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FOREIGN DIRECT INVESTMENT IN SOUTH AFRICA

HUNTER R. CLARK & AMY BOGRAN*

Foreign direct investment ("FDI")** can be like the quality of Portia's mercy: "twice-bless'd."[1] It can rain high profits on multinational enterprises. And for host nations, especially developing countries, FDI can create jobs and capital for new investments, while providing access to know-how, technology, and lucrative export markets. For these reasons receptivity to FDI has long been a cornerstone of Nelson Mandela's vision for post-apartheid South Africa's approximately 40 million people. As leader of his political group, the African National Congress ("ANC"), Mandela made the importance he attached to FDI clear in an article he wrote for *Foreign Affairs* in 1993, the year before he assumed the South African presidency. Mandela stated:

> It is obvious to me that the primary components of our international economic relations, which must feed our development strategy, are the strengthening of our trade performance and our capacity to attract foreign investment. In addition, we must examine the possibilities of obtaining technical and financial assistance from the developed industrialized countries. We do not expect foreign investment to solve our economic problems, but we understand it can play a valuable role in our economic development...
>
> The ANC believes the most important way to attract foreign investment is to create a stable and democratic political environment. Also important is the development of legitimate, transparent, and consistent economic policies. Foreign companies should be treated as domestic companies, obeying our laws and gaining access to our incentives, and the ANC is

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** As used in this article, the term "foreign direct investment," or "FDI," means the acquisition of an interest in an enterprise which operates in a state other than that of which the investor is a national, the investor's purpose being to acquire an effective voice in how the enterprise is managed.

1. WILLIAM SHAKESPEARE, MERCHANT OF VENICE, act 4, sc. 1.

> committed to the principle of uniform treatment. And while we do not plan to provide exclusive incentives for all foreign investors, we realize it might be necessary to make special arrangements to attract the kind of investment that will make a real difference in South Africa.[2]

No wonder it seemed as though the world was only waiting for Mandela to become the official leader of a post-apartheid South Africa to re-invest in his nation. After all, there are many reasons why South Africa would appeal to foreign investors. Foremost, South Africa has the "most powerful economy" on the African continent.[3] According to the *Africa Competitiveness Report 1998*, published by the World Economic Forum, "South Africa's comparatively open economy (when compared to the rest of Africa) dominates the southern region and the continent, as a whole. Its $134 billion size is more than twice the size of any other African economy . . . ."[4]

Among the many advantages of doing business in South Africa are that "[i]ts transport and telecommunications infrastructure is unrivaled on the continent, it produces more electricity than the rest of Africa put together and it has a third of Africa's telephone lines."[5] South Africa is also rich in mineral resources, including gold, of which it is the world's leading producer and exporter; coal; chrome; copper; diamonds; iron; manganese; nickel; silver; and uranium.[6] Moreover, according to the U.S. Department of State, South Africa's "value-added processing of minerals to produce ferroalloys, stainless steel, and similar products is a major industry and an important growth area."[7] Also, South Africa's "diverse manufacturing industry is a world leader in several specialized sectors, including railway rolling stock, synthetic fuels, and mining equipment and machinery."[8]

In addition, there are indications that currency dealers' speculations may have caused the South African rand's undervaluation.[9] This

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2. Nelson Mandela, *South Africa's Future Foreign Policy*, FOREIGN AFF., Nov.-Dec. 1993, at 86, 95.

3. Victor Mallet, *Trade and Investment: An African Renaissance*, FIN. TIMES SURV., Mar. 24, 1998, at IV.

4. WORLD ECONOMIC FORUM, THE AFRICA COMPETITIVENESS REPORT 1998, at 148 (1998).

5. Mallet, *supra* note 3, at IV.

6. *See generally* Office of Southern African Affairs, Bureau of African Affairs, (visited March 20, 1999), *Background Notes: Republic of South Africa, February 1998* <http://www.state.gov/www/background_notes/southafrica_0298_bgn.html>, at 5 [hereinafter *Background Notes*] (for a profile of the South African economy); *The Africa Competitiveness Report 1998*, *supra* note 4, at 146-49; NEW AFRICAN YEARBOOK 1997-1998 (1998), at 418-36.

7. *Background Notes*, *supra* note 6, at 5.

8. *Id.*

9. *Down with the Rand*, THE ECONOMIST, July 4, 1998, at 39. *See also Investment in South Africa*, 13 INT'L TRADE REP. 1581, 1613 (1996).

being the case, investing in South Africa now may be less expensive than in the future, when the rate might correct itself. Already several multinational corporations operating in South Africa have started to retool or add the capacity to increase export production.[10] In 1996, the annual rate of return on South African investments was an appealing 18% to 19%, compared with 14% on investments in Latin America, 12% to 13% on investments in Asia, and 9% on European investments.[11] Recently, the Investor Responsibility Research Center of Washington, D.C., surveyed the 261 U.S. companies currently doing business in South Africa. Respondents gave South Africa high marks for its infrastructure, legal system, supply of raw materials and macroeconomic management.[12]

However, despite apartheid's demise and South Africa's reacceptance into the world community, it has yet to experience the high levels of FDI it needs or expects.[13] According to South African finance minister Trevor Manuel, 1998 saw some 955 international companies engaged in business in South Africa, with interests in about 2,050 operations.[14] These operations controlled roughly $45 billion in assets, and employed approximately 380,000 people.[15] But according to the *Financial Times*, the statistics are somewhat misleading. Most of the foreign interests and assets in South Africa have been there for many years, while the "flow of foreign investment into new factories or businesses remains modest for a market of South Africa's size."[16]

This article will explore some of the reasons why FDI fled South Africa during the apartheid era; the current status of FDI in South Africa; and how South Africa is today addressing the concerns of present and prospective foreign investors. Finally, it will analyze why FDI in South Africa is so necessary and important to that nation, to the African continent as a whole, and to the industrialized world.

Historically, South Africa never rejected the ideological premises of FDI in the way that nations opposed to, or suspicious of, capitalism did. Vietnam, for example, passed laws expropriating and nationalizing private holdings of foreign and domestic individuals and corporations. FDI was viewed by that nation's leaders as an extension of imperialism and

10. *See Investment in South Africa*, *supra* note 9, at 1613.

11. *See* Gary G. Yerkey, *BIT: U.S., South Africa Expect to Conclude Investment Treaty this Year, Aide Says*, INT'L TRADE DAILY, May 10, 1996, at 1, *available in* 1996 WL 5/10/96 BTD d2.

12. *See id.*

13. *See Asian Investment in South Africa. . . and the Indian Ocean*, THE ECONOMIST, Aug. 24, 1996, at 52; *Investment in Africa: Primary Problems*, THE ECONOMIST, Nov. 9, 1996, at 95.

14. Victor Mallet, *Buoyant Markets Belie Challenges*, FIN. TIMES SURV., Mar. 24, 1998, at I.

15. *Id.*

16. *Id.*

hence anathema to socialism and communism. Worse, the expropriations occurred during the decades when Vietnam did not necessarily recognize a duty to pay restitution.

Today, however, Vietnam has altered its ideology, in part because of its dire economic circumstances.[17] Laws have been put in place to protect and attract FDI, and 25 years after the end of the Vietnam War, Vietnam has recognized its duty to pay, in full, reparations or restitution for the expropriated or nationalized property of U.S. citizens.[18] Consequently, foreign investors are returning to Vietnam to do business in the new ways and forms acceptable to that government.[19]

In contrast, the problem for South Africa was not that it rejected FDI. Instead, foreign investors rejected South Africa. Although ostensibly committed to the growth-oriented economic policies of free enterprise capitalism, South Africa during the apartheid era instituted policies that were not conducive to FDI. Those policies included extensive state intervention in the economy; apartheid itself, which created economic distortions and political unrest; and a "dual rand" monetary policy. As one analysis has expressed it:

> South African economists in the 1980s described the national economy as a free-enterprise system in which the market, not the government, set most wages and prices. The reality was that the government played a major role in almost every facet of the economy, including production, consumption, and regulation. In fact, Soviet economists in the late 1980s noted that the state-owned portion of South Africa's industrial sector was greater than in any country outside the Soviet bloc. The South African government owned and managed almost 40 percent of all wealth-producing assets, including iron and steel works, weapons manufacturing facilities, and energy-producing resources. Government-owned corporations and parastatals were also vital to the services sector. Marketing boards and tariff regulations intervened to influence consumer prices. Finally, a wide variety of laws governed economic activities at all levels based on race.[20]

In an article for the March-April 1996 edition of *Foreign Affairs*, R. Stephen Brent, an officer in the U.S. Agency for International Devel-

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17. *See generally* Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam--A Case Study*, 107 HARV. L. REV. 1995 (1994) [hereinafter *Protection of Foreign Direct Investment*] (discussing the laws and policies of the Vietnamese government regarding foreign direct investment).

18. *See* George Gedda, *U.S., Vietnam to Set Diplomatic Link*, ASSOC. PRESS, Jan. 27, 1995, at 2, *available in* 1995 WL 4360298.

19. *See Protection of Foreign Direct Investment*, *supra* note 17, at 2009-12.

20. FEDERAL RESEARCH DIV., LIBRARY OF CONGRESS, SOUTH AFRICA: A COUNTRY STUDY 186 (Rita M. Byrnes ed., 3d ed. 1997) [hereinafter LIBRARY OF CONGRESS].

opment mission in Pretoria, South Africa, assessed South Africa's governmental policies and performance under white rule as follows:

> Despite South Africa's reputation for a well-run economy under white rule, the policies of the National Party hampered growth severely. Apartheid brought about international isolation and economic sanctions, but the government's economic management was also poor. For all its criticisms of the ineptitude of African states under black rule to the north, the National Party followed policies after 1948 that resembled much of the rest of Africa. It developed massive bureaucratic and parastatal structures to provide public employment for Afrikaners, many of whom were poor in 1948. It embraced strong protectionism and import substitution. It spent lavishly on public investments, especially defense and supposedly strategic industries. And it set up puppet regimes in the so-called homelands it established that had all the elements of bad governance that the National Party criticized: autocracy, patronage, corruption, and enormous budget deficits.
>
> These policies did not have the same catastrophic effects as in other countries, partly because South Africa was trying to subsidize only 15 percent of the population [i.e., the whites] and had a cushion of vast gold revenues. But the policies did limit growth. After steady gains in per capita income from 1946 to 1974, income stagnated from 1974 to 1981 and fell by 20 percent from 1981 to 1994. Today South Africa's per capita income of $2,700 is practically what it was in the mid-1960s.[21]

The institutionalization of apartheid 1948 culminated decades of racial discrimination and formally created dual economies and societies within South Africa. Laws like the Group Areas Act of 1950 restricted the free movement of blacks and "had the effect of zoning all of South Africa's territory according to race."[22] Individual blacks were only allowed to live and work in the areas governed by the tribe or local government of which the individual was officially designated a member. The residents of these "homeland" areas were often "barely able to support themselves, owing in part to the homelands' arid land, inferior roads and transportation, and overcrowding; some were therefore forced to travel great distances to work in 'white' South Africa."[23] Other laws, such as the Separate Amenities Act of 1953, gave local officials authority to segregate public facilities and accommodations, including beaches, buses, elevators, hotels, libraries, railway stations, restau-

21. R. Stephen Brent, *South Africa: Tough Road to Prosperity*, FOREIGN AFF., Mar.-Apr. 1996, at 113-14.

22. FOREIGN AREA STUDIES, THE AMERICAN UNIV., SOUTH AFRICA: A COUNTRY STUDY 240 (Harold D. Nelson ed., 2d ed. 1981) [hereinafter FOREIGN AREA STUDIES].

23. LIBRARY OF CONGRESS, *supra* note 20, at 185.

rants, telephone booths, theaters, train stations, and the like, thereby forcing social separation of the races.[24]

Apartheid proved expensive and unsettling. For one thing, there was a high cost of maintaining the large security apparatus required to enforce apartheid. Also, investors grew nervous over brewing social unrest. As a result, the government in 1961 found itself faced with a sudden deterioration in its balance of payments. The government's response was to inhibit the flight of investment capital by imposing a "dual rand" currency and exchange rate system.[25] The "financial rand" was defined as "the local proceeds of South African assets owed by persons resident outside of the Republic [of South Africa]."[26] In other words, the financial rand became the currency used by foreigners investing in government approved ventures.[27] The "commercial rand," by contrast, was made the domestic currency.[28] The financial rand and the commercial rand were developed to block the easy repatriation of non-South African owned securities and prevent a run on foreign reserves.[29] By separating the currencies, the commercial rand was never affected by the fluctuation in the discount at which the financial rand traded, which sometimes was as high as 30%.[30]

One legal scholar has asserted that the Sharpeville Massacre precipitated South Africa's 1961 balance of payments crisis. On March 21, 1960 in Sharpeville, a modest township near Johannesburg, South African authorities opened fire on anti-apartheid demonstrators gathered outside a police station to protest apartheid restrictions. According to Nelson Mandela, "more than seven hundred shots" were directed into a crowd of several thousand protesters.[31] When the shooting stopped, "sixty-nine Africans lay dead."[32] More than 400 people were wounded, "including dozens of women and children."[33] In Mandela's view, "it was a massacre, and the next day press photos displayed the savagery on front pages around the world."[34] Mandela recalled, "the shootings at Sharpeville provoked national turmoil and a government crisis."[35]

Nevertheless, the white society and economy benefited at first from

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24. *See* FOREIGN AREA STUDIES, *supra* note 22, at 240.

25. *See* Gary S. Eisenberg, *The Policy and Law of Foreign Direct Investment in the New South Africa* 28 J. OF WORLD TRADE 5, 16 (Feb. 1994).

26. *Id.* at 17.

27. *Id.* at 16.

28. *Id.*

29. *Id.* at 16-17.

30. Eisenberg, *supra* note 25, at 17.

31. NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 238 (1995).

32. *Id.*

33. *Id.*

34. *Id.*

35. MANDELA, *supra* note 31, at 238.

governmental support and prospered sufficiently under the apartheid regime for South Africa to be considered a "middle-income country" by the World Bank.[36] By contrast, the black society and economy suffered as a consequence of having almost no governmental support. The result for blacks was massive poverty, unemployment, and poor education. A report prepared by the federal research division of the U.S. Library of Congress in 1987, entitled *South Africa: A Country Study*, concluded:

> By the late 1980s, black poverty was so serious that the government began to take steps to alleviate some of the most dire impacts of apartheid. Government statistics then indicated that more than 16 million people were living below internationally determined minimum-subsistence levels. Using nutritional standards as an alternative measure, an estimated 2.3 million people were at severe risk from hunger and malnutrition. In 1988 the [South African] minister of national health and population development characterized the crisis as 'worse than the Great Depression,' and in response, the government initiated food programs and other social welfare initiatives.[37]

By then, the nation's economy had deteriorated badly. "Discriminatory legislation based on race [had] affected the mobility of capital, the development of enterprises, and internal trade. All of these [had] retarded economic growth."[38] Yet for ideological reasons, South African whites for years had refused to acknowledge what one observer called the "basic economic interrelationship of the homelands and the White area."[39] In fact, not until 1980 did the government finally concede that South Africa's economic well-being depended on integration of the black and white economies, if not the societies.[40] By that time, however, FDI, which had been a "major catalyst" in the growth and development of the South African economy since the late 1800s, had declined significantly.[41] To outside observers, it began to appear that apartheid, and the government's inability to quell growing black unrest, was having a negative influence on foreign investors.[42]

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36. *See* FOREIGN AREA STUDIES, *supra* note 22, at 161.
37. LIBRARY OF CONGRESS, *supra* note 20, at 186.
38. FOREIGN AREA STUDIES, *supra* note 22, at 162.
39. *Id.*
40. *Id.*
41. *Id.* at 207.
42. *See* FOREIGN AREA STUDIES, *supra* note 22.
> Between 1973 and 1978 total foreign investment more than doubled. [T]hrough 1976 the rate of overall growth (public and private sectors, direct and nondirect investment) was over 20 percent and reached a high of 29 percent in 1975. The rate dropped sharply in 1977 to 7.6 percent and to 7.3 percent in 1978. Among the factors that appeared to have played a part in the decline were investor concerns after the political disturbances in Soweto in 1976. . . .

Starting in the mid-1970s, throughout the 1980s, and on into the early 1990s, international trade sanctions and investment boycotts became weapons of choice in the world's war against apartheid. The effects on South Africa's economy were devastating. As one report recounts:

> These [trade and investment] measures included a voluntary arms embargo instituted by the United Nations (UN) in 1963, which was declared mandatory in 1977; the 1978 prohibition of loans from the United States Export-Import Bank; an oil embargo first instituted by OPEC in 1973 and strengthened in a similar move by Iran in 1979; a 1983 prohibition on IMF loans; a 1985 cutoff of most foreign loans by private banks; the United States 1986 Comprehensive Antiapartheid Act, which limited trade and discouraged United States investors; and the 1986 European Economic Community (EEC) ban on trade and investment. The Organization of African Unity (OAU) also discouraged trade with South Africa, although observers estimated that [economically dependent] Africa's officially unreported trade with South Africa exceeded R10 billion [rand] per year in the late 1980s.
>
> The most effective sanctions measure was the withdrawal of short-term credits in 1985 by a group of international banks. Immediate loan repayments took a heavy toll on the economy. More than 350 foreign corporations, at least 200 of which were United States owned, sold off their South African investments.[43]

Today, however, South Africa should be very appealing to potential foreign investors because the country wants FDI, needs it, is amenable to it, and a democratic government has replaced apartheid. Among other measures, South Africa has passed new regulations promoting FDI in public and private partnerships.[44] These include regulations that reduce tax rates and import tariffs; allow for easier exchange and repatriation of profits; and which address lagging productivity and the overall socio-economic difficulties of the black population. Taken together the government hopes its policies will reduce crime, which has risen to daunting levels, and increase overall social stability.

To manage the evolution from apartheid to pluralistic democracy, a transitional Government of National Unity drafted a new constitution, which became effective on February 4, 1997.[45] Through the establishment of a Truth and Reconciliation Commission, the government is attempting to address both the black community's demand for an ac-

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Id. at 208.

43. LIBRARY OF CONGRESS, *supra* note 20, at 192-93.

44. *See* Mawusi Afele, *Africa Cries Out for Investment, but Will the World Listen?*, DEUTSCHE PRESSE-AGENTUR, July 18, 1996, *available in* WL 7/18/96 DCHPA.

45. *New South African Constitution Handed Out Free*, DEUTSCHE PRESSE-AGENTUR, Mar. 17, 1997, at 1, *available in* WL 3/17/97 DCHPA.

counting of the human rights violations committed by the apartheid regime, and the white community's fear of retaliation.[46] Even with these progressive policies, however, the current rate of FDI is disappointing.[47] Pinpointing the reason why is much harder than citing any one set of statistics or figures. The problem may be more a matter of perception on the part of prospective foreign investors than of reality. Consequently, as the government is already doing, South Africa can only hope for the best, give assurances, and continue to address the problems it knows affect FDI.[48]

For example, one of the problems is that post-apartheid South Africa inherited one of the most complex tariff systems in the world.[49] By joining the World Trade Organization ("WTO") in December 1994, the government agreed to abide by the general goal of reducing or eliminating tariffs.[50] A five-year plan to reduce or eliminate tariffs on most industrial products began in 1995, giving credibility to South Africa's commitment to overall tariff reform.[51] There had been some skepticism about that commitment because of the potentially detrimental effect tariff reduction and other policies aimed at attracting FDI might have on the alliance between the ANC and the country's labor unions.[52] For example, lower tariffs could conceivably put inefficient domestic industries out of business, thereby increasing the black unemployment rate, which has reached a staggering 41% overall and is even higher among young people.[53] The government, however, achieved a compromise position with labor with its five-year plan announced in June 1996.[54] The government introduced tax breaks for labor intensive industries, and committed to developing 409,000 jobs by the year 2000.[55]

The government also wants to remove all exchange controls "as soon as circumstances are favorable."[56] It has already abolished the

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46. *See generally* Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753 (1998).

47. *See* Mallet, *supra* note 14, at I.

48. *See* WILLIAM M. HANNAY & LAUREN G. ROBINSON, *Introduction to* A LAWYER'S GUIDE TO DOING BUSINESS IN SOUTH AFRICA 6-7 (Vaughn C. Williams et al. eds., 1996).

49. *See* Tani Freedman, *Southern African Trade Hobbled by Complex Tariffs*, AGENCE FRANCE-PRESSE, Apr. 23, 1998, at 1, *available in* 1998 WL 2267308.

50. *See* Leora Blumberg, *Trade Regulation in South Africa*, *in* A LAWYER'S GUIDE TO DOING BUSINESS IN SOUTH AFRICA, *supra* note 48, at 89.

51. *See id.* at 90.

52. *See* Mark Ashurst, *News: World Trade: Unity of Apartheid's Foes Under Strain*, FIN. TIMES, July 9, 1996, at 4.

53. *See* Brent, *supra* note 21, at 114.

54. *See Hilfe Country Report: South Africa: July 1995*, July 1, 1996, at 18, *available in* 1996 WL 11753513 [hereinafter *Hilfe Country Report*].

55. *See id.* at 19.

56. *Id.* at 25.

double rand system.[57] South Africa is also expected to remove controls on foreign investment by its citizens.[58] Ensuring the free flow of funds by eliminating currency controls would more than likely be an "essential part" of any bilateral investment treaty ("BIT") with the U.S.[59] The policy might also serve to quell the fears of South Africa's white business community. If white South Africans know they have the right to exchange and remove their money from the country, any sense of panic might ease. Hence they might feel less inclined to actually do so.

South Africa is also seeking to sign tax treaties with several countries as a further means of attracting FDI. For example, the new tax treaty with the U.S. provides relief from double taxation and reduces, or in some cases eliminates, withholding tax on dividends, interest, and royalties.[60] Other South African tax initiatives include accelerated depreciation write-offs and the possibility for up to three, two-year tax holidays under certain conditions.[61]

Tax treaties encourage FDI because they allow potential investors to plan for the consequences of their investment choices. For instance, if a company knows it will receive a credit or deduction for taxes paid to the foreign country in which it has a subsidiary, it is more likely to invest in that country than in another nation with which there is no tax treaty, and the treatment of foreign taxes paid is uncertain. Most of the countries which compete with South Africa for FDI have entered into tax treaties with many states. Executing tax treaties, like the one with the U.S., makes South Africa more competitive with these nations.

To make investment even more attractive, the government has taken steps to curb the low worker productivity which seems to have always plagued South Africa.[62] "South Africa's productivity is notoriously poor by international standards."[63] According to Dr. Jan Visser, executive director of the National Productivity Institute ("NPI"), a South African consulting firm which each year advises between 500 and 600 companies on how to improve worker output, South Africa's low productivity "is an organisational issue rather than a national norm."[64] Visser explains:

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57. *See Mandela Looks for Foreign Investors*, THE ECONOMIST, May 13, 1995, at 39.

58. *See* Yerkey, *supra* note 11.

59. *See id.* (quoting Dana DuRand, counselor for trade and industry at the South African Embassy in Washington, D.C.).

60. *See* Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., Feb. 19, 1997, at A1.

61. *See generally South Africa-Mozambique-Swaziland: Lubombo Corridor to Catalyze Integration*, INT'L MKT. INSIGHT REP., May 14, 1998, *available in* 1998 WL 8068620.

62. *See* Madeleine Wackernagel, at 1, *South African Productivity: A National Priority*, AFR. NEWS SERV., Aug. 26, 1996, *available in* 1996 WL 10503796.

63. *Id.*

64. *Id.*

> One of the biggest problems in terms of raising productivity in this country is the lack of cooperation between management and unions. They tend to fight, not to support each other. Strike negotiations are a case in point—a perfect example of how not to get along. For too long, organizations have set their sights on creating profits for shareholders, as opposed to creating wealth that can be shared around more equitably.[65]

According to Visser, South African labor and management have made progress toward a "common goal and a common vision," and toward the introduction of modern labor relations and management techniques.[66] He admitted to an interviewer that South Africa "fell behind somewhat during the period of isolation . . . ."[67] He insisted, however, that South African managers "are taking greater interest in overseas developments and applying them locally, albeit slowly."[68]

In addition, the government is planning ways to make FDI easier from a logistical standpoint. One plan calls for the creation of "one-stop" investment facilitation centers where prospective foreign investors could do everything necessary, such as obtaining licenses and permits, to start doing business in South Africa immediately and avoid having to deal with numerous government agencies.[69]

Another policy is to privatize some, if not most, large state enterprises, which should create tremendous FDI opportunities. A prime example of the government's resolve to commence privatization has been the acquisition of an equity partner in Telkom, the state telecommunications enterprise. According to one report, Telkom's partial privatization, by which the South African government relinquished a 30% interest in the parastatal, was motivated by the potential for "reduced tariffs, extra calls, and higher tax revenues that have followed such moves in other countries."[70] The government is planning more whole or

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65. *Id.*

66. Wackernagel, *supra* note 62, at 1.

67. *Id.* at 2

68. *Id.*

69. *See South Africa: A Trade Strategy that Dreams of Jobs*, AFR. NEWS SERV., Sept. 18, 1998, at 4, *available in* 1998 WL 17256788.

70. *VeldCom*, THE ECONOMIST, May 16, 1998, at 64. The *Economist* reported that in March 1998, a U.S. company, SBC Communications of San Antonio, Texas, acquired an 18% share of Telkom. *See id.* According to the report, SBC stands to profit handsomely from the acquisition, if current market trends are any indication, in large part because of growing South African consumer demand for mobile phones. The *Economist* report states:

> The bright spot for Telkom is mobiles. Since 1993, when the devices were first licensed, the number of users has rocketed from 12,500 to about 1.6 m, making South Africa one of the world's largest markets for mobile phones outside the OECD [Organization for Economic Co-operation and Development]. In a country where public phones are almost non-existent (people steal them for their value as scrap metal), the cellphone is a must for the well-off and a status symbol for every-

partial privatization.[71]

As stated, South Africa has made itself more attractive for FDI not only because it wants FDI, but also because it needs it. FDI is a cornerstone of the government's approach to economic development. In the past, during decades spent in exile or in jail ANC leaders espoused socialist ideals.[72] But contrary to conventional expectations, the ANC since coming to power in 1994 has committed South Africa to conservative economic policies, such as deficit reduction.[73] Toward that end the government would like to create jobs for the black population, but it cannot expand the civil service payroll as a means of reducing unemployment.[74] Due in part to the current lack of FDI, however, some government intervention has been required.[75] The primary governmental initiative designed to address the inequalities created by apartheid is the Reconstruction and Development Program ("RDP").[76]

So far, the RDP has emphasized the redirection of current government spending rather than new expenditures. The government, since 1996, has been trying to reduce the deficit to 3% of its gross domestic product ("GDP") by the year 2000, down from 5.2% in 1996.[77] This commits the government to a difficult and dangerous balancing act. On the one hand, it must hold spending to levels that will make South Africa attractive to foreign investors. On the other, it must improve black living conditions enough to avoid political unrest until such time as the benefits of increased FDI can be realized. It is only through increased FDI that the South African GDP can grow between 5% and 6% annually, the rate required to significantly reduce the high rate of black unemployment.[78] As one analyst has concluded, "[p]rivate sector growth is

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> one else. Nervous drivers like to know they can call for help if they break down somewhere dangerous. A recent letter to the Sowetan raged against immoral township girls who sleep with any man who owns a mobile phone.
>
> Telkom is one of two mobile providers. It is a partner of Britain's Vodaphone in a joint venture called Vodacom, which claims millions of subscribers. Its estimated pre-tax profits are 500 million rand ($100m) on sales of perhaps 1.8 billion rand [$360 million]. MTN, the other mobile firm, with fewer customers, but wealthier ones, probably has similar revenues. The good times are likely to continue . . . .

Id.

71. *See, e.g., Mandela Says Foundations Laid for a Better Life, but Admits Problems*, DEUTSCHE PRESSE-AGENTUR, Feb. 7, 1997, at 1, *available in* WL 2/7/97 DCHPA.

72. *See* Mallet, *supra* note 14, at I.

73. *Id.*

74. Brent, *supra* note 21, at 116.

75. *See id.*

76. *Id.* at 114.

77. *See* Ashurst, *supra* note 52, at 4.

78. *See* Brent, *supra* note 21, at 116. The government has already demonstrated its resolve to avoid inflating the civil service or having a fire sale of all of the parastatals.

the only long-term solution for South Africa's economic straits. But to generate the political capital necessary to pursue long-term growth, the government will have to combine economic liberalization with effective interventions to help the black majority."[79]

Additionally the government must decide whether to focus on capital intensive, as opposed to labor intensive, FDI. The two are antithetical. Capital intensive production methods utilize the most advanced equipment and technology to decrease labor costs, whereas labor intensive methods are ordinarily used when there is insufficient capital to invest in the latest technological advances. On the one hand, South Africa needs to update its technological infrastructure. In the long run, capital intensive production methods will make South African products more competitive and thus expand export markets. Conversely, however, labor intensive FDI would reduce black unemployment—at least in the short-run—which appears to be an economic and political imperative. For this reason the government has introduced tax breaks for labor intensive industries.

Fortunately, opinion polls indicate that South Africa's black population does not seek immediate payoffs, but is willing to endure incremental change for small but tangible improvements now, combined with the realistic possibility of a better life for black children.[80] According to one observer, South Africa's black communities have shown "little evidence of populist factions in revolt against the compromises of the new government."[81] However, if neighboring Zimbabwe's experience is any indication, the South African government may have no more than a ten-year window of opportunity to make significant changes.[82]

Yet South Africa's domestic economy cannot provide the capital necessary to develop jobs because there is a drastic shortage of savings, from which domestic capital investment normally comes; productivity of domestic industries is weak; and the skill level of the work force is low. *See id.* at 115. Therefore, it is only through FDI that South Africa can acquire the technical and capital revitalization to improve its export production and grow its economy to reduce the number of unemployed.

79. *Id.* at 114.

80. *See id.* at 117.

81. *Id.* at 113. Apparently most whites feel the same way. Brent states:

> Since the [1994] election, the once-feared threat of right-wing violence has faded. Although extremist Eugene Terre'blanche of the Afrikaner Resistance Movement still appears on his horse from time to time, most conservative Afrikaners accept the new government, which President Mandela has made easier for them by bending over backward to respond to white concerns.

Id.

82. *See id.* at 116-17. In 1980, the people of Zimbabwe were willing to accept slow economic progress, but when by 1994 they had not experienced significant changes in black participation in the economy through business ownership, there was a backlash against the government. *See id.* Even though the government of Zimbabwe succeeded in correcting many social welfare problems, and increased black employment by the government, it failed to provide measures to encourage black business ownership and reduce

As stated, the South African government cannot provide the necessary type of long term improvements for blacks without significant contributions from the private sector through FDI. In addition, white South Africans must realize and accept that their expectations must change. Whites no longer live under a regime which benefits them at the expense of others, as did apartheid, a system which, as one writer put it, "oppressed the majority of South Africans for the enrichment of a few."[83] To avoid turmoil and unrest, the government will have to keep all sectors of the economy focused on the long term growth that will provide jobs and allow for the development of the black community.[84]

Aside from the economic issues that concern foreign investors, the political question of who and what will come after Nelson Mandela lingers. His ANC will clearly remain the majority political group. Going into the 1999 elections, the ANC controls over 60% of the seats in parliament.[85] The question is whether the ANC will be able to govern effectively and responsibly without Mandela.

It is possible. Mandela is not as important to the day-to-day operation of the government as would seem at first blush.[86] His importance derives from his moral integrity and ability to unify various factions.[87] His nation and the world have clung to him as a "saint-like figure," both while he was in prison and since his release.[88] One observer has described him as "among the planet's foremost moral authorities."[89] Mandela has devoted most of his life, including nearly 30 years in prison, to the struggle against apartheid.[90] As an ANC leader, he came to understand the ways in which the colored, Asian, and white communities, as well as blacks, were denigrated by apartheid, and that therefore South Africa itself was the victim.[91] He has championed South Africa as a

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white control of the economy. *See id.* Instead, the Zimbabwean government settled for alleviating black unemployment through government jobs and benefits. *See id.*

83. Pumla Gobodo-Madikizela, *Facing the Truth in South Africa*, WASH. POST, Nov. 1, 1998, at C7.

84. *See* Brent, *supra* note 21, at 117. "The challenge for the [South African] government is to keep the focus on long-term growth but provide enough benefits to the majority population along the way that political consensus can be maintained and moral commitments protected." *Id.*

85. Lansing & King, *supra* note 46, at 759. Next in parliamentary representation are the New National Party and the IFP. Other political parties in the South African parliament are the Freedom Front, the Democratic Party, the Pan Africanist Congress, and the African Christian Democratic Party. *Id.*

86. *After He's Gone*, THE ECONOMIST, Oct. 12, 1996, at 17.

87. *Id.*

88. *Id.*

89. James Bennet, *The Testing of a President: The Visitor; Mandela, at White House, Says World Backs Clinton*, N.Y. TIMES, Sept. 23, 1998, at A26.

90. *See generally*, MANDELA, *supra* note 31 (describing Mandela's life and career, including his years in prison).

91. *See id.*

place of equality for all people, regardless of race, and he has promoted reconciliation.

This ability to understand, without necessarily agreeing with or excusing the behavior of all concerned, has made Mandela a person with whom the leaders of the different racial groups have been able to achieve compromise. Mandela demonstrated this ability by insisting that Chief Mangosuthu Buthelezei, and the Inkatha Freedom Party ("IFP") which he leads, be included in the transitional government of national unity that drafted the new constitution. Buthelezi and the IFP had opposed the ANC throughout the struggle against apartheid.[92] Mandela's conciliatory attributes were also reflected in the strong support for the new constitution demonstrated by the white-dominated New Nationalist Party, the modern incarnation of the Nationalist Party that institutionalized apartheid in 1948.

Yet South Africa's future cannot depend solely on one man. No one understands this better than Mandela himself, who will be 80 years old when his term of office expires in 1999, and has made clear that he will not run for a second term of office.[93] Besides, while his moral courage and efforts to lead South Africa out of apartheid should be lauded, his skills as president should not be held out as perfect or otherworldly. His tenure was successful in the broadest possible sense: he transformed his country from "a racist, pariah state to a major, regional diplomatic power."[94] He can also take pride in the fact that his policies "brought clean water to 3 million people and connected more than 2 million people to the electricity grid."[95] Like other politicians, though, Mandela has made mistakes and has been involved in funding as well as personal scandals.[96] Thus, his departure as president of South Africa should not be viewed as an apocalypse.

Mandela has already delegated most of the daily running of the government to Deputy President Thabo Mbeki, and has virtually

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92. *See* Lansing & King, *supra* note 46.

> Currently, there are nine major tribes in South Africa. The largest is the Zulu tribe, which dominates the Inkatha Freedom Party (IFP). The second largest is the Xhosa tribe, which dominates the ANC (Nelson Mandela is a Xhosa prince). Historically, the Zulu and the Xhosa have not gotten along. The antagonism between the tribes was used by the white government in the 1970s and 1980s to promote division among blacks, particularly between the IFP and the ANC.

Id. at 758. *See also* Kenneth D. Kaunda, *The First Shall Be the Last: The African National Congress and the Inkatha Freedom Party Dispute*, 37 ST. LOUIS U. L.J. 841, 842 (1993). Mr. Kaunda is former president of Zambia.

93. *After He's Gone*, *supra* note 86, at 17.

94. Daniel J. Wakin, *Mandela: "Long Walk" Is Not Over*, ASSOC. PRESS, Feb. 5 ,1999, *available in* 1999 WL 11925039.

95. *Id.*

96. *After He's Gone*, *supra* note 86, at 17.

anointed Mbeki as his successor.[97] As long as Mandela is in the background and participating in the ANC, even if he no longer holds a governmental office, Mbeki's transition to power should be smooth. Once in office Mbeki must show that he, too, can be a consensus builder. He must also be able to control the more radical elements within the ANC, a tough job if the promised improvements in black living conditions are not forthcoming.

Mbeki has worked with former South African president F. W. de Klerk, Chief Buthelezei, and other leading economic ministers on the economic council that guides the growth of South Africa's economy.[98] An economist by training, Mbeki was educated in the United Kingdom, and spent many years in exile in the former Soviet Union during the apartheid era.[99] To his advantage, he has impeccable credentials within the ANC.[100] In 1997 Fikile Bam, a judge who was imprisoned with Mandela on Robben Island, described Mbeki to an interviewer as a courteous man, "good at economic issues and foreign policy."[101] Bam went on to speculate that Mbeki might even be able to handle the "wealth gap" better than Mandela.[102] Like Mandela, Mbeki focuses on economic liberalization.[103] His designation as Mandela's "heir apparent" should comfort the white population, the ANC, and the international community as a whole because he will probably not seek to make any dramatic changes in the policies followed by Mandela's government.[104]

Besides, South Africa's future as a pluralistic democracy lies not in any one man's ability to govern, but rather first and foremost in the new South African constitution, which is the culmination of all the goals and aspirations Mandela has for a racially tolerant South Africa.[105] When he signed the document into law on December 10, 1996, in Sharpeville, site of the dastardly massacre that became the rallying cry of the anti-apartheid movement, "Mandela's pen brought to life long-dreamed-of guarantees of racial equality and cultural protection, as well as freedom of expression, association and religion, in one of the world's most liberal constitutions."[106] Ultimately, it will take the success of that constitution to alleviate the lingering concerns of current

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97. *See id.*

98. *See* Brent, *supra* note 21, at 117-18.

99. *See* Anthony Lewis, *Part Democrat/Part Autocrat; Mandela the Pol*, N.Y. TIMES MAGAZINE, Mar. 23, 1997, at 44; *Hilfe Country Report*, *supra* note 54, at 8.

100. *See Hilfe Country Report*, *supra* note 54, at 8.

101. Lewis, *supra* note 99, at 44.

102. *Id.*

103. *Hilfe Country Report*, *supra* note 54, at 8.

104. *Id.*

105. *How Wrong Is It Going?*, THE ECONOMIST, Oct. 12, 1996, at 23.

106. Lynne Duke, *Hopes and History Mingle as Mandela Signs Charter: Ceremony Held in Town of 1960 Massacre*, WASH. POST, Dec. 11, 1996, at A19.

and prospective foreign investors.

In addition to the matters already discussed, there are other fears which inhibit current and prospective FDI. These fears will have to be addressed by the next South African government. Among them: trepidation over the strength of South Africa's labor unions and the labor movement's alliance with the ANC;[107] the limited availability of qualified black managers and executives;[108] the manner in which established South African conglomerates might act to protect their home markets from foreign "intruders;"[109] and worries over South Africa's high crime rate.[110]

In regard to South African crime, the random and violent nature of it seems to be its most abhorrent aspect.[111] The government can, however, claim some success in the war against it. For instance, recent statistics show that the South African murder rate has declined steadily since 1994.[112] Nevertheless, in his final state of the nation speech to parliament in February 1999, Mandela felt compelled to address the crime problem. He assured his countrymen, "[t]he battle against crime has been joined and we have no doubts at all who the victors will be."[113]

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107. *See generally* Eric Taylor, *The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995*, 9 TRANSNAT'L LAW. 611 (1996) (for a discussion of South Africa's labor laws and the relationship between the South African labor movement and the ANC).

108. For a discussion of South Africa's efforts to include blacks in the executive and managerial job market, see Lynne Duke, *South African Blacks Lag in Job Market Despite Gain in Political Power*, WASH. POST, July 14, 1996, at A24.

109. *See* Mallet, *supra* note 14, at I. This concern over possible protectionist behavior by existing South African conglomerates is best-addressed by the government's adherence to the National Treatment Obligation (NTO). South Africa committed itself to NTO, which prohibits discriminatory differentiation between foreign and domestic enterprises, when it joined GATT and the WTO. For a discussion of South Africa's ideological commitment to NTO, see Mandela, *supra* note 2, at 95. "Foreign companies should be treated as domestic companies, obeying our laws and gaining access to our incentives, and the ANC is committed to the principle of uniform treatment." *Id.*

110. *See* Mallet, *supra* note 14, at I. According to *The Economist*, a combination of factors account for the rise in South African crime. One is that South Africa's criminal justice system is a weak and relatively ineffective relic of the bygone apartheid era. *See How Wrong Is It Going?*, *supra* note 105, at 21. Another is that organized crime has infiltrated the country, and South Africa has become a money laundering center, as well as a transshipment point for illegal drugs and stolen cars. *See id.* at 22.. Analysts differ as to the crime rate's impact on FDI. Some feel that the high crime rate makes foreign executives and their workers reluctant to relocate to South Africa. *See, e.g.*, Mallet, *supra* note 14, at I. Others say that crime, in and of itself, "probably does not deter foreign investors much: if there is money to be made or a market to conquer, businessmen will go there." *How Wrong Is It Going?*, *supra* note 105, at 22. Even this latter group concedes, however, that at the very least, crime reduces tourism. *See id.*

111. *How Wrong Is It Going?*, *supra* note 105, at 22.

112. *See Mandela: 'Long Walk' Is Not Over*, *supra* note 94.

113. Suzanne Daley, *Mandela, in Last State of the Nation Speech, Pleads for Peace*, N.Y. TIMES, Feb. 6, 1999, at A3.

By far the greatest obstacle facing South Africa, however, is the burden of its past: the political, economical, racial, and other wounds that are apartheid's bitter legacy. South Africa is taking steps to overcome its past. The government established the Truth and Reconciliation Commission in 1994 to chronicle human rights abuses committed during the apartheid era. Chaired by Nobel peace laureate Archbishop Desmond Tutu, the Commission has been "generally regarded as a successful instrument of national reconciliation."[114] The Commission's guiding philosophical principle, "promoted as a model for nations emerging from internal conflict, was that the full public exposure of political crimes was preferable to mass criminal prosecutions as a way of putting the past to rest."[115] In other words, by granting amnesty in exchange for information, the Commission has encouraged human rights violators to come forward and disclose their crimes in order to bring certainty and closure to the families of their victims, and to the nation as a whole. Archbishop Tutu has described the Commission's objective and purpose as follows:

> We are saying people who have committed horrendous acts, demonic acts, monstrous acts, are not monsters, are not demons. They remain human beings. We don't say that because you are a perpetrator, therefore you remain a perpetrator forever. We say that there is a possibility of changing...We—we are hoping that white people will, when they hear the stories, say, 'Isn't that incredible?' 'Aren't we lucky that black people are not wanting to treat us as we treated them?' I'm saying, white people, please, can you hear the generosity that is being offered you? Can you hear our people saying, 'Despite the—the agony that you have caused us, we want to be friends with you'?[116]

But the Commission has not restricted its investigations to human rights abuses committed by whites. Instead, it has endeavored to strike a balance between those on both sides of the anti-apartheid struggle. As President Mandela has stated, "[w]e believe that a government of national unity should be even-handed and grant amnesty, not only to those who committed offenses in their opposition to apartheid, but also to those who committed offenses in defense of apartheid."[117] As an unfortunate result of the Commission's even-handedness, neither the ANC

114. Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 610 (1998).

115. Lynne Duke, *South African Report Draws Bitterness: Apartheid Probe's Findings Anger ANC and Former Leaders*, WASH. POST, Oct. 30, 1998, at A1.

116. Interview with Archbishop Desmond Tutu, *60 Minutes: Forgive but Not Forget* (CBS television broadcast, Feb. 16, 1997), *available in* 1997 WL 7899905.

117. Steven A. Holmes, *South Africa Panel to Probe Political Violence*, HOUS. CHRON., June 8, 1994, at 15.

nor the country's former white rulers were pleased by its report issued in October, 1998. The 3,500-page document described the nation's former white leaders as "perpetrators of gross human rights violations . . . ."[118] But the document also "attacked the claim to the nation's moral high ground by the ANC, which led the struggle against apartheid."[119]

For all its good intentions, it remains to be seen whether the Commission's work will produce the longed for reconciliation of South Africa's racial groups. As one legal scholar has explained:

> Truth commissions do not produce full justice. They are not intended to. Nor will a truth commission reveal the whole truth. But, then again, it could not have been expected to. Reconciliation will stay incomplete, and so, too, will the hope for justice. Forgiveness, not justice, is the price deemed necessary if a truth commission is to help heal a society of the pain and suffering brought about by internal war and violent ethnic strife. And this poses the crux of the dilemma: Should those who perpetrate the most terrible of crimes escape punishment, at the price only of admitting their guilt by showing remorse? For the experience chosen by South Africa, the price of peace and reconciliation is "the truth" with amnesty. It is neither justice nor compensation. How well forgiveness actually works as a strategy for fostering political stability will only be seen in coming years.[120]

In the meantime, Mandela has expressed the need for what in effect amounts to a reconstruction and development program for the South African soul.[121] In his final state of the nation address, the outgoing president lamented lingering racial animosities, especially those harbored by whites, and issued a call for all South Africans to rise in support of their new democratic government. He complained:

> We slaughter one another in the stereotypes and mistrust that linger in our heads . . . and the words of hate we spew from our lips. We slaughter one another in the responses that some of us give to efforts aimed at bettering the lives of the poor. We slaughter one another and our country by the manner in which we exaggerate our weaknesses to the wider world, heroes of the gab who astound their foreign associates by their self-flagellation.[122]

Mandela went on to challenge South Africans to take responsibility for themselves. He declared:

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118. Duke, *supra* note 115, at A1.
119. *Id.*
120. Joyner, *supra* note 114, at 610.
121. Daley, *supra* note 113, at A3.
122. *Id.*

> Quite clearly there is something wrong with a society where freedom is interpreted to mean that teachers or students get to school drunk; warders chase away management and appoint their own friends to lead institutions; striking workers resort to violence and destruction of property; business people lavish money in court cases simply to delay implementation of legislation they do not like; and tax evasion turns individuals into heroes of dinner-table talk . . . .
>
> Something drastic needs to be done about this . . . South African society—in its schools and universities, in the workplace, in the sports, in professional work and all areas of social interaction—needs to infuse itself with a measure of discipline, a work ethic and responsibility for the actions we undertake.[123]

The Clinton administration has expressed a desire for South Africa to succeed in achieving the democracy and prosperity to which it aspires, and has pledged U.S. support. In fact, in 1998 Clinton announced that the administration would like to make South Africa the centerpiece of its new African trade policy.[124] The U.S. has recognized that a stable and prosperous South Africa is crucial to continent-wide democratization and development. South Africa has already taken the lead in establishing regional free trade arrangements from which all of southern Africa stands to benefit. These include the South African Development Community (SADC); the South African Customs Union (SACU); and a bilateral trade agreement with Zambia.[125] Commentators have summarized U.S. strategic interests in South Africa as follows:

> If South Africa achieves the economic and political potential within its grasp, it will be a wellspring of regional political stability and economic growth. If it prospers, it can demonstrate to other ethnically tortured regions a path to stability through democratization, reconciliation, and steadily increasing living standards. Alternatively, if it fails to handle its many challenges, it will suck its neighbors into a whirlpool of self-defeating conflict.
>
> Although controlling the sea-lanes around the Cape of Good Hope would be important, especially if widespread trouble were to erupt in the Middle East, American strategic interests are not otherwise endangered in southern Africa. Yet because South Africa is the United States' largest trading partner in Africa and possesses vast economic potential, its fate would af-

123. *Id.*

124. For a discussion of U.S. trade policy toward Africa, see Hunter R. Clark, *African "Renaissance" and U.S. Trade Policy*, 27 GA. J. INT'L & COMP. L. 265 (1999).

125. *See* Lynda Loxton, *South Africa Trade Agreements Are on a Roll*, AFR. NEWS SERV., Nov. 8, 1996, *available in* 1996 WL 14178461.

> fect American trading and financial interests that have invested there. It would also destabilize key commodity prices, especially in gold, diamond, and ore markets. More generally, instability in South Africa, as in Brazil and Indonesia, would cast a large shadow over confidence in emerging markets.
>
> American policy toward South Africa should reflect its importance as a pivotal state. While recognizing South Africa's desire to solve its problems without external interference, the United States should promote South Africa's economic and political stability.[126]

No wonder, therefore, that on March 26, 1998, while visiting Africa to promote his African trade policy, President Clinton told the South African parliament, "America has a profound and pragmatic stake in your success—an economic stake because we, like you, need strong partners to build prosperity . . . ."[127] He concluded, "Simply put, America wants a strong South Africa; America needs a strong South Africa. And we are determined to work with you to build a strong South Africa."[128]

For South Africa's sake, and for their own gain, foreign investors will, hopefully, come to share President Clinton's point of view.

In conclusion, South Africa's post-apartheid government is committed to FDI as a cornerstone of its economic development policies. So far, however, South Africa has failed to attract the level of FDI it needs and wants. The government has therefore taken steps to allay concerns of current and prospective foreign investors. These steps include tariff reduction; the privatization of state-run industries; monetary policies designed to attract FDI; increased worker productivity; and lowering the South African crime rate.

In order to avoid social unrest, the South African government has

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126. Robert S. Chase et al., *Pivotal States and U.S. Strategy*, FOREIGN AFF., Jan. 11, 1996, at 45-46.

127. Address by the President of the United States to the Parliament of South Africa (Mar. 27, 1998), *available in* 1998 WL 138738.

128. *Id. See also Albright Says South Africa Is a Model for Ties with U.S.*, N.Y. TIMES, Dec. 14, 1997, at 6. "Secretary of State Madeleine K. Albright today held up the United States' relationship with South Africa as an example of the type of ties it wants with countries across Africa." *Id.* This is not to suggest that the U.S. and South Africa agree on all matters. For example, the two nations have failed to reach accord on a bilateral investment treaty. This is in part because South Africa insists on maintaining an independent trade policy that includes relations with nations like Cuba, Iran, and Libya, with which the U.S. is at odds. *See* R. W. Apple Jr., *From Mandela, a Gentle Admonishment*, N.Y. TIMES, Mar. 28, 1998, at A2. Mandela has told Clinton that "we [South Africans] resist any attempt by any country to impose conditions on our freedom of trade." Charles William Maynes, *The Perils of (and for) an Imperial America*, 111 FOREIGN POL'Y. 36, 44 (1998).

also instituted the Reconstruction and Development Program to improve black living conditions and reduce black unemployment, without substantially increasing government spending. For example, the government is providing tax incentives for labor intensive industries in order to help alleviate unemployment.

In addition, and perhaps most importantly, the government is moving to reduce the lingering racial animosities that are the legacy of apartheid. The nation seems poised for a smooth transfer of power in 1999 from retiring President Nelson Mandela to his deputy, Thabo Mbeki. Indications are that Mbeki will continue the policies Mandela set in motion aimed at economic liberalization, democratization, and racial reconciliation.

Lastly, the U.S. has expressed its support for a strong South Africa that will emerge as a democratic, stabilizing force regionally and continent-wide. As this in fact occurs, investor confidence should grow along with foreign direct investment in South Africa.

THE PUBLIC OFFER OF SECURITIES IN THE UNITED KINGDOM*

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I. INTRODUCTION

The use of a statutory prospectus in connection with the public offering of securities in the United Kingdom long preceded the adoption of the Securities Act in the United States. The prospectus provisions of the English Companies Act with antecedents that go back to 1844[1] were the model on which the Securities Act of 1933 prospectus was based.[2] A new prospectus regimen became effective in the United Kingdom in July of 1995, applicable to all securities being publicly offered for the first time in the United Kingdom.[3] The new regimen completes the process of in-

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1. The Companies Act 1844, 7&8 Vict. C 110, was the first English Act to require the production of a disclosure document to accompany an issue of shares.

2. *See* SELIGMAN, J., THE TRANSFORMATION OF WALL STREET (1982) 62-63. The unique contribution of the Securities Act of 1933 was to provide a waiting period between the filing of a prospectus as part of the registration statement and the effective date after which the securities could be offered. *Id.* The Securities Act, in contrast to the Companies Act, also contemplated that during the waiting period the regulatory authority (now the SEC) would review the registration statement (including the prospectus) and could issue a stop order before or after the effective date if it were deficient. Schedule A to the Securities Act, prescribing the content of the prospectus, also drew on the prospectus requirements of the then much maligned New York Stock Exchange. *Id.* at 57.

3. Public Offers of Securities Regulations 1995 (hereinafter "POS"). SI 1995 No. 1537. The POS Regulations were amended March 9, 1999, effective May 10, 1999. Public

troducing the European Community's securities legislation program, and is best understood in the context of that program. The offering of securities, however, has two aspects: the legal and institutional framework within which a distribution of securities is completed, and the regulatory framework governing the firms engaged in the distribution of securities.

The Financial Services Act of 1986 provides the regulatory framework that governs those engaged in the investment business.[4] The FSA was the product of a compromise reached in the late 1980s between a government committed to statutory regulation of the securities industry and an industry determined to maximize its own influence over its own government, whose aim was, as far as possible, to retain the concept of self regulation within the statutory system. The result of this compromise was the creation of a single statutory regulator, known as the Securities and Investments Board ("SIB").[5] Although the SIB is a statutory body, it was given the ability to delegate many of its powers (including those involving authorization, supervision, surveillance and enforcement), and it did so to a group of industry self-regulators that were, at least initially, heavily practitioner based. The cumbersome ar-

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Offers of Securities (Amendment) Regulations 1999 (hereinafter "POS" 1999 Amendments). SI 1999 No. 734. Corresponding amendments to the Financial Services Act of 1986 were made in Section 3 of the same Statutory Instrument. The POS amendments and the amendments to the Financial Services Act are available on the Internet at http://www.hm-treasury.gov.uk/pub/html/docs/posame02.pdf. The amendments are of limited significance with four exceptions. First, the restriction on sales literature (investment advertisements) relating to the exemption for an offering of Euro-Securities is made more specific, and, perhaps, liberalized somewhat in the process. *See infra* note 135. Second, the liability of an offeror other than an issuer for misrepresentations in a prospectus is limited if the prospectus is prepared primarily by the issuer. *See infra* note 309. This may also have eliminated the generally unrecognized possibility that offeror liability may extend to an underwriter acting as principal. *See infra* note 314. Third, the exemption for offerings limited to offers to 50 persons was amended to clarify what or who constitutes a single person for this purpose. *See infra* note 122. Fourth, a prospectus prepared in another EU member state entitled to recognition under the EU Prospectus Directive no longer requires translation into English and no longer requires disclosure of UK tax ramifications. *See infra* note 171. Although not part of the POS amendments, HM Treasury in connection with release of the amendments provided general guidance to the effect that an offering not within a specific exemption does not have to comply with the POS Regulations if not a public offer as that term is defined by the Regulations. *See infra* note 98.

4. Financial Services Act 1986 (hereinafter "FSA"). The FSA received the Royal Assent on November 7, 1986.

5. The DTI may delegate certain powers to the Designated Agency (FSA § 114(1)) upon satisfaction that the rules and regulations of the Designated Agency afford investors an "adequate level of protection." FSA § 114(9). Schedule 8 of the FSA sets forth principles applicable to The Designated Agency's rules and regulations. The DTI may resume previously delegated functions at the request or consent of the Designated Agency. FSA § 115(1). If the Designated Agency is unable to discharge the transferred functions or its rules do not meet the statutory standards, the DTI may resume the transferred functions without consent. FSA § 115(3)-(5).

rangement of multiple self-regulatory organizations (SROs) the FSA produced is to undergo a radical revision, the initial stages of which were underway in mid-1998, but are dependent upon the enactment of a new statutory regime. All of the SROs are to be merged into the SIB, which on October 28, 1997 became the Financial Services Authority (the Authority). At the request of Chancellor of the Exchequer appointed by the then recently elected Labor Government, the then Chairman of the SIB on July 29, 1997 transmitted an outline of the new regulatory structure. The precise framework, however, is the subject of much discussion and speculation and will not be known until enabling legislation is proposed and adopted.[6] This Chapter therefore focuses on the public offering of securities, which, although it will be impacted by the new structure, is not likely to be drastically changed.[7]

The regulation of securities business in the UK is affected by the fact that London is both the center of the UK domestic equity and bond markets (for historical reasons there is no substantial domestic corporate bond market in the UK, so the latter is confined to UK sovereign issues, known as "gilts") and the center of the global bond market known as the "Euromarket [PLM1]." The Euromarket developed in the era of exchange controls and the U.S. Interest Rate Equalization Tax, which effectively prevented non-U.S. entities borrowing dollars in the U.S. domestic markets and international U.S. entities from using capital raised in the United States for their multinational operations. There therefore developed an offshore market in dollar balances held by non-U.S. institutions (known initially as the Euro-dollar market), and this market, through a series of historical accidents, came to be based in London. The market remained small until the early 1970s, when, as a result of the oil price increases of those years, the oil exporting countries found themselves holders of massive dollar balances that needed to be reinvested. These balances were recycled through the Euromarket, which became almost overnight one of the largest and most liquid

6. On June 1, 1998, Alistair Darling, Chief Secretary to the Treasury, announced that the Treasury would be publishing draft Financial Services legislation sometime during the summer of 1998. On June 1, the new Banking Act went into effect giving the Financial Services Authority supervision over the Banking system. Mr. Darling made clear that there was broad consensus on the need for a single regulator, referring to "a new regulator for the new millenium." *See* HM Treasury News Release 84-98, June 1, 1998, available on the Internet at http://www.hm-treasury.gov.uk.

7. This is true notwithstanding speculation that the power to review disclosure documents will be vested in the Authority. In that event, however, the Authority is likely to delegate its responsibilities at least for a period of time to the Stock Exchange. Alistair Darling, Chief Secretary to the Treasury, let it be known that the London Stock Exchange will continue to be responsible as the listing authority. He also noted, however, that the contemplated Financial Services Bill "will allow the Government to transfer all or part of the London Stock Exchange's function to the Financial Services Authority should that prove necessary in the future." *See* HM Treasury News Release 16-98, Feb. 6, 1998, available on the Internet at http://www.hm-treasury.gov.uk.

debt markets in the world. This boost seems to have given the Euromarket "critical mass," and it subsequently developed into a capital market that for size, depth, flexibility and product innovation compares favorably in a number of respects with the U.S. domestic market. The classical Euromarket instrument is still a fixed-term, fixed-interest US$-denominated debenture, but the market has expanded to embrace a variety of different currencies (notably Euro-Yen, although there are now Euro- markets in most major currencies) and products, extending to convertible bonds and, to an increasing extent, to equities.

The Euromarket is in principle offshore everywhere. It has no central organization, trading floor or even rules. The fact that most of the major players in the market are located in London is the result of a congeries of accidents. Indeed, during the negotiation of the implementation of the Financial Services Act 1986, the threat that the Euromarkets might emigrate from London to Zurich was taken sufficiently seriously by the UK government that several concessions to the Euromarkets themselves were added to the Act. UK regulation is, therefore, to some extent bifurcated. To some degree, it must address both the ordinary issues that arise out of domestic securities issuance and the very different issues that arise out of the regulation, or absence thereof, of the Euromarkets.

II. DISTRIBUTION OF SECURITIES IN THE UNITED KINGDOM

A. Offers of Sale, Placings, and Other Offerings

The distribution of securities in the United Kingdom has its own distinctive characteristics. The institutional framework for distributing securities in the United Kingdom is similar in some respects to that in the United States. The major distinction between the two systems is to be found in the use of the word "underwriter." In the U.S., an "underwriter" is an investment bank that agrees to purchase an issue at a discount from the price it offers the securities through an underwriting syndicate to the public. The objective of the underwriting syndicate is to distribute the securities to public investors, not to purchase the unsold portion of a public offering, although in rare instances it may be required to do so. In the UK, by contrast, an "underwriter" is an investing institution that agrees to purchase the offered shares at a discount price if placees cannot be found at the full price. In exchange for taking on this obligation, the underwriter receives a "commission" (classically equal to 2.5 percent of the amount of securities that he has undertaken to accept). Distributions in the UK therefore differ in many respects from the underwriting syndicates that have been an indispensable part of the arrangement for the distribution of most publicly offered securities in the United States for over a century.

The rules of the London Stock Exchange (the "Stock Exchange")

largely dictate in broad outline the manner of distributing securities in the United Kingdom. This in part is a reflection of the fact that most initial offerings by companies are undertaken concurrently with (and subject to) either a listing on the Stock Exchange or admission to dealings on the Alternative Investment Market ("AIM"). AIM is a second tier trading system that is under the supervision of the Stock Exchange. The principal types of offerings contemplated by the Stock Exchange Rules are as follows:[8]

An offer for sale. This is an offer to the public by an issuing house or broker of securities that has agreed to purchase the issue from the issuing company. This is the most common form of offer. The primary distinction between a UK-style offer for sale and a U.S.-style underwritten offer is that in an offer for sale the issuing house does not depend upon other dealers to sell to the public. The issuing house will make the offer directly to the general public, having arranged sub-underwriting (in the English sense) from institutions for its own benefit. There are prescribed procedures for such offers, as described below. The Stock Exchange Listing Rules describe such offers as follows: "An offer for sale is an invitation to the public by, or on behalf, a third party to purchase securities of the issuer already in issue or allotted."[9] The third party refers to the issuing house. The reference to "already in issue" is not as one might conclude to securities that have entered the trading market, but to the fact that at the time of the offer (or before completion of the offer) the securities will have been issued to the third party underwriter.

An offer for subscription is a variation of the offer of sale that differs in that the issuer is offering the securities directly to the public.[10] In an offer for subscription, the issuer arranges underwriting (in the English sense) directly for its own benefit. The underwriter agrees to purchase any securities not purchased by the public.

An intermediaries offer is an offer by an issuer to intermediaries (brokers or underwriters) who in turn offer the shares to their clients.[11] This type of offering permits a public offering to be made without affording the general public an opportunity to subscribe to or purchase the shares. Such an offering, accordingly, is somewhat comparable to the manner in which securities are publicly offered in the United States.

A placing, which is an offering of securities by a single issuing house (or a small group of them acting together) primarily to their own

8. Listing Rules, Ch. 4.
9. Listing Rules ¶ 4.4.
10. *See* Listing Rules ¶ 4.5.
11. *See* Listing Rules ¶ 4.10.

clients that does not involve an offer to the public.[12] A placing of already listed securities cannot be made at a price that is more than ten percent below the market price absent exceptional circumstances.[13]

An invitation to tender is an offer for sale or subscription that is not made at a fixed price, but rather where prospective subscribers indicate the number of shares they want to subscribe to and the price range they are willing to pay for the shares. Based on the subscriptions, the offeror determines the striking price that will result in the highest price at which all of the shares are subscribed for. The Listing Rules provide that an invitation for tender must provide for a stated minimum price.[14]

A placing tends to place an issue primarily with a few long-term investors. An offer for sale opens the offer to the general public and is more conducive to an active market. The Stock Exchange Listing Rules are designed to assure a public distribution prior to the listing of a security, although they provide considerable latitude with respect to placings. The Stock Exchange at one time required that offerings of a certain size be made by an offer for sale. This was because the use of the placing mechanism tended to result in the sponsoring broker-dealer and the co-sponsors placing "hot" issues with their favored clientele, thereby preventing members of the public from subscribing. The market-making system has now been abolished, and the only requirement now is that there be a sufficient number of shares in the hands of the public in order for the security to be listed.[15] Trading on the exchange rather than relying on market-makers is now an order driven system referred to as SETS (Stock Exchange Trading System).

An offer for sale or an offer for subscription typically involves opening the subscription books to all would-be subscribers during a limited time frame and, in the event of an over-subscription, allocating (allotting) the shares to subscribers on a fair basis. The basis of allotment has to be disclosed in the Listing Particulars as a material matter relating to the offer, and the Stock Exchange would not accept a document that contained an unfair basis of allotment.[16] This does not pre-

12. Listing Rules ¶ 4.7.

13. Listing Rules ¶ 4.8.

14. Listing Rules ¶¶ 4.4-4.5.

15. Listing Rules ¶ 3.18.

16. This does not necessarily mean pari passu. In some of the 1980s privatisations the government's policy objective of securing wider retail holdings of shares was met by adopting a "bottom-up" allocation, in which small applications were filled in full and large applications were reduced according to their size. This resulted in institutional investors being left short of stock and obliged to buy in the retail allocations at a substantial profit to the retail investors. Retail application for privatisation issues became so popular that one member of Parliament was obliged to resign his seat when it was demonstrated that he had made multiple applications for small numbers of shares in the names of a number of other people, including his dog.

clude the underwriters, who purchased the shares (offer of sale) or agreed to purchase the unsubscribed shares (offer for subscription), from allocating a part of the offering to institutional investors who act as sub-underwriters (sub-underwriters, although unusual, are not unknown).

The contrasting philosophies between the U.S. and the UK is an interesting one. In the United States, a public offering is not made to the public at large, but to the customers of the members of the underwriting and selling groups. The underwriters and members of the selling group by and large are free to sell the securities to whomever they please. The National Association of Securities Dealers' (NASD) "free-riding" rules preclude allocating shares in a "hot issue" (one in which the market opens at a premium) to certain categories of restricted persons,[17] but otherwise does not preclude a firm allocating shares to its own customers on whatever basis it chooses. The Commission and NASD have expressed some concern about the practice of allocating shares of a hot issue to executive officers of other companies whose corporate finance business the underwriter is seeking.[18]

B. Pre-Emption and the Distribution of Securities in the United Kingdom

The right of a company's existing shareholders to have the first opportunity to subscribe to any further equity that is issued for cash is enshrined in UK company law.[19] As a matter of company law, pre-emptive rights can be disapplied, but the power to do so is limited.[20] The rules of the London Stock Exchange, therefore, provide that companies listed thereon must in principle offer new securities to the existing holders.[21] Overseas companies, however, are exempt from this requirement.[22] The Pre-Exemption Group, a committee composed of representatives from the Stock Exchange, industry, corporate treasurers, pension funds, and insurance companies, has proclaimed the sanctity of pre-emptive rights:[23] "The retention of this pre-emptive right is a major point of principle to investors and without shareholders' approval

17. *See* IM-2110-1, NASD Manual (CCH) ¶ 4111.51. The Listing Rules ¶ 4.3 preclude allocating shares to a securities firm participating in the offering unless placed with a market maker or fund manager.

18. See Michale Siconolfi, Spin Desk Underwriters Allocate IPOs. For Potential Customers, WALL ST. J. (Interactive Ed.), Nov. 12, 1997.

19. *See* CA 1985 §§ 89-96 for the present position.

20. CA 1985 § 95. Pre-emption rights cannot be abolished once for all in a UK company, but the power to allot without regard to existing holders must be renewed every five years.

21. Rule 6.18 and 6.19.

22. Rule 17.8.

23. Pre-Exemption Group, "Shareholders' Pre-Emptive Rights" (Oct. 20, 1987) (hereinafter "PE Group Guidelines").

in general meeting, the right cannot be varied." Academic economists have regularly demonstrated that the existing holders do not benefit in any way from a new issue made on a "rights" basis, but this view has made little headway amongst London-based investing institutions. The LSE and the new London capital market, however, increasingly take into account the need of issuers and underwriters for an efficient distribution process. Pre-emptive rights are foreign to the experience of many of the new players (including U.S. securities firms) in the flotation of securities. The American experience is that a rights offering is the exception rather than the rule because it is inefficient and the existence of rights is routinely denied in the articles of incorporation of U.S. public corporations. The Stock Exchange, recognizing the need to accommodate diverse interests within the existing legal framework, formed the Pre-Emption Group, which has published a number of guidelines that will have the support of the IPCs (the investment committees of the Association of British Insurers ("ABI") and the National Association of Pension Funds ("NAPF").[24] Under the guidelines, the IPCs will recommend that their members support shareholder approval of resolutions for an annual disapplication of pre-emptive rights if restricted to shares not exceeding five percent of the outstanding ordinary shares and provided that such disapplication over a three-year rolling period does not exceed 7.5 percent of outstanding ordinary shares. The discount (price at which shares are purchased by the underwriter) at which shares are issued for cash other than to shareholders should not exceed five percent of the market price immediately prior to the announcement of the issue. The issuer is to file with the Stock Exchange reports reflecting the amount of the discount.[25]

Subject to applicable company law, and to obtaining the consent of its own shareholders, a listed company is free to act outside of the guidelines; however such companies are encouraged to consult with the IPCs before doing so.

III. OVERVIEW OF THE PROSPECTUS REGIMEN

A. The Companies Act and Unlisted Securities

A new prospectus regimen became effective in the United Kingdom in July of 1995, applicable to all securities to be offered to the public for the first time in the United Kingdom. The adoption of the new regimen, although it took several years to implement, was prompted by the adoption by the European Union of the Public Offer Prospectus Directive in

24. PE Group Guidelines.
25. PE Group Guidelines.

1989.[26] Relatively little was required in this regard vis-à-vis listed securities, other than to deal with the terminological confusion as between "listing particulars" and "prospectus," which in certain contexts are one and the same. The problem in adapting to the Prospectus Directive related largely to unlisted securities. The European Union (then the European Community) in 1980 adopted the Listing Particulars Directive,[27] which, among other things, prescribed the minimum content for a prospectus (referred to, however, as listing particulars) of securities officially listed on a stock exchange in a member state. The standards of the Listing Particulars Directive already had been built into the Rules of the London Stock Exchange. The Financial Services Act of 1986 introduced a comprehensive scheme for the regulation of the investment business (securities business) in the UK adopting a largely new regulatory framework for securities professionals. The Act, however, built on what was in place in terms of disclosure in connection with public offerings. Schedule 3 of the Companies Act of 1985,[28] which set forth the prescribed content of a statutory prospectus,[29] was replaced in 1987 by the provisions of Part IV of the Financial Services Act in respect of offers the subject of an application for listing on the Stock Exchange. The Companies Act provisions, however continued to govern offers of securities not the subject of an application for listing. It was not until 1995 and enactment of the Public Offers of Securities Regulation ("POS") and related amendments to the Financial Services Act that the scheme of the 1989 Prospectus Directive was brought fully into force in English law. *See* Section V.

Prospectuses in respect of unlisted securities were not subject to any form of scrutiny under the Companies Act. Delivering a document meeting the statutory prospectus requirements to the Registrar of Companies satisfied the prospectus requirements of the Companies Act.[30] The Registrar is a ministerial official who is authorized to refuse registration of the prospectus only if (1) it is not dated, or (2) not signed in accordance with the requirements of the Act, or (3) it does not have attached documents required by the Act.[31]

B. The Stock Exchange and Listed Securities

In order to go public and to be listed on the Stock Exchange, a company must meet the listing requirements of the Exchange, one of which

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26. Directive 89/298, 1989 OJL 124 (May 5, 1989) (hereinafter the "Prospectus Directive").

27. Directive 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

28. CA 1985, Pt. III, consisting of §§ 56-79.

29. CA 1985 § 56(1).

30. CA 1985 § 64(1).

31. CA 1985 § 64(5).

is that it have an acceptable sponsor.[32] One of the principal responsibilities of a sponsor is to make an appropriate investigation of the company and advise the Stock Exchange that in its opinion the company "is an appropriate entity to be admitted to listing."[33] Some issuers, including issuers of Eurobonds, covered warrants and other asset-backed securities, may dispense with the requirement for a sponsor and appoint a listing agent instead. The role of a listing agent is similar to that of a sponsor, but, unlike a sponsor, the listing agent is not required to make a declaration to the Stock Exchange that it is satisfied that the company for whom it acts is a suitable candidate for listing.[34] Sponsors ordinarily are investment banks and are not precluded from acting as an underwriter or otherwise participating in the offering. If a company is able to meet the admission requirements of The Stock Exchange and an appropriately qualified person is prepared to act as a sponsor, the process of going public (or going to market) in the United Kingdom and the process of listing on the Exchange are intertwined and basically the same. For many years Appendix 34 to the Yellow Book prescribed in detail the information to be included in a prospectus that overlapped the information required in the Listing Particulars. The Adoption by the European Community or EC (now the European Union or EU, although also still known for some purposes by its former name of the European Community) of the Listing Particulars Directive,[35] specifying in Schedules A and B the minimum content standards for listing particulars, resulted in a revision to the content of the listing particulars. The provisions of the Yellow Book relating to the content of the listing particulars were moved from Appendix 34 to the body of the Listing Rules where, after amendments and revisions, they reside today.[36] Although referred to as listing particulars, the listing particulars did double duty prescribing the disclosure required in order to be listed and the disclosure document used in connection with the public offering. The listing particulars and the prospectus in effect became one and the same document for an issuer going public and concurrently applying for admission of the securities being offered to the Official List of the Stock Exchange.

C. *The Financial Services Act and Listed Securities*

Part IV of the FSA essentially left this process undisturbed with respect to securities publicly offered subject to admission to listing. The

32. Listing Rules ¶ 2.3(a). A sponsor must be an authorized person under the Financial Services Act and satisfy the Exchange that it is competent to discharge its responsibilities as such. Listing Rules ¶ 2.1.

33. Listing Particulars ¶ 2.7[b].

34. Listing Particulars ¶ 2.19.

35. Directive 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

36. Listing Rules, Chapter 6.

Act, following the Listing Particulars Directive, prohibits the admission of any security to the Official List of the Stock Exchange unless it complies with the listing rules of the "Competent Authority."[37] The Council of The Stock Exchange is designated by the FSA as the Competent Authority.[38] In addition, the FSA imposes a separate statutory duty upon those responsible for the prospectus that it "[s]hall contain all such information as investors and their professional advisors would reasonably require." Compliance with the disclosure prescribed by the Yellow Book may not discharge this responsibility.[39] The FSA also requires that before the Listing Particulars are published as required by the listing rules of The Stock Exchange that a copy of the Particulars be delivered to the Registrar of Companies and a statement to that effect must be included in the particulars.[40] The Prospectus Directive, which, in effect, incorporates the Listing Particulars Directive under these circumstances, adds little, if anything, to this basic process other than requiring that the Particulars be referred to as a Prospectus when being used to satisfy the requirements of the Prospectus Directive. The Prospectus Directive merely requires for securities offered subject to being listed that "the contents of the prospectus and the procedures for scrutinizing and distributing it shall, subject to adaptations appropriate to the circumstances of a public offer," conform to the standards of the Listing Particulars Directive.[41] If securities that are the subject of an application for listing comply with the requirements described above in the UK and the notice[42] and publication requirements[43] of the Prospectus Directive in the other member states in which the securities are to be offered, the prospectus is entitled to the benefit of the mutual recognition provisions of the Prospectus Directive.[44]

D. Unlisted Securities — The Road to the POS Regulations

When the FSA was originally enacted, in addition to Part IV it included Part V, consisting of Sections 157-171, which dealt with offers of securities that were not to be listed. The FSA contemplated that Parts IV and V together would completely replace the prospectus provisions of

37. FSA § 142.

38. FSA § 142(6).

39. FSA § 146. ("[L]isting Particulars . . . shall contain all such information as investors and their professional advisers would reasonably require, and reasonably expect there, for the purpose of making an informed assessment of — (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and (b) the rights attaching to the securities.")

40. FSA § 149.

41. Prospectus Directive, Art. 7.

42. *Id.*, Arts. 14 and 17.

43. *Id.*, Arts. 15-16.

44. *See* § 1.09.

Part III of the Companies Act 1985.[45] Part IV was implemented in 1987, and Part III of the Companies Act was thereby repealed as to securities offered subject to listing on The Stock Exchange.[46] Part V was never brought into force and the prospectus provisions of the Companies Act continued to govern the offering of unlisted securities until 1995.

The implementation of Part V as to unlisted securities is a study in administrative delay. After the adoption of the European Union Prospectus Directive in 1989,[47] the implementation of Part V as to unlisted securities became not only a matter of implementing the FSA, but also of harmonizing it with the Prospectus Directive. On July 12, 1990, the Department of Trade and Industry (DTI) published a Consultative Document outlining and discussing in broad terms the implementation of Part V of the Financial Services Act and harmonization of the Part V prospectus with the requirements of the Prospectus Directive.[48] The expectation was that the DTI would propose draft regulations by the end of 1990 implementing Part V and permitting compliance with the Prospectus Directive by April 17, 1991, the date by which Member States were to have adopted measures necessary to comply with the Prospectus Directive.[49] The draft regulations contemplated by the Consultative Document were not published[50] and the prospectus requirements relating to an offering of securities not to be admitted to the official list continued to be governed by Schedule 3 to the Companies Act of 1985. In June of 1992, the authority to implement those provisions of the FSA that interface with European Union listing and disclosure directives was transferred to HM Treasury.[51] The Treasury in July of 1994 issued a consultation document seeking views on draft regulations that would implement Part V and belatedly satisfy the requirements of the EC Directive.[52] In July of 1994, the Treasury proposed "The Public Offers of Securities Regulations 1994," which with some revisions were adopted effective June 19, 1995 as "The Public Offers of Securities Regulations 1995 (POS).[53] Concurrently with the adoption of the POS, Part V of the

45. FSA § 212(3), Sch. 17, pt. I.

46. SI 1986 No. 2246.

47. Directive 89/298, 1989 OJL 124 (May 5, 1989) (hereinafter the "Prospectus Directive").

48. DTI, Consultative Document on Listing Particulars and Public Offer Prospectuses: Implementation of Part V of the Financial Services Act 1986 and Related EC Directives.

49. Prospectus Directive, Art. 26.

50. Cook, Likelihood of a Simplified Route to Public Listing Remains Elusive, FIN. TIMES, Mar. 28, 1991, at Section I, p.31.

51. *See* Transfer of Functions (Financial Services) Order 1992, SI 1992, No. 1315, June 4, 1992.

52. UK: HM Treasury — Revised Implementation of the Prospectus Directive, Hermes — UK Government Press Releases, July 20, 1994.

53. SI 1995 No 1537 (June 14, 1995), adopted pursuant to the European Communities Act 1972, § 2(2).

FSA and Schedule 3 to the Companies Act were repealed. The POS belatedly brings the UK into compliance with the Public Offers Prospectus Directive.

IV. THE EU PROSPECTUS DIRECTIVE

The UK prospectus regimen is understood best in the context of the EU Prospectus Directive. The European Community adopted the Prospectus Directive on April 17, 1989 to coordinate the requirements for the "drawing-up, scrutiny and distribution" of a prospectus to be used when securities are offered to the public.[54] The Directive contemplated that each of the member states would adopt implementing legislation by April 17, 1991. The purpose of the Directive is to encourage "the creation of a genuine European capital market."[55] The Directive applies to securities offered to the public for the first time in a member state if such securities are not already listed on a stock exchange in that state.[56] Member states must ensure, absent an exemption, that any offer of securities to the public "within their territories" is subject to the publication of a prospectus by the offeror.[57] The prospectus must be published or made available no later than the time when an offer is made to the public.[58]

The Directive is expressly inapplicable to certain types of offers, including, without limitation, offers of securities to a "restricted circle of persons."[59] Various types of securities also are excluded, such as certain government securities; securities offered in connection with a takeover bid or merger; certain debt securities;[60] and "Eurosecurities which are not the subject of a generalized campaign of advertising or canvassing."[61] The provision for Eurosecurities, which includes both Euro equity and Eurobonds, excludes from regulation in the EU large amounts of securities issued annually in the Euromarket.[62] "Eurosecurities" are

54. Prospectus Directive, *supra* N. 47.

55. *Id.*, Preamble.

56. *Id.*, Art. 1.

57. *Id.*, Art 4.

58. *Id.*, Art. 9; Art. 16.

59. *Id.*, Art. 2, no. 2.

60. *Id.*, Art. 5(a) (debt securities issued by certain financial institutions); *id.*, Art. 5(b) (certain debt securities guaranteed by a member state or subdivision thereof); *id.*, Art. 5(c) (certain other debt securities considered by national law as debt securities issued or guaranteed by the state).

61. *Id.*, Art. 2, no. 2. "Eurosecurities" are transferable securities which are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different states; are offered on a significant scale in one or more states other than that of the issuer's registered office; and may be subscribed for or initially acquired only through a bank or other financial institution. *Id.*, Art. 3.

62. See Warren, Regulatory Harmony in the European Communities: The Common Market Prospectus, 16 BROOKLYN J. INT'L L. 46, n.167 (1990).

not, however, exempted from the Prospectus Directive if they are the subject of "a generalized campaign of advertising or canvassing." The exemption for Eurosecurities appears to have been born of competitive considerations.[63] The definition of Eurosecurities has raised some concerns among participants in the Eurobond market that are discussed at § 1.07. Securities already listed in a member state are not subject to the Directive even if publicly offered in the state for the first time.[64]

The Prospectus Directive approaches public offerings on the basis of whether the securities in question will be listed in a member state. If securities are not to be listed in the state in which offered or another member state, the content of the prospectus must conform with the minimum standards established by Article 11.[65] If a public offer of transferable securities is made in a member state and at the time of the offer the securities are the subject of a listing application in the same state[66] or another member state,[67] prospectus requirements must be determined in accordance with the Listing Particulars Directive. The Listing Particulars Directive requires considerably more disclosure than Article 11 of the Prospectus Directive. In the case of securities being listed concurrently with the offering, the Listing Particulars Directive is applicable to both the prospectus content requirements and the procedures for reviewing and distributing the prospectus, subject to "adaptations appropriate to the circumstances of a public offer."[68]

In the case of the first public offerings of other securities (*i.e.*, securities not subject of a listing application and not already listed in that state) in a member state, the prospectus must contain information necessary in order to enable investors[69] to make an informed investment

63. *Id.* at 38-41. "From the beginning, an all-pervasive fear of the Eurobond market taking flight to Zurich or elsewhere outside the EC dictated opposition to the [Prospectus] Directive." *Id.* at 39. "The United Kingdom and Luxembourg were concerned 'that the [Euromarket] would be driven offshore to Zurich rather than submit to the prospectus obligation.'" *Id.*, n.132, *quoting See Rules Requiring Detailed Prospectuses Adopted by EC; Will be Effective 1991*, 20 SEC. REG. & L. REP. (BNA) 1975 (Dec. 23, 1988). "Once it became clear . . . that a Eurobond exemption could be secured, the goal was expanded to include Euroequities as well." *Harmony, id.* at 41.

64. Prospectus Directive, *supra* N. 47, Art. 1. This can occur, for example, when an issuer became a public company in one member state and listed its securities because of trading interest in another member state. The issuer, of course, would have had to comply with the rules of the exchange relating to listing particulars in that member state, which would be based upon the Listing Particulars Directive.

65. Prospectus Directive, Art. 11.

66. Prospectus Directive, Art. 7.

67. Prospectus Directive, Arts. 7 and 8.

68. *Id.*

69. This appears to be a lesser requirement than that which applies in the case of listing particulars, where the requirement is that the document contain sufficient information to enable investors *and their investment advisors* to make an informed assessment of the prospects of the issuer. The omission of the italicized words from the prospectus directive may be significant, but the point has never been considered by any judicial

decision.[70] Without limiting the foregoing, Article 11 of the Prospectus Directive sets forth the minimum prospectus disclosure requirements member states must apply to prospectuses for a public offer of securities not to be officially listed on an exchange in a member state.[71] Prospectuses for unlisted securities must be published or made publicly available pursuant to procedures established by each member state.[72] The member states may provide, however, that the person making the offering may prepare the prospectus, in terms of its content, and subject to appropriate adaptation, in accordance with the Listing Particulars Directive, even though the securities in question are not subject of a listing application.[73] In such event, authorities designated by the appropriate Member State make prior scrutiny of the prospectus.[74] A prospectus so prepared and approved by a Member State in the three months preceding application for listing must be recognized, subject to translation, as listing particulars in the member states in which application for listing is made.[75] Such a prospectus must also be deemed to satisfy the prospectus requirements of other member states in which the same securities are, simultaneously or within a short time period, offered to the public.[76]

A member state is not compelled to give issuers not proposing to list the alternative of complying with the more stringent disclosure standards of the Listing Particulars Directive, but may limit those standards and procedures to securities for which an application for listing is to be made. This, of course, would require that the issuer be able to satisfy the conditions to listing. Under the Prospectus Directive, a member state has no obligation to recognize a prospectus meeting the requirements of another member state that satisfies only the Article 11 requirements. Thus, if an issuer wishes to make an offer to the public in more than one member state without obtaining a listing in any of them,

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authority.

70. *Id.*, Art. 11(1).

71. *Id.*, Art. 11(2). Member states may allow the omission from the prospectus of otherwise required information under certain circumstances, such as if the disclosure of the information would be "contrary to the public interest." *Id.*, Art. 13(1)(b). The member state also may permit omission of information if the disclosure thereof would be "seriously detrimental" to the issuer, if omission would not be likely to mislead the public. *Id.* Similar accommodation may be made in the case of sellers other than the issuer or an agent thereof, in respect of information not normally in the possession of the seller. *Id.*, Art. 13(2).

72. *Id.*, Art. 15.

73. *Id.*, Art. 12(1).

74. *Id.*, Art. 12(2).

75. Listing Particulars Directive, Art. 24b. This is one of the world's more obscure provisions, as why an entity incorporated in one country would wish to submit a prospectus to its own authority and then demand mutual recognition of another exchange when it could simply submit the prospectus directly to that other exchange is not clear.

76. Prospective Directive, Art. 21(1).

he may either (a) comply with the disclosure requirements of the Listing Particulars Directive and have the document approved by his selected Competent Authority, or (b) comply with the local implementation of the Article 11 requirements in each country in which it is intended to make a public offer. Presumably, issuers contemplating a multi-member state offering will be motivated to comply with the more stringent disclosure standards relating to securities to be listed, if that alternative is available to an unlisted security in an appropriate member state, in order to have the benefit of the multi-prospectus recognition provision. Some may conclude, however, that the cost of meeting the more stringent disclosure standards outweighs the mutual recognition benefit. The UK as discussed below authorized the Stock Exchange to adopt rules to implement Article 12 and permit unlisted securities to conform with the disclosure requirements and procedures applicable to listed securities. *See* Section IX(B).

The Prospectus Directive requires a member state to recognize, subject to translation if necessary, a prospectus prepared in accordance with the content requirements of the Listing Particulars Directive approved in another member state in accordance with the Directive. If public offers are made within short intervals of one another in two or more member states, a public offer prospectus prepared and approved in accordance with the content requirements of the Listing Particulars Directive must be recognized as a public offer prospectus in such member states.[77] The member states may not impose any approval requirement or require additional information to be included in such prospectus, other than certain country-specific information and translation.[78] Article 21 of the Prospectus Directive permits EU companies prepared to satisfy the disclosure requirements of the Listing Particulars Directive to sell securities, simultaneously or within a short time period, in several EU countries on the basis of one prospectus. The Directive permits member states to limit this reciprocity requirement to issuers having their registered offices in a member state.[79] *See* Section IX for the mutual recognition provisions adopted by the UK.

The EU may negotiate agreements with non-EU countries pursuant to which it would recognize, for purposes of the Prospectus Directive, prospectuses prepared and reviewed in accordance with the foreign law of non-member countries, provided such foreign law gives equivalent protection, even if it differs from the Directive.[80] This possibility, however, is subject to "reciprocity,"[81] meaning subject to acceptance by the particular foreign country of prospectuses prepared in accordance

77. *Id.*, Art. 21.
78. *Id.*
79. *Id.*, Art. 21, no. 4.
80. *Id.*, Art. 24.
81. *Id.*

with EU law. Although no negotiations of this nature between the SEC and the EU have been publicly reported,[82] it is possible that at some future date this provision may serve as a basis for negotiating a multijurisdictional disclosure system between the United States and the EU.

V. THE PUBLIC OFFERS OF SECURITIES REGULATIONS 1995

The Treasury proposed and on June 14, 1995 adopted (effective June 19, 1995) the Public Offers of Securities Regulations 1995 ("POS"). The objective was to prescribe the content of the prospectus for unlisted securities contemplated by Part V of the Financial Services Act and to implement the provisions of the European Union Public Offers Prospectus Directive. The POS is not applicable to securities that are officially listed or securities that are the subject of a listing application.[83] Securities in these categories continue to be regulated by the Stock Exchange in accordance with Part IV of the FSA. *See* Sections XII-XIII. The Regulations follow the Prospectus Directive in that the prospectus requirements are applicable only to the first offer to the public of the securities in the United Kingdom. The first public offering of the securities may be by the issuer (which would be the usual situation) or by someone other than the issuer (a secondary distribution).[84] The POS is applicable to stock, corporate debt securities, warrants to purchase such securities or certificates representing them.[85] POS does not apply to government securities (issued by any government) or to "Units in Collective Investment Schemes" (mutual funds and the like).[86]

The POS provides two alternatives for satisfying the prospectus requirements in connection with the first offering of unlisted securities, tracking respectively Article 11 of the Prospectus Directive, establishing minimum prospectus requirements, and Article 12, applying the Listing Particular requirements and Stock Exchange scrutiny to the prospectus. The prospectus requirements are satisfied either by complying with the specific disclosure requirements set forth in Schedule 1 of POS[87] or by complying with the requirements applicable under Part IV of the

82. It is believed that bilateral negotiations took place in the late 1980s between the SEC and the London Stock Exchange. However, the reciprocity provisions of the various EC Directives would (probably) have prevented the Stock Exchange from entering into such an agreement on anything other than a Europe-wide basis, and the discussions were discontinued.

83. POS § 3(1)(a).

84. POS § 4(1).

85. POS § 3(1)(b). The securities included are by reference to "investments" as defined by Schedule 1 to the FSA, paragraphs 1, 2. 4, and 5. Debentures with a maturity of less than one year from date of issue are specifically excluded. POS § 3(2)(a).

86. POS § 3(1)(b) in describing the securities to which the POS is applicable omits those described in ¶ 3 (government and public securities) and ¶ 6 (units in collective investment accounts) of Schedule 1 to the Financial Services Act.

87. POS § 8(1).

FSA for securities officially listed and submission of the document to the Stock Exchange for approval.[88] Under the latter provision, the securities, although unlisted, are required to comply with a selective list of the disclosure requirements applicable to applicants for admission to listing that omits for the most part those that go beyond the minimum disclosure required by Schedule A (for equity securities and Schedule B (for debt securities) to the Listing Particulars Directive as incorporated into the Listing Rules of the London Stock Exchange. *See* Section XIII(B). Such securities do not thereby become officially listed securities, but the prospectus is subject to pre-vetting review by the appropriate Stock Exchange Committee. This alternative is designed to permit an offeror of unlisted securities to take advantage of the mutual recognition provisions of the Prospectus and Mutual Recognition Directives. The Stock Exchange rules and procedures to accommodate this type of offering are discussed at § 1.13[2].

Schedule 1 to the POS sets forth the content of disclosure for issuer's electing to comply with the POS prospectus disclosure requirements. The financial statements required are divided according to the jurisdiction of incorporation of the offeror. For a UK company, the requirements are those of the Companies Act 1985 relating to annual accounts and reports of public companies.[89] For companies incorporated outside the UK, the requirement is for accounts prepared in accordance with the applicable local law, and either audited in accordance with such law or accompanied by a statement that such law does not require an audit.[90] The prospectus must be delivered to the Registrar of Companies before the securities are offered.[91] Those complying with the POS requirements are not entitled to the mutual recognition provisions of the EU Prospectus Directive, whereas those complying with the prospectus requirements of Schedule A/B of the Listing Particulars Directive have the benefit of the mutual recognition provisions of the EU Prospectus Directive. *See* Section IX.. The POS also introduces a new regime of liability and responsibility for misrepresentations in a prospectus relating to unlisted securities.[92]

VI. LISTED SECURITIES — CONFORMING TO THE PROSPECTUS DIRECTIVE

As noted above (*see* Section III(C)), the contents requirements for disclosure documents relating to securities being listed in conjunction with a public offering of securities have been governed prior to and since the adoption of the Financial Services Act by the rules and proce-

88. POS § 4(3), FSA § 156A.
89. POS Sch. 1, pt. 7. *See* § 1.13[3].
90. POS Sch. 1 ¶ 45.
91. POS § 4(2).
92. POS §§ 13-15.

dures of the Stock Exchange. The Stock Exchange is the designated competent authority under Part IV of the FSA to determine the content of the listing particulars/prospectus, the minimum standards for which are set forth in the Listing Particulars Directive.[93] Since the Prospectus Directive in effect defers to the Listing Particular Directive as to securities being listed in conjunction with the first public offer of the securities, only a modest number of amendments to the FSA were required to prescribe the prospectus to be used in connection with such offerings. Those amendments were made at the same time as the effective date of the POS in order to coordinate the Act with the POS and fully implement the EU Prospective Directive. Section 142 of the FSA was amended by adding a new paragraph 7A that defines what constitutes an offer of securities for purposes of the Act and incorporates a Schedule 11A that determines "whether a person offers securities to the public in the United Kingdom." Schedule 11A then creates a number of exemptions from the prospectus provisions. Schedule 11A provides that any offer made to any person in the United Kingdom is made to the public unless to the extent made in the United Kingdom it falls within one of the safe harbors provided by the Schedule. This list corresponds with the exemptions from the POS.[94] Thus, under this scheme of things, substantially identical exemptions from the use of a prospectus are included in Section 7 of the POS for unlisted securities and in Schedule 11A to the FSA for securities to be listed. Section 144(2) of the FSA was amended to provide that securities "which are to be offered to the public in the United Kingdom for the first time before admission" shall be subject to the condition that a prospectus meeting the requirements of the rules of the Stock Exchange as to form and content be submitted, approved, and published in accordance with the rules of the Exchange. A new Section 156B was added to the FSA making it unlawful to offer listed securities subject to Section 144(2) in the UK before the publication of the prospectus. Thus, the FSA obligation to publish a prospectus in connection with securities to be listed (as under the POS in connection with unlisted securities) is limited to the first public offering of the securities in the UK. A new Section 156A also was added authorizing the Stock Exchange to prescribe the content of a prospectus for issuers not seeking to list their securities, but attempting to obtain Stock Exchange approval of an offer document in order to utilize that document in another EC member state through the mutual recognition procedure.[95] The same section incorporates substantial portions of Part IV of

93. Directive No. 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

94. *See* respectively, *supra* Ns. 59, 85 and related text. The differences between Schedule 11A and reg. 7(2) of POS are entirely drafting matters, and the substance of the two exemptions is identical. The exemptions for the most part correspond to those allowed by the Prospectus Directive.

95. *See supra* N. 88 and related text.

the FSA with appropriate modification in terminology to make them applicable to a prospectus issued pursuant to this Section. Documents that are submitted to the Stock Exchange for approval under this mutual recognition regime are sometimes hereinafter referred to as Section 156A documents and the specific listing disclosure rules applicable as Schedule A/B of the Listing Particulars. The Stock Exchange has amended its Listing Rules to accommodate the changes described above. *See* Section XIII(A)-(B).

From the perspective of a UK issuer, therefore, the potential content requirements may be set out in tabular form as follows:

Document	***Disclosure Requirements***
Application for listing on the London Stock Exchange and concurrent public offering. Can also be used as listing particulars to be listed and/or as a prospectus for offering in another member state.	Listing Rules of the London Stock Exchange ("Yellow Book").
Prospectus to be used for UK offering of unlisted security and to be used for more or less concurrent offering and/or listing in another EU member state.	§ 156A regime — LSE Rules for Approval of Prospectuses Where No Application for Listing is Made (equivalent to Schedule A/B of the Listing Particulars Directive[96] plus approval from the Stock Exchange).
Prospectus to be used for an unlisted public offer in the UK.	Schedule 1 of the POS Regulations (loosely equivalent to Schedules A/B of the Listing Particulars Directive).

VII. EXEMPT OFFERINGS

The POS only requires that a prospectus be prepared in the event of an offer "to the public" in the UK Reg. 7(2) of the POS sets out a series of safe harbor provisions in respect of offers that are "deemed not to be an offer to the public in the United Kingdom."[97] Paragraph 3 of Schedule 11A to the Financial Services Act, applicable to securities to be listed, contains a number of the same exemptions phrased in precisely the same manner. The exemptions follow generally those allowed

96. *See* Art 2 of the Second Mutual Recognition Directive 90/211/EEC.
97. POS § 7(2).

under the EU Prospectus Directive. *See* Section IV. There are, however, some potentially significant differences, suggesting that UK regulators and practitioners had some concern about the phraseology and, in some instances, scope of those set forth in the Prospectus Directive. There is a basic difference in how the UK regulatory framework and the Prospective Directive address the exemptions/exclusions from the prospectus requirements. The Prospectus Directive in Article 1 provides that the Directive applies "to transferable securities which are offered to the public for the first time in a Member State" if not already listed on a stock exchange in that member state. It then in Article 2 lists in paragraph 1 the type of offers to which the Directive does not apply and in paragraph 2 the types of securities to which the Directive does not apply. Presumably, the lists were intended to establish by implication "securities which are offered to the public" by setting forth those that are not deemed "offered to the public." It does not, however, define when securities are deemed to be offered to the public or specifically purport to have set forth an exclusive list of what are not deemed offered to the public. The POS in Section 4, very much like the Prospectus Directive, limits the application of the POS to "[w]hen securities are offered to the public in the United Kingdom for the first time." In Section 5, the POS defines what constitutes an offer and in Section 6 it defines in very general terms when a person offers securities to the public in the United Kingdom. In Section 7 it then sets forth the circumstances under which "an offer of securities shall be deemed not be an offer to the public in the United Kingdom."[98] In the process some of the Prospectus Directive exemptions/exclusions are modified and a number of additional specific situations are deemed not to involve an offer to the public. The following table compares the language of a number of relevant UK exemptions with the language of the Prospectus Directive and sets forth some of the UK exemptions that have no precise Prospectus Directive counterpart.

POS Section 7 except as otherwise indicated	***Prospectus Directive Art. 2(1)***
Box 1:	
(a) the securities are of-	(a) where transferable se-

98. HM Treasury in publishing the POS Amendments in March of 1999 set forth "Guidance" making clear (1) that whether an offer is to the public under the general language of Section 6 is a question of fact in each instance, (2) the specific exemptions of Section 7 are not necessarily exclusive, and (3) offerors may rely on Section 6 if the offering in fact is not to the public. *See* HM Treasury, *Guidance Note -Public Offers of Securities Amendment Regulations* (March 1999), available at http://www.hm-treasury.gov.uk/docs/1999/78.htm. Offerors, presumably, ordinarily will rely on the safe-harbor of the specific exemptions.

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
fered to persons— (i) whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their businesses; or (ii) who it is reasonable to expect will acquire, hold, manage or dispose of investments (as principal or agent) for the purposes of their businesses; or are otherwise offered to persons in the context of their trades, professions or occupations[99]	curities are offered to persons in the context of their trades, professions or occupations,
Box 2: (d) the securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer;[100] (7) In determining for the purposes of paragraph (2)(d) whether a person is sufficiently knowledgeable to understand the risks involved in accepting an offer of securities, any information supplied by the offeror shall be disregarded, apart from information about — (a) the issuer of the securities, or (b) if the securities confer	(b) where transferable securities are offered to a restricted circle of persons,

99. Reg. 7(2)(a).
100. POS § 7(2)(d); FSA § 142(7A), Sch. 11A, ¶ 3(1)(d).
101. POS § 7(7); FSA § 142(7A), Sch. 11A, ¶ 4.

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
the right to acquire other securities, the issuer of those other securities.[101]	
Box 3 (b) the securities are offered to no more than 50 persons;[102]	No counterpart
Box 4 (c) the securities are offered to the members of a club or association (whether or not incorporated) and the members can reasonably be regarded as having a common interest with each other and with the club or association in the affairs of the club or association and in what is to be done with the proceeds of the offer.	No counterpart
(e) the securities are offered in connection with a bona fide invitation to enter into an underwriting agreement with respect to them;[103]	No counterpart
(g) the securities are offered to a government, local authority or public authority, as defined in paragraph 3 of Schedule 1 to the Act;[104]	No counterpart
(h) the total consideration payable for the securities cannot exceed ECU 40,000 (or an equivalent amount);[105]	(c) where the selling price of all the transferable securities offered does not exceed ECU 40,000, and/or
(i) the minimum consideration which may be paid for securities acquired pursuant to	(d) where the transferable securities offered can be acquired only for a consideration

102. POS § 7(2)(b); FSA § 142(7A), Sch. 11A, ¶ 3(1)(b).
103. POS § 7(2)(e); FSA § 142(7A), Sch. 11A, ¶ 3(1)(e).
104. POS § 7(2)(g); FSA § 142(7A), Sch. 11A, ¶ 3(1)(f).
105. POS § 7(2)(h); FSA § 142(7A), Sch. 11A, ¶ 3(1)(g).

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
the offer is at least ECU 40,000 (or an equivalent amount);[106] (j) the securities are denominated in amounts of at least ECU 40,000 (or an equivalent amount)[107]	of at least ECU 40,000 per investor;
(k) the securities are offered in connection with a takeover offer;[108]	(2)(d) to transferable securities offered in connection with a take-over bid;
(l) the securities are offered in connection with a merger within the meaning of Council Directive No. 78/855/EEC;[109]	(2)(e) to transferable securities offered in connection with a merger;
(n) the securities are shares, or investments falling within paragraph 4 or 5 of Schedule 1 to the Act relating to shares, in a body corporate and are offered in exchange for shares in the same body corporate, and the offer cannot result in any increase in the issued share capital of the body corporate;[110]	(2)(g) to shares or transferable securities equivalent to shares offered in exchange for shares in the same company if the offer of such new securities does not involve any overall increase in the company's issued shares capital;
(s) the securities offered are Euro-securities and are not the subject of advertising likely to come to the attention of persons who are not professionally experienced in matters relating to investment;[111] "Euro-securities" means investments which —	(2)(l) to Euro-securities which are not the subject of a generalized campaign of advertising or canvassing. (3)(f) Euro-securities shall mean transferable securities which: — are to be underwritten and distributed by a syndicate

106. POS § 7(2)(i); FSA § 142(7A), Sch. 11A, ¶ 3(1)(h).
107. POS § 7(2)(j); FSA § 142(7A), Sch. 11A, ¶ 3(1)(i).
108. POS § 7(2)(k); FSA § 142(7A), Sch. 11A, ¶ 3(1)(j).
109. POS § 7(2)(l); FSA § 142(7A), Sch. 11A, ¶ 3(1)(k).
110. POS § 7(2)(n); FSA § 142(7A), Sch. 11A, ¶ 3(1)(m).
111. POS § 7(2)(s); FSA § 142(7A), Sch. 11A, ¶ 3(1)(r).
112. POS § 2(1), incorporating ¶ 3 of FSA, Sch. 11A; FSA § 142(7A), Sch. 11A, ¶ 3(2).

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
(a) are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different countries or territories; (b) are to be offered on a significant scale in one or more countries or territories other than the country or territory in which the issuer has its registered office; and (c) may be acquired pursuant to the offer only through a credit institution or other financial institution; "financial institution" means a financial institution as defined in Article 1 of Council Directive No 89/646/EEC;[112]	at least two of the members of which have their registered offices in different States, and — are offered on a significant scale in one or more States other than that of the issuer's registered office, and — may be subscribed for or initially acquired only through a credit institution or other financial institution.
Section 3(2)(a) debentures having a maturity of less than one year from their date of issue shall be deemed to be excluded from paragraph 2.[113]	No counterpart
Excluded from coverage of the POS regulation.[114]	(2)(b) to units issued by collective investment undertakings other than of the closed-end type.
(o) the securities are issued by a body corporate and offered — (i) by the issuer; (ii) only to qualifying persons; and	(h) to transferable securities offered by their employer or by an affiliated undertaking to or for the benefit of serving or former employees;

113. POS § 3(2)(a); FSA § 142(7A), Sch. 11A, ¶ 3(1)(t).

114. Section 3 of the POS regulations provides that it is applicable to securities described in specific paragraphs of Schedule 1 of the FSA and excludes units in a collective investment scheme by not referencing paragraph 6 of such schedule that in turn references such securities.

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
(iii) on terms that a contract to acquire any such securities may be entered into only by the qualifying person to whom they were offered or, if the terms of the offer so permit, any qualifying person.[115] (12) For the purposes of paragraph (2)(o), a person is a "qualifying person," in relation to an issuer, if he is a bona fide employee or former employee of the issuer or of another body corporate in the same group or the wife, husband, widow, widower or child or stepchild under the age of 18 of such an employee or former employee.[116]	
Excluded by Section 3 of the POS regulations.[117]	(c) to transferable securities issued by a State or by one of a State's regional or local authorities or by public international bodies of which one or more Member States are members;
An offering of securities issued pursuant to conversion rights where a prospectus relating to the convertible securities was published previously pursuant to Part IV of the FSA (listed securities), the POS (unlisted securities post-POS),	(i) to transferable securities resulting from the conversion of convertible debt securities or from the exercise of the rights conferred by warrants or to shares offered in exchange for exchangeable debt securities, provided that a public of-

115. POS § 7(2)(o); FSA § 142(7A), Sch. 11A, ¶ 3(1)(n).

116. POS § 7(12); FSA § 142(7A), Sch. 11A, ¶ 8(a).

117. Section 3 of the POS regulations provides that it is applicable to securities described in specific paragraphs of Schedule 1 of the FSA and excludes government and public securities by not referencing paragraph 3 of such schedule that in turn references such securities.

POS Section 7 except as otherwise indicated	*Prospectus Directive Art. 2(1)*
or the Companies Act of 1985 (listed securities pre-POS).[118]	fer prospectus or listing particulars relating to those convertible or exchangeable debt securities or those warrants were published in the same Member State.

The exemption in Box 1 expands on without otherwise restricting the in the context of their trades, professions, or occupations exemption of the Directive to make it clear that it encompasses institutional investors, money managers, and other professional investors. This as discussed below in part may have been to assuage concerns of investment banking firms marketing eurobonds and other Eurosecurities. On the other hand, the exemption in Box 2 relating to an offering to a restricted circle of investors limits the Directive counterpart to persons who are "sufficiently knowledgeable to understand the risks" of the investment. This appears to be out of concern that a restricted circle might be a limited identifiable group that knew little about the issuer and/or investments. For purposes of the exemption for an offering to a restricted circle of persons sufficiently knowledgeable to understand the risks, it is specifically provided that any information provided by the "offeror" shall be disregarded except "information about the issuer of the securities."[119] A similar proviso is not tacked on to the counterpart Prospectus Directive exemption for an offering to a restricted circle of persons.[120] The reason for this restriction apparently is that otherwise it would be possible to argue that any person who had been provided with sufficient preliminary material by the offeror would be sufficiently knowledgeable to understand the risks. The exemption would widen to include all offers in respect of which full disclosure is made, whereas the exemption is intended to be a narrow one. What is intended in this context is that the offering be limited to a restricted group who because of their relationship to the company or their involvement in the industry or otherwise have sufficient knowledge of the risk without more to evaluate the company. This does, however, require reading the phrase "information about the issuer" in the narrow sense of identifying the company making the offer.[121]

118. POS § 7(2)(p); FSA § 142(7A), Sch. 11A-3(1)(o).

119. POS § 7(7), FSA, § 142(7A), Sch. 11A-3(4).

120. *See* Prospectus Directive, Art. 2, 1(b).

121. It is also mindful of the position taken by the Fifth Circuit prior to adoption of Rule 506 in construing the Section 4(2) exemption under the Securities Act of 1933 for transactions not involving a public offering. *See* SEC v. Continental Tobacco Co., 463 F.2d 137, 160 (2d Cir. 1972) (private placement memorandum cannot furnish the knowledge

Box 3 and Box 4 set forth two exemptions not specifically included in the Prospectus Directive. The Box 3 exemption to offers to not more than 50 persons, presumably, is to provide a reliable criterion that, if followed, provides assurance the exemption is available.[122] The exemption for offers to members of a club having a common interest in the club and what is to be done with the proceeds appears to be a narrow one. It should be noted that the 50-person exemption is based on offers and not purchases. A person is deemed to make an offer if "it would give rise to a contract" if accepted or if he "invites a person to make such an offer."[123] There is an interesting provision as to what is deemed to constitute the offering for the purpose of the exemption for offerings to not more than 50 persons.[124] For this purpose, securities of the same class offered by the same person in reliance on that exemptions within any 12-month period are deemed to be a single offering.[125]

It is interesting that the POS restricts the restricted circle exemption and at the same time adds a 50-person exemption. The POS, unlike the Prospectus Directive, which is silent in this regard, provides with limited exceptions part of the offering may be within one of the exemptions and the other part within another exemption.[126] Thus one could offer an unlimited amount of securities to a restricted circle of knowledgeable persons and also offer securities to 50 other persons without being involved in an offer "to the public." The exceptions for exemptions that must pertain to the entire offering include the exemption for Eurosecurities, the total offering cannot exceed 40,000 ECU, and the minimum investment is at least 40,000 ECU. This, presumably, does not preclude reliance on more than one exemption for the entire offering if otherwise applicable.

The definition of Eurosecurities warrants extensive discussion as much of the Eurobond market is centered in the UK.[127] The Prospectus

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required to make one a knowledgeable investor for purpose of private offering exemption).

122. The POS amendments provide that for purposes of determining the number of persons to whom offers are made offers to a trust, to a partnership, to a joint venture, or to two or more persons jointly are to be deemed an offer to one person. POS 1999 Amendments, § 2(g).

123. POS § 5; FSA § 142(7A)(a).

124. What constitutes a single offering is determined in the same manner in relation to the exemption for offerings not aggregating more than 40,000 ECU equivalents.

125. POS § 7(6); FSA § 142(7A), Sch. 11A-3(3).

126. POS § 7(3)-(4); FSA § 142(7A), Sch. 11A-4.

127. The UK fortuitously had an exemption going back to the Companies Act of 1948 that made London an attractive market for Eurobonds and played an important role in London becoming the centre of the Eurobond market. Section 423(2) of the Companies Act 1948 provided that "an offer of shares or debentures for subscription or sale to any person whose ordinary business is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public" [and therefore shall not require a prospectus] as long as the offer pertained to securities of a company incorporated outside of the UK. Thus, when the Euromarket emerged the UK provided a friendly unregulated

Directive exemption reads as follows:[128] "[I]nvestments which — (a) are to be underwritten and distributed by a syndicate at least two of the members of which have their registered offices in different countries or territories; (b) are to be offered on a significant scale in one or more countries or territories other than the country or territory in which the issuer has its registered office; and (c) may be acquired pursuant to the offer only through a credit institution or other financial institution." Beyond that, for the exemption to be available the offering must not be "the subject of a generalized campaign of advertising or canvassing."[129] On the positive side, it embraces both bonds and equity securities, although the so-called Euromarket is largely a market for debt securities. It conforms with the definition used by the OECD for statistical purposes to identify Eurobonds, except the OECD uses as a reference point the currency in which denominated rather than the registered office of the issuer and makes no reference to being purchased only through credit or other financial institutions. The OECD classifies as Eurobonds offerings by an international syndicate with significant portions of the offering sold in two or more countries other than the country of the currency in which the bond is denominated.[130] Thus bonds of a U.S. issuer denominated in dollars and sold by an international underwriting syndicate in the United Kingdom and on the continent are Eurobonds under this definition. Similarly, securities of a Japanese issuer denominated in dollars or yen and sold by an international underwriting syndicate in the UK and Switzerland are Eurobonds. The how acquired part of the definition aside, they are also Eurosecurities under the Prospectus Directive definition. The Prospectus Directive definition is also

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market as Eurobonds could be sold unrestricted by prospectus regulations in the UK. Ironically, for many years it had the effect of locking out UK companies from raising capital in the Euromarkets, although it promoted the development of London as the center of the European capital market. This provision became Section 79 of the Companies Act 1985. This may explain in part the concern of the City that the Prospectus Directive definition of Euro-securities might be construed more restrictively.

128. Prospectus Directive, Art. 3(f).

129. Prospectus Directive, Art. 2, par. 2(l).

130. The *Institutional Investor* was the keeper of the statistics for many years on international bond offerings, which it divided into two categories — foreign bonds and eurobonds. Foreign bonds were defined as bonds of foreign issuers "sold primarily within one country in that country's currency and by a syndicate of that nationality." Eurobonds consisted of "deals done by international syndicates with a significant portion sold in two or more countries other than the country of the currency in which the issue is denominated." *See, for example, Sweepstakes,* INSTITUTIONAL INVESTOR (Int'l ed.), Mar. 1996, at 119. The Directorate for Financial Fiscal and Enterprise Affairs of the OECD took over the task of maintaining the statistics and in 1996 published *International Capital Markets Statistics,* 1950-1995 and thereafter periodically published detailed statistics relating to international offerings in *Financial Market Trends.* Unfortunately, for a period of time it referred to eurobonds as international bonds and eurobonds together with foreign bonds as external bonds. In February of 1996 it returned to the *Institutional Investor* terminology, referring to eurobonds and foreign bonds as the two categories that together constitute international bonds. *See* OECD, FINANCIAL MARKET TRENDS, Feb. 1996.

broad enough in some instances to cover a relatively new phenomenon, the global offering, since the exemption is not limited to offerings made exclusively in member states. U.S. issuers often looked to the Eurobond market not only because of more favorable interest rates, but also because of perceived savings in offering costs by avoiding registration with the SEC. During the decade of the 1990s, global offerings made in the U.S. and registered with the SEC or made pursuant to Rule 144A, but with significant tranches sold in countries all over the world, were not uncommon. Literally, even a global offering by a U.S. issuer meets at least the first part of the definition of the Eurosecurities test although it may not meet the restriction against a generalized campaign of advertising and canvassing. The possibility of meeting this test is more likely if the offering is made in the U.S. pursuant to Rule 144A, which is often the case particularly in a global offering by a non-U.S. issuer.

Some concern existed among UK practitioners about, among other things, the requirement that Euro-securities be acquired only through a credit institution or other financial institution. A credit institution by the Prospectus Directive is defined in effect as a bank. Financial institution is not defined in the Prospectus Directive and is variously defined in other EU Directives. "Financial institution" can have a very narrow meaning.[131] It is broadly defined in the Second Banking Directive and the POS[132] and the related amendment to the FSA setting forth exemptions[133] both incorporate as part of the definition of Euro-Securities the Second Banking Directive definition of financial institutions. That definition includes the following: (1) portfolio management and advice; (2) providing services relating to and participation in share issues; (3) advising and services relating to on mergers and acquisitions; (4) advising companies on capital structure and industrial strategy; and (5) trading for one's own account and for customers in transferable securities.[134] In addition, the UK exemption differs in one other significant respect from the Prospectus Directive. The UK exemption substitutes for the Directive language, "are not the subject of a generalized campaign of advertising or canvassing," the words, "are not the subject of advertising likely to come to the attention of persons who are not professionally experienced in matters relating to investment."[135]

131. For example, under the Securities Exchange Act of 1934, § 3(a)(46), it is limited to domestic banks, foreign banks, and saving associations.

132. POS Regulation § 2(1), incorporating FSA, Schedule 11A ¶ 3 (sic). Although the cross-reference is to ¶ 3 of Schedule 11A, the definition of a financial institution appears in ¶ 2 of Schedule 11A.

133. FSA, Schedule 11A ¶ 2(c).

134. Directive 89/646, Art. 1, ¶ 6 incorporating Annex ¶¶ 2-12, 1989 OJL 386 (Dec. 15, 1989).

135. The 1999 amendments in lieu of this generalized language incorporate by reference provisions of two statutory instruments specifying persons to whom investment ad-

The variations between the UK exemption and the Prospectus Directive exemption should allay most concerns. The POS and related amendment to the FSA also expands the Prospectus Directive exclusion for offerings "to persons in the context of their trades, professions or occupations"[136] to exclude all offers made to "persons whose ordinary activities [in the context of their trade, profession, or occupation] involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their businesses."[137] This latter exemption as noted above goes beyond the offering of Euro-market securities, but also provides a fall back exemption for an offering of Euro-securities. Investment banking firms involved in Euro-market offerings generally use a prospectus meeting relatively high disclosure standards.[138] The prospectus, however, generally does not conform to any specific regulatory regimen and the Euromarket would like to keep it that way.

VIII. PUBLICATION AND REGISTRATION OF THE PROSPECTUS

The POS requires as to unlisted securities that a copy of the prospectus be delivered to and registered with the Registrar of Companies prior to publication of the prospectus.[139] The POS requires that a prospectus prepared thereunder be made available free of charge at an address in the UK from the time of the first offer and so long as the offer remains open.[140] An advertisement or other notice of an offering for

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vertisements can be sent without violating general restrictions on the use of investment advertisements under Section 57 of the Financial Services Act. These provisions take a fairly liberal view of persons who are deemed professional investors for this purpose, including the following: (1) persons authorised to engage in the investment business in the UK; (2) European investment firms authorised by another Member State operating in the UK under the EU passport for investment sevice companies; (3) corporations with 20 or more shareholders and a paid in share capital or net assets of not less than £500,000; (4) any other corporation or an unincorporated association that has share capital or net assets of not less than £5 million; (5) the trustee of a trust with net assets of £10 million or more; (6) persons whose ordinary business involves them in acquiring investments for purposes of the business, (7) persons whose ordinary business involves managing investments for others. The amendment also permits the offering, which pursuant to the terms of the exemption has to be made through credit or financial institutions, to be made to customers of such credit or financial institutions who effected a transaction through such institution within the 12 months preceding the commencement of the offering. See POS 1999 Amendments, § 2(e) amending POS § 7(2)(s) and incorporating Article 8 of the (Investment Advertisements)(Exemption Order) (2) (1995), SI 1995 No. 1536 and Article 11 of the (Investment Advertisements)(Exemption Order) (1996), SI 1996 No. 1586.

136. Prospectus Directive, Art.2, 1(a).

137. POS Reg. § 7(2)(a).

138. Because of the possibility that the fraud provisions of the federal securities laws may follow them offshore, U.S. investment bankers participating in such syndicates often require from counsel a so-called Rule 10b-5 opinion relating to the prospectus.

139. POS § 4(2). The Financial Services Act § 149 is a similar provision with respect to a Part IV prospectus.

140. *Id.* at § 4(1).

which a prospectus is required by the POS must state that a prospectus is available and the address at which available.[141] The publication requirements of the POS also are applicable to a 156A document.[142] The POS requirement relating to delivery of the prospectus to the Registrar is not applicable to a 156A prospectus,[143] but Section 156A of the FSA, adopted contemporaneously with the POS,[144] specifically incorporates those provisions of the FSA requiring the prospectus/listing particulars be delivered for registration to the Registrar of Companies.[145]

The EU Public Offer Prospectus Directive requires as to securities being listed in conjunction with the first public offer that the prospectus be made available either by publication in a newspaper or in the form of a brochure available at the registered office of the person making the offering and at the offices of the company's paying agent.[146] A notice must be published in a designated newspaper stating where the prospectus has been published and where a copy may be obtained.[147] The Listing Rules include similar requirements with respect to the public offering of securities in conjunction with an application for listing.[148]

IX. MUTUAL RECOGNITION OF PROSPECTUS/LISTING PARTICULARS APPROVED IN OTHER EU MEMBER STATES

A. The EU Directives

The POS amends the FSA in a number of respects so as to allow listing particulars and/or a prospectus approved in a Member State to be recognized, subject to translation, without further review and approval. The operation of the mutual recognition provisions requires an understanding of the mutual recognition provisions of the applicable directives. Assuming the first public offer of the securities in a Member State, the Prospectus Directive establishes four category of offerings. First, securities that are not to be listed in any Member State that are to be offered in accordance with legislation embodying the minimum standards set forth in Article 11.[149] Second, securities being offered in the Member State for which an application has been filed for listing on a stock exchange in that state (Article 7 offering).[150] Third, securities

141. *Id.* at § 12.
142. POS § 4.
143. POS § 4(3).
144. *See supra* N. 95 and related text.
145. FSA § 156A(3) incorporating §§ 146-152 and 154 of the FSA. Section 149 of the FSA provides for registration of the listing particulars/prospectus.
146. Prospectus Directive, Art. 10(3).
147. *Id.* at Art. 10(4).
148. *See* Listing Rules, ch. 8.
149. Prospectus Directive, Art. 11.
150. *Id.* at Art. 7.

being offered in a Member State that are not being listed in that state but for which an application has been filed for listing in another Member State (Article 8 offering).[151] Fourth, the securities being offered that are not to be listed in a Member State, but as to which, as permitted by Article 12, the prospectus conforms with all the prospectus requirements and procedures applicable to a listed security.[152] Securities complying with legislation of a Member State implementing Articles 7, 8, or 12 of the Prospectus Directive are entitled to the mutual recognition provided for by Article 21 of the Prospectus Directive.[153] Securities offered under legislation embodying the Article 11 standards are not.[154]

The EU scheme of things, in addition to providing for mutual recognition of prospectuses, provides under appropriate circumstances for mutual recognition of listing particulars in connection with the listing of securities. The Listing Particulars Directive established the minimum standards as to the content of the listing particulars and procedures for processing the listing particulars.[155] Those standards and procedures, with appropriate modifications for a public offering, are incorporated into the Prospectus Directive for securities being concurrently listed with the public offering either in the Member State in which the offering is being made or another Member State.[156] The Listing Particulars Directive also has its own mutual recognition provisions requiring under the circumstances set forth that the listing particulars of a company listed in one Member State be accepted as the listing particulars when the company applies for listing in another Member State.[157] Article 24 provides that if application for listing is made simultaneously or within a short interval in two or more Member States, the listing application shall be prepared in accordance with the legislation of and approved by the competent authority of the state in which it has its registered office. If it does not have its registered office in any of the states in which application for listing is made, the listing particulars must be drawn and approved in accordance with the legislation of the Member State in which it is applying for listing that it selects. Under Article 24a, if the listing particulars have been drawn and approved as provided in Article 24, the listing particulars subject to translation must be accepted without further approval by any other Member State in which application for listing is made simultaneously or within a short interval. After the adoption of the Prospectus Direc-

151. *Id.* at Art. 8.

152. Prospectus Directive, Art. 12.

153. Prospectus Directive, Art. 21.

154. *Id.* at Art. 20.

155. Directive No. 80/390, Mar. 17, 1980, O.J. 1990 L100/1 (hereinafter "Listing Particulars Directive").

156. *See* Prospectus Directive, Arts. 7 and 8, respectively. *See also supra* Ns. 66, 67 and related text.

157. Listing Particulars Directive, Arts. 24, 24a, 24b.

tive, the Listing Particulars Directive was amended to require a Member State on application for listing to recognize as the listing particulars a public-offer prospectus under the circumstances set forth. If such application is made within three months of the approval of the prospectus in another Member State under Article 7, 8 or 12 of the Prospectus Directive, the prospectus must be recognized as listing particulars in the state in which application for listing is made without further approval.[158] There is no similar obligation with respect to a prospectus approved pursuant to legislation conforming with Article 11.[159]

Article 21 of the Prospectus Directive (incorporating Article 20) provides in substance that subject to translation if securities are offered to the public simultaneously or within a short interval of one another in more than one Member States, all Member States in which the offering is made must recognize a prospectus drawn up in accordance with Article 7, Article 8, or Article 12. All three of these articles as noted above require compliance with the disclosure requirements of and review by the competent authority passing upon applications for the listing of securities under the Listing Particulars Directive.[160] Under Article 20, assuming concurrent offerings in more than one Member State, if the offering is being made or an application for listing is being made in the Member State in which the issuer has its registered office, the competent authority of that state is the competent authority for approval of the prospectus. If neither the offering nor the application for listing are being made in the Member State in which the issuer has its registered office, then the person making the offering is to choose from among the competent authorities of the states in which the offering is being made the competent authority that is to scrutinize the prospectus.

The Member States generally have elected to make the grant of mutual recognition subject to a requirement for translation into the local language. As a result, in practice the mutual recognition procedure is seldom used. for a small offering as the cost of translation of an entire prospectus can be prohibitive. In the case of a large offering, if retail distribution is considered desirable in multiple jurisdictions then it is usual to seek listings on the appropriate stock exchange of each Member State in which the offering is being made. Although the mutual recognition provisions as discussed above extend to listing particulars, the applicant for listing must still satisfy the admission conditions of the stock exchange in each country in which listing is sought. A number of offerors apparently have concluded that there is no substantial downside to having the listing particulars/prospectus also reviewed by the local stock exchange authority as part of the process. Companies are not precluded from listing in their home country (the UK, for example) and

158. Listing Particulars Directive, Art. 24b.
159. *See supra* note 149 and related text.
160. *See supra* notes 66-67 and related text.

offering the securities in other Member States without listing in those states. In that event, the mutual recognition provisions subject to translation and other limited localized disclosure requirements would come into play without the necessity of review by the regulatory body in which the offering is being made. *See* Section IX(B) immediately below for the manner in which the UK implements this requirement. The predilection for listing in the EU countries in which the offering is being made may be influenced by the fact that the European "passport" for carrying on the investment business under the Investment Services Directive can be restricted to securities dealt in on a regulated market in that country.[161]

B. UK Implementing Provisions

The UK gives effect to the above as to securities for which application for listing is to be made by defining a European Document to include (1) listing particulars it is required to recognize under Article 24a of the Listing Particulars Directive in connection with an application for admission to listing, (2) a prospectus it is required to recognize under Article 24(b) of the Listing Particulars Directive in connection with an application for admission to listing, and, subject to the qualification noted immediately below, (3) a prospectus it is required to recognize under Article 21 of the Prospectus Directive in connection with the public offer of securities.[162] The prospectus referred to in (3) above, however, is within the definition of a European Document only if it relates to securities that are subject to an application for listing the United Kingdom.[163] In connection with an application for listing without a concurrent offering of the securities in the UK, a European Document is in effect deemed to constitute the listing particulars for purposes of Part IV of the FSA without further approval.[164] If securities are to be offered for the first time in the UK in conjunction with the application for listing, a European document that is a prospectus is deemed to constitute the prospectus and listing particulars for purposes of Part IV of the FSA without further approval.[165]

The foregoing provisions of Schedule 4 with respect to the recognition of a prospectus are applicable only to the situation in which a listing application is being made in the UK. Separately provision is made for the recognition of a prospectus approved in another Member State without regard to listing in the UK if recognition is required under Ar-

161. *See* Directive 93/22 on Investment Services. 1993 OJL 141 (May 10, 1993), Art. 14(3).

162. *See* POS (SI 1995 No. 1537), § 20, Schedule 4, ¶ 1(c).

163. *Id.* at ¶ 1(c)(3).

164. *Id.* at ¶ 3(a) and ¶ 4.

165. *Id.* at ¶ 3(a) and ¶ 4.

ticle 20 of the Prospectus Directive.[166] Article 20 references a prospectus conforming with Article 7,[167] 8,[168] or 12[169] of the Prospectus Directive.[170] With respect to securities approved under the appropriate Article but not to be listed with the Stock Exchange, however, the translation of the prospectus into English must be certified in a prescribed manner and additional disclosures, including the following, are required: (a) tax information relevant to a UK resident, (b) name and address of paying agent, if any, in the United Kingdom, (c) a statement of how notice of meetings and other notices will be given to UK residents.[171] Further, the offer in the UK must be made simultaneously or within three months of the offer in the Member State in which the prospectus was approved.[172]

The mutual recognition provisions of the Prospectus Directive[173] and of the Listing Particulars Directive[174] provide that a Member State does not have to afford recognition to a company that does not have its registered office (*i.e.*, not incorporated under the laws of) a Member State. If the securities being offered are to be listed in the UK, a European Document in each instance is defined by the UK mutual recognition legislation not only to include listing particulars or prospectus, as appropriate, that it is required to recognize, but those that it is permitted to recognize.[175] The latter appears to be an awkward way of saying that the UK foregoes its right under the relevant EU Directives to not recognize European documents as defined above involving an issuer that has its registered office in a non-Member State. A U.S. issuer, for example, could list securities and/or offer securities for the first time in a Member State other than the UK in compliance with the applicable legislation of that state. If the securities are then listed and offered for the first time in the UK, the UK would recognize the listing particulars and/or the prospectus to the same extent it is required to recognize similar documents of issuers that have their registered offices in a Member State.

If the securities are to be offered in the UK, but are not to be listed, there is no reference to a prospectus that the UK is permitted to recog-

166. POS, Schedule IV, Pt. 2.

167. *See supra* note 150 and related text.

168. *See supra* note 151 and related text.

169. *See supra* note 152 and related text.

170. *See supra* note 154 and related text.

171. POS, Schedule 4, ¶ 8. NOTE: The 1999 amendments, revoked those provisions of Schedule 4 requiring the transalation of a prospectus into English and disclosure relating to tax information relevant to a UK resident. See POS 1999 Amendments, § 2(q) revoking POS Schedule IV, ¶¶ 8(1)(a) and 8(1)(c)(i).

172. POS, Schedule IV, ¶ 8(1)(b).

173. Prospectus Directive, Art. 21, ¶ 4.

174. Listing Particulars Directive, Art. 24a, ¶ 5; Art. 24b, ¶ 2.

175. POS Schedule 4, ¶ 1(c).

nize.[176] This may be accounted for by a drafting quirk. Schedule 4, in referring to the effect to be given to a prospectus scrutinized and approved by the appropriate regulatory authority in another member state if a listing application is made in the UK in connection with a public offering in the UK, refers to Article 21 of the Prospectus Directive as the relevant provision.[177] In referring to the effect to be given to a prospectus scrutinized and approved by the appropriate regulatory authority in another member state if a public offering is to made in the UK, but there is no application for listing in the UK, reference is made to as approved by Article 20 of the Prospectus Directive.[178] This is two ways of saying the same thing except paragraph 1 of Article 21 provides that such a prospectus must be recognized and paragraph 4 of Article 21 says, however, a Member State "may restrict the application of Article 21" to issuers whose registered office is located in a Member State. This may explain why in referring to Article 21 in the first instance, the draft person in addition to the reference what the UK is required to recognize added "or which paragraph 4 of that Article permits to be recognised." The reference in the other instance to Article 20 is a reference to the manner in which the prospectus was approved not to what is required to be recognized, which, perhaps, accounts for the lack of any reference to paragraph 4 of Article 21.

X. ADMISSION TO LISTING ON THE LONDON STOCK EXCHANGE

Chapter 3 of the Listing Rules sets forth the conditions for listing on the London Stock Exchange. The margins include annotations to the related provisions of the EU Listing Conditions Directive, establishing minimum conditions for admission to the official list of a Stock Exchange in the member states.[179] The conditions are minimal in terms of market capitalization (£700,000) of the class of shares to be listed.[180] The company, however, must have published audited financial statements covering a period of at least three years,[181] although the Exchange may accept a lesser period if deemed appropriate.[182] The published financial statements must have been prepared in accordance with the applicant's national law and "in all material respects" conform to Generally Accepted Accounting Principles of the United Kingdom, or the United States, or the International Accounting Standards.[183] The

176. POS Schedule 4, Pt. 2.
177. POS Schedule 4, Pt. 1, ¶ 1(c)(iii).
178. POS Schedule 4, Pt. 2, ¶ 8(1).
179. Directive 79/279 on conditions for admission to official stock exchange listing, 1979 OJL 66 (Mar. 5, 1979).
180. Listing Rules ¶ 3.16.
181. Listing Rules ¶ 3.3(a).
182. Listing Rules ¶ 3.4(a).
183. Listing Rules ¶ 3.4(c).

statements must have been independently audited in accordance with the auditing standards of the United Kingdom, the United States, or International Standards on Auditing.[184] If a new applicant, the accountant's opinion must be an unqualified one.[185] The applicant must have carried on as its main activity a revenue producing business for the period required to be covered by the financial statements.[186] This leaves little room for start-up companies, and the Stock Exchange takes the view that such companies are generally unsuitable for listing.

There are, however, special rules governing application for listing from companies in a number of different categories as set forth in the accompanying footnote.[187] Generally each of these incorporate the provisions of Chapter 3 setting forth the conditions to admission and then make limited dispensation for companies in the specific categories and/or add additional conditions. In the case of natural resource companies (mining, oil, and natural gas), for example, it is provided that the Exchange *may* list securities of such companies that cannot comply with paragraph 3.3(a), which is the provision requiring three years of audited accounts, or paragraph 3.6, which requires a three-year history as a revenue-producing business.[188] The Chapter also, however, requires the company to have proven reserves sufficient to maintain an operation on a commercial scale for at least two years.[189] Further, if paragraphs 3.3(a) and 3.6 are not complied with, the corporate insiders must agree not to dispose of their stock, except among themselves, until two years after trading on the exchange commences.[190] In the case of a scientific research based company, there is no dispensation for three years of financial statements, but the company does not have to meet the requirements of paragraph 3.6 requiring three years or revenue producing activity.[191] The company, however, must satisfy a number of enumerated requirements including a demonstrated ability to attract funds from sophisticated investors, seek to raise at least £10 million with a view to bringing an identified product to a revenue producing stage and demonstrated significant commercial achievements in its re-

184. Listing Rules ¶ 3.4(d).
185. Listing Rules ¶ 3.4(e).
186. Listing Rules ¶ 3.6.
187. Non-UK Companies, Listing Rules, Chapter 17; Property Companies, Listing Rules, Chapter 18; Mining, Oil and Natural Gas Companies, Listing Rules, Chapter 19; Scientific Research Based Companies, Listing Rules, Chapter 20; Investment Companies, Listing Rules, Chapter 21; Public Sector Issuers, Listing Rules, Chapter 22; Debt Securities, Bonds, Asset-Backed Securities and Covered Warrants, Listing Rules, Chapter 23; Ordinary Warrants and other Certificates Representing Securities, Listing Rules, Chapter 24; Single-Project Companies, Listing Rules, Chapter 25; Venture Capital Trusts, Listing Rules, Chapter 26.
188. Listing Rules ¶ 19.3(a).
189. Listing Rules ¶ 19.3(c).
190. Listing Rules ¶ 19.3(g).
191. Listing Rules ¶ 20.2.

search development as evidenced by certain enumerated factors such as clinical trials of pharmaceutical products if a pharmaceutical company.[192] It seems apparent that the conditions to listing are intended to attract quality companies.

The company making application for listing must have adequate working capital prior to admission, and the issuer must make a representation to this effect.[193] In the case of an application for the listing of further securities by an applicant with shares already listed the statement of working capital may be prospective — *i.e.*, may be expressed in the form that the issuer, although not having sufficient working capital as at the date of the prospectus, has made proposals for the provision of sufficient working capital that are satisfactory to The Stock Exchange.[194] In strict theory it seems that the exchange will refuse an application for first listing by a company that needs the proceeds of the issue to satisfy its requirement for working capital. This is not as absurd as it seems, since the requirement may be rephrased that capital must be first raised and then employed, and not *vice versa*. The shares must be freely transferable; the Exchange may in "exceptional circumstances" allow the issuer to disapprove of transfers if such restriction "would not disturb the market in those shares,"[195] but it is unlikely that such permission would be given. This does not preclude an issuer from contractually obtaining a commitment not to transfer shares for a certain period of time, as in the case of Regulation S restrictions, for example. The company, however, would have to enforce the restriction by enforcing the contract rather than imposing transfer restrictions on the shares. This may raise serious problems for U.S. issuers offering shares in the United Kingdom in reliance on Regulation S that attempts to list those shares on the London Stock Exchange. Rule 905[196] provides that such securities are restricted securities as defined by Rule 144 and can be resold by an offshore purchaser only if registered, exempt from registration, or in accordance with Regulation S.[197] Such restrictions generally are embodied in the form of a legend on the stock certificate that requires submission of documentation to the issuer before the shares can be transferred. Although a resale on a Designated Overseas Securities Market (DOSM) is permitted under Rule 904, and the London Stock Exchange is a DOSM, such resales are subject to certain albeit limited conditions.

A sufficient number of shares must be distributed to the public in EU member states. The holding of shares by the public that are listed

192. Listing Rules ¶ 20.3.
193. Listing Rules ¶ 3.10.
194. Listing Rules ¶ 3.10.
195. Listing Rules ¶ 3.15.
196. 17 C.F.R. § 230.905.
197. 17 C.F.R. § 230.905.

in non-member states also will be taken into account.[198] There is deemed an adequate public float if 25 percent of the class of shares to be listed are held by the public and a lesser percentage may be acceptable if a large number of shares of the class are outstanding.[199] The Exchange may impose other conditions to admission to listing if it deems it appropriate to protecting investors, but must inform applicant of same.[200]

In order to be listed on the Stock Exchange, a company must have an acceptable sponsor.[201] One of the principal responsibilities of a sponsor is to make an appropriate investigation of the company and advise the Stock Exchange that in its opinion the company "is an appropriate entity to be admitted to listing."[202] Some issuers, including issuers of Eurobonds, covered warrants and other asset-backed securities, may dispense with the requirement for a sponsor and appoint a listing agent instead. The role of a listing agent is similar to that of a sponsor, but, unlike a sponsor, the listing agent is not required to make a declaration to the Stock Exchange that it is satisfied that the company for whom it acts is a suitable candidate for listing.[203] The functions of the sponsor and listing agent are discussed below in the context of preparing the prospectus/listing particulars for a company going public and concurrently listing the security on the Stock Exchange. *See* Section XIII(A)(8).

XI. ADMISSION TO TRADING ON THE ALTERNATIVE INVESTMENT MARKET

The Alternative Investment Market (AIM) has superseded the Unlisted Securities Market (USM) as a trading market supervised by the Stock Exchange for securities not admitted to the official list. The conditions for admission to trading on AIM are set forth in Chapter 16 of the Rules of the London Stock Exchange (the "AIM Admission Rules") as distinguished from the Listing Rules. In order to apply for admission to AIM, the applicant is required to prepare a prospectus in accordance with the POS regulations.[204] There are no market capitalization requirements for AIM. AIM itself has no minimum periods for which the company must have published financial statements or earned revenues, but the POS regulations require that any prospectus produced must contain the company's last three year's accounts if it has existed for that long. The company must be duly incorporated under the laws of the

198. Listing Rules ¶ 3.18.

199. Listing Rules ¶ 3.19. *See* ¶ 3.20 for shares deemed part of the public float.

200. Listing Rules ¶ 3.1.

201. Listing Rules ¶ 2.3(a). A sponsor must be an authorized person under the Financial Services Act and satisfy the Exchange that it is competent to discharge its responsibilities as such. Listing Rules ¶ 2.1.

202. Listing Particulars ¶ 2.7[b].

203. Listing Particulars ¶ 2.19.

204. AIM Admission Rules ¶ 16.10.

place of organization and the shares must be freely transferable.[205] To the extent the issuer has published financial statements, the published financial statements must have been prepared in accordance with the issuer's national law and with the accounting standards of the United Kingdom, or the United States, or International Accounting Standards.[206] Such statements must be audited if that is required by the law of the place of incorporation of the company. Under provisions applicable generally in the United Kingdom, operating companies are required to publish annual accounts and the accounts must be audited.[207] The issuer must have a nominated adviser[208] and a nominated broker.[209] The same firm, however, may perform both roles.[210]

The nominated adviser must be an authorized person under the FSA or a member firm of the Stock Exchange, independent of the issuer, and acceptable to the Exchange.[211] The Stock Exchange maintains a list of nominated advisers who have completed the required application forms and meet the general and any special eligibility criteria.[212] The responsibilities, among others, of the nominated adviser include assuring that the directors are aware on an ongoing basis of their responsibilities to ensure compliance by the issuer with the AIM Admission Rules and to confirm to the Stock Exchange that the issuer and the securities are appropriate for admission to trading on AIM.[213]

Although the AIM Rules are considerably less extensive than those applicable to listed securities, they are not inconsequential. The Rules, among other things, impose obligations to timely disclose major developments,[214] report certain transactions,[215] notify the Exchange of insider transactions in its shares,[216] and the like. The Exchange may impose sanctions on the issuer,[217] directors,[218] and nominated adviser[219] for non-compliance with their respective responsibilities. The Exchange may suspend or discontinue trading in the security on AIM. There is a separate Chapter 17 to the Rules of the Stock Exchange (hereinafter the "AIM Trading Rules") governing trading in AIM securities. The Trading Rules provide for registering member firms to act as market maker in

205. AIM Admission Rules ¶ 16.1(a)-(b).
206. AIM Admission Rules ¶ 16.2.
207. CA 1985 § 235.
208. AIM Admission Rules ¶ 16.1(d)(i).
209. AIM Admission Rules ¶ 16.1(d)(ii).
210. AIM Admission Rules ¶ 16.1(d).
211. AIM Admission Rules ¶ 16.28.
212. AIM Admission Rules ¶ 16.29.
213. AIM Admission Rules ¶ 16.30.
214. AIM Admission Rules ¶ 16.14.
215. AIM Admission Rules ¶ 16.22.
216. AIM Admission Rules ¶ 16.17.
217. AIM Admission Rules ¶ 16.32.
218. AIM Admission Rules ¶ 16.37.
219. AIM Admission Rules ¶ 16.38.

specific AIM securities and only such market makers can display quotations in the trading system.[220] The nominated broker must furnish the trading system with relevant information relating to the company and if there is no registered market maker in the security use its "best endeavours" when requested to find "matching business" in the security.[221] AIM has also adopted the Model Code governing dealings in the company's securities by directors and employees.[222]

There were 298 companies admitted for trading on AIM with a market capitalization of approximately £5,354,000,000 as of October 31, 1997.[223] Since its launch on July 19, 1995 through October 31, 1997, approximately £1,456,890,000 had been raised by AIM companies.[224] Information Technology companies form a significant component of the market, approximately 60 such companies with a market capitalization of approximately £1 billion traded on the AIM market in October of 1997.[225]

XII. THE LISTING RULES AND THE NEW PROSPECTUS REGIMEN

The Stock Exchange for years has regulated the public offering of securities of companies going public in conjunction with their admission to listing. *See* Section III(B). The Stock Exchange made minimal changes in The Listing Rules to accommodate the new prospectus regimen. Paragraph 5.1(a) of Chapter 5, which continues to be titled "Listing Particulars" (*see* Section VI), provides that an issuer applying for listing of securities to be offered to public in the United Kingdom for the first time must submit "a prospectus prepared in accordance with the provisions of this chapter." Paragraph 5.1(b) provides that in any other application for listing, listing particulars or a prospectus is to be prepared and submitted in accordance with the provisions of this chapter. Paragraph 5.1(c) provides that a prospectus and listing particulars must be published in accordance with the provisions of Chapter 8. Paragraph 5.1(d) provides that the contents of and procedures for submission for the prospectus are the same as those applicable to listing particulars, "subject to adaptations appropriate to the circumstances of a public offer." Paragraph 5.1(e) provides with some enumerated exceptions that references in the listing rules to listing particulars unless the context otherwise requires are applicable to a prospectus "as if any reference to listing particulars or supplementary listing particulars was a reference to a prospectus or supplementary prospectus as appropriate."

220. AIM Trading Rules ¶ 17.5.
221. AIM Trading Rules ¶ 17.4(b).
222. Stock Exchange Rules, Appendix 12.
223. Stock Exchange, *AIM Market Statistics* (Oct. 1997).
224. *Id.*
225. *See* Stock Exchange, *AIM News* (Oct. 1997), at 1.

The Listing Rules otherwise, with limited exceptions, refers only to listing particulars, although such references are to both when the document is a prospectus for purposes of the offering.[226] For convenience of exposition, reference herein generally will be to listing particulars/prospectus to indicate the dual role of the same document under the Listing Rules.

Paragraph 5.9 provides that the listing particulars/prospectus must be submitted in draft form to the Exchange (attention Listing Department) at least 14 days prior to the expected publication date. Paragraph 5.10 requires that it be submitted earlier in the case of a new applicant or if there are complex issues to be resolved "to allow proper consideration by the Exchange and consequent amendment and resubmission by the issuer." Paragraphs 5.11 through 5.23 set forth what is to be included in the "filing" and details such as annotated margins to indicate compliance with specific requirements and redlining of amendments (¶ 5.11). With a bow to "plain English," ¶ 5.7 provides that the particulars/prospectus must be written "in as easily analysable and comprehensible form as possible." Chapter 6 details the content of the listing particulars/prospectus, supplemented by Chapter 12 as to the form and content of financial statements and Chapters 18-23 as to specific industries (*e.g.*, Chapter 19, Mineral Companies) and specific types of securities (*e.g.*, Chapter 21, Investment Entities).

A supplement to the Listing Rules, unnumbered but titled "Rules for Approval of Prospectuses Where No Application for Listing Is Made," is added at the end of Chapter 26 (the last of the chapters). These Rules are sometimes hereinafter referred to as the 156A Rules. The 156A Rules set forth the content of a prospectus and procedures to be followed if no application for listing is being made in connection with the offering.[227] The requirements of this section are to be followed in connection with a first public offering by an issuer electing pursuant to Section 156A the alternative of complying with the disclosures and procedures required of listing companies, although the securities are not to be listed. This part has the effect of disapplying for the most part the parts of the Listing Rules that are over and above the requirements of schedule A/B of the Listing Particulars Directive. *See* Section XIII(B). The prospectus and other documents are to be submitted in draft form to the Exchange at least 14 days prior to the expected publication date or such longer period necessary to allow proper consideration and consequent amendment and resubmission.[228] An Appendix to this section

226. Chapter 8, titled "Publication and Circulation of Listing Particulars," although also applicable to a prospectus, consistently refers to listing particulars with limited exceptions, although under appropriate circumstances the reference is to a prospectus.

227. Since this part of the Listing Rules has no official designation, it will be referred to as the 156A Rules.

228. 156A Rules ¶ 6.

sets forth those portions of Chapter 6 relating to the content of listing particulars that apply to the prospectus.

XIII. CONTENT OF THE PROSPECTUS

A. Contents of Prospectus for Offering of Securities to be Listed

1. Introduction

The assumption made in this section is that the prospectus relates to the first public offer of shares by a company that has not previously listed shares and that the shares are to be listed in conjunction with the public offering of the securities. Table 1 to Appendix 1 to Chapter 5 of the Listing Rules sets forth seven categories of information that are to be included in the prospectus and specifically references the applicable portions of Chapter 6 prescribing the content of the information to be included in the prospectus. The specific items referenced in Chapter 6 reference other provisions of the Rules; in particular, those relating to financial information that are set forth in Chapter 12. Reference often is made in the Listing Rules to the "group" and to "undertakings," which are respectively "British speak" for the consolidated entity and subsidiaries. For convenience of exposition, the consolidated entity is referred to herein as the issuer or the company. To avoid unduly extensive footnoting, the applicable paragraph of the Listing Rules sometimes is set forth in parenthesis after the description of the specific prospectus disclosure required by the Listing Rules.

2. Description of Business

An extensive description of the company's business is called for including the following:

A description of the company's principal activities that sets forth the main products sold and/or services provided. (6.D.1). Description of any recent (last 12 months) unfavorable development ("interruption") in the company's business that has a significant effect on the company's financial position. (6.D.9)

Information relating to significant new products and/or activities, if any. (6.D.2)

Net turnover (revenue) for the last three years by business segments and geographical markets. (6.D.3)

A description by location, size, and manner held of the principal properties of the company. A principal property is defined in terms of one that accounts for ten percent of net revenues or production. (6.D.4).

Description of substantial expenditures being made for new facilities or otherwise, noting where being undertaken (at home or abroad) and how financed. (6.D.12-6.D.13)

The occurrence during the relevant period of non-representative events ("exceptional factors") that materially impacted the company's principal business activities, products, revenues, or plants. (6.D.5)

A description of the company's research and development policies during the past three financial years. (6.D.5). Description of substantial expenditures being made or contemplated on research and development, noting where being undertaken (at home or abroad) and how financed. (6.D.12-6.D.13)

A description of substantial investments made in acquisition of other enterprises during the past three fiscal years and the current fiscal year, setting forth the amount invested and the interests acquired. (6.D.11)

A description of legal proceedings that had or may have a significant impact on the company's financial position. (6.D.7)

The average number of employees over the last three fiscal years, by segments of the company's business activities, if possible, noting material changes occurring during the period. (6.D.10)

Summary information on the extent the company is dependent, if at all, on patents, licenses, material contracts, or new manufacturing processes if of "fundamental importance" to the company's profitability. (6.D.6.)

If the company is engaged in mining, oil and gas exploration and development, or similar activities, information relating to mineral reserves and other relevant information relating to the exploitation of same called for separately in Chapter 19 relating to mining companies. (6.D.16)

3. Financial Statements

a. The Annual Accounts and the Companies Act

The provisions relating to financial information requires some understanding of the financial reporting required of substantially all companies incorporated as public limited liability companies (plc) in the United Kingdom as well as the requirements for admission of a stock to the official list. The Companies Act, with some exceptions for small companies and so-called private companies, requires all corporations ("companies") to prepare audited annual accounts.[229] The United King-

229. CA 1985 § 226 *et. seq.*

dom, in accordance with the Fourth Company Law Directive of the European Union,[230] requires all corporations ("companies") to maintain adequate accounts and to prepare for each fiscal ("financial") year a balance sheet and a profit and loss statement, with accompany notes.[231] The format of the financial statements ("annual accounts") and the accompanying notes are prescribed in some detail following generally the requirements of the Fourth Directive. The directors must prepare an annual report[232] and independent auditors must report on the financial statements. The auditors' report must express an opinion that the financial statements are "properly prepared" in accordance with the requirements of the Act and "whether a true and fair view is given" of the state of affairs at the end of the year and the profit or loss for the year.[233] The notes, among other things, must include information relating to the shareholdings, compensation ("emoluments"), and pensions of the directors.[234] Detailed information relating to subsidiaries, joint venture arrangements, and the like must be included in the notes for companies required to file consolidated financial statements ("group accounts"). Similar information must be included in the notes to financial statements of companies not required to file consolidated statements but which have subsidiaries. Companies within the medium size category as defined by the statute are allowed to include somewhat less information and small companies as defined are allowed to have the auditors' report prepared by someone meeting lesser standards than required of other companies.[235] The auditor, however, in each instance must meet the independent requirements established by statute and must undertake the "investigation" prescribed by statute.[236] The annual accounts, directors' report, and auditors' report must be sent to all shareholders ("members"), debenture holders, and other persons enti-

230. Fourth Council Directive on the Annual Accounts of Certain Types of Companies, Directive 78/660 (July 25, 1978).

231. The provisions relating to preparing and publishing financial statements are found in Part VII of the Companies Act of 1985 (§§ 221-262 and related schedules) and were extensively amended by Part I of the Companies Act of 1989 (§§ 1-23). Schedule 4 to Part VII, as amended prescribes the format of the financial statements and the basic contents of the accompanying notes. Schedule 5 to Part VII, as amended, sets forth the information to be included in the notes relating to subsidiaries. Schedule 6 to Part VII, as amended, prescribes the information to be included in the notes relating to the directors (shareholders, compensation, pensions, etc.). In principle the requirement to prepare Company Accounts to UK standards extends to non-UK companies with established places of business in the UK (§ 700 of the Companies Act 1985), but the Companies Act of 1989 amendments with limited exceptions do not apply to such companies. *See* the Overseas Companies (Accounts) (Modifications and Exemptions) Order 1990 SI 1990 No. 440.

232. CA 1985 § 234.

233. CA 1985 § 235.

234. CA 1985 § 232.

235. CA 1985 § 248.

236. CA 1985 § 249D.

tled to notice of the general meeting.[237] The annual accounts, directors' report, and auditors' report must also be filed with the Registrar.[238] The failure to comply with specific provisions constitutes an offense for which directors who fail to assert an adequate defense under the statutory provisions can be imprisoned or fined.[239] The Secretary of State (head of the Department of Trade) also has authority to initiate proceedings to assure compliance with the statutory provisions.[240]

b. Financial Reporting History Required for Admission to Listing

In order for a company to have its equity securities admitted to the Stock Exchange, absent special dispensation from the Exchange, the company must have published or filed consolidated financial statements covering a period of at least three years. The statements must have been prepared in accordance with the company's national law and "in all material respects" in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards formulated by the International Accounting Standards Committee.[241] The company during the minimum three-year period covered by the financial statements must have been carrying on as its main activity a revenue-earning business.[242]

c. Comparative Table vs. Audited Report

The Listing Rules assume that any company applying for admission of the securities for listing has three years of financial statements that have been published and are available.[243] The financial statements, therefore, do not have to be included in the prospectus, but a comparative table of financial information based thereon is included in lieu thereof.[244] A comparative table, however, cannot be used in lieu of an audited report under the following circumstances:[245]

A material change to the company's business or structure occurred, including material acquisitions or dispositions, during the period covered by the financial statements or during the interim from the end of the periods covered to the date of application for listing.

A material change has been made in accounting policies or a mate-

237. CA 1985 § 238.
238. CA 1985 § 242.
239. CA 1985 § 233.
240. CA 1985 § 245B.
241. Listing Rules ¶¶ 3.3-3.4.
242. Listing Rules ¶ 3.6.
243. Listing Rules ¶ 12.17(b).
244. Listing Rules ¶ 12.1.
245. Listing Rules ¶ 12.1.

rial adjustment has been made or is required to be made to the published audited accounts.

The auditors' report for the last three years "has been qualified or refers to a matter of fundamental uncertainty."

Notwithstanding none of the foregoing may be applicable, an auditor's report may be required if the Exchange decides for any reason not to accept the auditors' report of the published statements "or that an additional report is necessary."

d. The Comparative Table

If a comparative table may be used, it must cover at least three years to the end of the latest audited financial period. The comparative table must extract from the audited accounts without material adjustment appropriate profit and loss, balance sheet, and cash flow statement items.[246] The cash flow statement may pose some problems as the annual accounts required of all companies does not specifically require a cash flow statement, although it may be required by generally accepted accounting principles. *See* Section XIII(A)(3)(a). The Listing Rules specifically require a table showing the changes in financial position either in the form of a source and application of funds statement or a cash flow statement. Rule 6.E.10. Accounting policies should be set forth as well as notes to the last two balance sheets and for the period covered by the accountant's report for the profit and loss and cash flow statements. The presentation must be consistent with the issuer's annual accounts. Rules 12.19-12.20. In the case of an offering of previously unlisted securities, a letter from the issuer's auditors or reporting accountants, as appropriate, must be submitted to the Exchange. The letter must state that in their opinion the issuer's annual accounts were prepared and audited in accordance with the standards established by the exchange and that the comparative financial table was "properly extracted without material adjustment from the audited accounts." Rule 12.18. The accounting standards acceptable to the Exchange are United Kingdom or United States Generally Accepted Accounting principles, or the International Accounting Standards established by International Accounting Standards Committee. Rule 3.3(c). The annual accounts must have been independently audited in accordance with the auditing standards required in the United Kingdom, the United States, or the International Standards of Auditing established by the International Auditing Practices Committee of the International Federation of Accountants. Rule 3.3(d). The statements must be prepared in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards. Rule 12.14(d).

246. Listing Rules ¶ 12.17.

e. The Accountant's Report

If an accountant's report is required, it must cover the same period and the same financial statements and related information covered by a comparative table. Rules 12.19-12.20. The accountant's report must be prepared by independent accountants qualified to act as auditors under the Listing Rules. Rule 12.14(c). The rule on independence provides that the "auditors must be independent of the applicant and comply with guidelines on independence issued by their national accountancy bodies." Rule 3.5. The financial statements must be prepared in accordance with United Kingdom or United States Generally Accepted Accounting principals, or the International Accounting Standards. Rule 12.14(d). There are limited circumstances under which the Exchange will accept financial statements of overseas companies (companies organized under the laws of a country other than the United Kingdom) not prepared in accordance with such standards. Rule 17.3. The Report must contain an opinion of the accountants as to whether or not the financial statements "give[] a true and fair view of the financial matters set out." Rule 12.14[e]. If the opinion is qualified, the opinion must refer to "all material matters" as to which the accountants have reservations, the reasons therefor, and, if practicable, quantify the effect thereof. Rule 12.14(f). If the company has not previously listed securities on the Exchange, the opinion cannot "contain any qualification or reference to a matter of fundamental uncertainty which relates to a matter of significance to investors." Rule 12.14(g).

The accountant's report can contain "only such adjustments to the previously published figures" as the accountants consider necessary. The accountants must prepare and submit to the Exchange a written statement of the adjustments in sufficient detail to show how the reported figures reconcile to the corresponding information in the published accounts. Rule 12.15.

f. Earnings Per Share

If the issuer includes its own accounts (as distinguished from consolidated accounts) in the comparative table or the accountants' report, as appropriate, it must include the profit or loss per share from ordinary operations ("ordinary activities"), after tax, for each of the last three financial years. Rule 6.E.4(a). If the issuer includes consolidated annual accounts, the corresponding figure on a consolidated basis must be set forth. Rule 6.E.4(b). Dividends paid per share for the last three financial years must also be included. Detailed specified information must be included in the notes relating to each company in which the issuer owns a significant direct or indirect participating interest, the consolidation principles applied, the indebtedness of the subsidiaries included in the consolidation, and the aggregate contingent liabilities (including guarantees) of the consolidated entity. Rules 6.E.11-6.E.13,

6.E.15.

g. Working Capital

The prospectus must include a statement by the issuer that in its opinion the working capital available to the consolidated entity is sufficient for its "present requirements." Rule 6.E.16. Such statement, made after "due and careful enquiry" is also a condition to admission for listing. Rule 3.10. In the case of an issuer with securities already listed, if it can not give such opinion, the prospectus may state how it propose to provide the additional working capital necessary to meet its present requirements. Rule 6.E.16. In such case, the securities may be admitted to listing if the Exchange is satisfied that the provision for additional working capital is satisfactory. Rule 3.10.

h. Interim Period

If more than nine months have elapsed since the end of the last financial year for which annual accounts have been published, interim statements covering at least six months must be included in the prospectus. Such interim statements can be unaudited if it is so stated. Rule 6.E.7. If there has been any significant change in the financial position or business ("trading activities") of the issuer since the end of the last financial period for which either audited financial statements or interim financial statements were published, such changes must be described. Rule 6.E.8.

4. Material Trends and Forecasts

The prospectus must include "general information" as to the trends in the issuer's business since the last published yearly financial statements with emphasis on significant recent trends in production, sales, inventories ("stocks"), backlog ("order book"), costs and prices. Rule 6.G.1(a). Information as to the issuer's prospects relating "at least" to the current financial year must be set forth. This should include any material information relating to such prospects. Specifically, "special trade factors or risks (if any)" that "could materially affect the profits" if not otherwise disclosed in the prospectus and if "unlikely to be known or anticipated by the general public." Rule 6.G.1(b). Statements relating to future prospects "must be clear and unambiguous." Rule 12.22. The prospectus does not have to include a profit forecast or estimate, but if one is included certain limitations are applicable. Rules 6.G.2, 12.22. The issuer must determine with its sponsor in advance whether statements relating to its future prospects will constitute a forecast or estimate. Rule 12.22. An estimate pertains to a financial period that has expired, but for which results have not yet been published. Rule 12.21. Any words that expressly or by implication state a minimum or maxi-

mum likely level of profits for a period subsequent to the published audited accounts or contain data from which "an approximate figure for future profits or losses may be made" is, as appropriate, a profit forecast or estimate. This follows whether or not the word "profit" is used. A dividend forecast may also be a profit forecast if "the issuer has a known policy of relating dividends to earnings" or because of the level of retained earnings or otherwise such dividend forecast "implies a forecast of profits." Rule 12.23. The forecast or estimate normally should be to the end of the issuer's accounting period. The forecast or estimate normally should be before tax. If the tax charges are expected to be abnormally high or low that should be disclosed separately as well as any exceptional item. Rule 12.26.

The principal assumptions upon which the issuer based its profit forecast or estimate must be set forth in the prospectus. Rule 6.G.2. A profit forecast or estimate must be reported on by the auditors or reporting accountants and by the sponsor. Rule 12.24. The prospectus must include a report of the accountants setting forth their opinion as to whether the profit forecast has been properly complied on the stated basis and that the accounting basis for such forecast or estimate is "consistent with the accounting policies of the issuer." Rule 12.24 and Rule 6.G.2. The report of the sponsor must confirm that the profit forecast, if included, "has been made after due and careful enquiry by the directors." Rules 6.G.2. The sponsor's report included in the prospectus must also state "that it has satisfied itself that the forecast or estimate has been made after due and careful enquiry by the issuer." Rule 2.15. It is interesting that the UK in contrast to the U.S. places more emphasis on assuring that appropriate care is employed and procedures adopted for making profit forecasts than surrounding the forecast with cautionary statements designed to protect against liability. This may be explicable by virtue of the fact that there are no class actions as such in the UK and to date few entrepreneurial lawyers making a career out of bringing private actions alleging securities fraud.

5. Persons Responsible for the Prospectus

The prospectus must set forth information relating to the persons responsible for the prospectus, the auditors, and other advisers. Rule 6.A. This information is of particular significance since it is closely related to the provisions imposing civil liability. *See* Section XIV(B). The information in this category includes a prescribed declaration of the directors. The declaration of the directors is to the effect that they assume responsibility for the information in the prospectus. To the best of their knowledge and belief (taking "reasonable care to ensure that such is the case") the information set forth in the prospectus "is in accordance with the facts and does not omit anything likely to affect the import of such information." Rule 6.A.3. This is consistent with the provisions of Section 152(1)(b) of the FSA, which includes the directors of the issuers

among the persons responsible (and, hence, potentially liable under Section 150) for untrue or misleading statements in the prospectus. It is also a consistent with the defense of a responsible person under Section 151(1) that "he reasonably believed, having made such enquiries (if any) as were reasonable, that the statement was true and not misleading or that the matter whose omission caused the loss was properly omitted." The directors' declaration can be limited to specific parts of the prospectus if so indicated (Rule 6A.2), but, presumably, can only exclude parts for which someone else has primary responsibility such as portions attributed with their consent to experts. The name and home or business address of each of the directors must be set forth in the prospectus. Any statement or report included in the prospectus and attributed to a person as an expert must set forth that such statement or report was included with the consent of such expert in the form and context in which it appears in the prospectus and that such person has authorized the contents of such part of the prospectus for purposes of section 152(1)(e) of the FSA. Rule 6.A.9. Section 152(1)(e) imposes responsibility and potential liability on any person "who has authorised the contents of, or any part of" the prospectus. The inclusion of such report of an expert with the expert's consent would also appear to be covered by Section 152(d) imposing responsibility on persons who accept responsibility for any part the prospectus, which seems apropos since 152(1)(e) is applicable to any person not otherwise responsible under Section 151. This appears to include the accountants who furnish the accountants' report if required by Rule 12.1[a]-[d]. It is not clear, however, whether it is applicable to the accountant's opinion required by Rule 12.18 relating to the comparative financial table, since it is furnished in the form of a letter to the Stock Exchange rather than as part of the listing particulars/prospectus. *See* Section XIII(A)(3)(c). Section 152, however, would apply to the accountants' report required under Rule 12.2 if an accountant's report is presented in substitution for a comparative table or the published accounts. Similarly, it appears applicable to the accountants' report required under Rule 12.24 if the prospectus includes a profit forecast or estimate. *See* Section XIII(A)(4). There may, of course, be other reports of experts included in the prospectus with consent (*e.g.*, mineral or hydrocarbon reserves (Rules 19.12 to 19.16)), in which event an appropriate statement relating to their consent and authorization must be included. The prospectus must also include the names and addresses of the reporting accountants and of any other expert to whom a statement or report in the prospectus is attributed. Rule 6.A.8. The prospectus must include a statement that the issuer's annual accounts (financial statements) have been audited for the last three years (Rule 6.A.5) and the names, addresses, and qualifications of the auditors who audited such statements (Rule 6.A.4). A statement of what other information audited by the auditors and included in the prospectus must also be set forth. Rule 6.A.6. If any audit reports have been refused by the auditors on any of the above referred to financial statements or con-

tain qualifications, such refusal or qualification must be set forth "in full and the reasons given." Rule 6.A.5. If during the last three financial years auditors have resigned, been removed, or not re-appointed, additional disclosure may be triggered. In such event, if they delivered a statement to the issuer of circumstances they believe should be brought to the attention of the shareholders or creditors of the issuer, the prospectus must set forth such information, if material. Rule 6.A.7.

6. Legal Advisers

The prospectus must also include the names and addresses of the issuer's legal advisers and of the legal advisers to the issue. This appears to be for informational purposes rather than liability purposes, except to the extent the prospectus may include an opinion of such legal adviser as an expert. Section 152(8) of the FSA specifically provides that no person shall be deemed responsible for the prospectus "by reason of giving advice as to their contents in a professional capacity." The names and addresses of the issuer's bankers must also be set forth in the prospectus. This also appears to be for informational purposes only.

7. Sponsor

The prospectus must also set forth the name and address of the sponsor. Rule 6.A.8. The sponsor (who also may be and usually is the underwriter) as sponsor plays an unique role and its responsibility for the prospectus or portions thereof is not clear beyond the fact that there is no specific reference to the sponsor as a person responsible for the prospectus in Section 152 of the FSA. The Listing Rules set forth a number of responsibilities of the sponsor (Rules 2.1-2.18), but specifically provides that "[T]hese responsibilities are owed solely to the Exchange." Rule 2.5. Failure of the sponsor to carry out its responsibilities may result in censure and publication of such censure and removal from the Exchange's register of qualified sponsors and publication of such removal. Rule 2.25. The obligations imposed on the sponsor generally require it to play an important role in the preparation of the prospectus, including "seeking the Exchange's approval of the listing particulars [prospectus]." Rule 2.16(c). Some of those rules relate to specific information to be included in the prospectus. For example, the sponsor must obtain written confirmation from the issuer that its working capital is sufficient for its present requirements and that such confirmation of the issuer was "given after due and careful enquiry by the issuer" and that the financial institutions providing working capital "have stated in writing" that relevant financing arrangements exist between the issuer and the financial institution. ¶ 2.14. The issuer in turn has to make appropriate representations as to the adequacy of the working capital in the prospectus, but no specific reference is made to the role of the sponsor in that regard. *See* Section XIII(A)(3)(g). The one area in which the

sponsor has to submit a report to be included in the prospectus pertains to a profit forecast or earnings estimate if such forecast or estimate appears in the prospectus. In that event, a report from the sponsor must be included in the prospectus stating that "it has satisfied itself that the forecast or estimate has been made after due and careful enquiry by the issuer." Rule 2.15. *See also* Section XIV(C). Under these circumstances, arguably, the sponsor is the person responsible for such report under the provisions of Section 152(d) imposing responsibility on persons who accept responsibility for any part the prospectus. The Exchange also has authority to require a responsibility statement from persons other than directors. Rule 5.4. This might be utilized, for example, in the case of shadow directors or control persons who exercise the functions of a director without formal appointment as such.

8. Distribution Arrangements

The Listing Rules specifically call for limited information relating to the nature of the offering and the distribution terms. The prospectus must set forth the number of shares offered (6.B.15(b)); the offering price (6.B.15(d)(i)); the method of payment of the price (6.B.15(d)(iii)); the period during which the offering will remain open (6.B.15(f)); the names, addresses and description of the underwriters and the amount of the offering being underwritten (6.B.15(h)); an estimate of the aggregate and per share expenses of the offering payable by the issuer (6.B.15(i))); the total remuneration of the underwriter, including underwriting commissions or similar compensation of the financial intermediaries (6.B.15(i)), and the estimated net proceeds to be received by the issuer. (Rule 6.B.15(f)). If a tranche of the offering is being reserved for marketing in other countries, details relating to same must be set forth. If securities of the same class concurrently are being placed privately details relating to such placing must be set forth. Rule 6.B.22. Details of the aggregate number of shares reserved for allocation to existing shareholders, directors, employees and past employees of the issuer or its subsidiaries and any other preferential allocation arrangements have to be included in the prospectus. Rule 6.B.26. The date the securities are expected to be admitted to listing and on which dealings is to commence is to be set forth. Rule 6.B.18. If listed on another stock exchange or traded in a regulated recognized securities market, such information should be included. Rules 6.B.19-6.B.20. The prospectus also must set forth the intended application of the net proceeds from the offering. Rule 6.B.15(j).

9. Management of the Company

This part provides for disclosure of information about the persons having the management control of the company and, in particular, the following:

(i)An indication of the main activities of the directors outside the group where such activities are significant with respect to the group, together with a description of any other relevant business interests or activities they may have. Rule 6.F.1-6.F.2.

(ii)Details of directors' remuneration and benefits (of whatever description) in the last financial year. Rule 6.F.3.

(iii)Details of the beneficial and non-beneficial interests of any directors in the shares or debentures, or in rights to subscribe for shares or debentures, in the issuer, any subsidiary or holding company and any subsidiary of any holding company (including, in the case of interests in the shares or debentures themselves, the interests of the spouse and children of the director). If a director does not have any such interest, it must be so stated. Rule 6.F.4.

(iv)Particulars of the interests of any director in transactions which were either unusual in their nature or conditions or significant to the business of the group and were effected by the issuer in the current or preceding financial year or remain in any respect outstanding or unperformed. If there have been no such transactions, there must be a statement to that effect. Rule 6.F.6.

(v)Details of any employees' share or share option schemes.

(vi)Details of the directors' service contracts (including unexpired term, notice periods, remuneration, commissions or profit sharing arrangements and any other matters necessary to enable investors to estimate the possible liability of the company on early termination). However, it is not necessary to give such details if the service contract in question was available for inspection in accordance with paragraph 16.9 before the last annual general meeting and that service contract has not subsequently been varied. There must also be an estimate of the amounts payable to the issuer's directors by the group in the financial year current as at the date of the listing particulars. Rules 6.F.10-6.F.12.

10. Basic Information

Certain basic information about the issuer is required: its name, place of incorporation and basic information about its capital and changes to its capital over the preceding three years. Information must be included about persons having preferential subscription rights; convertible debt securities; options; shareholdings exceeding three per cent of share capital and potential controlling interests. Rules 6.C.1-6.C.6, 6.C.10-6.C.16. The following also must be included.

(i)*Availability of documents for inspection.* Paragraph 6-C.7 requires that various documents be made available for inspection for at least 14 days at a named place in or near the City of London (or such other place as the Stock Exchange may determine), at the issuer's regis-

tered office and (if any) the offices of its paying agents in the United Kingdom. The most important of the documents which are to be displayed include the following:

(a)Material contracts (see below) and directors' contracts;

(b)Reports, letters, balance sheets, valuations and statements prepared by any expert, which are extracted or referred to in the listing particulars;

11. Material Contracts

A summary must be given of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group in the two years immediately preceding the publication of the listing particulars.[247] The summary must include particulars of dates, parties, terms and conditions and any consideration passing to or from the issuer or any other member of the group, unless such contracts have been on view during the two years preceding publication, when a statement referring to them collectively as being on view will suffice. Paragraph 5.22, following section 148 of the Act, lays down a procedure under which the Stock Exchange may allow all or part of a material contract to be withheld from public inspection. A written request must be made to the Stock Exchange setting out the ground upon which the request is made. This ground must be one of the three set out in the Listing Rules (¶ 5.18); the most likely ground will be "detriment" to the issuer by reason of trade competitors obtaining access to sensitive commercial information.

It is often difficult to determine whether a contract is material and whether it was entered into in the ordinary course of business. The Listing Rules do not provide (and neither did the Companies Act 1985 from which the phrase was derived) a definition of "material contract." The relevant case law dates to the 19th century. It would seem to indicate that materiality should be looked at from the point of view of the investor rather than the company. In *Sullivan v. Mitcalfe*,[248] the court considered that a material contract is one that "upon a reasonable construction of its purport and effect would assist a person in determining whether he would become a shareholder of the company").[249] It has been held that a director who knows of the existence of a contract cannot escape liability for nondisclosure of that contract by professing ignorance of its content or materiality. Quite apart from the specific requirements of the Listing Particulars, it may be necessary to disclose any other con-

247. Listing Particulars § 6.C.20.

248. (1880) 5 CPD 455.

249. *See also* Twycross v. Grant, (1877) 2 CPD 469, and Broome v. Speak, (1903) 1 Ch. 586.

tract that is material, *e.g.*, a vital long-term supply contract that is about to expire, even if it was entered into in the ordinary course of business and/or more than two years before publication of the particulars.[250]

12. Dealings with Promoter(s)

Details must be given of any payment or benefit made or given to a promoter of the company to the extent that disclosure is required by law. In addition The Stock Exchange may require to be included in the listing by name of any promoter of the company or any of *its subsidiaries* and the amount of any cash, securities or benefits that are proposed to be or have been, within the two years preceding publication, paid, issued or given to any promoter and the consideration given therefor.[251]

A "promoter" has been defined as a person who "undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose."[252] This definition might appear to limit the term to persons who are involved in the formation of the company. If that were so, the consequences could be overcome by purchasing a ready-made company. In fact, this is not a complete definition and it is submitted that the relevant factor is the promotion of a project with a company as the vehicle, so that the purchaser of the ready-made company would be a promoter if he also promoted the project. Thus, a parent company floating off a subsidiary would usually be a promoter as would an initial subscriber or director who has taken the initiative in setting up the company. An issuing house, on the other hand, will not usually be a promoter simply by virtue of its responsibilities as an underwriter, although it may cross the line if it actively participates in setting up the company, has representatives on the board and is otherwise significantly involved in the decision to float the company.

13. Supplementary Prospectus

If, between the time when the prospectus/listing particulars have been formally approved by the Stock Exchange and commencement of dealings in those securities, the persons responsible for the listing particulars become aware of any significant change regarding any matter included in the listing particulars/prospectus or any significant new matter, the inclusion of which would have been required in the listing particulars if it had arisen at that time, the Stock Exchange must be informed immediately and supplementary listing particulars/prospectus

250. FSA § 146.
251. Listing Rules ¶ 6.C.21.
252. Twycross v. Grant, (1877) 2 CPD 469.

submitted for approval and, when approved, published (FSA § 147). The Listing Rules (¶ 8.20) set out how supplementary listing particulars are to be published; this includes circulation to shareholders if the listing particulars were themselves circulated. A significant change or a significant new matter for purposes of section 147(2) of the Act refers to such information as specified in section 146 of the Act that investors reasonably require for the purposes of making an informed assessment. *See* Section XIII(A)(15) below.

14. General Duty of Disclosure

Quite apart from the listing rules, section 146 of the Act imposes on the persons responsible for, the listing particulars a duty to disclose in the listing particulars all such "information as investors and their professional advisers reasonably require, and might reasonably expect to be included for the purpose of making an informed judgment about the value of the securities as an investment. The information to which the duty applies is that which is within the knowledge of the persons responsible for the listing particulars or which it would be reasonable for them to ascertain by making enquiries. The Listing Rules (¶ 5.5) now require as part of the listing application procedure that the issuer must provide the Stock Exchange with a letter signed by or on behalf of each director of the issuer confirming that the listing particulars contain all such information.

15. Verification

Directors in the UK, like directors in the United States, must exercise appropriate diligence to avoid liability for misrepresentations in a prospectus by verifying to the extent reasonable representations set forth therein. Obviously, each director of a company cannot be expected to know every fact relating to the company. With respect to some statements it may be proper for a director to rely on other people, including the company's advisers, to check particular parts of the prospectus or listing particulars. Reliance on an appropriate person to carry out a detailed verification should afford a director reasonable grounds for his belief that a particular statement is true, provided that it was reasonable to rely on that person in the circumstances and the director believes on reasonable grounds that he has in fact verified the statement. *See* further discussion of director's liability at Section XIV.

It is often very difficult to impress on directors the extent of their individual responsibility for the prospectus and the significance in terms of limiting potential liability. To assist directors and others to show that reasonable care has been taken in the preparation of the prospectus or listing particulars, and thereby minimize the risk of liability under section 150 of the Act or under Regulation 14 of the POS Regulations (*see also* section 151(1) and Regulation 15(1), and the conditions

thereto discussed at Section XIV(E)), should it subsequently be found to be untrue or misleading, the practice has grown up of preparing verification notes as part of the verification process. This process as a whole should involve:

(a)the identification of at least one source for the verification of every statement of fact;

(b)the recording in writing of that source;

(c)the recording in writing of a reasonable basis for each statement of opinion;

(d)each of the directors having sufficient time to consider and comment on the prospectus and the notes (so that they may be corrected and/or amplified if necessary); and

(e)the notes, including copies of documents resulting from the verification process, being presented to the board meeting at the time when the prospectus is finally approved.

It is obviously desirable that a full board meeting attended by every director should consider the prospectus substantially in its final form while it is still possible to incorporate any amendments considered necessary. It must be emphasized that the responsibility for statements in the prospectus does not end with its issue but continues for a period of time (section 150(1) of the Act or Regulation 14(1) of the POS Regulations). *See* Section XIV(C).

16. Timetable for Listing Application

The timetable for an application for listing is as follows:

Applications for listing are considered on Wednesday and Friday of each week. Not later than 14 days prior to the intended publication date of the listing particulars/prospectus, three copies of the following documents must be submitted to the Stock Exchange in draft:[253]

Listing particulars and cover;

Application forms to purchase or subscribe shares;

Formal notices of the offer;

Mini-prospectus (if used);

Summary particulars (if used);

Text of the accountant's report (if any);

Sponsor's working capital letter;

Text of the directors' letter confirming that to their knowledge the prospectus contains all relevant information;

253. Listing Rules ¶ 5.9.

The text of any relevant letter of application for any derogation from the listing rules. The two most important of these letters are the "non applicable letter" — a letter specifying all information required by the listing rules but not contained in the prospectus, along with an explanation as to why not — and the "omission" letter, requesting the Exchange to authorize the omission of any required information.

The Exchange will not permit an application for listing to proceed until it has reviewed and accepted all these documents. However, except in the case of the application letters the Exchange has very limited discretion in that it (probably) cannot reject a prospectus that complies with the listing requirements on grounds not related to the content of the document. In practice, however, the Exchange has been able to discourage inappropriate applicants from listing without having to test this point.

Forty-eight hours before consideration of the application for listing, the following documents must be delivered to the exchange:[254]

The application form for listing;

Two copies of the listing particulars;

A copy of the national newspaper advertisement (if any) containing listing particulars, mini-prospectus, offer notice, formal notice or other such document;

A copy of the board resolution allotting the securities;

In the case of a new applicant, various constitutional documents of the company.

No later than 9:00 a.m. on the day the application for listing is to be considered, the following must be delivered to the exchange:[255]

Payment of the listing fees;

A statement of the total shareholdings in the company broken down by class;

Where no prospectus has been published, a letter confirming that the securities have not been offered to the public.

17. Publication of the Listing Particulars/Prospectus

Chapter 8 of the Listing Rules sets forth the publication requirements applicable to Listing Particulars. The same provisions are made applicable subject to adaptation appropriate for a public offer to a prospectus when an issuer applies for listing in connection with the first offer of the securities to the public in the United Kingdom.[256] The listing

254. Listing Rules ¶ 7.5.
255. Listing Rules ¶ 7.7.
256. Listing Rules ¶ 5.1(a)-(d).

particulars/prospectus cannot be published until formally approved by the Stock Exchange[257] and cannot be circulated or made available publicly until published in accordance with the procedures described immediately below.[258] The listing particulars/prospectus is published by making printed copies thereof available to the public free of charge at the Company Announcement Office of the Exchange, the issuer's registered office in the UK (if any), and the offices of any paying agent of the issuer in the United Kingdom.[259] A notice of the availability of the listing particulars/prospectus must be published in at least one national newspaper no later than the next business day following publication.[260] Copies of the listing particulars/prospectus must be available at the registered office of the issuer and the offices of its paying agent for at least 14 days, commencing in most instances with the day on which the notice of availability is published.[261] In addition, at least 30 copies and such additional copies necessary to satisfy public demand must be available at the Company Announcement Office of the Stock Exchange for at least the first two of the 14 days.[262]

B. Contents of Prospectus for 156A Securities

The Exchange has adopted Rules for Approval of Prospectuses Where No Application for Listing is Made (hereinafter the "156A Rules"). The 156A Rules follow Chapter 26 and have no Chapter designation. Strictly speaking, the 156A rules apply to an issuer who is not applying for a listing that proposes to offer securities to the public in the UK for the first time AND the securities are to be offered to the public or are to be the subject of an application to the official list in another member state simultaneously or within a short time (normally within three months) of the offering in the UK.[263] There, of course, is little reason for an issuer to comply with the 156A Rules unless it intends to offer and/or list the securities in another member state, but, presumably, this does not require the issuer to go forward with the offering and/or listing application in another member state. The approach of the 156A Rules as to the content of the prospectus is to identify and disapply those of the Listing Rules that are over and above the disclosure standards set by Schedules A/B of the Listing Particulars Directive. The Listing Particulars Directive establishes minimum standards

257. Listing Rules ¶ 8.1.

258. Listing Rules ¶ 8.2. Draft listing particulars/prospectus clearly marked as a draft, however, can be circulated by to approval and prior to publication for purpose of arranging a placing or syndication or underwriting. *See* Listing Rules ¶ 8.3.

259. Listing Rules ¶ 8.4.

260. Listing Rules ¶ 8.7. For content of such notice, *see* Listing Rules ¶¶ 8.10-8.11.

261. Listing Rules ¶ 8.5.

262. Listing Rules ¶ 8.6.

263. 156A Rules ¶ 1.

that each Member State must adopt. Schedule A of the Listing Particulars Directive sets forth the disclosure required in for the admission of shares to the official list and Schedule B sets forth the disclosure required for the admission of debt securities to the official list. The London Stock Exchange has incorporated comparable standards into the Listing Rules, but has added a number of additional requirements that go beyond Schedules A/B. Those that are required by Schedules A/B are identified in the Listing Rules by an annotation referencing the relevant provision of Schedules A/B being followed. Article 12 of the Prospectus Directive requires as to a prospectus seeking the benefit of the mutual recognition provisions that it meet the standards established by the Listing Particulars — *i.e.*, by Schedules A/B. The 156A Rules require that the prospectus contain the information set out in Chapter 6 (which prescribes the content of the listing particulars/prospectus for a company applying for listing) to the extent required by the Appendix to the 156A Rules. Paragraph 3 of the 156A Rules Appendix lists the provisions of Chapter 6 that are not applicable to a 156 prospectus and by this process for the most part leaves only those items required by Schedule A/B as applicable to a 156A prospectus. There are a few instances, as indicated below, in which the prospectus goes beyond Schedule A/B. This leaves a document consisting of the following:

Business Activities. Identical to prospectus for securities to be listed. *See* Section XIII(A)(2).

Financial Statements. The financial information can be presented in the form of a comparative table in lieu of the accountants' report.[264] The issuer's auditors or reporting accountants, as appropriate, must deliver a letter to the Stock Exchange to the effect that the comparative table of financial information was extracted from the issuer's annual accounts and that the annual accounts were prepared and audited in accordance with the appropriate accounting standards.[265] This letter, however, is not part of the prospectus. The circumstances under which the accountants' report has to be used are not applicable. The prospec-

264. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.E.2 of the Listing Rules from the information to be included in an 156A prospectus. Paragraph 6.E.2 sets forth by incorporating relevant provisions of Chapter 12 the requirements as to the financial statements to be included in and the form of the accountant's report. An applicant for listing, except under specified circumstances or unless it elects to file an accountant's report, can use a comparative financial table meeting the requirements of ¶ 6.E.1 of the Listing Rules instead of an accountant's report. *See* § 1.13[1][c][iii]. Paragraph 6.E.1 incorporates by reference the relevant provisions of Chapter 12 setting forth the content and form of the comparative table. Since the Appendix to the 156A Rules provides that the prospectus of a 156A filer "shall not include information required by paragraph . . . 6.E.2" the assumption is made that such filers are to use a comparative table meeting the requirements of ¶ 6.E.1 rather than an accountant's report.

265. *See* 156A Rules, Appendix ¶ 3 incorporating Listing Rules ¶ 6.E.1, which in turn incorporates ¶ 12.18.

tus, therefore, should include a comparative financial table similar with limited exceptions to that required in the case of securities to be listed. *See* Section XIII(A)(3)(c). Since there is no requirement that the issuer have been in business for at least three financial years, specific provision is made for including information relating to the company's accounts for such shorter periods, if any, that are applicable.[266] The most significant other exception is that a statement as to the adequacy of the working capital otherwise required by Rule 6.E.16 is not required.[267]

Material Trends and Forecasts. The general requirements as to the discussion of trends in the company's business since the end of the last financial years as to which its financial reports relate and information relating to its prospects for the current financial year are the same as in the case of a company making application for listing (*see* Section XIII(A)(4)). If, however, the company chooses to include a profit forecast or estimate it is not required as is the company applying for a listing to set forth (a) the principal assumptions on which it is based; (b) the forecast or estimate does not have to be examined and reported on by the reporting accountants or auditors; and (c) the sponsor does not have to confirm that the forecast was made after due and careful inquiry by the auditors.[268] A company as a matter of disclosure, however, should consider doing so. *See* Section XIII(A)(4).

Persons Responsible for the Prospectus. There are a number of significant differences. No disclosure has to be made relating to the resignation, removal, or failure to re-appoint the auditors during the last three financial years.[269] No obligation to disclose information such auditors regarded warranting the attention of shareholders or creditors.[270] No statement required as to reports of experts included in the prospectus that such reports were included with the consent of the experts who authorized the inclusion for purposes of section 152(1)(e).[271] Of lesser significance, names and addresses of the issuer's bankers, legal advisers and sponsor, legal advisers to the issue, and the reporting accountants do not have to be included.[272] The omission of these specific requirements is consistent with the general approach under the 156A Rules of requiring disclosure mandated by Schedules A/B of the Listing Particulars Directive since they go beyond what Schedule A/B require. *See*

266. 156A Rules, Appendix ¶ 4.

267. 156A Rules, Appendix ¶ 3.

268. 156A Rules, Appendix ¶ 3 excludes ¶ 6.G.2, which includes such limitations on profit estimates or forecasts by a company applying for listing.

269. 156A Rules, Appendix ¶ 3 excludes ¶ 6.A.7, which requires such information be included if the company is applying for a listing.

270. *Id.*

271. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.A.9, which requires such information be included if the company is applying for a listing.

272. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.A.8, which requires such information be included if the company is applying for a listing.

Section XIII(A)(6) for discussion of the requirements in the case of securities to be listed. Notwithstanding the foregoing, by virtue of Section 156A(3) the prospectus relating to 156A securities is subject to Sections 146, 150, and 152 of the FSA. Section 146 provides that any FSA Part IV prospectus, which a 156A prospectus is, in addition to the information called for by the Stock Exchange "shall contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of — (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities." Derogatory information from former auditors would seem to fall into this category. The question who may have civil liability for the failure to comply with § 146 in this regard is a complex one. *See* Section XIV(e).

Distribution Arrangements. No significant differences. *See* Section XIII(A)(9).1.13[1][i].

Management. There are substantially lesser requirements in that directors' relevant business interests and activities do not have to be described,[273] considerably less information is included relating to directors' remuneration and service contracts with the issuer.[274] *See* Section XIII(A)(10) for description of requirements relating to securities to be listed.

Promoters: The prospectus must include the name of any promoter of the company or any of *its subsidiaries* and the amount of any cash, securities or benefits that are proposed to be or have been, within the two years preceding publication, paid, issued or given to any promoter and the consideration received for same. This provision, which is applicable to companies applying for listing, is one of the few instances in which the disclosure of a 156A company goes beyond Schedule A/B.[275] *See* Section XIII(A)(13).

Material Contracts: The Listing Rules require that in the case of a company applying for a listing that the listing particulars/prospectus set forth that it will make available for inspection for 14 days from the date the prospectus is published or for the period of the offer, if longer, at a designated place in or near the City of London a long list of documents, including all material contracts entered into within two years of the date of publication of the prospectus.[276] *See* Section XIII(A)(12). The listing particulars/prospectus must also include a summary of each such

273. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.F.2, which requires such information be included if the company is applying for a listing.

274. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.F.10-6.F.13, which requires such information be included if the company is applying for a listing.

275. 156A Rules, Appendix, ¶ 3 does not exclude ¶ 6.C.21, which requires such information be included if the company is applying for a listing.

276. Listing Rules ¶ 6.C.7(c), incorporating ¶ 6.C.20.

material contract.[277] The 156A Rules do not require that the issuer make the material contracts available for inspection,[278] but do require that the listing particulars/prospectus include a summary of the material contracts entered into within two years of the date of publication.[279] This is another of the few instances in which the 156A Rules go beyond what is required by Schedules A/B.

The Issuer and Its Capital. Substantially the same information required of securities to be listed with the exception noted below. *See* Section XIII(A)(11). The requirement that documents be available for inspection for not less than 14 days at a named place in or near the City of London (6.C.7) and that the availability of such documents be set forth in the prospectus is not applicable to the following documents: (a) Articles of Association of the issuer; (b) any trust deed referred to in the prospectus; (c) written statement of the auditors or accountants of adjustments made by them to the annual accounts, and (d) the audited accounts of the issuer for each of the two financial years preceding publication of the listing particulars.[280] The absence of the statement of adjustments follows from the fact that no auditors or accountants report is included in the prospectus. The absence of the audited accounts from the list of documents to be available for inspection seems lax since the required comparative financial table is based on them.[281] Presumably, they are available at the office of the relevant Registrar since if a company organized under the laws of the UK such annual statements have to be filed with the Registrar. *See* Section XIII(A)(3)(a). Any report, balance sheet, valuation or other statements made by an expert included or referred to in the prospectus must be made available for inspection during normal business hours for not less than 14 days from the date of the prospectus or for the duration of the offer, if longer, at a named place in or near the City of London.[282]

The 156A prospectus cannot be published until formally approved

277. Listing Rules ¶ 6.C.20.

278. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.C.7(c), which requires such material contracts be made available for inspection if the company is applying for a listing.

279. 156A Rules, Appendix, ¶ 3 does not exclude ¶ 6.C.20, which requires such information be included if the company is applying for a listing.

280. 156A Rules, Appendix, ¶ 3 excludes ¶ 6.C.7(a), (b), (f), and (g), which require such documents be referenced and be made available for inspection if the company is applying for a listing.

281. The Rule 156A prospectus, however, does have to reference and the issuer must make available for inspection reports and balance sheets included in or referred to in the listing particulars/prospectus. 156A Rules, Appendix, ¶ 3, does not exclude ¶ 6.C.7(e), which require such documents be referenced and be made available for inspection if the company is applying for a listing. Since the comparative financial table at least indirectly has to reference the published balance sheet; perhaps, this requires that it be made available for inspection by a 156A issuer.

282. 156A Rules ¶ 14.

by the Stock Exchange[283] and cannot be circulated or made available publicly until published in accordance with the procedures described immediately below.[284] The publication requirements are the same as those applicable to a POS prospectus (*see* Section VIII) with the qualification noted immediately below.[285] Any announcement of the public offer must be submitted to the Stock Exchange for approval prior to use and must state that a prospectus has been or will be published and the addresses and the times at which copies are available to the public.[286] A press release that merely includes a reference to the public offer, however, does not have to be submitted for approval.[287]

C. *Content of Prospectus of Other Unlisted Securities Not Traded on AIM*

The content of the prospectus of securities not to be listed and as to which reliance is not being placed on Section 156A is determined by Schedule 1 to the POS Regulations. Schedule 1 to a significant degree, although numbered differently, follows the principal categories of information called for by the Listing Particulars for a first offering of shares. The following description lists the significant similarities and differences from the prospectus for shares to be listed.

Business Activities. Schedule 1, Part VI. Somewhat less information is required than is required of securities to be listed. *See* Section XIII(A)(2). For example, there is no requirement to furnish revenue by products or by geographical areas. The specific requirements include (a) a description of the company's business and "exceptional factors" that impact the business; (b) dependence on contracts, licenses, patents, and intellectual property of "fundamental importance" to its business; legal proceedings, pending or threatened, that "may have a significant effect on the issuer's financial position," and (d) information relating to significant "investments in progress."

Financial Statements. Schedule 1, Part VII. In some respects, the requirements appear to be more onerous than in the case of securities to be listed or the 156A requirements. If, as is generally the case for an UK issuer, the company has been required to publish its annual accounts under Part VII of the Companies Act of 1985 (*see* Section XIII(A)(3)(a)), the following requirements are applicable: Three years'

283. Listing Rules ¶ 8.1 as incorporated into 156A Rules ¶ 13.

284. Listing Rules ¶ 8.2 as incorporated into 156A Rules ¶ 13. Draft prospectus clearly marked as a draft, however, can be circulated prior to approval and prior to publication for purpose of arranging a placing or syndication or underwriting. *See* Listing Rules ¶ 8.3 as incorporated into 156A Rules ¶ 13.

285. 156A Rules ¶ 12.

286. 156A Rules ¶ 16.

287. 156A Rules ¶ 17.

annual accounts (covering a continuous period of at least 35 months) must be set out together with a statement by the directors that the accounts have been prepared in accordance with the law and that they accept responsibility for them. "Annual accounts" has the same meaning as in the Companies Act 1985 and so, by section 261(2) of that Act, must include the notes to those accounts. The name and address of the auditors has to be given together with a copy of the auditors' report on those accounts. The prospectus is required to include a statement by the auditors that they consent to the inclusion of their reports in the prospectus and accept responsibility for them, and have not become aware, since the date of any report, of any matter affecting the validity of that report at that date. As an alternative to the foregoing, it is possible to include a report by a person qualified to act as an auditor with respect to the state of affairs and profit and loss shown by the issuer's annual accounts for the last three years. If the company has been in existence for less than three years, the requirement is qualified so that the prospectus must contain the accounts that have actually been prepared for financial years during its existence (disregarding a financial year that ended less than three months before the date on which the offer is first made). If more than nine months have elapsed at the date on which the offer is first made (*i.e.*, the date of publication of the prospectus) since the end of the last financial year, the prospectus is also required to include interim accounts. The interim accounts need not be audited but must be prepared to the standards required for annual accounts. The prospectus must state the name and address of the person responsible for the interim accounts, and a statement by him that the interim accounts have been properly prepared in accordance with the law and that he consents to the inclusion of the accounts and a statement in the prospectus to that effect. Alternatively, a report covering that period with respect to the state of affairs and profit and loss of the issuer, by a person qualified to act as an auditor, may be included. If such alternative is utilized, the name and address of the person who audited the accounts must be included. In addition, the prospectus must include a statement by the person preparing the report "that in his opinion the report gives a true and fair view of the state of affairs and profit or loss of the issuer and its subsidiary undertakings, and that he consents to the inclusion of his report in the prospectus and accepts responsibility for it; or a statement why he is unable to make such a statement."

It is interesting to note that neither the prospectus for securities to be listed nor the 156A rules require the consent of the auditors who prepared the annual accounts to be included in the prospectus. Neither require someone to specifically accept responsibility for the interim statements. Neither specifically require the directors to accept responsibility for the financial information. *See* Section XIII(A)(3)(c)-(e). In the

case of a 156A prospectus, no statement accepting responsibility for the financial information (which is included in the form of a comparative table) included in the prospectus is required.[288] *See* Section XIII(B).

Recent Developments. Profit forecasts and estimates. Schedule I, Part IX. *See* Section XIII(A)(4) as to securities to be listed. There are no requirements relating to profit forecasts and estimates. The issuer, however, must include information relating to "the issuer's prospects for at least the current financial year of the issuer." In addition, "significant recent trends concerning the development of the issuer's business" must be included. Such information, however, is limited to developments since the end of the financial year.

Distribution Arrangements. Schedule 1, Part IV. *See* Section XIII(A)(1) as to listed securities. The Schedule calls for limited information relating to the nature of the offering and the distribution terms. The prospectus must set forth the number of shares offered (¶ 19); the offering price, or, if applicable, the procedure, method and timetable for fixing the price (¶ 26); the method of payment for the shares and timetable for delivery of the shares (¶ 27); the period during which the offering will remain open (¶ 25); the names of the underwriters (the procedure, method and timetable for fixing the price); an estimate of the expenses of the offering and by whom payable (¶ 23); commissions payable to the underwriter (¶ 23), total proceeds expected from the offering and net proceeds after deducting expenses to the issuer (¶ 20). The prospectus must also state whether (a) the securities being offered have been admitted to dealings on a recognized investment exchange; or (b) an application for such admission has been made.

(2) If no such application for dealings has been made, or such an application has been made and refused, a statement as to whether or not there are, or are intended to be, any other arrangements for there to be dealings in the securities and, if there are, a brief description of such arrangements. Whether the securities are admitted to or application for admission to dealings has been made on a "recognised investment exchange." If not, a brief description of the market in which it is expected such securities will trade (¶ 16).

The purposes for which the securities are being offered must be set forth (¶ 17). If the offer is by subscription, the following information must be set forth concerning the use of the proceeds (¶ 21):

(a)The minimum amount which, in the opinion of the directors of

288. 156A Rules, Appendix ¶ 3 does incorporate Listing Rules ¶ 6.E.1, which in turn incorporates ¶ 12.18. Paragraph 12.18 requires a letter to the Exchange from the issuer's auditors or reporting accountants as appropriate to the effect that the comparative table of financial information was extracted from the issuer's annual accounts and that those were prepared and audited in accordance with the appropriate accounting standards. This letter, however, is not part of the prospectus.

the issuer, must be raised by the issue of those shares in order to provide the sums (or, if any part of them is to be defrayed in any other manner, the balance of the sums) required to be provided in respect of each of the following—

(i)The purchase price of any property purchased, or to be purchased, that is to be defrayed in whole or in part out of the proceeds of the issue;

(ii)Any preliminary expenses payable by the issuer and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the issuer;

(iii)The repayment of any money borrowed by the issuer in respect of any of the foregoing matters;

(iv)Working capital; and

(b)The amounts to be provided in respect of the matters mentioned otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

In many respects this is considerably more specific than what has to be disclosed concerning the use of proceeds as to securities to be listed. *See* Section XIII(A)(1).

Management. Schedule 1, Part VIII. *See* Section XIII(A)(10) as to securities to be listed. This part of Schedule 1 requires a concise description of the directors' existing and proposed service contracts of more than one year's duration. Details also have to be given of the aggregate remuneration paid and benefits in kind granted to the directors of the issuer during its last completed financial year together with an estimate for the current year. The prospectus must also set out the interests of each director in the share capital of the issuer, distinguishing between beneficial and non-beneficial interests. For this purpose it is assumed that the provisions of sections 324 to 328 of the Companies Act 1985 are relevant for determining the interests of the directors.

Persons Responsible. Schedule 1, Part III. *See* Section XIII(A)(6) as to securities to be listed. The prospectus must set forth the names and addresses of the persons responsible for the prospectus, specifying the portions for which they are responsible. The persons responsible are those on whom responsibility is imposed by Section 13 of the POS Regulations, which is comparable in most respects to Section 152 of the FSA. *See* Section XIV(C). In some respects this is more specific than what is required in connection with a prospectus relating to securities to be listed. A statement of the directors must be set forth in the prospectus that "to the best of their knowledge the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect the import of such information." There is no specific reference to the statement being made after enquiry

as in the case of the declaration required in a prospectus of securities to be listed. *See* Section XIII(A)(6). The provisions of the POS Regulations imposing liability for untrue statements or misleading statements, however, require, as in the case of securities to be listed, that directors established that they exercised due care and made appropriate inquiries to avoid liability. *See* Section XIV(E). The prospectus must also include "a statement by any person who accepts responsibility for the prospectus, or any part of it, that he does so." This is without prejudice to the provisions of ¶ 45 imposing responsibility on certain persons with respect to the financial information included in the prospectus. *See* Section XIV(C).

Securities to Which the Prospectus Relates. Schedule 1, Part IV. *See* Section XIII(A)(11) as to securities to be listed. The securities being offered must be described and a detailed summary of rights attaching to those securities must be included in the prospectus. Particulars must be given of tax on income from the securities withheld at source, including tax credits.

General Information. Schedule 1, Part II. A number of general items of information are required to be included in the prospectus, including such fundamental matters as the name of the issuer and the address of its registered office. If the offeror is different from the issuer, the name and address of the offeror must be given. The date of publication of the prospectus is required to be stated and a statement must be included that the prospectus has been drawn up in accordance with the POS Regulations.

The preparation of the prospectus for unlisted securities is not in fact significantly less onerous than securities to be listed. The significant difference, however, is that there is no review of the prospectus. The prospectus for unlisted securities is filed with the Registrar who has limited authority not to accept it for filing and the prospectus is not reviewed by anyone.

D. Contents of Prospectus for Securities to be Admitted to Trading on AIM

A company making a public offering and applying for admission to trading on AIM in connection therewith must comply with the prospectus requirements of the POS.[289] The company, however, must include the additional information prescribed by the AIM Admission Rules;[290] in other words, a working capital adequacy statement, a statement of the basis of any profit forecast, a notice to the effect that application has been made for listing on AIM; some further disclosure as to directors;

289. AIM Admission Rules (AIM Rules) ¶ 16.10.
290. AIM Rules ¶ 16.11.

the name and address of the nominated advisor, and the names of any persons who are interested in more than three percent of the issuers capital, along with a statement of the amount of their holding. If the main business of the company has not realized revenues for at least two years prior to admission, the directors, employees, and their associates, other than those owning less than two percent of the outstanding shares, must agree, and the prospectus must disclose, that for a period of one year from the date trading commences such persons will not dispose of their shares except in the event of death and under other limited circumstances.[291] The prospectus must include on the first page (excluding the cover, if any) in prominent lettering a prescribed legend that notes the company has applied for admission to trading on AIM, that AIM is primarily for emerging or smaller companies with a "higher investment risk" than established companies, prospective investors should take the risks into account and "invest only after careful consideration and consultation with his or her own independent financial adviser." The legend must also note that AIM has less demanding rules than the Official List, that no application has been made for admission to the Official List, and "the Exchange itself has not approved the content of the document."[292] The prospectus is submitted as part of the application procedure, and in the case of a new applicant must be delivered to the AIM office of the Stock Exchange not less than five business days prior to the date the issuer wishes the securities to be admitted.[293] The document is not reviewed by the AIM office, which relies entirely upon the statement by the nominated adviser to the effect that the document complies with all relevant rules. A company applying for admission to AIM must publish a prospectus conforming with the POS regulations whether or not it is making an offer of its securities to the public.[294] The prospectus is an Article 11 prospectus for purposes of the Public Offers Prospectus Directive, not entitled to mutual recognition by other member states. *See* § 1.09. Presumably an issuer could follow the Section 156A procedures, in which event the Stock Exchange would review the prospectus and it would be entitled to mutual recognition. *See* § 1.13[2].

E. Acceptance of Applications and Allotment of Shares

A prospectus will usually invite the public to apply for shares by returning an application form. The prospectus will state the time by which the application forms must be received (normally the time when the subscription lists open and immediately afterwards close) and to

291. AIM Rules ¶¶ 16.9(c), 16.11(d).
292. AIM Rules ¶ 16.11[c].
293. AIM Rules ¶ 16.4C(c).
294. AIM Rules ¶ 16.10.

whom they should be sent. In the case of large issues, they will normally be sent to receiving bankers who are appointed specifically to receive and deal with applications. Usually, the application must be accompanied by a check and the issuer or vendor will probably reserve the right to clear all checks. The prospectus or listing particulars will contain detailed terms and conditions on the basis of which applications will be made. For example, the issuer or vendor will reserve the right to reject any application and, if it is considered appropriate, to aggregate multiple applications (or perhaps prohibit multiple applications by including a warranty made by signing and submitting an application form that it, the application form being signed, is the only application form that has or will be made by the applicant).

Allotments and the treatment of applications in respect of unlisted securities offered for sale or subscription are regulated by Companies Act 1985.[295] Applications made pursuant to a prospectus issued generally (*i.e.*, issued to persons other than existing members or debenture holders) may not be accepted until the beginning of the third working day after the prospectus is first issued or until such later time as is specified in the prospectus.[296] The period during which the offer is open must be stated in the prospectus.[297] The word "issue" is given a special meaning for this purpose if the prospectus is issued as a newspaper advertisement. If it is so issued before the third day after it is issued in some other manner, the date of issue is the date on which it first appears as a newspaper advertisement. In any other case the date of issue is the first date on which the prospectus was issued in any manner.[298] This provision ensures that applicants have a reasonable opportunity to consider the prospectus and return the application before the subscription lists open.

The Companies Act 1985 does not specify a date by which the subscription lists must be closed and it is theoretically possible for a company to issue a prospectus and seek applications for its shares on the basis of that prospectus over a long period of time. The burden on the

295. Part IV. (The Financial Services Act 1986 prospectively repealed sections 81 to 83, 86 and 87 and certain parts of CA 1985 § 84 and CA 1985 § 85. Under the Financial Services Act 1986 (Commencement) (No. 3) Order 1986 (SI 1986 No. 2246) the repeal of those sections was brought into force "to the extent to which they would apply in relation to any investment which is listed or the subject of an application for listing in accordance with Part IV of the [Financial Services] Act." By contrast, the Financial Services Act 1986 (Commencement) (No. 13) Order 1995 (SI 1995 No. 1538), which has effect to repeal CA 1985, Part III relating to prospectuses, does not bring the repeal of sections 81 to 87 of that Act into force; indeed, a saving is made in the repeal of Part III of, and CA 1985, 3 Sch. to the extent necessary for the purpose of giving meaning to sections 81 to 87 (and various other sections).)

296. CA 1985 § 82(1).

297. POS Regulations, Sch. 1, ¶ 25.

298. CA 1985 § 82(3).

directors and other persons responsible for the prospectus of ensuring that the information in the prospectus remained accurate during that period, however, would be very arduous. The prospectus, therefore is likely to set forth a closing date. In addition, the Companies Act provides that where there is an offer to the public for subscription of shares, no allotment of shares can be made unless the minimum amount that in the opinion of the directors must be raised after the expenses of the offering for any proposed acquisition and for working capital has been subscribed. If this minimum amount has not been raised within 40 days after the first issue of the prospectus, all money that has been received from applicants has to be repaid to them forthwith without interest or, if it is not repaid within 48 days after the issue of the prospectus, with interest.[299] A prospectus under the POS Regulations is required to include a statement of the minimum subscription required to close the issue.[300] Section 82(7) provides that applications made pursuant to a prospectus issued generally will not normally be revocable until after the expiration of the third working day after the opening of the subscription lists. Accordingly, applications, which in contractual terms are offers, should be accepted by the issuer before the end of that third day. Within one month of making an allotment of shares, a return must be made to the Registrar of Companies on Form 88(2).[301]

XIV. CIVIL LIABILITY FOR LISTING PARTICULARS AND PROSPECTUSES

A. Introduction

The issue of civil liability for misrepresentations in a prospectus can arise in connection with a prospectus prepared in conformity with the POS regulations (POS prospectus), a prospectus prepared in conjunction with a listing application on the London Stock Exchange (listing particulars/prospectus), and a prospectus prepared in accordance with Section 156A (a 156A prospectus). Liability relating to a listed prospectus and a 156A prospectus (hereinafter collectively sometimes referred to as "Part IV prospectuses") is governed by Part IV of the Financial Services Act. Sections 146, 147, and 150-152 of the FSA, as amended by Section 154A, are the critical provisions of the FSA determining liability for misrepresentations in connection with listing particulars/prospectus of listed companies. Section 156A of the FSA specifically extends these provisions with variations in terminology as appropriate to a 156A prospectus. Liability for misrepresentations in a POS prospectus is determined under §§ 13-15 of the POS. There are

299. CA 1985 § 83.

300. POS, Sch. 1, ¶ 21. That paragraph equates with CA 1985, 3 Sch. 2 which is incorporated into CA 1985 § 83(1).

301. *See* Companies (Forms) (Amendment) Regulations 1988 (SI 1988 No. 1359).

many similarities, but also some apparent and, perhaps, real differences in the relevant provisions governing persons liable for misrepresentations relating to POS prospectuses and Part IV prospectuses. There may also be difference in application of Part IV to listing particulars/ prospectus and a 156A prospectus as the former play a dual role as listing particulars and as a prospectus. The absence of authoritative judicial interpretations of these provisions leaves some important issues unresolved.

Section 150 of the FSA (POS Regulation 14) provides a remedy to an investor who acquires securities or an interest in securities and suffers loss by reason of false or misleading information in the listing particulars/prospectus. This remedy is in addition to any other statutory or common law remedy available to the injured party. There are two aspects of liability as follows:

Any person responsible for the listing particulars/prospectus (*see* § 1.14[3]) will be liable to compensate anyone who has acquired any of the securities in question, and suffered loss in respect of them, as a result of any untrue or misleading statement in them or the omission of any matter required to be included under section 146 (Regulation 9) (general duty of disclosure) or section 147 (Regulation 10) (supplementary listing particulars or supplementary prospectus) (section 150(1)). For the purposes of this provision, if the listing rules or the POS Regulations require a statement either as to the existence of a matter or, if there is none, a negative statement, the omission of the information is treated as a statement that there is no such matter (section 150(2) and Regulation 14(2)).

Any person who fails to issue supplementary listing particulars/prospectus when they are required or otherwise fails to comply with section 147 (Regulation 10) will be liable to pay compensation to anyone who has acquired the securities and suffered loss as a result of the failure (section 150(3) and Regulation 14(3)).

B. Who May Assert a Claim for False or Misleading Statements in a Prospectus or Listing Particulars?

Section 150 of Part IV as amended by Section 154A creates a private action "in any person who has *acquired any of the securities in question* and suffered loss in respect of them as a result of any untrue or misleading statement in the particulars or the omission from them of any matters required to be included in them by Sections 146 and 147." The antecedent of "in the particulars" is "listing particulars" and "supplementary listing particulars." Section 154A makes this provision applicable to a prospectus and supplemental prospectus issued in connection with a public offer of securities by a company concurrently applying for listing and Section 156A makes it applicable to a 156A prospectus. Section 14 of the POS Regulations creates a private action in "any per-

son who has *acquired the securities to which the prospectus relates* and suffered loss in respect of them as a result of any untrue or misleading statement in the prospectus or supplementary prospectus or the omission from it of any matter required to be included by regulation 9 or 10." A potential issue is whether the cause of action is limited to those who purchase in the offer to which the prospectus relates or whether those who buy in the trading market also can assert a claim. The only difference in Section 150 vis-à-vis a prospectus or supplemental prospectus and Regulation 14 pertains to the italicized phrases. In *Possfund*, a lower court by way of dicta, since neither provision was involved, concluded that the Regulation 14 language "securities to which the prospectus relates" limits the cause of action to those who purchase in the offering, whereas the language of Section 150 "any of the securities in question" refers to the listed securities and is applicable whether purchased in the offering or after trading has commenced.[302] The latter is a tenable assumption as at the time Section 150 was adopted it was applicable only to listed securities and listing particulars and the securities in question had to be the listed securities.[303] Section 150 is now applicable to 156A securities as well and such securities will not be listed and the reference to the securities in question has to be to the securities described in the prospectus. The POS language establishing a right of action for misrepresentations in a prospectus was taken from Section 166 of Part V of the FSA. Since Part V never became effective (*see* Section III(D)), Section 166 was never applied although *Possfund* alludes to

302. *See* Possfund Custodian Trustee Ltd. v. Diamond, (1996) 2 All ER 774. The court, nonetheless, with respect to a prospectus relating to unlisted shares refused to grant a motion to dismiss as to those who purchased the securities in the trading market. The court acknowledged that in the seminal case of Peek v. Gurney, (1873) LR 6 HL 377, the House of Lords held that under the law of deceit an after market purchaser could not assert a claim based on misrepresentations in a prospectus. The court regarded it as "at least arguable" that "in the light of changed market practice and philosophy" that the issuer intended that the prospectus be relied upon not only by those who purchased in the offering, but those who purchase in the after market. This was suggested by the fact that the prospectus referenced that the securities would be dealt in after the offering closed on the Unlisted Securities Market (USM). In the court's view, it should be determined at trial whether it was intended that the prospectus could be relied upon by purchasers in the after market. *See* further discussion of *Peek v. Gurney* at § 1.14[6][c].

303. The court in *Possfund* in concluding that after market purchasers of a listed security could assert a claim also relied on "the listing rules (which the Act required to be complied with) required listing particulars to be constantly updated in respect of any information affecting, *inter alia*, the value of the listed securities." It is not entirely clear what the court is referencing vis-à-vis a duty to update after the offering is completed. The Listing Rules do require that a listed company notify "without delay" the Stock Exchange's Company Announcement Office of price sensitive "major new developments." Listing Rules ¶¶ 6.1-6.2. These Rules are not phrased in terms of updating the Listing Particulars and are not specifically required by the FSA. Schedule 4 to the FSA, however, does require the Stock Exchange as a Recognized Investment Exchange to require issuers of securities dealt with on the Exchange to provide "persons dealing in the investments [securities] proper information for determining their value."

it as limiting the cause of action to those who purchase in the offering. The reference in Regulation 14 to "securities to which the prospectus relates," although susceptible to the interpretation adopted by the court,[304] describes the securities but doesn't definitively resolve whether they have to be purchased in the offering. The prospectus describe a security and it describes an offering. The prospectus relates to a specific class of shares of a specific issuer and in that sense one who purchased them in the trading market also acquired the securities to which the prospectus relates. Regulation 14 is not specifically limited "to the offering to which the prospectus relates." Regulation 14 as to such unlisted securities supplants Section 67(a) of the Companies Act of 1985, which created a private action in "all those who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage which they may have sustained by reason of any untrue statement included in it." This provision in contrast by the use of the term of art "subscribe for" makes it clear that it related to purchasers in the offering.

The defenses discussed below available to prospective defendants also have some subtle differences between Part IV prospectuses and a POS prospectus. For this purpose, it is necessary to distinguish between the accuracy at the time the listing particulars/prospectus and supplemental listing particulars/supplemental prospectus are approved by the London Stock Exchange from any general duty to update after completion of the offering, which is not addressed by the referenced provisions. The Listing Rules require that before dealings on the exchange have commenced the listing particulars/prospectus must be updated with a supplemental listing particulars/prospectus if there have been any significant changes. Under Section 151(1), the speaking date as of which liability is determined for false or misleading statements is the dates as of which the listing particulars/prospectus and the supplemental listing particulars/prospectus were or should have been submitted to the Exchange. Under Section 151(1)(d) of Part IV of the FSA defendant (1) must reasonably believe that same were not false or misleading at such speaking date, (2) defendant continued in that belief after commencement of dealings on the exchange, and (3) "the securities were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused." The latter proviso suggests that after an appropriate lapse of time, whatever that may be, the defendant no longer has liability even though prior to the acquisition of the shares he no longer had reason to believe that the representations were not false or misleading at the time as of which the document spoke. The negative implication of

304. The plaintiffs apparently did not challenge this view, relying instead on the argument that the changes in marketing of the securities warranted extending responsibility for misrepresentations under the law of deceit so as to protect purchasers in the after market if the prospectus was intended to influence their decision to purchase the security.

this is that one who purchases securities after trading commences on the exchange can assert a claim based on false or misleading representations in the prospectus at the relevant date provided an unreasonable period of time has not elapsed since the securities commenced trading.

Section 10 of the POS Regulations requires after the POS prospectus has been delivered to the Registrar that so long as the offering remains open that in the event of any significant change or significant inaccuracy in the prospectus, the offeror is to deliver to the Registrar a supplemental prospectus appropriately updating and/or correcting the prospectus. The speaking date of the prospectus for determining liability of prospective defendants that the prospectus is not false or misleading under Regulation 15 is the time the prospectus and supplemental prospectus were or should have been delivered to the registrar. To avoid liability, defendant under § 15(1)(a) must have continued in that belief until the securities were acquired or under § 15(1)(d) "that the securities were acquired after such lapse of time that he ought in the circumstances to be reasonably excused." If only persons who bought in the offer can assert a claim, the latter provision is a redundancy unless it is designed to preclude a person who purchases in the offering that has remained open for a long period of time to be precluded from recovery because of the time that had elapsed since the offering commenced. This appears unlikely, particularly in view of the fact that the offeror at least has an obligation to file a supplemental prospectus to update the prospectus for significant developments and/or correct significant errors in the prospectus as long as the offering remains open. Section 15(1)(d) adds, if the securities are dealt in on an approved exchange (which would be AIM presently, *see* Section XIII(D)), defendant must have continued to believe that the prospectus or supplemental prospectus at the relevant date was not false or misleading "after commencement of dealings on that exchange." This does not limit the applicability of the lapse of time provision to securities admitted to dealings on the exchange. Further, with respect to such securities that are admitted to dealings, this provision suggests that purchasers of the securities dealt on AIM after the offering closed can assert a claim and that defendant can avoid liability only by proving that after dealings commenced on AIM he continued to hold the reasonable belief that the prospectus and supplemental prospectus were not false or misleading at the relevant date. Since the AIM prospectus is a POS prospectus, it is subject to the "to which the securities relate" limitation of § 14(1) of the POS. If that language limits the plaintiffs to those who purchased in the offering, it is at odds with the implication of § 15(1)(d) as to securities dealt on the Alternative Investment Market after completion of the offering.[305]

305. The prospectus involved in *Possfund* was issued in April 1992 in connection with a flotation of shares on the Unlisted Securities Market (USM). The USM is a market for dealings in unlisted securities on the London Stock Exchange that has since been dis-

In the case of the 156A prospectus, the relevant provisions are those pertaining to a listed security except the language relating to continuing to believe following admission of the securities to the official list is deleted and the identical language discussed above relating to § 15(1)(d) of the POS Regulations is added.[306] The same conclusion appears to follow, that these provisions suggests that one who purchased after completion of the offering can assert a claim as these provisions otherwise would serve no purpose.

C. *Against Whom May a Claim be Asserted?*

The provisions in Part IV of the Act and Part II of the POS Regulations as to liability and responsible persons are very similar. The term listing particulars/prospectus will be used to include any supplementary listing particulars or supplementary prospectus. Under section 152 of the Financial Services Act, there are five categories of person responsible for listing particulars/prospectus, as follows:

(i) The issuer of the securities;

(ii) The directors of the issuing company at the time the listing particulars/prospectus are submitted for approval (or, in the case of POS Regulation 13, at the time the prospectus is published);

(iii) Each person who is named in and has authorized himself to be named in the listing particulars/prospectus as a director or as having agreed to become a director either immediately or at a future time;

(iv) Any person who accepts and is stated in the listing particulars/prospectus as accepting responsibility for the particulars or any part thereof (but only for that part); and

(v) Any other person who has authorized the listing particulars/prospectus or any part thereof (but only for that part).

Under Regulation 13 of the POS Regulations, two additional categories of person may be responsible for a prospectus:

The offeror of the securities, where he is not the issuer; and

Where the offeror is a company, but is not the issuer and is not making the offer in association with the issuer, each person who is a director of that company at the time when the prospectus is published.

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placed by AIM. The plaintiffs did not raise the issue of the resolution of its status under Section 166 of Part V of the FSA, since it never went into effect and was clearly inapplicable. The court, however, in concluding that the "to which the securities relate" limitations of Section 166 would have limited claims thereunder to purchasers in the offering failed to take into account why it would have been necessary, if the provision were applicable, for the defendant to continue reasonably to believe after securities commenced trading on the USM that the prospectus was not false or misleading.

306. FSA § 156A(3)(d).

The additional provisions were necessary as the Prospectus Directive on which it is based adopted a somewhat different approach from the FSA to the use of the prospectus as the requirement is phrased in terms of the first offer to the public of a security in the member state. The first offer to the public in a specific EU country may be by someone other than the issuer. It is the offeror of POS securities that must publish the prospectus and that must file the prospectus with the Registrar.[307] This is likely to be the issuer, but it is not necessarily the issuer. A person, for example, may have acquired securities in circumstances that did not involve an offer to the public, but subsequently offers them to the public. In that event, it is that person, and not the issuer of the securities, who must publish the prospectus and file the prospectus with the Registrar.[308] The apparent reason for imposing liability on the offeror is in view of the eventuality that the prospectus requirement might be triggered by an offeror who is not the issuer. In such a case, provided the issuer has not authorized the offer, neither the company that issued the securities nor the directors of that company have any liability for the contents of the prospectus.[309]

Since the FSA was enacted before the Prospectus Directive was adopted, it did not anticipate the first public offer approach of the Prospectus Directive. It is not surprising, therefore, that Section 152 does not refer to the offeror as a person responsible for this purpose. The distinction, however, may only be apparent. Section 154A was added to the FSA at the same time the POS regulations were adopted. Section 154A is designed to make the relevant provisions of the FSA governing preparation of the listing particulars applicable to the prospectus required in connection with the offering for the first time in the United Kingdom of listed securities. Section 154A provides that the reference in Section 152(1)(a) to the issuer of the securities, notwithstanding Section 142(7) (the definition of an issuer), is also "a reference to the person offering or proposing to offer them." Section 152(1)(a) is the provision that imposes responsibility (and, hence, liability) on the issuer of the securities for the listing particulars/prospectus. Section 156A was added to the FSA at the same time as the POS regulations was adopted. Section 156A is designed to apply the relevant provisions of Part IV of the FSA relating to listing particulars the 156A prospectus. *See* Section VI. Section 156A(3)(e) also provides that the reference in Section 152(1)(a)

307. POS § 4(1)-(2).

308. POS § 4(1)-(2).

309. POS § 13(2). Under the 1999 amendments, however, if the issuer has authorized the offering an offeror who is not an issuer is not subject to the prospectus related civil liability provisions if (a) the issuer has responsibility for the prospectus under the regulations (which is ordinarily the case if it has authorized the offering), (b) the prospectus was drawn up primarily by the issuer or persons acting on behalf of the issuer, and (c) the offeror is making the offer in association with the issuer. POS 1999 Amendments, § 2(n) adding to the POS § 13(2A).

to the issuer of the securities is also "a reference to the person offering or proposing to offer them." Notwithstanding the somewhat awkward language and convoluted manner of doing so, the offeror appears also to be a responsible person with respect to the civil liability provisions applicable to listed securities and 156A securities. This, of course, as in the case of a POS prospectus, was necessary to impose liability for the prospectus on the person who makes the first public offer of the security when it is not the issuer.

Only the issuing company itself may apply for listing of securities, so that liability as to listed securities can only arise in respect of listing particulars/prospectus prepared by the company itself. It appears, therefore, that the issuer and its directors continue to be responsible persons even if the first public offer in the United Kingdom is made by someone other than the issuer. This tends to be confirmed by the fact that unlike the POS[310] Section 152 does not include a provision to the effect that the issuer and its directors are not responsible persons with respect to an offer made by someone without its authorization. A 156A prospectus has to be submitted to and approved by the London Stock Exchange. *See* Section XIII(B). Unlike a prospectus or listing particulars pertaining to securities to be listed, the provisions of the Stock Exchange governing a 156A prospectus provide that "the prospectus may be submitted by the issuer, or with the consent of the issuer, by the offeror to the Exchange for approval."[311] Section 156A(3) incorporates those provisions of Section 152 that make the issuer and directors of the issuer responsible persons vis-à-vis the 156A prospectus without the POS provision absolving them from responsibility with respect to a first public offer by a person other than the issuer. The apparent reason for such exclusion is that even though the 156A prospectus can be submitted by the offeror, the offeror must have the issuer's authorization to do so. One suspects that an issuer would not be inclined to grant such authorization without provision for indemnification against liability. Further, even though the offeror is responsible for submitting a POS prospectus to the Registrar and for its publication, it would be difficult for it to obtain much of the information it needs to meet the POS requirements without the participation of the issuer. The POS does provide that an offeror who is not the issuer and is not acting pursuant to an agreement with the issuer may omit information not available to him because he is not the issuer.[312] He, however, is excused from furnishing such information only if is unable to obtain it after "making such efforts (if any) as are reasonable, to obtain the information."[313]

310. POS § 13(2).

311. Rules for Approval of Prospectuses Where No Application for Listing Is Made, ¶ 2.

312. POS § 11(2).

313. POS § 11(2)(c).

Query, if the issuer furnished such information, does it constitutes an authorization of the offer, making the issuer and its directors responsible persons? An issuer under these circumstances would be well advised not to cooperate with the offeror absent indemnification and/or compelling reason to do so.

The need to impose offeror liability is apparent in view of the structure of the prospectus regime imposed by the EU Prospectus Directive, although the Directive itself includes no liability provisions and does not require a country to impose civil liability for a false or misleading prospectus. The imposition of liability on the offeror under the POS Regulations and the FSA as amended may have some unforeseen and apparently unintended consequences. The civil liability provisions of the Directors Liability Act of 1890 was designed to impose liability in connection with a prospectus that went beyond the law of deceit as reflected in *Derry v. Peek*. That Act is the precursor of civil liability for false or misleading prospectuses both in the UK and the United States. That Act did not impose liability on the underwriter and the successor provisions in the Companies Act of 1985 and Section 152(a) of the FSA also do not make underwriters qua underwriters responsible persons. Section 11 of the Securities Act of 1933, notwithstanding the outspoken opposition at the time of Wall Street, specifically imposes liability on the underwriters in connection with misrepresentations in a registration statement filed under that Act. The unanswered and generally unasked question is whether Section 13 of the POS Regulation and Section 152 of Part IV as amended by Sections 154A and 156A, inadvertently or otherwise, impose liability in certain types of offerings on the underwriter(s). Do these provisions make the underwriter a responsible person in connection with an offer of sale or any other type of offering in which the underwriter purchases the securities from the issuer and offers them as principal? *See* Section II. Section 142(7A) of the FSA, added at the same time as the POS regulations, provides that for purposes of Part IV of the Act "(a) a person offers securities if, as principal — (i) he makes an offer which, if accepted, would give rise to a contract for their issue or sale (which for this purpose includes any disposal for valuable consideration) by him or by another person with whom he has made arrangements for their issue or sale; or (ii) he invites a person to make such an offer, but not otherwise; and, except where the context otherwise requires, 'offer' and 'offeror' shall be construed accordingly." Section 5 of the POS Regulations includes a substantially identical definition of offer and offeror. These provisions may fit the underwriter in certain types of offerings. *See* Section II(A). If construed in that fashion, underwriters could have offeror liability. A possible escape from such construction is that the definition of offer and offeror are qualified by the language, "except where the context otherwise re-

quires."[314]

Interestingly, the Listing Rules of the London Stock Exchange impose considerable responsibility on the sponsor, and the sponsor ordinarily is the underwriter. Those responsibilities include, among others, assuring that the issuer is "properly guided" in complying with the listing rules, that all the relevant requirements of the listing rules have been complied with in preparing the listing particulars, that all the directors are aware of their responsibilities and obligations as directors of a listed company, obtain written confirmation from the issuer and those providing the issuer with financing facilities that the issuer's working capital is sufficient to meet its present needs, and confirm in writing that any profit forecast or estimate that appears in the listing particulars "has been properly complied."[315] The sponsor must submit as part of the listing application and procedure for approval of the listing particulars/prospectus that it has "discharged all of its responsibilities set out in Chapter 2 of the listing rules with due care and skill."[316] The only "report" of the sponsor, however, that must appear in the listing particulars/prospectus is that pertaining to any profit forecast or estimate, as to which it may be a responsible person for civil liability purposes. *See* Section XIII(A)(8). The Listing Rules take care to provide that the responsibilities of the sponsor "are owed solely to the Exchange."[317] If the Exchange determines that the sponsor has failed to carry out its responsibilities, it may impose sanctions in the form of a censure, publication of such censure, and/or removal from the register of sponsors maintained from the Exchange. The latter could seriously impact the firm's investment banking business. The Stock Exchange, fortuitously, is a recognized investment exchange and not a recognized self-regulatory organization.[318] A breach of its rules, unlike the rules of a self-regulatory organization,[319] is not within Section 62 of the FSA. Section

314. The 1999 amendments to the POS Regulations and counterpart amendments to the Financial Services Act may have alleviated this problem. Under the 1999 amendments, an offeror who is not an issuer is not subject to the prospectus related civil liability provisions if (a) the issuer has responsibility for the prospectus under the regulations (which is ordinarily the case if it has authorized the offering), (b) the prospectus was drawn up primarily by the issuer or persons acting on behalf of the issuer, and (c) the offeror is making the offer in association with the issuer. POS 1999 Amendments, § 2(n) adding to the POS § 13(2A). The reference to offers made in association with the issuer appears concerned with situations in which the issuer and selling shareholders may both be making an offering or the issuer is facilitating an offering by a large shareholder. The reference to an offer made in association with the issuer, however, may be broad enough to cover the underwriter acting as principal. In any event, this could raise some interesting questions as to by whom the prospectus was primarily drawn up.

315. *See* Listing Rules ¶¶ 2.6-2.17.

316. Listing Rules ¶ 2.8 and Schedule 4A.

317. Listing Rules ¶ 2.6.

318. FSA § 36.

319. *See* FSA § 62(2).

62 permits under limited circumstances a private action to be brought by a person who suffers a loss as a result of a breach of a rule of a self-regulatory organization.[320]

It is interesting to note that if a comparative chart of financial information is used in lieu of an accountants' report, the accountants who reported on the financial statements extracted in the chart do not accept responsibility for the financial statements upon which the chart is based or the chart. The accountants who prepare the chart and submit a letter to the Stock Exchange to the effect in their opinion the referenced statements were properly prepared and that the table properly extracts such information also assume no responsibility for the prospectus and apparently have no liability under Part IV of the Exchange act. *See* Section XIII(A)(3). This leaves the issuer and the directors as responsible for the financial information and they are not in a position to claim reliance on an expert since the financial statements have not been included with the consent of the accountants.

Part IV of the FSA, in a concession to the market in Eurobonds, excludes from the persons responsible for the listing particulars/prospectus directors of "an issuer of international securities."[321] There is no comparable provision applicable to a POS prospectus. An offering of Eurobonds generally is exempt from the requirement that a prospectus be used in connection with a first public offer of securities as Euro-securities or otherwise. *See* Section VII. It is the general practice, nonetheless, for Eurobonds to be listed on at least one stock exchange within the European Union even if the securities are not going to be traded on the exchange. The provision exculpating directors of an issuer of international securities comes into play primarily with respect to the listing particulars relating to Eurobonds. The definition of "international securities," however, although vague in some respects, is broader. International securities are defined as listed debt securities that are denominated in a currency other than sterling or are otherwise associated with a country outside the United Kingdom and are of a kind likely to be dealt in by corporations and persons resident in a country other than the United Kingdom.[322] The securities must also be of a class of debt securities that the Listing Rules of the Stock Exchange provide are suitable "for persons of the kind who may be expected normally to buy or deal in the securities."[323] Chapter 23 of the Listing Rules of the London Stock Exchange include specific and somewhat less stringent requirements as to the content of the listing particulars of specialist securities, including Eurobonds. Specialist securities are defined by the Listing Rules as "securities which, because of their nature are normally

320. *See* FSA § 62 *as amended by* § 62A.
321. *See* FSA § 152(5).
322. FSA § 152(6).
323. FSA § 148(1)(c) as incorporated into § 152(5).

bought and traded by a limited number of investors who are particularly knowledgeable in investment matters."[324] If Eurobonds are listed on the London Stock Exchange, the issuer is a responsible person vis-à-vis the Listing Particulars, but the directors of the issuer are not.

D. What Must Plaintiff Prove

The question of when plaintiff must have purchased the security and the speaking date of the prospectus and supplementary prospectus are discussed at § 1.14[2]. Assuming an appropriate plaintiff, plaintiff must prove at the speaking date of the prospectus or the supplementary prospectus that the prospectus or supplementary prospectus, as appropriate, contained an untrue or misleading statement or omitted information required to be included therein.[325] Plaintiff must prove his loss was a result of the untrue or misleading statement or the omitted information. The relevant provisions do not specifically require that the misrepresentations or omissions relate to a material fact, but it would be necessary to establish materiality to prove that the plaintiff's loss resulted from the misrepresentations. There is no specific provision as to how such loss is to be computed, which leaves it to the analogous measure of damages under common law in an action of deceit. *See* Section XIV(F)(3).

E. What Are the Defendants' Defenses?

A defendant with respect to statements not made on the authority of an expert can defend by carrying the burden of proof that "having made such enquiries (if any) as were reasonable" "he reasonably believed" at the relevant times "that the statement was true and not misleading or that the matter whose omission caused the loss was properly omitted."[326] If the statement was made on the authority of and with the consent of an expert, defendant can avoid liability by carrying the burden of proof that at the relevant times "he believed on reasonable grounds" that the expert "was competent to make or authorise the statement and had consented to its inclusion in the form and context in which it was included."[327] The speaking date of the listing particulars/prospectus and defendant's belief at the time of the acquisition of the shares by the plaintiffs is discussed at § 1.14[2] in connection with the discussion of who may assert a claim for a misrepresentation in the prospectus.

In addition, a defendant may defend vis-à-vis a particular plain-

324. Listing Rules ¶ 23.1(a).
325. POS Regulations § 14(1); FSA § 150(1).
326. POS Regulations § 15(1); FSA § 151(1).
327. POS Regulations § 15(2); FSA § 151(2).

tiff(s) on the ground that it was not "reasonably practicable" to bring a correction of the statement[328] (or the fact that an expert relied upon was not competent or had not consented)[329] "to the person likely to acquire the securities." Alternatively, it is a defense if defendant carries the burden of proof that he took all reasonable steps to "secure that a correction [of the statement] was [forthwith, under the POS Regulation] brought to the attention" of such persons.[330] It is a defense that defendant took all reasonable steps "to secure" that the fact that the expert relied upon was not competent or had not consented to the use of his report [if such was the case] "was forthwith brought to the attention" of prospective purchasers.[331] Note that both the POS and the FSA require as to correcting the statements relating to the competence and consent of the expert, that it be brought to the attention of prospective purchasers "forthwith," whereas only the POS provision includes the word "forthwith" with respect to the correction of misrepresentations generally. It is also a defense if the correction of misrepresentations or the fact that the expert was not competent or had not consented is "published in a manner reasonably calculated to bring it to the attention of persons likely to acquire the securities" before plaintiff acquired the securities.[332] Similarly, it is a defense that defendant took reasonable steps "to secure such publication and reasonably believed that it had taken place before the securities were acquired."[333] Defendant can also defend by carrying the burden of proof that plaintiff knew at the time he acquired the securities that the statement was false or misleading.[334]

There are some additional defenses, but the foregoing and those discussed at § 1.14[2] are the defendant's principal defenses applicable to POS prospectus, listing particulars and prospectus of a listed or to be listed company, and to 156A prospectus.

F. Common Law Liability for Listing Particulars and Prospectuses

Apart from the specific remedies provided by the Financial Services Act 1986 and the POS Regulations, a person suffering loss by virtue of any untrue or misleading statement (or omission) in a prospectus or listing particulars may have remedies in contract and tort. In this section the term "prospectus" includes listing particulars.

328. POS Regulations § 15(1)(b); FSA § 151(1)(b).
329. POS Regulations § 15(2)(b); FSA § 151(2)(b).
330. POS Regulations § 15(1)(c); FSA § 151(1)(c).
331. POS Regulations § 15(2)(c); FSA § 151(2)(c).
332. POS Regulations § 15(3)(a); FSA § 151(3)(a).
333. POS Regulations § 15(3)(b); FSA § 151(3)(b).
334. POS Regulations § 15(5); FSA § 151(5).

1. Negligent Misstatement

The principles enunciated in obiter dicta in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[335] established a remedy for loss suffered as a result of a negligent misstatement, provided that the person making the statement owed a duty of care to the person suffering loss in reliance on it. Such a duty of care will arise when there is a special relationship between the parties (*i.e.*, a relationship between the function that the defendant was requested to perform and the transaction in relation to which the plaintiff said he had relied on proper performance); *see*, for example, the discussion of the duty of care owed by auditors generally in *Caparo Industries plc v. Dickman and others*,[336] *Al Saudi Banque and others v. Clark Pixley*,[337] *Berg Sons & Co. Ltd. and others v. Adams and others*,[338] *Galoo Ltd. and others v. Bright Grahame Murray and another*.[339] It has been held that such a relationship exists between the persons putting their names behind a prospectus and persons who subscribe or purchase shares in reliance on that prospectus; *Al-Nakib Investments (Jersey) Ltd. and another v. Longcroft and others*.[340] However, the case still stands as authority for the proposition that any duty of care that is owed in relation to a prospectus is owed only to the initial subscribers and not to subsequent purchasers. By contrast, in *Morgan Crucible Co. PLC v. Hill Samuel & Co. Ltd. and others*,[341] a profit forecast was made in a contested take-over. The bidder claimed to rely on this. On a preliminary point it was held arguable that there was a relationship that was sufficient to give rise to a duty of care, but the point was never brought to trial.

2. Contract and the Misrepresentation Act 1967

Actions for damages for breach of contract will be available only against persons who have privity of contract with the claimant. Thus only the actual vendor of the shares to the claimant would be liable in contract. However, an incorrect statement in a prospectus will not give rise to a breach of contract unless the statement became a term of the contract; the courts are not usually prepared to regard statements in prospectuses as other than mere representations that induce a subscriber to apply for shares to be allotted to him.

If the prospectus contains an untrue or misleading statement, or there is an omission that renders a statement in the prospectus mis-

335. (1964) AC 465.
336. (1990) 2 AC 605.
337. (1990) 1 Ch. 313.
338. (1992) BCC 661.
339. (1995) 1 All ER 16.
340. (1990) 1 WLR 1390.
341. (1991) Ch. 295.

leading, the injured party may have a remedy under the Misrepresentation Act 1967.[342] The remedies provided by the Misrepresentation Act are rescission of the contract and/or damages. The remedy of rescission will be lost if the subscriber or purchaser affirms the contract by failing to act within a reasonable time of discovering the truth. Furthermore, the right of rescission only extends to the original purchaser or subscriber and not to a subsequent purchaser. As in the case of an action founded on breach of contract, a claim under the Misrepresentation Act lies only against another party to the contract, *i.e.*, the issuer in an offer for subscription or the vendor in an offer for sale. It is a defense to a claim for damages, but not rescission, for the defendant to prove that he believed on reasonable grounds, up to the time the contract was made, that the statement complained of was true.

Formerly, under the rule in *Houldsworth v. City of Glasgow Bank*,[343] a subscriber (by contrast with a purchaser under an offer for sale) was only able to maintain an action for damages if he rescinded the contract. A subscriber lost the right to rescind if he affirmed the contract or the company went into liquidation before he had rescinded (since the intervention of third party rights is a bar to rescission). However, CA 1985, § 111A (inserted by the Companies Act 1989) has in effect abolished that rule. Section 111A states as follows:

A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares.

3. Deceit

The prospectus action originally developed out of the action in the tort of deceit. This action was originally a satisfactory remedy for defective prospectuses since it lay for any inaccuracy and might be brought by any person to whom the deceitful representation had been made. It was robbed of its usefulness by two late-nineteenth century decisions, *Peek v. Gurney*,[344] in which it was held that only a subscriber might sue in deceit, and not a market purchaser, and *Derry v. Peek*,[345] in which it was held that "deceit" embraced only a deliberate intention to deceive, and did not encompass a negligent failure to inform. However, it should be noted that the statute that was passed to reverse the effect of *Derry v. Peek*, the Directors Liability Act 1890, was the direct ascendant of the

342. The Act is not applicable to Scotland, but see section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

343. (1880) 5 App. Cas. 317.

344. (1873) LR 6 HK 377. *But see* discussion of Possfund Custodian Trustee Ltd. v. Diamond, (1996) 2 All ER 774 at § 1.14[2].

345. (1889) 14 App. Cas. 337.

§ 150/Reg. 14 provisions imposing statutory liability upon directors for defective prospectuses. Consequently, it is clear that the measure of damages in any case brought on a breach of § 150/Reg. 14 will be the deceit measure (*i.e.*, all consequential loss without regard to questions of mitigation or remoteness) rather than the ordinary tortious measure.[346]

XV. PUBLIC REMEDIES

Section 47 of the FSA makes it an offense, hence a crime punishable by imprisonment up to seven years or to a fine, or both, to knowingly or recklessly make a statement, promise or forecast that is misleading, false, or deceptive or knowingly "dishonestly conceals any material facts" to induce the purchase or sale of a security. The same section makes it unlawful to create "a false or misleading impression as to the market in or the price or value of a security" for the purpose of inducing others to purchase or sell a security.[347] Although no private action is provided for violations of Section 47, the SIB can apply to an appropriate court for a restitution order directing one who has violated Section 47 or any rule of an SRO to pay over profits or make restitution for loss to persons who were the victims of the violations.[348] The court may order payment by the defendant into court of such amounts as it deems just, which the court is to distribute among the persons from whom the defendant realized the profit or the persons suffering loss as a result of such violations.[349]

XVI. CONCLUSION

The adoption of the Public Offers of Securities Regulations in 1995 and the amendment of those regulations in 1999, brings to a close a process that commenced with the adoption of the Financial Services Act in 1985. There is now in place in the United Kingdom an overall regulatory scheme for determining when a prospectus must be used, what it must contain, who is to review it, how it is to be delivered, and liability for any prospectus misrepresentation. The scheme of things to some extent was delayed because of the adoption of the European Union Prospectus Directive in 1989 and the need to conform to that Directive. The EU has provided member state companies with a road map for com-

346. Clark v. Urquhart, (1930) AC 228, *and see* Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd., (1996) 4 All E.R. 769.

347. Section 47(2) is similar to Section 9(a)(4) of the Exchange Act which makes it unlawful to effect transactions in a listed security "creating actual or apparent active trading . . . or raising or depressing the price . . . for the purpose of inducing the purchase or sale of such security by others."

348. FSA § 61.

349. FSA § 61.

pleting a Union-wide public offering using a single prospectus prepared in compliance with the laws of any member state that conform with the Directive. There have been few offerings to date, however, that have taken advantage of the mutual recognition of prospectuses among the member states. The 1999 amendments to the POS regulations attempt to encourage such offerings by eliminating the translation of the prospectus requirement permitted by the Directive. It remains to be seen whether other member states will follow this lead and how effective it may be in encouraging multiple member state offerings.

SCHOOLS, SIGNS, AND SEPARATION: QUEBEC ANGLOPHONES, CANADIAN CONSTITUTIONAL POLITICS, AND INTERNATIONAL LANGUAGE RIGHTS

WILLIAM GREEN*

I. INTRODUCTION

Contemporary Canadian politics has been defined by Quebec's vision of the province as a linguistically distinct society and by its 1980 and 1995 sovereignty referendums.[1] Quebec's rejection of Canada as a bilingual nation, embodied in the 1982 Charter of Rights and Freedoms,[2] and Canada's obsession with keeping Quebec in Canada have, however, left unexamined the impact of the province's language policies on its anglophone minority. In Quebec, the enactment of the Charter of the French Language[3] and the government's promotion of a French culture have intruded upon the Canadian Charter freedom of its anglophones to conduct their business in English and their Canadian Charter right to have their children educated in English.[4] In response, the

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1. Studies of minority language include the following recent examples: LANGUAGE RIGHTS IN CANADA (Michael Bastarache ed., 1987); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 90-127 (1989); SCOTT REID, LAMENT FOR A NOTION: THE LIFE AND DEATH OF CANADA'S BILINGUAL DREAM (1993); TOWARDS RECONCILIATION? THE LANGUAGE ISSUE IN CANADA IN THE 1990'S (Daniel Bonin ed., 1992); CAROLYN TUOHY, POLICY AND POLITICS IN CANADA: INSTITUTIONALIZED AMBIVALENCE 298-345 (1992); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION (1994); Denise Reaume & Leslie Green, *Education and Linguistic Security in the Charter*, 34 MCGILL L. J. 777 (1989); Leslie Green, *Are Language Rights Fundamental?*, 25 OSGOODE HALL L. J. 639 (1990).

2. CANADIAN CONSTITUTION ACT, Part I: CANADIAN CHARTER OF RIGHTS AND FREEDOMS(1982) being Schedule B to the CANADA ACT, R.S.Q., ch. 11 (1982) (Can.) [hereinafter CANADIAN CHARTER].

3. CHARTER OF THE FRENCH LANGUAGE, R.S.Q., ch. 11 (1977) (Can.) [hereinafter Bill 101].

4. Peter H. Russell, *The End of Mega Constitutional Politics in Canada*? 26 PS: POL. SCI. & POL. 33-37 (1993).

Quebec anglophones have litigated business and education language issues in provincial, national, and international courts and made the suppression of their language a significant part of the debate over Canadian national unity and Quebec sovereignty.

Canadian constitutional lawyers and political scientists suggest that three dimensions have structured the politics of minority language rights. One defines the nature of domestic constitutional politics and distinguishes between micro- and macro-level constitutional disputes, i.e. between litigation over the meaning of legislative and constitutional provisions and disputes about the nature of the state. The second focuses on the participants in these constitutional conflicts, provincial governments and their official language minorities, and examines the interrelationship of the micro and macro-constitutional actions they take to advance their linguistic objectives.[5] The third considers the influence of the international legal environment on the participants in domestic constitutional politics who rely upon international law and legal institutions with their commitment to human rights and charters and their sensitivity to the interests of ethnic, linguistic, and cultural minorities.[6]

This study of Canadian minority language rights weaves together these three dimensions. Part I identifies three language law regimes that structure the micro-constitutional litigation over minority language politics. Parts II through V use this framework to explore the domestic and international litigation over Quebec anglophone rights — the Supreme Court of Canada's decisions in the Quebec Protestant School Boards Case (1984)[7] and the Ford Public Signs Case (1988),[8] and the UN Human Rights Committee decision in Ballantyne v. Canada (1993)[9]—and its impact on the current domestic and international legal initiatives by anglophones to establish the right of Quebec children to be taught and businesses to advertise in English. Part VI briefly explores the interplay between this micro-level litigation by Quebec anglophones and the macro-level efforts of their provincial government to either redesign the Canadian Constitution to further the linguistic and cultural objectives of its distinct society or to separate from Canada. Then Part VI brings the article to a close by asking: what might be the

5. *See* F. Morton, *Judicial Politics in Canadian-Style: The Supreme Court's Contribution to the Constitutional Crisis of 1992, in* CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992 132-148 (Curtis Cook ed., 1994).

6. Maxwell Cohen, *Reflections on Human Rights, The Canadian Charter, and International Influences, in* INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE 159-68 (Irwin Cotler & F. Pearl Eliadis eds., 1992).

7. A.G. (Que.) v. Que. Ass'n of Protestant Sch. Bds. [1984] 2 S.C.R. 66 [hereinafter *Quebec Protestant School Boards*]

8. Ford v. Quebec [1988] 2 S.C.R. 712 [hereinafter *Ford*].

9. Ballantyne, Davidson, and McIntyre v. Canada, U.N. Comm. H.R., 47th Sess., CCPR/C/47/D359/D385/1989 (1993) [hereinafter *Ballantyne*].

status of anglophone minority language rights if Quebec chooses to sever its federal ties and become a sovereign state?

II. THE POLITICAL AND LEGAL SETTING OF MINORITY LANGUAGE RIGHTS IN CANADA

In Canada, the dispute over English and French has been defined primarily by domestic politics and has been entangled in the macro-constitutional question of whether Quebec, as a uniquely French culture, shares enough in common with the Rest of Canada "to go on sharing a common constitution."[10] Canada has addressed this question in its debate over the Meech Lake Accord, the Charlottetown Accord, and since the razor-thin 1995 Quebec referendum rejecting separation, Quebec separation and partition. This question, along with the micro-constitutional litigation over minority language rights, has also been shaped by the international arena.[11] The growth of nationalism and ethnicity, the support for constitutionally-entrenched bills of rights, and the emergence of an international body of human rights law have influenced the definition of three language regimes —the Quebec priority regime, the Canadian bilingual regime, and the UN non-discriminatory regime— which have provided the structure for the language rights litigation involving Quebec anglophones and their provincial government.

The Quebec language regime is based on the Charter of the French Language (Bill 101) which declares French to be the official language of the provincial legislature, courts, government agencies, and public schools.[12] French is also the official language of provincial commerce, business and labor relations.[13]Tempered by amendments and court decisions, Bill 101's unilingual character now gives priority to French while not prohibiting the use of other languages.[14] Its business provisions which regulate the use of French and other languages in the names, signs and advertising of private firms have generated substantial anglophone opposition.[15] So have its education provisions which require that instruction in provincial "elementary and secondary schools shall be in French,"[16] even though they permit limited access to English

10. PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 75 (1993).

11. ALAN CAIRNS, CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM 11-32 *passim* (1993).

12. BILL 101, *supra* note 3, at §§7-29. Sections 7-13 govern the legislature and the courts and sections 14-29 govern civil administration.

13. *Id.* at §41-71. Sections 41-50 govern labor relations and sections 51 to 71 govern commerce and business.

14. The Charter of the French Language has been amended several times but it is still known by the title of its original legislation: Bill 101.

15. Bill 101, *supra* note 4, at §§51-71.

16. *Id.* at §72.

language education.[17] In sum, Bill 101 defines Quebec's current language policy and, along with Party Quebecois policy statements,[18] it provides the framework for Quebec's language policy as a sovereign state.

The Canadian bilingual language regime has its origins in the British North America Act.[19] Now called the Constitution Act, 1867, it contains in Section 133 a bilingual language requirement for provincial legislatures and courts.[20] The Canadian Charter of Rights and Freedoms of 1982 (Canadian Charter) substantially extends this bilingual regime. Section 2(b)'s guarantee of freedom of expression includes linguistic expression.[21] Section 16 establishes English and French as Canada's official languages.[22] Sections 17 to 20 guarantee bilingual rights in federal parliamentary and judicial proceedings and records and in public communications with the federal government.[23] Section 23 grants the right to publicly funded minority language education to the children of three categories of English-speaking parents in Quebec and French-speaking parents in the other provinces as long as the "the number of children . . . is sufficient to warrant the expenditure of public funds."[24] In sum, these Charter provisions and Section 133, define Canada's bilingual language policy.

The United Nations nondiscriminatory language regime is based on the UN Charter. As a UN member, Canada's legal commitment flows from the International Bill of Rights: the Universal Declaration of Human Rights[25] and UN treaties such as the International Covenant on Civil and Political Rights (1976),[26] the International Covenant on Economic, Social, and Cultural Rights (1976),[27] and the UN Convention on the Rights of the Child (1989).[28] As a signatory to these treaties, Canada has committed itself to the general principle of linguistic nondiscrimination. Canada did not sign the UNESCO Convention Against

17. *Id.* at §§73-86.

18. NATIONAL EXECUTIVE COUNCIL OF THE PARTI QUEBECOIS, QUEBEC IN A NEW WORLD (Robert Chudos trans., 1984) [hereinafter PARTI QUEBECOIS].

19. Constitution Act, 1867, 30&31 Vict., ch. 3 (Eng.) [hereinafter Constitution Act, 1867].

20. *Id.* at §133.

21. CANADIAN CHARTER, *supra* note 2, at §2(b).

22. *Id.* at §16.

23. *Id.* at §§17(1), 18(1), 19(1), and 20(1).

24. *Id.* at §23(3).

25. Universal Declaration of Human Rights (1948).

26. International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 14668 [hereinafter ICPR Covenant].

27. International Covenant on Civil and Political Rights, December 19, 1966, 993 U.N.T.S. 14531 [hereinafter IESCR Covenant].

28. United Nations Convention on the Rights of the Child, U.N. Doc. A/RES/44/25 (1989) [hereinafter UNRC Convention].

Discrimination in Education (1960),[29] because education is subject to provincial jurisdiction, but as a UNESCO member, it has accepted the Recommendation Against Discrimination in Education.[30] In sum, these international human rights documents define the UN language regime.

Together these language regimes give expression to major features of the international community: the pervasiveness of ethnic nationalism, the commitment to charters of individual rights entrenched in domestic constitutions, and the growth of a cosmopolitan body of human rights law.[31] These language regimes also provide the framework for the micro-constitutional litigation of Canadian minority language rights by domestic and offshore courts. The Canadian Charter confers upon the Supreme Court of Canada the final domestic authority to decide whether Quebec's language statutes governing private business and public education violate the constitutional language rights of the province's anglophones.[32] However, Canada's UN membership and commitment to international human rights treaties grant international tribunals the authority to determine whether Quebec language laws and the Canadian Supreme Court's Charter decisions violate the linguistic human rights of Quebec anglophones.[33]

III. THE CANADIAN AND QUEBEC LANGUAGE REGIMES PRIOR TO 1982

The Canadian constitutional odyssey began with Quebec's Quiet Revolution of the 1960's which led to the creation of the province's priority language regime based on Bill 101.[34] Before then provincial laws were silent on the language of education. In 1969, Quebec's Union Nationale government passed an Act to Promote the French Language in Quebec (Bill 63) which took the first tentative steps towards making French the priority language in the province, but explicitly recognized the freedom of linguistic choice in education.[35] The Liberal government repealed Bill 63 in 1974 and ended linguistic equality by replacing it

29. United Nations Educational, Scientific, and Cultural Organization Convention Against Discrimination in Education, December 15, 1960, 93 U.N.T.S. 6193 [hereinafter UNESCO Convention].

30. United Nations Educational, Scientific, and Cultural Organization Recommendation Against Discrimination in Education, Dec.14, 1960, 429 U.N.T.S. 93 [hereinafter UNESCO Recommendation].

31. *See* CAIRNS, *supra* note 11.

32. CANADIAN CHARTER, *supra* note 2, at §52(1).

33. *See supra* text accompanying notes 26-30. But personal human rights claims are not always available: See discussion *infra*, notes 184 and 195.

34. For studies of the Quiet Revolution, *see, e.g.*, WILLIAM JOHNSON, A CANADIAN MYTH: QUEBEC, BETWEEN CANADA AND THE ILLUSION OF UTOPIA 19-34 (1994); MARC LEVINE, THE RECONQUEST OF MONTREAL: LANGUAGE POLICY IN A BILINGUAL CITY 39-64 (1990); RUSSELL, *supra* note 10, at 72-106; *Towards Patriation: Constitutional Reform, 1960-1982, in* WEBBER, *supra* note 1, at 92-120.

35. An Act to Promote the French Language in Quebec, R.S.Q., Bill 69 (1969).

with the Official Language Act (Bill 22) which declared that "French is the official language of Quebec."[36] Bill 22 did not create a French unilingual language regime, but gave official priority to French in government, business, and education. English schooling was still guaranteed, but French was encouraged by the requirement that access to English schools was only available to Francophones and immigrants who passed an English proficiency test. Otherwise, they were required to attend French language schools.[37] Quebec's commitment to qualified bilingualism ended with election of a Parti Quebecois government in 1976 and its enactment of the Charter of the French Language (Bill 101) the following year.[38]

Quebec anglophones had only limited Canadian constitutional means to challenge its provincial government's language laws. The Constitution Act 1867, contains in Section 133 a bilingual language requirement for provincial legislatures and courts, but no provision governing the language of education.[39] Constitutional authority over education was entrusted to the provinces. Section 93 of the Constitution Act 1867 permits provincial legislatures to "exclusively make Laws in relation to education" including the language of instruction.[40]

When Bill 22 ended linguistic choice and gave French official priority as the language of education, Quebec anglophones relied upon Section 93 to challenge its language education provisions. In *Protestant School Boards of Greater Montreal v. Minister of Education of Quebec* (1976), however, the Quebec Superior Court found no constitutional violation, because Section 93 protected denominational rights, not linguistic rights.[41] In 1978, the Quebec Court of Appeals dismissed the appeal, because the new Parti Quebecois government had repealed Bill 22 and replaced it with Bill 101.[42] Then Quebec anglophones challenged Bill 101's requirement which permitted only French to be used in the drafting and enactment of provincial legislation, but allowed their printing and publication in an unofficial English translation.[43] In *Attorney General of Quebec v. Blaikie* (1979), the Canadian Supreme Court found that Bill 101's French-only requirement for provincial legislation violated Section 133 which mandated the use of both English and French.[44]

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36. The Official Language Act of 1974, R.S.Q., Bill 22, preamble (1974).

37. LEVINE, *supra* note 34 at 98-109.

38. Bill 101, *supra* note 3. *See also* LEVINE, *supra* note 34, at 114-20.

39. Constitution Act, 1867 *supra* note 19, at §133.

40. *Id.* at §93.

41. Protestant Sch. Bd. Of Greater Montreal v. Minister of Educ. of Que., [1976] 83 D.L.R. 645.

42. Protestant Sch. Bd. of Montreal v. Minister of Educ. of Quebec, [1978] 83 D.L.R. 679.

43. *Id.* at §§7-15.

44. A.G. (Que.) v. Blaikie [1979] 2 S.C.R. 1016.

Neither Bill 101's business language provisions, nor those governing public education confronted any constitutional legal challenges, because the freedom of speech guarantee in the 1960 Canadian Bill of Rights applied only to the federal government,[45] and Section 93 bestowed upon provincial governments constitutional authority over education.[46] This constitutional landscape would change dramatically with the patriation of the Constitution and the promulgation of the Canadian Charter of Rights and Freedoms.

IV. THE CANADIAN AND QUEBEC LANGUAGE REGIMES AFTER 1982: CONSTITUTIONAL CONFLICTS OVER THE LANGUAGE OF EDUCATION AND BUSINESS

The defeat of Quebec's sovereignty association referendum of 1980 gave Canadian Prime Minister Pierre Trudeau the opportunity to patriate the Constitution and obtain a constitutionally-entrenched Charter of Rights and Freedoms (Canadian Charter).[47] The Supreme Court of Canada upheld his efforts and laid the foundation for Quebec alienation from post-Charter Canada with its decisions in the *Patriation Reference* (1981) that a constitutional convention required only a "substantial degree" of provincial consent,[48] and in the *Quebec Veto Reference* (1982) that Quebec's consent was not necessary to satisfy the "substantial degree" requirement.[49]

The Charter of Rights and Freedoms substantially expanded the scope of the Canadian language regime in two ways that are important to the micro-constitutional disputes over the language of business and education. The Charter's Section 2(b) provides a broad guarantee of freedom of expression which extends to the choice of linguistic expression.[50] The Charter's Section 23, as the federal government's direct response to the Bill 101, grants the right to a minority language education by conferring upon English-speaking parents in Quebec and French-speaking parents in the other provinces "the right to have their children receive primary and secondary school instruction in the [minority] language in that province"[51] if "the number of children . . . is suf-

45. The Canadian Bill of Rights, S.C., ch. 44, §1(d) (1960) (Can.). The Canadian Bill of Rights is a statute which binds only the federal government.

46. Constitution Act, 1867 *supra* note 19, at §93.

47. For studies of the patriation of the Constitution, *see, e.g.*, PETER HOGG, CONSTITUTIONAL LAW OF CANADA 51-59 (3d ed. 1992); JOHNSON, *supra* note 34, at 175-88; RUSSELL, *supra* note 10, at 107-27.

48. Patriation Reference (RE: Amendment to the Constitution) [1981] 1 S.C.R. 753, 905.

49. Quebec Veto Reference (RE: Objection to Resolution to Amend the Constitution) [1982] 2 S.C.R. 793, 817-18. *See also*, Morton, *supra* note 5, at 138.

50. CANADIAN CHARTER, *supra* note 2, at §2.

51. HOGG, *supra* note 47, at 122.

ficient to warrant the provision of minority language education . . . in minority language education facilities."[52]

The Quebec Clause, the Language of Education and the Quebec Protestant School Boards Case (1984)

Shortly after the patriation of the constitution and the promulgation of the Canadian Charter, Quebec anglophone parents relied upon the Charter's Section 23 to challenge Bill 101's Quebec Clause, which largely limits English language instruction to children whose parents have received their education in English in Quebec.[53] The Quebec Association of Protestant School Boards asked the provincial Superior Court to decide whether the Quebec Clause violated Section 23's Canada Clause, which confers the right to a minority language education upon the children of Canadian parents in Quebec "who received their primary school instruction in Canada in English or French;"[54] and the Sibling Clause, which grants Canadian parents the right to minority language education for the brothers and sisters of their children who are receiving or have received "their primary or secondary school instruction in English in Canada."[55]

The Quebec Superior Court ruled in favor of the school boards, and the Quebec Court of Appeals unanimously affirmed its judgment.[56] On appeal, the Supreme Court of Canada in *Attorney General of Quebec v. Quebec Association of Protestant School Boards* first examined the purposes of the framers of Section 23 and then turned to the true nature and effects of Bill 101's education provisions.[57] The Court found that the framers of Section 23 were well aware of the preferred treatment Bill

52. CANADIAN CHARTER, *supra* note 2, at §23(3).

53. Bill 101, *supra* note 3 at §73. The Quebec Clause, Section 73 states that "the following children . . . may receive their instruction in English: (a) a child whose father or mother received his or her elementary instruction in English, in Quebec; (b) a child whose father or mother, domiciled in Quebec on the date of the coming into force of this act [August 26, 1977] received his or her elementary instruction in English outside Quebec; (c) a child who, in his last year of school in Quebec before [August 26, 1977], was lawfully receiving his instruction in English, in a public kindergarten class or in an elementary or secondary school; [and] (d) the younger brothers and sisters of a child described in paragraph c.

54. CANADIAN CHARTER, *supra* note 2, at §23(1)(b). Section 23's Canada Clause confers the right upon the children of parents who "received their primary school instruction in Canada in English or French and who reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province."

55. *Id.* at §23(2). Section 23's Sibling Clause confers upon the children of a third category of parents: those who have any child who "has received or is receiving . . . instruction in English or French in Canada, have the right to have all their children receive . . . instruction in the same language."

56. A.G. (Que.) v. Que. Ass'n of Protestant Sch. Bds. [1983] C.A. 77, 1 D.L.R. (4th) 139, *aff'g* [1982] C.S. 673, 140 D.L.R. (3rd) 33, 3 C.R.R. 114.

57. *See* Quebec Protestant School Boards, [1984] 2 S.C.R. 66, at 79.

101 gave to French language instruction and they had drafted Section 23 to correct Bill 101's special language regime. "The framers' objective appears simple," the Court said: "to adopt a general rule guaranteeing the francophone and anglophone minorities in Canada an important part of the rights which the anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted."[58] When the Court compared Section 23 with Sections 72 and 73, it found that the combined effect of the latter two provisions constituted "a permanent alteration of the classes of citizens who are entitled to the protection afforded [by Section 23 and has] the effect of depriving an entire class of individuals of the right conferred by [section] 23."[59]

Then the Court turned to Canadian Charter Section 1 which provides that the Charter's rights and freedoms are subject to "reasonable limits prescribed by law as can be justified in a free and democratic society."[60] The Court acknowledged that Section 1 applied without exception to all Charter rights including Section 23,[61] but rejected its application in this case, because of the framers' purpose to use Section 23 to override Bill 101.[62] Nor was Section 73 saved by the Canadian Charter Section 33's Notwithstanding Clause, which permits legislation to continue in force in spite of a judicial decision that it violates the Charter, because Section 33 applies only to Charter Sections 2 and 7-15.[63] Finally, the Court found that Section 73 had altered the effect of Section 23 without following the Constitution's amending procedures set forth in Charter Clauses 38 to 49.[64]

In sum, the Supreme Court unanimously concluded that the Quebec Clause violated Section 23 of the Canadian Charter and that Quebec government had to admit the children of Canadian parents and siblings who had been educated anywhere in Canada to provincial English language schools. The Court's decision affirmed the bilingual vision of Canada by restoring to Quebec's anglophone minority parents the right to have their children receive an education in their minority language. As Christopher Manfredi observed, the Court "simply restored rights that English-speaking Quebecers had enjoyed prior to Bill 101 . . . through the relatively straightforward remedy of judicial nullification."[65] Since Section 23 is restricted to Canadian citizens, English, French and allophone (speakers of other languages) immigrant parents

58. *Id.* at 84.
59. *Id.* at 87.
60. CANADIAN CHARTER, *supra* note 2, at §1.
61. Quebec Protestant School Boards, [1984] 2 S.C.R. at 85.
62. *Id.* at 84.
63. *Id.* at 86.
64. *Id.*
65. Christopher Manfredi, *Constitutional Rights and Interest Advocacy, in* EQUITY AND COMMUNITY: THE CHARTER, INTEREST ADVOCACY, AND REPRESENTATION 103 (F. Leslie Seidle, ed., 1993).

were, however, still required by Section 23 to send their children to French-language schools.

In effect, the Supreme Court's first post-Charter language case led the Quebec government, unable to use Section 33's Notwithstanding Clause to override the Court's decision, to respond to federal government's invitation to open macro-constitutional negotiations to gain the province's agreement to the 1982 Constitution.[66] Known as the Quebec Round, it produced the Meech Lake Accord of 1987 which included Quebec's proposal to amend the Canadian Charter by inserting a clause recognizing the province as a distinct society.[67] Quebec clearly intended the clause to serve as a "constitutional trump card," allowing the province to argue in future Charter litigation that the preservation of its culture would require the Supreme Court to uphold provincial language education legislation under Section 1 as a reasonable limitation on its anglophones' Charter 23 rights.[68]

The Quebec French-Only Signs Law and Ford v. Quebec (1988)

In spite of the *Blaikie* and *Quebec Protestant School Boards* cases, Bill 101 had "generated a sense of 'relative linguistic security' in the French-speaking community" which led the Party Quebecois government to pass Bill 57.[69] The bill met some of the anglophone community's concerns by amending Bill 101's preamble to meet "anglophone demands for 'institutional' as opposed to 'personal' bilingualism in English language hospitals, schools, and social service agencies."[70] The 1985 provincial elections brought in a Liberal Party government which subsequently enacted legislation further modifying Bill 101 by granting amnesty to students enrolled in English language schools,[71] streamlining the language bureaucracy,[72] and guaranteeing anglophones the right to receive social and health services in English.[73] The Liberal Party election also signaled the relaxed enforcement of Bill 101's French-only commercial signs provisions, but the government took no legislative action to modify the signs provisions.[74]

Quebec anglophones had already initiated a legal challenge to the French-only signs requirement when the Supreme Court decided the

66. Quebec Protestant School Boards, [1984] 2 S.C.R. 66, at 88.

67. LEVINE, *supra* note 34 at 128.

68. Morton, *supra* note 5, at 139.

69. For studies of the Meech Lake Accord, *see, e.g.*, DAVID JAY BURCUSON & BARRY COOPER, DECONFEDERATION: CANADA WITHOUT QUEBEC 199-131 (1991); JOHNSON, *supra* note 34, at 199-251; P. MONAHAN, AFTER MEECH LAKE: THE INSIDE STORY (1991); RUSSELL, *supra* note 10, at 127-53; and WEBBER, *supra* note 1, at 121-76.

70. Morton, *supra* note 5, at 142.

71. LEVINE, *supra* note 34, at 128.

72. *Id.* at 130.

73. *Id.* at 131-33.

74. *Id.* at 133-34.

Quebec Protestant School Boards Case. In 1984, five anglophone businesses[75] claimed that Section 58 requiring French-only commercial signs, posters, and advertising,[76] and Section 69 requiring French-only commercial firm names,[77] infringed their freedom of linguistic expression protected by Section 2(b) of the Canadian Charter of Rights and Freedoms[78] and Section 3 of the Quebec Charter of Human Rights and Freedoms (Quebec Charter).[79]

The Quebec Superior Court agreed that Section 58 violated Section 3 of the Quebec Charter, but not Section 2(b) of the Canadian Charter.[80] Two years later (1986), the Quebec Court of Appeals unanimously held that the Quebec government could require signs to include French, but Sections 58 and 69's French-only provisions violated both Section 2(b) and Section 3.[81] The Court of Appeals' decision provoked considerable linguistic discord in Quebec, but the Liberal Party government ruled out any legislative action until the Supreme Court of Canada decided the signs issue.[82]

The Supreme Court's unanimous *per curiam* decision, handed down December 15, 1988, held that freedom of expression guaranteed by Section 2(b) included the freedom to express oneself in the language of one's choice.[83] "Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice."[84] This freedom to choose, given the Court's "large and liberal interpretation" of Section 2(b) in *Dolphin Delivery (1986)*[85] and *Irwin Toy (1989)*,[86] extended to the commercial expression addressed by Sections 58 and 69, because it "plays a significant role in enabling individuals to make informed economic choices, an important aspect of in-

75. *Ford*, [1988] 2 S.C.R. at 722-23.

76. Bill 101, *supra* note 3, at §58. Section 58 states: "Signs and posters and commercial advertising shall be solely in the official language."

77. *Id.* at §69. Section 69 states: "[O]nly the French version of a firm name may be used in Quebec." Bill 101, R.S.Q. 1977, §69.

78. CANADIAN CHARTER, *supra* note 2, at §2(b)

79. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS, R.S.Q., ch. C-12, § 3 (1977)(Can.).

80. Ford v. Quebec, [1985] C.S. 147, 18 D.L.R. (4th) 711.

81. Ford v. Quebec, [1986] R.J.Q. 80, 5 Q.A.C. 119, 36 D.L.R. (4th) 374.

82. LEVINE, *supra* note 34, at 134.

83. *See Ford*, [1988] 2 S.C.R. at 712. A companion case, Divine v. Quebec (AG) [1988] 2.S.C.R. 790, held that other sections of Bill 101 which did not require the exclusive use of French for brochures, orders, invoices, and other business documents also violated the CANADIAN CHARTER, §2(b). For studies of the Ford case, see e.g.: *R. Yalden, Liberalism and Language in Quebec: Bill 101, the Courts, and Bill 178* 47 U.T. FAC. L.REV. 973 [1984].

84. *Ford*, [1988] 2 S.C.R. at 748.

85. RWDSUV v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

86. *See* Irwin Toy Ltd. v. A.G. (Que.), [1989] 1 S.C.R. 927.

dividual self-fulfillment and personal autonomy."[87] The Court did not decide that Section 58 violated Section 2(b) of the Canadian Charter, because it was protected by a valid Notwithstanding Clause,[88] but it did hold that Section 58 violated Section 3 of the Quebec Charter[89] and that Section 69 violated both Section 2(b) and Section 3, because they prohibited Quebec anglophones from using the language of their choice.[90]

Then the Court addressed whether limits imposed on freedom of expression by Sections 58 and 69 were justified by Quebec as reasonable limits under Section 1 of the Canadian Charter and Section 3 of the Quebec Charter. Using a two part test it had created in *R. v. Oakes (1986)*,[91] the Court first asked whether Quebec's legislative purpose was sufficiently important. Quebec had argued that the French-only signs and firm names provisions were enacted to respond to "the vulnerable position of the French language in Quebec and Canada,"[92] and "to assure that the 'visage linguistique' of Quebec would reflect the predominance of the French language."[93]

The Court agreed that these purposes were "serious and legitimate,"[94] and then turned to the second requirement: that Sections 58 and 69, as legislative means, be proportional or appropriate to these purposes. Applying the *Oakes* proportionality element, the Court found that there was a "rational connection" between Sections 58 and 69 and the provincial government's goals of protecting the French language and communicating the reality of Quebec society, but their prohibition on the use of any language other than French was not necessary to achieve those goals.[95] "Predominant display of the French language, even its marked predominance," the Court suggested, "would be proportional to the goal of promoting and maintaining a French 'visage linguistique' in Quebec . . . [because it would] reflect the reality of Quebec society."[96] In sum, the Court recognized Quebec's distinct character, but concluded that Bill 101's signs provisions were not tailored to protect and enhance the French language in the province while minimally impairing the freedom of expression of its anglophone minority.

Bill 178

A week after the Supreme Court decision, the Quebec Liberal gov-

87. *Ford*, [1988] 2 S.C.R. 748 at 767.
88. *Id.* at 742.
89. *Id.* at 767.
90. *Id.*
91. *See* R. v. Oakes, [1986] 1 S.C.R. 103, *aff'd* in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, 768-69.
92. *Ford*, [1988] 2 S.C.R. at 777.
93. *Id.* at 778.
94. *Id.*
95. *Id.*
96. *Id.* at 780.

ernment enacted Bill 178, which amended Section 58 to require the exclusive use of French on outside commercial signs, but permitted English inside small businesses as long as French was predominant, and protected both Sections 58 and 69 with a notwithstanding clause provision.[97] Bill 178's "indoor outdoor compromise" may have satisfied the Ford "predominant display standard,"[98] but the bill and its Notwithstanding Clause were politically controversial in Quebec and across Canada.[99]

Bill 178 helped doom the Meech Lake Accord and its centerpiece, a "distinct society" clause which was included to entice Quebec to sign the 1982 Constitution. The rest of Canada saw the use of Section 33 "as an attack on the Charter and a betrayal of national bilingualism . . . and the distinct society clause as a clever ruse that would allow Quebec to achieve indirectly what it was now perceived as doing directly [by means of Section 33]: denying equality to its English-speaking minority."[100] Bill 178 also had an impact on the 1989 Quebec election which returned the Liberal Party to power. An alienated anglophone community created the Equality Party and, "running on the single issue of opposition to Bill 178," elected four members to the provincial legislature[101] and then supported the appeal of Bill 178 to the United Nations Human Rights Committee.[102]

V. THE UNITED NATIONS LANGUAGE REGIME AND THE LANGUAGE OF BUSINESS: *BALLANTYNE V. CANADA (1993)*

John Ballantyne and Elizabeth Davidson, two Quebec anglophone business people, initiated a UN Human Rights appeal in April 1989.[103] Later joined by Gordon McIntyre,[104] they claimed that Sections 58 and 69 violated their rights under Articles 2, 19, 26 and 27 of the International Covenant of Civil and Political Rights (ICPR Covenant), because they had been forbidden to use any language other than French on their commercial signs and in their firm names.[105] They also claimed that Bill 178's notwithstanding clause overrode their human rights guarantees in the Canadian Charter and Quebec Charter and that the override

97. An Act to Amend the Charter of the French Language, R.S.Q., §10 (1988) (Can.) [hereinafter Bill 178].

98. RUSSELL, *supra* note 10, at 145.

99. LEVINE, *supra* note 34 at 135. *See also* JOHNSON, *supra* note 34, at 262-67; *Yalden*, *supra* note 83.

100. Morton, *supra* note 5 at 143.

101. LEVINE, *supra* note 34 at 137.

102. MAURICE J. KING, THE FIRST STEP 207 (1993).

103. *Ballantyne*, supra note 9. (Communication No. 359/1989).

104. *Id*, communication No.385/1989. The McIntyre case was financially supported by the Chateauguay Valley English-Speaking People's Association (CVESPA), a Quebec Anglophone organization and was chronicled in KING, *supra* note 102.

105. *Ballantyne, supra* note 9 at 3.1.

provisions in those charters tolerated human rights abuses and violated Canada's obligation under Article 2 of the ICPR Covenant.[106]

Ballantyne v. Canada

The UN Human Rights appeal was a lengthy process which the UN Human Rights Committee (Committee) did not decide until March 1993.[107] Canada, given six months to respond to the complaints, provided its submission on December 28, 1990.[108] After receiving responses from the anglophone authors of the communication (authors), the Committee declared the complaints admissible on April 11, 1991.[109] With six months to address the merits of the complaint, Canada delayed its response until March 6, 1992 when it made two submissions: one requested a review of the Committee's admissibility decision and the other, prepared by Quebec, addressed the merits of the author's complaints.[110] After receiving the authors' responses,[111] the Committee, once again, declared the complaints admissible and then decided their merits.[112]

Article 2 of the ICPR Covenant's Optional Protocol permitted Quebec anglophones, as private parties, to submit their complaints to the UN Human Rights Committee, but since the Committee serves as an international tribunal of last resort, Article 2 also protects its jurisdiction by requiring private parties to exhaust their domestic remedies.[113] Canada objected to the admissibility of the complaint, because it claimed that the anglophone businesses who had made no attempt to challenge Bill 178 could still apply for a declaratory judgment that Bill 178 was invalid.[114] The authors denied that a declaratory judgment action would have any legal value, because Bill 178 contained a Notwith-

106. *Id.* at §3.1 & §3.3. See also THE CANADIAN CHARTER, supra note 2, at §33(1); Quebec Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, §52 (1977) (Can.); and ICPR Covenant, supra note 27, at §2.

107. The appeal of Bill 101 to the UN Human Rights Committee was a lengthy process which was handled solely in writing. After the Committee received the communications, the first (Ballantyne and Davidson) on April 10, 1989 and the second (McIntryre) on November 21, 1989, Canada replied on December 28, 1990 challenging the admissibility of the complaints. In April 11, 1991, the Committee decided that the communications were admissible. Canada requested reconsideration and submitted its arguments on the merits on March 6, 1992. The Committee declined to reconsider its decision on admissibility, decided the case on the merits, and announced its views on March 31, 1993. *See* KING, *supra* note 102.

108. *Ballantyne, supra* note 9, at 5.1-5.5.

109. *Id.* at 6.1-6.10 & 7.1-7.4.

110. *Id.* at 8.1-8.10.

111. *Id.* at 9.1-9.10

112. *Id.* at 10.1-10.5.

113. Optional Protocol to the International Covenant of Civil and Political Rights, art. 2, Mar. 23, 1976, U.N.T.S. 302, [hereinafter Optional Protocol].

114. *Ballantyne, supra* note 9, at 8.2.

standing Clause.[115] They also rejected Canada's argument that the Canadian Charter's Notwithstanding Clause was compatible with Canada's obligations under Article 2 of the ICPR Covenant, because the clause rendered inoperable the rights to "freedom of expression and protection from discrimination protected under the [ICPR] Covenant."[116]

The Committee declared the author's communications admissible, because it "disagreed with the State party's contention that there were still effective remedies available."[117] Even though Bill 101's business provisions had been declared unconstitutional, the Committee found that they had been replaced by provisions similar in substance and protected by Bill 178's notwithstanding clause which was not at issue in the cases before the Quebec courts.[118] The Committee then found that the authors might have a claim as victims of a violation of the ICPR Covenant's Optional Protocol.[119]

When the Committee turned to the merits, it held that Bill 178 did not violate Article 26 of the ICPR Covenant. The Committee accepted Quebec's argument that Sections 58 and 69 are "general measures applicable to commercial advertising which lay down the same requirements and obligations for all tradesmen, regardless of language."[120] The French-only restrictions on commercial advertising and firm signs, the Committee concluded, met Article 26's equality before the law requirement, because they apply equally to francophones and anglophones.[121] Nor did Bill 178 violate Article 27. The Committee also accepted Quebec's argument that Article 27's protection of linguistic minorities could not be invoked by Quebec anglophones, because the article is intended to protect the language and culture of Quebec francophones.[122] The Committee agreed that Quebec francophones would be entitled to protection under Article 27, but not Quebec anglophones, because the article applies to linguistic minorities within states, including federal states, not to a linguistic minority within a province.[123]

Bill 178 did, however, violate Article 19 of the ICPR Covenant. The Committee rejected Quebec's narrow reading of Article 19(2) that freedom of expression "concerns only political, cultural, and artistic expression and does not extend to the area of commercial advertising," and even if this were not the case, "freedom of expression in commercial advertising requires lesser protection than that afforded to political

115. *Id.* at 9.1
116. *Id.* at 9.10.
117. *Id.* at 7.2.
118. *Id.* at 10.2-10.3
119. *Id.* at 10.4
120. *Id.* at 11.5.
121. *Id.*
122. *Id.* at 11.2 in response to Quebec's arguments in 8.5.
123. *Id.*

ideas."[124] The Committee held that Article 19 should be interpreted "as encompassing every form of subjective ideas and opinions capable of transmission to others" and the form of commercial expression did not remove "this expression from the scope of protected freedom."[125] Then the Committee crafted a three part test for any restriction on freedom of expression: "[1] it must be provided for by law, [2] it must address one of the aims enumerated in paragraph 3(a) and (b) of Article 19, and[3] [it] must be necessary to achieve the legitimate purpose."[126]

Applying the test to Bill 178, the Committee acknowledged that the French-only commercial signs and firm names were provided for by law and the "rights of others," as the aim of Article 19(3)(a), "could only be the rights of the francophone minority within Canada under Article 27 . . . to use their own language.[127] But the French-only provisions which prohibited others from advertising in English were not necessary "to protect the vulnerable position in Canada of the francophone group . . . . This protection," the Committee concluded, "may be achieved in other ways that do not preclude freedom of expression [by Quebec anglophones] in a language of their choice . . . . The law could have required advertising be in both French and English."[128]

The Committee's definition of freedom of expression, its test for governmental restrictions on expression, and its decision that Bill 178's French-only commercial signs and firm names requirements violated Article 19, was a defining moment in Canadian constitutional language politics. The Committee, acting as an off-shore constitutional court, had used the human rights guarantees in the ICPR Covenant, an international treaty, to provide a binding offshore constitutional legal standard for Canada's language debate that may have partially overruled the Supreme Court of Canada's decision in the Ford case.

Ballantyne and Ford Cases Compared

The Human Right Committee (Committee) and the Canadian Supreme Court (Court) agreed that freedom of expression in Article 19 and Section 2(a) should be given a broad reading that includes freedom of linguistic choice in commercial expression. The Committee and the Court also agreed that Bill 178's French-only public signs and firm names requirements served at least a legitimate purpose, but were not necessary to protect the Quebec francophone community in Canada. However, the Committee's conclusion did not address the issue of the role of the French language in the public domain: whether Quebec could use the French-only requirement to assure the province's *visage linguis-*

124. *Id.* at 8.9.
125. *Id.* at 11.3.
126. *Id.* at 11.4.
127. *Id.*
128. *Id.*

tique. Finally, the Committee and the Court agreed that Quebec could have achieved its purposes in other ways that did not preclude freedom of choice in linguistic expression.

Thereafter, the Committee's and the Court's analyses diverged. For the Committee, a State could choose one or more official languages, but it could not deny the private use of the language of one's choice. Then it suggested that "the law could have required advertising be in both French and English."[129] The Court went much further. Using the *Oakes* proportionality test, it focused on Quebec's public domain argument (which the Committee had not considered) and found that "the [p]redominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French 'visage linguistique' in Quebec . . . [because it would] reflect the reality of Quebec society."[130]

Given the controlling character of the Committee's decision for Canadian constitutional law, the question is whether the *Ford* decision is consistent with *Ballantyne*. The answer depends on whether the Article 19(3)(a) grounds, "rights of others" which the Committee read to include "the rights of the francophone minority within Canada under Article 27 . . . to use their own language,"[131] is the exclusive basis under domestic law to uphold a government's action which limits freedom of linguistic choice. If it is not, then the Court's consideration of the importance of French in the public domain of Quebec and its use of the *Oakes* proportionality test to allow both languages to appear, but for French to be given "marked predominance," does not violate *Ballantyne*. If the test is exclusive, then *Ballantyne*, as it has been incorporated into Canadian constitutional law, has partially overruled *Ford*, because it does not permit Quebec to give "marked predominance" to French in commercial signs and firm names.

In sum, the UN Human Rights Committee decision in the *Ballantyne* case has brought about a major change in Canadian minority language politics. No longer are language issues defined solely in terms of the Quebec and Canadian language regimes, nor will its participants be guided solely by the Supreme Court of Canada's interpretation of the Canadian Charter provisions governing the use of language on commercial signs and in public schools. The *Ballantyne* decision has expanded the parameters of the micro-constitutional debate over Canadian minority language rights to include the UN language law regime.

Bill 86

The UN Human Rights Committee's *Ballantyne* decision, adopted on March 31, 1993, called upon Canada to remedy its Article 19 viola-

129. *Id.*

130. *Ford*, [1988] 2 S.C.R. at 780.

131. *Ballantyne, supra* note 9 at 11.4.

tion by "an appropriate amendment of the law."[132] On December 22, 1993, the Quebec Liberal government enacted Bill 86 which contained substantial changes in the use of language in business and education.[133] Bill 86, and the regulations which it authorizes the Quebec government to promulgate, currently define the province's language law regime, the political debate about the role of language in the life of the province, and the basis for anglophone legal challenges to its business and education provisions.

Bill 86 incorporated the language from the *Ford* decision by revising Section 58 to read: "public signs and commercial advertising must be in French, [but t]hey may be both in French and in another language provided that French is markedly predominant."[134] Section 63 requires firm names to be in French, but Bill 86 revises Section 68 to permit a firm name to "be accompanied with a version in a language other than French provided that . . . the French version of the firm name appears at least as prominently."[135] Section 58 and 68 also delegate authority to determine, by regulation, where commercial signs, posters, and advertising and firm names "must be in French only, where French need not be predominant, or . . . may be in another language."[136]

Bill 86 was also a belated response to the *Quebec Protestant School Boards* decision. The provincial government had impeded access to English language education for nine years.[137] Now Bill 86 provides access to anglophone schools to the children of Canada Clause and Sibling Clause parents by revising Section 73 to incorporate as Section 73(1) and (2) a version of the Canadian Charter Section 23(1)(b) and Section 23(2).[138] But these parents are required by Section 73 to make a request to have their children receive instruction in English.[139] Then Section 80

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132. *Id.* at 13-14.

133. An Act to Amend the Charter of the French Language R.S.Q. (1993) (Can.) [hereinafter Bill 86].

134. *Id.* at §58.

135. *Id.* at §68.

136. *Id.* at §§58. Section 68 states: "In public signs and posters and commercial advertising, the use of a version of a firm name in a language other than French is permitted to the extent that the other language may be used in such signs and posters or in such advertising pursuant to section 58 and the regulations enacted under that section. Bill 86, *supra* note 133, at §68.

137. *See* TASK FORCE ON ENGLISH EDUCATION, REPORT TO THE MINISTER OF EDUCATION OF QUEBEC (1992); *see also,* Don C. Donderi, *English-Language Population of Quebec Has Shrunk*, MONTREAL GAZETTE, August 17, 1995, at B3.

138. Bill 86, *supra* note 133, at §73.

139. *But cf.,* Bill 86, *supra* note 133, at §73(1)-(2); CANADIAN CHARTER, *supra* note 2, at §§23(1)(b) and 23(2). Note that Bill 86 is more restrictive than §23. The Canadian Charter's §23(1)(b), unlike Bill 86's §73(1) does not require that the parent's "instruction constitutes the major part of the elementary he or she received in Canada." The Canadia Charter §23(2) does not require, as does §73(2) that to be entitled to an English language education in Quebec, a child must have a parent and siblings who have "received or is receiving elementary or secondary instruction in English in Canada . . .provided that that

authorizes the provincial government to prescribe by regulation the procedures these parents must follow and "the elements of proof they must furnish in support of their request" to receive a certificate of eligibility for their children.[140] Still Bill 86 gives the province's francophone and immigrant anglophone and allophone parents no choice. They must send their children to French language schools.

In sum, Bill 86 was the Liberal government's attempt to bring the Quebec language law regime into compliance with the Supreme Court of Canada's interpretation of the Canadian Charter's Section 23 linguistic education rights in the *Quebec Protestant School Boards* case and the Charter's Section 2(b) freedom of linguistic choice in the *Ford* case. At the same time, it does not appear that the Liberal government in enacting Bill 86's business provisions was sensitive to UN Human Rights Committee's interpretation of the ICPR Covenant in the *Ballantyne* case, nor to the ICPR Covenant and other UN human rights treaties by its authorization of the provincial government to promulgate regulations governing the language of business and education. So it is not possible to indulge a presumption of constitutionality on behalf of the regulations Bill 86 authorizes the provincial government to promulgate, and those it has promulgated, nor is it possible to indulge a presumption of their conformity, and the conformity of the legislation's business provisions, with UN human rights treaties.

VI. THE UNITED NATIONS LANGUAGE REGIME: THE CONTINUING CONFLICT OVER THE LANGUAGE OF BUSINESS AND EDUCATION

The Quebec anglophone community, encouraged by the *Ballantyne* case, has explored a challenge to Bill 86's business and education provisions as violations of the Canadian and international language regimes.[141] The Montreal-based Parents Support Group, then the Equal-

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instruction constitutes the major part of the elementary or secondary instruction by the child." For the regulations which impede access to English language schools further, see *infra*, note 140.

140. Bill 86, *supra* note 133, at §80.(Regulations Adopted Under the Charter of the French Language); Regulations Respecting Requests to Receive Instruction in English, R.S.Q., ch. C-11, §4-2 (1981) (Can.). These regulations further impede access to English language schools to Canada Clause and Sibling Clause children.

141. Several Anglophone organizations have considered both domestic and international legal challenges to Bill 101's education provisions: the Parent's Support Group, Equality Party, the Chateauguay Valley English-Speaking Peoples Association (CVESPA) and Alliance Quebec.

The Parents Support Group, an association of Quebec English and French parents which offered advice and assistance to parents seeking admission for their children to English language schools, raised the issue of Quebec's compliance with the UNESCO Recommendation on Discrimination in Education and the United Nations Convention on the Rights of the Child before the Commission on the Sovereignty of Quebec on February 10, 1995. *See* B. TYLER, BRIEF OF PARENTS SUPPORT GROUP SUBMITTED TO THE COMMISSION

ity Party, and now Alliance Quebec have not limited their legal challenge to the ICPR Covenant and its provisions governing the freedom of expression,[142] equality before the law[143] and linguistic freedom.[144] Rather, they have considered other UN treaties which define the meaning of Canadian linguistic human rights. These treaties include the International Economic, Social and Cultural Rights Covenant (IESCR Covenant), which bestows the right to an education without discrimination on linguistic grounds;[145] the United Nations Rights of the Child Convention (UN Convention), which recognizes the educational rights of children;[146] and the UNESCO Recommendation on Education, which recognizes the right of national minorities to carry out their own educational activities.[147] In sum, the willingness of Quebec anglophones to rely upon these human rights treaties further expands the parameters of the micro-constitutional debate over Canadian minority language rights.

The Bill 86 Signs Provisions: Canadian and International Legal Issues

Do Bill 86's commercial signs provisions violate Section 2(b) of the Canadian Charter and Article 19 of the ICPR Covenant? Section 58's requirement that the use of French on commercial signs be "markedly predominant" clearly complies with the *Ford* standard and Section 68's requirement that the French version of the firm name appear "at least as prominently" as another language is more generous than *Ford* requires.[148] Whether Sections 58 and 68 violate the ICPR Covenant depends on whether the *Ford* decision is consistent with *Ballantyne*. If the Article 19(3)(a) grounds, "rights of others," is the exclusive basis under

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ON SOVEREIGNTY OF QUEBEC ON THE SUBJECT OF QUEBEC'S INTERNATIONAL OBLIGATIONS IN THE AREA OF DISCRIMINATION IN EDUCATION (1995) [hereinafter BRIEF OF PARENTS SUPPORT GROUP].

Similar testimony was given to provincial and federal government by the Equality Party and CVESPA. See: Keith Henderson, Equality Party Submission to the Estates General on Education (1995); Joint Presentation of the Chateauguay Valley English-Speaking Peoples Association (CVESPA) (1997). When William Johnson became president of Alliance Quebec in June 1998, he proposed that the Alliance Quebec challenge Bill 101's education and business language restrictions on the ground that they violate the UNESCO Recommendation on Discrimination in Education and the United Nations Convention on the Rights of the Child. *See* Diane Francis, *Johnson Wins an Important Skirmish in the Language War*, FIN. POST, June 4, 1998; Herbert Bauch, *Alliance Foes Bury Hatchett: Group "Moving Harmoniously Forward"*, MONTREAL GAZETTE, June 21, 1998, at A3.

142. ICPR Covenant, *supra* note 26, at art.19.

143. *Id.* at art. 26.

144. *Id.* at art. 27.

145. IESCR Covenant, *supra* note 27, at art.13.

146. UNRC Convention, *supra* note 28, at art.28.

147. UNESCO Recommendation, *supra* note 30, at art.5(c)

148. Bill 86, *supra* note 133, at §§58 & 68.

domestic law to uphold a government's action which limits freedom of linguistic choice, then Quebec may not give "marked predominance" to French in commercial signs, but it may require the French version of the firm name to appear "at least as prominently."[149] If the Article (19)(3)(a) grounds are not exclusive, then Quebec may give consideration to the importance of French in the public domain of the province, per *Ford*, by giving French "marked predominance."[150]

The language regulations which Bill 86's authorizes the provincial government to enact do, however, clearly fail to meet the standards established in *Ford* and *Ballantyne* and provide the basis for a legal challenge in the Quebec courts with an appeal to the Supreme Court of Canada, and, perhaps, to the UN Human Rights Committee, because they transfer to the Quebec government the authority to determine by regulation, where commercial signs, posters, and advertising and firm names "must be in French only, where French need not be predominant, or . . . may be in another language."[151] As a consequence, Sections 58 and 68 delegate to the government the discretion to prohibit the use of a language other than French on billboards, the sides of buses, and in metro stations and, thereby, to deny freedom of linguistic expression to Quebec anglophones guaranteed by Article 2(a) and Article 19.[152]

The Bill 86 Education Provisions: Canadian and International Legal Issues

Bill 86's language education provisions, Section 73's Canada Clause and Sibling Clause, respect the Canadian Charter. Bill 101 does not contain the Canadian Charter's Section 23(1)(a) Mother Tongue Clause,[153] but its omission does not violate the Canadian Constitution, because Section 59(1) of the Canadian Charter provides that Section 23(1)(a) will not apply to Quebec until its legislature approves, which it has not yet done.[154] Yet Bill 101, even with its Bill 86 revisions, may violate Canada's international legal obligations.

International Covenant on Civil and Political Rights

The ICPR Covenant commits Canada in Article 2 "to respect and ensure" the rights of individuals without linguistic distinction,[155] which

149. ICPR Covenant, *supra* note 26, at art.19(3)(a).

150. *Id.*

151. Bill 86, *supra* note 133, at §58.

152. *Id.* at §§58 & 68.

153. Canadian Charter, *supra* note 3, at §23(1)(a). Section 23's Mother Tongue Clause confers the right to a minority language education upon the children of parents whose "first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside."

154. *Id.* at §59(1).

155. ICPR Covenant, *supra* note 26, at art.2

Article 27 defines to include the right of persons belonging to linguistic minorities not to "be denied the right, in community with others of their group, . . . to use their own language."[156] Article 27's right does not explicitly extend to minority language education. Even so, it has been widely accepted that Article 27 does apply, but "requires only that the State Parties allow minorities to set up private schools, at their own expense, to provide instruction in their own language. The State is not legally obligated either financially or materially to assist the minorities concerned. . . or set up a minority public school system for their benefit."[157] If this is so, then Section 73 will not violate Article 27, because it does not hinder private anglophone and allophone private education. It only discourages Section 73 Canada Clause and Sibling Clause parents from sending their children to English language public schools and requires allophone immigrants who choose to have their children educated at public expense to attend French language schools.[158]

Canada has probably violated Article 26 of the ICPR Covenant which prohibits a state from discriminating on the basis of language, national origin, and birth, because Section 23 (1) (a), the Mother Tongue Clause, does not apply in Quebec.[159] Since all the provinces, except Quebec, have adopted Section 23(1) (a), francophone immigrant parents living in Ontario have a constitutional right to send their children to a French language public school as long as there is a sufficient number of eligible students, but anglophone immigrants parents living in Quebec would not have a corresponding right under Bill 101 to send their children to an English language education public school.[160]

International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (IESCR Covenant) commits Canada in Article 2(2) to guarantee the right to an education without discrimination on the basis of language, as set forth in Article 13(1).[161] Article 13(1), like Article 27 of the ICPR Covenant, may be read to apply to minority language education, and, like Article 27, does not bestow a positive right which will require the state to provide minority language education at public expense. Rather, it confers a negative right which forbids the state from intruding upon the right of linguistic minorities to set up private minority

156. *Id.* at art. 27

157. Jose Woehrling, *Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms,* 31 MCGILL L.J. 50, 58 (1985).

158. *Supra* note 133 with regard to Canadian Anglophones, but not Anglophone and allophone immigrants who must comply with Bill 101, §72, supra note 3, requiring a French language public education, since they do not qualify for a public English language education.

159. CANADIAN CHARTER, *supra* note 2, at §59(1).

160. Woerhling, *supra* note 157, at 72.

161. IESCR Covenant, *supra* note 27, at §§ 2(2) & 13(1).

language schools at their own expense.[162] As a consequence, Section 73 does not violate Article 13(1), just as it does not violate Article 27 of the ICPR Covenant, because it does not hinder private anglophone and allophone education.[163] If, however, Articles 2(2) and 13(1) are read jointly and incorporate Article 2(2)'s prohibition of discrimination on the basis of national origin and birth, Canada may also violate the IESCR Covenant, as it may violate Article 26 of the ICPR Covenant, by permitting a province, using Section 59(1) of the Canadian Charter, to discriminate on the basis of language, national origin, and birth in providing publicly financed education.[164] Since all the provinces except Quebec have adopted Section 23(1)(a), the difference in the treatment of Canadian and anglophone and allophone immigrants creates a difference in treatment within Canada in violation of the IESCR Covenant.[165]

UNESCO Recommendation Against Discrimination in Education

The UNESCO Recommendation Against Discrimination in Education (UNESCO Recommendation) gives member states the freedom to organize their school systems, but only grudgingly permits separate education.[166] Section 1 prohibits "any distinction, limitation or preference which, being based on . . . language, . . . national origin, . . . or birth, has the purpose or effect . . . of nullifying or impairing equality of treatment in education and in particular of depriving any person or group of persons of access to education . . . and establishing or maintaining separate educational systems for persons or groups of persons."[167] Section 2 , however, allows states to establish separate linguistic educational systems "if participation and attendance is optional,"[168] so long as they do not prohibit national minorities whose attendance is also optional "from understanding the language and culture of the community as a whole."[169]

Quebec anglophones will argue that Bill 101 violates the UNESCO Recommendation.[170] Section 73 has the purpose of creating a distinct francophone community in Quebec by establishing two separate and unequal linguistic educational systems for three groups of parents and denying those parents the option to participate in a francophone educational system. Section 73 furthers this purpose by giving a preference to francophone education and placing limitations on the access to anglo-

162. Woerhling, *supra* note 157, at 58.

163. *Id.*

164. CANADIAN CHARTER, *supra* note 3, at §59(1).

165. Woerhling, *supra* note 157, at 72.

166. PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 289 (1991).

167. UNESCO Recommendation, *supra* note 30, at §1(1).

168. *Id.* at §2(b).

169. *Id.* at §5(c)(i) & (iii).

170. *Supra* note 141; *see also*: B. Tyler, *Bill 101 Regarding Signs and Access to Schools, the Facts Underlying the Pending Language Debate*, DIALOGUE, April 1996, at 24.

phone education in a manner which nullifies or impairs equality of treatment by depriving parents of the option to participate in the francophone educational system. Canadian anglophone parents who qualify under Section 73's Canada and Sibling Clauses do have a choice, but not an unburdened one. Section 73 requires them to request a public anglophone education for their children[171] and then, per Section 80, to comply with detailed administrative regulations to receive a certificate of eligibility in order to attend anglophone schools.[172]

Bill 101 does not require francophone and immigrant parents to request a public francophone education for their children, nor obtain certificates of eligibility for them to attend French schools, because attendance at anglophone schools is not an option for these parents. Their children are required to attend francophone schools. Bill 101 also violates the UNESCO Recommendation Section 5 rights of these francophone and immigrant allophone parents. Since they are members of Canadian national minorities who are deprived of access to anglophone education, they are prevented from "understanding the culture and language of the [Canadian] community as a whole and from participating in its activities."[173] In sum, Quebec anglophones will make a persuasive argument that Bill 101 violates the UNESCO Recommendation, because it limits "access to children whose parents were Canadian citizens educated in Canada .... [and] denies to immigrants and French-speaking Quebecers ... the freedom of choose between two publicly funded systems of education in Quebec."[174]

UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UN Convention) commits Canada in Article 2(1) to guarantee that child's right to an education, as set forth in Article 28(1), without discrimination on the basis of the child's or his or her parent's language, national origin, or birth.[175] States are bound by Article 28(1) to recognize this right of the child to an education by making "primary education compulsory," secondary education "available and accessible," and both freely available to all children.[176] Do Section 23 of the Canadian Charter and Section 73 of Bill 101 violate the UN Convention?

A child's Section 23 Charter right to a minority language education depends upon the parents' citizenship, provincial residence, and language of instruction. Quebec children do not have access to English schools under Section 23(1) (a), the Mother Tongue Clause, because the

171. Bill 86, *supra* note 133, at §73
172. *Id.* at §80
173. UNESCO Recommendation, *supra* note 30, at §5(c).
174. BRIEF OF PARENTS SUPPORT GROUP, *supra* note 141, at 1.
175. UNRC Convention, *supra* note 28, at arts. 2(1) & 28(1).
176. *Id.* at art. 28(1).

Quebec government has not enacted legislation authorized by Section 59(1) of the Canadian Charter.[177] "This means that children of British, American, or Australian parentage are discriminated against by not being allowed to go to school in their mother tongue."[178] Nor do French and allophone immigrant Quebec children have access under Bill 86 or Section 23 Canada and Sibling clauses.[179] In fact, Bill 86 further restricts the child's right to an education, because it mandates French as the language of instruction for the children of all Quebec, Canadian, and immigrant francophone parents.[180] As a consequence, Quebec parents argue that a child's right to a minority language education depends upon some factual characteristic of his or her parents and, thereby, constitutes discrimination on language, national origin, and birth in violation of the UN Convention.

The UN Convention is unlikely to bear the weight of the Quebec parents' argument when their claim includes "a right to choose on behalf of their children between two publicly funded systems of [language] education" in Quebec.[181] Article 28(1), like Article 13(1) of the IESCR Covenant and Article 27 of the ICPR Covenant, does not require Quebec to provide minority language education at public expense, but merely prohibits the province from intruding upon the right of a linguistic minority to establish private minority language schools at their own expense.[182] As such, Section 73 does not violate Article 28(1), because it does not hinder private minority language education. At the same time, Canada may violate Article 2(1) and 28(1) of the UN Convention, as it may violate Article 26 of the ICPR Covenant and Article 13 of the IESCR Covenant, by not requiring Quebec to be bound by Section 23(1)(a), the Mother Tongue Clause, and, thereby, permitting Quebec, unlike other provinces, to discriminate in the provision of public education to Canadian and immigrant anglophones.[183]

Summary

The Quebec anglophone community has taken the opportunity to expand the legal parameters of the micro-constitutional debate over Canadian minority language rights by exploring the possibilities of both domestic and international language regime challenges to Bill 86's business and education provisions. Bill 86's business language provisions, Sections 58 and 68, do not violate the Canadian Charter.

177. CANADIAN CHARTER, *supra* note 2, at §59(1)

178. Diane Francis, *UN Committee Says Quebec Discriminates Against Children*, FIN. POST, July 20, 1995, at 11.

179. *See* CANADIAN CHARTER, *supra* note 2, at §23(1)(b); Bill 86, *supra* note 133 at §§73-86.

180. Bill 86, *supra* note 133, at §§72-73.

181. Brief of Parents Support Group, *supra* note 141, at 7.

182. Woerhling, *supra* note 157, at 58.

183. *Id.* at 72.

Whether they violate the ICPR Covenant will depend on whether the *Ford* decision is consistent with *Ballantyne*. However, there should be no doubt that the regulations which Bill 86 authorizes the provincial government to promulgate fail to meet the standards established in *Ford* and *Ballantyne* and provide the basis for domestic and international legal challenge as violations of Article 2(a) of the Canadian Charter and Article 19 of the ICPR Covenant.

Bill 86's education provision, Section 73, may also violate the ICPR Covenant, IESCR Covenant, UNESCO Recommendation, and UN Convention which prohibit discrimination on the basis of language, nationality, origin, and birth. All but the ICPR Covenant explicitly extend this prohibition to education. Together they could provide the basis for challenging Section 23 of the Canadian Charter and Section 73 of Bill 101. At the same time, all of these international human rights documents confer negative educational rights which forbid Quebec from intruding upon the freedom of anglophone and allophones to establish a privately funded minority language education, but do not obligate Quebec to financially or materially assist them or to provide a public school system for them. The ICPR Covenant, IESCR Covenant, and the UN Convention should also provide the basis for a claim that Section 23 of the Canadian Charter, because of its joint operation with Section 59(1) permits Quebec to discriminate on the basis of language, national origin, and birth in the provision of public education.

Whether Quebec anglophones will have the opportunity to have these human rights complaints heard will depend upon whether the international procedures permit private persons to submit complaints. The UN Human Rights Committee and the UNESCO Committee on Conventions and Recommendations in Education will be able to hear Quebec anglophone claims submitted under the ICPR Covenant and the UNESCO Recommendation, because the ICPR Covenant contains an optional protocol and the UNESCO's 1978 procedure permits human rights advocates to submit individual cases.[184] Since the IESCR Covenant and the UN Convention do not contain any procedures for individual complaints, Quebec anglophones will be unable to initiate a legal complaint in spite of their persuasive case against Bill 101.[185] Still, the Quebec anglophones may be able to use their international human rights complaints to influence the direction of the current national unity discussions and, if Quebec separates from Canada, the debate

184. *See* Optional Protocol, *supra* note 113 and UNESCO Executive Board, 1978: Decision 104 EX/3.3. On the UNESCO Decision, *see* S. Marks, *The Complaint Procedure of the United Nations Educational, Scientific, and Cultural Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS 86 (Hurst Hannum ed., 1992).

185. The IESCR Covenant and the UN Convention contain no individual complaint procedures. *See* Letter from Fiona Blyth-Kubota, *Human Rights Officer, Centre for Human Rights,* to Keith Henderson, *Equality Party Leader* (August 22, 1995).

over its admission to the United Nations.[186]

VII. MACRO-CONSTITUTIONAL IMPLICATIONS OF MINORITY LANGUAGE RIGHTS

Quebec anglophones and their provincial government have not limited their efforts to preserve or alter language policy to micro-constitutional litigation. Interwoven into the analysis of micro-level litigation, so far, has been Quebec's macro-constitutional response to the *Quebec Protestant School Boards Case*, the Meech Lake Accord, and following the passage of Bill 178 in response to the *Ford* commercial signs case, the death of the Accord in 1990. Since then Quebec and the Rest of Canada have been torn between two macro-constitutional strategies: keeping Quebec in Canada or permitting the province to separate. Still, the micro-constitutional question remains: What will either path mean for Quebec anglophones and minority language rights in business and education?

Anglophone Minority Language Rights in the Province of Quebec

While the UN Human Rights Committee had been involved with the *Ballantyne* case, the Quebec Liberal government, angered from the rejection of the Meech Lake Accord, committed the province to a sovereignty referendum in October 1992.[187] The Rest of Canada responded with the Canada Round, the second effort to "induce Quebec to acquiesce in the Constitution Act, 1982."[188] The Canada Round produced the Charlottetown Accord of 1992 which included a substantially broadened distinct society clause intended to guide the courts in interpreting the Canadian Charter in a manner consistent with "the vitality and development of official language minorities throughout Canada."[189] The Accord was, however, such a comprehensive response to so many matters of constitutional discontent and created so many cross-cutting cleavages that Quebecers and the Rest of Canada rejected it in a popular referendum on October 26, 1992.[190]

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186. BRIEF OF PARENTS SUPPORT GROUP, *supra* note 141, at 7.

187. For studies of post-Meech Lake Canada and the events leading to the Charlottetown Accord, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5; JOHNSON, *supra* note 34, at 311-45; RUSSELL, *supra* note 9, at 154-89.

188. For studies of post-Meech Lake Canada and the events leading to the Charlottetown Accord, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5; JOHNSON, *supra* note 34, at 311-45; RUSSELL, *supra* note 9, at 154-89.

189. Charlottetown Accord, Consensus Report on the Constitution, §1.2(1)(d) (1992) (Can.)(visited,June7,1999)<http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownConsensus.html>.

190. For studies of the making of the Charlottetown Accord and its defeat, *see, e.g.*, CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992, *supra* note 5;

The UN Committee's *Ballantyne* decision four months later led the Quebec Liberal government to pass Bill 86 by the end of the year. During the 1994 provincial election campaign, Parti Quebecois candidates avoided the language issue, although Jacques Parizeau, the PQ leader, remarked that he would reactivate the provincial language police and would "get rid of the decisions of the Supreme Court of Canada that condemned whole chapters of Bill 101."[191] Parizeau's comment was consistent with the PQ party platform which called for restoring Bill 101 to its original form and tightening the francisation rules to business and education, but he promised that there would be "no changes . . . in language laws before the sovereignty referendum" which the PQ promised within a year.[192]

A Parti Quebecois victory ushered in a third round of constitutional self-examination when the new government, fulfilling its election promise, introduced legislation on sovereignty.[193] During the first ten months of 1995, public discourse in Quebec focused on the issue of whether the province should separate. On September 8, the Quebec Superior Court's decided that Bill 1, the referendum law, violated the Canadian Constitution's amending provisions, but the PQ was not deterred from holding the referendum, because the court refused to issue an injunction.[194] On October 30, Quebecers went to the polls and said No to sovereignty by the narrow margin of 50.6% to 49.4%.[195] Minority language rights were clearly a decisive factor. "Montrealers, ethnic, and anglophone voters joined together to defeat Yes voters who were overwhelmingly francophone native-born Quebecers from other regions."[196]

Since the Quebec referendum, Canada has been involved in another

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BROOKE JEFFREY, *STRANGE BEDFELLOWS, TRYING TIMES*: OCTOBER 1992 AND THE DEFEAT OF THE POWER BROKERS (1993); C. Manfredi, *On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord, in* RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION, AND THEORY 40-60 (Anthony A. Peecock ed., 1996); RUSSELL, *supra* note 10, at 190-227.

191. *I'll Reactivate the Language Watchdogs, Parizeau Says,* MONTREAL GAZETTE, September 9, 1994, at A8.

192. *Id.*

193. Bill 51, An Act Respecting Sovereignty, 1st Sess., 35th Leg., (1994) (Can.). After the bill was tabled in the Quebec National Assembly on December 6, 1994, Premier Parizeau announced that the bill would be considered at the next session in September 1995. On September 7, 1995, Bill 1, "An Act Respecting the Future of Quebec" was passed and the referendum date (October 30, 1995) and question were announced. An Act Respecting the Future of Quebec, R.S.Q. (1995) (Can.).

194. Guy Bertrand, a Quebec City lawyer, former PQ separtist leader, and now a federalist, challenged the referendum in Bertrand v. Quebec (AG), *see*: GUY BERTRAND, ENOUGH IS ENOUGH: AN ATTORNEY'S STRUGGLE FOR QUEBEC 151-90 (1996).

195. Anthony Wilson-Smith, *A House Divided* [A Special Edition: The Quebec Referendum], MACLEANS, November 6, 1995, at 14; *see also* H. Clarke and A. Kornberg, *Choosing Quebec? The 1995 Quebec Sovereignty Referendum*, 29 PS: POL. SCI. & POL. 676-82 (1996).

196. Wilson-Smith, *supra.*note 195.

effort to gain the province's assent to patriation of the 1982 Constitution and to counter Quebec's campaign for an independent French-speaking nation. The federal government, which had taken a low profile until shortly before the referendum vote, became actively involved in promoting national unity. Parliament responded to Quebec's interests by enacting semi-constitutional resolutions in early 1996 which recognized Quebec as a distinct society and gave the province a veto over constitutional changes.[197] At the same time, the federal government adopted two anglophone Quebecer arguments by submitting a reference to the Canadian Supreme Court in 1996 which asked for a legal opinion on whether the Canadian Constitution or international law allow secession;[198] and by arguing that if Quebec separated, it would not maintain its current boundaries. In other words, if Canada can be partitioned by Quebec separation, so can a post-separation Quebec be partitioned to keep anglophone Quebecers in Canada.[199]

The provincial premiers from the rest of Canada also took the initiative to counter Quebec's separation impulse. At Calgary in September 1997, they issued a declaration which established a process for public consultation on national unity based on seven principles which affirm "the vitality of the English and French languages;" the equality of all provinces; "the unique character of Quebec society, its French-speaking majority, [and] its culture;" and the role of the Quebec government in protecting and developing "the unique character of Quebec society within Canada."[200] In sum, the Calgary Declaration, vaguely

197. S. Delacourt, *Provinces Given Last Word on Veto*, THE GLOBE AND MAIL, November 29, 1995; T. Wills, *Veto Over Constitutional Changes Now Law*, MONTREAL GAZETTE, February 3, 1996.

198. Anthony DePalma, *Canada Seeks Legal Advice on the Status of Quebec* N.Y. TIMES, February 17, 1998, at A5. The federal government's reference began when Guy Bertrand and Stephen Scott, a McGill law professor, challenged the constitutionality of a future Quebec referendum. The federal government intervened on September 26, 1996 and referred the case to the Supreme Court of Canada which heard oral arguments on February 16 to 19, 1998. *See In the Matter of Section 53 of the Supreme Court Act*, R.S.C., ch. S-26 (1995) (Can.). The text of the decision is online at <http://www.droit.umontreal.ca.html> . *See also* In the Matter of a Reference by the Governor in Council P.C. 1996-1497 (Reference re Secession of Quebec), File No. 25506, 37 I.L.M. 1340 (August 20, 1998). The decision's text is online at <http://canada.justice.gc.ca/Orientations/scess/index_en.html>. In a unanimous decision, the Supreme Court held that the Canadian Constitution required Quebec to negotiate with the federal government and the provinces if it wanted to secede and that international law did not apply because Quebecers were not a suppressed or colonized people.

199. B. Cox, *Partition After Separation OK: Dion*, MONTREAL GAZETTE, January 27, 1996, at B1. Quebec Anglophones put partition on the national agenda by creating the Special Community for Canadian Unity and arguing that if Canada were divisible, so was Quebec. *See* DIANE FRANCIS, FIGHTING FOR CANADA (1996); and KEITH HENDERSON, STAYING CANADIAN: THE STRUGGLE AGAINST UDI (1997).*Calgary Declaration*, 1997 (visited April 10, 1999)<http://www.uni.ca/calgary.html>.

200. *Calgary Declaration*, 1997 (visited April 10, 1999)<http://www.uni.ca/calgary.html>

reminiscent of the Charlottetown Accord, has no constitutional authority, but it does provide a basis for future national unity discussions.

Anglophone Minority Language Rights in a Post-Separation Quebec: Canadian and International Legal Perspectives

Politicians, academics, and journalists continue to debate the great "if." What will happen if Quebec votes for sovereignty in a forthcoming referendum? Speculation ranges from a "velvet divorce" to civil strife and U.S. military intervention.[201] The questions focus on how Canada, outside Quebec, may be politically, economically, and culturally restructured, and what political and economic challenges Quebec will confront as a new nation in an international political economy.[202] Speculation also focuses on the nature of the new Quebec and Canadian constitutional orders: the powers their governments will exercise and the rights their citizens will possess.[203]

In terms of this study, the question is what the character of minority language rights in a post-separation Quebec may be if the current macro-constitutional discussions fail and Quebec votes for sovereignty. One major macro-constitutional query is whether Quebec will separate by constitutional means or issue a unilateral declaration of independence.[204] A closely related issue is whether an independent Quebec will be defined by its current provincial boundaries or be partitioned with

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201. LANSING LAMONT, BREAKUP: THE COMING END OF CANADA AND THE STAKES FOR AMERICA (1994); L. Gagnon, *The Sorties by Bertrand and Bourgault Rocked the Sovereignty Boat*, THE GLOBE AND MAIL, January 21, 1995, n.p.

202. For studies of the political, economic, and cultural impacts of separation, *see, e.g.*, MARCEL COTE & DAVID JOHNSTON, IF QUEBEC GOES: THE REAL COST OF SEPARATION (1995); ALAN FREEMAN & PATRICK GRADY, DIVIDING THE HOUSE: PLANNING FOR A CANADA WITHOUT QUEBEC (1995); BEYOND THE IMPASSE: TOWARD RECONCILIATION (R. Gibbins & G. LaForest eds.,1998); NEGOTIATING WITH A SOVEREIGN QUEBEC (Daniel Drache & Roberto Perin eds., 1992); KIMON VALASKAKIS & ANGELINE FOURNIER, THE DELUSION OF SOVEREIGNTY: WOULD INDEPENDENCE WEAKEN QUEBEC (1995); ROBERT A. YOUNG, SECESSION OF QUEBEC AND THE FUTURE OF CANADA (1995).

203. For analyses of the constitutional and legal impacts of separation, *see, e.g.*, BEYOND THE IMPASSE, *supra* note 202; JOHNSTON, *supra* note 202; DONALD G. LENIHAN, GORDON ROBERTSON, et al., CANADA: RECLAIMING THE MIDDLE GROUND (1994); PATRICK J. MONAHAN, COOLER HEADS SHALL PREVAIL: ASSESSING THE COSTS AND CONSEQUENCES OF QUEBEC SEPARATION (1995); YOUNG, *supra* note 202.

204. *See, e.g.*, BERCUSON & COOPER, *supra* note 69; K. Banting, If Quebec Separates: Resturcturing Northern North America, in The COLLAPSE of CANADA? (1992); ALAN C. CAIRNS, LOOKING INTO THE ABYSS: THE NEED FOR A PLAN C (1997); GORDON GIBSON, PLAN B: THE FUTURE OF THE REST OF CANADA, (1994); HENDERSON, supra note 201; MONAHAN, supra note 205; PATRICK J. MONAHAN, MICHAEL J. BRYANT ET AL., COMING TO TERMS WITH PLAN B: TEN PRINCIPLES GOVERNING SECESSION (1996); P. RUSSELL & B. RYDER, RATIFYING A POST-REFERENDUM AGREEMENT ON QUEBEC SOVEREIGNTY (1997); YOUNG, *supra* note 202; John E. Trent, Neither Integration Nor Disintegration: An Agenda for Renewal of the Canadian Federation, DIALOGUE CANADA, March 1998, <http://www.uni.ca/dialogue/trent_dc3.html>.

anglophones and aboriginals remaining in Canada.[205]

Assuming Quebec could be linguistically partitioned, Quebec anglophones who remained in Canada as a new province would have no need to rely on their Canadian Charter Section 23 minority language rights, because they would be the linguistic majority. What about the language rights of immigrant allophones who will live in the new province? Whether they would be able to raise any international human rights claims, now made on their behalf by Quebec anglophones, will depend upon whether official bilingualism persists in a Canada where the francophone minority will fall from 25% to 3% after separation, and whether the new anglophone province adopts Section 23(1) (a), the Mother Tongue Clause.[206] Assuming Quebec separates and maintains its current boundaries, what might be the character of minority language rights in a the new state? The Parti Quebecois in *Quebec in a New World*, its plan for sovereignty, clearly envisions a Quebec in which the French language will be "the cornerstone of Quebec's cultural identity[,] . . . the official language of Quebec . . . and the preferred instrument for integrating newcomers into Quebec society."[207] Still, the PQ says it is committed to a pluralistic society and that sovereignty will lay the foundation "for Francophone and Anglophone Quebecers to live together more harmoniously and fruitfully."[208] In a sovereign Quebec, the PQ affirms "[t]he individual rights of Quebec anglophones will be guaranteed and the community will be able to continue to count on a secure network of educational, social, and cultural institutions that can maintain its vitality."[209]

The PQ government's 1995 draft legislation on sovereignty is, however, more cautious when it states that the new Quebec Constitution "shall guarantee the English-speaking community that its identity and institutions shall be preserved . . . . Such guarantee . . . shall be exercised in a manner consistent with the territorial integrity of Quebec."[210] Premier Parizeau's 1994 election remarks about his intention to "get rid of" the Supreme Court's decisions in the *Quebec School Board Case (1984)* and the *Ford Case (1988)* give even greater cause for concern.[211] His remarks drew upon other parts of the PQ program which call for the restitution of the French-only commercial sign law, further restrictions on English language education, and extension of the requirement

205. For studies of partition, *see, e.g.*, LIONEL ALBERT & WILLIAM F. SHAW, PARTITION: THE PRICE OF QUEBEC'S INDEPENDENCE (1980); HENDERSON, *supra* note 199; SCOTT REID, CANADA REMAPPED: HOW THE PARTITION OF QUEBEC WILL RESHAPE THE NATION (1992).

206. Kenneth McRoberts, *Protecting the Rights of Linguistic Minorities, in* NEGOTIATING WITH A SOVEREIGN QUEBEC, *supra* note 202, at 173-88.

207. PARTI QUEBECOIS, *supra* note 18, at 37.

208. *Id.* at 39.

209. *Id.*

210. *See supra* note 193.

211. *I'll Reactivate the Language Watchdogs, Parizeau Says*, *supra* note 191.

that businesses operate in French. Quebec anglophones who believe that a post-separation government will bring out the "tongue troopers" who will tighten down the "language screws" direct attention to the current PQ government which has toughened its enforcement of its language laws with the passage of Bill 40, instead of revising Bill 86.[212]

Still, it seems unlikely that Quebec would adopt a vengeful approach to anglophones. Bill 101's restriction on English language schools are already an object of international attention. "Quebec will [further] tarnish its image in international public opinion if, in acceding to sovereignty, it decides to reduce or abolish the constitutional rights that [linguistic] minorities have traditionally enjoyed."[213] Quebec will also need to be sensitive to the views of other states and the UN, UNESCO, and other international organizations. The PQ's government has announced that Quebec would assume Canada's international legal rights and obligations and apply for admission to the United Nations, UNESCO, and other international organizations.[214]

Granted, the ICPR Covenant, the IESCR Covenant, and the Convention on the Rights of the Child would not obligate Quebec to actively support the freedom of anglophone businesses to advertise in English and anglophone and allophone immigrant parents to send their children to English schools, but merely to refrain from overtly discriminating against them; and "their education clauses [would] only require covert toleration of minority mother tongues."[215] Still, a newly sovereign Quebec which moved to further restrict the commercial use of English would violate the spirit of *Ballantyne v. Canada*, and further limits on English language education would also raise questions about Quebec's compliance with the UNESCO Recommendation Against Discrimination in Education. As Kenneth McRoberts observes, the readiness of the international community "to recognize Quebec's sovereignty [and admit it to membership] might well be influenced by how the Quebec government treats its anglophone minority."[216]

VIII. CONCLUSION

Minority language rights have been a central feature of Canadian legal and political life for the past thirty years. Quebec's vision of the province as a distinctly French society has clashed with the freedom of

212. An Act to Amend the Charter of the French Language, R.S.Q., Bill 40 (1996) (Can.).

213. Freeman & Grady, *supra* note 202, at 189.

214. *Supra* note 193.

215. Tove Skutnabb-Kangas & Robert Phillipson, *Linguistic Human Rights: Past and Present*, *in* LINGUISTIC HUMAN RIGHTS: OVERCOMING LINGUISTIC DISCRIMINATION 86 (1995).

216. McRoberts, *supra* note 206, at 183

its anglophone minority to conduct its business in English and its right to educate its children in English. Quebec anglophones have litigated these issues before the Supreme Court of Canada in the *Quebec Protestant School Boards* and *Ford* cases and before the UN Human Rights Committee in the *Ballantyne* case. Quebec has been adept at resisting changes in the Charter of the French Language, but Quebec anglophones, buoyed by their successes in domestic and international litigation, have contemplated further litigation to challenge Bill 86 as a violation of the Canadian Charter and the international human rights covenants and conventions. The outcome of future litigation will be interwoven, as it already has been, with the macro-constitutional question of whether Quebec shares enough in common with the Rest of Canada to remain within the federation.

THE COUNTERPROLIFERATION SELF-HELP PARADIGM: A LEGAL REGIME FOR ENFORCING THE NORM PROHIBITING THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

COLONEL GUY B. ROBERTS*

> Neither the United States of American nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.
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> — John F. Kennedy, 1962[1]

I. INTRODUCTION: THE PROBLEM OF PROLIFERATION AND THE LACK OF AN EFFECTIVE LEGAL REGIME

The proliferation of weapons of mass destruction (WMD),[2] as well

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The opinions expressed in this article are those of the author and do not necessarily represent the views of the U.S. Government or any of its agencies.

1. The Soviet Threat to the Americans, Address by President Kennedy, 47 DEP'T ST. BULL. 716 (1962).

2. There is no universal and consistent use of this term to designate these weapons. For purposes of this article the term "weapons of mass destruction" refers to nuclear, biological and chemical weapons and their means of delivery. It will be abbreviated as WMD. The implication is that these weapons have a common ability to inflict far greater casualties than a comparable sized conventional explosive. Nonetheless considerable dif-

as missile delivery systems, is one of the most significant and protracted threats to international security and global stability ever faced by mankind. In a world where regional tensions may unpredictably erupt into war and terroristic acts of violence have become commonplace, these weapons have devastating consequences for world order. We continue to witness a steady and deadly increase in those countries determined to acquire a WMD capability. While the reasons are complex, and beyond our scope here, the fact remains that despite the creation of international nonproliferation norms and legally binding treaty commitments, a minority of states continues to pursue these weapons. No nation can absorb the devastating consequences of these weapons of terror. Yet, although the international community has condemned the proliferation of these weapons, the mechanisms for stopping or rolling back proliferation have been ineffective and the current legal regime authorizing nations to use force in response to this threat is moribund.

The use of force, under the most commonly accepted view of the current legal regime, may only be justified as an act in self-defense. The criteria for self-defense include an actual attack or a threat of attack so imminent that the perceived victim has no reasonable choice but to attack. All other uses of force, absent specific UN Security Council approval, are illegal and therefore prohibited. However, given the strategic realities created by proliferators armed with such weapons should such responses be condemned as illegal in the absence of an "imminent" threat?

Regrettably, the prevailing patterns of statecraft and the fundamental change of circumstances in the past fifty years have created a radically different world from the one of the Cold War, so that the current legal constructs so optimistically and idealistically enshrined in the 1945 UN Charter are unworkable. A new paradigm is essential if we are to successfully meet the challenge of the WMD threat. The main reason for a new juridical paradigm is that the old juridical paradigm of restraint as codified in the UN Charter simply no longer works. It is no longer responsive to the threat facing nations. We already see evolving events undermining the older paradigm's claim to deal adequately with the problems within its domain. Consequently, new paradigms which expand the permissible nature and role of the use of force are credibly

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ferences exist between these weapons with respect to their effects, the potential military impact of their use, the technical difficulties involved in acquiring them, and thus the degree of proliferation concern that they engender. I will also use the abbreviation NBC to refer to specific categories (nuclear, biological, chemical) of weapons and CBW to refer only to chemical and biological weapons. Where necessary I will discuss them separately in order to take into account the different issues (and the nature of the threat) that they raise. Also, the term "nuclear weapons" is meant to include radiological weapons (i.e. weapons that disperse radiological materials by whatever means) as well as the more familiar large energy yield nuclear fission/fusion weapons.

challenging the old order. A new legal regime or paradigm is necessary to reflect the new political environment in which national survival, regional security and world peace can, dictate the preventive or preemptive[3] use of force to either deter acquisition plans, eliminate acquisition programs or destroy illicit WMD sites at any stage in the proliferator's acquisition efforts.

This new counterproliferation self-help paradigm is not business-as-usual power politics validated by a legal construct but rather a common sense recognition that the law is not a suicide pact and that it is a process, more than just rules, that reflect and at the same time controls state behavior. This new "counterproliferation self-help" paradigm is fully consistent with the purposes of the Charter,[4] since illicit WMD programs threaten international peace and security. The current legal paradigm is not responsive. So, if the law is to have any relevance, a paradigm shift is both necessary and possible.

The term "paradigm" is appropriate since what is proposed is the embodiment of a distinct and coherent explanation of a new legal norm for the use of force that explains and validates the use of that force which should guide future practitioners in responding to the extraordinary threat posed by WMD proliferators.[5] The term is used as a conception of a specific legal regime, in this case a new legal regime to justify and rationalize state (or states) responses to the new threat of WMD proliferation. New modes of thought, new orientations are needed if the law is to adopt a dynamic, progressive—and therefore relevant—perspective. The old paradigm reflected a seemingly endless debate over the limits and scope of the UN Charter's Article 2(4) use-of-force prohibition and the right of self-defense enshrined in Article 51. As it currently stands we either provide tortuous and not-very-convincing legal justifications for our actions or we end up hobbling ourselves with legalistic restrictions against carrying the war—and indeed that is exactly what it is—to those that intend to do us and our way of life severe

3. A distinction should be drawn between the "preventive strike" and the "preemptive strike." A preventive strike is taken to eliminate the potential capability of a known enemy. A pre-emptive strike is one undertaken, based on clear and convincing evidence in the hands of decision-makers, in anticipation of an immediate enemy aggression. *See* CARL VON CLAUSEWITZ, ON WAR 370 (Michael Howard & Peter Paret trans. 1976). Until the moment that WMD or its delivery system(s) is deployable and ready for use, any counter-measure must be considered preventive. Once the weapon is deployable, the focus shifts to the prospective moment of its use, and self-defense becomes a preemptive act.

4. That fundamental purpose is the maintenance of international peace and security. U.N. CHARTER art. 1, para 1.

5. Dr. Thomas Kuhn first coined the term "paradigm." THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). A paradigm denotes "one sort of element in [a constellation of beliefs], the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." *Id.* at 175.

harm, either now or in the not-to-distant future.

To be relevant and useful international law must be adaptable. As one legal scholar counseled: "International law, like all living law, is in a process of continuous growth and adaptation to the new needs and circumstances."[6] Responding to the weapons of mass destruction proliferation threat necessitates examining the current legal regime in which these potential responses will be made. The very nature of the threat itself—WMD in the hands of unstable, despotic states that make no secret of their hegemonic designs or desire to threaten regional peace and security—is sufficient to justify the use of force, collectively or unilaterally if necessary. In cases involving the most fundamental of issues—the survival of the nation, regional security, global peace and order—the law should not be silent. A new paradigm will provide the world community with legally and politically supportable justifications for responding to and helping to eventually eliminate this ever-growing threat to world peace and security.

After a brief review of the magnitude of the threat, the nonproliferation and US counterproliferation efforts will be discussed, and the current legal regime will be reviewed, to include the on-going debate on the limits of self-defense. The criteria for the new paradigm will be set forth and four case studies will be examined under these criteria to demonstrate their efficacy and supportability without doing damage to the norm requiring states to "refrain" from using force in international relations. In the face of the demonstrably horrible threat of WMD, new legal parameters need to be established that support and justify collective or unilateral actions in response to the threat.

Preemptive or preventive acts are and, it is submitted, always will be controversial. In the current historical moment of world politics the United States—the world's only superpower—with unparalleled military power leads an international system in which most of the other states participate as willing partners. If the United States fails to use its power in ways that others will accept as just and legal, a terrible backlash could result. The consequences could be weakened cooperation, the de-legitimization of US leadership, and current international nonproliferation regimes could collapse, resulting in the acceleration of weapons of mass destruction proliferation both horizontally and vertically. The new proposed paradigm recognizes that certain state actors refuse to adopt the accepted practice of civilized nations and that stated response policies, supported by a coherent legal regime, are the only way to ensure national security, regional stability, and eventually a world free of this scourge on mankind.

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6. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 91 (1980).

II. THE WMD THREAT: AN EXTRAORDINARY CHALLENGE TO CIVILIZATION AND WORLD ORDER

> As the new millennium approaches, we face the very real and increasing prospect that regional aggressors, third-rate armies, terrorist groups and even religious cults will seek to wield disproportionate power by acquiring and using these weapons that can produce mass casualties. These are neither far-fetched nor far-off threats.
>
> — Secretary of Defense William S. Cohen[7]

Since the end of the Cold War, a number of states have emerged into the public consciousness whose behavior is in contravention of agreed norms of state behavior; that have either used or threatened to use force to coerce those that thwart their ambitions, and that seek to acquire arsenals of nuclear, biological, or chemical (NBC) weapons to achieve their aspirations. Former national security advisor Anthony Lake identified these state actors as "rogue" or "backlash" states.[8] At least 25 countries already have or are in the process of developing nuclear, biological or chemical weapons and the means to deliver them.[9] Of these, many have ties to terrorists, to religious zealots or organized crime groups who are also seeking to use these weapons.[10]

Why are these weapons so unique? This is a threat qualitatively different from conventional weapons because of its potential to do extreme damage, physical and psychological, with a single strike.[11] Due to their availability, relative affordability, and easy use, weapons of mass destruction allow conventionally weak states and non-state actors to counter and possibly thwart the overwhelming conventional superiority possessed by the United States and other Western nations.[12] Because of their potentially far greater lethality, any threats of use against the civilian populations of regional allies or of Western inter-

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7. TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY, REPORT OF THE NATIONAL DEFENSE PANEL 42 (1997).

8. Anthony Lake, *Confronting Backlash States*, 73 FOREIGN AFF. 45 (1994). The term "rogue" or "pariah" states will be used here to characterize those states that are illicitly seeking these weapons of mass destruction in contravention of established international normative behavior or in violation of solemn legal agreements.

9. CENTRAL INTELLIGENCE AGENCY NONPROLIFERATION CENTER, THE WEAPONS OF MASS DESTRUCTION 1 (1995).

10. PROLIFERATION:THREAT AND RESPONSE, DEP'T OF DEF. REPORT 49-51 (1997).

11 Mark, *Consequences of Nuclear War, in* THE DANGERS OF NUCLEAR WAR: A PUGWASH SYMPOSIUM 7, 7-16 (F. Griffiths & J. Polanyi eds. 1979); OFFICE OF TECHNOLOGICAL ASSESSMENT, THE EFFECTS OF NUCLEAR WAR (1979).

12. *See* Eric Arnett & Thomas Wander, *The Proliferation of Advanced Weaponry: Technology, Motivation and Responses* (1992); Scott Sagan, *Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb*, INT'L SECURITY, Winter 1996/97, at 56.

vening powers will have a much greater impact than similar ones of a conventional variety.[13]

The threat of holding civilian populations hostage to WMD use has a unique ability to deter regional allies from supporting a Western military intervention, as well as to affect the calculus of Western governments regarding the wisdom of the intervention itself.[14] In strictly military terms, Western forces will hold conventional superiority over their adversaries in most regional confrontations in which they become involved.[15] Regional powers that anticipate potential confrontation with the West are likely to seek asymmetrical strategies able to exploit areas of Western vulnerability. In this context, as former Secretary of Defense William Perry noted: "Rogue regimes may try to use these devastating weapons as blackmail, or as a relatively inexpensive way to sidestep the U.S. military's overwhelming conventional military superiority."[16]

The threat is well known and understood by our world leaders. In January 1992, the UN Security Council, meeting for the first time at the levels of Heads of State and Government, issued a declaration stating that "[t]he proliferation of weapons of mass destruction constitutes a threat to international peace and security."[17] In 1995, NATO responded to the growing proliferation threat by declaring:

> We attach the utmost importance to preventing the proliferation of weapons of mass destruction (WMD), and, where this has occurred, to reversing it through diplomatic means... As a defensive alliance, NATO is addressing the range of capabilities needed to discourage WMD proliferation and use. It must also be prepared, if necessary, to counter this risk and thereby protect NATO's populations, territory, and forces.[18]

President Clinton has declared weapons of mass destruction one of the "most significant threats that all of our people will face in the next whole generation...." [19] In 1994, President Clinton, by Executive Order, declared that the proliferation of weapons of mass destruction "constitutes an unusual and extraordinary threat to the national security,

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13. See OFFICE OF TECHNOLOGY ASSESSMENT, PROLIFERATION OF WEAPONS OF MASS DESTRUCTION:ASSESSING THE RISK (1993).

14. Sagan, *supra* note 12, at 57-74; John Supko, *The Changing Proliferation Threat*, FOR. POLICY, Winter 1996-97, at 5-6.

15. NATIONAL MILITARY STRATEGY, DEP'T OF DEFENSE 9 (1997).

16. PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF. REPORT iii (1996).

17. *Maintenance of International Security and Strengthening of the International Security System*, 46 U.N. Y.B. 33 (1993).

18. *Final Communiqué*, Communiqué M-DPC/NPG-1 (95) 57, NATO Press Service, June 8, 1995.

19. THE PROLIFERATION PRIMER, A MAJORITY REPORT OF THE SUBCOMMITTEE ON INTERNATIONAL SECURITY, PROLIFERATION, AND FEDERAL SERVICES (1998).

foreign policy, and economy of the United States," and declared a national emergency to deal with that threat.[20] Secretary of State Albright called the proliferation of these weapons "the most overriding security interest of our time."[21] The 1997 Department of Defense annual report on proliferation describes in graphic detail this wide-ranging and growing threat—a threat that was to have diminished with the establishment of comprehensive treaties banning such weapons.[22] Unfortunately, as Secretary of Defense William Cohen describes:

> As the new millennium approaches, the United States faces a heightened prospect that regional aggressors, third-rate armies, terrorist cells, and even religious cults will wield disproportionate power by using—or even threatening to use—nuclear, biological, or chemical weapons against our troops in the field and our people at home.[23]

Notwithstanding extraordinary efforts by the United States and others to create incentives to not acquire these weapons, the trend toward further proliferation has accelerated, with a few notable exceptions.[24] Dictators both impress and intimidate their populations by acquiring WMD. In several regions, for example the Persian Gulf and Northeast Asia, there appear to be few, if any, limits on the ambitions of unstable actors to acquire the most advanced and deadly weapons available, either through internal or external sources.[25] Increasingly, the currency of power for these countries is a WMD capability.

Consequently, an increasing number of countries have or are seeking the capability to produce and deliver nuclear weapons, heightening security concerns and increasing tensions world-wide.[26] China, the

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20. Exec. Order No. 12,938, 30 WKLY COMP. PRES. DOC. 2386 (Nov. 14, 1994). On November 12, 1997, he continued the declaration of national emergency by finding that the proliferation of these weapons continues "to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. . . ." 32 WKLY COMP. PRES. DOC. 2384 (Nov. 12, 1997).

21. William Drozdiak, *U.S. Pushes NATO on Arms Proliferation*, WASH. POST, Dec. 17, 1997, at A1.

22. OFFICE OF THE SECRETARY OF DEFENSE, PROLIFERATION: THREAT AND RESPONSE (1997).

23. *Id.* at iii.

24. Argentina and Brazil have resolved their security concerns and abandoned their nuclear programs with Brazil ratifying the Nuclear Nonproliferation Treaty (NPT) in 1998. John Rodick, et. al, *Nuclear Rapprochement: Argentina, Brazil, and the Nonproliferation Regime*, WASH. Q., Winter 1995, at 107. South Africa agreed to dismantle its nuclear weapons program (to include the six nuclear weapons it has assembled) and joined the NPT as a non-nuclear weapons state. Roger Molander & Peter Wilson, *On Dealing with the Prospect of Nuclear Chaos*, WASH. Q., Summer 1994, at 19, 30.

25. Attempts by rogue states such as North Korea, Iraq and Iran to acquired WMD is well known and voluminously documented. *See e.g.* OFFICE OF TECHNOLOGY ASSESSMENT REPORT, *supra*, note 13; PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF. (1997).

26. *See* DEFENSE NUCLEAR AGENCY REPORT, GLOBAL PROLIFERATION: DYNAMICS,

world's most proliferant proliferator of WMD materials and technologies,[27] now has intercontinental ballistic missiles targeting the United States and others with nuclear annihilation.[28] India and Pakistan have now officially joined the nuclear club with the underground testing of nuclear weapons.[29] Pakistan's nuclear weapons program is particularly worrisome. With the detonation of the "Islamic Bomb" the danger of transferring weapons and technology to other states and potentially terrorist groups has dramatically increased. As one Pakistan leader was quoted: "We are going to sell our nuclear technology. . . . It will be up for grabs to the highest bidder."[30] The Iranian Foreign Minister, in congratulating Pakistan on its successful nuclear detonation, reportedly said that "all over the world, Muslims are happy that Pakistan has this capability," claiming it would help counter Israel's presumed nuclear weapons program.[31] The lack of effective civilian control over its nuclear capability and the increasing political turmoil brought on by a shaky economy, turmoil in Afghanistan and extremist Islamic groups further exacerbates the situation.[32]

Nuclear weapons have the greatest potential for catastrophic devastation, the disruption of world peace, and the destruction of nonproliferation norms. Small (weighing a few kilograms) nuclear devices smuggled into population centers could produce thousands of casualties.[33] Those we most worry about as potential if not actual threats con-

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ACQUISITION STRATEGIES AND RESPONSES (1994), ERIC STANTON MILLER, THIRD WORLD NUCLEAR WEAPONS CAPABILITIES AND NOTIONAL ACQUISITION PATHS, CENTER FOR NAVAL ANALYSES (CRM 93-220, Mar. 1994).

27. *See* THE PROLIFERATION PRIMER, *supra* note 19.

28. Bill Gertz, *China Targets Nukes at U.S.*, WASH. TIMES, May 1, 1998, at A1 (quoting a CIA report on China's strategic missile and nuclear capability); Bill Gertz, *China's Nukes Could Reach Most of U.S*, WASH. TIMES, Apr. 1, 1998, at A1 (citing concerns expressed by commander, U.S. Strategic Command, over China's growing capability).

29. John F. Burns, *India Sets 3 Nuclear Blasts, Defying a Worldwide Ban; Tests Bring Sharp Outcry*, N.Y. TIMES, May 12, 1998, at A1; John F. Burns, *India Detonates a Hydrogen Bomb, Experts Confirm*, N.Y. TIMES, May 18, 1998, at A1; Steven Komarow, *Test Indicate Devices Big and Small, India's Arsenal Seen as Equal to U.S. in '60's*, USA TODAY, May 14, 1998, at A10; Molly Moore & Kamran Kahn, *Pakistani A-Tests Seen as 'Triumph for Islam'*, WASH. POST, June 15, 1998, at A19 [hereinafter Moore & Kahn]. Interestingly, prior to Pakistan's nuclear detonation, a former prime minister of Pakistan called on the world community to launch a preemptive strike since "rogue nations that defy world opinion ought to be taught a lesson." Benzair Bhutto, *Punishment: Make it Swift, Severe*, L.A. TIMES, May 17, 1998, at M5.

30. Moore & Khan, *supra* note 29.

31. John Ward Anderson, *Pakistan Claims It Has New Missile*, WASH. POST, June 2, 1998, at A7.

32. Christopher Thomas, *Tottering Pakistan Alarms Neighbors*, LONDON TIMES, Sept. 17, 1998, at 1.

33. GRAHAM T. ALLISON, ET AL., AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL chs. 1 & 2 (1996). A quantity of plutonium the size of a soda can (about 2.2 pounds or one kilogram) is

tinue along well-worn proliferation paths to acquire these weapons. For example, despite Herculean efforts by the United States to stop and roll back North Korea's nuclear weapons program,[34] U.S. intelligence officials have concluded that North Korea has resumed it's efforts to acquire nuclear weapons,[35] and the recent firing of a long range missile capable of hitting Japan and possibly US territories demonstrated that it now has a delivery system to threaten the US and key US allies with WMD.[36]

One of the greatest proliferation dangers is the huge quantity of fissile (nuclear) materials.[37] The danger of fissile materials cannot be overstated. Radioactive elements being removed from dismantled nuclear weapons and from nuclear power plant waste in the Former Soviet Union (FSU) are being stored in a country where physical security is compromised, where people in the military and scientific community are not paid well, if at all, and where organized crime operates aggressively and pays handsomely.[38] FBI Director, Louis Freeh, described the threat of Russian criminal organizations stealing and selling nuclear material to a rogue state or terrorist group as "extremely high."[39] Thousands of weapons and unknown quantities of weapons-quality nuclear materials are being inadequately stored and secured in a still highly unstable country.[40] Further, given the past and current economic crisis affecting

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enough to create a nuclear explosion. *See* THOMAS COCHRAN & CHRISTOPHER PAINE, THE AMOUNT OF PLUTONIUM AND HIGHLY ENRICHED URANIUM NEEDED FOR PURE FISSION NUCLEAR WEAPONS *9* (1995).

34. William E. Berry, Jr., *North Korea's Nuclear Program: The Clinton Administration's Response*, Institute for National Security Studies Occasional Paper #3 (Mar. 1995); Walter B. Slocombe, *Resolution of the North Korean Nuclear Issue, in* FIGHTING PROLIFERATION: NEW CONCERNS FOR THE NINETIES (Henry Sokolski ed., 1996).

35. J.F.O. McAllister, *More Nukes, Is North Korea the Latest to Proliferate?*, TIME, Aug. 10, 1998, at. 24.

36. Bill Gertz, *N. Korean Missile seen posing risk to U.S.*, WASH. TIMES, Sept. 16, 1998, at A1; Jim Lea, *NK Gives Japan Warning*, PAC. STARS & STRIPES, Sept. 18, 1998, at 4.

37. Guy B. Roberts, *Five Minutes Past Midnight: The Clear and Present Danger of Nuclear Weapons Grade Fissile Materials*, INST.OR NAT'L SEC. STUDIES OCCASIONAL PAPER #8, Feb. 1996.

38. *See* Barbara Slavin, *Nuclear Weapons Threat Lurks in Russia Poorly Paid Guards Are a Security Concern*, USA TODAY, Nov. 24, 1998, at A20 ("Recent U.S. visitors to Moscow's elite Kurchatov Institute of Atomic energy found no one guarding a building that holds 220 pounds of highly enriched uranium—enough for several bombs—because the cash-strapped institute could not afford to hire a single guard."); Judith Matloff, *In Poorer Russia, Risk Rises for Nuclear Sites*, CHRISTIAN SCI. MONITOR, Nov. 3, 1998, at 1 ("more than 15,000 tactical nuclear weapons. . . are at risk because no proper inventory exists.").

39. Mark Johnson, *Nukes and the Russian Mob*, J. COM., Mar. 13, 1998, at 6. *See also* Martin Sieff, *Russian 'Kleptocracy' Risks Spread of Nuclear Weapons*, WASH. TIMES, Sept. 30, 1997, at A3.

40. Since 1991 hundreds of incidents of theft and illicit trafficking of nuclear materials have been reported, and, in a society rampant with social and economic hardship, po-

Russia there is a great potential for the unauthorized export of dangerous WMD materials.[41] Troubling possibilities include the sale of materials or weapons and the recruitment of scientists, engineers or technicians by rogue states seeking to acquire a WMD capability.[42] It is virtually certain that one or more of these states will try to exploit perceived opportunities in Russia or other states of the former Soviet Union to obtain a WMD capability at bargain-basement prices.

On December 1, 1997, the congressionally-mandated National Defense Panel warned that, "[t]he increasing capability to fabricate and introduce biotoxins and chemical agents into the United States means that rogue nations or transnational actors may be able to threaten our homeland."[43] Despite signing and ratifying international agreements banning the development, production and use of such weapons, many nations are clandestinely attempting to acquire such weapons.[44]

While the consequences of chemical or biological weapons appear more uncertain, they nevertheless present the potential to inflict extraordinarily large casualties on civilian population centers and disrupt military operations. Iraq was able to use chemical weapons to good effect against poorly protected and trained Iranian forces as well as against Iraqi Kurds, and Iraq had (and may still have) the potential to launch Scud missiles with chemical agents against Israeli population centers.[45] Chemical and biological weapons, we know, are the poor man's atomic bomb—cheaper to buy, easier to build and extremely deadly, and it is extremely difficult to detect and eliminate such programs.[46] Witness for example, the seemingly never-ending efforts to

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litical opportunism and highly organized criminal elements the risk of a catastrophic rupture, if it has not already occurred, remains distressingly high. *See* Guy B. Roberts, *Five Minutes Past Midnight: The Clear and Present Danger of Nuclear Weapons Grade Fissile Materials,* Institute for National Security Studies Occasional Paper #8, Feb. 1996; GRAHAM T. ALLISON ET L., AVOIDING NUCLEAR ANARCHY: CONTAINING THE THREAT OF LOOSE RUSSIAN NUCLEAR WEAPONS AND FISSILE MATERIAL (1996); NATIONAL RESEARCH COUNCIL, PROLIFERATION CONCERNS, ASSESSING U.S. EFFORTS TO HELP CONTAIN NUCLEAR AND OTHER DANGEROUS MATERIALS AND TECHNOLOGIES IN THE FORMER SOVIET UNION (1997).

41. *See, e.g.* Lee Hockstader, *Rampages by Russian Troops Illustrate Army Erosian,* WASH. POST, June 4, 1997, at 27; Douglas Farah, *Freeh Says Russian Mafia Pose Growing Threat to U.S.*, WASH. POST, Oct. 2, 1997, at 18; Oleg Bukharin & William Potter, *Potatoes Were Guarded Better,* BULL. OF ATOMIC SCIENTISTS, May/June 1995, at 48.

42. *See, e.g.* Bill Richardson, *Russia's Recession:The Nuclear Fallout,* WASH. POST, Dec. 23, 1998, at 23.

43. TRANSFORMING DEFENSE: NATIONAL SECURITY IN THE 21ST CENTURY, REPORT OF THE NATIONAL DEFENSE PANEL 25 (1997).

44. *See, e.g.,* Tim Weiner, *Soviet Defector Warns of Biological Weapons,* N.Y. TIMES, Feb. 25, 1998, at A1.

45. PROLIFERATION: THREAT AND RESPONSE, DEP'T OF DEF.29-33 (1997).

46. *See* CENTRAL INTELLIGENCE AGENCY, THE WEAPONS PROLIFERATION THREAT (Brad Roberts ed, 1995); TERRORISM WITH CHEMICAL AND BIOLOGICAL WEAPONS: CALIBRATING RISKS AND RESPONSE (1997).

discover the depth and breadth of Iraqi's chemical and biological weapons program eight years after the Persian Gulf War and the imposition of the most intrusive inspection regime ever. Iraq's biological warfare program was far more extensive than first believed, and much of the program and the weapons and delivery systems are thought to still exist.[47]

So horrific and dangerous is the biological warfare threat it has been called "the weapon too terrible for the parade of horribles."[48] Any nation or non-state actor "that has even a rudimentary vaccine production capability also has the equipment and expertise necessary to produce biological agents. . . ."[49] For example, they could be readily introduced into mass transportation systems and quickly spread to thousands of people with devastating consequences. American cities are dangerously vulnerable to the sneak release of biological agents in subway systems or outside the unguarded vents of office buildings, and troops "remain inadequately equipped, poorly trained and insufficiently immunized to confront germ warfare."[50] Biological agents are a relatively cheap force multiplier. One expert estimated that biological weapons are the most cost effective for producing mass casualties.[51] The continued progress of biotechnology could potentially lead to the

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47. *See, e.g.*, R. Jeffrey Smith, *Iraq's Drive for a Biological Arsenal*, WASH. POST, Nov. 21, 1997, at A1. Iraq admitted to making enough botulinum toxin to, in theory, wipe out the Earth's population several times over. During the 1980's, the Iraqis' produced many potential BW agents and studied ways to enhance the lethality and durability of several potential BW agents.

48. Roger Cohen, *The Weapon Too Terrible for the Parade of Horribles*, N.Y. TIMES, Feb. 8, 1998, at 4-1.

49. Randall Larsen & Robert P. Kadlec, *Biological Warfare: A Silent Threat to America's Defense Transportation System*, STRATEGIC REV., Spring 1998, at 7. For example, ten grams of anthrax spores could kill as many people as a tone of sarin nerve agent. The authors also cite the 1979 Sverdlovsk incident where less than one gram of anthrax spores were released causing the deaths of 66 people in a relatively sparsely populated area. *See also* Martin Arostegui, *Fidel Castro's Deadly Secret*, INSIGHT, July 20, 1998, at 1 (detailing Castro's biological and chemical warfare program and the possibility of providing terrorists with such weapons); Bill Gertz, *China has Biological Arsenal, Congress Told*, WASH. TIMES, July 15, 1995, at 2 (U.S. annual arms control report to Congress details China's noncompliance with it's treaty obligations to not develop biological weapons).

50. Bradley Graham, *U.S. Gearing Up Against Germ War Threat*, WASH. POST, Dec. 14, 1997, at A1. A recent Pentagon Inspector General report found that the military is not adequately training forces to fight in the face of the likely chemical and/or biological attack. *See* John Donnelly, *IG:Chem/Bio Battle Training Falls Short*, DEF. WK., Aug. 3, 1998, at 1.

51. Estimated costs for producing mass casualties per square kilometer are:
$1 for biological
$600 for chemical (nerve agent)
$800 for nuclear
$2,000 for conventional
See RICHARD DANZIG, BIOLOGICAL WARFARE: A NATION AT RISK—A TIME TO ACT (1996).

development of new agents that are more lethal, easier to store, and have an even greater lethality against unprotected civilian populations than nuclear weapons.[52]

Reports abound about various radical and fundamentalist groups attempting to acquire these weapons. For example, a group calling itself the "Jihad Islamic Front Against Jews and Crusaders," founded in February 1998 by the infamous and elusive Osama Bin Ladin, has threatened to unleash a terrorist offensive using chemical and biological weapons.[53] With money no object, fanatics are supposedly being trained to use these agents on Western populations.[54]

Finally, the methods of delivering these weapons of terror increase the likelihood of deployment and use of such weapons after their acquisition. Many of the states in the process of acquiring a WMD capability are also developing a ballistic missile capability.[55] In July 1998, the Congressionally mandated Commission to Assess the Ballistic Missile Threat to the United States released its report whose unanimous conclusions bear repeating here:

> a. Concerted efforts by a number of overtly or potentially hostile nations to acquire ballistic missiles with biological or nuclear payloads pose a growing threat to the United States, its deployed forces and its friends and allies. These newer, developing threats in North Korea, Iran and Iraq are in addition to those still posed by the existing ballistic missile arsenals of Russia and China, nations with which we are not now in conflict but which remain in uncertain transitions. The newer ballistic missile nations . . .would be able to inflict major destruction on the U.S. within about five years of a decision to acquire such a capability (10 years in the case of Iraq). During several of those years, the U.S. might not be aware that such a decision had been made.
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> b. The threat to the U.S. posed by these merging capabilities is broader, more mature and evolving more rapidly than has been re-

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52. For an overview of this evolving BW threat *see* The Institute for Strategic Studies, *Biological Weapons: New Threats or Old News?*, STRATEGIC SURV. 31-41 (1996).

53. Guido Olimpio, *Islamic Cell Preparing Chemical Warfare, Toxins, Gases Against West*, MILAN CORRIERE DELLA SERA, July 8, 1998, at 9 (trans. by Foreign Broadcast and Information Service).

54. Recently, news reporters "posing as middlemen for a medical laboratory in North Africa, were offered samples of anthrax, plague and brucella by a laboratory in the Far East" for around $1000 a sample. *See Need a Biological War? Labs Sell Anthrax Germs by Mail Order*, LONDON TIMES, Nov. 22, 1998, at 1.

55. *See* Barbara Slavin, *Nations See Missiles as Ticket to Power*, USA TODAY, Sept. 16, 1998, at 15; Walter Pincus, *Iran May Soon Gain Missile Capability*, WASH. POST, July 24, 1998, at 28.

ported in estimates and reports by the intelligence community.[56]

c. ***The warning times*** the U.S. can expect of new, threatening ballistic missile deployments are being reduced. Under some plausible scenarios—including rebasing or transfer of operational missiles, sea- and air-launch options, shortened development programs that might include testing in a third country, or some combination of these—***the U.S. might well have little or no warning before operational deployment.***[57] (Emphasis added)

The post Cold War era has elevated WMD proliferation into one of the most important international security issues facing the world today. In the hands of states unwilling to adhere to the established norms of civilized nations, the likelihood of devastation and instability is great. As will be discussed, the international community has erected important legal and normative barriers to the proliferation of these types of weapons, and yet it has not been enough to stop proliferation. Those threatened with the potential of these weapons have recognized this and instituted a series of defensive and offensive measures designed to limit damage in case of attack and raise the costs in order to deter those who acquire such weapons from using them.

III. CURRENT NON-PROLIFERATION EFFORTS AND THE US COUNTERPROLIFERATION INITIATIVE

> "Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty. We will not waver in the face of aggression and tyranny."
>
> — John F. Kennedy [58]

A. Non-Proliferation and the Establishment of Legal Norms

"For to win one hundred victories in one hundred battles is not the

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56. After the embarrassing nuclear tests of India and Pakistan, U.S. intelligence Agencies publicly acknowledged serious intelligence shortfalls in its ability to detect WMD programs and ballistic missile development. Walter Pincus, *Buried Missile Labs Foil U.S. Satellites*, WASH. POST, July 29, 1998, at 1. *But see Pakistan, India Exaggerated Nuclear Tests, Study Finds*, BALT. SUN, Sept. 16, 1998, at A20 (tests by India and Pakistan were overstated both in terms of numbers and power).

57. NATIONAL SECURITY COMMITTEE, SUMMARY OF THE REPORT OF THE COMMISSION TO ASSESS THE BALLISTIC MISSILE THREAT TO THE UNITED STATES, <http://www.nyu.globalbeat/usdefense/nsc071598.html>.

58. President John F. Kennedy, Inaugural Address, January 20, 1961 *in* PUB. PAPERS (1961).

acme of skill. To subdue the enemy without fighting is the acme of skill."

— Sun Tzu[59]

The United States, NATO and the world community at large have recognized that these weapons pose a "grave danger and urgent threat" to international peace and security,[60] and the United States has undertaken a multi-faceted approach to stop would-be proliferators. US nonproliferation policies are based on three main thrusts: buttress technical constraints; reduce proliferation incentives and enhance disincentives; and build nonproliferation institutions or norms.[61] Nonproliferation efforts aim at preventing potential proliferators from gaining access to the relevant capabilities and technologies necessary to develop, field and maintain such weapons. Indeed, nonproliferation policy has achieved noteworthy successes in preventing and helping to reverse proliferation. Traditional instruments of nonproliferation policy have included detecting weapons programs (verification measures); reducing regional tensions through confidence building measures, security assurances and assistance, and military cooperation; strengthening multilateral export control regimes to curtail access to NBC technologies and material; reinforcing the international nonproliferation regimes; and bringing pressure to bear on proliferating nations through trade sanctions and public diplomacy.[62]

Over the past three decades, multilateral export controls and suppliers restraints have been put in place to enhance technical constraints and make it more difficult for countries to acquire WMD weaponry.[63] These controls have not been expected to block proliferation outright. Instead their purpose has been to "buy time."[64] In some cases, buying time has allowed other diplomatic and political actions to be taken (for example, the use of US influence in the mid-1970s to persuade both

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59. SUN TZU, THE ART OF WAR 77 (Samuel B. Griffith ed., 1963).

60. WHITE HOUSE PRESS RELEASE, EXEC. ORDER No. 12938 (Nov. 12, 1997) (declaring a national emergency over the extraordinary threat of WMD proliferation); THE ALLIANCE'S STRAGIC CONCEPT paras. 12,50 (1991), (Recognition of the grave risks of WMD Proliferation); President of the UN Security Council Statement, S/23500, Jan. 31, 1992 (Proliferation of all WMD constitutes a threat to international peace and security).

61. The United States proliferation strategy is summarized in OFFICE OF TECHNOLOGY ASSESSMENT, PROLIFERATION OF WEAPONS OF MASS DESTRUCTION: ASSESSING THE RISKS (1993); PROLIFERATION: THREAT AND RESPONSE, *supra* note 10.

62. PROLIFERATION: THREAT AND RESPONSE, *supra* note 10, at 53-77.

63. *See* PROLIFERATION AND EXPORT CONTROLS (Cathleen Bailey & Robert Rudney eds., 1993).

64. "In the ninth century the King of France imposed the death sentence on anyone who sold a sword to a Viking. This did not prevent the Vikings from taking Normandy or, even worse, their children from conquering England." David Fisher, *The London Club and the Zangger Committee: How Effective? in* PROLIFERATION AND EXPORT CONTROLS, *supra* note 63.

South Korea and Taiwan to shutdown questionable nuclear activities).[65] Buying time, however, is also valuable in its own right. Regional security and domestic political changes can lead to unexpected decisions to renounce or rollback WMD programs. This is perhaps best typified by South Africa's decision in the early 1990s to dismantle its rudimentary nuclear arsenal and join the NPT, a decision made possible by the withdrawal of Soviet and Cuban forces from Angola in the late 1980s and made necessary in the eyes of the new government of President de Klerk by the inevitability of black majority rule.[66]

Equally important, traditional prevention policies have sought to reduce proliferation incentives. Diplomatic persuasion and dissuasion, use of conventional arms sales to help buttress defense capabilities of US allies and friends, political support in crises, and efforts to encourage regional stability and confidence-building all have played a role. The threat of economic and other sanctions, for example, has been used to enhance disincentives to pursuing NBC weaponry.

In the past, deterrence of acquisition has also been a modest but not very successful element of past non-proliferation efforts. Almost exclusively, deterrent efforts have emphasized the threat of punishment. They have frequently foundered, however, on the reluctance either of the US or of other countries to carry out such threats.[67] And if such threats are carried out, most states are reluctant or unable to stay the course for usually a long, indefinite period before any results can be seen.

Nonetheless, the threat of preventive military action has proven a useful adjunct to other proliferation prevention initiatives. An implicit threat of recourse to military force could back-up political and diplomatic initiatives. Similarly, the risk that acquisition of NBC capabilities would prove a lightning rod and not a deterrent of US military strikes in the event of conflict could reinforce other ongoing efforts to buttress deterrence of acquisition by a strategy of denial of gains.

During the Persian Gulf War, for example, it has been argued that the threat of massive retribution by the United States deterred Iraq

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65. Joseph Yager, *Prospects for Nuclear Proliferation Rollback*, DEP'T OF ENERGY OFFICE OF ARMS CONTROL AND NONPROLIFERATION, July 6, 1992.

66. Frank Pabian, *South Africa's Nuclear Weapons Program: Lessons for US Nonproliferation Policy*, NONPROLIFERATION REVIEW (Fall 1995).

67. Despite frequent statements by government officials that certain "rogue" states were engaged in developing an illicit WMD capability the United States and its allies have rarely used force or the threat of force to deter the continued development of these programs. *See, e.g.* James Woolsey (Director of Central Intelligence), World Threat Assessment Brief to the Senate Select Committee on Intelligence, S. Hrg. 103-630; CIA REPORT, *supra* note 46; and the discussion in footnotes 197-261 and accompanying text, *infra*.

from using its biological and chemical weapons.[68] The threat or retaliation apparently worked in this case. Ultimately, how, and how well, we cope with WMD proliferation will come down to what we know, how much we know, and when we know it. Despite the extraordinary threat these weapons present, the indiscriminate use of force could have the same devastating impact on the international norms we are defending.

In practical terms, it is very difficult to formulate an approach to post-Cold War deterrence that would systematically seek to deter regional powers, NBC armed or not, from initiating aggression that threatens Western security interests. Unlike during the Cold War, there is no clear consensus within or between Western states regarding the regional interest that need to be protected through deterrence threats. It may be impossible, for example, to provide a definition of "regional Western security interests," other than in quite general terms. Challenges to regional interests are very unlikely to be always identifiable prior to a crisis, as was the case for Iraq's invasion of Kuwait in 1990.

Consequently, it is quite likely that Cold War deterrence will have a diminished affect against regional local powers that are likely to have more at stake than Western powers, whose interests at risk may be the object of domestic political controversy and vary considerably depending on the specific case. Furthermore, undemocratic regional powers may have much greater interest in challenging the status quo that the defunct Soviet Union did during the Cold War, thus making them even more inclined to accept significant risks.[69] There are also indications that enhancing freedom of action vis-à-vis Western countries has become another acquisition incentive. Former Indian Army Chief of Staff General Sundarji has been widely quoted as stating that the primary lesson of the 1991 Gulf War is "[d]on't fight the United States unless you have nuclear weapons," and "the next conflict with the United States would involve weapons of mass destruction."[70] Shortly before the Gulf War, Muammar Qaddafi called for "a deterrent—missiles that could reach New York.... We should build this force so that they and others will no longer think about an attack."[71]

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68. During the Gulf War President George Bush informed Saddam Hussein that "[t]he United States will not tolerate the use of chemical or biological weapons.... The American people would demand the strongest possible response. You and your country will pay a terrible price if you order unconscionable acts of this sort." Terry N. Mayer, *The Biological Weapon: A Poor Nation's Weapon of Mass Destruction, in* AIR WAR COLLEGE, STUDIES IN NATIONAL SECURITY 3 206 (1995).

69. *See* KENNETH WATMAN & DEAN WILKENING, U.S. REGIONAL DETERRENCE STRATEGIES (1995).

70. PATRICK GARRITY, WHY THE GULF WAR STILL MATTERS: FOREIGN PERSPECTIVES ON THE WAR AND THE FUTURE OF INTERNATIONAL SECURITY, Rpt. 16 , July 1993, at xiv.

71. BRAD ROBERTS, WEAPONS PROLIFERATION AND WORLD ORDER AFTER THE COLD WAR 235 (1996).

Attempting to prevent acquisition, above all on the part of countries likely to threaten Western interests and in violation of treaty or other legal commitments, clearly constitutes a critical goal of post-Cold War security and defense policies.[72] However, this objective also does not readily lend itself to the formulation of a deterrence doctrine and posture, since it is impossible systematically to threaten the use of military force in order to prevent NBC acquisition. It totally fails with respect to transnational terrorist groups.

Finally, there are important legal and normative barriers related to all three types of weapons, barriers that are in the interests of the entire international community. Beginning with the creation of the International Atomic Energy Agency in 1957, institution building has been the third major non-proliferation thrust.[73] In an incremental process, major institutional advances have been made over the ensuing decades. This process of institution building has helped to create and extend an overall norm of non-proliferation—one that is arguably *jus cogens*. That is, a pre-emptory norm of international law from which states may not abjure or contravene. The establishment of worldwide legal norms against the continuing proliferation of such weapons includes the following:

1. The Nuclear Non-Proliferation Treaty (NPT),[74] with its legally binding obligation not to acquire nuclear weapons as well as its provisions for international inspections and export controls, represents an almost universal commitment by the international community to stop, and condemn as illegal, the proliferation of nuclear weapons. The NPT was indefinitely extended in 1995 and has over 185 parties (only Israel, Pakistan, India and Cuba are non-signatories).[75]
2. The Biological and Toxin Weapons Convention (BWC),[76]entered into force in 1972 and helped establish the norm, albeit unverifiable, banning the use of biological weapons by prohibiting the "development, production, stockpiling, acquisition or retention" of biological weaponry for offensive purposes.[77] The BWC cur-

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72. Exec. Order No. 12938, *supra* note 60.

73. *See* SEC. OF DEF., REPORT ON NONPROLIFERATION AND COUNTERPROLIFERATION ACTIVITIES AND PROGRAMS 3-4 (1994).

74. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

75. *See* Barbara Crossette, *Treaty Aimed at Halting Spread of Nuclear Weapons Extended*, N.Y. TIMES, May 12, 1995, at A1.

76. April 10, 1972, 26 U.S.T. 583, T.I.A.S. 8062.

77. There is also a norm-creating 1925 Protocol banning the use of poisonous gases and biological weapons in war. Although signed and ratified by few parties (the US ratified in 1975) it does arguably create a legal norm against the first use of biological weapons in wartime. *See infra* note 121.

rently has 140 state parties and, with an additional 18 signatories, it also represents universal opprobrium for the use of such weapons.[78]

3. The Chemical Weapons Convention (CWC),[79] signed by 169 nations (ratified by 118 as of October 1998) and entered into force in 1997 (the US ratified in 1997), contains one of the most intrusive verification regimes yet devised to ensure the destruction of CW stockpiles and limit diversion to illicit CW programs.[80] It prohibits the development, production and use of chemical weapons for any purpose and obligates the parties to destroy all existing stocks. It too is approaching universal adherence.
4. The creation of nuclear weapons free zones beginning with the Treaty of Tlatelcolo, creating a nuclear free zone in Latin America in 1967.[81] Since then one other NWFZ (South Pacific) has been created,[82] another has been agreed to for Africa,[83] and several others are proposed.[84] These initiatives further strengthen the international norm that eschews the position and development of these weapons.
5. The establishment of export control groups to limit and control nuclear materials, equipment and technology. To help stem the tide of nuclear weapon information and technology, the Zangger Committee was established in 1974 and periodically updates "trigger" lists of controlled exports that could support a clandestine nuclear weapons program, and the Nuclear Suppliers Group (established in 1978) whose goal is to obtain the agreement of all suppliers, including nations not members of the re-

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78. NPT, BWC, and CWC treaties can be found at website http://www.acda.gov/treaties.

79. The Convention on the Prohibition, Production, Stockpiling, and Use of Chemical Weapons, *opened for signature*, Jan. 13, 1992, U.N. GAOR, 47th Sess., Supp. No. 27, U.N. Doc. A/47/27/Appendix 1 (1992), *reprinted in* 32 I.L.M. 800 (1993).

80. *See* Statement of the Honorable John D. Holum, Director, U.S. Arms Control and Disarmament Agency Before The Committee on Foreign Relations, U.S. Senate, March 22, 1994. Current status of CWC ratifications can be found at website http://www.opcw.org/.

81. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 6 I.L.M. 521.

82. *See* United States, France, and the United Kingdom to Sign Protocols of the South Pacific Nuclear-Free Zone Treaty [Treaty of Raratonga], 7 DEP'T ST. DISPATCH 15, Apr. 8, 1996 (White House Statement of Mar. 22, 1996).

83. *See* Fact Sheet: African Nuclear Weapons-Free Zone Treaty, 7 DEP'T ST. DISPATCH 16, Apr. 15, 1996; African Nuclear-Weapon-Free Zone Treaty (Pelindaba Text), 35 I.L.M. 698 (1996).

84. There already exist agreements prohibiting nuclear weapons in Antarctica, in outer space and on the seabed. Proposals for NWFZs exist in every region of the world. *See* UN website www.unog.ch/unidir/Rr-enwfz.htm.

gime to control nuclear and nuclear-related exports in accordance with established guidelines. A similar group was established in 1986 (called the Australia Group) to control BW and CW-related items and equipment.

6. The Missile Technology Control Regime (MTCR), created in 1987, restrains and limits the sales of missiles, missile components, and related technologies by key industrial countries.[85] The goal is to limit the spread of missile technologies to countries of proliferation concern.

These multi-lateral treaties and voluntary restraint regimes have been the primary engines for creating the current non-proliferation norms that serve as political and legal barriers to WMD development. The establishment of these norms has been effective in reversing WMD acquisition programs or facilitating the decision not to acquire such weapons. Many nations that currently have the wherewithal to develop and acquire these weapons have chosen not to do so or abandoned nascent programs based on their commitment to these norms.[86]

However, the lack of credible and effective response to non-compliance with countries' obligations under the NPT, BWC and CWC stands out in any assessment of non-proliferation traditionalism. Recent experience has been decidedly mixed. The story of Iraqi resistance to inspections and it's stonewalling in the UN's attempt to root out its NBC programs are well known.[87] North Korea's success in resisting international pressures to honor its NPT obligations also risks sending a signal that other aspiring proliferators may seek to emulate.[88] More generally, lack of effective international responses to non-compliance can only encourage countries contemplating treaty violations. Over time, if some countries are perceived to be able to violate with impunity their non-proliferation obligations, the credibility of the overall legal regime will erode. Still other countries are all but certain, as well, to rethink their own decision not to seek NBC weaponry. The establishment

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85. Agreement on Guidelines for the Transfer of Equipment and Technology Related to Missiles, 26 I.L.M. 599 (1987) (revised Jan. 7, 1993; annex revised July 1, 1993) (revisions reproduced at 32 I.L.M. 1298 (1993) and 32 I.L.M. 1300 (1993), respectively). The MTCR is not a treaty but a voluntary set of guidelines.

86. *See* LEONARD SPECTOR, NUCLEAR AMBITIONS (1990); DAVID FISCHER, STOPPING THE SPREAD OF NUCLEAR WEAPONS: THE PAST AND THE PROSPECTS (1992). Some states might be considered "virtual" nuclear weapons states since they have the fissile materials, technology and infrastructure to relatively quickly develop nuclear weapons. Japan and Germany are two examples. *See* Selig Harrison, *A Yen for the Bomb*? WASH. POST, Oct. 31, 1993, at C1; Michael Williams, *Japan Urged to Keep Potential for Nuclear Arms*, WALL STREET J., Aug, 2, 1994, at 10.

87. Ruth Wedgewood, *Truth Sleuth in Iraq*, WASH. POST, June 19, 1996, at 19; *Evidence Lacking that Iraq Destroyed Arms, Report Says*, BALTIMORE SUN, April 12, 1996, at 22.

88. William Berry, *supra* note 34.

of international nonproliferation norms does not and has not stopped the determined proliferator. Recognition of that fact has resulted in the United States developing a program to roll back or eliminate a rogue state's WMD capability, and defending against the illicit acquisition and use of such weapons to complement nonproliferation efforts. This relatively new program is known as the Counterproliferation Initiative.

B. The United States Counterproliferation Initiative

> "Between two groups that want to make inconsistent kinds of worlds, I see no remedy except force."
>
> — Oliver Wendell Holmes[89]

The United States and others continue to enhance current nonproliferation norms and strive to establish others (the fissile material control regime currently being negotiated at the Conference on Disarmament being but one example). Unfortunately, as former Secretary of Defense Les Aspin noted "the policy of prevention through denial won't be enough to cope with the potential of tomorrow's proliferators."[90] The United States Senate Subcommittee on International Security, Proliferation, and Federal Services concluded that "even if U.S. nonproliferation efforts work reasonably well, they will only slow the spread of weapons of mass destruction and, in particular, ballistic missile technology. America must be prepared for failure—of diplomacy, of arms control, of export controls, and of deterrence—with something more than threats of retaliation."[91]

Recognizing that despite all our nonproliferation efforts and institutional and legal norm building there continues to be determined state and transnational actors pursuing these deadly weapons, the U.S. Department of Defense (DoD) in 1993 declared that the U.S. strategy for addressing the new dangers of proliferation should involve a multpronged approach, consisting firstly of "nonproliferation efforts to prevent the spread of weapons of mass destruction," and secondly of cooperative threat reduction with the former Soviet Union.[92] It then stated that "[w]hile these first two efforts involve primarily diplomatic measures, DoD must also focus on counterproliferation efforts to deter, prevent, or defend against the use of WMD if our nonproliferation efforts

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89. Letter from Oliver Wendell Holmes to Sir Frederick Pollack, *quoted in* Livingstone, *Proactive Responses to Terrorism, in* FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM 130 (Livingstone & Arnold, eds. 1986).

90. Secretary of Defense Les Aspin, "The Defense Counterproliferation Initiative Created," 8 DEF. ISSUES 68, Dec. 7, 1993.

91. THE PROLIFERATION PRIMER, *supra* note 19, Summary.

92. Secretary of Defense, *The Defense Counter-Proliferation Initiative Created*, DEF. ISSUES, Vol 8, No. 68 (1993).

fail."[93]

Consequently, in late 1993, the DoD unveiled its counterproliferation initiative designed to help embed these defense counterproliferation objectives as an integral feature of the planning, doctrine, training and equipment procurement decisions of the military services.[94] Counterproliferation involves preparing U.S. forces to fight and survive in a WMD environment.[95] It also includes, however, "maintaining a robust capability to find and destroy NBC weapon delivery forces and their supporting infrastructure elements with minimal collateral effects."[96] Another key element is developing the ability "to detect, characterize, and defeat NBC/M facilities with minimal effects."[97] U.S. forces must be able to interdict an adversary's biological and chemical capability during each stage of the agent's employment.[98] Counterforce operations include (but are not limited to) attacking agent production facilities, storage complexes, and deployed mobile weapon platforms."[99]

So, on a multifaceted front, engaging all political, diplomatic and military tools, the U.S. strategy is to prevent further proliferation, roll back proliferation where it has occurred, and adapt U.S. forces and planning to conduct military operations despite or against proliferation threats. If proliferators cannot be stopped from obtaining these weapons, however, then the U.S. will consider whatever means necessary to eliminate that capability. However, while preventing the spread of WMD remains an objective that is shared by the overwhelming majority of states in the world,a goal that unites both North and South, the unilateral intentions of the U.S. to strike at all who would violate the "norms" prohibiting proliferation raises serious legal and policy issues.

Counterproliferation became, in the eyes of its critics, nothing more than a way of punishing those states that successfully defied the status quo by eluding the spider's web of controls imposed by a world under

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93. Secretary of Defense Les Aspin, *supra* note 90.

94. The U.S. Counterproliferation Initiative (CPI) is summarized in the annual editions of several unclassified Defense Department publications: PROLIFERATION: THREAT AND RESPONSE; SEC. OF DEF. ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS; COUNTERPROLIFERATION REVIEW COMMITTEE, REPORT ON ACTIVITIES AND PROGRAMS FOR COUNTERING PROLIFERATION; AND DEFENSE TECHNICAL INFORMATION CENTER, NUCLEAR/BIOLOGICAL/CHEMICAL (NBC) DEFENSE ANNUAL REPORT TO CONGRESS.

95. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 7.

96. Department of Defense Counterproliferation Program Review Committee, *Report on Activities and Programs for Countering Proliferation and NBC Terrorism* (May 1998), at 1-3.

97. *Id.* The purpose of the CPI is to contribute to government-wide efforts to prevent parties from obtaining, manufacturing, or retaining these weapons by "equipping, training, and preparing U.S. forces, in coalition with the forces of friends and allies, to prevail over an adversary who threatens or uses these weapons and their associated delivery systems." PROLIFERATION: THREAT AND RESPONSE, supra note 16, at iii.

98. *Id.* at 71.

99. *Id.*

U.S. leadership.[100] On the contrary, the intent of the Counterproliferation Initiative was to ensure that potential adversaries recognize and legitimately fear that the United States is not only capable of striking them from outside their WMD range, but that it was also capable of operating within a contaminated environment. If weapons of mass destruction are employed against the territory of the United States or against our forward-deployed forces, this is a clear and unambiguous signal that the United States is prepared to respond decisively.

In sum, if prevention efforts fail, at a minimum, the United States will contemplate responding, as appropriate, to any proliferation scenario. This includes attacking designated WMD facilities ***before*** they pose a present threat to the United States, its forces or allied forces. However, absent an actual attack or threat to use these weapons would such a response be legitimate under the currently understood international legal regime regulating the use of force among nations?

IV. AN OVERVIEW OF THE CURRENT LEGAL REGIME: THE SELF-HELP PARADIGM

A. Traditional Responses to Threat: The Customary International Law of Self-Help

> "It cannot be helped, it is as it should be, that the law is behind the times."
>
> — Oliver Wendell Holmes[101]

The employment of coercive self-help measures by states is an anomaly since for the most part disputes are resolved peaceably. However, in an anarchical world where no central authority exists to assist states and other international actors in obtaining justice or a satisfaction of legitimate claims, states have historically resorted to self-help measures short of war to remedy the injustice or satisfy the claim. As discussed, *infra*, although the UN Charter condemns methods of self-help based on the use of force short of war, the fact remains that such methods are still in use, precisely because there is no Hobbesian "Leviathan" to render final justice in disputes. A former U.S. State Department legal advisor once noted that "the policeman is apt protection against individual criminals; but national self-defense is the only protection against the criminal state."[102] In situations where force was deemed necessary it is an act of self-help, usually described as either a

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100. *See* Harald Muller and Mitchel Reiss, *Counterproliferation: Putting New Wine in Old Bottles*, WASH. Q., Spring 1995, at 143.

101. SPEECHES BY OLIVER WENDELL HOLMES 101 (1934),.

102. Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 922 (1986).

reprisal or self-defense.

The right of self-defense is generally limited, confined to responding to breaches of legal duty or wrongs committed against it by other nations.[103] But historically, the traditional right of self-defense never contemplated that one must wait until the first blow is struck. The father of international law, Hugo Grotius, in *The Law of War and Peace,*[104] recognized that a nation could legitimately respond to "present danger." Self-defense is permitted not only after an attack but also in anticipation of such an attack, or, in his words: "It be lawful to kill him who is preparing to kill. . . ."[105] Grotius' position was adopted and endorsed by later legal scholars such as Emmerich de Vattel, who posited in 1758 that:

> The safest plan is to prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force. . . against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.[106]

American legal scholar Elihu Root argued in 1914 that international law did not require the aggrieved state to wait before using force in self-defense "until it is too late to protect itself."[107] His reasoning was posited on the self-defense criteria enunciated by Secretary of State Daniel Webster in his diplomatic note to the British in the context of the *Caroline* Case of 1842.[108] He stated, in a widely accepted dictum, that "anticipatory" self-defense must be restricted to those cases where the necessity "is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." He further argued that the act should involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept

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103. DerekW. Bowett, SELF-DEFENSE IN INTERNATIONAL LAW 3-9 (1958).

104. Hugo Grotius, *The Law of War and Peace, in* CLASSICS OF INTERNATIONAL LAW Vol. 3, 1625 (James Brown Scott ed., 1925).

105. *Id.* at ch. 1. Elsewhere he wrote that "the first just cause of war. . . is an injury, which even though not actually committed, threatens our persons or our property." Bk 2, ch. 1, § 2.

106. E. de Vattel, *The Law of Nations IV, in* CLASSICS OF INTERNATIONAL LAW Vol. 3 (James Brown Scott ed., 1916).

107. Elihu Root, *The Real Monroe Doctrine*, 35 AM. J. INT'L L. 427 (1914).

108. The *Caroline* was an American steamboat, accused of running arms to Canadian rebels. A Canadian military force crossed over into the United States and set the ship ablaze, killing an American citizen in the process. A Canadian was arrested in New York for the murder, and the British government protested. While never admitting culpability, The British apologized to the United States for the Incident. *See* Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 85-89 (1938); John Moore, 2 DIG. INT'L L. 409-14 (1906).

clearly within it."[109]

Webster's *Caroline* criteria continue to this day to form the basis for analysis of the right of self-defense focusing on the "necessity" of the response and the "proportional" use of force in response.[110] "Necessity" is the most important precondition to the legitimate use of military force in self-defense (or, one could argue, under any other condition requiring the use of force). The initial determination of necessity is made by the target state based on a number of facts. These include, but are not limited to, the nature of the coercion being applied, the relative size and power of the aggressor state, the nature of the aggressor's objectives, and the consequences if those objectives are achieved.[111] "Proportionality" is the "requirement that the use of force or coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."[112] Because the purpose of self-defense is to preserve the status quo, proportionality requires that military action cease once the danger has been eliminated.[113] The requirements of necessity and proportionality "can ultimately be subjected only to that most comprehensive and fundamental test of all law, reasonableness in particular context."[114]

While this right of self defense is widely acknowledged as customary international law, it is not absolute.[115] It must be balanced against similar rights enjoyed by other states and the maintenance of peace in the international community.[116] However, when in the judgment of the injured state the necessity of acting in self-defense outweighs any harm such act imposes, it may lawfully resort to the use of force.[117]

Another form of self-help commonly resorted to in the pre-UN Charter era was reprisals. Reprisals are considered to be illegal acts undertaken by a state in retaliation or retribution to compel a state to agree to a satisfactory settlement of a dispute originating as a result of a prior illegal act done by the state or to compel the state to cease activi-

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109. *See also* DANIEL PATRICK. O'CONNELL, INTERNATIONAL LAW 343 (1965).

110. DEREK BOWETT, *supra* note 90, at 188; Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States*, 37 Brit. Y.B. Int'l L., 229-302 (1961).

111. Oscar Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis*, 37 J. INT'L L. 242 (1984).

112. MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 242 (1961).

113. GERHARD VON GLAHN, LAW AMONG NATIONS 496-97 (3d ed. 1976); J.E.S. Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, RECUEIL DES COURS 404-8 (1961); Oscar Schachter, *In Defense of the International Rules on the Use of Force*, 58 U. CHI. L. REV. 120 (1986).

114. *Id.* at 218. *See also* DEREK BOWETT, *supra* note 90, at 269-70.

115. DEREK BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 9 (1958).

116. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

117. *Id.*

ties that violate it's legal obligations either to the state or the international community at large.[118] As laid down by the *Naulilaa Incident Arbitration*[119] Tribunal legitimate reprisals must fulfill three conditions:

> 1. The act of the offending state must have been illegal;
>
> 2. Retaliatory "illegal" action must have been preceded by a "request for redress which has been unavailing"; and
>
> 3. A reasonable degree of proportionality must be shown to exist between initial offense and retaliatory action.[120]

The *Restatement of Foreign Relations Law of the United States* further states that in response to violations of international obligations the victim state "may resort to countermeasures that might otherwise be unlawful, if such measures

(a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and

(b) are not out of proportion to the violation and the injury suffered."[121]

In defining the "necessity" of such actions the *Restatement* concludes that:

> [C]ountermeasures in response to a violation of an international obligation are ordinarily justified only when the accused state wholly denies the violation or its responsibility for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiation or third-party resolution. Countermeasures are to be avoided as long as genuine negotiation or third-party settlement is available and offers some promise of resolving the matter. A showing of necessity is particularly important before any drastic self-help measures are taken.[122]

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118. HERSCH LAUTERPACHT, ED., OPPENHEIM'S INTERNATIONAL LAW 136-37 (1952).

119. Concerning the Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa, (Port.-F.R.G.), Arbitral Decision of July 31, 1928, 2 R.I.A.A. 1011 (1949).

120. *See* A.V. W. THOMAS & A. J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 136-38 (1956).

121. RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987). ("The threat or use of force in response to violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter. . .).

122. *Id.* at 381. Regarding retaliation the Restatement states that "[t]he principle of necessity ordinarily precludes measures designed only as retribution for a violation and not as an incentive to terminate a violation or to remedy it." And, in response to a violation of international law: "[t]he use or threat of force in response to a violation of international law is subject both to the requirements of necessity and proportionality and to the

The prohibition of reprisals is deducible from the broad regulation of force in UN Charter Article 2(4), the obligation to settle disputes peacefully in Article 2(3), and the general limiting of permissible force by states to "self-defense" as delimited by Article 51. A total ban on reprisals, however, presupposes a degree of global cohesion that simply does not exist, and the circumstances may clearly arise wherein the resort to reprisal as a form of self-help would be distinctly law enforcing. This is especially the case in matters where reprisals are undertaken for prior acts of terrorism.[123]

It is often difficult to distinguish between reprisals and acts of self-defense. Although reprisal and self-defense are both forms of the same generic remedy of self-help, an essential difference lies in their respective aim or purpose. Since they come after the harm has already been absorbed, reprisals are punitive in character and cannot be undertaken for protection.[124] Self-defense, on the other hand, is by its very nature intended to mitigate harm.[125]

Often the rationale for use of force is based on a combination of facts and circumstances that justify it under either definition. In fact, notwithstanding the apparent prohibition, there have been numerous cases where states have claimed a right to reprisals or retribution,[126] and many publicists take a similar view.[127] As with most cases in which force is used in response to acts or threats of terrorism, the distinction between self-defense and retribution or reprisal for illegal acts is blurred. As the author has argued elsewhere,[128] slavish devotion to "self-defense" as the sole justification for the use of force to stop delictual activities by another state blurs the distinction between self-defense and reprisals. This is primarily because states are reluctant to recognize a right to reprisal under the Charter paradigm eschewing the

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prohibitions of the United Nations Charter." *Id.* at 382.

123. *See, e.g.* R. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969). *See also* JULIUS STONE, AGGRESSION AND WORLD ORDER 94-8 (1958) (arguing that a permissible role for reprisals continues to exist under international law).

124. *See* Derek Bowett, *Reprisals Involving Recourse to Armed Force, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 394-410 (1985) (discusses the distinction between reprisals and self-defense).

125. *Id.*

126. *Id.*; William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421 (1990). On the legal status of reprisals, Professor Bowett noted that "there is a discrepancy between the formal principle and the actual practice." D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 22 (1972).

127. *See, e.g.* Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of Its Best Friends*, 27 HARV. INT'L L. J. 599 (1986); O'Brien, *supra* note 142.

128. Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243 (1987).

use of force even though, in practice, many of the uses of force characterized as "self-defense" are, in fact, reprisals under the *Naulilaa* definition.[129] Obviously, there is a danger that accepting reprisals would be destabilizing and contrary to the internationally agreed preference of solving disputes by peaceful means. But, as Professor Arend succinctly observes:

> [W]hile states are formally unwilling to depart from the Charter paradigm, in justifying their actions they have expanded the notion of self-defense to include deterrence and even punishment. Such a broadened notion of self-defense, while perhaps politically and even morally commendable, seems to be clearly at variance with the Charter's ideal of peace over justice.[130]

Nevertheless, each use of force is currently judged by the international community on whether it meets minimally acceptable standards of self-help within the extended parameters of "self-defense."[131]

B. The UN Charter Paradigm: Article 2(4) and Article 51

> The point is that international law is not higher law or better law; it is existing law. It is not a law that eschews force; such a view is alien to the very idea of law. Often as not it is the law of the victor; but it is law withal and does evolve.
>
> — Daniel Patrick Moynihan[132]

After the adoption of the UN Charter, particularly Article 2(4) prohibiting states from using force as an instrument of statecraft, and Article 51, giving back to the state the right of self-defense (discussed *infra*), the debate on use of force centered on whether the right to use force absent an "armed attack" continued to exist.[133] Despite widespread reference to the *Caroline* case, some contend that Article 2(4) limits its applicability to traditional threats of aggression where an enemy was massing on the border in preparation of an attack.[134] As I argue here, and as have others urged earlier, such a prerequisite today is unrealistic and conceivably fatal to state survival.[135]

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129. *Id.*

130. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 15 (1990).

131. *See* James McHugh, *Forcible Self-help in International Law*, 62U.S. NAVAL WAR COLLEGE INT'L STUDIES 143 (1980).

132. DANIEL MOYNIHAN, ON THE LAW OF NATIONS 19 (1990).

133. Josef Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, AM. J. INT'L L. 41 (1947); Schachter, *supra* note 116.

134. DEP'T OF ST., OFFICE OF THE LEGAL ADVISOR, 12 DIG. OF INT'L L. 49-50 (1971).

135. Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963). One author commented that "The formulation was probably unrealisti-

The original United Nations Charter paradigm for the use of force has essentially three components: 1) a legal obligation to refrain from the use of force and to resolve disputes by peaceful means; 2) institutions to enforce the obligation, primarily the Security Council; and 3) a value hierarchy that formed the philosophical basis of this obligation; specifically, a preference for change by peaceful processes rather than coercion.[136] The legal obligation was enshrined in Article 2(4) of the UN Charter that obliges nations to "refrain" from the use of force in their relations with each other.[137] Under Chapter VII of the UN Charter, the Security Council is empowered to investigate international conflicts and determine if there is a threat to the peace, a breach of the peace, or an act of aggression.[138] If it so determines, the Council is authorized to take collective action against the miscreant state. The final element is the preeminent goal of maintaining international peace and security. The goal of peace was to take priority over the other goal of justice; justice could be sought but not at the expense of peace.

Unfortunately, state practice since the adoption of the Charter has challenged the validity of this Charter paradigm.[139] States frequently assert self-defense as a justification for the use of force, often in circumstances where the assertion is palpably false.[140] The term "self-defense" has thus become so distorted that it now represents a rather curious category of the use of force. These distortions are representative of the failure of international institutions and the emergence of new values concerning the recourse to force. While almost all international legal scholars would agree that these post-WW II developments represent serious threats to the Charter paradigm, Professors Arend and Beck argue that, in fact, a new legal paradigm has emerged: a "post-Charter

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cally restrictive when stated in 1841. In the contemporary era of nuclear and thermonuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it [was] actually applied instead of merely repeated." W.T Mallison, *Limited Naval Blockade or Quarantine—Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 348 (1962).

136. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 177. *See also* JOHN NORTON MOORE, LAW AND THE INDO-CHINA WAR 170-71 (1972).

137. U.N. CHARTER art. 2., para. 4, stating that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

138. U.N. CHARTER art. 39.

139. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (1997) (Weisburd details hundreds of cases of the use of force that demonstrates the utility of such uses in pursuit of vital interests).

140. *Id.*; Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 67 (1991); Note, *Self-Defense or Presidential Pretext? The Constitutionality of Unilateral Preemptive Military Action*, 78 GEORGETOWN L. J. 415 (1989).

self-help" paradigm.[141] That is, in the face of the current UN Charter paradigm being unresponsive to the needs of the community of nations, that paradigm has been ignored and is in the process of being replaced with a new "self-help" paradigm more attune to the legitimate needs of the world community and more in line with previous customary international law which recognized multiple justifications for using force in the face of articulable threats.[142] The philosophical underpinning of the Charter, that peace was more important than justice, has been undermined since members of the international community have time and again demonstrated their belief that, at certain times and places, it is better to pursue justice than to accept an inequitable peace.[143]

While several scholars have argued that the legal proscription of Article 2(4) is still good law,[144] that view is clearly inconsistent with the overwhelming realities of state practice and the international system; a system in which the norm eschewing the use of force is violated frequently and with impunity in some of the most important cases of state interaction.

A putative norm, however, is a rule of international law only if it is authoritative and controlling.[145] In numerous instances there are profound violations of the Article 2(4) norm; specifically, when a state judges foreign policy goals to be at stake, it will generally not allow itself to be circumscribed by the prohibition of Article 2(4).[146] In a decentralized system that exists today, international law can only be constituted through state practice followed as a matter of legal obligation.[147]

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141. AREND & BECK, *supra*, note 136, at 178.

142. Bowett, supra note 124, at 20.

143. The view that the sovereignty and integrity of the state, as enshrined by Article 2 of the UN Charter, is no longer sancrosant is succinctly stated in the International Court of Justice's recent Appeal's Chamber opinion in *Prosecutor v. Tadic*:

> "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of law and as a protection for those who trample underfood the most elementary rights of humanity." Further, "a [s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oreinted approach. . . ."

Prosecutor v. Tadic, IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 54 (1966). *See also*, Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238 (1996); Bowett, *supra* note 124, at 50.

144. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 183-268 (1961).

145. J.L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 60-61 (5th ed. 1955).

146. *See generally* Myres McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 93-96 (1961). The propensity to obey international rules disappears when to do so could be tantamount to self-destruction.

147. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES,

If state practice does not coincide with a putative norm, even one enshrined in a treaty such as the UN Charter, then the practice, rather than the putative Charter rule becomes the norm. To again quote Arend and Beck:

> In 1945, fifty-one states chose to enunciate a particular rule relating to the use of force by ratifying the United Nations Charter. Since then, these states and over one hundred additional ones have, through their actions, chosen to change the rule. Even though there have been no formal acts that have attempted to change the written words of Article 2(4), the behavior of these states has been sufficient to effect a change.[148]

Indeed, some have argued that Article 2(4) is "dead." Professor Franck argued in 1970 that the practice of states "has so severely shattered the mutual confidence which would have been the sine qua non of an operative rule of law embodying the precepts of Article 2(4) that, as with Ozymandias, only the words remain."[149] Twenty years later, in his *The Power of Legitimacy Among Nations*, Franck, in acknowledging the egregious lack of control of putative rules dealing with the use of force, commented:

> The extensive body of international 'law,' oft restated in solemn texts, which forbids direct or indirect intervention by one state in the domestic affairs of another, precludes the aggressive use of force by one state against another, and requires adherence to human rights standards simply, if sadly, is not predictive of the ways of the world.[150]

Article 51 of the Charter recognizes a state's "inherent right of individual or collective self defense if an armed attack occurs. . . ."[151] Many legal scholars have argued that the customary law of self-defense, as developed from the *Caroline* case did not survive the language of Article 51 since states parties to the Charter waived their rights to those aspects of self-defense not specifically permitted.[152] A larger number have argued that the customary international law right of self-defense remains unimpaired and includes the right to act in anticipatory self-

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§102(1)(c)(3) cmt. C (1987).

148. *Id.* at 182.

149. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

150. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 32 (1990).

151. U.N. CHARTER art. 51.

152. Representative views are included in PHILLIP C. JESSUP, A MODERN LAW OF NATIONS, vol. 1166 (1948). Qincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 560 (1963); American Bar Association, Section on International Law and practice, Committee on Grenada, *International Law and the United States Action in Grenada*, 18 INT'L L. 266-67 (1984); Kathryn S. Elliott, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 67 (1991).

defense.[153]

Professor Myres McDougal argues that Article 51 can not be taken so literally as to preclude a victim from using force in self-defense until it has actually been attacked.[154] He argues that Article 51 should be interpreted to mean that a state might use military force when it "regards itself as intolerably threatened by the activities of another."[155] Earlier, Sir Humphrey Waldock stated that "[i]t would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first, and perhaps fatal, blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first strike."[156] Whatever interpretation one may take, it is undisputed that the practice of most member states since the Charter was adopted has been to recognize acts of anticipatory self-defense as legitimate.[157]

Former US Ambassador to the United Nations, Jean Kirkpatrick, explained it this way: "The prohibitions against the use of force in the Charter are contextual, not absolute. . . The Charter does not require that people submit supinely to terror, nor that their neighbors be indifferent to their terrorization."[158] One should note that the language of self-defense is being invoked to cover military responses that really bear the characteristics of reprisals or retaliation.[159] Nevertheless, because the language of the Charter essentially prohibits all other acts of unilateral self-help,[160] all uses of force are characterized as legitimate acts of "self-defense." As one legal scholar lamented:

> What the provisions of the Charter have done, in effect, is to deprive states of valuable tools of self-help and of enforcement of international rights without substituting a really workable method for achieving the same ends. It remains to be seen whether states will stand by the prohibition if and when interests or rights considered to be vital are affected and peaceful methods of settlement or sanction fail.[161]

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153. *See, e.g.* BOWETT, *supra* note 124, at 188; Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, in* 37 BRIT. Y.B. INT'L L. 299-302 (1961); W. Michael Reismann, *Coercion and Self-determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642-45 (1984); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620-26 (1984).

154. Proceedings, 57 AM. SOC'Y OF INT'L L. 165 (1963).

155. *Id.*

156. Sir Claud Humphrey Meredith Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 45, 498 (1952).

157. McDougal & Feliciano, supra note 146, at 190; Bowett, supra note 130, at 188; Higgens, supra note 110.

158. Ved Nanda, *The United States Armed Intervention in Grenada—Impact on World Order*, 14 CAL. W. INT'L L. J. 395, 418 (1984).

159. *See* Oscar Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989) (discussion of expanded claims of self-defense).

160. Arts. 2(4), 51. *See* Brownlie, *supra* note 144.

161. GERHARD VON GLAHN, LAW AMONG NATIONS 512 (3d ed. 1976).

Based on an analysis of state practice since the inception of the Charter,[162] that practice simply does not support the proposition that the limits of use of force enshrined in the Charter are rules of customary international law. Indeed, this is hardly a novel observation; Professor Reisman has argued for some time that the Charter standard cannot be said to state the law when measured against the practice of states.[163] Professor Arend has taken a similar position[164] as have others.[165]

It must be remembered that the Charter does indeed have its own procedures for dealing with international threats to peace. If the threat is one that could reasonably be contained or turned aside through calling an emergency meeting of the Security Council, then a unilateral anticipatory self-defense response probably will not be met. At the same time, in a nuclear age, common sense cannot require one to interpret a provision in a text in a way that requires a state passively to accept its fate before it can defend itself. Even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defense.[166] Of course, abusive claims may always be made by states claiming to act in anticipatory self-defense. But in a decentralized legal order that is always possible; there is no avoiding the judgment that third parties will have to make on claims of self-defense in the light of all the available facts.

V. A NEW COUNTERPROLIFERATION SELF-HELP PARADIGM: THE USE OF FORCE IN RESPONSE TO WEAPONS OF MASS DESTRUCTION PROLIFERATION

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

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162. *See* MARK WEISBURD, *supra* note 156. Oscar Schacter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291-94 (1985).

163. W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, *in* THE AMERICAN SOCIETY OF INTERNAL LAW PROCEEDINGS 75 (1986).

164. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1 (1990).

165. *See* VON GLAHN, *supra* note 161, at 512.

166. *But see* Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, *in* THE AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 147 (1963).

— Thomas Jefferson[167]

Those that view international law as rule-based are apt to see those rules as immutable and static rather than dynamic. Repeated violations of these rules are to them a reflection of the reality that at the end of the day international law is dependent upon power: and, if there is a divergence between the two, it is power politics that will prevail.[168] The perception that international law is rules-based—rules impartially applied and frequently ignored because of the absence of effective centralized compliance mechanisms—is, I believe, off the mark. True, there is no world government to enforce the law of nations and the rule of law, but, as Professor McDougal has described, international law as:

> Not a mere static body of rules but. . .rather a whole decision-making process. . . . It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character. . .and in which other decision-makers, external to the demanding state. . .weight and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.[169]

Rules play a part in law, but not the only and by no means predominant part. Rather, international law should be viewed as process delineated by established practices and norms. As Judge Rossyln Higgins explained "international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions, which are, termed 'rules'."[170]

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167. THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 279 (Paul Ford ed., 1898).

168. *See generally* GEORG SCHWARZENBERGER, THE MISERY AND GRANDEUR OF INTERNATIONAL LAW (1963). Professor Schwarzenberger argues that if particular rules of international law are constantly breached, we cannot continue to call them law.

169. Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 356-57 (1955).

170. Rosalyn Higgens, *Policy Considerations and the International Judicial Process*, 17 INT'L COMP. L. Q. 58, 58-59 (1968). The contrary view is best expressed in Judges Fitzmaurice and Spender's opinion in the South West Africa Cases in 1962, when the wrote:

> We are not unmindful or, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other. . .but these are matters for the political rather than for the legal arena. They cannot be

Consequently, if international law is to have any relevance in the eyes of the public and guide the practices of states it cannot distance itself from that practice or the social policies it reflects. Judge Higgins is persuasive on this point:

> Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is *part of the legal process*, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.[171]

We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made. The role of norms should be the achievement of values for the common good. Whether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision makers—by the Security Council, the International Court of Justice, by various international bodies and public opinion.

Recently we have seen the emergence of new paradigms beyond the paradigm of self-defense. These include intervention to remove an "illegitimate regime" or one that denies the "right" to democratic self-determination.[172] Another, is the growing consensus that states may act for humanitarian reasons to intervene in the affairs of another country.[173] Intervention is based on the principle that sovereignty is limited and that there are certain obligations states owe each other, and which

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> allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.

South West Africa Cases, 1962 I.C.J. 466 (Joint diss. op.).

171. Rosalyn Higgens, *Integration of Authority and Control: Trends in the Literature of International Law and Relations*, *in* TOWARDS WORLD ORDER AND HUMAN DIGNITY (Burns Weston & Michael Reisman eds., 1976).

172. AREND & BECK, *supra*, note 153, at 192.

173. *See, e.g.*, Glen T. Ware, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive 25*, 44 NAVAL L. REV. 1 (1997); EMERGING NORMS OF JUSTIFIED INTERVENTION (Reed & Kaysen eds., 1993). However, many legal scholars argue against the lawfulness of humanitarian intervention. *See, e.g.* Ian Brownlie, *Humanitarian Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John. Moore ed., 1974); Richard Falk, LEGAL ORDER IN A VIOLENT WORLD 339 (1968); Louis Henkin, *General Course*, *in* RECUEIL DES COURS 154 (1989). *See also* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res 2131, U.N. GAOR 1st Comm., 20th Sess., Annex 3, Agenda Item 107, at 10, U.N. Doc. A/6220 (1965).

no state is at liberty to violate.[174] The practice of intervention is, arguably, an admissible means for enforcing these higher claims. The intervention paradigm has been roundly criticized by advocates of the narrow interpretation of Article 2(4) and Article 51. For example, one publicist flatly denied any flexibility in the Charter language of Article 2(4):

> Article 2(4) prohibits entirely any threat or use of armed force between independent States except in individual or collective self-defense under Article 51 or in execution of collective measures under the Charter for maintaining and restoring peace.[175]

Such an interpretation, of course, would deny the right to use force even in the face of a threat to regional or global peace and security despite the failure of peaceful efforts or measures to reverse the WMD proliferation decision of the threatening state. So, when the traditional methods of securing compliance with the law of nations (that is, negotiations, mediation, countermeasures or, in rare cases, recourse to supranational judicial bodies such as the International Court of Justice) fail, there is no legal basis for responding to the threat. The state must wait figuratively and literally for the first blow to strike. The fundamental change of circumstance brought on by an aggressor's known possession of WMD can wreck more havoc on regional security than the actual use of such weapons but it certainly increases greatly the likelihood of a full-blown armed conflict. The proliferant state will directly or indirectly attempt to achieve its goals by the manipulation of other states based on the implied threat inherent in WMD possession. Aggression does not usually begin, and injury is not usually incurred when the first weapons are fired. The uses of force are usually but one phase of a competition of interest and power.[176] As Clauswitz observed, the aggressor is often peace-loving, and it is his resistant victim who causes war to erupt: "[a] conqueror is always a lover of peace (as Bonaparte always asserted of himself); he would like to make his entry into our state unopposed; in order to prevent this, we must choose war."[177]

As the foregoing analysis has amply demonstrated, such a view of the law is impracticable and far off the mark as a reflection of state practice. Self-defense, expanded to include pre-emptive acts to eliminate "imminent" threats, is legally supportable, and most scholars make

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174. EMERGING NORMS, *supra*.

175. Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in RECUEIL DES COURS 544 (1952). *See also* Richard B. Lillich, *Forcible Self-Help Under International Law*, *in* U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 129-30 (1980): pp. 129-30.

176. War is merely the continuation of Policy by other means." CLAUSEWITZ, *supra* note 3, at 87.

177. *Id.* at 376.

a plausible case for pre-emption based on the concept of anticipatory self-defense.[178] However, in an age of uniquely destructive weaponry that has the potential to put a population at risk of annihilation, pre-emptive or anticipatory self-defense responses are also inadequate. The current self-defense paradigm does not go far enough in providing the legal justification for using whatever force is necessary to eliminate a rogue state's illicit WMD program. The new counterproliferation self-help paradigm proposed here will fill that lacunae and will relieve states of the burden of continually contorting the round peg of military response into the square hole of self-defense as interpreted under Article 51.

A. The Counterproliferation Self-Help Paradigm: Use of Force Criteria

> "When you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him."
>
> — Franklin D. Roosevelt[179]

Based on the clear and present danger to international peace and security, in any case where it has been determined that nonproliferation efforts have failed and a state has embarked on a program to acquire a WMD capability, any nation, unilaterally or preferably in conjunction with others, has the right to use force, as a legitimate form of self-help, to prevent WMD acquisition or to pre-empt the development and use of such weapons. International law is always subject to the criteria that it is essentially political by nature and lacking in legal standards. Since it derives from political events and is often result-oriented, as this proposal is, care must be taken to formulate a framework and to derive generally accepted principles or criteria before analyzing actual events. Otherwise every statement of law will justify or condemn a particular incident, but no principle will ever emerge or acquire precedential value.

Recognizing that the use of force should always be limited to situations that detrimentally affect the international community and the nations that are a part of it, this new paradigm of self-help should only be applied under carefully crafted criteria upon which the application of force should be judged. It is proposed here that, in order to be legally supportable, the following six criteria should be the standard for the use of force in responding to the threat of WMD proliferation.

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178. See footnotes 139-166 and accompanying text *supra*.

179. Franklin Roosevelt, Fireside Chat of Sept. 11, 1941, *quoted in* DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 247 (1966).

1. Notice. A declaratory statement by a regional security organization or an individual state that WMD acquisition programs or the possession of such weapons, in violation of treaty obligations or international nonproliferation norms, is a threat to the vital national security interests of the state, regional security, and international peace and security.

As already discussed *supra*, the United Nations, NATO and the United States have already declared the proliferation of such weapons a threat to international peace and security. The United States in both it's *National Military Strategy*[180] and *A National Security Strategy for a New Century*[181] have put rogue nations on notice that illicit acquisition of WMD is a threat to the vital national security interests of the United States.

President Clinton's National Security Advisor, Anthony Lake, identified seven categories in which the United States would use force, unilaterally if necessary, in furtherance of national interests. One of those categories included preventing "the dangerous proliferation of nuclear weapons and other weapons of mass destruction."[182]

The United States' willingness to act unilaterally was made clear when then U.S. Ambassador to the United Nations, Madeleine Albright, stated to Congress:

> When threats arise to us or to others, we will choose the course of action that best serves our interests. We may act through the UN, we may act through NATO, we may act through a coalition, **we may sometimes mix these tools or we may act alone. But we will do what ever is necessary to defend the vital interests of the United States.**[183] (Emphasis added)

Unilateral U.S. action firmly rests within a framework of vital national interests. If interests to the United States are vital and the UN is not capable of ensuring those interests, then the United States will look to other means of ensuring the protection and preservation of those interests. As the target of an anticipated illegal use of force, a state need not wait before defending itself until it is too late to do so.

Further, a rogue state's failure to conform to the legal norms of the

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180. JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA i (1997).

181. WILLIAM CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 6 (1997).

182. Anthony Lake, *American Power and American Diplomacy*, 5 U.S. DEP'T OF DISPATCH 46 (1994).

183. Warren Christopher, *A New Consensus of the Americas*, 5 U.S. DEP'T OF DISPATCH 20 (1994).

world community or their solemn treaty commitments clearly threaten global order, peace and security. If an NBC-armed rogue were able to challenge a major commitment or interest of one of the established nuclear powers, and thereby cause that power to back down and appease, others could draw the conclusion that the security guarantees of the great powers—especially the United States—and the already limited promise of collective security are paper tigers. Similarly, the acquisition of these weapons in contravention of existing legal undertakings, such as the Nuclear Non-Proliferation Treaty, could lead to an unraveling of the international effort to control the proliferation of such weapons, particularly since other measures such as sanctions have proven so ineffective. This could prove highly damaging to international security. Many states have the capability to build WMD weapons but for the moment are uninterested in doing so. The actions of an WMD-armed rogue could lead to the fire-like building of arsenals of mass destruction in regions in conflict and in regions now free of such weapons. Such far-reaching changes in the distribution of power and in the credibility of the major powers would likely erode sharply the international processes and institutions that are the current foundation of international order. These changes would eviscerate the norms and principles of the UN Charter, if not lead to their eclipse by new norms antithetical to the interests of justice and peace.

In the international system today, many small and medium-sized states depend upon international norms and collective mechanisms to compensate for their own modest capabilities to provide for their own security.[184] Therefore, defending the stability of the system is in the national interest of overwhelming majority of states. The world order argument thus creates an additional justification for preventive or preemptive action. Protecting the world from a WMD catastrophe is long-term self-defense.

> **2. Threat. The threat must be a concrete, persuasive threat rather than a speculative or unsubstantiated one. Attack with WMD need not be imminent but, by objective evidence, a state must reasonably determine (1) the existence of an illicit WMD program, and (2) that past behavior or declaratory statements indicate that acquired WMD will be used as an aggressive force against it's vital national security interests, or regional peace and security.**

Whether or not the WMD threat is "imminent" as required under

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184. Literature about international regimes abounds. *See e.g.*, Stephen Krasner, ed., *International Regimes*, special issue of INTERNATIONAL ORGANIZATIONS, vol. 36, no. 2, (1982); ROBERT KEOHANE, AFTER HEGEMONY (1984); VOLKER RITTBERGER/PETER MAYER, REGIME THEORY AND INTERNATIONAL RELATIONS (1993).

the current self-defense paradigm is irrelevant, and requiring such calculations prior to using force potentially has the affect of forcing a state or states to wait until it's too late. The rogue proliferator will have already deployed the weapon or, worse, used it. When the threat to a state's vital interests is predicted as the logical conclusion of a course of events, that state, in cases of WMD proliferation, must have the legal right to take preventive action rather than waiting until the threat becomes more immediate. While there is latitude for national decision makers to make independent determinations concerning what are a state's vital national interests, inevitably, once a decision is made and acted upon, it will be the community of nations that ultimately decide the correctness of the decision based on whether the nation's perceptions were reasonable, given the actual circumstances under which it acted and whether a reasonable nation with such perceptions would have acted the same way.

A nation's decision makers, under this condition, need to make it emphatically clear that illicit WMD acquisition is a threat of such magnitude that the perpetrator is on notice that if the traditional tools of statecraft or diplomacy fail, all other means, to include the use of force, are available. A nation that uses those "other means" will be legally justified. So, in addition to the political declaration the world community has made against WMD proliferation, states need to develop not only the military capability to act, but also provide the requisite domestic legal authority. For example, in 1966, Congress authorized the President to "use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens."[185] A similar authorization to target WMD "infrastructure" developed by rogue states would accomplish the dual purpose of raising the costs to a potential proliferator and reenforcing the legal basis for responding to the threat.

In determining intent, the relationship between the parties is critical. Past aggressive acts, disregard for sovereign integrity, support for terrorism and terroristic acts against the state or its allies, violations of the laws of war, and repetitive threats of future action may support a reasonable apprehension of attack. On the other hand, prior peaceful relationships would raise the standard to one requiring a direct and specific threat of the use of force to provide justification for the use of force; i.e. meeting the anticipatory self-defense standard. In sum, evaluation of the facts must lead a reasonable person to believe that a state, which historically has not complied with international norms or made declarations of its intent not to abide, has embarked on the path

185. U.S. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1255, § 324 (1996).

of WMD proliferation, and the threat is sufficiently concrete to require contemplation of the extraordinary application of the use of force.

> **3. Force Imperative. A finding that further delay in undertaking the preventive strike will compromise security and will unreasonably increase the possibility of harm to its civilian population or will exacerbate the threat to the region or international peace and security.**

The threatened state must determine, in terms of time and degree, whether a use-of-force response is necessary. If so, this standard defines a clear course of action, and critically, provides the international community with a means with which to judge any action taken. Once a state has chosen to use force, the legality of the act is not determined by the depth of the state's explanation, but by how closely the act corresponds to the pattern of practice sanctioned by the international community. In how to determine the legitimacy of the response to the threat I would offer Professor Walzer's useful commentary:

> The line between legitimate and illegitimate first strikes is not going to be drawn at the point of imminent attack but at the point of sufficient threat. That phrase is necessarily vague. I mean it to cover three things: a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk. . . . Instead of previous signs of rapacity and ambition, current and particular signs are required; instead of an "augmentation of power," actual preparation for war; instead of the refusal of future securities, the intensification of present dangers.[186]

So, expanding on Professor Walzer's commentary, states that demonstrate hostile intentions, act in such a way as to abrogate specific legal undertakings or contravene accepted norms of international behavior and otherwise act in a way to adversely affect the peace and security of a region or neighboring state become a legitimate target for a military response to those illicit acts—a response that is legally justifiable and therefore legally appropriate. The acquisition of weapons of mass destruction fits nicely under this criterion. Such actions can confirm an intent to injure, create a positive danger, and raise the risks of waiting. Their dispersal in time of crisis would certainly signal preparation for war. Acquiring such weapons and a viable delivery system and preparing for their use would qualify as a "sufficient threat," particularly if done so by a "rogue" regime since such regimes have already demonstrated their propensity to act outside the bounds of normative behavior.

Obviously, there are risks in preventive/preemptive responses to

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186. MICHAEL WALZER, JUST AND UNJUST WARS 81 (2d ed. 1992).

WMD threats as posited here. It has the potential for nuclear confrontation. If the strike is not successful in eliminating an aggressor's NBC weapons and he opts to use them in reply, the use of force would have unleashed a terrible chain of events. Wars such as this may or may not prove to be massively destructive, depending on the choices made by the aggressor and the character of the arsenals and delivery systems available to him. No rogue has the nuclear capacity to annihilate a major power, although each major power has the capacity to annihilate a rogue. The nuclear powers would have to consider whether or how to use nuclear weapons in meeting the aggression of such states, not simply in deterrence or for national survival, but for larger purposes of international order. Arguing here that it would be legal to do so does not make for an easy answer since any use of force will always have moral, geo-political and domestic ramifications to a state's decision-makers.

As the world's only superpower, the United States faces a real dilemma in cases where it might undertake preventive/preemptive strikes against rogue states that have not first made military attacks on it. If it arrogates to itself the right to determine when and how to strike at nations it considers outside the law, it may be judged as having put itself above the law. In this particular historical moment, the United States, as the world's dominant military, economic, and political power, has been cast in the role of primary defender of the global status quo—of the existing balance of global power and of the institutions it has labored to put in place to promote global stability, prosperity, and liberty.[187] As the defender of the status quo, it has a special stake in turning back the aggressions and deterring the potential aggressions of rogue nations. The concern that the United States not put itself above the law is particularly evident among its closest allies, for their partnership with the United States is based on a belief in its benign use of power and on the legitimacy it enjoys within their societies as a steward of common interests.[188] Both of these qualifications would be eroded by acts outside the law.

The United States, therefore, should always encourage, where possible, collective action against WMD proliferation as it has done with the NATO Alliance, and use the standards set forth here in these criteria to explain why the use of force was necessary, justifiable and legally supportable. Today, the vast majority of states side with the United States in its commitment to the preservation of hard fought nonproliferation norms, so long as this permits them the opportunity to make evolutionary changes in the ways that promote justice, peace and pros-

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187. *See* WILLIAM CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 5-6 (1998).

188. For example, NATO members have leveled criticism at the potential unilateral use of American military force to destroy WMD. *See* Natalie J. Goldring, *Skittish on Counterproliferation*, BULL. OF ATOMIC SCIENTISTS 12 (1994).

perity. The world community must declare that any state that embarks on an illicit WMD acquisition program or allows transnational terrorist groups to do so on their territory forfeits any of the protections and procedural guarantees currently in place and enshrined in the UN Charter. It is vitally important, therefore, for the United States, as currently the only power capable of responding worldwide to the proliferation threat, establish the concrete legal basis for the use of force in order that the world community will accept and embrace the standard supporting nonproliferation.

> **4. Discriminate Response. The use of force to eliminate the threat is proportional. That is, the least amount of force should be applied to resolve the threat. If destruction or elimination of the WMD program is required, the use of force will be limited to the facilities that relate directly to the threat.**

Another essential requirement must be that only the minimum force necessary be used to eliminate the threat. Specifically, this principle of proportionality is enshrined in traditional *jus ad bellum* (when it is legally justified to use force) and *jus in bello* (the appropriateness of the type and use of weapon, and the duration and magnitude of weapon use in comparison to the object of attack and the potential for collateral damage) concepts of conducting war or using force in international relations.[189]

With regard to *jus ad bellum*, the proportionality of prevention/preemption is clouded by a number of factors. Even if the use of force successfully prevents the aggressor's use of those weapons, the cost of that thwarted aggression cannot be known—certainly not publicly proven. Most WMD arsenals have been used not militarily but politically, to coerce a potential adversary to make an important concession (either to do or to refrain from doing something).[190] The costs of this "use" cannot readily be compared with the costs of the military attack upon them. However, the potential coercive use of WMD arsenals does provide a legitimate basis for a prevention/preemption response. As history as demonstrated dramatically and with regularity, appeasement or untimely inaction typically emboldens aggression and those acts of aggression are usually only reversed at an enormous cost.[191]

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189. *See, e.g.* FRITS KALSHOVE, CONSTRAINTS ON THE WAGING OF WAR 29-32 (1987); ESBJORN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 12-14 (1979); DEP'T OF THE ARMY, THE LAW OF LAND WARFARE (FM27-10) 3 (1956).

190. During the Cold War nuclear protagonists deterred each other through the threat of mutual annihilation. Likewise, non-nuclear states were coerced through threats, overt or implied, of the possibility of nuclear attack. *See* LAWRENCE FREEDMAN, THE EVOLUTION OF NUCLEAR STRATEGY 87-8, 192-3, 318-19 (1983).

191. *Id.* at 95; HENRY KISSINGER, DIPLOMACY 310—12, 531 (1994).

5. Positive Outcome. There is a reasonable chance that the proposed use of force will be successful. That is, it will eliminate the WMD program or site, or significantly, in terms of cost, time, and resource allocation, degrade the ability of the proliferator to resurrect the illicit program.

The military and technical risks of any use of force have to be carefully weighed and evaluated in terms of objective national criteria defining the "success" of the use of force. Usually military forces will be tailored to the target, backed by timely and accurate intelligence and with the right on-call technical experts.[192] Depending on the specific situation, the political costs—both at home and overseas—also are likely to vary. They could range from intensely critical in the case of interception of questionable but legal dual-use transfers to widely welcoming in the event of use of military forces to block transfer of or recover stolen NBC weaponry or critical materials.

Whatever the scenario, it is vital that an appropriate assessment be made to determine if the attack will either eliminate the WMD program or so degrade its capabilities or resources that the proliferator can no longer carry on the program, at least for the near term. If information is insufficient to give the responding state high confidence that the program can be eliminated, then the use of force should be shelved in favor of using the other tools of statecraft or until sufficiently identifiable targets present themselves. So, for example, once a program has been underway for some time, the military requirements of successful military preventive action—from accurate intelligence on all facilities and sites to target destruction with a politically acceptable risk of collateral or environmental damage—are likely to be very high.

6. Last Resort. The potential victim state should continuously seek to resolve the threat by other means unless it would, based on the actions of the aggressor, reasonably be seen as futile.

To the extent practicable, a state must affirmatively pursue alternative modalities of resolution and remained engaged in the diplomatic process until the ultimate moment of action. Military action shall not be undertaken unless all other reasonable means have been tried and have failed. This does not mean all conceivable means, rather those that policy makers within a particular country have determined to be sufficiently exhausted as to reasonably leave the recourse to force as the

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192. *See* CHAIRMAN OF THE JOINT CHIEFS, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (1997); DEP'T OF THE ARMY, FM 100-5 OPERATIONS (1993).

reasonable course of action.[193] These decisions are never easy and there is no commonly acceptable standard of proof by which states make these decisions. While the evidence must be more than "some" it does not have to rise to a level beyond a reasonable doubt. Evidence sufficient to convince any prudent person that a threat to the national security or vital national interests of the state will warrant a military response. What that evidence is depends on the circumstances. Obviously, when a state is confronted with a rogue regime bent on acquiring WMD the last resort criterion will be subject to a quite narrow interpretation.

Of course, if the political climate supports it, a state should always attempt to secure UN Security Council action or, minimally, an endorsement for the use of force in response to WMD proliferation. There already exists a presumption of Security Council support given its condemnation of proliferation. This could help not only to fill noncompliance gaps, but also to build norms and lessen insecurities that could shape other countries' proliferation decisions. While a state could always seek endorsement by the Security Council for a decision to strike preemptively, there are, however, many practical reasons not to consider such a move, not least the warning likely to be given to the target state proliferator by such an action, which might induce it to disperse its weapons or to perhaps use them before losing them.

Also, preemptive use of force is a exceedingly unpopular measure usually generating strong negative reactions in key regions of the world.[194] In fact, even the characterization of certain states as "rogue" for violating established international norms by the United States, and its subsequent policies to isolate them and undertake counterproliferation preparations for possible military action against their WMD programs and facilities have been much criticized, not least by U.S. friends and allies who see such actions as an effort to put the United States above or outside the law.[195] In any case, it is extremely difficult to separate defense of national interests that one state but not others see as common, or to justify an attack as a defense of norms that it asserts but others do not support.

In sum, in order for use of force to be justified under this new paradigm all six interrelated conditions or criteria must be satisfied if the

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193. "[T]aken literally. . . 'last resort' would make war morally impossible. For we can never reach lastness, or we can never know that we have reached it." *Id.* at xiv.

194. See, for example, responses to Israeli attack on Iraqi's nuclear reactor in 1981 and the United States raid on Libya in 1986 drew criticism from around the world. *See* United Nations, Security Council, Official Records: Resolutions and Decisions of the Security Council, 1981, Resolution 487 (1981) S/IUF/37 (1981); Frederick Zilian, Jr., The *U.S. Raid on Libya—and NATO,*" ORBIS, Fall 1986, at 499-524; CLYDE MARK, LIBYA: U.S. RELATIONS, CONGRESSIONAL RESEARCH SERVICE (1987).

195. *See generally* MICHAEL KLARE, ROGUE STATES AND NUCLEAR OUTLAWS: AMERICA'S SEARCH FOR A NEW FOREIGN POLICY (1995).

use-of-force response is to be legitimate and legally supportable. Obviously, in determining the propriety of the use of force in these cases certain ambiguities, problems of interpretation, difficulties of factual application, and standards of proof problems will arise. There will always be those that require more certainty and specificity than is factually or politically possible. However, as Professor Brownlie observed: "Those who demand the perfect definition present an attitude of mind more suited perhaps to the design of precision instruments than the making or formulation of legal rules." [196]

Inevitably, the nature of the threat to peace and stability, the evidence presented establishing an illicit WMD program, the degree of limitation on the use of force in response to the threat, the achievement of the desired goal by the use of that force, and the degree of subsequent reaction to that action by the world community at large will determine the legal appropriateness of each instance in which force was the chosen in response. Four previous cases in which the acts in response to the threat were characterized as self-defense (or likely would have been so described in one case) have been chosen to apply the criteria to demonstrate how this new legal paradigm supports and validates the application of force in response to proliferation threats with clear, easy-to-understand guidelines for both decision makers and their publics.

B. Anticipatory Self-Defense in Responding to the WMD Threat: Four Case Studies

> Neither the United States of American nor the world community of nations can tolerate deliberate deception and offensive threats on the part of any nation, large or small. We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.
>
> — John F. Kennedy[197]

1. The Cuban Missile Crisis

One of the most useful examples for the application of these criteria is the Cuban Missile Crisis of 1962. President Kennedy, in response to photographic evidence that the Soviets were installing medium range ballistic missiles capable of hitting large portions of the United States,

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196. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. 183 (1961).

197. 47 DEP'T OF ST. BULL. 715, 716 (1962) (address by President Kennedy, The Soviet Threat to the Americas).

declared that United States military forces would interdict the delivery of offensive weapons and associated material going to Cuba.[198] Cuba was to be "quarantined" from receiving any "offensive" weapons.[199] This involved putting naval forces around the island and boarding and searching all vessels bound for Cuba, in effect a blockade.[200] Further, it was announced that any continuation of "offensive" military preparations would justify "further action" on the part of the United States.[201] The State Department primarily defended the "quarantine" as a collective action against a threat to the region as a result of authorization of the Organization of American States and thus appropriate under the UN Charter.[202] Most commentators on the legality of the United States' activities sought to justify the naval "quarantine" used to stop missile parts from reaching Cuba as a legal exercise of self-defense.[203] Otherwise, it would be a violation of the Article 2(4) prohibition against the use of force.[204] However, under the counterproliferation self-help paradigm the quarantine would have been legally supportable as a legitimate response to a WMD proliferation threat.

The nonproliferation norms that exist today did not exist in 1962.[205] If it had, this clearly would have been a violation of the NPT. Certainly, the United States was unambiguous in its response and made it emphatically clear that this deployment of nuclear-armed missiles was a grave threat to potentially the survival of the nation and to regional peace and security.[206] Arguably, the presence of missile sites or nuclear weapons in Cuba did not per se constitute a threat against the United States and the Western Hemisphere. Their presence, only when considered together with other factors, created a real threat. The most important factor to consider is the purpose behind the introduction of the missiles and the intention for subsequent use.[207] The aggressive inten-

198. *See* James S. Campbell, *The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 STAN. L. REV. 160 (1963); C. G. Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, 57 AM. J. INT'L L. 588 (1963). Note that this volume has several articles on this issue debating the legal validity of the quarantine.

199. President John F. Kennedy, Proclamation No. 3504, 27 Fed. Reg. 10401 (1962), 47 DEP'T OF STATE BULL., *supra* note 197, at 717.

200. *Id.*

201. *Id.*

202. *See* Abe Chayes, *The Legal Case for US Action on Cuba*, 46 DEP'T ST. BULL. 763 (1962).

203. Myres McDougal, "The Soveit-Cuban Quarantine and Self Defense, 57 AM. J. INT'L L. 597 (1963); Carl Christol and Charles Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated material to Cuba, 1962*, 57 AM. J. INT'L L 525; Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963).

204. Leonard Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963).

205. The Nuclear Non-proliferation Treaty was not signed until 1968. See footnotes 75-78 and accompanying text, *supra*.

206. 47 DEP'T OF ST. BULL., supra note 197.

207. McDougal, *supra* note 208.

tions, based on past acts, of Cuba and the Soviet Union were clear.[208] The record of the Soviet Union in Hungary and East Berlin, and Castro's well known support for terrorism and "revolutionary" armies throughout central and South America demonstrated their aggressive intentions, and previous attempts at attacking or undermining regional peace and stability.[209] The mere presence of these missiles in Cuba would have given Castro the opportunity for blackmail and other mischief in the region.

In customary self-defense terms, the question must also be asked as to whether or not the danger to the territorial integrity or political independence or vital national interest of the United States was imminent?[210] The answer would be affirmative if the mere deployment of nuclear missiles in Cuba was considered as the danger. If there was enough evidence to show that the other side was planing an attack using weapons of mass destruction, the right of self-defense may be invoked, even though the exact date of the expected attack is unknown.[211] We can avoid this quandary under the new paradigm by the fact of WMD proliferation, and that the weapon of choice is a WMD in the hands of one whose intentions could easily be read from his past conduct.

The United States response was proportional and reasonable to the threat. Indeed, given the Cold War climate of the times, the response was constrained by the real concern that the overt use of military force could result in a nuclear Armageddon.[212] Assessing Soviet and Cuban intentions, U.S. decision-makers felt that this limited measure had a reasonable chance of success in persuading the Soviets to remove the missiles without recourse to more violent measures.[213] Obviously, if this had not achieved the removal of the threat, other measures would have been required. Finally, the United States and the Soviet Union continuously sought to resolve the crisis through measures other than force.[214] Ultimately, it was a combination of force, threat of nuclear war, and willingness to compromise that led to a solution that avoided further uses of force. But, the quarantine and the ultimate resolution of the crisis met all the criteria of the new counterproliferation self-help paradigm.

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208. Brian Crozier, *Soviet Support for International Terrorism, in* BENJAMIN NETANYAHU, ED., INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE 64-78 (1981).

209. Fenwick, *supra,* note 198, at 589-90.

210. *See* Martin Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law,* 16 BROOKLYN J. INT'L L. 493 (1990).

211. McDougal, *supra* note 208.

212. *See* GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 56-62 (1971).

213. *Id.*

214. *Id.* at 63-66.

2. The Israeli Attack on the Iraqi Nuclear Reactor at Osirik

In 1981 Israeli jets bombed an Iraqi nuclear reactor at Osirik. The international community roundly condemned Israel, and the UN Security Council passed a resolution strongly condemning "the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."[215] Few legal scholars argued in support of the Israeli attack.[216] Of course, subsequent events demonstrated the perspicacity of the Israelis, and some scholars have revisited that attack arguing that it was justified under anticipatory self-defense.[217]

In 1981, as it continues today, there exists a state of war between Israel and Iraq.[218] Israel's actions and statements prior to the attack made it clear to the international community that it would not tolerate any threats to its national security.[219] Iraq was certainly on notice that any threat, whether it be WMD or conventional, would result in a response by Israel.[220] Iraq is, by all accounts, a "rogue" state, flouting international norms, the will of the international community, as reflected in the numerous Security Council resolutions, and its acts of aggression against Kuwait and Iran.[221] It has never recognized Israel as a state and considers itself at war with Israel.[222] Iraq is also known for its support of terrorism, and has been implicated in terroristic acts such as the

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215. U.N. SC Res. 487, 36 UN SCOR, 2288th mtg., UN Doc. S/RES/487 (1981). *See also* W.T. Mallison & Sally Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self Defense?*, 75 VAND. J. TRANSNAT'L L. 417 (1982).

216. *See* Anthony D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983).

217. *See, e.g.,* Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMPLE INT'L & COMP. L.J. 437 (1995); Uri Shoham, *The Grenada Intervention: The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191 (1985).

218. U.S. Congress, Senate, Committee on Foreign Relations, *The Israeli Air Strike*, Hearings, at1, 4 (1981) (statement of Walter J. Stoessel, Jr., Acting United States Secretary of State).

219. For a detailed account of Israeli decision making and subsequent justifications see DAN MCKINNON, BULLSEYE IRAQ 1988 (especially chapters 13 and 18).

220. Given the state of hostilities between Israel and Iraq, as well as Israel's overt military actions against perceived threats it is reasonable to assume Iraq would have known that Israel would attack if evidence persuaded them it was a site for nuclear weapons programs. *See* Steve Levenfeld, *Israeli Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisals under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1 (1983). Also, the Iranians had tried to destroy the facility during its war with Iraq. *See* Frits Kalshoven, *Prohibitions or Restrictions in the Use of Methods and Means of Warfare*, IGE DEKKER AND HARRY POST, EDS., THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE 106 (1992).

221. Lake, *supra* note 8.

222. Iraq has never signed an armistice with the Israelis following their 1967 war. Moreover, Iraq has announced its commitment to the destruction of Israel. Hearings, supra note 218, at 76.

attempted assassination of former President Bush.[223]

There is compelling evidence that the nuclear reactor bombed by Israel would have been used to produce plutonium for weapons purposes even though Iraq had repeatedly denied it had a nuclear weapons program.[224] Subsequent events have definitively established what Israel through its intelligence sources discovered; Iraq's intent to make nuclear weapons and to use them against Israel.[225] Iraq continued to deny any attempts at manufacturing nuclear weapons and it is reasonable to assume that resorts to peaceful attempts at redress had little likelihood of success.[226] International inspections continued to give the Iraqi program a clean bill of health.[227] The proportionality requirement was met since the attack occurred prior to the reactor's activation, limiting any radioactive fallout, and attacking the facility on a weekend when there would be few workers about. There was certainly a good chance of success in terms of severely degrading Iraq's nuclear capability since this was the only known facility and the physical destruction of it would destroy years of effort.[228] It would be exceedingly costly and time consuming to reconstitute the program.

Most legal scholars originally condemned the attack because it was argued that the danger was not so "imminent" as to require this use of force.[229] If the threat is not imminent, it does not meet the anticipatory self-defense requirements and therefore "dangerous as they are, customary international law [does] not consider such displays of force illegal so long as they remained on . . . the state's own territory, unless there was evidence of an immediate intention to use them for attack."[230] Under the counterproliferation self-help paradigm, however, given the horrific nature and potential for destruction and disruption of peace and international security, the mere acquisition of nuclear weapons (or any other weapon of mass destruction for that matter) by this state would be a threat to regional security. Any illicit acquisition of weapons of mass destruction and their attendant catastrophic consequences should logi-

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223. PRESIDENT WILLIAM CLINTON, ADDRESS TO THE NATION, June 26, 1993, *reprinted in* 49 CONG. Q. ALMANAC 21-D (1993).

224. Marc Dean Millot, *Facing the Emerging Reality of Regional Nuclear Adversaries,* WASH. Q 41, 48 (1994).

225. Shoham, *supra* note 217, at 208.

226. *Israeli and Iraqi Statements on Raid on Nuclear Plant,* N.Y. TIMES, Jan. 16, 1986, at A1.

227. *See* W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?* 15 VANDERBILT J. TRANSN'L L. 420 (1982).

228. Beth Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age,* 59 NEW YORK U. L. REV. 203, 226 (1984).

229. Mallison & Mallison, *supra* note 227, at 429; MARIAN NASH LEICH, U.S. DEP'T OF ST., CUMULATIVE DIG. OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 2933-35 (1995).

230. Qincy Wright, *The Cuban Quarantine,* 57 AM. J. INT'L L. 546, 549 (1963).

cally give a threatened state the right to respond. Illicit WMD acquisition is a clear and present danger requiring a response. The new paradigm accepts that shared values implicit in the current international legal order require the international community or member states to respond to threats to its survival and a unilateral response is appropriate when the international community cannot or will not respond.

3. The U.S. Secretary of Defense's threat to destroy Libya's Chemical Weapons Facility

In the 1980s, Libya produced over 100 tons of chemical weapons agents, and it is one of the few nations to have employed chemical weapons.[231] In 1987 it dropped chemical agents from a transport aircraft against Chadian troops.[232] Libya is not a party to the Chemical Weapons Convention, but it is a party to the 1925 Gas Protocol which bans the use, but not the possession, of chemical weapons in warfare.[233] In response to intense media scrutiny, Libya supposedly shut down its facility in 1990 but re-opened it in 1995 as a "pharmaceutical" facility, and began constructing a large underground chemical facility near Tarhunah, a mountainous region southeast of Tripoli.[234] The United States has accused Libya of continuing its chemical weapons program, which Libya denies.[235] Libya has also embarked on a ballistic missile acquisition program.[236] It is attempting to acquire the No Dong missile from North Korea with a reported range of up to 1000 kilometers.[237] This would allow Libya to threaten all of Egypt, Israel, NATO countries in southern Europe and U.S. forces in the Mediterranean.[238]

Secretary of Defense William Perry condemned the Libyan chemical weapons program, in announcing it to the world, and when asked whether the United States was contemplating the use of force to destroy the plant, he replied, "I wouldn't rule anything out and I wouldn't rule anything in."[239] He also stated that the United States would not allow

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231. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 35.

232. OFFICE OF THE SEC. OF DEF., PROLIFERATION:THREAT AND RESPONSE 26 (1996) ; *Duel over Rabta,* ECONOMIST, Jan. 7, 1989, at 34. Also, in January 1989, a Sudenese rebel group alleged that Libya had used chemical weapons against it during the previous six months. John Pear, *Suddenese Rebels Say They are Victims of Poison Gas,* N.Y. TIMES, Jan. 10, 1989, at A12, col. 1.

233. Multilateral Bacteriological (Biological) and Toxin Weapons, 26 U.S.T. 583, T.I.A.S. 8062, *available in* 1975 WL 39791.

234. PROLIFERATION: THREAT AND RESPONSE, *supra* note 232, at 27.

235. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 35.

236. *Id.* at 37.

237. *Id.*

238. *Id.* at 36.

239. John Lancaster, *Perry Presses U.S. Charge Against Libya,* WASH. POST, Apr. 4, 1996, at 1.

Libya to open the plant.[240] He later warned Libya and other nations that any use of chemical weapons against it would result in a "devastating response. In every situation that I have seen so far, nuclear weapons would not be required for response, that is, we could make a devastating response without the use of nuclear weapons, but we would not forswear that possibility."[241] Under anticipatory self-defense analysis a use of force against Libya's chemical warfare capability and its means of delivery without a demonstration of "imminent" use would fail and therefore be subject to condemnation as an illegal use of force. Under the counterproliferation self-help paradigm the use of force would, however, be legally supportable.

First, United States pronouncements were clear and unambiguous that it would view acquisition of this capability as an international threat to regional peace and security.[242] The acquisition efforts continued despite overwhelming world condemnation for chemical weapons. Libya has already demonstrated its contempt for its treaty obligations by using chemical weapons in violation of the 1925 Gas Protocol. It is a well-known sponsor of terrorism, and it is currently harboring at least two suspects in the Pan Am 103 bombing in 1988, in violation of Security Council Resolution 731.[243] It is a state under UN sanctions, imposed by UN Security Council Resolution 748, for its refusal to comply with its international legal obligations.[244] It is a rogue state.

Second, Libya has already demonstrated its willingness to use chemical weapons and its attempts at acquiring a long-range ballistic missile capability is further evidence of its offensive intentions.[245] Libya's well-documented terrorist affiliations and a report that it was training its air forces in mid-aid refueling, a technique that could conceivably enable Libyan aircraft to reach Israel, increased the concern that Libya would use its chemical weapons.[246] Third, based on past acts and future intentions, the United States could reasonably conclude that the best time to strike would be before the weapons are deployed.[247] On

240. Secretary Perry declared that Libya "will not be allowed to begin production" and strongly intimated that the United States would use military force to enforce this promise. Philip Shenon, *Perry, in Egypt, Warns Libya to Halt Chemical Weapons Plant*, N.Y TIMES, Apr. 4, 1996, at 4. No attempt was made to ground this declaration on any legal rationale for justifying the use of force against the site in Libya. Libya is not a party to the Chemical Weapons Convention and there does not exist any legal prohibition against possessing chemical weapons. Interviews, Office of Legal Advisor to the Chairman of the Joint Staff, Aug. 27 1998.

241. William J. Perry, Statement on Libyan Chemical Warfare Facility at Tarhunah Air War College Conference on Nuclear Proliferation Issues (Apr. 26, 1996).

242. *Id.*

243. *See* U.S. DEP'T OF ST., PATTERNS OF GLOBAL TERRORISM 24 (1997).

244. *Id.*

245. PROLIFERATION: THREAT AND RESPONSE, *supra* note 16, at 37.

246. *Duel over Rabta*," *supra* note 232, at 33.

247. Targeting of WMD is particularly onerous once deployed from production facili-

the other hand, as far as the facts are currently and publicly known, the United States could just as easily conclude that this is not the right time to respond. As already discussed, an evaluation of state use of force under this criterion will be heavily situational and fact dependent, subject to the responding or threatened state's evaluation of evidence.[248] Fourth, an attack on the identified facilities will in all likelihood meet the proportionality test. They are located in an isolated area so damage and injury to civilians and civilian infrastructure would be minimal.[249] Finally, Libya has already demonstrated its disregard for peaceful resolution of this issue and has denied that it has a chemical weapons program. By any reasonable standard further dialogue or Security Council resolution would have no effect on Libya's CW program. Under the counterproliferation self-help paradigm the use of force to eliminate this threat is legally supportable.

4. The United States Attack on the Sudan "Chemical Weapons" Facility

On August 20, 1998, the United States attacked with cruise missiles and destroyed a pharmaceutical plant near Khartoum, Sudan that U.S. intelligence sources had identified as a chemical weapons facility.[250] This attack was part of a U.S. response to the bombings of two American embassies in East Africa two weeks earlier by a terrorist group led by Osama bin Laden, an exiled Saudi who had "declared war" on the United States and the West. The United States also attacked bin Laden's headquarters in Afghanistan. The legal justification for the U.S. attack was "as an act of self-defense." More specifically, because the bin Laden terrorist group was behind these and other terrorists attacks, he had declared his intention to conduct more attacks, and because "key terrorist leaders" were gathered at the headquarters compound the continuing threat was sufficient "imminent" to justify the attack. The Chairman of the Joint Chiefs of Staff explained that this was an act of "prevention," stating, "[t]his is not simply a response to some specific act, but a concerted effort to defend U.S. citizens and our interests around the globe against a very real and very deadly terrorist

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ties because of their small size and a proliferator's ability to hide such weapons in populated areas. *See* Robert Chandler, *Counterforce: Locating and Destroying Weapons of Mass Destruction*, INSTIT. NAT'L SEC. STUDIES OCCASIONAL PAPER #21, August 1998.

248. *See* footnotes 147-196 and accompanying text, *supra*.

249. The Tarhunah facility is 60 kilometers southeast of Tripoli in an unpopulated mountainous region. PROLIFERATION:THREAT AND RESPONSE, *supra* note 218, at 26.

250. The facts as discussed here are derived from the Washington Post and New York Times reports of the U.S. attack. *See* James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1; Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, at 1.

threat."[251]

As discussed earlier, the use of force in response to these attacks contained elements of both self-defense and reprisals.[252] And, as is always the case, such acts are always controversial even if popular. As one law professor complained: "The U.S. and Israel are the prime supporters of the notion of retaliation in the world, and they tend to make legal justifications that other people are uncomfortable with. I'm not convinced that punishment is useful as a deterrent."[253] Assuming the attack on bin Laden's headquarters was a legally sustainable act of self-defense, the attack on the "chemical weapons" factory is more problematic. So far, the only evidence available supporting the attack is the U.S. claim it was a chemical weapons facility, that bin Laden was known to have made financial contributions for its construction, and that bin Laden was known to be seeking to acquire chemical weapons for use in terrorist attacks.[254] Assuming for the moment that the facility was in fact a chemical weapons factory,[255] the United States has not made a valid argument for use of force under anticipatory self-defense unless it can convincingly explain that acquisition and use by bin Laden was imminent. To date, no such claims have been made.

The United States response fairs better under the counterproliferation self-help paradigm. First, as previously noted, a number of statements and pronouncements have condemned the proliferation of chemical weapons.[256] The United States has made it clear that it would not tolerate the acquisition of such weapons and it would respond if it considered it a threat to its vital national security interests.[257] Since the most recent use of chemical weapons involved a terrorist attack (i.e. the March 1995 Aum Shinrikyo attack on the Tokyo subway with cyanide), there was heightened concern for terrorist use of such weapons.[258] Since at least 1996, Sudan has continued to serve as a refuge and training hub for a number of terrorist organizations. Sudan has failed to comply with the Security Council's demand to cease supporting terrorists and turn over at least three terrorists wanted in the 1995 assas-

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251. Bennet, *supra* note 250.

252. See footnotes 102-131 and accompanying text, *supra.*

253. Serge Schmemann, *In the War Against Terrorism, Any Attack Has Pros and Cons*, N.Y. TIMES, Aug. 21, 1998, at A1, *quoting* Professor Roger Clark, Rutgers University Law School. Another professor from Wharton Business School is quoted as calling the attacks "a violation of international law." *Id.*

254. *Supra* note 250.

255. *See* Steve Chapman, *Doubts Continue to Grow About Sudan Raid*, CHI. TRIB., Nov. 1, 1998, at 1.

256. *See* footnotes 73-78 and accompanying text, *supra. See also* ARMS CONTROL AND DISARMAMENT AGENCY, CHEMICAL AND BIOLOGICAL WEAPONS READER, Jan. 21, 1994.

257. Shenon, *supra* note 240.

258. PROLIFERATION THREAT AND RESPONSE, *supra* note 16, at 50.

sination attempt of President Mubarak.[259] Assuming the facility was actually a chemical weapons facility, possession of such a clandestine facility violates the universal ban on such weapons. Currently 169 states have signed the Chemical Weapons Convention (CWC) and there are 125 state parties.[260] Although Sudan has not signed the CWC, arguably the CWC is reflective of the will of the international community as a whole that states will not possess or use chemical weapons. Therefore, the prohibition against chemical weapons is arguably a preemptory norm of general international law from "which no derogation is permitted."[261]

Second, while there is little evidence bin Laden was about to use chemical weapons against the United States, there is more than sufficient evidence for any reasonable observer to conclude he was well on the road to acquiring such a capability, and that once so obtained he would find a way to use it. The existence of chemical weapons and an expressed or implied intent to use it against vital national security interests would be sufficient. The use of force was discriminate and proportional. Precision weapons were used to attack the facility, and it was done in a manner to limit destruction. Given the use of these precision guided munitions there was a great probability of success. The facility was completely destroyed and, although the Sudanese have vowed to rebuild it, it is unlikely that it will be rebuilt for some time to come. Finally, it is quite obvious that there would have been little chance of resolving the threat peaceably given bin Laden's stated intentions and the Sudan's failure to comply with Security Council resolutions by continuing to harbor terrorists.

As all of these examples demonstrate, the new counterproliferation self-help paradigm is clear, predictable, credible and effective in establishing a new norm for the use of force. It is constraining in that it is only applicable in response to violations of the nonproliferation norms and the rogue state has already, by its actions, demonstrated it is not amenable to peaceably stopping and rolling back its WMD acquisition program. It augments but does not supplant the self-defense paradigm by authorizing states, unilaterally or collectively, to prevent WMD proliferation as well as pre-empting a WMD capability before it becomes an imminent threat. And finally, it allows states to respond to one of the greatest threats to the survival of civilization and international peace and security even though, at the moment, a particular state or region may not be in imminent danger of attack.

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259. *See* PATTERNS OF GLOBAL TERRORISM, *supra*, note 243, at 25.

260 *See* Organization for the Prohibition of Chemical Weapons website http://www.opcw.org/.

261. Article 53, Vienna Convention on the Law of Treaties (1969) *in*, BASIC DOCUMENTS OF INTERNATIONAL LAW 233 (1972).

VI. CONCLUSION

> "[A]ny startling developments in international law cannot be the work of international lawyers... [but] must be the outcome of a changed attitude of Governments prompted and supported in this matter by an enlightened public opinion."
>
> —Hersch Lauterpacht[262]

Since the Charter's inception there has been numerous instances of armed intervention justified under the rubric of self-defense.[263] They have been controversial due in large part to the expansive—oftentimes tortured and unconvincing—definition of self-defense offered by the intervening state.[264] Many legal scholars have been reluctant to countenance an expansive self-defense rationale because there is "a widespread perception that widening the scope of self-defense will erode the basic rule against unilateral recourse to force."[265] Yet leaving the law behind while states respond to the new dangers to civilized peoples is wholly unsatisfying. I reject the proposition that we should conclude that the law stops short of these problems, and leave it at that. Further, if the strict application of the rules on the use of force leads to results that seem absurd, as it certainly can, then those rules lose their credibility. In the face of these threats we need to facilitate the continued development of legal rules that enable states to deal effectively with new forms of aggression, such as the proliferation of weapons of mass destruction. These new dangers represent offenses against the international order itself and undermine the very fabric of international relations in an insidious way.

The law cannot be seen as irrelevant in situations where a nation's vital interests or survival is at stake. The United States has made it clear, particularly with it's recent response to terrorist acts in Kenya and Tanzania, that it will use whatever means at its disposal to defend and respond to such threat, and it is ready to act unilaterally when circumstances require.[266] As Secretary Cohen cautioned:

> Any individual or group that seeks to deprive us of [the] ability to move about as members of the international community is an enemy of freedom-loving people everywhere, and will be treated as such. The

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262. HERSH LAUTERPACHT, INTERNATIONAL LAW, COLLECTED PAPERS, Vol. 2 42 (1975).

263. *See e.g.* CONGRESSIONAL RESEARCH SERVICE, U.S. LOW INTENSITY CONFLICTS 1899-1990, Committee on Armed Services Rpt. No. 13, 1990 (detailing numerous instances of the use of force for self-defense and other purposes).

264. *See* Roberts, *supra* note 128.

265. Oscar Schacter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 272 (1989).

266. See footnote 183 and accompanying text.

> American people cannot retreat and hide behind concrete bunkers and barriers and expect to be a force for good in the world—or even be secure in or own homes. . . . No government can permit others to attack its citizens with impunity if it hopes to retain the loyalty and confidence of those it is charged to protect. We can remain free only as long as we remain strong and brave. Those states that sponsor or support [such] acts. . . are not beyond the reach of American's military might.[267]

Like all law, international law is (or certainly ought to be) a living institution in a living world society. It is a reflection of the political will of the community it purports to govern.[268] Consequently, it must be responsive to the needs of that society or it will be ignored. Customary international law represents the commingling of legal principle and policy.[269] The breadth of this law is defined by the generally accepted and sanctioned practices of states, delimited first by policy. When legal "norms" present an unworkable solution, or mandate an illogical result, an imbalance in the law exists. In the face of a belligerent state that has acquired a WMD capability and a credible delivery system, the potential for mass destruction must be the critical factor in the justification and timing of the potential victim's response. The destructive nature of these weapons requires that the point of unacceptable danger move further in time from the actual moment of aggressive use. Policy, practice, and the law must move to resolve the imbalance.

In responding to the threats to international peace and security and national sovereignty in the modern age, we have seen states respond to the challenges while the law vainly tries to keep apace. As new legal obligations emerge in the areas of humanitarian intervention, pro-democracy self-determination, and self-help to correct injustices, the legal boundaries proscribing the use of force must change. Numerous categories of action (e.g. imminent attack and indirect aggression) give rise to the right of self-defense even if not explicitly accommodated in the original Charter language.[270] So too then must the legal regime change to adapt to the new threat of weapons of mass destruction proliferation.

If, as seems obvious, sovereign states are involved in clandestinely developing and acquiring weapons of mass destruction and delivery systems (or using surrogates to deliver these weapons of terror), then the

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267. William S. Cohen, *About Last Week. . . The Policy: We Are Ready to Act Again*, WASH. POST, Aug. 23, 1998, at C1.

268. Horace Robertson, Jr., *Contemporary International Law: Relevant to Today's World*, *in* JOHN NORTON MOORE & ROBERT TURNER, INTERNATIONAL LAW STUDIES 1995, READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994 1 (1995).

269. *Id.*

270. See footnotes 139-166 and accompanying text, *supra*.

law must adapt and a new legal paradigm adopted to allow sovereign states to effectively respond without themselves being labeled international rogues. The response should not be judged on the basis of a popularity contest but on its legitimacy as a tool of statecraft in the war against chaos. Fighting terrorism and the proliferation of weapons with the potential to destroy us all is, unfortunately, the war of the future. If the law is to have any relevance in maintaining world order in the face of this threat it must either adapt or become an anachronistic curiosity. The highest national interest of all nations is a stable peace based on respect for the rule of law. Adoption of a legal paradigm that governs responses to the greatest threat to the new world order is the only way to return nonproliferation norms to their rightful place of respect and to prevent the world from sliding into anarchy.

Results in this continuing process will remain as incomplete and imperfect as nearly everything else in legal development. It will always remain difficult to make convincing assessments except in retrospect. Long-term effects often remain obscure, and anticipating objections which may arise at a later stage is risky by any standard. The law can not nor should it be discerned in a vacuum or cold sterile void. The law is but one factor in the human decision-making process; a process that requires an interdisciplinary approach, one that includes ethical, cultural, technological, economic, and operational considerations. It is not a fixed set of bright line rules that can be applied irrespective of the factual context. None of the problems that the use of force is supposed to solve can be satisfactorily resolved by confident invocation of a "correct rule."

The United Nations Charter enshrines principles of peace, order and prosperity and admonishes us to use force only as a last resort in the face of threats to that peace and order that are unlikely to be persuaded to use peaceful means. International law can and must set strict limitations on the use of force. But to interpret that law to flatly prohibit such uses in all cases that do not meet the classic paradigm—to tell a government confronted with the specter of weapons of mass destruction that it cannot under any circumstances respond with force because possession of such weapons, albeit illicitly, is not really an "armed attack"—is to undermine the legitimacy and credibility of the legal restraints on the use of force themselves. New challenges demand new responses. The manner in which those responses are framed can help determine whether the international legal restraints on the use of force will be perceived as a meaningful basis for efforts to uphold international law, or as merely an anachronistic and irrelevant obstacle. Instead of waiting for an unsatisfactory legal regime to respond to a world order threat, states should agree on a legal paradigm that is responsive to that threat. The proposed counterproliferation self-help paradigm will help to clarify the when and how of using force in response to this extraordinary threat, and when not to.

Errata

Human Rights in India — Fifty Years After Independence (1947-97)

VIJAYASHRI SRIPATI*

The following mistakes appeared in the above-named article published at 26 DENV. J. INT'L L. & POL'Y 93:

Pages 102 and 103, the table should appear as:

RIGHTS CONTAINED IN BOTH THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Covenant on Civil & Political Rights	*Fundamental Rights*	*Name of the Right*
Article 8(3)	Article 23	Freedom from forced or compulsory labor
Article 14(1)	Article 14	Right to Equality
Article 26	Article 15	Protection against discrimination based on any ground: race, religion, color, sex, language, etc.
Article 25(c)	Article 16(1)	Right to have

* Vijayashri Sripati, LL.B., Osmania University, India, 1989; Rotary International Graduate Scholar (1990-91); LL.M., American University Washington College of Law, May 1991; British Chevening Scholar (1995-96); M.A. (International Law and Politics)(With Distinction) University of Hull, England, January 1997; Recipient of the Josephine Onsh Memorial Prize in Public International Law awarded by the University of Hull, England, January 1997. I dedicate this essay to my dearest father, Mr. Rammohan Rao Sripati, who has enthusiastically encouraged my love for learning and writing since childhood. I also wish to thank Dr. Upendra Baxi, Professor of Law, University of Warwick, U.K. for his valuable advice in preparing this essay. I alone am, however, responsible for mistakes, if any. I also wish to thank Mrs. Jaya Janakiram, Maryland for providing me with excellent computer facilities during the preparation of this article.

		access to public service
Article 19(1) & (2)	Article 19(1)(a)	Freedom of Speech
Article 21	Article 19(1)(b)	The right of peaceful assembly
Article 22(1)	Article 19(1)(c)	Freedom of association
Article 12(1)	Article 19(1)(d) & (e)	Freedom of movement and freedom to choose one's own residence
Article 15(1)	Article 20(1)	Freedom from ex-post facto legislation
Article 14(7)	Article 20(2)	Freedom from double jeopardy
Article 14(3)(g)	Article 20(3)	Freedom from self incrimination
Article 14(7)	Article 20(3)	Freedom from being compelled to be awitness against oneself
Article 6(1) & Article 9(1)	Article 21	Right to life, liberty & security & freedom from arbitrary arrest & detention
Article 9(2), (3) & (4)	Article 22 & 32	Right to be informed of charges of arrest; right to legal remedies
Article 18(1)	Article 25	Freedom of thought, conscience & religion
Article 27	Article 29(1) & 30	Rights of minorities to preserve their own language and culture.

Page 99 second paragraph second sentence should read:

It secures to every individual, citizens and aliens alike, the right to invoke the Supreme Court's writ jurisdiction for enforcing any of the fundamental rights.

Page 99, footnote 57 should read:

It submitted the Draft Constitution for the approval of the Constituent Assembly in February 1948.

Page 101, first full paragraph, second sentence, should read:

The express declaration of fundamental rights coupled with the introduction of judicial review in the Indian Constitution marks a radical departure from the pivotal British Constitutional doctrine of parliamentary supremacy.

Page 102, footnotes 75 and 76:

The phrase [hereinafter Universal Declaration] should be included in footnote 76, not footnote 75.

Page 104, section F, the subheading should read:

Judicial Interpretation In The First Three Decades of Independence - Pre-emergency Era (1950-77).

Page 105, footnote 96:

The case L.C. Golaknath v. State of Punjab 1967 S.C. 1643, should read I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.

Page 107, second full paragraph, first sentence, should read:

In the aftermath of emergency, the Supreme Court carved a role for itself in Indian politics quite different from that which it had played since independence.

Page 113, footnote 151 should not contain the phrase "in the world is unnecessary".

Page 124, first paragraph, last sentence should read:

In the words of a former Additional Solicitor-general:

Page 124, last paragraph, first sentence should read:

While these matters are legitimate concerns, nonetheless, they ought not to be taken very seriously indeed.

Page 125, part III, first paragraph should read:

Jack Greenberg, an American jurist, made a prescient observation fifteen years ago: "it may be time for United States Courts to begin looking to international criteria as sources of domestic law on human rights issues". This observation makes sense even for the Indian judiciary.

Page 129, the following paragraph is missing:

Let noble thoughts come to us from all sides goes an ancient Vedic saying. One hopes that in keeping with this noble invocation and the Harare Declaration, the Indian judiciary will continue to enrich its jurisprudence with international learning.

Page 134, second paragraph, Article 38-A of the Indian Constitution should be Article 39-A of Part IV of the Indian Constitution, which deals with the provision of free legal services.