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COMMENTS

The Time Has Come for an International Criminal Court

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Introduction

The end of the "Cold War" presents an historic opportunity to advance the international rule of law by establishing an international criminal court to preserve peace, advance the protection of human rights and reduce international and transnational criminality.

The idea for such a court is not new and the efforts to establish it have increased over the years. All of the precedents, however, have been *ad hoc* international tribunals which ceased to exist when the specific function or purpose for which they were designed ended. But the important legal fact is that they existed, albeit with all the weaknesses and shortcomings of having been hastily established, created for a single adjudicating purpose and temporary in nature. Nevertheless, these precedents are the backdrop of international experience which must now ripen into a permanent international adjudicating structure designed to apply international criminal law with consistency and objectivity, and by means of fair process.

Historical Background

It can be said that the first international criminal court was established in 1474 in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the "laws of God and man" because he allowed his troops to rape and kill innocent civilians and pillage their property.[1] Since then, a number of similar precedents have taken place and moreover,

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1. G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462 (1968). *See also* M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 23-59 (1965).

a number of initiatives for a permanent international criminal court have been developed. (*See* Appendix I for the chronology of these initiatives.)

-After World War I, the Treaty of Versailles provided for the prosecution of Kaiser Wilhelm II[2] and for an international tribunal to try German war criminals.[3] After the war, the Kaiser fled to the Netherlands where he obtained refuge, but the Allies, who had no genuine interest in prosecuting him, abandoned the idea of an international court.[4] Instead, they allowed the German Supreme Court sitting at Leipzig to prosecute a few German officers.[5] The Germans criticized the proceedings because they were only directed against them and did not apply to Allied personnel who also committed war crimes. More troublesome, however, was the Allies' failure to pursue the killing of a then estimated 600,000 Armenians in Turkey.[6] The 1919 Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War, which investigated the responsibility of those who violated the laws of war, recommended the prosecution of responsible Turkish officials and by doing so, the notion of "crimes against humanity" became a legal reality.[7] Strange as it may seem today, the United States, at that time, opposed such prosecution on the technical legal argument that no such crime yet existed under positive international law.[8] Consequently, the Treaty of Sèvres (1923), which was to serve as a basis for Turkish prosecutions, was never ratified,[9] and its replacement, the Treaty of

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2. Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919, 11 Martens NOUVEAU RECUEIL DES TRAITES (3d) 323, art. 227.

3. *Id.*, art. 228.

4. *See generally* J.F. WILLIS, PROLOGUE TO NUREMBERG (1982); *see also*, Wright, *The Legality of the Kaiser*, 18 AM. POL. SCI. REV. 121 (1919).

5. *See* C. MULLINS, THE LEIPZIG TRIALS (1921). The two major prosecutions were "The Dover Castle," (*reprinted in* 16 AM. J. INT'L L. 704 (1922)), and "The Llandovery Castle," (*reprinted in* 16 AM. J. INT'L L. 708 (1922)).

6. *See generally* Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989).

7. Report of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War, Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32 (1919), *reprinted in* 14 AM. J. INT'L L. 95 (Supp. 1920).

8. *Id.*, Dissent of the United States, at 58 (of Pamphlet No. 32).

9. The Treaty of Peace Between the Allied Powers and Turkey (Treaty of

Lausanne (1927), gave the Turks amnesty.[10] Thus, the first of many mass killings in this century — atrocities now commonly referred to as genocide[11] — remained unpunished. Nevertheless, one can assume that the granting of amnesty constituted implicit legal blameworthiness; i.e., amnesty is only granted for a crime. The reluctance to recognize

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Sèvres), 10 August 1920, 15 AM. J. INT'L L. 179 (Supp. 1921) (not ratified). *See* in particular arts. 226-230. Article 226 provides:

> The Turkish Government recognises the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her alies.
>
> The Turkish Government shall hand over to the Allied Powers or to such one of them as shall so request all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the Turkish authorities.

See generally Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORD. INT'L L. J. 86 (1989).

10. In fact, the treaty did not even address the question of prosecuting war criminals. Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), 24 July 1923, 28 L.N.T.S. 11, *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924). *See generally*, Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920).

11. *See* Convention on the Prevention and Suppression of the Crime of Genocide, 9 Dec. 1948, 78 U.N.T.S. 277, *reprinted in* 45 AM. J. INT'L L. 7 (Supp. 1951). Article II defines genocide as follows:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

On its face, this definition excludes mass killings which are committed without the accompanying intent to destroy a group "in whole or in part." *See* Bassiouni, *Introduction to the Genocide Convention*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 281 (1986). *See also*, E. ARONEAU, LE CRIME CONTRE L'HUMANITE (1961); P. DROST, THE CRIME OF STATE (1959); Bassiouni, *International Law and the Holocaust*, 9 CAL. W.J. INT'L L. 201, 250 (1979); Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145 (1944).

"crimes against the laws of humanity" in the post-World War I era as prosecutable and punishable international crimes came back to haunt the very same Allies, and particularly the United States, after World War II.

-In 1937, the League of Nations adopted a Convention Against Terrorism. The Protocol to this Convention contained a Statute for an International Criminal Tribunal; however, India was the only country to ratify it and the Convention never entered into effect.[12] Since then, the world has been plagued with all sorts of terror-violence, producing significant victimization, and as a consequence, a number of international Conventions on the subject have been adopted but none contained a provision for the establishment of an international criminal court as did the 1937 Convention.[13] Once again the short-sightedness of public officials prevented the taking of that additional step which many felt to be necessary.[14]

-After World War II, the Allies established two international tribunals — at Nuremberg[15] and Tokyo[16] — to try major war criminals; however,

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12. Convention for the Creation of an International Criminal Court. Opened for signature at Geneva, Nov. 16, 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547(I).M.384(I).1937V. (Never entered into force); *reprinted in* 7 INTERNATIONAL LEGISLATION (1935-37), 878 (M. Hudson ed. 1972).

13. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 Dec. 1973, T.I.A.S. No. 8532; International Convention Against the Taking of Hostages, 18 Dec. 1979, G.A. Res. 34/145 (XXXIV), 34 U.N. GAOR Supp. (No. 46), at 245, U.N. Doc. A/34/146; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, 24 Feb. 1988, 27 I.L.M. 627 (1988); Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 Mar. 1988, I.M.O. Doc. SVA/CON/15.

14. *See* INTERNATIONAL TERRORISM AND POLITICAL CRIMES, (M.C. Bassiouni ed. 1975). In particular, *see* "Final Document: Conclusions and Recommendations" (of the participants to the International Conference on Terrorism and Political Crimes, held at the International Institute of Higher Studies in Criminal Sciences, June 4-16, 1973), at xi-xxii.

15. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 Aug. 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (entered into force, 8 Aug. 1945), and the annexed Charter of the International Military Tribunal (Nuremberg). *See generally*, TRIAL OF THE MAJOR WAR CRIMINALS: PROCEEDINGS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1949), known as the "Blue Series." The ensuing trials were published under the title, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL (1949), known as the

the absence of a strong precedent in the post-World War I era weakened the legality of the process. Even worse was the absence of prosecution of Allied military personnel for war crimes. These and subsequent prosecutions became tainted with the claim of "victor's vengeance," although the legitimacy of prosecuting such offenders by far outweighed the legal weaknesses of the process and certainly outweighed non-prosecution. Subsequent to Nuremberg and Tokyo, the Allies established war crimes tribunals in their respective zones of occupation in Germany and tried over 20,000 war criminals.[17] Germany then took over the task of prosecuting offenders found in its territory.[18] Formerly occupied countries of Europe also prosecuted Germans and their own nationals who collaborated with the occupiers. In some countries, the process continues. Suffice it to recall: Israel's Nazi and Nazi Collaborators (Punishment) Law,[19] under which there were two landmark

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"Green Series." For an account of the trial and the accused, *see* E. DAVIDSON, THE TRIAL OF THE GERMANS (1966). For a legal appraisal and description of the proceedings, *see* R. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1960); J. KEENAN & B. BROWN, CRIMES AGAINST INTERNATIONAL LAW (1950); S. GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT (1944).

16. International Military Tribunal for the Far East: (a) Special Proclamation: Establishment of an International Military Tribunal for the Far East; (b) The Charter of the International Military Tribunal for the Far East, Tokyo, 19 Jan. 1946 (General Order No. 1), as amended 26 Apr. 1946, T.I.A.S. No. 1589, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE U.S.A., 1776-1949 20 (C.I. Bevans ed. 1968).

17. "Control Council Law No. 10" (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), adopted at Berlin, 20 Dec. 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, Berlin, 31 Jan. 1946, *reprinted in* 1 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT 488 (1980). *See* A. MAUNOIR, LA REPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANCAIS ET ALLIES (1956); HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (Wright ed. 1948); Bierzanek, *War Crimes: History and Definition*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 559 (M.C. Bassiouni and V.P. Nanda eds. 1973); Cowles, *Trial of War Criminals (non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948). In the post-Nuremberg prosecutions conducted in the occupied zones, the U.S. prosecuted 1814 persons (450 executed); the U.K. 1085 (240 executed); France, 2107 (109 executed). *See* Bierzanek, *War Crimes: History and Definition*, in 3 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: ENFORCEMENT, (1987). The U.S.S.R. is estimated to have prosecuted over 10,000 persons in Germany. No information is available on the number of persons executed. The United Nations War Crimes Commission also reported a number of other prosecutions in and throughout the European countries at war with Germany in World War II.

18. *See* Weinschenck, *Nazis Before German Courts: The West German War Crimes Trials*, 10 INT'L LAW. 515 (1976).

19. Nazi and Nazi Collaborators (Punishment) Law-5710 (1950) 4 LAWS OF

prosecutions, Eichmann[20] (convicted in 1961) and Demjanjuk[21] (convicted in 1989); in Yugoslavia where Artukovic — extradited in 1988 from the United States — was executed in 1989;[22] in France, where Barbie was convicted for the second time in 1989;[23] in the United States denaturalization and deportation of World War II criminals continues;[24] and in Canada, where a 1987 law permits prosecution of persons charged with war crimes and crimes against humanity;[25] the first case was decided in 1989.[26] Prosecution of similar violations as those occurring after World War II has not taken place on any sort of consistent basis, notwithstanding many reported cases in regional conflicts and other conflicts of a non-international character.[27] For

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THE STATE OF ISRAEL No. 64, at 154. *See* U.N. YEARBOOK ON HUMAN RIGHTS 163 (1950) for the English translation of that law.

20. Attorney General of Israel v. Eichmann (Israel Dist. Court of Israel 1962), 36 I.L.R. 277 (1962). *See generally* G. HAUSER, JUSTICE IN JERUSALEM (1966).

21. Extradited from the U.S. to Israel, In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Oh. 1985), *aff'd*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied* 475 U.S. 1016 (1986).

22. Artukovic v. Rison, 628 F. Supp. 1370 (C.D. Calif. 1986), *aff'd*, 784 F.2d 1354 (9th Cir. 1986).

23. *See* Matter of Barbie, Gaz. Pal. Jur. 710 (France Cass. crim. Oct. 6, 1983). *See also* Le Gunehec, "Affaire Barbie" *Gazette du Palais*, No. 127-128, 106e anneé, Mercredi 7-Jeudi 8 Mai, 1985; and Angevin, "Enseignements de L'Affaire Barbie en Matiere de Crimes Contre l'Humanité," *La Semaine Juridique*, 62e anneé, No. 5, 14 Dec. 1988 p. 2149; Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 COLO. L. REV. 449 (1989).

24. On the revocation of naturalization, *see* 8 U.S.C. § 1451 (1988). *See also Alleged Nazi War Criminals: Hearings Before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 59 (1977). And *see generally*, A. RYAN, QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA (1984) (examining the issue of war criminals who emigrated to the United States and who now must confront their past).

25. *See* Act to amend the Criminal Code, ch. 37, 1987 Can. Stat. 1107. (*See* in particular § 1.96.). Also, Australia and the United Kingdom have passed or considered similar legislation. In Australia: War Crimes Act 1988, No. 3 of 1989, 25 Jan. 1989; In the U.K. *see* WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY (Presented to Parliament by the Secretary of State for Home Department by Command of Her Majesty, July 1989).

26. The Queen v. Imre Finta, Court File No. 30/88 (Sup. Ct. of Ontario, 1990).

27. *See generally* Mudge, *Starvation as a Means of Warfare*, 4 INT'L LAW. 228 (1969-1970) [Biafra; Nigeria]; KAMPUCHEA: DECADE OF THE GENOCIDE (K. Kiljunen ed. 1984); Frank & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973); and Commentary, *International Crimes Tribunal in Bangladesh*, 11 INT'L COMM. JUR. REV. 29 (N. MacDermot ed. 1973); Paust &

example, only one conviction arose out of the Vietnam War.[28]

-In 1948, the Genocide Convention recognized the jurisdiction of an international criminal court, should one be established, but the Convention did not require that such a court be established.[29] Since 1948, however, mass killings have gone unpunished, including those resulting from the internal conflicts in Biafra (Nigeria), Bangladesh and Kampuchea, where the killing is still ongoing.[30]

-As a result of the post-World War II prosecutions, the United Nations established a Committee for the codification of "Offences Against the Peace and Security of Mankind"[31] and also to develop the statute for an international criminal court. In 1951, such a draft statute was prepared[32] and in 1953, it was amended,[33] but it has been tabled by

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Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND J. TRANS. L. 1 (1978); The Asia Watch Committee, KHMER ROUGE ABUSES ALONG THE THAI-CAMBODIAN BORDER (1989). *See also* L. KUPER, GENOCIDE (1981).

28. U.S. v. Calley, 46 C.M.R. 1131 (1973), *aff'd* 48 C.M.R. 19 (1973); *see also* 2 L. FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 1703 (1972).

29. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 11, art. IV.

30. *See supra* note 27.

31. *See generally* Williams, *The Draft Code Against the Peace and Security of Mankind*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 109 (1986).

32. Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Court Jurisdiction, 31 Aug. 1951), 7 U.N. GAOR Supp. (No. 11), U.N. Doc. A/2136 (1952), at 23. *See also* subsequent Reports of the Committee on International Criminal Jurisdiction, U.N. Doc. A/2186 and U.N. Doc. A/2186/Add. 1. The discussions of the Sixth Committee and of the General Assembly until the end of 1952 encompassed all three reports (U.N. Doc. A/2136, U.N. Doc. A/2186, U.N. Doc. 2186/Add.1). *See also* Historical Survey of the Question of International Criminal Jurisdiction, Memorandum by the Secretary-General, A/CN.4/7/Rev.1 (1949), *reprinted in* 1 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT 399 (1980). The chronology of relevant U.N. documents, reports and resolutions are: Report of the International Law Commission on the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/15 (1950); Report of the International Law Commission to the U.N. General Assembly on the Question of International Criminal Justice, 5 U.N. GAOR Supp. (No. 12), at 18, U.N. Doc. A/1316 (1950); Report of the Sixth Committee to the U.N. General Assembly concerning the Report of the International Law Commission on the Question of International Criminal Jurisdiction (U.N. Doc. A/1316), 5 U.N. GAOR, U.N. Doc. A/1639 (1950); Report on the International Criminal Jurisdiction, 7 U.N. GAOR Supp. (No. 11), U.N. Doc. A/2136 (1951) (Final).

33. Report of the 1953 Committee on International Criminal Jurisdiction to the Sixth Committee, 9 U.N. GAOR Supp. (No. 12), at 23, U.N. Doc. A/2645 (1953); Report of the Sixth Committee to the U.N. General Assembly considering the (Final) Report of the 1953 Committee on International Criminal Jurisdiction (U.N.

the General Assembly ever since.

-In 1972, the *Apartheid* Convention provided for the establishment of an international criminal jurisdiction.[34] In 1980, at the request of the Commission on Human Rights, I prepared a draft statute for an international criminal tribunal to prosecute *apartheid* violators, but the project thus far has not been acted upon.[35]

-In 1989 and 1990, the General Assembly requested the International Law Commission to report on the establishment of an international criminal court to prosecute persons engaged in the international trafficking of drugs.[36] Pursuant to that call, the International Institute of Higher Studies in Criminal Sciences (Siracusa), in cooperation with the United Nations Crime Prevention Branch and the Italian Ministry

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Doc. A/2645), 9 U.N. GAOR Supp., U.N. Doc. A/2827/Corr. 1 (1954); G.A. Res. 898 (X), U.N. Doc. A/RES./266 (1954) (tabling the Report of the 1953 Committee on International Criminal Jurisdiction); G.A. Res. 1187 (XII), 12 U.N. GAOR (1957) (tabling the Report of the Sixth Committee on International Criminal Jurisdiction, U.N. Doc. A/3771 (1957)).

34. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30), at 75, U.N. Doc. A/9030 (1973), *reprinted in* 13 I.L.M. 50 (1974), arts. V, IX.

35. U.N. Doc. E/CN.4/AC.22/C.R.P. 19 (1980), "Study on ways and means of insuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, including the establishment of the international jurisdiction envisaged by the Convention," U.N. Doc. E/CN.4/1426, (1980). *See also* Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

36. G.A. Res. 43/164 (1988) and 44/39 (1989). And, in particular, *see* Agenda item 152 entitled *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities Establishment of an International Criminal Court with Jurisdiction Over Such Crimes, Report of the Sixth Committee to the General Assembly*, U.N. Doc. A/44/770 (1989). *See also Adoption of a Political Declaration and a Global Programme of Action*, Draft global programme of action by the Bureau of the *Ad Hoc* Committee of the Seventeenth Special Session of the General Assembly (Item 14 of the provisional agenda), U.N. Doc. VA/S-17/AC.1/L.2 (1990), which at paragraph 80 provides:

> Since the International Law Commission has been requested to consider the question of establishing an international criminal court or other international trial mechanism with jurisdiction over persons alleged to be engaged in illicit trafficking in narcotic drugs across national frontiers, the Administrative Committee on Co-ordination shall consider, in its annual adjustments to the United Nations system-wide action plan on drug abuse control requested by the General Assembly in its resolution 44/141 of 15 December 1989, the report of the International Law Commission on the question.

See generally, 84 AM. J. INT'L L. 930, 930-933 (1990).

of Justice, convened a committee of experts in June 1990 to prepare such a draft statute. The Committee approved the document I prepared[37]

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37. The Draft Statute for an International Criminal Court is based on the earlier proposal prepared by this author for the United Nations to prosecute *apartheid* violators. *See supra* note 35. Thereafter the Draft Statute was amended and published in M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL (1987). In preparation for the Siracusa meeting the Draft Statute was discussed at a meeting convened by Senator Arlen Specter:

> But, the ILC is not the only forum for discussion of this proposal. Commencing later [sic] month in Italy, the International Institute of Higher Studies in Criminal Sciences in cooperation with the United Nations Crime Prevention Branch on Penal Codes will focus primary attention on the issue of creation of an international criminal court. And, in August, the United Nations' 8th Congress on Crime Prevention will also focus debate on the creation of such a court. Clearly, the progress made on the need for and creation of international criminal court has taken a quantum leap forward.
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> In sum, it is clear that there is broad agreement on the definition and threat posed by drugs and drug trafficking leading to the United Nations adoption on December 20, 1988 of the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In spite of several international conventions on aviation, maritime safety and hostage-taking, there is less agreement on the definition of terrorism. While both represent a very serious problem to safety and security, the development of a regional international criminal court focusing on drugs and international drug trafficking, in my view, offers a start in establishing and developing the international criminal court system.
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> In closing, I wish to support the effort of the forthcoming fora in their efforts to create an international criminal court. In the months ahead I shall be introducing a new legislative proposal to move the United States closer to a more active role in the formulation of an international criminal court.
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> Mr. President, I would be gravely remiss if I did not recognize the extensive scholarship contributed by Cherif Bassiouni, professor of law at DePaul University College of Law to the development of an international criminal court and code. Professor Bassiouni's counsel and dedication have been a source of inspiration and guidance to this Senator and indeed to the community of international criminal lawyers and scholars. His competence and vision as an international criminal law scholar are universally shared. I thank him publicly for his contributions and leadership in this matter and look forward to greater cooperation with him in the formulative period ahead.

136 CONG. REC. S8080 (daily ed. June 18, 1990) (statement of Sen. Specter). And also, after the Siracusa Conference:

> [A] special committee of experts organized by the International Institute of Higher Studies in Criminal Sciences under the auspices of the Italian Ministry of Justice and in cooperation with the United Nations Crime Prevention and

with minor changes and the text was submitted to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders held in Havana, Cuba, August-September, 1990.[38]
-The Eighth Congress debated the subject and that discussion was summarized in its report as follows:

> There was a need to develop clear ideas and a firm attitude on international co-operation, free of isolationism while respecting the sovereignty of States. Some delegations considered that the threat of major international crimes necessitated the establishment of an international criminal court. It would serve as an instrument for the defence of international peace and security, without which the sovereignty of some States, particularly small States, could be placed in jeopardy.[39]

The Congress, however, resolved as follows:

> The International Law Commission should be encouraged to continue to explore the possibility of establishing an international criminal court or some other international mechanism to have jurisdiction over persons who have committed offences (including offences connected with terrorism or with illicit trafficking in narcotic drugs or psychotropic substances), in accordance with General Assembly resolution 44/39 of 4 December 1989. Similarly, and in the light of the report that the International Law Commission will submit on this particular subject to the General Assembly at its forty-fifth session, the possibility might be considered of establishing an international criminal court or appropriate mechanism with each and all of the procedural and substantive arrangements that might guarantee both its effective operation and absolute respect for the sovereignty and the territorial and political integrity of States and the self-determination of peoples. States

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Criminal Justice Branch held a symposium in Siracusa, Italy. The Institute urged establishment of the court, drafted a model statute for such a court and presented its recommendations to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders which met in August.

136 CONG. REC. S18160 (daily ed. Oct. 25, 1990) (statement of Sen. Specter).

38. U.N. Doc. A/Conf. 144/NGO 7, *Draft Statute: International Criminal Tribunal* (1990), Item 5, *reprinted in* 15 NOVA L. REV. 375 (1991). *See also* Bassiouni, A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court, 15 NOVA L. REV. 353 (1991).

39. *Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/Conf. 144/28, at 227, (1990).

> could also explore the possibility of establishing separate international criminal courts of regional or sub-regional jurisdiction in which grave international crimes, and particularly terrorism, could be brought to trial and the incorporation of such courts within the United Nations system.[40]

-In July 1990, the International Law Commission completed a report and submitted it to the 1990 session of the General Assembly.[41] It expressed a positive view on the feasibility of such a court with jurisdiction over "Crimes Against the Peace and Security of Mankind."[42]

All these efforts have brought us closer to realizing the expectations of so many who believe that some form of international adjudication for international and transnational crimes may be forthcoming. But so far the political will of the world's major powers has been lacking, and progress toward that goal is slow though growing.

Political, Practical and Technical Legal Considerations

The obstacles to the establishment of an international criminal court fall essentially into three categories: (1) political; (2) practical; and, (3) legal-technical. Of these three, the political factor is the most significant, followed by the practical one, while the legal-technical one does not pose any serious difficulties.

The political factor stems essentially from objections generated by those who adhere to a rigid conception of sovereignty, even though such conceptions have been *dépassé* in so many other areas of international law, particularly with respect to the international and regional protections of human rights embodied in conventional and customary international law. The real opposition, however, comes from government officials who fear two types of situations.

The first is the risk that they and other senior officials, especially heads of state, can be called to answer for their acts which may constitute international violations and which would be subject to the Court's jurisdiction. This is not surprising in view of the fact that the Nuremberg[43] and Tokyo[44] international military tribunals, and the United Nations'

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40. *Id.*, at 193-4.

41. *See supra* note 36, and accompanying text.

42. International Law Commission, Forty Second Session, U.N. Doc. A/CN.4/430/Add.1 (1990) *Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind.*

43. *See supra* note 15.

44. *See supra* note 16.

subsequent affirmation of the Nuremberg principles, removed the immunity of heads of states and negated other defenses, such as "obedience to superior orders."[45]

Since World War II a number of instances have come to world public attention indicating that heads of state and senior government officials have engaged in or supported the commission of such international crimes as aggression, war crimes, crimes against humanity, genocide, *apartheid*, slavery and slave-related practices, international trafficking in drugs, aircraft hijacking, kidnapping of diplomats, taking of civilian hostages and torture. And while the world community expresses abhorrence of some of these crimes, and outrage about others, little if anything is done, other than pious denunciations, and occasionally, some condemnatory resolutions by the United Nations and other international bodies.

The political problem is obvious. Heads of states and senior government officials have historically wanted to shield themselves from any form of international accountability. Their successors and even their opponents so frequently cover up for them for fear that they too may find themselves in a similar situation, or because they feel that domestic political peace may warrant it. This was evident when Bangladesh did not carry out its intended prosecution of Pakistanian military personnel after the independence of that region, which was once part of Pakistan.[46] It was also the case when Argentina, after prosecuting some officers for the estimated 15,000 *desaparecidos* between 1976-1983, passed an amnesty law on December 29, 1990.[47]

During the "cold war" (1948-1989) countries on both sides of the then "iron curtain" perceived the exigencies of national security at precluding consideration of an international criminal court that would deal with such international crimes as aggression and terrorism. But the real reason was that the two superpowers engaged in acts violating international criminal law, as did their surrogates, satellites and respective friendly countries. Exaggerated as these claims of national

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45. *See Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal* G.A. Res. 95 (I) U.N. Doc. A/64 Add. 1 (1946); *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (International Law Commission), 5 U.N. GAOR (No. 12), 11 U.N. Doc. A/1316 (1950). Also, in 1968, the United Nations adopted the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 Nov. 1968, 754 U.N.T.S. 73, *reprinted in* 8 I.L.M. 68 (1969).

46. *See* Frank & Rodley, Paust & Plaustein, *supra* note 27.

47. *See* Timerman, *Fear Returns to Argentina* New York Times, Jan. 5, 1991, at 13, col. 1.

security were, and certainly as they now appear to be, the argument of national security was frequently used to rationalize the commission of international crimes ranging from aggression to torture. Even now, public officials in countries which resort to, or allow torture, rationalize it on the grounds of national security or public necessity.[48] Strange as it may seem, the efforts of public officials to shield themselves from accountability, whether heads of state or simple police officers, has consistently been the same for as long as there is a record of these occurrences. They invariably argue that their action was necessary in order to protect or save the nation, or to advance its vital or national security interests.

Another argument advanced against such a court, as well as another risk perceived by public officials, is the apprehension that an international adjudication body can, for purely political reasons, embarrass governments and public officials. But surely sufficient safeguards could be developed to prevent such possibilities, much as certain mechanisms have been developed in domestic legal systems to avoid abuse of power through prosecutorial misconduct and abuse of prosecutorial discretion. Such issues as well as other legal-technical issues cannot be raised *a priori* to oppose the realization of the idea. They are valid concerns to be raised in the context of drafting the norms and provisions of an international criminal court system so as to develop appropriate safeguards. It is, therefore, more likely that this argument is raised in order to obfuscate the fact that the former one (to shield public officials) is the real reason for the opposition to the idea.

Practical questions are also raised with frequency and have a ring of authenticity to them, particularly to the non-initiated. Among these questions are: where to locate the Court; how to secure the presence of the accused to stand trial; how to select judges, etc. These and other practical questions are no different than those which faced the drafters of the 1899 Hague Convention establishing the Permanent Court of Arbitration,[49] or those of the 1920 Permanent Court of International Justice and of the 1945 International Court of Justice, respectively part of the League of Nations and United Nations Charters. Granted, these tribunals were not set up for purposes of individual criminal prosecutions and that there are peculiar problems to this type of adjudication, but

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48. *See generally* Bassiouni & Derby, *The Crime of Torture*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 363 (1986); TORTURE IN THE EIGHTIES (An Amnesty International Report, 1984).

49. Convention for the Pacific Settlement of Disputes, July 29, 1899, 32 Stat. 1799.

political sensitivities about all forms of international adjudication are similar. That is why both the PCIJ and the ICJ provide for the Member-States the choice of compulsory or voluntary submission to jurisdiction.[50] In the case of an international criminal court having jurisdiction over individuals, it would seem that these political sensitivities should be of a lesser nature, except, of course, when it comes to prosecuting public officials for crimes having political overtones or which are committed pursuant to state-policy and particularly if the international criminal court were to have exclusive jurisdiction.

The Draft Statute for an International Criminal Tribunal, which I prepared in 1980 and which was revised and reviewed by the 1990 Siracusa Committee of Experts and then submitted to the Eighth United Nations Congress,[51] addresses these concerns without compromising the basic values and goals sought to be achieved by such a Tribunal. Clearly, other solutions to practical and legal technical questions can be developed, but the point is that these problems are not as difficult to resolve as some government officials claim. They are not, therefore, a valid reason for the refusal of establishing an international criminal court.

Legal-technical issues are easily resolvable and many thoughtful models have been developed by the League of Nations, the United Nations, non-governmental organizations and individual scholars.[52] (Some of these questions are discussed below when the "Proposed Model" is examined.)

Recent Developments

In the last three years, the question of establishing an international criminal court has emerged at the highest political levels in the world and renewed interest has been expressed by world leaders and by the United Nations.[53]

As early as 1987, President Gorbachev expressed support for such a court, but with jurisdiction limited to terrorism.[54] In the United

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50. *See* Statute of the International Court of Justice, art. 36. For a case which examines the Court's jurisdictional issues, *see* MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA 1986. I.C.J. 14. *See generally*, Maier, *Appraisals of the ICJ's Decision: Nicaragua v. United States*, 81 AM. J. INT'L L. 77 (1987).

51. *See supra* notes 37-39.

52. *See e.g.*, *supra* notes 32, 33 and 35, *infra* note 71 and the Appendix.

53. *See supra* notes 36-42 and accompanying text and *infra* notes 54-56, 65 and accompanying text.

54. Pravda Sept. 16, 1987.

States, Senator Arlen Specter has been, since 1986, a constant advocate of such a court,[55] as have Congressmen Leach and Kastenmeier in the House.[56] In fact, the United States Congress has urged the establishment of an international criminal court, but only with regard to international terrorism and international trafficking in drugs. In 1986, as part of the Omnibus Diplomatic Security and Antiterrorism Act of 1986,[57] Congress called upon the President to "consider including on the agenda for these negotiations [regarding an international convention to prevent and control all aspects of international terrorism,] the possibility of eventually establishing an international tribunal for prosecuting terrorists."[58] Also, in 1988, Congress passed the Anti-Drug Abuse Act of 1988,[59] which also asserts the need for some sort of international tribunal to handle cases of drug trafficking. It provides that:

> It is the sense of the Senate that the President should begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes.[60]

Even more recently, Congress, at the behest of Senator Specter, amended the "Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991,"[61] and provided:

(a) The Congress finds that—

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55. *Supra* note 37; *see also* Appendix II.

56. H.R. Con. Res. 66, 100th Cong., 2d Sess. (1989). In recognition of the efforts of Congressmen Leach and Kastenmeier, Senator Specter stated in the *Congressional Record*, October 25, 1990, *supra* note 37:

> First and foremost, I wish to recognize the great contribution made by Congressman Jim Leach, Congressman Bob Kastenmeier and their staffs on behalf of this legislation regarding the creation of an international criminal court. Their efforts in the House of Representatives have served as inspiration for this Senator to continue ahead in the unchartered waters surrounding this issue. Their House Concurrent Resolution 66, which they introduced on March 2, 1989, served as a source of reassurance to my past resolutions and in my crafting of amendment No. 3068.

57. PUB. L. No. 99-399 (1986).

58. *Id.*, Title XII - Criminal Punishment of International Terrorism; § 1201 (Encouragement for Negotiation of a Convention) (d).

59. PUB. L. No. 100-690 (1988).

60. *Id.*, Title IV International Narcotics Control, § 4108 (International Criminal Court) (a).

61. PUB. L. No. 101-513 (1990).

(1) the international community has defined as criminal conduct in various international conventions, certain acts such as war crimes, crimes against humanity, torture, piracy and crimes on board commercial vessels, aircraft hijacking and sabotage of aircraft, crimes against diplomats and other internationally protected persons, hostage-taking, and illicit drug cultivation and trafficking;

(2) in spite of these international conventions, the effective prosecution of those who commit criminal acts has been seriously obstructed in certain cases because of problems of extradition and differences between the legal and judicial systems of individual nations;

(3) the jurisdiction of the International Court of Justice extends only to cases involving governments, and not to individual criminal cases;

(4) the concept of an international criminal court has been under consideration in the United Nations and other international fora for many years, including proposals and reviews undertaken in 1990 by the United Nations General Assembly, the International Law Commission, and the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;

(5) the international military tribunals established in Nuremburg, Germany, and Tokyo, Japan, following World War II also establish a precedent for international criminal tribunals; and

(6) there is growing movement among nations of the world to formulate their economic, political and legal systems on a multilateral basis.

(b) It is the sense of Congress that—

(1) the United States should explore the need for the establishment of an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions; and

(2) the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of

due process, the rights of the accused to a fair trial and the sovereignty of individual nations.

(c) The President shall report to the Congress by October 1, 1991, the results of his efforts in regard to the establishment of an International Criminal Court to deal with criminal acts defined in international conventions.

(d) The Judicial Conference of the United States shall report to the Congress by October 1, 1991, on the feasibility of, and the relationship to, the Federal judiciary of an International Criminal Court.[62]

As for the Bush Administration, it has stressed international cooperation against terrorism and trafficking in drugs, but it seems, at this point, reluctant to support an international court to prosecute such offenders.[63] (For a chronology of U.S. developments regarding an international criminal court *see* Appendix II.)

As for other countries, France and the United Kingdom have an ambiguous position. At the 1990 Eighth United Nations Congress on Crime Prevention and Treatment of Offenders, their representatives joined efforts to lobby other Western European countries against a resolution calling for the establishment of an international criminal court, though both countries had previously voted favorably on two resolutions in the General Assembly in 1989-90 supporting such an idea.[64] On the positive side, sixteen Caribbean and Latin American countries have been supporting the idea since 1989. Trinidad and Tobago has been in the forefront of this question, led by Prime Minister A.N.R. Robinson, and since 1990, Columbia's President C. Oaviria Trujillo has also strongly supported the idea.[65] In response to such

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62. *Id.*, § 599 E (International Criminal Court).

63. On terrorism and drugs, *see e.g.*, Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, 4 EMORY INT'L L. REV. 9 (1990); Bassiouni, *Critical Reflections of International and National Control of Drugs*, 18 DEN. J. INT'L L. & POL. 311 (1990).

64. *See supra* note 36. At the Eighth United Nations Congress, *see supra* notes 38-40 and accompanying text; a number of countries made statements supporting the idea of an international criminal court. They are: Brazil, Colombia, Czechoslovakia, Israel, Poland, Romania, Trinidad and Tobago, U.S.S.R. and Yugoslavia.

65. Agenda Item 152, referred to *supra* note 36, was introduced at the request of Trinidad and Tobago, *see* G.A. Res. A/44/195 (1989) and in the Annex, an explanatory memorandum by Ambassador Margorie Thorpe stated, in part, as follows:

The desirability and feasibility of an international criminal court to deal

strong interest, the Organization of American States has begun studying the possibility of a Regional Criminal Court for the Americas.[66] The Caribbean and Latin American countries show particular eagerness for such a Court and they are understandably dismayed to see the disinterest and opposition of other countries (particularly the U.S.) that are quick to accuse them of not doing enough to control international trafficking in drugs and terrorism.

Current international interests, however, seem to focus only on drugs and terrorism. What is needed instead is an international criminal

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with international criminal offences was the subject of much discussion even before the establishment of the Nuremberg International Military Tribunal on 8 August 1946. It was envisaged then that the jurisdiction of an international criminal court would cover individuals charged with violations of certain rules of international law such as genocide. Such a proposal was formalized in 1951 and revised in 1954 by the Committee on International Criminal Jurisdiction, established pursuant to General Assembly resolutions 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952 . . . .

The establishment of an international criminal court with jurisdiction to prosecute and punish individuals and entities who engage in, *inter alia*, the illicit trafficking in narcotic drugs across national borders would serve to bolster the legal process whereby such offenders are prosecuted and punished and would also contribute substantially to the progressive development and codification of international law.

With regard to Columbia, as Senator Specter notes in the *Congressional Record*:

Colombia is a vivid case in point. Extraditions to the United States have had some positive effect on traffickers. But, these same extraditions represent a serious political problem for the leadership of Colombia. Thus, in his August 7, 1990, Inauguration address, President Cesar Oaviria Trujillo vowed to "explore the possibility of creating an international or regional criminal jurisdiction to fight narco-trafficking and other related crimes that surpass international borders."

136 CONG. REC. S18160 (daily ed. October 25, 1990).

66. The Inter-American Juridical Committee of the OAS at its 1990 session, held in Rio de Janeiro, Brazil (*see* document OEA/Ser. G, CP/doc.2113/90, Nov. 7, 1990, page 53). The motion to examine this topic was presented by the Argentine member of the Committee, Dr. Jorge R. Vanossi, who was subsequently appointed rapporteur together with Professor M. Vieira from Uruguay. In his introductory statement, Dr. Vanossi made reference to the work undertaken by the International Institute of Higher Studies in Criminal Sciences, and to the preparatory work submitted by Dr. Bassiouni (*see* 1990 Session of the Inter-American Juridical Committee, August 18 meeting, Minute No. 12). These documents will be an important source for the Committee, which is expected to begin examination of the topic at the 1991 July-August session. This information was provided by Ambassador Hugo Caminos, Assistant Secretary General for Legal Affairs, who is following this question at the OAS.

court with universal jurisdiction to prosecute all or most of the 22 categories of international crimes covered by conventional and customary international law, including, but not limited to:[67] aggression (crimes against peace); war crimes; crimes against humanity; genocide; *apartheid*; slavery and slave-related practices; torture; unlawful human experimentation; piracy; hijacking and sabotaging of aircraft; kidnapping of diplomats and other internationally protected persons; taking of hostages; and, criminal damage to the environment. The International Law Commission has taken such a position in its 1990 Report to the General Assembly, though the list of international crimes it has developed is different from the one proposed above by this writer.[68]

The ILC's 1990 position on such a Court is stated as follows:

> 1. *Competence of the Court*
>
> (a) *Jurisdiction limited to the crimes mentioned in the Code or jurisdiction as to all international crimes?*
>
> (i) *Versions submitted*
>
> 5. On this topic, the Special Rapporteur submits the following versions:
>
> *Version A*: There is established an International Criminal Court to try natural persons accused of crimes referred to in the draft Code of crimes against the peace and security of mankind.
> *Version B*: There is established an International Criminal Court to try natural persons accused of crimes referred to in the draft Code of crimes against the peace and security of mankind, or other offences defined as crimes by the other international instruments in force.

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67. *See* M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985 (1986). *See also* statement of Senator Specter, *supra* note 37:

> Modern international criminal law can be said to have commenced in 1815 at the Congress of Vienna with efforts to abolish slavery. Since then 317 international instruments on substantive international criminal law have been agreed to covering international crimes such as aggression, war crimes, crimes against humanity, apartheid, torture, piracy on board commercial vessels, aircraft hijacking, kidnapping of diplomats and other internationally protected persons, taking of civilian hostages and environmental damages to name a few.

68. *See* the International Law Commission's latest report (from its Forty-First Session) to the General Assembly, U.N. Doc. A/CN.4/L.443 (1990).

(ii) *Commentary*

6. The question is whether international criminal jurisdiction will be limited to the crimes referred to in the draft Code of crimes against the peace and security of mankind, or whether it will also encompass other international crimes which do not fall within that category. As is well known, the Code does not cover all international crimes. Among those not mentioned therein are the dissemination of false or distorted news, or false documents, by persons knowing that they will have an adverse effect on international relations; insults to a foreign State; the counterfeiting of currency, practiced by one State to the detriment of another State, and the theft of national or archaeological treasures; the destruction of submarine cables; international trafficking in obscene publications, etc.

7. Accordingly, the concept of an international crime is broader than that of a crime against the peace and security of mankind; it covers a wider field which includes all other international crimes in addition to those defined in the draft Code.

8. The question, therefore, is whether the jurisdiction of the Court is limited to crimes against the peace and security of mankind, or whether the Court will deal with all international crimes.

9. It would seem preferable to confer the broadest possible jurisdiction upon the Court; otherwise, it would be necessary to establish two international criminal jurisdictions, which would lead to complications.

(b) *Necessity or non-necessity of the agreement of other States*

(i) *Versions submitted*

Version A: No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals.

Version B: Any State may bring before the Court a complaint against a person if the crime of which he is accused was committed in that State, or if it was directed against that State, or if the victims are nationals of that State. If one of

the said States disagrees as to the jurisdiction of the Court, the Court shall resolve the issue.

(ii) *Commentary*

11. Version A is based on article 27 of the draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.[69] Is it appropriate? From the legal point of view, nothing prohibits a State from punishing crimes against its own security, even if such crimes are committed abroad by foreigners. Moreover, in the vast majority of cases, this solution would lead to requesting the consent of Governments guilty of having organized or tolerated criminal acts.[70]

Such a court is not only possible, it is quite feasible. All of the foreseeable problems and difficulties have been thoughtfully dealt with by a number of experts who have prepared detailed studies and examined alternative solutions to the various legal and practical questions.[71]

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69. *See* Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex, article 27.

70. International Law Commission, Forty Second Session, U.N. Doc. A/CN.4/430/Add.1 (1990) *Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind.*

71. *See e.g.*, B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT (1980), which provides a documentary examination of the historical evolution of international crimes and the establishment of an international criminal court. Some scholars see the problem both in terms of the political will of the most powerful governments and of the lack of scholarly consensus on the broader issue of the scope and content of international criminal law. *See e.g.*, Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction*, 17 CASE W. RES. J. INT'L L. 79 (1985) (wherein the author re-examines Georg Schwarzenberger's query about the existence of international criminal law); Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983); Green, *Is There an International Criminal Law*, 21 ALBERTA L. REV. 251 (1983); Green, *New Trends in International Criminal Law*, 11 ISR. Y.B. HUM. RTS. 9 (1981); Green, *An International Criminal Code — Now?* 3 DALHOUSIE L.J. 560 (1976); Dinstein, *International Criminal Law*, 5 ISR. Y.B. HUM. RTS. 55 (1975); Wright, *The Scope of International Criminal Law*, 15 VA. J. INT'L L. 562 (1975). *See generally* Derby, *A Framework for International Criminal Law*, in 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES 33 (1986); Schwarzenberger, *The Problem of International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263 (1950); Report of the International Law Commission on Questions of International Criminal Jurisdiction, U.N. Doc. A/CN.4/15 (1950). *See also* Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments*, 9 HOFSTRA L. REV. 523 (1981); Kos-Rabcewicz-Zubkowski, *La Creation d'une Cour Pènal Internationale et l'Administration Internationale de la Justice*, 1977 CAN. Y.B. INT'L L. 253;

Alternative Models

The formulae presented in the scholarly literature and proposals advanced by different organizations range from the position of the Association Internationale de Droit Pénal, which since 1926, has urged the establishment, by way of a treaty-statute (much like the Nuremberg Charter and Tokyo Statute), of a universal, as opposed to a regional, international criminal court having jurisdiction over all international crimes, to that of the International Law Association, which has advocated an International Commission of Inquiry (*See* Appendix I). Alternative approaches are based on an expanded concept of jurisdiction discussed, since the 1970's, within the Council of Europe under the rubrique "*L'Espace Judiciaire Européen*", which is still under consideration, and which has inspired the Commission of the Andean Parliament

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Kos-Rabcewicz-Zubkowski, *The Creation of an International Criminal Court*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 519 (M.C. Bassiouni ed. 1975); Grebing, *La Creation d'une Cour Pénal Internationale: Bilan et Perspectives*, 45 REV. INT'LE DE DROIT PÈNAL 435 (1974); Miller, *Far Beyond Nuremberg: Steps Toward an International Criminal Jurisdiction*, 61 KY. L.J. 925 (1973); Dautricourt, *The Concept of International Criminal Court Jurisdiction — Definition and Limitations of the Subject*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 636 (M.C. Bassiouni & V.P. Nanda eds. 1973); J. STONE & R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970); Klein & Wilkes, *United Nations Draft Statute for an International Criminal Court: An American Evaluation*, in INTERNATIONAL CRIMINAL LAW 573 (G.O.W. Mueller & E. Wise eds. (1965)); Ambion, *Organization of a Court of International Criminal Jurisdiction*, 29 PHIL L. J. 345 (1954); P. CARJEU, PROJET D'UNE JURIDICTION PENALE INTERNATIONALE (1953); Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); Finch, *Draft Statute for an International Court*, 46 AM. J. INT'L L. 89 (1952); Yeun-Li, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT'L L. 73 (1952); A. SOTTILE, THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT (1951); Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Pella, *Plan d'un Code Repressif Mondial*, 6 REV. INT'LE DE DROIT PÉNAL 148 (1935). *See* Symposium issue 45 REV. INT'LE DE DROIT PÉNAL, Nos. 3-4 (1974) (containing contributions for the Fifth U.N. Congress on Crime Prevention and the Treatment of Offenders, Geneva, 1-12 Sept. 1975; Symposium issue 20 REV. INT'LE DE DROIT PÉNAL, No. 1 (1949) (regarding the various U.N. drafts); Symposium issue (with articles by Donnedieu de Vabres and Francis Biddle) 19 REV. INT'LE DE DROIT PÉNAL, No. 1 (1948); Symposium issue 17 REV. INT'LE DE DROIT PÉNAL, Nos. 3-4 (1936). *See Draft Statute for an International Commission of Criminal Inquiry and a Draft Statute for an International Criminal Court*, International Law Association, 60th Conference, Montreal, Aug. 29 - Sept. 4, 1982, in *Report of the 60th Conference of the International Law Association* (1983); *Draft Statute for an International Criminal Court*, Work Paper, Abidjan World Conference on World Peace Through Law, Aug. 26-31 (1973); *Draft Statute for an International Criminal Court*, Foundation for the Establishment of an International Criminal Court (Wingspread Conference, Sept. 1971).

to consider the "*Espacio Judiciario Andino.*"[72] These approaches substitute expanded regional criminal jurisdiction for the idea of regional or international adjudicating bodies. Thus, national criminal courts and national structures of administration of criminal justice would remain competent but they would be able to act even when the crime was not committed within their territory. In fact, these schemes are not really designed to expand the adjudication system, but they are a subterfuge for allowing law enforcement agencies, now limited by territorial jurisdiction, to operate outside it. These approaches, while strengthening law enforcement, do not accomplish the many goals of international or regional adjudication, and consequently, should not be regarded as valid alternatives. In addition, these schemes are fraught with dangers to procedural safeguards on the extra-territorial activities of law enforcement.

The establishment of an international criminal court, whether universal or regional, can be based on exclusive jurisdiction for certain crimes or on concurrent or alternative jurisdiction with that of the state having criminal jurisdiction. The jurisdictional mechanisms are, of course, to be established by the treaty-statute.

The establishment of an international criminal court could admittedly be based on various models including, but not limited to:

> i. Expanding the jurisdiction of the International Court of Justice to include questions of interpretation and application of conventional and customary international criminal law, and providing for compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice for disputes between states arising out of these questions;
>
> ii. Establishing an international commission of inquiry, either as an independent organism, as part of the international criminal court or as an organ of the United Nations. Such a commission would investigate and report on violations of international criminal law, taking into account the proposal of the International Law Association and existing United Nations experiences with fact-finding and inquiry bodies which have

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72. *See generally*, Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUROPEAN J. INT'L L. 67, 81-85 (1990); *see also* Mosconi, *L'Accordo di Dublino del 4/12/79, Le Comunita Europee e La Repressione del Terrorisimo*, in LA LEGISLAZIONE PENALE 543 (1986); Van Den Wyngaert, *L'Espace Judiciarie Européen Face á L'Euroterrorisme et la Sauvegarde des Droits Fondamentaux*, 3 REV. INT'LE DE CRIMINOLOGUIE ET DE POLICE TECHNIQUE 289 (1980).

developed over the years;

iii. Establishing an international (universal) criminal jurisdiction along the lines of the 1953 United Nations Draft Statute for Establishment of an International Criminal Court[73] or the 1980 Draft Statute for the Establishment of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of *Apartheid* Convention;[74]

iv. Establishing Regional International Criminal Courts.

The Proposed Model

This model could be used for a (Universal) International Criminal Court, as well as for a Regional International Criminal Court, the latter being only limited in geography to State-Parties from the region. The highlights of this proposal are as follows:

1. Establishment of the Tribunal

   a. The Tribunal would be established pursuant to a multilateral convention (hereinafter referred to as the "Convention") open to all States.

   b. The States-Parties to the Convention would agree on the establishment of the Tribunal whose location will be determined by the Convention.

   c. The Tribunal would have an independent international legal personality and would sign a host-country agreement with the host-state. The Tribunal will thus have extra-territoriality for its location and immunity for its personnel.

   d. The Tribunal's costs and facilities, including detentional facilities would be paid on a pro-rata basis by the State-Parties to the convention.

   e. The Tribunal as an international organization would be granted jurisdiction by the State-Parties to prosecute certain specified

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73. *See supra* note 33.
74. *See supra* note 35.

offences embodied in the Annex to the Convention and would have the authority to detain those accused, and those convicted of the charges.

2. Jurisdiction of the Tribunal and Applicable Law

   a. The jurisdiction of the Tribunal would be over persons for those offences defined in the Annex to the Convention, as amended, from time to time. [This would permit expanding the list of crimes depending upon need, and also to allow State-Parties to acquire confidence in the Tribunal.]

   b. The Court could have exclusive jurisdiction for some crimes and derivative jurisdiction over others by virtue of a transfer of the proceeding[75] from a State-Party to the Convention, provided the State-Party has jurisdiction on the basis of territoriality, active or passive personality. [This would avoid the sovereignty problems that some claim would exist if the Tribunal would have exclusive or original jurisdiction. It would also serve to circumvent problems of mandatory national prosecution if the laws of the state where the crime occurred so require. Transfer of proceedings may also be done in a way that would be similar in legal nature to a change of venue. This approach coupled with the possibility of transfer of the offender back to the state where the crime occurred would also avoid many domestic legal difficulties.] Nothing, however, precludes the State-Parties from conferring exclusive jurisdiction for certain crimes to the Tribunal. Thus, each State-Party that has original jurisdiction based on territoriality, active or passive personality would not lose jurisdiction, but merely transfer the criminal proceedings to the Tribunal.

   c. To avoid problems of what substantive law to apply, the Tribunal would use the substantive law of the transferring state or of the state where the offence was committed and its own procedural rules which would be part of the Convention and promulgated prior to the Tribunal's entry into function.[76] [The

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75. *See e.g.*, European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, E.T.S. No. 73. *See also* M.C. BASSIOUNI & E. MÜLLER-RAPPARD, EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS (1987).

76. The procedural rules would be on the basis of general principles of international law and in accordance with internationally protected human rights, particularly the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI),

Tribunal's procedural rules would incorporate international human rights standards of due process and assure uniformity of procedural treatment of all persons. The application of the substantive law of the state where the offence was committed is fair, and would assuage any exacerbated feelings of sovereignty that such a state may have in allowing the Tribunal to prosecute those accused of committing crimes in their territory.]

3. Prosecution

   a. The Tribunal's Procurator-General would act as the Chief Prosecutor, but could be assisted by a prosecuting official of the transferring state whose law is to be applied. [This too would reinforce the change of venue approach and prevent the claim that State-Parties totally relinquished jurisdiction.]

   b. Prosecution would commence on the basis of a criminal complaint brought by a State-Party (thus supporting State-Parties' sovereignty). In addition, a State-Party that does not have subject matter or *in personam* jurisdiction, or that does not wish to bring a criminal complaint within its own jurisdiction, may petition the Procurator-General of the Tribunal to inquire into the potential direct prosecution by the Tribunal. [This relieves a State-Party from pressures in certain cases.] In such cases, the request by a State-Party would be confidential, and only after the Procurator-General of the Tribunal has deemed the evidence sufficient will the case for prosecution be presented to an Inquiry Chamber of the Tribunal *in camera* for its action. In such a situation, the Tribunal's Procuracy and the Inquiry Chamber would be acting as an international judicial board of inquiry.[77] Once the Inquiry Chamber has decided to allow

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16 Dec. 1966 and the Inter-American Convention on Human Rights, O.A.S. Official Records Ser. K/XVI/1.1 Doc. 65, Rev. 1, Cor. 1 (Jan. 7, 1970), 22 Nov. 1969; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 262, No. 5.

77. *See* "Draft Statute for an International Commission of Criminal Inquiry and a Draft Statute for an International Criminal Court," International Law Association, 60th Conference, Montreal, Aug. 29-Sept. 4, 1982, in *Report of the 60th Conference of the International Law Association* (1983). For efforts to initiate such a commission *see* U.N. Security Council Resolution 672 (1990) and Bassiouni, *Iraq's Human-Rights Toll*, CHRISTIAN SCIENCE MONITOR, Nov. 26, 1990 at 19, which provides in part:

> Recently, the Security Council resolved to establish an ad hoc commission to investigate Israel's killing of some 20 Palestinians at Jerusalem's Temple

prosecution, it would authorize the Procurator-General to issue an indictment and request the surrender of the accused from the State where the accused may be found. If that state is a State-Party, it would be bound to surrender the accused. Any other state may do so by the special treaty with the Tribunal or on the basis of comity.

c. The Convention would include provisions on surrendering the accused to the Tribunal and providing the Tribunal with legal assistance (including administrative and judicial assistance) for the procurement of evidence, both tangible and testimonial.[78]

d. By virtue of the Convention, an indictment by the Inquiry Chamber, will be recognized by all State-Parties in much the same way as other forms of recognition of foreign penal judgments. [National legislation could be amended whenever necessary to provide for such recognition.]

4. Conviction

a. Upon conviction, the individual may be returned to the surrendering state, which will carry out the sentence on the basis of provisions in the Convention, which would be in the nature of "transfer of prisoners" agreements.[79] Alternatively, the convicted person can be transferred to any other State-Party on

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Mount. Appropriate as that is, no one who views human rights as universal can fail to note that the same measure was not resolved for Iraqi violations — or, for that matter, for other more serious ones. Lest one forgets, 1.5 million people have been killed by the Khmer Rouge in Cambodia, with muted condemnation by powers quick to condemn Israel and now Iraq. We must not have different scales to weigh human-rights violations, scales dependent upon who the violator or the victim may be.

The tragic incidents in the Middle East can be an opportunity to enhance human-rights protections by serving as an impetus to the establishment of an impartial, permanent fact-finding commission. The time has come to do something more than express selective verbal condemnations.

78. *See e.g.*, The European Convention on Mutual Legal Assistance, Apr. 20, 1959, E.T.S. No. 30; *see* M.C. BASSIOUNI & E. MÜLLER-RAPPARD, *supra* note 75. *See generally* Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters* in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE 151 (1986).

79. *See e.g.*, The European Convention on Transfer of Sentenced Persons, Mar. 21, 1983, E.T.S. No. 112. *See* Epp, *The European Convention on Transfer of Prisoners*, in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: PROCEDURE 253 (1986), and Bassiouni, *Transfer of Prisoners Between the United States, Mexico, and Canada. Id.*, at 239. *See* M.C. BASSIOUNI & E. MÜLLER-RAPPARD, *supra* note 75.

the same legal basis, or the Tribunal may place the convicted person in its own detentional facilities, which would be established by the Convention in accordance with a host-state agreement between the Tribunal and the state wherein the detentional facility would be established. [This provides a first option to the State-Party where the crime was committed, to execute the sentence, as well as a second option of allowing the transfer to another State-Party in order to avoid the pressures and problems that the detention of certain offenders can engender or to have the Tribunal execute the sentence. A number of States are already bound by treaties on transfer of prisoners and the practice is well under way among more than thirty countries.]

b. A conviction by the Tribunal would be recognized by all State-Parties on the basis of a provision in the Convention establishing recognition for such judgments similar to existing agreements on the same subject.

Other states may recognize such a judgment by special arrangement with the Tribunal or on the basis of their domestic laws which could be made to include recognition of the Tribunal's penal judgments. [This would expand the network of cooperating states to include those states which may not become State-Parties but who would be willing to cooperate with the Tribunal in some respect.]

5. Composition of the Court

a. The Tribunal would consist of as many judges as there are State-Parties to the Convention, but not less than thirteen. There would be at least four Chambers of three judges each and a Presiding Judge. The judges would be drawn by lot and sit in rotation on the various chambers.

b. One of the chambers would act as the Inquiry Chamber while the other chambers would be adjudicating chambers.

6. Appeal

To provide for the right of appeal, the Tribunal sitting *en banc* with a panel of nine judges would hear appeals excluding those judges who decided the merits of the case.

7. Selection of Judges

Each State-Party would appoint a judge from the ranks of its judiciary or from distinguished members of the bar or from

academia. The judges would be persons of high competence, knowledgeable in international criminal law, and of high moral character. Appointment of judges and their tenure would be established by the Convention.

8. Rules of the Tribunal

The Tribunal would be authorized to enact rules of practice and procedures before it.

9. Standing Committee of State-Parties

The State-Parties would hold an annual conference to review the Tribunal's work and the Convention for purposes of amending it whenever needed and to ensue full compliance by the State-Parties.

10. The Organs of the Tribunal

These organs shall consist of:

The Court

1. The Court shall consist of twelve judges, no more than two of whom shall be of the same nationality, who shall be elected by the Standing Committee of States-Parties from nominations submitted thereto.

2. Nominees for positions as judges shall be of distinguished experts in the fields of international criminal law or human rights and other jurists qualified to serve on the highest courts of their respective states who may be of any nationality or have no nationality.

3. Judges shall be elected by secret ballot and the Standing Committee of States-Parties shall strive to elect persons representing diverse backgrounds and experience with due regard to representation of the major legal and cultural systems of the world.

4. Elections shall be coordinated by the Secretariat under the supervision of the presiding officer of the Standing Committee of States-Parties and shall be held whenever one or more vacancies exist on the Court.

5. Judges shall be elected for the following terms: four judges for four-year terms, four judges for six-year terms, and four judges for eight-year terms. Judges may be re-elected for any term at any time available.

6. No judge shall perform any public function in any state.

7. Judges shall have no other occupation or business than that of judge of this Court. However, judges may engage in scholarly activity for remuneration provided such activity in no way interferes with their impartiality and appearance of impartiality.

8. A judge shall perform no function in the Tribunal with respect to any matter in which he may have had any involvement prior to his election to this Court.

9. A judge may withdraw from any matter at his discretion, or be excused by a two-thirds majority of the judges of the Court for reasons of conflict of interest.

10. Any judge who is unable or unwilling to continue to perform functions under this statute may resign. A judge may be removed for incapacity to fulfill his functions by a unanimous vote of the other judges of the Court.

11. Except with respect to judges who have been removed, judges may continue in office beyond their term until their replacements are prepared to assume the office and shall continue in office to complete work on any pending matter in which they were involved even beyond their term.

12. The judges of the Court shall elect a president, vice-president and such other officers as they deem appropriate. The president shall serve for a term of two years.

13. Judges of the Court shall perform their judicial functions in three capacities:
    a. Sitting with other judges as the Court *en banc*;
    b. Sitting in panels of three on a rotational basis in chambers; and
    c. Sitting individually as supervisors of sanctions.

14. The salary of judges shall be equal to that of the judges of the International Court of Justice.

15. The Court *en banc* shall, subject to the provisions of this Statute, adopt rules governing procedures before its chambers and the Court *en banc*, and provide for establishment and rotation of chambers.

16. The Court *en banc* shall announce its decisions orally in

full or in summary, accompanied by written findings of fact and conclusions of law at the time of the oral decision or within thirty days thereafter, and any judge so desiring may issue a concurring or dissenting opinion.

17. Decisions and orders of the Court *en banc* are effective upon certification of the written opinion by the Secretariat, which is to communicate such certified opinion to parties forthwith.

18. The Court *en banc* may, within thirty days of the certification of the judgment, enter its decisions without notice.

19. No actions taken by the Tribunal may be contested in any other forum than before the Court *en banc*, and in the event that any effort to do so is made, the Procurator shall be competent to appear on behalf of the Tribunal and in the name of all States-Parties of this Statute to oppose such action.

20. States-Parties agree to enforce the final judgments of the Court in accordance with the provisions of this Statute.

The Procuracy

1. The Procuracy shall have the Procurator as its chief officer and shall consist of an administrative division, an investigative division and a prosecutorial division, each headed by a deputy Procurator, and employing appropriate staff.

2. The Procurator shall be elected by the Standing Committee of States-Parties from a list of at least three nominations submitted by members of the Standing Committee, and shall serve for a renewable term of six years, barring resignation or removal by two-thirds vote of the judges of the Court *en banc* for incompetence, conflict of interest, or manifest disregard of the provisions of this Statute or material rules of the Tribunal.

3. The Procurator's salary shall be the same as that of the judges.

4. The deputy procurators and all other members of the Procurator's staff shall be named and removed by the Procurator at will.

The Secretariat

1. The Secretariat shall have as its chief officer the Secretary,

who shall be elected by a majority of the Court sitting *en banc* and serve for a renewable term of six years barring resignation or removal by a majority of the Court sitting *en banc* for incompetence, conflict of interest or manifest disregard of the provisions of this Statute or material rules of the Tribunal.

2. The Secretary's salary shall be equivalent to that of the judges.

3. The Secretariat shall employ such staff as appropriate to perform its chancery and administrative functions and such other functions as may be assigned to it by the Court that are consistent with the provisions of this Statute and the rules of the Tribunal.

4. In particular, the Secretary shall twice each year:

a. Prepare budget requests for each of the organs of the Tribunal; and

b. Make and publish an annual report on the activities of each organ of the Tribunal.

5. The Secretariat staff shall be appointed and removed by the Secretary at will.

6. An annual summary of investigations undertaken by the Procuracy shall be presented to the Secretariat for publication, but certain investigations may be omitted where secrecy is necessary, provided that a confidential report of the investigation is made to the Court and to the Standing Committee and filed separately with the Secretariat. Either the Court or the Standing Committee may order by majority vote that the report be made public.

The Standing Committee

1. The Standing Committee shall consist of one representative appointed by each State-Party.

2. The Standing Committee shall elect by majority vote a presiding officer and alternate presiding officer and such other officers as it deems appropriate.

3. The presiding officer shall convene meetings at least twice each year of at least one week duration, each at the seat of the Tribunal, and call other meetings at the request of a majority vote of the committee.

4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with the Convention, but in no way shall those functions impair the independence and integrity of the Court as a judicial body.

5. In particular, the Standing Committee may:

a. Offer to mediate disputes between States-Parties relating to the functions of the Tribunal; and

b. Encourage states to accede to the Convention.

6. The Standing Committee shall propose to States-Parties international instruments to enhance the functions of the Tribunal.

7. The Standing Committee may exclude from participation representatives of States-Parties that have failed to provide financial support for the Tribunal as required by this Statute or States-Parties that failed to carry out their obligations under this Statute.

8. Upon request by the Procuracy, or by a party to a case presented for adjudication to a chamber of the Court, the Standing Committee may be seized with a mediation and conciliation petition. In that case, the Standing Committee shall within 60 days decide on granting or denying the petition, from which decision there is no appeal. In the event that the Standing Committee grants the petition, Court proceedings shall be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the parties and with the consent of the Court.[80]

Conclusion

We no longer live in a world where narrow conceptions of jurisdiction and sovereignty can stand in the way of an effective system of

80. M.C. Bassiouni, *supra* note 37, at 236-44, and *Draft Statute: International Criminal Tribunal, supra* note 38.

international cooperation for the prevention and control of international and transnational criminality. If the United States and the Soviet Union can accept mutual verification of nuclear arms controls, then surely they and other countries can accept a tribunal to prosecute not only drug traffickers and terrorists, but also those whose actions constitute such international crimes as aggression, war crimes, crimes against humanity and torture.

Many of the international crimes for which the Court would have jurisdiction are the logical extension of international protection of human rights.[81] Without enforcement, these rights are violated with impunity. We owe it to the victims of these crimes and to our own human and intellectual integrity to reassert the values we believe in by at least attempting to prosecute such offenders. When such a process is institutionalized, it can operate impartially and fairly. We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these *ad hoc* structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.

An international criminal court will surely be established one day. In the meantime, however, we will have to remain with the bitter realization that, if it had existed earlier, it could have deterred certain people and thus prevented some victimization. The conscience of world leaders should be bothered by this prospect, especially when they oppose the idea on the basis that it might infringe on jealously guarded notions of sovereignty.

Justice Robert Jackson as Chief Prosecutor at the Nuremberg International Military Tribunal stated in his opening speech: "This principle of personal liability is a necessary as well as a logical one if International Law is to render real help to the maintenance of peace . . . . Only sanctions which reach individuals can peacefully and effectively be enforced . . . . [T]he idea that a State . . . commits crimes, is a fiction. Crimes always are committed only by persons."[82] It is

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81. *See* Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORDER 193 (1982), *reprinted in* 1 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: CRIMES, 15 (1986).

82. 1 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, 82-83 (1946).

unconscionable at this stage of the world's history, and after so much human harm has already occurred, that abstract notions of sovereignty can still shield violators of international criminal law or that the limited views and lack of vision and faith by government officials can prevent the establishment of such an important and needed international institution. The time has come for us to think and act in conformity with the values, ideals and goals we profess.

Appendix I

I. *Establishment of an International Criminal Court*

A. OFFICIAL TEXTS

1. Convention for the Pacific Settlement of International Disputes (First Hague, I), signed at The Hague, 19 July 1899, 26 MARTENS NOUVEAU RECUEIL DES TRAITES (2d) 720, 32 Stat. 1779, T.S. No. 342 (entered into force 4 Sept. 1900).

2. Convention Relative to the Establishment of an International Prize Court (Second Hague, XII), signed at The Hague, 18 Oct. 1907, 3 MARTENS NOUVEAU RECUEIL DES TRAITES (3d) 688 (never entered into force).

3. Treaty of Peace with Germany (Treaty of Versailles), signed at Versailles, 28 June 1919, 11 MARTENS NOUVEAU RECUEIL DES TRAITES (3d) 323 (entered into force 10 Jan. 1920).

4. Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 Nov. 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547 (I).M.384(I).1937, (1938) (never entered into force).

5. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), signed at London, 8 Aug. 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (entered into force, 8 Aug. 1945), ANNEX, Charter of the International Military Tribunal (Nuremberg).

6. International Military Tribunal For the Far East Proclaimed at Tokyo, 19 Jan. 1946 and amended 26 Apr. 1946, T.I.A.S. No. 1589 (entered into force 19 Jan. 1946), ANNEX Charter of the International Military Tribunal for the Far East (Tokyo).

7. Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), adopted at Berlin, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946.

8. Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 Aug. 1951), 7 GAOR Supp. 11, U.N. Doc. A/2136 (1952) at 23.

9. Revised Draft Statute for an International Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 20

Aug. 1953), 9 GAOR Supp. 12, U.N. Doc. A/2645 (1954), at 21.

10. Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid, 19 Jan. 1980, U.N. Doc. E/CN.4/1416.

B. UNOFFICIAL TEXTS

1. Report on the Creation of an International Criminal Jurisdiction, by V.V. Pella to the Interparliamentary Union, XXII Conference, held in Berne and Geneva, 1924, in *L'Union Interparliamentaire. Compte Rendu de la XXII Conference tenue a Berne et a Geneva en 1924, publie par le Bureau Interparliamentaire*, 1925, *see also L'Union Interparliamentaire. Compte rendu de la XXIII Conference tenue a Washington et a Ottowa en 1925* (1925).

2. Projet D'Une Cour Criminelle Internationale, adopted by the International Law Association at its 34th Conference in Vienna, Aug., 1926, *The International Law Association, Report of the 34th Conference, Vienna, Aug. 5-11, 1926* (1927).

3. Project of the International Association of Penal Law, in *Actes du Premier Congres International de Droit Pénal, Bruxelles, 26-29 June 1926* (1927) and Projet de Statut pour la Creation d'une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationale, presented by the International Association of Penal Law to the League of Nations in 1927, 5 REVUE INTERNATIONAL DE DROIT PÉNAL (1928).

4. Constitution et Procedure D'un Tribunal Approprie pur juger de la Responsabilite des Auteurs des Crime de Guerre, presente a la Conference des Preliminaires de Paix par la Commission des Responsabilites des Auteurs de la Guerre et Sanctions, III, *La Paix de Versailles* (1930).

5. Project for the Establishment of a Convention for the Creation of a United National Tribunal for War Crimes, established by the United Nations War Crimes Commission, 1944, *see* UNITED NATIONS WAR CRIMES COMMISSION (Wright ed. 1948).

6. *L'Union Interparliamentaire. Compte rendu de la XXVII Conference tenue a Rome en 1948* (1949).

7. Draft Statute for an International Criminal Court, in J. STONE AND R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970).

8. Draft Statute for an International Criminal Court, *Foundation for the Establishment of an International Criminal Court* (Wingspread Conference, September 1971).

9. Draft Statute for an International Criminal Court, *Work Paper, Abidjan World Conference on World Peace Through Law, Aug. 26-31*, (1973).

10. Draft Statute for an International Commission of Criminal Inquiry and a Draft Statute for an International Criminal Court, International Law Association, 60th Conference, Montreal, Aug. 29-Sept. 4, 1982, in *Report of the 60th Conference of the International Law Association* (1983).

II. *Instruments on the Codification of Substantive International Criminal Law*

A. OFFICIAL TEXTS

1. 1954 Draft Code of Offences Against the Peace and Security of Mankind. 9 U.N. GAOR Supp. No. 9, U.N. DOC. A/2693.

2. *Draft* International Criminal Code, Presented by the AIDP to the 6th U.N. Congress on Crime Prevention and the Treatment of Offenders (Caracas, 1980). U.N. Doc. E/CN.4/NGO 213. Updated in M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

Appendix II

CHRONOLOGY OF CONTEMPORARY U.S. POSITIONS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT*

13 Feb. 1978: Resolution adopted by the House of Delegates of the American Bar Association. It urges the US State Department to open negotiations for a convention for the establishment of an International Criminal Court, with jurisdiction expressly limited to a) hijacking, b) violence aboard aircraft, c) crimes against diplomats and internationally protected persons, and d) murder and kidnapping.

13 Mar. 1986: Statement of Secretary of State George Schultz before the Foreign Operations Subcommittee of the Senate Committee on Appropriations. The agenda is "Foreign Assistance and Related Programs Appropriations for Fiscal Year 1987." Schultz responds to Senator Specter during his testimony that "we need to be working on the web of law that can operate here, and in conjunction with others around the world to say to terrorists that they have no place to hide and they are going to get prosecuted."

25 June 1986: Senator Specter presents Amendment 2187 on the Senate floor and comments on his proposal. The amendment states in part that "rampant terrorism by its very nature threatens world order and thereby all civilized nations and their citizens; any and every nation has the right, under current principles of international law, to assert jurisdiction over offenses considered to be 'universal crimes', such as piracy and slavery, in order to protect sovereign authority, universal values, and the interests of mankind." Specter, in the amendment, also suggests that the President establish an international criminal court that would have jurisdiction over the crime of international terrorism. He acknowledges that because of issues of sovereignty, various nations might be reluctant to act together on such an initiative. He argues nevertheless that "if these crimes were prosecuted in a world tribunal, there could be no question that such prosecutions . . . would have much greater force and much greater weight than those prosecutions in an individual state." The amendment was agreed to.

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* This chronology was prepared by Charles Bataglia, Assistant to United States Senator Arlen Specter. It was slightly edited by the author.

27 Aug. 1986: Public Law 99-399, the Omnibus Security and Terrorism Act mandates the President to consider "the possibility of eventually establishing an international tribunal for prosecuting terrorists." This Act also includes an amendment (Chapter 113A) to Part I of title 18, United States Code which defines and stipulates penalties for terrorist acts abroad committed against US nationals.

16 June 1988: Testimony of Secretary of State George Schultz before the Foreign Operations Subcommittee of the Senate Committee on Appropriations. The agenda is "Foreign Assistance and Related Programs Appropriations for fiscal Year 1989." Senator Specter asks Secretary Schultz whether it would be "useful" to "push ahead with an international tribunal for the trial of these kinds of international criminals [terrorists]." Secretary Schultz replies that "it may be an important possibility," and notes that "over a period of years now more and more usefulness of the rule of law in getting at terrorism and drug trafficking."

1988: Senator Specter includes a provision in the Omnibus Anti-Drug Abuse Act calling on the President to pursue negotiations to establish an international criminal court with jurisdiction over international drug trafficking.

2 Mar. 1989: House Concurrent Resolution 66, submitted by Congressman Jim Leach of Iowa. The resolution calls for "the creation of an International Criminal Court with jurisdiction over internationally recognized crimes of terrorism, illicit narcotics trafficking, genocide, and torture, as those crimes are defined in various international conventions."

15 Mar. 1989: Floor Statement by Senator Specter on international terrorism. Specter recalls that in a 1986 amendment to the Omnibus Diplomatic Security and Antiterrorist Act and in Section 4108 of the 1988 Omnibus Anti-Drug Abuse Act, Congress called on the President to pursue negotiations to establish an international court with jurisdiction over terrorism and drug trafficking. He goes on to say that his discussions with various foreign leaders have persuaded him that "the civilized international community is prepared to speak with one voice to condemn terrorism." The creation of an international criminal court, he concludes, "would be an eloquent expression of that condemnation."

15 Mar. 1989: Testimony of Secretary of State Baker before the Subcommittee on Foreign Operations of the Committee on Appropriations. Senator Specter asks Secretary Baker what he thinks of the possibility of an international court. Secretary Baker calls the idea "interesting,"

but says it has "some fundamental problems." For instance, there are the questions of who would conduct the investigations, who would bring the prosecutions, and the exact composition of the court. Still, Baker admits "we could probably reach some sort of a United States position on that and then after some period of time, perhaps an international agreement." He concludes that the idea of an international court is worthy of further consideration.

Autumn 1989: The United Nations places the question of establishing an international criminal court for illicit drug traffickers on the Fall agenda of the UN General Assembly.

20 Nov. 1989: UN General Assembly Agenda Item 152 (44th session, Sixth [Legal] Committee). This resolution, following three days of intense debate, requests that the International Law Commission address the possibility of establishing "an international criminal court or other criminal trial mechanism," the jurisdiction of which would include illicit trans-national drug trafficking.

18 June 1990: Floor Statement by Senator Specter. Specter describes a symposium held at his request to discuss the creation of an international criminal court. At the 10 May 1990 symposium chaired by Professor M.C. Bassiouni, 13 international criminal law scholars and government officials joined by Congressmen Bob Kastenmeier and Jim Leach, expressed a consensus that "a regional international criminal court of limited scope and powers had the potential for making a significant contribution in the area of narcotics trafficking and should be further explored." Specter includes in the Congressional Record a copy of the written consensus drafted at the symposium.

24-28 June 1990: The Draft Statute for an International Criminal Tribunal prepared by Professor M.C. Bassiouni and discussed at the May 10 symposium is presented to a special committee of experts organized by the International Institute of Higher Studies in Criminal Sciences. A model draft statute to establish an international criminal tribunal is prepared and in August, 1990 the Committee submits it to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders.

16 July 1990: Draft Report of the International Law Commission on the work of its 42nd session in Geneva (1 May - 20 July 1990). In Chapter II, Part C of this report, the Commission considers, and agrees in principle with, the idea of establishing a permanent international criminal court "to be brought into relationship with the United Nations system." The commission notes that there are at least three possible

models: 1) an international criminal court with exclusive jurisdiction, 2) concurrent jurisdiction between an international criminal court and national courts, and 3) an international criminal court having only a review competence. Professor S. McCaffery of the U.S. and a member of the ILC supports the report.

7 Aug. 1990: President Cesar Oaviria Trujillo of Colombia, who had planned to attend the Siracusa meeting of June 1990 (but sent three representatives who briefed him on it), vowed in his inaugural address to "explore the possibility of creating an international or regional criminal jurisdiction to fight narco-trafficking and other related crimes that surpass international borders."

4 Sept. 1990: Testimony of Secretary of State Baker before the House Foreign Affairs Committee points out that "defendants of the nature of Saddam Hussein or for that matter Pol Pot" do not answer to any judicial authority, Congressman Leach asks Secretary Baker to look seriously at the idea of creating an international criminal court. Secretary Baker replies that he thinks "the suggestion is a good one" and wonders "why that's not something that had been looked at before, if indeed it hasn't been."

10 Sept. 1990: Testimony of Under Secretary of State Robert Kimmitt before House Foreign Affairs Committee. Kimmitt states that the Leach and Specter proposals would be "enormously complex" undertakings, noting, for instance, that if the State Department wanted to go forward on these proposals, it would have to come to the Senate for advice and consent first. Still, Kimmitt expresses "no disagreement at all" on the mechanism and the principle involved in the Leach proposal. He adds, in fact, that he would like to bring in lawyers in other agencies and departments who are working right now on the Gulf situation. Kimmitt concludes that "the time is probably riper than ever to look closely at that situation." (international criminal jurisdiction).

11 Sept. 1990: By a vote of 97 to 2, the US Senate endorsed the idea of trying Saddam Hussein before an international tribunal.

19 Sept. 1990: During Congressional Testimony, Congressman Gus Yatron asked John Bolton, Assistant Secretary of State for the Bureau of International Organization Affairs, for his comment on House Concurrent Resolution 66, the House measure promoting the proposed court. Bolton said that the Department of State was open to discussing the merits of the court.

19 Oct. 1990: By unanimous consent, the Senate passes an amendment to the FY 91 Foreign Operations Appropriations bill. The amendment

calls for the President to report to the Congress by October 1, 1991, the results of his efforts in regard to the establishment of an International Criminal Court to deal with criminal acts defined in international conventions. It also requires the Judicial Conference of the United States to report to the Congress by October 1, 1991 on the feasibility of, and the relationship to, the Federal Judiciary of an international criminal court.

25 Oct. 1990: In conference on the FY 91 Foreign Operations Appropriations bill, House conferees recede to the Senate's position on the Specter amendment. The bill passes the Congress and is signed into law by the President on

5 Nov. 1990: President Bush signs into Law the FY 91 Foreign Operations Appropriations which includes the Specter amendment.

1990: The U.S. is among the sponsors of the UN General Assembly declaring the nineties as the Decade of International Law.

The Confucian View of World Order

*Frederick Tse-shyang Chen**

In writing about the Confucian view of world order, I am not describing a religious perspective, at least in a traditional Western sense. Confucianism is not a religion, although it is sometimes mistaken for one.[1] At one time Confucianism was sought to be constitutionally declared the state religion of the new republican China.[2] More correctly, however, Confucianism is a body of philosophical teachings about human beings, their values, their institutions, and so on or about, simply, a way of life in this, but not the next, world.

China does not have an indigenous religion. What is commonly known as the "three religions" is probably more correctly known as the three "teachings."[3] The three are Buddhism, Taoism, and Confucianism. Of these only Buddhism is a religion, but it was introduced from abroad. Taoism refers both to the philosophies of some Chinese scholars and to certain practices including alchemy in the search of elixir vitae, hygienic breathing and meditation, faith-healing[4], and magic.[5]

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1. *See* H. A. GILES, CONFUCIANISM AND ITS RIVALS (1915); W. E. SOOTHILL, THREE RELIGIONS OF CHINA (1929).

2. LIU WU-CHI, A SHORT HISTORY OF CONFUCIAN PHILOSOPHY 184 (1964); Y. C. HSIEH, ON THE CONSTITUTION OF THE REPUBLIC OF CHINA 53 (7th ed. 1956) (In Chinese).

3. In Chinese, *chiao* means "teaching" and *tsung-chiao* (or its shorthand *chiao*) means religion. Thus, the term "three *chiao*" literally can mean either three religions or three (bodies of) teachings. It is better to take the term by the latter meaning since a religion is also a body of teaching, whereas not every body of teaching is a religion. *See*, W.E. SOOTHILL, THREE RELIGIONS OF CHINA 14-15 (1923).

For a brief history of the three *chiao*, *see* T. S. HUANG, A GENERAL HISTORY OF CHINA, v.1, 284-86 (1983) (In Chinese).

4. For an excellent summary of Taoist philosophy, *see generally* H. C. CREEL, CHINESE THOUGHT: FROM CONFUCIUS TO MAO TSE-TUNG 94-114 (1953).

5. *See* E. O. REISCHAUER & J. K. FAIRBANK, EAST ASIA, THE GREAT TRADITION 137-41 (1960).

It acquired the character of an organized religion not because of any domestic Chinese development but through the influence of Buddhism.[6] Confucianism does not share a number of the essential characteristics of a religion.[7] It does not advocate a belief in a deity, nor does it have an accepted doctrine of salvation, nor does it use sacred stories to aid propagation. While it does employ rituals and have a "code of conduct," the attendant perspectives are non-religious in character.

Though Confucianism is not a religion, it has had a unique place in the culture of mankind. For more than two thousand years Confucianism was the most prominent force in shaping the culture of the world's most populous nation, a nation which does not have a native religion of its own. Books on international law or order usually do not include any substantial discussion of Confucius or Confucianism, but the Confucians do have a view on world order. This view ought to be compared to the world's religious and other perspectives. In the following pages, I propose to explore it under these headings: (1) Postulation of Goal; (2) Confucian Conception of Community: World as "*Tien-Hsia*"; (3) Confucian Conception of Order: Non-Differentiation of Legal and Moral Order; (4) Minimum Order; and (5) Maximum Order.

Postulation of Goal

The Confucians postulate for world order the goal of *ping*. *Ping* denotes peace, harmony, evenness, equality, fairness, and the like. A world that has achieved *ping* is a world in which the Great Way[8] has prevailed, and such a world is known as a world of Great Harmony. As portrayed by Confucius:

> When the Great Way prevailed, the world community was equally shared by all. The worthy and able were chosen as office-holders. Mutual confidence was fostered and good neighborliness cultivated. Therefore people did not regard as parents only their own parents, nor did they treat as children only

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6. *Id.* at 140.

7. For "Chief Characteristics of Religion," *see*, WORLD BOOK ENCYCLOPEDIA, v. 16, 207-10 (1982).

8. For illuminating works on basic Confucianism *see* H. G. CREEL, CONFUCIUS AND THE CHINESE WAY (1949); T. C. CHEN, THE THEORY OF CONFUCIUS (4th ed. 1969). For a non-traditional current mainland-Chinese perspective, *see* S. S. TSAI, SYSTEMS OF CONFUCIAN THINKING (1982) (in Chinese); CONFUCIUS (S. C. Wang ed. 1985) (in Chinese); KUANG YAMING, A CRITICAL BIOGRAPHY OF CONFUCIUS (1985) (in Chinese).

> their own children. Provision was made for the aged till their death, the adult were given employment, and the young enabled to grow up. Old widows and widowers, the orphaned, the old and childless, as well as the sick and the disabled were all well taken care of. Men had their proper roles and women their homes. While they hated to see wealth lying about on the ground, they did not necessarily keep it for their own use. While they hated not to exert their effort, they did not necessarily devote it to their own ends. Thus evil schemings ceased to appear, and robbers, thieves and other lawless elements failed to arise, so that outer doors did not have to be shut. This was a world of Great Harmony.[9]

All Confucian teaching may be regarded as aimed at the achievement of this ultimate goal of a world characterized by *ping*. The *Book of Great Learning*, regarded as the "gate by which first learners enter into virtue,"[10] propounded eight virtuous accomplishments that every individual is urged to attempt. These are: (1) investigation of things; (2) extension of knowledge; (3) sincerity of thoughts; (4) rectification of the heart; (5) cultivation of the person; (6) regulation of the family; (7) government of the state; and (8) *ping* of the world. These eight items so systematically categorize Confucianism that all Confucian teaching can be grouped under them.[11] The eight are meant to be accomplishable and accomplished in succession. Each one is prerequisite to and preparatory for the next. The completion of the first seven must therefore precede that of the eighth. Thus, the accomplishment of the

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9. L. F. CHEN, THE CONFUCIAN WAY: A NEW & SYSTEMATIC STUDY OF THE "FOUR BOOKS" 577 (1972) (Quoting LI CHI, LI YUN). (I have made a minor change to the translation to reflect my understanding.)

10. These are the words of the philosopher Cheng as they appear in the Introductory Note to virtually every version of the Chinese text of *Great Learning*. *Great Learning* is one of the "*Four Books*," or the "*Books of the Fours Masters*." The four refers to *The Great Learning*, *The Doctrine of the Mean*, *The Confucian Analects*, and *The Works of Mencius*. In this essay I shall rely principally on the *Four Books* for my authority and on the *Tso's Commentary to Spring and Autumn* for the supply of cases. There is virtually no doubt as to the genuine authorship of all these works. I do not intend, nor am I competent, to get embroiled in quarrels about authorship of the Chinese classics. In this essay, all quoted passages from the *Four Books* and from *Tso's Commentary* are taken from the translation of James Legge, the renowned British scholar. His translation of all five works appears in J. Legge (tr.), *The Chinese Classics* in 5 vols. I have made changes to Mr. Legge's translation to reflect my understanding. GREAT LEARNING is in Vol. I.

11. L. F. CHEN, *supra* note 10 (reorganizes the "*Four Books*").

eighth would mean that all of the Confucian teachings would have been carried out.[12]

From the meanings of *pìng* and the above portrait of the ideal world, it may be seen that two central themes characterize *ping*: minimum order, in the sense of peace and tranquility; and maximum order, in the sense of abundance, sharing and general contentedness. A world that has reached the stage of *ping* is aptly called a "peaceful and happy world."[13]

Confucian Conception of Community: World as "Tien-Hsia"

I have been using the word "world" to describe the community for which the Confucians postulate the goal of peace and happiness. The original Confucian text described that community by using the Chinese words *tien-hsia*, literally, "all under Heaven (or the sky)." This term can be narrowly or broadly interpreted. Since all under Heaven at the time of Confucius was supposed to be ruled by the Son of Heaven, the king of China, *tien-hsia* naturally refers to that kingdom in China known as Eastern Chou. Thus, some translators of Confucian classics correctly rendered *tien-hsia* into the English word "kingdom."[14] *Tien-hsia* also admits a broader meaning. Since all under Heaven is extensive enough to comprehend the entire world, or the entire known world, the term can cover a community larger than the Chinese kingdom.[15] This means that today, the term can refer to the entire global community of mankind or even the still larger earth-space community. In this essay I will take the term in its broader meaning. Such a use may be justified on grounds other than linguistic permissibleness. First, there are major similarities between the *tien-hsia* of Confucius' time and that of the present time. What was postulated for one may be meaningful

12. According to *Great Learning*: "The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. To order well their States, they first regulated their families. To regulate their families, they first cultivated their persons. To cultivate their persons, they first rectified their hearts. To rectify their hearts, they first sought to be sincere in their thoughts. To be sincere in their thoughts, they first extended to the utmost their knowledge. Such extension of knowledge lay in the investigation of things." *Great Learning*, Text of Confucius, 4.

13. Legge uses both "tranquil and happy" (op. cit., GREAT LEARNING *supra* note 11, at 359) and "peaceful and happy" (Id. at 373).

14. Both Liu and Legge translate *tien-hsia* into "kingdom" or sometimes "empire."

15. The author of Chen, *supra* note 10, adopts the broader meaning but the translator uses the narrower meaning in rendering the original text of the classics into English.

and similarly appropriate for the other. Second, given the cosmopolitan and realistic perspective of Confucius, the broader reading is probably the more apposite. Third, in Confucius' time, as in the present, no state can secure order unless all other states can also achieve order. A peaceful and happy China cannot last unless the rest of the world under Heaven also enjoys peace and happiness.

Confucius lived in the so-called "Spring and Autumn" period (722-481 B.C.) in Chinese history. This was a wicked period. As described by Mencius, the number-two sage for the Confucians, "The world was fallen into decay, and right principles had dwindled away. Perverse discourse and oppressive deeds were again waxen rife. Cases were occurring of ministers who murdered their rulers, and of sons who murdered their fathers."[16] At the time, the king of Eastern Chou was ruler of the Chinese kingdom in name only.[17] His vassal states all became "fragments of a disintegrated empire,"[18] and each fragment stood, for all practical purposes, as an independent sovereign vis-a-vis Eastern Chou. These states fought among themselves and with the barbarian states and tribes on the peripheries of China. Might prevailed over right, and hegemons emerged as many weaker states were swallowed up.[19] In Confucian classics, *tien-hsia* was, intended to refer to this disintegrated kingdom of Eastern Chou, but the inter-state community of Eastern Chou was in many important respects similar to the international community of the present day. The vassal states were all independent sovereign states much like the sovereign nation-states of today. The larger inter-state community then was decentralized as is the international community of the present day. Even the hegemony politics shared similarities with the modern super-power politics. Although there was in existence a king who could be looked upon as representing some sort of a "world government," that government was more illusory than real.

The Confucians have always held a cosmopolitan outlook and a realistic view of the larger community. It is this cosmopolitanism and realism that warrant one also in thinking that the Confucians would, approve of the broader interpretation of the term *tien-hsia*. Confucius himself supplied a "living" example of this interpretation. Born a subject of the State of Lu, he spent many years travelling abroad in

16. WORKS OF MENCIUS, Bk. III, Pt. II, Ch. IX.

17. D. J. LI, THE AGELESS CHINESE: A HISTORY 45 (1965).

18. BRITTON, *Chinese Interstate Intercourse Before 700 B.C.*, 29 AM. J. INT'L L. 616, 618 (1935).

19. D. J. Li, *supra* note 18, at 50.

search of opportunities for public service.[20] He realized that his goal of a peaceful and happy world could not be realized without the support of those who, wielded effective power, as distinguished from the pretended authority held by the Eastern Chou king. Effective power was, in the hands of the rulers of the Chinese and barbarian states and tribes.

Through holding public offices in one of those states, he would get the opportunity to implement the Way and to influence the thoughts and heart of a ruler.[21] It was through the proper government of that state that he might have a realistic chance of achieving the peaceful and happy world that he had in mind. Confucius not only went to a number of Chinese states, but at one time also contemplated going to where the "nine wild tribes of the east" resided. When someone warned him that the tribespeople might be a bit crude for him, he retorted, "If a virtuous man dwelt among them, what crudity would there be?"[22] If his search among the Chinese states had been fruitful, he would have undoubtedly sought to implement the "nine standard rules" for the government of *tien-hsia* and of a state in the state of his employment, as enunciated in the book on *The Doctrine of the Mean*.[23] The nine standards included the standard of "indulgent treatment of people from a distance." To Confucius, "people" would include the barbarians. One way to have a peaceful and happy world is to have all the states of the world well-governed. The other is by a well-governed state's winning over all the peoples of the world. Mencius was particularly explicit on this second way of seeing the Great Way prevail in the

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20. Both Confucius and Mencius were eager to hold public offices so that they could implement their ideals. CONFUCIAN ANALECTS, Bk. VII, Ch. X; Bk. IX, Ch. XII; WORKS OF MENCIUS, Bk. III, Pt. II, Ch. III; Bk. II, Pt. II, Ch. XII.

21. Professor M. S. McDougal made this point: "The effective key to the improvement of global constitutive process and public order decision, to insuring that some of the many equivalent options for improvement are in fact put into practice, is of course to be found in the management of the global process of effective power, that is, through modification of the perspectives of the elite who maintain that process." McDOUGAL, *International Law and the Future*, 50 MISS. L. J. 259, 332 (1979).

22. CONFUCIAN ANSLECTS, Bk. IX, Ch. XIII.

23. "All who have the government of the kingdom or of a State to attend to have nine standard rules to follow: Cultivation of the person; honoring of worthy people; affection towards relatives; respect towards the great ministers; kind and considerate treatment of the whole body of officials; dealing with the mass of the people as children; encouraging the resort of all classes of artisans; indulgent treatment of people from a distance; and the kindly cherishing of the princes of the States." DOCTRINE OF THE MEAN, Ch. XX in CHEN, *supra* note 10, at 413.

universe in his advice to the rulers of his day.[24] Further, one of the "righteous rules" of Confucianism that may be derived from the book of *Spring and Autumn*[25] is to treat the barbarians as Chinese if they followed the Chinese rules of conduct ("*li*") and to treat the Chinese as barbarians if they followed the barbarian rules of conduct.[26]

Moreover, the restrictive reading of *tien-hsia* would make sense only in a first reading of the classical text. After the *tien-hsia* in the narrow sense was to coin a word, *pinged*, the cohesive kingdom of China would then be reduced to a mere state vis-a-vis the rest of the larger world. This larger world, though decentralized, would next have to be *pinged*. With the unification of China in 221 B.C., China has, in reality, been a single unit of the larger community; a state in the decentralized world. It thus makes sense to give *tien-hsia* in the Confucian text the broader reading.

Confucius explained his extensive foreign travels in search of office in terms of "association with mankind."[27] The faithful Confucians are all supposed to be deeply engaged in the "adjustment of the great invariable relations of mankind and the establishment of the great fundamental virtues of humanity."[28] They are supposed to "treat all China as one person and all under Heaven as one family."[29] It would

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24. For an example of Mencius' advice to King Hwei of State Liang and his advice to King Hsuan of State Chi, *see* WORKS OF MENCIUS, Bk. I, Pt. I, Ch. III; Bk. I, Ch. VII. It should be noted that this is not imperialism, as the peoples who would "come" from other states would be doing it by their own volition and desire.

25. A word about *Spring and Autumn*, maybe in order. The work, in form a chronicle of important events during Spring and Autumn, has always had a place of special importance in Confucianism. It was authored by Confucius not only to record historical events, but also to pass judgment upon the actors involved. This latter function was performed through discriminatory use of words that subtly imply "praise or censure." The work is accompanied by three commentaries that supply details and offer interpretations. Many of the cases referred to in this essay are taken from one of these commentaries, the *Tso's Commentary*. The reader is supposed to draw from *Spring and Autumn* the so-called "righteous decisions of *Spring and Autumn*" and perceive the norms or principles implicit therein. THE CH'UN TS'EW (SPRING AND AUTUMN) WITH THE TSO CHUEN (TSO'S COMMENTARY) appears in THE CHINESE CLASSICS vol. V (Legge trans. 1960). It should be noted that the decisions and norms thus drawn have been used as basis for deciding actual cases. *See* T. CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA 276 (1961).

26. M. CHIEN, AN OUTLINE OF NATIONAL HISTORY, v. 1, 38 (In Chinese).

27. CONFUCIAN ANALECTS, Bk. XVIII, Ch. VI.

28. DOCTRINE OF THE MEAN, Ch. XXXII, in THE CHINESE CLASSICS, vol. I, 429 (Legge trans. 1960).

29. I have lost the source from which I took these remarks. But *Confucian Analects*

be hard to believe that in this ever-shrinking world of the present day, the Confucians would eschew any part of the global community in their effort at securing the "illustration of the illustrious virtue all under Heaven."[30]

Confucius not only identified with the larger community and appreciated the distinction between the effective power and the formal authority that operate in society, but he also regarded the individual human being as the ultimate actor in all community processes.[31] It is in the individual, and not the nation-states, that the Confucians would find the starting point and locate the responsibility for building world order. Individuals identify with groups, the more important of which the Confucians list as the family, the state, and the world community.[32] The Confucians plan to reach their ideal world through the perfection of the individuals and their groups. Each person must first seek the perfection of himself and then broaden his efforts to bring about the perfection of the groups with which he identifies and through which he acts.[33]

Earlier, I listed the eight virtuous tasks or accomplishments of *Great Learning*. Of those eight, the first five pertain to the perfection of the self and the last three are examples of the perfection of groups. I pointed out that the eight tasks are supposed to be pursued in the order in which they were listed. The Confucians are particular about not confusing the "root" with the "branches" of things or the "beginning" with the "end" of affairs.[34] Since ordering the individual is like the root or the beginning for ordering the world, the importance of self-perfection cannot be overemphasized. It must be required of

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contains this advice given by one of Confucius' disciples to another: "Let the superior man never fail reverentially to order his own conduct, and let him be respectful to others and observant of propriety:—then all within the four seas will be his brothers. What has the superior man to do with being distressed because he has no brothers?" CONFUCIAN ANALECTS, Bk. XII, Ch. V.

30. GREAT LEARNING, Text of Confucious, 1: "What the Great Learning teaches, is—to illustrate illustrious virtue; to renovate people; and to rest in the highest excellence."

31. For a realistic and comprehensive modern view, *see* MCDOUGAL, LASSWELL AND REISMAN, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 200-02 (1968).

32. *See* text following note 10.

33. DOCTRINE OF THE MEAN, Ch. XXV: "The possessor of sincerity does not merely accomplish the self-perfection of himself. With this quality he perfects others and other things also."

34. GREAT LEARNING, Text of Confucious, 3: "Things have their root and their branches. Affairs have their end and their beginning. To know what is first and what is last is to be near the Way."

everyone, including even the king. Thus, as summarized in *Great Learning*.

> Things investigated, knowledge became complete; knowledge complete, thoughts were sincere; thoughts sincere, hearts were rectified; hearts rectified, persons were cultivated; persons cultivated, families were regulated; families regulated, States were rightly governed; States rightly governed, the whole world (*tien-hsia*) was made tranquil and happy. From the Son of Heaven to the masses of the people, all must consider the cultivation of the person the root of everything besides. It cannot be, when the root is neglected, that what should spring from it will be well ordered.[35]

Confucian Conception of Order: Non-Differentiation of Legal and Moral Order

There is much misunderstanding regarding the legal tradition of China. This is due in part to the fact that Western knowledge about China is not great, and to the lack of calibration of fundamental concepts. For example, the author of a popular textbook on jurisprudence wrote:

> The Chinese have never had a legal tradition at least as that term is understood in the West. Legality has no roots in Chinese civilization, law being regarded as the sign of an imperfect society. Confucius, the fount of traditional Chinese wisdom, believed that societal cohesion was furthered by example and established morality, not by regulation and punishment. A distinction was drawn in Chinese culture between *Li* and *Fa*: *Fa*, law, is an unpleasant necessity; *Li*, an ethical system of proper behavior is the more worthy and more useful method of social control.[36]

First, the basic assertion in the first two sentences is misleading. The writer fails to make clear what he means by "legal tradition" and "law," nor does he indicate whose understanding in the West he has

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35. *Id* at 5-7.

36. LORD LLOYD OF HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 760-61 (4th ed. 1979). *Compare* SCHWARTZ, ON ATTITUDES TOWARD LAW IN CHINA, in M. KATZ, GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27 (1957); S. P. SINHA, WHAT IS LAW 40 *et seq.* (1989); LORD LLOYD OF HAMPSTEAD and M. D. A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE (5th ed. 1985) only briefly mentioned *li* and *fa* in note 41 at 1101.

in mind. The West does not have a uniform understanding of law or legal tradition. The writer's own textbook attests to this fact. The major schools of jurisprudence in the West clearly have different conceptions of law among themselves. Each appears to be inadequate in some important respects.[37] If "positive law" (formally enacted and published as such) is what the writer has in mind by law, then China would appear to have a long and rich legal tradition. *Tso's Commentary to Spring and Autumn* reported the casting as early as 536 B.C. of tripods in the State of Cheng with crimes and their punishments described on them.[38] There is also, accumulated over two millennia, an overabundance of codes, statutes, ordinances, edicts and other written laws and orders governing criminal, administrative and other matters; not to mention the ever-present binding customs.[39] In fact, the written law formed the staple of *fa*. Even in inter-state relations, one can note the many "covenants" that were concluded (and readily breached, of course) as early as the time of Spring and Autumn.[40]

Second, as to the distinction between *li* and *fa*, it should be pointed out that the English word "law" is not the equivalent of the Chinese word *fa*. When *fa* is used as dichotomous with *li*, it customarily means "criminal law" only. The English word "law" certainly means more than just criminal law. It should also be pointed out that the Chinese word *li* does not refer merely to "ethical" rules of proper behavior. *Li* includes rules governing constitutional, administrative, inter-state and civil matters as well as moral propriety.[41] Under the maxim "to depart from the province of *li* is to enter the province of punishment (*hsing*)," *li* obviously is law that is enforced even through criminal sanctions. A passage from the book of *Li Chi* will indicate the broad scope of *li*'s coverage:

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37. MCDOUGAL, LASSWELL AND REISMAN, *supra* note 32.

38. Note, *supra* note 26 at 609-10.

39. Some of the familiar treatises on Chinese legal history are: K. Y. CHEN, HISTORY OF CHINESE LEGAL INSTITUTIONS (5th ed. 1973); T. L. HSU, A BRIEF HISTORY OF CHINESE LEGAL INSTITUTIONS (4th ed. 1967); H. L. YANG, HISTORY OF CHINESE LEGAL THINKING (4th ed. 1978); Y. Y. LIN, HISTORY OF CHINESE LEGAL INSTITUTIONS (rev. 7th ed. 1980); Y. H. TAI, CHINESE LEGAL HISTORY (2d ed. 1969); A COLLECTION OF PAPERS ON HISTORY OF CHINESE LEGAL INSTITUTIONS (K.S. Hsieh and L.C. Cha eds. 1968). All of these works are in Chinese. T. CH'U, *supra* note 26, and BODDE AND MORRIS, LAW IN IMPERIAL CHINA (1967) are useful volumes in English.

40. For a couple of examples, *see infra* pp. 68-9.

41. *See* K. Y. CHEN, A DISCUSSION AND REAPPRAISAL OF CHINESE LEGAL INSTITUTIONS AND THEIR FORMATION AND DEVELOPMENT FROM THE PERSPECTIVE OF CHINESE CULTURE, in K. S. Hsieh and L. C. Cha, *supra* note 40 at 1.

> They are rules of *li*, that furnish the means of determining (the observances towards) relatives, as near and remote; of settling points which may cause suspicion or doubt; of distinguishing where there should be agreement, and where difference; and of making clear what is right and what is wrong. . . . The course (of duty), virtue, benevolence, and righteousness cannot be fully carried out without the rules of *li*; nor are training and oral lessons for the rectification of manners complete; nor can the clearing up of quarrels and discriminating in disputes be accomplished; nor can (the duties between) ruler and minister, high and low, father and son, elder brother and younger, be determined; nor can students for office and (other) learners, in serving their masters, have an attachment for them; nor can majesty and dignity be shown in assigning the different places at court, in the government of the armies, and in discharging the duties of office so as to secure the operation of the laws; nor can there be the (proper) sincerity and gravity in presenting the offerings to spiritual beings on occasions of supplication, thanksgiving, and the various sacrifices.[42]

The broad and sweeping coverage of *li* hardly shows that it is or is intended to be, merely moral in nature.

It is clear that the Western concept of law is not coextensive with the Chinese concept of *fa*, and that the Chinese concept of *li* is not merely ethical or moral. If we must find some comparable Western expression for *li*, I think the late Professor Po-chi Wang has probably found a good one.[43] Professor Wang thought that Leon Duguit's "social norm" is the conceptual equivalent of *li*. In Duguit's conception, that part of the social norm is law which is supported by socially organized reaction against its violation. This part is referred to as the "juridical norm." *Li*, as we have seen, is in part also enforced by socially organized reaction. Following this *li* comprehends both law and morals, and *fa* is law but not all law is *fa*.

Professor Wang's analogy throws much light on a vexing problem. But, when thinking of law, even his focus seems to be confined to

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42. THE LI CHI, CHU LI, Pt. I, in THE SACRED BOOKS OF CHINA: THE TEXTS OF CONFUCIANISM vol. XXVII, 63-64 (Legge trans. 1960).

43. P. C. WANG, MODERN WESTERN LEGAL THINKING AND CHINESE TRADITIONAL CULTURE *et seq.* (1956) (In Chinese). For Duguit's theory, *see* DUGUIT, *Objective Law*, 20 COL. L. REV. 817 (1920) and 21 COL. L. REV. 17 (1921).

"rules," with its attendant shortcomings of overemphasizing "perspectives" and "authority" to the neglect of "operations" and "control."[44] A more balanced analysis would have to take into account all of these elements. The questions of operation and control are matters of empirical inquiry. It should be pointed out that by combining the vast stores of *fa* and that portion of *li* which were actually applied and attended by effective control, one would find an incredibly rich "legal tradition" in China sufficient to satisfy the most curious intellect. For present purposes it suffices to note that since *li* is both legal and moral in its nature, the social order that is secured by means of *li* is at once legal and moral. In the Confucian conception the order of a community is also at once legal and moral so long as that order is secured by *li*. There is no differentiation between legal and moral order. The implementation of *li* will obviously have to rely both on sanctions familiar to law and on other techniques including example. Confucius may have preferred example to punishment and morality to law, but he never said that law and punishment have no place in society. In fact, he said, "In hearing litigation, I am like any other person."[45] Mencius mentioned litigants going to the sage Shun for the resolution of their disputes.[46]

The whole story of "Confucianization of law" is a facinating record of the efforts of Confucians at combining authority and control to produce law.[47]

Minimum Order

The Confucian conception of minimum order has three core ideas: (1) absence of unauthorized coercion or violence; (2) disappearance of litigation; and (3) authorized uses of force.

Absence of Unauthorized Coercion or Violence

In inter-state relations, the Confucians have condemned the unauthorized use of force.[48] Spring and Autumn was a period of wars in

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44. For elaboration of these terms, *see* MCDOUGAL, LASSWELL AND REISMAN, *supra* note 32, 202-03.

45. GREAT LEARNING, Commentary, Ch. 4; CONFUCIAN ANALECTS, Bk. XII, Ch. XIII.

46. WORKS OF MENCIUS, Bk. V, Pt. I, Ch. V.

47. For the story, *see* Ch'u *supra* note 26 at 267 *et seq.*

48. Mencius, who lived during the so-called "Warring States" period condemned those as "great criminals" who boasted about and marketed their skills at marshalling troops and conducting battles. WORKS OF MENCIUS, Bk. VII, Pt. II, Ch. IV.

which the Chou king fought with barbarian or Chinese states or tribes, and the Chinese states fought among themselves or with barbarians.[49] The causes for war were many, but one study that covered 1,001 wars during a mere span of nine years, reported six: insult to diplomatic agents, failure or refusal to attend a convention for drawing up a treaty, violation of a treaty, desire for leadership and preeminence, avenging a previous defeat, and desire for conquest.[50] Mencius once concluded, "In the Spring and Autumn there are no righteous wars. Instances indeed there are of one war better than another [but all are equally unauthorized]."[51] An example of a "better" war is the war at Chao-lin in 655 B.C. in which the invaded state Chu submitted without the effusion of blood. On that occasion, Chi and its allies sought to justify their invasion of Chu on the strange grounds of exacting an account for Chu's failure to render tribute to the nominal Chou king and of making an inquiry into the unexplained drowning three centuries ago of King Chao of Chi.[52] These claimed justifications were hardly sufficient to purge the invasion of its unauthorized character, but the war was regarded as better because no life was lost in it.

Disappearance of Litigation

In jurisprudential thinking, there is minimum order so long as disputes are resolved by recourse to an appropriate decision-maker rather than by violence or threats of violence. Under that thinking, disputes and litigation still exist in society. The Confucian ideal of a peaceful and happy world aims for more. It calls for the disappearance of litigation, not merely the orderly conduct thereof. How is this possible? The answer is by making known virtue throughout the world and by the universal observance of the Way. A self-perfected person knows the difference between right and wrong. If his claim is spurious or questionable, he will feel too ashamed to raise it. He will also feel ashamed not to render his opponent what is rightly the latter's due.[53] As Confucius put it, "If the people be led by laws, and uniformity is sought to be given them by punishment, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and

49. CH'ENG, *International Law in Early China* (1122-249 B.C.), 11 CHINESE SOC. & POL. SCI. REV. 38, 251, 262-63 (1927).

50. *Id.* at 260-61.

51. WORKS OF MENCIUS, Bk. VII, Pt. II, Ch. II.

52. CH'UN TS'EW at 140-41.

53. GREAT LEARNING, Commentary, Ch. IV.

uniformity is sought to be given them by the rules of *li*, they will have the sense of shame, and moreover will become good."[54] Thus, while Confucius felt confident that he could try lawsuits as well as anyone else, he still held the preference that "What is necessary is to cause the people not to litigate."[55]

Authorized Uses of Force

Certain uses of force are regarded as appropriate and perhaps as in the interest of minimum order. These include: self-defense, humanitarian intervention, punitive expeditions, and the "right" to revolution.

Self-Defense

The Confucians would permit the use of force for self-defense, both individual and collective. In *The Works of Mencius* we find an opinion rendered by Mencius. Teng, a small state, was situated between two large and powerful neighbors, Chi and Chu. Teng's ruler, who was concerned about national security and survival, consulted Mencius as to what course to follow. Mencius, well aware that neither Chi nor Chu was inclined to follow *li*, rendered a reply which showed approval to individual self-defense:

> Your plan is beyond me. If I must counsel you, I can only suggest one thing. Dig deeper your moats, build higher your walls, and guard them with your people. In case of attack, be prepared to die in your defense, and have the people so that they will not leave you. This is a proper course.[56]

Another case of self-defense involved the defeat of Ch'in by Chin, during a war between Ch'in and Cheng, when Chin felt the presence of "imminent danger."[57]

The collective security enterprises led by the hegemonic ruler of Chi, Duke Hwan, during Spring and Autumn met with the approval of Confucius. With the loss of control by the Chou King, the vassal states could no longer depend on Chou for the maintenance of order. Now they had to fend for themselves. In the face of an expansionist Chu in the south and increasing barbarian invasions from the north,

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54. CONFUCIAN ANALECTS, Bk. II, Ch. III.

55. Op. cit., *supra* n. 53.

56. WORKS OF MENCIUS, Bk. I, Pt. II, Ch. XIII. *See also id.*, Bk. I, Pt. II, Ch. XIV.

57. CH'ENG, *supra* note 50, at 44.

the survival of many Chinese states hanged by a thread. Duke Hwan, aided by his able prime minister, Kwan Chung, summoned these states to many conferences, organized them, and became the acknowledged hegemon. Under Duke Hwan's leadership the allied states were successful in turning back and keeping the encroaching northern barbarians to the north of the Yellow River, thus perpetuating the existence of the states of Yen, Hing, Wei and their own. By a combined invasion, the allies were able to exact a covenant from the southern state of Chu. Confucius remarked: "The Duke Hwan assembled the rulers of states together, and that not with weapons of war and chariots. It was all through the influence of Kwan Chung. Whose benevolence was like his?" Whose benevolence was like his?[58] Again, said the Master:

> Kwan Chung acted as prime minister to the Duke Hwan, made him leader of all the princes, and united and rectified all under the sky. Down to the present day, the people enjoyed the gifts he conferred. But for Kwan Chung, we should now be wearing our hair unbound and the lappets of our coats buttoned on the left side [like the barbarians do].[59]

Confucius appraised Duke Hwans, "Upright and not crafty."[60]

Humanitarian Intervention

The Confucians would approve the use of force by one state against another state for the protection of human rights in the latter if properly carried out. The case of Chi and Yen is interesting. Chi and Yen both were large states, each being a "country of ten thousand chariots." The ruler of Yen was tyrannical. His people lived in the intolerable conditions of "hot fire and deep water." When Chi went to the relief of the Yen people by military force, it took no more than fifty days to complete the conquest. After the conquest; however, the ruler of Chi also behaved tyranically to the Yen people, "having slain their fathers and elder brothers, put their sons and younger brothers in confinement, and pulled down the State Ancestral Temple and begun to appropriate the precious vessels therein." He also annexed Yen. Whereupon, the rulers of various states deliberated together about aiding Yen and delivering it from Chi's abusive power. Mencius first discussed the annexation question. His view was that if the people of Yen would

58. CONFUCIAN ANALECTS, Bk. XIV, Ch. XVII.
59. *Id.*, Bk. XIV, Ch. XVIII.
60. *Id.*, Bk. XIV, Ch. XVI.

be pleased with Chi's annexation, then Chi should go ahead and annex Yen; otherwise, it should not.[61]

Mencius warned the ruler of Chi: "The rest of the kingdom is already afraid of the strength of Chi; and now when with a doubled territory you do not put in practice a benevolent government;—it is this which sets the arms of others in motion." He thus advised the ruler of Chi to immediately order that all captives be restored, that the removal of precious vessels be stopped, that a new ruler of Yen be installed in consultation with its people, and that Chi withdraw as soon as the new ruler be in place. A humanitarian intervention must not end up in greater misery or, as Mencius put it, in "making the water more deep and the fire more fierce."[62]

Punitive Expeditions

Punishment by the use of force may be inflicted upon a state for a serious violation of the rules of conduct by that state when commanded by the Son of Heaven or by the president of vassal states of a region. The very idea of commanding punishment signals correction by a higher authority against a subordinate. Therefore, the states, being co-equal, are not entitled to command correction among themselves. This explains the condemnation of all the wars during Spring and Autumn by Mencius since the belligerents were not entitled to punish each other.[63] When the king orders a punitive action, he entrusts its execution to the vassal states. "Thus the Son of Heaven commanded the punishment, but did not himself inflict it, while the heads of states inflicted the punishment, but did not command it."[64] When a head of a state acts to inflict a punishment pursuant to the order of the Son of Heaven, he is said to act as a "minister of Heaven."[65]

A case of a punitive expedition was undertaken at the command of a regional president of vassal states. This occurred following the death of the ruler of the State Tsao while he participated in the joint invasion of Ch'in with Chin, Lu, et al. One of his sons, Fu-tsu, was

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61. WORKS OF MENCIUS, Bk. I, Pt. II, Ch. X.

62. *Id.*, Bk. I, Pt. II, Ch. XI.

63. *Id.*, Bk. VII, Pt. II, Ch. II. Mencius was especially critical of the five hegemons who "dragged the heads of states to punish other heads of states." He called them "sinners." The five were Hwan of Chi (684-642 B.C.), Wen of Chin (636-629), Moh of Ch'in (659-620), Hsiang of Sung (651-635), and King Chuang of Chu (613-591). *Id.*, Bk. VI, Pt. II, Ch. VII.

64. *Id.*

65. *Id.*, Bk. II, Pt. II, Ch. VIII.

appointed by the people to take charge of the Tsao capital. Fu-tsu killed his eldest brother and made himself successor to the deceased ruler. This was a serious violation of *li*. Immediately, the allies wanted to punish Fu-tsu. However, the leader of the allies, Chin decided to postpone this until the following year due to fatigue. The next year, Chin called a meeting of the states in order to undertake punitive action against Fu-tsu. Fu-tsu was invited and went to the meeting, apparently not suspecting anything. The ruler of Chin seized Fu-tsu and delivered him at the King's capital.[66]

In an earlier case in 711 B.C., three states, Chi, Lu and Cheng invaded the state of Hsu for a transgression of law. Their forces captured the capital of Hsu, and Hsu's ruler fled abroad. Upon the submission of Hsu, the allied forces immediately ceased all military operations. Hsu was placed at the disposition of Cheng. Cheng's ruler made a high official of Hsu help the exiled ruler's younger brother rule, soothe and comfort the people. The ruler of Cheng told this Hsu official that in invading Hsu, he merely acted as a tool of Heaven in punishing the guilty ruler of Hsu. He did not consider himself an exemplary ruler of his own household. He would not pretend to be worthy of ruling Hsu, and his actions in Hsu were meant to serve the common interests of Hsu and Cheng. The ruler of Cheng's handling of Hsu was praised in the classics.

The above case is instructive on several points: (1) The invasion was undertaken for a specific limited purpose which was also a permissible purpose; (2) the actions of the allied powers were properly measured and commensurate with considerations of necessity and proportionality; (3) soothing and comforting the people of Hsu was foremost on the mind of the occupying power in charge; and (4) the actions of the ruler of Cheng were also commensurate with the quality of his own virtue. As remarked in the classics, "His arrangement of affairs was according to his measurement of his virtue . . . his movements were according to the exigency of the times, so as not to burden those who should follow him."[67]

A well-known case of unauthorized infliction of punishment because of lack of proper command involved the military actions by Chi against Yen. The ruler of Yen, Tzu-kuai resigned his throne to the prime

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66. Note, CH'UN TS'EW, at 388. For the case of a joint invasion of the guilty state of Ching by Chin, Lu and other states, *See also Id.*, at 352.

67. *Id.*, at 33. For the case of invasion of Cheng by Shih following "some strife of words." Shih was defeated, and its ruler was criticized partly for his failure to measure his own virtue against that of the ruler of Cheng, *see id*, at 33-34.

minister, Tzu-chih, to duplicate the story of the sage king, Yao, who relinquished his throne to the sage Shun.[68] Tzu-kuai did not expect Tzu-chih to accept the throne, but the latter surprised him. When Tzu-kuai's son took action to regain the throne, there was confusion and widespread suffering among the people. A high minister of Chi, Shen Tung, asked Mencius if Yen deserved punishment for this unauthorized gift and acceptance of the state between Tzu-kuai and Tzu-chih. Mencius replied positively. Whereupon, Chi smote Yen. When questioned if he had advised Chi's action, Mencius answered:

> Shen Tung asked me whether Yen might be smitten, and I answered him, 'It may.' They accordingly went and smote it. If he had asked me, 'who may smite it?' I would have answered him, 'He who is the minister of Heaven may smite it. Suppose the case of a murderer, and that one asks me, 'May this man be put to death?' I will answer him, 'He may.' If he ask me, 'Who may put him to death?' I will answer him, 'The chief criminal judge may put him to death.' But now with one Yen [that is to say, Chi] to smite another Yen:—how should I have advised this?[69]

The "Right" to Revolution

Many have mentioned the "right to revolution" or "right to revolt" in Confucian thinking.[70] It is probably more correct to say the "duty to bring about a revolution." Use of force in the discharge of that duty is not merely regarded as permissible but hailed by the Confucians. The two most celebrated cases are *Tang of Shang vs. Chieh of Hsia* and *Wu of Chou vs. Chou of Shang*. There are stringent requirements: (1) There must be an oppressive ruler who has repudiated the "decree of Heaven" by his abusive rule; (2) the revolt must be longed for by the oppressed people and is thus undertaken to carry out Heaven's sanctions against that ruler; and (3) the leader of the revolt must possess virtue commensurate with the righteous cause.

Chieh and Chou were two notorious despotic kings in Chinese history. Both Tang and Wu, on the other hand, were among a small handful of the "sage kings." Tang, the ruler of the small principality

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68. WORKS OF MENCIUS, Bk. V, Pt. I, Ch. V.

69. *Id.*, Bk. II, Pt. II, Ch. VIII. It should be noted that following the events just mentioned, the people of Yen rose in rebellion against Chi. *Id.*, Bk. II, Pt. II, Ch. IX.

70. *See, e.g.*, CREEL supra note 9, at 268-69.

of Shang, rose against Chieh. Tang summarized Chieh's crimes: "The king of Hsia [Chieh] extinguished his virtue and played the tyrant, extending his oppression over you, the people of myriad regions."[71] And Tang explained his revolt:

> The way of Heaven is to bless the good and to punish the bad. It sent down calamities on the House of Hsia, to make manifest its crimes. Therefore, I, the little child, charged with the decree of Heaven and its bright terrors, did not dare to forgive the criminal.[72]

The people of Hsia deplored their own plight: "When will this sun [i.e., King Chieh] expire? We will all perish with thee!"[73] It took Tang eleven expeditions to complete the revolution and Chieh was kept in banishment in Nan-tsao. It was reported that:

> When Tang pursued his revolution in the east, the wild tribes of the west murmured, when he went in the south, those of the north murmured:—they said, 'Why does he make us alone the last?' To whatever people he went, they congratulated one another in their chambers, saying, 'We have waited for our prince; he is come, and we revive.'[74]

At that time, people everywhere in Hsia "longed for Tang as if they longed for rain in a time of great drought."[75]

Wu of Chou recounted the crime of King Chou of Shang in great detail to the people:

> [T]he king of Shang does not revere Heaven above, and inflicts calamities on the people below. He has been abandoned to drunkenness, and has been reckless in lust. He has dared to exercise cruel oppression. Along with criminals he punished all their relatives. He has put men into office on hereditary principle. He has made it his pursuit to have palaces, towers, pavilions, embankments, ponds, and all other extravagances, to the most painful injury of you, the myriad people. He has burned and wasted the loyal and good. He has ripped up pregnant women . . . The iniquity of Shang is full. Heaven

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71. THE BOOK OF HISTORICAL DOCUMENTS, in THE CHINESE CLASSICS, vol. III, Pt. IV, Bk. III, Ch. II. (J. Legge trans. 1960) (Hereafter SHOO KING).

72. *Id.*, Pt. IV, Bk. III, Ch. II.

73. *Id.*, Pt. IV, Bk. I, Ch. II.

74. *Id.*, Pt. IV, Bk. II, Ch. IV; WORKS OF MENCIUS, Bk. III, Pt. II, Ch. V.

75. *Id.*

> gives command to destroy it. If I did not comply with Heaven, my iniquity would be as great.[76]

So, Wu complied, succeeded in overthrowing Chou, the last king of Shang, and established the kingdom of Chou. As Wu pursued his revolutionary work, he too enjoyed overwhelming public support. In the words of Mencius:

> Thus, the men of station of Shang took baskets full of black and yellow silks to meet the men of station of Chou, and the lower classes of the one met the other with baskets of rice and vessels of congee. Wu saved the people from the midst of fire and water, seizing only their oppressor and destroying him.[77]

In each of the above cases a subordinate revolted against his king. Years later, the king of Chi asked Mencius, "May a minister put his sovereign to death?" Mencius answered:

> He who outrages the benevolence proper to his nature, is called a robber; he who outrages righteousness, is called a ruffian. The robber and ruffian we call a mere fellow. I have heard the cutting off the the fellow Chou, but I have not heard of the putting a sovereign to death, in his case.[78]

In other words, when Chou abused the decree of Heaven by which he ruled, that decree became rescinded. Without the decree, Chou was reduced, in theory, to a mere "fellow." There was, therefore, no insubordination or disloyalty to speak of.

Maximum Order

The essence of the modern concept of "maximum order" is "greatest production and widest distribution of values."[79] The Confucian postulate of peaceful and happy world embraces a similar idea. In Confucius' portrait of the ideal state, he summarized it all by saying, "When the Great Way prevailed, the world community was equally shared by all."[80]

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76. SHOO KING, Pt. V, Bk. I, Pt. i.

77. WORKS OF MENCIUS, Bk. III, Pt. II, Ch. V.

78. *Id.*, Bk. I, Pt. II, Ch. VIII.

79. For a definition of optimum order (equivalent of maximum order) *see, e.g.*, M. S. MCDOUGAL, H. D. LASSWELL AND L. C. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 322-23 (1980).

80. *See* text at *supra* note 10.

Values are preferred events. While the Confucians have never attempted to systematically categorize human preferences, they have touched upon all eight values as categorized by the policy scientists.[81] The following is a tabular sampling:

Wealth "Riches and honors are what people desire."[82] "Hence, the accumulation of wealth is the way to scatter the people; and the letting it be scattered among them is the way to collect the people."[83]

Respect "Riches and honors are what men desire."[84] "[H]onor men of virtue and talents."[85]

Power "The Record says, 'If Confucius was three months without being employed by some ruler, he looked anxious and unhappy.'"[86] "The worthy and able were chosen as office-holders."[87]

Enlightenment "Learn without satiety and teach without being tired."[88] "In teaching there should be no distinction of classes."[89]

Skill "By daily examinations and monthly trials, and by making their rations in accordance with their tasks:—this is the way to encourage the classes of artisans."[90]

Well-Being "In the kingdom there are three things universally acknowledged to be honorable . . . [A]ge is one of them."[91] "The ancients caused the people to have pleasure as well as themselves, and therefore they could enjoy it."[92]

Affection "Treat with reverence due to age the elders in your own family, so that the elders in the families of others shall be similarly treated; treat with kindness due to youth the young in your own family, so that the young in the families of others shall be similarly treated."[93]

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81. *See* MCDOUGAL, LASSWELL AND REISMAN, *supra* note 32, at 201.
82. CONFUCIAN ANALECTS, Bk. IV, Ch. V.
83. GREAT LEARNING, Commentary, Ch. X.
84. *Id.*
85. DOCTRINE OF THE MEAN, Ch. XX.
86. WORKS OF MENCIUS, Bk. III, Pt. II, Ch. III.
87. See text at *supra* note 9.
88. WORK OF MENCIUS, Bk. II, Pt. I, Ch. II.
89. CONFUCIAN ANALECTS, Bk. XV, Ch. XXXVIII. What is taught can of course be related to either enlightenment or skill. Confucius himself taught theory and practice of virtue, speech (a diplomatic skill), theory and practice of government, and literary subjects including poetry, history, *li*, and music. *Id.*, Bk. XI, Ch. II; T. C. CHEN, THEORY OF CONFUCIUS 292 *et seq.* (4th ed 1969) (In Chinese); S. S. TSAI, SYSTEM OF CONFUCIAN THINKING, Ch. viii, § 5 (1982) (In Chinese).
90. DOCTRINE OF THE MEAN, Ch. XX.
91. WORKS OF MENCIUS, Bk. II, Pt. II, Ch. II.
92. *Id.*, Bk. I, Pt. I, Ch. II.
93. *Id.*, Bk. I, Pt. I, Ch. VII.

Rectitude "The superior man thinks of virtue."[94] "What the *Great Learning* teaches, is—to illustrate illustrious virtue; to renovate the people; and to rest in the highest excellence."[95]

The Confucians are concerned about the abundance of these values and they actively promoted policies that would encourage the promotion of skills of production,[96] "make the people rich,"[97] enable the greatest production of goods and services,[98] provide widespread education through schools,[99] inculcate filial and fraternal duties and other virtues,[100] and so on. When they promoted the benevolent rule and the extension of the benefits of that rule to the people, the Confucians were naturally devoted to the goal of the greatest production of all values. As succinctly put by Mencius,

> There is a way to get the kingdom:—get the people, and the kingdom is got. There is a way to get the people:—get their hearts, and the people are got. There is a way to get their hearts:—it is simply to collect for them what they want, and not to lay on them what they dislike.[101]

Confucius taught about benevolence. He said that "the benevolent man, wishing to be established himself [i.e., "self-perfection"], seeks also to establish others [i.e., "perfection of others"]; wishing to be enlarged himself, he seeks also to enlarge others."[102] Confucius seems to think that sharing is more important than abundance. He said:

> I had heard that rulers of states and chiefs of families are not troubled as much with fears of poverty as with failures to attain equal and fair distribution. . . For when there is equal and fair distribution, there will be no poverty.[103]

In inter-state relations, there were many specific cases of state practices that may be regarded as either compatible or incompatible with maximum order. In 716 B.C., for example, a high minister presented a remonstrance to the ruler of Chen. Chen's ruler refused

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94. CONFUCIAN ANALECTS, Bk. IV, Ch XI.
95. GREAT LEARNING, Text of Confucious, 1.
96. DOCTRINE OF THE MEAN, Ch. XX.
97. WORKS OF MENCIUS, Bk. VII, Pt. I, Ch. XXIII.
98. *Id.*, Bk. I, Pt. I, Ch. III; GREAT LEARNING, Ch. X.
99. WORKS OF MENCIUS, Bk. I, Pt. I, Ch. III.
100. *Id.*
101. *Id.*, Bk. IV, Pt. I, Ch. IX.
102. CONFUCIAN ANALECTS, Bk. VI, Ch. XXVIII.
103. *Id.*, Bk. XVI, Ch. I.

to accept an offer to conclude peace from the ruler of Cheng who had invaded Chen the year before. "Intimacy with the virtuous and friendship with its neighbors are the jewels of a State."[104] In 549 B.C. the ruler of Chin was criticized for violation of *li* when he failed to discontinue his usual enjoyment of music on the death of the ruler of a neighboring state, Chee.[105] According to *li*, a state must cease all impending military operations against another state on the death of the latter's ruler. Shih-kai of Chin was said to know *li* when he ceased making an incursion into Chi in 553 B.C. upon hearing of the death of the ruler of the latter state.[106] On the other hand both Cheng and Wei violated *li* because each invaded the other on the death of the invaded state's ruler. Wei's invasion was also disparagingly characterized as "recompensing injury for injury."[107]

The way Confucius recorded in *Spring and Autumn* the battle of Han (644 B.C.) between Chin and Ch'in was said to imply his censure of the ruler of Chin's handling of his relations with the ruler of Ch'in. *Tso's Commentary*, in providing details, noted facts that apparently contrasted the more virtuous conduct of the shrewd ruler of Ch'in. Ch'in had been forthcoming to the ruler of Chin in times of need, including helping him to enter and get the state and sharing its grain with Chin during scarcity. The faithless and ungrateful ruler of Chin not only broke all his promises to Ch'in but also refused to allow the sale of grain to Ch'in when scarcity became Ch'in's lot. Ch'in won the battle of Han and took the ruler of Chin prisoner. After detaining Chin's ruler for a while, Ch'in released him. *Tso's Commentary* reported a view on the wisdom of releasing this prisoner which appealed to the ruler of Ch' in:

> To take him prisoner because of his duplicity, and to let him go on his real submission:—what virtue could be greater than this? what punishment more awing? Those who submit to Ch'in will cherish the virtue; those who are disaffected will dread the punishment:—the presidency of Ch'in over the States may be secured by its conduct in this case. . . . that same year, Chin had again a scarcity, and the earl of Ch'in

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104. CH'UN TS'EW, at 21.

105. *Id.*, at 500.

106. *Id.*, at 483.

107. Id., at 416. See also Tsang Liu's commentary on the events under Duke Hsiang, Year II, 5, which appears in most Chinese editions of THE FIVE CHING readers; compare CONFUCIAN ANALECTS, Bk. XIV, Ch. XXXV.

> again supplied it with grain, saying, 'I feel angry with its ruler, but I pity its people.'[108]

There were also instances of inter-state agreements aimed ostensibly at promoting maximum order. The more notable multilateral ones included the agreement concluded in connection with the famous "Covenant of Kwei-chew" of 650 B.C. and the agreement concluded in 561 B.C. between twelve states. The first was concluded under the hegemony of Chi but in the presence of the prime minister of the king of Eastern Chou; the latter, under the hegemony of Chin.

Mencius criticized the rulers of his time as "sinners" for their disregard of the principles contained in the Kwei-chew agreement. He narrated these injunctions:

> The first injunction in their agreement was,—'Slay the unfilial; change not the son who has been appointed heir; exalt not a concubine to be the wife.' The second was,—'Honor the worthy, and maintain the talented, to give distinction to the virtuous.' The third was,—'Respect the old, and be kind to the young. Be not forgetful of strangers and travellers.' The fourth was,—'Let not offices be hereditary, nor let officers be pluralists. In the selection of officers let the object be to get the proper men. Let not a ruler take it on himself to put to death a great officer.' The fifth was,—'Follow no crooked policy in making embankments. Impose no restrictions on the sale of grain. Let there be no promotions without first announcing them to the sovereign.' It was then said, 'All we who have united in this agreement shall hereafter maintain amicable relations.'[109]

The words of the covenant of 561 B.C. were recorded in *Tso's Commentary*:

> All we who covenant together agree not to hoard up the produce of good years, not to shut one another out from advantages [that we possess], not to protect traitors, not to shelter criminals. We agree to aid one another in disasters and calamities, to have compassion towards one another in seasons of misfortune and disorder, to cherish the same likings and dislikings, to support and encourage the royal House. Should any prince break these engagements, may He who watches over men's sincerity and He who watches over cov-

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108. CH'UN TS'EW, at 167-69.

109. WORKS OF MENCIUS, Bk. VI, Pt. II, Ch. VII.

> enants . . . destroy him, so that he shall lose his people, his appointment pass from him, his family perish, and his State be utterly overthrown.[110]

Conclusion

Light shineth by whatever name it may be called, religion or another. In the pursuit of world order, one view will illuminate the path as far as it will go: but when many and different views are looked at in relation to one another, they will together illuminate a much brighter path.

110. CH'UN TS'EW, at 453.

The Proposed Export Facilitation Act of 1990: Striking a New Balance for United States Business While Safeguarding National Security by Providing High Technology to the Emerging Democracies of Eastern Europe

I. INTRODUCTION

Since the beginning of the Cold War, the United States has restricted the export of high technology goods, both commercial[1] and military.[2] The purpose of the controls has been to limit the transfer of "dual use" technology to the Soviet Union and other Warsaw Pact nations,[3] who could potentially use the technology to their military advantage.[4] Historically, in formulating U.S. export control legislation

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1. This note will only be concerned with the first of three types of export controls. The first type governs "dual use" technologies which have commercial and potential military uses such as computer chips.

The first type regulates exports of high technology items in the commercial sector. Export Control Act of 1949, Ch. 11, 63 Stat. 7 (codified as amended at 50 U.S.C. app. §§ 2021-2032 (1964)(expired 1969)); Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (codified as amended at 50 U.S.C. app. §§ 2401-2413 (1976)(expired 1979)); Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-2420 (1979)); amended by Export Administration Amendments Act of 1982, Pub. L. 97-145, 95 Stat. 1727; amended by Export Administration Amendments Act of 1985, Pub. L. 99-64, 99 Stat. 120; amended by Omnibus Trade and Competiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107.

2. The second type of export control regulates the export of arms and military technology. *See* Neutrality Act of 1939, Pub. L. 54-2, 54 Stat. 4, codified at 22 U.S.C. §§ 441- 457 (1939)(partially repealed 1954); Mutual Security Act of 1954, Chap. 937, 68 Stat. 832 (1954)(partially repealed in 1976); Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (codified as amended at 22 U.S.C. §§ 2751-2796 (1982)).

The third type of export control allows the President to exercise broad authority over U.S. exports during times of national emergency. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. at 1626 (1977)(codified at 50 U.S.C. §§ 1701-1702 (1982)).

3. *See generally* Murphy & Downey, *National Security, Foreign Policy and Individual Rights: The Quandary of U.S. Export Controls*, 30 INT'L & COMP. L.Q. 791, 792 (1981).

4. *See generally* Comment, *The Export Administration Act of 1979: Refining United States Export Control Machinery*, 4 B.C. INT'L & COMP. L. REV. 77 (1983). *See also* Murphy & Downey, *supra* note 3, at 792.

the Congress and the President have used a two part balancing test: national security concerns versus U.S. business interests.[5] The balance for over 40 years has been in favor of national security and to the detriment of U.S. business.

This balance has been shifting with the appearance of two new factors. First, a phenomenon known as foreign availability has been gradually eroding U.S. export controls. Goods that were previously only available from the U.S.,[6] are now available from other worldwide

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5. The two part test is:

1. To increase exports from U.S. companies in order to provide jobs for Americans and reduce the trade deficit,

2. To protect U.S. security, particularly in technological areas, and to acheive certain foreign policy objectives.

In the past, the U.S. could more easily acheive both goals, because the U.S. was the undoubted technological leader in many fields. Although the U.S. still has the lead in some areas, the competition from Western Europe and Japan has equalled or surpassed the U.S. in a number of technologies. As a practical matter the United States frequently sacrifices the first objective yet fails to acheive the second one; it penalizes them from exporting goods or technology when the same or equivalent goods or technology are available from others.

Blair, *Export Controls on Nonmilitary Goods and Technology: Are We Penalizing the Soviets or Ourselves?*, 21 TEXAS INT'L L.J. 363, 367 (1986).

This paper will focus on national security controls. There are, however, four primary forms of export regulations under the EAA: (1) national security controls; (2) foreign policy controls; (3) short supply controls; (4) foreign boycott controls.

(1) 50 U.S.C. app. § 2404(a)(1)(1990)(the Export Admininistration Act [hereinafter EAA] empowers the President to forbid "the export of any goods or technology in the interests of national security"); Evrard, *The Export Administration Act of 1979: Analysis of its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1, 28 (1982).

(2) 50 U.S.C. app. § 2405 (1990)(Foreign Policy Controls serve three purposes:

(a) They influence a nation to change behavior that the United States finds objectionable by imposing economic costs on the target of the controls; (b) punish a nation for such behavior by imposing costs; and (c) symbolically demonstrate displeasure with, or distance the United States from, a specific country or behavior by restricting U.S. exports); *See* Abbott, *Linking Trade to Political Goals: Foreign Export Controls in the 1970's and 1980's*, 65 MINN. L. REV. 739 (1981).

(3) 50 U.S.C. app. § 2406 (1990)(to avoid "excessive drain" of domestic goods and to reduce inflation caused by foreign demand).

(4) 50 U.S.C. app. § 2407 (1990) bars any U.S. person from joining boycotts against a friendly nation.

6. Blair, *supra* note 5, at 367.

sources helping to supplant a burgeoning U.S. trade deficit.[7] Thus, denial of export licenses by the Department of Commerce does not keep the technology out of the hands of the Soviet Union.[8] U.S. business, however, does lose a potential sale to foreign competitors, mainly Japanese and Western European, who have less stringent export regulations.

Second, the recent dramatic changes in Eastern Europe make a persuasive case for easing export restrictions to the Eastern Bloc.[9] The Soviet military threat has been reduced due to the movement of Poland, Hungary and Czechoslovakia towards democracy and market economies, the destruction of the Berlin Wall, and Soviet glasnost and perestroika.[10] Moreover, these emerging Eastern European democracies cannot succeed as stable, prosperous, market democracies without access to the technology that increasingly drives advanced Western countries.[11]

Because of recent changes in Eastern Europe and the advent of foreign availability, it is now necessary for Congress and the President to consider four factors rather than two when reformulating export control legislation that expired on September 30, 1990.[12] This note suggests that the four factors are the needs of: (1) the emerging Eastern

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7. 136 CONG. REC. H3270 (daily ed. June 6, 1990)(statement of Rep. Slaughter)("trade deficit last year was $108 billion, 95 percent of which was attributable to the manufacturing sector.")

8. Blair, *supra* note 5, at 367.

9. Besides providing high technology there is a tremendous need in Eastern Europe for hard currency. To keep these countries from falling back into Communist control the United States is providing financial aid. *See* Support for East European Democracy Act of 1989, Pub. L. No. 101-179, 103 Stat. 1298-1324 (codified at 22 U.S.C. §§ 5401-5495 (1990)).

10. Changes in the Soviet Union and Eastern Europe over the past year-reduced military expenditures, military-to-civilian production conversion programs, the renunciation of the Brezhnev Doctrine, East-West arms control agreements, a reduced Soviet military presence overseas, the weakening or overthrow of communist rule, and the undermining of the Warsaw Treaty Organization as a cohesive military force indicate a diminution of the military threat posed by the Soviet Union to the West. *The Reauthorization of the Export Administration Act: Hearings and Markup on H.R. 4653 Before the Subcomm. on Arms Control, International Security and Science, and International Economic Policy and Trade of the House Foreign Affairs Comm.*, 101st Cong., 2d. Sess., 106 (1990) (statement of Gary K. Bertsch and Martin J. Hillenbrand, Center for East-West Trade Policy, University of Georgia) [hereinafter *Reauthorization Hearings*].

11. 136 CONG. REC. H3283 (daily ed. June 6, 1990)(statement of Rep. Dicks).

12. 8 Int'l. Trade Rep. (BNA) 234 February 13, 1991. Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503 (1979) codified at 50 U.S.C. app. §§ 2401-2419 (1979); amended by Pub. L. 97-145, 95 Stat. 1727; amended by Pub. L. 99-64, 99 Stat. 120; amended by Pub. L. 100-418, 102 Stat. 1107.

European democracies for American technology; (2) American technology firms for new markets in Eastern Europe; (3) the United States not to be left far-behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the United States to defend itself against present and future adversaries.[13] However, under the present export control system these four needs can not be meet.

The present export control system consists of two types of controls: unilateral and multilateral. First, unilateral controls are controls imposed by the Department of Commerce upon U.S. business; these controls determine whether a U.S. company is allowed to ship their high technology products abroad. These regulations are in a complex statutory framework, embodied in the Export Administration Act of 1979 ("the Act or EAA of 1979"). Problems intentionally exist in the EAA that make it difficult, if not impossible, for U.S. exporters to export their high technology abroad.

Perhaps, the fundamental problem is jurisdiction over export controls. Under the EAA, jurisdiction is divided among the Department of Commerce and the Department of Defense. The conflicting goals of the two departments are at the heart of the debate over U.S. unilateral export controls. The Department of Defense raises concerns about the risks of having U.S. technology freely available on the world market while the Department of Commerce points out the adverse effects on U.S. business by denying them free access to world markets. Moreover, the Departments of Commerce, Defense and State have simultaneous jurisdiction[14] over the commodities, and often differ on whether the commodity to be exported poses a national security threat.[15] Thus, long delays are common even when licenses are granted.[16]

Second, multilateral controls were created when the U.S. and its allies formed the Coordinating Committee on Multilateral Controls

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13. Heritage Foundation Backgrounder, Controls Still Needed on High Technology Exports to the U.S.S.R., August 2, 1990. [hereinafter Heritage Foundation Backgrounder].

14. 50 U.S.C. app. § 2404(d)(1990).

15. 136 CONG. REC. H3275 (daily ed. June 6, 1990)(statement of Rep. Gejdenson)(he estimates that $10-$50 billion in export sales are lost due to "bureaucratic wrangling, infighting, and the inefficiencies . . . between the Department of Commerce, State Department, and Department of Defense [that] have created a three-headed monster that has put a stranglehold on American industry.")

16. 136 CONG. REC. H3272 (daily ed. June 6, 1990)(statement of Rep. Gejdenson)("It has taken 2 1/2 years, in one instance, just for the Department of State and the Department of Commerce to decide who was supposed to look at a license, never mind issuing one. At the same time, our competitors, the Germans and the Japanese do it in 4 days.")

(COCOM). COCOM members agree to impose controls, by unanimous vote, over exports to simultaneously deny the Soviet Union technology. This group is, however, on the verge of collapse. U.S. leadership has eroded by insistence on strict controls. COCOM member countries have been denied business opportunities because non-COCOM member countries have supplied the "dual use" item. Moreover, most COCOM members have consistently supported business interests over national security. Thus, most are in favor of loosening controls, with the U.S. being the sole opponent of looser controls. Because COCOM requires unanimous vote, the U.S. has been successful in keeping COCOM controls relatively tight. If COCOM collapses U.S. national security will be affected because the Soviet Union will have virtually free access to all "dual use" technology.

There is consensus among the Bush Administration, Congress and COCOM that the export control system needs to be loosened. The question is whether to loosen U.S. unilateral restrictions, COCOM multilateral restrictions or both. This question can be answered by analyzing the structure of the U.S. unilateral and COCOM multilateral controls in light of the previously suggested four-part balancing test.

Under the present system, if a U.S. company wants to export a "dual use" high technology product to the Eastern Bloc they must go through a three step licensing procedure. First, the license is sent to the Department of Commerce to determine commodity jurisdiction. Second, the Department of Commerce applies the U.S. Commodity Control List (the "Control List") and country group classification to determine licensing requirements. The Control List is a list of the regulatory status and procedures for export of particular commodities to specific groups of countries. Finally, the license application is sent to COCOM for approval.

The Bush Administration and Congress have two different schools of thought on how to satisfy the suggested four part balancing test within the structure of the EAA and COCOM. The Bush Administration prefers gradual decontrol of the U.S. unilateral export control system that has been in place for over 40 years.[17] Bush Administration proposals[18] to COCOM would modify only the third step in the licensing

17. *Reauthorization Hearings*, *supra* note 10 at 534-35 (letter from Brent Scowcroft). *See also Reauthorization Hearings*, *supra* note 10, at 7. (statement of Richard Perle, President Fellow, American Enterprise Institute). It is argued that the export control system has contributed significantly to the collapse of the Soviet empire in Eastern Europe.

18. The White House, Office of the Press Secretary, Fact Sheet, Comprehensive U.S. Proposal for Modernizing COCOM, May 2, 1990.

process. This would occur through negotiation with our allies in COCOM[19] to reduce the number of commodities on COCOM Industrial Control List (the "Industrial List").[20] Commodities to be decontrolled would include "priority list" items such as computers, machine tools and telecommunications equipment. Thus, the Eastern European countries would probably be able to purchase the technology they require. The Bush Administration, prefers to leave the U.S. unilateral system intact, and therefore, seeks to extend the EAA for another year until COCOM negotiations are complete.[21]

Congress, however, is concerned that multilateral negotiations with COCOM will be extremely slow and complex due to the unanimous vote requirement, previous delays in reaching COCOM agreement and general COCOM reluctance to conservative U.S. proposals. Therefore, Congress has proposed changes to reauthorize the EAA which expired on September 30, 1990, entitled the Export Facilitation Act ("the Export Bill") of 1990.[22] The Export Bill would go further than the Bush Administration by modifying all three steps in the licensing process.[23] Congress believes that even if changes are approved by COCOM they will be virtually meaningless to the American business community without corresponding changes in the EAA, because without change to

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19. The seventeen allies of COCOM are Australia, Belgium, Canada, Denmark, France, West Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States.

20. COCOM now regulates Western exports through three embargo lists: (1) the International Atomic Energy List, (2) the International Munitions List and (3) the International List. Sherzer & Yesner, *Export Controls Over Direct Commercial Sales of Military and Strategic Goods and Technologies: Who's in Charge?*, 7 B.C. INT'L & COMP. L. REV. 303, 312 (1984). While the first two regulate the export of commodities and technologies of direct military application, the latter regulates the export of dual use commodities which could aid both the civilian and military sectors of Communist countries.

The U.S. Department of Commerce also maintains a Control List which is set forth at 15 C.F.R. § 799.1 (1989).

21. 7 Int'l. Trade Rep. (BNA) 985 (July 4, 1990).

22. Export Facilitation Act, H.R. 4653, 101st Cong., 2d. Sess. (1990) *reprinted in* 136 CONG. REC. H3284-3290 (daily ed. June 6, 1990) and *reprinted in Reauthorization Hearings*, supra note 10, at 540-79. The EFA is not a complete structural overhaul of the EAA. It does, however, make major modifications to national security controls and regulations.

23. 136 CONG. REC. H3277 (daily ed. June 6, 1990)(statement of Rep. Miller) "Our competitors say 'Don't buy American, their rules are too complex, their restrictions are too tight and their bureaucracy is too slow.'" The Bush Administration proposal would loosen restrictions only. The EFA would correct all three problems: simplify the rules, loosen restrictions, and speed up the bureaucracy.

the EAA the complex statutory maze will still be intact.[24] The U.S. also stands to gain consensus in COCOM negotiations if the member countries are aware that the U.S. is in the midst of changing its rigid unilateral control structure. Fundamentally, the Bush Administration places a higher priority on national security concerns. The Bush Administration proposals almost ignore the needs of U.S. business.

This note analyzes the Export Bill and whether it adequately satisfies the previously suggested four part balancing test. Section II is a summary of the history of U.S. export controls from 1949-1977 to illuminate the changing goals of the export system. Section III lays out the administrative and substantive provisions of the Act of 1979 including the classification of country groups, the use of the Control List, the various types of export licenses (general and validated), controls on re-exports, enforcement and foreign availability. Section IV reviews Bush Administration proposals to COCOM for change in multilateral controls. Section V analyzes why Congress is dissatisfied with the Bush Administration proposals and how the various provisions of the Export Bill of 1990 would modify the existing EAA. Section VI presents arguments for why the Export Bill, and not the Bush Administration proposals to COCOM, better meet the suggested four prong balancing test. Finally, this note argues that even if the Export Bill is not passed, during the 101st Congress, it has served its purpose by putting pressure on the Bush Administration, has stabilized a precarious COCOM consensus and laid some of the groundwork for future changes to the EAA.

II. HISTORY OF THE USE OF EXPORT CONTROLS IN UNITED STATES NATIONAL SECURITY POLICY TO THE EASTERN BLOC

A. *History and Origin*

Until 1949, United States export controls were only used in times of war or during emergency situations.[25] "After World War II, Congress enacted the Export Control Act of 1949, which was 'the first comprehensive system of export controls ever adopted by the United States

24. Congress has been trying to get sweeping reforms through on the EAA since 1985. The EAA expires every three years. Yet up to this point Congress has been unsuccessful.

25. *See, e.g.*, Trading with the Enemy Act of 1917, chap. 106, 40 Stat. 411, 50 U.S.C. app. §§ 1-44 (1985); Berman & Garson, *United States Export Controls-Past Present and Future*, 67 COLUM. L. REV. 791 (1967).

in peacetime.'"[26] Under the Export Control Act, the President was provided broad discretionary power to regulate exports.[27] The President delegated his power under the Export Control Act to the Commerce department. Vigorous enforcement resulted in a "'virtual embargo' on all United States industrial and military technologies to communist countries."[28] The previous reasons for stringent export controls had disappeared by 1949 and were replaced by reasons dictated by the Cold War.[29] The underlying reason for export controls after 1949 was to deny Communist countries accesss to United States military technology.[30]

To further the goal of restricting high technology exports the United States and six of its allies informally joined together to form the Coordinating Committee on Export Controls (COCOM).[31] COCOM is responsible for coordinating the efforts of member countries to prevent the export of high technology to communist countries. The Mutual Defense Assistance Act of 1951,[32] commonly called the Battle Act, both codified United States participation in COCOM and authorized restrictions on U.S. foreign assistance to countries exporting commodities "designated by the State Department as strategic commodities."[33]

COCOM has three responsibilities. First, it requires each member country to establish national "control lists of equipment that cannot be legally exported to the Soviet Union and its allies."[34] Second, member

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26. Note, *National Security Export Controls: Congress Adopts an All for One and One for All Approach*, 14 BROOKLYN J. INT'L L. 573, 575 (1988)[hereinafter *National Security Export Controls*].

27. Note, *Export Administration Amendments Act*, 19 VAND. J. TRANSNAT'L L. 812, 816 (1986)[hereinafter *Export Administration Amendments Act*].

28. *Export Administration Amendments Act*, *supra* note 27, at 816.

29. "[T]wo of the original reasons for stringent controls preventing shortages of goods vitally needed at home and channeling specific, critically needed items abroad on a priority basis had disappeared." *Export Administration Amendments Act*, *supra* note 27, at 816.

30. Overly, *Regulation of Critical Technologies Under the Export Administration Act of 1979 and the Proposed Export Administration Amendments of 1983: American Business Versus National Security*, 10 N.C.J. INT'L L. & COM. REG. 423, 427 (1985).

31. *See, e.g.*, Mastranduno, "The Management of Alliance Export Control Policy," in Bertsch, ed., Controlling East- West Trade and Technology Transfer (Duke University Press, 1988); *See also* Hunt, *Multilateral Cooperation in Export Controls-The Role of COCOM*, 14 U. TOL. L. REV. 1285 (1983); Comment, *COCOM: Limitations on the Effectiveness of Multilateral Export Controls*, 1983 WIS. INT'L L.J. 106 (1983).

32. Mutual Defense Assistance Control Program of 1951, Pub. L. 82-213, 65 Stat. 645 (1951)(codified at 22 U.S.C. §§ 1611-1613(d) (1976)(superseded 1979)).

33. Overly, *supra* note 30, at 428.

34. DANIELS, COCOM, WORLD COMPETITION AND TECHNOLOGY CONTROL: A NATIONAL SECURITY STRATEGY, IN TECHNOLOGY CONTROL, COMPETITION AND NATIONAL SECURITY: CONFLICT AND CONSENSUS 199 (B. Seward ed. 1985).

governments of COCOM are required to review exports of most industrial commodities to prevent their diversion from their purported destination.[35] In the United States this is done primarily by the Commerce department, which grants export licenses for goods that utilize modern technology. Third, COCOM coordinates the licensing practices for member governments.[36]

Congress strengthened the national security controls of the Export Control Act by passing the Export Controls Amendments Act of 1962.[37] It required the President to deny an export license for any commodity that "makes a significant contribution to the military or economic potential of such nations which would prove detrimental to the national security and welfare of the United States."[38] Congress reasoned, inter alia, that development of the Soviet economy, both commercial and military, "would be detrimental to national security and welfare of the United States."[39]

The Export Control Act worked well in the 1950's but required philosophical change in the late 1960's. As the economies of our trading partners strengthened, they sought greater trade opportunities with Eastern Europe and the rest of the Communist world.[40] The Export Administration Act of 1969 (the Act of 1969) was a liberalization of U.S. policy in East-West trade.[41] Under the Act of 1969, trade was viewed as beneficial to the U.S., even trade to Communist countries.[42] A major modification from the Export Control Act was that in the EAA Congress had a more active role in overseeing the executive branches implementation of export controls.[43] It was becoming apparent to Congress, however, that tight U.S. unilateral controls were having an adverse effect on U.S. business without a corresponding gain in national security.[44]

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35. *Id.* at 200.

36. *Id.*

37. Export Control Amendments of 1962, Pub. L. 87-515, 76 Stat. 127 (1962)(codified at 50 U.S.C. app. § 2023 (1962)(repealed 1969); *See also* Overly, *supra* note 30, at 429.

38. 50 U.S.C. app. § 2023 (1962)(repealed 1965).

39. Berman & Garson, *supra* note 25, at 801.

40. *See* Murphy & Downey, *supra* note 3, at 792.

41. Export Administration Act of 1969, Pub. L. 91-184, 83 Stat. 841 (codified at 50 U.S.C. app. §§ 2401-2413 (1976)); amended by the Export Administration Act of 1979 codified at 50 U.S.C. app. §§ 2401-20 (1979).

42. *See* Murphy & Downey, *supra* note 3, at 792.

43. *See* Overly, *supra* note 30, at 429.

44. *National Security Export Controls*, *supra* note 26, at 577.

The 1970's marked yet a new problem for export controls. With the development and astonishing drop in price of computer chips, manufacturers could incorporate potential military hardware into commercial products. Export restrictions began to be concerned with "dual use" technology.[45] The restriction on computer technology did not present a problem to U.S. business until similar technology started to become available abroad. The Act of 1969 was amended in 1977[46] to restrict executive authority to impose export controls on goods and commodities that were available in "sufficient quantity and of sufficient quality"[47] to U.S. products.[48]

B. *The Export Administration Act of 1979*

The Export Administration Act of 1979 (the Act of 1979) superseded the Act of 1969. It attempted to strike a better balance between business interests and national security.[49] Listed under the general provisions of the act were the responsibilities of the Department of Commerce, which has primary control over the export of high technology. The Secretary of the Department of Commerce was required to issue licenses, maintain the Control List and make determinations of foreign availability. However, the act stated that no person or corporation has a "right" to export. Nor does the executive branch have to give consideration to the needs of exporters.[50] Thus, national security concerns were safeguarded under the act of 1979.

The major change of the Act of 1979 over the Act of 1969 was the incorporation of the critical technology approach to export control.[51]

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45. *Id.* at 582. *See also* Gonzalez, *How to Increase Technology Exports Without Risking National Security-An In- Depth Look at the Export Administration Amendments Act of 1985*, 8 LOY. L.A. INT'L & COMP. L.J. 399 (1986).

46. Export Administration Act of 1969, Pub. L. No. 95-52, 91 Stat. 235 (codified at 50 U.S.C. app. §§ 2402-2407, 2409- 2410)(1977)).

47. 50 U.S.C. app. § 2404(f)(1)(1977).

48. *National Security Export Controls*, *supra* note 26, at 594.

49. Business could air their concerns under 50 U.S.C. app. § 2403(f) (1990) which states:

The Secretary shall keep the public fully apprised of changes in export control policy and procedures instituted in conformity with this Act with a view to encouraging trade. The Secretary shall meet regularly with representatives of the business sector to obtain their views on export control policy and the foreign availability of goods and technology.

50. *See* Evrard, *supra* note 5, at 17; 50 U.S.C. app. § 2403(d) (1990); *See also* Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255 (1981).

51. Overly, *supra* note 30, at 431.

Under this approach the United States maintains a Control List which is designed to restrict exports only if it would make "a significant contribution to the military potential"[52] of the Soviet Union. While this approach is not controversial, the implementation of it is. Under the Act of 1979 the Department of Defense was given concurrent jurisdiction over the Control List with the Department of Commerce. The degree of control over a particular commodity depends upon a variety of factors including: the analysis of the kinds and quantities of commodities or technologies, their military uses, their availability abroad, their country of destination, their ultimate end users and their intended end uses.[53] Since 1979, the Export Administration Amendments Act[54] (EAAA)[55] of 1985 and the Omnibus Trade and Competiveness Act[56] (OTCA) of 1988 have been passed. Both have gradually loosened export restrictions.

III. AN OVERVIEW OF THE EXPORT REGULATIONS UNDER THE EXPORT ADMINISTRATION ACT OF 1979

A. *Administration of the EAA*

The Department of Commerce[57] is the primary agency responsible for issuing export licenses for high technology commodities.[58] An export license application must first be filed with the Department of Commerce. The Department of Commerce then conducts its own review of the application and, within its discretion, may send a copy of the application to the other agencies for review and approval.[59] The State Department has the right to review applications for foreign policy controls.[60] The

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52. 50 U.S.C. app. § 2401(2) (1976).

53. 15 C.F.R. § 385.2(a)(2)(1985).

54. The Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120-59 codified at 50 U.S.C. app. §§ 2401-2419.

55. *See generally* Hentzen, *United States Export Restrictions for Foreign Policy and National Security Purposes: The 1985 Amendments to the Export Administration Act and Beyond*, 26 COLUM. J. TRANSNAT'L L. 103 (1987).

56. Omnibus Trade and Competiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

57. Export controls are administered through the Office of Export Administration (OEA) within the Department of Commerce. Note, *Export Administration Act of 1979: Continued Liberalization of Export Policies*, 3 DET. C.L. REV. 885, 893 (1983) [hereinafter *Liberalization of Export Policies*].

58. *Id.*

59. 50 U.S.C. app. § 2409(d)(1988).

60. 50 U.S.C. app. § 2405(a)(5)(1988).

Department of Defense has the right to review applications for export of dual use items.[61] Additionally, the Department of Defense can review export applications for certain dual use products, including some types of computers and semiconductors, to certain Western countries.[62] If there is disagreement regarding an export application it is resolved at the Cabinet level and ultimately by the President.[63]

B. *Various Principal Provisions of the EAA*

1. *Foreign Availability*

Foreign availability was determined under the Act of 1979 if the goods or technology was available "in sufficient quantity and sufficient quality."[64] The President retained a right to deny foreign availability for national security reasons.[65]

The EAAA made changes by lossening the requirements in the area of foreign availability determinations. Under the EAAA foreign availability is determined if the goods or technology be available "in sufficient quantity and comparable quality." The operative wording that changed, is comparable quality rather than sufficient quality. Sufficient quality is a subjective determination, that would typically be construed against the exporter. Comparable quality, by contrast, is a more objective determination that would typically be construed in favor of the exporter.

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61. 50 U.S.C. app. § 2404(d)(1988).

62. Overman, *Reauthorization of the Export Administration Act: Balancing Trade with National Security*, 17 L. & POL'Y. INT'L BUS. 325, 334 (1985).

63. 50 U.S.C. app. § 2404(c)(Supp. III 1979).

64. 50 U.S.C. app. § 2404(f)(1)(Supp. III 1979) provides as follows:
The Secretary, in consultation with appropriate Government agencies and with appropriate technical advisory committees . . ., shall review, on a continuing basis, the availability, to which exports are controlled . . ., from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section.

65. 50 U.S.C. app. § 2404(f)(Supp. III 1979) provides as follows:
(1) [U]nless the President determines that approving the license application would prove detrimental to the security of the United States.
(2) The Secretary shall approve any application for a validated license which is required under this section for the export of any goods or technology to a particular country [other than a controlled country] and which meets all other requirements for such an application, if the Secretary determines that such goods or technology will be available from foreign sources . . . .,

Under the EAAA of 1985 a rebuttable presumption was created in favor of the exporter.[66] For determinations of foreign availability under the Act of 1979, the exporter was required to make a showing of foreign availability to the Department of Commerce "in writing and . . . supported by reliable evidence."[67] The EAAA required the Department of Commerce to "accept the representations of applicants made in writing and supported by reasonable evidence, unless such representations are contradicted by reliable evidence."[68] Under the OTCA the entire burden for showing foreign availability is shifted to the Department of Commerce. Unilateral controls are to be lifted, unless the Department of Commerce determines that the commodities are not available from foreign sources.[69]

2. *Country Groups*

Under the Act of 1979 the United States maintained a greater degree of control of high technology exports to countries that were considered a security threat than to those countries that were allies. These controls take the form of different export licenses required, and different levels of technology allowed to be exported depending upon the country group.[70] These classifications are determined by the United States government's approval or disapproval of economic and political events taking place in that country.[71]

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66. EAAA of 1985 codified at 50 U.S.C. app. § 2404(f)(3)(1985).

67. 50 U.S.C. app. § 2404(f)(3)(1982)(Additionally, this provision stated that "[i]n assessing foreign availability with respect to license applications, uncorroborated representations by applicants shall not be deemed sufficient evidence of foreign availability.")

68. *Id.*

69. 50 U.S.C. app. § 2404(f)(3)(A)(1988).

70. For example most commodities can be exported to Canada without a license, thus creating a license free zone between the U.S. and Canada. 15 C.F.R. § 770, Supp. No. 1 (1990).

71. Countries are grouped into seven categories according to symbols "P", "Q", "S", "T", "V", "W", "Y", and "Z".

Country group "Q": Rumania

Country group "S": Libya

Country group "T": Includes most Central and South American countries plus Greenland

Country group "V": Includes all countries not included in any other country group (except Canada)

Country group "W": Hungary and Poland

Country group "Y": Includes the Soviet Union and most the Soviet Bloc countries

Country group "Z": North Korea, Vietnam, Cambodia, Cuba. *Id.*

Licensing requirements for a specific country and commodity can be determined by referring to a country's classification together with reference to the Control List. For example, by referring to country groups, the exact same computer would require a less stringent license if headed to France than if headed to Cuba. Similarly, by referring to the Control List, a powerful computer might be able to be exported to France but not to Cuba.

3. *Commodity Control List (Control List)*

The Control List is maintained by the Department of Commerce. It is the master list of all commercial commodities and technologies under the control of the Office of Export Administration.[72] However, the Department of Defense has input to the Control List by compiling the "military critical technologies (MCT)" list which is incorporated into the Control List.[73] Thus, "dual use" items are on both the Control List and MCT.[74] Previously, the Department of Commerce had been solely responsible for determining the military significance of particular goods and technology. The Act of 1979 marked the first attempt to include the Department of Defense in the compilation of the Control List.[75] The MCT list could only be included with the concurrence of the Department of Commerce.[76] Thus, the Department of Defense was given greater participation in the determination of national security.[77]

4. *Licensing*

The licensing process is extremely complex and beyond the scope of this paper. A few things need to be mentioned for the reader to understand the delays encountered by U.S. business attempting to export high technology.[78]

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72. The Control List appears at 15 C.F.R. § 799.1 (1989).

73. 50 U.S.C. app. § 2404(d)(2)(1990).

74. 50 U.S.C. app. § 2404(d)(3)(1990).

75. *Liberalization of Export Policies*, *supra* note 57, at 893. It was argued that the Department of Commerce had been unable to reconcile its dual function of promoting trade on the one hand, and regulating trade on the other. The Department of Commerce is unable to maintain an objective posture in export decisions due to the considerable pressure from commercial interests.

76. 50 U.S.C. app. § 2404(c)(2)(1990).

77. *See generally* Note, *The Department of Defenses Role in Free-World Export Licensing Under the Export Administration Act*, 1988 DUKE L.J. 785 (1988).

78. For recent changes in licensing that attempt to lessen delays in the granting of export licenses *see* J. Griffin & M. Calabrese & J. Lindsey, *Commerce Takes Steps to Ease Export Licensing Requirements*, 24 INT'L LAW. 535 (1990).

Under the Act of 1979, almost all commodities and technical data exported from the U.S. to any destination required either a general or a validated license.[79] A general license is a broad license, that allows the export of a particular commodity without specific case-by-case approval from the Department of Commerce and without the issuance of a license document.[80] Under a general license, an exporter may export a commodity without specific approval from the Department of Commerce. In contrast, a validated license is only valid to an individual party to export a specific commodity to a particular destination.[81] To obtain a validated license, an exporter must file an application with the Office of Export Administration.

The Act of 1979 was amended by the Export Administration Amendments Act (EAAA) of 1985. Changes were made to national security controls in the export licensing procedure, such as: tightening deadlines for Department of Commerce approval of licenses,[82] eliminating controls on low-technology exports to COCOM countries,[83] and adopting the comprehensive operations license. These changes significantly aided U.S. exporters.[84]

5. *Reexport Controls*

The United States uses the Department of Commerce to control the reexportation from one foreign country to another[85] of U.S.- origin

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79. *See* Overman, *supra* note 62, at 333.

80. *Id.*

81. *Id.*

82. 50 U.S.C. app. § 2409(o)(Supp. III 1985); For exports to COCOM countries that still require licenses, the EAAA provides that: "if the Department of Commerce does not act on the application within 15 days it is automatically granted unless the Department of Commerce notifies the applicant that it requires more time. At any rate, the outside limit is 30 days."

83. EAAA of 1985, 50 U.S.C. app. § 2404(b)(2)(Supp. III 1985). This section provides that:

> [n]o authority may be required before goods or technology are exported in the case of exports to a country which maintains export controls on such technology cooperatively with the United States pursuant to the agreement of the group known as the Coordinating Committee, if the good's technology is at such a level of performance characteristics that the export of the goods or technology to controlled countries requires only notification of the participating governments of the Coordinating Committee.

84. *See* Note, *Trade Regulation-Export controls-COCOM agrees on new multilateral export guidelines allowing eastern bloc to purchase low level technology legally*, 16 GA. J. INT'L & COMP. L. 197 (1986).

85. There are problems with application of U.S. law to citizens of foreign

high technology commodities through the use of reexport controls.[86] Particular commodities, previously exported from the U.S. to approved foreign destinations, may not be exported to a third country without a reexport authorization from the Department of Commerce. Generally, if a commodity was issued under a general license, it would not require reexport authorization. Conversely, if a validated license was required, a reexport authorization would probably be required.

6. *Judicial Review*

Agency action was not subject to judicial review under the Act of 1979. Under the EAAA there are two narrow instances in which there is a limited form of judicial review. First, when the U.S. government sues for recovery of civil penalties for an alleged violation of the EAAA, the accused may ask the district court to "determine de novo all issues necessary to the establishment of liability."[87] Second, an exporter has access to the court for the purpose of enforcing statutory deadlines for the processing of export license applications.[88]

IV. RECENT CHANGES IN EXPORT CONTROL

A. *Multilateral Export Controls*

It has become apparent that unilateral controls will not stop the flow of "dual use" commodities to the Soviet Union.[89] As the level of

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countries. This problem may be solved by bilateral treaties with Eastern European countries. *See e.g.*, Feldman, *The Restructuring of National Security Controls under the 1985 Amendments to the Export Administration Act: Multilateral Diplomacy and the Extraterritorial Application of United States Law*, 21 STAN. J. INT'L L. 235 (1985); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308 (1983); Note, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355 (1984).

86. *See* Note, *High Technology Warfare: The Export Administration Act Amendments of 1985 and the Problem of Foreign Reexport*, 18 N.Y.U. J. INT'L L. & POL. 663 (1986).

87. 50 U.S.C. app. § 2410(f)(1988).

88. 50 U.S.C. app. § 2409(j)(1)(1982).

89. The best known violation of COCOM was the Toshiba- Kongsberg incident where the Soviet Union illegally obtained milling machines. Propellors could be manufactured on these machines that would allow a submarine to run quieter. *See* Note, *Curbing Illegal Transfers of Foreign-Developed Critical High Technology from COCOM Nations to the Soviet Union: An Analysis of the Toshiba-Kongsberg Incident*, 12 B.C. INT'L & COMP. L.R. 181 (1989); Note, *Soviet Diversion of United States Technology: The Circumvention of COCOM and United States Reexport Controls, and Proposed Solutions*, 7 FORDHAM INT'L L.J. 561 (1984); Note, *Controlling the Transfer of Militarily Significant Technology: COCOM after Toshiba*, 11 FORDHAM INT'L L.J. 863 (1988); Note, *Of Ropes, Buttons and Four-By-Fours: Import Sanctions for Violations of the COCOM agreement*, 29 VA. J. INT'L L. 249 (1988).

foreign availability has increased, the effectiveness of the EAA has decreased. Thus, multilateral export controls have become increasingly important to national security. Faced with mounting pressure from COCOM, the Eastern European countries in need of high technology, U.S. business interests and Congress the administration has negotiated export control concessions with COCOM.

1. *Problems Within COCOM*

Restrictive U.S. unilateral controls have almost brought COCOM to the verge of collapse.[90] COCOM member countries have become increasingly frustrated by U.S. foreign policy export controls, extra-territorial application of U.S. law and U.S. reluctance to modify the Control List.[91]

COCOM members have voiced their opposition to U.S. insistence on foreign policy export controls.[92] These controls are used to express U.S. dissatisfaction with actions of other countries such as the Soviet invasion of Afganistan. This was highlighted by the Soviet Pipeline sanctions of the early 1980's.[93] Under the Act of 1979, the Department of Commerce banned the sale of oil and gas equipment to the Soviet Union by foreign companies owned or controlled by U.S. firms. This broad assertion of U.S. law outraged European governments, which characterized the sanctions as extraterritorial application of U.S. law.[94]

COCOM members were further infuriated at the high level meeting in October 1989, where COCOM members voted 16-1 in favor of loosening restrictions on machine tools.[95] The U.S. cast the sole dissenting vote.[96] West Germany has also threatened to withdraw from COCOM due to to conservative U.S. voting.[97] Moreover, COCOM member countries have openly begun to circumvent COCOM review. In 1989, Alcatel, a French telecommunications firm completed plans

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90. *Reauthorization Hearings*, *supra* note 10, at 5.

91. K. Quigley & W. Long, *Export Controls: Moving Beyond Economic Containment*, WORLD POL'Y. J. 165 (Winter 1990), *reprinted in Reauthorization Hearings*, *supra* note 10, at 77-99.

92. *Id.* at 78.

93. *Id.*

94. *Id.* at 87.

95. *Reauthorization Hearings*, *supra* note 10, at 25 (prepared statement of Paul Freedenberg, Former Under Secretary for Export Administration, Department of Commerce).

96. *Id.*

97. *Id.* at 18.

to sell sophisticated telephone switching equipment to the Soviet Union despite U.S. objections raised with COCOM.[98] Similarly, Simon-Carves, a British firm, contracted to build a $450 million dollar factory automation plant in the Soviet Union. "Great Britain refused to submit the case" for COCOM review "alleging that it fell within national discretion."[99]

Meanwhile, the U.S. has been insisting on unilateral controls. The U.S. West situation is a case in point.[100] U.S. West was denied a license to build a fiber optic system across the Soviet Union.[101] The Department of Defense raised the concern that it would be more difficult for U.S. intelligence to monitor Soviet communications if the fibre optic network was installed.[102] Therefore, U.S. West was denied a license.[103] Thus, the national security concerns won the battle but lost the war.

It is critical for national security interests to restore at least an uneasy concensus within COCOM. By bargaining away low technology export controls that pose no security threat, the U.S. would probably get more cooperation on other multilateral export control issues.[104] The Bush Administration, facing tremendous political pressure, reluctantly agreed to loosen the COCOM Industrial List with corresponding changes to the U.S. Control List.

2. *Bush Administration Negotiations with COCOM*

a. *Proposals*

On May 2, 1990, the Bush Administration submitted proposals to the Coordinating Committee for Multilateral Export Controls (COCOM) to reduce the the number and types of items on the Industrial List.[105] An evaluation of export controls was conducted that have both civilian and military uses.[106] The Bush Administration proposed a re-

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98. *Reauthorization Hearings*, *supra* note 10, at 81.
99. *Id.*
100. The Financial Times Ltd.; Business Law Brief, June 1990 (Lexis).
101. *Id.*
102. 136 CONG. REC. H3278 (June 6, 1990 daily ed.)(statement of Rep. Houghton).
103. *Id.*
104. *Reauthorization Hearings*, *supra* note 91, at 87.
105. *See supra* note 100.
106. This review was done by the Department of Defense. The White House, Office of the Press Secretary, Fact Sheet, Comprehensive U.S. Proposal for Modernizing COCOM, May 2, 1990.

formulation of the COCOM core list of technologies in the "priority sectors" of computers, telecommunications equipment and machine tools.[107] The primary beneficiaries of the changes in the core list would be the emerging democracies of Eastern Europe. In a high level meeting on June 6-7, 1990, COCOM agreed with the Bush proposal to create and implement a new list of controlled goods and technologies to supersede the existing core list.[108]

The new list would be built "from scratch" without explicit reference to the existing core list.[109] All COCOM member countries agreed to submit their proposals by the end of 1990.[110] Proposed implementation is January, 1991.[111] Once the new core list is agreed upon, the United States Control List would be modified to reflect the results of this core list approach.[112] COCOM also agreed to set less restrictive standards for export to Poland, Hungary and Czechoslovakia if these governments take precautions against diverting technologies to the Soviet Union.[113]

Furthermore, COCOM agreed to a new standard for creating the core list of controlled technologies. The previous standard for COCOM, in determining which items to restrict, was termed "strategic significance."[114] A commodities "strategic significance" was determined by whether the technology would increase the military effectiveness of the Soviet Union and other targeted countries.[115] This standard was abandoned on June 6-7 for a less rigid one. The new standard is "strategic

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107. COCOM also agreed to remove 30 out of 116 items off the control list. On July 1, COCOM agreed to remove 30 items including vacuum pumps and rolling mills. An additional eight items, including sophisticated robots and cameras will be taken off the list on August 15. The Financial Times, *supra* note 100.

108. The core list is being reduced from 10 to 8 categories. They are:

1. Electronics design, development and production;
2. Advanced materials and material processing;
3. Telecommunications;
4. Sensors and sensor systems and laser;
5. Navigation and avionics systems;
6. Marine technology;
7. Computers;
8. Propulsion systems. *Id.*

109. *See supra* note 106.

110. N. Y. Law Journal August 2, 1990, at 5, col. 1.

111. The United States Department of Commerce, The Under Secretary for Export Administration, Press Release, June 12, 1990.

112. *Id.*

113. *See supra* note 110, at 7, col. 5.

114. Heritage Foundation Backgrounder, *supra* note 13.

115. *Id.*

criticality."[116] This standard would consider the "inherent controllability" of a commodity. COCOM member nations would be able to argue that although an item may be useful to the Soviet military it should not be controlled because it is freely available on world markets.

b. *Agreements from the June 6-7, 1990, High Level COCOM Meeting*

The agreement calls for the immediate elimination of 30 of the 116 categories currently on the COCOM control list, with 13 others to be reduced.[117] In the United States this is expected to release about $48 billion dollars in export sales.[118]

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116. *Id.*

117. *See supra* note 111. These items are:

1. Spin forming and flow forming machines;
2. Vacuum pump systems;
3. Electric furnaces;
4. Electric arc devices;
5. Metal rolling mills;
6. Equipment to manufacture or test printed circuit boards;
7. Equipment for the continuous coating of polyester based material magnetic tape;
8. Specially designed tooling and fixtures for the manufacture of fibre-optic connectors and couplers;
9. "Stored-programme controlled" equipment;
10. Equipment specially designed for in-service monitoring of acoustic emissions in airborne or underwater vehicles;
11. Technology for industrial gas turbine engines;
12. Floating Docks, software and technology;
13. Pulse modulators;
14. Telemetering and telecontrol devices;
15. Solid state amplifiers;
16. Cathode ray tubes;
17. Cold cathode tubes and switches;
18. Semiconductor diodes and dice wafers;
19. Transistors and dice and wafers therefor;
20. Thyristors and dice and wafers therefor;
21. Hydrogen/hydrogen isotope thyratrons of ceramic-metal construction and accessories;
22. Thermoelectric materials and devices;
23. Oscilloscopes;
24. Quartz crystals and assemblies;
25. Materials composed of crystals having spinel, hexagonal, or garnet crystal structures, thin film devices;
26. Pyrolitic deposition technology;
27. Steel alloys in crude or semi-fabricated form;
28. Low density rigid, carbon-bonded, fibrous or non-fibrous thermal

Computer products which would be decontrolled include state of the art personal computers[119] and mainframe systems with processing data rates of up to 275 megabytes per second.[120] The latter would allow for sale of large systems which could be used for sophisticated banking needs, or airline reservation networks.[121] There would be no differentiation between Eastern Bloc countries and the Soviet Union under the COCOM proposal.

For telecommunications, COCOM has agreed to lift restrictions on basic technologies such as cellular systems and satellite ground stations.[122] For advanced fiber optic equipment and microwave communications systems, COCOM has differentiated between the Soviet Union and the Eastern Bloc. This technology although denied to the Soviet Union, would be licensed to the Eastern Bloc. To qualify for this equipment, the country must adopt certain safeguards against diversion of the technology to controlled destinations and unauthorized end users.[123]

The greatest levels of decontrol have been effected for advanced machine tools. These relaxations, most of which are on the immediate decontrol list, will allow approximately 75 percent of the advanced machine tools produced in the U.S. to be exported without prior licensing approval.[124] Currently, it is estimated that 90 percent of the machine tools require a license before being cleared for export to Eastern Europe.[125]

3. *The 101st Congress*

Although Congress approves of the proposals made by the Bush Administration to COCOM it wants to go further faster. The Bush Administration seeks to extend the EAA for another year while ne-

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insulating materials;

29. Polycarbonate sheets;

30. Tantalates and niobaters, except fluorotantalates.

118. The Financial Times, *supra* note 100.

119. This would include the previously controlled IBM-PC and Apple MacIntosh.

120. *See supra* note 111.

121. This COCOM proposal would allow computer exports at the same level as that granted to China in 1985-up to the so called "green line." The Bush proposal limits the accessibility granted to the Soviet Union. The Financial Times Ltd., supra note 100.

122. *See supra* note 111.

123. Heritage Foundation Backgrounder, *supra* note 13.

124. *See supra* note 111.

125. *Id.*

gotiating with COCOM to reduce the number of items on the Industrial List.[126] Congress also seeks to remove the burdens placed upon U.S. business by the unilateral control system by reauthorizing the EAA with the Export Bill of 1990.

The Export Bill of 1990 would be a sweeping reform of the EAA.[127] Major modifications include commodity jurisdiction given to the Department of Commerce and a license free zone within COCOM up to the China green line. Congress is concerned that by allowing a case-by-case review, old cold war attitudes will prevail and it will be a case-by-case turn down rather than acceptance.[128]

On June 6, 1990, the House of Representatives overwhelmingly approved[129] the Export Facilitation Act of 1990 (Export Bill). The Senate

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126. *Reauthorization Hearings*, *supra* note 10, at 534-35 (letter from Brent Scowcroft on May 2, 1990 to the House Foreign Affairs Committee).

127. H.R. 4653, 101st Cong., 2d. Sess. § 2 Findings and Purpose

(a) FINDINGS-The Congress finds that-

(1) there has been an extraordinary movement toward democracy and free markets in the countries of Eastern Europe;

(2) it is in the national security and economic interests of the United States to solidify the changes that have taken place and to promote additional progress;

(3) advanced technology that is committed to civilian purposes will facilitate the economic development of those countries of Eastern Europe, and broaden lines of communication with western countries;

(4) those countries of Eastern Europe that are committed to and capable of protecting against improper diversion should receive the technology that will help foster democracy and free market economies;

(5) by requiring licenses for exports to its closest allies, the United States spends a disproportionate amount of limited resources on controlling exports to friendly countries;

(6) the export control system has been unable or unwilling to reduce the number of items controlled for national security purposes; and

(7) the export control system is mired in bureaucratic redundancy and inefficiency.

(b) PURPOSES-It is the Purpose of this Act-

(1) to improve the efficiency of the export control system of the United States;

(2) to promote democracy and free enterprise in Eastern Europe by allowing for the export of goods and technology that will facilitate or assist in their economic development; and

(3) to make Federal agencies that administer export controls accountable for their actions, and afford due process to such controls.

128. *Reauthorization Hearings*, *supra* note 10, at 47 (statement of Rep. Houghton).

129. By a vote of 312-86. 136 CONG. REC. H3355 (daily ed. June 6, 1990).

Banking, Housing and Urban Affairs Committee, which has jurisdiction over export control in the Senate, approved a companion bill on September 13th.[130] The Senate bill will have to be reconciled with the House bill and then be acceptable to the Bush Administration to avoid veto. Because COCOM makes decisions only by unanimous consent, a less restrictive stance by the United States would be likely to bring about harmonization of export controls within COCOM.[131]

The Bush Administration was opposed to the bill, because it could potentially undermine the administration's conservative stance during the high level June 6-7 COCOM negotiations.[132] Moreover, the Bush Administration would like to see the restrictions placed on foreign policy export controls removed from the EAA.[133] These restrictions require the President to make an extensive set of determinations before imposing foreign policy export controls.[134] Also, under the Export Bill of 1990, Congress is dictating internal Executive branch procedure by giving sole jurisdiction over the Control List to the Department of Commerce.[135] The Bush Administration views this part of the bill as unconstitutional, because it violates the separation of powers provision in the Constitution.[136]

As of this writing the Act of 1979 has expired and the Export Bill of 1990 remains deadlocked because of the budget crisis.[137] The Bush Administration has invoked the International Economic Emergency Powers Act (IEEPA)[138] which gives the President the extremely broad authority to cut off exports once a national emergency has been declared.[139]

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130. 7 Int'l Trade Rep. (BNA) 1607 (Oct. 24, 1990).

131. Quigley & Long, *supra* note 10, at 87. *See generally* Dahl, *U.S. Restrictions on High Technology Transfer: Impact Abroad and Domestic Consequences*, 26 COLUM. J. TRANSNAT'L L. 27 (1987).

132. 7 Int'l Trade Rep. (BNA) 836 (June 13, 1990).

133. *Reauthorization Hearings*, *supra* note 10, at 534-535 (letter from Brent Scowcroft). *See* LONG, U.S. EXPORT CONTROL POLICY: EXECUTIVE AUTONOMY VERSUS CONGRESSIONAL REFORM (1989).

134. 50 U.S.C. app. § 2405(b)(1990).

135. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

136. *Reauthorization Hearings*, *supra* note 10, at 534-35 (letter from Brent Scowcroft).

137. For a review of how the OTCA was finally passed after years of debate *see* White, *Negotiating and the Congressional Conference Process: A Case Study of the EAA and OTCA*, 13 N.C.J. INT'L L. & COMM. REG. 333 (1988).

138. 50 U.S.C. § 1701 (Supp. I 1977).

139. 8 Int'l Trade Rep. (BNA) 234 (February 13, 1991).

4. *Congressional Concerns-The Export Facilitation Act of 1990*

a. *Administration of the Export Bill*

The proposed Export Bill of 1990 marks a major change in jurisdiction between the Department of Commerce and Department of Defense.[140] Although the Department of Defense will still have an advisory capacity in the formulation of the Control List, an item may no longer be on both the Control List and the United States Munition List.[141] In the case of a disagreement between the Department of Commerce and the Department of Defense, if after attempting to resolve the dispute for two months,[142] the matter must be resolved by the President within 10 days or the exporter will be allowed to export the goods. Thus, under the Export Bill of 1990, the Department of Commerce would have exclusive control of the Control List.[143] National security would not be threatened because a high technology product with direct military application would appear on the United States Munitions List.[144]

The Department of Defense would still review items[145] overtly headed to the Soviet Union,[146] headed to countries that the Department of Commerce and Department of State determine are still in Soviet orbit[147] or headed to destinations where the Department of Commerce determines the product will be overtly used for military purposes.[148]

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140. Other more radical approaches have been previously suggested. One is to create a separate agency, called the Office of Strategic Trade which has neither ties to Commerce or Defense. *See* Morehead, *Export Controls: Who's Policing the Enforcers?*, 13 N.C.J. INT'L L. & COMM. REG. 307 (1988).

141. EFA of 1990, § 9, amending the EAA of 1979 codified at 50 U.S.C. § 2404(c)(8) which states:

> (A) Notwithstanding any other provision of law, no item may be included on both the control list and the United States Munitions List.

142. EFA of 1990, § 9, amending the EAA of 1979 codified at 50 U.S.C. § 2404(c).

143. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. § 2404(b)(F).

144. 15 C.F.R. § 771 (1989).

145. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

146. *Id.* at § (A).

147. *Id.* at § (B).

148. *Id.* at § (C).

b. *Changes to Various Principal Provisions*

i. *Foreign Availability*

The Export Bill would incorporate the proposals presented by the Bush Administration to COCOM,[149] for determinations of foreign availability.[150]

ii. *Country Groups*

Under the proposed Export Bill, Hungary, Poland and Czechoslovakia would be removed from the controlled list. They would remain on the decontrolled list and have their licenses favorably reviewed as long as:

(i) The country's policies are not adverse to the security interests of the United States or any other country participating in the Coordinating Committee.

(ii) The country does not pose a significant military risk to the United States or any other country participating in the Coordinating Committee.

(iii) The country does not pose an unreasonable threat of-

(I) diversion of the goods or technology exported from the United States or other country participating in the Coordinating Committee to an unauthorized use or assignee; or

(II) unauthorized reexport of the goods or technology to a controlled country.[151]

iii. *Commodity Control List (CCL)-Indexing*

As goods and technology become obsolete, they no longer pose a threat to national security.[152] In order to assure that requirements for licenses are periodically removed an indexing system was created.[153] The Export Bill provides for automatic[154] increases in the performance

149. *See supra* footnotes 119-126.

150. EFA of 1990, § 3, amending the EAA of 1979 codified at 50 U.S.C. app. § 2402.

151. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

152. EFA of 1990, § 12, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(g).

153. There was an indexing system under the OTCA at 50 U.S.C. app. § 2404(g)(1988).

154. EFA of 1990, § 15, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(g).

levels of goods or technology subject to any licensing requirement.[155]

For example, on supercomputer exports, an indexing system would be created to be commensurate with technological advances in the computer industry. As long as the destination country maintains controls pursuant to the COCOM agreement, "no security safeguard procedures may be required in connection with any export or reexport of a supercomputer with a theoretical peak performance at or below approximately 25 percent of theoretical peak performance of the average of the two most powerful supercomputers currently available commercially in the United States or elsewhere."[156]

To make sure that decontrol is continued after the passage of the Export Bill a sunset provision was added.[157] This provision would provide full decontrol of all goods and technologies by 1992 to all non controlled countries.[158] In addition the Export Bill provides for publishing of the COCOM Industrial List which would allow exporters to determine which goods are subject to licensing requirements.[159]

iv. *Licensing-License Free Zone*

The Export Bill would go further in decontrolling exports multilaterally than the Bush Administration proposals to COCOM. Under the Export Bill, exports to COCOM countries,[160] with technology below that of the China green line would not require export licenses.[161] This would create a license free zone within COCOM. This would coincide with EC 1992, creating a single European common market, where the

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155. *See supra* note 152.

156. EFA of 1990, § 6(B), amending the EAA of 1979 codified at 50 U.S.C. app. § 2402(a)(6).

157. EFA of 1990, § 10, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(c).

158. *Id.*

159. EFA of 1990, § 14, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404.

160. EFA of 1990, § 5, amending the EAA of 1979 codified at 50 U.S.C. app. § 2402(a)(6)(B). The EFA defines goods or technologies. The export of which, to the Peoples Republic of China, on the date of enactment of the Export Enhancement Act of 1988 would require only notification of the participating governments of the Coordinating Committee.

161. *Id.* [N]o authority or permission may be required under this section for the export or reexport of goods or technology to, or the reexport of such goods or technology cooperatively with the United States pursuant to the agreement of the group known as the Coordinating Committee.

European countries would not require licenses to ship to each other.[162]

Additionally, new criteria have also been proposed for determination of whether goods or technology would be used for a civil purpose. These criteria would allow for the export of technology to controlled countries if the stated end use is for civil rather than military purposes. Under the Export Bill of 1990, four criteria must be met to determine if the end use is civil. First, the civil application of the goods is well established in countries other than controlled countries.[163] Second, the goods are reasonable in quantity and quality for the proposed end use.[164] Third, the government of the end user has provided assurances that the technology will only be used for its stated end use.[165] Finally, the risk of diversion to an unauthorized user can be verified.[166] An additional safeguard is that the exporter, as a condition of his export license, would be required to monitor the goods for reexport.[167]

Telecommunications equipment has been included in the COCOM license free zone.[168] This would include telephone switching equipment, test equipment, microwave equipment and telecommunications equipment that includes lasers.[169]

v. *Reexport Controls*

The Export Bill of 1990 would significantly reduce license requirements for reexport. Licenses would not be required for reexport within the COCOM trade free zone.[170] Licenses would not be required for goods with less than 25 percent of the theoretical peak performance of original U.S. technology.[171] Licenses would not be required for goods to controlled countries if the technology being reexported would "require only notification of the participating governments of COCOM."[172]

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162. *Reauthorization Hearings, supra* note 10, at 327 (opening statement of Rep. Feighan).

163. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. EFA of 1990, § 8, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

169. *Id.*

170. *See supra* footnotes 160-61.

171. EFA of 1990, § 6, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

172. *Id.*

However, the Export Bill of 1990 does require assurances from the end user in his respective country. Specifically, the end user's government must allow on site verification of the use and condition of the goods and technology exported.[173] That government must impose and enforce controls to prevent reexport.[174] Finally, the government must prevent the technology from being used in an unauthorized manner.[175] If these requirements are met, the Secretary of State should negotiate a bilateral treaty to implement these safeguards.[176]

vi. *Due Process*

Under the Export Bill of 1990 judicial review would be expanded.[177] An exporter would have access to the courts to determine whether the Department of Commerce's administration of the export control process conforms with statutory authority.[178] However, no discretionary rulings may be made by the court to determine if a technology should be on the Control List for national security purposes.[179]

vii. *Penalties*

To provide deterrence against violations of the Export Bill, penalties have been drastically increased. For violations of the regulations fines have been raised from no more than 5 times to no more than 10 times the value of the goods to be exported.[180] Corporate fines have been raised from a 1 million to 2 million dollar limit.[181] Individual fines have been raised from a limit of $250,000 to $500,000.[182] Finally, jail terms have been doubled from 5 to 10 years maximum.[183]

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173. EFA of 1990, § 7, amending the EAA of 1979 codified at 50 U.S.C. app. § 2404(b).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Reauthorization Hearings*, *supra* note 10 at 430 (prepared statement of Grant D. Aldonas, Section of International Law and Practice, American Bar Association).

178. EFA of 1990, § 18, amending the EAA of 1979 codified at 50 U.S.C. § 2412(a).

179. EFA of 1990, § 18, amending the EAA of 1979 codified at 50 U.S.C. § 2412(a)(2)(b).

180. EFA of 1990, § 16, amending the EAA of 1979 codified at 50 U.S.C. § 2410(b)(1).

181. *Id.* at § (b)(2).

182. *Id.* at § (b)(3).

183. *Id.* at § (b)(4).

VI. A SUGGESTED FOUR PART BALANCING TEST

Previous export control legislation used a two part balancing test to determine the level of U.S. control over exports. This two part balancing test consisted of weighing national security concerns against U.S. business interests. As can be seen from the proceeding discussion, liberalization of U.S. export controls has been occurring gradually, especially since 1979. In essence, with the advent of foreign availability, there has been a three part balancing test since 1979. This third part has been foreign availability.

Under the original two part test, national security outweighed U.S. business interests. With the advent of foreign availability the export controls swung further to the side of favoring U.S. business. The changes that are taking place in Eastern Europe have changed the balance again, helping swing the balance to the side of U.S. business interests.

This note proposes that a fourth prong be added which would consider the needs of the Eastern Europeans for western high technology. This fourth prong again swings the balance to the side of U.S. business for two reasons: (1) strengthening democracy in Eastern Europe would improve national security and (2) only by allowing for easier export of high technology goods, will the U.S. insure that the goods reach these countries rather than being tied up in a statutory maze of export controls in Washington.

The Export Bill implicitly uses a four prong balancing test which consists of: (1) the needs of the emerging Eastern European democracies for American technology; (2) the needs of American technology firms for new markets in Eastern Europe; (3) the needs of the United States not to be left far behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the needs of the United States to defend itself against present and future adversaries.[184]

A. *Needs of the Emerging Eastern European Democracies for American Technology*

The United States has a huge stake in securing democracy in Eastern Europe.[185] These changes can be cemented in place by making sure that Eastern European economies function properly. This can only be done with modern technology.

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184. Heritage Foundation Backgrounder, *supra* note 13.

185. *Reauthorization Hearings*, *supra* note 10, at 5 (statement of Rep. Wyden).

The Eastern European countries need to modernize their inefficient economies.[186] Political democratization could fail if their economies falter.[187] There is little debate either within COCOM or the U.S. that the need is real. The Bush Administration, Congress and COCOM are essentially in agreement in deciding what technology would help the Eastern European countries.

Communication, and improved communication equipment, is perhaps the most critical element. Both the Bush proposal to COCOM and the Export Bill of 1990 dramatically increase the level of communications technology that can be exported to Eastern Europe. Increased civilian communications both within and outside Eastern Europe would only serve to further liberalize the political climate there and make it more difficult to reverse the current trend toward a more pluralistic and open society.[188] Moreover, the value in national security terms of having Poland, Czechoslovakia and Hungary free of Soviet control cannot be overestimated.[189]

The counterargument is that Eastern Europe will only serve as a stopping off point for technology bound for the Soviet Union. Moreover, it would be naive to think that all ties with the Soviet Union and the KGB are broken after many years of Soviet domination. In fact, if these countries ever fell back into the hands of the Soviets, the high technology infrastructure would already be in place.

This counterargument fails for two reasons. First, these countries want to be free of Soviet control and have great incentives to protect any technology they may import against diversion to the Soviet Union.[190] If they fail to protect the technology they would be barred from importing these technologies in the future.[191] Second, protective measures are being taken by COCOM and by Congress, under the Export Bill of 1990, which should adequately safeguard diversion.

B. *Needs of American Technology Firms For New Markets in Eastern Europe*

One of the most pressing problems facing the U.S. is the growing trade deficit. A large part of the reason for this growing trade deficit

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186. *Reauthorization Hearings*, *supra* note 10, at 57 (statement of Professor Angela Stent, Department of Government, Georgetown University).

187. *Id.*

188. *Reauthorization Hearings*, *supra* note 10, at 20 (statement of Paul Freedenberg, Baker and Botts, Former Under Secretary for Export Administration, Department of Commerce).

189. *Reauthorization Hearings*, *supra* note 10, at 5 (statement of Rep. Wyden).

190. *See supra* notes 173-175.

191. *Id.*

is the restrictive export control policy of the United States for high technology. As long as the U.S. requires licenses, there will be corresponding losses to U.S. business. The National Academy of Science (NAS) report[192] stated that 38 percent of the companies surveyed shift to other sources of supply to avoid potential problems with U.S. export controls. Thus, U.S. firms, even if allowed to export a product are at a competitive disadvantage with Japanese and Western European firms.

This restrictive export policy has resulted in a statutory maze, embodied in the EAA, which includes: restrictive country groups, a broad Control List, confusing licensing requirements, commodity jurisdiction, reexport license requirements and lack of due process for U.S. exporters. The Bush Administration and Congress fundamentally disagree on what changes are necessary to the EAA to support U.S. business.

The Bush Administration proposal to COCOM would provide relief to U.S. business in only two areas: Poland, Czechoslovakia and Hungary would be removed from the controlled country groups and the U.S. Control List and COCOM's Industrial List would be modified to provide Poland, Czechoslovakia and Hungary the high technology products they require. These changes would provide some relief to U.S. business but not nearly enough.

By contrast, the Export Bill of 1990 would provide relief in virtually all areas. First, Poland, Czechoslovakia and Hungary would be removed from the list of controlled countries. Second, the U.S. Control List would be modified to allow high technology products to be exported to Eastern Europe. The major difference between the Bush administration and the Export Bill is in regards to subsequent reformulation of the Control List. The Export Bill would statutorily mandate that the U.S. Control List remain the same as that of COCOM. Under the Bush proposal, the Department of Commerce would still have the authority to unilaterally change the U.S. Control List to be more restrictive than COCOM's. Thus, the Bush proposal to COCOM might be illusory because if history is any indication, the U.S. Control List will become more restrictive than COCOM's.

The next four areas are where the major differences lie: licensing requirements, commodity jurisdiction, reexport license requirements and lack of due process for U.S. exporters. In these four areas only

192. COMM. ON SCIENCE, ENG'G., AND PUB. POLICY, NAT'L. ACADEMY OF SCIENCES, NAT'L. ACADEMY OF ENG'G., INST. OF MEDICINE, BALANCING THE NATIONAL INTEREST: U.S. NATIONAL SECURITY EXPORT CONTROLS AND GLOBAL ECONOMIC COMPETITION 11 (1987) [hereinafer NAS report].

the Export bill has spoken. The Bush Administration proposals do not suggest any changes to these four critical areas.

The first area is licensing requirements. The Export Bill would create a license free zone within COCOM. This would dramatically ease problems for U.S. business and bring U.S. business on a level playing field with our COCOM allies.[193] It would also free up $8-$10 billion dollars in export business that the U.S. is losing just because of stringent licensing requirements. Moreover, it would help to shore up the precarious COCOM consensus.

The second area is commodity jurisdiction. The Export Bill would eliminate the Department of Defense from the licensing process and formulation of the Control List. Major reports for years, have indicated that this approach would expedite the licensing process without jeopardizing national security. In 1986, the General Accounting Office (GAO) published a report questioning whether the Department of Defense should be involved in free world licensing.[194] In 1987, the National Academy of Science (NAS) conducted a study which criticized the Department of Defense stating "industry has become confused and alarmed . . .., and allies have become annoyed . . .."[195] The NAS report noted that five percent of all applications take 100 days or more causing huge losses to U.S. exporters.[196]

The third area is reexport license requirements. Reexport controls would be eliminated, under the Export Bill for non-controlled countries. In place of reexport controls are assurances that the country will take precautions to insure that the technology is not diverted to the Soviet Union. This approach is correct for two reasons. First, it would reduce the licensing load on U.S. business and help to create a level playing field with foreign competition. Second, elimination of reexport licensing would help shore up the shaky COCOM consensus that is infuriated with extraterritorial application of U.S. law. Moreover, with EC 1992, member European countries will no longer be requiring reexport licenses.

The fourth area is due process for U.S. exporters. Under the Export bill, U.S. exporters would have access to judicial review of Department of Commerce decisions. Under the EAA the Department of Commerce was not held accountable for agency inaction or deviation

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193. *Reauthorization Hearings*, *supra* note 10, at 358. Out of 75,400 licenses processed in 1989, 27,500 were for COCOM destinations. Only 10 were denied.

194. GENERAL ACCOUNTING OFFICE, U.S. CONGRESS, EXPORT LICENSING: COMMERCE-DEFENSE REVIEW OF APPLICATIONS TO CERTAIN FREE WORLD NATIONS (1986).

195. NAS report, *supra* note 192, at 161.

196. *Id.* at 13.

from the statutory requirements. Under the Export Bill the Department of Commerce would be held accountable for its actions. Providing judicial review, will give an element of fairness, which has been sorely lacking in previous legislation.

The Bush proposals to COCOM will probably be effective in getting the needed technology to Eastern Europe. They will not be effective in creating a level playing field for U.S. business because four problem areas were not addressed. Nor will they provide incentives to other COCOM members to negotiate in the future. Under the Bush proposals, COCOM negotiations will probably falter with no corresponding gain for U.S. national security.

The Export Bill of 1990 goes further towards helping U.S. business. The Export Bill would remove the burden of licensing requirements, clarify commodity jurisdiction, eliminate reexport licensing and allow due process. These changes should make the system more responsive to the needs of U.S. business.

C. *The Needs of the United States Not to be Left Far-Behind as the West Europeans and Japanese Sell Technology With Almost no Restriction*

Problems with determinations of foreign availability are recognized by the Bush Administration, COCOM and Congress. From the June 6-7 meeting, COCOM agreed to change the manner in which determinations of foreign availability are made. By shifting to "strategic criticality" from "strategic significance", COCOM would incorporate findings of foreign availability directly into the COCOM Industrial List. In theory, this approach would appear acceptable.

However, U.S. business needs may not be met because the speed at which COCOM changes are implemented might be slow. In fact, the COCOM members will not be submitting proposals for a new COCOM Industrial List until the end of 1990. Moreover, the Bush Administration would still be free to change the U.S. Control List to be more restrictive than that of COCOM which would eliminate any advantages gained by U.S. business from the current COCOM negotiations.

The Export Bill would go further towards recognizing and dealing with U.S. business concerns. The Export Bill would statutorily mandate that the U.S. Control List stay the same as COCOM's and create an indexing system for removal of technologically obsolete items from the Control List.

The Bush proposals to COCOM do not give U.S. business any guarantees regarding the future status of the U.S. Control List. Nor

would it appear that future COCOM negotiations would be rapid to remove items that are technologically obsolete from the COCOM Industrial List. The Bush proposals would, for the time being at least, improve the situation for U.S. export of high technology.

However, high technology is a rapidly advancing field. The Export Bill recognizes the rapid pace of technological growth and the corresponding slow pace of COCOM negotiations by including indexing provisions. Therefore, the Export Bill proposals will provide assurances to U.S. businessmen and to overseas customers that the U.S. export control system will change with technological change. Moreover, COCOM consensus would be improved because it is likely that as technological advances are made, the U.S. would be, without the Export Bill, the sole dissenter for removing obsolete technology from the COCOM Industrial List.

D. *The Need of the United States to Defend Itself Against Present and Future Adversaries*

Perhaps the best way that the U.S. can defend itself against the use of high technology obtained illegally is to strengthen COCOM. COCOM is on the verge of collapse due primarily to U.S. insistence on strict controls. Yet it is apparent that U.S. national security controls are no more effective than the cooperation the U.S. is able to gain from other producers and exporters of high technology. U.S. national security interests would be better served by building higher fences around fewer products.[197]

By shoring up COCOM consensus more countries might join. A goal of COCOM should be to bring newly industrializing countries such as Taiwan, Korea and Singapore into the COCOM multilateral control framework. This might be possible by reducing the main complaints of COCOM members with the U.S., namely elimination of U.S. unilateral controls and extraterritorial application of U.S. law. The Export Bill addresses these issues which are a problem within COCOM.

Less stringent controls will also generate new technology for U.S. military interests.[198] The strict controls have proved to be a deterrence

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197. N.Y. Times, June 8, 1990, § A, at 6, col. 5 (statement of Allen Wendt, Special Representative for Strategic Technical Policy at the State Department).

198. *Reauthorization Hearings*, *supra* note 10 at 89. "Today, defense procurement is no longer the catalyst of technological advancement; instead, advances in civilian technologies often drive the development of the military sector."

to developing commercial hardware. Yet much of this technology is generated by the civilian sector.

It is going to be important, from the standpoint of U.S. national security during COCOM negotiations, to differentiate between Eastern Europe and the Soviet Union. Many COCOM members are opposed to this differentiation because it would hinder export to the Soviet Union and require COCOM to review each export to determine the final destination. Yet, this differentiation was incorporated into the Export Bill and it appears that the Bush Administration is in agreement. From the standpoint of U.S. national security it is vital that COCOM differentiate because otherwise a license free zone would be created with the Soviet Union.

Perhaps the most powerful argument against passing the Export bill is that the export control system has been very successful in denying the Soviets U.S. military technology. Some argue that the U.S. should wait and see what the outcome of new Soviet policies such as glasnost and perestroika will bring and whether they will last. This argument is persuasive when viewed in light of what recourse the U.S. has for violations of the COCOM multilateral agreement. COCOM, as a non binding multilateral agreement does not even have the power of a treaty. The only recourse, short of war, is that the U.S. can impose sanctions for violations, such as a denial of the U.S. as an import market for alleged violators. This is what occurred following the Kongsberg-Toshiba incident where the U.S. imposed a three year moratorium on the import of Toshiba products into the U.S. This has proved to be a powerful deterrent to further violations of the COCOM agreement. Finally, if COCOM export controls are not loosened, there may no longer be a COCOM. Certainly, it is better to have an arguably less stringent organization than no organization at all.

VII. CONCLUSION

The EAA expired on September 30, 1990.[199] The previous balance of U.S. national security concerns over U.S. business interests is now obsolete in determining U.S. policy regarding high technology exports.[200] Recent historical changes in Eastern Europe and a burgeoning U.S. trade deficit are two additional factors to consider when reauthorizing the EAA.

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199. *See supra* note 12.

200. *See supra* note 5.

This note suggests four factors for Congress and the Bush Administration to consider which are: (1) the needs of the emerging Eastern European democracies for American technology; (2) the needs of American technology firms for new markets in Eastern Europe; (3) the needs of the United States not to be left far behind as the West Europeans and Japanese sell technology with almost no restriction; and (4) the needs of the United States to defend itself against present and future adversaries.[201] The Export Bill is deadlocked because the Bush Administration and Congress have different approaches to balancing these four factors within the present EAA unilateral, and COCOM multilateral, frameworks.

First, the Bush Administration and Congress are in general agreement regarding the high technology needs of Eastern Europe. It is considered imperative that for the emerging democracies to survive these countries must have high technology to modernize their economies.

Second, the Bush Administration prefers to leave the U.S. unilateral controls intact while negotiating with COCOM for change in multilateral controls. The Bush proposals to COCOM will probably be effective in getting the needed technology to Eastern Europe. Through modification of the U.S. Control List and COCOM 's Industrial List, and the removal of Poland, Czechoslovakia and Hungary from the controlled country list, high technology products should reach Eastern Europe. It is possible that the U.S. statutory maze might still stand in the way of U.S. high technology being exported to Eastern Europe.

Still, four problem areas in U.S. unilateral controls were not addressed by the Bush Administration. These are the areas of licensing, reexport controls, commodity jurisdiction and due process. Without addressing these major issues U.S. business will not be able to compete with its worldwide competitors.

The Export Bill of 1990 goes further towards helping U.S. business by making drastic reductions in U.S. unilateral controls. The Export Bill provides solutions to the problems of licensing requirements, commodity jurisdiction, reexport licensing and due process. These changes should make the system more responsive to the needs of U.S. business.

Under the Export Bill, licensing requirements would be removed for COCOM allies. This would create a license free zone within COCOM and drastically reduce the burden on U.S. business. Commodity jurisdiction would be given solely to the Department of Commerce. This would reduce the number of items on the Control List and help

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201. *See supra* note 13.

reduce licensing time. Reexport licenses would no longer be required so long as the destination country provides assurances against diversion to the Soviet Union. This would reduce the licensing burden on U.S. business as well as reduce the conflict in COCOM regarding the extraterritorial application of U.S. law. Finally, due process would be given to U.S. exporters. This would be a further assurance to U.S. business that the system will function properly in the future.

Third, both the Bush Administration and the Export Bill would provide for less restrictive determinations of foreign availability. Under the Bush proposals to COCOM foreign availability determinations would be incorporated into the COCOM Industrial List. However, under the Bush proposal there would not be any future guarantees that the U.S. Control List and COCOM's Industrial List would remain the same.

Under the Export Bill of 1990, Congress would statutorily mandate that the U.S. Control List and COCOM's Industrial List remain the same. Moreover, an indexing feature would be provided that would automatically take obsolete technology off the Control List as the technology level increases. Under the Export Bill, U.S. business interests would benefit and the indexing feature would be more in line with general COCOM consensus. Thus, the Export Bill would go further in shoring up an uneasy COCOM consensus.

Fourth, both the Bush Administration and Congress are in agreement that multilateral controls are critical to U.S. national security. It is apparent that U.S. national security controls are no more effective than the cooperation that the U.S. is able to gain from other producers and exporters of high technology. However, it was only when COCOM was on the verge of collapse, along with pressure from Congress and U.S. business, that the Bush Administration finally gave in and agreed to loosen COCOM restrictions.

Congress has attempted to shore up the precarious COCOM consensus by proposing the Export Bill. The Bush Administration's conservative stance during the recent COCOM negotiations will only serve to make COCOM weaker, and perhaps eventually lead to its demise. Congress has attempted to make changes to the U.S. unilateral control structure that the COCOM members find the most objectionable such as strict U.S. unilateral controls, U.S. reluctance to changing the COCOM Industrial List and extraterritorial application of U.S. law.

On balance, the proposed Export Bill of 1990 fulfills each of the four different needs better than the Bush Administration proposals to COCOM. The Bush Administration proposals look only at the present needs. The proposals to COCOM would allow high technology goods

to flow to the Eastern European countries. By reducing the COCOM Industrial List, the Bush Administration has temporarily restored shaky COCOM confidence in the U.S. However, it is apparent that the COCOM members, and U.S. business, will expect more changes in the unilateral and multilateral export control system to allow for future change. Multilateral changes include a reduction in extraterritorial application of U.S. law and future negotiations towards reductions in the COCOM Industrial List. Unilateral changes include reductions in licensing requirements, elimination of reexport controls, clarification of commodity jurisdiction and due process given to exporters. All of these problems are addressed in the Export Bill of 1990.

Furthermore, the Export Bill of 1990 serves a dual purpose even if it is not passed during the 101st Congress. First, it puts pressure on the Bush Administration to negotiate with COCOM at the June 6-7 COCOM meeting. Moreover, it helped COCOM consensus by signaling to COCOM that U.S. unilateral export controls will eventually be removed. Second, it is a vehicle for change of the EAA with widespread support. Arguably, it has served both purposes well. The COCOM Industrial List is being modified with subsequent changes to the U.S. Control List. Higher fences are being built around fewer products. Most likely, the Eastern European countries will benefit from these changes.

Passage of the Export Bill is critical to U.S. business interests. Without its passage the U.S. business community will be at a competitive disadvantage with producers around the world. Although the passage of the bill is uncertain it does appear certain that the U.S. unilateral control system is in for dramatic change in the near future.

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Political Offense Exceptions to United States Extradition Policy: Aut Dedere Aut Judicare (Either Extradite or Prosecute)

Violence is a regrettable and tragic part of mankind and the behavior of our species. But what we cannot eradicate can be reduced and limited. The hope, however, remains that the world community's tolerance for violence may soon reach a level when a change in the values and attitudes of a sufficiently large number of people can cause a change in the policies and practices of states, and also act as a social bulwark against individual and small group terror-violence whether for political or other purposes. Such a change can only be abetted by the respect for and observance of human rights on the part of states and individuals alike. That goal may not easily be achieved, buy try we must if there is to be hope for this civilization to endure.[1]

I. Justification for a New Approach

When dealing with one accused of a crime who asserts the political offense exception as a defense to extradition,[2] the United States tends

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1. Bassiouni, Legal Responses to International Terrorism [hereinafter Legal Responses), *A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism'*, xv, liii (Bassiouni ed. 1988).

2. "Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment." Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement], § 475, introductory note (1986). The extradition law of the United States provides that requests for extradition may be granted only pursuant to a treaty. 18 U.S.C. §§ 3181, 3184 (1988) provides in relevant part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or magistrate, to the end that the evidence of criminality may be heard and considered . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same . . . to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities

to wash its judicial hands of the offender.[3] The political offense exception is a defense to a request for extradition from the United States[4] and

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of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

See also Factor v. Laubenheimer, 290 U.S. 276, 287 (1933); United States v. Rauscher, 119 U.S. 407, 411-12 (1886); Valentine v. United States *ex. rel.* Neidecker, 299 U.S. 5 (1936) (holding that the executive branch may not exercise discretion to extradite a person unless authority to do so is expressly conferred by treaty); J.M. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 141 (3d. 1988) (an extradition treaty entered into by the United States usually contains a list of extraditable offenses).

3. Defining a political act is itself a form of a political act, changing with the nature of the extraditing nation's foreign relations and treaties. By assigning this task in part to the judiciary, the executive branch avoids potential economic repercussions or accusations that it is not diligent in the enforcement of its treaty obligations or that it is interfering in the internal affairs of another nation. *See, e.g.*, Eain v. Wilkes, 641 F.2d 504, 513 (7th Cir. 1981); Note, *Bringing the Terrorists to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71, 74 (1974) (stating that politics need not present a barrier to extradition if executive defers to judiciary).

4. "Under most international agreements, state laws, and state practice: A person will not be extradited if the offense with which he is charged or of which he has been convicted is a political offense." RESTATEMENT, *supra* note 2, § 476(2). "The definition of 'political offense' for purposes of extradition has been subject to various understandings in different states and at different times." *Id.*, comment g; "Most definitions of the term 'political offense' are tautologous rather than explanatory since they refer mostly to the political motivation or the political context of the act without defining the element "political, itself." C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 95 (1980) [hereinafter WIJNGAERT]. For a discussion of the political offense exception, see Note, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Treaty*, 26 VA. J. INT'L L. 755 (1986).

Courts distinguish between "pure" and "relative" political offenses. An act is considered a pure political offense if it is directed against the state and involves none of the elements of an ordinary crime. The violence, if any, is minor and rarely involves private victims. Such offenses include treason, sedition and espionage. *See, e.g.*, Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989); Eain v. Wilkes, 641 F.2d 504, 512 (7th Cir. 1981); Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir. 1986), *cert. denied* 479 U.S. 882 (1986); "A pure political offense may include acts of prohibited speech, such as speaking against ruling authority, demonstrating peacefully, flag burning or waving and the like." RESTATEMENT, *supra* note 2; pure political offenses are often specifically excluded from the list of extraditable crimes in a treaty. *See, e.g.*, Ahmad v. Wigen, 726 F. Supp. 389; Quinn v. Robinson, 783 F.2d at 794. As well, pure political offenses generally do not provide a basis for extradition because "[t]he purpose of the political offense exception is to protect individual's rights to foster political change through relatively peaceful political activity." Ahmad, 726 F. Supp. at 404.

A relative political offense is an otherwise common crime committed as a political

its scope has narrowed with the increase of international terrorist activities. Currently, when offenders do escape extradition due to the exception, they are not subject to prosecution by the United States.[5] Because even violent[6] offenders may go unprosecuted, courts have a tendency to construe the political offense exception strictly, thereby increasing extradition of those who wish to claim the exception.[7] As a result, the democratic principles[8] which the political offense exception was designed to protect are threatened.[9] This Note suggests that the

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act or for political motives or in a political context. *Id.*; "The term 'relative political offense' is at best a descriptive label of doubtful legal accuracy because it purports to alter the nature of the crime committed depending on the actor's motives." BASSIOUNI, INTERNATIONAL EXTRADITION 394 (2d ed. 1987) [hereinafter BASSIOUNI]; for a discussion of the terminology difficulties by the use of the terms "relative," "related," "mixed," "complex" and "connex political offenses," WINJGAERT, *supra* at 108-110; *see also* Eain v. Wilkes, 641 F.2d at 512; Quinn v. Robinson, 783 F.2d at 794; BASSIOUNI, *supra* at 383; *see also* Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law* 48 VA. L. REV. 1226, 1239 (1962) (hereinafter Garcia-Mora); RESTATEMENT, *supra* note 2; The United States Supreme Court has affirmed the notion that relative political offenses are nonextraditable. Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959), *aff'd* 278 F.2d 77 (2d. Cir.), *cert. denied* 364 U.S. 851 (1960); most courts require the political motivation to outweigh the intent to commit the common crime in order for a relative political offense to come within the spectrum of the political offense exception. Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQUETTE L. REV. 777, 781 (1977).

5. *See, e.g.*, Doherty v. U.S. Dep't of Justice, Immigration and Naturalization Service, 908 F.2d 1108 (2d Cir. 1990) (granting the right to apply for asylum) (overturning an order issued by the U.S. Attorney General that had denied an attempt by a former Irish Republican Army guerrilla to apply for sanctuary in the United States). Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986); it should be noted that two years later the United States revised the treaty which would have permitted extradition. Supplementary Treaty of Extradition, the United States and the United Kingdom, T.I.A.S. No. 8468, *reprinted in* 24 I.L.M. 1105 (1985) (hereinafter Supplementary Treaty). Ratified on July 18, 1986, this treaty precludes any claim that a violent political act can be considered a political offense.

6. *See infra* notes 47-56 and accompanying text for a discussion of the terms "violent" and "terrorism". *See also* BASSIOUNI, *supra* note 4 at 386; INTERNATIONAL CRIMINAL LAW, A GUIDE TO U.S. PRACTICE AND PROCEDURE [hereinafter INTERNATIONAL CRIMINAL LAW] 336-342 (V. Nanda & M. Bassiouni eds. 1987); *See also* RESTATEMENT, *supra* note 2, s 475, introductory note.

7. *See, e.g., In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984), *aff'd*, 786 F.2d 491 (2d. Cir. 1986).

8. *See infra* notes 36-45 and accompanying text for a discussion of the democratic principles which relate to the political offense exception.

9. *See infra* notes 36-45 and accompanying text for a discussion of how those democratic principles are threatened.

political offense exception should continue to protect all political offenders against extradition, while arguing that violent political offenders should not, as an alternative, go free without punishment.

When political offenders accused of committing violent acts are found in the United States, they should be prosecuted rather than set free.[10] "The practical application of internationally proclaimed norms has to be assured by states through their domestic enforcement and implementation systems."[11] Countries must adopt domestic legislation which makes violent acts committed anywhere in the world by those who claim political exceptions to extradition punishable under the domestic laws of the nation in which the accused is found. An adaptation of United States domestic law to an extradite or prosecute policy would not require major changes to United States domestic law. In order for an offense to be extraditable, the requirement of double-criminality must be satisfied. "The modern rule in the U.S., and in most countries, is that the offense constitutes a crime under the jurisprudence of the two legal systems."[12] Treaties which include the possibility of prosecuting political offenders by the nations in which they are found should be negotiated by the United States executive branch. Violent criminals who are not political offenders should continue to be extradited upon request.

There are several models for implementing an extradite or prosecute policy. One model suggests that international institutions can guide nations in drafting their domestic criminal laws:

> The theoretical and practical principles underlying the maxim *'aut dedere aut judicare'* could perhaps be formulated in a *'Declaration of Principles on International Cooperation in Penal Matters'*. Such a declaration could be drafted either within the general context of the United Nations, or within a more restricted regional framework such as the Council of Europe or the European Communities. This Declaration of Principles could constitute a guideline for further efforts in the field of international cooperation in criminal matters, both on the substantive and procedural level and could possibly lead to a better coordination of the various efforts which are at present simultaneously being undertaken.[13]

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10. *See infra* notes 168-185 and accompanying text for a discussion of jurisdictional defenses in relation to an extradite or prosecute policy.

11. WIJNGAERT, *supra* note 4 at 218.

12. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, PROCEDURE 412 (1986) (hereinafter PROCEDURE).

13. *Id.*

Another model suggests that violent political crimes should be prosecuted in an international court.[14] However, enforcement presents a practical problem to the idea of an international court.

> The inability of the world community to reach political consensus on the creation of an international criminal court or on the development of alternative mechanisms that would have the features of a direct enforcement system has led to the furthering of the indirect enforcement system. This explains why an increasing number of conventions dealing with international crimes or multilateral and bilateral conventions relating to transnational and common crimes have adopted the conceptual formula *aut dedere aut judicare.*[15]

This Note urges United States prosecution of violent political offenders under United States domestic law, guided by international agreements and customary international law. The legislature can extend univeral jurisdiction[16] to the United States for certain violent acts committed abroad. Under a theory of universal jurisdiction, the United States should prosecute political offenders found in its territory who violate internationally agreed-upon standards of conduct which were designed to protect humanity and which have been codified in United States domestic law. Indeed, "the contemporary trend in the world community is to follow the maxim *aut dedere aut iudicare,* namely to prosecute or punish."[17]

The history of the political offense exception in the United States is one of fluctuation. The Supreme Court has only tangentially touched upon issues with regard to the political offense exception because a denial or grant of extradition is generally not judicially reviewable.[18]

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14. *Id.*

15. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, CRIMES 7 (1986) (hereinafter CRIMES).

16. *See infra* notes 161-178 and accompanying text for a discussion of U.S. universal jurisdiction over violent political offenders.

17. PROCEDURE, *supra* note 12 at 415.

18. BASSIOUNI, *supra* note 4 at 591. "The role of the judiciary in United States practice is conclusive in finding that the exception applies, but is not definitive in its findings that the exception is inapplicable since executive discretion can override such findings." *Id.* at 402. "It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" and "a court can construe a treaty and may find it provides the answer." *Id.* at 416.

Although the judiciary has shouldered the burden of interpretation,[19] it remains unclear as to what extent the executive and political areas of government should be involved.[20] Moreover, there are accusations that the political offense exception promotes terrorism because it provides a loophole for terrorists around the world to escape justice. Because categorization of a political offense requires an investigation into the particular facts of the occurrence, the term "political offense" eludes practical definition.[21] Even if the term were definable, it is doubtful that it could be defined in such a way as to garner international acceptance because each society tolerates different levels of political dissidence. It is precisely when one nation deems the acts of an offender sufficiently "political" as to deny a request for extradition by another

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19. *Id.* at 386. *See also* Deere, POLITICAL OFFENSES IN THE LAW AND PRACTICE OF EXTRADITION, 27 AM. J. INT'L L. 247, 250 (1933); Evans, *Reflections upon the Political Offense in Int'l Practice* 57 AM. J. INT'L L. 1, 15 (1963); Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum,* 14 U. PITT. L. REV. 371, 371-72 (1953); Garcia-Mora, *supra* note 4 at 1230.

20. WIJNGAERT, *supra* note 4, at 100, 101; the State Department retains a key role in the determination of whether the political offense exception applies. Views from the State Department are explicitly or implicitly taken into acccount. *See* Eain v. Wilkes, 641 F.2d at 515 (stating "[e]ven though we do not leave sole determination to the Executive branch, we believe its views are entitled to great weight in extradition matters"); *see also* Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986) (holding that interpretation of treaty language by the Department of State is "entitled to considerable deference"); Charlton v. Kelly, 229 U.S. 447, 468 (1913) (stating that "[a] construction of the treaty by the political department of the government, while not conclusive upon a court, is nevertheless of much weight").

Although most treaties leave the determination of what acts constitute political offenses to the judiciary, some extradition treaties expressly designate the executive branch to make the determination of whether an offense is political. *See, e.g.,* Extradition Treaty, June 24, 1980, United States-Netherlands, art. IV, para. 4, T.I.A.S. No. 10733 *(entered into force* Sept. 15, 1983); *see generally* Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983,* 17 AKRON L. REV. 495, 502 (1984); "The definition of 'political offense' will then, like the cubit, alter with the length of the king's arm." INTERNATIONAL CRIMINAL LAW, *supra* note 6 at 338; professor Blakesley from the University of the Pacific, McGeorge School of Law argues that removing the issue of what constitutes a political offense from the judiciary poses a greater risk to the constitutional system than the risk that such judicial decisions will promote terrorism. Blakesley, 15 DEN. J. INT'L L. & POL'Y 109, 119 (1986).

21. At least one scholar suggests that the term is impossible to define. 1 OPPENHEIM, INTERNATIONAL LAW 707-08 (H. Lauterpacht 8th ed. 1955); *See also* BASSIOUNI, *supra* note 4 at 386; for an historical analysis of the international applications and interpretations of the political offense exception, *see* Comment, *The Political Offense Exception: An Historical Analysis and Model for the Future,* 64 TUL. L. R. 1195 (1990).

nation, that the ambiguity of the term presents itself most vividly. It is clear, however, that there is universal acceptance of the notion that violent offenders,[22] regardless of political motivations, should not go unpunished.[23]

Although the history of the application of the political offense exception in the United States indicates that offenses of a violent nature should not go unpunished, the solution to such moral conviction has been to extradite political offenders, regardless of the fact that they may otherwise be protected by the political offense exception.[24] The political offense exception is thus minimized in its effect. Reactionary

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22. *See infra* notes 47-56 and accompanying text for a discussion of violent political offenders and violent terrorists.

23. The international community has attempted to isolate the terrorists because international terrorist activities are sometimes beyond the scope of traditional human dissent or revolution in the quest of liberty. BASSIOUNI, INTERNATIONAL EXTRADITION & WORLD PUBLIC ORDER 416 (1974); Saddy, *International Terrorism, Human Rights & World Order*, 5 TERRORISM 325 (1982); W. WAUGH, INTERNATIONAL TERRORISM 21 (1982); Friedlander, *Coping with Terrorism: What is to be Done?* 5 OHIO N.U.L. REV. 432, 438 (1978).

International treaties are used to contain terrorists threats. *See, e.g.,* G.A. Res. 61, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/53, at 301 (1985) (General Assembly of the United Nations' recognition of the need of member states to cooperate in combating terrorism through apprehension, extradition and prosecution of terrorists); Council of Europe, European Convention on the Suppression of Terrorism, arts. 1 & 2, 25 Eur. Y.B. 289, 289-90 (1977), 15 I.L.M. 1272, 1272-73 (1976) (excluding terrorists acts from the political offense exception to treaties between members of the Council of Europe); Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating Protocol to the Protection of Victims of International Armed Conflicts (hereinafter Protocol I), art. 51(2), adopted June 8, 1977, 16 I.L.M. 1396, 1413, *reprinted in* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, BASIC DOCUMENTS SUPPLEMENT TO "INTERNATIONAL LAW CASES AND MATERIALS" 195, 202 (2d ed. 1987) (condemning violence designed to spread terror among civilian populations) [hereinafter DOCUMENTS SUPPLEMENT]; Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Protocol II), art. 4 (2)(d), 16 I.L.M. 1442, 1444 (1977), *reprinted in* DOCUMENTS SUPPLEMENT, *supra*, 213, 215; 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 (seeking more effective international cooperation in the extradition of all terrorists); Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 295 (1987) (noting the rise in terrorism and need for criminal justice system to adapt to deal with it); Lubet, *Extradition Reform: Executive Discretion and Judicial Participation in the Extradition of Political Terrorists*, 15 CORNELL INT'L L.J. 247, 291 (1982) (advocating reforms to "ensure that the courts do not extend the protection for the exception to those who practice violence against civilians").

24. *See* Ahmad v. Wigen, 726 F. Supp 389.

abrogation of the political offense exception not only threatens the democratic and humanitarian principles embodied by the exception, but also threatens nonviolent political actors. Such offenders may find the trend toward extraditing political offenders and the stringent application by the United States courts too burdensome and, consequently, will be deterred from action for fear of future extradition. Positive political change initiated by nonviolent political offenders may be stagnated.[25] Alternatively, a policy of extradite or prosecute[26] will provide foreign political dissidents with notice that certain forms of behavior will not go unprosecuted by the United States,[27] while at the same time preserving the integrity of the political offense exception for nonviolent political offenders.

Those accused of crimes may escape extradition via the political offense exception if political acts were committed, or acts that were politically motivated but which appear to be common crimes, or if an accused would be tried for political beliefs rather than for the common crimes which were allegedly committed.[28] Although most current extradition treaties contain political offense exceptions,[29] extradition requests for political offenders are usually granted because United States courts are reluctant to inquire into the judicial policies of other nations.[30] It is counter-intuitive to suggest that American courts should be denied the possibility of inquiring into another nation's judicial integrity, while

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25. WIJNGAERT, *supra* note 4 at 3.

26. *See infra* notes 168-185 and accompanying text for a discussion of *aut dedere aut judicare* (extradite or prosecute).

27. There still may be countries which will choose not to follow a policy of "either extradite or prosecute" and will thus provide potential havens for violent political offenders. However, as the United States aligns its extradition treaties with the language of such a policy, i.e. *aut dedere aut judicare*, it is conceivable that other nations will reciprocate with similar policies.

28. *But see* Jimenez v. Aristiguieta, 311 F.2d 547 (5th Cir.), *cert. denied*, 373 U.S. 914 (1962) (where the former President of Venezuela was sought from the United States for financial crimes and murder). The district court found the murder charge to be non-extraditable under the political offense exception but granted extradition because the financial crimes were not within the exception. Consequently, where multiple charges exist, some of which fall outside of the political offense exception, extradition may be granted unless all charges are related or connected to the political motive. *Id.*

29. BASSIOUNI, *supra* note 4; *see, e.g.*, Extradition Treaty, May 4, 1978, United States-Mexico, art. II, 31 U.S.T. 5059, T.I.A.S. No. 9656 (*entered into force* Jan. 25, 1980); Extradition Treaty, June 9, 1977, United States-Norway, art. II, 31 U.S.T. 5619, T.I.A.S. No. 9679 (*entered into force* Mar. 7, 1980); *but see* Supplementary Treaty, *supra* note 5.

30. *See, e.g.*, Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989).

the same courts must inquire into other nations' political circumstances in order to determine whether the offenses of an accused are protected by the political offense exception.[31] The issue becomes one of how United States courts can best promote justice at home and on an international level when confronted by a political offender who claims a humanitarian or due process exception to extradition. Nonetheless, it is doubtful that an accused who fails to prove that the crimes committed are worthy of the political offense exception would be able to prove that prosecution for those offenses by the requesting nation may be politically slanted.

Even if the political offender acted against a totalitarian government, the United States should, at the very least, avoid complicity to violent acts against innocent citizens of the world and, at the very most, actively move against those persons who resort to indiscriminate violence. The violent political offender of another country, who may not be a direct threat to the political power of the United States, is a threat to the general peace and well-being of the world.[32] The issue is not whether the violent offender should be prosecuted. Rather, the issue is where such prosecution will take place and whether those accused of violent political acts should be gauranteed procedural safegards from unfair prosecution. This Note concerns itself with only prosecution by the United States of violent political offenders. Nonviolent political offenders will be guaranteed safe haven, free from prosecution in the United States.

Under an extradite or prosecute policy, it would be the task of the executive branch and the legislature to define what acts would merit prosecution by the United States. Standards developed by international agreement may serve as guidelines in the determining whether offenses

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31. *See infra* notes 116-164 and accompanying text for a discussion of judicial application of the political offense exception. Courts require an uprising and a furtherance by the accused of that uprising in order to gain protection under the political offense exception.

32. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (analogizing torturers to pirates, as the enemies of mankind); United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (determining that terrorism is as much a threat to the international community as piracy), *appeal dismissed*, 645 F.2d 681 (9th Cir. 1981), *cert. denied*, 452 U.S. 972 (1981); MURPHY, PUNISHING INTERNATIONAL TERRORISTS (1985) [hereinafter PUNISHING]; Dinstein, *Terrorism and War of Liberation: An Israeli Perspective of the Arab-Israeli Conflict*, INTERNATIONAL TERRORISM AND POLITICAL CRIMES 155, 164 (M. Bassiouni ed. 1975) ("[t]he terrorist has replaced the pirate as the *hostis humani generis par excellence*").

should be prosecuted in the United States, due to the nature of their violence.[33] Although international limitations have been entertained by some United States courts in the treatment of the political offender,[34] no uniform standard has developed.[35] Moreover, when courts do rely on international treaties for guidance, they do so merely to determine the extraditability of an accused. Currently, once offenders are determined to have acted in a way that is internationally agreed upon as intolerably violent, they are usually extradited, regardless of their political motivations when the act was committed. Protection under the political offense exception thus ceases to exist.

The solution to the problem of the randomly violent political offender should not include judicial evisceration of the political offense exception, because abandonment of the political offense exception has led to an abandonment of democratic principles. For example, the basic premise that individuals have a "right to resort to political activism to foster political change"[36] dominates the use of the political offense exception. The political offense exception is considered "as a kind of political axiom of the democratic state, from which no derogation is warranted."[37] To reduce the scope of the political offense exception is to inhibit political change.[38]

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33. *See supra* note 23.

34. *See, e.g.,* Ahmad v. Wigen, 726 F. Supp. 389 (the court relied upon the Laws of Armed Conflict as a limitation for acceptable behavior to be tolerated of political offenders).

35. *See infra* notes 116-164 and accompanying text for a discussion of the divergent standards used in application of the political offense exception.

36. WIJNGAERT, *supra* note 4, at 102; *see also* LEGAL RESPONSES, *supra* note 1 at 181-182. Professor Christopher Pyle isolated the philosophical differences which support the political offense exception:

> In the Anglo-American context they reflect a traditional Whig-Tory division over the right of revolution and the obligation of nations to provide asylum to fugitives from foreign political strife. On the Whig side remains the Lockean view that there is a right to revolution, and that the courts of liberal republics should stand neutral towards all sides in foreign rebellions. The way to achieve this neutrality, is for nations and their courts to sheild most political fugitives from extradition to the regimes they have recently fought. On the Tory side is an Hobbesian abhorrence of rebellions and a conservative belief that ideologically similar nations ought to help suppress each other's revolutions.

Id.

37. WIJNGAERT, *supra* note 4 at 102. The political offense exception in the United States is used to protect those persons who have "committed themselves to the cause of democracy." *Id.* at 19, 46; *see also In re* Gonzalez, 217 F. Supp. 717, 721 n.9 (S.D.N.Y. 1963) (granting extradition because the acts of the accused did not appear to be "blows struck in the cause of freedom against a repressive totalitarian regime").

38. WIJNGAERT, *supra* note 4 at 102.

The right of political activism causes American courts to examine the infinite tension between the laws of a society and the limits of individual freedom. When dealing with political offenders, courts and legislatures must decide where, if at all, the rights of political activists should end. John Stuart Mill summarized the dilemma when he wrote, "[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."[39] Mill was acutely aware that individual liberty was not without boundary: "[t]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."[40] Prosecution of violent political offenders by the United States will provide a boundary for individual liberty, while respecting the tension between the laws of society and the liberty of the individual. Political offenders will be guaranteed due process and freedom from the political structures against which they rebel, and the peaceful expectations of the world's innocent civilians will be preserved.

More democratic principles put forth in support of the political offense exception are the humanitarian, political neutrality, and domestic order rationales.[41] Under the humanitarian basis, the United States should deny extradition if the accused would be subject to an unfair trial and punishment in the requesting state.[42] The political neutrality rationale suggests that governments, and especially their nonpolitical branches, should not intervene in the internal political struggles of other nations by inquiring into the extraditability of a political crime.[43] The political neutrality theory may be aligned with an extradite or prosecute policy because offenders will not be tried for their political beliefs, but rather, they will be tried for the violent methods used to convey such beliefs. The third rationale suggests that because political crimes are believed to be directed against the domestic public order of the requesting state and because the focus of their attack is thought to be localized, the international public order is unaffected

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39. THE ENCYCLOPEDIA OF PHILOSOPHY, vol. 5, 320 (P. Edwards, ed. 1985) (*quoting* J.S. Mill, *On Liberty*, PHILOSOPHY OF JOHN STUART MILL 211 (Anschultz 2nd ed. 1953)) (hereinafter J.S. MILL).

40. *Id.*

41. WIJNGAERT, *supra* note 4, at 3.

42. WIJNGAERT, *supra* note 4 at 100 ("[t]his approach overlooks the fact that the non-recognition of the political character of these ideologies in itself constitutes the taking of a political position").

43. *Id.* at 3.

and thus should not require the participation of other nations through extradition.[44] Because the domestic public order rationale minimizes the global effect of political acts, its premise could undermine justification for universal jurisdiction to prosecute the political criminal in the United States. Nonetheless, acts which violate internationally agreed upon limits for violence do threaten the world public order.[45] The domestic order rationale, though it preserves the political offense exception, should not be used as justification to escape United States prosecution of heinously violent, but nonetheless *political*, offenses.

The issue thus becomes a practical one of whether the United States will assimilate violent political acts committed in other countries into its own domestic criminal code. Moral complicity to violent acts would be reduced and the United States would serve as an example to the international community. Ideally, other nations will reciprocate until the violent offenders have no haven in which to escape the consequences of their acts.[46] An examination of political offenders and the humanitarian concerns which accompany the political offense exception reveals that it is reasonable to expect international acceptance of an extradite or prosecute policy.

A. The Political Offender and Humanitarian Concerns

1. Violence and the Political Offender

For purposes of legal definition, the terms "violent", "terrorism", and "innocent civilian" have not been universally defined.[47] One scholar provided a workable definition of the term "terrorism", which is suitable for the purposes of an extradite or prosecute policy:

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44. *Id.*

45. PUNISHING, *supra* note 32.

46. *See* Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. R. 733, 759 (1969) (noting that "states are motivated by selfish reasons and not globally altruistic concepts" and that an impediment to extradition such as the political offense exception illustrates that nation states are not concerned with a "common interest in the protection against criminal threats directed against societies"). Professor Bassiouni went on to note, "[t]he ideal solution is to elevate extradition from the national or parochial plane to the international or universal level. This would first cause us to examine 'criminality' in a world-wide sense rather than a provincial one." *Id.* at 760. A policy of extradite or prosecute would place acts of random violence by political offenders on an international level. *See infra* notes 168-185 and accompanying text for a discussion of the extradite or prosecute policy.

47. LEGAL RESPONSES, *supra* note 1 at xxi. (this Note limits its discussion to terrorists acts by individuals).

> Terrorism may thus be defined as an ideologically motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state.[48]

Such a definition does not include acts which are not politically motivated. Under an extradite or prosecute policy, an act must not only meet the above definition of terrorism, but also must be in violation of international norms.[49]

The increase in crimes of a political character[50] has created a need for more international extradition proceedings.[51] Not all terrorists are politically motivated, nor are all terrorists indiscriminately violent.[52] Many terrorists target military installations, and thus minimize potential effects on innocent civilians.[53] By the same token, not all political offenders resort to violent means. Nonviolent political offenders should be guaranteed protection from extradition because the political offense exception was created to protect such individuals.[54] Most indiscriminate terrorists acts are, however, politically motivated.[55] Nonetheless, in an attempt to balance the importance of preserving the political offense

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48. *Id.* at xxiii.

49. *Id.* (stating that "[t]o be deemed international, acts of terror-violence must contain an international element, be directed against an internationally protected target, or violate an international norm"). *See*, LEGAL RESPONSES, *supra* note 1 at xxiv - xxvi for a discussion of international terrorism.

50. *Id.* at xxvi.

51. INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 333.

52. For a discussion of modern terrorism, *see e.g.*, FIELDS, *Bringing Terrorists to Justice — The Shifting Sands of the Political Offense Exception*, INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 15 (R.B. Lillich ed. 1981); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 381-82 (1979); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. LAW AND CRIMINOLOGY 193, 193-95 (1980); *see also Extradition Reform of 1981; Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 20 (1982).

53. Selective targeting by the violent political offender may make a difference in whether the courts will choose to prosecute because attacks on military installations may not be considered violations of international law. It will be the task of the courts and legislature to determine which acts solicit justification for prosecution.

54. *See supra* note 42 and accompanying text for a discussion of the humanitarian rationale of the political offense exception.

55. LEGAL RESPONSES, *supra* note 1 at xxvii.

exception with the promotion of peace and protection of the world's innocent civilians, divergent standards have developed and inconsistent policy has emerged.[56] Under the proposed solution, political offenders found in the United States who violate internationally-defined violent crimes would be prosecuted by the United States under a universally applicable criminal code.

2. Deterrence and Rehabilitation

Political offenders do not have typical criminal motivations and there is a question as to whether their prosecution serves any relevant purpose. Such a question will be better understood with an examination of the political offender within the parameters of United States criminal theory. If the political offender is viewed *a priori* as anti-social and a hindrance to the world community, a much different approach will be taken, as opposed to if the accused is viewed as altruistic and committed to the general well-being of society. Some political theorists have classified the political offender as "hyper-social"[57] rather than anti-social due to fact that such a person does not act from personal motives, but acts for the benefit of society as a whole. Assuming *arguendo* that political crimes are reactions against the immorality of rulers, the political offender may be hailed as the innocent party while the political power is viewed as the guilty party.[58] Indeed, the politically disobedient rise against systems either which are not equipped with the appropriate infrastructure necessary to achieve the political changes desired by the offender, or which suffer from a type of tyranny, where the needs of political offenders go unheeded.

The United States, however, has a tendency not to grant the political offense exception to offenders who attack democratic systems because of conflicting ideologies such as anarchism or communism but grants the exception liberally with respect to crimes committed against totalitarian regimes.[59] As well, the political offense exception is used by the United States as a tool in which to preserve the political interests

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56. *See infra* notes 116-164 and accompanying text for a discussion of the divergent standards which have emerged.

57. *See, e.g.*, WIJNGAERT, *supra* note 4 at 33 (*citing* W. A. BONGER, CRIMINALITY AND ECONOMIC CONDITIONS 173 (1969)). *See also* H. D. THOREAU, *On the Duty of Civil Disbedience*, WALDEN AND "CIVIL DISOBEDIENCE" 230 (Signet 1960) (stating that "[u]nder a government which imprisons any unjustly, the true place for a just man is also a prison").

58. WIJNGAERT, *supra* note 4 at 33.

59. *Id.*

of the nation on an international level.[60] Ambiguous messages are sent to foreign political dissidents. On the one hand, the United States may condemn a dictatorship whose politics threaten the United States position in the global balance of power, while on the other hand, the United States may support, politically and economically, a dictatorship which has a proven record of human rights abuses against political offenders, yet which may provide regional security for United States influence in an area.[61] Absent some prevailing domestic policy against it, political offenders may be extradited to countries which support the United States position in the world but which are guilty of repressing humanity.[62] The litmus becomes one of world politics, rather than of individual struggle and self-determination. The ambiguity of the situation may contribute to an increase in violence by political offenders because non-extraditable criminal behavior is left undefined and, as a consequence, political criminals are unable to shape their behavior according to what will be tolerated on an international level. The limits of toleration by the international community are tested with political violence.[63]

One may argue that the practice of listing extraditable crimes in treaties, regardless of political motives, serves sufficient notice to potential political criminals.[64] To such a contention there are two responses: first, the treaties themselves are embodiments of international political alliances which are constantly changing and; second, the "depolitization"[65] and "exception to the exception"[66] approaches taken by such treaties do not dismiss the fact that the accused committed a political offense. Rather, such approaches merely create tautological legal fiction by placing the offenses outside of the spectrum of the exception.[67]

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60. *See supra* notes 59-63 and accompanying text for a discussion of how the political offense exception is used to further the interests of political powers.

61. LEGAL RESPONSES, *supra* note 1 at xlv (stating that "[t]he real impediment [to an international duty to extradite or prosecute], however, is the difference in ideological values among states, and the political will of governments in carrying out a duty to prosecute or extradite").

62. *Id.*

63. There has been an increase in international terrorists activities. *Id.* at xxvi.

64. *See* Supplementary Treaty, *supra* note 5.

65. WIJNGAERT, *supra* note 4 at 133 (stating that "[t]he depoliticizing formula excepts certain offenses from political asylum by assuming *a priori* that they are common crimes").

66. *Id.* at 134 (stating that "[t]he formula of the exception to the exception explicitly derogates from the political offense exception by providing that 'crime X', notwithstanding its political character, will always by liable to extradition").

67. *Id.* There is also an issue as to whether the removal of the duty from the

Rather than place offenses outside of the boundary of the political offense exception, extradition should be denied. Violent political offenders located in the United States should be prosecuted by the United States, thereby preserving the integrity of the political offense exception. However, whether the accused had notice of the illegality of his acts bears upon issues of deterrence and rehabilitation and there is, consequently, a question as to whether prosecution of the political offender will serve American criminal law goals of deterrence and rehabilitation.[68] Traditional notions of legality may not apply to the political offender:

> [P]olitical offenders, as a result of their ideological motivation, are less deterred than other offenders by the penalty . . . it must be noted that it is very difficult if not impossible to resocialize political offenders by means of penitentiary treatment because they are fundamentally opposed to the system. In fact, they consider themselves as a sort of prisoners of war of the system, rather than as persons held responsible for their acts committed in violation of law . . . From this perspective, the depolitization and the fictive assimilation of political and common offenders serve no operative purpose.[69]

Clearly, new goals must be adopted by the American criminal justice system in order to deal with political offenders.

The United States must take into account a duty to protect the world against violence. The new goal of the criminal justice system, when dealing with a political offender, must not be so much concerned with deterrence and rehabilitation of the political offender as with the preservation of innocent civilians' peaceful expectations, while at the same time preserving the humanitarian principles of the political offense exception.[70] While noting that one accused of a politically motivated crime poses special due process concerns to the courts, the issue becomes one of *where*, rather than *if*, the violent political offender should be prosecuted.

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judiciary to determine what constitutes a political offense is violative of the balance of powers established in the United States. Such an issue is not within the scope of this note. *See* Blakesely, *supra* note 20.

68. The term "criminal justice system" is all-inclusive. It includes judicial, legislative and reform institutions.

69. WIJNGAERT, *supra* note 4, at 32.

70. *See infra* notes 168-185 for a discussion of the extradite or prosecute alternative.

3. Due Process

Because other judicial systems of the world do not parallel that of the United States, it is unreasonable and morally imperialistic, not to mention legally inaccurate, to suggest that no extradition should be allowed to a country which does not recognize the same basic principles of due process as recognized by the United States.[71] Foreign judicial proceedings may be fair and humane without annexation of American constitutional principles. It cannot be ignored, however, that the politically accused, by virtue of their offenses, may be denied basic juridical rights even in a system which normally affords such.[72] United States courts must be mindful of the human rights concerns dominating extradition attempts of the political offender. Because of the unique nature of the political offense exception, with its intrinsic and independent humanitarian rationale, due process claims of political offenders must be examined more closely. Issues of due process must be carefully considered, in order to prevent the judicial system from being used as an instrument of injustice. The Eastern District of New York in *Ahmad v. Wigen*[73] noted that, "[b]ut neither can another nation use the courts of our country to obtain power over a fugitive intending to deny that person due process."[74] Ahmad had allegedly fire-bombed a civilian bus in the occupied territory and he claimed a political offense exception

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71. *But see* Shapiro v. Ferandina, 355 F.Supp. 563 (S.D.N.Y. 1973), *modified on other grounds*, 478 F.2d 894 (1973), *cert. dismissed*, 414 U.S. 884 (1973) (arguing that extradition should be denied to countries which do not honor American due process standards.

72. *See*, Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 85 (1964) (arguing that political offenders invoke a hostile atmosphere which makes a fair trial impossible).

Currently, political offenders may escape extradition when they prove that the judicial processes to which they would be subjected will be significantly antipathetical to a court's sense of decency. *See, e.g.*, Gallina v. Fraser, 177 F. Supp 856 (D.C. Conn. 1959), aff'd 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960), *reh'g denied*, 364 U.S. 906 (1960) (stating that a "federal court's sense of decency" may limit extradition); *see also In re* Matter of Burt, 737 F.2d 1477, 1486-87 (7th Cir. 1984) (holding that "fundamental conceptions of fair play and decency" and "particularly atrocious procedures or punishments" may be considered by the court); Plaster v. United States, 720 F.2d 340, 348, 354 (4th Cir. 1983) (holding that "individual constitutional rights" must be weighed to determine if extradition would be fundamentally unfair"); United States *ex. rel.* Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) (stating that extradition may be "antipathetic to a federal court's sense of decency").

73. Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989).

74. *Id.* at 410.

when Isreal sought his extradition from the United States. When an offender such as Ahmad, whose acts were clearly political, seeks to avoid extradition for a violent offense, the United States should have a duty to prosecute, regardless of whether the accused would receive a fair trial by the requesting nation.

Under an extradite or prosecute policy, determination of whether an accused would receive a fair trial by the requesting nation would be made by the courts. Whether courts in the United States should inquire into the judicial procedures of another nation is not novel and will be discussed *infra*.[75] Currently, an accused may request a *habeas corpus* hearing which could lead to the denial of extradition based upon the grounds that a fair trial cannot be guaranteed by the requesting nation.[76] Additionally, extradition treaties often include certain exceptions based upon whether such extradition may lead to unfair treatment of the accused.[77] Outside of treaty limitations, extradition has been fought in the United States on grounds that the trial in the requesting state will be or was unfair,[78] that the punishment will be excessive or cruel,[79] and that the requesting country will be unable or does not intend to protect the requested person from assassination attempts.[80] Although it rarely rejects a request for extradition of political offenders, the executive branch has the final decision in an extradition matter as to whether to deny extradition on humanitarian grounds.[81]

Ultimately, the issue of due process turns on United States jurisdiction over the offense. In 1901, the Supreme Court held in *Neely v. Henkel*[82] that even a citizen of the United States will be denied constitutional protection for prosecution of crimes which are committed without jurisdiction of the United States and against the laws of a

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75. *See infra* notes 94-115 and accompanying text.

76. *See* Ahmad v. Wigen, 726 F. Supp. 389.

77. *See* Eain v. Wilkes, 641 F.2d at 513; *see also* Treaty on Extradition, Jan. 21, 1972, United States-Argentina, art. VIII(c), T.I.A.S. No. 7510; Convention on Extradition, Oct. 24, 1961, United States-Sweden, art. VII, T.I.A.S. 5496 (restricting extradition for a capital offense or requiring the requesting country to ensure that the death penalty is not used); RESTATEMENT, *supra* note 2, s 475.

78. *See* Neely v. Henkel, 180 U.S. 109, 122 (1901) (accused arguing that due process rights will not be protected by a Cuban trial).

79. *See* Escobedo v. United States, 623 F.2d 1098, 1107 (accused arguing that they would be tortured in prison if returned to Mexico).

80. *See* Sidona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980) (where assassination of the accused was targeted by his political enemies).

81. S. TREATY Doc. No. 100-20, 100th Cong. 2d Sess. 7 (1988).

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

foreign country.[83] Sixty years later, the Court of Appeals for the Second Circuit re-evaluated the precedent established by *Neely* in the case of *Gallina v. Fraser*.[84] When Gallina had been convicted *in absentia* of armed robbery by the government of Italy, he argued that the trial in Italy violated his due process rights. The district court permitted extradition, noting that United States courts do not have the power to inquire into the judicial procedures of another nation.[85] The court of appeals affirmed but with exception:

> The authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the government . . . We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle.[86]

Consequently, the ruling in *Neely* was expanded by *Gallina* to include a court's sense of decency as the determiner of whether extradition of a political offender should be denied based upon a claim of due process.

A similar plea to the court's sense of decency was made in 1989 in the case of *Ahmad v. Wigen*.[87] Mohmoud El-Abed Ahmad sought a writ of *habeas corpus* to prevent his extradition to Israel to stand trial for allegedly attacking, with firebombs and automatic weapons fire, a passenger bus. Death of the bus driver and serious injury to one of the passengers resulted. The Abu Nidal Organization,[88] of which Ahmad

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83. *Id.* (where an American citizen charged that U.S.C. Section 3184 violated the Fifth Amendment because it did not secure all of the rights, privileges and immunities gauranteed to defendants in U.S. criminal proceedings to the accused when surrendered to a requesting country); *see also* Kadish, *Methodology and Criteria in Due Process Adjudication, A Survey and Criticism* 66 YALE L.J. 319 (1957) (arguing that the requirement of probable cause in an extradition proceeding guarantees that one will not be extradited contrary to basic American notions of due process).

84. 278 F.2d 77 (2d Cir. 1959); *see also* Ahmad v. Wigen, 726 F. Supp. at 413 (interpreting the *Gallina* ruling to require a showing the extradition would lead to unconscionable abuse by the requesting nation).

85. Gallina v. Fraser, 177 F. Supp 856 (D. Conn. 1959).

86. Gallina v. Fraser, 278 F.2d 77, 78-79; *but see* Sidona v. Grant 619 F.2d 167 (which warns against reading the *Gallina* decision too broadly).

87. Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y.).

88. The aims and objectives of the Abu Nidal Organization were described by Charles E. Allen, a career staff employee of the CIA:

> The Abu Nidal Organization opposes any settlement of the Arab-Israeli dispute by diplomatic means, preferring the use of violence to reclaim what

was a member at the time of the offense, publicly announced its responsibility for the attack.[89] The court rejected Ahmad's claim that he would not be guaranteed a fair trial in Israel for several reasons: first, although he was convicted *in absentia*, a condition of his surrender to Israel was a retrial; second, a member from the United States Department of State was to observe the new trial to ensure that Ahmad was given a fair trial and; third, Ahmad did not produce sufficient evidence to support his allegations that he would receive an unfair trial in Israel.[90] In the *Ahmad* case, there does not appear to be any reason why the court would be offended by Israel's judicial treatment of the accused after extradition. The district court specifically noted, however, that it was not deciding whether Israel would provide a fair trial; rather, it was deciding whether Ahmad had provided sufficient evidence indicating the contrary.[91] The court in *Ahmad* placed an undue evidentiary burden upon the accused. Generally, political offenders leave countries which seek their extradition under adverse conditions. Many times political offenders are of meager economic means, which is after what led to their rebellion in the first place. To place the "unfair trial" burden of proof on such defendants is to place them in precarious legal situations because they, most likely, will not be able to afford to produce witnesses or to afford the litigation costs associated with expensive international discovery and litigation.

It may be argued that the burden of trial would be less on such defendants if they were to be prosecuted by the nation which requests their extradition instead of by the United States. Witnesses are easier to produce and evidence is more readily available to defendants who are tried in the nation where the crime was allegedly committed. Such an argument seems to undermine the idea of an extradite or prosecute policy in the United States: political offenders who committed their acts in another country could not get a fair trial in the United States because defendants would be at an evidentiary disadvantage. Whether they are required to prove that the requesting nation will provide an

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> it considers to be Arab land lost to the state of Israel. It has conducted some 90 terrorist attacks since its inception in 1974, almost one-half of them since the beginning of 1984. At least 300 people have died and more than 575 have been wounded in attacks conducted by the Abu Nidal Organization.

In re Extradition of Atta, 706 F. Supp. 1032, 1034 (E.D.N.Y. 1989).

89. *Id.*

90. *Id.*

91. Ahmad v. Wigen, 726 F. Supp. 389, 415-416 (E.D.N.Y. 1989).

unfair trial or whether they are required to defend themselves against prosecution by the United States, political offenders will shoulder unusual evidentiary burdens.[92]

A superior policy is to prosecute violent political offenders found in the United States under United States domestic law through universal jurisdiction. One may argue that such a policy will encourage violent criminals to flee to the United States in order to avoid the judicial wrath of other countries. However, only offenders who meet the political offense exception requirements[93] will escape extradition, and the violent offenders will face prosecution by the United States. An extradite or prosecute policy will preserve the political offense exception and avoid the practice of inquiry into the judicial processes of other countries, thereby avoiding any violation of the principles of non-inquiry.

4. Non-Inquiry

The principle of non-inquiry is that American courts should not and will not inquire into the judicial processes of other nations. The court in *In re Ezeta* was the first to develop the rule of non-inquiry in a case which involved a political offender.[94] The court did not examine the claim made by the extraditable defendant that prosecution by the new San Salvador government was politically motivated, although the defendant, who had been a general under the previous government, led a revolt which resulted in the death of General Francisco Menendez, the president of the pre-revolution government.[95] Courts continue to follow *Ezeta*, even when persecution of the accused seems eminent.[96] The issue of political persecution through prosecution was deferred to the executive branch by the court in *Ezeta*:

> It is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State.[97]

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92. For example, if prosecuted by the U.S., offenders may not be afforded 6th amendment rights of the U.S. Constitution which allows for an accused to confront his accusers and for the compulsory process of witnesses.

93. *See infra* notes 116-164 and accompanying text for a discussion of the judicial tests used in applying the political offense exception.

94. *In re* Ezeta, 62 F. 972, 986 (N.D. Cal. 1894).

95. *Id.*

96. *See, e.g.,* Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962); *In re* Gonzales, 217 F. Supp. 717 (S.D.N.Y. 1963); Eain v. Wilkes, 641 F.2d at 518.

97. *In re* Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915), *quoted in In re* Gonzalaz, 217 F. Supp. at 722-23.

The executive branch, however, rarely refuses to return political offenders.[98]

The rationale behind the non-inquiry rule is that a judicial decision as to the legal integrity of another nation may cause difficulties in foreign relations.[99] Such a policy is predicated both upon deference to the good judgment of the executive and legislative branches who made the extradition treaties and also upon the idea that the judicial branch should not meddle in foreign political affairs.[100] In 1910, the Supreme Court determined in the case of *Glucksman v. Henkel*,[101] "[w]e are bound by the existence of an extradition treaty to assume that the trial will be fair."[102] Allowing the fear of adversely affecting foreign relations to dominate issues of extradition threatens the role of the judiciary in its determination of whether a person may be classified as a political offender in the first place, because some inquiry must be made into the political circumstances of the requesting nation. It is contradictory to allow United States courts, on one hand, to inquire into the political situation of another nation in order to determine whether an accused should be extradited, while, on the other hand, those same courts are denied the opportunity to inquire into the judicial proceedings to which the accused would be subjected if extradition were granted. Inquiry cannot be avoided when deciding whether a political offender should be extradited. It is likely that any decision to deny extradition will create the same results in foreign relations, whether the decision is made by the executive branch or by the courts. However, the executive branch currently has the ultimate power:

> The ultimate decision regarding extradition is always made by the Secretary of State or another delegated official. The review is *de novo,* and the executive branch may consider (or reconsider) issues that were or were not raised in the course of the judicial proceeding. Thus, while a court is bound by the terms of the treaty and by judicial precedent, the executive holds the power to deny extradition on factual, procedural,

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98. *See* Lubet & Czackes, *supra* note 46 at 199.

99. SHEARER, EXTRADITION IN INTERNATIONAL LAW 181, 197-98 (1971); *see also* Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir), *cert. denied*, 429 U.S. 833 (1976) ("[s]upervising the integrity of the judicial system of another sovereign nation . . . would directly conflict with the principle of comity upon which extradition is based").

100. SHEARER, *supra* note 99.

101. Glucksman v. Henkel, 221 U.S. 508 (1910).

102. *Id.* at 512.

> humanitarian, or political grounds, or for any other reason of state.[103]

If the legislature codified violent political acts committed in other countries into the United States domestic criminal laws, the executive branch would be bound to allow prosecution in the United States. Judicial involvement will preserve the balance of power which exists between the judicial and executive branches and it will lessen the chance that fundamental due process rights will be compromised due to geopolitical dynamics.

The district court in the *Ahmad* extradition proceeding, on a *habeas corpus* review, recognized the role of the judiciary in assessing whether the accused will likely receive a fair trial. The court stated that, "[i]t does entail an obligation not to extradite people who face procedures or treatment that 'shocks the conscience' of jurists acting under the United States Constitution and within our current legal ethos."[104] The court noted three safegards against wrongful extradition due to the likelihood of abuse by the requesting state, the most important of which was that the courts, "constituting an independent branch of government and charged with defending the due process rights of all those who appear before them, may grant the accused prisoner a writ of *habeas corpus* blocking extradition."[105] The court in *Ahmad* demonstrated that, even when sensitive foreign relations matters are at issue, the executive branch should not involve courts in unsavory decisions to extradite.[106] The court asserted a new standard for the concept of non-inquiry:

> Despite the fact that the executive branch has a constitutional duty and right to conduct foreign policy, and the legislative and executive branches together have the duty and right to enter into treaties for extradition, the courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction. They must, under Article III of the Constitution, exercise their independent judgment in a case or controversy to determine the propriety of an individual's extradition. The executive may

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103. Lubet, *International Criminal Law and the "Ice-Nine" Error: A Discourse on the Fallacy of Universal Solutions*, 28 VA. J. INT'L L. 963, 969 (1988).

104. Ahmad v. Wigen, 726 F. Supp. at 411 (E.D.N.Y. 1989) (*citing* Rosado v. Civiletti, 621 F.2d 1179, 1195-96 (2d Cir.), *cert. denied* 449 U.S. 856 (1980)).

105. *Id.*

106. *Id.*

> not foreclose the courts from exercising their responsibility to protect the integrity of the judicial process.[107]

Although Ahmad failed to provide clear and convincing evidence of the potential for an unfair trial,[108] the district court in *Ahmad* challenged the doctrine of non-inquiry.

Ahmad was affirmed in 1990 by the United States Court of Appeals for the Second Circuit.[109] The court of appeals disagreed, however, with the district court's position on the issue of non-inquiry, stating that role of the court on an appeal from the denial of *habeas corpus* is limited to: 1) concern over whether the alleged offense is within the extradition treaty and, 2) whether there is sufficient evidence to support probable cause that the accused is guilty of the offense charged by the requesting nation.[110] The court of appeals justified its rejection of the district court's inquiry into Israel's probable treatment of Ahmad by relying on traditional American notions of non-inquiry, stating, "[t]he interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced."[111] The criticism of the district court approach, on its face, though concerned with the preservation of international comity, does not lend credence to the district court's attempts to align United States policy with that of the international community. Such an alliance, as made by the district court in *Ahmad*, is highly rational, in view of the particular humanitarian and due process issues which the political offense exception poses to the entire world.

Indeed, the practice of judicial inquiry has expanded in scope on an international level due to the globalization of human rights concerns.[112] The European Court of Human Rights of the Council of

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107. *Id.* at 412 (*citing* Barr v. United States, 819 F.2d 25, 27 n. 2 (2d Cir. 1987).

108. *Id.* at 413 (examining such issues as reports of torture in Israel, Israeli criminal trial procedure, general facts about Ahmad's situation which might make him succeptable to harsh treatment, prison conditions in Israel, and defendant rights against self-incrimination during interrogation by Israeli officials).

109. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).

110. *Id.*

111. *Id.* at 1067 (*citing* Jhirad v. Ferrandina, 536 F.2d at 484-85).

112. *See* Cantrell, *supra* note 4, at 792-94; Samuels, *The English Fugitive Offenders Act, 1967*, 18 U. TORONTO L.J. 198 (1968); O'Higgins, *Reform of Intra-Commonwealth Extradition*, 1966 CRIM. L. REV. 361 (1966) (illustrating that the American practice of non-inquiry has not yielded international acceptance. For example, the United Kingdom's Fugitive Offenders Act of 1967 mandates inquiry into a foreign state's judicial procedures before extradition may be granted).

Europe in Strasbourg recently denied an extradition request made by the United States based upon what the court deemed as potential inhumane treatment.[113] The European Court established guidelines for a situation when another nation requests extradition of a political offender from the United States:

> Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbor the protected person but also tends to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.[114]

The European Court searched for a judicial balance between the protection of the accused's rights and the protection of society.

Such a balance will be found when the United States choses to deny extradition due to the humanitarian principles of the political offense exception and to prosecute violent political offenders under a theory of universal jurisdiction.

There is a need for a new policy because the courts in the United States have developed divergent and sometimes conflicting standards in their determinations of the extraditability of political offenders.[115]

B. Application of the Political Offense Exception

1. Lack of a Uniform Application in the United States

Interpretation of the political offense exception has yielded ambiguous results. American courts have adopted variations of the English

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113. Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989).

114. *Id.* at 414 (*citing* Soering Case, slip sheet, 1 Eur. Comm'n H.R. 161/217 (1989). Soering, a West German citizen, was wanted in Virginia to stand trial for murder. Extradition to the U.S. was denied on the grounds that the long wait for the death penalty constitutes inhumane treatment. The district court reasoned that the Soering decision may be explained in light of the fact that Soering would be tried for the crime in Germany. *Id.* Such a rationale supports an extradite or prosecute policy.

115. *See infra* notes 116-164 and accompanying text for a discussion of the divergent standards.

"incidence test"[116] as put forth in the case of *In re Castioni*.[117] Castioni killed a resisting member of the incumbent local government during an uprising in the Swiss Canton of Ticino.[118] The case provides the basic parameters of the incidence test which is two-pronged, requiring an uprising to have existed and a politically motivated act by the accused in furtherance of the uprising:

> In order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shewn [sic] that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.[119]

This test has been described by the American courts to mean that the act committed must be "incidental to"[120] an "uprising".[121]

The incidence test was adopted by the United States in 1894 in the case of *In re Ezeta*. Extradition was granted under the uprising requirement.[122] The accuseds were charged with arson, robbery and murder[123] and claimed that extradition should be denied on the grounds

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116. *See, e.g.*, Castioni, [1891] 1 Q.B. 149 (1890). The incidence requirement was questioned when, two years after *Castioni* an anarchist sought refuge in England under the protection of the political offense exception. In the case of *In re Meunier*, [1894] 2 Q.B. 415, 419 (1892), a distinction was made for the first time between a political struggle for the mastery of a government and activities which are intended to disrupt the social order by affecting private citizenry rather than attempting to take control of a state. Meunier detonated explosives at a French military barracks and at a Paris cafe. The *Meunier* case is particulary significant because under an "extradite or prosecute" policy, U.S. courts will be expected to distinguish between offenses which are political in nature and those which are randomly violent against innocent civilians.

117. Castioni, *supra* note 116.

118. *Id.*

119. *Id.* at 152.

120. *Id.*

121. *Id.*

122. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894) (denial of extradition due to the uprising requirement for all but one defendent because his murder was not incidental to the uprising); *Cf.* Ornelas v. Ruiz, 161 U.S. 502 (1896) (extradition was granted to Mexico when the Supreme court reversed a district court decision and held that there were personal, rather than political motives involved).

123. *In re* Ezeta, 62 F. at 972.

that their acts were a result of a revolutionary uprising because they were merely acting to preserve their political positions.[124] The accused, General Carlos Ezeta, led a revolt against the government but the court held that because an uprising did not exist before the revolt, extradition could not be denied under the uprising requirement.[125] The court in *Ezeta* put forth a "chicken-and-egg" inquiry when it required that the uprising precede the revolt. Under such an analysis, none could meet the requirement who begin an uprising, but those who revolt after an uprising has begun would not be extradited.[126] Such a limitation is arbitrary.

A different limitation was adopted sixty-four years after *Ezeta* in the case of *Karadzole v. Artukovic*.[127] The Yugoslavian government petitioned for extradition of Artukovic because he allegedly had ordered the execution of over 200,000 innocent civilian concentration camp inmates. The Court of Appeals for the Ninth Circuit affirmed the lower court decision that the offenses were political in nature because they occurred during a time in Croatia when many political factions were struggling for governmental power.[128] The magistrate on remand found that there was not enough evidence to support probable cause that Artukovic was guilty and Artukovic was not extradited.[129]

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124. *Id.* at 997.

125. *Id.*

126. *Id.*

127. Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded per curiam*, 355 U.S. 393 (1958); *for related proceedings, see* Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), *rev'd sub. nom.* Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954); United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383, 393 (S.D. Cal. 1959); *see also* Lubet & Czackes, *supra* note 52 at 203-04 (criticizing the uprising requirment:

> It tends to exempt from extradition all crimes occurring during a political disturbance, but not offenses which were not contemporaneous with an uprising . . . The over-inclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder).

128. Karadzole, 247 F.2d at 204. It should be noted that the outcome of this decision would be different today under Article VII of the U.S. Genocide Convention Implementation Act of 1987: "The political offense exception may not apply [to acts of genocide]," *reprinted in* 28 I.L.M. 754 (1989).

129. *See* Cardozo, *When Extradition Fails, Is Abduction the Solution?* 55 AM. J. INT'L L. 127 (1961). Judge Cardozo suggested that a refusal of extradition in this case would invite abduction by the requesting state. However, if the U.S. prosecuted offenders, rather than set them free, it would reduce violations of international law by the requesting states in their efforts to gain custody for prosecution.

The *Artukovic* decision highlights the inconsistent American approach to the exception because the reason Artukovic was not extradited was due to a lack of probable cause.[130] The holding by the Ninth Circuit Court of Appeals regarding the uprising requirement thus became irrelevant in terms of the extraditability of Artukovic. Nonetheless, given the court of appeals' analysis, even had there been sufficient probable cause to convict Artukovic, his alleged acts of killing 200,000 innocent civilians would have been protected from extradition by the political offense exception.

2. Emerging Standards in the Courts Today

Out of the historical ambiguity, American courts have come forth with divergent standards in their applications of the political offense exception. The three dominant standards which have been applied are the Ninth Circuit's "territoriality and neutrality"[131] standard, the Sev-

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130. Karadzole, 247 F.2d 198; *see also* Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959) (when Cuba requested extradition of two of Castro's soldiers who had allegedly killed an escaping prisoner after the fall of the Batista government, the Southern District Court of Florida found that the acts were in furtherance of a struggle because the victim had been imprisoned as a Batista sympathizer. Because the political offense exception was liberally construed in *Ramos*, such a decision historically parallels other decisions by American courts); *see also* Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1979), *cert. denied*, 449 U.S. 1036 (1980) (when Mexico requested extradition for murder of those in connection with a plan to kidnap the Cuban consul in Mexico, for whom they intended to exchange for Cuban political prisoners. The court held that because the offenses were not incidental to a violent political uprising, the political offense exception would not apply, regardless of political motivations). The key factor in *Escobedo* became the uprising prong. Because the uprising requirement was narrowly construed, there was no need for the court to investigate whether the accused acted in furtherance of the uprising or whether the accused had political motivations. The case implied that there must be some current uprising already present before a political offense may be claimed. Applying such a rationale to its legal conclusion means that one who starts a political uprising will not be gauranteed the same protection as one who adds to an already existing uprising. There is no legal justification for such a limitation. The seemingly arbitrary limitation placed on the interpretation of the uprising requirement in *Escobedo* may have turned on the fact that attacks were made upon an innocent person. Additionally, granting a political offense exception such a case would have communicated an undesirable message to international terrorists. It would provide them the freedom to involve persons who are entirely unrelated to the political ends which they seek. What is significant, in terms of the alternative solution of extradite or prosecute, is that the court in *Escobedo* examined the means of the acts of the political offenders, rather than the circumstances of those acts, in determining whether to grant or deny extradition.

131. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

enth Circuit's "indiscriminate violence limitation"[132] standard, and the Second Circuit's "violation of international law"[133] standard. These standards are important to examine, in order to determine what type of a standard should be utilized in future application of the political offense exception under a United States universal jurisdiction extradite or prosecute policy.

a. A Standard of Neutrality

The Ninth Circuit established a standard of neutrality when England requested extradition of a member of the Provisional Irish Republican Army in *Quinn v. Robinson*.[134] Quinn allegedly sent bomb threats to a Roman Catholic bishop, the British Armed Forces, a Crown Court judge, and the Chairman of the *Daily Express* newspaper. He was also alleged to have killed an off-duty police officer.[135] The District Court for the Northern District of California granted Quinn the political offense exception because his acts were in furtherance of an uprising, and in 1986 the Court of Appeals for the Ninth Circuit affirmed.[136] However, Quinn was deemed extraditable by the court of appeals due to a limitation of territoriality placed upon the uprising requirement.[137]

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132. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

133. Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989); *see also* Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990).

134. 783 F.2d 776.

135. *See supra* note 5. *Quinn* would be extraditable under the Supplementary Treaty.

136. Quinn, 783 F.2d 776; *see also* McMullen v. INS, 788 F.2d 591 (9th Cir. 1986); McMullen v. INS, 668 F.2d 122 (2d. Cir. 1981) (McMullen was accused of bombing a British army barracks which resulted in the deaths of 13 civilians. The magistrate held that McMullen could escape extradition because his crimes were of a nonextraditable political nature); *see* McMullen v. INS, 788 F.2d 591 (McMullen was subsequently issued deportation status by the Board of Immigration Appeals of INS because he had committed a "serious nonpolitical crime" under the Immigration and Naturalization Act, 8 U.S.C. s 1253 (h)(2)(C) (1988)).

Deportation of McMullen by INS illustrates the tendency of the United States to rid itself of the violent political offender, in spite of judicial findings. If the United States were operating under an extradite or prosecute policy, McMullen could have been tried in the U.S. for his acts and the tension between the judicial, political, and executive branches would be significantly diminished. *See also* Matter of Mackin, 80 Cr. Misc. 1 (S.D.N.Y. Aug. 12, 1981), *appeal dismissed* (by the government), 668 F.2d 122 (2d Cir. 1981).

137. Quinn, 783 F.2d at 807-806 (9th Cir. 1986) (requiring that the offense occur in the accused's own country where the political changed desired by the accused was sought).

The court in *Quinn* was attempting to preserve the integrity of the political offense

The furtherance element, as applied in *Quinn*, did not distinguish between civilian and military targets. It was the court's responsibility to determine whether the conduct was intended to benefit the uprising, rather than to determine the worthiness of the insurgent's cause.[138] The court of appeals proposed a neutral standard:

> It is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty. It is the fact that the insurgents are seeking to change their governments that makes the political offense exception applicable, not their reasons for wishing to do so or the nature of the acts by which they hope to accomplish that goal.[139]

A standard of neutrality best justifies a refusal of extradition due to the political offense exception. Rather than inquire into the validity of an actor's political purposes, the superior policy is to inquire into whether the means used by the political offender were an affront to humanity. If so, extradition should still be denied under the rationale of the neutrality standard but prosecution should be instituted by the United States. The political offense exception will be preserved, as will the peaceful expectations of the world's innocent civilians.

b. Indiscriminate Violence Limitation

In 1981 the Seventh Circuit added to the political offense exception in *Eain v. Wilkes*.[140] The District Court for the Northern District of Illinois granted Israel's request for extradition of a Palestinian who

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exception. Ironically, in so doing, the court was forced to create a legal fiction with the notion of territoriality limits on the uprising requirement. The *Quinn* analysis would not fare well in a situation involving territorial disputes, such as in the occupied territory of Isreal, as no Palestinian refugee could meet the test, by definition. The court's concern that it was the extra-national terrorist who "interfered with the rights of others to exist peacefully under their chosen form of government" is a concern which would hold true for both domestic and extra-national terrorists. *Id.* It may, however, be the act of labeling a citizen as an extra-nationalist which is at the center of the controversy which led to terrorist acts in the first place. *See, e.g.*, Ahmad v. Wigen, 726 F. Supp. 389.

138. Quinn, 783 F.2d at 804, 810 (concluding that the *Castioni* test needed modification because current struggles were no longer traditional).

139. *Id.*

140. Eain v. Wilkes, 641 F.2d 504, 507 (7th Cir. 1981).

planted a bomb in a marketplace which killed two people and wounded thirty-six others.[141] The Court of Appeals for the Seventh Circuit extended the political offense exception when it required: 1) the existence of war, revolution or civil strife; 2) an ideological motivation by the accused; 3) that the target is the state or its political structures; 4) that there be an existence of a link or nexus between the motive of the actor, and the target of the act.[142] The court of appeals interpreted the uprising element relative to the need to meet the threat of terrorism,[143] and noted, "[w]e recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."[144]

In addition to narrowing the uprising component, the court of appeals strictly construed the furtherance requirement, holding that unless a direct link exists "between the perpetrator, a political organization's political goals, and the specific act," that murder of innocent civilians cannot further the overthrow of a government.[145] Because the defendant's alleged aim was to eliminate a segment of the civilian population in the occupied territory, the court held that a direct link did not exist.[146] The Court of Appeals for the Seventh Circuit in *Eain v. Wilkes* appeared to be not so concerned with whether there was an uprising, as with whether the means employed by the accused involved indiscriminate violence against civilians. Extradition was granted where unnecessary violence was used and that the accused met the uprising and furtherance requirements became moot.[147]

The indiscriminate violence rationale was extended in the case of *In re Doherty*.[148] Doherty's extradition was sought by Great Britain on murder and weapons possession charges stemming from participation in an attack on a British convoy in Northern Ireland. Doherty escaped to the United States from Northern Ireland while he was being held on charges that he murdered a British soldier. He and three other volunteers were ordered by an I.R.A. officer to ambush a convoy of five British officers. A British captain was killed and Doherty was jailed.

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141. *Id.*
142. *Id.* at 518-521.
143. *Id.* at 520.
144. *Id.*
145. *Id.* at 521.
146. *Id.*
147. *Id.*
148. *In re* Doherty, 599 F. Supp. 270, *aff'd* 786 F.2d 491.

Two days before he was convicted, he escaped from prison. He was arrested by the FBI in New York in 1983. Judge Sprizzo of the Federal District Court in Manhattan ruled in 1984 that Doherty could not be extradited for a political offense, concluding that Northern Ireland was in a state of uprising and that Doherty had acted in furtherance of that uprising.[149] The Court of Appeals for the Second Circuit affirmed the district court decision in 1986.[150] In examining the *Eain* and *Castioni* requirements, the district court in *Doherty* examined whether the violence used was proportional to the political goal which was sought to be attained;[151] otherwise, the *Castioni* "incidence test" could potentially be used to deny extradition of those responsible for events such as the Bataan death march and the Auschwitz murders.[152] The court added to the political offense exception when it required, "[n]o act be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct."[153] In dictum the court in *Doherty* noted that he would have been extradited had he detonated a bomb in a civilian building.[154] Doherty was not extradited.[155]

c. Ahmad v. Wigen: A Violation of International Law Standard

The indiscriminate violence limitation in *Doherty* parallels international law limitations observed by other courts. For example, international guidelines as to what would constitute an extraditable offense were used explicitly by the District Court for the Eastern District of New York in the case of *In re the Extradition of Atta*.[156] Under an extradite

149. *Id.*
150. *Doherty*, 786 F.2d 491.
151. *Doherty*, 599 F. Supp. 270.
152. *Id.* at 274.
153. *Id.*
154. *Id.* at 276.
155. *Id.*; *see also* Doherty v. Thornburgh, 750 F. Supp. 131 (S.D.N.Y. 1990) (a *habeas corpus* review dening Doherty's release from prison while the Board of Immigration Appeals processed him for possible deportation).
156. *Atta*, 706 F. Supp. 1032 (E.D.N.Y. 1989) (magistrate extradition hearings, held in December, 1987 and February, 1988 pursuant to 18 U.S.C. § 3184) (U.S. Attorney filed a second extradition complaint seeking *de novo* consideration, when an independent extradition hearing was held before U.S. district judge Edward Korman, sitting as an extradition magistrate); *see also In re* Extradition of Atta, No. 87-0551-M, 1988 WL 66866 (WESTLAW) (E.D.N.Y. June 17, 1988) (denying extradition in June 1988 in part on the ground that the attack constituted a "political act" for which Ahmad was immune from extradition under the extradition treaty between the U.S. and Israel); *see also* The Convention on Extradition Between the Government of the

or prosecute policy, the international guidelines examined by the court in *Atta* would have been used to determine whether or not the accused should be prosecuted by the United States under a theory of universal jurisdiction. Because Ahmad claimed that his offenses should be protected from extradition by the political offense exception and because his offenses were found to be violative of international law, he would have been prosecuted in the United States under an extradite or prosecute policy.

The district court in *Ahmad* on a *habeas corpus* review, in reversing a magistrate decision, applied the *Doherty* indiscriminate violence analysis[157] and found that only acts which are not in violation of international law could qualify for the political offense exception. Because Ahmad's acts were indiscriminately directed against civilians and would be punishable even if committed by military personnel during wartime, he could not escape extradition under the exception.[158] The Law of Armed Conflict was relied upon in order to limit the application of the political offense exception.[159] Ahmad was required to prove that

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U.S. and the Government of the State of Israel, Dec. 10, 1962, T.I.A.S. No. 5476 (hereinafter Convention on Extradition); Ahmad v. Wigen, 726 F. Supp 389 (E.D.N.Y. 1989) (granting the February 14, 1989 extradition request); *see also* Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y.) (By petition for writ of *habeas corpus*, Ahmad appealed the order claiming in part that he would face procedures and treatment in Israel "antipathetic to a court's sense of decency," which he claimed made him eligible for an evidentiary hearing on the due process issue. The District Court considered Ahmad's due process claim. The government sought a writ of mandamus from the Court of Appeals for the Second Circuit to prohibit the court from holding a hearing on the nature of the judicial procedures of Israel in an extradition matter, which the court of appeals denied. On September 26, 1989, the District Court denied Ahmad a political offense exception); *see also* Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990) (affirming the grant of extradition on August 10, 1990; *see also* Ahmad v. Wigen, 111 S.Ct. 23 (1990) (denying Ahmad's application for stay).

157. Ahmad v. Wigen, 726 F. Supp. 389, 402 (where the court heard testimony from a legal advisor for the State Department's Office of Combatting Terrorism who testified that "'indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable in both [Israel and the United States]").

158. *Id.*; *see also Atta*, 706 F. Supp. at 1045-50 (shifting responsibility to the executive branch, although there is no explicit language in the treaty which would justify such a shift); *see* Convention on Extradition, *supra* note 77.

159. Ahmad v. Wigen, 726 F. Supp. 389 at 406 (this limitation would include Protocol I, which states in relevant part:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects

the offense was acceptable under conventions governing military conduct in the course of armed conflict.[160] Stating that "[t]he law has an obligation not to recognize such dark brutality under either the rules of war or of civilian insurrection or political opposition,"[161] the District Court for the Eastern District of New York justified the "depolitization"[162] of the political offense exception through the Law of Armed Conflict limitation. A new standard was formulated in the district court's *habeas corpus* review in order to determine the extraditability of the accused, "[p]etitioner must show that: 1) there was a violent political disturbance of such a degree as to constitute in effect a state of civil war; 2) the acts charged were incidental to the disturbance; and 3) the acts did not violate the Law of Armed Conflict."[163] The district court reasoned that, "[t]he current threat of terrorism to the peaceful expectations of civilians for a secure and safe society is so great as to either require some limitations on the political offense doctrine or an interpretation placing such offenses outside its protection."[164] The court in *Ahmad* chose the latter approach when it placed all of those offenses which are in violation of international law outside of the penumbra of the political offense exception. The decision in *Ahmad* demonstrates an American court's willingness to move away from the political offense exception.

Because the violent political offender is of international concern, standards of conduct defined by international agreement should be examined. However, an offense of political character, although violent, should be protected by the political offense exception against extradition. Violent political offenders found in the United States should be prosecuted by the United States, thereby guaranteeing due process, freedom

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and military objectives and accordingly shall direct their operations only against military objectives.

(*citing* Protocol I, *supra* note 23 at 195) Protocol I has not been ratified by the United States).

160. *Id.*

161. *Id.* at 407.

162. The depoliticizing formula exempts certain offenses from the political offense exception by assuming *a priori* that they are common, rather than political crimes; *see* WIJNGAERT, *supra* note 4 at 133-34 (contending that "depoliticizing, while on the surface being a neutral statement, constitutes in fact the taking of a political position". Another formula is the "exception to the exception" which expressly derogates from the political offense exception by listing certain crimes, regardless of political intent, as outside of the political offense exception).

163. Ahmad v. Wigen, 726 F. Supp. at 408.

164. *Id.* at 403.

from prosecutorial persecution, preservation of the democratic principles embodied in the political offense exception, and protection of the world's innocent civilians.

II. A PROPOSED SOLUTION: UNITED STATES PROSECUTION OF THE VIOLENT POLITICAL OFFENDER

Many United Nations treaties emphasize the concept *aut dedere aut judicare*.[165] Such treaties can create a legal duty to prosecute in circumstances where extradition is inappropriate and would require the United States to institute criminal proceedings against the offender.[166] It may be said that prosecution of political offenders by the United States contradicts the spirit and intent of the political offense exception, and that political offenders from countries whose political systems are different from the United States do not pose a threat to United States political power. It may also be argued that prosecution will discourage political dissidents from taking real action against repressive governments. In terms of discouragement of the potential political offender if the United States adopts an extradite or prosecute policy, it has never been the position in any democratic government that political freedom be without boundary.[167] United States domestic law does not afford political criminals freedom from the consequences of their acts. If they kill, they will be prosecuted for murder. Even nonviolent political offenders must suffer the legal consequences of their acts. It was not long ago that Martin Luther King, Jr. sat in a Birmingham jail for his political dissidence regarding civil rights or that Henry David Tho-

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165. WIJNGAERT, *supra* note 4, at 161-62:

> [T]he treaties all follow the same general scheme: (a) in view of the alternative *aut dedere*, the crime in question is rendered extraditable; extradition remains subject to the domestic law of the requesting state which can, but need not necessarily apply the political offense exception; (b) in view of the alternative *aut judicare*, signatory states undertake to create, in their domestic legal order, jurisdiction with respect to the crimes concerned, by criminalizing them and by creating rules of competence which, according to the treaty, may amount to universal jurisdiction; if extradition is not granted, the requested state is obliged to undertake prosecutions or at least to submit the case to its competent authorities for purposes of prosecution.

For a definition of the principle of *aut dedere aut judicare* and an explanation of its legal origins, *see* BASSIOUNI, *supra* note 4; *see also* WIJNGAERT, *supra* note 4.

166. There is an issue as to whether international law is binding and enforceable by U.S. courts. *See* The Paquete Habana, 175 U.S. 677, 712 (1899) ("[t]he law of the United States includes international law").

167. *See*, J.S. MILL, *supra* note 39 at 370.

reau was jailed for taking a political stand on the issue of unjust taxation. Consequently, the issue becomes one of how the United States will secure jurisdiction in order to prosecute violent political offenders found within its territory.

A. Universal Jurisdiction Over the Violent Political Offender

The principle of universal jurisdiction grants each nation jurisdiction over offenses which have been recognized as being of universal concern, regardless of the nationality of the offender or the country in which the offense occured.[168] Although other types of jurisdiction require direct connections between the prosecuting state and the offense or the offender, universal jurisdiction allows every state to exercise jurisdiction in order to combat those heinous offenses which all states condemn.[169] International treaties may subject terrorists to universal jurisdiction by the United States for such acts as hijacking and sabatoge of aircraft,[170] hostage taking,[171] crimes against internationally protected persons,[172]

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168. O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 262 (1985).

169. *See,* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 823 (2d ed. 1987); *see e.g.,* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied,* 470 U.S. 1003 (1985); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 254 (D.D.C. 1985) (relying on the "concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of 'universal' violations of international law"); *In re* Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (Israel's attempts to prosecute a concentration camp guard "conforms with the international law principle of 'universal jurisdiction'"), *aff'd sub. nom.,* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (recognizes universal jurisdiction as grounds to prosecute terrorist acts against internationally protected persons), *appeal dismissed,* 645 F.2d 681 (9th Cir.), *cert. denied,* 452 U.S. 972 (1981).

170. *See, e.g.,* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971 [hereinafter Aviation Convention), T.I.A.S. No. 7570 (*entered into force* Jan. 26, 1973), *reprinted in* 10 *I.L.M.* 133 (1971); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 (*entered into force* Oct. 14, 1971), *reprinted in* 10 I.L.M. 133 (1971).

171. International Convention Against the Taking of Hostages, Dec. 4, 1979 [hereinafter Hostage Convention], 18 I.L.M. 1456, adopted by G.A. Res 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/C.6/34/L.23 (1979) (the United States is a party).

172. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973 (hereinafter Protected Persons Convention), 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, adopted by G.A. Res. 3166, 27 U.N. GAOR Supp. (No. 10), U.N. Doc. A/Res/3166 (1974) (the United States is a party); *see also* the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99- 399, s 1202, 100 Stat. 853, 896 (1986) (codified at 18 U.S.C. § 2331).

human rights violations through apartheid,[173] and torture.[174] Such treaties generally contain language which require parties to either extradite the offender or submit the offender's case to proper domestic authorities for purposes of prosecution.[175]

There is a question as to whether persons may be tried by the United States under a theory of universal jurisdiction if the conduct is not defined as being criminal by international treaty but is, rather, a violation of international customary law. An accused cannot be tried in federal court until the United States passes a statute defining the offense.[176] Currently, four crimes are considered to be in violation of international customary law: piracy, slave trading, genocide, and war crimes.[177] However, political offenses, by their very nature, may constitute war crimes. Political offenders should be held to the minimum requirement of Laws of Armed Conflict[178] standard, which should minimize any objections to United States jurisdiction over the offenses. The United States must inculcate these crimes against customary international law into its own domestic criminal code.

Indeed, prosecution by the United States of another nation's political offenders may pose unique issues in terms of jurisdiction. However, the Act of State Doctrine may infringe on the exercise of universal jurisdiction by the United States because the doctrine suggests that an American court cannot examine acts which are committed by a foreign

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173. Convention on the Suppression and Punishment of Apartheid, adopted Nov. 30, 1973, 1015 U.N.T.S. 243, adopted by G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/Res/3068 (1973), *reprinted in* 13 I.L.M. 50 (1974) (the United States is not a party).

174. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984 (hereinafter Torture Convention), adopted by G.A. Res. 39/46, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/Res/39/46 (1985), *reprinted in* 23 I.L.M. 1027 (1984) (the United States is not a party).

175. Hostage Convention, *supra* note 171, art. 8(1), at 1460; Torture Convention, art. 7(1), at 1032; Internationally Protected Persons Convention, *supra* note 172, art. 7, at 1981, T.I.A.S. No. 8532, at 1981; Aviation Convention, *supra* note 170, art. 7, at 571, T.I.A.S. No. 7570, at 571; for a discussion of the concept of universal jurisdiction, *see* K. Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785 (1988) (arguing that adoption of multilateral conventions implies that the world community recognizes the legitimacy of universal jurisdiction).

176. *See e.g.,* Dickinson, *The Law of Nations as Part of the National Law of the United States,* II, 101 U. PENN. L. REV. 792, 795 (1953); Lillich, *The Proper Role of Domestic Courts in the International Legal Order,* 11 VA. J. INT'L L. 9, 16 (1970).

177. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes,* 87 COLUM. L. REV. 1515, 1529 (1987).

178. *See* Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989).

sovereign.[179] Such a doctrine may stifle United States jurisdiction over offenses to which another government's acts are central. The Act of State Doctrine may be raised by individuals whom the United States intends to prosecute.[180] The Supreme Court preserved the role of the judiciary when the Act of State Doctrine was asserted as a defense in the case of *Banco Nacional de Cuba v. Sabbatino:*[181]

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not consistent with the national interest or with international justice.[182]

Some acts of random violence and terrorism are codified by the international community as being against international law. Under an extradite or prosecute policy, individuals who commit such acts will not be shielded by the Act of State Doctrine.

Another doctrine which may affect United States jurisdiction over violent political offenders is that of *forum non conveniens,* wherein a violent political offender may claim that prosecution by the United States ignores the existence of a more convenient forum for the accused in the requesting state.[183] The use of universal jurisdiction by the United States may "present special problems that bear on the fairness and propriety of the judicial proceedings in a State removed from the site of the crime and having no link of nationality to the accused."[184] The choice may become one as to the lesser of two evils: either violent political offenders will be extradited to the requesting nation or they may face prosecution by the United States.[185] Political offenders prosecuted in the United States under an extradite or prosecute policy will be afforded more protection of basic juridical rights, because their acts will be subject to international scrutiny under the scope of international agreements.

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179. *See* LEGAL RESPONSES, *supra* note 1 at 104.

180. *Id.* at 105.

181. 376 U.S. 398 (1964).

182. *Id.* at 428.

183. LEGAL RESPONSES, *supra* note 1 at 108-09.

184. O. SCHACHTER, *supra* note 168 at 265.

185. *See supra* notes 71-96 and accompanying text for a discussion of the due process concerns.

B. International Law as a Threshold for Prosecution

Under the proposed solution, the Ninth Circuit's neutrality standard[186] will be the uniform standard by which potential political offenders are to be assessed in extradition proceedings. The neutral incidence test aligns itself with the political neutrality rationale, on which the political offense exception is based.[187] The district court in *Ahmad* recognized the significance of the Ninth Circuit neutrality standard:

> While seemingly harsh, there is something to be said for the traditional expansive view of the political offense, approved by the Ninth Circuit, in terms of modern conditions. It enables the courts to avoid such fuzzy issues as whether the "civilians" attacked were members of paramilitary forces. In the murky area of internal conflicts taking place all over the world, the roles of the various parties are often unclear. Courts may compound their difficulties in dealing with extradition by engaging in such inquiries. Moreover, foreign governments may find it easier to reach out to this country for assistance in returning those who oppose their policies in what are contended to be civil wars of liberation against dictatorial governments. To enforce extradition orders under such circumstances may implicate our courts in grave injustices and cruel repressions.[188]

The political offense exception will be preserved and those who wish to instigate change against their governments, through both peaceful or nonpeaceful means, may escape persecution for their acts in the United States.

Political offenders who flee to the United States must not confuse an escape from political persecution with an escape from individual accountability, via prosecution in the United States. The dilemma lies with the violent political offender. It would be unjust and unsafe to allow the indiscriminately violent offender freedom for the sake of preserving the political offense exception. Rather than escape the dilemma through the creation of legal fiction which threatens the very

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186. The territoriality limitation adopted by the Quinn court would not be applied. The *Quinn* neutrality test includes proof by the accused of an uprising and furtherance. Quinn v. Robinson, 783 F.2d at 810; *see also infra* note 188 and accompanying text for the *Ahmad* district court comments on the neutrality standard.

187. *See supra* note 43 and accompanying text for a discussion of the political neutrality rationale to the political offense exception.

188. Ahmad v. Wigen, 726 F. Supp. at 405 (E.D.N.Y. 1989).

essence of the political offense exception,[189] courts should determine whether the violence used in committing the offense warrants prosecution in the United States when assessing the violent political offender who has been spared extradition due to the political offense exception.

Two requirements must be met in order to establish a threshold for potential prosecution by an American court. First, the Seventh Circuit's indiscriminate violence limitation from *Eain v. Wilkes* will ensure that violence against the innocent does not go unpunished.[190] The violation-of-international-law standard most likely will encompass any offense which may be prosecuted under the indiscriminate violence limitation test. The *Ahmad-Doherty* violation-of-international-law standard[191] will provide objective guidelines in the determination of whether a political offender should stand trial in the United States for certain violent acts against humanity. Courts may look to treaties, international agreements, and to United States domestic laws in order to determine which crimes should be subject to prosecution by the United States.

III. CONCLUSION

Because there is a need for the international community to control acts of violence against innocent civilians, the United States has a duty to improve its handling of violent political offenders. By remaining politically neutral, United States courts may follow international treaties and domestic laws in determining whether an accused should stand trial for an offense. Rather than taking a Pontius Pilate approach, by completely washing its judicial hands of the political offenders, the United States, through prosecution of violent political offenders found in its territory, may preserve the democratic principles upon which the political offense was founded while at the same time preserving the peaceful expectations of the world's civilians. Ideally, other nations will follow the American example of extradite or prosecute and, even if they do not, violent offenders will be provided with one less safe haven in which to hide. Symbolically, prosecution of violent political offenders will represent a goal of universal peace which has yet to be achieved

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189. *See supra* note 162 and accompanying text for a discussion of the "depolitization" and "exception to the exception" approaches.

190. 641 F.2d 504 (2d Cir. 1981); *see supra* notes 133-140 and accompanying text for a discussion of the *Eain* indiscriminate violence limitation.

191. *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); Ahmad v. Wigen, 726 F. Supp. 389; *see supra* notes 148-164 and accompanying texts for a discussion of the violation-of-international-law standard.

by the international community. Internalization of such a symbol by the United States and by the international community may lead to introspection by nations as to their own practices relative to acts of state terrorism and state sponsored violence. Ironically, such violence is normally directed at political dissidents of nation states. An extradite or prosecute policy may help to unlock the chains of circular political violence.

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"The Ancient Chinese Secret": A Comparative Analysis of Chinese & American Domestic Relations Mediation

I. INTRODUCTION

One day Ye Chengmei, of Henan Province China, was beaten by her husband, Pan Chenggong. Ye's brother sought to teach his brother-in-law a lesson by bringing a group of men armed with sticks and spades to Pan's home. Pan heard the news and gathered up his friends to fight back. At this critical moment, Ye Bringyan, a mediator, hastened to the scene. The mediator persuaded the men to stop the fight and sit down to talk. Through the persuasion and education on applicable laws by the mediator, Pan admitted his wrong doings and apologized to his wife's family. The dispute was solved and the family was on good terms again.[1]

This incident illustrates one of the many types of disputes in China settled through mediation.[2] As portrayed in the anecdotal incident, mediation is considered to be at the forefront of China's judicial system. The mediator prevented a fight and settled a domestic dispute. Consequently, the formal judicial system will likely not be involved in the incident between Ye Chengmei and her husband because adjudication of Chinese civil disputes is regarded as a last resort.[3] This philosophy is colorfully reflected in the ancient Chinese proverb "[t]o enter a court of law is to enter a tiger's mouth."[4] This sentiment holds true for both

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1. *Mediators Help Ensure Social Stability,* The Xinhua General Overseas News Service, Oct. 31, 1989, Item No. 1031142 (Made available through the Xinhua News Agency, and available on Lexis) [hereinafter Xinhua News].

2. There are a variety of textual and statutory definitions for mediation. Roughly speaking, mediation is a process where the participants, along with a neutral person or persons, isolate the dispute, clarify the issues, consider alternatives, and reach a mutual agreement. Unlike litigation or arbitration, a third party does not resolve the dispute for the parties. The parties, with the assistance of a mediator reach their own agreement while resolving the dispute. *See* J. FOLBERG & A. TAYLOR, MEDIATION, A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7 (1984).

3. Cohen, *Chinese Mediation on the Eve of Modernization,* 54 CALIF. L. REV. 1201, 1201 (1966).

4. Comment, *"Far From the Tiger's Mouth": Present Practice and Future Prospects for the Settlement of Foreign Commercial Disputes in the People's Republic of China,* 3 J. LAW & COM. 115 (1983).

Chinese international and domestic affairs. The importance of mediation in China is confirmed by its extensive use. In 1989, China had more than one million mediation committees and over six million mediators.[5] This Note focuses on the potential use for Chinese mediation or conciliation practices in American family law.[6]

The introductory scenario illustrates the typical role of a Chinese mediator. In Ye Chengmei's case, the mediator prevented a fight, established communication, and educated the parties using related laws. Other functions of a mediator may be to define issues; decide questions of fact; make recommendations for settlement; and place political, economic, social, and moral pressures on the parties.[7]

Mediation has recently gained attention as an alternative dispute resolution (ADR) technique in the United States.[8] ADR techniques have developed to provide viable informal options for settling disputes. There are many types of ADR techniques, such as pretrial arbitration, summary jury trials, mini-hearings, and labor arbitration. The increased interest in mediation may be a result of the growing concern regarding the effectiveness of the United States' legal system or simply a response to the continual increase in litigation. The United States' judicial system has become overburdened. Non-traditional methods are needed to relieve an over-crowded system.[9]

Mediation is of particular interest in the area of family law in the United States.[10] Family disputes, especially disputes involving children, may best be resolved through a consensual rather than an adversarial

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5. Xinhua News, *supra* note 1.

6. For information on the use of mediation in China to settle foreign trade and economic disputes, *see "Far From the Tiger's Mouth"*, *supra* note 4, at 115; *see also* ERIC LEE, COMMERCIAL DISPUTES SETTLEMENT IN CHINA 9-20 (1985).

7. Cohen, *supra* note 3, at 1201.

8. There are now several professional associations that have been formed, including the Society of Professionals in Dispute Resolution, the National Institute of Dispute Resolution, and The Federal Mediation and Conciliation Service. There are also newsletters and journals, including Harvard Journal of Negotiation, Mediation Quarterly, and The Missouri Journal of Dispute Resolution. Prisons, Law schools, and other institutions have joined in the movement. *See generally D. McGillis & J. Mullen*, NEIGHBORHOOD JUSTICE CENTERS, AN ANALYSIS OF POTENTIAL MODELS 14-15 (1977). Former U.S. Supreme Court Chief Justice Warren E. Burger is in favor of alternative dispute resolutions, *see* Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982).

9. Burger, *supra* note 8, at 274.

10. *See, e.g.*, Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 651 (1981).

process.[11] Instead of giving third parties the decision making power, mediation places the power in the hands of the parties. Thus, it increases family autonomy and the benefits of a privately produced result.[12] Mediation has been favored for "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception . . . that will redirect their attitudes and dispositions toward one another."[13]

The Chinese people have used mediation as a form of ADR for thousands of years, and mediation appears well suited to their society.[14] It is one tradition that has continued in spite of many different Chinese political and economic systems. The present mediation system is a result of both traditional Chinese culture and the influence of the Communist Party. An understanding of the Chinese mediation system may benefit the American legal system as the interest in mediation grows. Although the Chinese mediation system may be impossible to implement fully in the United States, the underlying theories may be useful to American family law mediation.

II. THE ROLE OF CONFUCIAN PHILOSOPHY IN CHINESE MEDIATION

Confucianism, which dominated Chinese philosophy for millennia, is thought to be the source of Chinese mediation.[15] Although traditional Chinese beliefs formed from various philosophies of social behavior and law, the significance of Confucianism must be extracted from the other traditional Chinese school of philosophy.[16] Admittedly, it is not clear to what extent a society's philosophical beliefs will influence its practice. However, the long reign of Confucianism has made it the dominant Chinese philosophy.[17] Clearly Confucianism emerged as the dominant philosophy and influenced the leaders and the people of China for many years.[18]

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11. Note, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 *Colum. J. L. & Soc. Probs.* 419, 439-445 (1985); *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1088 (1990) [hereinafter *Mandatory Mediation*].

12. *Agreements to Arbitrate Post-Divorce Custody Disputes*, *supra* note 11, at 440.

13. Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

14. *See generally* Cohen, *supra* note 3.

15. *Id.* at 1206.

16. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 S.U.L. REV. 1, 2 (1990).

17. Cohen, *supra* note 3, at 1206-1209.

18. *Id.*

Confucianism stresses that social conflicts interfere with the natural order of life. Harmonious living is the goal of a Confucian society. In the Confucian view:

> A lawsuit symbolized disruption of the natural harmony that was thought to exist in human affairs. Law was backed by coercion, and therefore tainted in the eyes of Confucianists. Their view was that the optimum resolution of most disputes was to be achieved not by the exercise of sovereign force but by moral persuasion. Moreover litigation led to litigiousness and to shameless concern for one's own interest to the detriment of the interests of society.[19]

A. The Concept of Li

This harmonious attitude centers on the dichotomy between the concepts of *li* and *fa*.[20] The single word definitions of *li* and *fa* do not capture the essence of the concepts. *Li* translates as propriety, and *fa* translates as law.[21] However, these concepts are much more complex than indicated by the single word translations.

Ethical rules of conduct regarding basic relationships are found in the *li*.[22] *Li* is more closely related to morality rather than to punishment by physical force.[23] The function of *li* is to promote a natural harmony of ethical behavior. For example, a man who lives his life by a moral force was thought to ". . . naturally . . . [accept] his social role. He [would] submit to *li* without hesitancy. Furthermore, the moral force which the noble man manifests in his behavior and in his attitudes acts as a radiating force, as it were, bringing others into its field of radiation."[24] In a purely *li* society, systems of law would be unnecessary because people would conduct themselves properly because of their devotion to a moral life.

Although the traditional *li* concept is not as strong in today's China, it is still prevalent, especially concerning individual rights or interests. In a society where *li* rules, individual interests extend up to a certain point. When conflicts of individual interest arise, they are

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19. *Id.* at 1207.

20. SCHWARTZ, ON ATTITUDES TOWARD LAW IN CHINA, GOVERNMENT UNDER LAW AND THE INDIVIDUAL 28 (1957).

21. *Id.*

22. *Id.* at 30.

23. *Id.*

24. *Id.*

easily resolved because individuals are willing to yield personal rights to maintain societal harmony. "Both sides will be ready to make concessions, to yield (*jang*), and the necessity for litigation will be avoided."[25] To invoke one's individual rights is in complete contradiction to the spirit of *li*.[26] The favored position is one in which the individual yields or compromises in favor of society.[27] It was ". . . taught that it was better [for the individual] to 'suffer a little' and smooth the matter over rather than make a fuss over it and create further dissension."[28] This yielding trait underlies the modern Chinese view of litigation.[29] The Chinese have traditionally associated courts with the enforcement of state rules and not with the settlement of private disputes.[30] Thus, the court's primary function is to enforce *duties* of citizens, not rights of citizens.[31]

B. The Concept of Fa

Not all Chinese philosophers emphasized *li*, as did Confucianists. For example, the Legalist emphasized *fa*, rather than *li*, for guiding behavior.[32] *Fa* functions as a model for human behavior. *Fa* establishes a method of behavior, and functions as a rule or law. These functional legal rules are enforced by sanctions.[33] *Fa* maintains order in society through fear of punishment. This concept contrasts sharply with *li* which maintains order by valuing the volitional pursuit of a state of natural harmony.

As time passed, Confucian followers realized that *li* could not prevail in all human situations.[34] Therefore, *fa* began to reinforce *li*.

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25. SCHWARTZ, *supra* note 20, at 31.

26. *Id.* at 32.

27. Cohen, *supra* note 3, at 1207.

28. *Id.*

29. A Chinese proverb also provides insightful background on the Chinese view of litigation. "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit." *Id.* at 1201.

30. R. FOLSOM & J. MINAN, LAW IN THE PEOPLE'S REPUBLIC OF CHINA 86 (1989).

31. *Id.*

32. *Schwartz, supra* note 20, at 34; H. CREEL, SHEN PU-HAI 147-48 (1974); The short-lived Ch'in dynasty during the third century B.C. ruled by a legalist philosophy. The dynasty employed a harsh penal system and heavy reliance on brute force. *Schwartz, supra* note 20, at 35.

33. Funk, *supra* note 16, at 7.

34. *Schwartz, supra* note 20, at 33.

New standards of *li* were reflected in successive dynastic penal codes.[35] Thus, over time, the two concepts were interwoven. The resulting combination of *li* and *fa* was viewed as a whole system.[36] Under the Ch'in dynasty, the people only followed the concept of *fa*. In this society, an individual conducted himself in a particular way because of the threat of punishment, not because of some sense of moral obligation. Therefore, to instill morality within the people, both *fa* and *li* were needed.[37]

The intertwined concepts of *li* and *fa* produced the unique Chinese view of dispute resolution. Although China continues to undergo many other cultural changes, the Confucian virtue of compromise remains.[38] Understanding the importance of Confucian philosophy is essential to appreciate the Chinese aversion to litigation.[39]

III. MAO ZEDONG'S[40] INFLUENCE ON MEDIATION

During the twentieth century, China was in a constant state of unrest.[41] When the People's Republic of China was established in 1949, the laws of the Nationalist government were abrogated.[42] Mao criticized

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35. Funk, *supra* note 16, at 7.

36. SCHWARTZ, *supra* note 20, at 33.

37. *Id.*

38. Schwartz suggests that, " . . . the main effect of Confucianism has been to inhibit the growth of an all-inclusive legal system and of an elaborate system of legal interpretation. [Additionally] [i]t has inhibited the emergence of a class of lawyers and has in general, kept alive the unfavorable attitude toward the whole realm of *fa*. *Id.* at 37. For a brief introductory on Confucianism, *see, e.g.*, CHAN, CHINESE PHILOSOPHY, IN 2 ENCYCLOPEDIA OF PHILOSOPHY 87-96 (1967). For more on Confucian history *see, e.g.*, LOWE, THE TRADITIONAL CHINESE LEGAL THOUGHT 27-34 (1984).

39. Currently Chinese still avoid litigation and disfavor the judicial system. However, as China continues to develop the bias toward lawyers seems to be lifting.

40. Mao Zedong was the leader of the Chinese Communist Party, and the Red Army, that seized control of the most populous country in the world. In 1949, he announced the birth of the People's Republic of China. He was the leader of the Chinese Communist Party for forty years. His inspiring leadership contributed greatly to the development of China; however, during the Great Proletarian Cultural Revolution, he was responsible for nearly destroying the Party. There were constant struggles among the leaders and the country went through troubled times. It was not until after Chairman Mao's death in 1976, that these problems were somewhat resolved. C. DIETRICH, PEOPLE'S CHINA 3-49 (1986).

41. Starting with the fall of the Ch'ing dynasty in 1911, China was devastated by internal chaos, topped with the conflict between the Nationalists and Communists and the battles fought by both of those groups against the Japanese. Utter, *Tribute: Dispute Resolution in China*, 62 WASH. L. REV. 383, 387 (1987).

42. LEE, *supra* note 6, at 4.

the legal system for being a tool of suppression over the lower classes, used to continue class struggle.[43] Mao believed the old system was unnecessary because the people could judge and decide disputes arising in ordinary life.[44] The entire judicial system suffered greatly during the cultural revolution which began in 1966 and ended in 1976.[45]

The beginning of the revolution was marked by the closing of all law schools. Attorneys, judges and legal scholars were sent to rural farms to work. The purpose of these actions was to reeducate those in the legal profession regarding the new Communist Party. These actions resulted in the collapse of the judicial and legal systems. "China was virtually in a state of lawlessness."[46]

Changes in dispute resolution proceedings were accompanied by political changes. Although Confucian thought is still prevalent in Chinese society, its emphasis in dispute resolution has diminished.[47] Today's dispute resolution methods have been heavily influenced by Communist ideology and perspectives. Instead of focusing on compromise and yielding, mediation began to function as a means of educating the masses on Party ideology.[48] This shift in emphasis was due largely to Mao's leadership. During the 1950's, the Chinese people followed Mao's teaching that "'disputes among the people' (as distinguished from those involving enemies of the people) ought to be resolved, whenever possible, by democratic methods, methods of discussion, of criticism, of persuasion and education, not by coercive, oppressive methods."[49]

Mao's plan was to mobilize the masses to gain support for the Party.[50] He planned to transform the thought of individuals through mobilization. He believed and taught that "[t]he thought and consciousness of men and their social classes must be changed by 'resolving their contradictions' through the use of tools of struggle, especially 'criticism and self-criticism' and 'thought reform.'"[51] This mobilization

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43. *Id.*

44. FOLSOM & MINAN, *supra* note 30, at 11-12.

45. *Id.*

46. Jenkin Chan Shiu-Fan, *The Role of Lawyers in the Chinese Legal System*, 13 H.K.L.J. 157, 158 (1983).

47. Confucian thought is illustrated by the trial of the Gang of Four (1980-81), who were viewed "not simply as criminals, but as victims of incorrect thinking who deserved to be given human dignity." FOLSOM & MINAN, *supra* note 30, at 6.

48. Cohen, *supra* note 3, at 1201.

49. *Id.*

50. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1303-05 (1967).

51. *Id.* at 1305.

of people was accomplished by a mass line.[52] The mass line is a term given to a variety of techniques used to gain support for the Communist Party. The purpose of the mass line was solidarity, with the goal of achieving the people's desires.[53] The party stayed intimately involved with the masses, using propaganda, discussion, persuasion, and exhortation to gain further support.[54] Cadres, who are members of the Communist Party or people employed by the government, would consult with the masses about their problems and then work out appropriate courses of action.

During the mass line era, mediation was used extensively. Legislation was passed that required mediation in civil cases.[55] Mediation was thought to be a defense against injury to the masses. Reconciling the disputes among the people promoted unity and Party policies.[56] The principle of compromise still existed in mediation, but education on the Party's policies and goals became mediation's most important function.

Another important function in Mao's mediation was to bring the disputing parties to a "correct attitude." A correct attitude required the development of "positive factors."[57] The mediators stressed the importance of positive factors, such as an individual's job status. Individuals were to concentrate on these positive factors to educate themselves. The disputing party thought to be the wrongdoer was educated on the importance of a positive factor. After the party realized the positive factor, the problem was solved.[58] One method of educating the wrongdoer was applying pressure on him through his work unit, neighbors, and family. It was hoped that the pressure would eliminate the dispute.

It is interesting to note that China's government credits the Communist Party with the origin of mediation.[59] One reason for this may be that the government wants the Party to be associated with the success of the mediation system. The Party maintains that pre-revolution mediation was operated by the wealthy and influential classes to manipulate

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52. For further information on Mao's mass line, *see* MAO TSETUNG, SELECTED WORKS OF MAO TSE-TUNG 226 (1965).
53. Lubman, *supra* note 50, at 1304-08.
54. *Id.*
55. *Id.* at 1306.
56. *Id.* at 1306-07.
57. *Id.* at 1308.
58. Lubman, *supra* note 50, at 1308.
59. Cohen, *supra* note 3, at 1205.

and evade the law, and to oppress the masses.[60] Even though the Communist Party and Mao contributed greatly to the current mediation system, the formative period of mediation is attributable to Confucian scholars.

IV. THE ROLE OF MEDIATION IN MODERN CHINA

Mediation has been the traditional Chinese method for resolving disputes for thousands of years. Mediation is successful because of its unique history, Chinese culture, and effectiveness. Although altered to some degree, mediation is still the most popular method of dispute resolution.[61]

Conflict is inevitable in all human relations, thus, the obvious role of mediation is to resolve these disputes. Mediation is a mandatory preliminary step for all civil cases in China.[62] However, if *any* type of dispute can be mediated, then mediation should be the first step in resolving that dispute. Currently, mediation serves the people by resolving disputes. It also serves the government by providing a method of continuous education regarding Communist Party policies.

Not only does mediation provide an effective alternative to overcrowded courts, it is also an acceptable and respectable mode of dispute settlement because most disputes are resolved in an amicable manner. Ideally, parties have resolved their dispute and no longer bear grudges. One reason why mediation is viewed more favorably than litigation is because it encourages the people to work together as a collective.[63] This factor, along with the historical bias against litigation, gives mediation a key role in Chinese law. In addition, practical reasons support mediation.[64] The most obvious is its cost-effectiveness in settling disputes in the world's most populous country.[65] Furthermore, China is a country where lawyers are scarce, and disfavored as "litigation tricksters."[66]

Mediation also serves the country by educating the masses on the Party's policies, values and principles.[67] Additionally, it helps mobilize

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60. *Id.*

61. Yu Zhan J, Lecture at the East China Institute of Politics and Law (June 2, 1990) [hereinafter Lecture by Yu].

62. *Id.*

63. *Id.*

64. *See* FOLSOM & MINAN, *supra* note 30, at 86, for a list of practical reasons.

65. China's official census of 1982 reported a population of 1,008,175,288, making China the home of approximately one out of every four people in the world. *Id.* at 17.

66. V. LI, LAW WITHOUT LAWYERS 87-89 (1978).

67. Lubman, *supra* note 50, at 1339.

the masses by increasing their commitment toward Party policies and goals.[68] However, problems emerge when the function of settling disputes collides with the function of educating the masses. The main problem is that mediation may serve to suppress rather than settle disputes between individuals. Although the Party wants to educate the masses, it is concerned with settling disputes because too many social conflicts interfere with the building of a powerful, socialist China.[69]

Chinese village committees contain about twenty people. One of the committees' roles is mediation. The village committees are organized by place of residence and employment.[70] These committees meet with the community to discuss current events and ideas. If a dispute arises, a mediator is aware of it because of his connection with the community.

Mediators apply social pressure to criticize and educate the wrongdoer. During the mediation process, the disputing parties are pressured by their neighbors, families, and work units to settle the dispute. This pressure makes it difficult to imagine a dispute continuing beyond mediation. If the dispute continues, then it may be litigated. Mediation brings about self-criticism and social cohesion. In today's China, it also promotes the Communist ideology regarding the individual's role in modern Chinese society.[71] Furthermore, it educates people in the spirit of the law.[72]

Mao was succeeded by Deng Xiaoping. As the present leader of China, Deng, places much emphasis on the promulgation of new laws and codes.[73] This re-establishment of a legal system is based on the plan of "Four Modernizations": (1) agriculture, (2) industry, (3) national defense, and (4) science and technology.[74] However, despite these reforms, the traditional legal system still cannot handle the number of cases that arise.[75] Thus, mediation is still the predominant method of settling disputes.[76]

V. THE STATUTORY MEDIATION SCHEME

Although mediation has been used in China for thousands of years, the first regulations establishing a mediation system were drafted in

68. *Id.*
69. *Id.*
70. Utter, *supra* note 41, at 391.
71. FOLSOM & MINAN, *supra* note 30, at 13.
72. Lecture by Yu, *supra* note 61.
73. FOLSOM & MINAN, *supra* note 30, at 13.
74. A. KANE, CHINA BRIEFING, 1989 141 (1989).
75. UTTER, *supra* note 41, at 390.
76. FOLSOM & MINAN, *supra* note 30, at 85.

1954.[77] It took approximately ten studies and many years for these rules to be passed. The importance placed on these rules is illustrated by the fact that they were passed during the cultural revolution.[78] Another important aspect of the mediation rules was that they were the sole rules applicable to the entire nation.[79] These early regulations were recently repealed and replaced by new regulations enacted in June of 1989.[80]

China's 1982 Constitution[81] provides for the establishment of neighborhood and municipal people's mediation committee.[82] A second body of mediation law can be found in Article 14 of China's Law of Civil Procedure enacted in 1982 that states:

> Under conditions prescribed by law . . . [the] people's mediation committee conduct mediation work through the methods of persuasion and education. The parties concerned should follow the agreement reached in mediation; those who do not want the mediation or for those whom mediation has failed may initiate legal proceedings in the people's courts.[83]

This rule clearly reflects the preference of mediation as a form of dispute resolution. Although mediation appears to be a tradition, it is certainly not merely a custom. During the last century, regulations and rules have been enacted, making mediation an official dispute resolution method.

Similarly, a preference for mediation can be seen in China's Marriage Law. The present marriage law was enacted on September 10, 1980, making mediation a compulsory first step in any dissolution case.[84] The traditional concept of *li* underlies this first-step requirement

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77. Cohen, *Drafting People's Mediation Rules for China's Cities*, 29 HARV. J. ASIA STUDIES 295, 302 (1969).

78. *Id.* at 300.

79. *Id.* at 298.

80. The new regulations consist of 17 articles. Article 1 states the regulations were ". . . formulated with a view to strengthening the establishment of people's mediation committees, settling promptly any civil disputes, promoting solidarity among the people, safeguarding social security and facilitating socialist modernization and construction." HSIN CHANG, SELECTED FOREIGN-RELATED LAWS AND REGULATIONS OF THE PRC 651-54 (1989).

81. In the last forty years, China has had five constitutions: 1949; 1954; 1975; 1978; 1982. Each constitution indicates a change in economic or political conditions.

82. P.R.C. CONST. art. 111.

83. *Civil Procedure Law of the People's Republic of China Provisional* art. 14 (1982).

84. *Marriage Law of the People's Republic of China* ch. IV art. 25 (1980) [hereinafter

for divorce mediation. *Li* has always advocated that a husband and wife should compromise and work together toward a harmonious way of life within the family.

Mediation is especially necessary in divorce proceedings because it promotes Communist morality and opposes the bourgeois idea of loving the new and detesting the old.[85] Mediation also opposes rash decisions in marriage. Couples that seek divorces are counseled not to insist on their legal rights, but to fulfill their duty to stay married.[86] However, if mediation fails and alienation of affection is present, then under the 1980 Marriage Law a divorce "should" be granted. This is a notable change from the 1950 Marriage Law that provided a court "may" grant a divorce if mediation failed.[87]

Although divorces are more readily available in today's China, the divorce rate is still lower than Western countries.[88] One reason for the lower Chinese divorce rate is that divorce is still condemned by public opinion.[89] Another reason is the success rate of mediation that often results in reconciliation of the husband and wife.[90]

Mediation committees that work with family disputes are usually neighborhood committees made up of housewives and retired workers.[91] The mediator investigates the couple's relationship to determine if they have truly lost affection for one another. There are no explicit grounds for divorce in China.[92] It is not uncommon for the mediator to persuade the couple through moral pressure and public shaming.[93] It is important

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Marriage Law]. Article 25, chapter IV states:

> When one party insists on divorce, the organizations concerned may try to effect a reconciliation, or the party may appeal directly to the people's court for divorce. In dealing with a divorce case, the people's court should try to bring about a reconciliation between the parties. In cases of complete alienation of mutual affection, and when mediation has failed, a divorce should be granted.

85. FOLSOM & MINAN, *supra* note 30, at 388.

86. *See e.g.* Palmer, *The People's Republic of China: Some General Observations on Family Law*, 25 J. FAM. L. 41, 44 (1986-87).

87. *Marriage Law*, *supra* note 82, at ch. IV, art. 25.

88. FOLSOM & MINAN, *supra* note 30, at 377.

89. Naftulin, *The Legal Status of Women in the PRC*, 68 WOMEN LAW J. 74, 75 (1982).

90. Beijing Rev., Feb. 4, 1985, at 18.

91. Lecture by Yu, *supra* note 61.

92. Naftulin, *supra* note 89, at 75.

93. Hareven, *Divorce, Chinese Style: The Cases That Come Before Shanghai's Family Court Offer Intimate Glimpses of a Changing Society*, THE ATLANTIC MONTHLY, Apr., 1987.

to remember that pressure not only comes from the mediators, but also from work units.

Although benefits of mediating family disputes are apparent, some drawbacks do exist. One drawback is the coercive pressure applied on the individual. This pressure can become overwhelming. The pressure may be too much for an individual to resist when most everyone he contacts emphasizes the need to settle his family dispute. This pressure also raises questions about what makes mediation successful. It may be that mediation really does not solve a dispute, but merely temporarily suppresses the problem.[94]

VI. THE ROLE OF FAMILY MEDIATION IN THE UNITED STATES

Recall the case of Ye Chengmei, discussed at the beginning of this Note.[95] If this family domestic dispute had occurred in the United States a different result would most likely have transpired. If a husband beat his wife in the United States, the wife would likely seek recourse through the legal system. Although the provisions vary, most jurisdictions provide remedies for the victim of spousal abuse. Most statutes provide for civil protective orders and make spousal abuse a separate criminal offense.[96]

A civil protective order is granted to stop future threats or abuse by one spouse against another. The order may be issued against the abuser to refrain from contacting the victim, to move from a shared home, or to enter counseling.[97] The drawback in obtaining a protective order is that several days may pass before a hearing.[98] However, abusive situations are recognized as an emergency in most jurisdictions; therefore, a temporary restraining order may issue at an ex parte hearing.[99]

Many years ago spousal abuse was not perceived as a criminal offense. Within the last decade, however, all states have enacted legislation making spousal abuse a criminal offense.[100] Accordingly, an abused spouse can seek some type of immediate relief. However, without further action, such as a divorce proceeding, the problem may not be resolved. If mediation were available, the family dispute might be

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94. *See supra* text accompanying notes 70-71.

95. *See supra* text accompanying note 1.

96. Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RIGHTS L. REP. 271, 276-84 (1980).

97. *Id.* at 272.

98. *Id.* at 273.

99. *Id.*

100. Lerman, *supra* note 96, at 272.

resolved more efficiently, as in Ye Chengmei's case, where the dispute was settled through mediation and a family reunited.

In the last few years, adjudication has become more complex, time-consuming, and expensive.[101] These increased costs have produced great dissatisfaction with and within our legal system. The need for ADR has been recognized. As former U.S. Supreme Court Chief Justice Warren E. Burger stated: "We must now use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools . . . . We need to consider moving some cases from the adversary system to administrative processes, . . . or to mediation . . . ."[102]

Mediation and other forms of ADR encompass many areas, but mediation has become most popular in divorce and family proceedings.[103] The first divorce statistics available in the United States are from 1867.[104] In 1867, divorces totalled 9,937, or approximately .03 divorces per every 1,000 people.[105] Divorces increased to approximately 500,000 in 1967, or a rate of 4.2 divorces per every 1,000 people.[106] By 1981, there were approximately 5.3 divorces for every 1,000 people.[107] In 1987, the last year in which complete national figures are available,[108] the divorce rate of 4.8 for every 1,000 people was its lowest since 1975.[109] However, commentators are predicting a slow rise in the divorce rate during the next two decades.[110]

The high divorce rate, together with family law cases, has added to already over-crowded court dockets. However, the over-crowded system is not the only problem. There is increasing evidence that the traditional adversarial system is not the best method to resolve spousal and parental disputes.[111] Problems with using the adversarial system as

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101. *Mandatory Mediation*, *supra* note 11, at 1086.

102. Burger, *supra* note 8, at 276.

103. *Agreements to Arbitrate Post-Divorce Custody Disputes*, *supra* note 11, at 439-442.

104. C. VETTER, CHILD CUSTODY: A NEW DIRECTION 9 (1982); Rigby, *Alternative Dispute Resolutions*, 44 LA. L. REV. 1725 (1984).

105. *Id.*

106. *Id.*

107. *Id.*; Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213, 214 (1982).

108. Figures are available for Indiana in 1989: there were 47,603 divorce or legal separations filed. The courts handled 46,783 divorces or legal separations. Gannett News, Sept. 21, 1990, at 1.

109. San Francisco Chron., May 31, 1990, at A6.

110. Rigby, *supra* note 104, at 1725; C. VETTER, *supra* note 104, at 11.

111. Rigby, *supra* note 104, at 1725; Bahr, *Mediation is the Answer*, 3 FAM. ADVOC. 32 (1981); Mumma, *Mediating Disputes*, 42 PUBL. WELFARE, 22, 25 (1984).

a method for solving family disputes include: (1) encouraging "cat and dog fights" that are inapposite to the children involved; (2) failing to address unsettled feelings about the marriage and divorce that often predated the conflicts; (3) failing to encourage cooperation, communication, and the problem-solving techniques of the parties; and (4) increasing costs and delays.[112] Moreover, in a traditional adversarial divorce, one party is thought to win, and the other lose. In contrast, parties who use divorce mediation are concerned with values such as honor, respect, dignity, security and love that often are lost in the traditional divorce.[113]

It appears that the United States is beginning to realize the benefits of the ancient technique of resolving disputes that the Chinese people have used for thousands of years. Although China's heritage is diverse from the United States's background, the extensive use and age of the Chinese mediation system demands the attention of other countries developing mediation systems. The Confucian goal of harmony is at the polar opposite of the American focus on autonomy and individual liberty.[114] Although these two countries' goals for mediation may differ in purpose and direction, both share interests in positive use of mediation.

VII. THE HISTORY OF MEDIATION IN THE UNITED STATES

Informal mediation has a long history in the United States.[115] Mediation was first formally used in the United States in labor disputes.[116] In 1947, the Federal Mediation and Conciliation Service was established to handle conflicts between labor and management.[117] The rationale for this mediation panel was to prevent strikes or lockouts and to improve the safety, welfare and wealth of Americans.[118]

Mediation has grown tremendously and now is used in several areas. One of the most useful areas for mediation is in family law.[119] The increased use of mediation indicates a belief among courts and

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112. Rigby, *supra* note 104, at 1727; Wolff, *supra* note 106, at 222-23.

113. J. FOLBERG & A. TAYLOR, *supra* note 2, at 7-10.

114. *See* May, *Adversarialism in America*, CENTER MAG. 47, 48 (Jan.-Feb. 1981).

115. *See generally* J. AUERBACH, JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS (1983) (Describes the history of dispute resolution techniques used by the Puritans, Quakers, and other religious sects. Also gives description of applicable dispute procedures for Jewish and ethnic groups).

116. C. MOORE, THE MEDIATION PROCESS 21 (1986).

117. *Id.*

118. *Id.*

119. *See supra* text accompanying notes 86-93.

legislatures that some disputes may call for a more consensual process than the traditional adversarial system provides.

VIII. MANDATORY MEDIATION IN THE UNITED STATES

As explained earlier, mediation in China is mandatory.[120] On the other hand, the mediation process in the United States varies among the jurisdictions that use it. It is employed in both private[121] and court annexed[122] methods of dispute resolution. Private mediation is always voluntary.[123] However, court annexed mediation can be either voluntary or mandatory.[124] The most popular cases for mandatory mediation are in child custody and other civil disputes.[125] Studies reflect a belief that most parties involved in mandatory mediation experience greater satisfaction than those involved in adjudication.[126] Furthermore, mandatory mediation cases tend to settle at the same rate as voluntary mediation cases. This suggests that a mandatory mediation requirement does not interfere adversely with the effectiveness of the mediation.[127]

In most cases mediation is mandatory in China. Historically, the Chinese mediation system has been accepted without debate. Even after the Communists came into power, the mandatory nature of the system did not change. The Chinese constitutional provision providing for the mediation of disputes has not been challenged. Perhaps the mandatory characteristic of mediation and its acceptance by the people of China are the reasons their mediation system works so well.

In contrast, mandatory mediation has not found favor in the United States. The Constitution of the United States does not prohibit ADR; however, the courts' power to mandate ADR is unclear.[128] A number

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120. *Id.*

121. Private or voluntary mediation occurs when the parties mutually agree to mediate. *Mandatory Mediation*, *supra* note 11, at 1087.

122. Court annexed mediation takes place when mediation is judicially mandated. *Id.*

123. *Id.*; *See, e.g.* OKLA. STATE. ANN. title 12, ch. 37 app., rule 7(E) (West Supp. 1991) (authorizes a case to be mediated when stipulated and judicially approved).

124. *Mandatory Mediation*, *supra* note 11, at 1087.; *See, e.g.* CAL. CIV. PROC. CODE § 1141.11 (West Supp. 1991) (provides mandatory ADR for civil cases involving amounts in disputes under $50,000).

125. *See, e.g.*, CAL. CIV. PROC. CODE § 4607(a) (West Supp. 1987) (requires mandatory mediation for child custody disputes before adversary procedures).

126. *Mandatory Mediation*, *supra* note 11, at 1088; *see* McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-57 (1981).

127. *Mandatory Mediation*, *supra* note 11, at 1091 n. 37.

128. *Id.* at 1089.; *See generally* Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989).

of courts claim such power rests in a trial court's authority to control its docket and in rule 16(c) of the Federal Rules of Civil Procedure.[129] Those opposed to mandatory mediation have two arguments. First, mandatory mediation represents a distinct deviation from previously accepted legal doctrine.[130] Second, mediation does not work for everyone and can place undue pressure on those with unequal bargaining power.

A. Mandatory Mediation - a Significant Departure from Traditional Doctrines

The legal system has traditionally decided divorces, child custody, and other family law disputes. Legislatures, which are thought to be the best representatives of the people, make laws. Courts then decide cases based on those laws. Traditionally, these court procedures have been adversarial in nature. The traditional goal of a divorce action was the termination of the couple's marriage. However, mandatory mediation suggests that the adversarial approach is not the best method to handle certain types of family disputes.[131] However, some contend that mediation, as a method for settling such disputes, is a deviation from the traditional system and should not be followed.

Mandatory mediation is perceived as a less harsh method for settling family disputes than adjudication. Social workers and other professionals are thought to be better equipped to handle some types of family disputes. However, under mandatory mediation, social workers in custody disputes are accused of functioning as decisionmakers, removing guardians ad litem and substituting for judges as the final arbiters of child custody.[132] The role of social workers in the meditation system is completely different from their traditional function in the legal system as counselors or investigators.[133]

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129. *Mandatory Mediation*, *supra* note 11, at 1089.; *See, e.g.*, McKay v. Ashland Oil, 120 F.R.D. 43, 47-48 (E.D. Ky. 1988) (This court held that the district court's inherent power and the Federal Rules of Civil Procedure (FRCP) provide authorization for a local mandatory summary jury trial rule. Summary jury trial is another form of ADR, where third parties have no decision making authority and can resolve the dispute only through mutual agreement of the parties). FRCP 16(c) states: "The participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . ." FED. R. CIV. P. 16(c) (West Supp. 1990).

130. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, 728 (1988).

131. *See supra* text accompanying note 94.

132. Fineman, *supra* note 130, at 741.

133. *Id.* at 740.

According to M. Fineman, a Professor of Law and Director of the Family Policy Program in Wisconsin, family disputes once solved by the adversarial process, are now being treated as emotional crises through mandatory mediation.[134] Attorneys are viewed as incapable of handling the crises because of their insensitivity and adversarial background. Consequently, the traditional adversarial role of the attorney in family disputes is substantially altered. Resistance by attorneys to the implementation of mediation may be attributable to the reduction of their role in family disputes.

B. Mandatory Mediation Inapplicable to All Cases

The second major argument against mandatory mediation is that mediation is not for everyone. Parties bringing an action have certain expectations, and these should be considered. Some parties may not need mediation. Other parties may need mediation, but have no incentive to mediate in good faith. The latter problem could be resolved if some type of sanction were applied to parties who did not make an effort to mediate. However, some couples have already determined they want to end their marriage and requiring mediation merely adds another layer to the judicial process. These types of parties are expecting the court to render a judgment and to end the dispute.

Requiring mediation for everyone undoubtedly subjects some parties to mediation who really do not need mediation, particularly in divorce proceedings. Arguably, where no dispute over the proceeding exists, a couple should not be forced to mediate. Mandatory mediation for all divorces is thought by some to prolong the procedure and increase the costs to both the parties and society. However, Chinese mediation is required in all divorce actions and as a result, China's divorce rate is much lower than that of the United States.[135] Moreover, if mediation is not mandatory for all parties, it may be impossible to determine which cases should be mediated and which should not. Undoubtedly, some cases well-suited for mediation may slip through the system.

Another danger inherent in mandatory mediation is its application to disputes between individuals with unequal bargaining power.[136] A knowledgeable party could dominate the entire process. Since the mediator should remain a neutral third party, individuals who are not aware of their legal position will not be directed by the procedure to

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134. *Id.*
135. *See supra* p. 12.
136. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 34-35 (1982).

develop a consciousness of their rights.[137] The idea of parties being aware of their individual rights is foreign to the Chinese system. In China, mediation works to bring the parties together through the concept of *li*. The goal is to restore harmony. Because of the different schools of thought, unequal bargaining power may not be a concern for the Chinese, but is a primary concern in the United States.

The extreme position is that much inequality exists between the average man and woman in terms of bargaining and that mediation is never appropriate in any domestic situation.[138] This idea is based on the assumption that women are generally taught to be passive, deferential, and nurturing toward others. Thus, they are unable to bargain for what they need.[139] However, this position becomes outdated as more women enter professional careers and become heads of families. Women are developing bargaining skills and independence.[140] In general, women today are as skilled in negotiations as men.

Despite the arguments against mandatory mediation, several states have recognized its advantages and have implemented court annexed programs for mediation.[141] Perhaps the mandatory nature of mediation is essential to the Chinese system. As the United States continues to develop mediation processes, the mandatory requirement of the Chinese system should not be overlooked. Mandatory mediation seems to benefit most parties, and also prevents lack of use of the process. Courts are often reluctant to order mediation because they are unclear of their power to do so. However, if mediation were mandated by statute, both problems would be solved.

IX. MEDIATOR QUALIFICATIONS

To aid the United States in establishing an effective mediation system, an understanding of the Chinese mediator selection process is helpful. Chinese mediators consist mainly of women and retired workers.[142] There are usually three to eleven mediators per committee, and they are selected every two years in each village, municipality,

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137. *Id.* at 35.

138. Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 862 (1985).

139. *Id.* at 862.

140. *Id.*

141. *See* Jenkins, *Divorce California Style*, STUDENT LAWYER 30 (Jan. 1981); CAL. CIV. CODE § 4607 (West Supp. 1990); MICH. COMP. LAWS ANN. § 522.513 (West Supp. 1991).

142. Lecture by Yu, *supra* note 61.

and neighborhood.[143] There is no dispute over who acts as a mediator in China. The selection of Chinese mediators has been made for thousands of years without debate.

This is not the case in the United States. The recent popularity of mediation in the United States has raised many issues. Among these issues is who is qualified to be a mediator. The mediator's role is unique in the United States' legal system.

A mediator's objective is always to facilitate communication between the parties and achievement of a mutually acceptable settlement.[144] Although the mediator is neutral, he need not be entirely passive during the mediation process.[145] The mediator may assist the parties in spotting the issues that need to be resolved.[146] Usually the mediator meets with each party separately to determine who can compromise. While the mediator meets with the parties, he cannot show favoritism to one party.[147]

The process should be controlled by the parties, as opposed to the mediator.[148] The parties determine what compromises are needed to reach agreement. However, the mediator's role is to facilitate compromise. A vital skill the mediator must possess is the ability to listen carefully not only to what is said, but also to what is not said. Although the parties control the mediation process, it is the mediator who motivates the parties to reach agreement.

There has been much disagreement over who should serve as mediators. Some commentators believe a new field of certified public mediators should be established.[149] Others think that social workers or psychologists are best able to fulfill the requirements of mediator. Still others believe lawyers should mediate. Interestingly, retired workers and housewives have not been suggested as mediators. This is a further reflection on the differences between the mediation system of China and the United States.

A mediator's success should not depend on his background or training. As long as he possesses the necessary skills and obtains ad-

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143. *Id.*

144. R. COULSON, PROFESSIONAL MEDIATION OF CIVIL DISPUTES 17 (1984).

145. McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 *Arb. J.* 15, 22 (1990) [hereinafter *Ethical*].

146. *Id.*

147. *Id.*

148. R. COULSON, *supra* note 144, at 18-23.

149. If the process is mandatory the quality control of mediation becomes increasingly important because the free market will no longer be controlling the process. *See Mandatory Mediation*, *supra* note 11, 1101 n. 106.

ditional training in mediation, he should be qualified to mediate. Skills required are the ability to communicate and the ability to identify issues. The most critical skill is the ability to remain neutral in the eyes of the parties. The mediators must be able to remain open minded and allow the parties to settle the dispute. A variety of requirements should be imposed on those entering the profession to ensure quality mediation.[150] After being trained, the mediator should receive a license and follow a code of ethics.[151]

If a lawyer is a mediator, a few complications exist. One problem is that some lawyers are unable to remain neutral because of their adversarial training.[152] Unlike China, American law schools have traditionally trained students to represent their clients with zealous advocacy. It is difficult for some lawyers to be neutral and restrain their commitment to the adversarial process. However, American law schools are beginning to offer training in ADR methods.[153] As law students are exposed to ADR methods, this problem may fade.

Another dilemma for the lawyer/mediator is the considerable ethical issues involved. Since divorce mediation may involve the representation of two clients, difficulties arise as to the lawyer's role.[154] Conflict-of-interest problems normally arise when a lawyer represents more than one client in the same matter.

The American Bar Association has created model rules that allow lawyers to act as intermediaries between clients if the lawyer complies with certain restrictions.[155] This common representation approach is

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150. *Id.*

151. *Ethical*, *supra* note 145, at 22.

152. *Id.*

153. Comment, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 WASH. U.L.Q. 223, 225 (1985) [hereinafter *Model Rule 2.2 Comment*]. *See also* MODEL RULES OF PROFESSIONAL CONDUCT RULE 2.2 (1983).

154. *Model Rule 2.2 Comment*, *supra* note 153, at 225.

155. Model Rule 2.2 provides:

> (a) A lawyer may act as intermediary between clients if:
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the

manifestly difficult. Many ethics committees and bar associations have suggested that lawyers provide non-representational divorce mediation to alleviate some ethical dilemmas lawyers face.[156]

These problems involving the selection of the mediator are non-existent in the Chinese mediation system. Traditionally, the Chinese mediators have been selected without debate. The Chinese mediators seem to be at an advantage because they are accepted by most everyone. The United States is still struggling to decide who should mediate and what limitations should be placed on the mediator.

X. APPLICATION OF PRESSURE ON THE DISPUTING PARTIES

A common role of Chinese mediators is to pressure the disputing parties to resolve their dispute.[157] This pressure is applied in many ways. One method is to encourage the parties to engage in self-criticism, to examine their behavior, and to resume a happy life.[158] A second method is to have the families, neighbors, and work units of the parties suggest a settlement. Another method may be for the mediator to stress values to the disputants regarding commitment to the Party and to collective efforts to attain them.[159] These types of pressures to resolve the dispute may, in reality, result in a suppression rather than a resolution of the dispute.[160]

The possibility of suppression of the dispute occurs when the mediator's application of values emphasizing national unity and collective living suffocate the underlying dispute.[161] For example, "[a]

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contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

156. *Model Rule 2.2 Comment*, *supra* note 153, at 228.
157. *See supra* text accompanying note 70.
158. Lecture by Yu, *supra* note 61.
159. Lubman, *supra* note 41, at 1346-47.
160. *Id.*
161. *Id.*

bourgeois creditor is told that he cannot expect a cadre to pay rent because all economic classes must unite to assist the national economic effort."[162] The original conflict may still exist, though the dispute has ended.

Application of pressure runs contrary to the traditional legal notions in the United States. Some American courts have held that judges do not have the power to coerce settlement.[163] The same concept should apply to mediators. When mediators pressure parties to settle their dispute, they undermine the consensual nature of mediation and run the risk of suppression rather than resolution of the dispute.

An American mediation system should implement safeguards to prevent coerced settlement. Mediators should be required to caution parties that no pressure should be applied during the mediation and that they may report any such pressure to the proper authorities.[164] In addition, the mediators' code of ethics should forbid settlement pressure.[165] Mediators should never make decisions for the parties. One way to ensure that no pressure is applied by mediators would be to submit mediators to malpractice sanctions.[166]

Although the above suggestions may help reduce the likelihood of forced settlement, the confidentiality of mediation creates a problem of enforcing the safeguards. The preservation and importance of confidentiality is widely accepted.[167] The ability to assure confidential disclosure that is necessary to reaching a settlement may decide the success of the mediation. However, mediators should be subjected to some type of review, especially when disclosure is crucial to prevent forced settlement.[168] The courts should protect the disputants' confidentiality; however, an open proceeding should be available when the risk of coercion is present.[169]

XI. CONCLUSION

The Chinese mediation system is deeply-rooted in Confucian philosophy, and has grown over the years to become an integral part of

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162. *Id.* at 1347.

163. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

164. *Mandatory Mediation*, *supra* note 11, at 1098.

165. *Id.*

166. *Id.*

167. *See* Freedman & Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. DISPUTE RESOL. 37 (1986); *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984); N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 96-100 (1989).

168. *Mandatory Mediation*, *supra* note 11, at 1100.

169. *Id.*

Chinese society. The mediation system was reinforced by Mao's leadership which added education as a function of mediation. While the system works very well for China, it is possible that some disputes are merely suppressed rather than resolved. However, mandatory mediation has been quite effective in Chinese society for centuries.

As interest in mediation grows in the United States, much can be learned by considering the scope and effectiveness of the Chinese mediation system. The American legal system is often counter-productive and wasteful. An increasing number of couples facing divorce and legal separation seek a fair and amicable settlement that will allow them to restructure their family. When children are involved, couples especially need to communicate and continue to cooperate in the raising of their children. Mediation offers a more productive forum for settlement that will enhance communication between the parties. Perhaps mandatory mediation as used by the Chinese should be implemented in the United States.

The United States' mediators should be carefully trained and prohibited from applying pressure on individuals to settle disputes. The application of pressure on the disputing parties may be the most significant difference between the two countries' mediation systems. The United States' traditional legal doctrine prohibits applying pressure on parties to settle disputes, unlike the Chinese system, where pressure is viewed positively.

Although there are inherent dangers involved with mediation, it is a promising system for dispute resolution. Many details and standards remain to be established. The mediation process from ancient and modern China has provided a foundation upon which the United States can build its own system to meet the needs and values of its citizens.

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