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TRYING TERRORISTS – JUSTIFICATION FOR DIFFERING TRIAL RULES: THE BALANCE BETWEEN SECURITY CONSIDERATIONS AND HUMAN RIGHTS

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INTRODUCTION

> Sometimes life really does imitate art, and in surprising ways. Take for example, President Bush's recent executive order to have military commissions try terrorists. Ever since it was announced, that order has been the center of great controversy, as we debate the extent to which liberty must be sacrificed to homeland security. This is not a simple, black and white issue.[1]

The terrorist attack against the United States on September 11, 2001, breached the balance between human rights and national security. This breach has had a dual effect: It has led to the impairment of the constitutional rights of the citizens of the United States itself,[2] and also to the impairment of the basic rights of non-U.S. citizens, suspected or accused of terrorist offenses, who are to be tried before special military tribunals to be established in accordance with an executive order[3] issued by U.S. President George W. Bush.

The President of the United States, presiding over a power that is the symbol of democracy for many other Western nations, has explained in the executive order concerning the trial of terrorists: "[I] find consistent with section 836 of title 10, United States Code, that *it is not* practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[4]

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* Professor of Law, Haifa University, Israel. Thanks are due to my research assistant Karin Meridor, whose diligence and dedicated work enabled this article, as well as to Mr. Ranan Hartman of the Hakirya Academit, Kiryat Ono, who assisted in financing the article.

1. Daniel J. Kornstein, *Life Imitates Art on Secret Tribunals*, N.Y.L.J., Nov. 28, 2001, at 2.

2. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter U.S.A. Patriot Act]; *see also* Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, N.C. INT'L L. & COM. REG. (forthcoming).

3. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (2001) [hereinafter Military Order].

4. *Id.* § 1(f) (emphasis added).

One may ask why it was found necessary not only to establish special tribunals to try terrorists, but also to desist from observing the constitutional safeguards granted to accused persons facing trial? The answer apparently lies in concern for the efficiency of the hearing, achieving deterrence at the expense of the pursuit of justice, and refraining from convicting innocent persons. In so doing, absolute priority is given to national security. Is this an appropriate course of action for a democratic nation contending with terrorism? One should recall the comments of Israeli Supreme Court President, Professor Aharon Barak:

> It is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems.[5]

U.S. society's acquiescence to according priority to considerations of efficiency and deterrence because of the needs of national security is understandable (if not justifiable) in view of the many fatalities caused by the attack of September 11. In the long term, however, the dangers posed by the creation of a special tribunal for a specific offense should act as a warning to society in America and other places, including Israel,[6] of the potential danger involved in creating a special tribunal for what is a *specific,* but not necessarily *special,* offense, and the reason for this is that terrorism is only a metaphor.

A society that distinguishes between classes of offenders, with the deliberate objective of increasing the efficiency of the hearing and deterring others from participating in the commission of similar offenses, broadcasts moral weakness. There is a danger that by showing a negative attitude towards persons accused of terrorism, society will avoid a conscientious application of trial procedures. In taking this path society demonstrates moral weakness. The danger of the "slippery slope" arises when society adjusts to this weakness. Today, the justification given for the new measures is that because of the extraordinary terrorist attacks, procedural constitutional rights must be sacrificed in the just war against terrorism even at the price of harm to the innocent. Tomorrow, attacks by atypical sex offenders will be regarded as justifying the establishment of special tribunals and the modification of the

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5. High Court of Justice [H.C.] 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) P.D. 817, 840 (Heb.).

6. For an extensive discussion of special tribunals for terrorists in Israel, see *infra* Part Two.

constitutional safeguards set out in the rules of procedure and evidence that have been arduously put together over hundreds of years, all in order to promote the efficiency of the hearing and deterrence. Where will this downhill slide end? Will we eventually agree to put political opponents on trial for treason, applying special criminal procedures? Changes to the nature of the trial forum, its composition and procedures may indicate that the stability of society, its basic values, and the rules which society shaped are in danger. A regime cannot possess a genuine democratic character and adhere to Due Process of Law if its principles are applied on a discriminatory basis.

Perhaps what is at issue here is not discrimination but rather simple Aristotelian equality – equal treatment for the equal and different treatment for the different. The terrorists breach every possible rule and law; therefore, why should they enjoy the privilege of being protected by rules which they refuse to acknowledge?

This article will try to explain the error in this approach: the violation of rights is not a violation of the rights of a terrorist on trial but rather an infringement of the rights of a person *suspected* or *charged* with terrorist offenses who is now on trial. Every person suspected of a crime is suspected of having breached a rule or certain law – the approach to every crime must therefore be identical.

I do not seek to argue that one cannot violate the constitutional safeguards of a person suspected of a terrorist offense who has been put on trial, but rather that the violation must be proportional, for a proper purpose and compatible with the basic values of society. Accordingly, this article shall demonstrate that even if there is justification for a separate tribunal for terrorists, such justification cannot provide grounds for allowing different rules of procedure more efficient than the ordinary rules. The outcome would be to completely negate the concept of due process in criminal law, and from there the path to the conviction of innocent persons is extremely short.

Such an outcome would be contrary to the balancing formula which I regard as proper – the prohibition on disproportionate or excessive injury to a suspect, an injury which even if intended for a proper purpose, namely, to safeguard national security, is completely contrary to the basic values of a democratic society.

Thus, this article will focus primarily on the proper forum for trying terrorists and will ask whether it is appropriate to establish a special forum for a specific offense, namely, terrorist offenses. The questions which forum should try terrorists and which procedural rules should be applied by that forum are not purely technical; on the contrary, these issues are substantive and the answers to them will have repercussions for the character and democratic strength of the society which operates such trial procedures.

The first part of this article will commence by considering the jurisdiction of the United States over terrorists when the United States conducts a war outside its own borders, and within the territory of another state, such as recently occurred in Afghanistan and earlier in the Gulf War.

The second part will discuss the legal rationale for establishing a single court, possessing general power to try all types of offenses and all classes of offenders. This part will further examine why countries such as the United States, England, and Israel deviate from this rationale. The third part will examine the nexus between the adjudicating forum – its character and composition - and its influence on the procedural rights of a defendant, as well as whether this nexus is essential. This part will examine the justification for creating a special forum for a particular type of offense and whether this justification makes it necessary to establish divergent rules of procedure. The fourth part will deal with the manner of establishing a judicial forum for trying terrorists in occupied territory according to the rules of international law. This part will examine the example of the State of Israel, which operates military courts in the territories administered by it, for the trial of terrorists. We shall also consider the establishment of a special military court within Israel for the trial of persons suspected of terrorism. The fifth part will present the legal position in the United States and in Britain in respect of the trial of terrorists, following September 11, and the criticisms thereof. The sixth part will examine the Rome Statute, which established the International Criminal Court, and the idea of including terror offenses within the scope of its jurisdiction.

The final concluding part of this article will seek to support the thesis presented by this research that trying terrorists is nothing more than the trial of criminal offenders motivated or inspired by a certain ideology. There is no reason whatsoever for trying criminal offenders in a manner different to that which has been established over many years by the criminal system. Any attempt to deviate from ordinary judicial procedures requires a justification that does not exist here. Deviating from such procedures comprises nothing more than an attempt to exploit the criminal law to violate human rights for what is an improper purpose and certainly in a manner that is neither compatible with democratic values nor proportional to the offense.

PART ONE

The scope of jurisdiction of the United States to try its enemies at a time when it is conducting a war outside its own borders

Terrorism is an international phenomenon. Terrorists are scattered throughout the entire world. Their desire to harm the citizens of a particular state does not necessitate their actual presence in that state. Is a democratic country, within the framework of its war against terrorism, entitled to try every terrorist who is a member of a terrorist organization and who operates against that country or against another democratic country? Does this right embrace terrorists who are not located within the territory of the trying country? The United States has apparently answered these questions in the affirmative: "[a]ccording to the executive order, the military tribunal can be used to try *any* suspect who is not an American citizen and has been identified

by [George W.] Bush as a member of al Qaeda, participated in acts of terrorism against the U.S. or harbored terrorists."[7]

The primary problem that shall be examined in this part concerns the issue of the extraterritorial jurisdiction of a state over persons whose sole connection to that state is their intention to harm it or its citizens.

Prior to describing the various approaches taken by international law to this issue, we must emphasize the distinction between territorial jurisdiction and extraterritorial jurisdiction. The rule is that the criminal law of the various countries has territorial application: each country applies its laws to the area over which it is sovereign. Extraterritorial application is the exception to the rule: the state decides to apply its laws even outside its own borders. This exception is accepted when special circumstances exist. Thus, for example, the State of Israel has decided to apply its penal laws to offenses committed outside its jurisdiction where such offenses are perpetrated against the Jewish people.[8] The reason for this is clear: the historical attempt during the Second World War to destroy the Jewish people as a people requires the State of Israel to protect Jews in general and its citizens in particular. The criminal code of the United States also grants extraterritorial jurisdiction over persons accused of injuring or killing others in the United States.[9]

Legislation is a unilateral measure taken by a state that establishes extraterritorial application of its jurisdiction. Extraterritorial application may take the form of a multilateral reciprocal measure taken by a number of states party to an international convention that confers extraterritorial jurisdiction over offenses dealt with by that convention.[10] Indeed, in the past, this was one of the three justifications raised by the United States to validate its extraterritorial jurisdiction:

> 1. Congress extended the application of the laws of the United States even beyond U.S. borders in order to enable the punishment of offenders.[11]

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7. Vanessa Blum, *When the Pentagon Controls the Courtroom*, THE RECORDER, Nov. 27, 2001, at 3 (emphasis added).

8. *See generally* Penal Law of 1977 (Aryeh Greenfield, trans. 1999), sec.13(b)(2) [hereinafter Penal Law].

9. *See* 18 U.S.C. §§ 2331-2339B (2000). Section 2332b(a) of Title 18 forbids killing or injuring persons in the United States under special circumstances and "involving conduct transcending national boundaries." *Id.* § 2332b(a)(i). This conduct required under the statute refers to "conduct occurring outside of the United States in addition to the conduct occurring in the United States." *Id.* § 2332b(g)(1).

10. *See* Penal Law, *supra* note 8, sec. 16. For example, the State of Israel possesses extraterritorial jurisdiction in relation to foreign offenses to which it has acquiesced in multilateral international conventions over persons who are not Israeli citizens; the place of commission of the offense is immaterial to its jurisdiction. *See id.*

11. *See* U.S. CONST. art. I, § 8, cl. 10. The Offense Clause of the U.S. Constitution states that Congress shall have the power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." *Id.*

2. Customary international law permits the United States to exercise extraterritorial jurisdiction in cases where harm has been caused to it.[12]
3. Conventional international law: in cases where there is a convention that vests the United States with jurisdiction.[13]

In this regard it should be pointed out that in the case of Pan Am Flight 103 in 1990, the Security Council of the United Nations supported the demand of the United States and Britain that one of them should be vested with jurisdiction on the ground that the terrorists were not entitled to conduct negotiations in respect to the place where they would be tried.[14]

Today, the extraterritorial jurisdiction of a state to try terrorists is derived from a consequential test – the damage test. This is a test that was shaped by customary international law. It asserts that if the location of the damage or target to be harmed is in a certain state then that state has the power to place on trial the terrorists who were involved in the terrorist operation.[15] This is one of the justifications voiced by the United States for obtaining extraterritorial jurisdiction over the Libyans suspected of having committed the terrorist atrocity on Pan Am Flight 103:

> [T]he territoriality principle of customary international law, the most commonly used basis for the exercise of jurisdiction, allows the United States to have jurisdiction over individuals who engage in conduct outside of U.S. territory that has a substantial effect within the United States. This principle would allow the United States to regulate activities aboard U.S. aircraft because any conduct occurring

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12. *See* Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222, 236 (1993) (discussing international law grounds for allowing the United States to assert jurisdiction over suspects).

13. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 568. Article 5 (2) of the Convention states that "each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses that are mentioned in Article 1." *Id.* at 570. For example, the United States claimed jurisdiction on the basis of the Montreal Convention in the case of Pan Am Flight 103.

14. Daniel Cohen & Susan Cohen, *A Trial at Risk*, N.Y. TIMES, July 27, 1998, at A5.

15. *See generally* Caryn L. Daum, *The Great Compromise: Where to Convene the Trial of the Suspects Implicated in the Pan am Flight 103 Bombing Over Lockerbie, Scotland*, 23 SUFFOLK TRANSNAT'L L. REV. 131, 135 (1999).

> on board these vessels would result in harm to U.S. citizens who would likely be on board.[16]

In this manner and in the light of the fact that the terrorist attack of September 11 took place within the territory of the United States, it is possible to justify the demand of the United States for extraterritorial jurisdiction over every terrorist connected to the attack. As these persons are no longer alive, merely acknowledging jurisdiction over those actually perpetrating the attack, cannot be seen as exhausting jurisdiction. Their deaths were an integral part of the terrorist action in which they participated. The entire force of the extraterritorial jurisdiction lies in the trial of those people who are located outside the borders of the United States and who assisted in the planning and execution of the operation, the purpose of which was to cause harm to the United States and serious injury to its citizens.

The damage test is not the only test that justifies extraterritorial jurisdiction. Customary international law has acknowledged a number of additional principles (underlying a number of which is the principle of damage) that deal with extraterritorial jurisdiction. It should be pointed out that international law sets limits on the right of a state to demand jurisdiction over offenses committed outside its borders. The extent of the limits depends on the nature and character of the crime.[17] As we shall see, the development of the phenomenon of international terrorism and its centrality in the lives of nations may lessen the scope of the restrictions placed by international law on the demand of a state for extraterritorial jurisdiction over terrorists.

It is customary to talk of five fundamental grounds for extraterritorial jurisdiction:[18]

1. *The territorial principle*: this principle has been universally identified by international law in respect of all types of crimes.[19] Under it a state has jurisdiction over crimes committed within its borders. The nationality of the victims or the perpetrators is

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16. *Id.* at 147. *See also* RESTATEMENT OF FOREIGN RELATIONS § 402 cmt. h (1987). Section 402 states that "a state has jurisdiction to prescribe law with respect to . . . (c) conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.*

17. *See* Zephyr Rain Teachout, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1310 (1999).

18. *See Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935). These grounds were first identified collectively in research conducted in Harvard in 1935. *See id.*

19. *See* Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 177 (1997).

immaterial to the right of adjudication.[20] In other words, the United States has jurisdiction over terrorists who are caught within its territory even if they are not American citizens.

2. *The protective principle*: a state has the right to claim extraterritorial jurisdiction when a national interest is threatened by any act, irrespective of the place of occurrence of that act.[21] A threat to the security of the nation is a recognized interest.[22] The multifaceted network of terrorism that spreads over the entire world sees causing harm to the United States as its primary goal.[23] Accordingly, the United States can argue in its favor that it has extraterritorial jurisdiction over terrorists located outside its territory by virtue of their membership in a terrorist organization. That membership causes them to pose a threat to a crucial national interest – national security.
3. *The universality principle*: this confers extraterritorial jurisdiction over certain crimes, such as genocide, that are universally defined as punishable crimes by virtue of the degree of abhorrence to which they give rise.[24] Since these crimes threaten humanity as a whole, every nation has the right and even the duty to try the perpetrators of these crimes.[25] War crimes are recognized as crimes to which the universality basis applies.[26] As we shall see below, it is possible to identify terrorist acts as war crimes.[27] Accordingly, the

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20. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998).

21. *See* United States v. Columba-Colella, 604 F.2d 356, 358 (5th Cir 1979); IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 2 (1994).

22. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 33 n. 7 (D.D.C. 1998) (stating that American "victims of foreign state sponsored terrorism" may invoke protective jurisdiction in civil actions against those governments based on the "national security interests" involved).

23. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L. L. 236, 239 (2002) (citing the declarations of Osama Bin Laden: "[T]errorizing the American occupiers [of Islamic Holy Places] is a religious and logical obligation.").

24. *See* Beverly Izes, Note, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J. L. & SOC. PROBS. 1, 11 (1997).

25. *See id.*

26. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir 1985) (stating in the context of war crimes allegedly committed by a former Nazi concentration camp guard that "some crimes are so universally condemned that the perpetrators are the enemies of all people" and concluding that "any nation which has custody of the perpetrators may punish them according to its law").

27. For an extensive discussion *see infra* Part Six.

United States may claim extraterritorial jurisdiction over terrorists whom it has captured outside its borders within the context of its war against terror, by virtue of the universal principle.

4. *The passive personality principle*: jurisdiction will extend in accordance with the nationality of the victim. The state has power to punish all those who have caused harm to its citizens and breached its laws, irrespective of the place where the harm occurred.[28] To some extent this principle covers the same ground as the damage test. Both tests permit a state to exercise extraterritorial jurisdiction over terrorists because they have caused harm and damage to its citizens, except that the damage test ascribes importance to the place of occurrence of the damage and grants jurisdiction in cases where the damage occurred within the territory of the state.
5. *The nationality principle*: under this principle a state has jurisdiction over its citizens who committed crimes, irrespective of the place of commission of the offense.[29] This principle is not central to the issue of extraterritorial jurisdiction over terrorists and indeed is not clearly identified by the international community;[30] accordingly, no further elaboration will be given to it here.

In the light of the various principles it may be said that customary international law establishes the right of the United States to exercise jurisdiction over terrorists who caused it harm or who are interested in causing it harm and therefore endanger its security. As noted, even before September 11, the United States claimed extraterritorial jurisdiction, except that today this claim to jurisdiction refers to dangers that did not exist in the past.

This may be explained by noting that in the past, when the United States claimed extraterritorial jurisdiction, it intended to try terrorist suspects who had actually injured its citizens or who had been involved in attacks, before the "ordinary" courts and in accordance with existing procedure.[31] In other words, its purpose was to obtain extraterritorial jurisdiction and exercise it in

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28. John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 FORDHAM INT'L L. J. 298, 299-300 (1989-1990).

29. *See* CAMERON, *supra* note 21, at 17.

30. *See generally* Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992).

31. See *infra* Part Five, which deals with the trial of terrorists by the United States in the text accompanying notes 204 and 205.

a manner identical to the territorial jurisdiction exercised over other criminal offenses that had been committed within the territory. The United States demanded that the suspects be brought to justice in accordance with the due process of law at the end of which the guilt or innocence of the defendant would be determined. This is the place to emphasize: there is no doubt cast on the existence of the extraterritorial jurisdiction of the federal courts to try terrorists who caused harm or intended to cause harm to the United States. Rather, this article shall examine whether the extraterritorial jurisdiction to try terrorist suspects who acted outside the borders of the United States also allows the conferral of jurisdiction on special tribunals, such as those which President Bush established following the attacks of September 11.

Beyond general principles of customary international law we shall examine whether it is possible to base the extraterritorial jurisdiction of the United States, within the framework of the war against terror, on the international laws of war that deal with jurisdiction. The rules of international law that deal with jurisdiction and with demands in relation to the manner of implementation were shaped in the context of wars conducted between two states[32] and where in that situation one state conquered the territory of another. Accordingly, the rules of international law deal with the proper criminal proceedings to apply within territory subject to belligerent occupation.[33]

When the United States declared war on terror, the first front was opened in Afghanistan.[34] Within the framework of this operation, the United States has probably captured numerous suspected terrorists. Its claim to extraterritorial jurisdiction over these people raises the question whether it should conduct these proceedings in accordance with the rules of international law as shaped in relation to cases of war waged between states even though it is fighting the phenomenon of terrorism and not another state.

The problem is simple: we need only examine whether the activities of the United States in Afghanistan are in the nature of belligerent occupation or whether it has merely conducted an invasion in the nature of "hit and run." Only if its operations are in the nature of belligerent occupation will the United States be bound by the rules of international law when it tries terrorist suspects. The distinction between the two situations depends on effective control of the territory – such control provides a legal basis for belligerent

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32. *See* Emanuel Gross, *The Laws of War Between Democratic States and Terrorist Organizations*, MANITOBA LAW JOURNAL (forthcoming).

33. *See* Convention with Respect to the Laws and Customs of War on Land (Hague II) 1899, (No. IV) 1907 [hereinafter Hague Regulations]; The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 973, 287 [hereinafter Fourth Geneva Convention]. See details of the regulations in Part Four.

34. *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001) [hereinafter Response Address].

occupation.[35] Article 42 of the Hague Rules emphasizes that occupation only applies to cases of actual control of enemy territory and refers only to that territory in which the occupier is able to exercise its authority.[36] It is difficult to say that the United States does not have effective control of Afghanistan. Indeed, the purpose of its war there is to fight against Al Qaeda, but that is not its sole purpose.[37] The United States was interested in overthrowing the Taliban regime on the assumption that this regime was providing support for terrorism.[38]

On the other hand, we should recall that the United States had never recognized the Taliban regime as the official government of Afghanistan.[39] It may certainly be argued that the United States did not launch a war in Afghanistan with the intention of conquering Afghan territory and substituting its control for that of the Taliban. Its war was, and is, a war against terror that is an international phenomenon with multiple branches around the world, including Afghanistan. Because the prevailing regime provided support for terrorism and the regime that sought to replace it (the fighters of the Northern Alliance) was weak and incapable on its own of fighting the Taliban and the terrorist organizations hosted by it, the United States initiated action against the terrorism in Afghanistan by providing assistance to the regime that would ultimately replace the existing regime, i.e., an independent regime in which the United States plays no part.[40]

The power granted by Congress to President George W. Bush to use U.S. military forces was aimed at preventing additional terrorist attacks and

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35. *See* Meir Shamgar, *Law in the Territories Occupied by the IDF*, 23 HAPRAKLIT, 540 (1967) (Heb.).

36. *See* Hague Regulations, *supra* note 33, art. 42.

37. *See* John F. Harris & Mike Allen, *President Details Global War on Terrorists and Supporters; Bush Tells Nations to Take Sides As N.Y. Toll Climbs Past 6,000*, WASH. POST, Sept. 21, 2001, at A1 (discussing the demands put by the United States to the Taliban regime prior to launching the attack against Afghanistan).

38. *See* Response Address, *supra* note 34, at 1348. In addressing his demands to the Taliban, the President of the United States declared:

> The United States of America makes the following demands on the Taliban: deliver to United States authorities all the leaders of Al Qaeda who hide in your land . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities . . . The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.

Id.

39. *See* Murphy, *supra* note 23, at 243.

40. *See* Steven Erlanger, *After Arm-Twisting, Afghan Factions Pick Interim Government and Leader*, N.Y. TIMES, Dec. 6, 2001, at B1. During November 2001, the fighters of the Northern Alliance succeeded in taking control of central Afghanistan and ultimately, with the help of the United Nations, took over the government of Afghanistan for six months prior to establishing a new government with a two-year mandate. *See id.* Following this, a permanent government was to be elected under a new constitution. *See id.*

not at conquering Afghanistan.[41] Prior to launching the war, President Bush explained to the nation that his objective was to eradicate the network of terror: "[b]y destroying camps and disrupting communications, we will make it more difficult for the *terror network* to train new recruits and coordinate their evil plans." [42]

According to this position, occupation as such is not relevant to the operations of the United States in Afghanistan; therefore, the trial of terrorists who are captured in the territory of Afghanistan by the United States does not amount to the trial of combatants in occupied territory and is not subject to the rules of international law under the Fourth Geneva Convention.

As noted, the Geneva Conventions were formulated in a period when war was conducted between identifiable states having clearly defined geographical boundaries and an organized army. The modern war against terror is not a war between states — terror is an enemy without an address. This war is not a war that has the objective of conquering territory; the objective is eradicating terrorism, *inter alia*, by capturing terrorists and bringing them to justice. The *lacuna* that is found today in the Geneva Conventions do not provide judicial rules for wars of this type is not necessarily a negative arrangement.[43] The war against terror is a war between democratic states, states of the free world headed by the United States, and organizations which see freedom as their enemy. Is it conceivable that democratic states that fight terrorism with the aim of catching terrorists and placing them on trial will act in accordance with rules that are incompatible with their democratic values? Below we shall explain why in our view this is not possible.

At the beginning of this part, principles of international law were presented that may justify the extraterritorial jurisdiction of the United States over terrorists. An additional argument that may justify the jurisdiction claimed by the United States in its war against terror is that the terrorists that it has seized are none other than the principals of the perpetrators of the terrorist attacks of September 11, or those who plan to execute future terrorist attacks within U.S. borders, who have thereby committed the offense of terrorism within the borders of the United States. It follows therefore that the jurisdiction that the United States demands is not concerned with offenses committed outside its territory but rather with domestic offenses that have

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41. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, Pmbl., 115 Stat. 224 (2001).

42. Address to the nation announcing strikes against Al Qaeda training camps and Taliban military installations in Afghanistan, 37 WEEKLY COMP. PRES. DOC. 1432 (Oct. 7, 2001) (emphasis added) [hereinafter Strike Address].

43. *See* the extensive discussion *infra* Part Six. An indication of this may be found in the Rome Statute of the International Criminal Court, 37 I.L.M. 999, which establishes the International Criminal Court and proposes the inclusion of terror offenses within its jurisdiction. The rules of procedures and evidence in this court were formulated with a keen eye towards ensuring a fair criminal process.

been planned abroad but which are designed to be committed exclusively within its territory.[44]

In other words, the extraterritorial jurisdiction asserted by the United States may be well founded; the shakier basis is that which concerns its right to try terrorists before military tribunals. The establishment of military tribunals is only permissible under international law when they are set up by an occupier and for the purpose of trying local offenders within the occupied territory.

In the light of the fact that the United States did not launch a war of occupation against Afghanistan, it does not have power to establish military tribunals. First of all, the situation does not involve an occupying state, and secondly, the terrorist offenders whom the United States is interested in placing on trial are not local but rather international offenders.

International law provides two alternative options for trying terrorists that may be compatible with the circumstances in which the United States is acting. The first enables the establishment of an ad hoc tribunal that is not a military tribunal, and the second authorizes the establishment of a military tribunal in a particular place:

1. Many would certainly agree that by their actions the terrorists fighting in the various nations of the free world are in breach of the laws of war and in particular the rules forbidding injury to innocent civilians[45] and conducting war from the midst of civilian populations.[46] Accordingly, it seems that terrorists are war criminals: "Terrorism is a form of warfare in which, by design, innocent civilians are indiscriminately killed and civilian property devastated. Terrorists acts, therefore, are properly regarded as war crimes or crimes against humanity." [47]

   By virtue of the scope of their activities on the international plane it is necessary to act in accordance with the provisions of the U.N. Charter regarding the

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44. *See, e.g.*, the definition of a domestic offense in the Israeli Penal Law, sec. 7(A)(2) of the Penal Law of 1977. A domestic offense is generally defined not only as an offense committed within the territory of the state but also as an act preparatory to the commission of an offense outside the territory, provided that the offense in whole or in part, was due to be committed within the territory. *See id.*

45. *See* Protocol Additional to the Geneva Conventions of 12 August, 1949, And Relating to the Protection of the Victims of International Armed Conflicts (Protocol 1), art. 48 (1979).

46. *See id.* art. 58

47. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 354 (1996).

power to establish special ad hoc tribunals for the trial of war criminals.[48]

2. The status of terrorists has not yet been regulated as a matter of international law.[49] At the same time there is a broad consensus that they should not be seen as lawful combatants as defined in the Geneva Conventions.[50] As only legal combatants are entitled to the status of prisoners of war, i.e., enjoy the advantage of immunity from trial following capture by the enemy;[51] terrorists are not entitled to this protection. It is customary to regard terrorists as illegal combatants in view of the fact that they operate outside the framework of lawful combat. Illegal combatants may be tried before military tribunals in the location where they have been caught and may be punished as strictly as the law allows, albeit they may not be executed without trial.[52]

Neither of these alternatives expressly permit the United States to remove the terrorists from the places in which they were found and captured and bring them to United States territory to try them before a tribunal specially set up for them. It should be emphasized that the concern is not with the capture of terrorists who were once located within the United States, planned terrorist attacks against it and against its citizens, and escaped to other countries in which they found refuge. Rather, the concern is with the capture of terrorists, illegal combatants such as the combatants who belong to the Al Qaeda organization, who have never visited the United States and who have not committed actual terrorist acts against it but who possess the status of terrorists by reason of the fact that they chose to belong to an organization

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48. *See* U.N. CHARTER art. 39-51. *See generally* Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233 (1997).

49. *See* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have A Right To Hold Terrorists As Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L., 721 (2001) (comprehensive discussion on the status of terrorists).

50. *See* the Geneva Convention Relative to the Treatment of Prisoners of War (No. III) (1949). Article 4 of the Geneva Convention defines the term legal combatants. *See id.* Protocol I to the Convention of 1977, expands the protection granted by the Geneva Conventions to combatants. *See* Protocol 1 to the Geneva Convention 1977, art. 43. It also affords protection to freedom fighters, i.e., combatants who are not part of the official armed forces of the state, but are regarded as lawful combatants. Israel and the United States refused to sign Protocol I for fear that members of terrorist organizations would exploit Article 43 to obtain the status of prisoners of war. *See id.*

51. *See* YORAM DINSTEIN, THE LAWS OF WAR 96 (Tel Aviv University Press 1983) (Heb.).

52. *See id.*

whose sole purpose is to fight against the United States as the symbol of their war against the principles of freedom and democracy.

More precisely, it must be recalled that the fact that these persons have never visited the United States says nothing about their criminal activity. It is possible, and perhaps easier, to conspire against the United States from outside its borders. It has been explained that such a conspiracy is sufficient to confer jurisdiction upon the United States. However, such jurisdiction is extraterritorial jurisdiction before a civilian court system and not before a military tribunal in the United States.[53]

Indeed, these terrorists hold diverse nationalities and the place of their capture is not necessarily their country of nationality. Each one of these suspects could be extradited to his home country in order to stand trial there. However, the United States has chosen to reserve to itself the task of trying them. This demand may be justified on the ground that the terrorists that the U.S. has captured, by virtue of their affiliation to a terrorist organization the sole purpose of which is to wage war against the countries of the free world and at the head of the list, the United States, thereby conspired against the United States. The argument continues, this nexus suffices to vest the United States with jurisdiction over the terrorists in accordance with the damage principle or the protection principle referred to in the beginning of Part One.

True, the damage has not yet occurred; however, had this issue depended solely upon the terrorists, they would have been interested in causing damage of an effective and enormous magnitude immediately. It is difficult to agree with the contention that the United States cannot obtain extraterritorial jurisdiction over terrorists "only" because they are located outside its territory and "only" because they planned or were accomplices in a crime or party to an objective held by the terrorists who actually committed the terrorist attack against the United States.

The intent to harm the United States and active membership in an organization that is the leading player in realizing this objective may certainly be sufficient to vest the United States with jurisdiction. More precisely, this consent to the conferral of jurisdiction upon the United States is not consent to trial before a special military tribunal. Thus, many of the critics of the executive order do not doubt the power of the United States to try terrorists within the framework of its war against terror, but they reject the solution proposed by international law to establish an ad hoc tribunal and prefer that trials be conducted in accordance with existing legal procedures:

> If we should capture Osama bin Laden or his accomplices in the days ahead, where should we try them? Two unsound

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53. *See* 18 U.S.C. § 2332b(g)(1) (2000). We should note that the Criminal Code in the United States indeed provides for extraterritorial jurisdiction in respect of acts performed outside the United States but these acts must be connected to offenses committed within the borders of the United States. *See id.*

> proposals have recently emerged. The first, and by far most dangerous, is already law: the president's misguided and much criticized order authorizing secret trials before an American military commission. The second, more benign approach, offered by prominent international lawyers, is to try terrorists before an as yet uncreated international tribunal. Both options are wrong because both rest on the same faulty assumption: that our own federal courts cannot give full, fair and swift justice in such a case. If we want to show the world our commitment to the very rule of law that the terrorists sought to undermine, why not try mass murders who kill American citizens on American soil in American courts.[54]

To conclude this point, it should be clarified that the position held is not that the United States' war in Afghanistan is in the nature of occupation. Its activities indeed comprise a single, though not the only, front in its war against terrorism, but this fact should not be seen as "freeing it from the fetters" of the rules of international law. The fact that the Geneva Conventions fail to provide a solution to modern circumstances in the war against terrorism and the mode of trial of illegal combatants who have been captured by a non-occupying power is also insufficient reason to authorize a departure from the right to a fair trial. Moreover, even if the United States is entitled to claim jurisdiction over the terrorists, either because they are illegal combatants who belong to enemy forces against whom the United States is fighting or by virtue of the latter's extraterritorial jurisdiction under its own laws to try members of terrorist organizations, by placing them on trial it must apply its domestic law.

The United States is not entitled to violate the rights of defendants in such a manner as to leave them without almost any protection against improper trial procedures. There are a number of substantive elements that are intended to guarantee the existence of due process and a genuine effort to seek out the truth and bring about a just result. Infringement of these safeguards is prohibited independently of the question whether the accused is a citizen of an occupied state or acted and was caught in the territory of a foreign country and is placed on trial there, in accordance with the laws of the seizing state. In both cases the safeguards of Due Process of Law must be maintained. This approach benefits the accused; more importantly it benefits

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54. Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001. The author explains why the establishment of a tribunal under the U.N. Charter must be rejected as a solution. The reasons are the cost of establishing an ad hoc tribunal and the fact that such a tribunal can only be established in the absence of an existing legal system operating in a fair and efficient manner, as was the case in Yugoslavia and Rwanda. As noted, this is not the position in the United States.

society by ensuring that the truly guilty (and not those who are deemed to be guilty because the state has set up a special process for them which inevitably leads the public to regard them as guilty) will cease moving freely in society and instead will find themselves behind bars. In order to clarify this position and the rationale behind it, the following part presents the legal system operating in a democratic country and the ideology inspiring this system – an ideology which places the decision to establish a special tribunal for a single offense – terrorism – in open conflict with legal principles which apply in a democratic state and the perception of substantive procedural justice operating therein.

PART TWO

Perception of the legal system and procedural justice in a democratic state

> It is a government that detains people for the slightest violation and for indeterminate periods . . . and tries suspects in secret military proceedings, potentially far offshore and out of reach of its courts or constitution. It is the government of the United States, standing on what it calls a 'war footing.' The common question asked in the wake of the Sept. 11 attacks was what 'justice' meant as a response to the murder of thousands of innocents. Now, it seems that question has been answered. Last week's executive order signed by President George W. Bush establishing a military tribunal to try terrorist suspects touched off a firestorm of criticism from Congress and civil libertarians. But what it was, more than anything, was the final building block in what can be described as a 'shadow' criminal justice system, created specifically as a means to deal with the special problem of terrorism.[55]

Much criticism has indeed been directed against the establishment of a special tribunal for an apparently special offense – terrorism. Why are many shocked by the notion of a special tribunal to try a certain group linked to a certain offense? It is conceivable that the courts may operate on the basis of classifying people by their relationship to a particular type of offense, thereby allowing us to single out offenses (together with population groups). This would enable us to create special courts for immigrants, special courts for minorities, as well as special courts for terrorists. It is highly likely that the system would operate very efficiently – so why reject it?

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55. Jim Oliphant, *Justice During Wartime, Order on Military Trials Final Piece of Sept. 11 Response*, LEGAL TIMES, Nov. 19, 2001, at 1.

The answer to this question lies in the ideology underlying the legal system in a democratic state. The object is not the establishment of a legal system per se. A legal system is only a means through which to realize democratic values.[56] In its absence one would have a governmental mechanism likely to endanger democracy and its values, as would be the case were it to decide upon a legal system structured on the basis of classes of offenses. The objective is democracy itself, and this must be the subject matter of government. The courts are the "watchdogs" of democracy and the values underlying it.

Equality is one of the basic values in every democratic regime. It follows that the principle of equality is a fundamental value in every enlightened legal system: "Equality is a basic value for every democratic society to which the law of every democratic country aspires for reasons of justice and fairness to realize."[57] Its primary purpose is to guarantee equal application of the law: equality before the law. "Every person will achieve justice within the framework of law. We do not discriminate between one person and another; all are equal before us. We protect all persons; all minorities; all majorities."[58]

Thus, for example, the U.S. Constitution guarantees equal protection of the law to all persons within the jurisdiction.[59] Moreover, international constitutional documents which deal with human rights such as the Universal Declaration of Human Rights which was adopted by the U.N. General Assembly in 1948, emphasize the principle of equality as a central aspect of human rights:[60] after all, what is a democratic nation if not the expression of the values of liberty, freedom and the preservation of human rights? These international declarations on human rights seek to preserve the principle of equality before the law followed immediately by protection of the right to due legal process.[61]

The combination of the two rights leads us to the conclusion that the existence of a uniform legal system for the matters within the jurisdiction of

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56. *See* Aharon Barak, *They gave the State of Israel all that they had*, THE COURT–FIFTY YEARS OF ADJUDICATION IN ISRAEL 13 (MOD, 1999).

57. H.C. 6698/95, Adel Qa'adan and others v. Israel Land Authority, 54(1) P.D. 258, 275 (Heb.).

58. Barak, *supra* note 56, at 14.

59. *See* U.S. CONST. amend. XIV which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*

60. *See* UNIVERSAL DECL. OF HUMAN RTS. art. 2. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.*

61. *See id.* art. 7. "All are equal before the law and are entitled without any discrimination to equal protection . . . against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.* "Everyone is entitled in full equality to a fair trial, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *See id.* art. 10.

the state is the true expression and reflection of the concept of equality before the law: no distinction is made from the point of view of the law between different types of offenders. All those who breach the law are equal before it and are subject to the same treatment by the judiciary: the award of due legal process. Put differently, a democratic state derives its court structure from the principle of equality, namely, a single body and not separate bodies adjusted to different types of offenders/offenses.

The establishment of special tribunals for certain classes of offenses breaches another central principle that informs all democratic states: the principle of the separation of powers,[62] and in particular the importance of the independence of the judiciary in a democratic state. Accordingly, the ordinary courts fear the establishment of special tribunals:

> The standing and constitutional roles of the court as the 'third and independent arm' of government are in the process of being diminished. The creation by the Executive through Parliament of these new specialist tribunals can impair judicial independence in the widest sense, that is to say, as distinct from the independence of judges as such, inasmuch as it serves to prevent the operation of the judicial process according to law in the widest sense for the administration of justice.[63]

It is possible to appreciate the danger which creating a special tribunal poses to basic principles of a proper democratic regime, through the example of a special military tribunal:[64] not all of the judges sitting on the panel are professional judges; some are army officers. The prosecutors are not private attorneys but service personnel, as are the judges. The separation between the judicial branch and the executive branch is infringed: the absence of dependence of the judicial branch upon the executive branch and its agencies is undermined, and in consequence the independence of the judiciary is impaired. More is at stake: separation within the judicial authority itself between judges and prosecutors, to be found in every proper legal system so as to preclude bias and conflicts of interest, does not exist in special military tribunals.

As noted, the principle of equality before the law, which necessitates the establishment of a uniform court system for everyone, requires that equal treatment be accorded to equal persons. Absent equal particulars, different

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62. *See* H.C. 3267/97, Amnon Rubinstein v. Minister of Defence, 52(5) P.D. 481, 515 (Heb.).

63. *Victorian Supreme Court's concern over development of specialist tribunals*, THE AUSTRALIAN LAW JOURNAL, vol. 64, 385-386. July, 1990.

64. *See infra* Part Four for an extensive discussion.

treatment does not mean improper discrimination. In other words, improper discrimination is the result of the unequal treatment of equals.[65]

Thus, it may be argued that the establishment of a separate judicial system for a certain type of offense does not comprise improper discrimination. A certain class of offense is in the nature of a different particular that therefore enables divergent treatment. This treatment is a permissible distinction between different classes of offenses. A permissible distinction does not contradict democratic values.

An argument of this type might have been justified had divergent treatment for different classes of offenses indeed been a permissible distinction. It is inconceivable that a distinction between offenders ensuing from the fact of their affiliation to a particular class of offense will make them different, so as to justify trying them before a tribunal different to the tribunal which tries "the general population." Every offense is different. This is the reason why different offenses are listed in the criminal law of every country (offenses of robbery, fraud, offenses against national security, etc.). Is it sufficient that there be a difference between offenses in order to justify trial before different tribunals?

The question is not whether a distinction can be found between offenses but whether the distinction justifies divergent treatment. If the distinction is not relevant to the purpose of the regulation being considered, reliance on it for the purpose of applying different law infringes the principle of equality and leads to improper discrimination; only a relevant distinction justifies divergent treatment and will comprise a permissible distinction.[66]

> The principle of equality, which is no more than the other side of the coin of discrimination and which the law of every democratic state aspires, for reasons of justice and fairness, to realize, means that one must consider for the purposes of the said goal, equal treatment of men, among whom there are no real differences, which are relevant to that goal . . . .[67]

Different classes of criminal offenses do not justify divergent treatment, i.e., the establishment of separate judicial tribunals. Why? First, as we have explained there are no classes of criminal offenses, there are different criminal offenses and all are concentrated within a single criminal code. Second, and more important the search for a relevant distinction that justifies divergent treatment depends on the system of values accepted by enlightened societies. An expression of this system of values in democratic countries in particular,

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65. *See* BARUCH BRACHA, EQUALITY OF ALL BEFORE THE LAW, RESEARCH IN CIVIL LIBERTIES IN ISRAEL 3 (1988).

66. *See id.* at 4.

67. Further Hearing [FH] 10/69, Boronovsky v. Chief Rabbis of Israel et al, 25(1) P.D. 7, 35 (Heb.).

may be found in the constitutions adopted by each of those countries and specifically, in the universal declarations of human rights that are the outcome of the encouragement offered by democratic countries. Indeed, these declarations do not expressly prohibit discrimination on the basis of different offenses. However, the cumulative effect of these provisions and their emphasis on due process of law, in particular the criminal law process, create the impression that in democratic societies application of the class criteria towards criminal offenses, in order to provide the basis for divergent approaches towards the trial of offenders, may be regarded as improper discrimination.

Thus, for example, regarding to the criminal process, Article 14 of the International Covenant on Civil and Political Rights stresses:

> (1) All persons shall be equal before the courts and tribunals. In the determination of any *criminal charge* against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . . .
> (2) Everyone charged with a *criminal offense* shall have the right to be presumed innocent until proved guilty according to law.
> (3) In the determination of *any criminal charge* against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . .[68]

Article 14 specifies basic procedural rights to be made available to every defendant in criminal proceedings, such as the right to be informed of the charges brought against him, in a language that he can understand, the right to consult with an attorney of his choice, the right to be present during the trial and the right to cross-examine witnesses.[69] These are safeguards that are the necessary minimum for every criminal proceeding, whatever the offense. Therefore, when the objective is to place a person on trial and conduct criminal proceedings, no relevant distinction exists between offenders – all are charged with having breached specific provisions of the criminal law and the law will treat all of them equally, i.e., it will place them before the same court/tribunal irrespective of the type of offense.

The combination of principles underlying the democratic state: separation of powers, the rule of law and protection of human rights, leads to the conclusion that the governing rule is trial for all offenders and for all offenses before a single central forum. Every rule has an exception; however,

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68. International Covenant on Civil and Political Rights, art. 14 (1976) (emphasis added).
69. *See id.* art. 14(3).

anyone wishing to deviate from the rule, who is interested in reserving a particular type of offense to a particular judicial tribunal, must explain the grounds justifying the exception. Can it not be said that today, when we are living under the very real threat of destructive terrorist attacks, state security considerations are sufficient grounds to justify the creation of a special judicial forum for the particular crime of terrorism? Grounds that justify deviating from the rule and the principle underlying the legal system of democratic states – equality before the law?

> It should not be forgotten that security is not just the army. Democracy is also security. Our might is in our moral strength and our adherence to the principles of democracy precisely when the danger in our midst is great. Indeed, security is not an objective which stands alone. Security is a means. The objective is a democratic regime, which is the regime of the people which emphasizes individual liberties.[70]

Later in this article it will be shown that the offense of terrorism is no different than any other criminal offense. Assigning a special judicial forum to it is improper and it is not possible to show any direct linkage between such a forum and the objective for which it has been set up, namely, promoting national security. The influence that a special forum for trying terrorists may have on national and individual security will at the most be found as an improvement in the sense of security felt by the citizens of the state. It will not result in the genuine strengthening of security on the ground. In order to prove this proposition, we shall now turn to an examination of the influence exerted on procedural rights available to the accused by deviations from the fundamental concepts guiding the implementation of the legal process in a democratic state and the perception of procedural justice appropriate to it.

PART THREE

The character of a judicial forum and its ramifications for procedural rights available to an accused

It is difficult to understand the sharp criticism voiced throughout the United States at the Executive Order establishing special military tribunals to try terrorists, without examining the answer to the question: does the nature of a judicial forum influence the procedural rights of the accused? The answer is in the affirmative. In order to illustrate this, the military courts responsible for trying soldiers in Israel will be considered and how isolationist ideology, separating the military and civilian systems, led to the creation of a

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70. H.C. 680/88, Shnitzer et al v. the Military Censor et al, 42(4) P.D. 623 (Heb.).

separate military legal system. Later, it will also be seen how the separate system sought to justify the use of legal procedures that diverged from those applied in the ordinary criminal legal system will be examined. These divergent procedures almost inevitably led to the infringement of the procedural rights of the soldiers, primarily including their constitutional rights to a fair trial.

The nature of a military judicial forum

The relationship between a military judicial forum and a civilian judicial system takes one of three forms:

1. A system that is embedded within the civilian system, which includes *inter alia* judges and soldiers.
2. A system that is integrated in the civilian system but preserves a certain degree of uniqueness for military trials.
3. A separate system without any organizational connection to the civilian system, although it generally allows appeal proceedings from the highest military instance to the supreme civilian court in the state.[71]

The discussion will focus on the military justice system in Israel, in which the military legal system is separate from the civilian legal system.[72] The military legal system has dual jurisdiction: (a) exclusive jurisdiction for military offenses,[73] and (b) concurrent jurisdiction with the civilian legal system in relation to other criminal offenses.[74] The military legal system differs from the civilian legal system in two main areas. The first concerns the differing procedures expressly established by the Military Justice Law.[75] It should be noted that the laws of evidence and defenses in military law were drawn from the general criminal law and in general were applied by way of reference to the general law.[76] The second difference relates to the composition of the judicial panel. Whereas the judges in the civilian legal system are purely professional judges, in the military legal system, one sees judges who are not professional jurists sit in judgment.

While it would be desirable in terms of the democratic theory for a soldier, like every civilian, to bear civic duties and be entitled to protection for

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71. *See* Oded Mudrik, *Military Trials in Israel from the 'Command Perspective' to the 'Court'*, 1 PLILIM 83, 84 (1990) (Heb.).

72. *See* Military Justice Law of 1955 (Heb.) [hereinafter Military Justice Law].

73. *See id.* sec. 1.

74. *See id.* sec. 14.

75. *See id.* sec. 461.

76. *See id.* sec. 476.

all his civil rights, the fact that a soldier is part of a mechanism responsible for national security makes him different than any civilian. He is subject to potentially lethal dangers and is required to tacitly waive the fundamental right of every person, the right to life.[77] A soldier, in contrast to a civilian, is required to carry out his tasks in almost every condition, whereas a civilian is entitled to abandon his job at will. In the army, one may find mutual dependence and mutual trust – each individual relies on the other and each individual is dependent on the other. Without such trust, the military system cannot function. In order to preserve the sense of trust and mutual dependence, and the ability to demand certain behavioral standards, it is necessary to have a judicial system that is separate from the civilian system.

The principle reasons justifying a separate legal system for soldiers are practicality and efficiency – the fact that a military system must be capable of meeting its own needs unconditionally, remain completely independent, flexible, and take into account timetables of training programs, specific tasks and the like. Beyond this, a separate military legal system allows exploitation of the potential manpower, as a soldier who is punished by a military court remains within the army, and the army may continue to make use of that soldier in accordance with its requirements.[78]

The most important justification for a separate judicial system is the need to regulate the conduct of the soldiers in a manner particular to the army as an essential precondition to achieving military goals. It is necessary that soldiers be tried by their commanders, who are military men, and not purely professional judges, as military men are capable of properly assessing the nature of the soldier's conduct. Further, these commanders possess the overall responsibility for the army's activities, including the maintenance of discipline therein. Likewise, on occasion, a military interest may have priority over the soldier's individual interests; accordingly, whereas the civilian judicial system acts diligently to protect the rights of the individual in the criminal process, the military legal system restricts the soldier's interests in so far as a preferred military interest exists that dictates the actions of the army.[79]

One of the possible justifications for a separate military legal system is that the army is a comprehensive structure in which the scope of conduct unique to it relates to a large number of highly diverse matters. To this, one may add the special military experience. These features justify a separate specific judicial system. Nonetheless, it is necessary to examine whether the existence of a separate legal system also inevitably entails the institution of divergent legal procedures and divergent evidentiary rules that may violate the procedural rights of the accused.

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77. *See* Basic Law: Human Dignity and Liberty of 1992, sec. 9 [hereinafter Basic Law].

78. *See* Mudrik, *supra* note 71, at 87-90.

79. *See* Westmoreland & Prough, *Military Justice*, 3 HARV. J. L. & PUB. POL'Y 1, 50 (1970).

In Israel, "the overall view is that the balance tilts significantly towards substantive closeness (of the military legal system)" to a court, which is part of the judiciary.[80] "The legal procedures and rules of evidence are similar,[81] as are the functions fulfilled by the military prosecution and defense and most important[ly] the fact that there is a review by the civilian legal system by way of appeal to the Supreme Court."[82]

> Still, it is not possible to ignore the 'lack' in the military legal system and the difference ensuing from the composition and nature of the military court, which may have an influence on the procedural rights of the accused, and the consequential test also has an impact on his substantive rights: the dignity and liberty of the soldier are violated notwithstanding that none would dispute that human rights also mean the rights of the soldier as a man.[83]

For example, notwithstanding that the Military Justice Law establishes the principle that a trial before a military court is to be conducted in public and provides a power to hold hearings *in camera* on the grounds set out in the law, as is the situation in the civilian courts,[84] the law is not satisfied with this arrangement and also grants powers to the convening authority to close the proceedings where he believes such a course is necessary to prevent infringement of national security.[85] There is no doubt that this supplementary power may have an unnecessarily harmful impact on the rights of the accused to a public trial, as the authority need not give reasons for its decision and the military court hearing the matter will not review it. Judicial review is a privilege reserved to the High Court of Justice that usually does not intervene in the discretion exercised by the command level in the army.[86]

In my opinion, such an infringement is not necessary. It is possible and appropriate to confine the exceptions of a public trial to those set out the Military Justice Law, which are subject to the discretion of the court, without conferring separate power upon the convening authority. The danger of the misuse of power by the convening authority and the ancillary fear of the violation of the constitutional safeguards of the accused to a fair trial, require

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80. Mudrik, *supra* note 71, at 116.

81. *See* Military Justice Law, *supra* note 72, at sec. 476. This section provides: "[s]ave as otherwise provided in this Law, the rules of evidence binding in criminal matters in the law courts of the State are binding also in a court martial and before an examining judge." *Id.*

82. *See* Military Justice Law of 1986, Amendment No. 17, sec. 440.

83. ODED MUDRIK, MILITARY JUSTICE 56 (1993).

84. *See* Military Justice Law, *supra* note 72, at sec. 325.

85. *See id.* sec. 324.

86. *See, e.g.*, H.C. 2888/99, Hollander v. Attorney General, Tak-Al 99(2) 1407 (Heb.).

that the rule of public trials in the military court be identical to the rule and exceptions concerning public trials, applicable in the civilian legal system.

I have explained the discrepancy that exists between the laws of arrest in the army and the laws of arrest in the general criminal law system.[87] Thus, for example, at a time when considerations of deterrence and efficiency have been excluded from the civilian laws of arrest and have been declared to be unlawful,[88] the substance of military service and its nature apparently continue to justify per se the arrest of a soldier solely on grounds of deterrence or the efficiency of the legal system.[89] The justifications that are identified for the establishment of a separate legal system are now used to justify remand until the conclusion of legal proceedings of persons charged with offenses for which they would not have been remanded in the civilian courts.[90] The justifications for a separate military legal system do not also justify the discrepancies between the laws of arrest and procedures applicable respectively in the civilian legal system and the military legal system.

The procedural right of every defendant not to be remanded until the conclusion of the proceedings simply because he has been accused of a serious offense or in order to deter others, also applies in respect of the military legal system. Arrest for reasons of deterrence contradicts the fundamental perception of innocence that applies to all citizens of the state – detention prior to a verdict is only justified on a preventative basis. The rationale whereby remand until the conclusion of the legal proceedings is a way of expressing the dissatisfaction of the army with offenses that breach discipline and is an essential tool to the proper functioning of the army, is outrageous and sends a message that the criminal process in the army has failed. It means that despite the extensive powers, which the criminal process places in the hands of the judicial authorities, that process is not effective by itself in sending a message of deterrence, and that the soldiers are incapable of understanding the significance of standing trial and deterrence embodied in the very existence of a penal provision in the law. [91]

Accordingly, the remand of a soldier merely because he has committed a serious offense, notwithstanding the fact that personally he is not dangerous, comprises a serious infringement of the freedom of a person who may be found innocent at the conclusion of the legal proceeding. It is not asserted that one must examine the restrictions on the freedom of a soldier on the basis of the expectations of military commanders in relation to the measures that will

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87. *See generally* Emanuel Gross, *Constitutional Aspects of the Laws of Arrest in the Army,* LAW & GOV'T 5(2), 437, (Heb.).

88. *See* Criminal Appeal [Cr.A.] 537/95, Ghanimat v. State of Israel, 49(3) 353 (Heb.); Cr.A. 8087/95, Zada v. State of Israel, 50(2) P.D. 133 (Heb.).

89. *See* Gross, *supra* note 87, at 450.

90. *See* Arrest Appeal [A.A.] 15/97, Private Ya'akov Damri v. Chief Military Prosecutor (unpublished) (Heb.).

91. *See* Gross, *supra* note 87, at 437.

assist them to promote discipline and deterrence in the army. The correct test should be whether the proposed restriction on liberty is necessary and whether it is compatible with the fundamental perceptions of society – the answer would be in the negative. Another noteworthy difference relates to the right of an accused to come before a judge following his or her initial arrest. In the civilian system, the period of arrest prior to bringing a suspect before a judge may not exceed twenty-four hours.[92] In contrast, in the military system the period was shortened by eight days[93] to ninety-six hours,[94] and subsequently, following a judgment of the Supreme Court, to forty-eight hours.[95] There does not seem to be any substantive reason connected to the nature of military service that justifies the discrepancy between the two judicial systems. The difference only exists because it is intended to serve the needs of one side, namely, the convenience of the system, but this convenience cannot justify the refusal to bring a soldier before a judge within twenty-four hours and not forty-eight hours.

The inescapable conclusion is that the nature of the judicial forum can indeed have an impact on the constitutional safeguards of the defendants before it.

Special judicial forum for terrorist offenses

It has been found that society justifies swift trials when it seeks to achieve a different goal not less worthy than securing the rights of the accused, such as, ensuring the security of the state and its citizens. It does this by seeking to achieve maximum trial efficiency and deterrence. Thus, in the same way as it is important that the military establishment react swiftly to try a soldier who is suspected of having betrayed his friends in war time, even if such efficiency in the conduct of the trial will erode the constitutional safeguards of the accused, so too President George W. Bush believed that the swift trial of terrorists would be an appropriately rapid and efficient response in the war against terrorism.[96] Such a trial, which is a type of field court martial, a quick trial, so it is believed, will achieve the goal of deterring those dealing in terrorism by causing them to fear the consequences of being suspected of terrorist acts. Does the infringement of the right to due process combined with the pursuit of a speedy trial achieve this aim? In my opinion, speed per se cannot be regarded as the ultimate goal:

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92. Criminal Procedure Law, Powers of Enforcement – Arrest, § 29(a) (1996) [hereinafter Criminal Procedure].

93. *See* Military Justice Law, Amendment No. 32, *Sefer Hachukkim* 366, § 440 (1996).

94. *See id.* at 278.

95. *See* H.C. 6055/95, Zemach v. Minister of Defence, Tal-Al 99(3) 1400 (Heb.).

96. Ann Woolner, *Model Trial? 1942 Tribunal Hid More Than State Secrets*, FULTON COUNTY DAILY REPORT, Dec. 5, 2001.

> Legal proceedings serve a primary purpose and that is doing justice while ensuring the appearance of justice. All the rest is generally the outcome of this: the imposition of the law and the instilling of the consciousness of its power, accepting the authority of the law, its might as an instrument for rooting out crime generally and terrorism in particular, deterrence ensues from this and other ancillary significances, all these are consequences derived from doing justice and not its alternatives. Of course, legal proceedings must, generally, commence and conclude within a reasonable period of time... however the efficiency, force and influence of legal proceedings are not measured solely by their duration. In every judicial proceeding there are, conventionally, substantive elements, which cannot be waived in any circumstances, even if in practice their existence tends to lengthen the proceedings somewhat.[97]

The desire of the establishment to bring about efficiency and deterrence is understandable particularly in times of emergency; however, this understanding is likely to cause society to permit a critical deviation from the constitutional safeguards that, in practice, comprise the bill of rights of the accused, and waive them. The result is that society uses the person as an instrument. It sacrifices him or her in order to realize a more important social interest – security!

One of the constitutional principles common to the policies of democratic societies, when placing persons on trial and deciding upon the legal procedures in court, is the well-known categorical imperative of the philosopher Immanuel Kant: "*Never use a man merely as a means but always at the same time as an end.*"[98]

The creation of a special judicial forum with special legal procedures that do not permit the accused to exercise the right of cross-examination, but enable a conviction on the basis of evidence kept secret for reasons of national security, severely violates the procedural rights of the accused. This violation falls outside the scope of the balance between human rights and social interests (including national security), as expressed in the ordinary rules of

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97. H.C. 87/85, Argov v. Commander of IDF Forces in Judea and Samaria et al, 42(1) 353, 378 (Heb.).

98. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 101(H.J. Paton trans. 1964). "Act always so as to treat humanity whether in your own person or in that of another, never merely as a means but always as at the same time as an end." *Id. See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

procedure applicable in the civil legal system.[99] This deviation is a blatant breach of the prohibition upon using a man as a means; he is being turned into a tool in the hands of society in the hope of deterring others who may plan a future attack. The most serious risk is that of convicting innocent persons. Is this a price that a democratic society is prepared to pay? Is it at all right to demand from a democratic society that it pay this type of price? The answer is no. A democratic society in which individual liberties are acknowledged as basic rights is required to pay a social price that entails waiving part of the protection usually accorded to public security,[100] as

> [n]o security reason, even the most weighty, is heavier, in the relative balance of a given criminal proceeding, than the weight of the conviction of an innocent person. In this connection, the type of offense with which the person has been accused and the punishment which he may expect are not important. The conviction of an innocent man is so profound and painful a violation in the regulation of the criminal procedure, as not to be permitted under any circumstances.[101]

Nonetheless, is not the offense of terrorism sufficiently unique so as to justify the separate trial of terrorists, even if this would violate the rights of the terrorist suspect facing trial?

Many of the writers on terrorism describe it as so exceptional a phenomenon that the usual treatment offered by the legal system and the law are unsuitable:

> Since terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them. In the face of terrorism, extraordinary law, it seems, is required. Terrorism literature emphasizes, through its choice of metaphors, that the situation is one of "us" or "them." To

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99. *See, e.g.*, Evidence Ordinance [Consolidated Version] (Aryeh Greenfield, Trans. 2000), sec. 44(a) & 45. (1971) [hereinafter Evidence Ordinance]. These sections establish the proper balance between an important public interest (national security) and the right to a fair trial and justice. *See id. See also* Cr.A. 889/96, Mazrib Muhammed v. State of Israel, 51(1) P.D. 433, 443-445 (Heb.).

100. *See* Criminal Further Hearing [Cr.F.H.] 5/89, State of Israel v. Ghanimat, 49(4) P.D. 589, 645 (Heb.) ("A basic right by its nature carries a social price . . . .").

101. Miscellaneous Applications [M.A.] 838/84, Menachem Livni et al v. State of Israel, 38(3) P.D. 729, 738 (Heb.). This case concerned the need to reveal privileged evidence in order to achieve justice and conduct fair criminal proceedings that might uncover the truth versus security needs, which argued against disclosing the evidence. *See id.*

> survive, we must destroy them. To fail to destroy them is to destroy ourselves.[102]
>
> The threat terrorism poses to civilization passes through violence. A recurring problem for authors on terrorism is the need to distinguish terrorist violence from other kinds of violence. The terrorist should not be said to be using run-of-the-mill kinds of violence, the everyday kind of violence that affects the citizen of our democracies in a matter of fact way the violence that we have come to live with. If the violence of terrorism is not distinguishable, then the average terrorist may not seem much worse (if not any better) than the average rapist, murderer, robber, or vandal.[103]

Others explain the distinction between offenses of terrorism and other offenses by referencing the fact that the victims of terrorism are innocent from a dual point of view compared to their status in other criminal offenses:

> They are inherently innocent (not to blame as victims), but they are also innocent because they are in some sense sacrificed and sacrificial victims. Sacrificed by the terrorists because they stood for the things the terrorists despise. Sacrificial in that if our governments had taken strong action against terrorists, as they should have, these innocent people would not have been victims.[104]

I reject these views – when it is said that the victim of a terrorist offense is an exceptionally innocent victim, a victim of an exceptional act of violence, then the position that "normal" violence exists, with victims who may be characterized as "normally" innocent is taken. Such an argument is unfounded.

True, terrorists do not respect laws and breach all rules of the game. However, every person suspected of a criminal offense is suspected of not having respected the law. There are those who believe that terrorists are different in this regard as, in contrast to other criminals, they do not respect any law – not the criminal law, not moral law, not the laws of peace and not the laws of war. They breach all forms of law simultaneously.[105] Does this justify a different mode of trial for a person suspected of breaking all the rules of the game? Does the fact that terrorists are always presented as "other," and they chose to be "other" and behave as "others" means that the state must treat

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102. Ileana M. Porras, *Symposium: On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119,121-22 (1994).

103. *Id.* at 129.

104. *Id.*

105. *See id.* at 139.

them in another manner and that the terrorists can only blame themselves for this outcome?

Terrorism is essentially no different from any other criminal offense. It substantively resembles every other criminal offense in the statute books. The only difference that can be found lies in the perpetrators' motives. The acts of violence or murder are motivated by the desire to instill terror. However, the existence of a distinct motive in terrorism offenses does not justify separate trials. The venue for trying terrorist offenses is the ordinary courts. Any desire to deviate from this structure in favor of another structure suggests a desire to tilt the balance between human rights and national security in one direction only – security interests.

Terrorism is an offense of violence, and it seems the state adopts the following tactic when dealing with it: it classifies the offense of violence under the name "terrorism" while repeatedly emphasizing[106] the images of terror as an enemy, whose goal is to kill, whose tools are violence and whose motives are the motives of a fanatic fundamentalist Islam.[107] From the moment the state classifies an offense of criminal violence as terrorism, it signals to the public, and the public that visualizes the fanatic Islamic fundamentalists, against whom the government warns, has little choice but to agree, that "it is something else" and from that moment everything must be "other." As it has been previously explained, the offense of terrorism is like every other criminal offense, only the motive is different, and this difference does not justify "different" treatment.

It should be noted that in the past the United States was accustomed to classifying terror offenses as criminal offenses.[108] Even in the war against terror now being waged, the President declared he wanted to catch the

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106. *See, e.g.*, William J. Casey, *The International Linkages - What Do We Know?*, *in* HYDRA OF CARNAGE: INTERNATIONAL LINKAGES OF TERRORISM – THE WITNESSES SPEAK 5 (Uri Ra'anan et al. eds., 1986). The explanation given by the CIA is as follows:

> In confronting the challenge of international terrorism, the first step is to call things by their proper names, to see clearly and say plainly who the terrorists are, what goals they seek, and which governments support them. What the terrorist does is kill, maim, kidnap and torture. His or her victims may be children in the schoolroom. Innocent travelers on airplanes, businessmen returning home from work, political leaders .... They may be kidnapped and held for ransom, maimed or simply blown to bits.

Id.

107. *See 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001*, ¶¶ 21-22 (Oct. 4, 2001), *available at* http://www.number-10.gov.uk/news.asp?NewsId=2686 (last visited Oct. 22, 2002). An expression of the religious-Islamic component of the phenomenon of terrorism may be seen in the statements of Osama Bin Laden: "[t]he killing of Americans and their civilian and military allies is a religious duty for each and every Muslim to be carried out in whichever country they are until the Al Aqsa mosque has been liberated from their grasp and until their armies have left Muslim lands." *Id.*

108. *See* 18 U.S.C. §§ 2331-2339B (2000) (defines and establishes punishments for terrorism).

terrorists and bring them "to justice."[109] This objective is identical to the objective of the criminal legal system: the prevention of crime and damage by the capture and punishment of those guilty of causing them.[110] It may be argued the character of the terrorist attack of September 11, 2001, and its outcome were different from any other terrorist attack previously suffered by the United States. This difference requires the offense of terror to be classified in a different manner and prevents it from continuing to be regarded as a purely criminal offense. Support for this proposition may be found in the fact that before September 11, the United States regarded terrorist attacks as crimes; whereas, in the aftermath of September 11, it regarded them as acts of war.[111]

The primary difference between the terrorist attack of September 11, and previous terrorist attacks on the United States, lies in the tremendous scale of damage and injury caused to innocent persons. But from the point of view of the criminal law, the character of an offense, which forbids taking life as a criminal offense, does not depend and will not vary in consequence of the number of victims involved: "[t]he point is not that the September 11 attacks were no different from past terrorist attacks, but rather that they were not so different that the criminal law had not contemplated them."[112]

Moreover, we are not dealing here with a separate field requiring exceptional expertise in order to try the terrorist offenses. The fact that terror offenses are criminal offenses that, like all criminal offenses, necessitates expertise in the field of criminal law as such[113] (and not in the "area of terrorism"), contrary to the example of the adjudication of fiscal offenses – where it is possible to justify the existence of a special panel on the basis that special expertise and professionalism is required in relation to the subject-matter. More precisely, the existence of a special panel does not mean a special tribunal, and it certainly does not mean special procedural rules that differ from the ordinary rules of procedure.

Other issues can justify the establishment of a special tribunal. For example, the State of Israel created a special court system for labor law,[114] but the entire rationale behind the creation of this separate legal system turns on the special expertise and professionalism required in the field of labor relations. The motive for creating this separate legal system was the desire to advance the cause of justice in that field of law, *i.e.*, to ensure that labor disputes would be heard by a body that would be devoted to dealing with these

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109. Strike Address, *supra* note 42, at 1432.

110. *See generally* WAYNE R. LAFAVE, CRIMINAL PROCEDURE 1.2(c), 10 (2d ed. 1992).

111. *See* Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1225 (2002).

112. *Id. at* 1226.

113. *See* Wison Finnie, *Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation*, 1990 L.J. OF SCOT. U. JUD. REV. 1, 2-3 (1990).

114. *See, e.g.*, Labour Court Law (1969) (Heb.).

matters and would specialize in them to a greater extent than the ordinary courts.[115] Yet, the creation of a separate tribunal was not thought to justify the violation of the procedural rights of those being judged by the Labor Court!

When a state creates a separate legal system, which differs from the ordinary prevailing system, it bears the burden of showing the new structure has not been motivated by a desire to violate constitutional safeguards, but rather to preserve them. If one draws a comparison with the examples considered above, one sees that when the state creates special tribunals for terrorists, modifies the laws of procedures and evidence and violates the procedural rights of the accused, it is not motivated by the desire to advance the cause of justice by conducting a trial with the aid of experts in the "laws of terror." On the contrary, the state has a concealed motive; it seeks to obtain results which cannot be obtained by holding a trial within the ordinary court system, as the constitutional safeguards of the accused would delay the ultimate outcome to which the state aspires, namely, a conviction that will have a deterrent effect: "[t]he primary American interest created by the September 11 attacks is the successful punishment of those responsible. This interest is not satisfies by mere apprehension of the perpetrators; prosecution resulting in acquittal would not satisfy the United States' interests in punishment and safety."[116]

Accordingly, it is difficult to find a special ideology that can provide a basis for, and justify the creation of, a separate system for trying terrorists. Searching for these justifications leads only to the state's desire for retribution, deterrence and realization of the desired outcome under the cover of a legal process. However, a democratic state cannot be satisfied with what is merely a legal process, it must ensure that the legal process is *proper* and accords with its democratic values. It is the departure from these values as reflected in the executive order in the United States, which requires American society to act to abolish the military tribunals:

> [w]e need to think long and hard when it's time to try somebody in a tribunal. There are good reasons to use the criminal justice system. It sends a signal to the world of the unimpeachable integrity of the process .... We don't want to become what we criticize.[117]

Like American society, Israeli society too must reexamine its special courts, such as the military court for terrorists in Lod.[118] It should be emphasized that, in the light of the fact that trials are no longer held in the Lod

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115. *See* H.C. 5168/93, Shmuel Mor v. National Labour Court et al, 50(4) P.D. 628, 638 (Heb.).

116. *See* Note, *supra* note 111, at 1235.

117. *See* Oliphant, *supra* note 55, at 1.

118. *See infra* Part 4 for an extensive discussion.

military court, it would seem Israeli society has understood that a special court for trying terrorists, even if established by statute, is not appropriate and measures should now be taken to abolish it even though it exists only on paper.

I wish to stress that I do not cast doubt on the fact that the security of the nation and its citizens is an important public interest standing at the center of the fundamental values of a democratic state, as without every citizen being guaranteed his personal safety and without public safety being secured, it is not possible to ensure the real implementation of human rights: "without order there is no liberty."[119] Accordingly, had the President of the United States declared it proper to establish a separate legal system for terrorist suspects for the reason that the phenomenon of terrorism is spreading swiftly and dangerously and the dangers it poses are likely to prove calamitous, and had he declared it necessary to set up this separate system so as allow it to deal solely with persons suspected of this offense in order to avoid the routine delays in the ordinary federal system, which is burdened with many other issues, but had he nevertheless stated that the procedural and evidentiary rules and constitutional safeguards available to a defendant in this special tribunal would be identical to the "due process of law" that prevails in the federal legal system, then it would not be necessary to criticize the presidential decision.[120] The proper balance in a democratic state between human rights and national security is not breached when a special tribunal is set up in order to avoid the burdens on the existing system or even when it is designed to satisfy the public's demand for a system that will deal solely with terrorist suspects. This balance is maintained as long as the rules applicable within the existing system are coextensive with the rules that will apply in the new tribunal.

Regrettably, this is not the case. The situation that has been created in the United States has led many to the conclusion that: "The new administration powers, amassed during wartime, have made the normally

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119. H.C. 14/86, Leor v. Film and Play Censorship Council, 41(1) P.D. 421, 433 (Heb.).

120. *See* ABA, Task Force on Terrorism and the Law Report and Recommendations on Military Commissions (Jan. 4, 2002). It should be noted that the American Bar Association (ABA) has declared its willingness to accept the special tribunal but seeks the maintenance of fair legal criminal procedures. *See id.* The ABA proposals require:

> Compliance with Articles 14 and 15 of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of *ex post facto* application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

Id.

delicate balance between individual rights and collective security that much more precarious."[121]

A real danger exists because there is much sharper focus on national security and threats of terror in times of emergency than in times of peace, and because we are dealing with the conduct of persons who threaten the security of the state and its citizens, society will agree to deal with them separately in a manner that differs from that applied in the ordinary courts. Achieving this distinction will only be possible if different rules of procedure are established that are based on the desire to achieve a goal that is adjusted in times of emergency, and which has a different weight to that ascribed to it in times of peace. For example, the need to protect sources of information leading to the detection of terrorists would be justified, although in a regular trial the testimony of these sources would result in their exposure. In a separate system, evidence would be allowed to be given in the absence of the accused and would even permit a conviction on the basis of police testimony to the effect that to the best of the police officer's knowledge – the defendant is guilty of terrorist activity, all this without an examination of the police officer's source of information.[122]

In my opinion, a society, which sanctions a separate system that acts in accordance with special rules in the trial of terrorists, and does so out of a fear that conducting a trial in accordance with the prevailing rules will impair national security, makes a serious mistake.

It is agreed that in criminal legal procedures concerning terrorist offenses a real need may arise to protect the intelligence sources that helped to uncover the terrorist or to depart from the principle of public trials. However, this need can be met within the existing judicial system. If the state proves that, for worthy and well-founded security reasons, which will not lead to a miscarriage of justice for the accused, it is necessary to refrain from disclosing evidence or that the trial should be held *in camera*, the regular judicial system can meet this need. It must be recalled that the system operates in accordance with procedures based on the principle of openness — secrecy and privilege are the exceptions. Nonetheless, the exceptions exist and in cases of need, national security grounds will allow them to be implemented.[123] The emphasis lies on the fact that usually, secrecy is an exception; but, where special rules are created for the trial of terrorists, the

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121. Richard L. Berke, *Bush's New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at 1.

122. *See infra* Part 5, concerning the trial of terrorist suspects in Britain.

123. *See, e.g.*, Courts Law [Consolidated Version] (Aryeh Greenfield trans. 2000), sec. 68 (1984): (a) The Courts shall conduct their hearings in public. (b) A court may hear all or part of a certain matter behind closed doors, if it deems it necessary because of one of the following: (1) to protect the national security." *Id. See also* Evidence Ordinance, *supra* note 99, sec. 44. "(a) A person does not have to deliver and a Court shall not admit any piece of evidence, if the Prime Minister or the Minister of Defense expressed his opinion in a certificate signed by him that delivering it is liable to injure national security. . . ." *Id.*

exception becomes the rule. For example, a trial *in camera* without the possibility of external supervision and review but has all the dangers accompanying this state of affairs.

It would seem that the grounds justifying the trial of terrorist before military tribunals, such as the need to safeguard intelligence sources in the continuing war against terrorism, the danger involved in disclosing information in a public trial and the desire to prevent terrorist suspects exploiting the proceedings should they be held in open court by turning the trial into a platform for proclaiming their views, are merely the openly declared motives for creating the military tribunal. The concealed, but genuine, motive is the use of the military tribunals as a United States policy measure in its war against terror; the aim of the United States is to achieve this objective and not to bring the suspect to trial and justice.[124]

Consequently, it seems that the desire of the United States to see those guilty of the attacks of September 11 behind lock and key is so intense as to cause it to distrust its own existing legal system:

> They [the military tribunals] help to guarantee those interests [retribution and incapacitation] and suggest that Americans have come to distrust their own criminal justice system's ability to safeguard them. By granting the President discretion to try Al Qaeda members without the procedural and evidentiary rules that favor defendants in our civilian justice system, the military tribunals promise to reduce the probability that a suspected terrorist will escape conviction.[125]

A different danger is that of the "slippery slope:" a society that today allows the disparate treatment of persons suspected of terrorism may tomorrow allow the disparate treatment of persons suspected of other offenses: "But why stop there? If the theory behind the November bill is that a streamlined system should be set up to process thousands of claims with fundamental similarities, why not extend the system to suits against, say, managed health care companies? Or all doctors?"[126]

Other critics of the power of the President of the United States to issue this executive order are also aware of this danger and explain:

> President Bush has claimed the power to create and operate a system for adjudicating guilt and dispensing justice through military tribunals without explicit Congressional authorization —threatening to establish a precedent that

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124. *See* Note, *supra* note 111, at 1236-37.

125. *Id.* at 1235-1237.

126. Evan P. Schultz, *Decisions Set Precedents Whether Justices Like it or Not*, FULTON COUNTY DAILY REPORT, Dec. 27, 2001, at 5.

> future presidents may seek to invoke to circumvent the need for legislative involvement in other unilaterally defined emergencies.[127]

The inescapable conclusion is that it is precisely in times of emergency in which the governmental authority desires to exploit the situation in order to obtain the public's understanding, encouragement, support and consequently authorization, in the name of national security, for an efficient war against terrorists by violating the rights of the enemy – that society must recognize that it should refrain from giving such authorization. Indeed, terrorism is an enemy, and therefore the tendency to agree to the erosion of the rights of the enemy may be legitimate and broad but it must be recalled that violation of the rights of the enemy defendant may end in injury to another enemy who is none other than one's political opponent.

PART FOUR

Rules of international law for trying terrorists in occupied territories and comparative law in relation to the State of Israel

Since its establishment, the State of Israel has been compelled to deal with the phenomenon of terrorism. Terror attacks in the territory of the State of Israel are frequent and since the events of October 2000 have become a matter of routine. The trial of terrorists or "wanted persons" who have been caught and are suspected of terrorist activity is an integral part of Israel's fight against terrorism. Most of the terrorist attacks against Israel are launched from the territory of the Palestinian Authority – territory that the State of Israel occupied in 1967. In this part, the rules of international law for trying terrorists in occupied territories outside the borders of the occupying power will be examined, and how the State of Israel has chosen to implement these rules will be described.

The rules of international law

When international law deals with issues of occupied territories, it uses the term "belligerent occupation." Such occupation is primarily regulated by Articles 42-56 of the Hague Regulations[128] and the Fourth Geneva Convention.[129] This is a situation in which occupied territory remains in the hands of the enemy in time of war or thereafter. If the enemy has effective

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127. Neal K. Katyal & Laurence H. Tribe, *Essay: Waging War, Declaring Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1308 (2002).

128. *See* Hague Regulations, *supra* note 33.

129. *See* Fourth Geneva Convention, *supra* note 33.

control over the occupied territory, then there exists a legal basis for belligerent occupation.[130]

The government in occupied territory is military in character. Governing the occupied territory is a supreme military commander; however, this individual does not act in a vacuum. The commander receives orders from those who have authority over him within the framework of the military hierarchy, while responsibility for occupation is principally imposed not on the commander, but on the Occupying Power.[131]

The relationship between the occupier and the civilian population ensues from the special circumstances of belligerent occupation. As the occupier does not obtain property rights in the occupied territory, the residents of the territory do not lose their nationality. Accordingly, if they were citizens of the occupied area, they continue to hold that citizenship and owe a persisting duty of loyalty to the enemy.[132] Alongside this principle, Article 5 of the Fourth Geneva Convention provides that where in occupied territory a person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited the rights of communication (with the outside world) under the present Convention; however, the Occupying Power must treat this detainee in a humane manner, *and in case of trial, he shall not be deprived of the rights of fair and regular proceedings.*[133]

Article 43 of the Hague Regulations provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[134]

As a result, the occupier must respect the laws prevailing in the occupied territory, and he may repeal or amend existing laws and enact new laws only in exceptional circumstances where he is absolutely prevented from respecting the previous legal position. The construction that has been given to the exception talks of situations of "necessity" (and not being "absolute prevented" in the literal sense).[135] The necessity may ensue from legitimate

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130. *See* Shamgar, *supra* note 35.

131. *See* Yoram Dinstein, *Judgment in relation to the development of Rafiah*, 3 IUNEI MISHPAT, 934, 935-937 (1974) (Heb.).

132. *See* DINSTEIN, *supra* note 51, at 214.

133. *See* Fourth Geneva Convention, *supra* note 33, art. 5

134. Hague Regulations, *supra* note 33, art. 43.

135. *See* H.C. 202/81, Tabib et al v. Minister of Defence et al, 36(2) P.D. 622, 629-631 (Heb.).

interests of the occupier, such as laws prohibiting acts of sabotage, hostile organizations, and so on. The article deals with legislation in both the civil and criminal spheres, although additional provision exists in relation to the criminal sphere in the Fourth Geneva Convention. Article 64 provides that the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Convention.[136] According to Article 64 the occupier is entitled to legislate its own penal laws in the occupied territory in so far as is necessary to fulfill its obligations under the Convention, maintain orderly government in the occupied territory and ensure the security of the occupier.[137] Article 65 adds that the new penal laws shall not come into force before they are published and brought to the knowledge of the inhabitants in their own language, they may not have retroactive effect.[138]

With regard to all the offenses that are included in the penal laws, which the occupier leaves in effect in the occupied territory, Article 64 provides that the tribunals of the occupied territory shall continue to function.[139] Nonetheless, the indigenous courts are not the only courts functioning in the occupied territory, joining them are a system of military courts.[140] Whereas the indigenous courts handle all the civil and criminal matters in accordance with the local law, the military courts of the occupier apply in the occupied territory the criminal laws that it legislates for the local population in accordance with its own legitimate interests. The authority to establish a system of military courts is accorded by Article 66 of the Fourth Geneva Convention subject to the courts being properly constituted, non-political and sitting as first instance courts in the occupied territory.[141]

The subsequent articles of the Convention have a cumulative effect providing broad protection for the maintenance of fair criminal proceedings. For example, the military courts shall apply only those provisions of law applicable prior to the commission of the offense and which are in accordance with general principles of law. The penalty must be proportional to the offense and the court must take into consideration the fact that the accused is not a national of the Occupying Power.[142] The trial must be regular and the defendants must be informed, in writing, in a language which they understand, of the particulars of the charges preferred against them.[143] An accused shall

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136. *See* Fourth Geneva Convention, *supra* note 33, art. 64.

137. *See id.*

138. *See id.* art. 65.

139. *See id.* art. 64.

140. In contrast to military tribunals that have jurisdiction over soldiers serving in the army of the occupier, here we are concerned with jurisdiction over civilians, and accordingly we use the term "court" and not "tribunal."

141. *See id.* art. 66.

142. *See id.* art. 67.

143. *See* Fourth Geneva Convention, *supra* note 33, art. 71.

have the right to present evidence in his defense and obtain the assistance of an attorney and an interpreter.[144] A convicted person shall have the right of appeal or the right to petition a competent authority of the Occupying Power.[145] Additional provisions in respect of this matter appear in Article 6 of the Additional Protocol:[146] the presumption of innocence, whereby every person is deemed to be innocent until convicted; trial in the presence of the accused and privilege against self-incrimination whereby a person may not be compelled to testify against his own interest or admit guilt.

The trial system operated by the State of Israel in the occupied territories

The State of Israel is a Contracting Party to the Geneva Convention and accordingly the Convention applies to all the territory that Israel occupied during the Six Day War and has remained under its control. At the same time, it should be noted that the State of Israel has taken the position that it does not admit the application of these Conventions to these territories, as it has never recognized the rights of the Egyptians or Jordanians to any part of the Land of Israel.[147] This position is not compatible with the provisions of the Fourth Geneva Convention that does not make application of the Convention contingent upon recognition of property rights and declares that it is applicable to every case of full or partial occupation of the territory of a Contracting Party.[148] Nonetheless, in 1971, in an international symposium on human rights, the Attorney General formally declared that the State of Israel had decided (without withdrawing from its fundamental legal position) to act in practice in accordance with the humanitarian provisions of the Fourth Geneva Convention.[149] At the same time it should be recalled that as the majority of the provisions of the Fourth Geneva Convention are constitutive, so long as Israel does not adopt legislation incorporating the Convention into its domestic law, the constitutive provisions do not automatically apply on the national level.[150] Notwithstanding this, the Supreme Court has held "that it is a mistake to think . . . that the Geneva Convention does not apply to Judea and Samaria. It applies, notwithstanding . . . that it is not justiciable in the Israeli courts."[151]

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144. *See id.* art. 72.

145. *See id.* art. 73.

146. Protocol I to the Geneva Conventions of the 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 23.

147. *See generally* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y. B. HUM. RTS., 262–263, (1971).

148. *See* Fourth Geneva Convention, *supra* note 33, art. 2.

149. *See* Shamgar, *supra* note 147, at 266.

150. *See* Ruth Lapidoth, *International Law in Israeli Law*, 19 MISHPATIM 807, 826 (1990) (Heb.).

151. H.C. 390/79, Dawikat et al v. Government of Israel et al, 34(1) P.D. 1, 29 (Heb.).

And indeed, after the State of Israel occupied the areas of Judea, Samaria and the Gaza Strip in 1967, it established in those regions a system of military courts that was compatible with the recognition accorded by international law to the need to ensure the rule of law, even in times of belligerent occupation.

The State of Israel sought to ensure the existence of a fair and proper legal and judicial system that would create an independent mechanism for applying the law. Security, public order and the welfare of the population were to be guaranteed by establishing a military judicial system in Judea, Samaria and the Gaza Strip, while at the same time preserving the indigenous courts in these areas.

In compliance with the principles of international law discussed above, following the entry of the IDF into the areas of Judea, Samaria and the Gaza Strip, the indigenous judicial system, including its jurisdictional powers, were preserved as the local law had applied them prior to the IDF occupation of the territory. Parallel with this system, a military court system was established in each and every area by the commander of the IDF forces in the region, namely, by the O.C. of the particular command, holding the rank of Major-General, who, under the rules of international law, comprised the supreme authority in the occupied area, and who held as such the powers of government, legislation and execution from the initial moment of the occupation. Thus, the Proclamation Concerning the Government and the Law, which was published in Judea, Samaria and the Gaza Strip by two Supreme Commanders at the time, stated: "Every power of government, legislation, appointment and administration in relation to the region or its inhabitants will from this point on be held by me only, and will be exercised by me or by someone appointed for that purpose by myself or who will act on my behalf."[152]

Within the framework of the legislative powers, each of the Supreme Commanders published an Order Concerning Security Provisions, 5730-1970[153] ("OCSP") for their respective regions, in which they set up first instance military courts in the region. Later, a military appeals court was established.

The Powers of the Military Courts

The OCSP empowers the military courts to adjudicate every offense set out in the security legislation and every offense set out in the local law – the local criminal law applicable prior to the IDF's entry into the region – subject

152. Ayal Gross, *The Military Court System in Judea, Samaria and the Gaza Strip*, MONTHLY REVIEW: MONTHLY FOR IDF OFFICERS, 36(5), 12, 13 (1989) (Heb.).

153. This order replaced a previous order issued in 1967, during the initial days of IDF government in these regions.

to the provisions in the security legislation.[154] The military courts and the indigenous courts that continue to operate in the regions even after the IDF's entry, possess concurrent jurisdiction, in so far as concerns offenses against the local law.[155] The decision where to try a person suspected of having contravened a local law is made by the competent prosecutorial authorities.[156] Generally, in the past, when the offense was of a security nature, the charges would be brought before the military court. These were offenses, which by their nature, undermined the security of the area, breached public order, or harmed the security forces or various bodies cooperating with the security forces, Israeli citizens or any other important interest of the military government in the area.[157]

It should be emphasized that in certain circumstances the jurisdiction of the military courts also extends beyond the confines of the territory, for example, a military court has jurisdiction in respect of an act that is performed outside the boundaries of the region and which would be an offense against the security legislation or the local law were it to be committed within the area, where that act harmed or was intended to harm the security of the area or the public order therein.

Panels of the Courts

Each court is headed by the President of the Court; additionally, there is a Duty President, who fills the functions of the President in the event of the latter's absence. These judges are appointed by the Commander of the IDF forces in the area in accordance with the recommendation of the Military Advocate General.[158] An IDF officer of the rank of Major and above, who has legal training, may be appointed as a jurist judge; the President of the Court must be a jurist judge of the rank of Lieutenant-Colonel and above. The Presidents of the Court and the Duty Presidents are judges in the regular army; whereas, the majority of the judicial force, in terms of numbers, consists of reserve army lawyers serving in the Military Advocate General's Unit.[159]

The hearing of the indictments submitted to these courts is conducted by a panel of three judges, at least one of whom must be a jurist who acts as the presiding judge; the two other judges consist of IDF officers who need not

154. *See* Order Concerning Security Provisions, cl. 7 [hereinafter OCSP].

155. *See* M. Drori, *Concurrent Criminal Jurisdiction in the Occupied Territories*, 32 HAPRAKLIT 386 (1979) (Heb.).

156. *See* H.C. 412/71, Nasirat v. Commander of IDF Forces in the Gaza Strip and North Sinai (unpublished manuscript) (Heb.).

157. *See* Gross, *supra* note 152, at 14. *See also* H.C. 481/76, Liptawi v. Minister of Defence et al, 31(1) P.D. 266 (Heb.).

158. *See* OCSP, *supra* note 154, cl. 3.

159. *See* Gross, *supra* note 152, at 14.

have legal training.[160] Alternatively, the panel may consist of a single judge who is a jurist.[161] From the point of view of substantive jurisdiction, there is no distinction between the two panels, in both cases the military court is empowered to hear every offense defined by security legislation or the local law subject to the security legislation. The distinction between the two panels lies in the sentences that may be passed. A court consisting of a one-judge panel is restricted in the sentences it may pass; for example, the judge may not sentence a person to death. Only a three-judge panel, containing two jurists, and voting unanimously, may pass such a sentence.

The decision before which panel (a single or three judge panel) an indictment will be heard is within the sole discretion of the military prosecution.[162]

Legal and Evidentiary Procedures

The rules of procedure are as established by the OCSP or are in accordance with the procedures that seem to the court most suitable for the pursuit of justice.[163] Express provisions have been made in relation to the principle of open trials.[164] These provisions include: the right of an accused to be present throughout the proceedings,[165] the right to an interpreter if the accused does not understand Hebrew,[166] and the right of an accused to have assistance from an attorney of his choice.[167] Moreover, where the charge relates to a serious offense, and the accused has not chosen a defense attorney and no defense attorney has been appointed for him by the legal advisor of the region, the military court, with the consent of the accused (and the proposed defense attorney), will appoint a defense attorney for him.

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160. It should be noted that this arrangement is similar to the arrangement applying in the military tribunals under the Military Justice Law of 1955, described in Part 1 *supra*.

161. *See* OCSP, *supra* note 154, cls. 3a and 4.

162. *See* H.C. 372/88, Fox v. Military Advocate General et al, 42(3) P.D. 154 (Heb.). Here the petitioner argued that the decision of the military prosecution to try him before a single judge was extremely unreasonable. The petition was dismissed on the ground that the choice of charges and the judicial panel, which would hear the matter was in the hands of the military prosecution. *See id.*

163. *See* OCSP, *supra* note 154, cls. 9 and 10.

164. *See id.* cl. 11. This clause provides:

> A military court shall hold its hearings in open court, however, a military court is entitled to order that a hearing will be held, in whole or in part, *in camera*, if it is of the opinion that it would be appropriate to do so for the security of IDF forces, public safety, protection of morality or the safety of a minor, or if it believes that an open hearing would deter a witness from testifying freely or prevent him from testifying at all.

Id. It should be noted that as a rule in Israel trials are open to the public.

165. *See id.* cl. 35.

166. *See id.* cl. 12.

167. *See id.* cl. 8.

Right of Appeal

Until April 1, 1989, it was not possible to file an appeal against a judgment of the military court to any appeals court.[168] A convicted person could make various requests regarding the judgment to the Commander of the IDF forces in the region. The Area Commander could intervene in the judgment either by acquitting the accused or by canceling the judgment and ordering a new trial.

The establishment of an additional appeals process followed a hearing in the High Court of Justice in Israel on a petition filed by two persons who had been convicted by the military court in Ramallah.[169] In that case, the High Court dismissed the petition and did not see fit to intervene in view of the fact that the rules of international law did not mandate an appeals process. However, the High Court did express its support for the establishment of a military appeals court in the area of Judea, Samaria, and the Gaza Strip. The High Court's position was rooted in its conviction that the right of appeal would contribute to strengthening the elements of fairness and reasonableness in legal proceedings. In enlightened systems, the appeal is regarded as an essential and substantive factor in the fairness of the trial; its introduction into the military court system would raise the esteem in which it was held and emphasize its independence. Likewise, in the light of the "doctrine of long occupation" to the effect that the lengthier the occupation the more weight has to be given to the needs of the indigenous population by modifying existing laws and instituting new laws that will meet the changing needs of society over time, President Shamgar held:

> The implementation of a right of appeal expresses the departure from extreme emergency measures, which are necessary in the initial period of a military government, but which are not justified in a military government, which has already existed for twenty years or more... One cannot find reason or logic why the military legal system, *i.e.*, the instrument by which the Israeli government does justice, has to be the one to bear, more than any other governmental system, the mark of the war, of transience, of the limitations which ensue from times of emergency, which are expressed by the absence of the characteristics which complement the

168. *See* Fourth Geneva Convention, *supra* note 33, art. 73. As we have explained international law as set out in Article 73 of the Fourth Geneva Convention does not establish an obligation to provide an appeals court. A convicted person has the right to petition the competent authority of the Occupying Power, but the latter is not a court of appeal.

169. *See* H.C. 87/85, Argov et al v. Commander of IDF Forces in Judea and Samaria et al, 42(1) 353 (Heb.).

> substance and appearance of *the fair and complete legal system.*[170]

As a consequence of this judgment, the OCSP was amended,[171] and as of April 1, 1989 a military court of appeals has been instituted to serve both regions. For the purpose of an appeal, a distinction has to be drawn between a judgment given by a single judge and a judgment given by a panel of three judges. In the latter case, the appeal is a right; whereas, leave must be given to appeal against the judgment of a single judge.[172] Both a convicted person and the prosecution may exercise the right of appeal or apply for leave to appeal. An automatic appeal lies in the event of a judgment imposing the death penalty, even if the accused has not chosen to submit such an appeal.[173]

This institution is extremely important and, as noted, strengthens the element of fairness in the trial. It enables the consideration of legal decisions made by the court of first instance in a new setting, which ultimately will discard decisions that are flawed, while those decisions that have passed the additional review will emerge strengthened. This new instance strengthens the independence of the military legal system and its detachment from external influences. Many see the legal proceedings, which are conducted by the State of Israel in the administered territories, as part of a real effort to negate the well-known adage that "military justice resembles justice to the same extent as military music resembles music."[174]

I believe that the State of Israel has indeed made a genuine effort to maintain a fair legal system in the administered territories. The fact that Israel established a special judicial system for security offenses, the military legal system,[175] does not prompt any real fears to the contrary, as the trial of security offenses by the indigenous courts in the occupied territories would be clearly tainted by prejudice and conflicts of interests. The indigenous courts could not really be expected to conduct objective hearings in respect to offenses against the security of the area. Moreover, the State of Israel has chosen to preserve the constitutional safeguards of the accused and constrict as much as possible the influence of the judicial forum upon his procedural rights.

Why did the State of Israel choose to take steps to minimize the influence of the judicial forum, but not to neutralize it completely? One

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170. *Id.* at 375-376 (emphasis added).

171. *See* OCSP, *supra* note 154, cl. 4b.

172. *See id.* cls. 3 and 40b.

173. *See id.* cl. 140.

174. *See* Gross, *supra* note 152, at 21. This saying is attributed to the Frenchman Kalmanaso.

175. It has been explained that the jurisdiction of the military courts and the indigenous courts is concurrent, however, generally the military court obtains jurisdiction over security offenses.

cannot ignore the fact that some influence does exist, as the judges are not professional judges. The panel is comprised of a professional judge and military commanders who have no legal training.

The State of Israel chose to preserve the same constitutional safeguards in the military courts in the administered territories as are available to an accused in a military tribunal within the State of Israel; notwithstanding, that it could have conducted the criminal proceedings in the military court in accordance with rules of procedure and evidence applicable in the indigenous criminal courts in the territories. It should be noted that the State of Israel has decided that the rules of evidence to be applied in the military courts will be the same as the rules applied in courts in Israel.[176] In contrast, the right of a detainee to be brought before a judge under the OCSP differs from the right of an Israeli citizen within the territory of the State of Israel to be brought before a judge. Whereas in Israel a detainee must be brought before a judge within twenty-four hours of arrest,[177] under the OCSP, it is possible to detain a person and only obtain a warrant of arrest ninety-six hours later.[178] Under the OCSP, more serious harm is caused by the fact that a police officer is authorized to issue an arrest warrant within seven days.[179] Under Israeli law, only a judge may issue an arrest warrant.

An additional discrepancy between the rules of procedure applicable in Israel and those under the OCSP relates to the right of a detainee to meet with an attorney. The law applicable in the courts in Israel enables a meeting between a person suspected of security offenses and his attorney to be delayed for up to ten days with the authorization of the officer in charge[180] and up to twenty-one days with the authorization of the President of the District Court, subject to a right of appeal to the Supreme Court.[181] In contrast, under the OCSP, the person in charge of the investigation may delay a meeting between the detainee and his attorney for up to fifteen days on grounds of the security needs of the region or the needs of the investigation. Furthermore, the confirming authority is entitled to extend this period by fifteen days. Therefore, it is possible to delay a meeting for up to thirty days.[182]

These discrepancies and their ramifications certainly highlight the existence of a departure from the balance between security needs and the rights of the accused to a fair trial and to protection of the constitutional safeguards, which guarantee a fair trial. In 1989, the Betselem organization

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176. *See* OCSP, *supra* note 154, cl. 9. This clause provides: "in relation to the laws of evidence, a military court will act in accordance with the rules applicable to criminal matters in the courts of the State of Israel." *Id.*

177. *See* Criminal Procedure, *supra* note 92, § 29(a).

178. *See* OCSP, *supra* note 154, cl. 78 (c).

179. *See id.* cl. 7d (d)(1).

180. *See* Criminal Procedure, *supra* note 92, § 35(c).

181. *See id.* § 35(d).

182. *See* OCSP, *supra* note 154, cl. 78(c).

presented a report based on observations made by attorneys for the organization concerning trials in the military courts.[183] The findings of the report reflect the dangers discussed here:

> The serious situation, in which the majority of hearings are delayed for about a month because of the failure to bring up accused persons under arrest or because of the failure of witnesses for the prosecution to appear violates the basic right of a man not to be punished by lengthy detention prior to his guilt being established in a fair trial. The punishment therefore precedes the conviction and the court seems only to determine the date of conclusion of the punishment, and not act as the decision-maker on the question of guilt and innocence.[184]

The comments of military judge Aryeh Cox (Res.) emphasize even more the dangers posed by a military court system:

> It is clear that this court is not a natural and regular court, but some sort of solution which the military government found to enforce the government of occupation. The work performed there is not purely judicial: in practice, the whole situation in the military court in Gaza seems to be something from another world. Hundreds of family members outside, tens of prisoners inside, most of them very young, and the impression left is that they have lost faith in the system and do not even try to defend themselves. They admit everything. Their defense counsel who in many cases are pathetic figures, also accept the situation and in practice do the work of middlemen for purposes of punishment. I found a complete symbiosis there between the prosecution, the judges and the lawyers. The accused are on the sidelines and all is conducted with stoic acceptance. We found accused, we also found suitable offenses for them, and what has to be done now is to find even more suitable punishment for them.[185]

There can be no more doubt; evidence in the field has shown that the primary influence exerted by the character of the judicial forum on the rights of an accused ensues from its composition. In a military court in which the judges are appointed by a military commander, it follows that the judges and

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183. *See Report from the back yard.* SUBJUDICE: LEGAL MONTHLY FOR LAWYERS AND THEIR CLIENTS 1: 30, 1992.

184. *Id.*

185. Sarah Leibowitz, *Interview with a military judge*, HADASHOT, (Oct. 11, 1991) (Heb.).

prosecutors who serve in the Military Advocate's Unit are subordinate to one commander and are dependent on one authority for their advancement. Likewise, it follows that the whole system of the separation of powers between judges and prosecutors that exists in the regular civil courts disappears when it comes to a military court:

> In military courts, for example, the ties between the judge and prosecutor are close ties, occasionally only a thin wall separates the room of the prosecutor from the room of the judge. They are really one on top of the other. As the separation of powers is a basic principle of every legal system, its absence comprises one of the main reasons for the fact that the element of adjudication in the territories is not pure.[186]

From observations conducted by the Betselem organization during the period it appears that the majority of trials are not based on witness testimony while convictions are based on admissions of guilt by the accused. This finding casts doubt on the conclusion that the process before a military court indeed leads to a just trial, notwithstanding the provisions we have already discussed that apply the rules of procedures and evidence prevailing in Israeli law to the military courts:

> Contrary to the civil court system, the ability of a military judge in the territories to check whether he is indeed conducting a just trial and whether the accused committed all the offenses, is non-existent, because generally there is a total and comprehensive admission of all the offenses. Thus, the judge is deprived of the ability to examine whether the person before him committed the offenses, in whole or in part, or whether he is innocent. In other words, in practice, the judge cannot unearth the truth and conduct a just trial. In this area of offenses there is another factor, fundamental and no less complex than those that come after it. The investigators reach a large portion of the offenses from 'snitching.' There, people admit everything, and from confession to confession they incriminate others. It is very dangerous and uncertain to decide the fate of a person on the basis of 'snitching.' And on the basis of this information charges are brought. This is a chain reaction: 'information, indictment, confession, punishment. And if we mention punishment, the level of punishment too does not give rise to equal justice. When a

186. *Id.*

> Jew kills an Arab he may be given a year's imprisonment. When an Arab throws a stone and causes no damage, he receives a similar punishment. This is not a just trial.'[187]

This is the practical result of a military trial that is different in composition to an ordinary civil trial, even when it purports to apply procedures that are similar to the procedures applicable in the ordinary civil courts. The outcome is deep erosion in the basic rights of each accused to a fair trial. Such an outcome contradicts the tenets of a democratic state. What will be the result in a situation where not only the panel trying the accused (terrorists) is different from the panel sitting in an ordinary civil court, but the law, too, allows the application of legal procedures and laws of evidence which are different and which seek the benefit of one party only, the prosecution, as ordered by the President of the United States? Such an arrangement will be completely incapable of meeting basic principles of a genuine democratic regime that seeks truth and justice; the outcome will be known in advance and the discrepancy between this outcome and the truth will be palpable.

To complete the picture of the system of adjudicating security offenses established by the State of Israel, it should be noted that concurrently with the trial of persons suspected of security offenses in the military courts in the administered territories, the courts of the State of Israel, too possess jurisdiction to try persons charged with security offenses, including terrorists, under Israeli law.[188] In these cases, the domestic law of the State of Israel applies and not international law. However, it is important to emphasize that notwithstanding that the State of Israel is subject to large numbers of frequent and horrific terrorist attacks, it has not seen fit to set up special tribunals having exclusive jurisdiction to try terrorists. Jurisdiction is conferred on the ordinary courts that try all other criminal offenses and alongside this a special military court – the military court in Lod - has *concurrent* jurisdiction. The military court in Lod was set up and operates under the Defense (Emergency) Regulations, 1945.[189]

Most defendants coming within the doors of the military court in Lod court are Arab citizens and residents of Israel who breached the Defense (Emergency) Regulations, or Arab residents of the territories who committed such offenses within the territory of the State of Israel.[190] The fact that this court has concurrent and not exclusive jurisdiction to try terrorists (by virtue

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187. *Id.*

188. *See e.g.* Penal Law, *supra* note 8, Ch 7, B & D; Penal Law, *supra* note 8, sects 146-147; Defence (Emergency) Regulations, 58, 59, 62, 64, 66, 67, 84 and 85 (1945) [hereinafter Regulations]; Prevention of Terrorism Ordinance, secs. 2-4 (1948).

189. *See* Regulations, *supra* note 188, §§ 12-15.

190. *See* A. Ben-Haim, *Death Penalty in the Case Law of the Military Courts in Israel and the Administered Territories*, 10 LAW AND ARMY 35, 42 (1989) (Heb.).

of the breach of the Defense (Emergency) Regulations) to some extent lessens the fear that would have ensued had this court possessed exclusive jurisdiction. Yet, the fear does not leave altogether. Why was it not possible to be satisfied with the jurisdiction of the regular civil system?

I have explained that there is no justification for the existence of a separate tribunal save where the subject-matter requires particular expertise that is not possessed by all the judges of the regular courts or where the motive for establishing a separate tribunal is to advance the cause of justice. It seems that neither of these justifications formed the basis for the establishment of the military court in Lod, and this explains the lack of activity there and the fact that no indictments are filed there. In practice, it is the regular courts that conduct the trial of terrorists within the territory of the State of Israel, and they do so in accordance with the criminal law. Consequently, the path to amending the law so as to abolish the military court in Lod altogether is short.

PART FIVE

A comparative glance – the manner in which the United States and Britain cope with the trial of terrorists

The United States

In November 2001, President of the United States, George W. Bush, issued an executive order requiring that the trial of persons charged with terrorist offenses, whom are not citizens of the United States, to be conducted in special tribunals – military tribunals. The stated cause for this executive order was the terrorist attack of September 11, 2001. The reasoning behind the order includes:

> The speed of such tribunals, their portability, the availability of the death penalty, and their looser rules make them a good option, in Bush's view. But looser rules also mean a greater likelihood that the innocent would be convicted and the system manipulated by officials. Secrecy would mean no public scrutiny.[191]

The very dangers that were discussed previously in connection with the ramifications for due process resulting from the establishment of a special tribunal for a particular type of offense and the introduction of specially composed judicial forums, are likely to be seen in all their gravity as a result of the new legal situation created in the United States.

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191. Woolner, *supra* note 96.

As mentioned *supra*, the dangers of terrorism facing the United States led the President to decide that the legal rules of procedure and evidence applicable in ordinary criminal proceedings are not suitable in trials conducted by the military tribunals,[192] namely for a person who is not a citizen of the United States[193] and who is charged with terrorist offenses will be tried by a military tribunal without the protection and guarantees conferred on defendants in criminal proceedings in the courts of the United States:

> Instead, suspects will be tried by a panel of commissioned military officers; prosecutors will be permitted to introduce evidence not ordinarily admitted in court, such as hearsay and evidence obtained through illegal searches; and suspects will have no right to judicial review. Little if any of the proceeding are expected to be open to the public . . . . Defendants will be represented by counsel, but potential defense attorneys are likely to be selected or scrutinized by the government because much of the evidence against their client will be classified information . . . . And unlike U.S. jury trials, which require unanimous verdicts, a military commission will require only a two-thirds vote to determine guilt. A two-thirds vote of the commission is also required for sentencing, even for imposing sentences of life imprisonment or death. Decisions reached by a military commission, according to the executive order, will not be reviewable by any court or international tribunal. Only the [P]resident [sic] or [S]ecretary [sic] of [D]efense [sic] can review or overturn a tribunal's decision.[194]

"The statute that established the tribunal provides the accused with the presumption of innocence and the rights to a public hearing, counsel of his own choosing, cross-examination of witnesses and to appeal any conviction to a judicial body. Bush's commission denies all of these rights to the accused."[195]

First, it should be noted that the distinction made in the executive order between a terrorist suspect who is a U.S. citizen and one who is not a citizen and is subject to the jurisdiction of the military tribunal is problematic from a constitutional point of view, in the light of the injury caused to the principle

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192. *See generally* Military Order, *supra* note 3.

193. *See* U.S. CONST. amend. V, VI . The Constitution of the United States does not enable citizens of the United States to be tried before special tribunals. *See id.*

194. Blum, *supra* note 7.

195. Marjorie Cohn, *Let U.N. try terrorists*, NAT'L L. J., Dec. 10, 2001, at A21.

of equality.[196] The injury to the principle of equality before the law has a dual nature. The first concerns the distinction between a U.S. citizen and a foreign national located within the territory of the United States:

> Why should a hacker from Montana who launches a computer virus that infects terminals in hospitals and government facilities be subject to trial in a military tribunal if he is a green-card holder, but accorded a civilian trial if he is a citizen, when the relevant provisions of the Bill of Rights, and the separation of powers, apply without regard to citizenship?[197]

The second distinction is between a U.S. citizen and a non-U.S. citizen who is not located within U.S. territory, but was captured outside its borders and is tried before the military tribunal. From a constitutional point of view, this distinction is less grave, as it is customary to regard the principle of equality before the law as a principle confined to the territory of the United States.[198] As explained below, when a state decides to impose its laws and try a defendant before a tribunal of its own creation, it must conduct the legal proceedings in accordance with the central tenet of its system of law, the principle of "due process."

There are those who believe that the distinction between one who is a U.S. citizen and one who is not may carry practical dangers; as this distinction nourishes and strengthens the hatred felt by the Muslims against the United States and its citizens: "[t]he inherent distinction based on nationality unwittingly feeds the mind-set of non American Muslims as being victimized and unworthy of treatment according to higher standards reserved for Americans. This, of course, does nothing to ameliorate the hatred simmering below the surface."[199]

Beyond this, it is difficult not to obtain the sense that the establishment of the military tribunals with their special panels and special rules of procedures was designed to make it easier for the prosecutors to achieve a high rate of conviction that would not be achievable in the regular courts, where "due process" is diligently pursued.

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196. *See* the text accompanying notes 203 and 204. An explanation of the scope of protection afforded by the United States Constitution is provided *infra*.

197. Katyal & Tribe, *supra* note 127, at 1298.

198. *See* 42 U.S.C. § 1981(a) (1994) (the words are confined to "the jurisdiction of the United States" and to "states" and "territories"). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the provisions of the Equal Protection Clause "are universal in their application, to all persons within the territorial jurisdiction . . . ").

199. Michael J. Kelly, *Essay: Understanding September 11th - - An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV., 283, 292 (2002).

In other words, the efficiency of the hearing takes preference to the search for justice, which on occasion requires somewhat more time. Is this order of preference constitutional in a democratic state? There are those who think not: "We should not retreat from our constitutional system of justice, which has served us well for more than 200 years. The constitution guarantees all 'persons', not just citizens, basic fairness before depriving them of their liberty or their life."[200] Attorney Mary Jo White, U.S. Attorney for the Southern District of New York, explains:

> In the United States, we have all of the safeguards of the Constitution, the rules of criminal procedure, and the rules of evidence, which are fully applicable to defendants accused of terrorists crimes who are tried in American courtrooms. I believe that the United States' judicial system is a model of how terrorist crimes should be prosecuted. We should not lower the bar of our criminal justice system when it is invoked to deal with the very serious crimes of terrorism. If we did lower the bar, we should be bowing to that particular type of crime and diluting our own fundamental principles of fairness and due process.[201]

Therefore, the question is: are human rights and constitutional protections relevant to terrorist suspects and defendants? In my opinion, the answer to this is in the affirmative. The purpose of constitutional safeguards is not solely to protect defendants, but also to allow a fair trial, to protect a defendant against the unjustified abridgement of his rights, and to protect society in general. Doing justice is also relevant when dealing with terrorist suspects: "[T]o bring these terrorists to justice with justice."[202]

Moreover, there are those who believe the performance of the enforcement authorities of the United States are subject to constitutional rules, such as prohibitions on unreasonable searches and arrest,[203] even when they fulfill their functions outside the borders of the United States:

> [A]ny action under authority of the United States is subject to the Constitution. If U.S. law enforcement officers act in a foreign state, they must of course observe the laws of the foreign state. But neither the high seas nor foreign soil can

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200. Cohn, *supra* note 195, at A21.

201. Mary Jo White, *Symposium: Panel I: Secrecy and the Criminal Justice System*, 9 J.L. & POL'Y 15, 16-17 (2000).

202. Jeff Blumenthal, *Set Up Rights for Al-Qaeda Captives, ABA Urges Bush*, FULTON COUNTRY DAILY REPORT, Feb. 6, 2002 (V113, N25) (quoting Evan Davis, New York Bar President).

203. *See* U.S. CONST. amend. IV.

> free a U.S. law enforcement officer from the restraints on official behavior imposed by the United States Constitution.[204]

How, then, shall we allow measures to be taken within the borders of the United States that are not compatible with constitutional principles applicable even outside the borders of the United States?

It will become apparent that the investigatory and governmental authorities are also of the opinion that the Constitution of the United States binds them in their activities on U.S. territory. This is the reason why the practice developed whereby the government of the United States secretly transports countless persons suspected of involvement in terrorist activities to other countries where investigative techniques may be used that would be unlawful in U.S. territory:

> Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics —including torture and threats to their families — that are illegal in the United States . . . .[205]

There is no room for the distinction between the prohibition on implementing unconstitutional investigative tactics on U.S. land and the similar prohibition against operating legal procedures in an unconstitutional manner so as to put a spoke in the wheels of justice. There are those who may argue that the U.S. Constitution only applies to U.S. citizens: "[S]ome measure of allegiance to the United States, as evidenced by citizenship or residency, is the *quid pro quo* for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials."[206]

This stance touches on the constitutional rights entrenched in the First, Second, Fourth, Ninth and Tenth Amendments of the Constitution, but not the constitutional rights entrenched in the Fifth and Sixth Amendments.

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204. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 451 (1990).

205. Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at 1.

206. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1236 (9th Cir. 1990) (Wallace, J., dissenting) (emphasis added).

Accordingly, those who advocate that the Constitution only applies to the citizens of the United States believe that "aliens" are still entitled to due process — that is to the protection of the Fifth and Sixth Amendments to the Constitution — which give the right to counsel, cross-examination, and to a trial in the presence of the defendant. The explanation for this position may be found in the language of the Constitution. Whereas the First, Second, Fourth, Ninth and Tenth Amendments refer to "people," the Fifth, Sixth and Fourteenth Amendments refer to "any person" and "no person."[207] The use of the term "person" and not "citizen" displays the deliberate intention to protect aliens.[208]

In other words, even those who argue that the Constitution of the United States only applies to U.S. citizens cannot justify the negation of constitutional safeguards that are accorded to a defendant by the United States. The conduct of fair proceedings and due process are not dependent on time and place. The question is not whether everyone in the world, including terrorists, have the right to enjoy the constitutional protections afforded by the U.S. Constitution, but rather whether everyone in the world has some expectation of being tried in the United States when they are actually located outside its borders. The answer is no. However, as noted in cases of terrorist activities that harm the citizens of the United States, the latter has jurisdiction, and in such cases it would be reasonable to expect that it would operate its judicial system in a constitutional manner in so far as concerns the due process of law.

Indeed, the same U.S. Constitution that provides the basis for the entire legal system in the United States and affords constitutional protection to the defendant, deals in the First and Sixth Amendments with the basic guarantees of a fair trial: the right to a trial in open court, a trial by jury, and public review by way of freedom of expression concerning the process.[209] These rights may be justifiably violated (as opposed to being abridged in advance) when dealing with the trial of terrorist suspects. Secrecy is a necessary measure for preserving the integrity of investigations concerning continuing terrorist offenses in order to protect the safety of: persons transmitting information to the Grand Jury and to the government, witnesses, defendants and their families. Consequently, there is a clash between the right to an open trial and the public interest in open legal proceedings on one hand and the

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207. *Id.* at 1239.

208. *Yick Wo*, 118 U.S. at 369 ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens"). *See also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was deliberately formulated in order to extend certain rights to aliens).

209. *See* U.S. CONST. amend I. ("Congress shall make no law... abridging the freedom... of the press"). *See also* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (observing that "public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system").

public interest in holding proceedings *in camera* and incorporating other elements of secrecy where the offenses charged are terror offenses. Which interest is overriding in this clash? Attorney Mary Jo White answers this question as follows:

> Prosecutors and judges must be sensitive to the media and the public's right of access to the judiciary in international terrorism cases.... At the same time, however, what we would ask is that the media and the public recognize, and even try to accept, that the law protects and needs to protect the compelling countervailing interests that are so frequently present in international terrorism cases: national security; public safety; ongoing investigation; often involving ongoing terrorist plots; and witness safety. Very often, in terrorism cases, the law will strike a balance in favor of greater closure, sealing and secrecy. This may at times frustrate the media. But that, in my view, is a necessary and lawful price to pay.[210]

It is not disputed that there is a need for secrecy in appropriate cases in which there is a real fear that openness will endanger essential public interests. At the same time, these are exceptional cases. The rule will continue to be openness and in a regular legal proceeding the need to take secret measures will be examined in accordance with the rules of procedure applied by the existing legal system. The legal position that has been created today in the United States following the issue of the executive order, reflects a complete shift in the rules of the game not only the rule of public trials, but also additional rules that guarantee the existence of fair criminal proceedings. The cumulative effect of these changes is not and cannot be a necessary and lawful price to pay. First, there is the fact that the framework for the conduct of the trial has changed – the existing federal framework is no longer suitable. This change carries a fundamental flaw that will have an influence on the entire proceedings and ultimately, on the substantive rights of the defendant. The defendant's life and liberty may be taken away from him unnecessarily and unjustifiably. This flaw cannot be accepted or justified: history has proven that the United States is able to contend with international terrorists who have injured U.S. citizens by placing them on trial *within the existing legal framework.* Thus, for example, in the case of Fawaz Yunis, who was involved in the hijacking of a Jordanian airplane in 1985, Yunis was tried in a federal court in the United States (among the passengers there were U.S. citizens).[211] Another example concerned the American success in bringing Al-

210. White, *supra* note 201, at 20.

211. *See* United States v. Yunis, 924 F.2d at 1086, 1089 (D.C. Cir. 1991).

Jawary to trial. Al-Jawary was accused of carrying out three attacks in New York in 1973.[212]

Conducting the trial of terrorists within the existing system will achieve the goal of deterrence much more ably than conducting a trial in "secret" tribunals: "The pursuit of terrorists overseas, as illustrated by the Al-Jawary case, demonstrates the commitment of the United States in bringing international criminals to justice. It also should serve as a deterrent to others."[213]

The executive order and the additional statutory and constitutional changes that followed the events of September 11, 2001, may be seen as a dangerous expansion of the United States' attitude towards terrorism as a special phenomenon that requires exceptional proceedings shrouded in secrecy.

In 1996, when the United States enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[214] and the Illegal Immigration Responsibility Act of 1996 (IIRIRA),[215] it created a special court that is entitled to make use of secret testimony and secret evidence to deport aliens charged with terror offenses. The consequences of operating this system were harsh:

> [C]onspiracy prosecutions operate invidiously in inviting the jury to assess the defendant's identity as an American . . . [asking] the jury to decide whether the defendant is one of 'us' engaging in protected speech, or one of 'them' conspiring . . . against our government. Xenophobia operates to make those defendants who are ethnic minorities seem more threatening and thus more likely to be guilty of seditious conspiracy. When the defendants are actually foreigners, such as the immigrants in the New York City terrorism trial, their identities cast even a longer shadow.[216]

The use of secret evidence inspired by fear of potential harm to national security led to many cases of unjustifiable deportations. When evidence is

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212. *See* United States v. El-Jassem, 819 F. Supp. 166, 170 (E.D.N.Y. 1993) (Al-Jawary and El-Jassem were the same person).

213. James S. Reynolds, *Domestic And International Terrorism: Expansion Of Territorial Jurisdiction: A Response To the Rise In Terrorism*, 1 J. NAT'L SECURITY L. 105, 109 (1997).

214. AntiTerrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. § 1214 (1996).

215. Illegal Immigrant Response Act of 1996, Pub. L. No. 104-208, 110 Stat. § 3009-546 (1996).

216. Bradly T. Winter, *Invidious Prosecution: The History of Seditious Conspiracy — Foreshadowing the Recent Convictions of Sheik Omar Abdel-Rahman and His Immigrant Followers*, 10 GEO. IMMIGR. L. J. 185, 212-13 (1996).

secret, it is difficult to imagine how the defendant may counter it, as a court has said:

> Rafeedie— like Joseph K. in *The Trial* - can prevail . . . only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.[217]

Another court explained the great danger to the principle of due process entailed by a rule that routinely permits secret evidence and described it as a violation, which is unconstitutional:

> Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggest that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process.[218]

These remarks, made by courts in the United States in connection with the special structures set up for deporting aliens, identified the fact that the government's measures undermined the adversarial system and the purpose underlying the legal system, namely, the discovery of the truth.

It is noteworthy to mention that when the courts ordered the disclosure of the secret evidence and allowed the defendants to provide evidence in rebuttal, no connection was found between the evidence and the defendants.[219] This was the state of affairs in a special system that allowed the use of secret evidence, yet enabled representation by an attorney and public and judicial review. What will be the outcome if a special system operates to try persons accused of terror offenses on the basis of evidence that is concealed for reasons of national security, does not allow the accused to choose his attorney, and does not permit review of any type which, on the contrary, merely allows secret proceedings behind closed doors?

The principal argument for the trial of terrorists by military tribunals is that terrorists are war criminals; accordingly, they should be tried in military tribunals for that exact reason and not because terror offenses are substantively different from other criminal offenses.

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217. Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989).

218. American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1070 (9th Cir. 1995).

219. *See generally* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists,'* 8 ASIAN L. J. 1, 19-24 (2001).

Even before September 11, 2001, it was customary to hear leaders of democratic countries comment to the effect that the struggle against the phenomenon of terrorism amounted to a war against terrorism: "This is a case involving a war."[220] If this is indeed a war, and after September 11, 2001, it is difficult to question this proposition:

> [A]nd it involved a battle plan, by enemy 'soldiers' of the Sheik, to target innocent civilian commuters for death in contravention of all international law of armed conflicts, then why was the venue for the war criminals a civilian court instead of a military tribunal?[221]

Trying acts of terrorism is trying acts of war. The court system, rules and judges were not intended to try these types of activities. This was also the explanation Justice Mishael Cheshin of the Supreme Court of Israel gave for the problems that, in his opinion, arose from the trial of acts of terror and the reaction thereto:

> The act of the murderer was in substance — even if not in its framework and formal definition — an act of war and to an act which is in essence an act of war, one responds with an act which too is in essence an act of war and in the manner of war. From this the great difficulty follows, we find it difficult to apply to an act of war standards which are required of everyday law: and I as a judge have not become accustomed to dealing with war and have not learned the ways of soldiers. *And here I am required to apply everyday law and standards of law to an act which is in substance an act of war. How shall I do this?*[222]

Following the declaration of war against terror and the issue of the executive order, senior sources in the United States explained that the reason for establishing a military tribunal was none other than that the United States was involved in a military conflict: "The traditional processes of criminal

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220. Richard Bernstein, *Biggest U.S. Terrorist Trial Begins as Arguments Clash*, N.Y. TIMES, Jan. 31, 1995, at A1.

221. *See* Crona & Richardson, *supra* note 47, at 351.

222. H.C. 1730/96, Sabiach v. General Biran et al, 50(1) P.D. 342, 369-370 (Heb.) (emphasis added) (The judgment deals with the decision of a military commander to demolish the houses of terrorists who had committed suicide attacks against Israeli citizens and had caused the death of innocent persons).

justice were inappropriate and ineffective . . . This is a war situation . . . This is all about dispensing military justice attendant to a military conflict."[223]

In view of the expansion of the phenomenon of terrorism, its development and strengthening, as reflected in the events of September 11, that lead to the deaths of thousands of innocent civilians, and that no society could have conceived so runs the argument of those advocating trial by military tribunals; submitting the perpetrators of these acts and their principals to the same jurisdiction as the perpetrators of other crimes. To the contrary: "The legitimacy of using military commissions in this country for trying 'unlawful combatants,' such as members of Al-Qaeda charged with violating the laws of war, is not open to serious question." [224]

Military tribunals are not a new phenomenon. During the Civil War and later during the Second World War, Germans who had committed war crimes on U.S. territory were tried by military tribunals.[225] Thus, supporters of trying terrorists before military tribunals find justification for their position in U.S. Supreme Court judgments that examined the constitutionality of these tribunals and held that the federal government had power to order the establishment of military tribunals to try unlawful combatants who had breached the laws of war on U.S. territory. [226] At the time, Congress expressly authorized this measure there was certainly no constitutional problem.

The inescapable conclusion is that: "The definition and punishment of war crimes and crimes of universal jurisdiction are constitutionally the direct responsibility of Congress, not of the judiciary, and the historically and legally approved mechanism for discharging this duty is the military commission, not the federal district court."[227]

The court also rejected the contention that military tribunals breach the Sixth Amendment of the Constitution regarding the right to trial by jury, for the reason that the Amendment did not intend to have an impact on the existence of a preceding right – the right of nations to make use of military tribunals to try unlawful combatants:[228] "The Court's decisions in Milligan and Quirin establish that persons, be they citizens or otherwise, who as unlawful combatants commit acts that violate the law of war can be subjected to the jurisdiction of military tribunals when such are authorized by Congressional legislation."[229]

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223. Jim Oliphant, *War on Terror Is Reshaping Legal Landscape*, THE RECORDER, Nov. 19, 2001, at 3.

224. Hugh Latimer, *A legitimate tool*, NAT'L L.J., April 15, 2001, at A21. *See also* Crona & Richardson, *supra* note 47, at 356.

225. *See generally* Yamashita v. Styer, 327 U.S. 1 (1946).

226. *See generally* Quirin v. Cox, 317 U.S. 1 (1942).

227. Crona & Richardson, *supra* note 47, at 375.

228. *See Quirin*, 317 U.S. at 38-45.

229. Christopher Dunn, *Reviewing the Constitutionality of Military Tribunals*, N.Y.L.J., Jan. 11, 2002, at 1.

It should be noted, the judgment of the court dealt with the existence of express authorization by Congress for the establishment of the tribunals. [230] No such express authorization was given in relation to the order issued by President Bush.[231]

Congress authorized the use of force in relation to all those involved in any way with the events of September 11. In its resolution, Congress refrained from using the term "war."[232] Only in emergency situations, where waiting for Congressional authorization is likely to pose a danger to the security of the nation and its citizens, is the President entitled to act without the authorization of Congress.[233] When the executive order was issued one month after the terrorist attack, this was not the case.

Beyond this, it is not clear if the order is confined solely to unlawful combatants who have breached the rules of war on U.S. territory (as noted, Congress authorized the use of force only in respect of those involved in the attack of September 11). It seems that the President intended a much broader application that would efficiently fight international terrorism. A hint of this may be found in Spain's refusal to extradite terrorist suspects to the United States for fear that they would be tried before military tribunals that failed to meet basic and essential standards of due process. "Authorities in Spain this week expressed reluctance to hand over eight alleged terrorists they have arrested if it meant the men would be put before a U.S. tribunal."[234]

To the contrary, it may be argued that trying terrorists before a civilian court and not before a military tribunal that follows special procedures may

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230. *See Quirin*, 317 U.S. at 1 (In Quirin, Congress authorized the use of military tribunals. This authorization was the result of several legislative decisions stitched together. First, Congress had declared war and had understood the government's total commitment to the war effort). *See* Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796. Second, there was a pair of statutes explicitly authorizing trial by military commission for spying and providing aid to the enemy. *See also* Brief of the Respondent app. III, at 78-79, Quirin (Orig. Nos. 1-7), reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 397, 479 (Philip B. Kurland & Gerhard Casper eds., 1975).

231. *See* Katyal & Tribe, *supra* note 127, at 1284-93. For the distinction between the cases in the past when Congress authorized trial by military tribunals and the circumstances in which the executive order was issued following the events of September 11, 2001. *See id.*

232. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224. (2001) The Resolution states:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determinate planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

233. *See* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 4 (1947).

234. T.R. Reid, *Europeans Reluctant to Send Terror Suspect to U.S.*, WASH. POST, Nov. 29, 2001, at A23. *See also* Berke, *supra* note 121.

serve the interests of the terrorists. A public trial open to the press may provide them with a platform to disseminate their ideas, persuade people of the justice of their actions, and most seriously, continue to sew fear among the general public.[235] These phenomena must be prevented and a military tribunal, operating on the basis of special criminal procedures, has the power to do so before they take place. In the United States, for example, the President decided to try Zacarias Moussaoui before a federal court, even though he is a French citizen. According to the United States, Moussaoui was involved in the planning and execution of the attack of the September 11. He was supposed to be one of the airplane hijackers; however, his arrest on immigration charges in August of 2001 prevented him from taking part in the actual attack.[236] During his trial, the fear that the public process would be misused bore fruit. Moussaoui waived his right to representation by counsel and instead of concentrating on conducting his defence chose to make political speeches with the aim of broadcasting his views, even though these views tended to incriminate him:

> For one thing, his 50-minute speech before Judge Leonie M. Brinkema supported the prosecution's portrait of him as a hate-filled terrorist. He told the Court that he prayed to Allah for 'the destruction of the United States of America' and for the 'destruction of the Jewish people and state.[237]

Is the fear and panic that speeches of this type seek, a price that society wishes to pay? If defendants charged with terrorism ignore their rights, including their right to due criminal process, and instead focus on using the process for their own contemptible purposes, one must be justified in strengthening the legal position of tribunals, such as the military tribunals for terrorists, in order to enable their legal procedures to operate to prevent the terrorists from using the process as a device for achieving their objectives.

There is no doubt that court room "shows" of the type staged by Moussaoui must be prevented. However, the tools for preventing these displays are not necessarily found in closed hearings before a military tribunal. It is possible to conduct the trial in a civilian court, in which the

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235. *See, e.g.*, Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 § 20 (Eng.) [hereinafter Prevention of Terrorism Act]. "Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Id.* The desire to cause fear is one of the prominent components of all the various definitions of terrorism.

236. *See* Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks; Action Formally Links Man to Al Qaeda, States Evidence Against Bin Laden*, WASH. POST, Dec. 12, 2001, at A1. Robert O'Harrow, Jr., *Moussaoui Ordered to Stand Trial In Alexandria*, WASH. POST, Dec. 14, 2001, at A15.

237. Neil A. Lewis, *Mideast Turmoil: The Terror Suspect; Moussaoui's Defense Plan Complicates Terror Trial*, N.Y. TIMES, April 26, 2002, at A12.

judge may choose to exercise his inherent power to caution the defendant against improper use of the process. In cases where the defendant disregards these cautions, the judge may immediately terminate his "speech" and find him guilty of contempt of court.

It should be recalled that the support for the trial of terrorists before the civilian court system in accordance with existing legal procedures is not intended to provide the terrorists with a "platform" for spreading their ideas, but rather to prevent the conviction of innocent persons. As we have explained, the danger of convicting innocent persons increases when the process is conducted in a military tribunal, in accordance with special procedures that violate the rights of the accused. Indeed, military tribunals like the civilian courts are interested in the truth and are capable of unearthing it. However, contrary to the position in the civilian legal system, exposing the truth as it emerges from the evidentiary materials before it is the central consideration guiding the military tribunals and not the real fear which informs the civilian legal system that innocent people may be convicted.

There are those who contend that because we are concerned with the trial of terrorists, it would be correct not to focus too intensely on the fear of convicting the innocent:

> The civilian criminal justice system, which entails a trial to a jury of twelve persons who must unanimously agree that a particular defendant is guilty beyond a reasonable doubt, is designed to err on the side of letting the guilty go free rather than convicting the innocent. However, when this nation is faced with terrorist attacks that inflict mass murder or hundreds of millions of dollars damage in a single instance, we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims becomes paramount. [238]

More precisely, it would seem that even those who support terrorists being tried by military tribunals are not willing to go to the extreme of allowing rules of procedure and evidence as stated by the executive order: "I think even those of us supportive of the concept of a military tribunal think it makes sense to confine its jurisdiction to the leaders of terrorist organizations."[239] "These are extreme circumstances, and I think the [P]resident's action is not unreasonable .... On the other hand, it is a little surprising they would settle on less than a unanimous vote to impose the death penalty."[240]

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238. Crona & Richardson, *supra* note 47, at 379.

239. Blum, *supra* note 7 (quoting former Deputy Solicitor General, Philip Lacovara, now a partner in the Washington, D.C. office of Chicago's Mayer, Brown & Platt).

240. *Id.* (quoting former Secretary of the Army Togo West, Jr., a lawyer at D.C.'s Covington & Burling).

In their article, Spencer J. Crona and Neal A. Richardson, who support military tribunals, propose a model that would better ensure the exposure of the truth than would be the case under the procedures for operating the military tribunals outlined in the executive order. For example, they would allow a deviation from the rules of evidence prevailing in the "regular" legal system, but would prohibit the admission of evidence elicited in an unlawful manner, such as an unlawful search, in contravention of the right against self-incrimination, or in a statement given without the customary Miranda warning.[241] And yet, the authors contend that the deviation from the rules of procedure and evidence, the erosion of constitutional safeguards available to a defendant facing a military tribunal, and the violation of the due process of law, are all legitimate measures in the war against terror.

> [T]he pre-eminent question with due process always is; given the circumstances, what process is due? We assert that the military commission approach provides the process due to those accused of committing terrorist war crimes . . . It is legally and intellectually disingenuous to provide terrorists the same rights as persons accused of ordinary crimes against society. Our Bill of Rights was designed to protect individuals in society against the arbitrary exercise of government power. It is not meant to protect commando groups warring on society through arbitrary acts of mass violence. [242]

I consider the argument, that those who breach the laws of war are not entitled to enjoy any of the constitutional protections conferred by the U.S. Constitution, irrelevant. The desire to try persons within the "regular" legal system is motivated by the wish that society enjoy the benefits of doing justice, which includes convicting the guilty and acquitting the innocent. This is the primary characteristic of every court and tribunal. It is a forum of justice. The enjoyment obtained by an accused from constitutional safeguards is an enjoyment that is ancillary to the primary purpose of due process, which will ultimately end with the revelation of the truth and the performance of justice.

Indeed, why not show the world that the United States is able to "perform justice?" Why is it necessary to be enveloped in this cloak of secrecy?

> Why are we afraid of using our own processes? Trials are emblematic of both the possibility of knowledge and the risk

241. Crona & Richardson, *supra* note 47, at 385.
242. Crona & Richardson, *supra* note 47, at 396, 405.

> that information could come affecting judgment of those accused. The profoundly emotional response to the tragedy and horror of Sept. 11, 2001, has created an environment afraid of deliberation. The effort to preclude that process represents a desire to ensure punishment. Despite the terrorists attack on the United States, the presidency has continued to function. And although disrupted by anthrax, Congress still works. *Why should we accept the order's premise that the federal judiciary cannot similarly do its job of sorting the guilty from the innocent? Now is not the time for a radical form of alternate dispute resolution. Rather, it is a time to display our courts and our constitution as proudly as our flag.*[243]

If any legal system in the world can cope in a fair, efficient, and open manner it is the American legal system: "No country with a well functioning judicial system should hide its justice behind military commissions or allow adjudication of the killing of nearly 4,000 residents by an external tribunal. Why not show the world that American courts can give universal justice?"[244]

Moreover, it should be remembered that terrorism is not a new phenomenon. During the Clinton period, a number of terrorist attacks took place against the United States. At that time, no one proposed trying terrorists before military tribunals. To the contrary, Attorney General Janet Reno treated terrorists like other criminals: "There are good reasons to use the criminal justice system. It sends a signal to the world of the unimpeachable integrity of the process."[245]

The victims of the acts of terror of September 11 justify the executive order. In their view: "Al-Qaeda and its supporters . . . despise the freedoms Americans cherish and have not only declared war on this country but also declared hatred against it."[246] This argument supports the position that the executive order is likely to be understood and accepted on an emotional basis because of the many fatalities and injuries caused by the terrorist attack. However, this argument does not justify the order; it misses the essence of the problem, the likelihood of an improper process leading to a discrepancy between the factual truth and the conclusions ultimately reached by the panel of the military tribunal.

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243. Judith Resnik, *Invading the Courts We Don't Need Military "Tribunals" to Sort Out the Guilty*, LEGAL TIMES, Jan. 14, 2002, at 34. (emphasis added).

244. Koh, *supra* note 54, at A39.

245. Oliphant, *supra* note 223, at 3 (quoting Randy Moss who headed the Justice Department's Office of Legal Counsel during the Clinton administration).

246. Blumenthal, *supra* note 202 (quoting U.S. Solicitor General Theodore B. Olson, whose wife died in the September 11 terror attack).

We should emphasize that we are not arguing that terrorists are entitled to move freely is not being set forth. The argument is that the state and society must support a process that identify those who are the real terrorists and those who are merely people wrongly suspected of terrorist offenses.

Because of the many criticisms directed at the executive order as originally formulated, along with the serious ramifications it had for a fair criminal process, on March 21, 2002, Secretary of Defense Donald H. Rumsfeld published an order specifying new guidelines for the operation of the military commissions for trying terrorists.[247] He stressed: "Let there be no doubt that these commissions will conduct trials that are honest, fair and impartial . . . While ensuring just outcomes, they will also give us the flexibility we need to ensure the safety and security of the American people in th[e] midst of a difficult and dangerous war."[248]

In theory, the new provisions in the order seek to achieve a fair legal process;[249] however, the existence of multiple basket provisions[250] may pose an obstacle to obtaining a fair trial in practice. It must be recalled that the concern here is with terror offenses that fall within the category of criminal offenses against national security. In such a class of cases, the prosecution will frequently demand to make use of provisions authorizing secret evidence or hearings *in camera* on grounds of national security. Accordingly, it is not clear whether the order issued by the Department of Defense will indeed lead to changes that are substantively different from those ensuing from the executive order; particularly in light of the provision that in every case of incompatibility between the two orders, the executive order shall govern.[251]

This is the place to note the principal changes effected by the Department of Defense's order:

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247. *See* Department of Defense Military Commission Order No. 1, *available at* http://www.defenselink.mil/news.Mar2002/d20020321ord.pdf (last visited Mar. 23, 2002) [hereinafter Military Commission Order].

248. DoD News: *Secretary Rumsfeld Announces Military Commission Rules, available at* http://www.defenselink.mil/news/Mar2002/b03212002_bt140-02.html (last visited Mar. 23, 2002) [hereinafter DoD News].

249. *See* Military Commission Order, *supra* note 247, art. 1. The purpose of this article is as follows: "[t]hese procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order." *Id.*

250. *See, e.g., id.* art. 9 (provisions that place national security at the head of the list of priorities and prohibit contrary activities). Article 9 provides for the protection of state secrets that "[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." *Id.* For a provision that enables hearings *in camera* on various grounds of state security, see Article 6(B)(3): "Grounds for closure include . . . intelligence and law enforcement sources, methods, or activities; and *other national security interests.*" *See id.* art. 6 (emphasis added).

251. *See id.* art. 7(B).

- Application: Article 3 provides for application of the order in accordance with the executive order.[252] The distinction between a terrorist suspect who is not an American citizen and one who is a U.S. citizen is preserved. Only the former may be tried before the military tribunal.
- *Panel of judges*: Every panel will be composed of between three to seven judges.[253] The judges will be military officers in the U.S. army, and not professional judges. [254] Presiding over every tribunal will be a president who is required to be a military lawyer by profession.[255]
- *Prosecution*: All the prosecutors will be military officers who act as military advocates.[256]
- *Representation*: The accused has the right to be represented by counsel throughout the proceedings.[257] The accused has the right to choose a civilian attorney (to be paid for by the accused) on condition that the attorney meet a number of criteria, including security clearance at the level of "secret" and above.[258] Whether or not the defendant has chosen his own attorney, the judicial panel will appoint a military advocate.[259]
- *Trial format*: The rule is open trials and a press presence.[260] However, in cases where the prosecution wishes to present classified information, the hearing will be closed to the public.[261] This will also occur in cases where various security interests require hearings to be held *in camera*.[262]
- The rule is that the accused will be present during the hearings subject to certain exceptions relating to security interests.[263]
- The accused has the right to obtain the indictment in a language he understands in order to prepare his defense.[264]
- The accused will enjoy the presumption of innocence and will be deemed innocent until his guilt is proved.[265]
- The standard of proof needed for a conviction is beyond a reasonable doubt.[266]

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252. *See id.* art. 3(A).
253. *See id.* art. 4(A)2.
254. *See id.* art. 4(A)3.
255. *See* Military Commission Order, *supra* note 247, art. 4(A)4.
256. *See id.* art. 4(B)2.
257. *See id.* art. 4(C)4.
258. *See id.* art. 4(C)3(b).
259. *See id.* art. 4(C)2.
260. *See id.* art. 5(O).
261. *See* Military Commission Order, *supra* note 247, art. 6(D)5(c).
262. *See id.* art. 6(B)3.
263. *See id.* art. 5(K).
264. *See id.* art. 5(A).
265. *See id.* art. 5(B).
266. *See id.* art. 5(C).

- The accused will obtain the benefit of the privilege against self-incrimination — he cannot be forced to testify against himself, and his refusal to testify cannot be used against him.[267]
- The accused will have the right to conduct cross-examinations of prosecution witnesses.[268]
- The accused shall have the right of access to the evidence against him.[269] At the same time, the rules of evidence will differ from the rules of evidence in the civilian legal system.[270] It will be possible to use types of evidence that are inadmissible in the civilian legal system such as hearsay or opinion evidence:[271]

The military will allow prosecutors to use evidence that has a '*probative value to a reasonable person,*' which could include hearsay statements or documents and other evidence that came into prosecutors' hands through unorthodox means.[272]

The evidence standard opens the door to hearsay and physical evidence obtained by military forces in Afghanistan . . . preventing any chain-of-custody challenges.[273]

- The prosecution has the right to use secret evidence and not to disclose the source of the evidence.[274] It should be noted that the order does not allow use against the accused of evidence that has been concealed from the military defense advocate who has been appointed for him.[275] It would be expected to find a similar provision in relation to the failure to disclose information to the civilian lawyer, as the latter is required to possess security clearance at least at the "secret" level; however, the order is silent about this situation. Its silence is likely to be interpreted as permission to use evidence against an accused even though that evidence has not been disclosed to the civilian lawyer who has been appointed by the accused to conduct his defense. In contrast, in a trial in the civilian court system, the prosecution is obliged to disclose secret

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267. *See* Military Commission Order, *supra* note 247, art. 5(F)(G).

268. *See id.* art. 5(I).

269. *See id.* art. 5(E).

270. *See id.* art. 6(D)(1).

271. *See id.* art. 6(D)(3). This provision states that "[s]ubject to the Requirements of Section 6(D)(1) concerning admissibility, The Commission may consider *any other evidence including, but not limited* to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." *Id.* (emphasis added).

272. Associated Press, *Military Tribunals to Resemble Courts-Martial*, DOW JONES INT'L NEWS, Mar. 20, 2002 (emphasis added).

273. David E. Rovella, *Tribunals Tribulations. Debate focuses on Fairness, Secret Evidence and Appeals Process*, PALM BEACH DAILY BUSINESS REVIEW, Mar. 26, 2002, at A7.

274. *See* Military Commission Order, *supra* note 247, art. 6(D)5(a).

275. *See id.* art. 6(D)5(b).

information and its sources or lose a conviction. Such a situation is likely to complicate the defense of the accused.

- A two-thirds majority is needed for a conviction. However, in cases where the death penalty is imposed, there must be a unanimous verdict.[276]
- In the event of a conviction, the accused may apply for a review by a special panel composed of three military officers, at least one of whom has experience as a judge.[277] In suitable cases, the case will be transferred to the Secretary of Defense and from him returned to the judicial panel or transferred to the President for a final decision.[278]

There should be no mistake: these modifications draw us closer to the goal sought by the judicial system in a democratic country — the pursuit of justice. However, the fact that the legal procedures and laws of evidence are not identical to the legal procedures applicable in the federal legal system leaves the danger that the nature of the special judicial forum will have an impact on the procedural rights of the accused and ultimately on the latter's basic human rights. Allowing hearings to be conducted *in camera* and the use of secret evidence, as well as the use of various types of evidence that are not admissible in the civilian legal system are likely to result in serious violations to the procedural rights of the accused. Moreover, there is no guarantee that these violations will be proportional and for a proper purpose. This is because the judges are not professional judges, but rather military officers who identify very strongly with the national security interests. The prosecutors are military advocates as well. The resulting absence of the separation of powers between the judges and prosecutors continues to undermine the fairness of the criminal process as it is meant to be conducted under the order. There is a real likelihood of consensus between the judges and prosecutors as to the use of provisions that will violate the rights of the accused. No balancing factor will be available that will point to the error in making unnecessary use of "secret" measures. Moreover, the right of appeal provided for by the order is not a right of appeal to a civilian court or to the Supreme Court. It refers to a panel that is similar in its composition to the original judicial panel, and the final decision rests with the President. It follows that the entire process remains within a special military system; whereas, the offense itself is no different from any other criminal offense tried within the civilian framework. The existence of a right of appeal strengthens the elements of fairness and reasonableness in the legal process. The absence of a right of appeal to the civilian legal system will necessarily have an impact on the nature of the adjudication in the military tribunal, as:

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276. *See id.* art. 6(F).
277. *See id.* art. 6(H)(4).
278. *See id.* art. 6(H)(5) – (6).

> the existence of an appeals instance which has the function of bringing the actions of the lower court under review directly affects the functioning of the lower court, channels issues to their proper course and promotes, by virtue of acting in these areas, the standing and prestige of the judicial institution and the confidence felt in it.[279]

A close reading of the provisions of the order leads to the conclusion that the changes that the President decided to authorize were proper but insufficient. One may understand that within the framework of the war against terror, the President of the United States thought he was under a duty to establish separate tribunals to try terrorists in order to focus the task of adjudication on this subject-matter and draw the population's attention to the steps taken by the government to promote their security. The Secretary of Defense explained it as follows:

> Make no mistake, we are dealing with a dangerous and determined adversary, for whom Sept. 11 was just the opening salvo in a long war against our nation, our people and our way of life. We have no greater purpose, no greater responsibility as a nation, than to stop these terrorists, to find them, root them out, and get them off the streets, so that they cannot murder more of our citizens. The President has a number of tools at his disposal to meet that difficulties challenge, including the use of military commissions to try captured Taliban and Al Qaeda terrorist.[280]

It is difficult, perhaps even impossible, to understand what connection exists between the need for intensive and focused judicial treatment of terror offenses designed to capture terrorists and distance them from society, and the modification of the laws of procedure and evidence applicable in the trial of every other criminal offense. Special judicial treatment should not deviate from just forms of treatment. The amendments to the order have not yet internalized this principle. So long as the tribunals act otherwise than in accordance with the rules of procedure applicable in all other criminal processes, the chances of capturing the real terrorists are not great.

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279. H.C. 87/85, Argov v. Commander of IDF Forces in Judea and Samaria et al, 42(1) 353, 373 (Heb.).

280. *See* DoD News, *supra* note 248.

Great Britain

The path that Britain chose to pursue in dealing with terrorism is primarily that of counter-terrorism legislation. This legislation clearly leads to the different treatment of terrorist suspects as well as to divergent legal procedures and rules of evidence applied in connection with persons accused of terrorist offenses.

Statutes such as the Prevention of Terrorism (Temporary Provisions) Act of 1989 (PTA) and the Northern Ireland (Emergency Provisions) Act of 1996 (EPA) confer upon the police and the security forces broad powers of search, arrest, and detention that can be carried out without a warrant and without need for reasonable suspicion.

The legislation having the greatest ramifications for the conduct of a fair trial is the Criminal Justice (Terrorism and Conspiracy) Act of 1998 (CJTCA). This Act significantly modified the type of evidence admissible in a legal proceeding on the basis of which suspects may be convicted of involvement in terrorist organizations. In order to convict a person of membership of an organization listed under the Act, the CJTCA allows a police officer to testify that: "[I]n his opinion, the accused belongs to an organization [sic] which is specified, or belonged at a particular time to an organisation [sic] which was then specified."[281] This testimony is admissible and evidence of the contents of the statement, although a person cannot be convicted merely on the basis of a police officer's testimony. [282] As a result of this Act, the police officer is transformed into an expert witness, who is not only entitled to testify as to the facts, but may also give interpretations and opinions.

The possibility of obtaining an impression from the opinion of a police officer combined with the situation where increased use is made of secret evidence — on the ground that disclosing the evidence would be contrary to the public interest[283] (because it would reveal the police officer's source of information thereby endangering the life of the informant) — is likely to seriously violate the right of the accused to due process and his ability to refute the evidence against him or cast doubt on the impression created by the police officer in his testimony against him.

The issue of using secret evidence arises in two separate situations. In the first situation the prosecution may keep the evidence secret and still make use of it, in other words, the secrecy is specifically directed towards a certain defendant and his defense attorney. The secrecy does not apply in relation to the court and the prosecution is entitled to present the evidence to the judges. This evidence is likely to have significant influence on the judgment of the court, notwithstanding that the accused has not been given any opportunity to

281. Criminal Justice (Terrorism and Conspiracy) Act, 1998, ch. 40, §1(2) (Eng.) [hereinafter CJTCA].

282. *See id.* §1(3).

283. *See* R. v. Hennessey, 68 Cr. App. R. 419, 425 (1978).

cast doubt on the reliability and relevance of the evidence against him. The second situation is where the prosecution seeks to keep evidence secret, but in so doing forfeits any opportunity to make use of the evidence against the defendant or bringing it before the court.[284] The privilege is directed at the accused and his defense attorney as well as the court. In a case where the interests of justice require the disclosure of the evidence and the prosecution persists in its refusal to disclose it, the defendant will most likely be acquitted.[285] The CJTCA is concerned with the first situation. This is the more serious scenario from the point of view of the ramifications for the basic right of the accused to a fair trial.

At the same time, the court held in 1994 that there was no impropriety in the use of secret evidence where the intention was to protect the identity of an informant used by the police, except in cases where the exposure of the informant would enable the defendant to prove his innocence or prevent a miscarriage of justice.[286]

In terror type offenses, the clash between the public interest in using secret evidence and the right to a fair trial, and the danger of causing a miscarriage of justice to an accused is severe. The likelihood that the defendant will succeed in proving that his interest in disclosing the evidence overrides the interest in defending public security is non-existent:

> [I]n many of these situations it is likely that the balance may favor non-disclosure. This is due to the nature of prosecutions for terrorist offenses. They often involve information flowing from highly confidential intelligence sources . . . . Also, there will be a great need to keep the identities of

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284. *See, e.g.*, Evidence Ordinance, *supra* note 99, at sec. 45. This section states that

> A person does not have to deliver *and the court shall not admit*, a piece of evidence, if a Minister expressed the opinion by a certificate signed by him that delivering it is liable to injure an important public interest, unless the Court hears that the matter of the petition of the party who asks that the evidence be revealed decides that the need to reveal it in order to do justice outweighs the interest not to reveal it.

Id. (emphasis added).

285. *See* M.A. 838/84, Livni et al v. State of Israel, 38(3) P.D. 729, 736-737 (Heb.). This case states that:

> Where the court has held that the evidence must be disclosed, the prosecution faces a dilemma, whether to continue the criminal proceedings or end them. If it continues, it will have to disclose the evidence. If it believes that disclosure of the evidence will harm national security, it will have to bring about the termination of the criminal proceedings and on occasion even the acquittal of the accused.

Id. This is the law applicable in Israel.

286. *See* R. v. Keane, 2 All E.R. 478, 99 Cr. App. R. 1 (1994). Likewise, the laws of evidence in Israel permit the disclosure of privileged information where the need to disclose it in order to prevent a miscarriage of justice supercedes the interest in non-disclosure. *See* Evidence Ordinance, *supra* note 99, at secs. 44(a) and 45.

> informers confidential due to the reputation of certain paramilitary and terrorist organizations of exacting revenge on informers.[287]

The Act also undercuts the defenses available to a defendant and his right to a fair trial by permitting the violation of his right to silence. The Act permits a jury to draw conclusions from the silence of the defendant during the investigation and hold that silence against him in two situations.[288] First, when the suspect was interrogated prior to being charged and was permitted to meet an attorney prior to the interrogation. Second, after he was charged or a police officer informed him that he would probably be charged and he was interrogated after he was permitted to meet an attorney. In addition, it should be noted that in these cases it is not possible to obtain a conviction solely on the basis of the defendant's silence.[289] Nonetheless, the Act is quiet as to the situation where the defendant's silence is joined with a police officer's opinion that the accused is a member of a terrorist organization.

Further erosion of a terrorist suspect's right to a fair trial may occur at an earlier stage when he is still only a suspect; as the Act permits a suspect to be held for up to seven days before being brought before a judge.[290] During the first forty-eight hours there is no obligation to provide the suspect with an attorney or allow him to make a telephone call. This leaves the door open for the application of enormous psychological pressure upon the suspect to answer the questions of the interrogation team and undermines his right to silence to an extent that may lead to an unsound conviction.

In the United States, as in Britain, it would seem the purpose of the measures that violate the right to due process is to deter terrorists and give preference to public and state security interests at the expense of human rights. This is achieved in a manner that is not proportional:

> The CJTCA is also unlikely to aid the apprehension of terrorists or to deter potential terrorists from committing offenses . . . . In the long run, all that the CJTCA may accomplish is an increase [in] the number of terrorist convictions and, given the evidentiary burdens that face these suspects, a corresponding increase in the number of innocent people falsely convicted.[291]

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287. Kevin Dooley Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act of 1998 Be Reconciled with its Human Rights Act?*, 33 VAND J. TRANSNAT'L L. 221, 243 (2000).

288. *See* CJTCA, *supra* note 281, § 1(4).

289. *See id.* § 1(6)(b).

290. *See* Prevention of Terrorism Act, *supra* note 235, §§ 14(4) and 14(5).

291. Kent, *supra* note 287, at 271.

Special attention should be given to the manner in which it was decided to try terrorist suspects in Northern Ireland. In view of the frequency of terrorist attacks in Northern Ireland, a non-jury judicial process was established for these types of offenses. This decision formed a clear exception to the customary mode of trial: "There is no more potent symbol of the common law tradition than the jury trial."[292]

The system of trial without a jury in Northern Ireland, known as the "Diplock Trials,"[293] enables a suspect to be immediately arrested and held for up to four weeks before being brought before a judge. On the other hand, if the offense for which a person is being detained is not classified as a terrorist offense, but is an "ordinary" crime of violence, a preliminary inquiry has to be held before a magistrate who will determine if there is probable cause evidencing guilt.[294] When the prosecution is of the opinion that the offense is a terror offense, he will transfer the case to the Director of Public Prosecutions for Northern Ireland who will decide whether the offense may indeed be classified as a terrorist offense that justifies trial without a jury.[295] A judge does not have power to release the defendant on bail.[296] Generally, the Director of Public Prosecutions will require clear and solid evidence of the fact that the offense relates to terrorism.[297] Within twenty-four hours of receiving the case file, the Director of Public Prosecutions must decide whether the case will be tried before a "Diplock court." The Act creates a special judicial system for terror offenses: "The system is designed to filter out of the Diplock process trials which are not terrorist-related, which the statute defines as involving the use of violence for political means."[298]

This method of trying terrorists deviates from accepted rules of evidence and procedure, which results in the violation of the rights of the accused. Such rights include the right to remain silent. As previously seen, later legislation allows the violation of the right of silence and permits conclusions to be drawn from the silence of the accused or his refusal to testify in cases where the accused has been charged with terror offenses.[299] Accordingly, this violation is not unique to the Diplock trials system, but to terror offenses as a whole. This was also the explanation given for the provisions of the

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292. John Jackson & Sean Doran, JUDGE WITHOUT JURY: THE DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 48 (1995).

293. *See* Diplock Report 1970, promulgated into status in 1973, now the Northern Ireland (Emergency Provisions) Act 1991 (EPA). Named for Lord Diplock, Chairman of the Parliamentary Commission that studied the problems emanating from the violence and ultimately recommended the measure.

294. *See* Carol Daugherty Rasnic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239, 244 (1999).

295. Northern Ireland (Emergency Provisions) Act, 1991, ch. 24, § 65 (N. Ir.).

296. *See generally* Criminal Evidence Order, 1988, No. 1987 (N. Ir.).

297. *See* Jackson & Doran, *supra* note 292, at 21.

298. Rasnic, *supra* note 294, at 246.

299. Criminal Evidence Order, *supra* note 296, § 3(5).

Evidence Order that enable the silence of a defendant to be used against him: "Defending the legislation in the House of Commons, prior to its passage, Secretary of State for Northern Ireland, Mr. Thomas King, stated that the Evidence Order resulted from the continued abuse of the judicial system in Northern Ireland and the *difficulties many prosecutors were experiencing in litigating terrorist trials*."[300]

In other words, convenience – easing the task of prosecutors in dealing with the evidentiary burden in terrorist offenses – was offered as the justification for violating the basic right of *every* defendant to a fair trial.

The Diplock system causes particular harm to the right to silence and the privilege against self-incrimination when it permits an admission to be obtained from a suspect or accused by means of a "moderate degree of physical maltreatment."[301] However, a judge has discretion whether or not to accept an admission gained in this way and may reject it in order to prevent a miscarriage of justice to the defendant or for other reasons of justice.[302]

The appeal process in relation to Diplock trials is automatic. Therefore, alleviating to some extent the injury to a defendant who has been deprived of the right to a jury trial in the customary manner.[303] However, freeing oneself from the grim impression created by the special rules for terrorist offenses is difficult because the presumption of innocence has been pushed into a corner. Furthermore, the entire process is based on the assumption that a person charged with terror offenses must indeed be guilty even though their guilt has not been proven.

Britain, like Northern Ireland, has also made an effort to give "special treatment" to terror offenses. Britain employs a special judicial forum that is different from the forum used for other criminal offenses, based on the deliberate and clear knowledge that the alternative treatment will influence the protection given to an accused to prevent an unfair trial. The justifications offered for this treatment are efficiency, that is, use of a person as an expeditious instrument to achieve objectives in the fight against terrorism, and convenience aimed at the benefit of one party only, the state. However, "[t]here is no discernable consensus among bench and bar in Northern Ireland as to whether the Diplock trial functions as a means toward the laudable goal of dealing with violence in the most effective and expeditious manner."[304]

To the contrary, in order to succeed in the fight against terrorism in Northern Ireland and elsewhere, it would be better not to have a special system of rules and a separate judicial forum for terrorist defendants:

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300. Thomas P. Quinn, Jr., Note, *Judicial Interpretation of Silence: The Criminal Evidence Order of 1988*, 26 CASE W. RES. J. INT'L L. 365, 374 (1994) (emphasis added).

301. Rasnic, *supra* note 294, at 249 (Quoting R v. McCormick and Others (1977) 105, 111 (McGonigal, J)).

302. *See* Northern Ireland (Emergency Provisions) Act, *supra* note 295, § 11(3).

303. *See* Jackson & Doran, *supra* note 292, at 26.

304. Rasnic, *supra* note 294, at 255.

> Long-heralded as the birthplace of individual rights and liberties, the home of the Magna Carta, and the Bill of Rights of the Glorious Revolution, Great Britain has reverted to tyrannical measures to deal with the crisis in Ireland. The sides to the crisis in Northern Ireland are currently seeking a peaceful settlement.
>
> *Respect for the rule of law is crucial to the success of this process, and depriving suspected terrorists of fundamental legal rights has no constructive role. For 'without the higher moral ground of legality and fairness, any democratic society is left weaker against its enemies.'*[305]

It should be noted that the Diplock trials have been abolished as well as the interrogation process which permitted the use of violence in Britain.[306]

Following the terrorist attack of September 11, 2001, on the United States, Britain declared a state of emergency based on the ground that the attack on September 11 amounted to a threat to the life of the nation as a whole. Accordingly, under Article 15 of the European Convention on Human Rights,[307] which during times of emergency or war permits violation of rights entrenched in the Convention. Britain saw fit to renew its counter-terrorism legislation in a new statute, the Anti-Terrorism, Crime and Security Act, 2001.[308] This Act permits the use of measures that are more injurious to the rights of the person suspected or accused of terrorist acts. Critics of the Act have expressed themselves unable to understand why British Prime Minister Tony Blair and Home Secretary David Blunkett were not satisfied with the existing legislation but instead wished to deal more harshly with persons already subject to severe treatment:

> Last year's act extended police powers to investigate, arrest and detain. It created new offenses, which permit the courts to deal with terrorist acts and their planning, wherever in the world they are carried out. All that it required is a charge and evidence, leading to that old-fashioned legal commodity:

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305. Quinn, *supra* note 300, at 399 (emphasis added).

306. Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 131 (2001).

307. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 22. Britain adopted this Convention into its domestic law in 1998 and since then the Convention has been regarded as the British Charter of Human Rights. *See also* Kent, *supra* note 287, at 225.

308. Anti-Terrorism, Crime and Security Act. (2001), *available at* http://www.the-stationery-office.co.uk (last visited Mar. 19, 2002).

> proof beyond a reasonable doubt. No presumption of innocence. That is now considered too demanding. With an eye to new-style 'foreign' terrorism, Blunkett's bill says that foreign nationals suspected of terrorism can be detained indefinitely without charge or trial, simply on the basis of a certificate signed by him that they are a threat to national security and suspected of being international terrorists. That is all. The presumption of innocence, fundamental to justice in both our great countries, will not apply. The Star Chamber lives again. The [H]ome [S]ecretary can act on suspicion and belief based merely on information provided by the security services and antiterrorist police. The quality of that information will not be challenged or tested by the alleged terrorist because he will not be told what it is -nor will his attorney. Suspects, thus found guilty by certificate and not by the verdict of a jury, will be held for six months in a high-security jail after which their case will be reviewed by a special immigration commission, with further reviews every six months. But there will be no right to appeal to the normal courts save on a question of law. *Habeas corpus* will not be available.[309]

Furthermore, as we saw John Ashcroft, the U.S. Attorney General, explain the executive order and its violation of the right to due process by the statement: "Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protection of the American Constitution."[310] So too, his equivalent in Britain, David Blunkett, explained that he would do everything necessary in order to protect British nationals. Moreover, this article has already considered the flaws in this approach.

PART SIX

The International Criminal Court as an appropriate tribunal for trying terrorists

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309. Fenton Bresler, *Certified Criminals*, NAT'L L. J., Dec. 10, 2001, at A21 (emphasis added).

310. *See* DoD News, *supra* note 248.

Background

On July 17, 1998, the Rome Statute was signed.[311] One Hundred and twenty states voted for the establishment of an international criminal court (ICC). Seven states objected, including Libya, China, Iraq, Israel, and the United States. Twenty-one others abstained. The Rome Statute entered into force after sixty states ratified it.[312]

The ICC purports to be an international forum available to all, designed to conduct legal proceedings in an objective manner, with neutral judges. Excluded from the panel will be judges from states that have been injured, which have caused the injury, or are allies of judges from such states.[313]

The main reason for the establishment of the ICC was the strong desire of the UN to set up a permanent international tribunal to replace the *ad hoc* tribunals,[314] which the UN and the international community as a whole had concluded possess more disadvantages than advantages. First, the jurisdiction of an *ad hoc* tribunal is limited to the states represented on the tribunal; second, it is extremely expensive to establish new *ad hoc* tribunals each time a conflict occurs in which it is claimed that human rights have been violated.[315] The pressure exerted by the international community and in particular the NGOs and human rights organizations should also not be disregarded. In retrospect, the activities of the latter in particular had great influence on the manner of establishment of the ICC.[316]

The ICC has three primary objectives:

Deterrence:[317] The ICC will cause people, from the simplest soldier to the most senior officers and political leaders, to be aware that they are responsible for their actions and may be answerable for them in the future.

Complementary:[318] The ICC will complement the criminal legal system in every country. If a state has failed to exercise its judicial mechanisms for

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311. *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/10 (1998); Rome Statute on the International Criminal Court, 37 I.L.M. 999 (1998) [hereinafter The Rome Statute].

312. *See id.* art. 126.

313. *See id.* arts. 34-38 (regarding the composition of the panel of judges).

314. *See* Blakesley, *supra* note 48, at 240.

315. LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 6 (1997).

316. *See generally* Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

317. *See* Carroll Bogert, *Pol Pot's Enduring Lesson*, FIN. TIMES, Mar. 16, 1998 at 16.

318. *See* Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 710 (1996) (discussing the importance of an international tribunal's ability to take over a matter when a national criminal justice system proves inadequate).

trying atrocities, the ICC will enter the fray and rectify the failure. In particular, the tribunal is intended to be used in relation to weak nations which are unable to bring suspected criminals to justice.

Permanence:[319] The ICC will be a permanent fixture that will document the atrocities and the stories of the survivors.

The principal crimes within the jurisdiction of the court:

Article Five of the Statute provides that jurisdiction will lie over: "[T]he most serious crimes of concern to the international community as a whole."[320] These crimes include Genocide, crimes against humanity, war crimes, and crimes of aggression. For the purposes of the Statute, 'genocide' includes: "commit[ing] [acts] with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ."[321]; 'crimes against humanity' includes "[crimes] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . ."[322]; and 'war crimes' mean "[crimes] committed as part of a plan or policy or . . . as a large-scale commission of such crimes."[323]

The provision relating to acts of aggression is one of the most problematic, because the Statute does not define what is meant by the term. The Article will only enter into force seven years after the entry of the Statute into force, at which time a definition of the offense will be established. In the meantime, a definition has been adopted from a draft code concerning crimes against international peace and security, which defines aggression as follows: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations." [324]

On the last day before the final ratification of the Statute a provision was added enabling the international community, at some time in the future, to add offenses relating to acts of terror and international trade in drugs to the jurisdiction of the ICC.[325] It should be emphasized that the jurisdiction of the ICC is prospective, so that it relates to offenses that may be committed after the Statute comes into force.[326]

Prior to considering the issue of the trial of terrorists before the ICC, an explanation is required as to the principle underlying the exercise of ICC

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319. *See id.* at 714-15.
320. The Rome Statute, *supra* note 311, art. 5
321. *Id.* art. 6.
322. *Id.* art. 7.
323. *Id.* art. 5.
324. G.A. Res. 3314 (1974), art. I.
325. *See* The Rome Statute, *supra* note 311.
326. *See id.* art. 24.

jurisdiction, namely, the principle of complementary jurisdiction.[327] According to this principle, a case will not be justiciable if it has been investigated or is already the subject of proceedings in a state that has jurisdiction over it. This is also the position in relation to a case where a state has jurisdiction, has investigated the matter, and has chosen not to prosecute.[328] In practice, the principle is limited to cases where the state having jurisdiction is: "unwilling or unable genuinely to carry out the investigation or prosecution."[329] In such a case, the ICC may obtain jurisdiction over the matter.

In terms of "unwillingness," the court must examine whether the state attempted to investigate or capture the wanted suspect and if there is justification for the fact that to that point the state had not done so.[330] In terms of "inability," the court must examine whether complete disregard has been shown for the matter or "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[331]

The primary anxiety arising in connection with the jurisdiction of the ICC concerns the misuse of the powers of the ICC and the fear of politicization of trials before the ICC. Political fears ensue principally from the ways in which the Statute permits complaints to be submitted and investigations launched; ways that may lead to fraudulent and arbitrary claims. Article Thirteen provides for three ways of filing claims. First, a state that is a party to the Statute may complain before the prosecutor. Second, the Security Council of the United Nations may file a complaint with the prosecutor. In such a case there is almost no fear of politicization. To the contrary, this Article is the product of U.S. demands. For all the states, the Security Council represents a much more neutral and objective body in relation to specific states that submit complaints and demands for investigations. Third, the prosecutor may decide to launch an investigation.

There is no doubt that political considerations may be brought to bear even at the initial stage of the submission of a complaint to the ICC prosecutor.[332] To obviate this, it was decided that a trial would only be commenced after the complainant supplied proof of the existence of a case. Upon the provision of such proof, the prosecutor may launch an investigation

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327. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 464 (1993). Attention should be paid to the dictionary meaning of this term: "The interrelationship or the completion of perfection brought about by the interrelationship of one or more units supplementing, being dependent upon, or standing in polar position to another unit or units." *Id.*

328. *See* The Rome Statute, *supra* note 311, art. 17(1)(a).

329. *Id.*

330. *See id.* art. 17(2)(a)-(c).

331. *Id.* art. 17(3).

332. *See generally* SUNGA, *supra* note 315.

and file charges. The charges are to be presented for consideration by members of the presidency of the court, which consists of judges from the various countries that will act as a *quasi* jury to decide whether there is a case. The presidency may also instruct the prosecutor not to launch an examination, not to bring charges, or reconsider the charges. Article Fifteen of the Statute requires a reasonable basis for the information in order to launch the investigation. This information will be considered in a preliminary hearing and the members of the Pre-Trial Chamber, which consists of three judges, must confirm that the court indeed has jurisdiction and that the information provides a reasonable basis for launching and pursuing an investigation. Article Eighteen adds that a decision of the Pre-Trial Chamber may be appealed to an Appeals Chamber.

In examining the question of the jurisdiction of the ICC over terrorists, the fear of the misuse of power and the introduction of political considerations lessens. An examination of the phenomenon of terrorism in the international arena reveals the abhorrence felt by many countries towards it. Indeed, it is customary to regard the criminal trial as a domestic interest of a particular society, which determines the social values that it believes should be protected — a form of criminal relativism. However, in the fight against terror, there is no relativism. The threat is relevant to the entire world. Therefore, it may be argued that jurisdiction must be held by a global or international body, the ICC, which will provide an additional international front in the war against terror. In practice, many scholars believe that: "Global terrorism must be combated through concerted international action. In fact terrorism can be best combated through the use of a permanent international criminal court." [333]

The United States was of the opinion in the past that terrorism had to be dealt with on an international level, with a permanent international court. Pennsylvania Senator Arlen Specter declared: "The fight against terrorism could be tremendously aided by an international court to try these international criminals." [334]

The call for the establishment of an international tribunal to try terrorists was first raised in 1937 in the Convention Against Terrorism,[335] which proposed creating such a body. However, India was the only country to ratify the convention. Yet, in 1998 an agreement was reached to create an international court.

The discussion concerning the trial of terrorists by the ICC highlights the fact that the majority of problems identified with the institution do not justify the absence of jurisdiction in relation to terrorism. First, the United

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333. Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 233 (1992).

334. Arlen Specter, *A World Court for Terrorists*, N.Y. TIMES, July 9, 1989, at 27.

335. The League of Nations Convention Against Terrorism of 1937. *See also* Rupa Bhattacharyya, *Establishing a Rule of Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 58-9 (1996). Rule 1.2 encourages parenthetical explanation.

States objected to terrorism as well as to other crimes being subjected to the jurisdiction of the ICC, primarily on the grounds that insufficient protection would be afforded to the rights of the accused and that the subsequent trial would not be fair. Based on the events of September 11 and in light of the Patriot Act[336] and the Executive Order concerning military tribunals,[337] these arguments are no longer available to the United States. The ICC will safeguard the rights of the accused much more stringently than the military tribunals established by the United States:

> Suspected terrorists will be tried not before a jury but rather a commission made up primarily — though not necessarily exclusively — of military officers. The suspects and their lawyers, who may also be military officers appointed to represent them, will be tried without the same access to the evidence against them that defendants in civilian trials have. The evidence of their guilt does not have to meet the familiar standard 'beyond reasonable doubt' but must simply 'have probative value to a reasonable person.' There will be no appeals.[338]

In contrast, in the ICC, a person will be deemed to be innocent unless his guilt is proven.[339] A person has a right to representation and protection against double jeopardy. However, it is inconceivable that a person will be tried both by his own state and by the ICC. The hearing will be public and there is a right of appeal against factual and legal errors as well as against the lack of proportionality between the crime and the punishment. Appeals will be heard before seven judges. There is no death penalty; [340] there is a privilege against self-incrimination and the right to silence.[341] The trial may only be conducted in the presence of the accused[342] and any admission as to the commission of the offense by him must be corroborated.[343] "And so, in many ways, this Statute offers much more protection for defendants than is offered most defendants in the United States."[344]

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336. *See* U.S.A. Patriot Act, *supra* note 2, at 115.
337. *See* Military Order, *supra* note 3.
338. Berke, *supra* note 121.
339. *See* The Rome Statute, *supra* note 311, art. 66, para. 1.
340. *See id.* art. 77, paras. 1-2.
341. *See id.* art. 55, paras. 1(a) & 1(b).
342. *See id.* art. 63, para. 1.
343. *See id.* art. 65, para 1.
344. *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 240 (1999). Note that these comments were made prior to the terrorist attack of September 11, 2001. In the aftermath of that attack the degree of protection given to the rights of the accused deteriorated even further.

The fact that the trial is not before a jury fortifies the fairness of the trial of the terrorists. The trials will be conducted by professional judges who will be much more neutral than juries as far as terrorism is concerned. This is particularly so in the aftermath of the attacks of September 11, which affected almost every citizen. In other words, in the United States, jury members come from the very population which had suffered injury. U.S. Judge John Parker has explained that judges "[would be] better qualified than a jury could possibly be to pass upon the issues which would be presented to a court trying the complicated sort of cases which would be presented to an international criminal court."[345]

One should also recall the judgment of the U.S. Supreme Court to the effect that the Bill of Rights does not prohibit the trial of U.S. citizens by foreign tribunals outside the territory of the United States:

> When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.[346]

The United States' objections to making international terrorism subject to the jurisdiction of the ICC hamper the united front and international cooperation shown by the nations of the world in the fight against international crime. The United States, in principle, cooperates in this endeavor to the point where terrorism is involved. When terrorism, an issue which is one of the priorities of the United States, is involved, the United States is not willing to allow an external body to take over its powers; rather it relies solely upon itself and seeks to ensure that the handling of the terrorism will conform to its own interests. However, states weaker than the United States are interested in including terrorism within the court's jurisdiction. These states generally lack the ability to capture terrorists and place them on trial themselves. Such states include Egypt, Argentina, India, Algeria, and Russia.[347] "Jurisdictional restraints excluding terrorism from the ICC strongly favor resource-rich countries that can afford to carry out long

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345. Ilia B. Levitine, *Constitutional Aspects of an International Criminal Court*, 9 N.Y. INT'L L. REV. 27, 38 (1996).

346. Neely v. Henkel, 180 U.S. 109, 123 (1901).

347. *See* Steven W. Krohne, *Comment, The United States and the World Need an International Criminal Court as an Ally in the War Against Terrorism*, 8 IND. INT'L & COMP. L. REV. 159, 166 (1997).

distance operations to capture and extradite suspects, but this also places a heavy prosecutorial burden on countries that cannot."[348]

The question which should be put to the United States is: why take this position? The "complementary" principle underlying the ICC means the ICC will not have exclusive jurisdiction over the terrorists. If the United States succeeds in coping with the phenomenon, capturing the terrorists by itself, and placing them on trial, the ICC will be left outside the picture.

Notwithstanding the declared opposition of the United States, it should be noted that the population in general and scholars in particular are of the opinion that the jurisdiction of the ICC should be expanded to include acts of terrorism.[349] This is also the opinion of various NGOs, including human rights organizations.[350] Nonetheless, from our point of view, it is the government's decision which prevails and United States' opposition is likely to have an impact on the entire world. The United States should not use its influence to cause suffering to the innocent. To the contrary, as former Secretary of State Warren Christopher has said, the United States must "use our influence to stop the suffering of innocent civilians."[351]

In our opinion, the ICC has the ability to help countries cope with terrorism. Even if the United States is of the opinion that it is an expert in handling terrorism, and that this phenomenon entails such complex problems which requires the commitment of the best minds, money and resources to deal with the issues efficiently - while any extrinsic involvement would only detract from the outcome - the United States should not be allowed to exclude terrorism from the jurisdiction of the ICC. The complementary principle enables the United States to make use of its powers to place terrorists on trial; and only if the United States should fail in this endeavor will the ICC enter the picture and complete the task. The United States should not be allowed to ignore other weaker countries which cannot bring the terrorists to trial by themselves and need the ICC: "The United States . . . should support granting the proposed court jurisdiction over the crimes proscribed by the Terrorism Conventions even if it does not intend to avail itself of that jurisdiction; such support would aid less powerful nations that are unable to effectively prosecute terrorist themselves."[352]

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348. William F. Wright, *Symposium Issue: The International Criminal Court: Limitations on the Prosecution of International Terrorists by the International Criminal Court*, 8 J. INT'L L. & PRAC. 139, 140 (1999).

349. *See* Robert E. Griffin, *Editorial, Court Would Deter Terror*, HARRISBURG PATRIOT, Aug. 2, 1996, at A10.

350. *See* Bonnie Santosus, *An International Criminal Court: "Where Global Harmony Begins,"* 5 TOURO INT'L L. REV. 25, 28-29 (1994).

351. Secretary of State Warren Christopher, Speech at the *Soref Symposium*, Washington Institute for the Near East Policy (May 20, 1996), *available at* http://www.washingtoninstitute .org/pubs/soref/chris.htm (last visited Oct. 21, 2002).

352. Krohne, *supra* note 347, at 177.

The emphasis on the support for trying terrorists before the ICC is confined to those cases in which the state seeking to capture them is not required to pay an unconscionable price. If the capture of the terrorists entails the loss of many soldiers and innocent civilians, then the principle of reasonableness that guides us in the exercise of discretion will tilt the balance towards taking measures other than capturing the suspects and placing them on trial, such as targeted killings or other actions falling within the framework of a state's right to self-defense.[353]

In practice, even today, it is possible to interpret the Rome Statute in such a manner as to vest the court with jurisdiction over terrorist offenses. Despite the provision, which was added to the effect that only in another seven years will it be decided whether to make terrorism a justiciable offense, in the aftermath of September 11, 2001, the Statute must be interpreted so as to incorporate terrorism within its jurisdiction, in the light of the fact that acts of terror are war crimes. The Rome Statute, in defining war crimes, refers to the Geneva Conventions of August 12th, 1949 and lists acts that comprise a breach of the Conventions and consequently are also acts of war under the Rome Statute. Among these provisions, Article 8(2)(b)(i) states expressly that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities is an act of war.[354]

Indeed, in the definition of war crimes in the Rome Statute, Article 8(e)(i) expressly provides that war crimes also include:

> [O]ther serious violations of the laws and customs applicable in armed conflicts *not of an international character*, within the established framework of international law, namely, any of the following acts:
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.[355]

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353. *See generally* Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L. & COMP. L. J. 195 (2001).

354. *See* The Rome Statute, *supra* note 311, art. 8(2)(b)(i). This article provides:

> For the purpose of this Statute, 'war crimes' means:
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the establish framework of international law, namely, any of the following acts:
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Id.

355. The Rome Statute, *supra* note 311, art. 8(2)(e)(i) (emphasis added).

The addition of terrorism to the jurisdiction of the ICC will require states to reach an agreement regarding the definition of terrorism. This is not an easy task because the definition of terrorism is subject to serious dispute.[356] Nonetheless, one of the elements common to the various definitions of terrorism is that terrorism uses violence and instills fear among civilians in order to achieve a particular purpose, which is generally the collapse of or an uprising against an existing regime.[357] This element, which is common to the definitions regarding the use of violence against civilians by a terrorist body, which is not a state, is recognized by the Statute. Therefore, there is no need for a seven year wait; acts of terror should be regarded as war crimes and perpetrators of such acts should be placed on trial before the ICC through the channel provided by Section 8(e).

Beyond this, the existence of an international tribunal that will enable the capture and trial of terrorists is a necessary tool in the war being waged by the nations of the free world against the phenomenon of international terrorism. The explanation for this is found in the fact that there is a war underway; a war in the modern age is conducted only by way of self-defense.[358] One of the conditions which a state must meet in order to be able to exercise its right of self-defense, is that it has first attempted to resolve the dispute by peaceful means. In circumstances of a war against a terrorist organization, the state is required to refrain from any hostilities if the possibility exists of capturing the terrorists, arresting them, and placing them on trial.[359] This requirement is part of the theory which perceives war between a terrorist organization and a state as something other than conventional war, but a war nonetheless. Moreover, in every war a state must meet the basic demands of international law, *i.e.*, to refrain as far as possible from aggressive acts if the objectives may be achieved by alternative means. In this way, the ICC will supply an answer for those who believe that terror is war and that the attempt to resolve disputes other than by force, is consistent with modern laws of warfare. In addition, the ICC will serve as an answer for those who believe that it is not possible to speak of a war between a democratic state and a terrorist organization. In the opinion of the latter, a war takes place between two states, between combatants or freedom fighters. The terrorists who breach the laws of war do not fall within the definition of combatants or

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356. *See* Gross, *supra* note 306, at 97-101.

357. *See* Boaz Ganor, *Terrorism: No Prohibition Without Definition*, *available at* http://www.ict.org. (last visited Dec. 20, 2001). "[T]errorism is the deliberate use of violence against civilians in order to attain political, ideological, and religious aims." *Id.* *See also* Prevention of Terrorism Act, *supra* note 235, at § 14(1): "terrorism . . . means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Id.*

358. U.N. CHARTER, ch. VII, art. 51.

359. *See* Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 686-87 (1999). *See also* Gross, *supra* note 353.

freedom fighters nor are they innocent civilians as they take an active part in the hostilities. Thus, their status is not regulated by international law and they are considered to be unlawful combatants.[360] Therefore, not only should aggressive acts not be taken against them, but they should be stopped by being brought to trial. Indeed, the latter is the principal course of action available to a democratic nation in its struggle against terror.[361]

The essence of the criticism is that a democratic state does not have to respond by way of war; rather it should use the democratic measures which are at its disposal by virtue of its very nature. For example, the capture, detention, and trial of terrorists, as the acts of the terrorists are crimes that are no different from any other crime. Terror offenses are ideologically based, and certainly of a more serious nature than ordinary crimes, but that is only because of their impact. This alone does not change the fact that the phenomenon is criminal in nature. The crimes are perpetrated against the state or against humanity; they are war crimes. A state must deal with these crimes, not by using the tools of war but by employing the measures familiar to it, available to it, and customarily used in the handling of crime, via the law enforcement authorities and the judicial system. These measures for handling crime do not include launching a war. An act of war that leads to the elimination of any particular terrorist will not cause the phenomenon of terrorism to vanish. "Terrorism is not analogous to war because it is essentially a crime, and crimes are best dealt with through law enforcement, even when supplemented by paramilitary or military personnel. The response to terrorism is the pursuit of justice, relentless and unyielding."[362]

A democratic state is entitled to fight against terrorism by engaging in military action. At the same time, in cases where it is possible to capture the terrorists and bring them to trial, a democratic state should choose that course of action. The United States, by its desire to capture the terrorists itself, in the framework of its war against terror, and place them on trial before special tribunals, not only creates the risk of an unfair trial, as explained in the earlier chapters, but also leaves itself a slim chance of succeeding at this task. In view of the unique character of international terrorism as an unidentified enemy and one that is present everywhere and threatens all the countries of the free world, the solution lies in cooperation between those targeted countries.

Cooperation should be directed not only at waging war against terror in the military sense, but also at joint efforts between the authorities responsible for law enforcement and the intelligence agencies in every country. Cooperation could appropriately be expressed through the transfer of intelligence regarding terrorists, thereby making it easier for states seeking

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360. *See supra* Part 1.

361. *See* the response of Professor Jordan Paust following the terrorist attack of September 11, 2001, *available at* http://www.asil.org/insights/insight77.htm (last visited Dec. 20, 2001).

362. Cherif Bassiouni, *In the Aftermath; Seeking Revenge or Justice?; On the Dark Trail of New Criminals, U.S. Needs Help*, CHI. TRIB., Sept. 23, 2001, at 3.

their extradition to pass on information regarding the crimes, as well as freeze the assets used by the terrorists to finance their activities. International cooperation of this type will assist in exposing the movements of the terrorists, thwart their plans and bring them to justice. This is only the first aspect of cooperation. If cooperation is precluded by reason of the individual interests of a particular state, which is not interested in the extradition of suspects. For example, in the United States, an effort to uncover the truth by establishing tribunals to try terrorists, the constitutional safeguards of the defendant are not preserved and the defendant's guilt is not determined in a neutral environment[363] – then the second aspect of cooperation will come to the forefront through the operation of the Rome Statute. The trial of the terrorists before the ICC will be the outcome of the complementary principle, whereby if a state fails to bring the offender to trial, the ICC will step in and complete the task. As we have seen, the ICC safeguards the constitutional and due process rights of the defendants in criminal cases. There is no fear that states will refuse to cooperate to extradite terrorists to stand trial before an international tribunal that is much more neutral than a country such as the United States,[364] who lost thousands of citizens in one terrorist action and who will find it difficult to put aside the desire for revenge common to the entire population – including the jury members, the judges, and certainly the military judges who will be appointed to try the terrorists.

The horrendous consequences of the terrorist attack of September 11, 2001, caused the press to stress that United States citizens were waiting for a military response by their government. This response was not slow in coming. However, one must ask: what will be the outcome of this response? Will it lead to the eradication of international terror or will we later conclude that this response merely satisfied the desire for revenge felt by citizens of the U.S. without achieving a genuine eradication of the phenomenon? Genuine eradication of the phenomenon can only be obtained through the cooperation of democratic states in terms of law enforcement combined with other forms of action, non-war measures, such as economic sanctions.

The trial of terrorists by one country, such as the United States, will not put an end to the phenomenon of terrorism. Therefore, cooperation in placing suspects on trial should be regulated by an existing international convention, namely, the Rome Statute. The democratic states must respond to the terrorist

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363. *See Pentagon Officials Begin Designing Military Tribunals for Suspected Terrorists*, N.Y.TIMES, Oct. 25, 2001, at A1. Spain refused to extradite to the United States suspected terrorists captured on Spanish soil during the course of October 2001 precisely because it feared that these suspects would not be given a fair trial, similar to that afforded to citizens: "Spanish officials told the United States last week that they would not extradite eight men suspected of involvement in the Sept. 11, 2001 attacks without assurances that their cases would be kept in civilian court." *Id.*

364. *See* Laura Dickinson, *Courts Can Avenge Sept. 11: International Justice - Not War - Will Honor Our Character While Securing Our Safety*, LEGAL TIMES, Sept. 24, 2001, at 66.

threat within the framework of the rule of law, by placing suspects on trial. Military responses against organizations throughout the world will merely transform the democratic states into collaborators with the objectives of the terrorists: undermining the stability of Western cultured society. The danger to democratic societies is great. Therefore, societies must be aware of this danger and take precautions against it. Thus:

> An international terrorism tribunal with diverse representation would provide a vehicle for the world community to come together to witness, acknowledge, and condemn attacks such as those we have just suffered . . . . By working to create a court to try such terrorists, we send a message that *the proper response to terrorism is trial followed by appropriate punishment, not punishment without trial.*[365]

It should be noted that following the attack of September 11, 2001, many people asked themselves what would happen if Bin Laden were to be captured alive. The answer was to bring him to trial before the ICC[366] (disregarding for the moment the fact that it is not possible to try a suspect for offenses committed prior to the Statute taking effect) for crimes against humanity,[367] notwithstanding that terror is not within the jurisdiction of the ICC, since as already noted terrorism falls within the rubric of war crimes or crimes against humanity. These people agree, "even before the ICC gets off the ground, we already find that we need it. Just as we have already rethought other politics in the wake of September 11, the time has come for Washington to rethink its opposition to the ICC."[368]

One of the reasons why the United States objects to the inclusion of terrorism as an offense within the jurisdiction of the ICC is the absence of an international code, a law that regulates terror offenses.[369] As noted, to date no consensus has even been reached regarding the definition of the term. The difficulty is huge as the states of the free world may regard someone as a terrorist who would be considered a freedom fighter by the fundamentalist world.

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365. *Id.* (emphasis added).

366. *See* Douglass W. Cassel, Jr., *Try Bin Laden - But Where?*, CHI. DAILY L. BULL., Oct. 11, 2001, at 6.

367. *See* The Rome Statute, *supra* note 311, art. 7(1)(a). As defined in this article "[f]or the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder . . . ." *Id.*

368. Cassel, *supra* note 366, at 6.

369. *See* Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 442-43 (1995).

Without a definition in a Convention Against Terror, it might be argued that there is no jurisdiction in the light of the doctrine of "no crime where there is no law" – "*nullum crimen sine lege.*" This is undoubtedly a strong argument; however, it should not be given undue weight. Although there is no specific international code on the matter there are numerous international conventions which deal with terrorism even if they refrain from according a precise definition to the term.[370] Following the attack of September 11, widespread interest has been shown in formulating a codex of these conventions. Moreover, the UN has been working towards this goal for a number of years.[371]

There are those who argue that without the ICC obtaining jurisdiction over terror offenses, the court will not possess the teeth necessary to operate as an efficient tribunal: "jurisdiction over crimes such as terrorism is exactly what the court needs to help it build a positive reputation and save it from being useless."[372]

The legal situation today in the United States as described in Parts One and Five, where the United States claims that extensive jurisdiction is vested in military tribunals that do not abide by the constitutional safeguards of the defendant may lead to heightened enmity towards the United States. This enmity may be the outcome of the sense that the United States has turned itself into a paternalistic power responsible on behalf of the rest of the world for trying terrorists. Accordingly, in the interest of preserving relations with the rest of the world, the United States should favor the position supporting ICC jurisdiction over terror. We should recall that there are states which not only cannot fight against terrorism by themselves but also cannot extradite the terrorists to the United States due to political reasons or for fear that the trial will not be neutral. One such example is Columbia which has strained relations with the United States.[373] One cannot ignore the fact that even the United States, however mighty a power, cannot cope with terrorism on its own. There are examples in U.S. history where it failed to try terrorist suspects. For instance, in the case of Mohamar Ghadaffi, terrorists, who wished to prevent his extradition to the United States in 1987, did so by kidnapping two German citizens:

> Pan Am Flight 103 is a good example. We have not been able to bring the perpetrators to justice in all these years.

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370. *See, e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (New York Convention), Dec. 14 1973, 1035 U.N.T.S 167; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 704 U.N.T.S. 219; International Convention Against Taking of Hostages, Dec. 17, 1979, G.A. Res. 146, U.N. GAOR, 34th Sess. (1979).

371. *See* Pickard, *supra* note 369, at 452.

372. Krohne, *supra* note 347, at 178-79.

373. *See id.* at 180-81.

> Libya does not trust the United States or the United Kingdom to try the alleged perpetrators and the U.S. and U.K. do not trust Libya to do so. If we have an International Criminal Court, leaving aside the retroactivity question, it should be able to try that kind of case.[374]

Now, after September 11, there is a fear that the United States will attempt to bring to trial persons who in the usual course would not be tried. Thus, the ICC will provide a check on the United States; it will safeguard the rights of the defendant and will conduct a thorough investigation prior to trying the suspect. This will happen in cases where, the United States has failed to bring the person to trial.

To summarize this point, there are three main reasons which substantiate the argument that the inclusion of terror offenses within the jurisdiction of the ICC can only benefit the interests of the world in general, and the United States in particular, in the war against terror:

> First, the court would provide a neutral international forum in which to prosecute terrorists which may increase the likelihood that countries holding suspected terrorists would turn them over to be tried. In the past, some countries have refused to extradite suspected terrorists to countries such as the United States for fear that the United States had prejudged the defendants. Therefore, providing a neutral forum for trial may persuade countries harboring terrorists to extradite them for trial. Second, persuading countries to turn over terrorists would also reduce the need for the United States to impose economic sanctions as a means of pressuring countries into extraditing terrorists. Generally, these sanctions have been ineffective and end up hurting the general population more than the government which refuses to turn over the suspect. The third way the Court could help the United States fight terrorism is by alleviating the burden and political embarrassment of the United States having to rely on self-help methods, such as forcible abductions, to deal with terrorists. As a party to the Rome Statute, the United States could work with other party states to bring terrorists to justice and use the Court Prosecutor to determine whether a prima facie case actually exists against the suspect, thus reducing the number of wrongful abductions.[375]

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374. Cavicchia, *supra* note 333, at 264.

375. John Seguin, *Note, Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L. J. 85, 106-07 (2000).

A different question is whether the ICC will be capable of dealing with the terrorists. In other words, there are real difficulties arising from the fact that the ICC lacks the experience and the resources needed to investigate acts of terror. Such investigations are usually prolonged and complex and are conducted by law enforcement authorities and intelligence services.

This is a serious objective problem which may justify waiting an additional seven years, as required by the Statute, prior to including terrorism within the jurisdiction of the ICC. During these years the ICC will gather experience trying war crimes and crimes against humanity. As we have explained, acts of terror are no different in their outcome to war crimes or crimes against humanity.

Our conclusion is that terrorism is an international problem which feeds from the extraordinary cooperation that has evolved between those engaged in terrorism throughout the world. Accordingly, the solution to it must also be found in the international arena and it too must draw its life from unique cooperation between all the nations of the free world now facing the threat of terrorism. The struggle is complex. It is a hybrid, comprising both passive and active defense, including preventive measures against terrorist groups. The combination of these measures is likely to have the deterrent effect necessary to remove the terrorist threat from above the heads of the democratic nations.

The ICC is the product of a new convention that should properly be part of this combination of measures and express the cooperation on the international plane leading to the arrest and trial of the terrorists. More precisely, we do not seek to argue that a military response should not be used against acts of terror; rather, such responses should not to be seen as the ultimate answer. Those in the United States who claimed after September 11 that "[o]nly military victory - not judicial proceedings - ends a military threat"[376] must be opposed.

Agreement to include terrorist offenses within the jurisdiction of the ICC is not a magical solution that will guarantee victory in the war against terror. It is only an additional measure that will join the arsenal of measures available to a democratic state in its struggle. Yet, it is an essential measure as it will provide a solution towards the success, which everyone will be ready to work:

> Inclusion of terrorism in the jurisdiction of the ICC will bring prosecution of this criminal activity into a neutral forum, which will encourage participation by countries that do not trust the judicial processes currently in place. The further

376. George M. Kraw, *On Our Own Terms Do We Want Foreign Courts To Judge Our Reprisals To Terrorism?*, LEGAL TIMES, Sept. 24, 2001, at 67.

> effect will be to discourage resort to self-help measures and frontier justice that were the last resort of the desperate.[377]

We must recall that terrorism is directed at democratic states and seeks to undermine their values; a basic value of every democratic state is the pursuit of justice. Leaving the trial of terrorists in the hands of the injured states themselves is to let the victim judge and punish the criminal. The fear of prejudice is strong. Therefore: "[t]he establishment of the ICC creates an independent, neutral venue that promises to address concerns that the accused will receive an unbiased trial . . . [and] if the world community is to effectively address the issue of international terrorism, it must establish a neutral forum for prosecution of these crimes."[378]

A democratic state based on principles of justice, where the search for justice is obliged to locate the terrorists and place them on trial before international tribunals that employ fair and neutral processes would be the better solution compared to tribunals operating within the injured state, which may be exploited to satisfy the desire for revenge: "Indeed, one of the most important reasons to support a criminal process is to end the cycle of vengeance. Only justice can move us toward a safer society."[379]

Notwithstanding the criticism voiced throughout the United States about the decision not to ratify the Rome Statute, the President of the United States decided that the United States could not be a party to the Statute. The main reason for this was the fear that U.S. soldiers would become subject to trial before the ICC for war crimes or crimes against humanity as a consequence of injuries to innocent civilians caused during the war against terror in general, and the fighting in Afghanistan in particular, in the aftermath of the attack of September 11: "The United States simply cannot accept an international institution that claims jurisdiction over American citizens, superior to that of our Constitution."[380]

It would seem that the step which the United States seeks to take is precedent-making. The U.S. is not satisfied with refraining from ratifying the Rome Statute; rather it seeks to completely withdraw its signature from the Convention.

The rules of international law dealing with conventions prohibit a state from engaging in acts which would defeat the object and purposes of a treaty

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377. Wright, *supra* note 348, at 149.

378. *Id.* at 139, 148.

379. Dickinson, *supra* note 364, at 66.

380. David R. Sands, *U.S Withdraws from Treaty on Court*, THE WASHINGTON TIMES, May 7, 2002, at A01 (quoting House International Relations Committee Chairman Henry J. Hyde, Illinois Republican).

pending its entry into force.[381] The decision by the United States to remove its signature will not necessarily defeat and undermine the purpose of the treaty. The treaty will continue to exist and the ICC will initiate operations even without the participation of the United States. It is precisely because of this that some people argue that by removing its signature in circumstances where the treaty is in effect and the court will begin work on the basis of the broad consent of one hundred and thirty-nine states, the U.S. is making an error from the point of view of its own interests as a democratic state:

> [T]he U.S. is bucking the trend at the most critical moment. As a superpower, the U.S. cannot afford to turn away from such a consensus. With the ICC as a matter of fact and a reality of law, the U.S. will at some point be forced to deal with the Court. Before the 60th ratification, discussions about what form such dealings would take were academic. Now, they are very much real. State parties to the ICC, many of them U.S. allies, will start to implement laws and policy consistent with the ICC, whether such policies are favored by the U.S. or not. The U.S. may try to run away from the ICC through benign neglect or withdrawal from the entire process, but the issue is unavoidable.[382]

Beyond the dangers entailed in shaping the ICC without the active participation of the United States, we should note that when the U.S. decision is examined against the background of the legal and statutory developments ensuing from the war against terror, there are those who believe that: "there's a certain irony in the fact that the United States, which tends to extraterritorially apply its laws rather widely, is not willing to participate in a truly international consensus" [383] for the ICC.

CONCLUSION

> *True justice implies a balancing of the scales; and there is no action or force or thing on Earth that can balance the loss of a husband, a daughter, son, parent, or wife. But we can and*

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381. Vienna Convention on the Law of Treaties (1969), art. 18. This article provides:
> [a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .

Id.

382. *See* http:/www.isc-icc.org/mythreal.html (last visited May 9, 2002) (responses to the U.S. decision to remove its signature from the Rome Statute).

383. Sands, *supra* note 380, at A01 (quoting Canadian Foreign Minister Bill Graham).

> *do demand accountability. One way or another, terrorists must answer for their crimes.*[384]

Indeed, terrorists must pay for their acts. In this article we set out the jurisdiction possessed by the United States to try those who have caused it injury by acts of terror. We have explained that the offense of terror is no different than any other criminal offense. Therefore, there is no justification for trying terrorists separately in separate courts, operating special rules of procedures and evidence that differ from those applicable in the civilian legal system. An agreement to try terrorists before the regular courts is not a sufficient guarantee of due process or achievement of justice. The emphasis must be on prohibiting the establishment of special rules of procedure and evidence for terrorists. We saw that in Israel, a special provision exists that permits violation of the right of a person suspected of offenses against the security of the state, which is to meet with an attorney.[385] Another provision in Israel, enables notification of the fact of the arrest to be delayed for a relatively long period.[386] These provisions are specific to a particular type of offense, albeit the hearings in relation to the provisions are conducted before the ordinary courts. Because the hearings are likely conducted within the existing court system and not before a special tribunal, the exception to the procedures prevailing in relation to persons suspected of non-security offenses is balanced from the moment the indictments are filed. From that point, the greater safeguards are available to the defendant. For example, the prosecution is required to disclose all the investigative materials to the defendant,[387] including the fact that certain evidence has been classified as privileged.[388] The significance of the privilege (imposed because of the fear of harm to national security or another important public interest) lies in the fact that the prosecution cannot use the evidence. However, the defendant has the right to attempt to persuade the court that his defense will be harmed if the privilege is not removed and that uncovering the truth outweighs national security.[389]

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384. *See* Daum, *supra* note 15, at 131 (quoting Madeleine K. Albright, Statement on venue for trial of Pan Am # 103 Bombing Suspects, Aug. 24, 1999) (emphasis added).

385. *See* Criminal Procedure Act, *supra* note 92, sec. 35. This section permits delaying a meeting between a person suspected of national security offenses and his attorney for up to twenty-one days, in contrast to Section 34 of the same Law that permits delaying a meeting between a person suspected of other offenses and his attorney for up to forty-eight hours at the most. *See id.*

386. *See id.* sec. 36. This section permits the delay of notification for up to fifteen days compared to Section 33 of the same Law that requires notification without delay of the arrest of persons suspected of offenses which are not security offenses. *See id.*

387. *See* Criminal Law Procedure (Consolidated Version) Law, 1982, sec. 74 (Eng.).

388. *See* Cr.A. 1152/91, Siksik v. State of Israel, 46(5) P.D. 8, 20 (Heb.).

389. *See* Evidence Ordinance, *supra* note 99, at secs. 44(a) and 45.

As terror offenses are criminal offenses, offenses which touch upon issues of life and death, it is a core principle in this field of law that defendants are given a full opportunity to defend themselves against any evidence in the hands of the prosecution.[390] This right is derived from the essence of a democratic regime. Indeed, a democratic state cannot exist without security. It is possible to erode the rights of the defendant in the name of the security of the state and its citizens. However, a democratic state will only permit such an erosion of rights where the accused is guaranteed a just and fair trial. Accordingly, where there is privileged evidence, some of which is of critical and substantive importance to the determination of the guilt or innocence of the accused, it would be proper to disclose this evidence.[391] The fact that the defendant has been accused of terror offenses does not impair the need to disclose this evidence; such disclosure is compatible with the interests of the individual and the entire democratic society in ensuring due process.

We conclude that in judging terrorists it is more important to preserve rules of procedure which are identical to the rules applicable in every other criminal proceeding than to proclaim that the terrorists should be tried before the ordinary civil courts; yet concurrently permit the proceedings to be conducted in accordance with special rules of procedure. We have explained that in view of the growth of the phenomenon of terrorism we believe that it is possible to justify the existence of a special tribunal that will deal exclusively with the trial of terrorists. However, the motive for the establishment of such a tribunal should be to deal with terrorism in a focused manner with the purpose of promoting a just trial. This also meets the needs of public and national security which require concerted action to be taken against terrorism before the latter strikes again, without placing society at risk by reason of delays ensuing from pressure of work within the civilian legal system.

More precisely, our support for the establishment of a separate tribunal is not support for the application of different legal procedures and rules of evidence. To the contrary, we have shown how the character of a judicial forum, its composition, and the nature of its activities influence the procedural rights of the defendant. When we deal with the criminal process, with issues of liberty, this influence may have an additional far reaching effect:

> Often the line separating a procedural defect from a defect which may have an influence on the outcome of the trial is not too clear. Indeed, it is difficult to deny that in many cases the existence of a serious procedural defect creates a presumption of influence on the outcome of the proceedings.

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390. *See* H.C. 428/86, Barzilai v. Government of Israel and 521 others, 40(3) P.D. 505, 569 (Heb.).

391. *See* M.A. 8383/84, Livny et al v. State of Israel, 38(3) P.D. 729, 738 (Heb.).

> Moreover, the outcome of the proceedings is not a legal determination which exists in the air. It also entails a determination regarding the proper manner of conducting the proceedings and preserving the rights of the persons litigating before the court. Thus, a serious procedural defect is to a large extent a serious substantive defect.[392]

The United States understood the grave impact of the provisions of the executive order on the actual fairness of the criminal process. Accordingly, the order issued by the Department of Defense attempted to make the proceedings before the military tribunal correspond more closely to the criminal proceedings conducted in the civilian legal system. Although this attempt has not been completed, it should be applauded. The fact that the rules of evidence differ substantively in civilian and military tribunals and the fact that there is no separation of powers inside the court – the judges, prosecutors and even defense attorneys come from the same military system are obstacles to the existence of fair criminal proceedings. The order issued by the Department of Defense has not succeeded in overcoming these obstacles.

The phenomenon of international terrorism puts democratic society to a test with the most difficult aspect being which of the following two interests will prevail: the interest in national security or the interest in pursuing a fair trial. This question sets a trap; it hints that the answer requires one interest to be chosen, thereby completely negating the other. A democratic state cannot fall into this trap. It is the state's responsibility to find the proper balance between these two interests in a manner that guarantees the safety of the public by placing terrorist suspects on trial and only convicting a person on the basis of rules of procedure which mandate a conviction based on the disclosure of the truth. The truth, the acquittal of the innocent and the conviction of the guilty, is what will guarantee public safety.

In order for a democratic state to achieve victory in its war against terror, it does not need to alter the balances it has created between these competing interests:

> What message does it send to the world when we act to change the rules of the game in order to win? If we are acting justly, with faith in our cause and truth on our side, then we will prevail. We don't need to change the rules. They are sufficient for our purpose and fairly crafted to ensure a legitimate outcome.[393]

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392. M/H 7929/96, Kozli et al v. State of Israel, 99(1) Tak-El 1265 (Heb.).

393. Kelly, *supra* note 199, at 291-92.

ALL'S FAIR IN LOVE, WAR, *AND TAXES*: DOES THE UNITED STATES PROMOTE FAIR TAX COMPETITION IN A GLOBAL MARKETPLACE CONSISTENT WITH EUROPEAN COMMUNITY AND ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT RECOMMENDATIONS THROUGH ITS ADVANCE RULING PROGRAM?

Kimberly A. Butlak*

I. INTRODUCTION

The International Fiscal Association (IFA)[1] defines an "advance ruling" as a legal interpretation and application of an existing law to a proposed or advance transaction requested by a taxpayer in which the issuing revenue authority is bound by the conclusions it provides to the requesting taxpayer.[2] Applying the IFA definition, advance tax rulings in the United States are statements issued by the Internal Revenue Service (IRS) in response to a taxpayer's request to interpret and apply the Internal Revenue Code (I.R.C.)[3] and tax treaties to a proposed transaction, referred to as Private Letter Rulings (PLRs).[4] Agreements in which the IRS makes factual as well as legal conclusions regarding a proposed transaction between or among related

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1. *See generally What is the IFA?, available at* http://www.ifa.nl/ (last visited Feb. 20, 2002). The International Fiscal Association (IFA) is a non-governmental, international organization that studies international and "comparative law in regard to public finance, specifically international and comparative fiscal law and the financial and economic aspects of taxation." *Id.*

2. *See* Maarten J. Ellis, *General Report, in* ADVANCE RULINGS, Cashiers De Droit Fiscal International LXXXIVb, at 22-24 (Kluwer ed., 1999) [hereinafter ADVANCE RULINGS]. There are several qualifications on this definition: first, the extent to which the ruling must bind the issuer varies; second, advance rulings are not always provided by revenue authorities; and third, the distinction between future and past transactions is penumbral. *See id.* This definition excludes compromises on past transactions, public rulings issued by revenue authorities (classified as those that generally interpret statutes rather than apply to an individual set of facts and were not requested by an individual taxpayer), and approvals for specialized tax treatment granted only after an application is filed by the taxpayer but to which the taxpayer, once satisfying specified conditions, is statutorily entitled. *See id.* These rulings are used to encourage self-assessment, to contribute to good relations between tax administrators and the public, to give certainty to transactions, to consistently apply laws, to minimize controversy and litigation, and to achieve a more coordinated tax system. *See id.*

3. Unless otherwise stated, all statutory references are to the Internal Revenue Code of 1986, as amended, located in Title 26 of the United States Code.

4. *See infra* section II (discussing PLRs).

parties to determine the proper allocation of pricing, known as Advance Pricing Agreements (APAs), are also considered advance agreements in the United States.[5] Because the procedures governing the program are widely available and consistently applied to all taxpayers, United States advance tax rulings are consistent with the recommendations by the European Community (EC)[6] and the Organisation for Economic Co-operation and Development (OECD)[7] to prevent preferential taxing regimes.

To reach this determination, first, PLRs and APAs are defined and the salient features, procedures for requesting and issuing the rulings, the extent of adherence, and whether modifications and revocations are retroactive are discussed.[8] Second, criteria to evaluate the existence of harmful tax competition contained in the EC Treaty, the EC Code of Conduct, and the OECD Harmful Tax Competition Report as they pertain to advance rulings are reviewed.[9] The U.S. ruling program is then analyzed to determine whether it is consistent with the EC and OECD guidelines for promoting fair tax competition.[10] In conclusion, through transparency[11] and consistency, [12] advance rulings in the United States are consistent with the methods to achieve fair tax competition outlined by the EC and the OECD.[13]

II. PRIVATE LETTER RULINGS (PLRS)

The IRS may issue rulings that apply to specific taxpayers after receiving properly submitted requests. These private rulings interpret particular tax laws and are requested and issued through formal processes, they apply to individual taxpayers and relate to a specific set of facts, they are

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5. *See infra* section III (discussing APAs).

6. *See infra* section IV.A for a discussion of the consolidated version of the treaty establishing the European Community, Nov. 10, 1997, O.J. (340) 3, *see* Consolidated version of the treaty, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf (last visited Feb. 15, 2002) [hereinafter EC Treaty], and the U.S. advance ruling practice and *infra* section IV.B for a discussion of the EC Code of Conduct and the U.S. advance ruling practice.

7. *See infra* section IV.C for a discussion of the Organisation for Economic Co-Operation and Development, Harmful Tax Comp.: An Emerging Global Issue 11 ¶ 17, *available at* http://www.oecd.org/pdf/m00004000/m00004517.pdf (last visited Feb. 14, 2002) [hereinafter OECD 1998 Report], and the U.S. advance ruling practice.

8. *See infra* section II (PLRs) and *infra* section III (APAs).

9. *See infra* section IV.A.1 (EC Treaty arts. 87-89), *infra* section IV.B.1 (EC Code of Conduct) and *infra* section IV.C.1 (OECD 1998 Report).

10. *See infra* section IV.A.2 (analyzing US ruling practice in accord with EC Treaty arts. 87-89), *infra* section IV.B.2 (analyzing US ruling practice in accord with EC Code of Conduct) and *infra* section IV.C.2 (analyzing US ruling practice in accord with OECD 1998 Report).

11. "Transparency" is the government's openness in revealing both its procedures and the results of agreements and administrative and judicial determinations.

12. This consistency, referred to as "precedence," is the practice of creating a body of administrative and judicial law by basing individual decisions upon similar, previously resolved cases. *See* BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

13. *See infra* section V (conclusion).

non-discriminatorily applied, and they are generally disclosed to the public. These characteristics comply with the EC and OECD objectives to promote fair tax competition.[14]

The IRS was first authorized to enter into agreements over proposed transactions whenever appropriate, and in the interest of tax administration in 1938. [15] These agreements remain popular both with taxpayers and the IRS because they provide certainty and potentially decreased litigation, improved taxpayer compliance, and increased availability of information in the United States self-assessment tax system.[16]

A. Definition and Salient Characteristics of PLRs

PLRs, also referred to as letter rulings, are written statements applying tax laws to proposed transactions that are issued by the IRS National Office to requesting taxpayers when in the best interest of tax administration.[17] Only the requesting taxpayer may rely on the rulings, and only if the actual facts of

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14. *See infra* section IV (comparing EC and OECD recommendations with United States tax practices).

15. Rev. Proc. 2002-3, § 2.01, 2002-1 I.R.B. 117. *See also* Frans Vanistendael, *Legal Framework for Tax, in* TAX LAW DESIGN AND DRAFTING 15, 59 (Victor Thuronyi ed., 1996) (authorizing the Commissioner of Internal Revenue (CIR) to enter into binding agreements with taxpayers over prospective transactions in 1938). Authorization for United States federal tax rulings derives from Congress's conferral of power to the Department of the Treasury (Treasury), an executive agency empowered to promulgate rules and regulations interpreting the Internal Revenue Code (I.R.C.). *See generally* I.R.C. § 7805(a) (2001) (authorizing Treasury to create regulations to carry out tax laws); Treas. Reg. § 601.201(a) (2001) (authoriz-ing IRS to respond to taxpayer inquiries). Through the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-576, 701-706 (2001), federal administrative agencies (including the IRS) were granted authority to execute their designated functions. However, prior to the APA, the IRS had express authority to create regulations in over 1,338 places in the 1954 Internal Revenue Code. *See* MICHAEL I. SALTZMAN, IRS PRAC. AND PROC., ¶ 3.03[1] (2d ed. 1991) (referring to authority in I.R.C. for IRS to promulgate regulations); Vanistendael, *supra*, at 59 (explaining statutory delegation of authority to the IRS to issue regulations implementing tax law in the Administrative Procedure Act and in I.R.C. statutes). The Treasury re-delegated the authority to respond to "inquiries of individuals and organizations 'whenever appropriate in the interest of sound tax administration' about the tax effects of their acts or transactions or about their status for tax purposes" to the IRS. SALTZMAN, *supra*, ¶ 3.03[1] (quoting Treas. Reg. § 601.201(a)). The Statement of Procedural Rules in subchapter H of the Code of Federal Regulations is the principal source for the IRS's authority. *See* Treas. Reg. §§ 601.101 through 601.901; *see also* Rev. Proc. 2002-1, 2002-1 I.R.B. 1 through Rev. Proc. 2002-8, 2002-1 I.R.B. 252.

16. ADVANCE RULINGS, *supra* note 2, at 25 (increasing complexity of tax statutes worldwide contributes to increase in advance rulings); *see also* Jason Chang et al., *Private Income Tax Rulings: A Comparative Study*, 10 TAX NOTES INT'L 738, 738 (1995) (growing complexity of tax legislation combined with increasing reliance on self-assessment and "after-the-fact review by taxation authorities" have increased rulings).

17. *See* Rev. Proc. 2002-1 §§ 2.01, 3.00, 2002-1 I.R.B. 1; Treas. Reg. § 601.201(a)(2) (2001). References to "National Office" are to the division Offices of Associate Chief Counsel. *See* Rev. Proc. 2002-1 § 1, 2002-1 I.R.B. 1.

the transactions for which the rulings were requested are substantially the same as those presented in the ruling requests.[18] As a matter of policy and practice, IRS District Offices bind themselves to the conclusions stated in PLRs. The IRS, however, is only legally required to adhere to PLRs to the extent that they accompany closing agreements under section 7121.[19]

B. Procedure for Requesting PLRs

A taxpayer initiates the process to obtain a PLR by submitting a written request, supporting documentation, and a user fee. A request must contain a statement and analysis of material facts,[20] true copies[21] of relevant documents[22] and applicable foreign laws,[23] a discussion of whether issues have been considered

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18. *Compare* I.R.C. § 6110(k)(3) (2001) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."); Treas. Reg. § 301.6110-7(b) (2001) (substantially similar); David R. Webb Co. v. Comm'r, 708 F.2d 1254, 1257 n.1 (7th Cir. 1983) ("[PLRs] may not be used or cited as precedent."); Estate of Reddert v. United States, 925 F. Supp. 261, 267 (D.N.J. 1996) (PLRs and TAMs "reveal the interpretation put upon the statute by the agency charged with the responsibility of administering revenue laws and may provide evidence that such construction is compelled by language of statute.") (internal citations omitted); MARVIN J. GARBIS ET AL., TAX PROCEDURE AND TAX FRAUD CASES AND MATERIALS 67 (3d ed. 1992) (providing that, although only the taxpayer to whom the letter ruling was issued may rely on it, in practice they are often referred to for their insight into the IRS's position on many issues).

19. *See* Treas. Reg. § 601.201(a)(2) (2001); Rev. Proc. 2002-1, §§ 2.01, 12.04, 2002-1 I.R.B. 1. *See infra* section II.E (discussing PLR modification and revocation).

20. *See* Rev. Proc. 2002-1, § 8.01(1), 2002-1 I.R.B. 1. Each request for a letter ruling must contain a complete statement of facts to identify and describe the transaction including: the identifying information of all interested parties to the transaction (such as names, addresses, telephone numbers, and taxpayer identification numbers), the annual accounting period and methods used for maintaining books and filing taxes, a description of the taxpayer's business operations, the business reasons for the transaction, and a description of the transaction. *See id.* Any additional facts material to the ruling must be specifically stated and not incorporated by reference to attached documents or paperwork previously submitted; an analysis of their bearing to the requested ruling must also be included. *See id.* § 8.01(3).

21. *See* Rev. Proc. 2002-1 § 8.01(2)(a), 2002-1 I.R.B. 1. A true copy is a duplicate that clearly reflects the original document and that is easily understood to be a duplicate of the original. *See* BLACK'S *supra* note 12, at 1508. Original documents should not be submitted because they will become part of the IRS's file and will not be returned to the taxpayer. *See* Rev. Proc. 2002-1 at § 8.01(2)(a), 2002-1 I.R.B. 1.

22. *See id.* Relevant documents include "contracts, wills, deeds, agreements, instruments, trusts documents, proposed disclaimers, and other documents pertinent to the transaction." *Id.* Each document should be sufficiently labeled and attached to the request in alphabetical order. *See id.*

23. *See* Rev. Proc. 2002-1 § 8.01(2), 2002-1 I.R.B. 1. Statutes, regulations, administrative pronouncements, or other legal authority included "must be copied from an official publication of the foreign government or another widely available, generally accepted publication" (identifying the title and date of the publication, including updated supplements). *Id.* All paperwork must be submitted in English. *See id.* If the original document is not in English, a certified translation along with a true copy of the non-English document must be included. *See id.* § 8.01(2)(a). The translation must be performed by and attested to by a

in an earlier return, ruling, or request for ruling,[24] a statement of authority both in support of and contrary to the taxpayer's position,[25] and a statement identifying pending litigation. The request must include a deletion statement,[26] signature,[27]

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qualified translator. *See id.* § 8.01(2)(c). The attestation must contain statements that the translation is true and accurate, that the translator is qualified to translate income tax matters, and include the attesting person's name and address. *See id.*

24. *See* Rev. Proc. 2002-1 § 8.01(4), 2002-1 I.R.B. 1. The taxpayer or the taxpayer's representative must make an affirmative statement to the best of his or her knowledge attesting to whether the same issue upon which the ruling is sought was present in an earlier tax return of the taxpayer or related party and whether the issue is being, or has been considered by the IRS. *See id.* § 8.01(4)-(5), 2002-1 I.R.B. 1. If this issue is being or has been considered, then the taxpayer must also clarify whether the issue was resolved and, if so, in what manner. *See id.* § 8.01(4). If the ruling request requires the interpretation of an income or estate tax treaty, then the taxpayer must disclose whether a request for a ruling or closing agreement has been submitted to the tax authority in the treaty country on the same or similar issue for the taxpayer (or related party) and the outcome of the request. *See id.* § 8.01(6). If the taxpayer believes or has knowledge of a related ruling request, he or she must provide the IRS with identifying information (including the dates the request was submitted). *See id.* § 8.01(5).

25. *See* Rev. Proc. 2002-1 § 8.01(8) (supporting), (9) (opposing), 2002-1 I.R.B. 1. These statements should explain the grounds for the conclusion (citing relevant authorities, including legislation or proposed legislation, tax treaties, court decisions, regulations, notices, revenue rulings, revenue procedures, or announcements). *See id.* Even if not advocating a particular outcome, a statement containing the taxpayer's views for the transaction and legal authority must be included. *See id.* The purpose for doing so is to assist the IRS in understanding the issue and the relevant authorities and to, therefore, respond to the request expeditiously. *See id.* If the taxpayer determines that there are no contrary authorities then an attachment stating such should be included in the request. *See id.* § 8.01(9).

26. *See* Rev. Proc. 2002-1 § 8.01(11), 2002-1 I.R.B. 1. The request for a PLR must include a statement of information the taxpayer proposes to be deleted from the letter ruling that is disclosed to the public, referred to as a "deletions statement." *See id.* The general rule of section 6110 (authorizing the disclosure of the text of any written IRS determination to be available for public review) applies to PLRs. *See* I.R.C. § 6110(a) (2001). *See also infra* section II.I (discussing disclosure and section 6110). Before releasing this information for public review, the IRS deletes the taxpayer's identifying information based on the taxpayer's deletion statement. *See* Rev. Proc. 2002-1 § 8.01(11). The format for submitting the deletions statement is specific. *See id.* § 8.01(11)(a)-(c). After the IRS determines what information will be redacted, it sends the taxpayer a notice stating its intention to disclose the material and a copy of the version proposed for public review. *See id.* § 8.01(11)(e) (citing I.R.C. § 6110(f)(1)). To protest the proposed deletions, the taxpayer must send a written response to the IRS within 20 days of the date of the notice and a copy of the PLR with the proposed deletions enclosed in brackets. *See id.* Within 20 calendar days of receiving the protest, the IRS will mail its administrative conclusion to the taxpayer. *See id.* The taxpayer has no right to a conference to resolve any disagreements regarding the redactions from the text of the PLR. *See id.* As a general rule, the IRS will not consider deleting material that was not proposed to be deleted before the IRS issued the letter ruling. *See id.* Because disclosure of the underlying transaction for which advice is sought in a PLR may be adverse to the taxpayer for business purposes, a taxpayer may receive permission from the CIR to conceal the information until the underlying transaction is complete. *See id.*

27. *See* Rev. Proc. 2002-1 § 8.01(12), 2002-1 I.R.B. 1. The taxpayer or the taxpayer's authorized representative must sign and date the request for a letter ruling. *See id.* "A stamped signature is not permitted." *Id.*

and penalty of perjury statement.[28] Finally, the taxpayer must complete and submit the checklist provided by the IRS.[29] The amount of the user fee is $600, $1,200 or $6,000 depending on the transaction proposed but may be reduced based upon the taxpayer's gross income.[30]

Completed requests are submitted to the appropriate division of the Associate Chief Counsel or Division Counsel/Associate Chief Counsel and marked "RULING REQUEST SUBMISSION."[31] Once the request has been submitted (but before the letter ruling has been issued), the taxpayer has an affirmative duty to notify the IRS National Office of circumstances affecting the determination of the ruling or of a related examination.[32]

C. Processing of a PLR Request by the IRS National Office

The Technical Services staff of the Associate Chief Counsel for Procedure and Administration receives and processes PLR requests by accepting the user fee and forwarding the completed applications to the appropriate Chief Counsel division.[33] Within twenty-one days of receiving the request, an IRS representative contacts the taxpayer to discuss procedural and

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28. *See* Rev. Proc. 2002-1 § 8.01(15)(a), 2002-1 I.R.B. 1. A letter ruling request or changes in the request must be accompanied by the following penalties of perjury statement:

> Under penalties of perjury, I declare that I have examined [Insert, as appropriate: this request or this modification to the request], including accompanying documents, and, to the best of my knowledge and belief, [Insert, as appropriate: the request or the modification] contains all the relevant facts relating to the request, and such facts are true, correct, and complete.

Id. (bracketed material in original). The declaration must be signed and dated by the taxpayer, *not the taxpayer's representative. See id.* § 8.01(15)(b). A person who signs on behalf of a corporate taxpayer must be an officer of the corporation with personal knowledge of the facts submitted in the request and whose duties expand beyond obtaining a letter ruling from the IRS. *See id.* The signor for a trust, partnership, or limited liability company must have personal knowledge of the facts submitted. *See id.*

29. *See* Rev. Proc. 2002-1, 1 I.R.B. at app. C. These materials are published to assist the taxpayer in preparing PLR requests and to expedite processing the ruling. *See id.*

30. *See* Rev. Proc. 2002-1 § 15.05 (user fee), app. A(2)(a-d) (same), 2002-1 I.R.B. 1. The fees may be reduced to $500 if the request concerns a personal tax issue of an individual taxpayer and his or her gross income is less than $250,000 or pertains to a business tax issue and the taxpayer's gross income is less than $1,000,000. *See id.* at app. A (A)(4)(a)-(b). These fees are also reduced if the rulings are additional requests that are substantially the same as those previously requested for another entity in a control group. *See id.* at app. A (A)(5).

31. *See* Rev. Proc. 2002-1 § 8.03(1), 2002-1 I.R.B. 1. Generally, only the actual request for a PLR (with no additional copies) must be submitted to the IRS. *See id.* § 8.06.

32. *See* Rev. Proc. 2002-1 § 8.04, 2002-1 I.R.B. 1.

33. *See* Rev. Proc. 2002-1 § 10.01, 2002-1 I.R.B. 1. The application is then assigned to a branch of the Chief Counsel division. *See id.*

substantive issues.[34] If additional information is required, the IRS will close the request unless the information is received within twenty-one days.[35]

Generally, after the conference of right but before the PLR is issued, the branch representative informs the taxpayer of the IRS's conclusions.[36] No informal opinion can bind the IRS or be relied upon by a taxpayer as a basis for obtaining retroactive relief under section 7805(b).[37] If the IRS intends to rule adversely, the taxpayer is given the opportunity to withdraw the PLR request.[38] If it is not promptly withdrawn, the adverse ruling will be issued.[39]

Although the IRS is not restricted to a specified amount of time within which rulings must be issued, there is a general consensus that requests should be processed and PLRs issued as soon as practicable.[40] To facilitate this goal, timeframes within which specified actions must be completed by either the IRS or the taxpayer are provided.[41] Additionally, the taxpayer may submit a

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34. *See* Rev. Proc. 2002-1 § 10.02, 2002-1 I.R.B. 1. Examples of procedural or substantive issues discussed include whether a ruling recommendation will be favorable to the taxpayer; whether the IRS needs additional information; and whether, given the nature of the transaction, a conclusion can be made. *See id.* §10.02 (1)-(3). If the ruling request involves issues within the jurisdiction of another branch or office, then those issues will be referred to the appropriate branch and the initial IRS representative who received the request will inform the taxpayer of such. *See id.* § 10.03. The representative from the other branch will also contact the taxpayer within twenty-one days to discuss any related procedural and (to the extent possible) substantive issues. *See id.*

35. *See* Rev. Proc. 2002-1 § 10.06(1), (3), 2002-1 I.R.B. 1. If minor issues prevent the IRS representative from providing a favorable ruling recommendation then the representative will discuss minor changes in the transaction or adherence to certain published positions with the taxpayer that, if followed, would result in a favorable ruling recommendation. *See id.* § 10.04.

36. *See* Rev. Proc. 2002-1 § 10.08, 2002-1 I.R.B. 1.

37. *See* Rev. Proc. 2002-1 § 10.05, 2002-1 I.R.B. 1.

38. *See* Rev. Proc. 2002-1 § 10.08, 2002-1 I.R.B. 1. A taxpayer may withdraw a PLR request at any time before the IRS signs it. *See id.* § 8.07. Similarly, the IRS may refuse to issue a PLR. *See id.* If either occurs and the taxpayer has not submitted a statement that the transaction is being abandoned, then the IRS National Office will generally send a memorandum to the appropriate official in the operating division with examination jurisdiction of the taxpayer's return. *Compare id.* § 8.07(2)(b) (emphasis added), in which the National Office representative "*generally* will notify" the appropriate official in the examination division within the taxpayer's jurisdiction of withdrawn or otherwise un-issued letter rulings with *id.* § 8.07(2)(a), in which the IRS National Office representative "will notify" the appropriate official in the examination division within the taxpayer's jurisdiction of withdrawn or otherwise un-issued PLR ruling requests pertaining to changes to or from an improper accounting method. If the memorandum explains information beyond that the request was withdrawn and that the National Office was tentatively adverse to the underlying transaction, or that the National Office declined to grant a PLR, then the memorandum constitutes Chief Counsel Advice and is subject to public review. *See id.* § 8.07(2)(c), 2002-1 I.R.B. 1 (citing I.R.C. § 6110). The user fee to submit a PLR request is not refunded if the taxpayer withdraws the request. *See id.* § 10.08.

39. *See* Rev. Proc. 2002-1 § 10.08, 2002-1 I.R.B. 1.

40. A representative of the IRS will not provide an actual or estimated date by which a ruling will be issued.

41. *See, e.g., supra* notes 34-35 and accompanying text (imposing timeframe during which IRS and taxpayer must contact one another).

proposed draft of the ruling,[42] an expedited review request,[43] or a two-part ruling request,[44] which may accelerate the ruling process. However, rulings are seldom obtained within three months of submitting a request and most are issued between three to six months after the request is received.[45] Requests involving complex transactions or novel issues may take between six months to a year or more to obtain a PLR.[46]

Once the PLR is issued, the IRS National Office sends a copy to the operating division with examination jurisdiction over the taxpayer's return.[47]

D. Taxpayer Conferences with the IRS

Although taxpayers are entitled to a conference of right to discuss their PLR request with the IRS, they may also ask for a conference to discuss substantive or procedural issues related to the contemplated requests.

The taxpayer's conference of right occurs after the IRS branch has had an opportunity to study the case.[48] At the conference, the taxpayer meets with two IRS personnel: a branch representative who explains the IRS's tentative position on the substantive issues of the request and a representative

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42. *See* Rev. Proc. 2002-1 § 10.09, 2002-1 I.R.B. 1. Proposed drafts are based on discussions of the issues between the taxpayer and the IRS. *See id.* The IRS can provide a sample format of the letter ruling. *See id.* The proposed draft should include a discussion of the facts, analysis, and letter ruling language to be included. *See id.* The draft should also be submitted electronically. *See id.* Submitting a proposed draft is not required to receive a ruling. *See id.*

43. *See* Rev. Proc. 2002-1 § 8.02(4), 2002-1 I.R.B. 1. The IRS ordinarily processes ruling requests in the order that they are received. *See id.* However, expedited review may be granted (although rare) after a written request setting forth details substantiating the need for priority review. *See id.* The request for processing ahead of the regular order will only be granted to taxpayers with a compelling need that was outside of the taxpayer's control and create a real business need to obtain a ruling to prevent detrimental and significant consequences. *See id.* The taxpayer must demonstrate that the cause necessitating expedited review could not be reasonably anticipated or controlled, and that the ruling request was submitted as soon as practicable after becoming aware of the deadline. *See id.* If expedited review is granted, the IRS cannot assure that the PLR will be processed by the date requested. *See id.*

44. *See* Rev. Proc. 2002-1 § 8.02(3), 2002-1 I.R.B. 1. A two-part PLR request sets forth the statement of facts and related documents required (part one) and a summary of facts the taxpayer believes are controlling in reaching the desired conclusion (part two). *See id.* If the IRS accepts this statement of controlling facts, then the PLR is generally based on these facts, which are incorporated into the ruling. *See id.* Where this procedure is allowed, it is encouraged because the time necessary to process the request is reduced. *See id.*

45. *See* ADVANCE RULINGS, *supra* note 2, at 635.

46. *See id.*

47. *See* Rev. Proc. 2002-1 § 10.11, 2002-1 I.R.B. 1.

48. *See* Rev. Proc. 2002-1 § 11.02, 2002-1 I.R.B. 1. The taxpayer may request, however, that the conference be earlier. *See id.*

authorized to bind the agency to a ruling.[49] At the conference, neither representative may commit the IRS, and the taxpayer may not appeal the action of a branch.[50] Although held at the IRS National Office, the conference is informal and therefore may not be recorded.[51]

As noted above, the taxpayer may request a conference with the IRS prior to submitting a request for a PLR to discuss the substantive or procedural issues related to a proposed transaction.[52] The IRS will only grant such a request if the identity of the taxpayer is disclosed, a PLR request is actually intended, the request concerns an issue over which PLRs are normally issued, and time permits.[53] If the taxpayer does not submit a request for a PLR after a pre-submission conference, then the IRS division with jurisdiction to audit the taxpayer is notified of the issues that were raised during the meeting.[54]

E. Retroactive Revocation of a PLR

Although in practice IRS district offices respect and adhere to PLRs, the IRS is only legally bound by rulings accompanied by closing agreements under section 7121.[55] Therefore, technically, the IRS has the discretion to modify or revoke a PLR anytime it finds the ruling erroneous or in discord with its current position on an issue.[56]

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49. *See* Rev. Proc. 2002-1 § 11.02, .04, 2002-1 I.R.B. 1. The most senior IRS representative also ensures that the taxpayer is given an opportunity to present his or her views on all issues. *See id.* §11.04.

50. *See* Rev. Proc. 2002-1 § 11.02, .04, 2002-1 I.R.B. 1. After the conference of right, the IRS will offer the taxpayer an additional conference if it proposes an adverse ruling either on a new issue or on grounds different than those discussed at the earlier conference. *See id.* § 11.05.

51. *See* Rev. Proc. 2002-1 § 11.02, .03, 2002-1 I.R.B. 1. A taxpayer may request that the conference of right occur via telephone rather than in Washington, D.C. (where the IRS National Office is located). *See id.*

52. *See* Rev. Proc. 2002-1 § 11.07, 2002-1 I.R.B. 1. A pre-submission conference may be requested over the telephone or in writing. *See id.* Requests should identify the taxpayer, and include a brief explanation of the primary issue so that the IRS can assign the conference to the appropriate branch. *See id.*

53. *See* Rev. Proc. 2002-1 § 11.07, 2002-1 I.R.B. 1. Three days before the pre-submission conference, the taxpayer is usually required to submit a statement of whether the issue to be discussed in the pre-submission conference is one that is normally addressed in a PLR, and a draft of the PLR request or another detailed written statement of the proposed transaction that includes the issue and the taxpayer's legal analysis. *See id.*

54. *See id.*

55. *See* SALTZMAN, *supra* note 15, ¶ 3.03[6][c].

56. *See* Rev. Proc. 2002-1 § 12.04, 2002-1 I.R.B. 1; *see also* SALTZMAN, *supra* note 15, ¶ 3.03[6][c]. Any revocation or modification "applies to all years open under the period of limitations unless the [IRS] uses its discretionary authority under [section] 7805(b) to limit the retroactive effect of the revocation or modification." Rev. Proc. 2002-1 § 12.04, 2002-1 I.R.B. 1.

> A letter ruling may be revoked or modified due to: (1) a notice to the taxpayer to whom the letter ruling was issued; (2) the enactment of legislation or ratification

This result is mitigated by the taxpayer's opportunity to initiate a judicial proceeding to determine whether the IRS's exercise of discretion was rationale and supported by relevant consideration. If the result was not, then the courts are empowered to change that result.[57]

In practice, the IRS applies revocations or modifications retrospectively only in rare and unusual circumstances.[58] In general, a taxpayer is afforded the benefit of prospective (and not retrospective) changes or revocations if there were no omissions or misstatements of material fact in the request; the facts of the actual, underlying transaction do not materially differ from those submitted in the request; there has been no change in applicable law;[59] the ruling was originally issued on a proposed transaction; and there has been good faith reliance on the PLR, resulting in a detriment to the taxpayer if the change or revocation is retroactive.[60]

Under section 7805(b), the IRS may prescribe the extent to which a revocation or modification of a letter ruling will be applied without retroactive effect. Accordingly, a taxpayer to whom a letter request has been issued may request that its retroactive effect be limited.[61] If such a request is made, then the taxpayer must state that the request is being made under section 7805(b), the relief sought, why the relief requested should be granted and include any documents bearing on the request.[62]

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of a tax treaty; (3) a decision of the United States Supreme Court; (4) the issuance of temporary or final regulations; or (5) the issuance of a revenue ruling, revenue procedure, notice, or other statement published in the Internal Revenue Bulletin.

Id. "Publication of a notice of proposed rulemaking will not affect the application of [a PLR] issued under this revenue procedure." *Id.* If a PLR is revoked or modified retroactively by another PLR then it will state the grounds upon which the retroactive revocation or modification was based unless the taxpayer engaged in fraud. *See id.* § 12.05.

57. 1 MERTENS LAW OF FEDERAL INCOME TAXATION § 3.105 (Martin M. Weinstein et al. eds., 1985 & Supp. 2002) (discussing the requirement that retroactively applied PLRs must treat taxpayers similarly). An abuse of discretion was found where the IRS revoked a PLR although the conditions for revoking PLRs, as stated in its revenue procedure, were not met. *Id.* (citing Presbyterian & Reformed Pub. Co. v. Comm'r, 79 T.C. 1070, 1089 (1982); Capital Federal Savings & Loan Ass'n v. Comm'r, 96 T.C. 204 (1991)).

58. *See* Treas. Reg. § 601.201(*l*)(5) (2001).

59. *See generally* Dixon v. United States, 381 U.S. 68 (1965); Automobile Club v. Comm'r, 353 U.S. 180, 184 (1957). Retroactive corrections of mistakes in law in PLRs are permitted (but are subject to an abuse of discretion standard) because an erroneous statement of law is without legal effect; only Congress is empowered to create tax laws, not the Commissioner. *See id.*

60. *See* Treas. Reg. § 601.201(*l*)(5); Rev. Proc. 2002-1 § 12.05(1)-(5), 2002-1 I.R.B. 1. These are the general conditions used to analyze whether the Commissioner commits an abuse of discretion under section 7805(b). *See* SALTZMAN, *supra* note 15, ¶ 3.03[6][c].

61. *See* Rev. Proc. 2002-1 § 12.11, 2002-1 I.R.B. 1.

62. *See* Rev. Proc. 2002-1 § 12.11(01)(a)-(d), 2002-1 I.R.B. 1.

F. Limitations on Ruling Areas

Ruling areas can be categorized into the following classes: no ruling, not ordinarily issued, and temporarily not issued,[63] and are further distinguished by general restrictions within those categories and by particular topics. General distinctions are made within these classes as well as those based on particular topics within those classes.

1. No ruling areas

Taxpayers may request PLRs on issues within the jurisdiction of each of the divisions of the Associate Chief Counsel.[64] However, the IRS does not issue rulings where the problems involved are inherently factual or when doing so is not in the interest of sound tax administration.[65] In addition, the IRS will not issue a ruling on a transaction, regardless of the topic, that contains: alternatives to a proposed transaction,[66] frivolous issues,[67] unresolved employment relationship determinations,[68] issues in which the government has not exhausted its right to appeal,[69] proposed transactions that would subject the taxpayer to a criminal penalty[70] or that lack a bona fide

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63. In addition to the restrictions discussed *infra*, letter rulings will not be issued in areas covered by automatic approval procedures. *See* Rev. Proc. 2002-3 § 6.01-.06, 2002-1 I.R.B. 117 (listing automatic approval procedures).

64. *See* Rev. Proc. 2002-1 § 3, 2002-1 I.R.B. 1. Procedures for obtaining PLRs that apply to alcohol, tobacco, and firearm taxes under subtitle E of the I.R.C. are under the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms (ATF). *See* Rev. Proc. 2002-1 § 4.01, 2002-1 I.R.B. 1.

65. *See generally* Rev. Proc. 2002-1 § 7.01, 2002-1 I.R.B. 1; Rev. Proc. 2002-3 §§ 2.01, 3.02, 2002-1 I.R.B. 117; Rev. Proc. 2002-7 § 2.01, 2002-1 I.R.B. 249. "Inherently factual" issues include those where, under I.R.C. procedure, a factual determination of "reasonable cause, due diligence, good faith, clear and convincing evidence, or other similar terms" is necessary. Rev. Proc. 2002-3 § 3.02(4), 2002-1 I.R.B. 117.

66. *See* Rev. Proc. 2002-1 § 7.02, 2002-1 I.R.B. 1; Rev. Proc. 2002-3 § 3.02(3), 2002-1 I.R.B. 117. This restriction likely exists because, by submitting alternative transactions in the request, the taxpayer is submitting multiple ruling requests in the form of a single request, and therefore is requesting tax planning advice. *See id.*

67. *See* Rev. Proc. 2002-3 § 3.02(9), 2002-1 I.R.B. 117; Rev. Proc. 2002-1 § 7.04, 2002-1 I.R.B. 1. "Frivolous issues" are defined as those without a factual or legal basis, or determined as frivolous by the courts. *See id.* For example, whether the requirement of filing a tax return is an unreasonable search prohibited by the United States Constitution, whether income taxes are voluntary, and whether refusing to pay taxes is permitted because the taxpayer opposes government expenditures are frivolous issues. *See id.*

68. *See* Rev. Proc. 2002-3 § 3.02(7), 2002-1 I.R.B. 117. The IRS will not issue PLRs about which an entity is considered an employer of a worker under common law employer-employee relationship rules when more than one entity is treating the worker as such. *See* Rev. Proc. 2002-1 § 1.06, 2002-1 I.R.B. 1.

69. *See* Rev. Proc. 2002-3 § 3.02(2), 2002-1 I.R.B. 117.

70. *See* Rev. Proc. 2002-3 § 3.02(5), 2002-1 I.R.B. 117.

business purpose,[71] or any incomplete or non-conforming request.[72] Under the jurisdiction of the Associate Chief Counsel (International), the issuance of PLRs is also restricted where: the estate tax is prospectively applied to the property or the estate of a living person, an issue is clearly and adequately addressed by another authority (absent extraordinary circumstances), and any issue that is the subject of the taxpayer's pending request for competent authority assistance under a United States Tax Treaty.[73] Finally, PLRs are only issued on partial transactions if the remaining portions of the transaction falls within a specific no ruling area.[74]

The IRS also refuses to issue PLRs on certain topics. Within the jurisdiction of the Associate Chief Counsel (International), these topics address: original issue discount, income affected by a treaty, foreign base company income, and dual consolidated losses.[75]

2. *"Not ordinarily" issued*[76]

PLRs will not ordinarily be issued when the underlying transaction contemplates whether a business purpose exists or whether a taxpayer uses a correct classification code, contradicts United States tax law designed to effectuate different tax consequences under the tax laws of the United States and of a foreign country, concerns a taxpayer domiciled in a foreign jurisdiction with which the United States does not have an effective mechanism for obtaining tax information relevant to the ruling request,[77] considers proposed federal, state, local, municipal, or foreign legislation,[78] or interprets foreign law or documents beyond their plain meaning.[79]

Areas over which rulings are not ordinarily issued that are within the ambit of the remaining, combined Associate Chief Counsel Offices include

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71. *See* Rev. Proc. 2002-3 § 3.02(1), 2002-1 I.R.B. 117. Transactions designed primarily to reduce taxes do not have a bona fide business purpose. *See id.*

72. *See* Rev. Proc. 2002-3 § 3.02(6), 2002-1 I.R.B. 117.

73. *See* Rev. Proc. 2002-7 § 3.02(1)-(7), 2002-1 I.R.B. 249. *See infra* section III.F (discussing consideration of APAs by competent authority).

74. *See* Rev. Proc. 2002-1 § 7.03, 2002-1 I.R.B. 1. Note that *determination* letters *may be* issued on partial transactions. *See id.* If a taxpayer submits a PLR request on a partial transaction attesting that the remainder of the transaction falls within a no ruling area, then the taxpayer must state the tax treatment of the no rule tax issue in the request to the best of the taxpayer's knowledge and belief. *See* Rev. Proc. 2002-3 § 2.03, 2002-1 I.R.B. 117.

75. *See* Rev. Proc. 2002-7 § 3.01(1)-(4), 2002-1 I.R.B. 249.

76. *See* Rev. Proc. 2002-3, §§ 1.00, 4.01(1), 2002-1 I.R.B. 117. "Unique and compelling reasons must be demonstrated" for a PLR that is characterized as "not ordinarily" issued to overcome this classification and to be issued. *Id.*

77. *See* Rev. Proc. 2002-3 § 4.02(7), 2002-1 I.R.B. 117; Rev. Proc. 2002-7 § 4.02(5), 2002-1 I.R.B. 249.

78. *See* Rev. Proc. 2002-7 § 4.02(5), 2002-1 I.R.B. 249.

79. *See* Rev. Proc. 2002-7 § 4.02(6)(a), 2002-1 I.R.B. 249.

those in which: interrelated items, sub-methods of accounting,[80] or indefinite consummation dates for underlying transactions exist;[81] properties are held primarily for sale in the ordinary course of a trade or business;[82] or litigation by affected parties concerning the underlying transactions is contended.[83] In addition, the IRS will not ordinarily address questions and problems in PLRs regarding specific code provisions (generally because they require largely factual determinations).[84]

3. "Temporarily not issued" ruling areas

Rulings will not be issued for a temporary period in specified areas that are under extensive study.[85] These issues currently include: salary reimbursement arrangements,[86] deferred compensation plans for state and local governments and tax-exempt organizations,[87] undivided fractional interests in real property,[88] defining a small business corporation,[89] and determining the identity of a disregarded employer.[90]

G. Effect of a Favorable, Adverse, or Withdrawn Ruling

"A taxpayer may not rely on a [PLR] issued to another taxpayer."[91] When determining a taxpayer's tax liability, the director must determine whether the transaction executed was the transaction proposed in the ruling request, whether the conclusions stated in the PLR are accurately reflected in the taxpayer's tax return, and whether there has been any change in the applicable law during the period in which the transactions occurred.[92] If the

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80. *See* Rev. Proc. 2002-3 § 4.02(3), 2002-1 I.R.B. 117.

81. *See* Rev. Proc. 2002-3 § 4.02(4), 2002-1 I.R.B. 117.

82. *See* Rev. Proc. 2002-3 § 4.02(5), 2002-1 I.R.B. 117.

83. *See* Rev. Proc. 2002-3 § 4.02(6), 2002-1 I.R.B. 117.

84. *See* Rev. Proc. 2002-3 § 4.02(1), 2002-1 I.R.B. 117; Rev. Proc. 2002-7 § 4.01(1)-(29), 2002-1 I.R.B. 249.

85. *See* Rev. Proc. 2002-3 §§ 2.02, 5.00, 2002-1 I.R.B. 117. These advance rulings will be issued again once the Treasury or IRS announces their resolution in revenue rulings, revenue procedures, or regulations. *See id.*

86. *See* Rev. Proc. 2002-3 § 5.01, 2002-1 I.R.B. 117.

87. *See* Rev. Proc. 2002-3 § 5.02, 2002-1 I.R.B. 117. Specifically, a PLR will not be issued on the tax treatment of any section 457 plan providing that a loan may be made from assets held by such plan to any participants or beneficiaries under the plan. *See id.*

88. *See* Rev. Proc. 2002-3 § 5.03 (regarding eligibility for tax-free exchanges), § 5.06 (concerning whether arrangements constitute a separate taxable entity), 2002-1 I.R.B. 117.

89. *See* Rev. Proc. 2002-3 § 5.04, 2002-1 I.R.B. 117. The specific issue under review is whether a state law limited partnership electing under Treas. Reg. 301.7701-3 to be classified as an association taxable as a corporation has more than one class of stock for purposes of section 1361(b)(1)(D). *See id.*

90. *See* Rev. Proc. 2002-3 § 5.05, 2002-1 I.R.B. 117.

91. Rev. Proc. 2002-1 § 12.02, 2002-1 I.R.B. 1.

92. *See* Rev. Proc. 2002-1 § 12.03(1)-(4), 2002-1 I.R.B. 1.

director determines that a PLR should be revoked or modified, this determination is forwarded to the IRS National Office for review before the director takes further action.[93] A taxpayer may protest an adverse PLR under section 367(a)(1) within forty-five days.[94]

H. User Fee Requirements for a PLR

The Secretary of the Treasury is vested with the authority to establish user fees paid for taxpayers in exchange "for requests to the [Internal Revenue] Service for letter rulings, opinion letters, determination letters, and similar requests."[95] The fees, payable in advance, apply to requests made between February 1, 1988 and October 1, 2003 and vary depending on the time and difficulty associated with fulfilling taxpayers' requests for these rulings.[96]

Requests involving several unrelated transactions or requests about a related transaction by separate entities are treated as separate requests and separate fees apply to each.[97] User fees are reduced for PLR requests that are substantially identical to rulings previously issued by the IRS.[98] The user fee

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93. *See* Rev. Proc. 2002-1 § 12.03, 2002-1 I.R.B. 1. If the director determines that the transaction and the ruling are consistent and there has been no change in the law affecting the taxpayer, then the PLR is to be applied by the director to determine the taxpayer's liability. *See id.*

94. *See* Treas. Reg. § 601.201(e)(19). The Assistant Commissioner (Technical) will establish an ad hoc advisory board to consider each protest, regardless of whether a conference is requested. *See id.* The taxpayer will be granted one conference upon request. *See id.* The board will consider all materials submitted in writing by the taxpayer and oral arguments presented at the conference. *See id.* The Board will make its recommendation to the Assistant Commissioner (Technical), who will make the decision. *See id. See also* Rev. Proc. 77-5(4) (providing procedures for taxpayer to protest an adverse PLR).

95. Rev. Proc. 2002-1 § 15.01, 2002-1 I.R.B. 1 (citing § 10511 of the Revenue Act of 1987, 1987-3 C.B. 1, 166 enacted Dec. 22 1987, as amended by § 11319 of the Omnibus Budget Reconciliation Act of 1990, 1991-2 C.B. 481, 511, enacted Nov. 5, 1990, by § 743 of the Uruguay Round Agreements Act, 1995-1 C.B. 230, 239, enacted Dec. 8, 1994, and by § 2 of the Tax Benefits for Individuals Performing Certain Services in Certain Hazardous Duty Areas, 1996-3 C.B. 1, enacted March 20, 1996). "Similar requests" include APAs and certain closing agreements. *See id.* § 15.02. User fees do not apply to filing for certain elections, information letters, or requests to change a taxpayer's accounting period or method that is permitted by a published automatic change revenue procedure. *See* Rev. Proc. 2002-1 § 15.03(1)-(4), 2002-1 I.R.B. 1. Nor are user fees imposed upon departments, agencies, or instrumentalities of the United States that certify that they are seeking a PLR or determination letter on behalf of a program or activity funded with federal appropriations or on requests as to whether a worker is an employee for federal employment taxes and income tax withholding. *See id.* § 15.04(1)-(2); Rev. Proc. 2002-8 § 4.03, 2002-1 I.R.B. 252.

96. *See* Rev. Proc. 2002-1 § 15.01, 2002-1 I.R.B. 1.

97. *See* Rev. Proc. 2002-1 § 15.06(4), (5), 2002-1 I.R.B. 1.

98. *See* Rev. Proc. 2002-1 § 15.07(2), 2002-1 I.R.B. 1.

will generally only be refunded if the IRS refuses to rule on all issues for which a ruling is requested.[99]

I. Disclosure of PLRs

There are three primary authorities controlling the disclosure of taxpayer information and administrative materials promulgated by the IRS: section 6110, the general rule authorizing disclosure; section 6103, the exception limiting disclosure; and, although largely historical, the Freedom of Information Act (FOIA). [100]

1. Evolution of required disclosure of taxpayer information

Prior to the Tax Reform Act of 1976, there were two competing provisions regarding disclosure of IRS information, section 6103 and the FOIA. Section 6103 provides that tax returns and return information are confidential and, unless otherwise authorized, may not be disclosed.[101] Conversely, the FOIA requires each federal agency to make "interpretations . . . adopted by the agency available for public review and duplication,

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99. *See* Rev. Proc. 2002-1 § 15.10, 2002-1 I.R.B. 1. User fees *will not* be refunded to the taxpayer in the following instances: (1) if the taxpayer withdraws the request for a PLR or determination letter after it is received by the IRS (unless the cause is attributed to the IRS's charging of a higher fee than the one sent with the original request that the taxpayer is unwilling to pay), (2) if the taxpayer's request is procedurally deficient and not timely corrected, or (3) if the case is closed because the taxpayer failed to file additional information after receiving notice from the IRS to do so. *See id.* § 15.10(1)(a)-(i).

100. *See* 5 U.S.C. § 552 (2001). FOIA is the primary authority for availability and access to information related to the federal government. *See* ROBERT F. BOUCHARD & JUSTIN D. FRANKLIN, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 8 (1980). It provides that "'any person' has a right, enforceable in court, to access to all agency records—except to the extent the records or parts of them may be covered by one of FOIA's nine exemptions. FOIA thus applies to almost the entire range of federal activities and has resulted in a much more open government." *Id. See infra* note 102 (listing nine exceptions that prevent disclosure).

101. *See* I.R.C. § 6103(a) (2001). "Return" is defined as "any tax or information return, declaration of estimated tax, or claim for refund . . . filed with the Secretary . . . and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed." *Id.* § 6103(b)(1). "Return information" is defined as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments," or other data collected by the IRS regarding a taxpayer's return or tax liability. *Id.* § 6103(b)(2)(A). Return information also includes "any part of any written determination or any background file document . . . not open to public inspection under section 6110," any advance pricing agreement and related background information, and any closing agreement and related background information. *Id.* § 6103(b)(2)(B)-(D).

(subject to nine enumerated exceptions)."[102] In this discord, the IRS concluded that PLRs and related information were prohibited from disclosure under section 6103 because they contain private information,[103] do not have "precedential significance," and are "issued to a taxpayer on a particular transaction or set of facts and applied only to that set of facts."[104]

Non-disclosures of this type led to claims of unfairness. Complaints included remarks "that the private letter ruling system developed into a body of law known only to a few members of the tax profession,"[105] such as Washington law or accounting firms with libraries containing the PLRs of its clients. This, it was argued, created an unfair advantage because, given their special access to the information contained in the rulings, the firm representatives could advise other clients of the IRS's position.[106] A second criticism that arose was that the tax laws were not applied equally.[107]

The final blow to the IRS's non-disclosure of PLRs and related information came with alleged FOIA violations in *Tax Analysts & Advocates v. IRS*[108] and in *Fruehauf v. IRS*.[109] Both courts held that PLRs were subject to disclosure under the FOIA but neither addressed what parts of the rulings should be disclosed, their precedential value, or procedures for taxpayers to

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102. STAFF OF THE J. COMM. ON TAX, GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976 (H.R. 10612, 94th Cong., 2d session, Pub. L. 94-455) Dec. 29, 1976, *reprinted in* 1976-3 C.B. 1,314. [hereinafter GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976]. The nine exceptions preventing disclosure under the FOIA pertain to the following: (1) information interfering with national security, (2) matters internal to an agency not of substantial and legitimate public interest, (3) material protected under another statute, (4) trade secrets and other confidential business information, (5) communication within the executive branch that is "deliberative" (*i.e.:* advice and recommendations but not factual information) or protected by the attorney-client or work-product privileges, (6) information about individuals the disclosure of which would be an unwarranted invasion of privacy, (7) records compiled as part of a law enforcement investigation (violation-oriented or background security investigation; not general agency audits, reviews or investigations in the manner the agency accomplishes its mission) to the extent that one of six specified harms is present, (8) and (9) records related to examinations of financial institutions and oil well information. *See* BOUCHARD & FRANKLIN, *supra* note 100, at 12-19.

103. *See* GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976, *supra* note 102, at 315; *see also* SALTZMAN, *supra* note 15, ¶ 3.03[3][c].

104. Jonathan Sobeloff, *The New Freedom of Information Act—What it Means to Tax Practitioners*, J. OF TAX'N, (Sept. 1967), *reprinted in* FREEDOM OF INFORMATION ACT TEN MONTH REVIEW (submitted by the Subcomm. on Admin. Prac. and Proc. to the Comm. on the Judic. of the U.S. Sen.), May 1968, at 249 (quoting Treas. Reg. § 601.702(b)(1) (1967)).

105. GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976, *supra* note 102, at 315.

106. *See id.*

107. *See id.*

108. 505 F.2d 350 (D.C. Cir. 1974).

109. 522 F.2d 284 (6th Cir. 1975), *vacated and remanded*, "for reconsideration in light of the Tax Reform Act of 1976," 429 U.S. 1085 (1977).

assert claims of privacy.[110] In an attempt at clarification, the IRS issued procedural rules allowing for public inspection of the full text of PLRs, including identifying information.[111] There was substantial public comment on these rules and scrutiny by the Justice Department that the procedural rules might contradict other provisions of the law.[112] Members of Congress were responsive to resolving these issues and enacted section 6110 in the Tax Reform Act of 1976.[113]

2. PLR disclosure governed exclusively by section 6110

Section 6110 was enacted as the exclusive remedy for disclosure of rulings and related material, precluding claims for disclosure under the FOIA.[114] The general rule of section 6110 provides that IRS written determinations—such as PLRs—along with relevant background file documents shall be open for public inspection as the Secretary allows.[115] "Written determinations" exclude APAs.[116] The disclosure requirements of

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110. *See* GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976, *supra* note 102, at 314-15 (citing Tax Analysts & Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974) and Fruehauf Corp. v. IRS, 522 F.2d 284 (6th Cir. 1975)); *see also* SALTZMAN, *supra* note 15, ¶ 3.03[3][c], at 3-30.

111. *See* GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976, *supra* note 102, at 315.

112. *See id.*

113. *See* BOUCHARD & FRANKLIN, *supra* note 100, at 9; SALTZMAN, *supra* note 15, ¶ 3.03[3][c], at 3-30. The quick Congressional response was partially motivated by the era of heightened suspicion about government secrecy: the challenges to and debates over the disclosure of letter rulings occurred shortly after former President Richard M. Nixon resigned from office in 1974 to avoid impeachment as a result of his involvement in Watergate. *See, e.g.*, Washington Post, *Revisiting Watergate, available at* http://www.washingtonpost.com/wp-srv/national/ longterm/ watergate/front.html (last visited Feb. 18, 2002) (discussing Watergate).

114. Section 6110(m) states:

> Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any Court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any such documents.

I.R.C. § 6110(m) (2001). *See also* Grenier v. Comm'r, 449 F. Supp. 834, 839 (D.C. Md. 1978) ("Congress evinced intent to displace Freedom of Information Act as means of access to unpublished Internal Revenue Service rulings.") (internal citations omitted); *see* SALTZMAN, *supra* note 15, ¶ 3.03[3][c], at 3-30 (limiting disclosure to section 6110).

115. *See* I.R.C. § 6110(a) (2001); *see generally* Treas. Reg. §§ 301.6110-1(a) through 301.6110-7 (1963). The Secretary may dispose of any *general written determination* or *background file document* three years after it is made available for public inspection but not of any *reference written determinations* and related background file documents. *See id.* § 6011(k)(2). *See infra* note 116 for definitions of italicized terms. The text of any PLRs open for public inspection under section 6110 is located in the reading room at the IRS National Office. *See* Treas. Reg. § 301.6110-1(c)(1)-(3) (2001). Materials may not be removed from the reading rooms (although they may be photocopied). *See id.*

116. *See* I.R.C. § 6110(b)(1), (3) (2001); Treas. Reg. § 301.6110-2(a) (2001). They can be classified as either reference or general written determinations. "A reference written determination is a written determination that the Secretary deems to have significant reference

section 6110 do not apply to confidential information arising under a treaty obligation or related to applications of organizations for tax-exempt status.[117]

Per subsection c of section 6110, before making information available for public review, the Secretary must redact identifying information,[118] classified information,[119] specifically exempted information,[120] certain business information,[121] private information,[122] financial institution regulation information,[123] and geological and geophysical information and data.[124] The Secretary shall determine the extent of the deletions and is not liable for failing to make them unless the omission is intentional or willful, or the deletions were either affirmatively agreed to or court ordered.[125]

Upon issuing a written determination or background file document, the Secretary must mail a notice of intention to disclose to any person about

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value." I.R.C. § 6110(b)(2)(C). A "general written determination" is any written determination other than a reference written determination. *Id.* § 6110(b)(3)(B). A "background file document" includes the request for the determination, material submitted in support of the request, and communication, written or otherwise between the IRS and those outside of the IRS in connection with the determination. *Id.* § 6110(b)(2). When a written determination is open for public inspection, upon written request, the Secretary also makes any background file document relating to the written determination available to the requestor. *Id.* § 6110(e).

117. *See generally* I.R.C. § 6110(*l*)(1) (2001) (excluding information in sections 6104 and 6105 from disclosure); I.R.C. § 6104 (2001) (providing separate rules for publicity of organizations' applications for tax-exempt status under sections 501(a) or 527); I.R.C. § 6105 (2001) ("Tax convention [generally defined as any agreement entered into with the competent authority of a foreign government pursuant to a tax convention] information shall not be disclosed.").

118. *See* Treas. Reg. § 301.6110-3 (2001). Examples of identifying information that is deleted are the names and addresses of the person to whom the determination pertains. *See id.* Information is considered to identify a person if a reasonable person who is generally knowledgeable about a community could identify the person based on the information available when the ruling is disclosed as well as the information that will be made available reasonably thereafter. *See* SALTZMAN, *supra* note 15, ¶ 3.03[3][c], at 3-32 (citing Treas. Reg. § 301.6110-3(a)(1) (2001)); GEN. EXPLAN. OF THE TAX REFORM ACT OF 1976, *supra* note 102, at 1,315.

119. *See* Treas. Reg. § 301.6110-3(a)(2) (2001). Classified information that is deleted is specifically authorized (such as in an executive order) to be confidential in the interest of national defense or foreign policy. *See id.*

120. *See* Treas. Reg. § 301.6110-3(a)(3) (2001). Specifically exempted information pertains to information specifically exempted from disclosure by a statute applicable to the IRS. *See id.*

121. *See* Treas. Reg. § 301.6110-3(a)(4) (2001). Examples of redacted business information include: trade secrets and privileged or confidential commercial or financial information. *See id.*

122. *See* Treas. Reg. § 301.6110-3(a)(5) (2001). Private information is information that, if disclosed, a "clearly unwarranted invasion of personal privacy would result." *Id.*

123. *See* Treas. Reg. § 301.6110-3(a)(6) (2001). Financial institution regulation information includes information related to examining, operating, or reporting to agencies regulating and supervising financial institutions. *See id.*

124. *See* Treas. Reg. § 301.6110-3(a)(7) (2001). An example of geological and geophysical information and data is maps concerning wells. *See id.*

125. *See* I.R.C. § 6110(c) (2001).

whom the written determination pertains.[126] The written determination or background file document becomes available for public inspection at the later of between seventy-five and ninety days after the notice of intention to disclose is mailed or within thirty days after a court decision becomes final.[127] To challenge the information not redacted by the IRS, the person requesting the PLR must have exhausted available administrative remedies, including the submission of a proposed deletion statement to the IRS, followed by a letter to the IRS stating further information and arguments to support omitting the material within ten days of receiving the proposed letter ruling.[128] Finally, a written statement must be submitted within twenty days of receiving the IRS' intention to disclose in which the deletions not made by the IRS are identified on a copy of the PLR with the proposed deletions enclosed in brackets.[129]

III. ADVANCE PRICING AGREEMENTS

An APA is a binding agreement between the IRS and a taxpayer about the transfer pricing methodology (TPM) to be applied to the apportionment or allocation of income, deductions, credits, or allowances between or among two or more related taxpayers.[130] The agreement is made in advance of the

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126. *See* I.R.C. § 6110(f)(1) (2001).

127. *See id.*; Treas. Reg. § 301.6110-5(b)(5) (2001).

128. *See* Treas. Reg. §§ 301.6110-5(b)(1); 601.201(e)(11). The IRS will attempt to resolve these issues prior to providing the PLR but the person requesting the PLR is not entitled to a conference to resolve the disagreement over the material to be deleted. *See* Treas. Reg. § 601.201(e)(11) (2001).

129. *See* Treas. Reg. § 601.201(e)(16) (2001). The IRS shall mail its final administrative conclusion regarding the deletions to be made within twenty days after receiving the response by the person requesting the ruling. *See id.* After exhausting these administrative remedies, if the person to whom the written determination pertains continues to object to the disclosure, he or she may file a petition and statement of proposed deletions in the United States Tax Court within sixty days of the Secretary's notice of intention to disclose. *See* I.R.C. § 6110(f)(3) (2001); Treas. Reg. § 301.6110-5(b)(2)-(3) (2001). Similarly, an action to obtain additional disclosure may be pursued once administrative remedies have been exhausted by filing a petition with the United States Tax Court or a complaint in the United States District Court for the District of Columbia requesting an order that any written determination or background file document be made available for public inspection. *See* I.R.C. § 6110(f)(4). The burden of proof regarding disclosure is on persons seeking to restrain disclosure. *See id.* Resolving the issue by the earliest practicable date, the Tax Court may disclose portions of related hearings, testimony, evidence, and reports to the public. *See* I.R.C. § 6110(f)(2) (2001). This time period may be extended for as long as the court determines is necessary for the Secretary to comply with its decision or, at the written request of the person requesting the written determination, for the lesser of ninety days or until fifteen days after the Secretary's determination that the underlying transaction has been completed (unless good cause is demonstrated for further delay of disclosure). *See* I.R.C. § 6110(f)(2), (3). Remedies for section 6110 claims must be brought in the Court of Claims. *See* Treas. Reg. § 301.6110-7(c) (2001).

130. *See* Charles S. Triplett & C. Cabell Chinnis, Jr., *United States* [Advance Rulings] *printed in* INT'L BUREAU OF FISCAL DOC., INT'L GUIDE TO ADVANCE RULINGS, ¶ 6.1 (1999).

underlying transaction. The United States was the first country to create an APA program of this kind. The APA program officially began in 1991 and has served as a model for other countries to resolve transfer pricing disputes.[131] The following discussion provides a context for the APA program, and addresses the program as it relates to concepts associated with advance rulings.

A. IRS Authority to Challenge Amounts Not Clearly Reflecting Arm's Length Prices[132]

Section 482 provides that the Secretary of the Treasury may "distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among" two or more related organizations, trades, or businesses—regardless of where organized—"to prevent evasion of taxes or clearly to reflect the income of ... such organizations, trades, or businesses."[133] The objective of this provision "is to place 'a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer.'"[134]

True taxable income is usually determined by the arm's length cost, also referred to as the fair market value, of a comparable transaction.[135] Depending

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131. *See id. See also* Rev. Proc. 91-22, 1991-1 C.B. 526 (announcing the APA program).

132. The process described herein oversimplifies the process of determining an arm's length price given the complexities of today's market. As a more detailed analysis of these issues are beyond the scope of this paper, consult the sources cited within this section for further information.

133. I.R.C. § 482 (2001). In its entirety, section 482 provides:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

Id.

134. BORIS I. BITTKER & LAWRENCE LOKKEN, FUNDAMENTALS OF INTERNATIONAL TAXATION, ¶ 79.1.1 (student 2d ed. 2001) (quoting Treas. Reg. § 1.482-1(b)(1), quoted with approval in Commissioner v. First Sec. Bank of Utah, 405 U.S. 399, 400 (1972)).

135. *See id.;* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS ¶ 8045, at 634 (2d ed. 2001) (quoting Treas. Reg. § 1.482-1(b)(1) (2001)). The effectiveness of the arm's length cost as a true measure of taxable income has been criticized because of "the absence of comparable arm's length transactions between unrelated parties, and the inconsistent results of attempting to impose an arm's length concept in the absence of comparables." BITTKER & LOKKEN, *supra* note 134, ¶ 79.1.1 (quoting Staff of Joint Comm. on Tax'n, 99th Cong., 2d Sess., Gen. Explan. of the Tax Reform Act of 1986, at 1014 (Comm. Print 1987)).

on the comparisons and methods used, different results may be obtained; the application of a best method may yield "a number of results from which a range of reliable results may be derived." [136] This continuum is referred to as the "arm's length range." [137] If the results fall within this range, then the taxpayer's proposed prices will not be adjusted.[138]

B. Consequences of Transfer Pricing Between Foreign and Domestic Related Parties

The IRS invokes section 482 most frequently to challenge transfer prices and expense allocations between domestic corporations and foreign affiliates that are not subject to United States tax on foreign income.[139] For example, the IRS may invoke its authority under section 482 to challenge the sale of goods at cost by a United States corporation to its foreign subsidiaries because the profits earned when the goods are resold overseas would not be taxed by the United States until they are repatriated (*e.g.*, through a dividend distribution by the foreign subsidiary to its United States parent.)[140]

Adjustments to an item of income under section 482 for one taxpayer in a control group results in a collateral adjustment to other members in the control group, such as "correlative allocations, deductions, conforming adjustments and setoffs."[141] This may be illustrated in the example above; the price at which the parent's products are transferred to the subsidiary must

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136. GUSTAFSON, *supra* note 135, ¶ 8045, at 636 (quoting Treas. Reg. § 1.482-1(e) (2001)). The following factors must be considered when determining the comparability of transactions: the resources used, the contractual terms, the risks, the weight of the economic conditions, and the nature of the property or services. *See id.* ¶ 8045 (citing Treas. Reg. § 1.482-1(d) (2001)). Differences attributed to attempts to enter or expand a market, comparisons of different markets, and different geographic locations may alter this analysis. *See id.* (citing Treas. Reg. § 1.482-1(d)(4) (2001)).

137. *Id.*

138. *See id.*

139. *See* BITTKER & LOKKEN, *supra* note 134, ¶ 79.1.1. The IRS has an incentive to invoke section 482 to increase tax collections in international transactions when the controlled arrangement is between a supplier and producer (as in the example set forth in the text accompanying note 140). *See* GUSTAFSON, *supra* note 135, ¶ 8020. By doing so, the IRS implicates the foreign tax credit limitations so foreign and United States-source income and deductions may be accurately measured. *See id.* The IRS also implicates attempts to shift income to tax haven subsidiaries to avoid constructive dividend treatment under controlled foreign corporation rules. *See id.*

140. *See* BITTKER & LOKKEN, *supra* note 134, ¶ 79.1.1. Transactions of this type are challenged because the United States parent receives the benefit of deferring the income tax owed to the United States and, if the U.S. parent can deduct the cost of conducting foreign operations from its domestic income, then the U.S. parent also receives an additional benefit of reduced taxable income and resulting U.S. tax. *See id.*

141. GUSTAFSON, *supra* note 135, ¶ 8005, at 628 (citing Treas. Reg. § 1.482-1(g) (2001)).

contemplate a reasonable profit and deductions attributable to the subsidiary for the expense of conducting the foreign operations.[142]

Problems regarding jurisdiction and double taxation of the same income arise when section 482 adjustments are made between or among control groups of foreign and domestic taxpayers. The United States does not have jurisdiction to alter the income of the foreign taxpayer if the foreign taxpayer does not pay United States taxes.[143] This is significant because the purpose of section 482 is to allocate income and deductions to the proper taxpayers.[144] For example, when the IRS makes adjustments under section 482 between two United States controlled entities, A and B, it will decrease income attributed to entity A to offset the increase in income attributed to entity B.[145] As a result, entity A's United States income tax liability is decreased; entity B's United States income tax liability is increased. If an entity involved in the section 482 adjustment is a foreign taxpayer and the income—and therefore income tax liability—attributed to the United States taxpayer is increased, there is no corresponding reduction in taxable income for the foreign controlled group member. This may result in multiple taxations of the same income because foreign tax officials are usually similarly authorized to adjust and allocate income and deductions between or among taxpayers.[146]

If a United States tax treaty is in effect between the United States and a foreign country, United States' taxpayers may seek relief through the "competent authority provision," which permits taxpayers to request assistance from the United States competent authority when either treaty partner is imposing taxes inconsistent with the treaty.[147] If a taxpayer's request for competent authority assistance is accepted, then the United States competent authority will generally consult with the appropriate foreign

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142. *See, e.g.*, BITTKER & LOKKEN, *supra* note 134, ¶ 79.1.1.

143. *See* GUSTAFSON, *supra* note 135, ¶ 8040, at 633. If the foreign entity's income is or becomes relevant for United States tax purposes, then it will be altered to reflect the section 482 adjustment. *See id.*

144. *See id.*

145. *See id.*

146. *See generally id.* To illustrate: taxpayer A from country one and taxpayer B from country two, both in the same control group, engage in a transaction. The taxing agencies of both country one and country two are authorized to adjust income and deductions of its taxpayers. Country one may allocate income from a transaction to its domestic taxpayer, A. Because it lacks jurisdiction to do so, no related decrease in income is attributed to taxpayer B, as taxpayer B does not pay tax in country one. After analyzing the transaction, country two may conclude that allocating the income in question to taxpayer B more accurately reflects income. As in country one, country two may lack jurisdiction to make a corollary reduction in income to taxpayer A. A double tax results because the same portion of income is taxed in each country. *See id.* at 634.

147. *See id.* The Assistant Commissioner (International) is the United States competent authority for interpreting tax treaties (acting with the concurrence of the Associate Chief Counsel (International)). *See* Rev. Proc. 96-13 § 2.01, 1996-1 C.B. 616.

competent authority and attempt to reach a mutual agreement satisfactory to all parties.[148]

C. APA Defined

An APA is a binding agreement issued by the Office of Associate Chief Counsel (International) between the IRS and a taxpayer determining the prospective, applicable TPM "to any apportionment or allocation of income, deductions, credits, or allowances between or among two or more organizations, trades, or businesses owned or controlled, directly or indirectly by the same interests."[149] The TPM represents the best method provided under the regulations governing section 482 as agreed to by the taxpayer and the IRS.[150] Although advance ruling requests generally resolve legal rather than factual questions, the IRS created the APA process to provide a "flexible problem-solving process based on cooperative and principled negotiations between taxpayers and the Service."[151]

D. Procedure for Obtaining an APA

A taxpayer initiates the procedure for obtaining an APA by submitting a request[152] containing copies of all relevant documents related to the proposed TPM[153] and a user fee, ordinarily $25,000.[154] The taxpayer also

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148. *See* Rev. Proc. 96-13 § 2.03, 1996-1 C.B. 616. See infra note 163 and accompanying text for discussion of coordination of APA procedure and competent authority agreement.

149. Rev. Proc. 96-53 § 1, 1996-2 C.B. 375. *See also id.* § 10.01 (an APA is a binding agreement). If the taxpayer complies with the conditions of the APA, the IRS will regard the underlying transaction as satisfying the arm's length standard according to the terms of the APA. *See id.* § 10.02.

150. *See* Rev. Proc. 96-53 § 1, 1996-2 C.B. 375.

151. Rev. Proc. 96-53 § 3.01, 1996-2 C.B. 375. *See also* GUSTAFSON, *supra* note 135, ¶ 8175.

152. *See* Rev. Proc. 96-53 § 3.09, 1996-1 C.B. 375. Prior to submitting an APA request, the taxpayer may request a conference with the IRS to determine whether the underlying transaction is suitable for an APA and, if so, to clarify the particular information that should be included with the request. *See id.* An English translation must accompany all documents submitted in a foreign language. *See id.* § 5.01(3). Once completed, the taxpayer should sign the request and submit the original and seven copies to the IRS. *See id.* § 5.12-13.

153. *See* Rev. Proc. 96-53 § 5.01(2), 1996-1 C.B. 375. The IRS retains all materials submitted in its files, therefore original documents should not be submitted. See id. § 5.01(1). The taxpayer may be required to provide an independent expert at its own expense to review and provide an opinion about the taxpayer's proposed TPM. *See* Rev. Proc. 96-53 § 9, 1996-1 C.B. 375.

154. *See* Rev. Proc. 96-53 §§ 5.01(4), 14(1) 1996-1 C.B. 375. The following summarizes the exceptions to the $25,000 user fee requirement. *See id.* § 5.14.

Standard to Determine APA User Fee	APA User Fee
Taxpayer's gross income more than $100,000 but not less than $1,000,000	$15,000
Taxpayer's gross income less than $100,000	$5,000

encloses general factual and legal information;[155] a detailed explanation of each proposed TPM (which applies the TPM to the financial and tax data of the previous three taxable years of the parties);[156] specific factual items related to the proposed transaction;[157] an annual report;[158] a signed perjury

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Total annual value of transaction not more than $50,000,000 (Property/Services)*		$7,500
Total annual value of transaction not more than $10,000,000 (Intangibles)*		$7,500
Requests involving more than one jurisdiction:	Initial request	$25,000
	Additional jurisdictions	Schedule/$7,500**
Renewal of an APA substantially unchanged from the initial APA		$7,500

*The annual value fee provisions apply regardless of the taxpayer's gross income.
**The usual fee schedule shall be applied unless the request involves the same issues and the same product line, goods, services or intangibles as in the first APA.

155. *See* Rev. Proc. 96-53 § 5.03, 1996-1 C.B. 375. Each APA request must include: (1) a list of the organizations, trades, businesses, and transactions that will be subject to the APA; (2) a list of names, addresses, telephone numbers, and taxpayer identification numbers of the controlled taxpayers that are parties to the requested APA; (3) a power of attorney form for any and all authorized representatives of the taxpayers; (4) a brief description of the general history of business operations, worldwide organizational structure, ownership, capitalization, financial arrangements, principal businesses, and the place or places where such businesses are conducted, and major transaction flows of the parties; (5) representative financial and tax data of the parties for the last three taxable years, along with other relevant data and documents in support of the proposed TPM (such as income tax returns, financial statements, and annual reports); (6) a statement of the currency used by each party and the currency in which payment between parties is made for the transactions that will be covered by the APA; (7) a statement of the taxable year of each party; (8) a description of significant financial accounting methods used by the parties directly related to the proposed TPM; (9) an explanation of significant financial and tax accounting differences, if any, between the United States and the foreign countries involved that have a bearing on the proposed TPM; (10) a discussion of the relevant statutory provisions, tax treaties, court decisions, regulations, revenue rulings, or revenue procedures; (11) a statement describing all previous and current issues at the examination, appeals, judicial, or competent authority levels, along with a description of both the taxpayer's and the government's positions. *See id.*

156. *See* Rev. Proc. 96-53 §§ 2, 5.02 1996-2 C.B. 375. The taxpayer must, to the extent possible, submit relevant pricing data from closely comparable uncontrolled transactions. *See id.* § 3.03. If the taxpayer is unable to obtain such information, then the taxpayer must identify transactions believed comparable but for which reliable data is not available. *See id.* If comparable transactions cannot be identified then the taxpayer must submit information from transactions that are similar, uncontrolled transactions with proposed adjustments to account for the differences between the transactions. *See id.* If no comparable, uncontrolled transaction can be identified, the taxpayer may demonstrate that, despite this lack of comparability, the proposed TPM satisfies section 482. *See id.* If the information about the previous three taxable years is not available then the taxpayer may use hypothetical data. *See id.* § 5.02.

157. *See* Rev. Proc. 96-53 § 5.04, 1996-1 C.B. 375. The following specific factual information may be included in an APA request to establish the arm's length basis for the proposed TPM: (1) measurements of profitability and return on investment; (2) a functional analysis of the economic activities performed, the assets employed, the economic costs incurred, and the risks assumed by each party; (3) an economic analysis of the general industry pricing practices and economic functions within the markets and geographical areas to be covered by the APA; (4) a list of the taxpayer's competitors and a discussion of any uncontrolled

statement;[159] and a discussion of any income tax issues collateral to the request.[160] The taxpayer must propose any fact, referred to as a "critical assumption," whose continued existence is material to the TPM, such as a range of expected business volume[161] and an initial term spanning no more than three years for the APA.[162] The taxpayer must also include information about whether the underlying transaction involves a treaty country as well as whether the taxpayer is requesting competent authority consideration.[163]

There is no time limit by which an APA request must be processed; the average time for processing a request varies based on the type and complexity of the APA.[164] The average time to complete unilateral APA requests is seventeen months while bilateral APA requests average thirty-two months.[165] To keep the APA process flexible to respond to the specific needs of particular taxpayers, the IRS and the taxpayer may agree to special procedures to reach an APA agreement, particularly when the taxpayer is a small business

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transactions, lines of business or types of businesses comparable or similar to those in the request; (5) a detailed explanation of the efforts and criteria used to identify and select possible independent comparables, and of the application of the criteria to the potential comparables, including a list of potential comparables and an explanation of why each was either accepted or rejected; (6) a detailed explanation of the selection and application of the factors used to adjust the activities of selected independent comparables for purposes of devising the proposed TPM. *See id.*

158. *See* Rev. Proc. 96-53 § 5.08, 1996-2 C.B. 375.

159. *See* Rev. Proc. 96-53 § 5.11, 1996-2 C.B. 375. *See supra* note 28 and accompanying text for discussion of similar perjury statement provisions.

160. *See* Rev. Proc. 96-53 § 5.06, 1996-2 C.B. 375.

161. *See* Rev. Proc. 96-53 § 5.07, 1996-2 C.B. 375.

162. *See* Rev. Proc. 96-53 § 5.09, 1996-2 C.B. 375. The term should be appropriate to the industry, product, or transaction involved. *See id.* § 5.09(1). APA requests may not be filed beyond the time for filing the taxpayer's federal income tax return for the first year the APA is proposed to cover. *See id.* § 5.09(2). If facts, law, and available records support the conclusion that a TPM obtained through an APA may apply to years prior than those covered by the APA, the IRS will "rollback" the TPM, making it apply to those earlier years. *See* Rev. Proc. 96-53 § 3.06, 1996-1 C.B. 375. The purpose for providing rollback treatment is to enhance a taxpayer's voluntary compliance with the tax code and to use resources addressing unresolved transfer pricing issues effectively. *See id. See also* Rev. Proc. 96-53 § 8, 1996-1 C.B. 375.

163. *See* Rev. Proc. 96-53 §§ 2, 5.10, 1996-1 C.B. 375. Taxpayers are encouraged to request a competent authority agreement regarding matters subject to the APA to avoid double taxation for all applicable periods. *See* Rev. Proc. 96-13 § 7.04, 1996-1 C.B. 616. Competent authority consideration should be requested under Rev. Proc. 96-53. Rev. Proc. 2001-1 § 3.04, 2001-1 I.R.B. 1. If APA negotiations are bilateral or multilateral, involving one or more foreign competent authorities, then the initial negotiating position of the United States competent authority is the IRS's opinion of the appropriate TPM, based on consultations with the taxpayer. *See* Rev. Proc. 96-53 § 3.01,1996-1 C.B. 375.

164. *See* ADVANCE RULINGS, *supra* note 2, ¶ 2.2.5, at 635.

165. *See Id.* (citing *IRS Finishes Record Number of APAs in FY98, Also Sees Surge in New Filings*, 7 TAX MGMT., TRANSFER PRICING REPORT 12 (1998)).

or to facilitate negotiations among the IRS, the taxpayer, and a foreign competent authority.[166]

E. Processing of APA Request by IRS

After evaluating the data submitted, the IRS discusses the APA request with the taxpayer.[167] Within forty-five days of receiving the request, the APA director assigns the review of the request to an appointed APA team consisting of at least one representative of the Office of Associate Chief Counsel (International), representatives of the appropriate District and District Counsel and, when appropriate, Appeals and the United States Competent Authority.[168] The APA team meets with the taxpayer to develop a case plan and schedule. The APA team and the taxpayer list each question raised during the initial IRS review of the request and determine a schedule by which the issue will be resolved.[169] The APA team is responsible for administering the APA request, which includes negotiating, documenting, and recommending an agreement to the Associate Chief Counsel (International).[170] The APA is binding once both the Associate Chief Counsel (International) and the taxpayer sign the proposed APA.[171]

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166. *See* Rev. Proc. 96-53 § 3.09,1996-1 C.B. 375. Using a simplified process is an example of "special procedure." *See id.*

167. *See* Rev. Proc. 96-53 §§ 2, 6.01-03 1996-2 C.B. 375.

168. *See* Rev. Proc. 96-53 § 6.04, 1996-1 C.B. 375. The APA Director also appoints a team leader to oversee the APA team's activities. *See id.*

169. *See* Rev. Proc. 96-53 § 6.05(1), (2), 1996-1 C.B. 375. The case plan and schedule reflects an agreement between the APA Team and the taxpayer on the scope of any additional information required to negotiate an APA. *See id.* Specific dates should be agreed upon for case milestones, including: (a) the taxpayer's submission of necessary, additional information; (b) the government's evaluation of information; (c) negotiation of a recommended agreement or competent authority negotiating position; and (d) presentation of the recommended agreement or competent authority negotiating position in writing to the Associate Chief Counsel (International). *See id.* § 6.05(1). The time for completing these milestones depends on the scope and complexity of the particular case. *See id.* § 6.05(2). If the request is bilateral or multilateral, the IRS will attempt to minimize the time for competent authority resolution by working with the competent authority of the treaty partner as best as possible. *See id.*

170. *See* Rev. Proc. 96-53 § 6.05(1), 1996-1 C.B. 375. If applicable, the APA team's recommendation should be in consultation with a competent authority negotiating position. *See id.* The District Director responsible for the taxpayer's returns is afforded the opportunity to review and comment on the draft APA (unilateral APAs) or proposed initial United States competent authority negotiating position (bilateral or multilateral APAs). *See id.* § 6.05(6).

171. *See* Rev. Proc. 96-53 §§ 2, 6.05(5), 1996-1 C.B. 375. A taxpayer may withdraw an APA before it is executed (signed), although the user fee will generally not be returned. *See id.* § 6.06. Similarly, the IRS may decline to accept an APA request or decline to execute an APA after a request has been accepted. *See id.* § 6.07. If the IRS does not execute an APA after the request has been initiated, it normally will not return the user fee unless otherwise appropriate under the circumstances. *See id.* If the Service proposes to reject an APA request, the taxpayer will be granted one conference of right. *See id.*

F. Consideration by Competent Authority

When a tax treaty between the United States and a foreign country applies to a transaction for which an APA request has been made, any party is entitled to relief under the treaty's competent authority provision.[172] The United States and foreign competent authorities are responsible for negotiating issues that interfere with a purpose of the treaty and one of which is avoiding double taxation.[173] A final agreement to the negotiated APA will be sought among the taxpayer, the IRS, and the foreign competent authority, but if the competent authorities are unable to reach an agreement or the taxpayer does not accept the competent authority agreement, the IRS will attempt to negotiate a unilateral APA with the taxpayer.[174]

"Any information received or prepared by the [IRS], including information furnished by the taxpayer or the related foreign entity, [will be] subject to the restrictions on disclosure of tax related information provided by [U.S.] law and the applicable income tax convention."[175] If the IRS must analyze confidential data that could harm the taxpayer if disclosed (such as trade secrets) "the parties will attempt to negotiate a mechanism to permit verification [of the information] by a foreign competent authority without disclosing such information."[176] When the competent authorities enter into an APA agreement, the IRS will—to the extent practicable—agree to mutually exchange information with the foreign competent authority concerning "subsequent modifications, cancellation, revocation, requests to renew, evaluation of annual reports, or examination of the taxpayer's compliance with the terms and conditions of the APA."[177]

G. Limited Use of Taxpayer Information Associated with an APA Request

Neither the IRS nor the taxpayer may introduce the APA, nor any non-factual oral or written representations made in connection with the APA, as evidence in a judicial or administrative proceeding concerning an issue beyond the scope of the APA.[178] This rule also applies if an APA is not

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172. *See* Rev. Proc. 96-53 § 7.01-.02, 1996-1 C.B. 375.

173. *See id.* The negotiations are primarily between the United States and foreign competent authorities although the taxpayer should be available while the request is considered. *See id.*

174. *See* Rev. Proc. 96-53 § 7.02, 1996-1 C.B. 375.

175. Rev. Proc. 96-53 § 7.03, 1996-1 C.B. 375.

176. Rev. Proc. 96-53 § 7.04, 1996-1 C.B. 375.

177. Rev. Proc. 96-53 § 7.05, 1996-1 C.B. 375. The United States competent authority will attempt to persuade the foreign competent authority to use APA data only on terms similar to those described *infra* at notes 178-179 and accompanying text. *See id.* § 7.06.

178. *See* Rev. Proc. 96-53 § 10.04, 1996-1 C.B. 375. Note that this restriction does not prevent rollback of the APA TPM, nor the discovery, use, or admissibility of non-factual material otherwise discoverable or obtained other than in the APA process because the same

executed or one is executed but later revoked or canceled. The rule extends to prevent using such information as an admission by the other party in any administrative or judicial proceeding for the taxable years for which the APA was requested or executed.[179]

H. Administering the APA

The taxpayer must file an annual report that describes actual operations for the year and demonstrate good faith compliance with the APA for each year covered by the agreement.[180] This report must describe requests to renew, modify or cancel the APA; explain any compensating adjustments;[181] and detail all items required by the APA.[182]

If a taxpayer party to an APA is audited for a tax year covered by the agreement, the examination is limited to a review of the taxpayer's good faith compliance with the terms and conditions of the APA; whether the taxpayer's material representations in the APA and the annual reports are valid and accurate; whether supporting data and computations used to apply the TPM were materially accurate; whether the critical assumptions underlying the APA are valid; and whether the taxpayer has consistently applied the TPM and met the critical assumptions.[183]

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information was also included in the APA process. *See id.* *See supra* note 162 and accompanying text.

179. *See* Rev. Proc. 96-53 § 10.05, 1996-1 C.B. 375. Note that this restriction does not prevent discovery, use, or admissibility of non-factual material otherwise discoverable or obtained other than in the APA process because similar material was also included in the APA process. *See id.*

180. *See* Rev. Proc. 96-53 § 11.01(1), 1996-1 C.B. 375.

181. *See id.* "Compensating adjustments" are adjustments made by the taxpayer and its related foreign entity when the results of applying the TPM differ from those contemplated by the APA. Rev. Proc. 96-53 § 11.02(1), 1996-1 C.B. 375. A compensating adjustment is appropriate when an APA provides a range of expected operating results and the actual operating results are outside that range but within the limits specified in the APA. *See id.* The APA may allow the parties to make a compensating adjustment to bring the results to an agreed upon point within the described range. *See id.* See Rev. Proc. 96-53 § 11.02(2)-(5), 1996-1 C.B. 375 for further discussion of compensating adjustments.

182. *See* Rev. Proc. 96-53 § 11.01(1), 1996-1 C.B. 375.

183. *See* Rev. Proc. 96-53 § 11.03(1)-(2), 1996-1 C.B. 375. If the District Director finds these requirements have not been met then the issue will be submitted to the Associate Chief Counsel (International), who will continue to apply the APA or revoke, cancel, or revise it. *See id.* § 11.03(3). *See infra* notes 184-187 and accompanying text (revision); notes 188-193 and accompanying text (cancellation); notes 194-196 and accompanying text (revocation); and notes 197-198 and accompanying text (renewal).

I. Revision, Cancellation, Revocation, and Renewal of an APA

If a critical assumption has not been met or there has been a change in the law or applicable treaty,[184] an affected APA must either be revised by the parties or cancelled.[185] If the IRS and the taxpayer revise an APA that has been subject to competent authority agreement, the IRS will seek the consent of the foreign competent authority to the revised APA.[186] If the foreign competent authority refuses to accept the revised APA or the competent authorities cannot agree on a revised APA, the taxpayer and the IRS may agree to continue applying the existing APA, to apply the revised APA, to further revise the APA, or to cancel the APA.[187]

The Associate Chief Counsel (International) may cancel the APA for a misrepresentation, mistake or omission of material fact, or lack of good faith compliance[188] with the terms and conditions of the APA.[189] "Material facts are those that, if known by the [IRS], would have resulted in [the issuance of a significantly] different APA or no APA at all."[190] If the taxpayer can satisfactorily demonstrate good faith and reasonable cause and agrees to make any proposed adjustments to correct for the misrepresentation, mistake, omission, or noncompliance, "then the Associate Chief Counsel (International) may waive cancellation."[191] Conversely, the Associate Chief Counsel (International) is not required to cancel the APA and may require the taxpayer to continue to abide by it.[192] If an APA is cancelled, then the cancellation will be effective as of the beginning of the year in which the misrepresentation, mistake, omission, or noncompliance occurred or as of the effective date of the change in law or treaty, whichever is applicable.[193]

The Associate Chief Counsel may, but is not required to, revoke an APA if the taxpayer has committed fraud, malfeasance, or disregard in obtaining or

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184. *See* Rev. Proc. 96-53 § 11.09, 1996-1 C.B. 375. "Changes in law or treaty" are those that alter the federal income tax treatment of a matter covered by the APA. *See id. The new law or treaty provision* supersedes the APA only to the extent of any inconsistencies between the two. *See id.*

185. *See* Rev. Proc. 96-53 § 11.07(1), 1996-1 C.B. 375. If the taxpayer and the IRS cannot execute a revised agreement, the APA will be cancelled, effective at the beginning of the taxable year in which the failure to meet a critical assumption occurred. *See id.* § 11.07(3). If the IRS and the taxpayer can agree on a revised APA, the effective date of the revised APA will be stated in the new APA. *See id.*

186. *See* Rev. Proc. 96-53 § 11.07(4), 1996-1 C.B. 375.

187. *See id.* If an agreement cannot be reached the APA will be cancelled. *See id.*

188. *See* Rev. Proc. 96-53 § 11.06(1), 1996-1 C.B. 375. "Fraud, malfeasance or disregard" does not constitute lack of good faith. *See id. See infra* note 194 for discussion of these standards as they apply to revocations of APA agreements.

189. *See id.*

190. *Id.*

191. Rev. Proc. 96-53 § 11.06(2), 1996-1 C.B. 375.

192. *See id.*

193. *See* Rev. Proc. 96-53 § 11.06(3), 1996-1 C.B. 375.

meeting subsequent reporting requirements in connection with the APA.[194] If the APA is revoked, the revocation may be retroactive to the first day of the first taxable year for which the APA was effective, resulting in possible assessments of income tax deficiencies for that time period.[195] When an APA has been the subject of negotiation with a foreign competent authority, the IRS will attempt to coordinate actions related to the revocation with the foreign competent authority.[196]

"A taxpayer may request renewal by following the form and procedures that apply to initial APA requests," including submission of a user fee and supporting documentation.[197] The renewal request should be filed no later than nine months before the existing term expires.[198]

J. Disclosure of APAs

Information associated with the APA process relates directly to the existence and amount of tax liability of the taxpayer; therefore, both the APA and related information are confidential per section 6103, as well as under applicable income tax conventions or rules related to communications with foreign governments.[199]

IV. U.S. RULING PROGRAM PROMOTES FAIR TAX COMPETITION CONSISTENT WITH EUROPEAN COMMUNITY (EC) AND ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD) RECOMMENDATIONS

The United States discloses the procedures for obtaining PLRs and APAs, as well as the results of PLRs. The United States also applies these procedures non-discriminatorily to similarly situated taxpayers. These

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194. *See* Rev. Proc. 96-53 § 11.05(1), 1996-1 C.B. 375. "Fraud" and "malfeasance" are interpreted under the same standards as under section 7121; "disregard" is any careless, reckless, or intentional disregard or "any failure to make a reasonable attempt to comply" with applicable provisions. *See* I.R.C. § 6621(b)(1), (c) (2001). Occasions implicating possible revocations of APAs include fraud, malfeasance, or disregard involving the material facts set forth in the request, or lack of good faith in complying with the terms of the APA. *See supra* text accompanying note 190 for a definition of "material facts."

195. *See* Rev. Proc. 96-53 § 11.05(3), 1996-1 C.B. 375. If the revocation of the APA is considered an "egregious case" under Rev. Rul. 80-231, 1980-2 C.B. 219, then the taxpayer may be denied a foreign tax credit. *See id.*

196. *See id.*

197. Rev. Proc. 96-53 § 11.08, 1996-1 C.B. 375. *See supra* section III.C.2.d for a discussion of procedures for filing initial APA requests and *supra* note 154 for listing of APA user fees.

198. *See id.*

199. *See* Rev. Proc. 96-53 § 12, 1996-1 C.B. 375. For a discussion of the debates regarding disclosure of APA materials prior to their specific exclusion, see John L. Abramic, Note, *Advance Pricing Agreements: Confidential Return Information or Written Determinations Subject to Release*, 76 CHI.-KENT L. REV. 1823 (2001); Kristin E. Hickman, Note, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT'L L. BUS. 171 (1998).

practices are consistent with EC and OECD aims of deterring harmful tax practices and forbidden state aid. As such, the United States promotes fair tax competition in a global market.

A. U.S. Ruling Practice Consistent with EC Treaty Articles 87, 88, and 89 Relating to Forbidden State Aid[200]

The EC, established as a result of the Treaty of Rome (EC Treaty), is charged with "establishing a common market and an economic and monetary union and by implementing common policies or activities to promote throughout the Community" for its overall good.[201] In doing so, the EC imposes limits on the ability of its member states to tax[202] one another.[203] The United States administers a single, highly publicized ruling program that is equally applicable to all taxpayers, resulting in a program that promotes fair tax competition consistent with the EC Treaty.

1. Articles 87, 88, and 89 of the EC Treaty described

Article 87 of the EC Treaty sets forth what is compatible and incompatible with the common market.[204] Specifically, aid from Member States that

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200. Renumbered after the Treaty of Amsterdam, these treaty articles were formerly Articles 92, 93, and 94, respectively, of the EC Treaty.

201. *See* EC Treaty, *supra* note 6, *available at* http://europa.eu.int/abc-en.htm (last visited Feb. 15, 2002). The fifteen members of the EC include: the original members who joined in 1950 (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands); the members joining in the 1973 accession (Denmark, Ireland, and the United Kingdom); Greece, joining in 1981; Spain and Portugal, joining in 1986; and the members from the last accession in 1995 (Austria, Finland, and Sweden). *See* DAVID W. WILLIAMS, EC TAX LAW (John A. Usher ed., Addison Wesley Longman Inc. 1998).

202. *See* WILLIAMS, *supra* note 201, at 2. Taxation, as defined by the OECD and International Monetary Fund ("IMF"), is the "levying of compulsory contributions for the benefit of government for which there is not direct return for the payer." *Id.*

203. *See* WILLIAMS, *supra* note 201, at 1 n.1.

204. *See* EC Treaty, *supra* note 6, at art. 87. Article 87 provides:

> 1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring [sic] certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
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> 2. The following shall be compatible with the common market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.
>
> 3. The following may be considered to be compatible with the common market:

distorts trade competition by favoring activities or the production of certain goods is incompatible.[205] Aid that is non-discriminatory and has a social character or is given in response to natural disasters, or for compensation associated with the division of Germany is compatible.[206] Other aid that may be (but is not definitively) compatible with the common market includes aid to promote economic development in areas with an abnormally low standard of living; aid that promotes a project of European interest or to remedy a disturbance in the economy; aid to develop economic activities that does not adversely affect trading conditions; aid to promote the conservation of heritage (again, so long as it does not adversely affect trading conditions); and other aid that a qualified majority of the Council of the European Union (Council)[207] determines is appropriate.[208]

Article 88 of the EC Treaty provides that the European Commission (Commission)[209] shall review aid given both to and by Member States and propose any changes necessary to ensure the functioning of the common market.[210] If the Commission finds that, after giving notice to the involved

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(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Id. *See* text accompanying note 201 (reference to "common market").

205. *See id.*

206. *See id.*

207. *See Charter of Fundamental Rights, available at* http://europa.eu.int/scadplus/leg/en/cig/g4000c.htm#c33 (last visited Feb. 15, 2002). The Council of the European Union, also referred to as the Council of Ministers, is a single institution and the primary decision making body of the European Union consisting of ministers of the fifteen Member States responsible for the matters on the agenda. *See id.*

208. *See* EC Treaty, *supra* note 6, at art. 87, para. 3.

209. *See The European Commission, available at* http://europa.eu.int/comm/role_en.htm#4 (last visited Feb. 15, 2002). The European Commission (Commission) represents the general interest of the EU and is responsible for initiating EU policies, ensuring that EU treaties are carried out through subsequent legislation, and managing policies and negotiating international trade agreements. *See id.*

210. *See* EC Treaty, *supra* note 6, at art. 88, para. 1. Article 88 provides:

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87

parties, aid granted by a State is incompatible with the common market or is being misused, then the Commission determines that the aid shall cease or be modified within a period of time.[211] Additionally, article 88 also provides an enforcement mechanism if the putative wrongdoer does not comply with the Commission's directives and an application procedure for States to receive a determination that aid granted is compatible with the common market.[212]

Article 89 of the EC Treaty provides that, after receiving a proposal from a qualified majority of the Commission and consulting with the European Parliament, the Council may promulgate regulations to apply articles 87 and 88 of the EC Treaty, particularly those relating to the Commission's consideration of a State's plan to grant or alter aid under article 88(3).[213]

[*see supra* note 204], or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 226 [referral of matters to the Court of Justice if the Commission determines that a Member State has not fulfilled a treaty obligation] and 227 [referral of matters to the Court of Justice after first referring them to the Commission if another Member State has not fulfilled its treaty obligations], refer the matter to the Court of Justice direct. On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89 [*see infra* note 213], if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

Id.

211. *See id.*

212. *See id.*

213. *See* EC Treaty, *supra* note 6, at art. 89. Article 89 provides:

The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 [*see supra* note 204] and 88 [*see supra* note 210] and may in particular determine the conditions in which Article 88(3) shall apply and the categories of aid exempted from this procedure.

Id.

2. U.S. practice consistent with articles 87, 88, and 89

The United States advance ruling practice does not conflict with the forbidden State aid provisions in the EC Treaty. As previously discussed,[214] article 87 distinguishes between acceptable and unacceptable State aid in the EC that distorts trade competition. When analyzing the acceptability of State aid under article 87, the focus is on the effect of the aid and the social purpose being advanced.[215] Similarly, advance rulings in the United States that are favorable to taxpayers are issued only if the underlying transactions are lawful. Practices that distort trade or interfere with trade competition conflict with United States policy.[216] Therefore, a favorable ruling would not be issued under such practices.

In the United States, aid granted to or received by a state that impermissibly discriminates would likely be challenged under one of three provisions of the Constitution: the Spending Clause, the Commerce Clause, or the Privileges and Immunities Clause. The Spending Clause allows Congress to spend, but not regulate, for the general welfare of the nation.[217] The Commerce Clause vests the power to regulate trade among the states with Congress to ensure uniformity and to avoid embarrassing and destructive consequences that result from conflicting state regulations.[218] When Congress has not acted, state regulation of interstate or foreign commerce is implicitly limited through the "dormant" or "negative" commerce clause.[219] The

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214. *See supra* notes 204-208 and accompanying text (discussing permissible and impermissible State aid under the EC Treaty).

215. *See supra* notes 207-208 and accompanying text (illustrating that aid given to advance social purposes or stimulate economic development in disadvantaged areas is permitted).

216. *See, e.g.*, 15 U.S.C. § 8 (2001) (prohibiting agreements made to restrain free competition in lawful trade of items to be imported into the United States); Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 99 (1994) (stating that laws of individual states in the United States that restrict interstate commerce are *per se* invalid unless the state can demonstrate that the law advances a legitimate, nondiscriminatory purpose and that the law is the least restrictive means to accomplish that purpose); Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) ("Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.") (quoting Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944)).

217. *See* U.S. CONST. art. I, § 8. Congress's authority to spend is under the general welfare clause of the United States Constitution: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.* at cl. 1.

218. *See* U.S. CONST. art. I, § 8. The Commerce Clause empowers Congress, the legislative branch of government, with the exclusive authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* at cl. 3. *See* ARVO VAN ALSTYNE ET AL., SUM & SUBSTANCE OF CONSTITUTIONAL LAW §§ 5.1000, 5.1200 (4th ed. 1986) [hereinafter SUM & SUBSTANCE]. Courts have interpreted the Commerce Clause as a limitation on state power. *See id.* § 5.1210.

219. *See* CALVIN R. MASSEY, CONSTITUTIONAL LAW, 147 (1997) [hereinafter CONSTITUTIONAL LAW].

Privileges and Immunities Clause prohibits a state's discrimination of non-residents in favor of its own citizens without permitted justification.[220]

Impermissible aid granted by the federal government to states would be analyzed under the Spending Clause, under which Congress often uses its authority to impose conditions on state action.[221] However, conditions on spending must meet three requirements: they must be in pursuit of the "general welfare" of the United States;[222] unambiguous, so states may exercise their choice knowingly; and reasonably further some national project or program otherwise within federal power.[223] These limitations, along with the fact that federal legislation must be passed by a majority of representatives from all states, prevent the likelihood that impermissible, discriminatory state aid that does not advance a generally accepted social policy will be given.

Impermissible aid provided by individual states would be challenged under the Commerce Clause or the Privileges and Immunities Clause. Under the Commerce Clause, all state laws affecting trade that do not conflict with federal laws must be rationally related to a legitimate state purpose.[224] State laws that promote local commercial purposes tend to violate free trade and are impermissible. Regulations advancing local health, safety, and welfare tend not to violate free trade and are therefore permissible.[225] In addition, courts

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220. *See* U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* Note that this clause only applies to natural persons, not business entities. *See* VAN ALSTYNE, *supra* note 218, § 6.4200 (citing Paul v. Virginia, 148 U.S. 107 (1869)). Although not related to market participation, a state may restrict privileges such as voting in local elections to its citizens. *See id.* § 6.4210 (citing Martinez v. Bynum, 461 U.S. 321 (1983)).

221. *See, e.g.*, United States v. Butler, 291 U.S. 1, 68 (1936) (Congress's attempt to raise farm prices by limiting production under the Agriculture Adjustment Act was beyond its spending power because it was regulating, rather than spending, for the general welfare); Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937) (conditioning a state's receipt of a payroll tax credit on a state's compliance with minimum funding requirements is valid under spending clause); South Dakota v. Dole, 483 U.S. 203 (1987) (holding withholding federal highway funds otherwise due under other federal laws from any state permitting persons under age twenty-one years from buying or possessing alcoholic beverages was a valid exercise of Congress' spending power).

222. *See* MASSEY, *supra* note 219, at 129 (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)). The limitation that conditions on federal spending must be in pursuit of general welfare is not meaningful because courts "defer substantially to the judgment of Congress." *Id.*

223. *See id.* This spending can be for any purpose necessary or proper to benefit the general public; it is not restricted to effectuate an enumerated power of the federal government. *See id.* at 127 (citing United States v. Butler, 291 U.S. 1 (1936)).

224. *See id.* at 147. Economic protection, alone, is not a sufficiently legitimate state purpose. *See id.*

225. *See* VAN ALSTYNE, *supra* note 218, § 5.1330 (citing Gibbons v. Ogdon, 22 U.S. 1 (1824) (distinguishing a state's police power from Congress's authority to regulate commerce) and Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 249 (1829) (noting that state restrictions to protect health and safety are within the power of the states, provided that they do not interfere with the powers of the general government)).

may review the practical effect of the state regulation being challenged; if it discriminates against or imposes an undue burden upon commerce, then it is not permitted.[226] The purpose behind analyzing state legislation under the Commerce Clause in this manner has been summarized as follows:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[227]

States are exempt from the restrictions imposed by the dormant commerce clause when acting as market participants (rather than as market regulators).[228] States act as market participants when they engage in or create commerce; similar to private parties, they may discriminate in favor of their own residents in interstate commerce.[229] Therefore, under the market-participant exception to the dormant commerce clause, a state may provide favorable treatment to its residents when awarding state contracts and the like. However, this occurrence is beyond the scope of the federal tax-ruling program in the United States.

The final, most likely constitutional ground upon which state aid may be challenged is under the Privileges and Immunities Clause, which prohibits discrimination by a state against non-citizens.[230] States are only mandated to treat citizens and non-citizens similarly under this clause when fundamental interests are concerned, defined as "those bearing on the vitality of the Nation as a single entity."[231] A state is permitted to discriminate based on residency where: "(a) there is substantial reason for the difference in treatment; and (b)

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226. *See id.* §§ 5.1350, 5.3000, 5.4000. State laws that facially discriminate against interstate commerce are invalid unless they advance legitimate objectives that cannot be achieved through less discriminatory means. *See* MASSEY, *supra* note 219, at 147.

227. H. P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949). However, these decisions are inconsistent in both their doctrinal approach and in their holdings because they are (and should be) analyzed considering their particular factual circumstance. *See* VAN ALSTYNE, *supra* note 218, § 5.1300.

228. *See* MASSEY, *supra* note 219, at 148.

229. *See id.* at 166 (citing Reeves, Inc. v. Stake, 447 U.S. 429 (1980)).

230. *See* VAN ALSTYNE, *supra* note 218, § 6.4200. Although not related to market participation, a state may restrict privileges such as voting in local elections to its citizens. *See id.* § 6.4210 (citing Martinez v. Bynum, 461 U.S. 321 (1983)).

231. *See id.* § 6.4200 (quoting Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978)).

that difference in treatment bears a close and substantial relationship to the state's objective."[232] This discrimination is permitted because state residents have a special interest in local public resources, because they support them by paying local taxes.[233] However, the restriction may not be overwhelmingly restrictive and is impermissible when it extends beyond what is reasonable or involves a fundamental right.[234]

The previous three Constitutional doctrines provide the foundation upon which state aid in the United States would be analyzed. These doctrines are consistent with article 87 of the EC Treaty. It is unlikely, however, that this state aid analysis is affected by the federal tax ruling program in the United States because, as discussed previously,[235] federal tax rulings are generally issued to private taxpayers, not government entities.

Although no corollary exists in the United States advance ruling program, the practices sought to be eliminated in article 88 are deterred in the United States, primarily, through independent judicial review of the activity; secondarily, through legislation. As discussed above, article 88 outlines general provisions to review aid given to or from Member States to ensure common market functioning. In the United States, individual states and taxpayers may challenge aid granted to or from another state by initiating a

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232. *Id.* § 6.4300 (quoting New Hampshire v. Piper, 470 U.S. 274, 288 (1985)). When considering the latter issue, the least restrictive means must be contemplated. *See id.*

233. *See id.* § 6.4300 (citing New Hampshire v. Piper, 470 U.S. 274 (1985)).

234. *Compare* Canadian N. R.R. v. Eggen, 252 U.S. 553 (1920) (permitting a state to grant more favorable access to courts to residents than non-residents); Vlandis v. Kline, 412 U.S. 441 (1973) (stating in dicta that states are permitted to give preferential tuition advantages to local students); Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a state's restriction limiting availability of divorce to persons who had been state residents for at least one year), *with* Toomer v. Witsell, 334 U.S. 385 (1948) (taxing residents $25 for shrimp boat licenses when non-residents were taxed $2,500 was impermissible because, although the state may charge a higher fee to non-residents, the amount must be reasonable to reimburse the state for additional burdens imposed by enforcing regulations and the difference here was nearly a total exclusion); Baldwin v. Fish and Game Comm'n, 436 U.S. 371 (1978) (requiring a state to treat citizens and non-citizens alike only when it pertains to a fundamental interest, defined *supra* in the text accompanying note 231); Austin v. New Hampshire, 429 U.S. 656 (1975) (overturning a commuter tax on the income of non-residents earned within the state when there was no corollary tax on either the income of residents earned out of the state or on domestic income of residents because the tax fell exclusively on non-residents' income and was not offset (even approximately) by other taxes imposed on residents alone); Hicklin v. Orbeck, 437 U.S. 518 (1978) (overruling a state statute requiring all employers engaged in oil businesses under state oil and gas leases or permits to give preferential treatment to job applicants who were state residents because it was not justified, either by a high state unemployment rate nor by the state's owning the oil that was being extracted and processed); Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (practicing law was a fundamental right and admission to the state bar could not be denied to a candidate who otherwise met the state requirements because the state interests sought to be protected were not substantial or could be protected by least restrictive means).

235. *See* discussion of rulings in sections I-III, passim.

judicial proceeding.[236] Courts are empowered to remedy the situation with both legal and equitable relief, including enjoining the offending state from continuing to provide or receive the aid and awarding monetary damages to the prevailing party. The United States also addresses the practices contemplated by article 88 through legislation. Congress, the law-making branch of the federal government, may enact legislation specifically proscribing the state from giving or receiving the aid under its exclusive authority to regulate interstate commerce.[237]

The authority of executive agencies in the United States to issue regulations interpreting statutes is consistent with article 89 of the EC Treaty. Article 89 provides that the Council may issue regulations pertaining to articles 87 and 88 of the EC Treaty, the provisions restricting forbidden State aid.[238] In the United States, executive agencies are authorized to issue regulations (like the provisions in article 89) to interpret Congressional laws so long as procedural requirements are satisfied, such as giving notice of the regulation and an opportunity to comment to the public.[239] As stated above,[240] practices that distort trade competition violate United States public policy. The result is that executive agencies in the United States may create regulations that deter harmful tax practices so long as they are issued pursuant to a conferral of Congressional authority.

The forbidden State aid provisions of the EC Treaty are designed to prevent, reduce, and eliminate interference with the common marketplace. Because the United States is one nation with its member states under the control of one common authority, the federal government can—and does—impose rules and standards applicable to the individual states. Congress has preempted the regulation of interstate commerce between the United States and individual states or other countries. Because the trading policy of the United States favors free competition and lawful trade, United

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236. To raise a successful claim, the plaintiff must have standing (the person initiating the claim must have a sufficient stake in an otherwise justiciable controversy). This requirement is satisfied if the putative plaintiff has a legally protected and tangible interest in the litigation. *See* BLACK'S *supra* note 12, at 1405 (citing Sierra Mountain Club v. Morton, 405 U.S. 727 (1972) and Guidry v. Roberts, 331 So.2d 44, 50 (La.App. 1976)).

237. *See* VAN ALSTYNE, *supra* note 218 for discussion of Congressional authority under the Commerce Clause.

238. *See supra* note 213 for text of EC Treaty article 89.

239. To summarize the process by which regulations interpreting statutory provisions in the United States are promulgated, legislative regulations must be issued in accordance with the notice and comment requirements of the Administrative Procedure Act. There is no similar requirement for interpretive and procedural regulations, although they are followed for interpretive regulations. Although not affecting the conclusion that United States practice is consistent with Article 89, regulations concerning aid by or to States that interfere with trade practices would likely be promulgated by the Department of Commerce, another executive agency, rather than the Treasury or the IRS.

240. *See supra* note 216 (discussing United States policy regarding practices distorting trade).

States practices comply with those advocated in articles 87 through 89 of the EC Treaty. Similarly, disruptive State aid practices are curtailed in the United States at least as much as the remedies afforded in articles 87 through 89 when claims are initiated through its judiciary branch because relief is both equitable (enjoining the action) and legal (awarding monetary damages). The United States has authority equal to that provided in article 89 to further explain relevant laws. Finally, all executive agencies are vested with authority to promulgate regulations interpreting law within their jurisdiction, including those deterring harmful competition in the marketplace.

B. U.S. Ruling Practice Consistent with EC Code of Conduct

1. EC Code of Conduct described

On December 1, 1997 the Council passed a package of measures to address harmful tax competition that included measures to reduce distortions in the single market, prevent excessive losses of tax revenue, and develop tax structures in employment-friendly manners.[241] The ECOFIN Council[242] and the Representatives of the Governments of Member States agreed to a resolution establishing a code of conduct for business taxation, now commonly referred to as the "EC Code of Conduct."[243]

The Code of Conduct (EC Code) identifies potentially harmful business taxing regimes, provides criteria to determine whether a regime is harmful, and includes a commitment both to end existing harmful regimes (the rollback) as well as to not start new ones (the standstill).[244] The EC Code specifically applies to tax measures—which includes not only laws and regulations, but also administrative practices—affecting the location of business activity.[245] Tax measures of this type that are significantly lower than those generally applicable to Member States are considered potentially

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241. *See* Coraline Kok, *EC Update*, EUROPE. TAX., EC-5, Feb. 1998; *see also* the OECD 1998 Report. The following three areas were business taxation, taxation of savings income, and withholding taxes on cross-border interest and royalty payments between companies. *See* Kok, *supra*, at EC-5.

242. *See* http://www.eu2001.se/static/eng/issues/ecofin.asp (last visited Feb. 15, 2002). The ECOFIN Council coordinates economic policy in the EU. In this capacity it has paid particular attention to combating harmful tax competition among countries. *See id.*

243. *See* Kok, *supra* note 241, at EC-5; OECD 1998 Report, *supra* note 7. The Code of Conduct is intended to apply to "business taxation, taxation of savings income and the issue of withholding taxes on cross-border interest and royalty payments between companies." *Id.*

244. *See* OECD 1998 Report, *supra* note 7, ¶ 17, at 11. *See also* Council of European Union and Representatives of the Governments of the Member States, Code of Conduct for Business Taxation *reprinted in* Kok, *supra* note 241, at EC-6 (Annex 1) (hereinafter "EC Code").

245. *See* Council of European Union and Representatives of the Governments of the Member States, Code of Conduct for Business Taxation *reprinted in* Kok, *supra* note 241, at EC-6 (Annex 1).

harmful.[246] Per the EC Code, in determining whether measures are harmful, the following factors should be considered:

> (1) [W]hether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or (2) whether advantages are ring-fenced[247] from the domestic market so they do not affect the national tax base, or (3) whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or (4) whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or (5) *whether the tax measures lack transparency, including where legal provisions are relaxed at the administrative level in a non-transparent way.*[248]

To comply with the provision of the EC Code regarding transparency,[249] Member States must inform each other of existing and proposed tax measures that may fall within the scope of the EC Code, especially if requested to do so by a Member State.[250]

2. U.S. ruling practice consistent with EC Code of Conduct

The advance ruling practice in the United States is consistent with the goals set forth in the EC Code. There are no particular advantages afforded to foreign over domestic taxpayers, or vice versa. Within the ruling program, members of each group are afforded similar treatment so long as there is compliance with the procedures for obtaining rulings. The ruling program does not advance ring-fencing—restricting a preferential taxing regime to non-residents or isolating it from the domestic economy—because, again, there is no advantage in the U.S. advance ruling program afforded to either foreign or domestic taxpayers. Because of the specific information, supporting

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246. *Id.*

247. *See infra* note 264 and accompanying text (discussing "ring-fencing").

248. Council of European Union and Representatives of the Governments of the Member States, Code of Conduct for Business Taxation *reprinted in* Kok, *supra* note 241, at EC-6 (Annex 1) (emphasis added).

249. *See infra* notes 265-277, 279-282 and accompanying text for a discussion of transparency. Although within the context of OECD provisions, the discussion of transparency applies equally to the EC Code of Conduct. *See id.*

250. *See* Council of European Union and Representatives of the Governments of the Member States, Code of Conduct for Business Taxation, E. *reprinted in* Kok, *supra* note 241, at EC-6 (Annex 1).

documentation, and penalty of perjury statements that must accompany requests for rulings, the likelihood that advantageous rulings are granted to individuals or entities without real economic activity and substantial economic presence is minute. The stringent disclosure requirements imposed by section 6110 and the Freedom of Information Act further contribute to the unlikely result that certain taxpayers would receive advantages over others. Finally, the EC Code rules regarding transfer pricing and transparency are substantially similar to those set forth in the OECD 1998 Harmful Tax Competition: An Emerging Global Issue Report (OECD 1998 Report) discussed below.

C. U.S. Ruling Practice Consistent With OECD Tax Competition Report (OECD 1998 Report)

The OECD 1998 Report promotes a uniform application of tax laws among taxpayers; nondiscriminatory rules—both in form and in application—that are publicized, widely available and consistently applied; and publicized transfer pricing guidelines based on arm's length transactions. The ruling program and transfer pricing agreements in the United States are consistent with OECD recommendations because they are widely disclosed and equally applied.

1. OECD 1998 Report

The OECD is an international organization established in 1960 to promote policies whose objective are three-fold:

> [First,] to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; [second,] to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and [third,] to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[251]

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251. Organisation for Economic Co-Operation and Development, OECD's Project on Harmful Tax Practices: The 2001 Progress Report 2, *available at* http://www.oecd.org/pdf/m00021000/m00021182.pdf (last visited Feb. 14, 2002) [hereinafter OECD 2001 Progress Report]. *See also* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-home-0-nodirectorate-no-no-no-0,FF.html (stating OECD mission as assisting member countries to address economic, social, and governance problems inherent with a global economy) (last visited Feb. 14, 2002). The OECD's membership consists of the European Union ("EU") and the European Economic Area (EEA) except Liechtenstein. *See* WILLIAMS, *supra* note 201, at 10 n.17. The thirty members of the OECD are: (1) Australia, (2) Austria, (3) Belgium, (4) Canada, (5) the Czech Republic, (6) Denmark, (7) Finland, (8) France, (9) Germany,

It accomplishes these goals by identifying and responding to emerging issues through internationally agreed upon recommendations, including intergovernmental reports on tax policy and practice developed by the OECD Committee on Fiscal Affairs.[252] These reports result from regular, ongoing discussions and information exchanges among countries about issues associated with direct and value-added taxation.[253]

In response to a directive by the OECD Ministers to "develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases," in 1998 the Committee on Fiscal Affairs (Committee) issued the OECD 1998 Report.[254] This report served as a vehicle for OECD members to better understand the effect of harmful tax practices on the location of financial and other service activities; the erosion of tax bases of other countries; the distortion of trade and investment patterns; and on undermining the fairness, neutrality, and social acceptance of tax systems generally.[255] The report and its accompanying recommendations were approved on April 9, 1998.[256]

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(10) Greece, (11) Hungary, (12) Iceland, (13) Ireland, (14) Italy, (15) Japan, (16) Korea, (17) Luxembourg, (18) Mexico, (19) the Netherlands, (20) New Zealand, (21) Norway, (22) Poland, (23) Portugal, (24) the Slovak Republic, (25) Spain, (26) Sweden, (27) Switzerland, (28) Turkey, (29) the United Kingdom, and (30) the United States. *See* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-countrylist-0-nodirectorate-no-no-159-0,FF.html (last visited Feb. 14, 2002). The OECD has no executive powers and only operates through unanimity. *See* WILLIAMS, *supra* note 201, at 11. Because it only makes recommendations, the OECD is regarded as a safe forum through which members can discuss taxation problems. *See id.* Additionally, the OECD affords the opportunity for discussions with all leading economic nations, rather than just those in Europe. *See id.*

252. *See id.* This is only one of the three ways the OECD is primarily active; the OECD also produces and maintains the OECD Model Tax Convention on Income and Capital and conducts outreach to member and nonmember countries. *See id.*

253. *See id.*

254. *See* OECD 1998 Report, *supra* note 7, at 3.

255. *See id.* ¶ 4, at 8. The end result the OECD hopes to achieve with its focus on harmful tax competition is to promote an open, multilateral trading system and encourage adjustments to the system to contemplate the changing nature of international trade, investment, and taxation. *See id.* ¶ 8, at 9. The guidelines contained in the OECD 1998 Report are compatible with the EC Code (*see supra* section IV.B), as they identify harmful tax competition similarly. *See id.* However, they differ in that the OECD Guidelines are limited to financial and other service activities, whereas business activities in general are examined in the EC Code (*see supra* this note). *See id.* Finally, unlike the EC Code, the review procedure in the OECD is directed toward a broader geographic group, it includes tax havens when considering harmful tax practices, and it focuses on the exchange of information. *See id.* ¶ 18, at 11.

256. *See* OECD Releases Progress Report on Addressing Harmful Tax Practices, n.1 *at* http://www.oecd. org/oecd/ pages/document/ print_template/0,3371,EN-document-notheme-1-no-no-21176-0-withoutnav,00.html (last visited Feb. 14, 2002). Luxembourg and Switzerland, who initially abstained, later rescinded their abstentions to the 1998 Report. *See id.*

The report focuses on "harmful tax practices," a phrase that collectively refers to tax havens and countries with potentially harmful tax regimes.[257] "Tax havens" are defined in the 1998 Report as countries "able to finance their public services with no or nominal income taxes and that offer themselves as places to be used by non-residents to escape tax in their country of residence . . . ."[258] Tax havens differ from "countries with potentially harmful tax preferential tax regimes" because, in countries with potentially harmful preferential tax regimes, significant revenue is raised from income taxes; their tax systems, however, have features that promote harmful tax competition.[259] These distinctions are relevant because the Committee concluded that tax haven jurisdictions are likely not willing to cooperate in eliminating harmful tax competition, whereas countries with potentially harmful tax preferential regimes were more likely to cooperate with the OECD agenda.[260]

Classification of the effects of tax practices as harmful is made after evaluating all relevant factors.[261] The chief considerations to determine the existence of a tax haven include: whether there is a low or nonexistent tax rate on relevant income; whether the country offers itself as, or is perceived to be, a jurisdiction where non-residents can escape taxation by their resident country; and whether limitations exist on the ability of other countries to obtain information relevant to tax purposes.[262] There are four primary considerations when classifying a jurisdiction as a preferential tax regime:[263] (1) no or nominal tax on relevant income; (2) the regime is restricted to non-

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257. *See* OECD 1998 Report, *supra* note 7, ¶ 4, at 8.

258. *Id.* ¶ 42, at 20.

259. *See id.*

260. *See id.* ¶ 43, at 20.

261. *See id.* ¶ 45, at 21.

262. *See id.* ¶ 46, at 21.

263. *See* OECD 1998 Report, *supra* note 7, ¶¶ 68-78, at 30-34. In addition to these four primary considerations, other factors may be considered, such as whether there is an artificial definition of the tax base or if the tax base is non-transparent, both of which make it difficult to determine whether all of the companies investing in the country have the same tax rate imposed. *See id.* Another consideration is whether the country fails to adhere to transfer pricing principles (generally relying on the arm's length standard to determine the transfer price but making adjustments given the facts and circumstances of the case). *See id.* Failure to adhere to transfer pricing principles most likely occurs where treatment afforded to a taxpayer is non-transparent, where a taxpayer can negotiate a transfer price, where equal treatment is not embedded in the legal system, or where advance rulings are not appropriately used (such as when agreements are non-transparent, not based on the facts and circumstances, and when guidelines are not followed). *See id.* An additional consideration is whether there is access to a wide network of tax treaties, which may open the benefits of harmful preferential tax regimes offered by the treaty country to a wider array of countries than would otherwise be the case. *See id.* Similarly, other factors include whether the tax rate or tax base is negotiable or whether the rate depends on the residency of the investor, or whether secrecy provisions restricting the access of other governments to relevant tax information exist. *See id.* Other considerations include whether foreign-source income is exempt from country tax, whether regimes are promoted as tax minimization vehicles, and whether the regime encourages purely tax-driven operations or arrangements. *See id.*

residents and isolated from the domestic economy; (3) lack of transparency in legislative, judicial, and administrative provisions; and (4) limited access of resident countries to information on taxpayers benefiting from the potentially preferential tax regime.[264] Of these, the third factor, transparency, is primarily relevant to tax rulings.

"Lack of transparency" is a broad concept that refers to how a taxing regime is designed and administered and includes: favorable application of laws and regulations, negotiable tax provisions, and a failure to make administrative practices widely available.[265] To be considered transparent, a tax regime's administration should set forth the conditions applicable to taxpayers so that the conditions may be invoked against the authorities; details of the regime, including those details applicable to a particular taxpayer, should be available to tax authorities of other countries.[266] A lack of transparency may result because favorable administrative rulings are provided, allowing some taxpayers to operate under a lower effective tax than others.[267] Criteria necessary to obtain a ruling should be available in a non-discriminatory manner to all taxpayers.[268]

Similarly, non-transparency can exist in jurisdictions that employ special administrative policies contrary the jurisdiction's statutory procedures.[269] For example, a jurisdiction may have a statutorily prescribed fixed tax rate and base but the jurisdiction's administrative practice does not conform to the statutory rules or is not consistently applied.[270] Such an administrative practice may result in corruption and discrimination, especially if these administrative practices are not disclosed.[271]

Finally, non-transparency can exist if laws in an otherwise legitimate regime are not enforced.[272] For example, the tax authorities may intentionally follow a lax audit policy to implicitly invite taxpayers not to comply with tax laws that otherwise conform to the OECD rules, resulting in affording these taxpayers a greater competitive advantage.[273]

In its 2001 Progress Report, the Committee explained that the objective of having tax haven jurisdictions comply with transparency criteria was to ensure that "laws are applied on an open and consistent basis among similarly situated taxpayers, and . . . information needed by tax authorities to determine

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264. *See id.* ¶¶ 46, 53, at 21, 23-24. The second consideration is referred to as "ring-fencing." *See id.* ¶ 46, at 21.

265. *See id.* at 27 Box II(c).

266. *See id.* ¶ 63, at 28.

267. *See id.* These administrative practices are viewed as legitimate and necessary exercises of administrative authority when they are consistent with statutory laws. *See id.*

268. *See* OECD 1998 Report, *supra* note 7, ¶ 63, at 29.

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

a taxpayer's situation is in place."[274] Lack of transparency also exists when there is "inadequate regulatory supervision or if the government does not have legal access to financial records."[275] Tax authorities are unable to apply laws effectively and fairly when the system is not transparent.[276] Examples of abuses that result in a non-transparent system include secret rulings and negotiated tax rates, which do not apply the law openly and uniformly.[277]

The Committee made a series of recommendations that countries ameliorate harmful tax competition by adopting measures consistent with its findings and its goal of reducing harmful tax competition, first through unilateral measures, then bilateral agreements negotiated in the form of tax treaties, followed by multilateral responses.[278] Of those recommendations, one that pertains to rulings suggests that countries providing agreements in advance of a planned transaction make the conditions for denying, granting, or revoking such decisions available to the general public.[279] Publication of these conditions includes making details concerning how the taxpayers' positions are determined (such as the arm's length value of services or profits and losses) known so that the same rules are applied to all taxpayers.[280] Further, if procedures for obtaining advance agreements are not widely known, then taxpayers may be treated unequally because the lack of public information may put taxpayers in different positions when determining their tax situation.[281] Finally, if the substantive and procedural conditions for granting or denying individual tax rulings are published, then greater transparency of tax policies is ensured.[282]

Regarding transfer pricing, the Committee recommended that countries follow the OECD's 1995 Guidelines on Transfer Pricing (OECD 1995 Guidelines) and refrain from applying transfer pricing rules that would constitute harmful tax competition.[283] The 1995 Guidelines set forth the arm's length principle as the general rule.[284] Deviations from that principle to make that country a tax-favored intermediary can constitute harmful tax competition.[285]

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274. OECD 2001 Progress Report, *supra* note 251, ¶ 6, at 5.

275. *Id.*

276. *See id.*

277. *See id.*

278. *See id.* ¶ 38, at 91. *See generally id.* ¶¶ 97-171, at 40-62 (enumerating and detailing the Committee's recommendations).

279. *See* OECD 1998 Report, *supra* note 7 ¶ 108, at 44.

280. *See id.*

281. *See id.* ¶ 109, at 44-45.

282. *See id.* ¶ 110, at 45.

283. *See id.* ¶¶ 111, 166-67 at 45, 61.

284. *See id.* ¶ 111, at 45.

285. *See* OECD 1998 Report, supra note 7, ¶ 111, at 45.

2. U.S. ruling program complies with relevant provisions of the OECD 1995 and 1998 Reports[286]

As noted above,[287] the primary condition in the OECD 1998 Report for determining whether a ruling program contributes to a jurisdiction's classification as a preferential tax regime is whether the country's practices are transparent.[288] Transparency is evaluated by reviewing whether legislative, judicial, and administrative rules of the country considered to ensure that the procedures for obtaining rulings are published, that taxpayers' rights are publicized, that those procedures are non-discriminatorily applied, that information regarding the underlying transaction can be verified, and that the substance of the transaction is made available (including to authorities in other countries). The jurisdiction must also follow its announced policies when issuing rulings, as well as when applying other tax laws that give advance rulings effect (such as following through with audit procedures to verify that taxpayers are complying with the rules prescribed in the tax system).

The APA program in the United States conforms to the standards advanced by the OECD. Like all other advance rulings in the United States, the procedures for obtaining an APA are highly publicized. The likelihood for discrimination in administration of the APA process is mitigated[289] by the use of APA teams, competent authority provisions, and the taxpayer's ability to withdraw APA requests and challenge any adverse determinations on audit through the independent judicial system. The possibility that an APA will be granted on fictitious transactions is greatly reduced because of the substantial documentation required, as well as the cost of seeking an APA. Also like other rulings, threats that the IRS will not adhere to the policies announced are slight, given the administrative checks on agencies of government.

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286. Although outside the scope of this paper, the OECD 2000 Report classified the U.S. Virgin Islands, an external territory of the United States, as a tax haven and the United States treatment of foreign sales corporations (FSCs) as a "preferential tax regime that is potentially harmful." *See* Organisation for Economic Co-Operation and Development, Towards Global Tax Co-operation Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs—Progress in Identifying and Eliminating Harmful Tax Practices 14 (foreign sales corporation), 17 (U.S. Virgin Islands), *available at* http://www.oecd.org/pdf/m000014130.pdf (last visited Feb. 14, 2002) [hereinafter OECD 2000 Report].

287. *See supra* text following note 264.

288. Another factor considered when classifying a jurisdiction as engaging in harmful tax practices—the extent to which resident countries have access to information about taxpayers benefiting from the potentially preferential tax regime—is considered in the context of transparency only.

289. *See* OECD's 1995 Guidelines on Transfer Pricing (OECD 1995 Guidelines). Although applying specifically to APAs and not advance rulings in general, the OECD recommends that countries subscribe to the "arm's length" standard when determining pricing of inter-company transfers. *See id.* Consistent with this recommendation, the APA program in the United States uses the arm's length standard as its initial starting point when making pricing agreements. *See id.*

V. CONCLUSION

The EC and the OECD are committed to promoting fair tax competition.[290] The tax ruling practice in the United States is consistent with this goal, as is apparent when analyzing the system in the United States with the EC and OECD criteria enunciated in the EC Treaty, the EC Code of Conduct, and the OECD Tax Competition Report.

The EC Code and the OECD recognize and are committed to ending harmful tax regimes.[291] A regime is determined harmful by reviewing whether residents and similarly situated non-residents are treated equally, whether information is available, whether favorable rulings are issued when transactions lack economic substance, whether transfer pricing rules comply with OECD standards, and whether tax measures are transparent.[292] If these criteria are satisfied, then a regime does not promote harmful tax competition under the EC and OECD models.

Although all factors are important, transparency is most relevant to tax rulings. To be transparent, procedures to obtain rulings should be clearly announced, details of the tax regime should be available to tax authorities of other countries, favorable rulings should be equally applicable to all similarly situated taxpayers, audit procedures should be utilized, and remedies against authorities should be afforded.[293]

The United States ruling practice is largely consistent with EC and OECD goals for ending harmful tax practices. The ruling program is designed so that formal, generally applicable rulings are applied equally to similarly situated taxpayers. If they are not, then procedural safeguards exist, such as administrative and judicial appeals so that aberrations may be challenged. Extensive notice and comment procedures are used prior to implementing generally applicable regulations. When interpreting general rules not made pursuant to these procedures, these rules are given less deference by the courts. Although the IRS may retroactively modify or revoke these rules—potentially allowing unfairness—this potential is tempered by the infrequency of retroactive application.

Formal, tailor-made rulings also comply with EC and OECD objectives. Ruling determinations are based on objective criteria, deterring potential discrimination between or among taxpayers. If the objective criteria are not

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290. *See generally supra* section IV (discussing U.S. advance rulings in the context of EC and OECD standards).

291. *See generally supra* section IV.B & C (discussing U.S. advance rulings in the context of EC Code and OECD standards).

292. *See generally supra* section IV.B & C (discussing U.S. advance rulings in the context of EC Code and OECD standards).

293. *See generally supra* section IV.B & C (discussing U.S. advance rulings in the context of EC Code and OECD standards).

adhered to, taxpayers are afforded administrative and judicial appeal rights. Rulings are disclosed for review after confidential information has been redacted, making the information available to the public. Because of the substantial documentation that is required when submitting a ruling request, it is unlikely that rulings may be issued on transactions lacking economic substance. Finally, transfer pricing rules in the United States are based on an arm's length standard, the same as that recommended by the OECD.[294] The result is that advance rulings in the United States—PLRs and APAs—are consistent with EC and OECD recommendations for promoting fair tax practices in a global marketplace and may serve as a model for other countries developing and reforming their ruling programs.

294. *See generally supra* section IV.B & C (discussing U.S. advance rulings in the context of EC Code and OECD standards).

PIERCING THE VEIL OF CHINA'S LEGAL MARKET: WILL GATS MAKE CHINA MORE ACCESSIBLE FOR U.S. LAW FIRMS?

Richard Qiang Guo*

I. INTRODUCTION

Beijing is in the triumphant rapture. After fifteen years of protracted negotiations, China legally became a member of the World Trade Organization (WTO) on December 11, 2001.[1] Beijing is also victorious because the International Olympic Committee (IOC) has chosen it to host the 2008 Summer Olympic Games, a dream-come-true achieved only after painstaking effort and perseverance. The Chinese, who make up nearly one-fourth of the world's population, are ready to put their wisdom, strength, and character to the ultimate test in the coming years.[2]

American lawyers are by no means strangers to China. Their wisdom was relied upon in the founding of the National Council for U.S.- China Trade, Inc. (the predecessor of the U.S.- China Business Council), the first non-governmental organization to promote trade relations with China.[3] It opened its first office in China in October 1973, at the Dong Fang Hotel in Guangzhou, to provide aid to Americans attending the so-called "Canton Fair."[4] All this happened even before China's own system of lawyers re-emerged in 1980.[5] Given the current jubilation in China over the accession to

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1. *See generally Information Paper on the Impact and Challenges for the Hong Kong Legal Profession upon China's Accession to the WTO*, HONG KONG DEPARTMENT OF JUSTICE, LEGAL POLICY DIVISION 1 (Dec. 2001), *available at* http://www.info.gov.hk/justice/new/depart/doc/ipaper281201e.pdf (last visited Sept. 15, 2002) [hereinafter *Information Paper*]. On Sept. 17, 2001, the Working Party on China's accession to the WTO successfully concluded negotiations on China's terms of membership in the WTO, paving the way for the text of the agreement to be adopted formally at the Fourth WTO Ministerial Conference in Doha, Qatar, Nov. 9-13, 2001. *See id.*

2. *See* Tamara Loomis, *Will China Be Boon for Lawyers?*, 224 N.Y.L.J. 5 (2000). The US-China Business Council is a Washington, D.C.-based trade association composed of 250 companies and law firms. *See id.*

3. *See generally* Eugene Theroux, *The Formation of the US-China Business Council: A Look at the Score*, CHINA BUS. REV., July 1, 1993.

4. *See id.*

5. *See generally* Qizhi Luo, *Autonomy, Qualification and Professionalism of the PRC Bar*, 12 COLUM. J. ASIAN L. 1 (1998). The Cultural Revolution totally dismantled the fragile primitive lawyer system of the 1950s. *See id* at 8-9. *See also* Randy Peerenboom, *The Legal Profession, in* DOING BUSINESS IN CHINA 2-6 (2000).

the WTO and selection by the IOC, considering the seemingly enormous investment opportunities for their clients, it seems odd that the mood of American law firms with China in mind is only "cautiously optimistic," according to John Ford, vice president of the U.S.- China Business Council.[6]

The past three decades have seen the influx of foreign investment in China, in which U.S. lawyers have played crucial roles. While their clients are partying with Chinese landlords, the lawyers are still lingering at China's doorway, trying hard to receive an official invitation to be invited in. "It was a bit like studying the moon: [y]ou could see it, but you couldn't get there," recalled Professor Jerome Cohen, who engineered the Coudert Brothers' Beijing office, the first foreign law firm to have a foothold in mainland China since the Communist takeover.[7]

China has earned a reputation of "being inhospitable to foreign business,"[8] but has been much more suspicious of foreign lawyers. Tight regulations for foreign law firms operating in China has sparked a firestorm of debate. To some extent regulation is justifiable because in China, the practice of law is to a large extent still a public function.[9] For one thing, western lawyers can by no means possess the national loyalty and shared cultural values, which are still prerequisites, though not literally, of the socialist regime.[10]

Nevertheless, how much leverage does a sovereign state like China have in regulating foreign access into its legal market? Is there a minimum international standard that universally applies to regulation of domestic legal markets? How should sovereign nations like China cope with the right to regulate and the duty to grant access? This article will explore the international rules governing trade in legal services, specifically the General Agreement on Trade in Services (GATS), briefly discuss the Chinese

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6. *See* Loomis, *supra* note 2.

7. Douglas McCollam, *Let A Thousand Branch Offices Bloom*, 22 AM. LAW. 92 (2000), *available at* http://www.law.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZU98Q8QEC&live=true&cst=1&pc=0&pa=0 (last visited Aug. 30, 2002).

8. Kevin Livingston, *The China Syndrome*, THE RECORDER, Nov. 15, 1999, *available at* http://www.law.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=A9934-1999Nov18&live=true&cst=1&pc=0&pa=0 (last visited Aug. 30, 2002).

9. *See* WTO SECRETARIAT, GUIDE TO THE GATS: AN OVERVIEW OF ISSUES FOR FURTHER LIBERALIZATION OF TRADE IN SERVICES 407 (2001). According to WTO Secretariat, countries that maintain a nationality requirement in relation to the provision of legal services appear to do so to protect a "public function" performed by host-country practitioners involved in the practice of host-country law, particularly in relation to representation associated with a right of audience in the courts of host jurisdictions. *See id.*

10. *See, e.g.*, Zongze Gao, President, All-China Bar Association, speech at the WTO on the China Legal Profession Conference (transcript, *available at* http://www.chineselawyer.com.cn/article/show.php?cId=736) (last visited Aug. 30, 2002). Zongze Gao stated that one of the achievements in Chinese legal market is the emergence of an echelon of lawyers of higher political consciousness and professional caliber, whom the Community Party and the people trust. *See id.*

regulatory regime regarding foreign law firms, and offer an historical review of the inroads that American law firms have made into the Chinese legal market. The article will conclude by gauging the potential impact that China's accession to the WTO is likely to have on China-oriented American law firms.

II. GATS AND TRADE IN LEGAL SERVICES

As the "first ever set of multilateral, legally-enforceable rules covering international trade in services,"[11] GATS received much controversial publicity.[12] Trade in services was included in the multilateral General Agreement on Tariffs and Trade (GATT) negotiations only upon the reluctant agreement of many developing countries.[13] Because a large share of trade in services takes place inside national economies,[14] the nature of the services makes any international body of law like GATS more intrusive than other trade legislation.[15] For the same reason, critics have claimed that liberalization under GATS means deregulation of services,[16] and as a result governments pay a high price from losing the right to regulate,[17] threatening democracy.[18] On the other hand, proponents of international cooperation in liberalizing trade in services criticize that too much flexibility in scheduling services makes GATS systematically an ineffective vehicle by which to liberalize trade in services.[19] Still no substantial improvement of market access has been achieved because most commitments merely preserve existing regulatory measures.[20]

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11. *Trading Into the Future, The Introduction to the WTO* (2001), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm (last visited Sept. 28, 2002) [hereinafter *Trading into the Future*].

12. *See generally GATS - Fact and Fiction*, *available at* http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf (last visited Aug. 30, 2002) [hereinafter *Fact and Fiction*].

13. *See* Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667, 670 (1997).

14. *See An Introduction to the GATS*, *available at* http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc (last visited Aug. 30, 2002).

15. *See* Jessica Woodroffe, *GATS: A Disservice to the Poor*, WORLD DEVELOPMENT MOVEMENT, 32 (2002), *at* http://www.wdm.org.uk/cambriefs/gatsdiss.pdf (last visited Aug. 30, 2002).

16. *See Fact and Fiction*, *supra* note 12, at 11.

17. *See id.* at 10.

18. *See, e.g.*, Scott Sinclair, *GATS: How the World Trade Organization's New "Services" Negotiations Threaten Democracy*, CAN. CENTRE FOR POL'Y ALTERNATIVES (Sept. 2001), *at* http://www.policyalternatives.ca/publications/gatssummary.html (last visited Aug. 30, 2002).

19. *See* Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade In Legal Services: A Proposal For An Annex On Legal Services Under the General Agreement On Trade In Services*, 16 MICH. J. INT. 941, 967-72 (1995).

20. JEFFREY S. THOMAS & MICHAEL A. MEYER, THE NEW RULES OF GLOBAL TRADE: A GUIDE TO THE WORLD TRADE ORGANIZATION 248-50 (1997).

A. GATS: Liberalization or Deregulation?

Negotiated in the Uruguay Round,[21] GATS covers all internationally-traded services with two exceptions.[22] Like the agreements on goods,[23] GATS operates on three levels: (1) the main text containing general principles and obligations; (2) annexes dealing with rules for specific sectors;[24] and (3) individual countries' specific commitments to provide access to their markets.[25] Unlike the agreement on goods, GATS has a fourth element showing which countries are temporarily not applying the "most-favored-nation" (MFN) principle of non-discrimination.[26]

MFN treatment under GATS directly parallels the centrally important Article I of the GATT.[27] Article II of GATS provides that "with respect to any measure covered by this Agreement, each Member shall accord *immediately* and *unconditionally* to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."[28] Article II further establishes a general obligation which is in principle applicable across the board by all Members to all service sectors, regardless of whether the member has undertaken specific commitments in a sector.[29] This provision requires a country allowing foreign competition in a service sector, to give equal opportunities in the sector to service providers from all other WTO members.

However, under GATS, any member can also apply for a one-time temporary exemption from MFN by listing a service sector in the Annex on Article II Exemption. In order to protect the general MFN principle, such

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21. *See Trading into the Future, supra* note 11. The Uruguay Round negotiation was launched in Punta del Este, Uruguay, in September 1986, and the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations was signed by ministers in Marrakesh on April 15, 1994. *See id.* The Final Act is 550 pages long and contains the legal texts, which spell out the results of the negotiations including those on legal services. *See id.*

22. *See Fact and Fiction, supra* note 12, at 1. The two exceptions are "services provided to the public in the exercise of governmental authority and, in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights." *Id.*

23. *See Trading into the Future, supra* note 11, at 14. The General Agreement on Tariffs and Trade (GATT) deals with trade in goods. The text of GATT 1947 has been amended and incorporated into the new WTO agreements and known as "GATT 1994." *See id.*

24. *See* General Agreement on Trade in Services, in Uruguay Round Final Act, Dec. 15, 1993, Annex 1B, GATT Doc. No. MTN/FA, 33 I.L.M. 1130 (1994). See art. XXIX (Jan. 2000), *available at* http://www.wto.org/English/docs_e/legal_e/legal_e.htm=services [hereinafter GATS]. There are eight annexes on Article II exemptions including: movement of natural persons supplying services, air transport services, financial services (two annexes), maritime transport services, telecommunications and negotiations on basic telecommunications respectively. *See id.*

25. *See Fact and Fiction, supra* note 12, at 1.

26. *Trading Into the Future, supra* note 11, at 21.

27. *See An Introduction to the GATS, supra* note 14, at 4.

28. GATS, *supra* note 24, art. II, para. 1 (emphasis added).

29. *See Trading Into the Future, supra* note 11, at 21.

exemptions are only made once and must be taken at the time the negotiations were concluded.[30] Exemptions last for not more than ten years and are subject to review after not more than five years (in 2000).[31] Subsequently, any future requests for exemptions from Article II are only granted under the waiver procedures of the Marrakesh Agreement.[32] In other words, an MFN exemption would give a Member who had made no commitments in a sector considerable freedom to discriminate.[33] Therefore, in such cases, a Member may accord treatment more favorable than the minimum standard to some Members, as long as all Members receive at least that minimum standard of market access and national treatment appearing in its schedule.[34]

This automatic extension of any bilaterally or multilaterally negotiated privileges amongst WTO members creates classic free-rider concern.[35] A member that has a restrictive policy and does not make a commitment in a particular service sector can maintain its status quo and free ride on other members who, through time-consuming negotiations and bargains, grant each other improved access to this service sector in their jurisdictions.[36]

As a matter of fact, even during the bargaining, Members may try to free ride on each other, as was alleged in the context of the financial services and telecommunications negotiations.[37]

> Each of the beneficiaries of a concession from a trading partner may be tempted to understate their willingness to pay for it, hoping that offers of reciprocal concessions from other

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30. *See id.* at 24.

31. *See id.*

32. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1154 (1994) [hereinafter Marrakesh Agreement], *also available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (last visited Aug. 30, 2002).

33. *See* Aaditya Mattoo, Most Favored Nation Status and GATS, speech presented at the World Trade Forum Conference on Most Favored Nation Status (Aug. 28-29, 1998) at 7-8 (transcript *available at* http://www1.worldbank.org/wbiep/trade/papers_2000/BPmfn.pdf) (last visited Aug. 30, 2002).

34. *See Guide to Reading the GATS Schedules of Specific Commitments and the List of Article II (MFN) Exemptions*, *available at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Aug. 30, 2002). "At the time of the signature of the Final Act of the Uruguay Round on April 15, 1994, 95 schedules of specific commitments in services and 61 lists of derogation from the MFN principle were submitted and agreed upon." *Id.*

35. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW & POLICY OF INTERNATIONAL ECONOMIC RELATIONS 136-38 (1994).

36. *See, e.g.*, WEITIAN ZHAO, ZUI HUI GUO YU DUO BIAN MAO YI TI ZHI 47 (1996). There is yet another possible free-riding problem when MFN "spills" out of WTO. *See id.* For instance, A and B are both GATS members. A owes MFN to C, who is not a member of GATS, under a bilateral treaty. *See id.* C could be able to enjoy all benefits A gives to B, which are the results of a multilateralized negotiation during which B presumably had traded away certain commitments, without having to fulfill any GATS obligations- since it is not a party of GATS. *See id.*

37. *See* Mattoo, *supra* note 33, at 31.

> Members will be sufficient to induce the concession.... This was reflected in the unwillingness in some of the services negotiations of some Members to make binding commitments unless a certain 'critical mass' of Members was willing to make significant liberalization commitments.[38]

Thus, free-rider concern seems to be the major driving force of Members taking actions to claim MFN exemption. There are at least two other reasons. First, when GATS came into force a number of countries already had preferential agreements in services that they had signed with trading partners, either bilaterally or in small groups.[39] WTO members felt it was necessary to maintain these preferences temporarily. They gave themselves the right to continue giving more favorable treatment to particular countries in particular service activities by listing "MFN exemptions" alongside their first sets of commitments.[40] Second, "[c]ertain sectoral sensitivities that emerged in the Uruguay Round raised the specter of wholesale sectoral exclusions from GATS as a means of avoiding the MFN rule. In order to prevent this, it was agreed to permit limited exemptions to MFN under GATS."[41]

It became clear during the Uruguay Round that "unqualified liberalization in some service sectors could not be achieved, and that liberalization subject to some temporary MFN exceptions would be preferable to no liberalization at all."[42] According to the Secretariat, GATS rules including the one-time MFN exemption provide remarkable flexibility that allows governments, to a great extent, to determine the level of obligations they will assume.[43] "It was this flexibility in the scheduling of commitments which put an end to the north-south controversy over services which marked the early years of the Uruguay Round."[44]

There are at least three other main elements of remarkable flexibility in GATS: (1) complete freedom to choose which services to commit, i.e., to guarantee access to foreign suppliers; (2) for those services that are committed, the ability to set limitations specifying the level of market access and the degree of national treatment they are prepared to guarantee; and (3) the ablity to limit commitments, or withdraw and negotiate commitments, to one or more of the four recognized "modes of supply" through which services

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38. *Id.*
39. *See Trading Into the Future*, *supra* note 11, at 24.
40. *See id.*
41. Mattoo, *supra* note 33, at 6.
42. *An Introduction to the GATS*, *supra* note 14, at 4.
43. *See Fact and Fiction*, *supra* note 12, at 7.
44. *Id.*

are traded.[45] In this sense, GATS is a product of compromise.[46] However, as the first set of legally-enforceable rules covering international trade in services, GATS rules do have teeth. One important bite comes from the so-called "specific commitment" approach.

Specific commitments are individual countries' commitments to open markets in specific sectors.[47] The commitments appear in "schedules" that list the sectors being opened, the extent of market access being given in those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies).[48] National treatment is thus treated differently for services than for goods (GATT) and intellectual property (TRIPS)[49] where national treatment is a general principle. In GATS, national treatment is a "specific commitment"—one of the negotiated rights/obligations—and only applies where a country has made a specific commitment, and exemptions are allowed.[50]

These commitments on national treatment and market access are "bound"[51] and, "like bound tariffs, they can only be modified or withdrawn after negotiations with affected countries, which would probably lead to compensation. Because "unbinding" is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business." [52] In light of the keen concerns over deregulation and threat to democracy, it is unfair to expect GATS to achieve the same extent of liberalization as the GATT has done over half a century.[53] "[T]he Uruguay Round services package is only a beginning,"[54] and, as such, the primary gain in the first round of commitments consisted of commitments not to increase protectionism (standstill commitments), rather than major advances in trade liberalization.[55] In consideration of this, in

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45. *See id.* However, the withdrawals are actually very difficult to achieve. *See infra*, Part II.B (regarding "unbinding" commitments).

46. *See generally An Introduction to the GATS, supra* note 14, at 7. This can be attributed, at least partially, to the fact that "services negotiations in the Uruguay Round were completed under extreme pressure of time." *Id.*

47. *See Trading Into the Future, supra* note 11, at 22.

48. *See id.*

49. *See generally Frequently asked Questions about TRIPS in the WTO, available at* http://www.wto.org/english/tratop_e/trips_e/tripfq.e.htm (last visited Sept. 24, 2002). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one of the three "pillars" of the WTO, the other two being trade in goods and trade in services. *See id.*

50. *See Trading Into the Future, supra* note 11, at 23.

51. *Id.* at 22.

52. *Id.*

53. *See* THOMAS & MEYER, *supra* note 20, at 250.

54. *An Introduction to the GATS, supra* note 14, at 1.

55. *See* International Trade Forum, *General Agreement on Trade in Services Opportunities for Developing Countries, available at* http://www.intracen.org/worldtradenet/docs/information/forum1_2000.htm (last visited Aug. 30, 2002).

contrast to GATT 1947, GATS incorporates not only specific commitments to prevent further trade restrictions but also the requirement to engage in ongoing rounds of negotiations for progressive liberalization.[56]

B. Trade in Legal Services: Special Dilemma Created by Unconditional MFN

As discussed above, only those nations who have chosen legal services to commit are bound to accept the GATS rules as applied to the legal services sector.[57] However, "the legal profession has unique characteristics arising from its role as intermediary between the citizen and the law and between the citizen and the state. At their core, the activities of the legal profession involve the execution of public duties, not the trade of services."[58]

Therefore, legal service negotiators face a special dilemma created by an inherent tension between the GATS approach, unconditional MFN, and intense national concerns about reciprocity in negotiations involving legal services, thanks to the mandatory extension of any bilaterally negotiated benefits under MFN principle.[59] As the Secretariat puts it, "[t]he main obstacle to trade in legal services is represented by the predominantly national character of the law and by the national character of legal education."[60]

The legal profession was originally organized around courts with lawyers' conventional role being representation before a court and each bar associated to a specific local court.[61] Thus, local court/local bar/local lawyer had been a paradigm before the emergence of a new class of lawyers known as transactional lawyers who advise on matters involving transactions, relationships and disputes not necessarily entailing court proceedings.[62] The legal profession has been further internationalized, driven by corporate clients who do business across borders and choose to rely on the services of professionals who are already familiar with their business and can guarantee high quality services.[63]

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56. *See Fact and Fiction*, *supra* note 12, at 2. In January 2000, WTO Member Governments started a new round of negotiations. *See id.*

57. *See supra* Part II. A regarding "specific commitments."

58. Canadian Bar Association, *Submission on the General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession* 1 (2000), *available at* http://www.cba.org/epiigram/november2000/pdf/00%2D30%2Deng.pdf (last visited Aug. 30, 2002).

59. *See* Chapman & Tauber, *supra* note 19, at 971.

60. WTO Council for Trade in Services, *Background Note by the Secretariat*, S/C/W/43(1998), ¶5 *available at* http://docsonline.wto.org/gen_search.asp (last visited Sept. 3, 2002) [hereinafter Background Note].

61. *See id.* ¶10.

62. *See id.*

63. *See id.* ¶3.

Legal services, for the purpose of GATS, include any advisory (counseling) or (court) representation service which is supplied on a commercial basis or in competition with one or more service suppliers.[64] "Completely excluded from the scope of the GATS are services supplied in the exercise of governmental authority, defined as services supplied neither on a commercial basis, nor in competition with one or more service suppliers."[65] In the WTO's Services Sectorial Classification List, "legal services" is listed as a sub-sector of "business services" and "professional services."[66] This entry corresponds to the UN CPC No. 861 in the United Nations Provisional Central Product Classification.[67] This classification, however, does not reflect the reality of trade in legal services.[68] In scheduling GATS commitments, Members have preferred "to adopt the following distinctions to express different degrees of market openness in legal services: (a) host country law (advisory/representation); (b) home country law and/or third country law (advisory/representation); (c) international law (advisory/representations); (d) legal documentation and certification services; (e) other advisory and information services."[69]

Like all services, there are four modes of supply of legal services: (1) cross-border supply when a legal service crosses a national frontier; (2) consumption abroad- when Member's residents purchase legal services in the territory of another Member; (3) commercial presence, i.e., involving foreign direct investment; and (4) movement of individuals-when independent service

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64. *See* WORLD TRADE ORGANIZATION: COUNCIL FOR TRADE IN SERVICES SPECIAL SESSION, *Communication From the United States (Legal Services)*, S/CSS/W28 (Dec. 18, 2000). The U.S. suggests that the classification should be understood to include the provision of legal advice or legal representation in such capacities as "counseling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar dispute resolution services, public advocacy, and lobbying." *Id.*

65. Mattoo, *supra* note 33, at 4 n.2. Services supplied in the exercise of governmental authority would include all the activities relating to the administration of justice (judges, court clerks, public prosecutors, state advocates, etc.) *See* Background Note, *supra* note 66, ¶ 15. In China, notarial activities were regarded as "services supplied in the exercise of governmental authority." *Id.* However, Chinese notaries often supply their services "on a commercial basis," and therefore shall be subject to the provisions of the GATS. *See id.* ¶ 3.

66. *See* WTO SECRETARIAT, *Services Sectoral Classification List*, MTN.GNS/W/120. (May 24, 1991).

67. *See* Background Note, *supra* note 60, ¶16.

68. *See id.* ¶ 17.

69. *Id.* Australia has proposed to change the WTO services classification, since the structure of the WTO schedules is better suited to accommodating definitions focused on the area of law and type of service, rather than on the definition of the service provider. *See* WORLD TRADE ORGANIZATION: COUNCIL FOR TRADE IN SERVICES SPECIAL SESSION, COMMITTEE ON SPECIFIC COMMITMENTS, *Communication From Australia, Negotiating Proposal: Legal Services Classification Supplement*, S/CSS/W/67/Supp.2 (Mar. 11, 2002), at 3-4. The proposed subcategories would provide the members with a clear mechanism through which to limit the practice of "host-country law (representation services)" to local practitioners, but make substantial commitments through other subcategories, thus protecting the "public function" as well as providing meaningful market access to foreign legal practitioners. *See id.*

providers or employees of a multinational firm move to and stay in, temporarily, another country to provide legal service.[70]

Legal services were first included in the GATS negotiations at the insistence of the United States in the Uruguay Round Negotiation.[71]

> In the Uruguay Round, 45 members (counting the then 12 Member States of the EU as one) made commitments in legal services. Two acceding members also included legal services in their schedule. Of these 47 members, 22 made commitments in advisory host country law (19 in representation), 41 in advisory international law (20 in representation), 40 in advisory home country law (20 in representation) 41 in advisory third country law and 6 in other legal services (including legal documentation and certification services and other advisory and information services).[72]

> U.S. negotiators initially envisioned a special annex on legal services, similar to the Annex on Financial Services, to specifically address the regulatory barriers facing lawyers. Under the terms of the GATS, obligations of such an annex would be binding on all GATS members and would have required all GATS members to afford foreign lawyers some uniform minimum level of access to their legal markets.[73]

Because an Annex is an integral part of the Agreement, binding on all members for the covered sector, the creation of an Annex on legal services, the argument went on, could have eased the inherent tension between the GATS approach and the national concerns.[74]

The final version of the GATS expressly rejected the "Special Annex" approach initially envisioned by U.S. negotiators and, instead, adopted the multilateral negotiation process for the opening of legal markets.[75] The multilateral negotiation approach permits members to offer improved access to their legal markets in exchange for concessions from other Members—not

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70. *See Guide to Reading the GATS Schedules of Specific Commitments and the List of Article (MFN) Exemptions, available at* http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Nov. 3, 2002).

71. Spencer A. Sherman, *Yankee Go Home: What Left for Lawyers After the GATT Debacle*, 14 CAL. L. REV. 65 (1994).

72. Background Note, *supra* note 60, ¶57. China, siding with Brunei Darussalam, Dominican Republic and Singapore, invoked an MFN exemption for legal services. *See* Chapman & Tauber, *supra* note 19, at 965 n.146.

73. *Id.* at 963.

74. *See id.* at 971.

75. *See id.* at 963.

limited within the context of the legal service sector per se, rather, on a more comprehensive service arena, or even across goods, services, investment and intellectual property.[76]

Due to the trade-off feature of such market access negotiations, among the forty-five members, no two Schedules of specific commitments are the same.[77] A member might want to trade more freedom in its legal market for a similar benefit in another service sector of another member, which it thinks more significant. As a result, the level of liberalization actually achieved in legal services will vary from country to country, "depending on the outcome of various 'horse trades' during the negotiation process."[78]

Still, because offers in the legal service sector are hard to assess due to lack of dependable data and complexity of national regulatory systems,[79] "legal services suffer from being invariably at the bottom of the [negotiation] agenda." [80]

III. FROM "RECIPROCITY" TO UNCONDITIONAL MFN: CHINA'S MFN SYNDROME

China entered into GATS negotiation in the Uruguay Round,[81] submitted its GATS schedules in 1991, 1992, 1994, and 1997, and along with another sixty countries and regions, made the MFN exemption at the time of the signature of the Final Act of the Uruguay Round.[82]

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76. *See id.* at 964.

77. *See* Background Note, *supra* note 60, ¶ 25-27.

78. Chapman & Tauber, *supra* note 19, at 964.

79. *See id.* at 968-69.

80. Patrick Stewart, *Trade War Looms Over International Legal Services*, 10 INT'L FIN. L. REV. 19, 20 (1991).

81. *See* NEWS BACKGROUND, *China's Access Into GATT/WTO*, *available at* http://business.sohu.com/991116/file/928noname.html (last visited Aug. 30, 2002). On July 11, 1986, China, an observer at GATT meetings since November 1982, formally applied to resume its GATT membership, which was withdrawn by the Kuo Ming Tang government in 1950. *See id.* It received a ermanent observer status on the GATT Council in April 1994, entered into the Uruguay round negotiation on September 15, 1986, and became one of the 123 signatories of the Final Act of the Uruguay Round on April 15, 1994. *See id.* The nine-year bid, however, failed to bring China into the ortune club when the WTO succeeded the GATT on January 1, 1995. *See id.* The WTO accepted China as an observer on July 11, 1995, and the accession negotiation has continued since November 1995 under the framework of the WTO. *See id.* The multilateral informal negotiation started in Geneva on March 20, 1996, and in October 1996, China undertook a standstill commitment whereby it promised not to introduce any new laws or policy measures inconsistent with WTO rules in the course of negotiation. *See* Donald C. Clarke, *China and the WTO*, *in* DOING BUSINESS IN CHINA, 4 (2000), citing Xiaobing Tang, *China Economic System and Its New Role in the World Economy*, *in* CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT, 58 (1998).

82. *See* Marrakesh Agreement, *supra* note 32.

In response to Members' demand to open up its legal market during the "requests and offers" procedure,[83] the 1994 schedule[84] was revised in November 1997 to embody the "legal services" as a sub-sector of "professional services" sector, subject to the MFN exemption based on reciprocity.[85] Trade in legal services, most significantly, the establishment of business offices of law firms (i.e. the mode 3 of legal service) would be on the basis of reciprocity.[86]

National authorities are very reluctant to tolerate asymmetric access to legal markets, so reciprocity is actually a shared concern.[87] However, a network of reciprocity provisions in domestic regulations will result in "lowest common denominator liberalization," in which the willingness of the most restrictive country to liberalize its domestic rules decide the pace of actual liberalization.[88]

Chinese negotiators formally gave up the MFN exemption during the accession negotiations.[89] Only a few days into the WTO fraternity, the central government has already released a new set of regulations in carrying out its WTO commitments.[90] For instance, on December 22, 2001, the State Council promulgated *The Regulations on the Management of Representative Offices set up by Foreign Law Firms in China*, (*New Regulations*) having come into force on January 1, 2002.[91] In conformity with its renouncement of the MFN

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83. *See* Hongming Xiao, *The Internationalization of China Legal Services Market*, 1 Perspectives 6, at 2-3, *at* http://www.oycf.org/Perspectives/6_063000/internationalization_of_china.htm (last visited Sept. 3, 2002).

84. *See* WORLD TRADE ORGANIZATION, *China - Final List Of Article II (MFN) Exemptions (1994)*, GATS/EL/19GATS/EL/19 (Feb. 14, 2002) [hereinafter FINAL LIST].

85. *See* WORLD TRADE ORGANIZATION, *1997 Schedule*, WT/ACC/CHN/12 (Nov. 20, 1997) [hereinafter 1997 Schedule] (complete copy unavailable at time of publication).

86. *See id.* It is important to distinguish between reciprocity as an aspect of the bargaining process and reciprocity as an aspect of the trade regime. In the former case, concessions are negotiated on a reciprocal basis and the results are multilateralized, so discrimination is not practiced in actual trade. In the latter case, reciprocity is the basis for the implementation of trade policy, so discrimination is a feature of actual trade policy. For purpose of this article, reciprocity means the latter. *See* Mattoo, *supra* note 33, at 30.

87. *See* Chapman & Tauber, *supra* note 19, at 962. Although few countries made MFN exemption—whether it is based on reciprocity or not—in GATS negotiations, reciprocity requirements are very common in domestic rules. *See id. See also* Background Note, *supra* note 60.

88. *See* Chapman & Tauber, *supra* note 19, at 963.

89. *See* FINAL LIST, *supra* note 84.

90. *See China In Compliance with WTO Accession Commitments, available at* http://www.moftec.gov.cn/moftec_cn/wto/wto11.html (last visited Nov. 3, 2002).

91. *See* HONG KONG SPECIAL ADMIN. REGION GOV'T DEPT. OF JUSTICE, *Mainland Regulations Relating to Legal Services* at http://www.info.gov.hk/justice/new/depart/doc/setup_law_firm_e2.pdf (last modified Aug. 20, 2002). To implement the Regulations, the Ministry of Justice issued the Stipulations Concerning the Enforcement of the "Regulations on the Management of Representative Offices set up by Foreign Law Firms in China, effective on September 1, 2002, *available at* http://www.info.gov.hk/justice/new/depart/doc/setup_law_firm_e4.pdf [hereinafter *Stipulations*]. For a commentary on the implementing measures, see

exemption, *New Regulations* write off the reciprocity provision of the *Provisional Regulations*.[92]

Were there any other reasons that China was so concerned about reciprocity? What then prompted it to withdraw the MFN exemption? This section is to address these questions from a historic perspective.

A. Unequal Treaty System in Colonialism Era

To offset serious balance of payments problems for the British purchase of tea and silk, Britain (with U.S. support) fought the Opium Wars of the mid-19th Century (1839-42 and 1856-60) for the unlimited right to sell opium to the Chinese.[93] Britain's victory over China in the Opium Wars created an "unequal treaties" system, in which China was forced to grant unilateral MFN status[94] in the treaties between China and foreign powers including the United States.[95]

The treaties typically stated that:

> the contracting parties hereby agree that should at any time the Ta-Tsing Empire grant to any nation, or the merchants or citizens of any nations, any right, privilege, or favor connected either with navigation, commerce, political or other intercourse which is not conferred by this Treaty, such right, privilege, and favor shall at once freely enure to the benefit of the United States, its public officers, merchants, and citizens.[96]

In these unequal treaties, China was required to impose tariffs fixed by treaty obligations without any equivalent tariff concessions, and China did not receive any equivalent grant of MFN from Great Britain, the United States or other foreign powers.[97] "This lack of reciprocity attained by the MFN clauses

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Richard Guo, *Time to Honor China's WTO Commitments: Ministry of Justice Issues Implementing Rules Regarding Foreign Law Firm Administration*, CHINA LAW & PRACTICE (Oct. 2002).

92. *See Provisional Regulations On the Setting Up of Offices by Foreign Law Firms Within the Territory of China* art. VI [hereinafter *Provisional Regulations*].

93. *See* Joseph Gerson, *The Debate Over Permanent Normal Trade Relations Treatment With China, available at* http://www.afc.org/nero/pesp/chinatrd.htm (last visited Apr. 9, 2000).

94. *See* ZHAO, *supra* note 36, at 2.

95. *See* Gretchen Harders-Chen, *China MFN: A Reaffirmation of Tradition or Regulatory Reform*, 5 MINN. J. GLOBAL TRADE 381, 390 (1996).

96. *Id.* citing Treaty of Tientsin, art. LIV, Dec. 21, 1858, Great Britian-China, *reprinted in* 1 TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES 390 (2d ed. 1917).

97. *See id.*

in the unequal treaties is reflected in China's modern day concern for reciprocity in foreign relations" as discussed below in more detail.[98]

The history of unequal treaties combined with Marxist ideology, viewing trade between developing and industrialized countries primarily as a form of exploration, led Communist China to de-emphasize trade in the twentieth century.[99] However, China continued to grant MFN status in the 1950's and 1960's, but only to friendly nations such as Yemen, the Soviet Union, Albania, Mongolia, Korea, and Vietnam.[100] "In China's history, trade and politics have been interwoven from the earliest times, and may so continue."[101] The use of MFN by China in treaties with its allies illustrates the connection between MFN and politics.[102] The United States' practice is no exception.

B. United States' Conditional MFN Practice

Under conditional MFN practices, if country A owes MFN treatment to B, it is then obligated to grant B the same privilege it grants to C, but only after B has given A some reciprocal privilege to "pay for it."[103] The United States pursued a "conditional MFN" policy prior to World War I and changed to an unconditional policy in 1923.[104] However, "there are ample situations which have occurred . . . that suggest the possibility that the United States has gradually moved away from its earlier adamant support of MFN and multilateralism toward a more 'pragmatic' approach of dealing with trading partners on a bilateral basis and of 'rewarding friends.'" [105]

One of the earliest post-1945 departures from MFN by the United States was its exclusion of communist countries from such treatment in 1951.[106] In the Tokyo Round (1973-1979), the United States also took some steps that departed from unconditional MFN.[107] The U.S. Congress mandated in the 1974 Trade Act that the United States try to offset the "free-rider" problem, at least for industrial countries, by withholding MFN treatment from certain countries if they did not provide reciprocal advantages as a result of

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98. *Id.* at 393.
99. *See id.* at 395.
100. *See id.*
101. Harders-Chen *supra* note 95, at 396.
102. *See id.*
103. *See* JACKSON, *supra* note 35, at 137.
104. *See id.*
105. *Id.* at 148.
106. *See* International Trade Data System, *Normal Trade Relations, at* http://www.itds.treas.gov/mfn.html (last visited Sept. 15, 2002) [hereinafter Normal Trade Relations]. "In 1951, Congress directed President Harry S. Truman to revoke MFN status to the Soviet Union and other Communist countries." *Id.*
107. JACKSON, *supra* note 35, at 146.

negotiation.[108] In addition, the United States has refused to give unconditional MFN status to all GATT members in connection with the obligations of three of the Tokyo Round Codes,[109] out of the same concern about the "free-rider" problem and the need to provide an incentive for countries to enter into the discipline of the Codes.[110]

In trade in services, the United States listed MFN exemption for the licensing of foreign financial service suppliers on the basis of reciprocity, although the exemption is very narrow and applicable only against countries in which United States financial institutions were forced to disinvest on the basis of their nationality.[111] However, maybe nothing is as controversial as the way the United States has dealt with China, which has generated a great sense of bitterness among the Chinese people whose task for more than a century has been ending the era of national humiliation.[112]

A key legislative action Congress faced before China became a WTO member was whether to remove China from coverage under Title IV of the Trade Act of 1974.[113] Title IV Section 401 of the Trade Act of 1974[114] requires the President to deny MFN to products from a number of countries, including China.[115]

> Section 402, better known as the 'Jackson-Vanik Amendment,' permits a one-year exception when the President determines that a nation substantially complies with certain freedom of emigration objectives. The President can recommend renewal of these waivers for successive twelve-month periods if he determines that further extensions will substantially promote these objectives.[116]

Far from the original intent of the 1974 Trade Bill, Jackson-Vanik has changed into an annual Congressional review of China on issues such as human rights, national security, Tibet, Taiwan, environmental concerns, and

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108. *See id.*

109. *See id.* The Subsidies-Countervailing Duty Code (interpreting arts. 6, 16 and 23 of GATT), the Technical "Standard" Code and the Government Procurement Code. *See also Trading Into the Future*, *supra* note 11, at 12.

110. *See* JACKSON, *supra* note 35, at 146. *See also* ZHAO, *supra* note 36, at 48-49.

111. *See* Mattoo, *supra* note 33, at 14. The United States withdrew its MFN exemptions at the end of the Uruguay Round when it was decided that the operation of Article II GATT would be suspended for the duration of the extended negotiations. *See id.* at 33 n.43.

112. *See* Gerson, *supra* note 93.

113. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, CHINA TRADE: WTO MEMBERSHIP AND MOST-FAVORED NATION STATUS, GAO/T-NSIAD-98-209 9 (June 1998) [hereinafter GAO 1998].

114. *See* Trade Act of 1994, 19 U.S.C. §§ 2431-2439 (1994).

115. *See* GAO 1998, *supra* note 113, at 9.

116. *Id.*

labor practices—to name a few.[117] It is widely agreed that the annual debate has done little or nothing to improve human rights and labor standards in China. Instead it makes the bilateral relations unnecessarily confrontational.[118] Although pursuant to the "annual waivers," China had been granted "MFN" status[119] since 1980 to, most recently, June 3, 1999,[120] the Chinese understandably perceive the United States' yearly debate over MFN as an insult.[121]

C. China's Foreign Trade Law

"The Foreign Trade Law was enacted at the same time China and the United States were battling over U.S. MFN status."[122] The Foreign Trade Law sets forth China's general principles of foreign trade, which emphasize equality and mutual benefit.[123]

The recurrent Chinese concern over reciprocity appears explicitly in the MFN clause of the Foreign Trade Law:[124] "The People's Republic of China grants [MFN] treatment or national treatment in the field of foreign trade to opposite concluding or acceding parties in accordance with international treaties or agreements concluded or acceded to, or on the basis of the principles of mutual benefit and reciprocity."[125] "By viewing application of the U.S. MFN principle as a personal insult, China was inclined to view the nondiscrimination principle of its own MFN clause as a vehicle for retaliation."[126] "Article 7 of the Foreign Trade Law reserves to China the ability to retaliate against any country not willing to abide by the Chinese MFN principle."[127] "China threatened to retaliate under the authority of Article 7 as soon as the United States invoked sanctions against China in 1995."[128]

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117. *See* Gerson, *supra* note 93.

118. *See id.*

119. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, CHINA'S MEMBERSHIP STATUS AND NORMAL TRADE RELATIONS ISSUES, GAO/NSAID/00-94 4 n.1 (March 2000) [hereinafter GAO 2000]. "In July 1998, the term 'normal trade relations' replaced the term 'most-favored-nation' in U.S. law." *Id.*

120. *See* Press Release, Office of the Press Secretary, To Extend Nondiscriminatory Treatment to the Products of the People's Republic of China by the President of the United States of America a Proclamation (Dec. 27, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/print/20011227-1.html (last visited Sept. 16, 2002).

121. *See* Harders-Chen, *supra* note 95, at 405.

122. *Id.* at 399-400.

123. *See id.* at 407 (citing *Foreign Trade Law of the People's Republic of China, Act of May 12, 1994*, art. 5, 8 CHINA L. & PRAC. 20, 20 (1994)).

124. *See id.*

125. *See id.* at 407 (citing *Foreign Trade Law, supra* note 123, art. 6).

126. *See id.* at 405.

127. Harders-Chen, *supra* note 95, at 400.

128. *See id.* at 402.

China is not the only country to retain the ability to implement retaliatory actions against other nations for failing to abide by non-discrimination principles in trade.[129] U.S. policies under Section 301 of the Foreign Trade Law falls into same category.[130] "Widespread usage of domestic retaliatory actions outside the WTO may undermine the effectiveness of the GATT."[131]

D. Permanent Normal Trade Relations (PNPR)

China's prospective WTO membership raised a critical issue about how the United States will handle China's MFN status under U.S. law. The U.S. government realized that the temporary (conditional) MFN under Jackson-Vanik would conflict with the WTO obligation to provide unconditional MFN to WTO members on a permanent basis,[132] and the United States would have to either remove China from Title IV's coverage or invoke the "non-application clause" of WTO Article XIII.[133]

Article XIII of the agreement establishing the WTO permits either a WTO member or an incoming member to refuse to apply WTO commitments to one another.[134] In case of the United States invoking "non-application" against China, the Sino-U.S. business dealings would continue under the 1979 U.S.-China bilateral agreement under which China is obligated to provide the U.S. MFN treatment, but only in the areas mentioned.[135]

Therefore, since the 1979 agreement (which provides for "reciprocal" MFN status[136] between the two countries) does not establish clear MFN obligations for services and service suppliers,[137] the net effect would be that American lawyers would not be entitled to any benefits China would have offered to lawyers from other WTO members. Furthermore, none of the bilateral agreements between the United States and China provide for binding multilateral dispute settlement, as do the WTO agreements. Thus, in the event of non-application, the United States would have to continue to enforce trade violations under U.S. law,[138] and "China would certainly reciprocate."[139]

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129. *See id.* at 411-12.
130. *See id.* at 412.
131. *Id.*
132. *See* GAO 1998, *supra* note 113, at 9.
133. *See* GAO 2000, *supra* note 119, at 16.
134. *See id.* at 16-17.
135. *See* GAO 1998, *supra* note 113, at 2.
136. *See id.*
137. *See id.*
138. *See* GAO 2000, *supra* note 119, at 18.
139. *China, the WTO and Permanent Normal Trade Relations*, WASHINGTON STATE CHINA RELATIONS COUNCIL (Jan. 2000), *available at* http://www.wcit.org/topics/china/chi_update_1_00_.htm (last visited Sept. 15, 2002).

It is in the interest of the United States, including American law firms, to grant China permanent MFN. "Since the Jackson-Vanik amendment provision only allows a 1 year waiver of Title IV restrictions and Congress can disapprove the waiver, the [Clinton] administration plans to ask Congress to enact legislation that would remove China from title IV's coverage."[140] In October 2000, the legislation was passed providing the President with discretionary authority to grant permanent MFN, now known as normal trade relations, to China after certifying that the terms and conditions for the accession of the People's Republic of China to the WTO were at least equivalent to those agreed between the United States and China on November 15, 1999.[141]

On December 27, 2001, President Bush announced that Chapter 1 of Title IV of the Trade Act should no longer apply to China and nondiscriminatory treatment (normal trade relations treatment) shall be extended to the products of China, effective January 1, 2002.[142] The name of MFN status was changed to "Normal Trade Relations" (NTR) status because it was believed that the term MFN was deceiving.[143] "Under NTR both parties agree not to extend to any third party nation any trade preferences that are more favorable than those available under the agreement concluded between them unless they simultaneously make the same provisions available to each other."[144]

However, there is at least one other explanation for the name change as applied to China—it "was getting hard to stomach redesignating the Communist Chinese slave state as 'most favored' every year."[145] Whatever the real reason, thanks to the December 27 Executive Order, China formally "graduated" from the Jackson-Vanik.[146] Although the Congressional vote on

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140. GAO 1998, *supra* note 113, at 9.

141. *See* 19 U.S.C. § 2434 (1994).

142. *See* Press Release, Office of the Press Secretary, To Extend Nondiscriminatory Treatment to the Products of the People's Republic of China by the President of the United States of America a Proclamation (Dec. 27, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/print/20011227-1.html (last visited Sept. 16, 2002).

143. *See Normal Trade Relations, supra* note 106. Normal Trade Relations are actually the norm in bilateral trade relationships between countries and most nations have this trade status except for a handful of rogue nations that have been refused this normal trade relationship. *See id.*

144. *Id.*

145. David W. Neuendorf, *Make Normal Trade Relations Normal* (2000), *available at* http://www.seidata.com/~neusys/colm0129.html (last visited Sept. 1, 2002).

146. *See* Press Statement, U.S. Department of State, Office of the Spokesman, Presidential Proclamation on Trade Relations with Georgia (Jan. 3, 2001), *available at* http://secretary.state.gov/www/briefings/statements/2001/ps010103.html (last visited Sept. 15, 2002). The process of a country being removed from the coverage of Title IV of the Trade Act of 1974 is known as "graduation." *See id.*

PNTR would not have affected China's accession in the first place,[147] it is considered a good gesture for China and the United States to "develop healthy and stable economic and trade ties on an equal and mutually-beneficial footing."[148]

Besides, it became more and more clear that China would soon obtain the WTO membership. "Once China becomes a member of the WTO, the concerns over reciprocity may subside because China has achieved equal footing with other contracting parties. GATT MFN allows some flexibility in equal treatment by allowing countries to bargain for preferences, thus supporting an element of reciprocity in tariff negotiations."[149] This may have helped China overcome its MFN syndrome. From reciprocity-based-MFN to unconditional "MFN," the history of foreign law firms in making inroads into China is just a vivid snapshot of this historic transition.

E. The Right of Establishment of Foreign Law Firms in China

1. Historical Perspective

Where business goes, lawyers follow. With the initiation of reform and open-door policies, foreign investment in China blossomed and created great demand for legal services.[150] However, China's legal profession did not arrive on the social scene until August 26, 1980, when the Fifteenth Session of the Standing Committee of the Fifth National People's Congress passed the "*Tentative Regulations on Lawyers in People's Republic of China*," which laid the foundation for development of the legal profession in China.[151] Even then, it was still impossible for foreign lawyers to obtain official access to China, not to mention permanent presence, because lawyers were defined as "state legal workers"[152] under the "*Tentative Regulations*" and the legal profession was rather politically delicate in nature.[153]

Nevertheless, foreign law firms still managed to make inroads into China in various forms. In August 1979, as counsel to its then client Amoco,

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147. *See China, the WTO and Permanent Normal Trade Relations*, *supra* note 149. Congressional approval is *not* required for China's membership in the WTO. *See id.* With or without a PNTR under the U.S. law, China would still become a full member of the WTO once it completes the rounds of diplomatic negotiations with WTO member states. *See id.* But in the latter case, almost certainly the United States had to apply non-application, China would have the right under WTO rules to extend its WTO commitments to all of its trading partners, except the United States. *See id.*

148. *U.S. Passes Bill on China's PNTR Status* (Febr. 25, 2000), *available at* http://www.chinadaily.net/highlights/docs/2001-04-30/2987.html (last visited Sept. 15, 2002).

149. Harders-Chen, *supra* note 95, at 407.

150. Xiao, *supra* note 83.

151. *See generally* Luo, *supra* note 5, at 1.

152. *Id.* at 10.

153. *See* Gao, *supra* note 10.

Coudert Brothers opened its Beijing office where it also carried out business under its own name.[154] It is believed to be the first-ever foreign law firm to provide legal service within the jurisdiction of China.[155] Vinson & Elkins operated on a visiting lawyer basis through a Beijing local office before it was officially issued license in March 1999.[156]

Working around the strict bans on setting up branch offices in China, many other firms showed up in various identities – consulting firms or business vehicles as permitted by the Ministry of Foreign Economic Relations and Trade (MOFER), the predecessor of today's Ministry of Foreign Trade and Economic Cooperation (MOFTEC).[157] The Chinese government obviously felt the pinch and started to research the possibilities of licensing foreign law firms. Delegations were sent to Singapore, Hong Kong, and European countries in 1986.[158] Unfortunately, the June 4, 1989, student protest in Tiananmen Squire and the ensuing political firestorm brought all the on-going preparation to a halt. Foreign investment shrank and the law firms with already established consulting offices in China started to withdraw from the China market.[159]

It was only three years later, on July 1, 1992, when the State Council formally authorized the Ministry of Justice ("MoJ") to start the licensing of foreign law firms on a trial basis.[160] The "beauty contest" turned out so fierce that some firms could no longer wait for an official approval and were "sending lawyers to work out of hotel suites on a project-by-project basis, or opening up full-blown unapproved offices."[161] Coudert Brothers (USA), Adams (France), Denton Hall (England), Lovell White Durrant (England), Licasiri & Co (Hong Kong), and eight other firms were among the first lucky law firms who were officially granted the right of establishment.[162] As of September 6, 2001, ninety-four foreign law firms (in addition to twenty-five from Hong Kong) have obtained permissions from MoJ and registered with the State Administration for Industry and Commerce ("SAIC") or its local

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154. VIRGINIA KAYS VEENSWOJK, COUDERT BROTHERS: A LEGACY IN LAW, THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM (1853 – 1993) 401 (1994).

155. *See id.*

156. Interview with Hongming Xiao, former division chief at the Lawyers Department in the Ministry of Justice of China, in New York, USA (Oct. 1, 2000).

157. Market Analysis: China (Sept. 2001). For instance, Paul Weiss, Graham & James and Dewey Ballantine first emerged on stage as consulting firms in Beijing and Shanghai respectively. *See* Xiao, *supra* note 83.

158. *See* Interview with Hongming Xiao, *supra* note 156.

159. *See generally* McCollam, *supra* note 7.

160. *See id.*

161. Yujie Gu, *Entering The Chinese Legal Market: A Guide For American Lawyers Interested In Practicing Law In China*, 48 DRAKE L. REV. 173, 199 (1999).

162. *See The Joint Announcement of Ministry of Justice and State Administration for Industry and Commerce*(Sept. 6, 2001), *available at* http://www.civillaw.com.cn/typical/LawCenterqt/Content.asp?No=881 (last visited Nov. 3, 2002) [hereinafter *Joint Announcement*].

branches.[163] They spouted in Beijing (52), Shanghai (48), Guangzhou (11), Shenzhen (2), Suzhou (1), Qingdao (1), Tianjin (1), Dalian (1), Fuzhou (1) and Chengdu (1) respectively.[164]

The experimental licensing program has entered into its tenth year. Lacking clear guidelines, the "historically arduous"[165] licensing process has been, by and large, subject to MoJ's discretion. There seems to be little pattern in the awarding of licenses.[166] The practice has aroused many controversies and has been attacked on the basis of transparency.[167] Law firms desperate to secure a license have to learn from others' experience as a more reliable guideline. A law review article summarized "building relations with" and "doing quite a few favors for government officials" as the keys to the success of a medium-sized U.S. firm (Altheimer & Gray).[168]

2. *The Current Regulatory Regime: Reciprocity in Practice*

The major legislative piece on the regulation of foreign law firms has until very recently been the "*Provisional Regulations on the Setting Up of Offices by Foreign Law Firms Within the Territory of China*," (hereinafter "*Provisional Regulations*").[169] MoJ also released a series of administrative regulations including the "*Operational Procedures On the Review, Approval and Administration of Representative Offices of Foreign Law Firms*"[170] (hereinafter the "*Operational Procedures*"), the "*Detailed Regulations on Several matters relating to the Review, Approval and Administration of Representative Offices of Foreign Law Firms*"[171] (hereinafter the "*Detailed Regulations*"), and the "*Notice Regarding Matters With Regard to Foreign Law Firms Applying to Set Up Offices in China*" (hereinafter the "*Notice*").[172]

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163. *See id.*

164. *See id.*

165. Livingston, *supra* note 8.

166. *See Information Paper, supra* note 1, at 6. According to an MOFTEC (instead of MoJ) official, the approval issued by the MoJ is mainly based upon the following considerations: (1) the size, strength and track record of the applicant firm in the country of origin or over the world; (2) the volume of business in the PRC handled by the applicant firm; (3) the relationship between the applicant firm's country of origin and the PRC; and (4) the principle of reciprocity, i.e., whether the applicant firm's country of origin would allow foreign law firms to set up offices in that country. *See id.*

167. McCollam, *supra* note 7.

168. *See* Gu, *supra* note 161, at 207-209.

169. *See Provisional Regulations, supra* note 92. It was co-issued by the Ministry of Justice and the State Administration for Industry and Commerce on May 26, 1992, coming into force on July 1, 1992. *See id.*

170. Waiguo Lushi Shiwusuo Banshichu Shenpi Guanli Gong Zuo Cao Zuo Guicheng, Ministry of Justice (May 26, 1992) [hereinafter *Operational Procedures*].

171. Guanyu Waiguo Lushi Shiwusuo Banshichu Shenpi Guanli Jige Wenti De Juti Guiding, Ministry of Justice (Mar. 2, 1993) [*Detailed Regulations*].

172. Guanyu Waiguo Lushi Shiwusuo Zaihua Sheli Banshichu Youguanshiyi De Tongzhi, Ministry of Justice (Oct. 30, 1992) [hereinafter *Notice*].

The regulations, all centered around Mode 3 of legal services, i.e. commercial presence, laid down a Licensing ("Pi Zhun"), Registration ("Deng Ji Zhu Ce") and Annual Report system for the foreign law firms exploring ways to set up outposts in China.[173] Under the system, a foreign law firm must obtain a license from MoJ before opening an office.[174] The awarding of licenses was governed by principle of reciprocity, i.e., China will grant the right of establishment only to those firms whose home country grants Chinese firms the same right.[175]

To substantiate the "reciprocity" principle of the *Provisional Regulations*, the *Detailed Regulations* required a foreign law firm provide documents certifying that its home country permits establishment of liaison offices by law firms from other countries including China.[176] Furthermore, the aspiring law firm must not only possess the competence in bringing in foreign investment but also has been friendly to China.[177] This is consistent with China's historical treaties granting MFN in the 1950's and 1060's to its allies.[178]

MoJ is the government agency with primary jurisdiction over administration, supervision and inspection of foreign law firms in setting up representative offices.[179] MoJ authorizes its local Departments/Bureaus, at the level of the provinces, autonomous regions and cities directly under the Central Government where the representative offices are to be located, to administer, supervise and inspect the representative offices as going concerns.[180] The MoJ had levied certain restrictions on foreign law firms:

a. Legal Forms

In terms of the legal forms, foreign law firms may only set up "Representative Office(s)" in China,[181] meaning that the Representative Offices are not legal persons and their tax obligations and indebtedness shall

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173. *See* discussion, *infra* Part IV.

174. *See Provisional Regulations*, *supra* note 92, art. II.

175. *See id.* art. VI.

176. *See Detailed Regulations*, *supra* note 171, art. III "Application Materials," Item 6.

177. *See id.* art. V(1).

178. *See* discussion *infra* Part III(A).

179. *See Provisional Regulations*, *supra* note 92, art. XIX. Before a Representative Office can be set up, it must also be registered with the State Administration of Industry and Commerce (SAIC) (art. 3). *See id.* art. II. The name of a Representative Office shall be the combination of the Alma Mater firm and the Chinese city where the office is located. *See id.* art. X. For instance, Allen & Overy Beijing office is registered as Ilen & Overy, Beijing Office (England). Moreover, the Representative Offices must, before January 31 of each year, submit a written report to the local Department/ Bureau of Justice, in triplicate and in Chinese, highlighting its business, revenue, expenses and tax paid in the previous year. *See id.* art. XXII.

180. *See id.* art. XIX.

181. *See id.* art. II.

be borne directly by the foreign law firms.[182] Foreign law firms cannot engage in legal services under the disguised form of "consulting firms" or "commercial firms" to sidestep the license and registration requirements.[183]

b. Practice Areas

The most rigid limitations are on practice areas. Representative Offices are prohibited from interpreting Chinese law, representing clients on Chinese law matters or engaging in other activities which are precluded from foreigners,[184] although they may accept assignments from Chinese clients or Chinese law firms for legal matters related to the home country or any third country where they are officially qualified, and they can act as agents for foreign clients and in turn hire Chinese law firms to handle legal matters in China.[185]

c. Local Hiring

Representative Offices are prohibited from hiring Chinese lawyers.[186] Under the *Notice*, it seems that foreign law firms are prohibited from hiring not only Chinese "licensed" lawyers, but also any person who has passed the National Bar Examination[187] and is thus domestically "qualified."[188] Notwithstanding the prohibition against hiring Chinese lawyers, in practice Representative Offices commonly recruit law graduates, many of who have passed the national bar and thus are qualified under Chinese law, as legal assistants or legal secretaries.[189] Even licensed Chinese lawyers often show up on the payrolls, but theoretically they have to forfeit their right to practice Chinese law.[190]

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182. *See id.* art. XIV.

183. *See id.* art. III.

184. *See id.* art. XVI.

185. *See Provisional Regulations*, *supra* note 92, art. XV.

186. *See id.* art. XVII. In the author's opinion, it is unclear what exactly the term "Chinese lawyers" mean. The "*Notice*" and "*Detailed Regulation*" evidenced the consciousness on the part of the drafters of the distinction between a "Chinese licensed lawyer" and a "Chinese citizen with qualification to practice law." According to Article 5 of the "PRC *Lawyers' Law*," one has to be both qualified and licensed before he can practice law. The usual way to get qualified is to pass the National Bar Exam, and a license is issued only following an administrative review.

187. *See* Press Release, Establishment and Enforcement of the National Uniform Judicial Examination (Feb. 7, 2002), *available at* http://www.china.org.cn/e-news/news02-02-7.htm (last visited Sept. 16, 2002). The national bar examination, which was put in place in 1986, is now incorporated into the national judicial qualification examination. *See id.*

188. *See Notice*, *supra* note 172, art. IX(a).

189. It is the author's opinion that this becomes a common method of localization by the Representative Offices in staffing their Chinese deals.

190. *See* discussion, *infra* Part E(b)(7). In China, licenses are technically granted to law firms rather than individual lawyers.

d. Geographic Limitation

The pilot program of licensing foreign law firms is geographically limited. At first only in Beijing, Shanghai, Guangzhou, Shenzhen and Hainan[191] could Representative Offices be set up.[192]

e. Quantitative Limitation

Known as the "One Firm, One Office" rule, the rule mandates that each foreign law firm may only have one Representative Office in China.[193] Legal services may not be provided under the camouflage of another name, such as "consulting firm."[194]

6. Qualification Requirements

As a practical matter, although there is no written provision, the approval authority has applied certain "seasoning requirements" in licensing foreign law firms.[195] For example, the chief representative and others must have at least three years of practicing experience, and no representative may have been subject to professional discipline at their local bar.[196] Furthermore, the chief representative must be admitted in the country where the law firm is headquartered.[197]

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191. *Detailed Regulations*, *supra* note 171, art. V, 1(3). Hainan (province) is replaced by the City of Haikou. *See id.*

192. *See 1997 Schedule*, *supra* note 85. In the November 1997 version of China schedule of specific commitments and the 1999 U.S.-China Market Access Agreement, Dalian, Qingdao, Ningbo, Yantai, Tianjin, Suzhou, Xiamen, Zhuhai, Hankzhou, Fuzhou, Wuhan, Chengdu, Shenyang and Kunming were added in the list, and Haikou substituted Hainan. *See id.*

193. *See* Xiao, *supra* note 83.

194. *See id.*

195. *See* Market Analysis, *supra* note 157. Foreign lawyers must be experienced in their home jurisdiction before they can practice, as registered foreign lawyers, in China. *See id.*

196. *See id.*

197. *See* Gu, *supra* note 161, at 201-02 n.306. This is a rather peculiar provision. However, one European law firm which, thanks to the very provision, was forced to replace an American lawyer as its chief representative. *See id.* This requirement was later changed to require a chief representative to be a partner of a law firm of a WTO Member. *See* WORLD TRADE ORGANISATION, *Protocol on the Accession of the People Republic of China, Annex IX, Schedule of Specific Commitments on Services*, WT/ACC/CHN/49/Add.2 [hereafter *Final Schedule*].

f. Disciplinary Rules[198]

For any violation of the "*Provisional Regulations*," MoJ or its authorized local agencies may impose a disciplinary warning, or either suspend or revoke a license. Similarly, the SAIC and its local agencies may impose fines, confiscate illegal gains or annul the registration.[199] For instance, both Coudert Brother and Baker & Mackenzie received a violation notice and had to close their "illegal" Shanghai shops in 1995[200] for violating the "one-city rule" discussed below.[201]

The lack of transparency of *Provisional Regulations* inevitably led to misunderstanding. For instance, in 1996, to ascertain the effect of the tentative licensing program, Beijing Bureau of Justice conducted a "feasibility study" of Representative Offices' business performance.[202] The study elicited, among other things, certain information about the clients of these Representative Offices. The U.S. lawyers, constrained by strict ethical canons, were extremely concerned that their lawyer-client privilege had been jeopardized.[203] Rumors loomed large that MoJ was to mandate the disclosure of a broad range of confidential information including the clients' names, the location and nature of the clients' projects and the amount of investment behind the projects.[204]

MoJ later clarified that no clients' names were to be disclosed. However, the exaggerated response of U.S. lawyers frustrated MoJ as well. As a matter of fact, the notion of attorney-client privilege is by no means an international one. For instance, the International Court of Justice held in *Am & S Europe Ltd. v. Commission* that a U.S. lawyer representing an E.U. client might be forced to produce an otherwise privileged document to the client government.[205] The U.S. lawyer, according to the holding, could not claim attorney-client privilege since the privilege applies only to lawyers governed by professional ethics within the E.U.[206]

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198. *See Provisional Regulations*, *supra* note 92, art. XXIII.

199. *See id.*

200. *See* Gu, *supra* note 161, at 200.

201. *See id.* Interestingly, while Clifford Chance allegedly used its influence with the MoJ to have Baker's second office under the disguise of a "consulting office" in Shanghai shut down, Clifford Chance, licensed to be in Shanghai, also technically violated the one-city rule when it merged with Germany's Punder Volhard Weber & Axster, which has an office in Beijing. *See* McCollam, *supra* note 7.

202. *See* Gu, *supra* note 161, at 200.

203. *See* Cynthia Losure Baraban, *Inspiring Global Professionalism: Challenges and Opportunities for American lawyers in China*, 73 IND. L.J. 1247, 1247 n.2 (1998).

204. *See id.* at 1247.

205. *See* Burr, *supra* note 13, at 680.

206. *See id.*

Any similar disputes after China's entry into WTO might soon be subject to WTO dispute panels.[207] As proposed, a domestic regulation, like the one in our case, "relating to qualification requirements and procedures, technical standards and licensing requirements,"[208] once challenged, may have to meet certain necessity tests.[209] The regulators may have to prove that the objective of the challenged regulation is "legitimate" according to WTO rules and that the regulation is the "least trade restrictive."[210] It would be up to certain trade experts, instead of "democratically-elected governments," to decide what is "legitimate" and what is "unnecessarily restrictive," and this worries people.[211]

There is an open question with respect to individual foreign lawyers' capacity to enter into China's legal market. It is noticeable that Chinese licensing is firm-based, which means that individuals who pass the national bar exam are qualified, but must still acquire sponsorship from a firm to receive their licenses.[212]

The *Provisional Regulations* are reluctant to recognize these foreign lawyers' "lawyer" status. Rather, the Staff of Representative Offices is referred to as "members," reflecting the regulator's consciousness of the national characteristics of the legal profession and the built-in sensitivity of the socialist legal system.[213] There is also no "Foreign Legal Consultant" (FLC) system present. Therefore, an individual U.S. lawyer is simply not eligible to practice in China. A U.S. lawyer can, however, provide legal services (exclusive of Chinese law) from the United States into China or within the United States to a Chinese customer because China did not schedule mode 1, "Cross-border," and mode 2, "consumption abroad," of trade in legal services.[214] And, of course, solo practitioners can penetrate by first setting up a law firm in the United States and then initiating the application on the firm's behalf.[215]

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207. *See* Woodroffe, *supra* note 15, at 26. The Working Party on Domestic Regulation is currently discussing certain proposals under Article VI:4 of GATS. *See id.* "If such proposals were accepted, they would increase the reach of GATS right into the heart of government decision-making." *Id.*

208. GATS, *supra* note 24, art. VI(4).

209. *See* Woodroffe, *supra* note 15, at 27.

210. *See id.*

211. *See id.* at 40.

212. *See The Lawyer's Law*, arts. V, VIII, X, XIV and XV, *available at* http://www.civillaw.com.cn/typical/LawCenterqt/Content.asp?No=1318 (last visited Sept. 29, 2002).

213. *See Provisional Regulations, supra* note 92. Throughout the Provisional Regulations, the staff of a Representative Office is referred to as either "Chief Representative" or "members," but never as "lawyers." *See id.*

214. *See Final Schedule, supra* note 197. The entries for mode 1 and 2 read "NONE" in the Final Schedule, which means that there are no limitations on market access or national treatment in cross-border supply and consumption abroad. *See id.*

215. For instance, Paragon Law Offices Beijing Office (USA) seems to support this assertion. *See Joint Announcement, supra* note 162.

Since GATS applies to four different modes of supplying services, extending equal treatment to services which are "like" one another means that Chinese regulators cannot discriminate against firms which supply legal services in these different ways.[216]

IV. HOW ACCESSIBLE IS THE CHINESE LEGAL MARKET NOW?

A. *China's Commitments in Legal Services*

In November 1999, the United States and China reached an agreement on China's commitment to open its services sector. China agreed to open nine of its twelve service sectors—including legal services—to foreign service providers, though with some specified limitations.[217]

The negotiation between China and the United States was widely considered as the most significant obstacle to China membership.[218] After thirteen years of marathon negotiation on China's WTO membership, U.S. Trade Representative, Charlene Barshefsky, and Chinese Minister of MOFTEC, Shi Guang Sheng, finally signed the *Agreement On Market Access* (hereafter the "*U.S.-China Pact*" or "*Market Access Agreement*") on November 15, 1999.[219] The Pact, combined with the signing of another trade pact with the European Union in May 2000, removed the greatest hurdles to

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216. *See generally* Woodroffe, *supra* note 15, at 21.

217. *See* GAO 2000, *supra* note 119.

218. *See* WORLD TRADE ORGANIZATION, *How to Become a Member of the WTO, at* http://www.wto.org/English/thewto_e/acc_e/access_e.htm (last visited Oct. 26, 2002). It is necessary to pause here to familiarize the reader with the basic WTO accession process. After receiving an application to accede to the WTO under Article XII, a Working Party is established composed of any interested member. *See id.* Based upon a Memorandum submitted by the applicant, the Working Party conducts a fact-finding process to examine the foreign trade regime of the applicant. *See id.* At about the same time, the applicant commences bilateral market access negotiations on goods, services and other specific terms of accession with members of the Working Party who have made the requests, the resulting market-access commitments of which are to become the payment for the entry ticket into the WTO of the acceding government. *See id.* Following the conclusion of the bilateral negotiations, the Working Party prepares a raft Report together with a raft Protocol of Accession containing the terms of accessions agreed to by the applicant and the members of the Working Party. *See id.* Annexed as part of the Draft Protocol are the Schedule of Specific Commitments of Services, if any, and the chedule of Concessions and Commitments on Goods. *See id.* Having been so multilateralized, the bilateral agreements, including the raft Report and raft Protocol and Schedules, are then finalized into a package and submitted to the WTO General Council/ Ministerial Conference for approval. *See id.* The rotocol of Accession becomes effective upon approval and the applicant becomes a WTO member thirty days after its acceptance of the Protocol. *See id.* .

219. *See* the text of the Agreement, *available at* http://www.uschina.org/public/wto/ factsheets/ (Feb. 7, 2000) (last visited Nov. 3, 2002).

China's accession.[220] The Doha Ministerial Conference adopted the text of China's Accession Agreement in November 2001. The final Schedule of Specific Commitments on Services,[221] including legal services, is annexed to the Protocol of Accession of China.[222]

Because of the ongoing nature of the multilateral trade negotiations, a series of bartering processes were or have been reflected in the Final Schedule.[223] For instance, the Sino-Europe trade pact, at the lobbying of the American law firm Paul Weiss, did away—albeit for a limited period—with the U.S.-China pact requirement that a foreign law firm's China office must be headed by a partner of the firm.[224] This rule, after the tentative withdrawal in the Sino-Europe pact, revisits China's Final Schedule.[225]

Essentially, China committed to lift all geographic limitations and quantitative limitations within one year after China's accession to the WTO, i.e., before December 11, 2002.[226] Before then, a foreign law firm could only establish one representative office in China, and in only one of the nineteen cities including Beijing, Shanghai, Guangzhou, Shenzhen, Haikou, Dalian, Qingdao, Ningbo, Yantai, Tianjin, Suzhou, Xiamen, Zhuhai, Hangzhou, Fuzhou, Wuhan, Chengdu, Shenyang, and Kunming.[227]

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220. *See Business Community Welcomes Release of Trade Agreement Text, available at* http://www.uschina.org/public/wto/b4ct/release.html (Mar. 14, 2000) (last visited Nov. 3, 2002). As far as the legal service is concerned, the U.S.-China pact expressly excludes foreign law firms from Chinese law practice. *See id.* It also preserves most of the limitations in China 1997 draft of GATS Schedule, including experience requirements and residence requirements. *See id.* China promised to lift the ban on geographic limitations and quantitative limitations, e.g., nineteen city and one office rule, within one year of China accession. *See id.* Business scope is almost as restrictive as the 1997 draft, except that the pact permits foreign law firms to have ong-term entrustment relations with Chinese firms, although partnership with local firms is still strictly prohibited. *See id.* The *Market Access Agreement* was sent to the WTO Secretariat for incorporation into the multilateral aspects of China accession to the WTO. *See id.* To facilitate U.S. Congressional approval, the *Agreement* was publicly released, on the joint decision of the United States and Chinese governments, on March 14, 2000. *See id.* Ordinarily, bilateral agreements on WTO accession are not made public until all other WTO members have finished their bilateral negotiations with an aspiring member. *See id.*

221. *See Final Schedule, supra* note 197.

222. *See* WORLD TRADE ORGANIZATION, *Report of the Working Party on the Accession of China,* 343, WT/ACC/CHN/49.

223. *See* discussion, *infra* Section II(B) regarding the "multilateral negotiation approach."

224. *See* Loomis, *supra* note 2. After the United States and China reached the historic agreement, American lawyers complained that, due to the mandated Partner-as-head rule contained therein, the legal service was actually put under greater restrictions. *See id.*

225. *See Final Schedule, supra* note 197; *infra* pt. IV(A)(c), regarding "experience requirement."

226. *See Final Schedule, supra* note 197; *infra* pt. II(A)(a), Limitations on Market Access 3.

227. *See* Interview with Hongming Xiao, *supra* note 156. Under 1997 Schedule, the total number of Representative Offices in China should not exceed 80. *See id.* However, this quota threshold, although not officially outlawed, has been dismantled. *See id.*

Foreign Representative Offices may now enter into contracts to maintain "long-term entrustment relations" with Chinese law firms for legal affairs, [228] as was first achieved in the 1999 U.S.-China Trade Pact.[229] Such entrustment would allow the foreign representative offices to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.[230] Furthermore, they are allowed to provide information on the "impact of the Chinese legal environment."[231]

According to the Final Schedule, China offers to give legal service providers from all WTO members the specified market access and national treatment, subject only to certain limitations. For example, "legal form limitation," "business scope limitation," and "experience requirements" are market access limitations; "residence requirement" and "restriction on local hiring" are national treatment limitations; and "presence of natural persons" is both.[232]

1. Legal Form Limitation

Foreign law firms may provide legal services in China only in the form of Representative Offices, [233] i.e., they can not incorporate in forms of limited liability companies. Under GATS, the government can not maintain such market access restriction unless so specified in the schedule.[234] "Countries often justify the restriction of incorporation on public policy grounds, and in particular, to ensure that professionals do not limit their professional responsibilities and liabilities."[235]

2. Business Scope

Chinese law practice by foreign firms will still be prohibited.[236] For Chinese legal affairs, foreign representative offices may entrust only Chinese law firms to deal with Chinese legal affairs on behalf of foreign clients.[237] Therefore, a foreign law firm's representative office may only provide legal services on the law of its home country, international law and the law of a

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228. *See id.*

229. The long term entrustment contracts may provide for "close working relationships" with Chinese firms. *See* U.S. - China Trade Pact, *at* http://www.uschina.org/public/wto/factsheets/professional.html (last visited Nov. 9, 2002).

230. *See Final Schedule, supra* note 197; pt. II(A)(a), Limitations on Market Access.

231. *Id.* at Limitations on Market Access, 3e.

232. *See id.* at Limitations on Market Access, 3-4. and Limitations on National Treatment 3-4.

233. *See id.* at Limitations on Market Access, 3.

234. *See* GATS, *supra* note 24, art. XVI(2)(e).

235. *Background Note, supra* note 60, ¶32.

236. *See Final Schedule, supra* note 197, at Limitation on National Treatment, 3a.

237. *See id.* at Limitations on Market Access, 3c.

third country where the lawyers of the representative office are qualified.[238] The nationality-based business limitation ensures that only Chinese nationals can practice domestic law. According to the Secretariat on Legal Services, nationality requirements in legal services are actually quite common, especially for notarial services, representation services (in all fields of law) and other sectors which involve "public function."[239]

Socialist China's stake is especially high. Despite the reclassification of Chinese lawyers from "state legal worker" to "legal service provider" under the 1996 Lawyers' Law,[240] the legal profession per se is still rather delicate and politically sensitive.[241]

3. Experience Requirements

The chief representative shall be a partner, or equivalent,[242] of a foreign law firm with practicing experience of at least three consecutive years (five years in the 1997 Schedule) in a country or region where he is admitted.[243] Other representatives shall be members of the bar of a country or region where they shall have practiced for at least two consecutive years (three years in the 1997 Schedule).[244] It seems that the requirements were meant to protect domestic consumers by preventing foreign law firms from staffing the representative offices with junior attorneys.[245]

4. Presence of Natural Persons

In this regard, the Final Schedule provides "unbound except as indicated in horizontal commitments."[246] In the horizontal commitments, natural persons are subject to the immigration regulations and other relevant regulations regarding the entry and temporary stay of foreigners.[247] The effect

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238. *See id.* at Limitations on Market Access 3a-3b. In the language of the Final Schedules, foreign representative offices can only (a) provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices and (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work. *See id.*

239. *See Background Note*, *supra* note 60, ¶30.

240. *See The Lawyer's Law*, *supra* note 212, art. II.

241. *See* Gao, *supra* note 10.

242. *See Final Schedule*, *supra* note 197, at Limitations on Market Access, 3e. For instance, a member of a law firm of a limited liability corporation. *See id.*

243. *See id.*

244. *See id.*

245. *See* Interview with Hongming Xiao, *supra* note 156.

246. *Final Schedule*, *supra* note 197, at Limitations on Market Accession, 4.

247. *See id.* at *Horizontal commitments*. The exceptions are: (1) The managers, executives and specialists defined as senior employees who temporarily move as intra-corporate transferees, of a corporation of a GATS member that has established a representative office, branch or subsidiary within China, are permitted entry for an initial stay of three years; (2) The managers,

of this "unbound" banner is that China will reserve its regulation power on the presence of natural persons, mainly by immigration methods.[248]

Listing such a condition in its Schedule is critical since, under GATS, it would otherwise be considered a violation of the "national treatment" provision. National treatment under GATS means de facto equal treatment between domestic and foreign service providers, meaning treating foreign vendors "no less favourable [sic] than that it accords to its own like services and service suppliers."[249] "A measure or treatment, whether formally identical or formally different, shall be considered to be less favorable (and thus violating GATS principle) if it modifies the conditions of competition in favor of domestic services or service suppliers."[250]

It follows that unintentional regulative actions may constitute de facto discrimination if it leads to discriminatory effects.[251] In this way, GATS explicitly includes in the text the issue that has only been developed in previous WTO agreements like GATT through legal dispute cases.[252] The rough test of de facto discrimination and the current round of GATS re-negotiation, by placing additional constraints on "domestic regulation," pose the most serious new threats to democracy.[253]

5. Residence Requirement

In order to counter the under-staffing phenomena in which everyday operations are maintained by a secretary with called-on assistance from "fly by night" lawyers,[254] all representatives shall be resident in China for no less than six months each year.[255] The 180-day residence may qualify the resident attorneys for income tax purposes.[256]

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executives and specialists defined as senior employees who are engaged in foreign invested enterprises within China, of a corporation of other GATS members, are permitted a long-term entry as stipulated in the terms of contracts concerned or an initial stay of three years, whichever is shorter. *See id.* at Limitations on Market Access, 4a-b.

248. *See id.* pt. I.

249. GATS, *supra* note 24, art. XVII(1).

250. *Id.* art. XVII(3).

251. *See* Woodroffe, *supra* note 15, at 22.

252. *See id.*

253. *See generally* Sinclair, *supra* note 18, at 13.

254. As a matter of fact, market seems to be at least as effective, if not more so, as government intervention in countering the under-staffing problem. See discussion *infra* regarding the competitive advantage of sufficiently staffed Representative Offices in getting assignments.

255. *See Final Schedule*, *supra* note 197, at Limitation on National Treatment, 3.

256. *See* Interview with Hongming Xiao, *supra* note 156.

6. Restrictions on Hiring Chinese National Registered Lawyers[257]

Representative offices shall not employ "Chinese national registered lawyers" outside of China.[258] This hiring restriction and restriction on partnership with local law firms are undivided parts of the above-mentioned restriction on host country law practice. Otherwise, by employing or associating with locally qualified lawyers, foreign law firms could circumvent the restriction on Chinese law practice and expand into the fields of representation before a court.[259]

B. Remaining Business

Although China is poised to play by international rules, this is not the end of the story. There remain at least three issues worth discussing:

1. How "like" is "like?"

Both the awarding of MFN and national treatment and the imposition of a "public order exception" are to be awarded to "like services and service suppliers."[260] Since GATS applies to four different modes of supplying services: cross border, consumption abroad, commercial presence, and the presence of natural persons extending equal treatment to services which are like to each other means that governments cannot discriminate amongst companies which supply services in these different ways.[261] Since standards and qualifications are unlikely to be exactly the same in any two countries, the question is how much difference justifies a pronouncement of unlikeness? For instance, how real is the difference between civil law and common law as reflected in lawyering and legal market?

The most appropriate basis for comparing services shall be a "notion that is related to the economically meaningful concepts of directly competitive

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257. *See Report of the Working Party*, *supra* note 222, at 67.

> In response to questions from members of the Working Party, the representative of China clarified that 'Chinese national registered lawyers,' as indicated in China's Schedule of Specific Commitments, were those Chinese nationals who had obtained a lawyer's certificate, were holding a Chinese practicing permit and were registered to practice in a Chinese law firm.

Id.

258. *See Final Schedule*, *supra* note 197, at Limitation on National Treatment, 3. It is unclear why the drafters need the phrase "outside of China." It seems odd to assume that employment of Chinese licensed lawyers is permitted inside of China since it would contradict the WTO Members' intention. It is noticeable that there is no equivalent term in the Chinese version of the Final Schedule.

259. *See Background Note*, *supra* note 60, ¶ 35.

260. *See* discussion, *infra* pt. IV.B.2 regarding "public order" exception.

261. *See* Woodroffe, *supra* note 15, at 27.

or substitutable and follows the logic of the market place."[262] This is the notion of "end uses," meaning whether consumers treat the services in question as substitutes.[263]

China is enacting a new law on property rights during which two schools of thought, modeled after civil law and the Anglo-American system respectively, are fiercely competing with each other for front page.[264] The civil law school, rooted in the Roman law idea of dominium, *i.e.*, absolute right over a thing, defines property as the ownership of things, moveable and immovable, while excluding from "property" in a legal sense any other kind of economic right.[265] The Anglo-American school notices the actual functions of property in industrial society where parties who have acquired the economic substance, but not the legal title, are increasingly exercising actual control functions.[266] It will be interesting to witness the impact that this statute, or the clients' choices, has on foreign lawyers and their practice.[267]

2. *"Public order" and "Security" exceptions to MFN*

While the maintenance of public order is not an objective listed in the general exceptions provision of GATT 1994,[268] the difference between goods and services sectors, and especially the sensitive national character of trade in legal services, necessitates such an exception in trade in legal services. Under GATS, Members are not prevented from adopting or enforcing any measures that are "necessary to protect public morals or to maintain public order," [269] or taking any action that "it considers necessary for the protection of its essential security interests."[270] However, the public order exception may be invoked "only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society,"[271] and shall not be applied in a manner which will constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.[272]

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262. *See* Mattoo, *supra* note 33, at 21.

263. *See id.*

264. For a commentary on the debate, see Guodong Xu, *Dui Zheng Cheng Si Jiao Shou de Lunzhan Lunwen de Guancha* (*Comments on Debates on Professor Zheng's Article*), *available at* http://www.law-thinker.com/detail.asp?id=1081 (last updated May 20, 2002).

265. *See* PHILIP P. WIENER, DICTIONARY OF THE HISTORY OF IDEAS Vol. 3, at 655 (1973-1974).

266. *See id.*

267. Although theoretically regulators can always claim and try to justify any "unlikeness" based on these variances, they have to, once challenged, satisfy a panel of trade experts whose decisions are not always predictable and favorable.

268. *See* Mattoo, *supra* note 33, at 11 n.12.

269. GATS, *supra* note 24, art. XIV(a).

270. *Id.* art. XIV 1(b).

271. *Id.* art. XIV(a) n.5.

272. *See id.* art. XIV.

"With the exception of general principles underlying broad doctrines such as the 'common law' or 'civil law,' legal rules are jurisdiction-specific,"[273] and they are based on different ideological values and social regimes. It seems only natural that legal regulators would require foreign service vendors to ensure respect for the core values of the host society.[274] Arguments aside, Chinese regulators are extremely concerned about any attempt to undermine its socialist national security. Thus, it shall not be a surprise that criminal defense of suspects indicted with violations of "national security" be precluded from foreign legal experts.[275]

3. Domestic Regulation and Self-Regulation

Although domestic regulatory measures (measures relating to qualification requirements and procedures, technical standards and licensing requirements) are not subject to scheduling under Articles XVI and XVII,[276] many members have scheduled them in the legal services sector.[277] Most of these measures are licensing and qualification requirements.[278]

GATS mandates that "[m]embers shall not apply licensing and qualification requirements and technical standards that nullify or impair [any existing sectoral] commitments in a manner which . . . could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made."[279] In the extreme, this provision could be read as "grandfathering" all existing restrictive requirements.[280]

To ensure that any domestic regulation measures "do not constitute *unnecessary barriers* to trade in services," GATS calls upon the Council for Trade in Services to develop any necessary disciplines.[281] Pending the entry into force of any such discipline, "each Member shall ensure that all measures of general application affecting trade in services are administered in a *reasonable, objective, and impartial* manner."[282] However, who decides what

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273. Canadian Bar Association, *supra* note 58, at 14. In terms of legal families, there are at least Romano-Germanic Law, Common Law, Socialist Law, Hindu Law, Muslim Law, Laws of the Far East, Black Africa and Malagasy Law. *See Background Note*, *supra* note 60, ¶ 7.

274. *See* Canadian Bar Association, *supra* note 58, at 16.

275. *See Final Schedule*, *supra* note 197. Some renowned Chinese law experts at American institutions have successfully counseled the family members, who are residents of the U.S., of some of the indicted. *See id.* However, these probably should not be interpreted as unauthorized practices of Chinese law since China doesn't schedule mode 2 of the trade in legal service, i.e., consumption abroad. *See id.*

276. *See Background Note*, *supra* note 60, ¶ 68. *See also* GATS, *supra* note 24, arts. VI, XVI & XVII.

277. *See Background Note*, *supra* note 60, ¶ 66. Twenty six Members have made such scheduling. *See id.*

278. *See id.*

279. GATS, *supra* note 24, art. VI(5)(a)(ii).

280. *See* Mattoo, *supra* note 33, at 23.

281. *See* GATS, *supra* note 24, art. VI(4) (emphasis added)

282. *Id.*, art. VI(1) (emphasis added)

is an "unnecessary barrier" and what is "reasonable, objective, and impartial?" The fact that trade experts, instead of democratically-elected representatives, have the final say worries many.[283]

On the other hand, for governments to avoid unnecessary confrontation with other Members on domestic regulation, it is probably wise to rely more on self-regulation to achieve the same policy goals. There have been proposals suggesting that the government delegate the regulation power to the All-China Lawyer Association and subject foreign lawyers to the same disciplines as Chinese lawyers.[284] It is believed that these proposals, like many basic ideas behind the current regulatory measures, draw fire from Japanese models, the one with the most restrictive force.[285]

Although self-regulation may help shift the burden and criticism away,[286] the regulators can not play ostrich as to the professional codes the bar associations come up with.[287] For the first time in a multilateral agreement, it is recognized that "certain business practices" of service suppliers may restrain competition and thereby restrict trade in services.[288] Therefore, Members have a general obligation to consult on such practices when so requested by another member, and to exchange information with a view to eliminate them.[289]

IV. CONCLUSION: IN THE WAKE OF WTO ACCESSION

China's offer in legal services is far less than adequate from other members' point of view.[290] However, since members have placed priority on issues of financial services and telecommunications rather than legal services,

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283. *See* Woodroffe, *supra* note 15, at 40.

284. *See* Interview with Hongming Xiao, *supra* note 156.

285. For a comparative study, see J. Ryan Dwer III, *The Door Only Opens Out: Japan's Special Measures Law for Regulation of Foreign Attorneys*, 18 HAWAII L. REV. 257 (1996).

286. *See* Canadian Bar Association, *supra* note 58, at 17. As Canadian negotiators put it, the association's rules concerning matters which relate to the public interest shall not be subject to review by a third-party dispute settlement body. *See id.* "[T]hese rules involve matters which are fundamental to the public interest, such as who can practice law, what standards of behavior they are required to meet, and how they must practice." *Id.* "Such issues of public protection should not be left to a panel of 'experts' from other countries with little or no familiarity of (host country's) legal history and culture." *Id.*

287. *See Introduction to the GATS*, *supra* note 14, at 7. Article IX is the general obligation of the GATS that has no GATT counterpart. *See id.*

288. *See* GATS, *supra* note 24, art. IX(1).

289. *See id.* art. IX(2).

290. *See Follow Up Letter to USTR Regarding China's Accession to WTO*, *available at* http://www.uscib.org/index.asp?documentID=1297 (last visited Sept. 13, 2002). For instance, during the negotiations on China's accession into WTO, in a letter addressed to then U.S. Trade Representative Charlene Barshefsky, the U.S. *See id.* Council for International Business made specific demands on behalf of the American legal profession. *See id.* Among others, China should extend "complete reciprocity" to legal services and permit American firms to hire Chinese attorneys licensed to practice law in China. *See id.* And there should be no restrictions on the number of licenses or locations for legal practice. *See id.*

the negotiators have been able to agree to "the minimal market opening China has already offered in this realm." [291]

It is always the concern whether and to what extent the Chinese government can live up to its words. There were new rounds of speculation sparked, for instance, by MoJ's recently reported willingness to award firms from Hong Kong, Macao and Taiwan rights to practice mainland law, after substantial lobbying by Hong Kong's Law Society for China to widen access.[292] The new rule, in draft form, did not give details on how to define a "Hong Kong firm." Many American law firms are qualified to practice Hong Kong law and their Hong Kong branches are staffed with Hong Kong lawyers.[293] It seems equally odd to either grant or deny them the preferential treatment in Chinese law practice. As luck would have it, the finalized rule grants "Hong Kong law firms," still an undefined term, exactly the same rights as extended to "foreign law firms" in the *Stipulations* issued by the MoJ earlier this year. [294]

Although legal services providers "came away with little from the WTO negotiations, their clients in banking, telecommunications and consumer products did well."[295] This may soon translate into billable hours for American lawyers. It is generally true for other foreign investments as well since, to many foreign investors, "China will remain a tricky place to do business, and lawyers will continue to be valuable guides."[296]

On top of vast opportunities provided by WTO, there is also the Olympics, which is predicted to provide an estimated $22 billion of infrastructure investment alone.[297] The hosting of the 2008 Olympics Games, signaling a 0.3% annual growth as predicted by Goldman Sachs,[298] will surely invigorate the foreign direct investment.

The Chinese economy has been undergoing major reshufflings characterized by a massive Going West campaign[299] which encourages businesses to set up operations in China's Wild West,[300] and state owned

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291. Clarke, *supra* note 81, at 118.

292. *See* Jane Moir, *Lawyers See Opening*, SOUTH CHINA MORNING POST, Jan. 14, 2002, at 1.

293. *See id.*

294. *See Measures on the Management of Representative Offices set up by Law Firms of the Hong Kong and Macau Special Administrative Regions in the Mainland, issued by PRC Ministry of Justice on February 20, 2002, effective April 1, 2002, available at* http://www.info.gov.hk/justice/new/depart/doc/setup_law_firm_e3.pdf (last visited Sept. 15, 2002). For the *Stipulations*, see *supra* note 91 and accompanying text.

295. McCollam, *supra* note 7.

296. *Id.* (quoting Howard Chao, partner of international law firm of O'Melveny & Meyers).

297. *Chinese Market Sparks Optimism Among U.S. Investors*, WALL STREET JOURNAL, July 17, 2001.

298. *See id.*

299. *See Notice of the State Council on Certain Policy Measures for the Implementation of the Great Development of the Western Region*, promulgated on Oct. 26, 2000, China Laws for Foreign Business/Business Regulation 4, CCH Asia Pacific (1998).

300. *See id.*

enterprise reform which typically involves vast corporatization, or "limited privatization." The demand for sophisticated legal services, especially in banking, corporate finance, and cross-border mergers and acquisitions, has far exceeded the capacity of the domestic bar, allowing Western lawyers to fill the gap.

Attracted by the long-term booming business opportunities, more and more foreign law firms are, despite the fact that few firms seem to operate profitably, willing to create a bridgehead and see a return only over the long term. It still seems unlikely that the foreign legal professionals will be tendered admission tickets for the national bar exam.[301] It is also doubtful that the relaxation of the one-city rule would alleviate the high concentration of foreign firms in major cities, unless foreign investment continues to pour into inland areas.

The staffing of linguistically qualified and willing talents are always the concern because China has yet to adopt English as the default language for business dealings and young associates tend to be reluctant to accept a posting far away from their headquarters.[302] The two-year practice threshold is especially annoying to the firms who want to send young lawyers to China to be trained.[303]

Commercial presence (Mode 3 of trade in legal services) has been, and will remain, the turf battle among foreign law firms. Clients, increasingly sophisticated and cost conscious, tend to now inquire more about the staffing of the Representative Offices to ensure such assignments as due diligence can be conducted locally without incurring the sometimes ridiculously high cost of international airfare and hotel expenses of those lawyers tentatively seconded from headquarters for a specific deal only.[304]

All in all, the GATS and China's Accession to the WTO will represent an optimistic step forward for U.S. lawyers in the international arena, although the actual impact remains to be seen. The entry may necessarily stimulate a new wave of law reform in areas of transparency and independence, impartial review of administrative actions.[305] To facilitate the PRC's compliance with WTO accession requirements, fostering a more open, law-abiding China is a must.[306]

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301. *See Press Release*, *supra* note 187. The exam is now known as National Uniform Judicial Examination. *See id.*

302. *See* McCollam, *supra* note 7.

303. *See id.* at 5.

304. Interview with Li Li, former partner, Pillsbury Winthrop (Feb. 20, 2002).

305. *See* Jerome Cohen, Comment, *China's Troubled Path to WTO*, INT'L FINANCIAL L. REV. (Sept. 2001), *available at* http://www.legalmediagroup.com/IFLR/includes/print.asp?SID=3019 (last visited Sept. 29, 2002).

306. *See id.*

At minimum, no new procedural hurdles will be erected and application (to set up a Representative Office) per se will not be as tedious.[307] China will also be obligated to continue to negotiate with other members in order to further liberalize international trade in services, including legal services.

However, to surf in the seemingly huge legal market safely and productively, U.S. firms will need to be armed with a realistic point of view. After all, embedded national character of legal services aside, Chinese practitioners are understandably concerned that overflow of foreign practitioners will lead to chaos and jeopardize the national legal market, which is by and large still an "infant industry" by all standards.[308]

307. Article VI(3) of GATS requires the authority to decide and inform the applicant, within a reasonable period of time, of any submission of the application and, without undue delay, notify the applicant of their status upon request. *See* GATS, *supra* note 24, art. VI(3).

308. *See The Penguin Dictionary of Economics*, *available at* http://www.xrefer.com/entry/445523 (last visited Sept. 29, 2002). The "infant-industry" argument commonly supports retention of protective measures to promote the creation of a local industry until the industry has reached its optimum size to obtain significant economies of scale. *See id.* However, the text of the GATS does not support a stand-alone right to protect "infant industry" beyond those scheduled measures. *See id.* As a matter of fact, because of the wide-ranging nature of GATS, the ability of a WTO Member to protect its own nascent industries by regulating domestic market could be open to a WTO challenge. *See* Woodroffe, *supra* note 15, at 13.

A HARMONY OR A CACOPHONY? THE MUSIC OF INTEGRATION IN THE AFRICAN UNION TREATY AND THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT

Nsongurua J. Udombana*

> We have noted, at the close of the 20th century, that of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned.[1]

I. INTRODUCTION

On July 11, 2000, the Assembly of Heads of State and Government of the Organization of African Unity (OAU), "proudly," adopted the Constitutive Act of the African Union[2] to "replace the Charter of the Organisation [sic] of African Unity."[3] The Treaty establishes an African Union (AU) to, *inter alia,* "accelerate the political and socio-economic integration of the continent."[4] The AU was formally launched on July 10, 2002, at the last summit of the OAU Assembly, which also became the first summit of the AU Assembly. South Africa hosted the summit in Durban, according to a timetable earlier agreed upon at Sirte.[5] It was at that summit that the Assembly emerged into a new order or sensibility. In the Durban Declaration that followed the summit,[6] the Assembly, *inter alia,* paid tribute to the OAU "as a pioneer, a

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1. Organisation of African Unity (OAU), Assembly of Heads of State and Government, Declarations, Resolutions and Decision. *Yaounde Declaration (Africa: Preparing for the 21st Century)*, AHG Decl. 3, pmbl. para. 2, OAU AHG/Res. 247-257 (XXXII)(July 8 – 10, 1996) [hereinafter *Yaounde Decl.*].

2. Constitutive Act of the African Union, May 26, 2001, *available at* http://www.kituochakatiba.co.ug/Act_Of_Union.htm (last visited Oct. 13, 2002) [hereinafter AU Treaty].

3. *Id.* art. 33(1). *See also* Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, 2 I.L.M. 766 [hereinafter OAU Charter](entered into force Sept. 13, 1963).

4. AU Treaty, *supra* note 2, art. 3(c).

5. *See generally* the draft calendar for the OAU's activities, *available at* http://www.au2002.gov.za (last visited Oct. 13, 2002).

6. *The Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union,* Assembly of the AU, 1st Ord. Sess., Durban, South Africa, 9-

liberator, a unifier, an organizer, and the soul of [the African] continent,"[7] and to "the founding leaders of the OAU" for "their tenacity, resilience and commitment to African Unity" and for standing "firm in the face of the decisive manipulations of the detractors of Africa and [fighting] for the integrity of Africa and the human dignity of all the peoples of the continent."[8]

Meanwhile, at a special summit in Abuja, Nigeria on October 23, 2001, Africa's leaders officially launched the New Partnership for Africa's Development (NEPAD).[9] Previously known as the New African Initiative, NEPAD

> is a pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic.[10]

This paper examines Africa's latest integration album, to see if all the separate notes melt into a swelling harmony or if the music is a mere cacophony. The enquiry has become necessary because there has been much dissonance in previous attempts, and there seems to be very little to show that this new release is different. The paper starts from the pre-text and then moves to the text before discussing the context. Part II looks at the anatomy of integration in Africa, its concept and processes. It argues on the benefits of integration and on Africa's journey so far. It concludes that although Africa's determination has been fervent, the drive has been faltering, making integration in Africa a beautiful utopian dream. "Africa's commitment to integration has been visceral rather than rational, more rhetorical than real."[11] Its leaders go down to the sea of integration and there they neither dive nor swim nor float, but only dabble and splash.

Part III of the paper highlights the latest releases—the AU Treaty and the NEPAD—while Part IV points to areas that African leaders will need to address for the needed economic and political rebirth and, hopefully, integration to occur. Part V is the conclusion. This paper is focused on economic integration, although the political aspect will be equally highlighted.

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10 July 2002, ASS/AU/Decl. 2 (1), *available at* http://www.africa-union.org/en/news.asp?newsid=175 (last visited Oct. 27, 2002) [hereinafter *Durban Decl.*].

7. *Id.* para. 14.

8. *Id.* para. 13. The Assembly also paid tribute "to all the Secretaries General and all the men and women who served the OAU with dedication and commitment." *Id.*

9. *See* The New Partnership for Africa's Development, *available at* http://www.au2002.gov.za (last visited Oct. 13, 2002) [hereinafter NEPAD].

10. *Id.* at 1.

11. Percy S. Mistry, *Africa's Record of Regional Co-operation and Integration*, 99 AFRICAN AFFAIRS 553, 554 (2000).

The reason is because the former is more realizable in the short term than the latter, if the continent's leaders are willing to play the right chord.

II. THE ANATOMY OF INTEGRATION IN AFRICA: CONCEPT AND PROCESS

A. The Concept and Benefits of Integration

Integration, at any rate economic integration, is the fusion of two or more national economies into one, in which goods, services, persons, and capital circulate freely and major economic policies are decided in common.[12] Various means are used in achieving this. One is the elimination of restrictions and discrimination that prevent or impede the free movement between the integrating countries of goods, services, persons, and capital.[13] The other is by mutual recognition of qualifications acquired in another integrating country, on the basis of an approximation of the various national laws or regulations stipulating the training required to obtain them.[14] Approximation may also be used to attenuate differences in national laws that can distort the conditions of competition in the integrating area, such as taxation, corporations, and intellectual property.[15] These two—removal of restrictions and discrimination and approximation of laws and/or mutual recognition—are often referred to as negative integration.[16]

Negative integration is used to contrast a third factor in economic integration, which involves the removal of obstacles to integration with active steps to further integration of the participating countries through policy harmonization. This is commonly called positive integration,[17] and has two elements: the replacement of national policies with a common policy and the coordination of national policies. This serves the function of correcting distortions that would otherwise arise if integrating countries were left to pursue purely national policies.[18] It also serves the function of deepening the integration of the economies of the participating countries, attaining common social and economic goals, and solving common problems.[19] A common social policy, for example, can be used to improve working and living standards throughout the integrating area on the basis of equal values and

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12. *See* PHILIP RAWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE EUROPEAN UNION 26 (2001).

13. *See id.* at 27.

14. *See id.*

15. *Id.*

16. *See generally* John Pinder, *Problems of European Integration, in* ECONOMIC INTEGRATION IN EUROPE 143, 145 (G.R. Denton ed., 1969).

17. *See generally id.* at 145-46.

18. *See* RAWORTH, *supra* note 12, at 27. Raworth refers to anti-trust policy which can set out common rules that prevent individual countries from abusing state aids or public companies in order to favor local production. *See id.* at 28.

19. *See id.*

levels, while a common environmental policy can deal more effectively with an issue that transcends national boundaries.[20]

In Africa, economic integration is generally seen as a vehicle for enhancing the economic and social development of the continent.[21] It constitutes

> the best means for Africa to regain its lost external competitiveness, to strengthen its capacity of negotiation in world affairs, to effectively open up its economies, to rapidly launch its industrial growth and enter the world market through diversification of exports, comparative advantages other than commodities and ultimately mitigate its marginalization.[22]

It is essential, not only for the self-fulfillment of the continent, but also, for securing an appropriate place in a world economy that is characterized by brutal competitions.

There is a generalized wave of fundamental economic restructuring of economic spaces, oriented towards achieving "a real continentalization of markets, and intensification and liberalization of trade and commerce."[23] The reasoning is that if the economically advanced countries of the West deem it necessary to establish regional economic groupings, then African countries, with weak institutional and human capacities, have no choice but to integrate.[24] Besides, the population of some African countries is too small to support economic development. The population of Gambia, for example, is less than two million, while that of most other African countries is, with limited exceptions, less than ten million.[25] Uniting the countries would permit the economies of scale that make countries competitive, providing access to a wider trading and investment environment, inducing backward and forward supply links.[26]

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20. *See id.*

21. *See generally* WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH (1989); *see also* Economic Commission for Africa (ECA), *African Alternative Framework to Structural Adjustment Programs for Socio-Economic Recovery and Transformation (AAF-SAF)*, U.N. Economic Commission for Africa, U.N. Doc. E/ECA/CM.15/6 Rev. 3. Which, though admitting the value of selective market liberalization, nevertheless reaffirmed the importance of government efforts to promote development. *See id.*

22. *Yaounde Decl., supra* note 1, para. 14.

23. *Id.* para. 13.

24. *See, e.g.*, Edwini Kessie, *Trade Liberalisation Under ECOWAS: Prospects, Challenges and WTO Compatibility*, 7 AFR. Y.B. OF INT'L L. 31, 33-4 (1999).

25. *See id.*

26. Economic Commission for Africa (ECA), ANNUAL REPORT ON INTEGRATION IN AFRICA 2002, 2 (2002), *available at* http://www.uneca.org/adfii/ariaoverview.htm (last visited Oct. 13, 2002) [hereinafter ECA ANNUAL REPORT].

Furthermore, integration will promote, on a more complementary and sustained basis, the development of the economies of the Member States. This will come through the reinforcement of the existing regional infrastructure, the development of a more efficient system of payments, greater access to credit, a greater awareness of each other's products, and economic agents operating in the different countries that comprise the community.[27] The prevailing economic, social and cultural problems of Africa cannot, it is further argued, be solved at the national levels, given the precarious situation of these economies. The continent stands a better chance of progressing more rapidly through the establishment of continental mechanisms that are viable. As K. Y. Amoako puts it, "a strong regional economy can facilitate the pooling of risks between otherwise vulnerable economies, and enable the continent to exploit complementarities and attract the levels of investment required to sustain economic growth and development in Africa."[28] Besides, international economics has redefined the concept of "domestic market" to imply the integrated individual member state's national markets. This greatly enhances the growth of small scale and medium scale enterprises.[29]

The realities of the global economy make integration imperative. Short of a backlash against globalization, states will have little choice but to agree to pool their sovereignty to exercise public power in a global environment now mostly shaped by private actors. The enshrined injustices of globalization and, in particular, the marginalization of Africa[30] has clearly shown that powerful countries have a greater opportunity to influence policy outcomes than weaker ones. In today's competitive world, it is the strong that determines the rules for the weak: "[F]or you know as well as we do," says Thucydides, "that right, as the world goes, is in question only between equals in power, while the

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27. *See* Muna Ndulo, *African Integration Schemes: A Case Study of the Southern African Development Community (SADC)*, 7 AFR. Y.B. OF INT'L L. 3, 6 (2001).

28. K. Y. Amoako, *Towards the African Union: A Development Perspective*, *available at* http://www.uneca.org/eca_resources/Speeches/amoako/2001/070501speech_amoako_lusaka.htm (last visited Oct. 13, 2002).

29. *See* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE 159 (1998).

30. *But see* NEPAD, *supra* note 9, para. 2. The OAU stressed that "[t]he continued marginalisation [sic] of Africa from the globalisation [sic] process and the social exclusion of the vast majority of its peoples constitute a serious threat to global stability." *Id.*

> [G]reater integration has also led to the further marginalisation [sic] of those countries that are unable to compete effectively. In the absence of fair and just global rules, globalisation [sic] has increased the ability of the strong to advance their interests to the detriment of the weak, especially in the areas of trade, finance and technology. It has limited the space for developing countries to control their own development, as the system makes no provision for compensating the weak. The conditions of those marginalised [sic] in this process have worsened in real terms. A fissure between inclusion and exclusion has emerged within and among nations.

Id. para. 33. *See generally* Paul Collier, *The Marginalization of Africa*, 134 INT'L LABOUR REV. 541 (1995).

strong do what they can and the weak suffer what they must."[31] A somnolent and foundering Africa risks further marginalization, as the continent will be traveling at a much slower speed than the rest of the world or, worse, traveling in the opposite direction. On the other hand, regional trading blocs are the surest means for poor African countries to protect themselves against the cold wind of globalization and the ravages of world trade.[32]

The preceding arguments and optimism appear to be supported by a recent World Bank study, which indicates that twenty-four countries that increased their integration into the world economy in the past twenty years, ending in the 1990s, achieved higher income growth, longer life expectancy, and better education standards.[33] It has also been suggested that

> the liberalization of the economies of the Southern African Development Communities (SADC)—most notably Mozambique, Tanzania and Zambia—has allowed for the participation of private companies in activities traditionally regarded as sacred to the state. This includes, through privatization, the ownership and/or management of water, power, gas utilities, ports and railways, and processing industries.[34]

A further and more dramatic case study is the European Union (EU), which is today the most successful experiment at economic integration. The objectives of the EU are, *inter alia,*

> to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of the Treaty.[35]

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31. THUCYDIDES, THE PELOPONNESIAN WAR: THE CRAWLEY TRANSLATION, 351 (T.E. Wick ed., Random House 1982).

32. *See* Summary Report of the Secretary-General on Economic Cooperation and Integration in Africa, *Towards the Establishment of an African Economic Community,* OAU Doc. AHG/162 (XXV); *see also* Jozef M. Brabant, *Economic Integration Among Developing Countries: Towards a New Paradigm, in* ECONOMIC COOPERATION AND INTEGRATION IN AFRICA 31 (Naceu Bourename ed., 1996).

33. *See* The World Bank Group, *Globalization, Growth, And Poverty: Building An Inclusive World Economy* (2000), *available at* http://econ.worldbank.org (last visited Sept. 5, 2002).

34. James Brew, *Confidence Grows in the Regional Economy,* AFRICAN TOPICS, Jan. – Mar. 2000, at 21.

35. MAASTRICHT TREATY, *available at* http://europa.eu.int/en/record/mt/title1.html (last visited Sept. 5, 2002).

In the pursuit of these objectives, the EU has made strenuous efforts to remove restrictions on the free movement of goods,[36] persons,[37] and the freedom to provide services and the freedom of establishment.[38] There are also pragmatic regulations on the protection of the environment,[39] consumer protection,[40] and egalitarian labor and social policies.[41] Nationals of Member States residing in another Member State enjoy the same social and educational rights as citizens of the host state and are protected at the "community" level

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36. *See* Commission Directive 70/50 of Dec. 22, 1969, on the Abolition of Measures Which Have an Equivalent Effect of Quantitative Restrictions on Imports, OJ 1970 "L 13," 29; *see also* Council Regulation 2679/98 of Dec. 7, 1998, on the Functioning of the Internal Market in Relation to the Free Movement of Goods, OJ 1998 "L 337", 8.

37. *See* Council Regulation 1612/68 of Oct. 15, 1968, on Freedom of Movement for Workers Within the Community OJ 1968 L 257, p. 2, as amended by Council Regulations 312/76 of Feb. 9, 1976, and Council Regulation 2434/92 of July 27, 1992, OJ 1992 L 245, p.1; Council Directive 73/148 of May 21, 1973, on the Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Member States with Regards to Establishment and the Provision of Services, OJ 1973 L 172, p. 14; and Council Directive 75/34 of Dec. 17, 1974, Concerning the Right of Nationals of a Member State to Remain in the Territory of Another Member State After Having Pursued Therein an Activity in a Self-employed Capacity, OJ 1975 L 14, p. 10; and *see generally* C. Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COM'N. MKT. REV. 1137 (1992).

38. *See* Council Directive 77/249 of Dec. 22, 1977, to Facilitate the Effective Exercise of Lawyers of Freedom to Provide Services, OJ 1977 (L 78), p. 17; *see also* Directive 98/5 of the European Parliament and of the Council of Feb. 16, 1998, to Facilitate Practice of the Profession of Lawyers on a Permanent Basis in a Member State Other than that in Which the Qualification was Obtained, OJ 1998 (L 77), p. 36.

39. *See* Council Directive 85/337 of June 27, 1985, on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ 1985 (L 175), p. 40, as amended by Council Directive 97/11 of Mar. 3, 1997; *see also* Council Directive 90/313 of June 7, 1990, on the Freedom of Access to Information on the Environment, OJ 1990 (L 158), p. 56.

40. *See* Council Directive 92/59 of June 29, 1992, on the General Product Safety, OJ 1992 L 228, p. 24; Council Directive 85/374 of July 25, 1985, on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, OJ 1985 L 210, p. 29; Council Directive 93/13 of April 5, 1993 on Unfair Terms in Consumer Contracts, OJ 1979 (L 379), p. 1; Directive 98/6 of the European Parliament and of the Council of Feb. 16, 1998, on Consumer Protection in the Indication of the Prices of Products Offered to Consumers, OJ 1998 (L 80), p. 27; Council Directive 85/577 of Dec. 20, 1985, to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises, OJ 1985 L 372, p.31; and Directive 98/27 of the European Parliament and of the Council of May 19, 1998, on Injunctions for the Protection of Consumers' Interests, OJ 1998 (L 166), p. 51.

41. *See* Council Directive 75/117 of Feb. 10, 1975, on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women, OJ 1975 (L 45), p. 19; Council Directive 76/207 of Feb. 9, 1976, on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, OJ 1976 (L. 39), p. 40; Council Directive 79/7 of Dec. 19, 1978 on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, OJ 1979 (L 6), p. 24; Council Directive 77/187 of Feb. 14, 1977, on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employee's Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses, OJ 1977 (L 61), p. 26.

by a common code of fundamental rights elaborated by the Court of Justice and endorsed by the Council, Commission, and the European Parliament.[42] The Court has also enlarged the concept of free movement of persons to include the removal of non-discriminatory obstacles to its exercise.[43]

Of course there are still promises to keep with regards to the European experiment of integration. For example, it is common knowledge that the EU does not have the coercive means to secure the protection of its citizens and to enforce the Union law. The closest approximation to a standing European coercive institution is the North Atlantic Treaty Organization (NATO). However, NATO is strictly not a EU institution, though it has been used in the past to advance the cause of the EU and to bring an end to certain atrocious activities, as in Kosovo.[44] However, it may generally be asserted that the convergence of public policies in Europe is leading to a kind of co-operative federalism without a state. This has been made possible by the emergence of a single European political agenda, a European space for new forms of interest representation, and European modes of operation among actors involved in public decision-making.[45] Thus, it may not be correct to describe the European polity as an "unidentified political object;" rather, the inherent teleology, arising from these co-operations, predestines it, ultimately to the emergence of a European federation. As Philip Raworth puts it, "the European Union now resembles a federal state more than an international trad[ing] grouping."[46] The physical arrival of the Euro,[47] with monetary policies internalized and unified, for example, "is surely a big step towards a more fully integrated European Union . . . ."[48]

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42. *See, e.g.* Joint Declaration by the European Parliament, the Council, and the Commission, Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ C 103/77.

43. *See Gouda* [1991] ECR 1-4007; *Gebhard* [1995] ECR 1-4165; *see generally* DENIS MARTIN & ELSPETH GUILD, FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION (1996).

44. *See* United Nations Daily Press Briefing of Office of Spokesman for Secretary-General, New York (Mar. 25, 1999) (stating that the UNHCR estimates that 450,000 people, the great majority of them civilian Kosovar Albanians, were displaced or expelled from Yugoslavia). The briefing also notes that NATO launched an air campaign against Yugoslavia on March 24, 1999 in order to bring an end to thirteen months of massacres. *See id.*

45. *See generally* YVES MÉNY ET AL., ADJUSTING TO EUROPE: THE IMPACT OF THE EUROPEAN UNION ON NATIONAL INSTITUTIONS AND POLICIES (1996); FINN LAURSEN, THE POLITICAL ECONOMY OF EUROPEAN INTEGRATION (1995); *European Unity: But Can it Last?* THE ECONOMIST, Nov. 3, 2001, at 86 (reviewing DAVID P. CALLEO, RETHINKING EUROPE'S FUTURE (2001)); GARY MARKS ET AL., GOVERNANCE IN THE EUROPEAN UNION (1996).

46. RAWORTH, *supra* note 12, at 237.

47. *See Redefining Europe*, BBC NEWS: IN-DEPT: EUROPE (2000), *available at* http://news.bbc.uk/hi/english/static/in_dept/europe/2000/redefining_europe/default.stm (last visited Aug. 15, 2002). On January 12, 2002, of the fifteen EU members twelve joined the single currency, including: Finland, Ireland, Netherlands, Germany, Belgium, Luxembourg, France, Austria, Portugal, Spain, Italy, and Greece. *See id.* Sweden, the United Kingdom, and Denmark are yet to do so. *See id.*

48. *One Currency, Too Many Markets*, THE ECONOMIST, Dec. 1, 2001, at 14.

Before attempting an assessment of integration effort in Africa, it is necessary to look at the historicity of integration in the continent.

B. The Phases of Integration in Africa

Africa's initiative at continental integration is not new, as five phases in the historical evolution have been identified.[49] These include putting up of supra-national pan-Africanism as the rallying point and the vision for political independence and economic decolonization; damage control of the abrupt reversal of French colonial policy of political and economic integration to one of balkanization and fragmentation before granting independence in 1960; and the search for larger and sustainable sub-regional integration among independent African countries resulting in a breakthrough in sub-regional co-operation arrangements in the 1970s and 1980s. Others include: the historic adoption of the Lagos Plan of Action (LPA);[50] the treaty establishing the African Economic Community,[51] and the giant stride from the AEC Treaty to the adoption of the AU Treaty in July 2000.[52]

The thread that binds all these phases has been "the realization of the imperative of creating an enabling infrastructural environment for regionalism through the regional programming and concerted action in the development of infrastructure."[53] It has been asserted, however, that before the LPA, these phases of historical developments were marked by the search for legitimacy in the economic competence of the OAU and an awareness of the inadequacy of aid, technical assistance, and international strategies.[54] The remainder of this section focuses on two major historical developments—the LPA and the AEC Treaty. The paper also briefly highlights the place of Regional Economic Communities (RECs) to the total picture, before attempting a general critique of the march towards integration in Africa.

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49. *See* Adebayo Adedeji, *History and Prospects for Regional Integration in Africa, 2, available at* http://www.uneca.org/eca_resources/speeches (last visited Aug. 5, 2002); A.M.R. Ramolete & A.J.G.M. Sanders, *The Structural Pattern of African Regionalism, in* COMP. & INT'L L.J. S.AFR. 155 (1971).

50. *See* THE LAGOS PLAN OF ACTION FOR THE ECONOMIC DEVELOPMENT OF AFRICA (1980) *available at* http://www.uneco/adfii (last visited Aug. 15, 2002) [hereinafter LAGOS PLAN OF ACTION].

51. *See Treaty Establishing the African Economic Community*, adopted June 3, 1991, 30 I.L.M. 1241 (entry into force May 11, 1994) [hereinafter *AEC Treaty*], *reprinted in* GINO J NALDI, DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 203 (1992). The AEC Treaty itself made references "to the various resolutions and declarations adopted by [the OAU] Assembly in September 1968, in Addis Ababa in August 1970 and May 1973 providing that the economic integration of the Continent is a pre-requisite for the realisation [sic] of the objectives of the OAU." *Id.* pmbl. para. 5.

52. See Adedeji, *supra* note 49, at 2.

53. *See id.* at 3.

54. *See* Ndulo, *supra* note 27, at 4 – 5.

1. The Lagos Plan of Action

In 1961, the UN declared the 1960s as the *United Nations Development Decade.*[55] As part of that effort, the OAU and the Economic Commission for Africa (ECA) convened a colloquium on "Perspectives of Development and Economic Growth in Africa Up to the Year 2000." The resulting document was the "Monrovia Declaration of Commitment on the Guidelines and Measures for National and Collective Self-reliance in Economic and Social Development for the Establishment of a New International Order."[56] Under the Declaration, African States committed themselves, *inter alia,* to the promotion of economic and social development and integration of their economies—with a view to achieving self-sufficiency—and to the promotion of economic integration of Africa.[57] The Declaration also called for the creation of an African Common Market as a prelude to an AEC.[58]

It was, however, in the 1980's and 90's that integration crusade became an urgent mission. In 1980, the OAU launched the LPA and the Final Act of Lagos of 1980—of which one was the integral part of the other.[59] It was a watershed in the analysis of Africa's economic problems, but it was also the blueprint for real economic independence in Africa and was intended to implement the Monrovia Strategy for Economic Development.[60] Though described as "economically illiterate,"[61] the LPA aimed at the self-reliance of African countries, self-sustaining development and economic growth. It was to usher in an era of general prosperity induced by government activism and massive inflows of aid and foreign investments in Africa.[62]

The LPA noted that of the thirty-one countries then designated by the UN as Least Developed Countries (LDCs)—a classification that is calculated to lead to discrimination in their favor—twenty of them came from Africa. It may be observed that this position has worsened over the years. Of the forty-nine countries currently classified as LDCs, thirty-four are from Africa,

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55. *See* G.A. Res. 1710 (XVI) 1961, U.N.Y.B. 1710 (1961).

56. See AHG/ST.3 (XVI) Rev.1., adopted by the Assembly of States and Government of the OAU in July 1979.

57. *See id.* para 1.

58. *See id.* para 5.

59. *See* UN General Assembly, *Industrial Development Decade for Africa*, G.A. Res. 35/66B (1980); *Transport and Communications Decade in Africa*, G.A. Res. 32/160 (1977); *Harare Declaration on the Food Crisis in Africa*, G.A. Res. 39/165 (1984).

60. *See* LAGOS PLAN OF ACTION, *supra* note 50.

61. CHRISTOPHER CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM 176 (1996).

62. *See* Rose M. D'Sa, *The Lagos Plan of Action—Legal Mechanisms for Co-operation Between the Organisation of African Unity and the United Nations Economic Commission for Africa*, 27 J. AFR. L. 4, 11-12 (1983); *see also* Emmanuel G. Bello, *Regional Cooperation and Organisation: African States, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, vol. 4, 107 (Rudolf Bernhardt ed., 2000).

including Angola, Mozambique, Uganda, and Zambia.[63] Senegal is the latest entrant—classified in 2001—though the DR Congo and Ghana have also been identified as meeting the criteria.[64] All the LDCs share the basic characteristic that they are ill equipped to develop their domestic economies and ensure an adequate standard of living for their populations. Their economies are also acutely vulnerable to external shocks or natural disasters.[65] In the thirty years since LDC ranking began in 1971, only one country has improved its economic status and broken ranks—Botswana, which was removed from the list in 1994,[66] the same year that Eritrea and Angola joined the club.

The LPA divided Africa into three sub-regions: West Africa, Central Africa, and East and Southern Africa, each passing through a free trade area, customs union, and economic community.[67] The LPA further envisaged that these regional areas would serve as building blocks for a large economic community for Africa by the year 2000—in a sense anticipating the AU.

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63. *See* United Nations Conference on Trade and Development, *Statistical Profiles of LDC's (2001), available at* http://www.unctad.org/conference (last visited Sept. 15, 2002). The remaining fifteen LDCs include nine from Asia, five from the Pacific, and one from the Caribbean. *See id.*

64. *See id.* Sixteen other countries, including five African countries—Cameroon, Ivory Coast, Kenya, Nigeria, and Zimbabwe—have met some, but not all, of the criteria. *See id.* However, if their economies continue in a downward slide—prompted by rising debt, falling commodity prices and sharp declines in development aid and foreign investments—the ranks of LDCs will keep swelling over the next decade, with Africa continuing to top the list. *See id.*

65. *See* Arghyrios A. Fatouros, *Developing States, in* I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1017, 1019 (Rudolf Bernhardt ed., 2000). The importance of this classification was stressed as far back as 1964, in the Final Act of the United Nations Conference on Trade and Development (UNCTAD) I. *See id.* Since then, the UN General Assembly, through its resolutions, has regularly identified countries falling within the category, on the basis of three tests: very low per capita GNP, very low literacy rate, and low contribution of manufacturing to the gross domestic product (GDP). *See id.* In 1981, the UN organized a Conference on the Least Developed Countries in Paris, where it adopted a Substantial New Program of Action for the 1980s, which lists a series of international measures to assist the poorest of the poor countries. *See id.* Similarly, the overwhelming majority of developing countries are given preferential treatment by all developed countries, though a few states benefit from special preferences by some but not all of the developed states. *See id.*

66. *See* Brew, *supra* note 34, at 21. It is cheering news to observe that Botswana is currently the world's number one producer of diamonds by value, with production worth 1.9 billion dollars at an average carat price of ninety-seven dollars. *See id.* World production is worth 6.6 billion dollars; Botswana's development record stands in sharp contrast to that of most African countries. *See id.* With a population of about one million people in the 1960s, the country sustained an average *per capita* economic growth rate of ten percent from 1960 to 1980, exceeding that of South Korea or Hong Kong. *See* ABDI ISMAIL SAMATAR, AN AFRICAN MIRACLE: STATE AND CLASS LEADERSHIP AND COLONIAL LEGACY IN BOTSWANA DEVELOPMENT 8 (1999). While *per capita* income private consumption throughout Sub-Saharan Africa declined at 2.1 percent a year from 1980 to 1997, it increased in Botswana at 2.3 percent. *See id.* The institutional capacity of African states in general to reverse underdevelopment has vanished in the last twenty years, but the capacity of the public sector in Botswana has improved considerably. *See id. See also* Paul Clements, *Challenges for African States*, 36(3) J. ASIAN & AFR. STUD. 295, 303 (2001).

67. *See* LAGOS PLAN OF ACTION, *supra* note 50.

Progress, however, was slow on the implementation of the LPA. Consequently, in 1985 the OAU adopted the Africa's Priority Program for Economic Recovery 1986-1990 (APPER)[68] to undertake the necessary measures to overcome the economic meltdown in the continent. The Program aimed at identifying areas for priority action for the rehabilitation and recovery of the African economies and mobilizing and fully utilizing domestic resources for the achievement of those priorities. Significantly, the international community simultaneously supported the initiative of the OAU under the APPER. At a Special Session, convened at the request of the OAU, the UN adopted a program of action designed to halt Africa's economic drift.[69] It undertook to promote food production and develop agro-industries and human resources.[70]

Five years later, in 1990, the OAU adopted the "Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World."[71] In view of the real threat of marginalization of the continent, the Declaration, which "constitutes a watershed decision as it formed the basis for subsequent intervention and action by the OAU,"[72] sought to address the major factors that should guide Africa's collective thinking on the challenges and options facing her in the 1990s and beyond. The declaration noted, *inter alia,* the changing East-West relations from confrontation to cooperation, the socio-economic and political changes taking place in Eastern Europe, and the steady move towards political and monetary union in Western Europe.[73] Furthermore, the Declaration noted the increasing global tendency towards regional integration and the establishment of trading and economic blocs as well as the advances in science and technology.[74] It affirmed that:

> Africa's development is the responsibility of our governments and peoples. We are now more . . . . determined to lay [a] solid foundation for self-reliant, human-centered and sustainable development on the basis of social justice and

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68. Adopted by the Assembly of Heads of State and Government of the OAU at its 21st Ordinary Session, held at Addis Ababa from 18 to July 20, 1985.

69. *See* UN General Assembly, *United Nations Programme of Action for African Economic Recovery and Development 1986-1990*; GA RES 13/2 (1986) [hereinafter *UN Program of Action for Africa*].

70. *See id.*

71. Adopted by the Assembly of Heads of State and Government of the OAU, meeting at its 26th Ordinary Session held in Addis Ababa, Ethiopia on July 11, 1990 [hereinafter *Addis Ababa Decl.*].

72. *See* OAU Ministerial Conference on Human Rights, *Report on the Progress Made Towards the Establishment of an African Court on Human and Peoples' Rights*, April 12—16, 1999, Grand Bay, Mauritius; MIN/CONF/HRA/4 (I), at 5 [hereinafter *OAU Min. Conf. on Hum. Rts.*].

73. *Addis Ababa Decl., supra* note 71, para. 2.

74. *See id.*

> collective self-reliance, so as to achieve accelerated structural transformation of our economies. Within this context, we are determined to work assiduously towards integration through regional cooperation. We are also determined to take urgent measures to rationalize the existing economic groupings in our continent in order to increase their effectiveness in promoting economic integration and establishing an African Economic Community.[75]

2. *The African Economic Community Treaty*

At its 27th Ordinary Session, held in Abuja, Nigeria, from June 3 – 5, 1991, the OAU adopted the AEC Treaty as "an integral part of the OAU"[76] to create an African Economic Community by 2025.[77] Its adoption achieved the pinnacle of the LPA and also brought to fruition the long debated idea that the economic integration of Africa is a *sine qua non* for the development of the continent. The key elements of the AEC Treaty include, *inter alia,* the promotion of economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and indigenous and self-sustaining development.[78] Others are the establishment of a framework for the development, mobilization, and utilization of the human and material resources of Africa; the promotion of co-operation in all fields of human endeavor in order to raise the standard of living of the African people and maintain and enhance economic stability in order to achieve self-reliant development.[79]

These aims are to be achieved in-part by the liberalization of trade through the abolition of customs duties on imports and exports and non-tariff barriers in order to establish a free trade area; the adoption of a common trade policy *vis-à-vis* third States; and the harmonization of national policies in agriculture, industry, transport and communications, energy, trade, money and finance, and science and technology.[80] Others are the establishment of a common external tariff; the removal of obstacles to the free movement of

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75. *Id.* para. 8.

76. *AEC Treaty, supra* note 51, pmbl. para. 12 and *id.* art. 98(1).

77. *See generally* Gino J. Naldi & Konstantinos D. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure*, 24 N.C. J. INT'L & COM. REG. 601 (1999); NALDI, *supra* note 51, at 240; Yinka Omorogbe, *Economic Integration and African National Development*, 7 ASICL PROC. 279 (1995); Bela Thompson, *Economic Integration Efforts in Africa*, 5 RADIC 743 (1993); Muna Ndulo, *Harmonisation of Trade Laws in the African Economic Community*, 42 I.C.L.Q. 101 (1993); MICHAEL A. AJOMO & OMOBOLAJI ADEWALE, AFRICAN ECONOMIC COMMUNITY TREATY: ISSUES, PROBLEMS AND PROSEPCTS (1993).

78. *See AEC Treaty, supra* note 51, art. 4(1).

79. *See id.*

80. *See id.* art. 2(2); Thompson, *supra* note 77, at 747 – 8.

persons, goods, services and capital, and the right of residence and establishment; and the establishment of a common market.[81] The AEC Treaty established modalities for establishing the AEC that, like the EU, was to lead to a political union and, like the LPA, anticipated the AU Treaty.

Classical international economic law recognizes four levels of economic integration.[82] The first and lowest level is a free trade area, which provides for the free movement of goods and services and a minimal amount of policy harmonization.[83] It is at this level that distortions caused by different trade regimes are dealt with by rules of origin. The next level is the customs union.[84] This level supplements the free trade area with a common external tariff, thereby obviating the need for rules of origin. The third level is the common market, an area in which there is free movement of goods, services, persons and capital together with a significant degree of policy harmonization.[85] Last, but by no means least, is the economic and monetary union, which can exist on its own or alongside a common market.[86]

In contrast, the AEC Treaty provides for six levels or stages of integration of variable duration over a transition period not exceeding thirty-four years, which began in May 1994—the date of entry into force of the Treaty.[87] The first stage, which is to last five years, involves the strengthening of existing Regional Economic Communities (RECs) and establishing new ones in regions where they do not exist.[88] The second stage of eight years involves, at the level of each REC, refraining from establishing tariff and non-tariff barriers, customs duties and internal taxes at the May 1994 level; and determination of the time table for the gradual liberalization of regional and intra-community trade; the harmonization of customs duties *vis-a-vis* third states;[89] the strengthening of sectoral integration, particularly in the fields of trade, agriculture, money and finance, transport and communications, industry and energy; and coordination and harmonization of the activities of RECs.

The third stage, lasting ten years, involves the establishment of Free Trade Area and a Customs Union at the level of each REC.[90] The fourth stage, lasting two years, involves the coordination and harmonization of tariff and

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81. *See id.*

82. *See* RAWORTH, *supra* note 12, at 28; *see generally* BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION (1973).

83. *See* RAWORTH, *supra* note 12, at 28.

84. *See id.*

85. *See id.*

86. *See id.*

87. *See AEC Treaty*, *supra* note 51, art. 28. Significantly, the AEC Treaty entered into force ahead of the time schedule envisaged by the LPA, which was the year 2000. *See generally id.*

88. *See id.* "During the first stage, Member States undertake to strengthen the existing regional economic communities and to establish new communities where they do not exist in order to ensure the gradual establishment of the community." *Id.*

89. *See id.* art. 30(1).

90. *See id.*

non-tariff barriers among various RECs with a view to establishing a Continental Customs Union.[91] The fifth stage, lasting four years, is the establishment of an African Common Market (ACM); while the sixth stage, lasting five years, involves the consolidation and strengthening of the structures of the ACM, including free movement of peoples and factors of production; creation of a single domestic market and Pan African Economic and Monetary Union, African Central Bank and African Currency; and the establishment of a Pan African Parliament.[92]

The AEC Treaty also envisages the creation and rationalization of regional training and capacity-building centers in Africa.[93] It provides that: "Member States shall strengthen cooperation among themselves in the field of education and training and coordinate and harmonize their policies in this field for the purpose of training persons capable of fostering the changes necessary for enhancing social progress and the development of the Continent."[94]

A Protocol on Relations between the AEC and the RECs was concluded and signed in February 1998,[95] seeking to bring the operation of the RECs under the umbrella of the AEC. On the one hand, the protocol will serve as an efficient instrument and framework for close cooperation, program harmonization and coordination, as well as horizontal integration among the RECs, and as a vertical link between the AEC and the RECs, on the other.[96] It is necessary, at this point, to highlight the activities of some of these RECs.

3. The Regional Economic Communities (RECs)

Many RECs have sprung up in Africa over the last four or so decades. Fourteen of them have presently been identified, all of them of varying degrees of design, scope, and objectives. These are the Arab Maghreb Union (AMU), with five members; the Common Market for Eastern and Southern Africa (COMESA), with twenty members; the Economic Community of Central African States (ECCAS), with ten members; the Economic Community of West African States (ECOWAS), with fifteen members; the Southern African Development Community (SADC), with fourteen members; the Inter-

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91. *See id.* art 32.

92. *See generally id.* chs. IV, V, & VI.

93. *See* AEC Treaty, *supra* note 51, art. 68(2).

94. *Id.* art. 68(1).

95. *See Protocol on the Relationship between the African Economic Community and the Regional Economic Communities 1998*, 10 RADIC 157 (1998) [hereinafter *AEC Prot. on RECs*]. The Protocol has been signed by COMESA, SADC, IGAD and ECOWAS. *See id.* ECCAS/CEEAC signed it in October 1999, but AMU/UMA is yet to sign. *See id*; *see also* AEC Foreign Relation, *available at* http://www.dfa.gov.za/for-relations/multilateral/aec.htm (last visited Oct. 15, 2002).

96. *See AEC Treaty*, *supra* note 51, art. 28(3). The Secretary-General of the AEC is a full participant in the meetings and deliberations of the RECs. *See id.*; *see also AEC Prot. on RECs*, *supra* note 95, arts. 20(1) and 23.

Governmental Authority on Development (IGAD), with seven members; and the Community of Sahel-Saharan States (CEN-SAD), with eighteen members.[97] Others include: the West African Economic and Monetary Union (UMEOA), with eight members; the Mano River Union (MRU), with three members; the Central African Economic and Monetary Community (CEMAC), with six members; The Economic Community of Great Lakes Countries (CEPGL), with three members; The East African Community (EAC), with three members; the Indian Ocean Commission (IOC), with five members; and the Southern African Customs Union (SACU), with five members.[98] Only a few will be highlighted here.

The political leaders of West Africa, for example, established the ECOWAS in May 1975,[99] as a regional economic grouping to foster economic development of the sub-region. In the revised Treaty of 1993,[100] ECOWAS objectives are stated as, *inter alia,* "to promote co-operation and integration, leading to the establishment of an economic union . . . in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent."[101] This clearly shows that ECOWAS objectives extend beyond trade to cooperation in almost all the key sectors of the respective economies of the Member States.[102]

The creation of ECOWAS was a significant step in regional integration, as it was the first time in Africa that an organization was established that cuts across divisions of language,[103] history and existing affiliations and institutions.[104] Over the years, the ECOWAS has made strenuous efforts to develop proper communications and transport facilities within its area. Two Conventions were signed in May 1982 on the establishment of Interstate Road Transport and Interstate Road Transit. The same Conventions relate to free movement of persons, which was intended to remove the many administrative barriers between Member States and facilitate economic and social intercourse among the various peoples of the sub-region. Although initially designed as a sub-regional organization for the pursuit of economic and social goals, the

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97. *See* ECA ANNUAL REPORT, *supra* note 26, at 5. The report identifies fourteen RECs, including the first seven that "dominate the integration landscape." *Id.*

98. *See id.*

99. ECOWAS Treaty, 35 I.L.M. 35 (1996); *see generally* Sunday Babalola Ajulo, *Temporal Scope of ECOWAS and AEC Treaties: A Case for African Economic Integration*, 8 RADIC 111 (1996).

100. *See* 35 I.L.M. 660 (1996) [hereinafter *Revised ECOWAS Treaty*].

101. *Id.* art. 3(1).

102. *See* S.K.B. ASANTE, REGIONALISM AND AFRICA'S DEVELOPMENT: EXPECTATIONS, REALITY AND CHALLENGES 45-46 (1997).

103. *See* Kessie, *supra* note 24, at 34. Of its sixteen Member States, eight are officially French-speaking (Francophone); five are English-speaking (Anglophone); two are Portuguese-speaking (Lusophone); while one is Arabic-speaking. *See id.*

104. *See id.*

ECOWAS has also gradually extended its mandate to include Mutual Assistance on Defense.[105]

Similarly, the COMESA[106] was created "within the ambit of the broader ideals of the creation of an African Economic Community"[107] to enhance economic development in the Eastern and Southern African region. Its Treaty, entered into force on December 8, 1994, thus fulfilling the requirements of the Preferential Trade Area (PTA) for East and Southern Africa Treaty[108] providing for the transformation of the PTA into a common market ten years after its entry into force. The scope of the COMESA is very broad, stretching from Angola to Eritrea and the Comoros.

There is also the SADC,[109] which is aimed at regional peace and security, cooperation in a number of sectors, and integrating regional economies.[110] In its preamble, the SADC Treaty actually provides that the Southern African States, in establishing the SADC, took into account the LPA and the AEC Treaty. On June 28, 1996, an SADC organization on politics, defense, and security was launched to coordinate the member's policies in this area.[111]

The understanding in the AEC Treaty was that the establishment of the AEC was the final objective towards which the activities of the existing and future RECs will be geared.[112] So far, the AEC has established direct working relations with the ECOWAS in the West African region, the ECCAS in the Central region, and the COMESA in the East and Southern regions, beside its dealings with the SADC. However, at this point, the UMA has no direct contact with the AEC.[113]

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105. *See ECOWAS Protocol Relating to Mutual Defense Assistance on Defense 29 May 1981, reprinted in* MARC WELLER, REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (1994).

106. COMESA, 33 I.L.M. 1067 (1994)

107. Frans Viljoen, *The Realisation of Human Rights in Africa through Sub-Regional Institutions*, AFR. YRBK INT'L L 185, 206 (2001).

108. 21 I.L.M. 479 (1982). Signed on Dec. 21, 1981, by the representatives of Comoros, Djibouti, Ethiopia, Kenya, Malawi, Mauritius, Somalia, Uganda, and Zambia. *See id.* The aims of the PTA are to promote cooperation and development in the fields of trade, customs, industry, transport, communications, agriculture, natural resources, and monetary affairs, with a view to the establishment of an economic community for the sub-region and to contribute to the achievement of the African common market envisaged by the LPA. *See id.*

109. SADC Treaty, 32 I.L.M. 116 (1993). The treaty was established following the *Southern African Toward Economic Liberation*, a Declaration by the Governments of Independent States of Southern Africa, made at Lusaka, April 1, 1980. *See id.*

110. *See generally* Kenneth Kaoma Mwenda, *Legal Aspects of Regional Integration: COMESA and SADC on the Regulation of Foreign Investment in Southern and Eastern Africa*, 9 RADIC 324 (1997).

111. *See id.*

112. *See* E. B. Akpan, *Joint Mission to the Regional Economic Communities (RECs)*, 2(1) AEC NEWSLETTER 3 (Nov. 1997 – Jan. 1998).

113. *See* OAU, *The African Economic Community, available at* http://www.oau-oua.org/document/documents/AEC.htm (last visited Aug. 15, 2002).

C. *Enterprise and Failure*

The assumed benefits of integration notwithstanding, the experience in Africa has thus far been negative. It has been a story of unrealized possibilities; the final hope has been flat despair, due to a variety of reasons.[114] To start with, African leaders lack the certitude to face the challenges of integration. Integration requires that each constituent party have clearly defined national plans and strategies to achieve economic development. Such plans are lacking in the continent. Like a child in a toyshop, most leaders in Africa do not know which way to look. They have been unable to make the changes that will sustain growth and development.[115] Others are not prepared to subordinate immediate national political interests to long-term regional economic goals or to cede essential elements of sovereignty to regional institutions.[116]

Integration in Africa is based on "lofty transcontinental ambitions, evocative political slogans, a plethora of treaties and regional institutions, high-minded principles, and protectionist proclivities."[117] Member States formulate grandiose policies at the continental level and then retreat into their domestic bunkers, leaving the policies to atrophy. Lessons are quickly forgotten, mistakes are repeated, and follow-through is lacking. Thus, the General Confession in *The Book of Common Prayer* has been their lot: "We have left undone those things which we ought to have done: And we have done those things which we ought not to have done; and there is no health in us."[118] Policy reversals and economic retrogression are the norms in Africa. Each succeeding Government starts by dismantling the economic policies of its predecessor that may have been laboriously put together. It then lays its own economic foundation that it might not finish constructing before another Government takes over. And so the cycle and corresponding break upon economic progress continues.

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114. *See generally* REGIONALISATION IN AFRICA: INTEGRATION AND DISINTEGRATION (DANIEL E. BACH, ed., 1999). The thrust of these collections is that while many world regions are responding to the economic challenges of globalization by strengthening regional ties, the scope and operations and scale of accomplishments of regional organizations in Africa have been more limited. *See id.* Many of the authors emphasize the inability of some African governments to maintain the functions associated with national sovereignty throughout their territories, such that maintenance of the rule of law, the regulation of borders, and the provision of services are uneven. *See id*; *see also* Clements, *supra* note 66, at 296.

115. *See* Malcolm F. McPherson and Arthur A. Goldsmith, *Africa: On the Move?*, 28 SAIS REV. 153 (1998).

116. *See* ECA ANNUAL REPORT, *supra* note 26, at 8.

117. Mistry, *supra* note 11, at 554.

118. United Church of England, BOOK OF COMMON PRAYER 10 (William S. Peterson, ed., 2002), *available at* http://www.inform.umd.edu/ENGL/englfac/WPeterson/ELR/bcp--1662--abridged-x.pdf (last visited Nov. 4, 2002).

The devastations of conflicts and the ravages of corruption that drain the state and sap individual endeavors have further clouded the vision of integration. In Nigeria, for example,

> recurrent social conflicts, particularly between religious groups, have diverted resources from productive uses to the containment of conflict and post-conflict reconstruction and have also led to inefficient choices in public and private investment management. Ethnicity continues to strongly influence budgetary allocations and plays a significant part in the mismanagement of public revenue.[119]

Meanwhile, Zimbabwe's economic outlook is said to be gloomy, largely due to the pervasiveness of corruption in high and low places.[120] In other countries, like South Africa and, again, Nigeria, personal security is threatened even in central locations, making it difficult for flourishing markets and vibrant social interaction. Instability and shrinking markets, consequently, have led private investors to view Africa as a last resort rather than the "last frontier."[121]

The historiography of regionalism has been mainly state-centric, confined to a narrow coterie of political leaders and senior technocrats, with limited attention given to the role of non-state actors that play key roles in the political economy of Africa.[122] Governments and public enterprises have crowded out private enterprise as their policies conspire against a higher degree of private sector-driven regional integration. This results in low levels of intra-regional as well as inter-regional trade, compounded by the existence of customs duties and barriers to trade—roadblocks and constraints on payment, investment and movement of persons. Most traders seeking to transport goods legally from one African country to another face a long wait at the border and stiff legal and/or extra-legal costs.

Another factor militating against integration in Africa is the existence of multiplicity of inconvertible currencies. The exchange of the existing currencies, via global currencies—notably the dollar and euro—fragments Africa and integrates discrete interests and regions with the world economy.[123]

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119. Economic Commission for Africa, *Economic Report on Africa 2002: Tracking Performance and Progress* 172 (2002) [hereinafter *ECA Report 2002*] (laying out an agenda for Africa based on systematic benchmarking of economic performance).

120. *See id.* at 133 (reporting, e.g., that "[m]isuse of resources in the government and in state-run companies cost [Zimbabwe] close to $800 million in 1999–2001").

121. James Duesenberry et al., *Restarting and Sustaining Growth and Development in Africa*, African Economic Policy Discussion Paper No. 28, Jan. 2000, at 16.

122. *See* Emmanuel Obuah, in 39(1) J. MOD. AFR. STUD. 168, 169 (2001).

123. *See* Mammo Muchie, *Wanted, African Monetary Union*, NEW AFRICAN, April 2002, at 32 (arguing also for the establishment of a dual currency system that can self-finance an integrated African development). One, which he calls the "people's currency," will be used for

The manufacturing sector is also weak. This is a problem compounded by the upheavals in the international system since the end of the Cold War, notably globalization. Closed regimes are not willing to reveal themselves to scrutiny. Many states fall foul in paying monies due to regional schemes and there is no hegemonic leadership capable of using coercive measures to ensure compliance by Member States. There are also no monitoring mechanisms to ensure adherence to agreed timetables for such matters as tariff and non-tariff barrier reductions, not to mention more difficult objectives, such as macro-economic stabilization.[124]

Another problem is the manifest dissimilarities among African countries in the areas of politics, culture, and economics. The idea of integration looks like the marriage of two incompatible couples. Cooperation among the French-speaking African States appears to be reasonably on course. This is largely due to their common colonial, language and cultural backgrounds, providing strong links across territorial boundaries. The operation of the French Technical Assistance has additionally boosted cooperation between these states. The same cannot, however, be said of the rest of Africa. For example, most countries in North Africa consider themselves to be either part of Europe or the Middle East.[125] Those in sub-Saharan West Africa have a lot of common interest, as do the people of Eastern and Southern Africa.

Libyan foreign policy relations with the other Arab states of Northern Africa have always taken precedence over the country's goals in sub-Saharan Africa. Mauritania is not ready to give up its own currency, the Ouguiya and has recently pulled out of the sub-regional ECOWAS, citing its opposition to the Organization's decision to establish a common currency by 2004 as one of its reasons.[126] It has, however, been observed that Mauritania's main problem is that it has no intention to integrate or have an open border policy with black

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the domestic economy. *Id.* This should be inconvertible and should be used to finance education, health, housing and infrastructure and foster inter-African linkages. *Id.* Meanwhile, "the existing state currencies that are not exchanged directly with each other, and whose exchange rate is mediated with the dollar or the euro, should give way to direct exchanges based on a fair settlement of the appropriate par value." *Id.*

124. *See* Mistry, *supra* note 11, at 554.

125. *See* Jerry Gbardy, *What to Make of the New African Union?* THE PERSPECTIVE, July 18, 2001, *available at* http://www.theperspective.org/africanunion.html (last visited Aug 15, 2002).

126. The Heads of States of six countries in West Africa, as part of the fast-track approach to integration, decided in Accra, Ghana, April 20, 2000, to establish a second monetary zone to be known as the West African Monetary Zone (WAMZ) by the year 2003. These countries—Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone—signed the "Accra Declaration," which defined the objectives of the Zone, an action plan and institutional arrangements to ensure the speedy implementation of their decision. It is envisaged that this Zone will be merged with the CFA Franc Zone to form a single monetary zone in West Africa by the year 2004. *See* Toye Olori, *West Africa Moving Closer to a Common Currency*, May 28, 2002, *available at* http://www.proutworld.org/news/en/2002/may/20020529wes.htm (last visited Oct. 31, 2002) (reporting that ECOWAS has put in motion programs aimed at ensuring the take-off of its long-muted common currency, the Eco, for the sub-region).

Africa, as the country suffers from a serious identity crisis, resulting in the denial of its African identity to bend over toward the Arab World.[127]

Like the LPA, the AEC Treaty appeared from the start to be an over-ambitious project, given the OAU's pathetic record in respecting and implementing the substance of previous agreements.[128] Success stories for existing RECs seem inconsistent, unsustained, and scarce. Others have not met their objectives, largely due to Africa's shrinking economies and shares in global trade.[129]

Overlapping memberships of the RECs have additionally worked against the overall objective of a continental union. Presently, all members of the UMEOA and of MRU are also members of the ECOWAS. States Parties to the CEMAC and CEPGL are also members of the ECCAS. Members of the EAC and IOC are also members of the SADC, while all States Parties to the SACU belong to SADC and two to COMESA.[130] The overlap in membership between the SADC and the COMESA is more pronounced than in other RECs.[131] Overall, of the fifty-three African countries, twenty-seven are members of two RECs; eighteen others are members of three RECs; while the DR Congo is a member of four. Only seven countries belong to one REC.[132] Their logic, faulty as it seems, is to run their integration race on multiple tracks, not minding the truth that a house divided against itself cannot stand. Besides, there are situations where potential conflicts may arise regarding which organization's obligations should take precedence.

All this appears to be in sharp contrast with the experiences in other parts of the globe. Thus, "[u]nlike economic integration in other parts of the world —in Europe (the EU), North America (NAFTA), and South America (MERCOSUR)—the African RECs have not accelerated growth or even trade."[133] It is not as if norms are lacking in Africa; the problem is in the area of implementation. For example, compared to Europe, Africa's integration policies are fundamentally different exactly where they are superficially similar. As previously pointed out, economic prosperity (activity) lies in the heart of the European Union.[134] Member States strive to improve each other's economy by encouraging trade, investment, and economic competition, while

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127. *See* Garba Diallo, *Mauritania—Neither Arab nor African*, 2 NEWS FROM THE NORDIC AFRICA INST. 5 (2000).

128. *See* ECA ANNUAL REPORT, *supra* note 26, at 4.

129. *See id.*

130. *See id.* at 6.

131. *See* Matthew Heiman, *The Drive Towards Regionalisation in Southern Africa: Fictional Reality*, 9 RADIC 269 (1997). The states that are members of both organizations include Angola, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia, and Zimbabwe. *See id.*

132. *See* ECA ANNUAL REPORT, *supra* note 26, at 6.

133. *Id.* at 7.

134. *See* Ali El-Agraa, *Integration in Other Regions: Lessons for the AU from the EU!*, *available at* http://www.uneca.org/eca_resources/speeches (last visited Aug. 15, 2002).

citizens of Member States live and work anywhere in the Union, free of hassle.[135]

The result of all this is a continent that is the most laggard in the multilateral trading system. Its economy is declining and increasingly losing its place in the global economy, as its share of world trade has fallen.[136] Greater economic integration at the global level has led to the further marginalization of those countries that are unable to compete effectively. Thus, the inability of African states to effectively integrate, coupled with bad governance, has resulted in a record of economic and political performance that compares very unfavorably with the rest of the developed world. It has also impeded the effective mobilization and utilization of scarce resources into productive areas of activity in order to attract and facilitate domestic and foreign investment.

It is important to bear these fault lines in mind if the current experiment is to lead the continent to its promised land of prosperity and sustainable development. It is within this context we must now examine the AU Treaty and NEPAD.

III. 'WHAT'S UP' IN THE AU TREATY AND NEPAD?

A. *The AU Treaty*

1. Background

The groundwork for the AU Treaty started in July 1999, during the 35th OAU summit in Algiers, Algeria where Libyan leader, Colonel Muammer Ghaddafi proposed the formation of the United States of Africa. Ghaddafi was quoted to have openly said that "[t]he 50 states [now 53,] which currently make up Africa have a short-lived existence, and I repeat, short-lived. Consequently we must establish a unified African state, which itself will last forever."[137] Later, on March 18, 2001, in an address carried on Libyan television, Ghaddafi explained his vision thus:

> [I]n the coming years, there will be changes towards further African integration. Boundaries between African states will be scrapped. Armies, with their heavy burden on the national state, will be made redundant and replaced by one African

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135. *See generally* JOHN PINDER, EUROPEAN COMMUNITY: THE BUILDING OF A UNION (1995).

136. *See, e.g., Yaounde Decl., supra* note 1, pmbl. para. 6; *see also* UN *Seminar on the Effects of the Existing Unjust International Economic Order on the Economies of the Developing Countries and the Obstacle that this Represents for the Implementation of Human Rights and Fundamental Freedoms*, Geneva, June 30 - July 11, 1980; ST/HR/SER.A/8.

137. Jonathan Derrick, *Towards the African Union*, AFRICAN TOPICS 4 (Nov. – Dec. 1999).

> defence [sic] force. Even passports and national identities will inevitably disappear. From now on, national differences will give way to a single African identity, with a single currency, one central bank, a single passport and a joint defence force.[138]

Ghaddafi was really not the first to make such a call. The concept of pan-Africanism or African unity was, itself, a highly motivating factor towards the founding of the OAU; indeed, the underlying philosophy of the OAU was to promote inter-African co-operation in the fields of economics, culture, science, and technology.[139] At that time, Dr. Kwame Nkrumah of Ghana also called for rapid progress towards a politically united Africa, predicting that Africa must either unite or perish.[140] If Africa fails to unite, Nkrumah warned, it would make it possible for others more powerful than the newly independent states to swoop on each one of them.[141] During the founding OAU summit, Nkrumah also called for "a political union based on Defence [sic], Foreign Affairs and Diplomacy, and a Common citizenship, an African Currency, an African Monetary Zone and an African Central Bank."[142] However, his ideas were rejected by most of his contemporaries, particularly from what has now come to be regarded as the moderate Brazzaville and Monrovia Groups,[143] as opposed to the radical Casablanca Group that Nkrumah led.[144]

Tragically, what Nkrumah feared has come upon Africa. As this paper has attempted to show, Africa is sliding down the slope of underdevelopment, while the rest of the world is undergoing far-reaching economic and political transformations. The continent has not been able to point to any significant

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138. Jakkie Cilliers, *Commentary: Towards the African Union*, 10(2) AFRICAN SECURITY REV. (2001), *available at* http://www.iss.co.za/Pubs/ASR/10No2/Cilliers.html (last visited Sept. 15, 2002).

139. *See generally* OAU Charter, *supra* note 3, art. II.

140. *See* KWAME NKRUMAH, AFRICA MUST UNITE (1963).

141. *See id.*; *see also* Julius Nyerere, *A United States of Africa*, 1 J. MOD. AFRIC. STUD. 1 (1963).

142. Derrick, *supra* note 137, at 5.

143. *See* NALDI, *supra* note 51, at 2. The Brazzaville Group represented a gradualist approach to African unity and advocated a loose association of states. *See id.* It was composed of Cameroon, Central African Republic, Chad, Congo Brazzaville, Cote d'Ivoire, Dahomey (now Benin), Gabon, Mauritania, Madagascar, Niger, Senegal, and Upper Volta (now Burkina Faso). *See id.* This group later metamorphosed into the Monrovia group, with the addition of seven other States—Liberia, Togo, Ethiopia, Libya, Nigeria, Sierra Leone, and Somalia. *See id.* It sought unity of aspirations and of action based on African social solidarity and political identity, urging co-operation in the economic, cultural, scientific and technical fields. *See id.*; *see generally* C.O.C. AMATE, INSIDE THE OAU: PAN-AFRICANISM IN PRACTICE 46 *et seq.* (1986); C. MUNHAMU BOTSIO UTETE, AFRICAN INTERNATIONAL RELATIONS ch. 5 (1985); MICHAEL WOLFERS, POLITICS IN THE ORGANISATION OF AFRICAN UNITY (1976).

144. The Casablanca Group was composed of Ghana, Guinea, Mali, Morocco, United Arab Republic (now Egypt), and the Provisional Government of Algeria. This group sought a political union and the creation of a United States of Africa along federal lines under a High Command. *See id.*

growth rate or satisfactory index of general well being in the past two or three decades.[145] On the contrary, there is everywhere evidence of degradation:

> [T]he entire African economy is declining and increasingly losing its place in the global economy. Cooperation and regional economic integration are marking time, while official development assistance is decreasing and the external debt burden is becoming heavier. Also, capital flight is coupled with real brain-drain which, each year, strip Africa of tens of thousands of its sons and daughters, professors, scientists and other highly qualified human resources, which escape to the North as the continent progressively loses its cultural identity in the face of dominant foreign cultures.[146]

The challenges facing African countries "due to the current economic situation, globalization and technological changes as well as the increased risks of unemployment, underemployment and the resulting social exclusion"[147] have necessitated the need for home-grown solutions to Africa's problems. The socio-economic context of the Union, thus, emanated from the desire of African leaders to face up to the present challenges of globalization and regional integration. In the face of increasing globalization, the leaders saw the necessity to reflect on appropriate strategies. That search for original solution for Africa led to the revision of the objectives, mandate and mode of functioning of the OAU and to reorient the parameters to addressing the present challenges.

Before the AU Treaty, however, the OAU first adopted the Sirte Declaration in September 1999[148] at its 4th Extraordinary Session, after receiving inspiration from

> the important proposals submitted by Colonel Muammar Ghaddafi, Leader of the Great Al Fatah Libyan Revolution and particularly, by his vision for a strong and united Africa, capable of meeting global challenges and shouldering its responsibility to harness the human and natural resources of the continent in order to improve the living conditions of its peoples.[149]

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145. *See* LAGOS PLAN OF ACTION, *supra* note 50, at 5.

146. *Yaounde Decl.*, *supra* note 1, para. 6.

147. OAU, *Decision on the Holding of a Ministerial Meeting on Employment and Poverty Control in Africa*, AHG/Dec. 166 (XXXVII), para. 3 (2001).

148. *See* OAU, *Sirte Declaration*, EAHG/Decl. (IV) Rev.1 [hereinafter *Sirte Decl.*].

149. *Id.* para. 7.

The Assembly of the OAU then mandated the Council of Ministers "to take the necessary measures to ensure the implementation of the above decisions and in particular, to prepare the constitutive legal text of the Union"[150] and to submit it to the OAU's next annual meeting—the July meeting in which the Treaty was adopted. There were two opposing views on the nature of the Union. The first draft of the Treaty, for example, provided for the Union to coexist with the OAU and the AEC—"an evolutionary process which would culminate into the fusion of the OAU and the AEC" into one institution.[151] This idea was finally rejected, because it would have potentially added to the number of African continental organizations rather than serving the purpose of rationalization and consolidation.

2. *Objectives and Principles*

In principle, the AU Treaty is a successful symbolic result of the political will called African Union—the final goal of the African Unity that African leaders have pursued for several years.[152] The Treaty recalls the heroic struggles waged by Africans and their countries for political independence, human dignity and economic emancipation.[153] It eulogizes Africa's determination "to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world,"[154] particularly in the face of "the challenges posed by globalization."[155]

African leaders adopted the AU Treaty to establish the AU "in conformity with the ultimate objectives of the Charter of ...[the OAU] and the provisions of the Treaty establishing the African Economic Community."[156] It is "intended to be a transformation of the existing institutional framework into a qualitatively higher form of integration and cooperation that would better meet the aspirations of the peoples of Africa for greater unity and solidarity in line with the vision of the Founding Fathers."[157] The objectives and principles of the Union, which "provide an advanced degree of political

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150. *Id.* para. 8(iii).

151. OAU, *Report of the Second Meeting of Legal Experts and Parliamentarians on the Establishment of the African Union and the Pan-African Parliament*, SIRTE/Exp/Rpt (II), para. 15 [hereinafter *Report of Legal Experts*].

152. *See* AU Treaty, *supra* note 2, pmbl. para. 1. The AU Treaty is "[i]nspired by the ideals which guided the founding fathers of [the OAU] and the generations of Pan-Africanists in their resolve to forge unity, solidarity, and cohesion as well as cooperation between African peoples and among African States." *Id.*; *see also Sirte Decl.*, *supra* note 148, para. 3.

153. *See id.* pmbl. para. 3.

154. *Id.* pmbl. para. 5.

155. *Id.* pmbl. para. 6.

156. *Sirte Decl.*, *supra* note 148, para. 8(i).

157. *Report of Legal Experts*, *supra* note 151, para. 14.

cooperation,"[158] cover virtually anything that can be put in the same catalogue even if not in the same category. These include: the promotion and defense of African common positions on issues of interest to the continent and its peoples;[159] the promotion of peace, security and stability on the continent;[160] the encouragement of international cooperation, taking due account of the Charter of the United Nations[161] and the Universal Declaration of Human Rights;[162] the promotion and protection of human and peoples' rights, in accordance with the African Charter on Human and Peoples' Rights;[163] and other relevant human rights instruments.[164]

Some objectives of the AU Treaty are at the core of integration. These are the acceleration of the political and socio-economic integration of the continent[165] and the promotion and defense of African common positions on issues of interest to the continent and its people[166]—such as the arguably unjust regime of globalization. Others include: the establishment of the necessary conditions that will enable the continent to play its rightful role in the global economy and in international negotiations;[167] the promotion of sustainable development at the economic, social and cultural levels as well as the integration of African economies;[168] the co-ordination and harmonization of

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158. *Report of the Secretary General on the Implementation of the Sirte Decision on the African Union*, (EAHG/DEC.1 (V), CM/2210 (LXXIV), para. 7(b) [hereinafter *Report of the Sec. Gen.*].

159. *See* AU Treaty, supra note 2, art. 3(d).

160. *See id.* art. 3(f); *see also* art. 4(e) and pmbl. para. 8.

161. Charter of the United Nations, *adopted* June 26, 1945, entered into force Oct. 24, 1945, as amended by G.A. Res. 1991 (XVIII) 17 Dec. 1963, entered into force Aug. 31, 1965 (557 U.N.T.S. 143); 2101 of Dec. 20, 1965, entered into force June 12, 1968 (638 U.N.T.S. 308); and 2847 (XXXVI) of Dec. 20, 1971, entered into force Sept. 24, 1973, (892 U.N.T.S. 119) [hereinafter UN CHARTER]. One of the principal purposes of the organization is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, and humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion . . . ." *Id.* art. 1(3).

162. Universal Declaration of Human Rights, adopted Dec. 10, 1948; G.A. Res. 217 A (III), GAOR, 3d Sess. (Resolutions, Part 1), at 71, UN Doc. A/810 (1948), *reprinted in* 43 A.J.I.L. 127 (Supp. 1949) [hereinafter UDHR].

163. African Charter on Human and Peoples' Rights, adopted June 27, 1981, entry into force Oct. 21, 1986, OAU Doc. OAU/CAB/LEG/67/3/Rev.5 [hereinafter Banjul Charter]. The values underpinning the Banjul Charter, for example, include the notions of community, rights and responsibilities, solidarity and the right to development. *See generally* CLAUDE E. WELCH, JR. & RONALD I. MELTZER, HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (1984). These values inform and inspire grassroots approaches to human rights. *See id.*

164. *See* AU Treaty, *supra* note 2, arts 3(e) & (h).

165. *See id.* art. 3(c).

166. *See id.* art. 3(d).

167. *See id.* art. 3(i).

168. *See id.* art. 3(j); The objectives of the Union shall be, *inter alia,*

> to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and

the policies between the existing and future RECs for the gradual attainment of the objectives of the Union;[169] and the advancement of the development of the continent by promoting research in all fields, in particular, science and technology.[170] The last of these objectives will, however, remain a pipe dream as long as African leaders continue to pay mere lip service to education, as they are currently doing. The AU Treaty is also intended to accelerate the implementation of the AEC Treaty which will, in turn, bring about higher social cohesion, economic integration, and political cooperation.[171]

Some of the principles that will propel the Union include human rights, universal values, democracy, and good governance and the rule of law,[172] even though in the context of Africa they are high words bearing semblance of worth, not substance.[173] Africa has been a continent infested with corrupt leaders and brutal governments. Presently, many African countries adopt the language of human rights and democracy with great reluctance.[174] Nevertheless, the rhetoric of democracy is welcome, for empirical record suggests that political corruption, the bane of Africa, is lower under democratic conditions than under arbitrary and non-representative governments.[175]

Other principles include the participation of all sectors of the African society in the activities of the Union,[176] the establishment of a common defense policy for the continent, prohibition of the use of force or threat to use force among Member States,[177] promotion of gender equality,[178] respect for the

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monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.

Id. art. 2.

169. *See* AU Treaty, *supra* note 2, art. 3(l).

170. *See id.* art. 3(m).

171. *See id.* pmbl. para. 6 (being "[c]onvinced of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa . . . ."); *Id.* para. 2 (taking cognizance of "the principles and objectives stated in the Charter of the Organisation of African Unity and the Treaty establishing the African Economic Community"); *see also Algiers Declaration*, AHG/Decl. (XXXV) of July 14, 1999, in which the OAU reaffirmed its faith in the AEC. *See id.*

172. *See id.* art. 4(m); *see generally* JAMES G. MARCH & JOHAN P. OLSEN, DEMOCRATIC GOVERNANCE (1995) (advocating an agenda of how individuals and societies can achieve institutions that make politics civil and capable). *See id.*

173. *See* Nsongurua J. Udombana, *Can the Leopard Change His Spots? The African Union Treaty and Human Rights*, 17(6) AM. UNIV. INT'L L. REV. (2002, forthcoming).

174. *See id.*

175. *See, e.g.*, Arthur A. Goldsmith, *Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets*, 58 AM. J. ECON. & SOCIOLOGY (1999), *cited in* Duesenberry, *supra* note 121, at 6.

176. *See* AU Treaty, *supra* note 2, art. 4(c).

177. *See id.* art. 4(f); *see also* UN CHARTER, *supra* note 161, art. 2(4) which provides 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." *Id.*; and the Declaration on Principles of

sanctity of human life, condemnation and rejection of impunity and political assassination, and acts of terrorism and subversive activities.[179] Significantly, the Treaty also provides for the rejection of unconstitutional changes of government,[180] a slogan that started in 1997 during the Harare Summit of the OAU[181] and culminated in the now famous "Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government" in 2000.[182]

Nevertheless, the Treaty enshrines the principles of the sovereign equality and interdependence among Member States,[183] respect of borders existing on achievement of independence,[184] and non-interference by any

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International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *adopted* by the UN General Assembly on Oct. 24, 1970, UN G.A. Res. 2625 (XXV), UN Doc. A/8028 (1971), para. 10.

178. *See id.* art. 4(l).

179. *See id.* art. 4(o).

180. *See id.* art. 4(p).

181. *See* Dec. AHG/Dec.141 (XXXV).The OAU first took a common position on military adventurism at its Harare Summit in 1997 following the *coup d'etat* in Sierra Leone. *See id.* The issue was revitalized and expanded during the Algiers Summit meeting in 1999. *See* 1999 OAU Algiers Decisions on Unconstitutional Changes in Government, adopted during the 35th Ordinary Session of the OAU Assembly, in which it unanimously rejected any unconstitutional change as an unacceptable and anachronistic act, which is in contradiction of its commitment to promote democratic principles and conditions.

182. AHG/Dec.5 (XXXVI), July 2000 [hereinafter *Decl. on Unconstitutional Changes of Govt.*]. The declaration proclaims a continent-wide commitment to democracy and attempts to give substance to that commitment by setting out "common values and principles for democratic governance in [African] countries." *Id.* It firmly rejects "unconstitutional change in government" as "an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions." *Id.* The declaration sets out four scenarios that would constitute such an unconstitutional change: military coup *d'etat* against a democratically elected Government; intervention by mercenaries to replace a democratically elected Government; replacement of democratically elected Governments by armed dissident groups and rebel movements; and refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections. *See id.* If any of these should occur, then a number of actions are triggered. *See id.* First, the Secretary-General "should immediately and publicly condemn such a change and urge the speedy return to constitutional order." *Id.* Second, he "should also convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the OAU." *Id.* This appears to be commitment not to seat a delegation sent to the Organization by the usurping regime. *See id.* And, in fact, this is the next step. *See id.* At the request of the Chairman, the Secretary General or any Member State, the OAU Central Organ may be convened to condemn the change. *See id.* A six-month period follows, during which a restoration of constitutional government will hopefully occur. *See id.* The Decl. provides that "during the six month period, the government concerned should be suspended from participating in the Policy Organs of the OAU." *Id.* Finally, if after six months constitutional order has not been restored, "a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted." *Id.* A Sanctions Subcommittee of the General Organ will be established to monitor compliance with its decisions. *See id.* It should be noted that virtually all these steps appear to be mandatory (actions "should" be taken, as opposed to "may"). *See id.*

183. *See* AU Treaty, supra note 2, art. 4(a).

184. *See id.* art. 4(b).

Member State in the internal affairs of another.[185] The combination is not accidental. These triune principles have been the foundation stones of the OAU since its inception. The OAU Charter placed great emphasis on the principles of territorial integrity and political independence of African States[186]—the *reserve domain* doctrine—an emphasis that greatly hampered the functionality and effectiveness of the continental body and reduced it to a mere mutual admiration club. The OAU seems to be an organization where not rocking the boat is genetically engineered into its leaders.

The AU Treaty, however, differs from the OAU Charter in that the non-intervention provision is counterbalanced with "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[187] Nevertheless, it will still be necessary for the AU to further define what is meant by "internal affairs" in Article 4(g) of the AU Treaty, in order to allow for the possibility of regional and international engagement with the security policies of Member States. What constitutes intervention in internal affairs requires a delicate balance between legitimate international concern and a state's exclusive domain. A matter should be denied the character of internal affairs if it amounts to a breach of international law, a threat to international peace, or a gross violation of human rights and self-determination.[188]

Overall the AU Treaty is seen as a "made in Africa" prescription for Africa's illnesses, though the prescription is partially based on a diagnosis that is foreign to Africa.[189] The AU is certainly not a United States of Africa, rather, it is a medium for strong cooperation and integrative mechanism of independent African States. The AU is a strategy to deal with other continents on an even keel, particularly as the methods adopted at the world level to settle Africa's problems do not always meet the requirements of African countries.[190] The AU will also allow Africa to withstand the negative pressures of the

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185. *See id.* art. 4(g).

186. *See, e.g.*, OAU Charter, Art. III(2) which declares that "non-interference in the internal affairs of States" is one of the fundamental principles of the Organization. *Id.*; *see generally* A. Bolaji Akinyemi, *The Organisation of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, 46 BRIT. INT'L L. 393, (1972-73); Obi Okongwu, *The OAU Charter and the Principles of Domestic Jurisdiction in Member-States*, 13 INDIAN J. INT'L L. 589 (1973); U. Orji Umozurike, *The Domestic Jurisdiction Clause in the OAU Charter*, 78 AFR. AFFAIRS 197, 202 (1979).

187. AU Treaty, *supra* note 2, art. 4(h).

188. *See* U. ORJI UMOZURIKE, INTRODUCTION TO INTERNATIONAL LAW 235 (1993).

189. *See* African Centre for Dem. & Hum. Rts. Studies, *Editorial African Union Established*, 11(2) AFR. HUM. RTS. NEWSL. 1, 13 (2001) [hereinafter HUM. RTS. NEWSLETTER].

190. *See id.*

globalization trend and provide effective remedies and redress to the victims of environmental devastation and uneven development.[191]

B. The NEPAD

1. Background

It was the thought of a concerted effort for African economic recovery that eventually crystallized into NEPAD, whose origin dates back to 1999, when Presidents Abdelaziz Bouteflika of Algeria, Thabo Mbeki of South Africa, and Olusegun Obasanjo of Nigeria were at the time the Chairmen of the OAU, the Non-Aligned Movement and the G-77 respectively. [192] These leaders seized the opportunity of their unique positions to address the problems of peace and security, as well as poverty and underdevelopment in Africa. Other pioneering leaders of NEPAD were Presidents Hosni Mubarak of Egypt and Abdoulaye Wade of Senegal.[193] The earlier New African Initiative, on which NEPAD is based, was endorsed by the OAU summit in July 2001.[194] On October 23, 2001, NEPAD was launched in Abuja, Nigeria. The OAU/AU provides its overall policy framework.

2. Objectives

If the AU Treaty is the smoke, then the NEPAD is the flame. NEPAD's main objective is to give impetus to African development by bridging gaps between the continent and the developed world.[195] It is a pledge by African leaders "to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic."[196] The document seeks to extricate Africa "from the malaise of underdevelopment and exclusion in a globalizing [sic] world."[197] There is an implicit presumption here—that poverty and backwardness of Africa are the results of "exclusion" and "marginalization" from "globalization." Although this

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191. *See Document: Statement of the International People's Tribunal on Human Rights and the Environment: Sustainable Development in the Context of Globalisation*, 23 ALTERNATIVE 109-47, 118 (Jan. - Mar. 1998); Morne van der Linde, *Globalization and the Right to a Healthy Environment: The South African Experience*, 6(2) E. AFR. J. PEACE & HUM. RTS. 253, 263 (2000). This article discusses the impact of globalization on environmental rights in South Africa. *See id.*

192. *See generally* L. Aluko-Olokun, *The New Partnership for Africa's Development, available at* http://www.uneca.org/eca_resources/Speeches/2002_speeches/030702presentation_nepad_amb_aluko_olokun.htm (last visited Oct. 13, 2002).

193. *See id.*

194. *See id.*

195. *See generally* NEPAD, *supra* note 9.

196. *Id.* para. 1.

197. *Id.*

presumption is true, it is not the whole, or even the main, truth. Unity, peace, security, prosperity, integration, and sustainable development have eluded Africa for years due largely to inept, mercenary, and corrupt leadership at both the national and continental levels. This point is even acknowledged in the NEPAD document: "Africa, impoverished by slavery, corruption and economic mismanagement, is taking off in a difficult situation. However, if the continent's enormous natural and human resources are properly harnessed and utilised [sic], it could lead to equitable and sustainable growth, and enhance Africa's rapid integration into the world economy."[198]

NEPAD calls for "a new relationship of partnership between Africa and the international community, especially the highly industrialised [sic] countries, to overcome the development chasm that has widened over centuries of unequal relations."[199] Africa wants to attract foreign investment, not merely aid and loans. Thus, "Africans are appealing neither for the further entrenchment of dependency through aid, nor for marginal concessions."[200] Instead, "[w]e will determine our own destiny. . ."[201] through "bold and imaginative leadership that is genuinely committed to a sustained human development effort and the eradication of poverty" and by harnessing all available capital, technology, and human skills.[202] It is common knowledge that Africa's development trajectory has been deflected by the self-serving colossus known as "[t]he loan and aid industrial complex."[203] It is gratifying that the continent is beginning to realize that at best, aid is like a birthday card: it is only a greeting, not the real gift. As this author stated elsewhere, "[d]evelopment is much more than foreign aid. Aid by its very nature is highly political. Some people mistake it for charity; it is not. It is part of a bargain between the donor and recipient."[204]

Regrettably, in its relationship with Africa, the West is still thinking in terms of aid, not trade. Thus, in his patronizing goodwill message to the Conference on the Financing of NEPAD, in April 2002, George W. Bush promised to "make significant new assistance funds available ... to countries that are decisively walking the often-difficult path of not only governing justly, but also investing in their people's health and education, and promoting

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198. *Id.* para. 52.

199. *Id.* para. 8.

200. *Id.* para. 5.

201. NEPAD, *supra* note 9, para. 7.

202. *Id.* para. 6.

203. Muchie, *supra* note 123, at 32; *see also* Roger C. Riddel, *The End of Foreign Aid in Africa? Concerns About Donor Policies,* 98(392) AFR. AFFAIRS 309 (1999); Nicolas van de Walle, *Aids Crisis of Legitimacy: Current Proposals and Future Prosperity,* 98(392) AFR. AFFAIRS 337 (1999). Although neither of these authors foresees the ending of aid, both question its value. One doubts the effectiveness of the renewed emphasis put by some donors on its use directly to relieve poverty; the other perceives a 'crisis of legitimacy' in all that so regularly disappoints the expectations vested in it.

204. Nsongurua J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium,* 22(3) HUM. RTS. Q. 753, 782-3 (2000).

economic freedom."[205] It is submitted that Africa's new seed of partnership with the world will only germinate and bear good fruit when the continent learns to neutralize the harm that "the unholy trinity of loans, aid and debt"[206] has caused over these years. The fear of aid is the beginning of wisdom.

The key success factors of the NEPAD are peace, security, democracy, good political governance,[207] improved economic and corporate governance,[208] and regional cooperation and integration.[209] The peace and security component consists of three elements: promoting long-term conditions for development and security, building the capacity of African institutions for early warning, as well as enhancing their capacity to prevent, manage and resolve conflicts, and institutionalizing commitment to the core values of the NEPAD through leadership.[210] Democracy embodies free and fair elections as well as democratic institutions, respect for human rights, including the rights of women and children, and transparency in public management. Similarly, political governance initiative consists of a series of commitments by participating countries to create or consolidate basic governance and practices, undertaking by participating countries to take the lead in supporting initiatives that foster good governance, and institutionalizing commitments through the leadership of the NEPAD to ensure that the core values of the initiative are followed.[211] Lastly, the objective of the economic and corporate governance initiative is to promote throughout the participating countries a set of concrete and time-bound programs that are aimed at enhancing the quality of economic and public financial management as well as corporate governance,[212] which is critical in a free market-oriented economy.

To achieve these initiatives, NEPAD identifies several priority sectors requiring particular attention and action, including: physical infrastructure, especially roads, railways and power systems linking neighboring countries, information and communications technology, human development, focusing on health and education, including skills development, agriculture, and promoting diversification of production and exports, with a focus on market access for African exports to industrialized countries.[213] Since human resources in particular are important growth factors, African States with no natural resources can harness creativity, inventiveness, and productivity by investing massively in education and training, spurring economic growth.

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205. George W. Bush, *message*, *in* NEPAD, CONFERENCE ON THE FINANCING OF NEPAD, (Dakar, April 15-17, 2002), *available at* http://www.nepadsn.org/delivered_messages/message_whitehouse.pdf (last visited Oct. 13, 2002).

206. Muchie, *supra* note 123, at 32.

207. *See* NEPAD, *supra* note 9, para. 71.

208. *See id.* paras. 86-89.

209. *See id.* para. 91.

210. *See id.* para. 72.

211. *See id.* para. 81.

212. *See id.* para. 88.

213. *See* NEPAD, *supra* note 9, para. 94.

NEPAD also develops a mechanism of peer review. Known as the African Peer Review Mechanism (APRM), the document will be used by Member States of the AU "for the purpose of self-monitoring", and is aimed "to foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration in the continent."[214] It is also intended to enhance the capability of states, to increase the effectiveness of aid, to stem policy reversals, and thus to accelerate development. The collective action, mutual learning, and support implicit in such a mechanism can have great benefits, demonstrating to African citizens and the international community that African countries have the political will and commitment to abide by codes and standards that they set for themselves. However, to be credible and effective, the peer review mechanism must be firmly anchored in rigorous monitoring and evaluation of performance.

In general, Africa will need to mobilize more resources, through a combination of African and external efforts. African countries themselves can take steps to increase national savings by firms and households, ensure more effective tax collection, rationalize government expenditures, and reverse the flow of capital flight, in-part by improving the conditions for domestic investments.[215] The international community can assist most immediately by increasing flows of official development assistance, although such aid needs to be significantly reformed, because the way it is currently delivered "itself creates serious problems for developing countries."[216] Creditors also should provide more debt relief—based on debt sustainability—both for countries qualifying under the Heavily Indebted Poor Countries Initiative and for those outside that debt-relief framework.[217] In addition, more foreign investment is important, but given the current difficulties of attracting private capital flows to Africa, it can only be a longer-term answer to the continent's resource gap. Whatever helps it can get from external partners, "Africa recognises [sic] that it holds the key to its own development."[218]

As a way forward, African leaders appealed to all the peoples of Africa in all their diversity to become aware of the seriousness of the situation and the need to mobilize themselves, "in order to put an end to further marginalisation [sic] of the continent and to ensure its development by bridging the gap between Africa and the developed countries."[219]

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214. *Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD)*, OAU Assembly of Heads of State and Government, 38th Ord. Sess., Durban, South Africa, July 8, 2002, ASS/AU/Decl.1(1), para. 6, *available at* http://www.africa-union.org/en/commpub.asp?ID=106 (last visited Oct. 27, 2002).

215. *See* NEPAD, *supra* note 9, paras. 144 – 45.

216. *See id.* para. 183.

217. *Id.* paras. 146 – 47.

218. *Id.* para. 203.

219. *Id.* para. 55.

The next part examines some of the parameters by which integration can be sustained in Africa.

IV. TOWARDS A SUCCESSFUL INTEGRATION IN AFRICA

As indicated earlier, most African States have, over the last forty or so years, proved themselves to be economically unviable as independent sovereign entities, despite their considerable natural resource endowments. The Bible considers forty years to be a proper time for wandering in a purifying wilderness—an experience that should dramatically reshape and redirect life. Africa's destination should not, like Augustine's *City of God,* be within comprehension but beyond reach. The AU Treaty has great potential, as it will enable the continent to tackle issues "from a central focal point."[220] Together with NEPAD, the Treaty extends and deepens Africa's regional commitment towards democracy, human rights, sustainable development, and peace and security, and does so with greater vigor and determination than has been witnessed before. It presents a unique opportunity for the organization to re-engineer its strategic policy direction and develop practical programs and projects in Africa, based on partnership strategy, for the immediate and medium terms.[221]

Generally, the issues that should remain on Africa's development agenda include: macroeconomic policies and regulatory environment, well developed and regulated financial and banking system, transparency, development of human resources, and an infrastructure provision as well as its efficient operation and maintenance, adequate legal framework, including enforcement of laws, as well as efficient delivery of public services. Political support for integration has to be solidified, with clear strategic priorities established. And the many overlapping regional economic communities need to be rationalized, both in their structure and in their interaction with national governments.[222]

The AU Treaty, as its contents stand, is not a global program of action. It only defined a general framework that is aimed at taking up the challenges facing the continent. It did not come to abolish or abrogate the AEC Treaty but to fulfill it; it only abolished the OAU Charter. Thus, the adoption of the AU Treaty will certainly necessitate a structural process and content review of the AEC Treaty. This is important, from a legal point of view, in order to ensure a sound legal basis for the AU and respect for its rule of law is maintained. It will also provide for the progression from organizational activities dominated by security and stability crisis situations to a developmental focus and emphasis. These issues are crucial if the ship of

220. Martha Bakwesegha, *From Unity to Union*, CONFLICT TRENDS 28, 30 (2001).

221. *See* UN HIGH COMMISSIONER FOR HUMAN RIGHTS, AFRICAN REGIONAL DIALOGUE 1: GENERAL REPORT 7 (2001).

222. *See ECA Report 2002*, *supra* note 119, at 10.

integration is to carry the continent and anchor it in the promised land of unity, peace, and sustainable development.

It is to some of these parameters that this section now turns.

A. Popular Participation and Private Sector Involvement

The AU Treaty romanticized on "the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples."[223] A similar sentiment was expressed in NEPAD, in which its architects stated "[t]he *New Partnership for Africa's Development* will be successful only if it is owned by the African peoples united in their diversity."[224] Yet, African leaders deliberately failed to carry out any referendum to obtain the views of the citizens before the adoption of these documents. The movement from the OAU to AU was hardly debated in national legislatures. The OAU simply imposed a superstructure on the people, without their input, thereby raising questions over the legitimacy of the Treaty, if not on its validity.[225] These leaders also unilaterally decided on the processes leading to the formulation of NEPAD. In his prepared speech to the World Economic Forum, Davos, January 2001, Thabo Mbeki, a prime mover of NEPAD, was reported to have said "[i]t is significant that in a sense the first formal briefing on the progress in developing this programme [sic] [NEPAD] is taking place at the World Economic Forum."[226]

All this appears to be a carry-over from African leader's autocratic rule at the municipal levels, where they impose strange and undemocratic constitutions and laws on the citizens, without their participation in their formulation processes. These leaders cannot run the AU and, *a fortiori*, NEPAD in cultic secrecies and expect them to be popular among the citizens. Economic and political integration is inextricably linked with democracy, freedom, and prosperity. Similarly, the history of Pan-Africanism is rooted in civil society and popular struggle; and whatever structures the continent

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223. AU Treaty, *supra* note 2, pmbl. para. 7; *see also* art. 3(g) which has, as one of its objectives, the promotion of "popular participation and good governance." *Id.*

224. NEPAD, *supra* note 9, para. 51.

225. *See* Evod Mmanda, *Debate on Constitutional Reform in Tanzania: Which Way to Effect Democratic Reforms*, paper presented at a workshop on THE PROCESS OF CONSTITUTION-MAKING IN KENYA WITH EXPERIENCES FROM UGANDA AND TANZANIA (Center for Constitutionalism, Nov. 1998). The basis of validity of an instrument is the powers of those implementing it; but the basis of its legitimacy is the way it is accepted by those it is targeting—which is the result of the way they consciously participated or were involved in its promulgation. *See id.* According to Ben Nwabueze, "[t]he legitimacy of a constitution is concerned with how to make it command the loyalty, obedience and confidence of the people . . . ." BEN O. NWABUEZE, THE PRESIDENTIAL CONSTITUTION OF NIGERIA 4 (1982).

226. *Cited in* Patrick Bond, *NEPAD: An Annotate Critique from South Africa*, (April 24, 2002), *available at* http://www.web.net/~iccaf/debtsap/nepad_aidc.htm (last visited May 11, 2002).

struggles to put in place must recognize and embody the basic principles of inclusion, participation, freedom, justice, and equity, which cannot be compromised under any circumstances. As the UNDP rightly observed,

> effective governance is central to human development, and lasting solutions need to . . . be firmly grounded in democratic politics in the broadest sense. In other words, not democracy as practiced by any particular country or group of countries—but rather a set of principles and core values that allow poor people to gain power through participation while protecting them from arbitrary, unaccountable actions in their lives by governments, multinational corporations and other forces.[227]

Consequently, there must be an increase in the pace of democratic participation of ordinary citizens in the affairs and governance of the continent, since exclusion leads to insecurity. People have to be able to take part in open debates over public policies that affect them. Africans must be involved in designing and, when necessary, redesigning the conditions of their co-existence. They must be part of constructing their "social contract."[228] That way, there will be a reciprocal pleasure in governing and being governed. The AU project depends on grassroots mobilization. Poverty reduction and increased decentralization require grassroots mobilization, which has a greater impact in the struggle for basic rights, such as health and access to affordable medicine, than when governments act alone.[229] Participation is also necessary to counter arbitrary and non-representative decisions of the leaders and political authorities. Without open access to decision-makers, the majority cannot press its demands; and, lacking pressure from below, leaders and governments are more likely to abuse their positions.[230]

Africa's problems can no longer be dealt with by "specialists and experts" alone, but also by the "man in the street."[231] Indeed, "uneducated" people are not necessarily irrational people. Mercifully, the leaders have

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227. UNDP, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD vi (2002) (hereinafter UNDP REPORT 2002) (arguing also that institutions and power should be structured and distributed in a way that gives real voice and space to poor people and creates mechanisms through which the powerful—whether political leaders, corporations or other influential actors—can be held accountable for their actions). *See id.*

228. *See* Tade Akin Aina, *Reflections on Democracy and Human Rights*, AFR. TOPICS 30 (Jan. – Mar. 2000).

229. *See* UN HIGH COMMISSIONER FOR HUMAN RIGHTS (UNHCHR), AFRICAN REGIONAL DIALOGUE 1: GENERAL REPORT 14 (2001) [hereinafter UNHCHR GENERAL REPORT].

230. *See* Duesenberry, *supra* note 121, at 6.

231. *See generally* Robert A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, 109 POL. SCI. Q. 23 (1994).

acknowledged the painful experiences of the past[232]—which was characterized by the neglect of real consultation with, and full involvement of, the people. In the absence of such involvement, all the many regional bodies will continue to be private clubs of the ruling elites. It is unfair to expect the citizens to take seriously a document that may have been elaborated with collusion with multilateral corporations only.

The private sector should be challenged to make meaningful contributions to the integration effort, such as economic development, job-creation, business innovation, and technological advancement. The role of a government in modern market-oriented economic integration processes is that of a facilitator, while the actors are private sectors and civil societies.[233] As a vehicle of growth, the private sector should be the driving force in cross-border investment and in the production of goods and non-infrastructural services. But the domestic and international conditions must be conducive. Private sector activity and investment are influenced not only by what individual countries do but also by developments within a particular region.[234] Making policy pronouncements about private sector development is one thing; effectively implementing the policies and effecting the institutional arrangements that are conducive for private sector development is another.

It is gratifying, even if belatedly, that the OAU has recently stressed "the importance of involving African non-governmental organizations, socio-economic organizations, professional associations, and civil society organizations in general in Africa's integration process as well as in the formulation and implementation of programmes [sic] of the African Union."[235] Similarly, NEPAD has promised to establish and nurture Public-Private sector Partnership (PPP) and to "grant concessions towards the construction, development and maintenance or ports, roads, railways and maritime transportation."[236] Thereafter, the leaders will give priority to the implementation of a PPP capacity building program through the African Development Bank and other regional development institutions. Such a program, according to NEPAD, will assist national and sub-national governments in structuring and regulating transactions in the provision of infrastructural and social services.[237] It is one thing to express the problem with exceptional clarity; it is quite another to act upon it. What is important is to translate this rhetoric into practice. Without empowering and involving

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232. *See* NEPAD, *supra* note 9, para. 15.

233. *See* Wilbert Kaahwa, *The Treaty for the Establishment of the New East African Community: An Overview*, 7 AFR. Y.B. INT'L L. 61, 65 (1999).

234. *See* Reed Kramer, *Improve the Environment for Business*, (Oct. 30, 2001), *at* http://allafrica.com/stories/200110300711.html (last visited Oct. 13, 2002).

235. OAU, *Decision of the Assembly of Heads of State and Government on the Implementation of the Sirte Summit Decision on the African Union*, AHG/Dec. 160(XXXVII), July 2001, para. 7(1) [hereinafter *Dec. on Implementation*].

236. NEPAD, *supra* note 9, para. 115.

237. *See id.* para. 154.

Africa's indigenous investors in the integration agenda, the entire project will be a colossal failure if the potential foreign investors fail to turn up.

B. Strengthening the RECs and Improving Infrastructures

As earlier indicated, one of the objectives of the AU is to coordinate and harmonize the policies of the RECs for the gradual attainment of the overall objectives of the Union.[238] This is a laudable objective. However, Africa's failure in previous integration efforts has, *inter alia,* been attributed to the absence of monitoring and enforcement mechanisms to ensure adherence to agreed time-tables on such matters as tariff and non-tariff barrier reductions. The AU must move from rhetoric to action and put the necessary mechanisms in motion for a "dynamic cooperation" with the RECs and the "enhancement of intra and inter-regional trade."[239] This will also fulfill one of the goals of the AEC, which is "to strengthen the existing" RECs.[240] The strengthening and consolidation of the RECs are the pillars for achieving the objectives of the AEC and the AU.[241]

It is important that the overall economic, political, financial, trade policies of the AU filter and spread to the RECs for implementation. Regular exchange of information among the RECs is vital for them to benefit from each other's experience. Two heads are better than one, not because either is infallible, but because both are unlikely to go wrong in the same direction. However, the AU must be at the center of such exchanges to avoid duplication of efforts. This is the only way that the Union will have a harmonized and integrated approach. Given the different levels of economic development of the RECs Member States, the AU and NEPAD will have to adopt certain implementation principles and strategies. These should include the principle of asymmetry, which addresses variances in the implementation of measures in an economic integration process, and the principle of complementarity, which defines the extent to which economic variables support each other in economic activity. There is also the principle of subsidiarity, which emphasizes multi-level participation of a wide range of participants in the process of economic integration, and the principle of variable geometry, which is the principle of flexibility that allows for progression in cooperation among

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238. *See* AU Treaty, *supra* note 2, art. 3 and *AEC Treaty, supra* note 51, Art. 88; the OAU recently reaffirmed the status of the RECs "as building blocs of the African Union and the need for their close involvement in the formulation and implementation of all programs of the Union:" *Dec. on Implementation, supra* note 235, para. 8(b)(ii).

239. OAU, *Lome Declaration,* AHG/Decl.2 (XXXVI), 12 July 2000, para. 15 [hereinafter *Lome Decl.*].

240. *AEC Treaty, supra* note 51, art. 28(1).

241. *See Sirte Decl., supra* note 148, para. 8(ii)(c).

a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.[242]

The RECs also require technical material and other supports, as most of them suffer from inadequate resources for program formulation and implementation. Many RECs countries have very poor infrastructural facilities—roads, railways, ports, and telecommunication facilities.[243] Any integration effort without strong infrastructural facilities is like building a wall with untempered mortar. It will collapse under the pressures of globalization. Similarly, without sustainable industrial development, African economies will be condemned to persistent economic crisis, dependence on humanitarian relief, and deepening poverty. Continuing the cycle, despair and political unrest will set in, with dire consequences for global peace and stability.

Without a strong industrial base, there can be no Foreign Direct Investment (FDI)—defined as an investment involving management control of a resident entity in one economy by an enterprise resident in another economy.[244] In order to attract scarce FDI, a would-be host country must be able to provide the requisite inputs for modern production systems. Efficiency-seeking FDI will tend to be located in destinations able to supply a skilled and disciplined workforce and good technical and physical infrastructure. A good quantity and quality of infrastructure in a location is among the factors that facilitate business operations.[245] All of these are acknowledged in the NEPAD. The question is whether African leaders have the political will to translate their rhetoric into action, since those who want happiness must stoop to find it.

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242. *See Treaty for the Establishment of the East African Community*, signed on Nov. 30, 1999, *cited in* 7 AFR. Y.B. INT'L L. 421 (1999), Art. 1.

243. *See, e.g.*, OAU, *Declaration on Africa's Industrialization*, AHG/Decl.4 (XXXIII), June 1997 (Noting with concern the precarious state of African industries). *See id.* pmbl. para. 1 [hereinafter *Decl. on Industrialization*].

244. *See* United Nations Conference on Trade and Development (UNCTAD), *available at* http://www.unctad.org (last visited Oct. 13, 2002); *see also* DONALD RUTHERFORD, DICTIONARY OF ECONOMICS 178-179 (1995). The author defines FDI as investment in businesses of another country which often takes the form of setting up of local production facilities or the purchase of existing businesses—contrasting it with portfolio investment which is the acquisition of securities. *See id.*

245. *See generally* Kjetil Bjorvatn, *Infrastructure and Industrial Location in LDCs*, OCCASIONAL PAPER, NORWEGIAN SCHOOL OF ECONOMICS AND BUSINESS ADMINISTRATION (1999). The UNCTAD presents some host country determinants of the FDI; *see generally* UNCTAD, WORLD INVESTMENT REPORT (1998). The policy framework includes (i) economic, political and social stability; (ii) rules regulating entry and operations of FDI; (iii) standard of treatment of foreign affiliates; (iv) policies on functioning and structure of the markets; (v) international agreement on FDI; (vi) privatization policy; (vii) trade policy—tariffs and non-tariffs barriers and coherence of FDI and trade policy; and (viii) tax policy. Similarly, the economic determinants include (i) business facilitation; (ii) investment promotion; (iii) investment incentives; (iv) hassle costs—related to corruption and administrative efficiency; (v) social amenities; and (vi) after-investment services. *See id.*

Because RECs are essential determinants of FDI,[246] the AU must work hard to assist them to improve their infrastructural facilities. Assuredly aware of these facts, the OAU has called on Member States and the RECs, with the full involvement of the African private sector and with the technical support of the UN Industrial Development Organization (UNIDO) and other relevant international organizations, to elaborate national and regional plans of action for Africa's industrialization.[247] The OAU has also requested the Secretary General to undertake necessary consultations with all the RECs in order to examine the implications of the AU Treaty on the existing institutional, operational, and programmatic relationship between the OAU and RECs. He is to also examine the current and future programs of the RECs in relation to the objectives of the Union.[248] The OAU has also called on the policy organs of the RECs to initiate a reflection on the relationship between the AU and the respective RECs, including the adoption of appropriate decisions on the most effective modalities for actualizing the relationship.[249]

However, there is a need for rationing resources, as many of the RECs duplicate, not only themselves, but also the major activities of the OAU, leading to waste of valuable but scare resources. International partners need to streamline their programs to ensure that all assistance given to RECs and NGOs is used to support and enhance the programs and projects of the Union and not duplicate or run parallel to them.

C. Dealing With Conflicts

Regional peace and security is an essential foundation for the Union, painfully lacking at the moment, as Africa "holds the record of inter-state wars and conflicts which produce influx of refugees and displaced persons, and result in economic devastation, enormous loss in human life and a drain on its meagre [sic] resources."[250] Conflict is taking its grips on the continent, especially in a great angled swathe from Angola in the southwest to Eritrea in the northeast, with the DR Congo at its fulcrum. The toll on human life is appalling and chilling. Over one million people have died in a twenty-six-year civil war in Angola. In Sudan, over two million people have died in civil war since 1983. Somali is a failed state, ruled by rival warlords since 1991. Inter and intra-state fighting has been raging in the DR Congo since 1996 when rebels overthrew Mobutu Sese Seko. The fighting in Congo has become Africa's First World War, because of the involvement of neighboring

246. *See generally* Honest Prosper Ngowi, *Can Africa Increase its Global Share of Foreign Direct Investment (FDI)?* 2(2) WEST AFRICA REVIEW (2001), *at* http://www.westafricareview.com/war/vol2.2/ngowi.html (last visited Oct. 15, 2002).

247. *See id.* para. 6.

248. *See id.* para. 8(b)(iii).

249. *See id.* at 37.

250. *Yaounde Decl. supra* note 1, para. 6.

countries,[251] where geographic proximity plus the play objectives alliances—where all the actors reason in terms of "the enemy of my enemy is my friend"—imbricate these conflicts.[252]

In Eritrea and Ethiopia, tens of thousands have died in a border war raging since May 1998, a war that is compounded by "the arrogance and miscalculation of two state elites out of touch with the needs of their people, and who think that seeking a compromise is a sign of defeat."[253] Once allies, Rwanda and Uganda are now enemies edging toward major conflict. In Zimbabwe, blacks have seized hundreds of white-owned farms, leading to conflicts and loss of lives. The story is no different in Burundi, where an eight-year conflict between Hutu and Tutsi have left over 200,000 people dead.[254] Sierra Leone has not been left out. Until recently, Foday Sankoh's army of teenage and child fighters spread savagery across the country, murdering and mutilating tens of thousands, including children.[255] Nigeria has also joined the list, and is currently on the edge of a precipice, following unremitting religious and ethnic conflicts that have wasted several thousands of lives and destroyed valuable economic assets.

African states must turn their swords into their ploughshares, because the concept of a Union will continue to be a façade in a continent that is plagued by conflicts. Regrettably, many of the so-called African leaders are involved in fueling these conflicts, as is the case in DR Congo. Unless African leaders begin to put to better use Africa's present bloody fields and sad seas, there will be very little meaningful and beneficial development. There are no rules of architecture for a castle in the clouds. As the AU Treaty itself acknowledges, "the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent."[256] This sentiment is also shared in the NEPAD document, as earlier noted.

Conflict or political instability in a neighboring country has implications for investment, tourism, and other business activities in the immediate vicinity and even beyond. Conflict prone countries themselves are not likely to attract a substantial quantity and quality of investments, although some multinational corporations seem to be so much attracted by mineral deposits in some of these

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251. The countries that are involved in the fray include Burundi, Rwanda, and Uganda—backing the rebels—and Angola, Chad, Namibia, and Zimbabwe—supporting the government. *See* Elizabeth Blunt, *DR Congo War: Who is Involved and Why*, BBC NEWS, Thurs. Jan. 25, 2001, *at* http://www.bbc.co.uk/hi/english/world/africa/newsid_1136000/ 1136470.stm (last visited Oct. 29, 2002).

252. *See* Filip Reyntjens, *Briefing: The Second Congo War: More than a Remake*, 98 AFRICAN AFFAIRS 241, 241 (1999).

253. Jon Abbink, 100(401) AFRICAN AFFAIRS 656 (2000) (reviewing T. NEGASH, BROTHERS AT WAR: MAKING SENSE OF THE ERITREAN-ETHIOPIAN WAR (2000)).

254. *See* Tom Masland & Jeffrey Bartholet, *Fury and Fear*, NEWSWEEK, May 22, 2000, at 16.

255. *See generally* ABDUL KOROMA, SIERRA LEONE: THE AGONY OF A NATION (1996).

256. AU Treaty, *supra* note 2, pmbl. para. 8.

countries that they give a blind eye to political unrest.[257] To the extent that dreadful warfare persists in Africa, it will be difficult for the continent to increase its global share of FDI inflow in any appreciable figure.[258] The promotion of peace, security, and stability is a prerequisite for the implementation of development and integration agenda. It is Africans, not outsiders, who must accomplish these goals through dialogue and effective mediation, peacekeeping, and peace building.

D. Redefining Colonial Boundaries

A regional union cannot go far without a strong and sustained political foundation and commitment. Dealing with the colonial boundaries has repeatedly challenged that commitment. Africa is an arbitrary geographic unit, not a natural, cultural or economic one, with more borders and states than any other region. There is no sense of national identity in Africa; and yet the most effective basis for cohesion that is necessary to sustain a nation state is a sense of national identity emanating from collective consciousness, what the Germans calls the *Volksgeist*. The citizens of a national state can be defined as a "single collection of individuals that has become conscious of its identity."[259]

Modern African states were largely the results of rivalries, partition conferences, and conquests. The Berlin Conference of 1884-5, for example, saw the slicing of Africa into various spheres of influence by the European powers. They made territorial allocations only to reduce armed conflicts among themselves rather than any regard for local inhabitants or geography.[260] This event had a profound impact on the continents of Africa and Europe and their peoples, and, indeed, the global system at large.[261] As the recent decision of the International Court of Justice (ICJ) on the Land and Maritime Boundary between Cameroon and Nigeria[262] demonstrates, the arbitrary lines drawn on

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257. Indeed, the lack of transparency in resource extraction industries across Africa has encouraged multinational corporations to provide funds to unaccountable military and political elites who then use conflict to cover up corruption and embezzlement in their, including Angola (oil and diamonds), Democratic Republic of Congo (timber, diamonds, cotton), Sierra Leone (diamonds, Liberian timber) and the Sudan (oil).

258. *See* Ngowi, *supra* note 246.

259. M. FORSYTH, THE THEORY AND PRACTICE OF CONFEDERATION 14 (1981).

260. *See* Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT'L ORG. 673, 678-85 (1989); SAADIA TOUVAL, THE BOUNDARY POLITICS OF INDEPENDENT AFRICA 3-17 (1972); *see generally* THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA: WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912 (1991).

261. *See generally* AMADU SESAY, AFRICA AND EUROPE: FROM PARTITION TO INDEPENDENCE OR DEPENDENCE? (1986); WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1974); FRANTZ FANON, THE WRETCHED OF THE EARTH (1963).

262. *See Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, ICJ General List, No. 94, Oct. 10, 2002, *available at* http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF (last visited Oct. 29, 2002) [hereinafter *Cameroon Case*]. The

maps have left countries with meaningless boundaries with no rhyme or reason in the geographical, topographical or ethnic character of particular regions.

More frequently, several ethnic groups have found themselves in one and the same country,[263] living on either side of the administrative frontier. For example, the *Yorubas*, who were previously united under the Oyo Empire, find themselves now divided into the colonies of Dahomey, Nigeria, and the Protectorate of Lagos.[264] The *Ewes* were divided between Gold Coast and Togo, *Efiks* and *Ibibios* between Nigeria and Cameroon and the *Somali* between Ethiopia, Somalia, Kenya and Djibouti.[265] The *Asante* of the Asante Empire found themselves in Ivory Coast (now Cote d'Ivoire) and Ghana. The *Mossi* were divided into Ghana and Burkina Faso (then called Upper Volta) while the *Kanuri* of Kanem-Bornu Empire became colonial subjects in Nigeria, Cameroon, and Chad.[266] In southern Africa, Malawi, South Africa, Zambia, Botswana, Lesotho, and Zimbabwe became countries that developed out of not only the actions of Shaka, the Zulu warrior, but also the intrigues of British settlers led by Cecil Rhodes.[267]

Today's "modern states" are nothing but "imagined communities," where "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[268] In such a state of affairs, nationalism works under false pretenses, and invents nations where they do not exist. Besides, the lack of defined territories by post-independence African states has led to the crisis of "inability to make progress with the integration of its people and to ensure their compliance with strategies designed within a specific territorial framework."[269]

ICJ determined the boundary between Cameroon and Nigeria, *inter alia*, from Lake Chad to the sea and requested each party to withdraw all administrative and military or police forces present on the territories falling under the sovereignty of the other party. In reaching its decision, the ICJ reflected on the scramble for Africa in the following words:

> The dispute between [Cameroon and Nigeria] as regards their land boundary falls within an historical framework marked initially, in the nineteenth and early twentieth centuries, by the actions of the European Powers with a view to the partitioning of Africa, followed by changes in the status of the relevant territories under the League of Nations mandate system, then the United Nations trusteeship, and finally by the territories' accession to independence.

Id. para. 31.

263. *See* MAI PALMBERG, NATIONAL IDENTITY AND DEMOCRACY IN AFRICA 11 (1999).

264. *See id.*

265. *See id.*

266. *See id.*

267. *See* DELE OLOWU AND JAMES S. WUNSCH, THE FAILURE OF THE CENTRALIZED STATE: INSTITUTIONS AND SELF GOVERNANCE IN AFRICA 35 (1990).

268. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (1992).

269. Dominique Darbon, *Crisis of the State & Communalism: New Ideological Stakes in African Integration*, *in* REGIONALISATION IN AFRICA, *supra* note 114, at 41.

The paradox is that while the OAU is striving at regional co-operation and integration, it is simultaneously rigidly adhering to the colonial borders drawn in imperial European capitals. The *uti possidetis juris* doctrine—that disastrous sword of Damocles hanging over the exercise of self-determination—enshrines the inviolability of the frontiers inherited from colonialism. Both the UN[270] and the OAU[271] flatly reject any *ex ante* right to secession. They insist on the cosmopolitan, multi-ethnic solution under all circumstances, even if, as Zelim Skurbaty points out, "the professed Pollyanna of democracy plus minority rights threatens to turn (in some specific cases) into forced cohabitation."[272] Thus, in the *Burkina Faso v. Mali* case,[273] the ICJ emphasized that *uti possidetis juris* constituted a general principle, whose purpose was to prevent the independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging of frontiers.[274]

It has been argued that African rulers have found the reason for their right to rule in the maintenance of these borders: "These boundaries defined and legitimated the particular kind of power structure which grew up within post-colonial African states, and provided the framework for the politics of patronage . . . through which those who controlled these states sought to survive."[275] However, the fact remains that these frontiers militate against the economic, political, or social viability and coherence of the African states thus artificially created. The consequence for Africa of indulging in these two tendencies—that is, remaining politically separate while being convinced of

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270. *See, e.g.*, UN G.A. Res. 2625 (XXV) (1970).

271. *See, e.g.*, OAU Res. 16(1) (1964); *see also* AU Treaty, *supra* note 2, art. 4(b) which enshrines the principle of "respect of borders existing on achievement of independence." *Id.*

272. ZELIM SKURBATY, AS IF PEOPLES MATTERED: A CRITICAL APPRAISAL OF 'PEOPLES' AND 'MINORITIES' FROM THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE AND BEYOND 27 (2000).

273. ICJ Rep. 554 (1986).

274. *See id.* at 566 – 7. *See also* Award of the Tribunal in the *Guinea-Guinea (Bissau) Maritime Declaration* case, 77 I.L.R. 77, 636 at 657 (para. 40) (1985); Award of the Tribunal in *Guinea (Bissau)—Senegal Delimitation* case, 83 I.L.R. 1, 22 (1989); and the Separate Opinion of Judge *Ad Hoc* Ajibola in *Territorial Dispute (Libya/Chad)* case, 1994 ICJ Rep. 83-92. Steven Ratner has argued that the policy was intended to serve an external and internal purpose: "externally, it would seek to prevent irredentist tendencies by neighbors from turning into territorial claims and the possible use of force. Internally, it would give clear notice to ethnic minorities that secession or adjustment of borders was not an option," Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 A.J.I.L. 590, 595 (1996); *see also* TOUVAL, *supra* note 260, at 90. The relevance of *uti possidetis* today is evidenced by the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, "apparently sanctifying the former internal administrative lines as interstate frontiers," Ratner, *id.* at 590; *see, e.g., Charter of the Commonwealth of Independent States*, 34 I.L.M. 1279, 1283 (1995); *SC Res. 713*, pmbl. para. 8, UN SCOR, 46th Sess., Res. & Dec., at 42, 42-3, UN Doc. S/INF/47 (1991).

275. Christopher Clapham, *Boundaries & States in the New African Order*, *in* REGIONALISATION IN AFRICA, *supra* note 114, at 55.

the need to achieve economic fusion at arm's length—has been "confusion about means and ends."[276]

For true integration to occur, Africa must radically redefine its boundaries in terms of pre-colonial identities, so that regions can consist of people wishing to work together rather than against one another for ethnic benefits. It may also be that existing states need not break up to enter into the new arrangement, although the revisions of borders in alignment with *de facto* authority and resources has been predicted, in the light of economic failures and the contraction of the institutional presence of many governments towards the capital city and away from borders.[277] Either way, African countries need to renegotiate their initial arrangements to enter into an all-African union framework; "[t]hey must be willing to challenge their institutionalised [sic] dependency on transnational actors in order to enter the African national system."[278] There could also be a sort of devolution of power to local rulers, similar to pre-colonial arrangements.[279] What is important is the need to make Africans gain a sense of national and, *a fortiori,* continental identity, otherwise the idea of an "African Union" will simply be a collection of thousands of tribes competing for ever-diminishing and diminished resources.

It is on this note that this paper may, *salva reverantia,*[280] commend Africa's efforts, through NEPAD, to focus on the region as a primary operational sphere rather than the African state in its current boundaries. NEPAD has chosen to elaborate its projects in ten sectors in each of the continent's five regions—West, North, Central, East, and Southern Africa and Madagascar.[281]

E. Africans Must Learn to Live Together

The OAU has urged Member States to take the necessary steps to popularize the AU among African citizens at all levels, "so that the [AU] can be truly a Community of Peoples."[282] This is obviously a noble idea, except that the love-hate attitude of some Africans towards their fellow Africans might prevent such "a Community of Peoples" from evolving. Being loved is not the same thing as being safe; and being hated is a danger in itself. Thousands of Africans are regular victims of expulsions, harassment and even massacre at the hands of fellow Africans, "for no reason other than the fact that

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276. Mistry, *supra* note 11, at 553.
277. *See* Clapham, *supra* note 275, at 62.
278. Muchie, *supra* note 123, at 39.
279. *See* Clapham, *supra* note 275, at 63.
280. Without outraging reverence.
281. *See* NEPAD, *Conference on the Financing of NEPAD,* Dakar, (April 15-17, 2002), *available at* http://www.nepadsn.org/entry.html (last visited Oct. 15, 2002).
282. *Dec. on Implementation, supra* note 235, para. 6(i).

they are simply not welcome in their country of abode."[283] In Libya, blacks have been ferociously and, sometimes, murderously attacked by local citizens, furious with Ghaddafi for consorting with and financing "blacks" at the expense of Arab-Africans in his own country. They clearly do not share Ghaddafi's desire to encourage pan-Africanism.[284]

There is a massive gang-up against Nigerians in Ghana, "helped by the Ghanaian media who take turns to express anti-Nigerian sentiments both in print and on air."[285] As Mr. Ogbechie stated: "The belief in Ghana is that every Nigerian is rich. They also believe that any crime committed in Ghana is by Nigerians . . . The Ghanaians think that they are avenging what Nigerians did to them in 1983 when Nigeria asked them to leave the country."[286] It is true that the ECOWAS "sustained a serious injury" when Nigeria took action, on January 17, 1983, to expel a large number of illegal resident aliens, many of whom were citizens of ECOWAS Member States.

If the idea of an African Union and economic integration is to be feasible, then the citizens of Member States should be able to move freely throughout the continent. They should be free to live and work any way, with equal access to social benefits, education and civic rights and should be protected by the same fundamental rights, subject, of course, to such reasonable and objective restrictions that are necessary in a democratic society. These are the minimum requirements of a federating entity.[287] Until Africans become their brothers' keepers, and until the wise learn to smile with the simple and the rich eat with the poor, the integration crusade will win no convert.

F. Financing Integration

The viability and credibility of the AU and NEPAD depend critically on the level of funding. Mobilization of resources is crucial in promoting both regional and intra-regional integration. Adequate resources have to be put in developing agriculture, for example, as this remains the backbone of most of the African economies. Without this, the goal of fighting poverty will remain "a fleeting illusion to be pursued but never attained."[288] Emphasis should be

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283. D. O. Obiaja, *African Union Day: A Resounding Disaster*, 4(36) THE FORUM 8 (June – July 2001).

284. *See* Ofeibea Quist-Arcton, *From OAU to AU—Wither Africa?*, (July 13, 2001), *at* http://allafrica.com/storries/printable/200107130178.html (last visited Aug. 15, 2002).

285. *Detention Leads to Ghana-Nigeria Tension*, AFRICAN TOPICS 20 (Jan. – Mar. 2000).

286. *Id.*

287. *See generally* Edwards v. California, 314 U.S. 160 (1941). The U.S. Supreme Court declared that "it is a privilege of citizenship of the United States, protected from state abridgement, to enter into any state of the Union, either for temporary sojourn or for the establishment of permanent residence there." *Id.* at 183.

288. Bob Marley, *'War': Rastaman Vibration*, *in* A. OJO, BOB MARLEY: SONGS OF AFRICAN REDEMPTION 89 (2000).

placed on the development of micro-credit finance schemes, the provision of market facilities, and the improvement or rural access roads, among many other needs crying for attention.

The critical question is from what source will these resources flow? If the AU expects to draw its resources primarily from membership dues, then this is clearly bad news. How will the AU augment its resources in comparison with the OAU, which has always had chronic funding problems? Will the AU be seeking other sources of funding? A possible source might include some OECD countries; but given that most African countries are highly dependent on concessional finance from these countries for their basic budgetary requirements, it does not make sense for the AU to turn to these governments.[289] Another choice is direct international aid partners for financial needs, which has far-reaching political implications for the accountability of the relevant organs of the AU. If international financial institutions pay the piper, then they will be entitled to dictate the tune of the music. It appears that the AU will find itself between the devil and the deep blue sea.

One of the many reasons for the failure of the OAU to make much impact on the many issues in the continent is lack of willingness on the part of Member States to finance the organization. The OAU has never been able to mobilize even a modest budget of twenty-five to thirty million U.S. Dollars. More than half of the membership does not, or is not in a position to, pay its modest contributions due to a variety of reasons—starting with embezzlement of public funds back home. These rulers have flung their countries' scarce resources to the winds, like rain. Barring any economic miracle, it is overwhelmingly improbable that the *status quo* will change in the foreseeable future, as only very few African countries—including, maybe, South Africa, Mauritius, and Botswana—are on the path of sustainable economic growth.[290] The large majority of others exist on handouts and crumbs from Western countries and their donor agents, in the name of development aid that are, largely, confined to the provisions of technical assistance and advisors as well as research and training.[291]

Some African countries are intrinsically disadvantaged, with few natural resources, while others have particularly challenging physical environments. Several African countries, for example, are currently facing exceptional food

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289. *See* Economic Commission for Africa, *The Architecture and Capacity of the African Union,* AFRICAN UNION SYMPOSIUM, ADF III (2002), *at* http://www.uneca.org/adfiii/auissuepn2.htm (last visited Sept. 15, 2002).

290. *See, e.g., ECA Report 2002*, *supra* note 119, at ix (rating ten African countries as having good economic policies, out of the twenty-three countries assessed with South Africa as the top score, just ahead of Botswana, followed by Namibia, Swaziland, and Mali).

291. *See* TERESA HAYTER, EXPLOITED EARTH: BRITAIN'S AID AND THE ENVIRONMENT 28 (1989).

emergencies caused by difficult weather conditions.[292] Many others are resource-rich but have failed to prosper because of man-made problems, poor governance or economic mismanagement. Angola is a classic example, where man-made problems have brought the country to its knees. Although it is the second largest sub-Saharan oil producer[293] and the fourth largest diamond producer, Angola is nevertheless ranked as the fifteenth most underdeveloped country in the world, with the second worst level of under-five child mortality.[294]

On the eve of the launching of the AU, the continental body was still owed a whopping $54.53 million by 45 of its 54 member countries,[295] including Morocco, which, technically, withdrew its membership in 1984, although its arrears goes back to 1981. Only nine Member States have fully paid their dues, as at May 2002. These are Angola (which, ironically, has been in a civil war for three decades), Botswana, Cameroon, Ethiopia, Mauritius, Namibia, South Africa, Swaziland, and Zambia.[296] Those in arrears include such 'giants' as Nigeria ($1,943,725), Egypt ($1,943,725), Algeria ($1,736,743), Ghana ($2,013,170), and Libya—the flag bearer of the African Union—(2,058,822.80).[297] Chronic financial crisis have prevented the

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292. *See, e.g.*, Global Information and Early Warning System on Food and Agriculture, *Food Supply Situation and Crop Prospects in Sub-Saharan Africa, at* http://www.fao.org/WAICENT/faoinfo/economic/giews/english/eaf/eaftoc.htm (last visited Aug. 1, 2001) (reporting that seventeen countries face food emergencies in sub-Saharan Africa). The countries listed are Angola, Burkina Faso, Burundi, Chad, DR Congo, Eritrea, Ethiopia, Guinea, Kenya, Liberia, Niger, Rwanda, Sierra Leone, Somalia, Sudan, and Tanzania. *See id.*

293. Angola's daily crude oil production in 2000 was 760,000bpd. *See World Oil*, (Feb. 2001), at 91, *available at* http://www.hwwilson.com/Databases/PDFsample/tf5.pdf (last visited Oct. 15, 2002).

294. *See* Philippe Le Billon, *Angola's Political Economy of War: The Role of Oil and Diamonds 1975-2000*, 100 AFRICAN AFFAIRS 55, 57 (2001). *See generally* ANGOLA'S WAR ECONOMY: THE ROLE OF OIL AND DIAMONDS, (Jakkie Cilliers and C. Dietrich eds., 2000).

295. For the list of defaulting countries, see Baffour Ankomah, *African Union in Danger of Being Stillborn*, NEW AFRICAN, June 2002, at 16, 20.

296. *Id.* at 19. *Cf. Decision of Congratulations to Member States Which are Up to Date in the Payment of Their Contributions to The Organization*, OAU Doc. CM/2188, CM/Dec. 551 (LXXIII) (April 2001) (stating that the eleven member states that are paid up are: Botswana, Ethiopia, Mozambique, Namibia, Senegal, South Africa, Swaziland, Togo, Mauritius, Lesotho, and Chad, as of Feb. 26, 2001); *Resolution*, CM/Res. 1279 (LII), para. 2(d); *Resolution*, CM/Res. 1311 (LII).

297. *Id.* at 20. *Cf.* AU Treaty, *supra* note 2, art. 23(1). The AU Treaty provides that:

> [t]he Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom.

Id. See also Decision on the Report of the Fifteenth Session of the Committee on Contributions, para. 6(c), Doc. CM/2189, CM/Dec. 550 (LXXIII) (April 2001) (endorsing the recommendation that nationals of defaulting countries should not be recruited as new staff members. The decision also states that the General Secretariat must comply with this measure for the recruitment of regular as well as temporary staff). *See id.*

continental body from executing most of its programs, not to mention the non-competitive salaries that do not attract and retain qualified technocrats for the body and its institutions.[298] It is doubtful if the continental organization can afford the proliferation of institutions envisaged in the AU Treaty and NEPAD. Most of these institutions overlap in functions, while others are merely recycled elements of some redundant OAU organs. It will be fascinating to see how the AU goes around this problem, particularly as its budget will be more substantial than that of the current OAU. In the end, the reality of things might force the AU to trim down its size, if all of its budget will not be used for overheads and on jamborees.

There are already signs of unease. For the purposes of funding the transitional period, the OAU has authorized its Secretary General to "explore the possibility of mobilizing extra budgetary contributions from Member States, OAU Partners and others,"[299] a euphemism for begging! The OAU has also authorized the Secretary General to "undertake studies, with the assistance of experts, to identify alternative modalities of funding the activities and programmes [sic] of the African Union, bearing in mind that the Union cannot operate on the basis of assessed contributions from Member States only, and to make appropriate recommendations thereon."[300] As noted earlier in this paper, there are also on-going conferences on the financing of NEPAD. These are bold steps though, and it may be suggested that the private sector should play a complimentary role to the public sector in mobilizing resources for integration efforts in Africa.

The danger is that failure to sufficiently fund the AU and NEPAD will leave governments with high disposable income to attempt to buy political loyalty by funding these institutions. Only recently, during the Fourth Extraordinary Session of the OAU in 1999, the Libyan government had to bail out some defaulting States with a check for $4.5 million[301] and a subsequent grant of $1 million to fund the process towards the AU.[302] One may wonder

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298. *See, e.g.*, Council of Ministers, *Decision on the Progress Report of the Secretary General on the Implementation of the Restructuring of the OAU General Secretariat*, Doc 2190 (LXXIII) Rev.1, which, *inter alia*, called upon "the Secretary General to submit to the next Session of the Council within the framework of the Career Development Plan, comprehensive proposals to address motivation of Staff, including the review of salaries," *Id. See also* CM/Dec.554 (LXXIII) (2001). *See also Decision on Improvement in the Conditions of Service of OAU Staff*, 76th Ord. Sess. of the OAU Council of Ministers, Durban, South Africa, 28 June – 6 July 2002, CM/Dec. 654 (granting, "as an interim measure, a 15% salary increase, across the board, to the entire staff [of the OAU] retroactively, with effect from 1st March 2002." *Id.* para. 2. The measure also requested "the General Secretariat to determine in absolute terms, the financial implications of the salary increase granted and to take necessary steps to implement immediately the decision for the benefit of the current staff." *Id.* para. 3.

299. *Dec. on Implementation, supra* note 235, para. 11(ii).

300. *Id.*

301. *See Libya Pays Out OAU Contributions for Seven States*, PAN AFRICAN UNION TREATY, Sept. 7, 1999. The states are Comoros, Guinea-Bissau, Equatorial Guinea, Liberia, Niger, Sao Tome and Principe, and Seychelles. *See id.*

302. *See* Cilliers, *supra* note 138.

why this sudden generosity was extended on the part of Libya? Is Ghaddafi a demagogue, advancing his own interest while pretending to be advancing the interest of Africa? Is his revived interest in sub-Saharan Africa more of a tactical move than a structural shift in its foreign policy, as has been suggested?[303] Recent events lend credence to some of these speculations. Ghaddafi has clearly built his support in the OAU to strengthen Libya's position in international organizations. Africa's support has helped Libya's slow and checkered return to the world fold, after years as a global pariah in international isolation and under UN sanctions for supporting terrorism. The OAU, for example, stood solidly behind Ghaddafi during the Lockerbie crisis that pitted the United States and Britain against Libya.[304]

V. CONCLUSION: A HARMONY OR A CACOPHONY?

The OAU has declared, "25 May as work-free day throughout the territories of Member States of the Organization of African Unity. On this occasion, appropriate activities will be organized to bring African peoples closer together, reaffirm their faith in the integration and popularize the ideals of union in the Continent..."[305] Consequently, Member States have been invited to take all necessary legislative and regulatory measures for the implementation of the decision. Similarly, March 2nd of each year is to be commemorated, as "Union Day," and Member States are "to observe it appropriately."[306]

It is doubtful that the citizens will be able to sing the integration song on these days, as many of them are imprisoned by the chilled winter of penury and unfulfilled longings. The OAU itself estimates that "close to half of its population lives in poverty and misery, while unemployment and under-employment have become endemic, especially in urban areas."[307] This is a very conservative estimate; the reality is that those living on the outskirts of

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303. *See* Asteris Huliaras, *Qadhafi's Comeback: Libya ad Sub-Saharan Africa in the 1990s*, 100 AFRICAN AFFAIRS 5, 9 (2001).

304. *See, e.g.*, OAU, *Declaration on the Dispute Between the Libyan Arab Jamahiriya and the United States of America and Great Britain*, AHG/Dec.2 (XXXIII) (appealing to the Security Council to lift the sanctions imposed on Libya and threatening that continued imposition of sanctions "might lead African countries to devise other means of sparing the Libyan people future suffering."). *Id.* para. 6.

305. OAU, *Decision Proclaiming 25 May a Work-Free Day in Africa*, AHG/Dec.157 (XXXVI), (July 2000), para. 1; *see also Dec. on Implementation*, *supra* note 235, para. 14(i), where the decision was reaffirmed.

306. *Id.*

307. *Yaounde Decl. supra* note 1, para. 6; NEPAD, *supra* note 9, para. 4. In Africa, 340 million people, or half the population, live on less than $1 per day. The mortality rate of children under five years of age is 140 per 1000, and life expectancy at birth is only fifty-four years. Only fifty-eight per cent of the population have access to safe water. The rate of illiteracy for people over fifteen is forty-one per cent. There are only eighteen mainline telephones per 1000 people in Africa, compared with 146 for the world as a whole and 567 for high-income countries. *See id.*

prosperity are far more than those living within it.[308] Several Africans are involved in the perennial struggle for a quality of existence that is often intangible; and in such a condition, they can scarcely be expected to concern themselves with the slogans of integration. They will, at best, exist in an ecstasy of indifference, since there can be no music for a man who is deaf any more than there can be sweet smells for a man with a cold in the nose. Africans are deaf to the high sounding music of a Union, whose chord is uncertainly applied, making the music a *cacophony*.

This new millennium presents Africa with two choices. The first is for the continent to remain as a source of raw materials and, *a fortiori*, a dumping ground for products from the western world. The second is for the leaders to press forward towards a politically united and economically integrated continent, one that is capable of asserting positive influence in the comity of nations as well as competing effectively and participating meaningfully in the elaboration of the arrangements of international trade.[309] There is no neutral ground in the universe. Africa's future economic growth is still predictably gloomy.[310] Yet, without rapid growth and development, African countries will remain "wards of the international community."[311] The future cannot be predicted; it must be created.

It is imperative for Africa's "management generation" to take urgent steps to rescue the continent from its downward slide and to generate a new collective dynamism that can lead to a genuine, self-sustaining, and self-reliant development. Since simply being hungry does not mean that there is food, the leaders must make a last leap in deepest desperation to ensure that this latest journey does not, like the OAU, end in betrayal of hopes and squandering of opportunities. While opening their minds to the lessons of the experience of other societies, they must also adopt a new vision for the continent's renaissance and development, and translate this vision into an appropriate and coherent program of action. They must adopt holistic solutions to a bedeviling predicament transcending the continent's almost two hundred national boundaries. They must construct the African state from the local, sub-national, regional and continental levels, "with a clear self-reliant, self-confident,

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308. *Cf.* UNCTAD, ECONOMIC DEVELOPMENT IN AFRICA: FROM ADJUSTMENT TO POVERTY REDUCTION: WHAT IS NEW? UNCTAD/GDS/AFRICA/2, at 2 (2002) (estimating that the proportion of the population living on less than US$1 a day in the least developed countries of Africa has increased continuously since 1965–1969, rising from an average of 55.8 *per cent* in those years to 64.9 *per cent* in 1995–1999).

309. *See Sirte Decl.*, *supra* note 148, para. 6. "It is also our conviction that our continental Organisation [sic] needs to be revitalised [sic] in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances." *Id.*

310. *See, e.g.*, *ECA Report 2002*, *supra* note 119, at 1 (maintaining that, though Africa's average GDP growth for 2001 was 4 *per cent*, the continent, at that rate, will not achieve any of the Millennium Development Goals set by the UN).

311. Paul Krugman, *Developing Countries in the World Economy*, *in* 118 DAEDALUS 183, 184 (1989).

development agenda."[312] Real change must come from within. The West will not donate or invest their monies out of sympathy to Africa; the continent will have to earn such investment.

The tasks ahead require visionary leadership, courage, hard work, willingness to turn a new leaf, and commitments to building the infrastructures that will make integration and foreign investment possible and secure fundamental freedoms for all. As Fredrick Chiluba, the former President of Zambia and former Chairman of the OAU puts it, "Africa does not have the luxury of time. If we hesitate, or procrastinate in implementing the decision we have taken concerning the establishment of the African Union, time will pass us by. We are living in an era where change takes place in milliseconds."[313] Africans are vigilantly expecting the dividends of integration, like the biblical wise virgins awaiting the coming of the bridegroom. No doubt, "long is the way and hard, that out of Hell leads up to light . . .";[314] but that is the only course by which the continent will escape from this vast wilderness of night. A pragmatic regional integration agenda holds out the prospects of improving the living standards of Africans and the dividends of assured peace and stability that will accrue from the synergies between diplomacy and development. If this new experiment succeeds, it will be the triumph of hope over experience.

312. Muchie, *supra* note 123, at 39.
313. Quist-Arcton, *supra* note 284.
314. John Milton, Paradise Lost, Book II, Line 433 (1667).

ON THE BRINK OF LAWLESSNESS: THE STATE OF COLLECTIVE SECURITY LAW

Nigel D. White*

THE CONCEPT OF COLLECTIVE SECURITY LAW

There are many definitions and discussions of what is meant by "collective security."[1] Very generally we can delineate this area of international relations as any collective action designed to defuse situations that endanger the peace or to combat threats to and breaches of the peace.

Using United Nations (U.N.) Charter terminology, collective security can both promote the peaceful settlement of situations that endanger peace (Chapter VI processes) and take action with respect to threats to the peace, breaches of the peace or acts of aggression (Chapter VII action). Much debate, mostly legal, then centers around the meaning of terms such as "threat to the peace," "breach of the peace," and the more judgmental concept of "aggression."[2]

The well-documented[3] lack of consistency and certainty in the development and application of these terms suggests that the balance between law and politics in this area leans towards the political. If the balance moves significantly towards the political then "the rule-governed character of [collective security] will disappear and, with it, the system's deterrent force.

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1. *See generally* George W. Downs, COLLECTIVE SECURITY BEYOND THE COLD WAR (Michigan Univ. Press 1994).

2. U.N. CHARTER art. 39. 'Aggression' can constitute a crime under international law, giving rise to individual and state responsibility. *See id.* 'Crimes against peace' were within the jurisdiction of the Nuremberg and Tokyo tribunals. *See International Military Tribunal*, 41 AM. J. L. 172, 1947 (Nuremberg). Although the International Criminal Court has jurisdiction over the crime of aggression, there has been no agreed definition of the offence. *See* Rome Statute of the International Criminal Court, July 17, 1998, 37 I. L. M. 999, art. 5. *See* Constantine Antonopoulos, *Whatever Happened to Crimes Against Peace?*, 6 J.CONFL. & SECURITY L. 33 (2001).

3. NIGEL D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY, 42-52 (1997).

It will start to seem like just another context for politics."[4] If the keys that unlock the collective security procedures and machinery are simply political ones then law will struggle to play a profound role in this area. However, it is argued below that this is not necessarily the case – the balance between law and politics is a subtle one. It is true that politics are normally in the ascendancy in this, above all, areas of international law, and also that politics influence the development of international law, but laws, particularly fundamental ones, are not easily swept away by the rise and fall of political tides.

Certainly, there is no inexorable move towards the rule of law in international relations, but with the inception of the U.N. Charter the legal foundations for such a move were laid. The Charter contains the fundamental norm prohibiting the threat or use of force;[5] and it creates the mechanisms for its enforcement. On occasions the rule of law seems to be enforced by the U.N., the primary example being the unprecedented support for the military action taken against Iraq following its invasion of Kuwait in 1990.[6] Faltering steps forward have been balanced by regression towards the anarchic situation that preceded the U.N. Charter. Total regression though has not occurred, for such a collapse is more difficult in the face of the U.N. Charter, a document that has been accepted by many as the constitution of the international community.[7]

Nevertheless, law at this primary constitutional level is under the greatest political pressure. Even relatively clear terms such as "breach of the peace," while retaining their core certainty, have been applied selectively, while other terms, such as "threat to the peace," have an inherent ambiguity, deliberately chosen so as to allow a significant amount of discretion. The amount of discretion, however, is debated,[8] with there being strong contentions that even determinations of threats to the peace by the Security Council are subject to law. It has been suggested that legal principles applicable include the concept

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4. Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INTL. L., 455, 464 (1996).

5. *See* U.N. CHARTER art. 2, para. 4.

6. *See* Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. OF U.N. L. 20 (1997).

7. *See* Rudolf Bernhardt, *Article 103 in* B. Simma (ed.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (1995); CHRISTIAN TOMUSCHAT, THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE (1995). *But see* Gaetano Arangio-Ruiz, *The Federal Analogy and U.N. Charter Interpretation: A Crucial Issue*, 8 E.J.I.L. 1, 9 (1997); J.E. Alvarez, *Constitutional Interpretation in International Organizations in* J-M. Coicaud and V. Heiskanen (eds.), THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 104, 104-110 (2001).

8. *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 727 (1951) (He argues for maximum discretion).

of *bona fides*,[9] the principle of due process,[10] the norms of *jus cogens*, as well as the purposes and principles of the U.N. Charter.[11] Such issues are hotly debated, particularly in relation to the Security Council's coercive action against Libya, and Libya's attempt to question the legality of this action before the International Court of Justice.[12] Although the case has not yet proceeded to the merits, and may never do so given the trial of the two Libyan agents suspected of the Lockerbie bombing,[13] the issue is of profound significance for collective security law. An assertion of legal review over the most jealously guarded element of Security Council discretion would indeed establish the reality of collective security *law*. The existence of discretion is not inconsistent with the idea of the rule of law. It is perfectly possible to state that discretion must be exercised in accordance with the law.

Beneath this level of primary constitutional norms, we can evaluate the application of collective security mechanisms in legal terms, tracing them back to their source, normally within the provisions of constituent treaties of international organizations. Law is more secure at this secondary level since it is not as pressured by political considerations, though they must not be underestimated. Collective security action may take the form of peaceful settlement (or Chapter VI processes in U.N. Charter terms), or coercive action in the form of economic or military measures (Chapter VII action).

Furthermore, institutional development within the U.N. and other entities operating in the field has led to the implication and assertion of other powers. These include the creation of a consensual military option in the form of a peacekeeping force (sometimes labelled "Chapter VI½" action) as well as the more controversial use of international criminal tribunals in a collective security context. Fierce debate is still to be found at this level of legal analysis, for example in the discussion of whether international criminal tribunals can actually contribute to international peace, and whether the Security Council has the power to create such tribunals.[14]

The diversity of views on what constitutes collective security is interesting in itself since it reflects profound uncertainty. In a sense this is partly a product of the fact that collective security is a voyage into the

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9. *See generally* Thomas Franck, *The Bona Fides of Power, the Security Council and Threats to the Peace*, 240 HAGUE RECUEIL 189 (1993).

10. *See Prosecutor v Tadic*, Case No. IT-94-1-AR72, 2 Oct. 1995, para. 18 (Judge Sidhwa dissenting).

11. *See* R. Cryer, *The Security Council and Article 39: A Threat to Coherence?*, 1 J. ARMED CONFL. L., 161 (1996).

12. *See generally* Lockerbie cases (provisional measures), 1992 I.C.J. Rep. 3; (preliminary objections), 1998 I.C.J. Rep. 9.

13. *See* Her Majesty's Advocate v. Al Megrahi, 40 I.L.M. 582 (2001).

14. *See, e.g.*, Colin Warbrick, *The United Nations System: A Place for Criminal Courts?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 237 (1995); Timothy D. Mak, *The Case Against an International War Crimes Tribunal for the Former Yugoslavia*, 4 INTL. PEACEKEEPING 536 (1997).

unknown in that it transcends the view that international society is essentially horizontal and consensual and can have no effective system of regulation or governance. We may have seen the erosion of this in certain areas, economics, human rights even, but to argue that such regulation has or can evolve in relation to the ultimate expression of high politics – the use of military power – automatically attracts accusations of "idealism" or "utopianism."

Indeed, to talk about collective security - and more so when talking about a collective security *system* - we are already assuming some sort of order, some sort of regulation perhaps. Law is presumed to exist, though it is not necessarily inherent in a collective security system, given that it is feasible to build an order on political foundations. However, such a political order is unstable, allowing a tremendous amount of change, often violent, as political considerations alter.

Maybe it is too much to expect law and mechanisms created by legal means to *govern* or *regulate* the use of military force in international relations, though the continuing normative force of the basic rule prohibiting the threat or use of force should not be underestimated. An absolute legalist and institutionalist vision does appear to be an exercise in utopianism. However, the opposite vision offered by the pragmatic or realist view of international relations of a brutal interplay of political interests and power sometimes disguised in normative language itself seems unrealistic given the time and energy states devote to justifying their actions, even their transgressions, not simply politically but legally.

But, it may be suggested that the current flexible use of purportedly legal justifications – for example the prosecution of a so-called global war against terrorism – suggest that we are living in a realist world. In the Middle East we are faced with a choice of trying to settle the conflict by the application of what Morgenthau labelled in 1946 as the "old diplomacy" based on balancing political interests or what he called the "new diplomacy" based on law embodied in the U.N.[15] The exclusion of the U.N. from peace negotiations and the total reliance on the skewed power and influence of the United States is another indication of the current weakening of law and the rise of politics. But this has happened in the past. During the Cold War, the Soviet Union was notorious for playing fast and loose with concepts of international law in order to justify its hemispheric hegemony. The United States was more subtle in its deployment of legal arguments, but was, ultimately, no more convincing. The balance between law and politics is in constant flux, and even though law is in decline at the moment, this does not mean that it is dead or that it will not reassert itself in the future.

Both visions - realist and legalist - are offered in the literature on collective security. Indeed, the global collective security system embodied in the U.N. can be analyzed as an alliance of realist balance of power

15. H.J. Morgenthau, *Diplomacy*, 55 YALE L.J. 1067, 1079-80 (1946).

considerations (in the shape of the permanent five of the Security Council with their veto power) within an institutionalist legal framework.[16]

Brierly pointed out in 1946 that the presence of the veto is a significant, perhaps fatal, flaw in the constitutional edifice of the U.N. Charter. He further argued that the much derided League system may have been a more honest attempt to shape a collective security mechanism suited to a society of states, based as it was on principles of unanimity and voluntarism. "[B]efore international institutions can be raised from the co-operative to the organic type . . . we need a society far more closely integrated than the society of states is to-day."[17] The League failed, according to Brierly, not because of weaknesses in the design of the organization, but in the failure of states to fulfill their obligations under the Covenant.

Nevertheless, the U.N. has survived, although largely ineffective during the Cold War. Though a minority of member states breached the fundamental U.N. Charter provision prohibiting the use of force, and the permanent members ignored the limited restraints that do exist on their right of veto,[18] the Charter has survived, though modified in certain respects by practice that has been accepted as normative.[19]

Furthermore, although powerful states chose to ignore the Charter in many instances, the idea of the U.N. as a mechanism for collective security has survived and its activities in the field have increased dramatically since the beginning of the 1990s. Powerful states cannot afford to be outside the U.N. This is illustrated historically by the temporary Soviet absence from the Security Council in 1950, an absence that enabled the Security Council to authorize military action against North Korea.[20] However, while powerful states remain (for the moment) members of the U.N., they, on occasions, act outside it even in the more proactive post Cold War era, or they claim to be acting in support of it without clear U.N. authority. Weaker states, too, find a certain sanctuary within the U.N., though this is as much a product of economic factors and the fact that they, at least in the General Assembly, can make their voice heard,[21] as it is about receiving protection under the collective security umbrella.

It is clear then that in collective security matters the law is not determinative, at least in a formalist sense. In the real world to achieve

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16. *See* A. Todd, *The Evolution of the International Executive: Reform of the U.N. Security Council* (2001) (unpublished Ph.D. thesis, University of Nottingham).

17. J.L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y.B. OF INT'L L. 83, 92 (1946).

18. *See* U.N. CHARTER art. 27, para. 3; WHITE, *supra* note 3, at 8-11.

19. For example, the practice that does not equate an abstention with a veto under U.N. CHARTER art. 27, para. 3, see the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 22 (June 21).

20. *See* U.N. SCOR 83rd Sess., 474th mtg. (1950).

21. *But see* V.S. Mani, *The Role of Law and Legal Considerations in the Functioning of the United Nations*, 35 INDIAN J. INT'L L. 91, 115 (1995).

solutions we cannot simply apply the law to the facts, although it is an exercise that the academic international lawyer loves to engage in, as students of international law know all too well. On the other hand, it is too simplistic to dismiss law as irrelevant. "Arguing that normative factors are either irrelevant or only marginally relevant to Security Council action undermines the degree to which any social action, including international activity, makes constant reference to normative codes, rules or principles."[22] Although there may be great debate and controversy about the content of these rules and principles, their presence and usage signifies that the "controversy is therefore normative . . . and not empirical."[23]

Powerful states may choose to step outside the normative framework on occasions. This is not just a recent phenomenon – witness the Cuban Missile Crisis in 1962 and the NATO bombings of the Federal Republic of Yugoslavia (FRY) in 1999. However, those states normally try to justify their actions either as actually coming within the institutional legal framework, or they try to stretch the framework, or they claim a customary basis for their action, or sometimes they simply have to admit that in all honesty this is an exceptional circumstance that does not create a precedent for the future. Law is confirmed or re-shaped by these claims and the responses of other states and actors to them. In effect the legal rules claimed to be applicable in any given conflict or dispute are put in the international spotlight, and either survive intact or are modified. Thus collective security law exists somewhere between the formalist and realist positions. However, as I will argue in the conclusion, we must not be too ready to assume that the law has changed when we are faced with behaviour that appears to disregard law even if that behavior is claimed to be reflective of a new law.

ACTORS WITHIN THE UNITED NATIONS: POWERS AND LEGITIMACY

The U.N. is the main actor in the field of collective security. Although there are many other organizations in the field – regional (for example the Organization of American States –OAS, the European Union – EU, and the African Union - AU), sub-regional (for example the Economic Community of West African States – ECOWAS), defence (for example the North Atlantic Treaty Organization - NATO), and security (for example the Organization on Security and Cooperation in Europe - OSCE) – the U.N. is the only global actor.

While the Security Council has "primary responsibility" for international peace and security,[24] the other organs (the General Assembly, the International Court of Justice and the Secretary General) have subsidiary competence, often

22. *See* Koskenniemi, *supra* note 4, at 468.
23. *Id.* at 469.
24. *See* U.N. Charter art. 24, para. 1.

overlooked in the cascade of activity emerging from the Security Council with the end of the Cold War. This activity has caused international lawyers great concern. While applauding increased effectiveness and enforcement, lawyers have been concerned with issues of legality, legitimacy, and selectivity.[25]

In particular, the failure of the Security Council to act effectively – for example in Rwanda in 1994, Srebrenica in 1995 and Kosovo in 1999 – when faced with clear threats to the peace – could be said to be a major factor which has endangered the whole collective security edifice. The U.N. *looks* increasingly irrelevant. In the events that followed September 11, 2001, the Security Council condemned the atrocity and took non-forcible measures,[26] but it has not in any way regulated the United States' military response.[27] Such a vision of the U.N. as being bypassed by major powers must be balanced against the fact that the longer-term solutions to Bosnia, Kosovo, and possibly Afghanistan, are left in the hands of the U.N. The UN appears irrelevant but it is not. Indeed, the presence of protectorate-type administrations in Bosnia, Kosovo, and East Timor represent a new development in the power of the U.N. It is, in effect, the government of these countries.[28] Furthermore, its anti-terrorist measures applicable within all member states taken in response to September 11, 2001 look very much like global governance much more so than its previous sanctions regimes which were targeted at individual states.[29]

While the U.N. is subject to criticism when it does not act, it is also subject to criticism when it does. With the end of the Cold War in the late 1980s, the Security Council has flexed its muscles in a variety of ways. Sometimes, this has been legally problematic, more often there have been question marks over the legitimacy of individual actions, and more fundamentally the issue of the legitimacy of a fifteen member organ (with a built-in pentarchy) "dictating" to the membership of one hundred ninety-one states. Sometimes this dominance narrows even further so that in the case of sanctions against Iraq, it is the refusal of two states (the U.S. and the U.K.) that prevents the lifting of the embargo.[30]

The concentration of governance in the hands of the Security Council is of direct concern to collective security law. While being conceived primarily as an executive body "bestowed with policing power and the capacity to use

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25. *See generally* T.M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

26. U.N. Security Council Resolution, S/Res/1368 (Sept. 12, 2001), U.N. Security Council Resolution, S/Res/1373 (Sept. 28, 2001).

27. The Security Council did authorize an International Security Assistance Force following the defeat of the Taliban. *See* U.N. Security Council Resolution, S/Res/1386 (Dec. 20, 2001). But this did not end the U.S.-led military action in that country.

28. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L. L. 583 (2001).

29. *See* Eric P. J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONFL. SECURITY L. 1, 2 (2002).

30. *See* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L. L. 552, 587 (1993).

coercive force in the form of military and economic sanctions,"[31] the Security Council has also acted in judicial and legislative ways. In liberal democratic theory, the failure to separate these powers in different organs (executive, judicial and legislative) is seen as a recipe for abuse of power, given that this may lead to one organ making law, applying the law and enforcing the law.

Although the Great Powers (the Permanent Five or P5) may have wanted to create an organization based on order or power, they failed to eradicate all references to justice and authority in the U.N. Charter. More importantly those powers made minor concessions to the smaller states, which wanted the General Assembly to have some competence to deal with economic, social and humanitarian matters. These matters had the potential, within a developing constitutional order, to spill into the Security Council's main area of competence. The result according to Koskenniemi is that "[t]he Organization is neither simply a policeman nor a Temple of Justice."[32] During the Cold War, with the Council (the Police) largely unemployed, matters were dealt with in the Assembly (the Temple). They were dealt with not simply in terms of order but in terms of the injustices felt by the majority of members. The result was that "[t]he 'tyranny' of the Great Powers was overruled by the 'tyranny' of the majority."[33] The Assembly, though much weaker in terms of powers, did occasionally try to maintain order in the absence of an effective Security Council. It did this by recognizing that it had recommendatory enforcement powers in the (in)famous Uniting for Peace Resolution of 1950,[34] and by creating the first peacekeeping force to help resolve the Suez crisis in 1956.[35]

However, with the end of the Cold War the position has been changed – "[i]t is not the Assembly that is trying to deal with the problem of order; the Security Council is attempting to deal with the problem of international justice."[36] Koskenniemi argues against this development in essence by stating that considerations of justice (embodied in wide conceptions of peace and security) are not the concern of the Police but of the Temple. He warns us that "[t]he peace of the police is not the calm of the temple but the silence of the tomb."[37]

The legality of the Uniting for Peace Resolution is regarded by many as a theoretical problem given that issues of order (and, increasingly, justice) are now in the hands of the Council. However, there are arguments that in

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31. Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?* 27 N.Y.U. INT'L. L. & POL. 103, 107 (1994).

32. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the U.N.: A Dialectical View*, 6 EUR. J. INT'L. L. 325, 328 (1995).

33. *See id.* at 337.

34. *See* U.N. GAOR, 5th Sess., 302d plen. mtg., U.N. Doc. A/Res/377 (1950).

35. *See* Mone Ghali, *The United Nations Emergency Force I: 1956-1967 in* W.J. DURCH (ed.), THE EVOLUTION OF U.N. PEACEKEEPING, 104 (London, Macmillan, 1994).

36. Koskenniemi, *supra* note 32, at 341.

37. *See id.* at 348.

exceptional cases, it should be revived. Arguably this should have happened in the Kosovo crisis, where the Security Council again appeared to be deadlocked.[38] The arguments in favor of NATO bombing of the FRY in 1999 seemed to be predicated on the need to uphold human rights and to prevent grave injustices – ideal issues to be considered by the General Assembly. The fact that General Assembly approval was not sought undermines the credibility of collective security law. Further, rhetorical claims to be acting on behalf of the "international community," without grounding those actions within concrete manifestations of that community, constitute a serious erosion of the fragile foundations of peace.

Collective security law loses its credibility if it fails to bring powerful actors within its procedures and mechanisms. Paradoxically episodes like Kosovo and Afghanistan, while eroding collective security law may be viewed as bolstering much wider claims for states to use force under customary international law. Claims to controversial customary rights such as humanitarian intervention are growing, as are claims to extend the scope of the existing right of self-defence.

When do terrorist actions give a state the right to exercise self-defence; and if triggered how far does that right extend? The United States has undertaken actions which seem to suggest that answers to these questions depend entirely on the subjective, strategic considerations of the victim state. The danger of creating such precedents is amply shown by Israel's current disastrous war against terrorism. The fact that Israel views its war as internal is irrelevant since the United States' stance on terrorism justifies internal repression as well as external aggression.

Further pressure on collective security law is exerted by states claiming to act in support of Security Council resolutions. This claim is sometimes combined with customary rights so that in Kosovo we had some NATO states claiming the right of humanitarian intervention, though most took the position that these actions were somehow justified under existing Security Council resolutions, though none authorized the use of force in clear language.[39]

Though the initial Security Council authorization given in 1990[40] to use force against Iraq was lawful, there is much greater doubt about the legality of continued military actions by the dwindling Coalition after the conflict had ended in March 1991.[41] This started with the protective measures taken by western forces in Kurdish northern Iraq in April 1991, although there was no

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38. Nigel D. White, *The Legality of Bombing in the Name of Humanity*, 5 J. CONFL. & SECURITY L. 27 (2000).

39. *See generally* U.N. Security Council Resolution, S/Res/1199 (Sept. 23, 1998); Nico Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council*, 3 MAX PLANCK Y.B. OF U.N. L. 59 (1999).

40. *See* U.N. Security Council Resolution, S/Res/678 (Nov. 29, 1990).

41. *See* Nigel D. White, *The Legality of the Threat of Force Against Iraq*, 30 SECURITY DIALOGUE 75 (1999).

clear Security Council authority for such an operation.[42] The claiming of such authority by those states using force has become part of the diplomatic and legal exchanges in the U.N. This has not only been the case with continued military action (mainly by the U.S. and the U.K.) as regards Iraq but also the action taken by NATO against the FRY in 1999. Action taken "in support" of Security Council resolutions has become a controversial legal claim so much so that it is sometimes combined with claims of customary rights allegedly belonging to the states taking the action such as self-defence or, much more controversially, humanitarian intervention. Again we appear to be heading towards a disintegration of the system – in that it seems that law does not shape the debate, it is simply a tool in the hands of the powerful states.[43]

Such claims, as they get wider and wider, and further removed from the basic principles governing the use of force in the U.N. Charter, will lead to a situation of lawlessness, though we are not there yet. The presence of additional or wider customary rights is not necessarily an anathema to the idea of collective security, though it may be argued that if these rights are recognized as wide-ranging and subjective, then it is no longer possible to talk about collective security. If this is the case, while not completely returning to the pre-1919 period of a virtually unlimited right to go to war, international relations will have reached a point where force is permitted in so many instances that the regulation of it no longer makes any sense.

COLLECTIVE SECURITY OUTSIDE THE U.N.

The credibility of collective security law is also dependent on there being workable legal principles governing the relationship between the U.N. and other actors in the field of collective security – regional, sub-regional, defence and security organizations. In considering the relationship between the U.N. and these entities it is pertinent to ask whether we have a collective security system in which universal and regional entities act in harmony to contribute to greater collective security, or do we have competition between them? This is the issue on which Hilaire McCoubrey, along with Justin Morris, has made a significant contribution.[44]

The Kosovo question raised the issue of the use of force by regional agencies. The U.N. Charter seems quite clear on these matters. While collective defence is preserved for such organizations,[45] any enforcement action beyond the purely defensive, to deal with a threat to the peace, requires

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42. *See* U.N. Security Council Resolution, S/Res/688 (Apr. 5, 1991).

43. *See* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 153 (1999).

44. *See* HILAIRE MCCOUBREY & JUSTIN MORRIS, REGIONAL PEACEKEEPING IN THE POST-COLD WAR ERA (2000).

45. *See* U.N. CHARTER art. 51.

the authorization of the Security Council.[46] NATO is an international organization consisting of nineteen member states, which acts on the basis of consensus. Should such an organization be limited by the use or threat of the veto in the Security Council, particularly when NATO's intent is to prevent crimes against humanity being committed?[47] The belief that regional organizations should not be so limited is not confined to NATO, but is also evident in the case of the ECOWAS, a sub-regional organization. ECOWAS has intervened in civil wars in Liberia and Sierra Leone without clear Security Council authority, and has adopted a Protocol that purports to allow it to do this.[48] The new Constitutive Act of the African Union of July 11, 2000, states as one of its principles "[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[49]

Such claims to collective regional intervention are sometimes bolstered by additional assertions of a customary right to humanitarian intervention, or by the consent of the government (if this can be obtained).[50] The fact that regional organizations feel the need to base their interventions on (controversial) customary grounds rather than solely on the basis of their own constituent treaties or documents is a sign of the weaknesses that exist in the legal basis of these actions. However, when taking account of the motives of these organizations – principally but not exclusively the desire to prevent human rights atrocities - should not collective security law reflect their demands?

It could be argued that just as Article 51 of the U.N. Charter was inserted to ensure that regional organizations had the right to defend themselves in emergency situations when confronted with an armed attack, so should such organizations be allowed an emergency right to defend human rights from serious violations.[51] However, such a recognition would have to be built into the legal framework of the U.N., not necessarily by formal amendment but perhaps by General Assembly resolution adopted by consensus. Without universal recognition, regional humanitarian military actions will lack legitimacy as well as legality. Furthermore, the General Assembly would have to set precise pre-requisites for regional humanitarian intervention, otherwise, to paraphrase Simma, the genie of regional self-authorization will be let out of

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46. *See* U.N. CHARTER art. 53, para. 1.

47. *See, e.g.*, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INTL. L. 15, 29 (1999) (statement made in 1998 by U.S. Deputy Secretary of State Strobe Talbott – "we must be careful not to subordinate NATO to any other international body.")

48. *See* Ademola Abass, *The New Collective Security Mechanism of ECOWAS: Innovation and Problems*, 5 J. CONFL. SECURITY L. 211 (2000).

49. *See* Constitutive Act of the African Union, July 11, 2000, art.4(h), *available at* http://www.au2002.gov.2a/docs/key_oau/au_act.htm (last visited Sept. 25, 2002).

50. *See* Christian Walter, *Security Council Control Over Regional Action*, 1 MAX PLANCK Y.B. OF U.N. L, 129 (1997).

51. *Id.* at 167.

the bottle.[52] Nevertheless, the increasing need to utilize regional mechanisms to achieve a better system of collective security is pointed out by McCoubrey and Morris:

> It is rather the case that the end of the Cold War has created a positive opportunity for the regeneration of a genuine global collective security system in which the UN, manifestly, cannot be expected itself to be the unique source of peace support action, but will function rather as the mechanism through which a variety of resources will be deployed to that end in cases of need.[53]

The challenge for the U.N. and regional actors is to produce an acceptable legal framework that allows for regional initiatives and actions but at the same time regulates them.

Cooperation between the universal and regional levels has occurred. This was seen in Bosnia after Dayton in 1995, and in Kosovo after Serbian withdrawal in 1999, where the NATO military operates under U.N. authorization, alongside U.N. and other (*e.g.* OSCE) civilian components. ECOWAS and the U.N. have cooperated in both Liberia and Sierra Leone after initial uncertainty. The world after September 11, 2001, though, does not seem to offer much prospect of further cooperation. Indeed, it seems to represent a profound move away from collective security organizations towards unilateralism.

NATO was at the heart of the operations against the FRY in 1999, though the military force applied was dominated by the United States. NATO was not utilized in a physical way in the case of Operation Enduring Freedom against Afghanistan, though Article 5 of its Treaty was invoked.[54] It seems odd that NATO was in operation in a collective security fashion alien to its origins against the FRY in 1999, but not in a purportedly defensive operation, closer to its *raison d'être*, against Afghanistan in 2001. In reality the war against terrorism is not a response to an armed attack or a series of armed attacks stretching back to Lockerbie but to a continuing threat to the peace represented by terrorist activities. In effect the Security Council recognized this in its resolutions following September 11, 2001, when it found a threat to the peace but did not clearly find that the attack constituted a breach of the

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52. *See* Simma, *supra* note 47, at 20.

53. MCCOUBREY, *supra* note 44, at 243. *See also* David O'Brien, *The Search for Subsidiarity: The UN, African Regional Organizations and Humanitarian Action*, 7 INT'L. PEACEKEEPING 57 (2000).

54. *See* Myjer & White, *supra* note 29, at 8-9 (citing statement by NATO Secretary General Lord Robertson, on Oct. 2, 2001).

peace or act of aggression.[55] The Security Council was unable or unwilling to exercise its primary responsibility to deal with threats to the peace, instead the United States and its ally, the United Kingdom, have acted. This represents the greatest challenge to collective security law.

In terms of the formal legal framework provided by the U.N. Charter, states are not permitted to take military actions except in self-defence or if authorized by the U.N.[56] What has happened in Iraq since the cease-fire in 1991, and Afghanistan since 2001, is that the United States, sometimes acting along with its allies, is taking action to deal with threats to *its* peace. Such a condition, being subjective and unilateral, is manifestly worse than a system, which despite its clear deficiencies, is at least an attempt at collective security to deal with threats to *the* peace. Kosovo is different in that it was more a product of altruistic and multilateral action. It had a greater legitimacy but the failure of NATO to seek General Assembly support undermined this, and the confused claims to legality render it a dubious precedent.[57]

CONCLUSION

The challenge faced by collective security law in attempting to regulate violent actions by states is encapsulated by the statement of Dean Acheson, then former United States Secretary of State, when he considered legal objections to the United States' quarantine of Cuba in 1962. Acheson stated "[t]he power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to the sources of sovereignty."[58] The U.N. system protects such power to a great extent by elevating the P5 to a position where they cannot normally be subject to enforcement action. However, with such power comes responsibility. If the members of the P5 acting within the Security Council disable that body, preventing it from carrying out its responsibility for peace and security, then the U.N. system loses its credibility. Pressure from regional bodies, *ad hoc* coalitions, and single states then mounts to allow them greater freedom of action in the sphere of collective security.

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55. Although the U.N. Security Council Resolution 1368 (Sept. 12, 2001) confirms in general terms the right of self-defence, it only determined that the terrorist attacks amounted to a threat to the peace. *See* S.C. Res. 1368 (Sept. 12, 2001). In contrast the Security Council affirmed the right of self-defence "in response to the armed attack by Iraq against Kuwait" in S.C. Res. 661 (Aug. 6, 1990), following a determination of a breach of the peace in S.C. Res. 660 (Aug. 2, 1990). *See* Myjer & White, *supra* note 29, at 5-7.

56. U.N. CHARTER arts. 42, 51, 53.

57. *See* H.C. Select Committee on Foreign Affairs, Fourth Report, June 7, 2000, paras. 124-44. *See also* International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, paras. 6.7-6.9 (2001), *available at* http://www.iciss.gc.ca/report-e.asp (last visited Aug. 27, 2002).

58. Dean Acheson, *Proceedings of Am. Soc. Int'l L. at its Fifty-fifth Annual Meeting*, 14 AM. SOCIETY INT'L L. PROC. 14-15 (1961-63).

Collective security is beset by tensions - tensions between universal and regional action, between collective and unilateral action, as well as those that exist between institutional legal frameworks and customary international law, and above all, as Acheson's statement shows, between politics and law.

The structures and rules that form the corpus of collective security law are inevitably rudimentary in a field of international relations that is dominated by sovereign states. Their weaknesses contribute greatly to the impression that the world, or at least a significant part of it, is continually balancing on the brink of disaster.

With the horrific attacks that were launched against the United States on September 11, 2001, when three hijacked civilian airliners were flown into the World Trade Center and the Pentagon, we seem to have moved closer again to that edge of lawlessness. The United States' response seems not to be based clearly on the established principles governing self-defence, although the action itself and the reaction of the world may lead to a re-shaping of that law. It is not solely a response to an armed attack, it is mainly a response to a threat to the peace caused by international terrorism – a collective security issue which has only been partially dealt with by the U.N.

What I have outlined is a system that continually shifts between politics and law. The fact that we have undoubtedly moved into a situation in which politics dominates does not mean that we cannot step back from the edge of lawlessness. The majority of states should be more prepared to criticize the United States and its allies – the General Assembly should attempt to reassert itself as the Temple of Justice, condemning illegal uses of force by states as well as terrorists without fear or favor as it tended to do during the Cold War. Otherwise the opportunity will be taken to argue that acquiescence is a condonation of actions taken, thereby giving rise to custom simply permitting powerful states to use force whenever their strategic interests are at stake, a proposition which must be far from the truth. Why would developing or weak states agree with this?[59] A cynic might argue they have no choice but to say nothing (which is not the same as agreeing) for if they object then they are in effect deemed to be siding with the terrorists. This is what President Bush made clear on November 6, 2001, when he stated that those nations not "for" the United States were "against us."[60] Despite the difficulty for the majority in making its voice heard, too much weight must not be attached to the voices and actions of the minority, no matter how powerful. Furthermore, the U.N. is not irrelevant, indeed it remains the only organization with sufficient legitimacy to pull the world back from the chasm of lawlessness that it is yet again looking down into. The U.N. should not compromise its laws and

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59. *But see* Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT'L. L. 21 (2002). *See also* Independent International Commission on Kosovo, *The Kosovo Report*, 172 (2000).

60. BBC NEWS, *Bush urges anti-terror allies to act*, Nov. 6, 2001, *available at* news.bbc.co.uk/hi/...orld/europe/newsid_1642000/16242130.stm.

principles in the face of increasing violence committed by states as well as non-state actors. Above all, we must not forget the idea to which Hilaire McCoubrey dedicated himself - the idea that peace *can* be achieved through law.

WHERE HAVE ALL THE YOUNG GIRLS GONE? PRECONCEPTION GENDER SELECTION IN INDIA AND THE UNITED STATES

I. INTRODUCTION

In Punjab,[1] one of India's most prosperous agrarian states, the 2001 census reported 793 female children per 1,000 male children.[2] This statistic has decreased from a 1991 statistic that reported 882 female per 1,000 male children.[3] The phenomenon is not localized solely in Punjab, but is representative of a disturbing trend occurring throughout all of India.[4] The cause of

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1. Punjab is located in northwestern India. *See* Map of India, *at* http://www.mapsofindia.com/maps/india/h3i00.htm (last visited Oct. 31, 2002). The Northern and Northwestern parts of India, including Punjab, as well as the states of Haryana, Rajasthan, and Western UP, are the areas most unfavorable to female children. *See* S. Sudha & S. Irudaya Rajan, *Intensifying Masculinity of Sex Ratio in India: New Evidence 1981-1991,* Centre for Development Studies, Prasanth Nagar, Ulloor, Thiruvananthapuram (1998), *at* http://www.hsph.harvard.edu/grhf/SAsia/forums/foeticide/articles/sexratio.html (last visited Oct. 31, 2002). These regions are characterized by higher fertility, higher mortality, more masculine sex ratios, and lower status of women than other regions of India. *See id.* The North traditionally had a wheat-based agrarian economy, and social systems marked by dowry, hypergamous marriage and the seclusion of women. *See id.* Nevertheless, female infanticide has been recently observed more frequently in rural South India, a region where this practice was historically unknown. *See id.* Increasing landlessness and poverty, accompanied by an escalating custom of dowry, high gender differentials in wages, low education, and few economic opportunities for women are suggested reasons for the rise of female infanticide. *See id.*

2. *See* 2001 India Census Statistics, *at* http://www.censusindia.net (last visited Oct. 31, 2002).

3. *See* 1991 India Census Statistics, *at* http://www.censusindia.net (last visited Oct. 31, 2002).

4. *See* 2001 India Census Statistics, *supra* note 2. The 2001 census reported the population of India to be 1.027 billion people. *See id.*

TRENDS IN SEX RATIOS 1991-2001, MAJOR STATES OF INDIA (MALES PER 1000 FEMALES)							
	Juvenile sex ratio (ages 0-6)				Juvenile sex ratio (ages 0-6)		
State	**1991**	**2001**	**Per cent change 1991-2001**	**State**	**1991**	**2001**	**Per cent change 1991-2001**
South				***Northwest***			
Andhra Pradesh	1027	1037	0.97	Haryana	1138	1220	6.72
Karnataka	1042		1.05	Punjab	1143	1261	9.36
Kerala	1044	1038	-0.57	***West***			
Tamil Nadu	1055	1065	0.94	Gujarat	1078	1139	5.36
North-Centre				Maharashtra	1057	1091	3.12

this decline is the widespread practice of postconceptual gender selection, typically consisting of ultrasound scanning followed by the abortion of fetuses of the undesired sex.[5] Demand for gender selection is driven partly by the recognized advantage of male children in India's male-dominated culture and partly by the financial burden that a female child will bring in the form of a dowry.[6] In May 2001, the Supreme Court of India responded to the growing problem by ordering governmental authorities to enforce a 1994 law banning sex determination.[7]

In the United States, the social implications of being a particular gender are much less severe than in the Indian culture.[8] Therefore, it would seem that the demand for gender selection would be much lower. In particular, very few couples feel strongly enough about the gender of their child to consider abortion of an already conceived fetus, despite it being of the "undesired" sex.[9] However, new reproductive technologies have emerged which allow the gender of a child to be determined prior to fertilization, thus eliminating the ethical issue of abortion from decision-making.[10]

Bihar	1043	1066	1.97	***East***			
Madhya Pradesh	1050	1076	2.42	Orissa	1034	1053	1.80
Rajasthan	1092	1100	0.72	West Bengal	1034	1038	0.39
Uttar Pradesh	1078	1091	1.19	***India***	1058	1079	1.95

See id.

5. *See* Vicki G. Norton, *Unnatural Selection: Non Therapeutic Preimplantion Genetics Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1600 (1994). In India, a study of 8,000 abortions at clinics throughout the country showed that 7,997 involved female fetuses. *Id.* Apart from abortion, the skewed sex ratio can also be attributed to female infanticide, abandonment or out-adoption (placing unwanted children up for adoption) of girls, under-reporting of female births, and selective neglect of female children. *See generally id.*

6. *See* R.P. Ravindra, *Fighting Female Foeticide – A Long Way to Go*, 6 THE LAWYERS 4, 5 (1991).

7. *See* Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India, 2001 SOL Case No. 340, May 4, 2001 (Supreme Court of India ordering the Central Government and state authorities "to implement with all vigor and zeal" the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994) [hereinafter CEHAT].

8. *See generally* Norton, *supra* note 5. In the United States, where women share equality with men, there is less social and cultural pressure to produce male children. *See id.* at 1601. In the United States, as in other countries with good vital registration, the sex ratio is approximately 104 to 106 boys per 100 girls. *See* Sudha, *supra* note 1. Mortality rates at every age are slightly greater for boys than for girls due to a combination of biological and behavioral factors. *See id.* Thus, with increasing age, the population sex ratio balances out to a slight female dominance overall. *See id.* Most Western societies, irrespective of level of income or development, exhibit this pattern. *See id.*

9. *See* Rosamond Rhodes, *Acceptable Sex Selection*, 1(1) AM. J. BIOETH. 31, 31 (2001).

10. *See* The Ethics Committee of the American Society of Reproductive Medicine, *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTIL. STERIL. 595 (1999) [hereinafter ASRM 1999]. Many methods of sex selection are now available, allowing both preconceptual and postconceptual selection. *See id.* The most reliable preconceptual method of sex selection

Some demand does exist for gender selection in the United States.[11] Two identified target groups that may utilize the new technology are parents who seek a child of a gender different from that of a previous child or children, and parents who have strong preferences for the gender of a first child.[12] The second group consists of Americans of international descent.[13] There has been a sizable migration to the United States of immigrant groups who may retain the same gender preferences that they would have held in their homelands.[14] Thus, acknowledging the existence of these two groups, there does appear to be some existing demand for gender selection in the United States.

This Note is a comparative study of the social, ethical, and legal reasons why India has banned all forms of gender selection, and how those reasons apply in the context of a constitutional analysis of gender selection in the United States. India presents a unique example of the problems that can arise given unrestricted usage of gender selection. After decades of permitting gender selection, India has experienced drastic social ramifications in the form of a markedly skewed sex ratio, thus drawing international attention to their practices of selective abortion and female infanticide, the purposeful killing of "unwanted" female newborns.[15] Primarily, the Note focuses on the

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is flow cytometric separation of X and Y sperm (MicroSort), followed by artificial insemination or in-vitro fertilization. *See* Microsort Gender Selection, *available at* http://www.microsort.net/ (last visited Oct. 31, 2002). MicroSort designed to conceive a girl currently results in an average of 88% X-bearing (female) sperm in the enriched specimen. *See id.* MicroSort designed to increase the probability of conceiving a boy currently results in an average of 73% Y-bearing (male) sperm in the enriched specimen. *See id.* As of June 2002, a total of 460 pregnancies have been achieved using MicroSort; 295 babies have been born so far. *See id.* For a discussion of MicroSort results, see also, E.F. Fugger et al., *Births of Normal Daughters after Microsort Sperm Separation and Intrauterine Insemination, In-vitro Fertilization, or Intracytoplasmic Sperm Injection*, 13 HUM. REPROD. 2367, 2367-70 (1998); J.H. Batzofin, *XY Sperm Separation for Sex Selection*, 14 UROLOGICAL CLINICS N. AM. 609, 609-18 (1987). The most reliable postconceptual method remains chorionic villus sampling of the fetus, followed by a sex-selective abortion. *See* Julian Savulescu, *Sex Selection: The Case For*, 171 MED. J. AUS. 373, 374 (1999). Preimplantation genetic diagnosis provides an alternative more reliable than flow cytometric separation and which does not require abortion. *See id.* Rather, it involves in-vitro fertilization, an embryo biopsy to determine gender, and insertion of the embryo into the mother. *See id.*

11. *See* The Ethics Committee of the American Society of Reproductive Medicine, *Preconception Gender Selection for Nonmedical Reasons*, 75(5) FERTIL. STERIL. 861, 862 (2001) [hereinafter ASRM 2001].

12. *See id.*

13. *See* Norton, *supra* note 5.

14. *See* Immigration, Fiscal Year 1996, *at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm (last visited Oct. 31, 2002). In 1996, the Immigration and Naturalization Service reported 44,859 immigrants to the United States from India. *Id.*

15. *See* India's Female Freefall, *at* http://europe.cnn.com/2001/WORLD/asiapcf/south/06/19/india.ultrasound/index.html (last visited Oct. 31, 2002) [hereinafter India's Female Freefall].

potential effect of new technologies that allow gender selection to be performed prior to fertilization.

Part II will begin by discussing gender selection in India. It will examine the cultural aspects of gender selection in India, namely the underlying reason for the strong preference for male offspring. Then, it will discuss the relevant history of sex determination and India's unsuccessful attempts at prohibiting the practice. Part III will consider the history of gender selection in the United States. Part IV will discuss the many policy arguments that can be made both for and against the use of gender selection. It will also weigh each of these policy arguments in the contexts of India and the United States. Finally, Part V will consist of a United States constitutional analysis of preconception gender selection, examining how the United States Supreme Court might rule on a challenge to a state's regulation of preconception gender selection.

Ultimately, this Note will address the issue of whether there exists in the United States a fundamental, constitutional right to preconception gender selection.

II. GENDER SELECTION IN INDIA

A. The Cultural Aspect of Gender Selection in India

For centuries, India has preferred male children.[16] Historically, one of the main reasons for this preference was the system of hypergamy, in which women can only marry into a social group above their own.[17] Among the uppermost castes, this was often impossible.[18] Furthermore, strict adherence to custom saw that the rules of hypergamy were rarely transgressed, and girls who remained unmarried were frowned upon heavily.[19] Thus, to avoid these

16. *See* M. Kishwar, *When Daughters are Unwanted: Sex Determination Tests in India*, 86 MANUSHI 15, 15 (1995).

17. *See* Judith Heyer, *The Role of Dowries and Daughter's Marriages in the Accumulation and Distribution of Capital in a South Indian Community*, 4(4) J. INT'L DEV. 419, 422-23 (1992). In fact, there existed separate "north Indian" and "south Indian" marriage systems. *See id.* The key elements of the "north Indian" system were: marriage was hypergam-ous; marriage was virilocal at a distance (brides go to live in villages far from the villages in which they grow up, surrounded by their husbands', not their own, kin; brides married very young (and hence were easily subordinated, controlled, dominated). *See id.* The "south Indian" system saw an absence of hypergamy, marriage was virilocal but nearby, and brides did not marry very young. *See id.* This difference explains why sex ratios are much lower in the northern parts of India. *See id.* However, the "south Indian" marriage system has recently seen an increase of dowries, and demographic statistics now show increasing discrimination in the sex ratio. *See id.*

18. *See* Sudha, *supra* note 1.

19. *See id.*

foreseeable problems, newborn girls in upper castes were killed,[20] and young men married females from sub-castes slightly lower than their own.[21]

In India today, families continue to desire sons primarily for economic reasons.[22] As most aging individuals have no social security or retirement pensions, the sons of a family become increasingly responsible for caring for the parents in old age.[23] On the contrary, daughters usually leave the parental family to live with their husbands, and will help care for their parents-in-law.[24] Even if a daughter were to stay in the parental home, she seldom has sufficient earning power to support her parents.[25]

Not only is a daughter unable to provide as well as a son economically, but she potentially represents a considerable economic burden, because her family must typically pay a dowry to her husband's family as a part of marriage custom.[26] A dowry is a payment, either in money or goods, to be

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20. *See id.* Typically, infanticide was carried out by 'dais' (traditional birth attendants), who were coerced by the senior male kin of the woman giving birth, often over the protests of women in the family. *See id.* There was no difficulty in committing infanticide, because the birth and death followed quickly upon each other, with no certificate recorded for either event. *See id.* Nineteenth century records indicate large groups of villages, comprising several hundred upper caste households, where no female child had been allowed to survive for many generations. *See id.*

21. *See id.* It was also common for female infanticide to be used in a strategic manner, as it could aid upper-caste families in improving and consolidating their household socioeconomic status. *See id.* Ownership of land was the hallmark of higher status and there was a constant drive toward acquiring more and more land. *See id.* This was achieved through manipulating the marriage of sons and acquiring dowry from daughters-in-law. *See id.*

22. *See* D.C. Wertz & J.C. Fletcher, *Ethical and Social Issues In Prenatal Sex Selection: A Survey of Geneticists in 37 Nations*, 46(2) SOC. SCI. & MED. 255, 256 (1997).

23. *See id.* Both sexes have internalized the chauvinistic social values that pervade India. *See* M. Sivaraman, *Female Infanticide-Who Bears the Cross?*, PEOPLE'S DEMOCRACY, Vol. XXV, No. 25, June 24, 2001. At an awareness camp for school children conducted in an infanticide-prone area, the children were asked whom they preferred for a sibling – boy or girl. *See id.* Ninety-nine percent favored boys. *See id.* Girls, they said, cost more for their parents. *See id.* A fourteen year old boy even ran away from home when his parents refused to kill the twin girls born to them rather late in their life – he did not want to carry the responsibility of marrying the girls off later in life. *See id.*

24. *See* Gail Weiss, *Sex-Selective Abortion: A Relational Approach*, 12 HYPATIA 3 (1995). Her children, and their labor, will also belong to her husband's family, not that of her father or mother. *See id.*

25. *See* Sudha, *supra* note 1. In 1981-82, the approximate average daily wage of a skilled male agricultural worker in Punjab was Rs.25, that of a female worker ranged from Rs.10-13. *See id.*

26. *See* D.C. Wertz & J.C. Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, Hastings Center Report, May/June 21, 25 (1989). Although the practice of dowry is now illegal in many states, the practice still continues. *See id.* To prohibit the demanding, giving and taking of dowry, the Dowry Prohibition Act, 1961 was put in force in July 1961. *See* Dowry Prohibition Act, 1961, INDIA CODE No. 28 of 1961. The Act maintained that in the case of suicide by a married woman, within seven years from the date of her marriage, a court may presume that such suicide has been abetted or encouraged by her husband or his relatives. *See id.* Also, as a result of the Dowry Prohibition Act, a person who gives or takes, or helps in the giving or taking of dowry can be sentenced to jail for five years and fined Rs.15,000, or the

supplied by the family of the bride as the bride's contribution to the marriage.[27] Moreover, a dowry often requires continuing payments to the groom's family after marriage.[28] Dowry payment has often been identified as the main reason today for female infanticide.[29] Rich or poor, the bride's parents must pay the groom and his family in money, property, or goods.[30]

An ultrasound followed by the abortion of a female fetus avoids the cost of a dowry.[31] With the size of the dowry escalating with a family's social standing, the price tag can be substantial, from a minimal one hundred dollars to a new car, jewelry, gold, an apartment, or a combination of all this and more.[32] To make matters worse, when a dowry payment falls short, it is not unusual for the groom's family to harass the bride.[33] Each year, dowry payment problems lead to the deaths of more than 13,000 young brides.[34]

As a result of the above customs and additional factors, there is a particularly strong social pressure on women to produce a son.[35] As a result of this pressure, pregnant women often dread the possibility of having a daughter.[36] What women have seen of their own experience and of their

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amount of the value of dowry, whichever is more. *See id.* To give or to agree to give, directly or indirectly, any property or valuable security, in connection with a marriage is prohibited. *See id.* The giving of or agreeing to the giving of any amount either in cash of kind, jewelry, articles, properties, etc. in respect of a marriage is absolutely prohibited by the Act. *See id.*

27. *See* Wertz, *supra* note 26, at 25.

28. *See id.*

29. *See* India's Female Freefall, *supra* note 15.

30. *See id.*

31. *See* Ravindra, *supra* note 6, at 5. The message of sex selection as a means of avoiding future dowries has traveled all the way to far-flung villages in the form of roadside advertisements that read, "Spend Rs.500 now, save Rs.50,000 later." *Id.* The cost of a sex determination test is viewed as far outweighing the potential burden of a female child. *See id.* As of January 2001, the currency exchange rate was 46.540 Indian rupees per U.S. dollar. *See* CIA World Factbook 2001, India, Economy, *at* http://www.cia.gov/cia/publications/factbook/geos/in.html (last visited Oct. 31, 2002).

32. *See* Wertz, *supra* note 26, at 25.

33. *See* India's Female Freefall, *supra* note 15.

34. *See id.*

35. *See* Kishwar, *supra* note 16, at 18.

36. *See id.* at 19. It is not uncommon to hear horror stories arising as a result of the pressure to bear a son. *See* Sivaraman, *supra* note 23. All too common are stories such as the following:

> Pandiamma, [sic] in her twenties, was devastated when her husband's family did not come to see her for ten days after her first baby girl was born. Pregnant a second time she lived in terror of conceiving a girl again. Her fears came true and her husband who visited her in the hospital remained sullen and silent. At her mother's home for a month and with no signs of her husband wanting her back, she was caught with the dead baby . . . Asked why she did it, she had said, bewildered: 'I do not know.'

Id. Also common are instances in which women are battered and abused by their husbands for failure to produce a male heir. *See id.* A common theme in most of these instances is women being taunted and abused for not producing an heir to the family. *See id.* Often, the only way women feel they can satisfy family and social norms is to destroy the 'non-heir' female children

mothers' lives gives them an aversion to producing another potential sufferer.[37] Many women are not able to envision their daughters having a better life than they themselves have experienced.[38] In addition, a woman often knows that her own status will be downgraded, and she will be subject to abuse if an unwanted daughter is born to her or she fails to produce a son.[39]

Social customs, such as dowries and hypergamy, are not only the product of a male-oriented society, but also serve to reinforce the cultural preference for male children.[40] Modern reproductive technologies have simply added a new means by which to reinforce the already existing discrimination against females.[41] As such, India's officials realize that the problem they face is not merely with the technologies themselves, but with the underlying cultural biases that fuel their demand.[42]

B. History of Sex Determination and Regulation

As a result of the cultural preference for male children, India has a long history of sex selection.[43] As mentioned above, until recently this preference manifested itself in the horrible guise of infanticide.[44] Over time, medical technologies have emerged which allow gender determination during

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and attempt to produce a new male child. *See id.*

37. *See id.* Women are often subject to seclusion, disinheritance from property, low literacy rates, poor health, and low employment rates. *See id.*

38. *See* Sivaraman, *supra* note 23.

39. *See id.* In Indian culture, men and women are expected to subordinate their individual interests to that of the family. *See id.* Women often see their own interests as indistinguishable from the family's interests, and thus become involved in favoring male children at the cost of daughters. *See id.*

40. *See* Dr. Sabu George, *The Need for Action Against Female Feticide in India*, *at* http://www.aidindia.org/aipsn/health/feticide.html (last visited Oct. 31, 2002).

41. *See id.*

42. *See* CEHAT v. Union of India (2001). The Supreme Court of India commented,

> It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has [a] soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide . . . continues in a different form by taking advantage of advance[d] medical techniques.

Id.

43. *See* S. Khanna, *Prenatal Sex Determination: A New Family Building Strategy*, MANUSHI, No. 86, 23, 27 (1995). Historically, methods of sex selection have ranged from special modes and timing of coitus to the practice of infanticide. *See id.* Certain "indicators," which were really nothing more than old wives' tales, were often thought to reveal gender (preference for spicy food indicated a female fetus; mother sleeping on her right side indicated male fetus; etc.). *See* ASRM 1999, *supra* note 10, at 595. Only recently have medical technologies allowed individuals to know the gender of their fetus prior to birth. *See id.*

44. *See* India's Female Freefall, *supra* note 15.

gestation.[45] This allows for the immediate abortion of unwanted fetuses, rather than requiring a mother to wait until birth to learn the sex of the newborn.[46] This approach of sex-selective abortion is also considered morally preferable to infanticide.[47] Unfortunately, this has meant that families, previously unwilling to kill a newborn, now may choose the "more ethical" approach of sex-selective abortion.[48]

The first private sex determination clinic was established in Amritsar[49] in 1979.[50] Soon thereafter, clinics emerged throughout the country.[51] Even small rural towns were made aware of the emerging technology of ultrasound testing.[52] Elaborate referral networks sprang up, connecting small villages to their nearest urban ultrasound clinics, with each link receiving a commission from the clinics.[53]

Then, in 1982, an error in sex determination diagnosis at the New Bhandari Hospital of Amritsar resulted in the abortion of a much-wanted son of an influential family.[54] The ensuing controversy erupted into a major national issue.[55] In response, the Central Government, while ruling out a legal ban, promised "appropriate action" against the hospital.[56] In actuality, no real

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45. *See* ASRM 1999, *supra* note 10, at 595. The cheapest, most reliable techniques are ultrasound and amniocentesis. *See* Kishwar, *supra* note 16, at 15-16.

46. *See id.*

47. *See* Sudha, *supra* note 1. Sex-selective abortion of females is apparently preferable to female infanticide or abandonment of baby girls. *See id.* Pre-natal sex selection techniques appear to be a substitute for post-natal methods, as shown by increasing masculinity of sex ratios at birth, coupled with more equitable sex ratios of infant and child mortality. *See id.* It appears that the majority of sex selection is now occurring prior to birth. *See id.* Dr Divya Kulkarni, a gynecologist in Belgaum, argues that sex-selective abortion is "more humane than the practice of female infanticide." Sudha Ramachandran, *New Technologies, Old Prejudices Blamed For India's Vanishing Girls*, *at* http://www.developments.org.uk/data/16/id_technology.htm (last visited Oct. 31, 2002). She believes that parents have the right to know the sex of the fetus and make their choices. *See id.* In doing so, she says she helps women avoid going through many pregnancies. *See id.*

48. *See id.*

49. Amritsar is an industrial city located in northwestern India in the state of Punjab. *See generally* Amritsar Net, *at* http://www.amritsarnet.net (last visited Oct. 31, 2002). Amritsar is about five thousand square kilometers and has a population of one million individuals. *See* History of Amritsar, *at* http://www.amritsarnet.net/history_of_amritsar.htm (last visited Oct. 31, 2002). The city is the spiritual center of the Sikhs faith. *See id.* In April 2001, the Akal Takht, the highest religious authority among the Sikhs, issued an edict that any Sikh who indulged in sex-selective abortion would be ex-communicated. Vijaya Pushkarna, *Noble Edict*, *at* http://www.the-week.com/21may06/events5.htm (last visited Oct. 31, 2002).

50. *See* George, *supra* note 40.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See* Ravindra, *supra* note 6, at 5.

55. *See id.*

56. *See id.*

action was taken, and the controversy improved the hospital's public visibility and expanded its business.[57]

The first state law prohibiting the use of prenatal diagnosis for sex selection was the Maharashtra Regulation of Use of Prenatal Diagnostic Techniques Act, 1988.[58] Three other states followed suit in enacting similar legislation.[59] As a result of these regulations, the number of sex determination clinics initially decreased, and it appeared that the practice of sex determination was in decline.[60] This achievement was due largely to sustained campaigning and active monitoring of the Act by the Forum Against Sex Determination and Sex Pre-selection (FASDSP).[61] The campaign against sex determination faltered when the FASDSP became nonfunctional.[62] The collapse of the FASDSP signaled to many clinics that the 1988 Act would not be enforced and many clinics quickly resumed operation.[63]

Sex determination once again became a widespread practice.[64] Only when the 1991 census revealed that the problem of sex determination was more severe than ever before was the Central Government of India finally moved to enact legislation aimed at prohibiting sex determination.[65] In 1994,

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57. *See id.* The hospital's geneticist even shifted to Delhi to start his own laboratory to cater to the needs of his overgrowing clientele, which included top government officials and ministers, the people who enact laws and are responsible for their implementation. *See id.*

58. Maharashtra Legislature Secretariat, L.C. Bill No. VIII of 1988. Maharashtra is a state located in western India. *See* Government of Maharashtra, *at* http://www.maharashtra.gov.in (last visited Oct. 31, 2002). It has a population of seventy-nine million individuals and an area of 308,000 square kilometers. *See id.* The state, while home to less than ten percent of the total population of the country, accounts for nearly one-fourth of the gross value of India's industrial sector. *See id.* Maharashtra also holds Bombay, India's Hollywood, which produces more films each year than any other country in the world. *See id.* For more information on Maharashtra, see *id.*

59. *See* Kishwar, *supra* note 16, at 16. The states of Punjab, Gujarat, and Haryana each passed similar legislation in response to the Maharashtra Act. *See id.*

60. *See id.* Before the prohibition, an amniocentesis cost from Rs.70 to Rs.600. *See id.* After the Maharashtra Act, amniocentesis could still be had for Rs.1,500 to Rs.2000 at average quality clinics. *See id.* The safer method of ultrasound could be performed for Rs.800 to Rs.1,500. *See id.*

61. *See* George, *supra* note 40. The FASDSP was a broad coalition, headquartered in Bombay, that monitored all aspects of sex determination, documented the spread of the technique, and orchestrated the legal and policy steps taken against it. *See* Ravindra, *supra* note 6, at 5.

62. *See* George, *supra* note 40. The FASDSP faltered partly due to insufficient lobbying with the state to set up the mechanisms to register sex determination clinics and partly due to failure to confront the medical profession's insensitivity to the gross violation of medical ethics. *See id.*

63. *See* Kishwar, *supra* note 16, at 16. "The Government of India has not been seriously committed to achieving the intent of this Act." *Id.* All that it took to get around the law was a minor change in the way gender selection was presented. *See id.* Advertisements which earlier had read "Find out if it's a boy or a girl" were replaced by barely veiled messages such as "Healthy boy or girl?," or "Everything you want to know about the child in your womb." *Id.*

64. *See* Sudha, *supra* note 1.

65. *See id.*

the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed, becoming the first national prohibition of sex determination.[66]

The Act stated that determining and communicating the sex of a fetus was illegal,[67] that genetic tests could be carried out only in registered facilities,[68] and that a test could only be offered to women who met certain medical criteria.[69]

However, due to effective lobbying by doctors in the early 1990's, the 1994 National Act was a watered-down version of the 1988 Maharashtra Act and the other state regulations.[70] As a result, the 1994 Act was filled with

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66. *See* Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

67. *See id.* Part III states:

III - REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

On and from the commencement of this Act.-

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus

(2) No person conducting pre-natal diagnostic Procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus [sic] by words, signs, or in any other manner.

6. Determination of sex prohibited

(a) no Genetic Counselling [sic] Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus [sic];

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus [sic].

Id.

68. *See id.* Part II states:

II - REGULATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

On and from the commencement of this Act.

(1) no Genetic Counselling [sic] Centre [sic], Genetic Laboratory or Genetic Clinic unless registered under this Act. shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques ;

(3) no medical geneticist, gynaecologist [sic], pediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a Place other than a place registered under this Act.

Id.

69. *See id.* Part III contains the following requirements:

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely :-(i) age of the pregnant woman is above thirty-five years; (ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal [sic] loss; (iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; (iv) the pregnant woman has a family history of mental retardation or Physical deformities such as spasticity or any other genetic disease;

Id.

70. *See* George, *supra* note 40.

loopholes.[71] Perhaps most importantly, a majority of the Act's restrictions pertained only to Government facilities.[72] Private laboratories and clinics were not banned from carrying-out sex determination tests so long as they were registered.[73] The requirement that clinics be registered helped little, because clinics could be allowed to remain in operation simply by registering as test sites for genetic abnormalities, which was legal.[74] Without keeping a written record, the additional information concerning gender could be easily obtained and provided to potential parents.[75]

The Act was also ineffective because it was made to apply only to pregnant women.[76] This left open the possibility that newer technologies could be developed to determine the sex of a fetus prior to fertilization, as is now possible with new preconceptual selection techniques.[77]

As a result of these loopholes, the Act could not be effectively enforced against the activities it set out to prohibit.[78] Until the Indian Supreme Court's 2001 ruling requiring the 1994 Act to be enforced, not a single conviction had taken place.[79] The result of this partial regulation is that sex determination and selection facilities became privatized, commercialized, and multiplied to cover India.[80]

C. Modern Attempts at Prohibition

Due to the repeated failure of the 1994 Act, and in response to the 2001 census information showing increasingly skewed sex ratios, the Supreme Court of India has recently ordered state authorities to enforce the former prohibition.[81] It is unclear whether this decision will succeed where past regulations have failed, but positive signals have emerged.[82] For instance, signs advertising "ultrasound facility available" which once flourished are now rarely seen.[83] In response to protests by women's groups and the media, even tiny advertisements on trees and utility poles in the smallest towns were

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71. *See* Sudha, *supra* note 1.
72. *See id.*
73. *See* Amit Sengupta, *Prenatal Diagnostic Techniques Bill: Loopholes Galore,* WOMEN'S EQUALITY, April-June 1994, at 10.
74. *See id.*
75. *See id.*
76. *See* Kishwar, *supra* note 16, at 17.
77. *See* ASRM 1999, *supra* note 10, at 595.
78. *See* Sengupta, *supra* note 73, at 10.
79. *See* Ramachandran, *supra* note 47.
80. *See* Sudha, *supra* note 1.
81. *See* CEHAT v. Union of India (2001).
82. *See* India's Female Freefall, *supra* note 15.
83. *See id.*

removed.[84] While this may seem insignificant, early speculation suggests that it may help to sever the elaborate referral networks that currently exist.[85]

Nevertheless, despite these optimistic hopes, it may be sometime yet before the Indian government is finally able to seriously deter the use of sex determination.[86] Hundreds of Indian towns that lack any modern medical facilities still have an abundance of ultrasound centers.[87] Even without advertisements, the poorest illiterate women remain very much aware of the technology.[88] The problem remains that there is a strong cultural bias for male children, keeping demand high for sex determination.[89] Dr. Sabu George, a leading Indian physician and bioethicist, stated that,

> To stem the increasing epidemic of female feticide . . . [o]rganizations and individuals with different priorities and ideological beliefs have to rally together to battle the powerful patriarchal forces operating within the institutions of the family, government and civil society. A transformation of our gendered society, (sic) is necessary for the elimination of female feticide.[90]

Without measures aimed at directly confronting the existing discrimination, prohibiting new technologies may provide only a temporary curative effect, and could drive some families back to the proven practice of infanticide.[91]

III. GENDER SELECTION IN THE UNITED STATES

In the United States, there does not exist a widespread recognized desire to select the gender of children.[92] With stringent criminal sanctions existing in the case of infanticide, the possibility that a parent will desire a particular

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84. *See id.*

85. *See id.*

86. *See* George, *supra* note 40.

87. *See* India's Female Freefall, *supra* note 15. "Villages might not have clean drinking water but they have an ultrasound machine," notes Dr. C.M. Francis of the non-governmental organization Community Health Cell. Ramachandran, *supra* note 47.

88. *See id.* Costs are low for prenatal diagnoses, sometimes less than one hundred dollars. *Id.* However, because of the laws prohibiting such tests, no paper records are conducted. *Id.*

89. *See id.*

90. George, *supra* note 40. Dr. Sabu George was one of the three named petitioners in *CEHAT v. Union of India*, along with the Centre for Enquiry into Health and Allied Themes and Mahila Sarvangeen Utkarsh Mandal (Masum), a research center based in Pune and Maharashtra. *See* CEHAT v. Union of India (2001).

91. *See* George, *supra* note 40.

92. *See* Stratham, et al., *Choice of Baby's Sex*, 341 LANCET 564, 564-65 (1993).

gender greatly enough that they would expose themselves to either murder or child neglect prosecution seems slight.[93]

Also, the importance of being a particular gender has typically not been powerful enough to convince parents to abort a child of an "undesired" sex.[94] Even parents who are strongly committed to having a child of a particular gender have not typically aborted after finding out the fetus was of the opposite sex.[95]

However, new reproductive technologies have emerged which allow the gender of a child to be determined prior to fertilization, thus eliminating any ethical issues of abortion or infanticide from decision-making.[96] The most promising preconception technology is flow cytometric separation of X- and Y-bearing sperm.[97] As this technique is improved, it could significantly increase the use of gender selection by couples contemplating reproduction.[98] Without the burden of sex-selective abortion, many couples previously unwilling to participate in gender selection may now come forward to utilize the procedure.[99]

In particular, medical authorities anticipate two groups who will seek the use of preconception gender selection.[100] First, there are individuals who desire to have a child of a gender different than that of a previous child or children.[101] As noted previously, the cultural preference for a particular gender is not considered a driving force for sex selection.[102] Thus, parents in this group may be selecting a particular gender without considering that a child of that gender would be inherently better. Rather, other social

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93. *See* American Law Institute, Model Penal Code and Commentaries § 210.2 (1985).

94. *See* Julian Savulescu & Edgar Dahl, *Sex Selection and Preimplantation Diagnosis*, 15 HUM. REPROD. 1879, 1879 (2000).

95. *See id.*

96. ASRM 1999, *supra* note 10, at 595.

97. *See* WILLIAM S. KLUG & MICHAEL R. CUMMINGS, CONCEPTS OF GENETICS 23-24 (5th ed. 1997). Females produce only X-chromosome bearing oocytes. *See id.* Males produce both X and Y-bearing sperm. *See id.* When combined with the X-chromosomes of oocytes, X-bearing sperm can produce only XX or female offspring. *See id.* Similarly, Y-bearing sperm combined with the X-chromosome of oocytes can produce only XY or male offspring. *See id.*

98. *See* Microsort Gender Selection, *supra* note 10. The procedure consists of passing laser beams across a flowing array of specially dyed sperm. *See id.* The lasers separate most of the nearly three percent heavier X- from the Y-bearing sperm, thus producing an X-enriched sperm sample for artificial insemination. *See id.* The United States Department of Agriculture (USDA) has licensed the Genetics and IVF Institute in Fairfax, Virginia, to study the safety and efficacy of the technique for medical and "family balancing" reasons. *See* ASRM 1999, *supra* note 10, at 596. In 1998, researchers at the Institute reported a ninety-three percent success rate for selection of females in twenty-seven patients. *See id.* A lower success rate, seventy-two percent, was reported for male selection. *See id.* In addition, flow cytometry has been successful in over 400 sex selections in rabbit, swine, ovine, and bovine species, including successive generations in swine and rabbit. *See* Fugger, *supra* note 10, at 2367-70.

99. *See* ASRM 2001, *supra* note 11, at 862.

100. *Id.* at 863.

101. *See id.*

102. *See* Stratham, *supra* note 92, at 565.

preferences may drive their decision.[103] Currently in America, there is a social preference for two-child families.[104] If this social preference for two-child families remains strong, some families could resort to preconception gender selection to choose the gender of their second child, so as to ensure a child of each sex.[105] Presumably, in such a scenario, girls would be chosen as often as boys, since the decision would rest solely on the gender of previous children, rather than an assumption that one gender is inherently superior.

The second identified group consists of individuals with strong preferences for the gender of their first child.[106] This group may contain individuals with strong religious beliefs, but the primary constituents would be immigrant groups who retain the same gender preferences that existed in their native country.[107] This group could contain many of the large number of immigrants who arrive in the United States from India each year.[108]

Also, the second group would contain people who place a special value on having their firstborn be male or female because of personal experiences or beliefs.[109] For instance, a father may desire a son who will follow in his footsteps and play football.[110] In addition, some parents may feel they would relate better to a particular gender or that they would not be as good a parent to the other gender.[111]

Response in America has been mixed with regard to gender selection. It is widely agreed that sex-selective abortion should be allowed for medical reasons, in order to avoid passing sex-linked genes, enabling parents to avoid passing heritable gender-linked diseases or other abnormalities to their offspring.[112] However, there is more rigorous debate regarding the usefulness of gender selection in the non-medical context.[113]

Recently, the American Society for Reproductive Medicine (ASRM) Ethics Committee published a report concerning the use of preconception gender selection for non-medical reasons.[114] The Ethics Committee recognized, in support of gender selection, that:

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103. *See id.*

104. *See* U.S. Census Bureau, Households and Families Data, *at* http://www.census.gov/population/www/cen2000/briefs.html (last visited Sept. 8, 2002).

105. *See* ASRM 2001, *supra* note 11, at 862.

106. *See id.*

107. *See id.*

108. *See* Immigration, Fiscal Year 1996, *supra* note 14.

109. *See* ASRM 2001, *supra* note 11, at 862.

110. *See id.*

111. *See id.*

112. Judith Daar, *Sliding the Slope Toward Human Cloning*, 1(1) AM. J. BIOETH. 23, 23 (2001).

113. *See* ASRM 1999, *supra* note 10, at 595.

114. *See* ASRM 2001, *supra* note 11.

> parents have traditionally had great discretion in their procreative decisions and that sex selection might provide perceived individual and social goods such as gender balance or distribution in a family with more than one child, parental companionship with a child of one's own gender, and a preferred gender order among one's children.[115]

The International Federation of Gynecologists and Obstetricians (FIGO) Committee for the Ethical Aspects of Human Reproduction and Women's Health stated, "[p]reconceptional sex selection can be justified on social grounds in certain cases for the objective of allowing children of the two sexes to enjoy the love and care of parents."[116]

The sentiment of the medical community is even more amiable to gender selection than the ASRM Ethics Committee or FIGO.[117] Most medical authorities today support a couple's ability to select gender regardless of their motivation.[118] A 1990 survey found that eighty-five percent of Master's-level genetic counselors in the United States would either arrange for prenatal diagnosis or offer a referral.[119] Most regarded sex selection as a private matter between doctor and patient.[120]

Nevertheless, preconception gender selection has also encountered resistance. After consideration of the many conflicting arguments (which are to be elaborated upon in Part IV of this Note), the ASRM Committee concluded that whereas preconception gender selection is appropriate to avoid the birth of child with genetic disorders, it is not acceptable at present when used solely for non-medical reasons.[121] The ASRM Committee's recommendations included, "the most prudent approach at present for the nonmedical use of these techniques would be to use [gender selection techniques] only for gender variety in a family, i.e., only to have a child of the gender opposite of an existing child or children."[122] However, the ASRM Committee left unanswered the question of the acceptability of preconception gender selection for non-medical purposes, stating that, "[i]f the social, psychological,

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115. *Id.* at 862.

116. *See* The International Federation of Gynecology and Obstetrics, Sex Selection, *at* http://www.figo.org/default.asp?id=6094 (last visited Sept. 12, 2002).

117. *See* Wertz, *supra* note 22.

118. *See id.* The genetic counselors surveyed predominantly said that sex selection was a logical extension of parents' acknowledged rights to choose the number, timing, spacing, and genetic health of their children. *Id.* They regarded withholding any service, including sex selection, as medical paternalism and an infringement on patient autonomy. *Id.* In cases involving couples with four children of the same sex, women, who comprised thirty-five percent of doctoral-level geneticists in the U.S., were twice as likely as men to say that they would actually perform prenatal diagnosis. *See id.*

119. *See* Wertz, *supra* note 22.

120. *Id.*

121. *See* ASRM 2001, *supra* note 11, at 861.

122. *Id.* at 863.

and demographic effects of those uses of preconception gender selection have been found acceptable, then other nonmedical uses of preconception selection might be considered."[123]

There are many relevant policy arguments suggested as to whether preconception gender selection ought to be utilized for non-medical reasons. The following section will discuss the many policy arguments raised both in India and the United States.

IV. GENDER SELECTION FOR NON-MEDICAL PURPOSES - POLICY ARGUMENTS

Medical scholars and ethics committees have put forth numerous policy arguments, weighing the pros and cons of preconception gender selection. This Note will first address the policy arguments raised by the situation in India, discussing how they apply to the United States. Subsequently, the Note will discuss the policy arguments particularly relevant in the United States.

A. Policy Arguments - India

1. Imbalance in sex ratio

A major policy concern is that widespread practice of sex selection can lead to imbalanced sex ratios. In India, the technique is widely practiced, and it has led to large sex-ratio imbalances.[124] In fact, sex-ratio imbalance was the only concern mentioned explicitly in the Indian Supreme Court's decision requiring enforcement of the 1994 Act.[125] However, there is no easy application of this data to society within the United States.[126] The most obvious disparity between the two countries is that America has no substantial preference for any particular gender.[127]

There is little threat that allowing preconception gender selection in America would imbalance the sex ratio.[128] Apart from there being little emphasis on gender, studies show that most couples simply prefer to leave the

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123. *Id.*

124. *See* discussion, *supra* Part II(b).

125. *See* CEHAT v. Union of India (2001). "Unfortunately, developed medical science is misused to get rid of a girl child before birth . . . This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance." *Id.*

126. *See* ASRM 1999, *supra* note 10, at 597.

127. *See generally* Stratham, *supra* note 92, at 564-65. A study shows empirical evidence suggesting that individuals in the United States do not have a preference for a particular sex. *See id.*

128. *See* David B. Resnik, *Difficulties with Regulating Sex Selection*, 1(1) AM. J. BIOETH. 21, 22 (2001). It is theorized that a sex-ratio imbalance does not pose a threat to America because cultural rather than biological traits now play the most decisive role in our evolution and survival. *Id.* For an interesting discussion of this topic, see generally *id.*

gender of their children up to fate.[129] Preconception gender selection (in particular, flow cytometric separation) requires artificial insemination or in-vitro fertilization.[130] Thus, this procedure involves not only financial costs, but also additional inconvenience and discomfort that is not associated with coitus.[131] Also, the fact remains that the natural act of making children is generally considered a pleasurable activity. Only those for whom gender is highly important are likely to utilize technology.[132] It is hard to imagine that the number of births employing the technology could rise to the level sufficient to have a demographic effect.[133]

Even among those individuals who do have a strong preference of gender and utilize sex selection, studies show that the tendency is a desire to balance their family's gender ratio, by having an equal number of sons and daughters.[134] The resulting effect would be a balancing, rather than an imbalancing, of the sex ratio.

Even if, for the sake of argument, sex selection in America was allowed and produced drastic changes in sex ratios, a number of self-correcting or regulatory mechanisms might come into play.[135] One option is an approach similar to that which India has taken; upon experiencing a shift in the sex ratio, regulatory measures could be taken to correct that imbalance. In constitutional law, a demonstration of actual overriding harm is a legitimate justification for constraining liberty.[136] Thus, even if the procedure qualified as a procreative liberty, it could still be regulated if a substantial harm could be shown.[137] Results showing an actual threat of sex-ratio imbalance would likely constitute the harm necessary to justify limits on gender selection. This harm has been shown in India, thus triggering its Supreme Court to require enforcement of the 1994 Act.[138] In similar fashion, if such a problem arose in

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129. *See id.*

130. ASRM 1999, *supra* note 10, at 595.

131. *See id.* at 597.

132. *See* Resnik, *supra* note 128, at 22.

133. *See* Liu, P., and Rose, A., *Social Aspects of >800 Couples Coming Forward for Gender Selection of their Children,* 10 HUM. REPROD. 968, 968-71 (1995).

134. *See* Savulescu, *supra* note 94, at 1879.

135. *See id.* Numerous regulations can be hypothesized. *See id.* Regulation does not have to come in the form of an outright prohibition. *See id.* For instance, in response to sex-ratio concerns, a more subtle regulation could consist of laws or policies that require providers (hospitals or clinics) of preconception gender selection to select for males and females in equal numbers. *See id.* This regulation would serve to alleviate the sex-ratio concern, as well as provide a less intrusive alternative to an outright prohibition. *See id.* A related regulation could limit sex selection to balancing intra-family sex ratios, and allow selection only after the first child. *See id.*

136. *See* Constitutional Analysis, *infra* Part V.

137. *See id.* If preconception gender selection is not considered a procreative liberty, a rational basis review will be used and state regulations will likely prevail. *See id.*

138. *See* CEHAT v. Union of India (2001).

America, regulatory measures could then be taken on the basis of actual, rather than speculative, harm.

2. Promote Gender Discrimination

In India, there exists a cultural discrimination towards women.[139] Many opponents of preconception gender selection feel that the ability to select gender will add to this discrimination.[140] In particular, there are two prongs to the argument that sex selection can lead to gender discrimination. The first prong highlights the practice of sex selection as being per se discriminatory, in that it promotes sexist ideals of preferring one gender to the other.[141] The second prong is a corollary of the imbalanced sex ratio argument. It maintains that the resulting imbalance in sex ratio will lead to a primarily male society, subject to the majority rule of men.[142]

Most would agree that the United States maintains a culture where both sexes are held to be equal. Also, since there is no overriding preference for male offspring, it is increasingly difficult to see how sex selection adds to gender discrimination. This is particularly true since couples seeking sex selection are generally motivated by the desire to balance their family.[143] Thus, the decision-making process does not usually include sexist rationales, for no weighing of the sexes is taking place.

In response to the second prong, it has never been conclusively shown that male dominance in a society is a result of the number of males present.[144] Rather, gender dominance has to be attributed to numerous factors, including (but not limited to) innate biological differences, both intergender and intragender attitudes, and historical patterns.[145] The opportunity to select gender through reproductive technologies will probably not change any discrimination that might already exist, either for better or worse.

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139. For a general discussion of discrimination in India, see Sivaraman, *supra* note 23. In many parts of India, women working outside the home are seen as a sign of a family's low social and economic status. *See also* Kishwar, *supra* note 16, at 19. Women are thus often confined to unpaid jobs at home, such as field labor, caring for family livestock, housework of all kinds, and care of children. *Id.*

140. *See* ASRM 2001, *supra* note 11, at 862.

141. *See id.*

142. *See id.*

143. *See id.*

144. *See* Resident Population Estimates of the United States by Age and Sex, U.S. Census Bureau (2000). In fact, the United States population contradicts this presumption. *See id.* If numbers were predictive of gender dominance, females would be the dominant gender in our society, as they outnumber males by approximately six million. *See id.*

145. *See* Daar, *supra* note 112, at 23.

3. Misallocation of Resources

With a population currently exceeding one billion people, one would presume that efficient allocation of medical sources is a constant concern in India.[146] Whether hospital rooms, medical equipment, or simply a doctor's attention, every resource that is utilized for sex selection is consequently a resource not being used for other medical purposes.

Sex selection is largely considered a cosmetic procedure, as it provides no actual health benefit.[147] Helping people to have children, as in treatment of infertility, is arguably different from helping fertile couples to have a particular gender of child. Since infertility interferes with the basic life activity of childbearing, it reasonably deserves the attention of health professionals.[148] The inability to have a child of a particular gender presents no such interference.[149] As such, many feel that it is a misallocation of valuable medical resources to tie up doctors and equipment in sex selection procedures.[150] The misallocation, should it prevent other individuals from receiving medical attention, would be in violation of the other's rights to basic care.[151]

This policy argument becomes less relevant when one considers the medical system in the United States. The resource problem, for the most part, does not exist.[152] Thus, if an individual is willing to pay for desired services, there is no direct, easy way to show how this choice takes away from the right of others to basic care. This is especially true since no one has seriously advocated that the state, i.e. the taxpayer, should subsidize sex selection.[153] The natural analogy is cosmetic surgery: if people are permitted to spend their own money on cosmetic surgery without being accused of violating the right of others to basic care, it is hard to see why couples willing to spend their own money on sex selection should be treated differently.[154]

4. Population Control

Not all policy arguments oppose gender selection for non-medical purposes. In support of the technique, it is argued that the ability to select

146. *See* 2001 India Census Statistics, *supra* note 2.

147. *See* Rebecca Dresser, *Cosmetic Reproductive Services and Professional Integrity*, 1(1) AM. J. BIOETH. 11, 11 (2001).

148. *See id.*

149. *See id.*

150. *See* Wertz, *supra* note 26, at 23.

151. *See id.*

152. *See* Savulescu, *supra* note 94, at 1880.

153. *See id.*

154. *See id.*

gender could aid population control.[155] This policy argument assumes the idea that, with preconception gender selection available, parents will no longer be compelled to reproduce until they achieve a child of the preferred gender. Without preconception gender selection, "try again" has been the method to get a child of the desired sex.[156] Prior to preconception selection, families desiring a son found it necessary to continue having children until a son was born. If the family was opposed to infanticide, a number of females could be born before the first male. With India's population exceeding one billion individuals, each additional child contributes to the already existing burden on available resources. Thus, preconception selection has the social advantage of not adding to overpopulation problems.

The use of sex selection is not likely to be used as a method of population control in the United States. The severe need to limit the population does not exist in the United States as it does in India.[157] By the year 2016, India is expected to have four times the population of the United States, while having only one-third the territory land size.[158]

5. Problems with Criminalization of Gender Selection

Regulation of gender selection may also be unwise considering the state of the criminal justice system in India.[159] It has been hypothesized that a prohibition of gender selection would not work due to corruption within police ranks.[160] It is not uncommon for police to collect regular bribes from doctors in exchange for immunity from prosecution.[161] Making the activity illegal simply gives the police a vested interest in encouraging doctors to continue the procedure, as it represents additional profit for the officers.[162] The cost of bribes can be passed on to the patients who will also benefit from immunity.[163]

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155. *See* Kishwar, *supra* note 16, at 15. Many physicians in India support gender selection as a method of population control. *See* Savulescu, *supra* note 10, at 374. Dr. Sunil Kothari, who runs a major ultrasound and abortion clinic in Delhi, admitted to having performed over 60,000 diagnoses during an interview on the BBC. *See* Kishwar, *supra* note 16, at 15. He stated, "This is the best way of population control for India." *Id.*

156. *See* Rhodes, *supra* note 9, at 31.

157. *See* U.S. Census Bureau, Population Estimates Program, Jan. 13 2000, *available at* http://www.census.gov (last visited Nov. 1, 2001). By 2016, the United States is expected to have a population of 314 million individuals. *See id.* By 2016, India is expected to have a population of 1.26 billion. *See* 2001 India Census Statistics, *supra* note 2. The United States has an area of 9.6 million square kilometers, whereas India is only 3.3 million square kilometers. *See* CIA World Factbook, *available at* http://www.cia.gov/cia/publications/factbook/index.html (last visited Nov. 1, 2001).

158. *See* CIA World Factbook, *available at* http://www.cia.gov/cia/publications/factbook/index.html (last visited Nov. 1, 2001).

159. *See* Kishwar, *supra* note 16, at 17.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

Of course, police corruption is not a reason in itself to continue gender selection. To analogize, one might argue that narcotic drugs should be legalized as a result of corruption on behalf of narcotics officers. Certainly, it would be better to take proactive measures toward ending police corruption. However, it is a policy concern deserving consideration when discussing regulation of preconception gender selection.

It is unlikely that such a situation would arise in the United States. While it would be naïve to think that corruption does not exist in the criminal justice system in the United States, it is unlikely that this is an area that presents any real danger of police misconduct. Demand does not appear to be high enough for gender selection so as to create a profitable black market.

Another problem with criminalizing gender selection is that it may force clinics to go underground.[164] The high demand for the procedure would surely drive some doctors to continue the procedure in exchange for higher payment.[165] If this occurred, it would become impossible to monitor clinic activity and safety, thus exposing women to increased risk.[166] As with abortions performed without adequate medical support, complications could arise which endanger the life of the mother.[167] The technology needed for performing the required tests is easily available and relatively inexpensive, allowing nearly anyone to set up a lab. Since ultrasound is a valuable technique for a whole range of other diagnoses of internal organs, it is not possible to ban ultrasound devices altogether.[168]

The smaller demand for the procedure in America may mean that doctors will not find it advantageous to continue illegally. A small black market may emerge, but it would likely be insignificant as compared to the situation in India.

B. Policy Arguments – United States

As discussed, many of the policy concerns which exist in India have little relevance in American society. However, there are some major policy concerns that are particularly relevant to American culture.[169]

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164. *See id.*

165. *See* Kishwar, *supra* note 16, at 17.

166. *See id.*

167. *See id.*

168. *See id.* Many doctors have begun to use portable ultrasound machines that can be carried in their cars, thus allowing them to perform tests in people's homes. *See id.*

169. *See* Wertz, *supra* note 22. In a 1997 survey, U.S. geneticists ranked their main reasons why they may not perform sex determination. *See id.* The following percentages are the number of geneticists ranking each as very important or extremely important to their decision: (1) Maintaining my own integrity (79%), (2) Ethical status of the profession (58%), (3) Preventing the abortion of a normal fetus (43%), (4) Preventing harm to a child of the unwanted sex, if born (35%), (5) Position of women in society (29%), (6) Maintain a balanced sex ratio (US 5%), (7) Lowering the birth rate (2%). *See id.*

1. "Slippery Slope" to Selection for Other Non-Medical Traits

It is often argued that the use of preconception gender selection for non-medical purposes could lead to the use of selection techniques for other non-medical traits.[170] Although the cultural climate in the United States may not exert as much pressure to select for a particular gender, there exists cultural pressure to select for other highly valued traits, such as intelligence or thinness.[171] It is often thought, not unreasonably, that the spread of preconception gender selection could be an incremental step in the growing technologization of reproduction and genetic control of offspring.[172] The fear is that, if selection becomes common for many characteristics, parent-child relationships could be altered and children would become more like "products."[173] When parents directly control the traits of their offspring, they might be less apt to accept their children's shortcomings.[174] Acknowledging a right to preconception gender selection may make it more difficult to justify regulations on selection for other traits.

However, this "slippery slope" argument may be remedied by timely legislative intervention.[175] If gender selection were acceptable but selection for other traits was not, numerous legislative controls could be employed to allow for those "acceptable" traits and prohibit those "unacceptable" traits.[176] A court reviewing regulations of "non-gender" selection could determine that other traits are not similarly protected under the umbrella of procreative liberties.[177] Such an analysis would mirror the analysis undertaken for gender selection.[178] Other traits could be distinguished either by declaring that selection for alternative traits is not as closely related to procreation as the ability to select for gender, or by a greater showing of harm caused by selection for the other traits.[179]

Furthermore, if a particular technique can be justified on its own terms, it should not be barred because of speculation of a slippery slope toward general selection of offspring traits.[180]

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170. *See* ASRM 2001, *supra* note 11, at 862.

171. *See* Geoffrey Cowley, *Made to Order Babies*, NEWSWEEK, Winter/Spring 1990 (Special Issue), at 94. A survey reported in Newsweek in 1990 showed that while only one percent of 200 New England couples surveyed would abort on the basis of sex, eleven percent would abort to avoid having a child carrying a gene for obesity. *See id.*

172. *See id.*

173. *See* Carson Strong, *Can't You Control Your Children?*, 1(1) AM. J. BIOETH. 12, 13 (2001).

174. *See id.*

175. *See* ASRM 2001, *supra* note 11, at 862.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

2. *Parental Expectations*

Preconception gender selection could also reinforce parental expectations that could be damaging to children of both the "right" and "wrong" genders.[181] Among those parents who feel strongly enough about gender to bear the burdens of cost and inconvenience that accompany preconception gender selection, it might be common to find that there exists some sort of parental expectations about how the child will turn out.[182] Thus, concern arises for the welfare of the children born as a result of gender selection whose parents may expect them to act in certain gender specific ways when the technique succeeds, but who may be disappointed if the technique fails.[183]

The ability to select gender could reinforce restrictive gender stereotypes or possibly convey the notion that one gender is superior in a particular family.[184] The psychological impact on children, while speculative, is not completely difficult to imagine. However, in response to this concern, it must be remembered that while parents who use gender selection may have specific gender role expectations of their children, so too will many parents who have a child through coitus.[185] It is not uncommon for parents, regardless of how conception occurs, to have expectations of their children and enforce these expectations through various child-rearing methods.[186]

V. CONSTITUTIONAL ANALYSIS

The ability to predict how courts would rule on constitutional challenges to governmental regulation of preconception gender selection is limited by the absence of virtually any Supreme Court precedent in the area. The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of

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181. *See* Dresser, *supra* note 147, at 12.

182. *See id.*

183. *See* Microsort Gender Selection, *supra* note 10. After all, preconception gender selection is not a perfect technique. *See id.* There is the possibility that even those parents who utilize the technique may bear a child of the "unwanted" sex. *See id.* Out of this possibility for failure arises concern that pregnancies of the wrong sex may lead to additional abortions. *See* ASRM 2001, *supra* note 11, at 862.

184. *See* Dresser, *supra* note 147, at 12.

185. *See* Gregory Stock, *Chance or Choice – Why Not Pick Our Children's Gender?*, 1(1) AM. J. BIOETH. 33, 33-34 (2001). "If bioethicists really fear that allowing parents to choose a child's gender will be detrimental to his or her future, then why aren't they more worried about adoption practices?" *Id.* "The preferences of adoptive parents include gender, health, age, ethnicity, the presence or absence of disabilities, and various other factors that parents balance against the availability of children." *Id.*

186. *See id.*

law."[187] Certain state statutes are found to be such an unreasonable interference with fundamental rights and liberty interests that they are tantamount to an unconstitutional denial of "liberty" guaranteed in the Fourteenth Amendment.[188]

To determine if a statute is constitutional, the court must first determine whether the matter involves a liberty interest.[189] If the court determines that there is a liberty interest at stake, the court must then decide if the interest involved is a fundamental or non-fundamental right.[190] Fundamental rights are described as those liberties that are "implicit in the concept of ordered liberty," in that "neither liberty nor justice would exist if they were sacrificed."[191] This allows the Court to recognize certain rights, like a right to contraception or abortion, which do not seem to be deeply rooted in tradition. The Supreme Court has held that there is a fundamental right to parental choice of the upbringing of one's children,[192] to marital privacy,[193] to contraception,[194] to marry,[195] and a limited right to have an abortion.[196]

It is also widely agreed that the Court would recognize a right to engage in coital reproduction.[197] Case law has established that an individual's right

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187. U.S. CONST. amend. XIV, § 1.

188. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

189. *See Glucksberg*, 521 U.S. at 720 (noting that the Due Process Clause "provides heightened protection [for]. . . liberty interests").

190. *See id.*

191. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

192. *See* Pierce v. Society of Sisters, 268 U.S. 510, 518-19 (1925) (commenting that the right of parents to send their children to parochial and private schools is the essence of personal liberty and freedom).

193. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that a State may not prohibit a married couple's use of contraceptives).

194. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the right to use contraceptives to unmarried couples by striking down a statute that permitted contraceptives to be distributed only to married couples).

195. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (invalidating a law prohibiting marriages between whites and "colored persons", stating that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival").

196. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (holding that a state may regulate a woman's right to have an abortion as long as the state does not place "undue burdens" on the woman's right to decide).

197. Several Supreme Court cases have held that the fundamental right to privacy includes the right to procreate. For instance, in *Skinner v. Oklahoma* the court stated, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (1942) (invalidating an Oklahoma statute that provided for the sterilization of some three-time felons). The court has also held in subsequent decisions that a person's liberty interests extend to activities like marriage, procreation, contraception, family relationships, child rearing, and education. *See* Planned Parenthood v. Casey, 505 U.S. at 851 (1992) (reaffirming the right to abortion first recognized in *Roe v. Wade*, 410 U.S. 113 (1973)). Support for a right to procreate can also be found in *Eisenstadt v. Baird*, where the court wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so affecting a person as the decision whether to bear or

to procreate is constitutionally protected "from unjustified intrusion by the State."[198] However, it is unclear whether this fundamental right to procreation is broad enough to include preconception gender selection.

The inability to select gender via preconception gender selection does not directly prevent anyone from reproducing, nor does it penalize individuals for the exercise of their procreative rights. The way in which regulations would implicate the right to procreate derives from the argument that preconception gender selection serves the needs of couples that have strong preferences about the gender of their offspring and would not reproduce unless they could realize those preferences.[199] If the ability to select offspring gender is truly essential to a couple's decision to reproduce, attempts to limit the use of preconception gender selection may not stand up to a constitutional challenge.

Acknowledging the fundamental right to procreate does not automatically imply that preconception gender selection is a fundamental right. Rather, this leads to the more interesting constitutional question concerning preconception gender selection: While the right to marry includes the right to decide whom to marry,[200] and the right to abortion includes the right to decide which method of abortion to employ,[201] does it follow that the right to procreate would include the right to decide the gender of your children?[202] The ability to have a child free from governmental intrusion is considered intertwined with the right to privacy.[203] However, the ability to select the gender of a child through preconception gender selection probably does not share similar status.

The Court has been hesitant to set forth overly sweeping due process jurisprudence.[204] In deciding whether a general right to procreate would en-

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beget a child." 405 U.S. at 438, 453 (1972) (invalidating a law that prohibited the dispensing of contraceptives to unmarried persons). As the court stated in *Cleveland Board of Education v. LaFleur*, "this Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." 414 U.S. 632, 639-40 (1974). *See* David Orentlicher, *Cloning and the Preservation of Family Integrity*, 59 LA. L. REV. 1019, 1033-37 (1999).

198. Carey v. Population Services Intern., 431 U.S. 678, at 687 (1977).

199. *See* ASRM 2001, *supra* note 11, at 862.

200. *See generally Loving*, 388 U.S. at 11-12.

201. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69 (1986) (striking down a portion of a Pennsylvania statute that required physicians to use the abortion procedure most likely to result in a viable child).

202. *See* Strong, *supra* note 173, at 12. Note that a right to preconception gender selection would entail a negative, rather than a positive, right. *See id.* The right claimed would be a right against government restriction or prohibition of preconception gender selection. *See id.* It is not a claim that society or insurers are obligated to fund preconception gender selection or that particular physicians must provide it. *See id.*

203. *See Eisenstadt*, 405 U.S. at 453.

204. *See Glucksberg*, 521 U.S. at 720 (observing that "we ha[ve] always been reluctant to expand the concept of substantive due process . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.").

compass the specific right to preconception gender selection, the Supreme Court would very likely resort to a tradition-based analysis. As the Court has stated, "[t]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[205] As a result, the Court almost certainly would "begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."[206]

Preconception gender selection does not seem to fall squarely into a tradition-based analysis. As discussed, until the twentieth century, gender selection consisted solely of the killing of a newborn of the unwanted sex.[207] Even with the procedures developed in the twentieth century, amniocentesis followed by abortion remained the primary method of gender selection.[208] Only in the last few decades has it become realistically possible to select gender prior to fertilization.[209] Thus, it will be difficult to support preconception gender selection under a tradition-based analysis.

However, preconception gender selection's lack of tradition can cut both ways. While there is seemingly no tradition in favor of the technique, there is also very little tradition of state or federal laws prohibiting preconception gender selection.[210] In the past, the Supreme Court has typically rejected a

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205. *Id.* at 720-21.

206. *Id.* at 710.

207. *See* Khanna, *supra* note 43, at 27.

208. *See id.*

209. *See* ASRM 1999, *supra* note 10, at 595.

210. *See* Norton, *supra* note 5, at 1600. There is some history of attempted regulation of sex-selective abortion. *See id.* However, such regulations have not yet faced a direct, constitutional challenge. *See id.* Pennsylvania is one of the states which currently bans sex-selective abortions. 18 PA. CONS. STAT. § 3204 (A)(1), (C) (1993). The Pennsylvania abortion statute was a provision in the statute challenged in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); however, Planned Parenthood did not litigate the section of the statute prohibiting abortion based on gender. In the Petitioner's Reply Brief for Petitioners and Cross-respondents, Planned Parenthood denied the Solicitor General's contention that Planned Parenthood did not challenge that provision because the group believed the law to be constitutional. *See* Norton, *supra* note 5, at 1600. Instead, Planned Parenthood explained that although Planned Parenthood believed that the sex-selective abortion provision violated the limits on abortion prohibition set forth in *Roe v. Wade*, 410 U.S. 113 (1973), the abortion provider believed that the provision could only be challenged by a plaintiff who could satisfy the standing requirement of Article III. *See id.* Reply Brief for Petitioners and Cross-respondents at note 20, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902). An Illinois statute also regulates sex-selective abortion. ILL. REV. STAT., ch. 38, para. 81-26 § 6(8) (1991). Although the constitutionality of this statute was also the subject of litigation, the injunction obtained against its enforcement does not appear to include the provision against sex-selective abortion. *See* Keith v. Daley, 764 F.2d 1265 (7th Cir.1985), *cert. denied*, 474 U.S. 980 (1985); and Charles v. Carey, 579 F. Supp. 464 (N.D. Ill. 1983). In addition, Utah has recently passed abortion regulations aimed at regulating sex-selective abortion. UTAH CODE ANN. § 76-7-301.1 (1992). Furthermore, two states have introduced bills that would ban sex-selective abortion. *See* Norton, *supra* note 5, at 1600. These include Massachusetts' proposed state constitutional amendment, and Wisconsin's proposed legislation. S. 1525, 177th General Court, 1991 Regular

constitutional right of personal autonomy only when there has been an important tradition of common and/or statutory law rejecting the right.[211] Nevertheless, tradition probably does not serve as an adequate method by which to analyze the constitutionality of preconception gender selection.

Whether the right to preconception gender selection is found to be fundamental is important, for it determines the standard by which regulations of the technique will be measured. If the Court decides that the right to preconception gender selection is fundamental, subsequent court decisions will need to apply a strict scrutiny standard.[212] The purpose of strict scrutiny is to ensure that the state is "pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . ."[213]

If the court finds that the right to preconception selection is a non-fundamental right, the court will apply the less stringent "rational basis" test.[214] Rational basis requires that the regulation be rationally related to legitimate governmental interests.[215]

Preconception gender selection, being closely related to procreation and yet not directly affecting a couple's ability to procreate, might be labeled as a quasi-fundamental right. This would mean that courts, in determining whether a statute regulating preconception gender selection is constitutional, would apply the test of "intermediate or heightened scrutiny."[216] Under "heightened" or "intermediate" scrutiny, the state must pursue an "important" objective, and the means chosen by the state must be "substantially related" to achieving that "important" objective.[217] Unlike the test of "rational basis," the Court will not hypothesize the state's purpose; rather the state must show the actual objective that motivated the legislature.[218] Under this approach, a state attempting to regulate preconception gender selection will need to point to policy arguments such as those mentioned above and show how the regulation is substantially related to achieving their objective.

Sess. Art. XXXII (Mass. 1991); A.B. 622, 90th Legis. Sess., 1991-92 Regular Sess. (Wis. 1991). *See id.*

211. *See Glucksberg*, 521 U.S. at 711-19. For example, when the Supreme Court found no constitutional right to physician-assisted suicide, it observed that states have traditionally prohibited physician-assisted suicide. *See id.* Similarly, when the Court rejected a constitutional right to engage in homosexual sodomy, it cited a tradition of state laws outlawing the practice. *See* Bowers v. Hardwick, 478 U.S. 186, 191-94 (1986).

212. *See Griswold*, 381 U.S. 479 (1965).

213. City of Richmond v. J.A.Croson Co., 488 U.S. 469, 493 (1989)

214. *See Glucksberg*, 521 U.S. at 726.

215. *See id.*

216. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997).

217. *See id.*

218. *See id.*

VI. CONCLUSION

Preconception gender selection should not be considered a fundamental right; rather, the technique should be considered a quasi-fundamental right. This would require any regulation of preconception gender selection to undergo "heightened" or "intermediate" scrutiny, forcing the state to show both an "important" objective and that the means chosen by the state are "substantially related" to achieving that "important" objective.

A number of the policy concerns raised against preconception gender selection are largely speculative and based upon data collected from other countries where the technique has been used. While situations like that occurring in India do raise some serious concerns about the technique, legislatures should not be quick to regulate gender selection on these grounds. It is difficult to interpret the data from India given the large differences between their culture and ours. As such, it is important that proper consideration be taken by legislatures to give the correct weight to findings from other countries.

The Supreme Court of the United States must always be vigilant when asked to put limits on matters of personal autonomy. In the absence of empirical evidence that preconception gender selection will have a negative effect in America, most of the opposition thus rests on ethical grounds. However, judging something as unethical should not be sufficient to justify legislation that would limit the liberty of everyone. Allowing people to live their lives in their own fashion and even to make some bad or even unethical decisions is inherent in our tradition of valuing liberty. A demonstration of actual, overriding harms is the only legitimate justification for constraining liberty. While this harm has been shown in India in the form of a skewed sex ratio, the United States has shown no actual harm and there is also little evidence that actual harm will occur.

Quite simply, there is and will probably always be a preference for natural reproduction over any form of technological intervention. Preconception gender selection, once perfected, will take its place among other available reproductive technologies and will likely be utilized by a very small segment of the population whose needs cannot be fulfilled by other less expensive, invasive, or artificial means. While the demand for such technology has been shown in the United States, it is nowhere near as intense as in India.

Furthermore, looking ahead, it would be nearly impossible to outlaw this technology, given the widespread acceptance of other reproductive technologies and prenatal screening as ways to use genetic knowledge to have healthy, wanted offspring. As witnessed in India, it can be difficult to regulate by way of requiring clinics to register before performing sex determination procedures. A clinic can easily determine gender as a part of numerous other lawful tests. As such, assuming that only clinics approved by such authorizing bodies will have access to preconception selection is shortsighted, especially

given the explosion of private sperm banks and gamete brokers, who may or may not adhere to government laboratory guidelines.

The American Society of Reproductive Medicine has adopted the best approach: proceed slowly at first, requiring studies into safety and efficacy.[219] Techniques for preconception sex selection, although not yet perfected, will probably be developed in the near future. Research should be allowed to proceed because of its potential benefits. We should allow potential parents and physicians to use the technology as they wish, and monitor the consequences. If we carefully follow the technique while it is in its infancy, by the time it matures enough to be widely used we will have a real basis for formulating sound policy and heading off any serious consequences that might arise. Moreover, the information about how people use preconception gender selection will be very useful for developing policies concerning other types of genetic screening that will soon be possible.

In final consideration, this cautious approach may merely lead us ten years down the road with still no definite rule as to the acceptability of preconception gender selection. As such, some might say the time to decide is now, and that there is little reason to wait. However, even the most careful analysis of policy arguments is still largely speculative. The cautionary approach will allow for a period of time where evidence can be collected, and the final decision, when made, can truly be in response to the effect of preconception gender selection in the United States.

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219. *See* ASRM 2001, *supra* note 11, at 863-64.

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SPARE THE ROD AND SPOIL THE CHILD? CORPORAL PUNISHMENT IN SCHOOLS AROUND THE WORLD

I. INTRODUCTION

Some children mature into adults without ever feeling the pain of physical punishment, others are far too familiar with the bruises and stinging sensations from whips, canes, slaps, and paddles. Physical punishment not only occurs at home behind closed doors, but at school, a place where young minds learn to become a part of an educated, civilized society. Most people dealing with children perceive corporal punishment as either the way to successfully control children or as a last-resort measure.[1] The main issue that should be considered "in relation to discipline is how the essential processes used can contribute to a high level of intelligent socialization and character development in children."[2]

Educational systems across the world have been dealing with debates surrounding appropriate types of discipline for teachers and administrators. Arguments in favor of using corporal punishment to correct poor behavior emphasize the belief that fear and pain will promote good conduct by students.[3] Arguments against corporal punishment, which are becoming more prevalent in today's society, focus on human dignity, emotional and psychological problems, and the effects upon the learning environment itself.[4] One major argument against corporal punishment is the failure of school officials to protect children from violence in school; thus denying them their right to be free from all forms of physical or mental violence and the full enjoyment of their right to education.[5] The right to be free from violence is one of the basic human rights afforded to adults and is a right children should be granted.[6]

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1. *See* University of Alabama – Birmingham, Department of Education, *Corporal Punishment: Children in a Changing Society, at* http://www.uab.edu/educ/corp.htm (last visited Sept. 2, 2002) [hereinafter *Children in a Changing Society*].

2. *Id.* at 3.

3. *See* Susan Bitensky, *Spare the Rod, Embrace Human Rights: International Law's Mandate Against All Corporal Punishment of Children*, 21 WHITTER L. REV. 147, 148 (1999). This article addresses the human rights issues surrounding corporal punishment. *See id.* One of these issues is that corporal punishment is intended to cause pain based on the premise that the discomfort will induce the child to alter bad behavior. *See id.* at 149.

4. *See Human Rights Watch: Children's Rights* (1999), *at* http://www.hrw.org/wr2k/Crd.htm (last visited Nov. 12, 2001) [hereinafter *Children's Rights*].

5. *See id.*

6. *See* Adah Maurer, PADDLES AWAY: A PSYCHOLOGICAL STUDY OF PHYSICAL PUNISHMENT IN SCHOOLS 133 (1981). The author concludes his work with a Charter of Children's Rights wherein he states:

> All children born into this world shall be accorded a basic set of human rights. Among these are the right to a welcome, to health, safety, food, physical comfort,

For some children, violence is a regular part of their school day. Teachers use caning, slapping, and whipping "to maintain classroom discipline and to punish children for poor academic performance."[7] Such children are at risk of being physically hurt and/or psychologically damaged by the use of physical punishment.[8] In general, children are both physically weaker and psychologically more vulnerable than adults and, therefore, deserve a greater degree of protection.[9] Nonetheless, many still hold "the belief that corporal punishment of children has an educative and instructive purpose, without which a child will not be able to learn."[10]

Numerous international and regional human rights institutions such as: the U.N. Committee on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Universal Declaration of Human Rights, have declared that some or all forms of school corporal punishment violate the human rights of children.[11] Many nations have either restricted or have placed an explicit ban on corporal punishment in their schools.[12]

Evidence of corporal punishment in schools is apparent from the beginning of formal education. Corporal punishment has traditionally been recognized as a way of controlling behavioral problems in the classroom, and until recently, was accepted in cultures all over the world.[13] Currently,

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personal care, education, equal protection of the law, freedom to be a child, a gradually increasing autonomy, and respect as a person without regard to race, sex, or economic status of the parents.

Id. at 133.

Part three further states:

SAFETY: All children shall have the right to be protected against abuse whether physical, psychological or sexual, and against neglect, dangerous situations and brutalizing physical punishments at home and while under the care of others at school, recreational facilities and in other institutions temporary or permanent.

Id. at 134.

7. *See generally* Human Rights Watch: Spare the Child, Corporal Punishment in Kenyan Schools (1999), *at* http://www.hrw.org/reports/1999/kenya/index.htm [hereinafter Spare the Child], at pt. I. Summary. Kenyan law permits limited school corporal punishment. *See id.* Children are physically punished for a number of things from noise making to unsatisfactory academic performance. *See id.*

8. *See Children in a Changing Society*, *supra* note 1.

9. *See* Spare the Child, *supra* note 7, at pt. I. Summary.

10. *Id.* School corporal punishment can be a form of cruel, degrading treatment or punishment, and is akin to the use of beatings to punish detainees in prisons or police stations. *See id.* In such cases, state agents use violence to discipline and punish people under their supervision and control. *See id.* The violence is inflicted with the intention of causing physical pain and humiliation. *See id.* However, today corporal punishment of prisoners is accepted as a human rights violation. *See id.*

11. *See infra* Part V.

12. *See* Spare the Child, *supra* note 7, at pt. VII. Conclusion.

13. *See* Robert McCole Wilson, A Study of Attitudes Towards Corporal Punishment as an Educational Procedure From the Earliest Times to the Present (1971) (unpublished M.A. thesis, University of Victoria), *available at* http://www.socsci.kun.nl/ped/whp/histeduc/

physical punishment in schools is a controversial issue. Many international standards and regulations have expressly addressed the need to rid children of this type of degrading, inhuman treatment.[14]

This Note will discuss various issues involving the use of corporal punishment in school systems around the world. Part II discusses definitions of both corporal punishment and discipline, and discusses how they are understood by society. Part III examines the history and development of corporal punishment and looks at how the attitudes surrounding the use of corporal punishment have changed from being considered necessary to correct misbehaviors, to the belief that physical punishment serves no purpose in education. Part IV discusses international standards and regulations on the use of physical punishment of children. These standards pay particular attention to a child's right to human dignity and integrity. Part V addresses the rationales for inflicting physical punishment in schools. Part VI compares the effects the international standards and regulations have on nations. Part VII addresses the consequences of corporal punishment on children, both psychologically and behaviorally, now and in the future. Part VIII presents discipline alternatives to be used in the classroom and legal alternatives for schools all over the world to instill. Fortunately, other methods have been found to be as effective in modifying a child's behavior without the physical and mental harm of corporal punishment. Finally, part IX contains legal recommendations.

II. DEFINITIONS

In order to understand why there is a growing concern regarding corporal punishment, it is important to define the terms "corporal", "punishment," and "discipline." When broken down individually, the concern surrounding corporal punishment in the school environment becomes apparent.

A. Corporal Punishment

"Corporal" is defined as being of the body.[15] The word "punishment", a form of the word "punish", is defined as imposing a penalty for an offense or fault.[16] The term "corporal punishment" involves imposing a penalty for an offense or fault on a part of the body. While the definitions seem clear in

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wilson/index.html (last visited Oct. 23, 2002) at pt. VII. Discussion. "[A]ttitudes towards and use of corporal punishment are an inseparable part of the beliefs and customs of society as a whole." *Id.*

14. *See infra* Part V.

15. *See* THE AMERICAN HERITAGE DICTIONARY 195 (3d ed. 1994).

16. *See id.* at 670. Punish also means to inflict a penalty for or to handle roughly or hurt. *See id.*

that they refer to the intentional application of physical pain as a method of changing behavior,[17] interpreting and applying the terms can be somewhat complex. This is due in part to the fact that what does and does not constitute a punishment, and the degree of such punishment, lies in the eyes of the beholder. Very often what is severe punishment to one may not be considered punishment by another.

Corporal punishment has also been defined as "the infliction of pain or confinement as a penalty for an offense committed by a student."[18] In light of these definitions, corporal punishment can be carried out in ways other than direct assaults upon children's bodies. There is a mental aspect to the infliction of physical punishment that should not be distinguished from the physical aspects because there is always an emotional or mental component to physical punishment.[19] Corporal punishment may be inflicted by the use of methods such as inflicting electrical shock, confining someone in closed spaces, forcing a student to assume painful bodily postures, or engage in excessive exercise drills.[20]

B. Discipline

As discussed above, corporal punishment by teachers is used as a disciplinary method to deter conduct that the teacher feels may inhibit learning. Discipline can be referred to as a type of training expected to produce a specific character or pattern of behavior.[21] The degree to which the

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17. *See* Society for Adolescent Medicine, *Corporal Punishment in Schools: A Position Paper of the Society for Adolescent Medicine*, 13 JOURNAL OF ADOLESCENT HEALTH 240 (1992) [hereinafter *Corporal Punishment in Schools*], *available at* http://www.adolescenthealth.org/html/corporal_punishment_in_schools.html (last visited Oct. 24, 2002). Corporal punishment encompasses a variety of methods including, but not limited to: hitting, slapping, punching, kicking, pinching, shaking, choking, use of various objects, painful body postures, use of electric shock, use of excessive exercise drills, or prevention of urine or stool elimination. *See id.*

18. IRWIN HYMAN, READING, WRITING, AND THE HICKORY STICK 10 (1990). By definition, corporal punishment is not self-defense by teachers against attacks by students. *See id.* Most corporal punishment is against students that are small and are not likely to strike back. *See id.* at 11.

19. *See id.* at 14. Experts are now recognizing that emotional reactions are the core of all physical punishment and/or abuse. *See id.*

20. *See id.* at 11. "Confinement for long periods has become increasingly popular . . . ." *Id.* at 11. "Some educators have developed unreasonable and irrational variations on the theme of time-out." *Id.* at 12. Many children have experienced the equivalent of solitary confinement in jails. *See id.* "They have been locked in school safes, buried in boxes, and left in unventilated, stifling storerooms, and confined in all manners of uncomfortable boxes for periods lasting from days to weeks." *Id.*

21. *See* THE AMERICAN HERITAGE DICTIONARY, *supra* note 15, at 243. There are six meanings listed for the word discipline. *See id.* at 1. Training expected to produce a specific character or pattern of behavior. *See* id. at 2. Controlled behavior resulting from such training. *See id.* at 3. A state of order based on submission to rules and authority. *See id.* at 4.

teacher maintains authority over the students is often looked at when determining the quality of a teacher's discipline. Student's behavior is also taken into consideration when speaking of the level of discipline within a particular classroom.[22] Discipline may represent any measure serving as a deterrent to certain types of behavior perceived as negative.

III. HISTORY

No other issue has been such a continuing center of controversy in education as the use of corporal punishment in the classroom. For years, the rod, or its alternate, was the emblem of the teacher, and there was no doubt that punitive methods of social control worked in one way or another. Corporal punishment would not have been so widely practiced throughout human history if physical punishment had no effect on deterring poor behavior. Despite this practice and/or effect, few educators continue to support the use of physical punishment in the classroom and those that do have enacted regulations limiting its use.[23]

Practicing corporal punishment as a means of discipline in schools dates back to ancient times.[24] For example, "the practice of physical punishment is related to the severity of the curriculum and atmosphere of schools in the early civilizations of Egypt and Babylonia."[25]

Furthermore, the use of corporal punishment in education also appears early in the recorded history of Western Judeo-Christian cultures.[26] It has been noted that the Victorians attributed the expression "spare the rod and spoil the child" to Solomon, who is thought to be the author of Proverbs.[27] In Christian theology, the use of corporal punishment is historically related to concepts of original sin and the need to combat Satan by "beating the devil" out of children.[28]

Punishment intended to correct or train. *See id.* at 5. A set of rules or methods. *See id.* at 6. A branch of knowledge or teaching. *See id.* The sixth definition does not pertain in the context discussed within.

22. *See* HYMAN, *supra* note 18, at 137.

23. *See* WILSON *supra* note 13, at 1.

24. *See* MARY LEVINE, TEACHERS' ATTITUDES TOWARDS CORPORAL PUNISHMENT AND ITS ALTERNATIVES IN THE SCHOOL ENVIRONMENT, 1 (1977).

25. *Id.*

26. *See* RONALD T. HYMAN & CHARLES H. RATHBONE, CORPORAL PUNISHMENT IN SCHOOLS: READING THE LAW, NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION (1993). The use of corporal punishment has roots in the Old Testament. *See id.* quoting Proverbs 23:13-14 ("[w]ithhold not correction from the child: for it thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shall deliver him from hell") and Proverbs 22:15 ("[f]oolishness is bound in the heart of a child; but the rod of correction shall drive it from him."). *Id.* at 19.

27. HYMAN, *supra* note 18, at 30.

28. *See id. at* 31. In ancient and primitive cultures, it is thought that deviant behavior arises from being possessed by some sort of evil spirit. *See id.*

The continued use of corporal punishment results from other factors as well. Until the past few decades, little research was done on the topic of corporal punishment. The majority of prominent figures in the history of education have had something to say, pro or con, about corporal punishment. But their comments have been based mostly on personal experiences and opinions.[29] Due to the lack of research, people did not realize the long-term effects that physical punishment could have on a child. In addition, corporal punishment was the method of discipline for such a long time that educators were ignorant to, or ignored, the fact that other methods had an even greater potential of controlling classroom behavior.[30]

For thousands of years, societies accepted schoolteachers and administrators using the rod or its substitute as a method of deterring poor behavior.[31] However, today few teachers and leaders support its use, and those who do, do so reluctantly.[32] Teachers have been influenced by society to learn and develop non-physical methods of punishment and control in the classroom.[33] One method that is becoming more and more popular is to encourage good behavior and instill consequences, such as time out or detention, for poor behavior rather than harsh punishments.[34]

IV. RATIONALE FOR INFLICTING CORPORAL PUNISHMENT IN SCHOOLS

A. Positive Attitudes Towards the use of Corporal Punishment

For many, corporal punishment is viewed as an acceptable way of teaching children proper behavior.[35] According to opinions favoring corporal punishment, children are better controlled, learn appropriate appreciation for authority, develop better social skills as well as improved moral character, and learn better discipline.[36] The thought is that if corporal punishment is removed there will be greater disciplinary difficulty in the classroom. Likewise, due to current legal and popular opinions suggesting that it is

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29. *See* WILSON *supra* note 13, at pt. 1.2 Previous Investigation. "Some mention is made of corporal punishment in most general histories of education, but usually only in passing." *Id. citing* LLUELLA COLE, A HISTORY OF EDUCATION, SOCRATES TO MONTESSORI (1965); GERVAS D'OLBERT, CHASTISEMENT ACROSS THE AGES (1965); and GEORGE R. SCOTT, FLAGELLATION: A HISTORY OF CORPORAL PUNISHMENT (1968). Each author provides a brief history and a discussion on corporal punishment with a chapter on schools. *See id.*

30. *See id.*

31. *See id.* at pt. 1.1 A Continuing Controversy.

32. *See id.*

33. *See infra* Part VIII.

34. *See infra* Part VII.

35. *See* HYMAN & RATHBONE, *supra* note 26, at 18-19. Some educators believe that corporal punishment teaches moral values and sets social expectations. *See id.* Corporal punishment "is swift and memorable, an immediate and palpable reminder, delivered on the spot and in terms that children will understand." *Id.* at 19.

36. *See Corporal Punishment in Schools, supra* note 17.

acceptable for parents to physically punish their own children, it is also acceptable for teachers and educators to exercise this method because they serve as substitute parents during school hours.[37]

Much of the argument in favor of corporal punishment stems from the view that a good beating has historically proven to be an effective way of instilling obedience in the child, whereas less physical alternatives such as detention, suspension, and time out, have little effect as deterrents on student behavior.[38] Some leading educational figures around the world still support the use of corporal punishment despite the fact that many nations have outlawed its use, believing that the fear of physical punishment may cause a child to work harder, and also that physical punishment does no harm unless it is overdone.[39] Many advocates of corporal punishment realize that children can be physically hurt by this method and it should be "proportioned out in limited doses, based on the offense and without attempt to physically harm. . . ."[40]

B. Why Corporal Punishment Has No Place in Schools

Corporal punishment of children fails to enhance moral character development, improve the teachers control in the classroom, or protect the teacher.[41] Corporal punishment was previously used because it was so accessible that often teachers did not think about, or take the time to instill other means of disciplining or correcting behavior.[42]

The use of physical punishment in schools promotes a very dangerous message that violence is acceptable in society.[43] Teachers have tremendous

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37. *See id.*

38. *See generally* HYMAN, *supra* note 18.

39. *See* Julia Grey, *MEC Fuels Debate About Corporal Punishment*, THE TEACHER (March, 1999), *available at* http://www.teacher.co.za/9903/cane.html (last visited Oct. 23, 2002). The new head of education in KwaZulu-Natal, Eileen Shandu, is outspoken in her support for corporal punishment. *See id.* However, corporal punishment is in violation of the national constitution and the South African Schools Act. *See id.* Shandu states that if it were her way, corporal punishment would be reintroduced because it is an effective way of instilling obedience in the child. *See id.*

40. *Corporal Punishment in Schools*, *supra* note 17. Although corporal punishment is not supposed to physically harm the child, it must produce instant discomfort and must surprise the victim as soon as possible after the violation. *See id.*

41. *See id.* The society for Adolescent Medicine has concluded that corporal punishment is an ineffective method of discipline and has major effects on the physical and mental effects of children. *See id.* No clear evidence has been shown that physical punishment improves the culture of the classroom or teaches children proper behaviors. *See id. See also* C.S. Moelis, *Banning Corporal Punishment: A crucial step toward preventing child abuse*, 9 CHILD LEGAL RIGHTS 2, 2-5 (1988).

42. *See* HYMAN, *supra* note 18, at 190. Teachers, especially those who are punitive, tend to move toward physical methods of discipline quickly and do not use a variety of alternatives. *See id.*

43. *See Children in a Changing Society*, *supra* note 1.

power over the lives of children and are seen as role models of society. When educators resort to corporal punishment for misbehaving or failing to perform academically, an unhealthy norm is established.[44] Children are encouraged to also resort to violent ways of solving unfavorable problems.[45]

Currently, End Physical Punishment of Children (EPOCH) is leading an international effort to make corporal punishment of children illegal.[46] The goals of EPOCH are "to see changes in attitudes to children; to see children recognized as people – and [to recognize] that it is as wrong to hurt a child as it is to hurt another adult."[47]

According to EPOCH, there are many positive effects to ending corporal punishment in all settings, which include:

1. children can only achieve their full potential when they are recognized as individual people with rights of their own;
2. the current acceptance of physical punishment helps to cause more serious child abuse;
3. even 'light' physical punishment can unintentionally cause significant injuries to small children;
4. children who are hit by their parents learn that violent solutions are acceptable and are more likely in turn to hit their own children. Violence breeds violence.[48]

Corporal punishment and corrective discipline are not synonymous. As will be discussed later in this paper, there are other methods

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44. *See id.*

45. *See id.* The result of using violent methods of punishment is that it teaches children that violence is especially acceptable against the weak, the defenseless, and the subordinate. *See id.*

46. *See* End Physical Punishment of Children, *Hitting People is Wrong and Children are People Too, at* http://www.neverhitachild.org/hitting.html (last visited Oct. 23, 2002).

47. *Id.*

48. *Id. See also* National Coalition to Abolish Corporal Punishment in Schools (NCACPS), *Facts About Corporal Punishment, at* http:// www.stophitting.com (last visited Aug. 3, 2002) [hereinafter *Facts About Corporal Punishment*] noting other arguments against corporal punishment including:

1. Corporal punishment perpetuates a cycle of child abuse. It teaches children to hit someone smaller and weaker when they are angry.
2. Physical injuries occur.
3. Educators and school administrators are often sued when corporal punishment is used in their schools.
4. Schools that use corporal punishment often have poorer academic achievement, pupil violence, and a higher dropout rate.
5. Corporal punishment is often used as a first resort.
6. Alternatives to corporal punishment have proven to teach children to be self-disciplined rather than be cooperative out of fear.

See id.

of correcting poor behavior in the classroom rather than resorting to whips, canes, and paddles.

V. STANDARDS AND REGULATIONS ON HUMAN RIGHTS

A. U.N. Convention on the Rights of the Child

The Convention on the Rights of the Child is the main international human rights instrument addressing the protection of children from violence and authoritatively prohibits the practice of corporal punishment in schools.[49] Every country in the world, except for the United States and Somalia has, in upholding its protections for children, ratified the Convention on the Rights of the Child.[50]

Children's rights became a topic of international concern when the League of Nations adopted the first Declaration of the Rights of the Child in 1924—commonly called the Declaration of Geneva.[51] The Convention on the

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49. *See* Spare the Child, *supra* note 7, at pt. I. Summary.

50. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 4th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (1989) [hereinafter Convention]. The Convention was ratified without reservations by the following: Albania, Angola, Antigua and Barbuda, Armenia, Bahrain, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Suriname Arab Republic, Tajikistan, Thailand, the former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine. Nations that have ratified the Convention with Declarations and Reservations: Afghanistan, Algeria, Andorra, Argentina, Australia, Austria, Bahamas, and Bangladesh. *See id.*

51. *See* Cynthia Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child*, 19 MICH. J. INT'L L. 633, 635-36 (1998). The Declaration of Geneva was concerned with child rights in terms of care and protection. *See id.* Paragraph 2 of the Declaration states that: "The child that is hungry should be fed; the child that is sick should be helped . . . and the orphan and the homeless child should be sheltered and succoured." *Id.* quoting the 1924 Declaration of Geneva.

Rights of the Child expanded the basic concepts of the Declaration of Geneva as the Convention continued to define children's rights in terms of protection and care.[52] Drafting the Convention began in 1979, under the support and help of a Working Group from the Commission on Human Rights, and it was completed ten years later.[53] The Convention worked from concepts that were previously recognized, further developing them into a theory that "depicts the child as an individual with the right to have an opinion, to be a participant in decisions affecting his or her life, and to be respected for his or her human dignity."[54]

"In 1999, the convention stood as the single most widely ratified treaty in existence."[55] Adopted by the United Nations General Assembly in 1989, the treaty includes a child's rights to: life, to be free from torture or cruel, inhuman, or degrading treatment or punishment; and on education.[56] The Preamble recognizes that young children are entitled to special care and assistance and should be afforded the "inherent dignity and . . . the equal and inalienable rights of all members of the human family . . . ."[57] The drafters of the Convention make no reference to corporal punishment; however, the Committee read its prohibition into the language.[58] The Committee stated categorically that all forms of corporal punishment are incompatible with the protections given to children under the Convention.[59]

Various Articles in the Convention address the safeguards of children, for example, Article 19(1) requires states to take:

> all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[60]

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52. *See id.* at 636.

53. *See id.* at 637. The Working Group used a model treaty given by the Polish government as a starting point to expand the concept of children's rights to one that not only is one of care and protection but one that protects a child's individual rights. *See id.*

54. *Id.* at 637-38.

55. *Children's Rights*, *supra* note 4.

56. *See id.*

57. Convention, *supra* note 50, at prmbl.

58. *See* Cohen, *supra* note 51, at 639-640.

59. *See* BARBRO HINDBERG, ENDING CORPORAL PUNISHMENT: SWEDISH EXPERIENCE OF EFFORTS TO PREVENT ALL FORMS OF VIOLENCE AGAINST CHILDREN – AND THE RESULTS 8 (Swedish Ministry of Health and Social Affairs pamphlet, 2001).

60. Convention, *supra* note 50, art. 19.

Article 28(2) states:

> States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.[61]

Article 37 states that children have a right to protection from "torture and other cruel, inhuman or degrading treatment or punishment."[62] Articles 28 and 37 of the Convention are used in various instances as a basis for criticizing countries that have not repudiated corporal punishment of children.[63] In addition, the right to be free from corporal punishment is protected by the Convention's nondiscrimination principle, Article 2. Article 2 forbids justifying corporal punishment of children just because they are children.[64] Also, in looking out for the best interests of the child, the Committee has advised that spanking is barred in Article 3, paragraph 1.[65] Furthermore, under the Convention, states "must recognize the right of the child to 'the highest attainable standard of health' and 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of

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61. *Id.* art. 28(2).

62. *Id.* art. 37.

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment or life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.

Id.

63. *See* HINDBERG, *supra* note 59, at 7.

64. *See* Bitensky, *supra* note 3, at 155.

65. *See id.*

children.'"[66] In reviewing these articles along with the Convention as a whole, it can be concluded that the acceptance of corporal punishment of children is not compatible with the Convention. The Committee strongly recommends prohibiting all corporal punishment, and suggests the establishment of campaigns to raise awareness of its negative effects.[67]

The Committee recommends legal reform in the area of juvenile justice administration be followed by taking into account the Convention on the Rights of the Child.[68] "[A]ttention should be paid to the prevention of juvenile delinquency, the protection of the rights of children deprived of their liberty, respect for fundamental rights and legal safeguards in all aspects of the juvenile justice system and full independence and impartiality of the judiciary dealing with juveniles."[69]

The Committee decided to continue to dedicate attention to corporal punishment in 1993 by examining States Parties reports to demonstrate the importance of corporal punishment in improving the protection of child rights.[70] The Committee on the Rights of the Child is now taking the lead to end violence inflicted upon children.[71]

B. The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) places limits on forms of discipline and punishment, including corporal punishment.[72] The CAT promotes universal respect for human rights and fundamental freedoms, and provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[73] The CAT also prohibits torture, which is defined as "any act

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66. HINDBERG, *supra* note 59, at 7, quoting Convention on the Rights of the Child, art. 24.

67. *See id.* at 8.

68. *Id.*

69. Cohen, *supra* note 51, at 646-647.

70. *See* HINDBERG, *supra* note 59, at 8.

> The Committee's Guidelines for Periodic Reports ask "whether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, *inter alia* within the family, in foster and other forms of care and in public or private institutions, such as penal institutions and schools."

Id.

71. *See id.*

72. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 U.N. GAOR (1984). The ambition of the Convention is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world . . . ." *Id.*

73. *See id.*

by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . ."[74]

"The Committee against Torture has indicated that corporal punishment is incompatible with the provisions of the Convention against Torture."[75] Many committee members have expressed the view that it is "degrading treatment to apply corporal punishment in schools and other institutions."[76] The Committee went on to say "[c]hildren should be treated with respect for their integrity and teachers should be able to maintain authority without resorting to such primitive measures."[77]

C. The Universal Declaration of Human Rights

Corporal punishment has been recognized as a human rights issue for many reasons. First, corporal punishment is intended to cause pain as a way to control or modify a child's conduct.[78] Secondly, corporal punishment is a human rights violation causing serious harm both during childhood and later in the victim's life.[79]

Many articles in the Universal Declaration of Human Rights are relevant to the discussion of the legality of corporal punishment in schools.[80]

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74. *Id.* art. 1(1):

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

75. Spare the Child, *supra* note 7, at pt. III. Background.

76. *Id. citing* a discussion by the committee of human rights practices in Tanzania in its 1993 Annual Report. *See id.*

77. *Id.*

78. *See* Bitensky, *supra* note 3, at 147.

> Corporal punishment is intended to cause pain based on the premise that the discomfort itself will induce the child to alter bad behavior. For the corporal punisher, pain is indispensable to correcting behavior. Torturers proceed upon the same assumption: pain is essential to intimidating the opposition. Such intentional infliction of pain is the very stuff of which human rights violations are made.

Id.

79. *Id.* at 149.

80. *See* Universal Declaration of Human Rights G.A. Res. 217A, (III), U.N. GAOR 3rd Sess., Doc. A/810 (1948) [hereinafter UDHR]. Articles 3 states, "[e]veryone has the right to life, liberty and security of person." *Id.* Article 5 states, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

According to the Human Rights Committee, corporal punishment is a form of cruel, inhuman, or degrading treatment protected by Article 7.[81] In a 1992 General Comment, the "committee reaffirmed its view that the prohibition *'must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.'*"[82]

The principles encompassed in the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment relating to corporal punishment are based on general human rights principles expressed in the Universal Declaration of Human Rights (UDHR). The UDHR recognizes the inherent dignity and equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world.[83]

VI. EFFECTS OF THE CONVENTION AND OTHER UNIVERSAL STANDARDS UPON NATIONS

In ratifying the Convention on the Rights of the Child, the international community expressly recognized the need to protect children from the harmful effects of corporal punishment.[84] Thus, it seems logical from a human rights perspective that children in schools should receive this same type of protection.

Various nations are taking positive steps towards restricting and even prohibiting corporal punishment.[85] Some restrictions, through statutes and court decisions, ban corporal punishment in schools and in the home.[86] Other restrictions take away common law immunity for educators who take part in the use of corporal punishment.[87]

Presently, "every European state, all but three industrialized nations (United States, Canada, and one state in Australia), and numerous other

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81. *See* Spare the Child, *supra* note 7, at pt. III. Background.

82. *See id. citing* General Comments by the U.N. Human Rights Committee, U.N. Doc. A/37/40, annex V., paras. 1-3 (emphasis in original).

83. UDHR, *supra* note 80, at pmbl. The General Assembly declares the Declaration as a standard of achievement for all nations whereby every individual and society shall strive by teaching and education to promote respect for all peoples in all nations. *Id.* at art. 26.

84. *See* Spare the Child, *supra* note 7, at pt. III. Background.

85. *See id.*

86. *See id.* All European and many African nations have statutes regarding corporal punishment. *See id.* The African Charter on Human Rights contains provisions that "speak broadly to issues raised by corporal punishment in school." *Id.* at pt. III. Background. The European Convention for the Protection of Human Rights and Fundamental Freedoms also has a provision relevant to corporal punishment. *See id.*

87. *See id.* In some nations "corporal punishment is now considered similar to other forms of assault and battery." *Id.*

countries around the world prohibit corporal punishment in schools."[88] The United States has not only denied ratification of the U.N. Convention on the Rights of the Child and continued to allow corporal punishment in schools, but has held that this type of punishment does not constitute cruel and unusual punishment under the Eighth Amendment[89] to the U.S. Constitution.[90]

However, ratifying the Convention on the Rights of the Child does not mean that each nation has also explicitly banned the use of corporal punishment in schools. Many countries have taken portions of the Convention and implemented those parts into their own statutes and regulations that are tailored to their own culture or type of government. Germany was the ninth European country to pass legislation that banned physical punishment.[91] For example, the Civil Code in Germany explicitly uses the term corporal punishment to eliminate any ambiguity by interpreters, stating "children have the right to a non-violent upbringing. Corporal punishment, psychological injuries and other humiliating measures are prohibited."[92] Israel also placed explicit bans on physical punishment when Israel's National Council for the Child recognized "the right of children not to be exposed to violence of any kind, even when those who use violence . . . [say it is] educational . . . ."[93] African governmental bodies have also taken into account child's rights. The African Charter on the Rights and Welfare of the Child prohibits harmful practices affecting the welfare, dignity, growth, and development of the

88. *Id. See also Facts About Corporal Punishment*, *supra* note 48. The following countries banned corporal punishment: Poland, 1783; Netherlands, 1820; Luxembourg, 1845; Italy, 1860; Belgium, 1867; Austria, 1870; France, 1881; Finland, 1890; Russia, 1917; Turkey, 1923; Norway, 1936; Japan, 1945; China, 1949; Portugal, 1950; Sweden, 1958; Denmark, 1967; Cyprus, 1967; Germany, 1970; Switzerland, 1970; Ireland, 1982; Greece, 1983; United Kingdom, 1986; New Zealand, 1990; Namibia, 1990; South Africa, 1996; England, 1998; American Samoa, 1998; Zimbabwe, 1999; Zambia, 2000; Thailand, 2000; Trinidad & Tobago, 2000. *Id.*

89. *See* U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

90. *See* Ingraham v. Wright, 430 U.S. 651, 683 (1977). The Supreme Court found that corporal punishment is permitted in the schools. *See id.* at 682. However, public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in civil and criminal liability. *See id.* at 676-78.

91. *See* Parenting Coalition International, International News: Global Progress Towards Ending All Corporal Punishment (2000), *available at* http://www.parentingcoalition.org/stories/global_progress_towards_ending_a.htm (last visited Sept. 15, 2002) [hereinafter Parenting Coalition International].

92. *Id.*

93. *Id.*

child.[94] The Charter reaffirms adherence to the Convention on the Rights of the Child and the articles within parallel those found in the Convention.[95]

Bans on corporal punishment have been found in Japan and throughout countries in Africa and Europe.[96] Australia does not have a universal law on corporal punishment but leaves the punishment issues for each jurisdiction to decide.[97] In some Australian States, the use of corporal punishment is completely banned, whereas in other States, moderate and reasonable corporal punishment can be lawfully administered for serious school offenses.[98]

The current status of corporal punishment can be looked at in three ways. First, there are the nations that have not only ratified the Convention on the Rights of the Child, but have also expressly banned the use of corporal punishment through statutes or judicial decisions.[99] These nations include Sweden and Japan.[100] Second, there are the nations that ratified the Convention on the Rights of the Child but have only placed restrictions on its use in schools, such as Kenya.[101] And third, there is the United States which has neither ratified the Convention on the Rights of the Child nor placed a national ban on the use of corporal punishment in schools.[102]

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94. *See* African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (1990), at pmbl. [hereinafter African Charter].

95. *Id.* at pmbl.

96. *See generally* Parenting Coalition International, *supra* note 91.

97. *See* Australia's First Report under Article 44(1)(a) of the United Nations Convention on the Rights of the Child (1995) at para. 407, *available at* http://www/agdHome.nsf/Alldocs/D91EE3EEA6D26578CA256B730014EC2d?Open Docu-ment (last visited Nov. 5, 2002) [hereinafter Australia's First Report].

98. *See id.* paras. 408-11. Article 44(1) of the Convention on the Rights of the Child states:

> States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights: (a) Within two years of the entry into force of the Convention for the State Party concerned . . . .

Convention, *supra* note 50. In upholding this obligation, Australia reported to the Convention that "torture and other cruel, inhuman, or degrading treatment or punishment," as stated in Article 37(a) of the Convention, "is not tolerated in Australia and constitutes a criminal and civil offense in all jurisdictions." *See* Australia's First Report *supra* note 97, para. 392. However, corporal punishment is only an offense if the particular Australian State considers it cruel, inhuman, or degrading. *See id.*

99. *See* Susan Bitensky, *The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States*, 5 GEO. J. ON FIGHTING POVERTY 225, 229 (1998).

100. *See infra* Part VI. A.

101. *See generally* Spare the Child, *supra* note 7.

102. *See* Allan Schwartz, *Administration of Corporal Punishment in Public School System as Cruel and Unusual Punishment Under Eighth Amendment*, 25 A.L.R. Fed. 431 (1975).

A. Explicit Bans on Corporal Punishment

Explicit bans on corporal punishment are in place in nine European countries.[103] The European Commission of Human Rights recognizes that the state bears the responsibility to ensure that children are not subjected to treatments that are contrary to the ban on degrading treatment or punishment while in school.[104]

One of the first countries to ban corporal punishment in schools was Sweden.[105] One hundred years ago, corporal punishment was commonly used as the main method of classroom control in Swedish schools.[106] There was a growing concern surrounding the fact that many pupils experienced severe beatings, which led to the Education Act being amended to forbid corporal punishment in secondary schools.[107] The prohibition was not expanded to other schools until 1962, when it was applied to all levels of the school system.[108]

In 1966, there was a change in the Swedish Children and Parents Code so that it contained no wording justifying corporal punishment.[109] However, because there was no provision expressly prohibiting corporal punishment, the Code was further amended in 1979.[110] The section of the Children and Parents Code prohibiting corporal punishment reads as follows:

> Children are entitled to care, security, and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or other injurious or humiliating treatment.[111]

The ban on corporal punishment is directed against treatment that endangers the child's personal development.[112] The law forbids not only corporal punishment but mentally humiliating treatment as well.[113] The concern

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103. *See* Parenting Coalition International, *supra* note 91. These countries include: Sweden (1979), Finland (1983), Norway (1987), Austria (1989), Cyprus (1994), Denmark (1997), Croatia (1999) Latvia (1998), and Germany (2000). *See id.*

104. *See id.* Other countries have also placed explicit bans on corporal punishment. *See id.*

105. *See* Joan E. Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects*, FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY (1996) *excerpt, available at* http://ww.nospank.net/durrant.htm (last visited Oct. 23, 2002).

106. *See id.*

107. *See id.*

108. *See id.*

109. *See* HINDBERG, *supra* note 59, at 12.

110. *See id.* at 11.

111. Durrant, *supra* note 105.

112. *See id.* The ban on corporal punishment not only forbids physical punishment but any mentally humiliating treatment as well. *See id.*

113. *See id.*

regarding an increase in mental abuse when physical punishment decreased was addressed by the legislation.[114]

Despite the change in wording, the amendment carries no penalties for infractions of the ban.[115] Punishments for violations remain within the Penal Code and are administrated only in instances satisfying the criteria for assault.[116] The law was intended to alter public attitudes so children's rights as individuals would be recognized.[117] So far, the law has prevailed.

Over the course of the past three decades, public attitudes have gone from a majority of Sweden's citizens supporting corporal punishment before the legislation to a few citizens supporting its use today.[118] It has become a matter of community interest that children grow into socially competent and mentally strong individuals. A form of upbringing and education that suppresses and humiliates children cannot meet these interests.[119] The ban on corporal punishment in Sweden granted children the fundamental human right to be free of physical violence both at home and in school, no matter how extreme the case of misbehavior.[120]

Laws against corporal punishment in Sweden have had a positive impact on reducing instances of corporal punishment.[121] Not only is there an increasing amount of negative attitudes towards the use of corporal punishment, but there is also a correspondence between this attitude and its use.[122] Occurrences of physical punishment have greatly decreased since the ban was enacted.[123] However, this type of success has not been seen in all nations who have laws in place prohibiting corporal punishment.

In Japan, laws concerning corporal punishment have gone through many revisions.[124] Currently, corporal punishment is still a problem in schools despite the fact that it is legally prohibited.[125] Since school education began in Japan, corporal punishment was accepted and endorsed by teachers, parents, and students as an indispensable and effective way of teaching and

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114. *See id.*

115. *See* Durrant, *supra* note 105.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See* HINDBERG, *supra* note 59, at 12.

120. *See id.*

121. *See id.* at 15.

122. *Id.*

123. *See* Durrant, *supra* note 105. Recent studies have shown a decrease in the use of corporal punishment in the home and at school since the ban was enacted. *See id.*

124. Noboru Kobayashi, Corporal Punishment in the Schools and Homes of Japan, Child Research Net (1997), *available at* http://www.childresearch.net/CYBRARY/KOBY/KORNER/CORPO.HTM (last visited Oct. 23, 2002). The first law banning corporal punishment was passed in 1879. *See id.* It was repealed in 1885, reinstated in 1890, repealed again in 1900 and reinstated in 1941. *See id.*

125. *See id.*

learning.[126] One teacher, angry about the mandate against corporal punishment stated "[w]ithout corporal punishment . . . there is no way to keep so many fun-loving, mischievous, disobedient, misbehaving, distracting students under control at school."[127]

Due to feelings similar to the teacher quoted above, corporal punishment continues to be a problem in Japan.[128] The number of cases of corporal punishment reported from 1990 to 1995 was approximately 700 to 1,000 cases each year, and the number of schools using corporal punishment during the same period ranged from 600 to 850 per year.[129] These figures show that during the five year period corporal punishment has been increasing in spite of the explicit ban.

The facts and examples discussed above illustrate while some nations have been successful in their ban on corporal punishment others have not. This may be due to the belief that some cultures have only known this type of punishment and are apprehensive in bringing about a change.

B. Regulations on the Use of Corporal Punishment

Very few nations who ratified the Convention on the Rights of the Child have implemented a complete ban on corporal punishment.[130] Many nations, like Kenya, have enacted standards or regulations on its use.

"For most Kenyan children, violence is a regular part of the school experience."[131] The following story is just one instance of such infliction of pain.[132] On September 23, 1998, Anastacia Katunge, thirteen years old, was severely caned by the headteacher at her school.[133] Katunge reported that the teacher came to class and asked for a list of the noisemakers and after receiving the list, punished those students.[134] The head teacher then called Katunge to the front of the class and started beating her.[135] She was told to remove her cardigan and was then beaten with a cane more than five times on the back.[136] At this point, she fainted and when she woke up she sat in her chair and waited for her classmates to go home.[137] When she finally left, she

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126. *See* Lee Chang-kook, [Ideas & Ideals] Corporal Punishment (1999), *at* http://www.hankiikilbo.co.kr/14_8/199901/t4851.56.htm (last visited Sept. 16, 2002).

127. *Id.*

128. *See* Kobayashi, *supra* note 124.

129. *See id.* tbls. 2, 3. There were about thirty to forty-five percent of teachers responsible for instances of physical punishment, hardly any were dismissed. *See id.* Of the schools using this type of punishment, twenty-five to eighty-five percent were legally sanctioned. *See id.*

130. *See* Bitensky, *supra* note 99, at 227-29.

131. Spare the Child, *supra* note 7, at pt. I. Summary.

132. *See id.*

133. *Id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. Spare the Child, *supra* note 7, at pt. I. Summary.

was bleeding from the neck and had bruises on her back that were bleeding as well.[138]

There are many cases similar to Katunge's in Kenya. However, her case was extraordinary due to her mother and father's initiative to report the incident.[139] The headteacher in Katunge's case was ultimately charged with assault.[140] Unfortunately, children who are physically disciplined at school either cannot make a formal complaint without dire consequences, or have parents that do not want to make a complaint.[141]

Many different forms of corporal punishment have a long history in Kenya. The Kenyan government school system began in the days of British colonial government, implementing nineteenth-century British traditions of school discipline, including the use of the cane.[142] Most adult Kenyans were often caned as children and believe in the Biblical precept, "spare the rod and spoil the child."[143] According to a primary school headteacher, violence is "what the African child understands, and women too, they have to be beaten."[144]

In some instances of corporal punishment in Kenyan schools, teachers use severe forms of corporal punishment out of sheer cruelty; however, a majority of teachers intend to "educate" children through canings and whippings.[145] Parents and other members of society usually see nothing wrong with physical punishment based on the theory that the child will only learn after a good beating.[146] Often, teachers justify serious injuries by arguing that the children only suffered physical injury because they were protecting themselves from the cane or whip.[147] These events are usually seen as unfortunate and unavoidable.[148] When a child is injured and attempts to press charges on the teacher or administrator, the severity of the charge depends on whether the doctor who examines the child classifies the injury as

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138. *See id.*

139. *Id.*

140. *Id.* "Those who protest ill treatment are often forced to leave school altogether," loosing any chance for an education. *Id.*

141. *See id.*

142. *See id.*

143. Spare the Child, *supra* note 7, at pt. I. Summary.

144. *Id.* High levels of violence against children and women are a constant concern for Kenyan rights groups, and corporal punishment is included in this context. *See id.*

145. *Id.* Many hold the belief that corporal punishment of children has an educative and instructive purpose, without which a child will not be able to learn. *See id.*

146. *See id.*

147. *See id.*

148. *See id.* "To the extent that children are seriously injured, many Kenyans are willing to write such incidents off as tragic exceptions in a generally acceptable system." *Id.*

"harm" or "grievous harm."[149] Misdemeanor offenses arise out of assaults resulting in "harm" and felonies are assaults that result in "grievous harm."[150]

Kenyan law allows limited forms of corporal punishment, but only under highly restricted conditions.[151] The 1972 Education (School Discipline) Regulations state that corporal punishment may only be administered under certain circumstances.[152] These regulations permit the use of corporal punishment; however, the Minister of Education, Stephen Kalonzo Musyoka, informed Human Rights Watch that the Ministry discourages the use of the cane.[153]

While the Ministry claims the use of canes is discouraged, caning is the most preferred method of corporal punishment in Kenya.[154] According to these regulations, corporal punishment is reserved for certain behaviors and can only be administered after a full inquiry by the headteacher, and in the presence of a witness other than another pupil.[155] The regulations further state the headteacher may inflict no more than six strokes and must keep a written record of each incidence.[156] These regulations, if followed, seem to take control of such a controversial issue. However, a report by Human Rights Watch found every classroom teacher has the independent authority to cane students.[157] One of the headteachers interviewed for the report implied the regulations were impractical and said "[d]iscipline is supposed to be done by

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149. Spare the Child, *supra* note 7, at pt. IV. Corporal Punishment in Kenyan Schools. "[H]arm means any bodily hurt, . . . whether permanent or temporary . . ., [and] grievous harm means any harm which amounts to main, or endangers life or seriously or permanently injures health, or which is likely so to impair health, or which extends to permanent disfigurement . . . ." *Id.*

150. *See id.*

151. *See id.*

152. *See id.* at pt. III. Background. The Education (School Discipline) Regulations, The Laws of Kenya, chapter 21, article 1; corporal punishment may be "inflicted in cases of continued or grave neglect of work, lying, bullying, gross insubordination, indecency, truancy or the like." *Id.* Article 12(1) and 12(2) state that corporal punishment may only be imposed by or in the presence of the school's head teacher or principal; and, "it may be inflicted only after a full inquiry, and not in the presence of other pupils . . . ." *Id.* Article 14 finds that records must be kept of all cases of corporal punishment. *See id.*

153. *See id. quoting* Interview by Human Rights Watch with Stephen Kalonzo Musyoka, M.P., Minister of Education, Nairobi, Kenya (May 5, 1999).

154. *See generally* Spare the Child, *supra* note 7, at pt. IV. Corporal Punishment in Kenyan Schools. Research conducted by Human Rights Watch indicates that caning is imposed regularly, and administered in a way inconsistent with the regulations. *See id.* Almost every teacher has a cane that is accessible in the classroom. *See id.*

155. *See id.*

156. *See id.* Despite these regulations, the number of strokes a student receives usually depends on many factors, such as expression of pain by the child, poor exam results where the number of strokes depends on the performance, or excessive noise making. *See id.* More than one teacher also canes some children at a time. *See id.*

157. *See id.*

the headmaster but he can't because there are so many students, so he delegates his authority to junior teachers who do it."[158]

Many factors determine the type of physical punishment a student will receive. These factors include the harshness of the teacher, the school, and the nature of the misconduct. A particular student might receive anywhere from two to twenty strokes of the cane at a time.[159] The reported frequency of caning also varies from school to school and ranges from one or more canings a day at most schools, to one caning a week or even one a month.[160] Canings occur for a wide range of behavioral violations, some serious and some very minor. Children may receive corporal punishment for being tardy, having a dirty or torn uniform, rudeness, fighting, and any form of disruptive classroom behavior.[161] Children are frequently caned for poor academic performance, failure to complete homework assignments or learn lessons, and other circumstances not within the student's control.[162]

Another regulation set by the Ministry of Education but often not followed involves conducting full inquires with the child and keeping records of each instance.[163] In interviews with children, Human Rights Watch found that teachers often caned students without waiting for an explanation of the perceived misbehavior, and few punishments were actually recorded.[164]

In light of the report from Human Rights Watch, it seems as though the Ministry of Education has not been persistent in enforcing the provisions of the Education (School Discipline) Regulations, which limit the use of corporal punishment.[165] Government responses to serious incidents of corporal punishment have been inadequate to combat such abuse.[166] When children are injured, the school may offer to pay medical expenses, but teachers are rarely dismissed, prosecuted, or even disciplined.[167] Headteachers and teachers who

158. *Id.*

159. *See* Spare the Child, *supra* note 7, at pt. IV. Corporal Punishment in Kenyan Schools.

160. *See id.*

161. *See id.* Other grounds for physical punishment include, graffiti, stealing, missing school, not paying attention, giving wrong answers, failure to pay fees, and many others. *See id.*

162. *See id.* Children may not have the appropriate books to do their assignments, or their parents may not have enough money to pay for a proper uniform. *See id.*

163. *See id.*

164. *See id.* Interviews with children showed that caning was more frequent than the logbooks of the schools demonstrate. *See id.*

165. *See generally*, Spare the Child, *supra* note 7, at pt. IV. Corporal Punishment in Kenyan Schools.

166. *See id.*

167. *See id.* Some parents have pressed charges but in almost every case teachers have been acquitted, or when teachers have been convicted, they have been handed extremely light sentences such as minimal fines. *Id.*

cane children may be criminally prosecuted for assault; however, difficulties arise that prevent or reduce liability.[168]

Kenya's Education Minister said the government would implement a new policy officially banning corporal punishment in late 2000.[169] However, as of this writing, there are no reports that this has occurred. So far, enforcing the regulations has not been successful, but if a complete ban is recognized, there will be no excuse as to why regulations were violated or physical punishment was inflicted. Eliminating regulations would remove subjective judgments on how serious the misbehavior is and whether the punishment was excessive.

C. United States

In the United States, corporal punishment has been the conventional method for disciplining children since colonial times.[170] However during the past two decades, there has emerged a growing protest condemning physical punishment of children.[171]

"In 1972, the American Civil Liberties Union (ACLU) . . . sponsored a formal conference on [the subject of corporal punishment]. At that time, only two states (Massachusetts and New Jersey[)] legally banned corporal punishment in schools."[172] "In 1974, the American Psychological Association passed a formal resolution banning corporal punishment in schools and established the Task Force on Children's Rights . . . ."[173] In 1987, the National Coalition to Abolish Corporal Punishment in Schools was developed and united in their efforts to ban the physical punishment of children in school.[174]

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168. *See id.* Kenya's Evidence Act prohibits anyone from being convicted of a crime based solely on the testimony of a young child. *See id.* It has also been noted that police and education officials typically try to handle cases administratively and avoid the legal system altogether. *See id.* Furthermore, the Teacher Services Commission has the responsibility of disciplining government-employed teachers and does not undertake investigations of corporal punishment unless complaints are brought to it despite the widespread media coverage of injuries resulting from school physical punishment. *See id.* at 12.

169. *See* Parenting Coalition International, *supra* note 91.

170. *See Corporal Punishment in Schools*, *supra* note 17.

171. *See id.*

172. *Id.*

173. *Id.* Also, the National Education Association published a report in the 1970's that denounced corporal punishment in schools and recommended it be abolished. *See id.*

174. *See id.* Included in the coalition was the National Center on Child Abuse Prevention, the American Academy of Pediatrics, the American Bar Association, the American Medical Association, the Parent-Teacher's Association, the National Education Association, and the Society for Adolescent Medicine, along with over twenty other groups interested in abolishing the practice of physically punishing children in school. *See id.* at 2. This coalition still has an active movement with national and local meetings along with publications and various other avenues for cultivating public awareness regarding physical punishment of children. *See id.*

In 1867, New Jersey became the first state in the United States to ban corporal punishment of discipline in schools.[175] As of 1990, twenty-seven states had banned corporal punishment in schools,[176] and even in states where it was legal, many school districts enacted policies prohibiting it.[177] At that time, out of the twenty-three states that continued to allow corporal punishment, Mississippi had the highest percentage of students struck by educators.[178]

A popular opinion in the United States is that applying physical punishment to children at school is legally permissible.[179] Since before the American Revolution, the common law has provided that a teacher may use reasonable force in disciplining children but any excessive force will lead to liability for personal injuries.[180] However, the legality of corporal punishment has recently been questioned from different perspectives.[181] Some arguments include:

> (1) the social and psychological arguments that society has progressed past the physical punishment stage; (2) the idea that legally corporal punishment is "cruel and unusual punishment" as prohibited by the Eighth Amendment, and (3) that corporal punishment should not be administered without first providing the student with procedural due process of law as prescribed in the Fourteenth Amendment.[182]

In considering these perspectives, physical punishment in the United States is not deemed to be so "excessive" or "degrading" in the constitutional

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175. *See Corporal Punishment in Schools*, *supra* note 17.

176. *See Facts About Corporal Punishment*, *supra* note 48. The following states have banned corporal punishment by state regulation: New Hampshire, New York, and Utah. *Id.* In Rhode Island, every school board in the state has banned corporal punishment, and in South Dakota corporal punishment has been banned by law rescinding authorization to use this method of punishment. *See id.* The following states have also banned corporal punishment in school: Alaska, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oregon, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See id.*

177. *See* HYMAN, *supra* note 18, at 228-29. Local efforts are winning individual school districts in: Colorado, Kansas, Arizona, Louisiana, New Mexico, Wyoming, Delaware, Missouri, Texas, South Dakota, Arkansas and Florida. *See id.*

178. *See Facts About Corporal Punishment*, *supra* note 48. According to the U.S. Department of Education, Office for Civil Rights, 1998 Elementary and Secondary School Civil Rights Compliance Report, the following states rank in the list of top ten worst for the issuance of corporal punishment: Mississippi is the worst at 10.1% followed by Arkansas 9.2%, Alabama 6.3%, Tennessee 4%, Oklahoma 3%, Louisiana 2.7%, Georgia 2.13%, Texas 2.07% Missouri 1.1% and New Mexico .9%. *See id.*

179. *See Corporal Punishment in Schools*, *supra* note 17.

180. *See id.*

181. *See* KERN ALEXANDER, SCHOOL LAW 8 (1980).

182. *Id.* at 320.

sense as to violate the "cruel and unusual punishment clause" of the Eighth Amendment.[183] In 1977, the Supreme Court held in *Ingraham v. Wright*[184] that moderate corporal punishment does not violate the constitutional prohibition against cruel and unusual punishment contained in the Eighth Amendment, or the guarantee of liberty contained in the Fourteenth Amendment.[185] According to the court, the proscription against cruel and unusual punishment is designed to protect those charged or convicted of a crime and not students in a disciplinary setting.[186] However, physical punishment may be found to be cruel and unusual where the incident has caused severe physical harm. Whether an incident of corporal punishment in the school is considered cruel and unusual under the Constitution depends mainly on the circumstances and setting at the time and not on the manner of punishment.[187]

In *Ingraham*, the court "left open the question of whether and under what circumstances corporal punishment of a student might give rise to an independent federal cause of action to vindicate substantive rights under the due process clause."[188] In 1975, the United States Supreme Court determined "that the due process provisions of the Fourteenth Amendment require that students are entitled to a hearing prior to any prolonged ejection from school for disciplinary reasons."[189] However, the *Ingraham* court found that common law remedies, civil actions, and criminal liability adequately protected due process rights of students.[190] Different circuit courts have tried to answer the question left by the court in *Ingraham* but "[n]evertheless, the burden of establishing a substantive due process violation, regardless of which circuit's definition is used, is a very difficult burden to meet."[191]

From district to district, legislature to legislature, corporal punishment policies are changing.[192] For people interested in furthering change in corporal punishment policy, federal courts are reluctant to institute such a

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183. *See* Schwartz, *supra* note 102, at 433.

184. *See Ingraham*, 430 U.S. at 656-658. James Ingraham brought suit arguing that his Eighth Amendment rights to be free from cruel and unusual punishment had been violated after being paddled less than twenty times with a wooden paddle two feet in length, three to four inches wide and one-half inch thick. *See id.*

185. *See* EVE CAREY ET AL., AMERICAN CIVIL LIBERTIES UNION: THE RIGHTS OF STUDENTS 107-111 (1997). *See also Ingraham*, 430 U.S. The decision in *Ingraham* is stunning because it left us with the fact that public schools are the only governmental-run institutions where corporal punishment is allowed. *See id.* Corporal punishment has been banned in places such as the military services and prisons. *See id.* It does not make sense that the government allows the physical punishment of school children if they cannot hit prisoners. *See id.*

186. *See Ingraham*, 430 U.S. at 654-58.

187. *See* Schwartz, *supra* note 102, at 433.

188. *Corporal Punishment in Schools*, *supra* note 17. *See also Ingraham*, 430 U.S.

189. *Corporal Punishment in Schools*, *supra* note 17. *See also Goss v. Lopez*, 419 U.S. 565 (1975).

190. *See Ingraham*, 430 U.S. at 667-68.

191. *Corporal Punishment in Schools*, *supra* note 17.

192. *See* HYMAN & RATHBONE, *supra* note 26, at 25.

change.[193] Many believe there is probably little chance of national legislation or a Supreme Court decision that will abolish corporal punishment in schools.[194] Therefore, there is little doubt that the best way to eliminate corporal punishment in schools is through a "state-by-state assault."[195]

However, if the United States were to pass a statue banning corporal punishment, it would need to be one that was both familiar and accessible to the average citizen.[196] A possible version of a statute expressly banning physical means of punishment and also containing penalty language that an offender could be prosecuted under may read as follows:

(1) (a) Corporal punishment is defined as the use of physical force with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child's behavior.
(b) Any person who uses corporal punishment on a child shall be guilty of the crime of battery provided that such physical force would be a battery if used on an adult.

(2) The penalties for conviction pursuant to subsection (1) shall be the same as those for conviction under any other criminal battery provisions or, in lieu thereof in appropriate cases, shall be a post-trial or post-plea diversion program.

(3) Nothing stated in subsections (1) or (2) herein shall preclude or limit further prosecution under any other applicable laws for the use of corporal punishment described in subsection (1).

(4) The proscription set forth in subsection (1) shall not apply to the use of such physical force as is reasonably necessary to prevent death or imminent bodily pain or injury to the child or others.[197]

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193. *Id.*

194. *See* HYMAN, *supra* note 18, at 220.

195. *Id.* at 213-20. Political action is a great way to change policy in the United States. *See id.* at 215. A number of state professional organizations that are backed by national policy are against the use of corporal punishment in schools. *See id.*

196. Bitensky, *supra* note 99, at 231. The United States has a legal system that does not make laws to "merely to announce preferred policies without creating adjunctive enforceable rights, duties, or liabilities." *Id.*

197. *Id.* at 231. Subsection one defines corporal punishment and distinguishes prosecutable conduct from acts that may cause pain for another reason, and requires that prosecutable use of force must be for the purpose of correcting, controlling, or punishing the child's behavior. *See id.* Subsection two then makes the penalties for hitting a child the same as those for hitting an adult to portray that children are worthy of the same protection. *See id.*

Widespread enactment of this type of statute may not fit into the national legal scheme, but each state could enact a similar statute to rid society of the physical punishment of children in schools.

VII. CONSEQUENCES OF CORPORAL PUNISHMENT IN SCHOOLS

School serves as a model of society and is an indicator of the values and policies of its citizens. Sometimes the school leads by furthering educational goals, sometimes it follows the changing needs of the community, and many times it does both. This leads to the perception that corporal punishment is symbolical of the culture in which it lies. Both proponents and opponents of corporal punishment see the effect as being long lasting and having a great impact outside the school day or school calendar.[198]

A. PSYCHOLOGICAL EFFECTS

Psychological abuse can take many forms, including exposing children to institutional practices that deny the opportunity for the maintenance of basic human needs. Five conditions have been associated with psychological maltreatment:

1. Discipline and control techniques based on fear and intimidation[;]
2. Low quantity and quality of human interaction in which teachers communicate a lack of interest, caring, and affection for students[;]
3. Limited opportunities for students to develop competencies and feelings of self-worth, especially for children who lack ability or motivation for high-level academic work[;]
4. Encouragement to be dependent and subservient, especially in areas where students are capable of making independent judgments[;]
5. Denial of opportunities for healthy risk taking such as exploring ideas that are not conventional and approved by the teacher.[199]

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198. *See* HYMAN & RATHBONE, *supra* note 26, at 19-21. Those concerned about violence in society see corporal punishment as a dangerous contribution to that violence. *See id.* Those concerned about the breakdown of the social order see corporal punishment as an important means of controlling undisciplined behaviors that lead to a disorderly classroom. *See id.*

199. *See* HYMAN, *supra* note 18, at 15 *citing* Stuart Hart, *Psychological Maltreatment in Schooling*, SCHOOL PSYCHOLOGY REVIEW 16(2) (1987).

A loss of confidence may be caused by self-depreciating actions and statements made by the teacher.[200] For example, when a child tries to explore new ideas and express his or herself in creative ways, but is physically and mentally demeaned in front of his or her peers, the child's sense of self worth is greatly reduced.[201] Low self-esteem can start a vicious cycle of academic deficiency, rebellion, and removal from any interactions with educators and peers.[202]

Traumatic and unforgettable experiences can arise out of caning and whipping young children. Many educators believe that corporal punishment will more likely cause a child to fear school, which undermines the entire purpose of education.[203] Experts have found corporal punishment produces in children neurotic reactions, such as depression, withdrawal, anxiety, tension, and in older children, substance abuse, and interference with school work.[204] Especially when children are caned or whipped in front of their classmates, they feel humiliated and degraded, and end up resenting those who punish them.[205]

Physically reprimanding children does not model desirable behavior unless society wants children to become violent and aggressive. Psychological and educational research indicates that children who are physically punished themselves are more likely to bully their peers.[206] To a considerable extent, children learn by imitating the behavior of adults, especially those with whom they interact and depend on daily. Therefore, the use of corporal punishment by adults having authority over children will likely lead children to use physical violence to control the behavior of others rather than a rational, educational, and intelligent form of positive and negative reinforcement.[207]

B. Effects on Class Discipline

Teachers do not need a cane to teach discipline in the classroom. According to many experts,

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200. *See id.* at 20.

201. *See id.*

202. *See Corporal Punishment in Schools*, *supra* note 17.

203. *See Corporal Punishment Should be Abolished in Schools*, THE GUARDIAN, Dec. 14, 1999, *available at* http://www.newafrica.com/education/articles/caning.htm (last visited Oct. 24, 2002). When a child goes to school with the fear of being caned, his or her learning is weighed down with psychological problems that may affect the child all throughout life. *See id.*

204. Bitensky, *supra* note 3, at 150.

205. *See id.*

206. *See* ADAH MAURER, PADDLES AWAY: A PSYCHOLOGICAL STUDY OF PHYSICAL PUNISHMENT IN SCHOOLS 25 (1981).

207. *See id.* at 26. Physical punishment, unless neutralized by other favorable circumstances, injects a streak of cruelty into the character of the victim. *Id.* at 25.

> there is considerable data indicating that corporal punishment does not, in any consistent way, deter misbehavior or encourage good behavior on the part of children. Most experts agree that corporal punishment does nothing to fulfill the disciplinary goal of developing a child's conscience so as to enable him or her to behave well . . . .[208]

When teachers inflict physical punishment upon students, it does not teach them what they did wrong, rather it illustrates the fact that the teacher deemed the behavior undesirable. This is due in part to the fact that corporal punishment is a general method of discipline that is directed at all types of misbehavior. It can become very confusing for children when the punishment is always of a physical means whether they were misbehaving or failing to perform well academically. Without understanding what about their behavior was inappropriate, the behavior cannot be corrected; the cycle continues, thus never reaching the goals of education. Poor behavior is not defeated by a cane or whip. Children are individual human beings with needs that do not include infliction of pain.

VIII. ALTERNATIVES TO CORPORAL PUNISHMENT

Corporal punishment is a method of behavioral and intellectual control that many generations have grown up knowing. For the teacher, it is easily accessible and serves the instant purpose of making the child aware of their misbehavior. Physical punishment instills a sense of control and order that most think is necessary for a successful learning environment. However, other forms of behavior management can be just as successful without the painful, harsh, long-term effects. These forms include: (1) the use of positive reinforcement and (2) the incorporation of the term 'consequences' rather than punishment. For these methods to prevail, programs need to be instituted educating teachers on different ways of classroom management. There also needs to be support from society to work along with the schools in eliminating physical punishment of children.[209]

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208. Spare the Child, *supra* note 7, at pt. V. Corporal Punishment's Impact, *citing* Susan Bitensky, *Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REF. 353, 426 (1998).

209. *See Corporal Punishment in Schools*, *supra* note 17. Teachers need to receive as much support and training as possible in their efforts to maintain classroom control without resorting to violence. *See id.* Teachers should receive information regarding the effects on physical punishment and have available to them classes concerning other methods of instilling control. *See id.*

A. *Positive Reinforcement*

One important technique to maintaining classroom control is creating an environment that conveys a mutual sense of value and respect.[210] Principles for learning behavior and misbehavior are based on reward and punishment tailored to particular students at particular times. Educational experts who oppose corporal punishment have found that positive reinforcement techniques have the tendency to reduce the frequency and extent of student misconduct.[211] Positive reinforcement techniques in the classroom can be just as accessible as corporal punishment. Some examples include: verbal praise, a pat on the back, or extra free time for good behavior.

One problem with this type of technique is that some teachers are reluctant or simply do not believe that children should be reinforced for good behavior.[212] These teachers look at reinforcement as bribery and think that children will take advantage of the classroom structure.[213] However, one characteristic of a well-managed classroom is frequently reinforcing children for appropriate behavior.[214] A way for this to happen is to provide a positive model of good behavior without calling attention to the bad behavior.[215] Positive reinforcement does not mean taking away all forms of punishment, but when a child misbehaves, they should be able to explain what happened and the punisher should explain what they did, and why it was wrong.

B. *Consequences*

More and more educators and administrators are beginning to use the term "consequences" rather than punishment. Consequences can provide clear and definitive answers to children's active inquiries on what is and is not acceptable.[216] Consequences can also teach children who is in charge and what their responsibilities are by holding children accountable for their choices and behavior.[217]

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210. *See id.* School officials should exhibit cordiality to students and an attitude that they generally enjoy working with them and value their needs. *See id.*

211. *See* Spare the Child, *supra* note 7. There are many ways that positive reinforcement can be carried out. *See id.* For example, a teacher can praise students in front of other classmates and teachers, award special certificates to those who perform well or list their name on a blackboard. *See id.*

212. *See* HYMAN, *supra* note 18, at 137.

213. *See id.*

214. *See id.*

215. *See id.* at 138. Modeling can occur in the classroom when, for example, three children are sitting together and one is misbehaving, the teacher can merely say to the other two, "I appreciate you doing your work" without saying anything to the misbehaving child. *Id.*

216. *See* ROBERT J. MACKENZIE, SETTING LIMITS IN THE CLASSROOM 164 (Prima Publishing 1996).

217. *See id.* Consequences, when used consistently, define the path for students to stay on. *See id.* Consequences accomplish the goal of stopping misbehavior when it occurs. *See id.*

What makes the consequences effective are the ways in which they are applied. If they are applied in a punitive or permissive manner, consequences will have limited value and teachers will find themselves reverting back to old methods that are easily accessible and provide quick effective results. On the other hand, if consequences are applied in a democratic manner, lessons and signals will be clearer.[218] It may take a while for students to get used to the idea of consequences, during this time the teacher must remain patient and calm.

Effective methods of punishment, that do not include physical pain, are available. Alternative methods may take more time to learn and initially instill in the classroom, but are just as effective as physical abuse without the pain and psychological problems.[219] Educators, administrators, and society as a whole need to embrace these methods and reduce the negative messages that children are receiving in the classroom.

IX. LEGAL RECOMMENDATIONS

As discussed above, there are many ways of instilling positive behavior in the classroom that do not involve physical punishment. These alternatives to corporal punishment are at the discretion of individual teachers or school districts. This choice could be eliminated through statutes specifically designed to prevent physical punishment of children. If a government chooses to place an explicit ban on corporal punishment or place restriction on its use, then those policies should be strictly enforced. Disregard of the law becomes frequent when violators are not punished for their wrong.

In ratifying the Convention on the Rights of the Child, nations made the promise to uphold the safeguards in the Convention. One of these promises includes taking all measures, legal and social, to protect children from all forms of physical punishment.[220] Nations that have only placed restrictions on corporal punishment, such as Kenya, have not followed through with their promises. Allowing any type of corporal punishment violates the Convention along with other human rights instruments. Therefore, such nations that have simply placed restrictions on its use should enact an explicit ban on the use of corporal punishment.

Enacting laws on corporal punishment can be very effective. It announces to the public that corporal punishment is against the policies and morals of society. "Law has an educative effect because it crystallizes and

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218. *See id.* at 167.

219. *See Corporal Punishment in Schools*, *supra* note 17. A variety of nonviolent disciplinary techniques can be taught and utilized. *See id.* These techniques may be powerful and compelling in changing unacceptable behavior. *See id.*

220. *See* Convention, *supra* note 50, art. 19.

makes visible in an impressive way, at the level of governmental authority, those norms that constitute a society's priorities and aspirations."[221]

There is much that can be done at many different levels to advocate the ban of corporal punishment.[222] "Banning corporal punishment at the local level has evolved from various effective strategies, such as civil suits against local schools using corporal punishment, promotion of publicity about such schools, and comparing the computerized corporal punishment rates of some schools."[223] Individuals can join various groups to evaluate their local and state views on physical punishment of children.[224] The government can encourage school authorities to implement support programs to educate parents, teachers, and society at large about the harm of corporal punishment and the existence of effective alternatives.[225]

Governments all over the world, especially those that have ratified the Convention on the Rights of the Child, need to clarify their position on the use of corporal punishment.[226] Until new regulations are adopted, parents and students should be educated about their rights under existing laws and regulations.[227] Local education agencies can establish independent complaint boards to investigate individual complaints and take all appropriate and immediate disciplinary action against accused teachers found to have violated the regulations.[228]

X. CONCLUSION

Corporal punishment has a long history in many countries around the world. With this in mind, the road to instilling alternatives has been long and difficult, despite the powerful alternatives that are available. Teachers need the support of parents, administrators, and society in general to defeat the theory that without the fear of pain, a child will not develop intellectually or behaviorally.

Elimination of corporal punishment has not been easy because there is no common agreement as to the benefits or problems related to such punishment. Some teachers still depend on harsh forms of punishment to solve difficult behavioral problems.

The purpose of children's education, as posed by the Convention on the Rights of the Child, should be the development of respect for human rights

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221. Bitensky, *supra* note 99, at 230.

222. *See Corporal Punishment in Schools*, *supra* note 17.

223. *Id.*

224. *See id.*

225. *See* Spare the Child, *supra* note 7.

226. *See id.* In ratifying the Convention on the Rights of the Child, states' parties promised to uphold the protection of children against inhuman, degrading treatment or punishment. *See* Convention, *supra* note 50.

227. *See* Spare the Child, *supra* note 7.

228. *See id.*

and fundamental freedoms.[229] Many nations throughout the world have recognized that corporal punishment in schools violates the provisions on the Rights of the Child, and constitutes cruel, inhuman treatment.[230] All governments need to take strong action to uphold the promises in the Convention to eliminate corporal punishment in schools.

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229. *See id.*
230. *See id.*
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TRULY INEFFECTIVE ASSISTANCE: A COMPARISON OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

I. INTRODUCTION

Both the United States of America and the United Kingdom[1] have adopted standards to curb miscarriages of justice resulting from ineffective assistance of counsel.[2] Yet, both countries'[3] efforts have fallen short of solving

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1. *See* U.S. Department of State: Background Note: United Kingdom, *available at* http://www.state.gov/r/pa/ei/bgn/3846.htm (last visited Aug. 11, 2002) [hereinafter United Kingdom]. Official name: The United Kingdom of Great Britain and Northern Ireland. *See id.* The United Kingdom consists of Great Britain, Northern Ireland, Scotland, and Wales. *See, e.g.*, Sarah Carter, *Update to A Guide of the UK Legal System, at* http://www.llrx.com/features/uk2.htm (last visited Aug. 11, 2002) [hereinafter *Update*]. The government is a constitutional monarchy. *See* United Kingdom. Originally, Scotland and Wales were independent kingdoms that resisted British rule. *See id.* Wales was conquered in 1282, but it was not until 1536 that an act completed its political and administrative union with England. *See id.* Beginning in 1603, England and Scotland were ruled under one crown, but kept separate parliaments. *See id.* It was not until 1707 that England and Scotland were unified as Great Britain. *See id.* A legislative union between Ireland and Great Britain was completed in 1801. *See id.* The union had been preceded by centuries of battles between England and the Irish for control of Ireland. *See* United Kingdom. The Anglo-Irish Treaty of 1921 established the Irish Free State, in which part of Ireland left the United Kingdom and became a republic after World War II. *See id.* However, six northern counties have remained part of the United Kingdom. *See id.*

2. The United States' standard for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*, 467 U.S. 1267 (1984); The United Kingdom's standard is set out in both *R. v. Clinton*, [1993] 1 WLR 1181, and *Anderson v. H.M. Advocate*, 1996 S.L.T. 155. The United Kingdom's standard for ineffective assistance of counsel was further refined by the Human Rights Act of 1998. *See* Human Rights Act of 1998, *at* http://www.legislation.hmso.gov.uk/acts/acts1998/80042--a.htm (last visited Aug. 11, 2002) [hereinafter Act]. All three of the cases and the Act will be discussed in subsequent sections of this note. Although the United States of America and the United Kingdom are the focus of this Note, other nations also have established standards for ineffective assistance of counsel. *See* Neil Gow, *"Flagrant Incompetency" of Counsel*, NEW L.J. 146, 153 (1996). In Canada, the standard is that a court can intervene if it finds that there was "a real possibility that any miscarriage of justice had occurred due to the flagrant incompetency of counsel." *Id.* at 153, *quoting* R. v. Garofolio (1988) 91 CCC (3rd) 103. (1988) 91 CCC (3rd) 103. In Jamaica, the standard is "whether the effect of the failure to put the defendant's case was such as to render the conviction unsafe and unsatisfactory." *Id. quoting* Mills v. Queen, [1995] 3 All ER 865. Argentina has not established a standard for determining ineffective assistance of counsel, however, it does have a constitutional right to an "effective defense." *See* CRAIG BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 49 (1999). In Russia, everyone has the "right to qualified legal counsel." *Id.* at 317. Ineffective assistance of counsel has become a problem because people with no formal legal training are allowed to act as defense counsel. *See id.* There are no recorded instances of a Russian defendant lodging an appeal claiming that defense counsel was incompetent. *See id.* However, people are increasingly lodging complaints with the Chairman of the local Court, the Russian Supreme Court, or one of the Collegia of Advocates regarding the professional conduct of defense counsel. *See id.* The Collegia of

the problem of ineffective assistance of counsel. In fact, each respective standard has been insufficient from an overall perspective, leaving room for improvement on both sides of the Atlantic.

Given the nature of the problem, defense counsel[4] are the easiest to blame for the standards' deficiencies. However, it is the United States' and United Kingdom's legal systems as a whole, that have ultimately allowed for such failure. The amount of deference that each system provides counsel's tactical and strategic decisions has allowed inept counsel to go unpunished for ineffective representation and lowered the bar by which each system's counsel is measured.[5] This disregards what each standard should be accomplishing. Both systems should be establishing what constitutes effective assistance of counsel, rather than contributing to each standards' decline.[6]

At their extremes, what passes for effective assistance of counsel in both the United States and the United Kingdom is baffling. Two such examples are *Smith v. Ylst*,[7] a United States case and *Egan v. Normand*,[8] a United Kingdom case.

In *Smith*, the United States Court of Appeals for the Ninth Circuit held that a per se ineffective assistance of counsel rule should not be applied where counsel is found to be mentally ill.[9] Instead, the court found that the

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Advocates has the authority to investigate and dictate the proper penalty to a member attorney. *See id.* at 317.

3. *See* United Kingdom, *supra* note 1. The United States and the United Kingdom are close allies. *See id.* British foreign policy calls for close coordination with the United States. *See id.* The countries' cooperation is evident in their "common language, ideals, and democratic practices . . . ." *Id.* The United Kingdom is the United States' fourth largest market after Canada, Japan, and Mexico. *See id.* Both continually consult one another on foreign policy issues and share foreign and security policy objectives. *See id.* The United States and the United Kingdom also share the world's largest investment partnership. *See* United Kingdom.

4. For the purposes of this paper, United States' defense attorneys and United Kingdom's barristers and solicitors will be referred to as "counsel," except in certain circumstances in order to provide uniformity throughout the Note. Counsel is defined as "one or more lawyers who represent a client." BLACK'S LAW DICTIONARY 284 (7th ed. 2000). In the United Kingdom, solicitors and barristers make up the two branches of the legal profession. *See Update*, *supra* note 1. Solicitors are defined as "a legal adviser who consults with clients and prepares legal documents but is not generally heard in High Court or (in Scotland) Court of Session unless specifically licensed." BLACK'S at 1124. A barrister is defined as "a lawyer who is admitted to plead at the bar and who may argue cases in superior courts." *See id.* at 117.

5. *See Strickland*, 466 U.S. at 689-90 (1984). *See also* Gow, *supra* note 2.

6. *See* Paul J. Kelly, *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089 (2001).

7. Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 480 US 829 (1988).

8. Egan v. Normand, 1997 S.L.T. 1166.

9. *See Smith*, 826 F.2d at 876. The defendant was convicted of first degree murder for shooting and killing his wife two days after their marriage ended. *See id.* at 874. The defendant's contentions focused mostly on his counsel's out of court statements. *See id.* Counsel believed that Smith was the target of a murder conspiracy involving the victim's lover and relatives. *See id.* Counsel introduced this conspiracy in his opening statements but did not develop the theory at trial. *See id.* Also, counsel's secretary stated that counsel told her he was

Strickland test[10] was sufficient to determine if mentally ill counsel was ineffective.[11] The court found that "mental illness is too varied in its symptoms and effects" to warrant a per se ineffective assistance of counsel rule for mental illness without evidence that counsel's performance was below constitutional standards.[12] Rather, the court believed it would be better to "evaluate the attorney's actual conduct . . . in light of allegations of mental incompetence."[13]

In *Egan*, the defendant appealed his conviction for breach of peace because his trial counsel was defective.[14] The defendant obtained new counsel for his appeal, but the defendant's appellate counsel also made a critical mistake.[15] While in front of the High Court of Justiciary,[16] appellate counsel admitted to not preparing for the hearing despite having eight months time to prepare.[17] Moreover, counsel could not provide an explanation for her lack of preparation.[18] The High Court held that the appeal could not proceed because counsel had not prepared for the appeal.[19] It appears, unfortunately, that the defendant lost at both the trial and appellate levels due to the ineptitude of his respective counsel.[20]

While the above cases do not represent the absolute norm regarding both standards, they are fair representations of the logic of the legal systems and of counsel's conduct regarding ineffective assistance of counsel. Given this, it is clear that both standards are in need of reforms. From a broad perspective,

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crazy and wanted to go to an asylum. *See id.* Counsel was also concerned that people were out to kill him. *See Smith*, 826 F.2d at 874.

10. *See Strickland*, 466 U.S. at 668. The *Strickland* test will discussed in depth in Part I(A) of this note.

11. *See Smith*, 826 F.2d at 876.

12. *See id.*

13. *Id.* The Ninth Circuit concluded that "if a mental illness or defect indeed has some impact on the attorney's professional judgment it should be manifested in his courtroom behavior and conduct of the trial." *Id.* at 876. For a more detailed examination of cases of this type see Jeffery Kirchmeier, *Drink, Drugs, and Drowiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996). Kirchmeier noted that, at the time of his article, courts applying the *Strickland* test to attorneys who were mentally impaired by drugs, alcohol, or psychological ailments had yet to find any of them constitutionally ineffective. *See id.* at 460.

14. *See Egan*, 1997 S.L.T. at 1167. The defendant alleged that his trial counsel did not present a defense, acted contrary to defendant's instructions, failed to challenge evidence properly, and failed to discover evidence that provided a legitimate explanation of the defendant's actions. *See id.*

15. *See id.*

16. *See Update*, *supra* note 1.

17. *See Egan*, 1997 S.L.T. at 1167.

18. *See id.* at 1166. Counsel stated that her firm recently instructed her to represent the defendant and that her firm advised her that she would have to take certain steps, obtain information, and obtain statements in order to support the appeal. *See id.*

19. *See id.* at 1167-68. The Court stated that had counsel taken the appropriate steps when it had time, a successful presentation on appeal would have likely led to the Court setting aside the verdict. *See id.* at 1168.

20. *See id.*

neither standard is truly effective. Simply put, the standards for ineffective assistance of counsel in both the United States and the United Kingdom are themselves ineffective.[21]

At this point, two questions emerge; why are both systems' standards ineffective and what can be done to improve both standards? This Note will examine the United States' standard and the United Kingdom's standard separately to fully answer both questions.

Part II of the Note will examine the United States' standard of ineffective assistance of counsel. Subsection I(A) will explore the history and development of right to counsel, the test for ineffective assistance of counsel, and subsequent relevant case law addressing that test. Subsection I(B) will address the different areas in American case law where ineffective assistance of counsel is prevalent, as well as illustrate the inconsistency of the *Strickland* test.[22] Finally, subsection I(C) will address criticisms of the United States' standard.

Part III will examine the United Kingdom's standard for ineffective assistance of counsel and will follow the preceding section's format. Subsection II(A) will explore the history and development of ineffective assistance of counsel in the United Kingdom. Subsection II(B) will address and compare United Kingdom case law concerning ineffective assistance of counsel. Subsection II(C) will address criticisms of the United Kingdom standard, with particular focus on the actions of solicitors.[23]

Part IV will provide some general suggestions to make each standard more efficient and effective. New rules and policy considerations will be suggested to eliminate the problems that plague both standards. The Note will conclude with an overview of the essential problems inherent in each standard and suggest remedies to those problems.

II. INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED STATES

The United States legal system[24] is based on the adversarial process.[25]

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21. *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1259 (2001). "Unfortunately, both [the United Kingdom's and the United States' adversarial processes] suffer from endemic, inadequate performance by the defense." *Id.* (emphasis added).

22. *See Strickland*, 466 U.S. at 687.

23. *See* BLACK'S, *supra* note 4, at 1124.

24. The United States of America has the largest legal profession in the world. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 267 (2nd ed. 1998). Technically, there is no such thing as an "American lawyer" since each state admits its own lawyers. *See id.* Each state has its own separate court system, with no two exactly alike. *See id.* at 75. Above the state courts is the federal court system; at least one federal court sits in each state. *See id.* Most state courts operate through a three-tier system: trial courts, appellate courts, and supreme courts. *See id.* at 79. However, some states, such as South Dakota, only have a two-tier system. *See id.* Federal courts also have a three tiered system. *See* FRIEDMAN at 79-80. Those three tiers consist of district courts, courts of appeal, and finally the Supreme

The emphasis on the adversarial process denotes counsel's importance in shaping the law and advocating a client's position.[26] The United States recently, in terms of legal history, created the standard for ineffective assistance of counsel.[27] Despite the standard's relatively recent development, concern over the effective assistance of counsel dates back decades before the standard's establishment.

A. History of the American Standard

The Sixth Amendment of the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[28] This seminal rule established by the Framers of the United States Constitution remained rather undeveloped until the early part of last century.[29] In 1932, the Supreme Court of the United States began expanding the scope of right to counsel and subsequently the right to effective counsel, with *Powell v. Alabama*.[30] In *Powell*, the Supreme Court held that indigent defendants[31] had a right to effective assistance of

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Court of the United States. *See id.* at 80-81. The Court of Appeals is the end of the line for most cases. *See id.* The Supreme Court has almost complete control over their docket and only hears a small percentage of cases. *See id.* at 81.

25. *See* Griffin, *supra* note 21, at 1244.

26. *See generally* Kimmelman v. Morrison, 477 U.S. 365 (1986). In the United States, the right to counsel is a fundamental right assuring fairness in, and legitimizing the adversarial process. *See id.* at 374. "Vigorous representation by effective counsel is central to the legitimacy and premises of the adversary system. Because the theory upon which the adversary systems rests is that the 'truth' is 'best discovered by powerful statements on both sides of the question . . . .'" ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE: A CRITICAL PERSPECTIVE 30 (1992), *quoting* Powell v. Alabama, 287 U.S. 45, 53 (1932).

27. *See Strickland*, 466 U.S. at 668.

28. U.S. CONST. amend. VI. For a full and detailed examination of the Sixth Amendment see GARCIA, *supra* note 26. Common opinion finds that the Sixth Amendment only vests rights in the accused and not the prosecution, victim, or community. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 167 (1995). However, the prosecution also enjoys Sixth Amendment rights as well. *See id.* The prosecution enjoys a right to a speedy trial and to challenge the jurors, among other powers. *See id.*

29. *See* Bruce A. Green, *Lethal Fiction: The Meaning of Counsel in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-39 (1993). The Framers' purpose behind this right to assistance of counsel was to ensure that laws such as those in England, where the criminal defendant was required to represent himself, would not be enacted in the United States. *See id.* at 57.

30. Powell v. Alabama, 287 U.S. 45 (1932). The defendants, all African-Americans, were charged with the rape of two white girls. *See id.* at 49. At arraignment the defendants were not asked whether they had or could obtain counsel. *See id.* at 52. Though an attorney volunteered to appear with whomever the court appointed counsel, the trial court refused to appoint specific counsel. *See id.* at 53. Rather, the trial judge appointed "all the members of the bar for the purpose of arraigning the defendants," and anticipated those members to continue representing the defendants during trial. *See id.*

31. An indigent defendant is "[a] person who is too poor to hire a lawyer and who, upon indictment, becomes eligible to receive aid from a court-appointed attorney and a waiver of court costs." BLACK'S, *supra* note 4, at 620.

counsel in capital cases.[32] The Court furthered this stance nearly thirty years later in *Gideon v. Wainwright*,[33] holding that due process requires that counsel be appointed for an indigent defendant charged with a felony.[34] In 1970, the Supreme Court continued expanding the right to counsel in *McMann v. Richardson*,[35] holding that effective assistance of counsel must be reasonable.[36]

By the middle of the 1980's, the Supreme Court had greatly broadened a defendant's right to counsel and, more specifically, to a defendant's right to effective assistance of counsel. However, the Supreme Court had not yet established a standard to determine what constituted ineffective assistance of counsel, and as a result, lower courts struggled to make any such a determination.[37] In 1984, the Court finally established a definitive standard in *Strickland v. Washington*.[38]

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32. *See Powell*, 287 U.S. at 73. The Court stated that:

> The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to more serious crimes, and in a very limited number, to capital cases.

Id. Justice Sutherland said, "[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.* at 68-69. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938) (The Sixth Amendment compels the assistance of counsel in all prosecutions, unless the accused waives counsel). *But see* Betts v. Brady, 316 U.S. 455 (1942) (The Fourteenth Amendment does not command that a defendant be represented by counsel in a state court. However, the Court did find that every court has the power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness).

33. Gideon v. Wainwright, 372 U.S. 335 (1963).

34. *See id.* at 349. "The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' . . . there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved." *Id.* Interestingly, despite being denied counsel, Gideon conducted a decently thorough case given his abilities and the hostile position that he had been placed in. *See id. See also* Jeffery Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 153 (2001). Gideon made an opening statement, cross-examined State witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument that emphasized his innocence. *See Gideon*, 372 U.S. at 337.

35. McMann v. Richardson, 397 U.S. 759 (1970).

36. *See id.* at 770-71. "Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter . . . on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id. See also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (Indigent misdemeanor defendants who could be sentenced to imprisonment can have access to counsel).

37. *See* Amy R. Murphy, Note, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 SUM LAW & CONTEMP. PROBS. 179, 189 (2000).

38. *See Strickland*, 466 U.S. at 668. The defendant pled guilty to three first-degree murder charges. *See id.* at 672. The defendant requested his counsel look at his background, however, counsel only talked with the defendant's wife and mother and did not follow up on the matter. *See id.* at 672-73. The defendant also requested a psychiatric examination, however counsel did not request an examination since the defendant gave no indication that the

In *Strickland*, the Supreme Court created a two-prong test [hereinafter the *Strickland* test] for determining ineffective assistance of counsel.[39] First, a court must determine whether counsel's performance was deficient.[40] Secondly, a court must determine whether counsel's deficiency was prejudicial to the defendant's defense.[41]

To determine whether counsel was deficient, the proper inquiry is whether the counsel's conduct fell below an objective standard of reasonableness.[42] In order to satisfy the prejudice prong, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[43] The Court noted that a court, in determining the prejudice prong, "must consider the totality of the evidence [that was] before the judge or jury."[44] Ultimately, the defendant wants to "undermine [the] confidence in the outcome [of the trial]."[45]

The Supreme Court elaborated on the prejudice prong in *Lockhart v. Fretwell*.[46] The Court held that overall fairness should be considered[47] rather than focusing "solely on mere outcome determination."[48] However, *Lockhart's* "fundamental fairness" holding was limited soon after in *Williams v. Taylor*.[49] In *Williams*, the Court re-characterized the analysis of

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defendant had psychological problems. *See id.* at 673. The defendant appealed on the ground that counsel was ineffective for not presenting character evidence and failed to request the psychiatric report, among other complaints. *See id.* at 675.

39. *See Strickland*, 466 U.S. at 668.

40. *See id.* at 687.

41. *See id.*

42. *See id.* at 688.

43. *Id.* at 694. To prove the prejudice prong in ineffective assistance of counsel cases involving guilty pleas, the defendant must show that there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

44. *Strickland*, 466 U.S. at 695. *But see*, Murray v. Carrier, 477 U.S. 478, 496 (1986) (An isolated error may be enough to find counsel ineffective if that error is sufficiently egregious and prejudicial).

45. *Strickland*, 466 U.S. at 694 (emphasis added).

46. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant was convicted for felony murder after killing a person during a robbery. *See id.* at 366. The defendant argued that his counsel was ineffective for failing to argue that since "an aggravating factor that duplicates an element of the underlying felony . . . " his death sentence is unconstitutional. *Id.* at 367. The Supreme Court found that counsel was not ineffective. *See id.*

47. *See id.* at 374.

48. *Id.* at 369. Justice O'Connor in her concurrence stated that "[T]oday's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under [the *Strickland* test]." *Lockhart*, 506 U.S. at 373 (O'Connor, concurring) (emphasis added). "This case . . . concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373.

49. Williams v. Taylor, 529 U.S. 362 (2000). The defendant was convicted of robbery and capital murder. *See id.* at 368. The defendant argued that his counsel was ineffective for failing to investigate and present mitigating evidence during the sentencing phase of the defendant's trial. *See id.* at 390. The Supreme Court held that the defendant's right to effective

"fundamental fairness" as a concern for both the substantive and procedural rights of a defendant.[50]

It should be noted that both prongs of the *Strickland* test do not have to be present in order to determine whether counsel was ineffective.[51] Moreover, the Court recognized that in certain contexts prejudice is presumed.[52] Such instances include "[a]ctual or constructive denial of the assistance of counsel"[53] and "various kinds of state interference with counsel's assistance."[54] The Court found that a case by case inquiry into the above instances is not worth the cost since such prejudicial impairments are easily identifiable.[55]

In addition to establishing the test for ineffective assistance of counsel in *Strickland*, the Supreme Court also set out additional parameters for a court to take into consideration when determining if counsel was ineffective.[56] The Court found that there is a strong presumption that counsel rendered adequate assistance.[57] The Court also noted that no "particular set of detailed rules . . . can satisfactorily take account [for] the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a [client]."[58] Moreover, and most significantly, the Court stressed that courts should be deferential to counsel's strategic and tactical decisions.[59]

As a result of these additional parameters, defendants have to overcome many presumptions by the court that are in counsel's favor and have difficulty in simply getting an ineffective assistance of counsel claim heard on appeal.[60]

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counsel was violated. *See id.* at 399.

50. *See id.* at 393. Fretwell's ineffective counsel did not deny him any substantive or procedural rights, thus he did not satisfy the prejudice prong of the *Strickland* test. *See Williams*, 529 U.S. at 392-93.

51. *See* Strouse v. Leonardo, 928 F.2d 548, 556 (2nd Cir. 1991) (The prejudice prong of *Strickland* could not be satisfied because the evidence adduced at trial overwhelmingly pointed to the defendant's guilt).

52. *See Strickland*, 446 U.S. at 692.

53. *Id.*

54. *Id.* One such instance of denial of effective assistance of counsel is counsel sleeping during trial. *See* Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001). However, it is interesting to note that the Fifth Circuit, upon hearing this matter for the first time, held that it was impossible to determine whether counsel's sleeping, in this case, was at a critical stage of the trial, thus prejudice could not be presumed. *See* Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000), *reh'g granted*, 234 F.3d 1339 (5th Cir. 2000).

55. *See Strickland*, 466 U.S. at 692.

56. *See id.*

57. *See id.* at 690. The Court went on to say that it should be presumed that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.*

58. *Id.* at 688-89 (emphasis added).

59. *See id.* at 689. The Supreme Court noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The Court also found that the mere mention of "strategy" alone is not enough if the attorney did not conduct a reasonable investigation that would allow the attorney to make an informed decision. *See id.*

60. *See* Jeffery Rosenfeld, et. al., *Thirtieth Annual Review of Criminal Procedure: Introduction and Guide for Users: III. Trial: Right to Counsel.* 89 GEO. L.J. 1485, 1509 (May 2001).

Generally, ineffective assistance of counsel claims are limited to collateral review and usually will not be considered on direct appeal.[61] In state cases, the defendant must first exhaust all state remedies before a federal court will even hear an ineffective assistance of counsel claim on habeas corpus review.[62]

B. American Case Law and Authority

Ineffective assistance claims are raised in many different respects, such as: challenges to professional qualifications, performance before trial, actions in jury selection, performance during trial, actions concerning jury instructions, assistance during sentencing, and performance on appeal.[63]

i. Counsel's Performance During Trial

Defendants often attack defense counsel's performance during trial. Generally, however, invoking strategy or tactic has allowed counsel to escape the clutches of the *Strickland* test.[64] One such example is *Matthews v. Rakiey*.[65] In *Matthews*, the defendant contended that his counsel's decision to employ the "dreadlocks defense"[66] was ineffective assistance of counsel.[67] The defendant thought that counsel should have attacked the victim's inconsistent identification statements.[68] The Court of Appeals for the First Circuit held that, even though counsel employed a losing strategy,[69] counsel's use of such

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61. *See id.* However, a defendant can immediately appeal on the ground of ineffective assistance of counsel if the defendant raises an objection at trial or when the record indicates counsel's conflict of interest. *See* United States v. Gambino, 788 F.2d 938, 950 (3rd Cir. 1986), *cert denied*, 479 U.S. 825 (1986), *aff'd*, 864 F.2d 1064 (3rd Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

62. *See* Rosenfield, *supra* note 60, at 1509. Habeas corpus means "[a] writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." BLACK'S, *supra* note 4, at 569.

63. *See Twenty-Fifth Annual Review of Criminal Procedure: III. Trial.* 84 GEO. L.J. 1115, 1130-32. (April 1996).

64. *See Strickland*, 466 U.S. at 690-91.

65. Matthews v. Raikey, 54 F.3d 908 (1st Cir. 1995), *aff'd*, 132 F.3d 30 (1st Cir. 1997).

66. *See id.* The "dreadlocks defense" refers to counsel's decision to use the defendant's dreadlocks as the only reason the victim identified him as her attacker. *See id.* at 916. The defendant felt that counsel should have focused on the victim's power of observation because of discrepancies by the victim in the police report, and during her testimony as to how she was alerted that a man was in her home. *See id.*

67. *See id.* at 915.

68. *See id.*

69. *See Matthews*, 54 F.3d at 916-17. *quoting* United States v. Natanel, 938 F.2d 302, 310 (1st Cir. 1991), *cert. denied*, 502 U.S. 1079 (1992). "That [the strategy] was not ultimately a winning strategy is of no moment in assessing its reasonableness." *See Matthews*, 54 F.3d at 917.

a strategy was not professionally unreasonable.[70] The court noted, in this instance, that the strategy used by counsel was much safer than attacking the victim's character.[71]

On the opposite side of the spectrum is *Genius v. Pepe Jr.*[72] In *Genius*, the defendant claimed that his counsel was ineffective for not pursuing an insanity defense when, initially, the defendant was found incompetent to stand trial.[73] Counsel argued that his decision was a tactical one since an insanity defense might have weakened counsel's partial defense based on expert testimony.[74] The Court of Appeals for the First Circuit noted that "[w]hile incompetency to stand trial is not equivalent to insanity, it is a serious condition, that should have flagged the possibility [of using it to show insanity]."[75] The court held that counsel was ineffective for not taking the defendant's initial incompetence into consideration.[76] The court noted that counsel's decision to forego a complete defense because it may weaken a partial one was "an extraordinarily unbalanced choice."[77]

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70. *See id.* at 917. The court found that counsel did not have much to work with because of the persuasive power of the victim's testimony and the weakness of the defendant's alibi. *See id.*

71. *See id.* The court noted that choosing to attack the discrepancies in the victim's testimony would have involved attacks on her credibility and character, which "would have carried with it a far greater risk of offending the jury." *Id.*

72. Genius v. Pepe Jr., 50 F.3d 60 (1st Cir. 1995), *aff'd*, 147 F.3d 64 (1st Cir. 1998), *cert denied* 526 U.S. 1121 (1999). The defendant was charged with first degree murder for killing his girlfriend. *See id.*

73. *See id.* at 60. After an initial finding of incompetency, the defendant was found competent months later. *See id.* The District Court held that counsel's decision was a reasonable tactical choice since an expert testified that the defendant was criminally responsible for the murder of his girlfriend. *See id.* at 61.

74. *See id.*

75. *Genius*, 50 F.3d at 61 (emphasis added).

76. *See id.*

77. *Id.* "Where insanity would have been a complete defense, it was inexcusable not to pursue it." *Id.* at 61. For a more extensive examination of invocation of strategy and tactics to combat ineffective assistance of counsel, compare *Waters v. Thomas*, 46 F.3d 1506, 1518-19 (11th Cir. 1995), *cert denied*, 516 U.S. 856 (1995), *reh'g denied*, 516 U.S. 982 (1995) (Counsel's tactical choice to rely on mental illness evidence during penalty stage was reasonable); *Nielsen v. Hopkins*, 58 F.3d 1331, 1335 (8th Cir. 1995) (Counsel's tactical decision to establish defendant's intoxication at time of shooting to negate intent requirement of first-degree murder is reasonable); *United States v. Romero*, 54 F.3d 56, 59-60 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1149 (1996) (Counsel's tactical decisions to initially not move for severance of counts and read a witness' statement rather than call the witness to the stand was reasonable); with *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358-59 (4th Cir. 1994) (Counsel's failure to contact alibi witness was ineffective because there was no reasonable excuse for not doing so); *Berryman v. Morton*, 100 F.3d 1089, 1102 (3rd Cir. 1996) (Counsel's failure to cross examine witness about inconsistent testimony to impeach identification and eliciting damaging testimony about defendant constituted ineffective assistance of counsel); *DeLuca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996), *cert. denied*, 519 U.S. 824 (1996) (Counsel's failure to preserve and prepare for extreme emotional disturbance defense constituted ineffective assistance of counsel).

ii. Counsel's Performance Before Trial

Claims of ineffective assistance of counsel during guilty pleas are also very common. The seminal case in this area is *Hill v. Lockhart*.[78] In *Hill*, the Supreme Court of the United States held that the *Strickland* test applied to guilty plea challenges "based on ineffective assistance of counsel."[79] Cases in the same vein as *Hill* demonstrate that the courts have found for both sides on the argument.

In *Lane v. Singletary*,[80] the defendant claimed his counsel was ineffective for failing to advise him of the consequences of pleading guilty to his state charges.[81] Counsel failed to advise the defendant that the conduct that led to his state convictions also allowed the federal court to prosecute him as well.[82] The Court of Appeals for the Eleventh Circuit found that counsel was not ineffective for failing to inform the defendant of the federal charges.[83] The court took into account that counsel knew the United States District Attorney's policy at the time was to not seek federal indictments for the criminal acts that formed the basis for the defendant's state court conviction.[84] Due to counsel's knowledge of the policy, the court found that counsel did not have to advise the client on the potential for federal prosecution.[85]

In *Dickerson v. Vaughn*,[86] the defendant argued that his counsel was ineffective for misrepresenting applicable law in a murder case, making the defendant's nolo contendere[87] plea involuntary.[88] The United States Court of Appeals for the Third Circuit found that counsel was ineffective.[89] Counsel incorrectly told the defendant that the double jeopardy issue that went against

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78. Hill v. Lockhart, 474 U.S. 52 (1985).

79. *Id.* at 58.

80. Lane v. Singletary, 44 F.3d 943 (11th Cir. 1995), *cert. denied*, 515 U.S. 1163 (1995).

81. *See id.* at 944. Pursuant to a plea bargain the defendant pled guilty to possessing and trafficking crack cocaine. *See id.* After the defendant was convicted in state court he was indicted in federal District Court for the same conduct and was subsequently sentenced to life in prison. *See id.*

82. *See id.* at 944. The federal court could also take into account his state convictions in fashioning his federal sentence. *See id.*

83. *See Lane*, 44 F.3d at 944. The court did find that there may be instances where counsel might have to inform the defendant that he/she could be prosecuted in another jurisdiction; however, the court reiterated that the defendant's instant case, was not one of those instances. *See id.*

84. *See id.*

85. *See id.* At the time, counsel was the chairman of the Criminal Law Section of the Manatee County Bar Association, and for that reason, counsel would have known of the United States Attorney's policy. *See id.*

86. Dickerson v. Vaughn, 90 F.3d 87 (3rd Cir. 1996).

87. Nolo contendere is Latin for "I do not wish to contend." BLACK'S, *supra* note 4, at 857. It is also commonly referred to as "NO CONTEST." *Id.*

88. *See Dickerson*, 90 F.3d at 92. Counsel mistakenly told the defendant that the double jeopardy issue that went against them could be appealed. *See id.*

89. *See id.* The court reasoned that but for counsel's errors, the defendant would have not pled guilty and instead gone to trial. *See id.*

him could be appealed.[90] The court noted the trial judge's sentencing instruction to both counsel and the defendant that said that a nolo contendere plea was the same as pleading guilty.[91] The court found that the judge's limitation on the scope of the nolo contendere plea and later reference to appeal rights being restricted should have left no doubt in counsel or the defendant as to the correct legal principle.[92]

Counsel is often found to have provided effective assistance of counsel despite failing to warn a defendant of the collateral consequences resulting from pleading guilty to a charge.[93] This is a troublesome issue, particularly when counsel fails to warn immigrant defendants of potential deportation as a result of their pleading guilty to a crime.[94]

Most courts follow the same line of reasoning illustrated in *United States v. Banda*.[95] In *Banda*, counsel failed to inform the defendant that he might be deported if he pled guilty to a drug charge.[96] The United States Court of Appeals for the Fifth Circuit held that counsel's failure to warn the defendant that his conviction could result in possible deportation was not ineffective assistance of counsel.[97] The court noted that a defendant "must be 'fully aware of the direct consequences' of a guilty plea."[98]

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90. *See id.*

91. *See id.* at 92.

92. *See Dickerson*, 90 F.3d at 92. For a more extensive examination of ineffective assistance of counsel claims during guilty plea challenges compare *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 852 (1993) (Nothing to suggest defendant would have succeeded at trial given the overwhelming evidence, thus suggesting defendant's choice to plead guilty was a rational one); *United States v. Raineri*, 42 F.3d 36 (1st Cir. 1994), *cert. denied*, 515 U.S. 1126 (1995) (No prejudice by counsel for failing to inform defendant of minimum penalty on a count that was already dismissed) with *United States v. Gordon*, 156 F.3d 376, (2nd Cir. 1998) (Defendant's guilty plea invalid after relying on counsel's gross under-estimation of sentencing exposure); *Meyers v. Gillis*, 142 F.3d 664, 667 (3rd Cir. 1998) (Counsel's advice that defendant would be eligible for parole, despite mandatory life sentence for the crime, was ineffective and prejudicial to the defendant).

93. *See* Lea McDermid, Note, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CALIF. L. REV. 741, 750 (2001). Courts consistently find that counsel was not ineffective for failing to report these collateral consequences. *See id.*

94. *See id.* at 753.

95. *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993).

96. *See id.* at 355. The defendant plead guilty to possession with intent to distribute dimentane containing ninety-nine grams of codeine. *See id.*

97. *See id.*

98. *Id.* at 356, *quoting* Brady v. United States, 397 U.S. 742, 755 (1970). However, the court went on to say that counsel should advise a defendant of possible deportation, but failure to do so, though disapproved, does not satisfy the deficient performance prong of the *Strickland* test. *See Banda*, 1 F.3d at 356. The following cases follow the collateral consequences rule: *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1995), *cert. denied*, 507 U.S. 1039 (1993); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 942 (1990). "Deportation is a harsh collateral consequence, but many other collateral consequences are also harsh . . . '[but] deportation [is not] so unique as to warrant an exception to the general rule that a defendant need not be advised of the [collateral] consequences of guilty plea.'" *See Del Rosario*, 902 F.2d at 59, *quoting United*

iii. Counsel's Assistance at Sentencing Phase

The *Strickland* test was actually borne out of an ineffective assistance of counsel claim during the penalty phase of a capital case.[99] In *Strickland*, the Supreme Court determined that counsel was not ineffective during the penalty phase of defendant's trial.[100] Since *Strickland*, many other cases have discussed ineffective assistance of counsel during the penalty phase of a trial with differing results.

In *Wright v. Angelone*,[101] the defendant alleged that his counsel was ineffective for failing to present potentially mitigating medical reports regarding the defendant's mental capacity into evidence during the penalty phase of the defendant's trial.[102] To rebut the defendant's claim, counsel presented the reports of three experts, all of which found that the defendant did not suffer from mental retardation or brain damage.[103] The Court of Appeals for the Fourth Circuit held that the three doctor's consistent evaluations showed that the defendant was neither brain damaged or mentally retarded.[104] Thus, the court found that counsel was not deficient for not using the evaluations.[105]

In *Kubat v. Thieret*,[106] counsel's strategy was to plead for mercy[107] rather than calling character witnesses on the defendant's behalf during the penalty phase of the trial.[108] The United States Court of Appeals for the Seventh Circuit noted that pleading for mercy on a capital defendant can be a reasonable strategy.[109] Despite this, the court found that counsel's "rambling"

States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985).

99. *See generally Strickland*, 466, U.S. at 668.

100. *See id.* at 699-700. The Supreme Court found that counsel's decision to argue extreme emotional distress as a mitigating circumstance was a reasonable strategic decision. *See id.* at 699. Even if counsel was unreasonably deficient, there was insufficient prejudice. *See id.* at 700.

101. Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998), *stay denied*, 525 U.S. 925 (1998). The defendant, only seventeen years old, was convicted for several crimes including murder, robbery, and attempted rape. *See id.* at 154-55.

102. *See id.* The defendant contended that his past psychiatric reports were "significant mitigation evidence." *Id.* at 160.

103. *See id.* at 162.

104. *See id.*

105. *See Wright*, 151 F.3d at 162. Before deciding whether counsel was ineffective, the Court of Appeals first noted that mental health evidence such as the defendant's could either "[condemn] [him] to death [or] [excuse] his actions." *Id.* (emphasis added).

106. Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), *reh'g denied*, 1989 U.S. App. LEXIS 4042 (7th Cir. 1989), *cert. denied* 493 U.S. 874 (1989).

107. When counsel pleads for mercy, counsel is asking for "[c]ompassionate treatment, as of criminal offenders or of those in distress; esp., imprisonment, rather than death, imposed as punishment for capital murder." BLACK'S, *supra* note 4, at 801.

108. *See Kubat*, 867 F.2d at 368.

109. *See id.* "[I]n some cases counsel might reasonably make a decision to omit evidence in mitigation and rely instead on an alternative strategy . . . ." *Id.*

and "incoherent" closing argument could not be considered a plea for mercy.[110] The court held that counsel effectively presented no defense and found counsel ineffective because the closing argument was so poor.[111]

C. *Criticisms of the American Standard*

The *Strickland* test has been criticized for many different reasons.[112] In his dissent in *Strickland*,[113] Justice Marshall stated that the test is "so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."[114] Years later, Justice Blackmun said, "[t]he *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'"[115]

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110. *See id.* The court noted that counsel's poor closing argument "may actually have strengthened the jury's resolve to impose a death sentence." *Id.* Counsel admitted that he was "not going to convince the jury" that the defendant did not deserve to be executed and asked the jury to "decide the way you feel." *Id.*

111. *See Kubat*, 867 F.2d at 369. For further examination of the ineffective assistance of counsel during the sentencing phase compare *McQueen v. Scroggy*, 99 F.3d 1302, 1314-15 (6th Cir. 1996), *reh'g denied*, 1996 U.S. App. LEXIS 34031 (6th Cir. 1996) (Counsel's decision not to call defendant's family at penalty phase not ineffective assistance of counsel since all of the family had testified in an earlier hearing and none had rendered testimony that would make not calling them ineffective); *Powell v. Bowersox*, 112 F.3d 966, 969 (8th Cir. 1997), *reh'g denied*, 1997 U.S. App. LEXIS 15012 (8th Cir. 1997), *cert. denied*, 522 U.S. 1055 (1998) (Counsel not ineffective for prohibiting the defendant to testify about the effects of his own substance abuse during penalty phase of trial for fear that he would look more competent than argued previously); *Trice v. Ward*, 196 F.3d 1151, 1163 (10th Cir. 1999), *cert denied*, 531 U.S. 835 (2000) (Even if counsel's investigation was deficient, defendant could not show result of death would have been different in penalty phase) with *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997), *reh'g denied*, 1997 U.S. App. LEXIS 4735 (7th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997) (Counsel was deficient for failing to make contact with defendant before capital sentencing hearing, failing to present mitigation witnesses, and failing to offer any reason in closing argument other than disregard of state law to spare defendant's life); *United States v. Soto*, 132 F.3d 56, 59 (D.C. Cir. 1997) (Counsel's failure to request downward sentence adjustment under the Sentencing Guidelines was ineffective assistance of counsel); *Arredondo v. United States*, 178 F.3d 778, 785 (6th Cir. 1999) (Counsel's failure to object to findings in a pre-sentence report that made defendant responsible for more than one kilogram of cocaine constituted ineffective assistance of counsel).

112. *See* Kirchmeier, *supra* note 13, at 438-39.

113. *See Strickland*, 466 U.S. at 707, (Marshall, J., dissenting).

114. *Id.* Marshall was concerned that the *Strickland* test would increase inconsistency and inject arbitrariness into death penalty decisions. *See* Murphy, *supra* note 37, at 193.

115. McFarland v. Scott, 512 U.S. 1256, 1259 (1994). Blackmun went on to note that the "impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have been denied." *Id.* at 1259-60.

i. The Inconsistency of the Strickland Test

The Supreme Court believed that the *Strickland* test would provide consistency in appellate decisions.[116] However, the *Strickland* test has been criticized for inconsistent application, leading to a new level of arbitrariness.[117] Allowing lower courts to interpret reasonableness according to this test "has resulted in generally low performance standards, varying dramatically from state to state."[118] The tactical choice theory[119] allows appellate courts to ignore gross incompetence on counsel's part if a mistake can be framed as a tactical decision.[120]

Also, counsel's errors are analyzed without context.[121] Such isolated analysis ignores the importance of having an overall, competent strategy.[122] "Each independent choice can be understood as reasonable, but together, [those] choices can be illogical or completely unreasonable."[123] Part of the problem is that reasonableness is measured under prevailing professional norms[124] and "the circumstances at the time of trial,"[125] which is a slippery notion.[126] This notion is exemplified through the "[p]revailing norms of practice as reflected in American Bar Association standards . . . [which] are guides to determining what is reasonable, but they are only guides."[127]

Moreover, the prejudice prong of the *Strickland* test often makes it impossible to conclude whether there was a reasonable probability that the outcome of the proceeding would have been different.[128] Justice Marshall stated, "[o]n the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments

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116. *See* Murphy, *supra* note 37, at 199.

117. *See id.* "There are numerous examples of cases that failed the Strickland test, as well as examples of cases that survived it." *Id.* According to Murphy,

> Strickland did little more than assent to the practice of appellate judges disposing of [ineffective assistance of counsel] claims based on their personal view of the mitigating evidence [that they never heard or saw because] there does not seem to be any pattern to what type of information will pass muster and what will not.

Id. (emphasis added).

118. McDermid, *supra* note 93, at 750. "[C]apital defendants in Texas are more likely to lose an ineffective-assistance claim than capital defendants in California." *Id.*

119. *See Strickland*, 466 U.S. at 690-91.

120. *See* Levinson, *supra* note 34, at 166.

121. *See id.* at 165. Counsel's errors are analyzed in isolation, rather than analyzing the totality of the circumstances. *See id.*

122. *See id.* "Once each alleged error is broken down and isolated, it readily can be seen as a tactical choice. This ignores the pattern of incompetence that can affect a trial." *Id.* at 166.

123. *See id.* at 166 (emphasis added).

124. *See* Murphy, *supra* note 37, at 191.

125. *Id.*

126. *See id.*

127. *Id. quoting Strickland*, 466 U.S. at 688.

128. *See* Levinson, *supra* note 34, at 169. "[A]n appellate judge [must] determine the effect of errors on . . . subjective decision[s], . . . removed from the context of the decision." *Id.* (emphasis added).

would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."[129] The prejudice prong "eludes any true comprehension or predictability"[130] and has been a "difficult hurdle to clear in many jurisdictions."[131] This is especially true during the sentencing phase of a capital trial,[132] where many times the outcome in such instances will turn on subjective facts.[133]

ii. Failure to Investigate Collateral Consequences

The failure of counsel to properly investigate the collateral consequences of a conviction is another problematic area.[134] Generally, under the collateral consequences doctrine, counsel has no duty to investigate or advise clients of collateral consequences to the penalty imposed by the court.[135]

The collateral consequences doctrine, as it pertains to counsel, is problematic because the doctrine was derived from the Federal Rules of Criminal Procedure, Rule 11 [hereinafter Rule 11].[136] Rule 11 requires that

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129. *Strickland*, 466 U.S. at 710, (Marshall, J., dissenting).

130. Murphy, *supra* note 37, at 192.

131. *Id.* "This variation between jurisdictions in [determining] how much prejudice is enough makes an unclear test even more inconsistent in application." *Id.*

132. *See* Levinson, *supra* note 34, at 169.

133. *See id.* A difficult childhood or the fact that the defendant is a good citizen that made a bad decision are two examples of subjective facts that provide a basis for decisions during the sentencing phase of a trial. *See id.* Other examples include social history, school records, prison records, health records, and mental health records. *See id.*

134. *See* McDermid, *supra* note 93, at 751-54.

135. *See id.* at 745. Direct consequences are consequences that have a "definite immediate and largely automatic effect on the range of the defendant's punishment." United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (quoting Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988)). A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence." BLACK'S, *supra* note 4, at 209. Examples of other collateral consequences include "the loss of the right to vote, to work as a civil servant, to drive, to travel freely abroad, to receive an honorable discharge from the military, and to possess firearms." *See* McDermid, *supra* note 93, at 752. The loss of a professional license is another example of a collateral consequence. *See* BLACK'S, *supra* note 4, at 209.

136. The relevant portion of the Rule 11 is:

> (c) Advice to Defendant
>
> Before accepting a plea guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

"courts . . . insure that a guilty plea is entered voluntarily."[137] Originally, courts interpreted Rule 11 to mean that trial courts only need to inform defendants of the direct consequences of the plea.[138] Over time, though, the collateral consequences doctrine was also applied to counsel.[139]

Yet, by extending this line of thinking to include counsel, a majority of courts have effectively relieved counsel of the duty to investigate.[140] The courts have provided counsel with power that should only be reserved for judges.[141] In doing so, counsel ignore their responsibilities to investigate mitigating factors, research relevant case law, and advocate the least harmful arrangement for a client, all of which are necessary for counsel to present a proper case.[142]

There are several different types of collateral consequences,[143] deportation being one of the most prominent and troublesome.[144] As a general rule,[145] counsel has no duty to tell an immigrant defendant that pleading guilty

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(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contedere the defendant waives his right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

FED. R. CRIM. P. 11(c)(1-6) (2001).

137. McDermid, *supra* note 93, at 751.

138. *See id.* at 752. "The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence . . . would impose an unmanageable burden on the trial judge . . . ." Frutchman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976).

139. *See* McDermid, *supra* note 93, at 753.

140. *See id.* "[E]quating the duties of defense counsel with the courts ignores the fact that defense counsel's representation clearly involves unique responsibilities." *Id.* at 754.

141. *See id.* at 754.

142. *See id.* "Defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger. [Rule 11] . . . was not intended to relieve counsel of his responsibilities to his client." Michel v. United States, 507 F.2d 461, 466 (2nd Cir. 1974).

143. *See* McDermid, *supra* note 93, at 745.

144. *See id.* The problem of inconsistency rears its head in this issue as well. *See id.*

145. *See id.* Courts can apply one of three rules to determine if counsel was ineffective for not informing the noncitizen client of potential deportation: "(1) [A]ttorneys need not address immigration consequences at all because they are 'collateral'; (2) [D]efense attorneys must affirmatively investigate and advise clients of immigration consequences; or (3) [A]ttorneys must refrain from misinforming clients of the immigration consequences of a guilty plea." *Id.* at 751. *See also* United States v. Banda, 1 F.3d 354 (5th Cir. 1993).

may result in deportation.[146] However, immigrant defendants should be able to rely on their counsel to inform them that they could be deported or suffer from other collateral consequences.[147] This allows defendants to make an intelligent decision as to whether to plead guilty or not.[148]

iii. Emphasis on Efficiency Rather Than Fairness

The *Strickland* test emphasizes efficiency over fairness.[149] The Supreme Court, with the establishment of the *Strickland* test, sought a "narrow conception of effective assistance [of counsel]."[150] The Court was concerned with broadening "the reasonably competent model" and, as a result, created a "'highly demanding' standard of competency."[151] The Court's elevated concern with efficiency stems from "the Court's result-oriented perspective."[152] The Court found that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance [from counsel] necessary to justify reliance on the outcome of the proceeding."[153]

The Court's deference toward defense counsel reflects its goal of efficiency.[154] However, that does not entitle the defendant to a "dynamic, strong defense."[155] Rather, it only provides the defendant with "minimally effective assistance of counsel."[156] As a result, valuing efficiency over justice

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146. *See* McDermid, *supra* note 93, at 753.

147. *See id.* at 745-46.

148. *See id.* at 746. Such reliance on the part of the immigrant is justified since it is relatively easy for an attorney to determine the consequences of a plea. *See id.* Counsel should be able to consult with an immigration attorney or an immigration handbook to find out if a plea bargain will result in deportation. *See id.*

149. *See* GARCIA, *supra* note 26, at 31. "In striking the proper balance between efficiency and fair process, it seems clear that, for normative and functional purposes, a dynamic, forceful view of effective assistance is critical . . . the defendant must be afforded an effective sword to pierce the prosecution's heavy armor." *Id.* "[T]he Court has constrained the ability of criminal defendants to choose counsel who will assiduously contest the prosecution's case. This trend runs counter to the essence of the adversary process, whose ideal is an evenly matched battle between skilled opponents." *Id.*

150. *Id.* (emphasis added).

151. *See id.* at 33. The *Strickland* majority stated that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U.S. at 690.

152. GARCIA, *supra* note 26, at 33. Though the Court's language suggests concern with "fair process," the overreaching theme of the decision is efficiency and "just results." *Id. See also* Murphy, *supra* note 37, at 191. "Apparently, the [Supreme] Court decided that controlling the deluge of appeals by convicted defendants was preferable to holding attorneys accountable for anything but the most blatant sort of negligent practice." *Id.* (emphasis added). *But see* Levinson, *supra* note 34, at 147. "While [the prejudice prong] may cheat defendants out of procedural fairness, it can be viewed as a necessary evil in the name of judicial economy." *Id.* at 163 (emphasis added).

153. *Strickland*, 466 U.S. at 691-92 (emphasis added).

154. *See* GARCIA, *supra* note 26, at 33.

155. *Id.*

156. *Id.* at 34.

neglects both the purpose and spirit of *Gideon*.[157] The perception created by the Supreme Court's concern over "minimally effective" counsel in *Strickland* "hardly inspires confidence in the promise fostered by *Gideon*."[158]

iv. Strickland's Applicability in Capital Cases

Another area of concern over the *Strickland* test stems from its applicability in capital cases, especially the sentencing phase.[159] The Supreme Court in *Strickland* found that the sentencing phase in a capital trial was "sufficiently" similar to the sentencing phase of an ordinary trial and, thus the *Strickland* standard could apply to both stages.[160]

However, in making this determination, the Supreme Court erred in three respects: (1) Defense counsel had fewer "big picture" strategic decisions to make in a capital trial penalty phase;[161] (2) the appeals process is different;[162] and (3) there are only two choices with a capital crime - death or life imprisonment.[163]

The *Strickland* test allows judges to determine whether counsel's performance was deficient and prejudicial to a defendant in a capital trial.[164] As a result, the "discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied [and feed] prejudices against the accused . . . ."[165]

Also, capital defendants who bring ineffective assistance of counsel claims "live or die on the unguided determination of an appellate court that was never intended to be the only hearer of the evidence ineffective counsel

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157. *See id.* at 35. "[T]he *Gideon* Court deemed the right to counsel to be . . . 'essential to fair trials' . . . ." *Id.*

158. *Id.*

159. *See* Levinson, *supra* note 34, at 163. "Considering all the reasons that 'death is different' . . . the Strickland standard should not be used to judge performance during the sentencing phase of a capital trial." *Id.*

160. *See Strickland*, 466 U.S. at 686.

161. *See* Levinson, *supra* note 34, at 163-64. "[C]apital sentencing trials are now more about painting the defendant as a human being worthy of compassion rather than obtaining the defendant's innocence through the crafty use of legal maneuvers and arguments." *Id.* at 164. Because the sentencing phase is less complex than the trial phase, "there are fewer potential errors and strategic decisions to make." *Id.*

162. *See id.* at 165. Death penalty sentences are automatically appealed, thus having higher standards would not mean more appeals. *See id.* A stricter standard would shorten the appeals process. *See id.*

163. *See* Levinson, *supra* note 34, at 165. In a life or death situation, only few of counsel's errors are tolerable. Under the Strickland test, courts are allowed to find that a person can be executed despite serious errors by counsel. *See id.*

164. *See* Murphy, *supra* note 37, at 195.

165. *Id. quoting* Furman v. Georgia, 408 U.S. 238, 255 (1972), (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1972) (emphasis added).

failed to present."[166] Capital defendants are left with, and must rely upon, a standard that "does little more than state what effective counsel should be," leaving appellate courts to decide what effective counsel actually was in a particular case.[167]

v. The Strickland Test and the Sixth Amendment

The overall view of ineffective assistance of counsel by the public and legal profession blurs the meaning of the Sixth Amendment.[168] Both the lay public and legal profession confuse the Constitutional right to counsel with whether counsel does an adequate job.[169] The Sixth Amendment was never meant to be a "performance benchmark" or define acceptable professional standards.[170]

The problem this creates, especially in the public's perception, is that each time an ineffective assistance of counsel claim is improperly resolved in counsel's favor, the minimum expectations for effectiveness of counsel have been lowered.[171] As a result, this lowered benchmark is what counsel is measured by rather than the established *Strickland* test.[172]

III. INEFFECTIVE ASSISTANCE OF COUNSEL IN THE UNITED KINGDOM

Similar to the United States' legal system,[173] the United Kingdom's legal system[174] is based on the adversarial process.[175] Given the United Kingdom's

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166. *See id.* at 194-95. "All Strickland did was shift the unguided discretion up a level." *Id.* The questions the Strickland test leaves appellate courts are questions "too big to provide the controls required by the Eighth Amendment." *Id.* at 195.

167. Murphy, *supra* note 37, at 195. "[T]he judges and juries who made their decision based on an incomplete story are foreclosed from expressing the opinion that the whole story would have meant everything, especially to the defendant." *Id.*

168. *See generally* Kelly, *supra* note 6, at 1089.

169. *See id.* at 1091.

170. *Id.* The number of ineffective assistance claims handled by the courts may be contributing to the public's perception as to why the Sixth Amendment is treated this way. *See id.*

171. *See id.*

172. *See id.* at 1093. *Strickland's* forgiving standard and the evidentiary obstacles that it has established makes the "class of cases in which relief will be afforded to defendants who suffer at the hands of unqualified lawyers is . . . fairly small." Green, *supra* note at 29, at 504.

173. *See generally* FRIEDMAN, *supra* note 24.

174. *See generally Update supra*, note 1. The four countries that make up the United Kingdom form three distinct jurisdictions, England and Wales, Scotland, and Northern Ireland, each of which have their own court system and legal profession. *See id.* In England and Wales, the lowest criminal courts are the Magistrates Courts. *See id.* The Crown Court hears the more serious cases, including cases appealed from the Magistrates Court on factual points. *See id.* Appeals on points of law go to the High Court, Queen's Bench Division. *See id.* The Court of Appeal, Criminal Division hears appeals against conviction and sentencing. *See id.* The House of Lords is the supreme court of appeal. *See Update*, *supra* note 1. In trials there are three classes of offenses, "those triable only on indictment, those triable only summarily, and those

adherence to this process, counsel plays a significant role in advocating their client's position. Furthermore, the United Kingdom has recently, in terms of legal history, developed a standard for ineffective assistance of counsel.[176] However, as in the United States, ineffective assistance of counsel has been an issue for quite some time in the United Kingdom's history.[177]

A. History of the United Kingdom's Standard

The United Kingdom has neither a written constitution[178] nor a constitutional Bill of Rights.[179] However, with the adoption of the Human Rights Act of 1998,[180] the United Kingdom now recognizes such rights as the enjoyment of property,[181] the enjoyment of liberty and security,[182] the right to a fair trial,[183] and the right to privacy.[184] Generally, legal advice and legal

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triable either way." *See* JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE 2 (1995). However, a majority of the defendants are tried summarily, meaning that most defendants are tried in magistrates court. *See* John Jackson, *Due Process*, *in* INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 115 (Christopher McCrudden and Gerald Chambers eds., 1994). European Community Law also applies in Britain, but mostly to economic and social matters. *See* United Kingdom-"Constitution," *available at* http://www.uni-wuerzburg.de/law/uk00000_.html (last visited Aug. 11, 2002) [hereinafter Constitution]. However, it rarely takes precedence over British domestic law. *See id.* The Scottish legal system is separate from the legal system of England and Wales. *See Update*, *supra* note 1. The principal law officer is the Lord Advocate and the Court of Session is the supreme civil court, subject to appeal by the House of Lords. *See id.* The High Court of Justiciary is the supreme criminal court. *See id.* The lower criminal courts are the sheriff courts and district courts. *See id.* Northern Ireland has its own court structure that replicates England and Wales court structure. *See id.*

175. *See* SPRACK, *supra* note 174, at 117. It is the prosecution's duty to present the case and the defense must represent the accused. *See id.* In the English, Scottish, and Northern Irish systems the prosecution has to prove the defendant's guilt beyond a reasonable doubt. *See* Jackson, *supra* note 174, at 114.

176. *See R. v. Clinton*, [1993] 1 WLR 1181. *See also* Anderson v. H.M. Advocate, 1996 S.L.T. 155. The United Kingdom's standard will be discussed in detail in the section below.

177. MICHAEL MANSFIELD, PRESUMED GUILTY: THE BRITISH LEGAL SYSTEM EXPOSED, ix (1993). Miscarriage of justice "has been an integral part of [the British] criminal justice system for centuries." *Id.* (emphasis added).

178. The equivalent body of law to a constitution is based on statutes, common law, and "traditional rights." *See* Constitution, *supra* note 174. New law can also come from conventions and customs. *See id.* Changes may also come from new acts of Parliament or informally through the acceptance of new practices, uses, or by judicial precedents. *See* United Kingdom, *supra* note 1.

179. See BRADLEY, *supra* note 2, at 49. The United Kingdom does have an act called the Bill of Rights 1689. *See* Constitution, *supra* note 174. However, it's focus is on the exercise of royal prerogative and succession to the Crown. *See id.*

180. *See* Act, *supra* note 2.

181. *See id.*

182. *See id.*

183. *See* Andrew J. Ashworth, *Criminal Proceedings After the Human Rights Act: The First Year*, CRIM. L. REV. 855, 863 (2001). A majority of the significant decisions under the Act in criminal proceedings concern the right to a fair trial. *See id.* at 863.

184. *See* Act, *supra* note 2.

assistance is available only if the defendant can afford to pay for it.[185] The State will only bear the expense through legal aid in limited situations.[186] Full legal aid is granted by the court if the court finds that it is "desirable to do so in the interests of justice."[187]

The United Kingdom ineffective assistance standard originated from case law.[188] Initially, courts in the United Kingdom were concerned with the "extent of counsel's alleged ineptitude."[189] Presently, the courts in the United Kingdom are primarily concerned with whether a miscarriage of justice[190] resulted from the counsel's conduct.[191] More specifically, the courts are concerned with whether counsel's conduct was so prejudicial to the accused that it establishes that the accused did not have a fair trial.[192]

Particularly, in England and Wales, the question is whether the conviction was unsafe.[193] Flagrant incompetency must be considered, however, the more accurate assessment concerns the effect of counsel's behavior on the conviction, rather than on counsel's behavior alone.[194] In Scotland, the question is whether there has been a miscarriage of justice.[195] Scottish courts focus on the effect of counsel's behavior on the conviction, rather than focusing on the counsel.[196]

In 1998, the United Kingdom adopted the European Convention on Human Rights[197] [hereinafter the Convention] with the passing of the Human

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185. *See* BRADLEY, *supra* note 2, at 125.

186. *See id.* at 124-25. The Legal Aid Fund pays a solicitor for a small amount of preparatory advice and assistance. *See id.* at 125. However, the accused may have to make a "means-tested contribution" to the cost. *See id.*

The court takes into account a number of factors including:

> [T]he seriousness of the consequences which the accused could face if convicted, the significance and complexity of any issues of law, the difficulties which are likely to be faced in investigating the case on his behalf, the ability of the defendant to represent himself, and the risk that a witness might be seriously distressed if forced to be cross-examined by the defendant in person.

Id.

187. *Id.* at 125.

188. *See* R. v. Clinton, [1993] 1 WLR 1181. *See also* Anderson v. H.M. Advocate, 1996 S.L.T. 155.

189. *See* SPRACK, *supra* note 174, at 323.

190. *See* BLACK'S, *supra* note 4, at 811. Miscarriage of justice means "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime." *Id.*

191. *See* Robert Shiels, *Blaming the Lawyer*, CRIM. L. REV. 740, 742 (1997).

192. See *generally* id.

193. *See id.*

194. *See id.* at 743.

195. *See id.*

196. *See* Shiels, *supra* note 191, at 743.

197. *See Update*, *supra* note 1. The United Kingdom is a signatory of the European Convention for Human Rights. *See id.* The Act allows for the Convention's provisions to be directly applied by the United Kingdom courts. *See id.*

Rights Act of 1998 [hereinafter Act].[198] The courts of the United Kingdom adopted Article 6[199] of the Convention. In *R. v. Allen*,[200] the Court of Appeal, Criminal Division found that Article 6 required that the "hearing of the charges against an accused shall be fair."[201] The court found that if counsel's conduct results in the accused not receiving a fair trial, then a court might be compelled to intervene.[202] The Court noted that because of Article 6's findings, flagrant

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198. *See* Act, *supra* note 2. It has been found that there are three principal strengths of rights under the Convention. *See* Ashworth, *supra* note 183, at 863. First, there are the absolute rights in Article 2 and Article 3. *See id.* Second, there are the qualified rights under Articles 8-11. *See id.* at 864. Finally, there are Articles 5-6, which lie in between the absolute rights and qualified rights in terms of strength. *See id.* Article 5 and Article 6 contain the rights most frequently raised in criminal proceedings. *See id.* Despite having the ability, under the Convention, to draw from the constitutional decisions in other European jurisdictions, there is very little reference that the United Kingdom has done so. *See* Ashworth, *supra* note 183, at 870.

199. The European Convention on Human Rights and its Five Protocols, *available at* http://www.hri.org/docs/ECHR50.html (last visited Aug. 11, 2002) [hereinafter Convention]. Article 6 states in full:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defence [sic];
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Y.B. Eur. Conv. on H.R.(6).

200. R v. Allen, 2001 WL 753441.

201. *Id.* Article 6 applies at the pretrial stage as well. *See* BRADLEY, *supra* note 2, at 436. Article 6 not only calls for the right to counsel it also calls for the right to effective counsel. *See id.* Article 6 is designed to handle "procedural irregularities in the administration of justice and is not concerned with whether the domestic courts have correctly assessed the evidence." Jackson, *supra* note 174, at 139. As a result, Article 6 does not provide a per se miscarriage of justice rule. *See id.*

202. See *Allen*, 2001 WL 753441.

incompetence is not the appropriate measure of when a court will quash a conviction.[203]

Before the advent of the Act, the leading English case for determining ineffective assistance of counsel was *R. v. Clinton.*[204] In *Clinton*, the Court of Appeal, Criminal Division held that "where it [is] shown that defence [sic] counsel's decision . . . was taken either in defiance of or without proper instructions [from the defendant], or when all the promptings of reason and good sense pointed the other way, [a conviction might be] open to the appellate court to set aside the verdict . . . ."[205] The court also found that "[i]t is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualtitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict . . . ."[206]

In the leading Scottish case, *Anderson v. HM Advocate,*[207] the High Court of Justiciary established four points defining what constitutes miscarriage of justice in Scotland, and also contributed to the definition of ineffective assistance of counsel in the United Kingdom.[208] First, the accused has the right to a fair trial and to have his or her defense presented to the court.[209] If counsel's conduct deprived the accused of those rights, a miscarriage of justice could result.[210] Second, counsel must abide by the

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203. *See id.* The court should "approach the matter simply upon the basis of the safety or otherwise of the conviction and repeating the observations . . . in *R. v. Clinton*." *Id.*

204. R. v. Clinton, [1993] 1 WLR 1181. *R. v. Clinton* is still relevant; however, the Act has slightly refined the standard that *Clinton* set out. By no means should *R. v. Clinton* be considered overruled by the Act.

205. *Id.* (emphasis added). The Court also found that where defense counsel made such decisions in good faith after proper consideration of the competing arguments and after discussion with the client, "his decisions could not render a guilty verdict unsafe or unsatisfactory nor could allegations of incompetence on counsel's part amount to a material irregularity." *Id.*

206. *See id. Clinton* "puts the . . . errors by counsel in a proper perspective." SPRACK, *supra* note 174, at 324. It is better to concentrate on how trial was affected than the "standard of advocacy." *Id.*

207. Anderson v. H.M. Advocate, 1996 S.L.T. 155. The defendant was found guilty of two counts of assault. *See id.* at 156. The defendant argued that his counsel misrepresented him. *See id.* The defendant claimed that his counsel ignored tactics stipulated to and agreed to between the defendant and counsel during consultation. *See id.* The defendant wanted the alleged victim's character attacked. *See id.* Because the victim's character was not attacked the defendant believed that he was prejudiced. *See id.* at 155.

208. *See* Shiels, *supra* note 191, at 743. *Anderson* reversed two earlier Scottish decisions, and reviewed the law in the United Kingdom, Commonwealth, and other jurisdictions on the question of whether the alleged incompetency of counsel could be a proper ground of appeal in a criminal case. *See* Gow, *supra* note 2.

209. *See Anderson*, 1996 S.L.T. at 163.

210. *See* Shiels, *supra* note 191, at 743. "[*Anderson*] draws a distinction between a failure by an advocate to present the defence [sic] that the accused instructs him to present and the making of a judgment by the advocate as to the manner in which that defence [sic] should be presented . . . ." E. v. H.M. Advocate, 2002 S.L.T. 715, 716 (emphasis added).

client's instructions, and not disregard those instructions.[211] However, counsel must conduct the case as he or she thinks best.[212] Third, counsel determines how the defense is presented, and the accused is bound by counsel's decision.[213] Finally, counsel, not the accused, decides whether or not to attack the character of a Crown witness.[214] The High Court[215] also found it was essential for counsel to be given a fair opportunity to respond to the appellant's allegations in writing, though counsel is under no obligation to do so.[216]

Traditionally, in England, the Criminal Division of the Court of Appeals has been reluctant to accept ineffective assistance of counsel claims.[217] Under British law, a conviction should not be set aside because counsel's decisions or actions during trial later appeared to be "mistaken or unwise."[218] In *R. v. Welling*,[219] the court held that the fact counsel may have made "a . . . decision . . . which in retrospect [is] shown to be mistaken . . . is seldom proper ground for appeal."[220] Rather, "it is only when counsel's conduct . . . can be described as flagrantly incompetent advocacy that this court will be minded to intervene."[221] The court relaxed the *Welling* standard in *R. v. Swain*.[222] In *Swain*, the court held that if a court had "any lurking doubt" that the defendant suffered some injustice because of counsel's "flagrantly incompetent advocacy" then the court would quash the conviction.[223]

Generally, despite this limited relaxation, ineffective assistance of counsel is not usually grounds for appeal in English law.[224] There may be grounds for appeal if counsel's conduct made a conviction unsafe.[225] Ineffective assistance of counsel may also be remedied by competent

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211. *See Anderson*, 1996 S.L.T. at 163-64.

212. *See id.*

213. *See id.* at 164.

214. *See id.* at 165.

215. *See* Gow, *supra* note 2. One reason that the decision in *Anderson* was important because it was a Full Bench decision. *See id.* "The Full Bench is a peculiarly Scottish procedure, which arises out of the fact that there is no appeal to the House of Lords on criminal matters from the Justiciary Appeal Court." *Id.* In order to overrule a previous appellate court precedent, "it is necessary to convene a full bench of five, seven or even nine judges." *Id.* A Full Bench is very rare event, only occurring four or five times a decade. *See id.*

216. *See Anderson*, 1996 S.L.T. at 164.

217. *See* SPRACK, *supra* note 174, at 323.

218. Shiels, *supra* note 191, at 742.

219. *See id. R. v. Welling* is an unreported case that is referred to in *R. v. Clinton*, [1993] 1 WLR 1181.

220. *See Clinton*, 1 WLR 1181, *quoting* R. v. Welling.

221. *See* Shiels, *supra* note 191, at 742.

222. *See* Gow, *supra* note 2, *citing Swain*, 1998 CRIM. L. REP. 109.

223. *See id.*

224. *See* BRADLEY, *supra* note 2, at 136-37.

225. *See id.* The test for whether a conviction is unsafe is subjective. *See* SPRACK, *supra* note 178, at 322. A member of the Court of Appeal must ask: "Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory?" *Id.* If the member has a doubt, then the member should allow the appeal, if not then the member should not allow the appeal. *See id.*

representation in an appeal through rehearing to the Crown Court.[226]

Courts in the United Kingdom are highly deferential to counsel's decisions.[227] Also, there is a strong presumption that counsel's conduct will fall within the wide range of reasonable effective assistance.[228] Additionally, courts in the United Kingdom will make allowances for the "distorting effect of hindsight."[229] As the result of such discretion, "[c]onducting the trial without, or even contrary to, the instructions of the client, mere errors of judgment or even negligence, may not be sufficient to set up an inference of an unfair trial."[230]

B. United Kingdom Case Law and Authority

There are at least six generally recognized types of complaints of ineffective assistance of counsel in the United Kingdom.[231] The first complaint concerns insufficient protection by the judiciary of the accused from the defendant's counsel.[232] The second complaint concerns inadequate preparation of counsel.[233] The third complaint concerns failure to give proper legal advice.[234] The fourth complaint concerns providing legal advice that does not satisfy the client.[235] The fifth complaint concerns failure to call witnesses at trial.[236] Finally, and most common, are complaints about the standard of presentation.[237]

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226. *See* BRADLEY, *supra* note 2, at 136-37. If counsel's failure results from the court's refusing to adjourn so that the defense has inadequate time to prepare, the decision may be quashed. *See id.* at 137, (referring to R. V. Thames Magistrates' Court, *ex parte* Polemis, [1974] 2 All E.R. 1219, D.C.)

227. *See* Gow, *supra* note 2. There may be circumstances where a court could find that the counsel's conduct "was such as to deny the accused a fair trial." E. v. H.M. Advocate, 2002 S.L.T. 715, 717.

228. *See* Gow, *supra* note 2. "A decision made by counsel in the conduct of the defence [sic] at the trial is, for the most part, a matter for his professional discretion and judgment." E. v. H.M. Advocate, 2002 S.L.T. 715, 717. "The soundness of such a decision cannot normally be the subject of an appeal, even if that question is one on which views might reasonably differ." *Id.* at 717.

229. *See* Gow, *supra* note 2.

230. *Id.*

231. *See* Shiels, *supra* note 191, at 740-741. "Allegations of professional ineptitude require [close examination] because they may turn out to be correct and because of the repercussions for the lawyer involved." Robert Shiels, *Blaming the Lawyer – Again*, CRIM. L. REP. 2000, 828 (emphasis added).

232. *See* Shiels, *supra* note 191, at 740. It is a longstanding principle that judges should protect the accused. *See id.* One example being, conflict of interest by the accused's counsel which is ground for a successful appeal. *See id.*

233. *See id.* The concern is that inadequate preparation by the solicitor has deprived counsel of material need to present a complete defense of the defendant. *See id.*

234. *See id.*

235. *See* Shiels, *supra* note 191, at 741. The client does not believe that the advice provided by counsel was not as full as it could have been. *See id.*

236. *See id.*

237. *See id.*

i. Inadequate Preparation of Counsel

Inadequate preparation of counsel is a major issue in the United Kingdom. In *McIntosh v. H.M. Advocate*,[238] the defendant was found guilty of conspiracy.[239] The defendant argued that his solicitor was inexperienced, did not prepare the case properly, and that his solicitor did not adequately identify Crown witnesses or elicit information from the defendant.[240] The Court held that the effect of counsel's conduct did not deprive the defendant of his right to a fair trial.[241]

Another example, albeit with differing results, is *Hemphill v. H.M. Advocate*.[242] In *Hemphill*, the defendant argued that his solicitor failed to investigate the timing of the victim's death, consult or consider pathologist reports about the victim's time of death, and failed to question expert or forensic witnesses.[243] Rather than relying on information from experts, the solicitor cross-examined the Crown's pathologist based on the solicitor's own hypotheses.[244] The High Court of Justiciary held that there had been a miscarriage of justice since counsel failed to investigate important forensic and pathological evidence.[245] The Court found that if counsel had taken the appropriate steps, the defendant's defense would have been "significantly reinforced."[246]

The counsel in *E v. H.M. Advocate*[247] acted similarly to the counsel in *Hemphill*. In *E v. H.M. Advocate*, the defendant argued that his counsel did not adequately present his defense because counsel failed to pursue supportive medical evidence that could have led to reasonable doubt that the defendant

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238. McIntosh v. H.M. Advocate, 1997 S.L.T. 1315.

239. *See id.* The defendant was found guilty of conspiring with persons possibly associated with the Scottish National Liberation Army to coerce the British government into setting up a separate government in Scotland and retaining firearms, ammunition, explosives, and detonators. *See id.*

240. *See id.*

241. *See id.*

242. Hemphill v. H.M. Advocate, 2001 S.C.C.R. 361.

243. *See id.* The defendant was found guilty of murder. *See id.* The basis of this conviction was blood spotting found on the defendant's shirt, and testimony of a pathologist stating that the victim could not have been breathing at the time that the defendant got the victim's blood on his shirt, as the defendant claimed, contradicting what the defendant stated in a police interview. *See id.*

244. *See id.* Counsel's hypotheses were not substantiated by any evidence. *See id.* The hypotheses revolved around the time of death and the blood spots that landed on the defendant's clothes. *See Hemphill*, 2001 S.C.C.R. 361.

245. *See id.* The Court noted that counsel has some discretion in its method of cross-examination, but in this case, it was a "substantial failure" to not investigate such evidence. *See id.*

246. *See id.* The court failed to say that the jury would reach another verdict with this forensic evidence. *See id.*

247. E. v. H.M. Advocate, 2002 S.L.T. 715.

did not rape his daughters.[248] During trial, defendant's counsel decided not to attack the credibility of the daughter's claim or their mother's role in instigating their claim.[249] The High Court of Justiciary held that defendant's counsel was inadequate and that the defendant did not receive a fair trial.[250] The Court found that counsel's decision not to follow a certain line of defense suggested by the defendant left the entire defense in peril.[251] The Court noted that the defendant's counsel had not presented his defense as the defendant wished and as a result the defendant received an unfair trial.[252]

ii. Failure to Call Witnesses

Counsel in the United Kingdom is also attacked for failing to call witnesses. In *Townsley v. Her Majesty's Advocate*,[253] both defendants argued that their counsel failed to present their defense to the jury.[254] One defendant told counsel that another person had sex with one of the girls and assumed that counsel would call that person to testify, but counsel did not call the person as a witness.[255] Counsel argued that the defendant did not rape the woman, but did see another person having sex with her to the jury.[256] The High Court of Justiciary held that there was no basis for the appeal.[257] The Court stated that counsel's actions or advice was "contrary to the promptings of reason and good sense."[258] The Court also held that both defendants' defenses were clearly presented in cross-examination.[259]

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248. *See id.* at 715. The defendant denied the charges and claimed that his wife manipulated the girls into claiming that he sexually abused them. *See id.*

249. *See id.* Counsel focused on the inconsistencies in the girls' story and the absence of direct evidence. *See id.* The defendant was subsequently convicted. *See id.*

250. *See id.* The defendant's "consistent denials of any sexual interference with [the girls] left the defence [sic] no alternative but to challenge the girls' credibility in relation to identity of the abuser, which would have necessitated a thorough investigation into the medical evidence [and] the possible manipulation by the mother . . . ." *E. v. H.M. Advocate*, 2002 S.L.T. at 715 (emphasis added).

251. *See id.* at 717. "The consequence of [counsel's] decision was that senior counsel perilled [sic] the whole defence [sic] on the high risk strategy of bringing out contradictions and inconsistencies in the evidence and prior statements of the girls . . . ." *Id.* (emphasis added). Because of the defendant's counsel's limited attack, many prosecution weaknesses were not "brought out thoroughly or were passed over altogether." *Id.* at 717.

252. *See id.* at 718.

253. Townsley v. H.M. Advocate, 1999 S.L.T. 374. The defendant in question was convicted of rape and indecent assault against another woman. *See id.* At the time of the incident the defendant was fifteen years old. *See id.*

254. *See id.* at 375.

255. *See id.* Before trial the defendant received new counsel and admitted that he had not talked specifically to counsel about who he wanted as defense witnesses. *See id.* The defendant thought the person was among the witnesses. *See Townsley*, 1999 S.L.T. at 374.

256. *See id.* at 374.

257. *See id.* at 375.

258. *Id.* at 379.

259. *See id.* at 379-80.

iii. Standard of Presentation

As noted, the standard of counsel's presentation is the most common complaint in the United Kingdom.[260] In *R. v. Allen*,[261] the defendant argued that his counsel was inept for failing to exclude the defendant's alleged admission to the police.[262] When questioned, counsel could not remember if he submitted an application for such exclusion, but did argue that it would have been unlikely that such an exclusion would have been granted by the trial judge.[263] The Court of Appeal, Criminal Division, found counsel's explanation inadequate.[264] The court found that, due to the misjudgment of counsel, it could not be determined whether the jury would have decided the case differently had the admission been excluded, thus the verdict was unsafe.[265]

In *R. v. Ullah*,[266] the defendant argued that his counsel was inept for failing to bring an exculpatory telephone conversation of the victim into evidence.[267] The defendant argued that the victim's bugged conversation showed the victim was concocting a false story.[268] The Court of Appeal, Criminal Division, noted that "wanting safety in a conviction cannot be based on a decision by counsel merely because other counsel might not have made that decision."[269] However, the court held that each member of the bench, in this case, would have used the tapes and that the conviction was unsafe.[270]

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260. *See* Shiels, *supra* note 191, at 741.

261. *R. v. Allen*, 2001 WL 753441. Witnesses saw three men rob a postal employee of his mailbag and escape in a blue car. *See id.* The police located the car and found two men with the contents of the bag. *See id.* The defendant argued that he had just arrived at the suspect's home when the police arrived and was not involved in the robbery. *See id.* The defendant was convicted of robbery. *See id.*

262. *See id.* The detective questioning the defendant taped a conversation that the defendant had with another inmate in the neighboring cell. *See Allen*, 2001 WL 753441. The defendant made inculpatory statements during that conversation. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. R. v. Ullah, 1999 WL 982443. Defendant was convicted of indecent assault of a female. *See id.*

267. *See id.*

268. *See id.*

269. *Id.* "Counsel is not on trial." Case Comment: *R. v. Ullah*, CRIM L.R. 2000, Feb., 108-09, 109. "A minor slip by [counsel] might render a conviction unsafe and a major blunder as to a collateral matter may leave the safety of the conviction in no doubt, . . . the more blameworthy the error, the more likely it is that safety will be affected . . . ." *Id.*(emphasis added).

270. *See Ullah*, 1999 WL 982443. The Court said that they would use the tapes "despite the possible ambiguities, despite the slight possible risk of a retrial being ordered, and despite other possible down side aspects . . . ." *Id.* The Court found that counsel "did not behave reasonably and sensibly" and that counsel's "failure to use [the] tapes was not just a mistake or understandable tactical decision . . . ." *Id.*

In *R. v. Dann*,[271] the defendant, who was on trial for bank robbery, argued that his counsel was inept for failing to ask a crucial question to a witness regarding the existence of a moneybag carried by one of the men involved in the robbery.[272] The defendant argued that eliciting this testimony would have corroborated his account of the events.[273] Counsel admitted to mistakenly not asking the witness about the moneybags.[274] The Court of Appeal, Criminal Division, held that the conviction was safe despite counsel's admitted mistake.[275] The Court noted that even though counsel should have asked the witness about the moneybags.[276] The extra evidence would not have persuaded the jury to find that the defendant's story was the truth.[277]

B. Criticisms of the United Kingdom Standard

The United Kingdom's ineffective assistance of counsel standard is subject to many of the same criticisms as the *Strickland* test.[278] As mentioned, courts in the United Kingdom place more emphasis on whether the client's verdict was prejudiced than whether counsel was deficient.[279] However, a review of authorities has shown that courts have difficulty "defining a formula which adequately and accurately specifies the [type of] case in which the court will intervene."[280]

Before addressing any issues concerning the respective standards adopted by the various jurisdictions of the United Kingdom, an examination of the actions of counsel is necessary. It is the actions of solicitors in particular that provide the foundation for many of the ineffective assistance of counsel problems presently facing the United Kingdom.[281]

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271. R. v. Dann, 2000 WL 571266.

272. *See id.* The defendant was convicted of bank robbery. *See id.* He had driven a friend and another person to the bank and claims that he was completely unaware that the robbery was going to take place. *See id.* Rather, he thought his friends were making a normal transaction because one of the other robbers had a moneybag filled with coins with him and said he needed to make a transaction. *See id.*

273. *See id.* During defendant's trial, the jury, while deliberating, returned to inquire about whether the moneybags were ever recovered by the police. *See Dann*, 2000 WL 571266. The judge told the jury that the bags had not been found. *See id.* The defendant contended that the jury's inquiry showed how important eliciting the information about the moneybags was. *See id.* The Court disagreed, finding that the jury's inquiry would have been answered the same way whether or not the witness had been asked the question or not. *See id.*

274. *See id.*

275. *See id.*

276. *See Dann*, 2000 WL 571266. The Court thought such question would have established the existence of the moneybags. *See id.*

277. *See id.* The Court noted that there was ample evidence in front of the jury for them to still find the defendant guilty despite the testimony that was not elicited. *See id.*

278. *See infra* section. II(C).

279. *See* Gow, *supra* note 2.

280. *Id.* (emphasis added).

281. *See* Griffin, *supra* note 21, at 1260. Studies have shown that "many solicitors have a negative attitude about their role as defense counsel." *Id.*

i. Solicitor-Client Contact

One major concern is solicitor-client contact.[282] In many firms, a solicitor spending time with a client is not even contemplated.[283] There are documented instances in which the solicitor does not even recognize their client or know any details of the client's case when they arrive at the courtroom.[284] After a cursory meeting, generally, solicitors have little contact with clients while both are in court.[285] In an effort to mask the effects of having little or no contact with their client, solicitors employ strategies that involve neither case preparation nor case-related work.[286] Solicitors often blame the system, rather than their own poor preparation, for losing a case.[287]

Thus, solicitors tend to rely more on their own perceptions and assumptions about the client rather than investigating their client's case and gathering evidence.[288] In order to deflect blame from themselves, many solicitors claim that client unreliability impairs their research and preparation, often leaving the solicitor to argue a piecemeal defense with information gathered the day of the client's hearing.[289] However, studies have shown that

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282. *See* MIKE MCCONVILLE ET AL., STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENCE LAWYERS IN BRITAIN 168 (1994).

283. *See id.* Solicitors would rather spend a half-hour speaking with colleagues over coffee than be with their client. *See id.* While there are some solicitors that believe there should be more contact with the client, others accept that there is no contact. *See id.* "You can't spend the time with people on legal aid, certainly the way [this firm] works, everybody is a factory, all the legal aid is only profitable because it is a factory." *Id.* at 67 (emphasis added). During an interview, one attorney stated "[t]hey [the clients] can't possibly get the same service [as private citizens]." *Id.* One excuse that solicitors use to justify minimal contact with clients is the heavy case volume they have to handle each day. *See* MCCONVILLE, *supra* note 282, at 168. Some solicitors, despite only handling one or two cases, still do not meet with clients. *See id.* Thus, heavy case load cannot fully explain the lack of client contact. *See id.*

284. *See* MCCONVILLE, *supra* note 282, at 168. Solicitors do many things to compensate for this unfamiliarity with their client and his or her case. *See id.* at 167-70. They make jokes and give their clients nicknames to make the client assume that they care about the case. *See id.* at 168. They bring up general facts about the client's life, like commenting on the client's job or a general fact about the offense. *See id.* In other instances they treat the client's problems as their own. *See id.* at 169.

285. *See id.* at 167.

286. *See id.* What case preparation that does get done is usually done by unqualified clerks. *See id.* at 166. Also, many times investigation is left to the client. *See id.* Solicitors also have clerks provide "substantial legal advice." *See* Griffin, *supra* note 21, at 1261.

287. *See* MCCONVILLE, *supra* note 282, at 169. Clients are told that there is nothing they can do to disrupt the court process. *See id.* The solicitor alleges to have considered all the options and was advising on the right option. *See id.* This strategy both lowers the expectations of clients and induces them to blame the system for any case failure. *See id.* Throughout all of this, the client is not told about the actual court process or the decisions to be made. *See id.*

288. *See id.* at 68. It is this lack of investigation that provides the foundation for many guilty pleas. *See* MCCONVILLE, *supra* note 282, at 169.

289. *See id.* at 279.

client unreliability is a result of solicitor conduct.[290] The unreliability of clients is often just a reflection of the behavior of their solicitor.[291]

ii. Presumption of Guilt

Solicitors often presume their clients are guilty.[292] This presumption by solicitors is applied to all clients without thought and barely concealed.[293] It is "transparent and available rather than opaque and hidden."[294] Solicitors, skewed by their own preconceptions of their client's wrong-doing, are "over-ready to interpret ambiguous information against the client [and] equate compliance with guilt . . . ."[295] Such presumptions undermine the client's ability to reach "autonomous decisions" about their case.[296] Moreover, clients are more apt to plead guilty, blurring the line between voluntary and involuntary guilty pleas.[297] Even more disturbing, solicitors often are not even aware of their role in the production of those pleas.[298]

iii. Deference to Counsel

Courts in the United Kingdom are highly deferential to counsel.[299] This deference allows for "minimally effective assistance of counsel."[300] As a result, many criminal defendants are slighted. Examples of such minimally effective assistance of counsel include solicitors not meeting with their clients[301] and counsel preparing a client's case upon arriving at the

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290. *See id.*

291. *See id.* "[T]he most immediate source from which defendants learn about the unpredictability of the criminal justice process is from the work done on their behalf by the own 'representatives.'" *Id.*

292. *See id.* at 140.

293. *See* MCCONVILLE, *supra* note 282, at 140-41.

294. *Id.* at 141. This presumption makes it difficult to determine which clients have a defense and which do not. *See id.* It also is difficult to tell the innocent from the guilty. *See id.*

295. *Id.* (emphasis added).

296. *See id.* at 141.

297. *See* MCCONVILLE, *supra* note 282, at 141. *But see* SPRACK, *supra* note 174, at 119. "[D]efense counsel's duty is to . . . 'fearlessly and without regard to his personal interests'" present to the court the defense of the accused. *See id.* at 119-20. Counsel's personal opinion about the accused should not matter. *See id.* at 119. "[T]hat is a cardinal rule of the Bar, and it would be a grave matter in any free society were it not." *Id.* 120 (quoting Chairman of the Bar, § 2 Cr.App.R. 193).

298. *See* MCCONVILLE, *supra* note 282, at 141.

299. *See* Gow, *supra* note 2.

300. GARCIA, *supra* note 26, at 34, *quoting* Caplin & Drysdale v. United States, 109 S.Ct. 2646, 2672 (1989) (Blackmun, J., dissenting).

301. *See* MCCONVILLE, *supra* note 282, at 167. Counsel often avoid clients by having all their cases transferred to one court. *See id.* This allows counsel to sit in the courtroom all day and not speak to clients. *See id.*

courtroom.[302] This deference also allows counsel to employ strategies that do not require investigation, research, or case-related work.[303] This deference also allows counsel to get away with having unskilled clerks do a majority of their research and investigation.[304]

iv. Presumption of Reasonable Conduct

Courts in the United Kingdom hold the strong presumption that counsel's actions fall within the range of reasonable conduct, until proven otherwise.[305] The presumption of reasonable conduct invites the same inconsistency that plagues the application of the *Strickland* test in the United States.[306]

As studies indicate, a major, contributing factor as to whether counsel has acted reasonably[307] is that prevailing professional norms determine what is reasonable in the United Kingdom, just as they do in the United States.[308] Also, counsel in the United Kingdom can escape punishment for their ineptitude and ineffectiveness by hiding behind the guise of tactical and strategic decisions.[309]

Courts in the United Kingdom are not overly concerned with counsel's conduct.[310] Rather, the United Kingdom is more concerned with whether the conviction is unsafe.[311] This narrow view strongly contributes to the difficulty in formulating an adequate and accurate formula to specify when counsel has acted ineffectively.[312] As noted, this could mean that counsel's failure to follow the client's instructions, errors in judgment, and even negligence, may not fall under the scope of the United Kingdom's ineffective assistance standard.[313]

Because an accurate formula cannot be specified for determining ineffective assistance of counsel, counsel's conduct remains unchecked.[314] This means that counsel in the United Kingdom can continue to not meet with clients, presume their guilt, and use unsound strategy.[315] By focusing solely on whether the conviction was unsafe, the courts in the United Kingdom are ignoring the extent of counsel's contribution to the problem. Eventually, the

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302. *See id.* at 168.
303. *See id.*
304. *See id* at 166.
305. *See* Gow, *supra* note 2.
306. *See* Murphy, *supra* note 37, at 199.
307. *See* MCCONVILLE, *supra* note 282, at 168
308. *See* Murphy, *supra* note 37, at 191.
309. *See* Gow, *supra* note 2.
310. *See* Shiels, *supra* note 191, at 742.
311. *See id.* at 743.
312. *See* Gow, *supra* note 2.
313. *See id.*
314. *See id.*
315. *See id.*

courts will be forced narrow the standard because, if counsel is allowed to continually act in the same manner, an ever-increasing number of unsafe convictions will be presented before them.

IV. SUGGESTIONS FOR STRENGTHENING BOTH STANDARDS

A. More Emphasis on Investigation

As noted above, counsel in the United States and counsel in the United Kingdom have shown serious deficiencies in investigating on client's cases.[316] Investigation and research are fundamental principles in the practice of law. These principles are universal regardless where counsel may reside. Neither investigation nor research should be ignored or treated lightly due to time constraints or a heavy caseload. Yet, as noted above,[317] counsel is willing to forego research and fail to pursue an investigation to its fullest extent. Such instances permeate both the United Kingdom and the United States. In the United Kingdom, solicitors do not even bother meeting with the client to discuss the client's case.[318] In the United States, defense counsel often fails to investigate the collateral consequences of a client's conviction.[319] Such disregard for the fundamental principles of investigation and research illustrates that counsel's failure to investigate is a serious problem in both countries.

The laws in both countries should be amended to rectify the issue. It is in the best interest of both the courts of the United States and the courts of the United Kingdom to implement more severe sanctions on counsel who do not properly investigate matters involving a client. Too many defendants lose the opportunity to mitigate their sentences as a result of counsel's poor research and investigation. If courts imposed harsher sanctions on counsel for not investigating their client's cases, those defendants would have a better opportunity to mitigate.

A crackdown on ineffective counsel will benefit those defendants who have received harsher sentences due to their counsel's lack of investigation and research. Also, it will benefit both the United States' and United Kingdom's legal professions. More thorough investigation by counsel into their client's cases is likely to result in fewer cases of ineffective assistance of counsel, and as a result the public will likely perceive a higher benchmark for counsel's performance.[320]

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316. *See* MCCONNVILLE, *supra* note 282, at 167-68.
317. *See id.*
318. *See id.*
319. *See* McDermid, *supra* note 93, at 751-54.
320. *See* Kelly, *supra* note 6, at 1093.

B. Less Deference to Counsel

As it currently stands, the deference that courts give to counsel on both sides of the Atlantic is tantamount to the inmates running the asylum. With the court's permission, counsel can avoid charges of ineffective assistance by hiding behind tactics or strategy.[321] This deference permits counsel to concoct a reasonable explanation for their actions. As a result, counsel can continue poor representation under the guise that it is their theory of the case. Such actions only punish that client further. Such deference also allows opportunities for counsel to employ strategies that omit research and case related work, all to the detriment of the client.[322]

It is dutifully noted that counsel should be afforded some deference. Greatly minimizing the deference to counsel would potentially be more damaging to the client than providing too much deference. If counsel did not have room to determine strategy and tactics, a client would have fewer options in order to present a defense. That being said, a middle ground could likely be found. There still should be a reasonable limit to the deference given counsel. A possible suggestion is an objective test to determine whether such strategic or tactical decisions were reasonable in terms of its effect on the client. Such a test would go a long way in determining whether that counsel has prejudiced his or her client by the actions that counsel has taken.

V. CONCLUSION

A comparison of both the United States' and the United Kingdom's standards for ineffective assistance of counsel demonstrates the arbitrariness engulfing both standards. Each standard relies too much on the subjective interpretation of appellate judges. As a result, a definable standard for what conduct constitutes ineffective assistance of counsel is nearly impossible to determine.

Egregious conduct is obviously simple to detect, but many times even that conduct goes unpunished, as seen in *Smith v. Ylst*[323] and *Egan v. Formand*.[324] However, such conduct is not the problem. Egregious conduct is much easier to remedy given its rarity. It is conduct by counsel, such as failure to fully investigate a client's case, which more often than not slips through the cracks because of the inconsistencies and subjectivity of both country's standards.

Courts in both the United States and the United Kingdom are concerned with whether counsel's conduct affected the verdict. Thus, each court system is willing to find counsel deficient. However, more often than not, the courts

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321. *See Strickland*, 466 U.S. at 690-91.
322. *See* MCCONVILLE, *supra* note 282, at 167.
323. *See Smith*, 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 480 US 829 (1988).
324. *See Egan*, 1997 S.L.T. 1166.

find that such deficiency did not affect the verdict. Defendants who find themselves on the losing side of a verdict must come to terms with the fact that not only was their representation defective, but that they have no recourse for being provided the best defense possible.

The United States and the United Kingdom should reexamine their standards. Both standards are arbitrary in nature and are too subjective to provide a firm basis for what constitutes ineffective assistance of counsel. The elements necessary to create a new, stronger, standard already exist. In fact, the current standards established by the United States and the United Kingdom are adequate foundations to reinforce those new standards. It is now up to the both countries' legal systems to realize that each standard is inadequate and that changes must be made. The voice of dissent is present, as of yet, though, it is not being heard. If that voice is heard, the result of such actions could provide the true justice one would think of coming from effective assistance of counsel.

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