RESOLVE CONFLICTS?
IF YES, IS THIS TRUE FOR DISPUTES BETWEEN PERSONS OF DIFFERENT NATIONAL GROUPS?
IF NO, WHY NOT, AND IS IT DIFFERENT FOR DISPUTES BETWEEN PERSONS OF DIFFERENT NATIONAL GROUPS?
DO YOU THINK THAT YOUR COLLEAGUES (IN YOUR CANTON/REGION) CAN PROVIDE A FAIR TRIAL UNDER THE CURRENT, DIFFICULT CONDITIONS?

How would you explain legal accountability?
How does accountability influence your decisions in court?
Should individuals be held more or less accountable for their actions during periods of warfare?

- If so, how? If not, why not?

What do you think the relationship is between ensuring the widespread accountability of war criminals and social progress and economic development in Bosnia-Herzegovina?

B. Dayton Accords and formal structures

WHAT ROLE DO THE ENTITY CONSTITUTIONS OF THE RS AND THE FEDERATION PLAY IN RECONCILIATION AND SOCIAL RECONSTRUCTION?
DOES INTERNATIONAL LAW IMPACT YOUR COURTROOM? IF SO, HOW?
WHAT DO YOU CONSIDER THE HIGHEST LAW OF THE LAND?
SHOULD A SUPREME COURT OF BOSNIA-HERZEGOVINA BE CREATED?

C. Concepts of accountability

In your legal opinion, did genocide happen anywhere in Bosnia-Herzegovina?
Against whom did these acts of genocide occur?
Do you hold anyone accountable for the war?
Do you think that bringing war criminals to trial can deter future war crimes?

D. Knowledge of the ICTY

What do you think about the ICTY?
What would you like to see the ICTY accomplish?
What changes would you make to the current processes or structure of the ICTY?
Who should the ICTY focus upon? The persons of the highest rank, like Milošević, or anybody who participated in war crimes?
What do you think others (your neighbors, friends, colleagues) would like to see them do?
Where should war crimes trials be held?
What do you think of the practice of sealed indictments?

How does the ICTY affect life in Bosnia-Herzegovina?
Do you think that citizens of Bosnia-Herzegovina are interested in the activities of the ICTY? Should they be?
Does the ICTY affect the process of "making up"?
Does it affect the process of reconstruction and redevelopment?
Do you think the ICTY affects people's perceptions of accountability regarding the war in Bosnia-Herzegovina?
What cases have you been following at the ICTY?
How do you get your news regarding the ICTY?
How has the ICTY affected proceedings in your courtroom?
Have you sent a case to the ICTY?

Been asked for evidence from the ICTY?
How do the Rules of the Road impact your courtroom?
Do other actions of the ICTY, such as decisions, indictments, and appeals, play a role in your own decision-making process?

V.
Domestic War Crimes Trials

What is a war crimes trial when conducted within Bosnia-Herzegovina? How do you identify such a trial?

Do domestic war crimes trials have an effect on social reconstruction?

Can you give us examples of any of these?

[Provide closure for people and their communities; stimulate recovery and reconciliation, reconstruction; deter future war crimes]

Have you had a war crime trial in your courtroom?

In your community?

> Please tell us about that trial. (What was the result of the trial? What were the effects on your courtroom? Within your community?)

How was that trial different from other trials in your courtroom?

[If the decision was not made by this judge. . .] Was it a typical result?
In your opinion, was this result the best one possible?

If not, what are the specific conditions that would have made it a fair trial?

What did/do you/would you do to ensure a war crimes trial would be fair?

Is life together in Bosnia-Herzegovina possible?

In closing:

Do you have any questions that you would like to ask us?
Are there any questions that we should have asked you that we have not?

Thank you / Hvala!

APPENDIX B

TABLE 1
DEMOGRAPHICS OF SAMPLE—JUDGES

PERSONAL AND PROFESSIONAL BACKGROUND OF JUDGES		
	Number	Percentage
Number of Judges	26	100%
Median Age	48.5	—
Median Years as Judge	13.5	—
Female	4	15%
Male	22	85%
Bosnian Serb	8	31%
Bosnian Croat	10	38%
Bosniak	8	31%
WARTIME EXPERIENCE		
Lost Housing	11	42%
Relative Injured or Killed	19* (one judge was not asked)	73%

TABLE 2
DEMOGRAPHICS OF SAMPLE—PROSECUTORS

PERSONAL AND PROFESSIONAL BACKGROUND OF PROSECUTORS		
	Number	Percentage
Number of Prosecutors	6	100%
Median Age	49.5	—
Median Years as Prosecutor	17	—
Female	2	33%
Male	4	67%
Bosnian Serb	1	17%
Bosnian Croat	2	33%
Bosniak	3	50%
WARTIME EXPERIENCE		
Lost Housing	2	33%
Relative Injured or Killed	2	33%

APPENDIX C

What is the Supreme Law of the Land?[46]

BOSNIAK	CROAT	SERB
BiH Constitution	Federation of BiH Constitution	RS Constitution
The Constitution	The Constitution	RS Constitution
BiH Constitution	Federation of BiH Constitution	RS Constitution
BiH Constitution	Federation of BiH Constitution	RS Constitution
BiH Constitution	BiH Constitution	RS and BiH
BiH Constitution	BiH Constitution	BiH Constitution
BiH Constitution	BiH Constitution	RS Constitution
BiH Constitution	BiH Constitution	RS or BiH Constitution
BiH Constitution	The Constitution	RS Constitution
BiH Constitution	Federation of BiH Constitution	
BiH Constitution	BiH Constitution	

46. Thirty-one out of 32 participants responded to this question.

APPENDIX D

Should the Supreme Court of Bosnia-Herzegovina be created?[47]

BOSNIAK	CROAT	SERB
YES	"Political question"	NO
YES	YES	NO
YES	"under certain conditions"	NO
YES	YES	NO
YES	YES	NO
YES	YES	YES
YES	YES	NO
YES	YES	YES
YES	NO	NO
YES	NO	
	YES	

47. Thirty out of 32 participants responded to this question.

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APPENDIX E

1. In your legal opinion, did genocide happen anywhere in Bosnia-Herzegovina?[48]
2. To whom/Against whom?

BOSNIAK	CROAT	SERB
YES "In this country there was too much genocide." "Aggression on BiH as recognized by Security Council resolution."	YES "Against all three nations."	YES "To all three peoples."
YES "Against Muslim and Croat peoples, the non-Serb peoples."	DO NOT KNOW ". . .I am talking about legal assessments of certain acts, and I can't give only approximate judgments."	PROBABLY "I think it was done by all to everybody"
YES ". . .personally I don't' have any information so I can't tell you where that happened and what happened."	YES ". . .against all three people, against all three nations."	YES "What I have heard is that there was genocide everywhere."
YES "It was not 'ethnic cleansing.' It did happen on all sides, but you cannot compare the examples. There is Srebrenica."	YES "Against everybody. It all depends on who happens to be in what kind of situation at the time. . . It's only the question of possibility."	NO
YES "I think that genocide occurred against Bosniak people."	YES ". . .Serb aggression was surely genocide against the Bosniak and Croat people." "I am positive that it was first created against Bosniak and Croat people, I really don't know if genocide occurred on Serb[s]."	NO "In the area of my supervision I think not."

48. Thirty-one out of 32 participants responded to this question.

BOSNIAK	CROAT	SERB
YES "It is a well known fact." "We all know, and starting with Srebrenica we all know against whom." "Well, there was some genocide against Croats."	YES "Genocide took place on all sides."	YES "Against all ethnic groups."
YES "Here, the most against Muslim people." "Mostly, mostly against Muslims."	"That's a political question."	I DO NOT KNOW
YES ". . .a horrible one." "School example of genocide in Srebrenica." "Against Bosniaks." "Against others, only murders, but not genocide."	YES "Against all three peoples. All of them committed genocide, some more, some less, but all three sides committed genocide."	"I do not want to speak about it."
YES "If you start from the definition of genocide used by the. . .Tribunal, I think that in relation to Bosniaks, the genocide did happen, especially in certain parts."	YES ". . .everywhere, all three sides." ". . .certain sides had more power. . ." "And as usual, people who are least ready suffer the most."	NO "I don't have any evidence and information whether it happened somewhere. In our area, I have no information."
YES "I don't even want to talk about Bosnia-Herzegovina. In this town, in ten days over 3,000 people were killed. If that's not genocide, I don't know what is." "Here, against Bosniaks."	MAYBE "I don't think there was a real genocide anywhere in BiH, the full one. In some ways, there was a genocide, in others not actually, you didn't have one people actually completely wiped out."	
YES "[A]gainst Bosniaks in Visegrad . . . Mass slaughters, mass killings. Expulsions, rapes. And all done along strictly ethnic lines, without any reason, any logical reason . . . [A]gainst everybody else was much, much smaller in scale."	YES ". . .on Bosniak people that happened." "You just have as example Srebrenica. And other places similar to Srebrenica."	

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TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda

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By
Frederick M. Abbott*

I.
INTRODUCTION

Government trade ministers arrived at the World Trade Organization (hereinafter WTO) Seattle Ministerial Conference in late November 1999 without preliminary agreement on the future course of multilateral trade negotiations, and they departed without reaching consensus on a new WTO agenda. There was ample warning that the WTO Ministerial Conference in Seattle would face serious difficulties, with or without the public protests that disrupted the meeting. Only a few months before, WTO Members had completed the selection of a new Director-General–in fact, the selection of two new Director-Generals to serve sequentially–in a tortuous process that lasted nearly a year.[1] The Seattle agenda included a host of divisive issues involving serious substantive differences that Members had been unable to resolve in months of pre-meeting negotiations.[2] Beyond the hope in some quarters that pressure to maintain "momentum" would cause Members to abandon or compromise strongly held views, it is not clear why the Seattle Ministerial might have been approached with optimism towards reaching a comprehensive result.

The failure to reach consensus on a WTO negotiating agenda in Seattle left considerable unfinished business on the table. In a number of areas, such as agriculture, existing WTO texts prescribed that negotiations would be resumed.[3] Since the ministerial, the WTO General Council has agreed to move forward with negotiations in agriculture and services, at least to the extent of seeking to

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1. *See, e.g.*, Frances Williams, *WTO Ends Leadership Row as Rivals Agree Three-Year Terms*, FIN. TIMES, July 21, 1999, at 18.

2. *See, e.g.*, Nathaniel Harrison, *Huge WTO Trade Conference Set to Open Under Cloud of Discord*, AGENCE FRANCE PRESSE, Nov. 28, 1999.

3. *See* Agreement on Agriculture, art. 20 (headed "Continuation of the Reform Process"), *reprinted in WTO Services and Agriculture Negotiations: Meetings Set for February and March*, WTO PRESS RELEASE NO. 167, Feb. 2, 2000 <http://www.wto.org/wto/new/pres167.htm>.

clarify the subject matter to be pursued.[4] There has been no agreement on a future agenda for negotiations regarding trade-related aspects of intellectual property rights (hereinafter TRIPS), although a number of "built-in" agenda items remain before the TRIPS Council.[5] The lack of agreement on a "new" TRIPS agenda is not surprising in view of the wide gulf in perspectives on this subject among WTO Members.

This brief essay seeks to explain the absence of consensus on TRIPS, and why the near-to-medium term prospects for the setting of an ambitious agenda are not too bright. It reflects in modest detail on the particular controversy surrounding the potential for non-violation nullification or impairment complaints to be brought in the TRIPS dispute settlement context.[6] This essay suggests that WTO Members might be best served in the near term by concentrating their efforts on establishing improved multilateral mechanisms to aid in the transfer of information and technology to developing and newly-industrialized countries.

II.
THE ON-GOING TRIPS DIALOGUE

The reasons for controversy over TRIPS are complex, and reflect the increasing importance of technology in maintaining competitive advantages in world trade, the existing disparity in the capacity of WTO Members to create and commercialize new technologies, and the view held by a number of Members that the present focus of intellectual property rights (hereinafter IPRs) on new technologies substantially undervalues existing stocks of knowledge and information.[7]

The highly industrialized Members of the WTO–led by the United States, the European Union and Japan–achieved a major diplomatic breakthrough in the GATT Uruguay Round when they persuaded developing country Members to adopt and enforce high levels of IPRs protection as part of an integrated WTO framework. These highly industrialized Members took a minimalist approach regarding any TRIPS-related negotiations to be launched in Seattle, recommending that WTO Members focus for the next several years on implementing

4. *See WTO Services and Agriculture Negotiations: Meetings Set for February and March*, WTO PRESS RELEASE NO. 167, Feb. 2, 2000 <http://www.wto.org/wto/new/pres167.htm>.

5. *See Intellectual Property, Council Debates Call to Expand Geographical Indications Protection*, WTO PRESS RELEASE, Mar. 28, 2000 <http://www.wto.org/wto/new/Trips.htm>.

6. The author has suggested that intellectual property negotiations are more likely to proceed among more limited groups of countries at the World Intellectual Property Organization [hereinafter WIPO] than at the WTO. *See* Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. INT'L ECON. L. 63 (2000).

7. For a discussion of the economics of the TRIPS Agreement, see Frederick M. Abbott, *The Enduring Enigma of TRIPS: A Challenge for the World Economic System*, 1 J. INT'L ECON. L. 497 (1998). For policy background and analysis of the TRIPS Agreement, and data regarding its implementation by the WTO and WIPO, see articles collected in *Special Issue on Trade-Related Aspects of Intellectual Property Rights*, 1 J. INT'L ECON. L. 497-698 (1998).

existing commitments and guarding against any backsliding from existing TRIPS Agreement rules.[8]

A number of developing Members of the WTO took a decidedly different view, urging that the Seattle Ministerial initiate the negotiation of rules that take into account their specific interests–in large measure to work a rebalancing of the TRIPS Agreement.[9]

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement), like the General Agreement on Trade in Services (hereinafter GATS) and the Agreement on Trade-Related Investment Measures (hereinafter TRIMS Agreement), established a "new area" of trade regulation in the WTO. The TRIPS Agreement (1) established minimum substantive standards of IPRs protection that all WTO Members must implement; (2) it required each WTO Member to maintain adequate measures for securing and enforcing IPRs; and (3) it subjected TRIPS-related controversies to dispute settlement under the WTO Dispute Settlement Understanding (hereinafter DSU).[10]

When the Uruguay Round was concluded, many developing country Members of the WTO did not have IPRs protection systems in place that would meet the new TRIPS Agreement standards. Since putting these systems into place would be administratively difficult and would involve economic dislocation, the TRIPS Agreement established certain transition arrangements in favor of developing Members (and Members transforming from non-market to market orientation).[11] The initial transition period for developing Members ended on January 1, 2000,[12] and thus the main implementation obligations of the TRIPS Agreement just became effective for most developing Members. Certain important obligations relating to new areas of patent subject matter coverage are allowed a ten-year transition period, and obligations regarding such new subject matter coverage become effective on January 1, 2005.[13]

The Uruguay Round TRIPS Agreement negotiations did not resolve all the issues that were on the table, and the agreement includes its own "built-in agenda" for future negotiations. The TRIPS Agreement also requires a review of

8. *See EC Approach to Trade-Related Aspects of Intellectual Property in the New Round*, WTO Doc. WT/GC/W/193 (June 2, 1999) (Communication from the European Communities to the WTO General Council); *Proposal on Trade-Related Aspects of Intellectual Property*, WTO Doc. WT/GC/W/242 (July 6, 1999) (Communication from Japan to the WTO General Council). The position of the United States was confirmed to the author in an e-mail from Joseph Papovich, Assistant Trade Representative for Services, Investment and Intellectual Property, Office of the United States Trade Representative, dated October 13, 1999.

9. See references to various government communications cited throughout.

10. *See* Adrian Otten and Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391 (1996).

11. *See* Adrian Otten, *Implementation of the TRIPS Agreement and Prospects for Its Further Development*, 1 J. INT'L ECON. LAW 523 (1998).

12. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 65:2, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

13. *See id.* art. 65:4.

its implementation beginning in 2000.[14] In this sense, WTO Members were bound to include certain items on the future agenda of the TRIPS Council. These built-in agenda items included negotiations concerning geographical indications of origin[15] and review of rules applicable to the protection of plant varieties.[16] Moreover, on January 1, 2000, a moratorium on the use of the "non-violation nullification or impairment" dispute settlement cause of action in the TRIPS Agreement context expired.[17] In a "non-violation complaint," a WTO Member may allege that, while another Member is meeting its express legal obligations under the terms of the applicable WTO agreement (for example, the TRIPS Agreement), that other Member is preventing the complaining Member from securing the benefits the complainant expected to receive when it entered into the agreement. The non-violation issue is discussed in more detail in the next section of this essay.

The United States, which was the main proponent of the TRIPS Agreement, did not offer a proposal for TRIPS negotiations at Seattle. It took the position that the focus of the TRIPS Council should be on assuring that developing Members fulfill their TRIPS obligations as transition periods expire.[18] Both the E.U. and Japan proposed a "North-North" agenda, which appeared principally aimed at persuading the United States to abandon its "first-to-invent" system for granting patents in favor of the "first-to-file" system near-universally used by other WTO Members.[19] This involves a long-standing point of contention among these three major patenting powers, but it is mainly of a technical character.

One item that the United States, the E.U. and Japan might have wished to see included on a TRIPS agenda is the negotiation of additional rules for the protection of IPRs in the digital environment. Some rules in this area were negotiated at the World Intellectual Property Organization (hereinafter WIPO) in 1996, and one approach might be to recommend that these rules be incorporated in the TRIPS Agreement.[20] However, certain IP industry interests are not entirely satisfied with the new WIPO rules,[21] and industrialized Member negotiators might prefer to tighten these WIPO rules in the WTO context.

OECD-based pharmaceuticals companies urged the tightening of TRIPS Agreement rules, which provide flexibility to take into account public health interests and allow Members to authorize parallel trade in IPRs protected

14. *See id.* art. 71:1.

15. *See id.* arts. 23:4, 24:1.

16. *See id.* art. 27:3(b).

17. *See id.* art. 64:2-3.

18. *See supra* note 8.

19. *See id.*

20. Regarding the details of the amendment process, see Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661 (1997).

21. *See, e.g.*, Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997) (discussing failure of copyright industries to secure preferred outcomes).

drugs.[22] The U.S., E.U. and Japanese governments did not appear inclined to pursue these urgings, at least for the time being. Nonetheless, it should be apparent that the United States, the E.U. and Japan were prepared to react to developing Member TRIPS-related demands with demands of their own, and that the reticence of these industrialized Members to initiate demands may have simply involved a question of negotiating tactics.

There were a number of possible agenda items that were of interest from the developing Member side, bearing in mind their diverse interests. First, just as the E.U.-Japan-U.S. group sought assurance that existing TRIPS compliance deadlines would be met, many developing Members urged an extension of those deadlines–or at least a moratorium on the initiation of dispute settlement proceedings against them as they sought to achieve compliance.[23] There is widespread acknowledgement that the difficulties and costs facing the developing countries in implementing the TRIPS Agreement were probably underestimated.[24]

A number of developing Members sought to expand the scope of specific protection for geographical indications of origin beyond that set out in the TRIPS Agreement.[25] A geographical indication is a name that associates a product with a place (such as "Bordeaux" wine), protecting producers' goodwill in that place. The TRIPS Agreement gives special attention to wines and spirits, and it includes a provision that negotiations on the establishment of a multilateral registration system (for wines) should be undertaken. Some developing countries would like to see similar specific attention extended to other products, such as India's "Basmati" rice and "Darjeeling" tea.[26]

The TRIPS Agreement provides at article 27:3(b) that Members may exclude from the scope of patentable subject matter "plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes."[27] Members must, however, provide plant varieties either with patent protection or some other unique form of protection.[28] The rules of this subparagraph were to be reviewed by the TRIPS Council beginning in 1999.[29]

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22. *See, e.g.*, Harvey E. Bale, Jr., *The Conflicts Between Parallel Trade and Product Access and Innovation: The Case of Pharmaceuti*cals, 1 J. INT'L ECON. L. 637 (1998).

23. *See, e.g.*, Daniel Pruzin, *Quad Group, Developing Countries Split Over Trims Deadline Extensions*, 17 BNA INT'L TRADE. REP. 143, Jan. 27, 2000.

24. On the challenges, see Carlos A. Primo Braga and Carsten Fink, *Reforming Intellectual Property Rights Regimes: Challenges for Developing Countries*, 1 J. INT'L ECON. L. 537 (1998).

25. *See, e.g., Extension of the Additional Protection for Geographical Indications to Other Products*, WT/GC/W/249 (July 13, 1999) (Communication from Turkey to the WTO General Counsel).

26. *See* Adrian Otten, *Implementation of the TRIPS Agreement and Prospects for Its Further Development*, 1 J. INT'L ECON. L. 523, 532 (1998). For continued demands for negotiations on geographical indications post-Seattle, see *Intellectual Property, Council Debates Call to Expand Geographical Indications Protection*, WTO PRESS RELEASE, Mar. 28, 2000 <http://www.wto.org/wto/new/Trips.htm>.

27. TRIPS Agreement, *supra* note 12, art. 27:3(b).

28. *See id.*

29. *See id.*

Many of today's most important technological advances occur in the field of biotechnology and include the creation of new life forms both in the animal and plant kingdoms. Article 27:3(b) of the TRIPS Agreement addresses this new technology in a way that is confusing even to highly trained IPRs specialists. The language is derived from article 53 of the European Patent Convention, the meaning of which has been the subject of debate for many years.[30] The language leaves considerable uncertainty, for example, as to whether genetic material may be excluded from patentability.[31]

Developing Members, in particular, have expressed concern as to the conditions under which patents or other forms of IPRs protection might be obtained on plant varieties that are indigenous to their countries but genetically modified to improve certain characteristics.[32] Should it be possible for the developer of a new variety to obtain a monopoly when the plant variety is almost wholly based on an indigenous species cultivated over the course of centuries?[33]

One important set of questions raised by a number of developing countries concerns the status of so-called "traditional intellectual property rights" (hereinafter TIPRs).[34] Historically, IPRs protection has been granted to ideas or expressions that are "new" or "original." Patent protection is granted to an invention that is new, capable of industrial application and involves an inventive step. Copyright protection is granted to an artist's creative expression. From the time such protection is granted, the inventor or artist is able to commercially exploit "intellectual property" while benefiting from certain legal protections. In many countries, there exist "inventions" that have been developed and passed down through generations, such as traditional medicinal practices. Likewise, there are bodies of creative expression, such as folk songs and stories, that are rooted in long tradition. These inventions and expressions are not "new" or "original" in the sense of existing forms of IPRs embodied in the TRIPS Agreement. Some developing Members have asked why their existing stock of valuable knowledge should not be worthy of some protection against uncompensated exploitation by nationals of other Members.

The establishment of TIPRs would present challenging questions. For example, who would benefit from economic rights granted to traditional knowl-

30. *See* Joseph Strauss, Patenting of Life Forms–The European Experience and Perspectives 6-12 (Aug. 27-28, 1999) (paper presented at World Trade Forum Conference on Intellectual Property: Trade, Competition and Sustainable Development, Berne, Switzerland, on file with author).

31. *See id.* (citing conflicting decisions of European Patent Office Technical Boards of Appeal).

32. *See Proposal on Protection of the Intellectual Property Rights Relating to the Traditional Knowledge of Local and Indigenous Communities*, WT/GC/W/362 (Oct. 12, 1999) (Communication from Bolivia, Colombia, Ecuador, Nicaragua, and Peru to the WTO General Council); *Proposals Regarding the TRIPS Agreement (Paragraph 9(a)(ii) of the Geneva Ministerial Declaration)*, WT/GC/W/282 (Aug. 6, 1999) (Communication from Venezuela to the WTO General Council) [hereinafter Communication from Venezuela].

33. *See* Statement by H.E. Mr. Murasoli Maran, Minister of Commerce and Industry of India, WTO Seattle Ministerial Conference (Nov. 30, 1999), WTO Doc. WT/MIN(99)/ST/16.

34. *See* Thomas Cottier, *The Protection of Genetic Resources and Traditional Knowledge: Towards More Specific Rights and Obligations in World Trade Law*, 1 J. INT'L ECON. L. 555 (1998).

edge? Who would be vested with the rights, and who would be responsible for allocating any economic benefits? What would be the duration of such rights?

Alongside TIPRs are issues concerning rights in existing genetic stocks. The Convention on Biological Diversity (hereinafter CBD) recognizes that each member country is sovereign over resources located in its territory, and obligates those seeking to exploit genetic resources to obtain the agreement of the host country. The CBD is not incorporated by reference in the TRIPS Agreement, as are a number of IPRs treaties (such as the Paris Convention on patents and trademarks and the Berne Convention on copyrights). Should the TRIPS Agreement be amended to incorporate rules of the CBD?[35] Might the rules of the CBD be modified in the context of the TRIPS Agreement?

Some developing Members of the WTO, as well as multilateral institutions like the World Health Organization (hereinafter WHO), have expressed increasing concern that the wider granting and enforcement of patents in pharmaceutical products and processes is leading to substantially higher drug prices, with adverse effects on health care services.[36] Some WTO Members have suggested that drugs on the WHO's list of essential pharmaceuticals be subject to exclusion from patent protection[37] or should be entitled to some lesser form of protection than that presently mandated by the TRIPS Agreement.

There is concern as well over the issue of "parallel trade."[38] This involves whether an IPRs holder should be able to block the import or export of a good or service once it has been placed on a national or regional market with the consent of the IPRs holder. In other words, should the first sale of a good or service "exhaust" the right of the IPRs holder to control further movement of the good or service? This issue was not resolved during the Uruguay Round, and remains unfinished business on the TRIPS agenda. Some WTO Members have insisted that IPRs holders be allowed to "resegregate" the world trading system as tariffs and quotas are otherwise reduced, for reasons which are not entirely clear. These same governments otherwise insist on adherence to the principles of free trade. The parallel trade issue remains intensely controversial, and for that very reason it may be that no WTO Member would consider it worthwhile to place on the active TRIPS Council agenda.

In fact, some of the most significant news to come from Seattle involved the United States' softening of its stand against parallel trade in patented pharmaceuticals. The Office of the United States Trade Representative (hereinafter USTR) announced that it would hereafter consult with the U.S. Secretary for Health and Human Service regarding claims by trading partners that U.S. intellectual property policies are impeding their ability to address health crises,

35. *See* Communication from Venezuela, *supra* note 32, at II(1) (including reference to Indian proposal).

36. *See WHO to Address Trade and Pharmaceuticals*, WHO PRESS RELEASE WHA/13, May 22, 1999 (regarding resolution on WHO's Revised Drug Strategy).

37. *See, e.g.*, Communication from Venezuela, *supra* note 32, at II(3).

38. *See* Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel importation*, 1 J. INT'L ECON. L. 607 (1998).

and "give full weight to the advice of HHS regarding the health considerations involved."[39] In connection with its announcement, the USTR removed South Africa from its "special 301" watch list.[40] This announcement followed USTR's decision, under pressure from Vice President Gore, to reduce pressure on South Africa because of its liberal parallel trade and compulsory licensing activities in respect to addressing the AIDS pandemic.[41]

Related to the specific issue of parallel trade is a more general concern with assuring that high levels of IPRs protection are balanced by competition rules that allow WTO Members to take action if IPRs are abused. The TRIPS Agreement presently provides Members with discretion to take action against anti-competitive practices, although it mentions only a few of the types of conduct that might be subject to remedial measures. There have been some suggestions both from developed and developing Members that TRIPS Agreement competition rules be further elaborated regarding the types of anti-competitive behaviors that are subject to government action.[42]

III.
NON-VIOLATION COMPLAINTS IN THE CONTEXT OF TRIPS

Leading up to the Seattle Ministerial, developing Members (and many industrialized Members) appeared ready to extend the moratorium on non-violation nullification or impairment causes of action.[43] Developing countries had two concerns: first, that developed Members would allege that the TRIPS Agreement was intended to grant IPRs holders access to their markets, rather than only obligating them to provide IPRs protection; and second, that developed Members would use the non-violation cause of action to expand the literal language of the TRIPS Agreement in light of whatever their "expectations" might have been about its effects. To give a concrete example, an industrialized WTO Member might contend that a developing Member's pharmaceutical price control regulations effectively deprive its producers of the benefits of patent protection by reducing their profits, although the TRIPS Agreement does not address price controls in any way. A single Member such as the United States

39. *The Protection of Intellectual Property and Health Policy*, Office of the United States Trade Representative, USTR PRESS RELEASE 99-97, Dec. 1, 1999.

40. *See id.*

41. *See* Frances Williams, *US to Consider Poor Countries' Need for Drugs*, FIN. TIMES, Dec. 3, 1999, at 6; Sabin Russell, *Poor Nations Given Hope on AIDS Drugs*, S.F. CHRON., Dec. 3, 1999, at A20.

42. *See* Robert Anderson, Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction between Trade and Competition Policy (Aug. 27-28, 1999) (paper presented at World Trade Forum Conference on Intellectual Property: Trade, Competition and Sustainable Development, Berne, Switzerland, on file with author).

43. *See, e.g., Extension of the Five-Year Period in Article 64:2 of the Agreement on TRIPS*, WTO Doc. WT/GC/W/256 (July 19, 1999) (Communication from Canada to the WTO General Council); *Proposals Regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. WT/GC/W/316 (Sept. 14, 1999) (Communication from Colombia to the WTO General Council); Communication from Venezuela, *supra* note 32.

had the power to block a consensus on the possible extension of the non-violation moratorium.

WTO Members failed to reach consensus at the Seattle Ministerial on extension or modification of the non-violation moratorium under article 64 of the TRIPS Agreement, and as of January 1, 2000, it became possible for Members to initiate non-violation complaints in the TRIPS Agreement context. It has long been recognized that the non-violation cause of action may present unique issues and problems in the TRIPS context. I want to elaborate here some of the special considerations in light of the language of the TRIPS Agreement and the recent jurisprudence of WTO panels and the Appellate Body. In this brief comment, I will limit discussion to major points.

The non-violation concept was succinctly framed by the WTO Appellate Body in its *India-Mailbox* decision, referring to the cause of action as it was understood in the context of the General Agreement on Tarrifs and Trade (hereinafter GATT) 1947 and as it is understood in the context of the GATT 1994:

> In the absence of substantive legal rules in many areas relating to international trade, the "non-violation" provision of Article XXIII:1(b) was aimed at preventing contracting parties from using non-tariff barriers or other policy measures to negate the benefits of negotiated tariff concessions. Under Article XXIII:1(b) of the GATT 1994, a Member can bring a "non-violation" complaint when the negotiated balance of concessions between Members is upset by the application of a measure, whether or not this measure is inconsistent with the provisions of the covered agreement. The ultimate goal is not the withdrawal of the measure concerned, but rather achieving a mutually satisfactory adjustment, usually by means of compensation.[44]

During the Uruguay Round TRIPS negotiations there was hesitation on several sides to include the non-violation cause of action as a TRIPS dispute settlement option. European Union negotiators were concerned that the United States would challenge its audio-visual sector market access restrictions as a denial of the benefits of copyright and related IPRs protections. Many developing countries were concerned that the OECD industry side would attempt to use non-violation complaints to expand the literal language of the TRIPS Agreement to accommodate whatever expectations that side might have had about the consequences of the Agreement, and developing countries shared the E.U.'s concern about use of the TRIPS Agreement as a market access tool. The moratorium allayed immediate fears, but little progress was made in the TRIPS Council on addressing concerns in the years subsequent to entry-into-force.

If a broad reading of the non-violation concept was accepted in the TRIPS context, there is a myriad of potential complaints that could be envisaged under the Agreement. These may be broken down into three broad categories: (1) actions that attempt to limit the range of permissible internal government measures, as these measures are argued to undermine the value of IPRs; (2) actions that effectively seek to expand the express language of the Agreement; and (3)

44. *See India–Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body, para. 41, WTO Doc. WT/DS50/AB/R (Dec. 19, 1997), *available in* 1997 WL 781259, at *11.

actions addressed to enforcement mechanisms and remedial processes. Under each of these broad headings, many possible claims might be foreseen. For example, regarding the range of internal measures, actions challenging price controls on patented pharmaceuticals; liberal compulsory licensing legislation; IPRs-related taxation policies, packaging and labeling requirements; consumer protection legislation; censorship policies; cultural policies; and parallel trade rules are all candidates. Regarding expansive interpretation of the express language of the Agreement, non-violation actions might challenge fair use allowances, public order and public health exceptions, and legislative uncertainty in areas such as industrial design protection. Regarding enforcement mechanisms, there are a number of potential avenues under which failures to effectively enforce IPRs could be pursued as non-violation actions; the aggressive application of competition laws might also be challenged. Finally, non-violation complaints regarding over-protection of IPRs might be considered, as well as complaints against those who use coercive threats without basis in WTO law and practice.

In this brief essay, I do not elaborate on the ways in which such potential non-violation actions might be legally framed under the terms of the TRIPS Agreement. You are welcome to wonder whether such a long list of possible causes of action is within reasonable contemplation. Assuming for the sake of argument that some of these suggestions are plausible, how might the TRIPS Agreement inform the breadth of potential application of the non-violation cause of action? How does existing WTO jurisprudence bear on this question?

Perhaps the most important provision is article 8 of the TRIPS Agreement, entitled "Principles." Article 8:1 authorizes Members to adopt measures "necessary to protect public health and nutrition, and to promote the public interest on sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."[45] This article covers an extensive category of internal (or external) measures that Members might adopt to affect private rights in IP.

Article 8:1 of the TRIPS Agreement establishes a basis for the adoption of internal measures in language similar to that used in article XX(b) of the GATT 1994. However, article XX(b) of the GATT 1994 is used to justify internal measures that are necessary yet otherwise *inconsistent* with the GATT 1994. Article 8:1 of the TRIPS Agreement, in contrast, provides that necessary measures must be *consistent* with the Agreement.

Because article 8:1 may not be used to justify measures inconsistent with the TRIPS Agreement, and because the Appellate Body has stressed that the language of WTO agreements is not to be viewed as surplusage, it seems apparent that article 8:1 is in fact to be read as a statement of TRIPS interpretative principle: it advises us that Members were "expected" (in the non-violation sense) to have the discretion to adopt "necessary" internal measures. This state-

45. TRIPS Agreement, *supra* note 12, art. 8:1. Article 8:2 is concerned with regulation addressing competitive markets. *See id.* art 8:2.

ment of principle may prove rather important in limiting the application of non-violation doctrine.

Article 8:1 does not by its own terms resolve uncertainty regarding interpretation of "necessary." This term is potentially freighted with interpretative decisions involving GATT article XX(b) and, more recently, the Agreement on Sanitary and Phytosanitary Measures (hereinafter SPS Agreement). Yet "necessary" in TRIPS Agreement article 8:1 probably requires its own jurisprudence because it is used in a context different than the context of its use in the GATT and SPS Agreement. This interpretative avenue remains to be further developed. It bears directly on the potential scope of non-violation causes of action. WTO Members were certainly expected to adopt necessary internal measures, and it is the permissible range of such measures that the WTO Appellate Body must determine.

As Jerome Reichman has pointed out, for those who are concerned about the potential scope of non-violation causes of action under the TRIPS Agreement, the Appellate Body decision in the *India-Mailbox* case is heartening.[46] The Appellate Body stressed that the TRIPS Agreement means what it says in its express language, neither more nor less. Even though the Appellate Body acted to exclude non-violation considerations from its decision (because the moratorium remained in effect), the decision conveys the firm message that the Appellate Body does not intend to be persuaded by arguments about what the parties to the Agreement thought it meant–or expected it to mean–but somehow failed to mention.

Yet if one is looking for non-violation trouble, one need look no further than the panel report in the *Japan – Film and Photographic Paper* case.[47] This is a case the United States lost–yet the USTR was sufficiently pleased by the panel's jurisprudence that it decided against an appeal.

The panel report in the *Japan–Film and Photographic Paper* case included a detailed explanation of the approach to be followed in assessing non-violation complaints.[48] The panel said that, for a measure to form the basis for a non-violation complaint, the complaining Member must not have anticipated it at the time of negotiation of the underlying concession. In its discussion of legitimate expectations (i.e. what the parties might reasonably have anticipated),[49] the panel said that the introduction of a measure by a complained-against Member

46. *See* Jerome H. Reichman, *Securing Compliance with the TRIPS Agreement after US v India*, 1 J. INT'L ECON. L. 585 (1998).

47. *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WTO Doc. WT/DS44/R, (Mar. 31, 1998).

48. The panel observed that in the few non-violation actions that were successfully pursued under the GATT 1947, specific relationships were demonstrated between products as to which tariff concessions had been granted, and domestic subsidy measures that were later adopted to undermine the value of the tariff concessions. The panel identified three elements that must be demonstrated to succeed in the non-violation context: "(1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure." *Id.* para. 10.41. The panel was referring to measures that are otherwise lawful under the WTO Agreement. *See id.*

49. *See id.* paras. 10.79-10.80.

subsequent to the conclusion of negotiations created the rebuttable presumption that it should not have been anticipated by the complaining Member. Rebutting the presumption might require a showing that such after-the-fact measure had clearly been contemplated by earlier measures. It said that, "in our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy."[50] The panel said that one Member should not have to assume that another Member might adopt similar measures to those adopted by third Members.[51] If measures were in place prior to the conclusion of tariff negotiations, then there would be a rebuttable presumption that those measures should reasonably have been anticipated to remain in effect.[52]

The panel report suggests that internal government measures adopted following the conclusion of trade negotiations may be presumed to be unanticipated and to potentially nullify or impair WTO concessions. However, WTO Members continuously adjust their industrial policies, including intellectual property-related policies, and routinely amend their intellectual property laws and related internal regulations to reflect changing conditions and perceptions as to appropriate public interest balancing.

Consider, for example, the case of a WTO Member that adopts new compulsory legislation or pharmaceutical price control legislation after the entry-into-force of the TRIPS Agreement. Does the fact that the TRIPS Agreement expressly contemplates compulsory licensing preclude an argument that such legislation was not anticipated prior to the conclusion of negotiations? Though price controls are not precluded by the terms of the TRIPS Agreement, might they nevertheless be unanticipated?

There are several reasons to be reluctant to regard the *Japan–Film and Photographic Paper* decision as a sound precedent for the TRIPS context. First, as a general proposition, the Appellate Body has often rejected the legal reasoning of panels of the first instance. There is no reason to believe that this case would have been an exception, particularly in light of the relatively uncharted ground that the panel was covering. Second, this case involved trade in goods, a context considerably different than that likely to arise in respect to TRIPS. Third, some of the general statements made by the panel in this case seem suspect as proper interpretations of WTO law–particularly as they might be extended to the TRIPS Agreement.

50. *Id.* para. 10.79 (emphasis added).

51. *See id.*

52. *See id.* para. 10.80. Regarding resulting harm, the panel held that the measures must be shown to have caused nullification or impairment – i.e. to have made more than a *de minimis* contribution. *See id.* para. 10.84. In the tariffs concessions context, nullification or impairment of benefits is determined by whether there is *de jure* or *de facto* discrimination such that "the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset." *Id.* para. 10.86. Measures may have effects individually or in the aggregate, but if measures are to be aggregated there must be a clear explanation of cause and effect. *See id.*, at para. 10.88. "Intent" is not determinative, but may be relevant. *See id.* para. 10.87.

There seems inadequate basis in the text of the GATT/WTO Agreement to justify the establishment of a presumption that measures adopted after the conclusion of trade negotiations were not anticipated during the negotiations. The WTO Agreement does not purport to place general limitations on the government policies of Members, except as expressly provided by the Agreement. Establishing a blanket presumption against "after-the-fact" adopted measures places a generalized burden on WTO Members to justify their policy measures. In the TRIPS context this might suggest that government measures that affect the exploitation of IP and are adopted after 1994 are presumed to not have been anticipated by the TRIPS negotiators. It would be difficult to ascertain the textual source of such a presumption–bearing in mind that the TRIPS Agreement itself contemplates the adoption of internal measures related to IP. Even assuming, *arguendo*, that the Appellate Body might hold that a domestic subsidy adopted following the grant of a tariff concession was presumptively unanticipated by trade negotiators, it would not seem reasonable to extend such a presumption to internal measures adopted to regulate intellectual property. IP laws and related regulations are constantly being adjusted to reflect changing conditions, and a presumption in favor of a potential non-violation action would not appear warranted in this context.

There is a close correlation between the concept of non-violation nullification or impairment and the concept of the good faith execution of treaty obligations. The Vienna Convention on the Law of Treaties, which essentially codifies the customary international law applicable to treaties, establishes a requirement that treaties be executed in good faith.[53] The good faith execution of a treaty inherently demands that a party not take actions that undermine the performance of the treaty[54]–that is, that a party to a treaty not seek to defeat the object and purpose of a treaty by actions inconsistent with that object and purpose, even if those actions might not be specifically precluded by the terms of the treaty.[55] Treaty law requires such a good faith doctrine since it is not practicable for parties to specify every possible step that parties should avoid.

The concept of non-violation nullification or impairment in the GATT/WTO context may be viewed substantially as a way of restating the good faith requirement.[56] That is, WTO Members should not seek to undermine the value of concessions they have granted in trade negotiations by taking steps that, while

53. The Vienna Convention on the Law of Treaties [hereinafter VCLT] at article 26, "Pacta sunt servanda," provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, Mar. 21, 1986, 25 I.L.M. 543, 560.

54. A specific obligation to refrain from defeating the object and purpose of a treaty is imposed on states that have signed but not yet ratified a treaty. *See id.* art. 18. Such an obligation would certainly extend to states that had ratified the treaty under the principle of *pacta sunt servanda.*

55. This idea is reflected in Article 31 of the VCLT regarding interpretation, which obligates states to interpret treaties consistently with their object and purpose. *See id.* art. 31.

56. This theme is developed in Thomas Cottier and Krista Nadakavukaren Schefer, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future, in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 143, 163-81 (Ernst Ulrich Petersmann ed., 1997).

not specifically precluded by the WTO Agreement, nevertheless are inconsistent with allowing the concessions to be used by their intended beneficiaries. Viewed in this way, at least some non-violation causes of action could quite properly be reframed as causes of action demanding good faith execution of WTO obligations.[57]

So far the WTO Appellate Body has given no indication that it intends to go on a "fishing expedition" to expand the scope of the TRIPS Agreement so as to limit the range of national discretion. It has hewn to the Vienna Convention as its jurisprudential path. Yet it is worthwhile to highlight the risks that inhere in the non-violation cause of action, because an expansive application of non-violation doctrine in the TRIPS context could be quite destabilizing for relations among WTO Members. The Agreement might well take on an Alice-in-Wonderland quality–meaning what I say it means—for whatever Member happens to be speaking. Many of the foreseeable non-violation complaints would involve pitting the interests of OECD producers against the discretion of developing country parliaments and executives. The OECD won the Uruguay Round battle over TRIPS, and the best interests of the WTO community would not appear to be served by pushing this victory to its furthest possible limit.

IV.
POST-SEATTLE DEVELOPMENTS AND THE POTENTIAL FOR A NEW FOCUS

At the February 7-8, 2000 meeting of the WTO General Council, there was active discussion of requests from developing countries to extend TRIPS transition periods. Debate is reported to have focused on the question whether any extensions should be negotiated as a comprehensive multilateral solution, or whether individual Member requests should be taken up on a case-by-case basis.[58] Further consultations within the TRIPS Council on this subject were reported on at an informal General Council meeting in March.[59] Whatever may be the outcome of these discussions, it is manifest that there is considerable interest among a substantial group of WTO Members to assure that developing countries do not become the targets of excessive litigation as they attempt to meet their TRIPS obligations.

The main item on the agenda of the TRIPS Council in 2000 will be the conducting of reviews of developing countries' steps to implement their TRIPS commitments. As noted previously, the Council is also obligated by the terms of the TRIPS Agreement to begin a general review of its implementation in 2000. Beyond moving forward on these tasks, all indications are that the TRIPS

57. To some extent, the differences in view expressed by the panel and the Appellate Body in the *India-Mailbox* case might be characterized as a dispute over the terminology used to characterize the good faith obligation in WTO law.

58. *See General Council Sets Dates for Negotiations,* WTO General Council Meeting Summary, Feb. 7-8, 2000, <http://www.wto.org/wto/new/gc__feb00.htm>.

59. *See WTO General Council Informal Meeting*, WTO PRESS RELEASE No. 173, Mar. 28, 2000.

Council will move cautiously in adding new items to its agenda. In light of the difference in perspectives among WTO Members concerning new items, a period of reflection may best serve the interests of the WTO as an institution.

There is a global TRIPS-related issue that overshadows the specific rules of the TRIPS Agreement and the interests of intellectual property rights holders in protecting their investments in invention and expression. This is the urgent need to assure that technology and information are made available for effective use in areas of the world where economic development is most needed–whether through providing funds for education, establishing Internet access points, or encouraging the formation of technology-based enterprises by providing or guaranteeing funding. Technologies exist to rapidly improve standards of education and to foster improvements in the production and distribution of goods and services throughout the world. WTO Members have until now focused their attention on achieving higher levels of IPRs protection to redress a situation of underprotection that had threatened to distort commercial trade patterns. But high standards of IPRs protection will not by themselves address the tremendous imbalance between the levels of technological development in the industrialized and developing economies. The WTO needs to begin to work more closely with the World Bank, UNCTAD, UNDP, WIPO, WHO and other multilateral institutions to create an environment that promotes the transfer of knowledge and technology in ways that are productive for both industrialized and developing countries. This may well involve the commitment of billions of dollars, and it will demand creative thinking about ways and means to encourage private sector commitment. Yet this is an enterprise from which all WTO Members will emerge as winners–and the notion of a multilateral trading system from which all Members benefit is the core of WTO economic philosophy.

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International Disability Law - A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999

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by
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I.
INTRODUCTION

Disability law has not been a field of legal research and teaching at many universities in the United States nor has it been widely acknowledged in other countries around the world. In North America and most European countries, the issue of disability as a subject of law has commonly been included in social security and welfare legislation, health law or guardianship law. Thus, disabled persons have been depicted not as subjects of legal rights but as objects of welfare, health and charity programs. The underlying policy has been to segregate and exclude people with disabilities from mainstream society, sometimes providing them with special schools, sheltered workshops, special housing and transportation. This policy has been deemed just because disabled persons were believed incapable of coping with both society at large and all or most major life activities.

Fortunately, when some countries made attempts to take a more integrative and inclusive approach to disability policy, major legal reforms resulted. Attempts to open up employment, education, housing, and goods and services for persons regardless of their disabilities have changed the understanding of disability from a medical to a social category. A key element of this new concept is the recognition that exclusion and segregation of people with disabilities do not logically follow from impairments, but rather from political choices based on false assumptions about disability. Inaccessibility problems do not so much re-

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sult from mobility, visual, or hearing impairments, but instead are a corollary of a political decision to build steps but not ramps, to provide information in printed letter version only or to exclude sign language or other forms of communication. Instead of viewing disability as the individual's problem, the focus has shifted to the environment and society as a whole and to the lack of consideration for human differences.

II.
DISABILITY AS A HUMAN RIGHTS ISSUE

With the paradigm shift from the medical to the social model of disability,[1] disability has been reclassified as a human rights issue. Law reforms in this area are intended to provide equal opportunities for disabled people and to combat their segregation, institutionalization and exclusion as typical forms of disability–based discrimination. With the evolution of civil rights legislation for disabled persons, such as the Americans with Disabilities Act (hereinafter ADA), the legal paradigm shifted from welfare law towards civil rights law. This new dimension of disability law has been welcomed as a major milestone on the path toward the eventual recognition of human rights of disabled people, an example more and more governments seem to be willing to follow.[2]

What remains unclear, however, is the scope of change. If the now undermined assumption that disability is a medical problem anchored much of the older welfare disability law, should government replace it with what we now call civil rights legislation? Do we still need benefits that were given as compensation for exclusion? What are the legal consequences of replacing the social model of disability with the medical model? Of course, this touches upon the delicate question of how to distribute resources in society.

Then, too, the issue is closely connected with another question that affects the outcome of law reforms in disability law, the principle of equality. The principle, one of the most fundamental human rights, is relational: equality for disabled people raises questions, such as compared to whom, to what extent, and under which circumstances? Is it enough to open the doors to education, employment, and political participation or do we need to help everyone get inside? Have we helped everyone get inside if schools, job premises, and public buildings are accessible but public transportation is not? Is it enough to prohibit invidious disability discrimination in employment or do we need to ensure that more subtle or even "good will" forms of discrimination are covered?[3] Is it enough to allow some disabled people to live outside institutions or do we need to ensure that everyone gets out?[4] Have we achieved equality if disabled work-

1. There is a large body of literature on this subject. *See, e.g.*, VICTOR FINKELSTEIN, ATTITUDES AND DISABLED PEOPLE: ISSUES FOR DISCUSSION (1980); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990); MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE (1996); JENNY MORRIS, PRIDE AGAINST PREJUDICE (1991).

2. *See Implementation of the World Programme of Action Concerning Disabled Persons: Report by the Secretary General*, U.N. GAOR, U.N. Doc. A/54/388 (1999).

3. For example, should we include sheltered employment?

4. *See, e.g.*, Olmstead v. L.C. *ex rel* Zimring, 527 U.S. 581 (1999).

ers receive the same salary as non-disabled co-workers, but have to spend sixty percent of their salary on personal assistance services that the non-disabled employees do not need?

III.
EQUALITY CONCEPTS

While there is consensus about the fundamental nature of the equality principle in domestic as well as in international law, the interpretation of this principle varies. The three main ways of understanding equality are as (1) formal or juridical equality, (2) equality of results, and (3) equal opportunity or structural equality.[5]

Juridical equality prohibits direct discrimination and aims at shifting the focus of a potential discriminator away from a characteristic such as race, gender, disability, or sexual orientation. Since it is deemed arbitrary to legitimize unequal treatment of such a characteristic, juridical equality requires ignoring the differences. This concept meets the demands of disability rights activists who try to overcome the medical model of disability, and it underlines the notion that disability is not the problem. To achieve equality, however, disability does have to be taken into account when it comes to providing access to accommodations such as architectural changes or program adjustments. Granting equal access to all members of various societies requires taking a look at the differences that exist among these members. Martha Minow has pointed to the moral policy dilemma of dealing with human differences such as disabilities.[6] To ignore differences helps to prevent stereotypes and stigmatization but at the price of failing to do justice to the reality of difference. Taking difference into account does justice to the reality of difference but at the potential price of perpetuating false assumptions about the nature of difference.

Second, equality of results essentially examines disability with an outcome-analysis. Thus, according to equality of results, disabled workers who receive equal pay but have an unequal burden regarding their personal needs are discriminated against. At the core of this way of understanding equality stands the human rights theory that all human beings are of equal value and of equal human dignity. As there can be no justification for inherently equal beings to own common resources unequally, this theory legitimizes the demand for equal allocation of resources.

Equality of results poses some thorny problems, however. The principle must first tackle the question of responsibility. Who is responsible for meeting

5. *See* Gerard Quinn, *The Human Rights of People with Disabilities Under EU Law, in* THE EU AND HUMAN RIGHTS 281, 290 (Philip Alston ed., 1999). Other equality concepts with respect to disability law have been described by Aart Hendriks, *The Significance of Equality and Non-Discrimination for the Protection of the Rights and Dignity of Disabled Persons, in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 40-62 (Theresia Degener & Yolan Koster–Dreese, eds., 1995); and LISA WADDINGTON, DISABILITY, EMPLOYMENT AND THE EUROPEAN COMMUNITY 53-66 (1995).

6. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-79 (1990).

these needs? Is it the State or the private sector? Second, equality of results might require a strong welfare state, which may interfere with the ideology of a free market system. At the same time equality of results may perpetuate injustice because its focus is on results more than on treatment. Segregated education for disabled students, for example, might be deemed legitimate if special schools for disabled students would provide the same educational opportunities and degrees as regular schools. To put it bluntly, if we accept equality of results as the sole way of understanding equality, mainstreaming disabled students into regular schools might be an illegitimate goal.

The third way in which to view equality, equal opportunity, is less rigid than the other two concepts in that it provides equal chances but not results. In this way, equal opportunity is more compatible with the market economy. It looks at the history of group discrimination and identifies traditional or classic forms of discrimination. The equal opportunity paradigm sees both stereotypes and structural barriers as obstacles to inclusion; one must ignore disability if stereotypes are the basis for action, but must consider it if changing the environment or social life in order to grant genuine access and inclusion. The key term for the latter is providing "reasonable accommodation," which was developed in the United States in the 1970s.[7] Since then it has been adopted around the world, though rephrased in some countries.[8]

The concept of equal opportunity is currently the most frequently applied equality concept in modern disability legislation. One reason behind this might be that this equality concept is the most compatible with the free market economy, which is now the global economic model. Since civil rights legislation provides equal opportunities for underrepresented groups or minorities, it opens the gates for those who have not been able to participate in the market. In the absence of non-discrimination legislation there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group. Thus, the concept of equal opportunity for all also aims to change the notion of the capitalist market. This latter goal might explain why those who have not been the beneficiaries of the market economy in the past support this intermediate model of equality.

IV.
NATIONAL AND INTERNATIONAL DEVELOPMENTS

The reform process in disability law has been going on in all parts of the world. The United States and Canada were the first countries to adopt anti-discrimination laws and other human rights legislation for persons with disabilities, starting with scattered equality provisions in various areas of the law in the

7. *See* U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); GERARD QUINN ET AL, DISABILITY DISCRIMINATION LAW IN THE UNITED STATES, AUSTRALIA AND CANADA (1993).

8. For instance, the term "adjustments" instead of "accommodations" is used in U.K. law. *See* BRIAN J. DOYLE, DISABILITY DISCRIMINATION: THE NEW LAW (1996).

1970s and following with more comprehensive laws in the 1990s.[9] The 1990s in particular was a banner decade for disability law; more than twenty nations enacted disability discrimination laws during this period.[10] New equality laws for disabled persons have emerged at the national as well as at the supranational and international level. Today we have binding and non-binding declarations of international human rights explicitly for disabled persons that have been adopted by the General Assembly of the United Nations.[11] At the regional level, the Organization of American States and the European Union have passed strong equality legislation on disability.[12]

Major driving forces behind these legal changes have been national disability rights movements, which seemed to have been able to learn quickly from each other as well as cooperate among themselves at the international level. Due to the scarcity of comparative law and international disability law publications, legal research has accompanied the reform process predominantly with respect to national laws.[13]

V.
INTERREGIONAL EXPERTS' MEETING IN HONG KONG AS A FOLLOW UP TO THE BERKELEY MEETING

The Interregional Seminar and Symposium on International Norms and Standards Relating to Disability, which took place December 13-17, 1999 in Hong Kong (Special Administrative Region), People's Republic of China, was

9. The landmark law being the ADA of the United States. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1999). In Canada the 1982 Canadian Charter of Rights and Freedoms and the 1985 Human Rights Act contain anti-discrimination provisions for disabled persons. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms); The Canadian Human Rights Act, R.S.C., ch. H-6, § 1 (1998) (Can.).

10. *See, e.g.*, Disability Discrimination Act (1992) (Austl.); AUS. CONST. art. 7 (1997); Law of the People's Republic of China on the Protection of Disabled Persons (1990); Law on Equal Opportunities for Persons with Disabilities (1996) (Costa Rica); FIN. CONST. § 5 (1995) (now FIN. CONST. § 6 (2000)); CODE PÉNAL arts. 225, 416-14 (Fr.); GRUNDGESETZ [constitution] art. 3(3) (F.R.G.); Disability Discrimination Ordinance, Cap. 487 (1995) (H.K.); Act XXVI on Provision of the Rights of Persons Living with Disability and their Equality of Opportunity (1998) (Hung.); The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (1995 (No. 1 of 1996)) (India); Employment Equality Act of 1998, Equal Status Bill of 1999 (Ir.); Equal Rights for People with Disabilities Law, 5758 -1998 (Isr.); Act Relating to Employment Promotion, etc. of the Handicapped, Law No. 4219 (1990) (S. Korea); Human Rights Act of 1993 (N.Z.); Republic of Malawi (Constitution) Act of 1994, chap. III, sec. 13 (g); Magna Carta for Disabled Persons (Republic Act No. 7277) (1991) (Phil.); Disability Discrimination Act (1995) (U.K.); S. AFR. CONST. § 9 (1996); Protection of the Rights of Persons with Disabilities Act, No. 28 of 1996 (Sri Lanka); Law on the Prohibition of Discrimination Against Persons With Disabilities in Employment, SFS No. 1999–132, (1999) (Swed.); UGANDA CONST. chap. IV, sec. 21(2) (1995); Disabled Persons Act of 1992 (Zimb.).

11. *See infra* Part VI.

12. *See infra* Part VIII.

13. *See, e.g.*, QUINN, *supra* note 7; DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE (Melinda Jones & Lee Ann Basser Marks eds., 1999); WADDINGTON, *supra* note 5; HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS, *supra* note 5; MARGE HAURITZ ET AL, JUSTICE FOR PEOPLE WITH DISABILITIES: LEGAL AND INSTITUTIONAL ISSUES (1998); Quinn, *supra* note 5; Marcia Rioux, *The Place of Judgement in a World of Facts*, J. INTELL. DISABILITY RES., Apr. 1997, at 102–11.

one of the first attempts to create a forum for international disability law. The Equal Opportunities Commission of Hong Kong organized the Hong Kong Seminar in cooperation with the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong; the United Nations' Division for Social Policy and Development was a sponsor.

Hong Kong was an appropriate location for the meeting for two reasons. Much like the United Nations Decade on Persons with Disability (1983–92),[14] the years 1993 until 2002 were declared the Asian and Pacific Decade of Disabled Persons.[15] In addition, Hong Kong has one of the most far-reaching anti-discrimination laws for disabled persons in this region. The Disability Discrimination Ordinance (hereinafter DDO) of 1995 prohibits disability-based discrimination in the private and public sphere and covers such significant areas as education, employment, housing, sports, access to premises and the provision of goods and services.[16] The DDO is one of only three pieces of anti–discrimination legislation in Hong Kong[17] and has a strong monitoring body, the Hong Kong Equal Opportunities Commission (hereinafter EOC), which is eager to break new ground in the elimination of discrimination.[18]

Nearly fifty experts in law and disability policy from all regions of the world participated in the Hong Kong meeting, which was intended to promote awareness and understanding of the existing human rights framework for persons with disabilities. Another goal was to provide a forum to examine critically the current international legal and policy initiatives relating to persons with disabilities.

The Hong Kong meeting was a follow up to a smaller meeting that convened a year earlier at Boalt Hall Law School, University of California at Berkeley (hereinafter Boalt Hall). In December 1998, fifteen international experts in law and policy analysis participated in an Expert Group Meeting on International Norms and Standards Relating to Disability convened by the United Nations, in cooperation with Boalt Hall and the World Institute on Disability.[19] The Berkeley expert meeting identified priority areas for further research and action in international disability law and policy.[20] Specifically, the priority areas

14. *See Implementation of the World Programme of Action Concerning Disabled Persons and the United Nations Decade of Disabled Person*, G.A. Res. 44/70, U.N. GAOR, 44th Sess., Supp. No. 49, at 191, U.N. Doc. A/44/49 (1990).

15. E.S.C.A.P. Res. 48/3, U.N. ESCOR, Supp. No. 11, at 113, U.N. Doc. E/1992/31-E/ESCAP/889 (1992).

16. Disability Discrimination Ordinance, Cap. 487 (1995) (H.K.).

17. The others are the Sex Discrimination Ordinance, Cap. 480 (1995) (H.K.) and the Family Status Discrimination Ordinance, Cap. 527 (1997) (H.K.).

18. It handled more than 1,200 complaints within the first three years and had a success rate of 66% for cases that proceeded to conciliation. *See* Equal Opportunities Commission, *Statistics* (visited Apr. 4, 2000) <http://www.eoc.org.hk/enquiries/enquiries.htm>.

19. The World Institute on Disability is a nonprofit public policy center of and for people with disabilities based in Oakland, CA.

20. The report can be viewed at United Nations, *Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards to Disability* (visited Apr. 3, 2000) <http://www.un.org/esa/socdev/enable/disberk0.htm>.

included comparative legal research, research on implementation of domestic and international laws, and research on the role of the judiciary.

The Hong Kong meeting set out to build upon the Berkeley findings and to work on three main subjects, organized into the following clusters: Cluster One, international norms and standards relating to disability; Cluster Two, capacity building to promote and monitor the implementation of norms and standards for persons with disabilities; Cluster Three, approaches to definitions of disability. While Cluster One was the most interesting with respect to the development of international disability law, Clusters Two and Three addressed significant aspects of this evolving area of law. I shall mention their contents briefly here.

Cluster Two focused on the role of disability rights organizations in the implementation of international and regional human rights instruments. Just as in most areas of human rights law, the role of non-governmental organizations (hereinafter NGOs) is immensely important. While national governments theoretically bear the legal duty to implement international human rights law, in reality, they rarely accomplish human rights promotion and protection. Without the work of international and national human rights NGOs, the status of human rights law today would be far from where it is now.[21] Disability rights organizations only recently entered the international human rights movement and, while impressive actions have been taken,[22] a need for training in human rights advocacy among disability rights NGOs remains. Cluster Two thus focused on pilot training in this area, which was facilitated by a special purpose Internet site.[23]

Cluster Three concentrated on the long standing issue of defining disability, which has been the quest for different disciplines such as medicine, biology, sociology and law for centuries. The legal definition of disability determines whether a medical or a socio-political model of disability is fostered. Participants reviewed a number of definitions of disability found in national and international laws, which generally fell into two categories. The first emphasized individual deficits of disabled persons, thus evoking the medical model of disability. The second category focused on the social, economic, political and legal barriers that result in disability, similar to the social model of disability. Participants also reviewed the current revision process of the International Classification of Impairments, Disabilities and Handicaps (hereinafter ICIDH), which the World Health Organization (hereinafter WHO) first adopted in 1980.[24] Disability rights experts have criticized this definition as being too medical-centered

21. *See* Irwin Cotler, *Human Rights as the Modern Tool of Revolution, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 7-20 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 456 (1996).

22. For a recent impressive investigation into the situation of incarcerated mentally ill persons, see Michael Winerip, *The Global Willowbrook,* N.Y. TIMES MAG., Jan. 16, 2000, at 58-67.

23. *See* WorldEnable, *An Internet Accessibility Initiative* (visited Apr. 3, 2000) <http://www.worldenable.net>.

24. *See* WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF IMPAIRMENT, DISABILITIES AND HANDICAPS (1980).

and too focused on the individual. In July 1999, the WHO published ICIDH–2,[25] which is currently being tested in the field.

Participants concluded that legal definitions of disability serve different purposes and that there thus cannot be one overall definition of disability. For example, a medical definition may be appropriate if one's purpose is clinical care or personal care benefits. However, if the goal is to ensure human rights, the medical model would not be adequate because it most likely results in limiting the rights of disabled persons. In any event, participants recommended that persons with disabilities and their organizations play a central role in any decision-making process about definitions. Having briefly summarized the work of Cluster Two and Cluster Three at the Hong Kong meeting, I shall now return to Cluster One, international norms and standards relating to disability, as the focal point for the rest of this article.

VI.
Overview of International Laws Relating to Disabled Persons

Despite being one of the largest minority groups in the world, encompassing 600 million persons (of which two out of three live in developing countries), disabled people have been rather ignored during the first three decades of the United Nations' existence. The drafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the equality clauses of any of the three instruments of this Bill, the Universal Declaration of Human Rights (1948) (hereinafter UDHR), the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR), mention disability as a protected category.[26] If disability is addressed as a human rights issue in these documents, it is only in connection with social security and preventive health policy.[27]

Only in the 1970s, with the promulgation of the Declaration on the Rights of the Mentally Retarded Persons (1971)[28] and the Declaration on the Rights of Disabled Persons (1975),[29] did persons with disabilities become subjects of human rights declarations. Even these early instruments reflect a notion of disability within the medical model, according to which disabled persons are primarily seen as persons with medical problems, dependent on social security and

25. *See* World Health Organization, ICIDH–2: International Classification of Functioning and Disability (1999).

26. *See* Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

27. *See* Universal Declaration of Human Rights, art. 25, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); International Covenant on Economic, Social and Cultural Rights, art. 12, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U N. Doc. A/6316 (1967).

28. G.A. Res. 2856, U.N. GAOR, 26th Sess., Supp. No. 29, at 93, U.N. Doc. A/8429 (1972).

29. G.A. Res. 3447, U.N. GAOR, 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1976).

welfare and in need of segregated services and institutions. It was also during this time that the General Assembly affirmed that the "other status" phrase of the equality provisions of the International Bill of Human Rights covered disabled persons.[30]

Throughout the 1970s and the 1980s, the General Assembly of the United Nations passed a number of resolutions that led to the 1982 World Programme of Action Concerning Disabled Persons (hereinafter WPA), the guiding instrument for the United Nations Decade of Disabled Persons 1982–1993.[31] The first two goals of the WPA, prevention and rehabilitation, reflected a more traditional approach to disability law and policy; the third goal, equalization of opportunities, set the path for change at the international level. Equalization of opportunities is defined as:

> the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities are made accessible to all.[32]

Throughout the decade, the equal rights component of disability policy and law became the main target of the emerging international disability rights movement.

Other major events that helped to shift the paradigm from the medical to the human rights model of disability were two thematic reports, one on human rights in the field of mental health and one on human rights violations with regard to disabled persons; the United Nations Commission on Human Rights prepared both.[33] These reports were the first to recognize disability as a thematic subject within the human rights division of the United Nations, which in turn helped in regarding disabled persons not only as recipients of charity measures but as subjects of human rights (violations). While one report resulted in a non-binding international human rights instrument protecting disabled persons in institutions,[34] the outcome of the other has been rather poor. No significant follow-up activities were taken under the auspices of the U.N. Commission of Human Rights. While other significant guidelines and standards were adopted during the decade,[35] the proposal for a binding treaty on the human rights pro-

30. For a more comprehensive analysis see Hendriks, *supra* note 5.

31. G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51, at 185, U.N. Doc. A/37/51 (1983).

32. *World Programme of Action Concerning Disabled Persons: Report of the Secretary-General,* Addendum at 21, U.N. GAOR, U.N. Doc. A/37/351/Add.1 (1982).

33. *See Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder: Report by the Special Rapporteur, Mrs. Erica-Irene Daes,* U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1983/17; *Human Rights and Disabled Persons,* U.N. Centre for Human Rights, U.N. Sales No. E.92.XIV.4 (1993).

34. *See The Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, G.A. Res. 46/199, U.N. GAOR, 46th Sess., Supp. No. 49, at 188, U.N. Doc. A/46/49 (1992).

35. *See, e.g., The Talline Guidelines for Action on Human Resources Development in the Field of Disability*, G.A. Res. 44/70. U.N. GAOR, 44th Sess., Supp. No. 49, Annex, at 196, U.N. Doc. A/44/49 (1990).

tection of disabled persons did not find majority support within the General Assembly in 1987.

As a compensatory alternative, the General Assembly adopted the non-binding U.N. Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter StRE) in 1993.[36] The StRE firmly build on the WPA and clearly accentuates equality, now defined as follows:

> The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.[37]

In contrast with other non-binding international disability instruments, the StRE have a Special Rapporteur and a panel of experts who have the mandate to promote and monitor the implementation of the rules. The panel of experts consists of ten representatives of the six major international non-governmental organizations in the disability field.[38] The reports reflect a clear human rights approach in monitoring performance, although the monitoring body is placed under the auspices of the United Nations Commission for Social Development instead of the Commission on Human Rights.[39]

VII.
PROTECTION UNDER GENERAL HUMAN RIGHTS INSTRUMENTS

Increasingly, NGOs that focus on disability have an impact on how traditional human rights norms are interpreted and implemented as well as on how modern human rights instruments are designed.[40] While disability was a forgot-

36. *See Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, at 202, U.N. Doc. A/48/49 (1994) [hereinafter *Standard Rules*]. For comment, see Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, *in* HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 5, at 9-39, and Bengt Lindqvist, *Standard Rules in the Disability Field –A New United Nations Instrument*, *in* HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 5, at 63-68.

37. *Standard Rules*, *supra* note 36, ¶¶ 24-27, at 204.

38. The organizations were as follows: Disabled Peoples' International, Inclusion International, Rehabilitation International, World Blind Union, World Federation of the Deaf and World Federation of Psychiatric Survivors and Users.

39. *See Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Report of the Special Rapporteur of the Commission for Social Development*, U.N. GAOR, U.N. Doc. A / 50 / 374, Annex (1995) (first report); *The Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Final Report of the Special Rapporteur of the Commission for Social Development*, U.N. GAOR. U.N. Doc. A/52/56, Annex (1996) (second report); *Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities: Final Report of the Special Rapporteur of the Commission for Social Development on Monitoring the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities on His Second Mission, 1997-2000*, U.N. Economic and Social Council, U.N. Doc. E/CN.5/2000/3 (1999) (third report); *see also* Dimitris Michailakis, *The Standard Rules: A Weak Instrument and a Strong Commitment*, *in* DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, *supra* note 13, at 117, 119, and 130.

40. While the focus is here on the human rights division of the U.N., it should be mentioned that the Special Agencies such as WHO, ILO or UNESCO have also taken an equal opportunity

ten category when the ICCPR and the ICESCR were drafted, these treaties are currently interpreted in a way that supports the human rights approach to disability. General Comment No. 18 to the ICCPR, which deals with the right to equality (ICCPR art. 25), is a clear statement that the concept of formal equality does not apply. It affirms that equal treatment does not always mean identical treatment and that States have a duty to take steps to eliminate conditions that perpetuate discrimination.[41]

The Committee on Economic, Social and Cultural Rights went even further and adopted a General Comment on how to interpret and implement the ICESCR with respect to persons with disabilities.[42] General Comment No. 5, which the committee adopted in 1994, is the only legal U.N. document to date that broadly defines disability-based discrimination:

> Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more "subtle" forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purpose of the Covenant, "disability-based discrimination" may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodations based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.[43]

The Comment also emphasizes the human rights approach to disability by including a clear demand for anti-discrimination legislation: "In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties."[44]

In a similar vein, the Committee on the Elimination of Discrimination Against Women has adopted General Recommendations that ask State parties to include specific information on the status of disabled women,[45] and has addressed the issue of disability in other thematic recommendations.[46]

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approach to disability in recent years. As a strong binding instrument, ILO Convention No. 159, Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983, is worth mentioning. *See Convention No. 159: Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), in* INTERNATIONAL LABOR ORGANIZATION, 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-91 (1992). For an overview of the specialized agencies see Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework, supra* note 36, at 20-33.

41. *See General Comment No. 18, Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, at 175, U.N. Doc. A/45/40 (1990).

42. *See* Philip Alston, *Disability and the International Covenant on Economic, Social and Cultural Rights, in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS, *supra* note 5, at 94-105.

43. *General Comment No. 5 (1994): Persons with Disabilities,* U.N. ESCOR, Supp. No. 2, at 102, ¶ 15, U.N. Doc. E/1995/22 (1995).

44. *Id.* ¶ 16.

45. *See General Recommendation No. 18, Report of the Committee on the Elimination of Discrimination Against Women,* U.N. GAOR, 46th Sess., Supp. No. 38, at 3, U.N. Doc. A/46/38 (1992).

46. *See, e.g., General Recommendation No. 24, Report of the Committee on the Elimination of Discrimination Against Women,* U.N. GAOR, 54th Sess., Supp. No. 38, at 6, ¶ 25, U.N. Doc. A/54/38/Rev.1 (1999).

More recent human rights treaties, such as the International Convention on the Rights of the Child, include specific provisions concerning persons with disabilities that reflect a strong human rights approach.[47]

VIII.
REGIONAL DEVELOPMENTS

At the regional level, three laws are worth mentioning in the context of promotion of human rights of persons with disability.

In Europe, both the Council of Europe as well as the European Community have taken steps to ameliorate the fact that disabled persons long had the status of invisible citizens.[48] The 1996 revision of the European Social Charter (hereinafter ESC) displays a departure from the one-dimensional welfare approach taken in 1961 when the ESC was adopted. Article 15 of the revised ESC contains a clear commitment to equal opportunities for disabled persons: "The right of persons with disabilities to independence, social integration and participation."[49]

The European disability movement within the legal framework of the European Community has moved further and more firmly towards anti-discrimination. At the 1996 inter-governmental conference held to revise the European Treaties, a new article (art.13) was included in the Treaty Establishing the European Community.[50] This article gives the Community the ability to take action to combat discrimination on a number of grounds, including disability. The new provision is significant in that it embraces the human rights or social model of disability and that it recognizes that disability discrimination exists.[51]

Within the Inter-American system, a very recent development has been the adoption of the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (hereinafter IACPWD). While it does not contain individual rights, it is the first regional treaty to define disability-based discrimination. Article 1 (2) states:

(a) The term "discrimination against persons with disabilities" means any distinction, exclusion, or restriction based on disability, record of disability, condition resulting from a previous disability, or perception of a disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.

(b) A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not con-

47. For a discussion of art. 23 of the United Nations Convention on the Rights of the Child, see Thomas Hammerberg, *The Rights of Disabled Children–The UN Convention on the Rights of the Child, in* HUMAN RIGHTS AND DISABLED PERSONS, *supra* note 5, at 147-58.

48. *See* Lisa Waddington, *The European Community's Response to Disability, in* DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE, *supra* note 13, 139-53; Quinn, *supra* note 5.

49. European Social Charter, Europ. T.S. No. 163. However, the medical model has not been clearly abandoned when it states that sheltered employment should be provided if mainstream employment *"is not possible by reason of the disability"*(emphasis added). *Id.* art. 15(2).

50. *See* Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 1 (1997).

51. For details see Waddington, *supra* note 48, at 148; Quinn, *supra* note 5, at 312.

stitute discrimination provided that the distinction or preference does not in itself limit the rights of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well being, such declaration does not constitute discrimination.[52]

IX.
CRITICAL REVIEW OF INTERNATIONAL DISABILITY NORMS AT THE HONG KONG MEETING

Participants of Cluster One of the Hong Kong meeting noticed that disability rights NGOs had successfully countered the myths so long associated with the welfare model of disability, prompting a pragmatic shift away both from the view that disability is a condition that requires a cure and from the resulting policies of institutionalization and exclusion. The current international legal framework encompasses a new understanding whereby living with a disability is something for society to accept and accommodate.

While the Cluster One members recognized the critical fact that the major part of international disability rights law is "soft law" with no binding obligations for States parties to the United Nations, they deemed these numerous instruments significant for at least two reasons. First, these instruments should be viewed as vital tools in crafting strategies to advance the disability agenda locally, nationally and internationally. Second, these soft instruments are valuable interpretations of broad treaty obligations of relevance to disabled people and have the potential to contribute to the corpus of customary international law in the field of disability rights.

In this regard, the participants welcomed treaties that address disability, such as General Comment No. 5 to ICESCR. It was recommended that other treaty bodies consider the adoption of similar comments on the application of their respective treatment, taking into account the existing jurisprudence of other treaty and charter-based bodies. Participants agreed that placing international disability rights within the human rights division rather than in the social development division of the United Nations is important, and they recommended that the Commission on Human Rights reinforce the importance of the disability issue through various actions. While participants acknowledged that the first human rights reports on mental health and on disability were appropriate first steps, they deemed more in-depth investigations of systematic and individual violations of the human rights of persons with disabilities necessary. Considering the scarce resources allocated to the investigation of human rights violations against disabled women, Cluster One participants recommended that the Special Rapporteur on Violence Against Women of the Commission on Human Rights

52. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, A.G. Res. 1608, 29th Sess., O.E.A. Doc. OEA/Ser. P AG/doc.3826/99 (1999). For the period prior to the new treaty see INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, LOS DERECHOS HUMANOS DE LA PERSONAS CON DISCAPACIDAD (Rodrigo Jiménez ed., 1996).

consider taking up the issue of violence against disabled women as a theme for a detailed study in one of her future annual reports.

Furthermore, participants considered the adoption of the first regional anti-discrimination convention on disability rights and expressed their agreement that this represented a success for the disability movement in the Inter-American region. Concerns were nonetheless expressed that the definition of discrimination in this treaty excluded declarations of incompetence. Advocates emphasized that in many cases, persons with mental disabilities are declared incompetent without the due process protections guaranteed under international human rights law. Participants reached consensus on supporting the treaty with the proviso that ratifying States enter a reservation with respect to these declarations of incompetence.

Participants of Cluster One, however, did more than recognize progress in the development of international human rights norms. The experts also paid attention to certain legal developments in the field of bioethics, because of their potentially adverse effects on disability rights. In particular, Cluster One reviewed the new European Convention on Human Rights and Biomedicine, adopted by the Council of Europe in 1997,[53] from a disability rights perspective. Article 17(2) of this treaty allows non-therapeutic medical experiments to be performed on persons unable to give their informed consent.[54] This result was seen as incompatible with article 7 of the ICCPR[55] and the Nuremberg Code of 1947.[56]

Another drawback was seen in the fact that the Statute for the International Criminal Court (hereinafter ICC) fails to address the rights and concerns of disabled victims, whereas it protects other groups such as children and women. In response, the participants suggested that an additional protocol on disability supplement the statute of the ICC.

X.
A NEW INTERNATIONAL TREATY ON DISABILITY?

A major portion of the debate focused on the desirability of a new international treaty on the rights of persons with disability. Participants recognized that States are reluctant to adopt yet another special human rights treaty. The concern is that the abundance of existing human rights treaty obligations has created a "treaty fatigue" because Member States are already burdened by and unable to fulfill their existing reporting obligations.[57]

53. *See* European Convention on Human Rights and Biomedicine, Europ. T.S. No. 164.

54. *See id.* art. 17(2).

55. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

56. For the text of the Code, see THE NAZI DOCTORS AND THE NUREMBERG CODE 2 (George J. Annas & Michael A. Grodin eds., 1992).

57. For more on this problem of human rights implementation see STEINER, *supra* note 21, at 559.

However, participants cited six principal arguments in favor of a new treaty on disability rights. First, a new treaty would be a significant advance in the creation of binding law. In contrast, the current international standards represent a regime that is little more than a "toothless tiger" when it comes to actual human rights advocacy. Second, a new treaty would result in claims for additional attention and resources within the human rights division of the United Nations, on governments and on other organizations. Third, a treaty on disability rights would provide an opportunity to add specific content to the human rights of persons with disabilities and address hitherto unexplored areas, such as the right to be different. In light of recent developments in the area of bioethics and biomedicine concerning the right to be different, participants felt that this right might be as fundamental as the right to equality for persons with disabilities.[58] Fourth, a new treaty would also provide disability rights organizations with the opportunity to promote human rights for persons with disabilities in domestic contexts. Fifth, a new treaty would be a catalyst for empowering and mobilizing the global disability rights movement. Finally, the adoption of a disability treaty would place the disability agenda squarely within the United Nations human rights program. Thus, this step would underscore the fact that disability was primarily a human rights rather than a social welfare issue.

The debate ended with a clear statement that the United Nations, member States and disability rights organizations should initiate the process for the adoption of an international treaty dealing specifically with the human rights of disabled persons. However, participants also felt a strong desire to formulate three guiding principles that should be observed. First, the process of drafting any new treaty should be open, inclusive and representative of the interests of all persons with disabilities. Second, disabled persons must be principal participants in the drafting of any new treaty at all stages of the drafting process. Finally, any new treaty must neither dilute any existing international provisions on disabled person's rights nor undermine any national disability standards that provide a higher level of protection of rights.

XI.
CONCLUSIONS

The Interregional Seminar and Symposium on International Norms and Standards Relating to Disability in Hong Kong gave evidence that international disability rights is an emerging area of law. Experts from over fifty countries exchanged experiences about current law reforms in disability issues that all seem to follow a certain trend, namely moving from welfare law to civil rights for persons with disabilities. While important aspects such as comparative disability law and the role of the judiciary in implementing disability law reforms were not discussed in depth, participants presented some interesting examples of

58. For more on this issue see Degener, *supra* note 36, at 36; Katarina Tomasevski, *The Right to Health for People with Disabilities, in* HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS, *supra* note 5, at 131–46.

domestic disability law. A significant number of countries seem to have modeled their modern disability discrimination legislation on the American with Disabilities Act and its predecessors.[59]

Then, there were countries like Uganda who chose different paths for participation and inclusion for disabled persons. The 1995 constitution of Uganda contains equal rights provision for disabled persons in section 21(2) and section 35.[60] Based on these provisions, the Uganda legislature adopted some impressive laws according to which a certain number of seats in elected political bodies at all levels are allocated for people with disabilities. More than 1800 disabled persons have been elected since then, including five persons with disabilities as members of the federal parliament.[61]

The Hong Kong meeting only briefly addressed the role of the judiciary. Experts seemed to be less enthusiastic with respect to the role of judges in disability law reforms. The shared experience was that judges tend to adhere to the medical model of disability and perpetuate prejudices about disabled persons. A rather eccentric example discussed was a 1993 decision of a German district court.[62] The Flensburg Court decided that German travel agencies have to pay damages to non-disabled tourists who feel disturbed and disgusted by the presence of disabled tourists in their hotel.[63]

The Hong Kong meeting provided a long needed forum for disability rights activists and international lawyers to discuss human rights of disabled persons. While it would have been laudable to have a higher representation of disabled experts at the meeting, international disability law gained momentum as a field of research and practice.

59. On the U.K. law see BRIAN J. DOYLE, DISABILITY DISCRIMINATION: THE NEW LAW (1996). Before the Irish disability discrimination laws were adopted, comparative legal research was undertaken. *See* QUINN, *supra* note 7. For Asia and the Pacific see UNITED NATIONS, ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, LEGISLATION ON EQUAL OPPORTUNITIES AND FULL PARTICIPATION IN DEVELOPMENT FOR DISABLED PERSONS: EXAMPLES FOR THE ESCAP REGION (1997).

60. *See* UGANDA CONST. §§ 21(2), 35, *available at* <http://www.uganda.co.ug/chapt4.htm.> (visited Apr. 4, 2000).

61. This is according to an interview between the author and Jenny Kern, an attorney from Berkeley, CA, who interviewed Andrew Wonsolo, then the director of the National Union of Disabled People in Uganda, during an exploratory trip to Uganda in 1998. The National Union is the umbrella national policy making organization for disabled people in Uganda.

62. Amtsgericht Flensburg, Urteil vom 27.08.1992 – 63 C 265/92, 46 NEUE JURISTISCHE WOCHENSCHRIFT 272, (1993).

63. *See id.*