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The Prospects for an International Criminal Court in the 1990s

Joel Cavicchia*

I. Introduction

An International Criminal Court (ICC), with the power to assert jurisdiction over international crimes, has been the subject of extensive debate throughout this century. The very concept has evoked a range of disparate responses, from those who view it as a realistic goal to those who view it as chimerical grist for academic mills. Focus on this issue, triggered to some degree by the recent Gulf War, has rekindled the debate. This article explores the possibility of creating an ICC which stakes a middle ground between idealism and skepticism.

This article proceeds as follows: Part II consists of a historical overview of past efforts to create an ICC. Part III discusses the reasons that the 1990s may be a particularly propitious time for development of an ICC—namely, increased global receptiveness to an ICC, the continued expansion of international terrorism, and the Gulf War, which has prompted more review of the role of international tribunals than at any time since the end of World War II. Part III also includes a review of the arguments for and against creation of an ICC. Arguments supporting an ICC—its potential for the maintenance of a global legal order, and its ability to serve as a worthy substitute to domestic courts in certain instances—are measured against the charges that ICC development remains an unworkable and idealistic vision. Part IV recognizes that a viable ICC would require nations to derogate from fundamental notions of state sovereignty and addresses three areas where ICC intrusion on state sovereignty would be most pronounced: subject matter jurisdiction, personal jurisdiction, and the rights of criminal defendants. Part V discusses the basic organization of an ICC and focuses upon four specific areas: possible association with the International Court of Justice (ICJ), the qualifications for ICC judges, the bureaucratic make-up of an ICC, and the degree of national assistance with those

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nations subject to the ICC's jurisdiction. Finally, Part VI concludes with a general summary and a reaffirmation that a modestly planned ICC would set the groundwork for a more ambitious international criminal tribunal in the future.

II. Historical Overview

International courts were not in existence during the Middle Ages. Cases consisting of an international nature, such as those relating to the law of arms, were submitted to individual sovereigns.¹ The first international tribunal was held in 1474. Peter Von Hagenbush was appointed by Duke Charles of Burgundy as Governor of Breisach, an Austrian possession pledged to the Duke. Von Hagenbush was captured by the Austrians and was tried and convicted by a court for crimes against "God and man," following his reign of terror over the citizens of Breisach.²

Some international tribunals were created in the nineteenth century and were empowered to destroy or confiscate vessels engaged in the slave trade. These courts were established pursuant to treaties between Great Britain and other nations. The masters and crews of these vessels were not tried in these tribunals, but were delivered to their respective nations for punishment under domestic law. At the close of the nineteenth century and at the beginning of the twentieth century, various European river commissions were given territorial or quasi-territorial jurisdictions.³

After World War I, the Treaty of Versailles contained provisions for an international tribunal. Article 227 required the public arraignment of William II of Hohenzollern for the "supreme offense against international morality and the sanctity of treaties."⁴ Article 228 provided for German recognition of the Allied and Associated Powers' right to bring before the military tribunal persons accused of having committed "acts in violation of the laws of war."⁵ A special tribunal was to be composed of five judges from the United States, Great Britain, France, Italy, and Japan.⁶

Attempts to put these articles into force failed. Following William II's flight to the Netherlands at the end of World War I, the Dutch government declined to extradite William II, alleging that the

1. M. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 23 (1965).

2. M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987); G. SCHWARZENBERGER, *II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 462 (1968).

3. M. HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE* 183 (1972).

4. *Id.*

5. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, II Martens Nouveau Recueil (3d) 323, (entered into force on Jan. 10, 1920).

6. *Id.*

offenses with which he was charged, were political and not punishable under Dutch law.⁷ The Allies' reluctance to press for prosecution of Hohenzollern and others accused of war crimes under Article 228, was based upon a fear that prosecution would stir an uprising in Germany,⁸ or even start a new war with the Allies.⁹

Despite the failure to bring William II before an international tribunal, initiatives for an International Criminal Court persisted during the 1920s. Several conferences of the International Law Association (ILA) addressed the issue,¹⁰ and the ILA's Permanent International Court Committee enacted a draft statute for an ICC in 1926.¹¹ The Committee noted its interest in the prospective remedial effects of an ICC, as opposed to retroactive applications of an ICC to the recently ended war.¹²

The assassinations of King Alexander I of Yugoslavia and French Prime Minister Louis Barthou prompted initiatives for an ICC to take a different direction, as the League of Nations considered the possibility of an ICC for the prosecution of crimes involving international terrorism.¹³ In fact, the League of Nations adopted a convention on terrorism which provided for an ICC.¹⁴ However, the convention did not go into effect due to insufficient ratifications.¹⁵ Following this failed initiative,¹⁶ efforts to establish an ICC under the direction of the League of Nations were halted due to the increased ineffectiveness of the League of Nations in the years immediately preceding World War II.¹⁷

During World War II, protests against the atrocities committed by the Nazis in Europe¹⁸ caused the concept of an ICC to resur-

7. R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 31 (1960).

8. *Id.*

9. J. WILLIS, *PROLOGUE TO NUREMBERG* 113 (1982).

10. See *A PERMANENT INTERNATIONAL CRIMINAL COURT*, International Law Association, 31st Conference, Buenos Aires, Aug. 24 - Aug. 30, 1922 (available in Report of the 31st Conference of the International Law Association (1923)); *DRAFT STATUTE FOR THE PERMANENT INTERNATIONAL CRIMINAL COURT*, International Law Association, 33rd Conference, Stockholm, Sept. 8 - Sept. 13, 1924, in Report of the 33rd Conference of the International Law Association (1925).

11. See *REPORT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT*, International Law Association, 34th Conference, Vienna, Aug. 5- Aug. 11, 1926 (available in Report of the 34th Conference of the International Law Association (1927)) [hereinafter 1926 ILA Draft].

12. *Id.*

13. Gross, *International Terrorism and International Jurisdiction*, 67 *AM. J. INT'L L.* 508 (1973).

14. League of Nations, *Convention for the Creation of an International Criminal Court*, opened for signature at Geneva, November 16, 1937, C. 547(I), M. 384(I), 1937 (V), reprinted in M. HUDSON, 7 *INTERNATIONAL LEGISLATION (1909-1945)* 878 (1941). This was never entered into force.

15. See M. HUDSON, *supra* note 3.

16. For a discussion of some of the problems experienced in this Convention, see Blischnenko & Shdanov, *The Problems of International Jurisdiction*, XIV 1976 *CANADIAN Y.B. INT'L L.* 283, 285 (Canadian Branch, Int'l L.A.).

17. See BASSIOUNI, *supra* note 2.

18. Finch, *Retribution for War Crimes*, 37 *AM. J. INT'L L.* 81 (1943).

face.¹⁹ In 1942 the Allies met at London's St. James Palace to declare their intent to prosecute the Nazis for war crimes.²⁰ In 1943 this intent was reaffirmed by the United States, Great Britain, and the Soviet Union in Moscow.²¹ On August 8, 1945, the Allies entered into an agreement establishing an international military tribunal for the prosecution and punishment of the major war criminals of the European Axis.²² The tribunal's subject matter jurisdiction consisted of crimes committed against peace, war crimes, crimes against humanity, and conspiracy to commit any of these crimes.²³ On January 19, 1946, the Allies established a similar tribunal for Japanese war crimes in the Far East.²⁴

Following these tribunals held in Nuremberg and Tokyo, debate arose over the propriety of the proceedings, especially on the issue of whether the convicted defendants had been charged with offenses recognized under international law.²⁵ Despite this concern, the sentiment prevailed that these trials could serve as a starting point for sweeping prosecution of international crimes,²⁶ with an ICC being a

19. Glueck, *Tribunal for War Offenders*, 56 HARV. L. REV. 1059, 1089 (1943).

20. E. JANECEK, NUREMBERG JUDGMENT IN THE LIGHT OF INTERNATIONAL LAW 13 (1949).

21. *Id.*

22. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472.

23. Article 6 of the Charter of the International Military Tribunal defines these crimes as follows:

(a) *CRIMES AGAINST PEACE*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) *WAR CRIMES*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) *CRIMES AGAINST HUMANITY*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

I PROCEEDINGS IN THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1949).

24. International Military Tribunal for the Far East, Jan. 19, 1946, and amended Apr. 26, 1946, 4 BEVANS 20, T.I.A.S. No. 1589.

25. R. MINEAR, VICTORS' JUSTICE, THE TOKYO WAR CRIMES TRIAL 34-73 (1961); April, *An Inquiry into the Judicial Basis for the Nuremberg War Crimes Trial*, 30 MINN. L. REV. 313 (1946).

26. Carter, *The Nurnberg Trials: A Turning Point in the Enforcement of International Law*, 28 NEB. L. REV. 370 (1949); Mignone, *After Nuremberg, Tokyo*, 25 TEX. L. REV. 475

distinct possibility²⁷ and with the newly established United Nations serving as a means to accomplish this goal.²⁸ Sentiment was so favorable that, in a closely related issue, President Harry S. Truman expressed enthusiasm over the possible codification of international criminal law.²⁹

On December 9, 1948, the United Nations General Assembly, pursuant to Resolution 260 B III, invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdictions will be conferred upon that organization by international conventions."³⁰ Two reports were prepared by special rapporteurs, Ricardo J. Alfaro³¹ and Emil Sandstrum.³² The ILC thereafter determined that the establishment of an ICC charged with jurisdiction over genocide and other crimes was a desirable goal, but did not recommend the establishment of a criminal chamber within the International Court of Justice (ICJ).³³

The General Assembly reviewed the ILC's report and appointed a special committee, comprised of representatives of seventeen Member States, to prepare a preliminary draft convention and proposal relating to the creation of an ICC.³⁴ The special committee submitted a draft proposal in 1951³⁵ and a revised draft in 1953.³⁶

Following its review of these drafts, the General Assembly decided to postpone consideration of an ICC pending the General Assembly's disposition of two separate yet related ideas: the United Nations' initiative on a "draft code of offenses against the peace and security of mankind" (hereinafter draft code of offenses), and the United Nations' work in defining the term "aggression," a key term in the draft code of offenses.³⁷

(1947).

27. Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 72 (1947).

28. Shick, *The Nuremberg Trial and Future International Law*, 41 AM. J. INT'L L. 770, 794 (1947).

29. Letter to Francis Biddle in Response to His Report on the Nuremberg Tribunal, 1946 PUB. PAPERS 480, 481 (Nov. 12, 1946).

30. G.A. Res. 260 B (III) at 177, U.N. Doc. A/810 (1948).

31. *Questions of International Criminal Jurisdiction*, Report by Ricardo J. Alfaro, [1950] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/15 (1950).

32. *Questions of International Criminal Jurisdiction*, Report by Emil Sandstrum, [1950] 2 Y.B. INT'L COMM'N 18, U.N. Doc. A/CN.4/20 (1950).

33. *Report of the International Law Commission*, 5, U.N. GAOR Supp. (No. 12), U.N. Doc. A/1316 (1950).

34. *Report of the International Law Commission*, 5 U.N. GAOR, U.N. Doc. A/1639 (1950).

35. 7 U.N. GAOR Supp. (No. 11), U.N. Doc. A/2136 (1952) [hereinafter 1951 ILC Draft].

36. 9 U.N. GAOR Supp. (No. 12), U.N. Doc. A/2645 (1954) [hereinafter 1953 ILC Draft].

37. G.A. Res. 898, 9 U.N. GAOR Supp. (No. 21) at 50, U.N. Doc. A/2890 (1954);

This domino-like effect resulted in extensive delay, and the General Assembly did not adopt a consensus resolution on the term "aggression" until 1974.³⁸ Following the resumption by the ILC of work on a draft code of offenses, the ILC in 1983 indicated to the General Assembly that resumption of effort to draft a code of offenses would be ineffective if unaccompanied by an international criminal jurisdiction.³⁹ This issue was raised by the ILC at subsequent sessions.⁴⁰ While the General Assembly has never directly responded to the ILC request, it had indicated, through a series of resolutions, its interest in the ILC resumption of efforts to develop an ICC.⁴¹

In 1990 the ILC incorporated an examination of numerous options relating to the development of an ICC in a draft report on its work in its 42nd session in Geneva.⁴² In this report, the ILC found that its examination of the questions of an ICC revealed broad agreement that a permanent ICC should be created in a relationship with the United Nations system.⁴³ These recent efforts have on occasion been assailed as making scant progress, especially when viewed in terms of the United Nations efforts which began over forty years ago.⁴⁴

Apart from the ILC efforts, the International Institute of Higher Studies in Criminal Sciences submitted a comprehensive draft statute for an ICC at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba from August 27 to September 7, 1990.⁴⁵ This draft, modeled after an earlier effort by Professor M. Cherif Bassiouni,⁴⁶ had been designed to implement the International Convention on the Suppression and Punishment of the Crime of Apartheid.⁴⁷

G.A. Res. 1181, 12 U.N. GAOR Supp. (No. 18) at 51, U.N. Doc. A/3805 (1957); G.A. Res. 1186, 12 U.N. GAOR Supp. (No. 18) at 51, U.N. Doc. A/3805 (1957); G.A. Res. 1187, 12 U.N. GAOR Supp. (No. 21) at 52, U.N. Doc. A/3805 (1957).

38. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/38/10 (1983).

39. 38 U.N. GAOR Supp. (No. 10) para. (c)(i), U.N. Doc. A/38/10 (1983).

40. 41 U.N. GAOR Supp. (No. 10) paras. 146 to 148, 185, U.N. Doc. A/41/10 (1986); 42 U.N. GAOR Supp. (No. 10) paras. 29 to 36, 67(c), footnote 28, U.N. Doc. A/42/10 (1987); 43 U.N. GAOR Supp. (No. 10), para. 280, commentary to art. 4, U.N. Doc. A/43/10 (1988); 44 U.N. GAOR Supp. (No. 10) paras. 211 to 216, U.N. Doc. A/44/10 (1989).

41. G.A. Res. 43/164, 43 U.N. GAOR Supp. (No. 49) at 280, U.N. Doc. A/43/49 (1988); G.A. Res. 44/32, 44 U.N. GAOR Supp. (No. 49) at 304, U.N. Doc. A/44/49 (1989).

42. *Draft Code Against The Peace and Security of Mankind: Report of The Working Group Established Pursuant To The Request From the General Assembly to The International Law Commission*, U.N. Doc. A/CN.4/L.454 (1990) [hereinafter 1990 ILC Draft].

43. *Id.*

44. See BASSIOUNI, *supra* note 2, at 11.

45. U.N. Doc. A/CONF. 144/NGO ISISC (1990) [hereinafter Havana Draft].

46. U.N. Doc. E/CN.4/22 CRP.19/REV.1 (1980); reprinted in Bassiouni and 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) [hereinafter *Apartheid Draft*].

47. G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

Finally, non-government organizations have persisted in efforts to create an ICC. The ILA drafted a statute for an ICC which, in some respects has circumvented the obstacles which have delayed the United Nations efforts.⁴⁸

III. Arguments For and Against the Creation of an International Criminal Court

Given the almost glacial pace of development of an ICC, it is important to determine why the 1990s may be a propitious time for an ICC. Three reasons are presented for the proposition that a permanent ICC may be a more attainable goal now than it was in the past.

The first reason is the increased receptivity by the global community. During the United Nations' early work on draft proposals for an International Criminal Court, some nations expressed concern that its establishment would be inconsistent with national sovereignty, while others felt such a proposal was simply impractical.⁴⁹ These concerns were compounded by fear that an ICC would have jurisdiction over political crimes and would provoke a clash of cultural and ideological differences.⁵⁰ This problem was of particular concern to the Soviet Union where, in the 1950s, legal scholars struggled with the issue of how the application of international law could be reconciled with the separate yet competing economic ideologies of Capitalism and Marxism.⁵¹

As recently as 1974, Professor Richard N. Gardner, writing in *Foreign Affairs* magazine, argued that few people retained any confidence in global strategies and that "the consensus on basic values and willingness to entrust vital interests to community judgment clearly do not exist."⁵² Yet, fourteen years later, he noted that the times were ripe for constructive multilateral cooperation through international organizations, prompted by several key forces: the United States' relative decline in international power which has necessitated

48. 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, August 29-September 4, 1982 in Report of the 60th Conference of the International Law Association (1983); DRAFT STATUTE FOR AN INTERNATIONAL COMMISSION OF CRIMINAL INQUIRY AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, International Law Association 61st Conference, Paris, August 26-September 1, 1984, in Report of the 61st Conference of the International Law Association (1984) [hereinafter 1984 ILA Draft].

49. See 1953 ILA Draft, *supra* note 36, general principles, para. 17 at 4.

50. Wright, *The Scope of International Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561, 567-75 (1975) [hereinafter *The Scope*].

51. R. FALK, REVIVING THE WORLD COURT 5 (1986); Kulski, *The Soviet Interpretation of International Law*, 49 AM. J. INT'L L. 518 (1955).

52. Gardner, *The Hard Road to World Order*, 52 FOREIGN AFF. 556 (1974) [hereinafter *World*].

a larger share of economic and political power with Europe, Japan, and the developing world; a "creeping moderation" of many third world countries gradually developing an interest in free markets, human rights, and respect for international obligations; and the dramatic changes in communist powers, which had long presented major impediments to the development of international organizations during the post war period.⁵³

The increased receptiveness to an ICC has been seen on many fronts. In September 1987 the former General Secretary of the Communist Party of the Soviet Union, Mikhail S. Gorbachev, submitted a letter to the United Nations proposing a tribunal, established under the auspices of the United Nations, to investigate acts of international terrorism.⁵⁴ On September 25, 1990, Eduard A. Shevardnadze, Minister for Foreign Affairs of the Union of Soviet Socialist Republics, submitted a statement to the United Nations General Assembly indicating that it was imperative to create a new legal environment "in which anyone guilty of grave crimes against humanity, or participating in atrocities, in taking hostages, acts of terrorism or torture, and those guilty of particular ruthlessness in the use of force, could not escape punishment."⁵⁵

Interest has similarly been evident in the Western hemisphere. In his inaugural address on August 7, 1990, President Caesar Gaviria Trujillo of Columbia indicated an interest to "explore the possibility of creating an international or regional criminal jurisdiction to fight narcotrafficking and other related crimes that surpass international borders."⁵⁶ The Permanent Representative of Trinidad and Tobago to the United Nations General Assembly requested that the forty-fourth session agenda include an initiative to establish an ICC with jurisdiction over crimes involving illicit trafficking of narcotics across national frontiers and other transnational activities.⁵⁷ This request was prompted by a "desire to foster increased regional and international cooperation in criminal justice administration and the speedy public trial of transnational offenders through acceptable investigative and judicial procedures."⁵⁸

Regarding United States legislation, the Omnibus Security and

53. Gardner, *The Case for Practical Internationalism*, 66 FOREIGN AFF. 827 (1988) [hereinafter *Internationalism*].

54. Quigley, *Perestroika and International Law*, 82 AM. J. INT'L L. 788, 794 (1988).

55. Address by Eduard A. Shevardnadze, Forty-Fifth Session of the General Assembly of the United Nations, *reprinted in* N.Y. Times, Sept. 26, 1990, at A10.

56. Inaugural address by President Caesar Gaviria Trujillo, Bogota, Columbia (Aug. 7, 1990).

57. Statement by the Permanent Representative of the Republic of Trinidad and Tobago, Ms. Marjorie R. Thorpe, Sixth Committee of the General Assembly of the United Nations (Nov. 10, 1989) [hereinafter Thorpe].

58. *Id.*

Terrorism Act of 1986 decreed that the President should consider "the possibility of eventually establishing an international tribunal for prosecuting terrorists."⁵⁹ In the 101st Congress, several bills were introduced which encouraged the President to enter into negotiations for the creation of an ICC to combat international drug trade,⁶⁰ and which called for the Attorney General to pursue the establishment of an ICC for acts of terrorism, drug-trafficking, genocide, and torture.⁶¹ On November 5, 1990, President George Bush signed into law the Foreign Operations Appropriations for Fiscal Year 1991, which contained an amendment calling for the President to report to Congress by October 1, 1991, the results of his efforts regarding the establishment of an ICC to deal with criminal acts defined in international conventions.⁶²

The United States Department of State has voiced guarded interest in the proposals for an ICC. On June 16, 1988, when testifying before the Foreign Operations Subcommittee of the Senate Committee on Appropriations, Secretary of State George Schultz said that the creation of an ICC was an "important possibility."⁶³ Two years later, Secretary Schultz's successor, James Baker, appeared before the House Foreign Affairs Committee and, when asked about the possibility of establishing an ICC, he said that "the suggestion is a good one."⁶⁴ Shortly thereafter, Undersecretary of State, Robert Kimmett, appeared before the same committee and, during a discussion of international criminal jurisdiction, he stated that "the time is probably riper than ever to look at that situation."⁶⁵

The second reason that the 1990s may be an appropriate time for the creation of an International Criminal Court is the increased perception that criminal activity relating to drug trafficking and terrorism is taking on an increasingly global dimension.⁶⁶ The conviction that this type of expanding criminal activity is extending beyond

59. Omnibus Diplomatic Security and Terrorism Act of 1986, Pub. L. No. 99-399, 1986 U.S. CODE CONG. & ADMIN NEWS (100 Stat.) 853.

60. H.R. Con. Res. 66, 101st Cong., 1st Sess., 135 CONG. REC. H529 (1989); S. Res. 218, 101st Cong., 1st Sess., 125 CONG. REC. S16, 682 (1989).

61. H.R. 3355, 101st Cong., 1st Sess., 135 CONG. REC. H6269 (1989).

62. H.R. 5114, 101st Cong., 2d Sess. 136 CONG. REC. S16,216-S16,217 (1990).

63. *Appropriations for Foreign Assistance and Related Programs for the Fiscal Year ending September 30, 1989; Hearings on H.R. 4637 Before the Subcomm. on Foreign Operations of the Senate Comm. on Appropriations*, 100th Cong., 2nd Sess. 312 (1988) (statement of George P. Schultz, Sec'y, DEPT. STATE).

64. *Hearings on the Crisis in the Persian Gulf Before the House Comm. on Foreign Affairs*, 101st Cong., 2nd Sess. 26 (1990) (statement of James A. Baker, III, Sec'y, DEPT. STATE).

65. Chronology of Proposals for an International Criminal Court Feb. 13, 1978-Nov. 5, 1990 (unclassified) (available in office of Senator Arlen Specter).

66. Oakley, *Terrorism: Overview and Developments*, DEPT. ST. BULL., Nov. 1985, at 61-64; Note, *The Extraterritorial War on Cocaine: Perspectives from Bolivia and Columbia* 12 SUFFOLK TRANSNAT'L L.J. 39 (1988) (authored by Mary Ellen Welch).

national borders has prompted renewed interest in an ICC.⁶⁷

The third reason is the recent Gulf War, which has created an atmosphere conducive to serious deliberation on the possibilities of an ICC. In the wake of President Saddam Hussein's invasion of Kuwait and allegations of criminal activity, an outcry has arisen for war crimes trials.⁶⁸ This call has been particularly forceful in the United States Congress where the Senate overwhelmingly endorsed the possibility of trying President Hussein before an international tribunal.⁶⁹ At the onset of the 102nd Congress, several bills were immediately introduced urging the establishment of an international military tribunal to prosecute President Hussein and his subordinates for war crimes during the invasion of Kuwait, missile attacks against Israel, and the capture and alleged mistreatment of prisoners of war.⁷⁰ While Part IV discusses the reasons why war crimes trials are too politically sensitive for the narrowly limited jurisdiction of the permanent ICC proposed in this article, it is nonetheless encouraging that the issue of the viability of international criminal tribunals, in general, has become a matter of public debate in the Gulf War's aftermath.

In a world fraught with imperfection, awaiting the perfect moment for creation of an ICC would be an undertaking of infinite duration. However, if there is any merit to the assertions that 1990 has been an "annus mirabilis," conducive to the development of a more constructive world order,⁷¹ or that the United Nations has undergone a rebirth which fosters "qualitatively new prospects for the development of international law,"⁷² a permanent ICC could be a worthy test to the merit of those pronouncements.

If the era of 1990s is a more hospitable time for reconsideration of an ICC than in the past decades, a re-examination of the benefits or pitfalls that the creation of an ICC might provide is essential. After the two World Wars, certain crimes were considered so destructive of world peace and order that the creation of an international world tribunal to punish such crimes was deemed imperative.⁷³

67. Wilkinson, *Wanted: An International Criminal Court*, WORLD PRESS REV. 22 (1986).

68. Kamen, *Geneva Conventions Basis of Allies Charges*, Wash. Post, Jan. 22, 1991, at A19, col. 3. See also Seib, *Bush Hints U.S. to Seek War Crimes Trial of Iraq's Leaders for Actions in Kuwait*, Wall St. J., Oct. 16, 1990, at A8, col. 1.

69. H.R. 5241, 101st Cong., 2d Sess., 136 CONG. REC. 12,784-12,813 (1990).

70. H.R. Con. Res. 66, 102nd Cong., 1st Sess., 137 Cong. Rec. H684 (1991); S. Con. Res. 7, 102nd Cong., 1st Sess., 137 Cong. Rec. S1286-87 (1991); S. Res. 15, 102nd Cong., 1st Sess., 137 Cong. Rec. S1007 (1991).

71. Howard, *The Springtime of Nations*, 69 FOREIGN AFF. 17, 32 (1990).

72. Entin, *A Stronger U.N. as a Means of Consolidating and Democratizing the International Legal Order*, 2 INT'L REV. CONTEMP. L. 21, 26 (1989).

73. Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 63 (1952).

This conviction was especially strong where such crimes were condoned or even sanctioned by the governments whose nationals were charged with the offenses.⁷⁴ After World War II, this feeling was heightened by a growing fear over the development of weapons of increased destructive power⁷⁵ and the belief that a more effective world order could be attained through a permanent ICC.⁷⁶

A concern, moreover, of the increase in crimes of an international nature caused some commentators to deem an ICC to be indispensable. Terrorism, for example, is considered best combatted by using an ICC as an alternate jurisdiction, when political impediments preclude successful prosecutions in national courts.⁷⁷ This reason is considered increasingly attractive when a national legal system is perceived as ineffective in prosecuting certain crimes.⁷⁸ The recent inability of some South American nations to prosecute drug traffickers reflects the current scope of this problem.⁷⁹

The accused has also been perceived as the potential beneficiary of an ICC. It has been argued that, in certain instances, such a court might provide an accused a better chance for an equitable trial than he might otherwise experience in a national court.⁸⁰

These proposed advantages are afforded no immunity from the criticism that arises in a variety of directions. For example, this question has been raised. What motivation would a nation have to turn over an accused to an ICC, if that nation had the inclination neither to prosecute nor to extradite the accused?⁸¹ Some fears have been voiced that an ICC would hinder other law enforcement endeavors by glamorizing the accused's position by providing him with an international forum.⁸² There is also the apprehension that an ICC may prove to be no more than a mere dumping ground for politically expedient cases.⁸³

Additionally, there has long existed an undercurrent of belief among some writers that an ICC is an idealistic vision which, while at some future period may be an engaging possibility, is clearly inconsistent with the hard boiled realities of the present age. In the

74. *Id.* at 63.

75. *The Scope*, *supra* note 50, at 575-76.

76. *The Scope*, *supra* note 50, at 576.

77. J. MURPHY, *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 54 (1980).

78. *See Thorpe*, *supra* note 57, at 4.

79. Robbins, *How Cocaine Rules the Law in Columbia*, *U.S. NEWS AND WORLD REP.*, Feb. 8, 1988, at 28, 29; *see also* Farah, *Judge Frees Drug Trafficker Under Columbia's New Rules*, *Wash. Post*, Jan. 22, 1991, at A5.

80. *See* Remarks by Alwyn V. Freeman, American Society of International Law, 66th Annual Meeting, Washington, April 27 - April 29, 1972 (available in Proceedings of the 66th Annual Meeting of the American Society of International Law at 243 (1972)).

81. Press Release USUN 145 - (89), *United States Mission to the United Nations* (Nov. 14, 1989) [hereinafter *Mission*].

82. *Id.*

83. *Id.*

midst of World War II, Manley O. Hudson wrote that "the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or individuals."⁸⁴ With the beginning of the Cold War and increased tension arising from the threat of nuclear confrontation, an ICC was considered an extremely remote prospect.⁸⁵

When, in 1968, Professor Charles Dalfen reviewed the effectiveness of the International Court of Justice, he wrote that its assessment required "an examination of how states see and assess the Court and the Court situation and the risk they see to their interests in that situation."⁸⁶ This observation is equally appropriate when debating the merits of an International Criminal Court, for such debate often entails review of those features of an ICC which a nation would find most attractive, and those a nation would find most detrimental. The successful creation of an ICC will depend upon the ability to strike a balance between the "chaos" feared by ICC opponents and the "millennial justice" all too frequently envisioned by its advocates.

IV. The International Criminal Court and State Sovereignty

The historical issue of state sovereignty⁸⁷ and the formidable impediment it presents⁸⁸ must be addressed before an ICC has an opportunity of becoming a reality. In 1950 Georg Schwarzenberger wrote that some nations were powerful enough to be immune from collective enforcement measures⁸⁹ and offered the bleak assessment that:

[A]n international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be war under another name.⁹⁰

Over thirty years later, the prospects for an ICC were treated with

84. M. HUDSON, *supra* note 3, at 186.

85. See Remarks by Sharon A. Williams, American Society of International Law, 80th Annual Meeting, Washington, April 9 - April 12, 1986 (available in Proceedings of the 80th Annual Meeting of the American Society of International Law at 125 (1986)) [hereinafter 80th Annual Meeting].

86. Dalfen, *The World Court: Reform or Re-Appraisal*, 1968, 1 CANADIAN Y.B. INT'L L. 212, 219.

87. Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. & L. 11 (1983).

88. Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567 (1982).

89. Schwarzenberger, *The Problems of International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950).

90. *Id.* at 295.

equal pessimism by some writers.⁹¹

In a press release issued in response to the Trinidad and Tobago initiative for an ICC, the United States Mission to the United Nations speculated that the lack of progress in the establishment of an international tribunal "raises the question of whether there is something inherent in the very concept of an ICC, and the derogation from state sovereignty which it represents, that would prevent such a court from receiving the broad acceptance which would be required to make it effective."⁹² If the concept of an ICC truly contains some implicit element of a derogation from state sovereignty, it is instructive to examine three areas in which the conflict between an universal tribunal and state sovereignty is most pronounced: the subject matter jurisdictional claims of a sovereign nation, its personal jurisdictional claims, and the rights of a criminal defendant who is tried in the sovereign nation's domestic courts.

The term "jurisdiction" has many meanings.⁹³ For the purposes of this article, "subject matter jurisdiction" refers to the power to hear cases of a certain class,⁹⁴ and "personal jurisdiction" refers to the power of a court over a defendant.⁹⁵

The types of crimes which might fall under subject matter jurisdiction scope are diverse. Like the term "jurisdiction," the term "international crime" is not easily defined. One possible definition is that any international crime must display at least one of the following elements: it must contain either an international or a transnational element which is an offense to the world community,⁹⁶ or it must be so sweeping in scope that its activity affects the interest of more than one nation.⁹⁷

Early debate on defining an International Criminal Court's subject matter jurisdiction reflected no need for precision in defining an international crime. Instead, the early debate questioned whether a codified penal law was even necessary.⁹⁸ In contrast, the efforts of

91. Friedlander, *Foundations of International Criminal Law: A Present Day Inquiry*, 15 CASE W. RES. J. INT'L L. 13 (1983).

92. *Mission*, *supra* note 81, at 2.

93. R. LEFLAR, *AMERICAN CONFLICTS LAW* 4 (3d ed. 1977). Professor Leflar's observation on the problem of defining jurisdiction is worth noting:

The word "jurisdiction" has too many meanings. Because of that, it is a prime source of ambiguity in the law. About all that can be done about it, is to try to be sure of the sense in which it is being used at any given time.

Id.

94. *See, e.g.*, the definition of "subject matter jurisdiction," BLACK'S LAW DICTIONARY 1425 (6th ed. 1990).

95. *See, e.g.*, the definition of "personal jurisdiction," BLACK'S LAW DICTIONARY 1144 (6th ed. 1990).

96. Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983) [hereinafter *Characteristics*].

97. *Id.*

98. During debate on the 1926 ILA Draft, the ILA's Permanent International Criminal

the United Nations to establish an ICC have had a strong link to its separate initiative of creating an international criminal code. On November 21, 1947, the General Assembly entrusted the ILC to formulate a draft code of offenses.⁹⁹ The ILC's special rapporteur, Jean Spiropoulos, submitted a draft code¹⁰⁰ and a revised draft code¹⁰¹ to the ILC, which thereupon submitted a draft code of offenses to the General Assembly, similar to Spiropoulos' revised draft.¹⁰² The ILC report listed thirteen international crimes, including acts or threats of aggression by the authorities of one state against another state for purposes of self defense; the undertaking or encouraging by state authorities of acts of civil strife and terrorism; the annexation of a state by means contrary to international law; and acts in violation of the customs and laws of war.¹⁰³ The draft code of offenses required a precise definition of the term "aggression." Therefore, the General Assembly decided that the special committee which had been assigned to prepare a detailed report on the definition of aggression,¹⁰⁴ should submit its report before either the issue of a draft code of offenses or the issue of an ICC would again be considered by the General Assembly.¹⁰⁵

In 1974 the General Assembly finally adopted a resolution defining aggression,¹⁰⁶ which appears to have been the apparent triggering event in the resurrection of United Nations reconsideration of a draft code of offenses. On December 10, 1981, the General Assembly called for reconsideration of a draft code of offenses pursuant to Resolution 36/106.¹⁰⁷ From its 35th Session in 1983 through its

Court Committee considered whether there was any need for a criminal code for an ICC. Though some people argued that a code would unduly limit an ICC's functions, the jurisdiction article, ultimately approved by the Committee, extended to international violations of a penal character and to the laws and customs of war. 1926 ILA Draft, *supra* note 11, at 180-82, 207-11. Thirty-eight years later, the ILA conceded that its earlier attempt at drafting a jurisdiction statute for an ICC was comprehensive yet quite general. 1984 ILA Draft, *supra* note 48, at 279.

99. G.A. Res. 177 at 112, U.N. Doc. A/579 (1947).

100. *Draft Code of Offenses Against the Peace and Security of Mankind*, Report of Jean Spiropoulos, [1950] 2 Y.B. INT'L L. COMM'N 253, U.N. Doc. A/CN.4/25 (1950).

101. *Draft Code of Offenses Against the Peace and Security of Mankind*, Report of Jean Spiropoulos, [1951] 2 Y.B. INT'L L. COMM'N 43, U.N. Doc. A/CN.4/44 (1951); *Draft Code of Offenses Against the Peace and Security of Mankind*, Report of Jean Spiropoulos, [1954] 2 Y.B. INT'L L. COMM'N 112, U.N. Doc. A/CN.4/85 (1954).

102. 9 U.N. GAOR Supp. (No. 9), U.N. Doc. A/2693 (1954).

103. *Id.* The draft consists of four articles and contains thirteen crimes.

104. G.A. Res. 895, 9 U.N. GAOR Supp. (No. 21) at 49, U.N. Doc. A/2890 (1954).

105. G.A. Res. 897, 9 U.N. GAOR Supp. (No. 21) at 50, U.N. Doc. A/2890 (1954).

106. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), at 142, U.N. Doc. A/9631 (1974). Article 1 of the resolution defining aggression states:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Id.

107. G.A. Res. 36/106, 36 U.N. GAOR Supp. (No. 51) at 239, U.N. Doc. 36/51

43rd Session in 1991, the ILC has received nine reports from Special Rapporteur Doudou Thiam and has provisionally accepted a number of articles which identified crimes, including acts and threats of aggression, international terrorism, illicit drug trafficking, and colonial domination.¹⁰⁸

Some commentators feel that the recent United Nations work in compiling a draft code of offenses is proceeding "fairly expeditiously."¹⁰⁹ Others, however, view the United Nations efforts over the past decade as an unfortunate regression from its efforts in the 1950s.¹¹⁰ For example, the Second and Third Reports of ILC Special Rapporteur Doudou Thiam have been criticized for including offenses not included in any existing international agreement, such as colonialism and mercenarism.¹¹¹ Perhaps the most acerbic charge is that

the crimes are vaguely defined, ambiguous in their meaning and the elements of each offense are far from being discernible. In short, they violate the principles of legality required in criminal codification. This is either a deliberate way to prevent the development of a technically sound code, or is the product of a very high degree of technical nonchalance.¹¹²

Despite such pessimistic assessments, the United Nations continues to link draft code of offenses initiatives with parallel efforts on behalf of an ICC.¹¹³ In the ILC 1990 report, three separate options

(1982).

108. First report on the *Draft Code of offences against the Peace and Security of Mankind*, [1983] 2 Y.B. INT'L L. COMM'N 137, U.N. Doc. A/CN.4/364 (1983); Second report on the *Draft Code of offences against the Peace and Security of Mankind*, [1984] 2 Y.B. INT'L L. COMM'N 89, U.N. Doc. A/CN.4/377 (1984); Third report on the *Draft Code of offences against the Peace and Security of Mankind*, [1985] 2 Y.B. INT'L L. COMM'N 63, U.N. Doc. A/CN.4/387 (1985); Fourth report on the *Draft Code of offences against the Peace and Security of Mankind*, [1986] 2 Y.B. INT'L L. COMM'N 63, U.N. Doc. A/CN.4/398 (1986); Fifth report on the *Draft Code of offences against the Peace and Security of Mankind*, [1987] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/404 (1987); Sixth report on the *Draft Code of offences against the Peace and Security of Mankind*, [1988] 2 Y.B. INT'L L. COMM'N 55, U.N. Doc. A/CN.4/411 (1988); Seventh report on the *Draft Code of offences against the Peace and Security of Mankind*, [1989] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/419 and Add. 1 (1990); Eighth report on the *Draft Code of offences against the Peace and Security of Mankind*, 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/430 and Add. 1 (1990); Ninth report on the *Draft Code of offences against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/435 and Add. 1 (1991).

109. Mueller, *Four Decades After Nuremberg: the Prospect of an International Criminal Code*, 2 CONN. J. INT'L L. 499 (1987) [hereinafter *Four Decades*].

110. See BASSIOUNI, *supra* note 2, at 9.

111. See BASSIOUNI, *supra* note 2, at 9.

112. See Remarks by Professor Bassiouni in 80th AM. SOC'Y INT'L L. PROC., *supra* note 85, at 120.

113. In a Report addressing the Implementation, Codification, and Progressive Development of International Law for the five year period from 1992 to 1997, the General Assembly indicated that continuing consideration for the creation of an ICC with jurisdiction over "transnational criminal activities" would extend beyond 1992. U.N. Doc. A/45/6 (Prog. 9) (1990). Following the U.N. solicitation of comments from member nations regarding a draft

for subject matter jurisdiction were addressed: jurisdiction over crimes based solely upon a code of offenses; jurisdiction over the crimes in a draft code of offenses as well as other international crimes not falling within that category; or a court established entirely independently of a draft code of offenses.¹¹⁴

The debate over the scope of an ICC's personal jurisdiction has been as vigorous as the debates on an ICC's subject matter jurisdiction. It is instructive, when reviewing United Nations efforts, to discuss draft articles conferring jurisdiction with draft articles recognizing jurisdiction. Under the 1953 ILC Draft, states would confer jurisdiction on a court by convention, special agreement, or unilateral declaration.¹¹⁵ Article 27 of the 1953 ILC Draft, which recognizes jurisdiction, is identical to the corresponding article in the 1951 ILC Draft, and it provides that no person shall be tried by an ICC unless jurisdiction is conferred upon the court by the nation of which that person is a national as well as by the nation or nations where the crime allegedly was committed.¹¹⁶

During debate over the 1951 ILC Draft, discussion arose over the possibility of prosecuting a defendant even if the nation having jurisdiction over the defendant had not accepted the ICC's jurisdiction. There was some support for the argument that a nation, merely by being party to the convention establishing an ICC, should be considered to have delegated its jurisdiction to the ICC.¹¹⁷

The contrary and ultimately prevailing opinion was to proceed cautiously, by requiring a nation to affirmatively confer jurisdiction on a case-by-case basis, even if the nation were already party to the convention.¹¹⁸ Two reasons were offered to support this position: first, to assure that a large number of nations would adhere to the statute establishing an ICC, and second, to assure the protection of the nation itself, in those instances in which prosecution of national leaders might mandate review of that nation's foreign policy.¹¹⁹

A similar concern for state sovereignty was evident in the 1953 ILC Draft.¹²⁰ A motion to delete that portion of Article 27 which mandated approval by the nation where the crime took place, was rejected¹²¹ and, as was the case with the 1951 ILC Draft, Article 27 was approved requiring the consent of both the nation of which the

code of offenses, numerous replies reflected interest in the integration of such a code with an ICC. See U.N. Doc. A/45/437 (1990).

114. 1990 ILC Draft, *supra* note 42.

115. 1953 ILC Draft, *supra* note 36, art. 26, at 24.

116. 1953 ILC Draft, *supra* note 36, art. 27, at 25.

117. 1951 ILC Draft, *supra* note 35, commentary to art. 27, para. 69, at 8.

118. 1951 ILC Draft, *supra* note 35, commentary to art. 27, para. 70, at 9.

119. 1951 ILC Draft, *supra* note 35, commentary to art. 27, para. 70, at 9.

120. 1953 ILC Draft, *supra* note 36, commentary to art. 27, para. 97, at 14.

121. 1953 ILC Draft, *supra* note 36, commentary to art. 27, para. 101, at 15.

defendant was a national and the nation where the crime took place.

The 1990 ILC Report shows some movement away from the jurisdictional scope of Article 27, as three separate options have been outlined for jurisdictional competence: an ICC with exclusive jurisdiction, concurrent jurisdiction between an ICC and national courts, and an ICC solely with review competence.¹²²

An issue of particular concern relating to personal jurisdiction is the question of what entities should come under an International Criminal Court's power. In an early United Nations debate, the ILC considered jurisdiction to apply to nations as well as to natural persons,¹²³ but determined that this scope of jurisdiction was unacceptable because state responsibility for criminal actions was of a political character and improper for an international court to address.¹²⁴ The 1953 ILC Draft provided for an ICC with competence to judge "natural persons," whether they are constitutionally responsible rulers, public officials, or private individuals.¹²⁵

The passage of over thirty years has not substantially changed the United Nations' position on state responsibility. In 1984 the ILA drafted a statute for an ICC which is similar to these United Nations initiatives, as it provides for jurisdiction solely over natural persons.¹²⁶ Furthermore, the 1990 ILC report indicates that the draft being developed by the ILC is restricted to individuals and that extension of jurisdiction to nations was left for consideration at some later stage.¹²⁷

Because the proposals for an ICC's subject matter and personal jurisdiction have taken more than one path, the United Nations must attempt to choose those roads which would most likely lead to an International Criminal Court. Regarding subject matter jurisdiction, vigilance over the protracted efforts of the United Nations is essential. More recent United Nations initiatives, such as the 1990 ILC Report which proposes the option of an ICC established independent of UN efforts to create a code of offenses, may be a step in the right direction.¹²⁸ Despite the years of United Nations work on a draft code of offenses, it is questionable whether this effort is the *sine qua non* for an ICC, as it is believed to be by some commentators. In 1984, for example, the ILA drafted a statute for an ICC which would not rely on a crimes code.¹²⁹ Instead, its statute provided for

122. 1990 ILC Draft, *supra* note 42.

123. 1951 ILC Draft, *supra* note 35, commentary to art. 25, at 4.

124. 1951 ILC Draft, *supra* note 35, commentary to art. 25, at 4.

125. 1953 ILC Draft, *supra* note 36, art. 25, at 24.

126. 1984 ILA Draft, *supra* note 48, at 287.

127. 1990 ILC Draft, *supra* note 42.

128. 1990 ILC Draft, *supra* note 42.

129. 1984 ILA Draft, *supra* note 48, appendix A1, art. 1, at 257.

an ICC with jurisdiction over offenses "generally recognized under international law" and listed twenty offenses as defined in corresponding conventions.¹³⁰

130. These crimes are listed as follows:

(a) Genocide in the Convention on the Prevention and Punishment of the Crime of Genocide of 9th December 1948 (Art. II, III, IV); UNTS (United Nations Treaty Series) Vol. 78, p. 277;

(b) Piracy on the High Seas in the Convention on the High Seas of 29th April 1958 (Art. 15, 16, 17); UNTS vol. 450, p. 11, 169;

(c) Offences and certain other acts committed on board aircraft in the Convention on Offences and certain other Acts committed on board Aircraft of 14th September 1963 (Art. 1); UNTS Vol. 704, p. 219;

(d) Unlawful Seizure of Aircraft in the Convention for the Suppression of unlawful Seizure of Aircraft of 16th December 1970 (Art. 1); International Legal Materials, Vol. X, No. 1, 1971, p. 133; I.C.A.O., Doc. 8920;

(e) Unlawful Acts against the Safety of Civil Aviation in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23rd September 1971 (Art. 1); International Legal Materials, Vol. X, No. 6, 1971, p. 1151; I.C.A.O., Doc. 8966;

(f) Offences defined in the four Red Cross Conventions of 1949, UNTS Vol. 75, Nos. 970-973;

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12th August 1949 (Art. 50);

2. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12th August, 1949 (Art. 51);

3. Geneva Convention relative to the Treatment of Prisoners of War of 12th August 1949 (Art. 130);

4. Geneva Convention relative to the protection of Civilian Persons in Time of War of 12th August 1949 (Art. 147);

(g) Slave Trade in

1. Slavery Convention of 25 September 1926 and amended by the Protocol of 7th December 1953 (Art. 1); LNTS (League of Nations Treaty Series) Vol. 60, p. 253; UNTS Vol. 182, p.51; Vol. 212, p. 17;

2. Supplementary Convention of 7th September 1956 (Art. 3, para. 1, 6); UNTS Vol. 265, p. 3;

(h) Traffic in women and children

1. In the International Convention for the Suppression of the White Slave Traffic of 4th May 1910 as amended by the Protocol of 4th May 1949 (Art. 1, 2); UNTS Vol. 98, p. 101; 53, p.29;

2. in the Convention for the Suppression for the Traffic of Women and Children of 30th September 1921 as amended by the Protocol of 12th November 1947 (Art. 3); UNTS Vol. 53, p.13;

(i) Offences related to narcotic drugs in the Single Convention on Narcotic Drugs of 30th March 1961 (Art. 36, para. 1, 2, (a), (i), (ii)); UNTS Vol. 520, p.151;

(j) Offences defined in the Convention on Psychotropic Substances of 21st February 1971 (Art. 22 para. 1, 2 (a), (i), (ii)); U.N. Doc. E/Conf. 58, 19th February 1971;

(k) Currency Counterfeiting in the International Convention for the Suppression of Counterfeiting Currency of 20th April 1929 (Art. 3, 4); LNTS Vol. 112, p.371;

(l) Offences defined in the Final Act and Convention of the International Overfishing Conference of 5th April 1946 (Art. 5, 6, 7, 8); UNTS Vol. 231, p.199; Vol. 431, p.304; Vol. 456, p.496; Vol. 482, p.372;

(m) Offences defined in the International Convention for the Prevention of Pollution of the Sea by Oil of 12th May 1954 (Art. III, IV, V); UNTS Vol. 327, p.3; Vol. 600, p.332;

(n) Damage to submarine cables in the Convention for the Protection of Submarine Cables of 14th March 1884 (Art. 2); 11 Martens Nouveau Recueil (2d)

In the absence of a court with international criminal jurisdiction such as an ICC, nations rely on an indirect enforcement system,¹³¹ based upon the assumption that each signatory nation enforces its provisions under its national criminal laws.¹³² The ILA model could be followed by selecting some of the twenty offenses cited by the ILA that have been the subject of international conventions, and by using them to serve as the substantive criminal offenses for an ICC. The ILA proposal on this issue may be in order during an era when the United Nations is sometimes exhorted to reassess the direction of its work on the draft code of offenses since such work is considered to be enmeshed at "a level of broad generalities."¹³³

No instance of the contrast between the ILA's expediency and the United Nations tentativeness is more evident than in their respective treatment of the term "aggression." The ILA acknowledges that the United Nations General Assembly Resolution defining aggression is "too general from the point of view of international criminal law"¹³⁴ and "utterly unsuitable" for application by an international criminal court.¹³⁵ However, under the ILA model, the ICC's jurisdiction is defined solely by valid international conventions.¹³⁶ The definition of aggression, thought by some legal scholars to be the "primordial international crime"¹³⁷ and the cornerstone of the United Nations efforts in drafting a code of offenses,¹³⁸ was not necessary in the disposition of the ILA Draft.¹³⁹

The ILA's observation that past efforts at establishing an ICC

p.281;

(o)Crimes defined in the Convention on the Prevention and Punishment of the Crime against Internationally Protected Persons of 14th December 1973 (arts. 2, 3); U.N. Doc. 3166 (XXVIII).

(p)Crimes defined in the Convention on the Suppression and Punishment of the Crime of Apartheid of 30th November 1973 (Art. 1); U.N. Doc. 3068 (XXVIII);

(q)Crimes defined in the Convention against the Taking of Hostages of 18th December 1979 (Art. 1, 2); U.N. Doc. A/34/819 (XXXIV);

(r)Crimes defined in the Universal Postal Convention of 26th October 1979 (Art. 13 (e));

(s)Offences defined in the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property of Nov. 14, 1970 (Arts. 6, 7, 8), No. 10 Int'l Legal Materials 1971 p.289-293;

(t)Offences defined in the Convention on Int'l Trade in endangered Species of Wild Fauna and Flora of 3 March 1973 (Arts. V, VI, VII & VIII), (cmend. 5459).

See 1984 ILA Draft, *supra* note 48, art. 1, at 257.

131. *Characteristics*, *supra* note 96, at 29.

132. *Characteristics*, *supra* note 96, at 29.

133. Statement of Sir John Freeland, 1984 BRIT. Y.B. INT'L L. 576.

134. See 1984 ILA Draft, *supra* note 48, arts. 27, 31, at 288-89.

135. *See id.*

136. See 1984 ILA Draft, *supra* note 48, art. 1, at 257.

137. See Remarks of Stephen C. McCaffrey in *Annual Meeting*, *supra* note 85, at 121.

138. *Id.*

139. See 1984 ILA Draft, *supra* note 48, arts. 27, 31, at 288-89.

gave too large a consideration to political offenses, which played a major role in defining aggression, raises the added issue of the practicality of establishing an ICC with a sweeping subject matter jurisdiction. In its 1990 report to the House of Delegates, the Section of International Law and Practice of the American Bar Association (ABA) recommended the establishment of an ICC with jurisdiction solely over international drug trafficking.¹⁴⁰ While acknowledging that its recommendation was modest, the ABA noted that:

Many of the crimes specified in the draft statutes on an international criminal court, such as the crime against peace, raise the prospect of the trial of international leaders before an international tribunal along the lines of the Nuremberg and Tokyo trials. However desirable this might be in theory it is simply unrealistic as a practical matter. Unlike World War II most armed conflicts do not result in the total defeat and the unconditional surrender of adversaries — the conditions that permitted the Nuremberg and Tokyo trials to be held.¹⁴¹

The ABA's modest approach to limiting the crimes to be considered by an ICC may be the most realistic approach possible. Amidst earnest calls for Nuremberg-like war crimes trials during war and its immediate aftermath,¹⁴² it is important to recall that international tribunals, such as those in Nuremberg and Tokyo, were sometimes categorized as forums in which the "victors have availed themselves of their powers as victors to judge."¹⁴³ This argument cast the victors as being as culpable as their vanquished opponents in certain instances, but having the power of their victory to immunize them from prosecution.¹⁴⁴

140. American Bar Association on International Law and Practice, Report to the House of Delegates (1990) [hereinafter ABA Report]. See also an earlier American Bar Association proposal for a limited jurisdiction for an International Criminal Court (ICC), leaving open the possibility of a future jurisdictional expansion following an ICC's initial successes. Hoffman, *Jurisdiction of an ICC*, 11 INT'L LAW, 377 (1977).

141. See American Bar Association on International Law and Practice, Report to the House of Delegates (1990) [hereinafter ABA Report].

142. Robbins, *Iraqi War Criminals Face Hanging*, Wall St. J., Jan. 23, 1991, at A12, col. 3.

143. Borchart, *International Law and International Organizations*, 41 AM. J. INT'L L. 106, 107 (1947). See also MINEAR, *supra* note 25.

144. Some thought it was ironic that only Nazi defendants were charged with crimes against peace through waging aggressive war, in the face of earlier silence, if not outright complicity, by some of the Allies following the annexations of Austria and Czechoslovakia, and during the Nazi invasion of Poland. See Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 26-28 (1947). See also George F. Kennan's discussion of the Nuremberg trials, wherein Kennan noted his distress with a proceeding whereby a Russian judge, representing a bloody Stalinist regime, could be permitted to preside:

The only implication that this procedure could convey was after all, that such crimes were justifiable and forgivable when committed by the leaders of one government, under one set of circumstances, but unjustifiable and unforgivable, and to be punishable by death, when committed by another set of government leaders, under another set of circumstances. It was difficult to arrive at any

It is significant to consider whether war crimes trials could damage the credibility of a permanent ICC, especially if the calls for war crimes trials may sometimes be perceived as mere rhetoric by world leaders,¹⁴⁵ which fades upon the cessation of hostilities.¹⁴⁶ It would also be necessary to determine the degree to which calls for war crimes trials are diluted by either a nation's desire to avoid the antagonism of a newly formed hospitable administration established in the recently vanquished nation,¹⁴⁷ or simply a reluctance to pursue such an endeavor at the end of a war.¹⁴⁸ Moreover, it is important to recall the apprehensions of those who have questioned the fragile balance between legalistic solutions and foreign policy objectives.¹⁴⁹

A permanent ICC with jurisdiction over war crimes may be successful in the prosecution of defendants charged with such crimes, despite the belief by some proponents, such as the ABA International Law Committee, that the success of an ICC is predicted upon a more minimalist approach. What price to its reputation, however, would an ICC pay if provided such extensive jurisdiction, especially at its inception? One might question, for example, the cost to its credibility if the ICC were faced the proposition that if an American officer were convicted of a war crime, the President of the United States, along with his Secretaries of Defense and State, should appear before the same tribunal. The question receives an added urgency if the proposition were advanced, as it once was, by someone such as the former chief United States prosecutor at the Nuremberg trials.¹⁵⁰

The modest scope of an ICC's subject matter jurisdiction is ap-

other interpretation.

KENNAN, MEMOIRS (1925-1950) 274 (1969).

145. When asked if Iraqi President Saddam Hussein should be tried and hanged for war crimes, President George Bush indicated that if he were approached "as a broker," he might be willing to allow Hussein to leave Iraq with the promise never to return, as a condition to avoid prosecution. Transcript of President Bush's News Conference, Wash. Post, Apr. 17, 1991 at A26, col. 1.

146. Kamen & Devroy, *Saddam's Power Seen Increasing*, Wash. Post, Apr. 20, 1991 at A1, col. 1.

147. BOSCH, JUDGMENT ON NUREMBERG 34 (1970).

148. *Id.* at 112.

149. G. KENNAN, AMERICAN DIPLOMACY 100 (expanded ed. 1984). George F. Kennan's observation over forty years ago might appear particularly prescient today among some foreign policy decision makers:

Even under a system of world law the sanction against destructive international behavior might continue to rest basically, as it has in the past, on the alliances and relationships among the great powers themselves. There might be a state, or perhaps more than one state, which all the rest of the world community together could not successfully coerce into following a line of action to which it was violently averse. And if this is true, where are we? It seems to me that we are right back in the realm of the forgotten act of diplomacy, from which we have spent fifty years trying to escape.

Id.

150. Sheehan, *Taylor Says by Yamashita Ruling Westmoreland May Be Gully*, N.Y. Times, Jan. 9, 1971, at 3, col. 1.

appropriate for an ICC's personal jurisdiction, by providing concurrent jurisdiction over defendants. The ABA has recently observed that the concurrent jurisdiction available in Article 27 of the 1953 ILC Draft would be an "indispensable component" of an ICC, especially since it would provide an effective compromise for those critics who consider that the creation of an ICC would adversely affect state sovereignty.¹⁵¹ The current Trinidad and Tobago initiative also supports the principle of concurrent jurisdiction.¹⁵²

While concurrent jurisdiction for an ICC has not received unanimous approval,¹⁵³ it remains a most realistic option. It would be completely consistent with the proposal for an ICC's subject matter jurisdiction by assuring potential Member States that their state sovereignty would not be impugned, and they would have control over the fate of their nationals.

Personal jurisdiction should, moreover, be limited to natural persons. Attempts to define personal jurisdiction narrowly have met with some criticism. The United Nations proposals that have excluded nations from criminal responsibility, have been viewed as inconsistent with the international legal doctrine that was established since the late 1800s,¹⁵⁴ as well as with the ILC's separate efforts in preparing Draft Articles on State Responsibility.¹⁵⁵ Despite this criticism, there is merit in the countervailing belief that "the concept of international state responsibility is not yet firmly established in international law"¹⁵⁶ and that efforts of the United Nations to codify state responsibility¹⁵⁷ have been more indicative of interest in developing the concept of state responsibility than in actually codifying state responsibility.¹⁵⁸

Sovereignty has, in a most pessimistic appraisal, been categorized as a "cult . . . characteristic of the tendency of political and legal thought to be parasitic upon things as they have been rather than perceptive of things as they are or purposeful of things as they might be."¹⁵⁹ In 1966 Raymond Aron wrote that an abandonment of the "state's right of determining justice without appeal" was contin-

151. See ABA Report, *supra* note 140, at 4, 5.

152. See Thorpe, *supra* note 57, at 6.

153. It has, for example, been argued that the competence of an ICC should supersede national criminal courts. It has also been argued that allowing nations whose citizens are criminal defendants, or nations where the alleged crime occurred, to confer jurisdiction on an ICC would result in many crimes not coming before an ICC because of the reluctance of these nations to confer jurisdiction in many instances. See Wright, *supra* note 73, at 69.

154. See BASSIOUNI, *supra* note 2, at 6.

155. See BASSIOUNI, *supra* note 2, at 6. See also *Apartheid Draft*, *supra* note 46, art. 24(4)(a).

156. C. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 217 (1987).

157. See Summary Records of the 1361st-1376th Meetings, [1976] 1 Y.B. INT'L L. COMM'N 7-91, U.N. Doc. A/CN.4/SER.19/1976.

158. See C. GRAY, *supra* note 156, at 217.

159. C. JENKS, *LAW IN THE WORLD COMMUNITY* 32 (1967).

gent upon three elements being present in the world: a consciousness of community, an acceptance of a juridical and political regime, and a monopoly of armed force.¹⁶⁰ If one were to accept Aron's proposition, the three conditions necessary for nations to relinquish this right are far from being realized. Therefore, it may be prudent to envision an International Criminal Court with a narrow focus on the type of crimes under its jurisdiction as well as on its personal jurisdiction. If an ICC with a modest mission is deemed credible, an expansion of jurisdiction would be more likely than if an ICC started out with an expansive jurisdiction and, therefore, lacked credibility.

If the success of an ICC is, to some degree, contingent upon the participation of world powers, it is important to consider how the United States would respond to the criminal rights and procedures that would be afforded an accused in a trial in such a forum.

Debate on this issue arose after the ILC 1953 Draft was proposed. John J. Parker, who in 1951 was Chief Judge of the United States Court of Appeals for the Fourth Circuit, found that the procedure set forth in the ILC 1953 Draft, would be fair to any defendant under an ICC's jurisdiction. Judge Parker also noted that the vital principles of the Bill of Rights, including the rights to due process, a public trial, and effective assistance of legal counsel were contained in the ILC 1951 Draft.¹⁶¹ Anticipating the argument that the ILC 1951 Draft presented unresolvable conflicts with the United States Constitution, Judge Parker asserted that "there is nothing in the Constitution which limits the power of the United States to join other nations in setting up a court to try those who have committed crimes against the law of nations."¹⁶²

Others were not as sure of compatibility between United Nations drafts and the United States Constitution. For example, the 1951 ILC Draft also gave rise to the argument that removal of offenses committed in the United States to an ICC pursuant to United States participation in a treaty authorizing such a removal would be *ultra vires* of Federal power under Article III of the Constitution.¹⁶³ Additionally, there was a strong belief that basic Constitutional rights guaranteed to an accused, such as the right to a trial by jury, could not be ignored if an accused were submitted to an ICC, at least for those offenses committed within the territory of the United States.¹⁶⁴

160. R. ARON, *PEACE AND WAR* 753 (1966).

161. See Parker, *An International Criminal Court: The Case for Its Adoption*, 38 A.B.A. J. 641 (1952). See also 1951 ILC Draft, *supra* note 35, arts. 35-53.

162. *Id.* at 647.

163. Finch, *An International Criminal Court: The Case Against Its Adoption*, 38 A.B.A. J. 644 (1952).

164. See Parker, *supra* note 161, at 648.

Controversy over this issue was not confined to the United Nations efforts during the 1950s. Since the Genocide Convention provides for the prosecution of genocide under any international tribunal that may come into existence,¹⁶⁵ debates over the interaction of this provision with the Constitution are relevant to proposals for international tribunals having a broader criminal jurisdiction, such as an ICC. When the United States first debated ratification of the Genocide Convention, the ABA's Special Committee on Peace and Law Through the United Nations expressed the concern that American citizens might be subjected to "an international tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime."¹⁶⁶ Judge Orie Phillips, Chief Judge of the United States Court of Appeals for the 10th Circuit in 1949, expressed apprehension over citizens of the United States, charged with genocide, falling under the jurisdiction of an ICC. Therefore, he proposed that an alternate focus on enacting domestic legislation and using domestic courts, would avoid potential Constitutional pitfalls.¹⁶⁷

Almost forty years after Judge Phillips' observations, these apprehensions have not abated. On the eve of the United States Senate's ratification of the Genocide Convention, the Report of the Senate Committee on Foreign Relations contained a provision that the United States participate in an international penal tribunal only with the advice and consent of the Senate.¹⁶⁸ The Committee, moreover, expressed extreme skepticism over efforts to establish any ICC, while noting serious constitutional objections, the novelty of the concept,

165. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 6.

166. *Report of the Special Committee on Peace and Law Through United Nations*, 74 REP. A.B.A. J. 317 (1949).

167. Phillips, *The Genocide Convention: Its Effect on Our Legal System*, 35 A.B.A. J. 623, 625 (1949). Judge Phillips stated that:

If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, offer the same protection to the accused as one charged with any domestic crime, and reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention.

Id.

168. S. REP. NO. 99-2, 99th Cong., 1 st Sess. 25 (1985).

and numerous legal and policy issues to be faced.¹⁶⁹ Senator Jesse Helms of North Carolina, voting against ratification of the Genocide Convention, stated that he did not "want to see the U.S. submit itself to an international regime of law or is enforced by a group of nations which do not have our legislative history and goals, and perhaps no understanding of those principles of our nation."¹⁷⁰ In light of the Senate's view of the international penal article contained in the Genocide Convention, it is not unreasonable to assume that any independent consideration of an ICC would be viewed with similar skepticism.

This apprehension has been considered by some writers to be groundless, on the basis of past United States participation in international tribunals, ranging from international arbitration tribunals and international war crimes courts to the ICJ.¹⁷¹ It has also been asserted that the laws of the United States must apply to offenses committed in the United States, and that United States courts must sit in judgment of such offenses. However, it has been noted that this proposition has been riddled with exceptions. Foreign consuls have enforced foreign criminal law over their fellow nationals, and the National Atlantic Treaty Organization Status of Forces Agreement¹⁷² has long permitted Allied soldiers and their dependents to be tried by Allied military courts, even when such offenses were triable in United States Courts.¹⁷³

The argument has been made that "the Supreme Court could . . . hold constitutional our participation in an international court whose charter and procedure incorporated the substantial elements of fairness which those institutions were designed to secure."¹⁷⁴ That element of fairness has, moreover, been considered in concert with "development of a scheme of ordered liberty."¹⁷⁵ In his book, *Foreign Affairs and the Constitution*, Professor Louis Henkin argued that the United States Constitution contains nothing to preclude participation in an ICC, though he observed that some element of fundamental fairness would be required of an ICC.¹⁷⁶ For example, a problem would arise if an ICC so deprived citizens of their funda-

169. *Id.* at 25, 26.

170. Toner, *After 37 Years, Senate Endorses a Genocide Ban*, N.Y. Times, Feb. 20, 1986 at A1, col. 1.

171. McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950) [hereinafter McDougal].

172. North Atlantic Treaty Status of Forces Agreement, June 18, 1951, Act AVII [1953], 4 U.S.T. 1792, T.I.A.S. No. 2846.

173. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

174. See McDougal, *supra* note 171, at 695.

175. See Klein & Wilkes, *United Nations Draft Statute for an International Criminal Court: An American Evaluation*, in INTERNATIONAL CRIMINAL LAW 578 (G. Mueller & E. Wise eds. 1965) [hereinafter INTERNATIONAL CRIMINAL LAW].

176. See L. HENKIN, *supra* note 173, at 200.

mental civil rights and liberties.¹⁷⁷

If one were to accept the premise that an ICC's code of criminal procedure had to reflect a concept of fundamental fairness as a pre-condition to United States participation, it is essential to note that attempts to incorporate these elements into various ICC drafts, while similar, are no means identical to the text of the United States Constitution. Such a variance could be problematic.¹⁷⁸

Efforts at harmonizing ICC drafts with the Constitution may be sincere attempts at assuring an ICC's approval by American jurists and politicians. Nonetheless, whatever form of criminal procedure would ultimately be adopted by an ICC, the chances that the forms of criminal procedure would be a duplication of the United States Constitution are remote. One observation made in the context of human rights initiatives is appropriate to this issue: "The notion that the United States would require no change in the way we do things seems — to put it mildly — anomalous. The principal purpose of undertaking obligations is to promise to do what one is not yet doing."¹⁷⁹

It is critical to dissuade apprehension over a possible divergence from the exact letter of the United States Constitution, lest it be an insurmountable impediment in efforts to create an ICC. This problem was noticed as early as the 1950s, when it was observed that were it necessary to await unanimity among United States lawyers for an appropriate judicial mechanism, "we [would] indeed wait forever."¹⁸⁰ In 1965 Gerhard Mueller noted that American objections to an international code of criminal justice rested, in part, on a

177. See L. HENKIN, *supra* note 173, at 201.

178. Several examples are illustrative of attempts to harmonize the United States Constitution with ICC drafts. The 1953 ILC Draft provides that ICC trials would be held without jury "except where otherwise provided in the instrument by which jurisdiction has been conferred upon the court." 1953 ILC Draft, *supra* note 36, art. 37 at 25. This provision was apparently included at the request of the United States and other nations whose own constitutional provisions were considered impediments to the adoption of this draft without such a provision, 1953 ILC Draft, *supra* note 36, commentary to art. 37 at 14, though some commentators felt that the concept of a jury trial in an international forum would nullify the principles underlying the concept of an ICC. Parker, *supra* note 161, at 243. See also INTERNATIONAL CRIMINAL LAW, *supra* note 175, at 561.

The 1953 ILC Draft further provided an ICC with the discretion to determine "whether an accused shall remain at custody during the trial or be personally set at liberty and the condition under which such provisional liberty shall be granted." 1953 ILC Draft, *supra* note 36, art. 41 at 26. This provision prompted some writers to note the absence of language consistent with the Eighth Amendment. See International Criminal Law, *supra* note 175, at 565. While it was acknowledged that even in the United States courts the right to bail was not absolute, a suggestion was offered to harmonize this provision with the Eighth Amendment by adding the phrase "but excessive bail shall not be required." See International Criminal Law, *supra* note 175, at 565.

179. Henkin, *International Human Rights in the United States*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 53 (T. Meron ed. 1984).

180. See Parker, *supra* note 161, at 643.

purely emotional basis.¹⁸¹ Twenty-two years later, he wrote that his earlier assessment of American objections was still justified, and that this emotional barrier was based on the belief of some United States' lawyers that, by entering into an international legal system, the United States would sacrifice the benefits of its presumably superior common law system on behalf of the supposedly weaker continental regime of their brethren across the Atlantic.¹⁸²

It has been asserted that the Framers of the United States Constitution, while never specifically contemplating allowing the United States to enter an ICC, did not contemplate preventing our entry into international forums.¹⁸³ It has also been observed that the formidable constitutional issues facing the United States entry into an ICC would be in uncharted, though not necessarily through unnavigable waters.¹⁸⁴ Any eventual entry by the United States into an ICC may be difficult without some concession on the issue of the rights afforded an accused.

The outlook may not be so bleak if the United States Constitution is viewed not as an impediment, but rather as a catalyst. For example, the rights afforded an accused appearing before an International Criminal Court could be the product of a synthesis between the Constitution and a variety of international agreements. This proposition is based upon two factors: the influence of the Constitution on nations worldwide,¹⁸⁵ and the transformation of human rights law from a national to an international concern over the past fifty years,¹⁸⁶ as is evidenced in numerous international agreements, such as the United Nations Charter,¹⁸⁷ the Universal Declaration of Human Rights,¹⁸⁸ and the International Covenant of Human Rights.¹⁸⁹ This combination might assuage political worries, while providing a framework for an effective guarantee for criminal defendants. To be sure, such an effort may require a reassessment of the United States' resolve to take a major role in such an effort.

181. Mueller, *The United Nations Draft Code of Offenses Against the Peace and Security of Mankind: An American Evaluation*, in *INTERNATIONAL CRIMINAL LAW*, 605 (G. Mueller & E. Wise eds. 1965).

182. See *Four Decades*, *supra* note 109, at 504.

183. L. HENKIN, *supra* note 173, at 198.

184. See L. HENKIN, *supra* note 173, at 199.

185. Blaustein, *The Influence of the United States Constitution Abroad*, 12 OKLA. CITY U. L. REV. 435 (1987).

186. Prounis, *The Human Rights Committee: Toward Resolving the Paradox of Human Rights Law*, 17 COLUM. HUM. RTS. L. REV. 103 (1985).

187. Signed at San Francisco on June 26, 1945, and entered into force October 24, 1945.

188. G.A. Res. 216 at 71, U.N. Doc. A/810 (1948). Adopted by the General Assembly on December 10, 1948.

189. *International Covenant on Civil and Political Rights*, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316; *International Covenant on Economic, Social and Cultural Rights*, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

If such a synthesis is deemed unworkable, however, other options for implementation of an ICC's criminal procedure are available. First, an ICC may adopt the existing criminal procedure of the nations which confer jurisdiction in any given case. Second, separate codes of criminal procedure could be drafted which would represent major legal systems, such as the Common Law, Code Civil, Socialist, Islamic, Far East, or Black African traditions.¹⁹⁰ The nations conferring jurisdiction for a specific case could be afforded, under such a plan, some measure of flexibility which could be useful for criminal cases having a particularly regional focus.

These proposals need not be mutually exclusive. A combination of the proposals may be made available, depending on the circumstances of a particular case. The incorporation of criminal procedure into a nascent ICC need not be as daunting as the detractors of an ICC may contend. The transplanting of a legal system from one nation, or people, to another has been viewed as a procedure which may be made without much difficulty and can be well received by the ultimate recipients of the transplant.¹⁹¹ What appears to be most important is neither the simplicity nor the sophistication of the legal system in place, but rather the social acceptance of a reliable rule of law.¹⁹²

V. The Basic Organization of an International Criminal Court

The issues relating to the basic organizational structure of an ICC are no less problematic than those related to the more fundamental questions already discussed. From the investigation of an alleged crime under an ICC jurisdiction to the incarceration of a defendant, the path may indeed be tortuous. An International Criminal Court would require more than mere panels of judges hearing a case. That stage is but one instance in the middle of an entire process of investigation, arrest, trial, sentencing, and imprisonment. Amid the various ICC drafts in existence, neither simplicity nor complexity of an ICC's organizational makeup is as significant as the necessity to structure such an organization as an inducement for nations to believe that it is in their best interest to confer jurisdiction on an efficient and equitable ICC. Factors relevant to a nation's motivation to confer jurisdiction upon an ICC are the following: possible association with the ICJ, qualifications of an ICC's judges, the bureaucracy of the ICC, and its cooperation with Member States.

190. See generally R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS OF THE WORLD TODAY (1985). For another analysis of global cultural and political traditions which could provide a framework for this proposal. See F.S.C. NORTHRUP, THE TAMING OF NATIONS (1952).

191. A. WATSON, LEGAL TRANSPLANTS 95, 96 (1973).

192. *Id.*

One issue discussed during the United Nations' early work on an ICC was whether such a court should be a criminal chamber created within the ICJ.¹⁹³ In 1950 Sebastian Pella wrote that the possibility of creating a criminal chamber for this purpose would be consistent with the identity of civil and criminal courts.¹⁹⁴ Pella determined, however, that because the creation of a criminal chamber of the ICJ required revision of the ICJ's statute, a more effective means for the creation of an ICC would be establishing an organ separate from the ICJ.¹⁹⁵ This proposal has been considered with approval by other writers.¹⁹⁶

To create a criminal chamber within the International Court of Justice would require the employment of the same procedures provided in the Charter of the United Nations for the amendment of that Charter.¹⁹⁷ The United Nations procedure, under Article 108 of the United Nations Charter, requires adoption by two-thirds of the General Assembly, including all permanent Members of the Security Council.¹⁹⁸ Pursuant to Article 70 of the ICJ statute, the initiative for changing the statute may arise from the Member States of the United Nations, or from the ICJ itself.¹⁹⁹ If the ICJ were to exercise its power to propose the creation of an ICC, such an initiative would not be unprecedented.²⁰⁰

The question remains whether such an initiative is advisable even if the ICJ, or Member States, would be inclined to take the necessary statutory measures. The ICJ, without an international criminal chamber, has been the subject of harsh criticism by some American conservatives, as reflected in the assessment that the ICJ "blows with the political breezes, some of them noxious to the U.S."²⁰¹ Such an observation may be dismissed by some as political rhetoric. Such a statement, however, when coupled with the long-standing perception that the ICJ has played an insignificant role in international dispute resolution,²⁰² and the inescapable reality that

193. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37, 59 (1950).

194. *Id.* at 59.

195. *Id.* at 59.

196. Wood, *Judges and Structure of an International Criminal Court*, in TOWARD A FEASIBLE INTERNATIONAL COURT 291 (J. Stone & R. Woetzel, eds. 1970).

197. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 69, in DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE at 60-89 (S. Rosenne ed., 2nd ed. 1979) [hereinafter STATUTE OF THE COURT].

198. UNITED NATIONS CHARTER, art. 108.

199. STATUTE OF THE COURT, *supra* note 197, art. 70.

200. The International Court of Justice (ICJ) has, for example, proposed amending the statute, which provides that the seat of its Court shall be at the Hague. See Qadeer, *The International Court of Justice: A Proposal to Amend its Statute*, 5 HOUS. J. INT'L L. 35, 52 n.88 (1982).

201. Krauthammer, *The Curse of Legalism: International Law? It's Purely Advisory*, THE NEW REPUBLIC, Nov. 6, 1989, at 44.

202. Comment, *The International Court of Justice: Is It Time for a Change?*, 8 HOUS.

the ICJ has averaged less than one contentious case per year in the first thirty-five years of its existence,²⁰³ is not as readily dismissable. If the ICJ has been criticized for its performance under its current jurisdictional mandate, one can scarcely anticipate that similar criticism would be absent if an individual were to appear before that same tribunal for criminal proceedings.

Certainly, some of the problems attributed to the International Court of Justice, such as excessive delay in rendering a decision, may be somewhat exaggerated.²⁰⁴ The ICJ's reputation, moreover, may have improved in recent years.²⁰⁵ Nonetheless, the effort remains for the ICJ to dispose of the numerous adverse perceptions, justified or not, which have evolved since its inception. To do so requires an effort to make it more attractive to those Member States that ultimately choose to submit to its jurisdiction.²⁰⁶ It is questionable whether the addition of a criminal chamber to the ICJ would be more of a hindrance than a benefit, both to the ICJ and to a newly created ICC. Sebastian Pella's suggestion in 1950 may be an attractive alternative. It may be far more prudent to proceed with a separately established International Criminal Court than to have it saddled with the ICJ's reputation before it has even heard its first case.

The questions relating to the nomination, selection, and qualifications of judges for an ICC have been treated in numerous ICC drafts.²⁰⁷ Focus herein is not on the procedural aspects of the selection of judges found in these proposals. Instead, several suggestions are advanced assuring diversity, competence, and efficiency, regardless of what framework is ultimately established for the selection of the judges.

The 1953 ILC Draft recognized the necessity for creating a broad-based representative composition of an ICC when it indicated that its judiciary, to the extent possible, should "represent the main forms of civilization and the principal legal systems of the world."²⁰⁸ This provision, incorporated into the 1984 ILA Draft,²⁰⁹ merits serious consideration. To the extent practicable, a "catholicity of representation"²¹⁰ should be infused into the provisions of an ICC statute

J. INT'L L. 175 (1985) (authored by Keith Weir).

203. Daly, *Is the International Court of Justice Worth the Effort?*, 20 AKRON L. REV. 391 (1987).

204. Gross, *The Time Element in the Contentious Proceedings in the International Court of Justice*, 63 AM. J. INT'L L. 74, 78 (1969).

205. Shapiro, *Of-Maligned World Court Poised for Comeback*, Legal Times, Feb. 5, 1990, at 6.

206. See Dalfen, *supra* note 86, at 220.

207. See Havana Draft, *supra* note 45, art. 23, at 37; Apartheid Draft, *supra* note 46, art. 14 at 553; 1984 ILA Draft, *supra* note 48, arts. 3-18, at 285-87.

208. 1953 ILC Draft, *supra* note 36, art. 10, at 23.

209. See 1984 ILA DRAFT, *supra* note 48, arts. 27, 31, at 288-89.

210. See T. HOLTON, AN INTERNATIONAL PEACE COURT (1970).

addressing judicial selection. Perhaps the statutes of the ICJ which embody judicial diversity may serve as a model.²¹¹ Attempts to select judges outside of the nations which would be parties to an ICC convention is another possibility.²¹² Whatever steps are taken, they should be pursued in the spirit of allowing nations to feel that ICC judges, though part of an international tribunal, maintain a representational character through their diversity, which would deflect the fears of alienation.²¹³

Regarding qualifications, ICC judges have been envisioned as jurists of "international repute"²¹⁴ or as "experts in the fields of international criminal law or human rights."²¹⁵ Frequently, these qualifications have been integrated into a requirement that prospective judges be qualified to serve on the highest courts of their respective nations.²¹⁶ Such proposals are similar to the requirements of the ICJ statute for judges "to possess the qualifications required in their respective countries for appointment to the highest judicial office, or [to be] juriconsults of recognized competence in international law."²¹⁷

Proponents of an ICC should be wary of using the ICJ statute as an exclusive model for ICC judges. It has been argued that the ICJ has sometimes included jurists with no reputation in international law, and whose training as international jurists began only after their appointments.²¹⁸ It has been further argued that some ICJ justices, though law students or practitioners interested in international law early in their careers, did not concentrate on international law thereafter.²¹⁹

This situation should be avoided with International Criminal Court judges. It is reasonable to assume that ICC judges would face, along with the natural challenges from sitting on an international bench, the added element of publicity and scrutiny from the media, especially involving defendants of international notoriety. Given such a possible circumstance, it may be useful to add a separate requirement to the current proposals. Specifically, candidates should be experienced in criminal practice before their national courts. Several

211. STATUTE OF THE COURT, *supra* note 197, arts. 2, 3.

212. See generally Editorial Comments, *EC-EFTA Court? 26 COMMON MKT. L. REV.* 343 (1989) (Proposal that judges for a merged EC-EFTA Court need not be nationals of nation members of the EEC).

213. See generally A. LARSON, *WHEN NATIONS DISAGREE* (1961).

214. See 1984 ILA DRAFT, *supra* note 48, arts. 27, 31, at 288-89.

215. Havana Draft, *supra* note 45, art. 23, at 37.

216. Havana Draft, *supra* note 45, art. 23, at 37; Apartheid Draft, *supra* note 46, art. 14(2) at 553.

217. STATUTE OF THE COURT, *supra* note 197, at art. 2.

218. L. PROTT, *THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE* 67 (1979).

219. *Id.* at 27.

such requirements might be delineated, such as experience as a public prosecutor, a specific number of cases tried either as prosecutor or defense counsel, or experience as a trial or appellate judge with a considerable criminal docket.²²⁰ When Senator Alfonse D'Amato of New York endorsed federal prosecutors for appointments to the United States federal Bench, he emphasized the importance of appointing "people who are steeped in the practicalities of the criminal justice system."²²¹ Such a criterion may have equal applicability for the selection of ICC judges.

One of an ICC's more attractive features could be the diversity of its bench, reflecting the experience and varying perspectives of judges from across the world. Inherent in that diversity are the contrasts in legal training and experience, which could engender confusion. It may, therefore, be appropriate to provide ICC with a panel of assessors, or counsel, who are experts in international criminal law, to provide assistance on the thorny international legal issues that the judges would confront. The idea was discussed, but rejected, during debate of the 1926 ILA Draft.²²² Several arguments were made in its opposition. First, some felt discomfort at the concept of "judges who are not judges,"²²³ or *de facto* judges with no official power of adjudication. Second, the combination of assessors and judges was considered too cumbersome and confusing an arrangement.²²⁴ Third, there was apprehension over the perceived difficulty in finding qualified assessors who had interest in the positions.²²⁵

Such apprehensions should not deter the resurrection of this idea. During debate on the 1926 ILA Draft, an example was offered of the positive role of assessors in British maritime law. These assessors, generally used when an issue of technical skill or experience arose, advised the judge on such "questions of a nautical character,"²²⁶ though the judge alone was responsible for the final decision.²²⁷ The disadvantages of using assessors would be outweighed by their value. While some have considered assessors contributing to the confusion of ICC judges, it is far more likely that their contribution would enable the judges of an ICC to be a more competent and enlightened body.²²⁸

220. See O'Byrne, *Finding the Best for the Bench*, JUDGES J., Winter 1988, at 30.

221. Squiers, *D'Amato Backs Drug Prosecutors as Judges*, N.Y. L. J. Nov. 21, 1990, at 1.

222. 1926 ILA Draft, *supra* note 11, at 188-92.

223. 1926 ILA Draft, *supra* note 11, at 189.

224. 1926 ILA Draft, *supra* note 11, at 191.

225. 1926 ILA Draft, *supra* note 11, at 189.

226. R. WILLIAMS, *A TREATISE ON THE JURISDICTION AND PRACTICE OF THE ENGLISH COURTS IN ADMIRALTY AND APPEALS* 442 (3rd ed. 1986).

227. *Id.*

228. It is also noted that the Statute for the ICJ provides for assessors, Stat. I.C.J. art. 30, para. 2, though this provision has not been applied. See 1988-1989 Y.B. INT'L CT. JUST. 15.

Past attempts at forming an International Criminal Court organizational structure follow a general pattern. The 1953 ILC Draft, for example, provides for a Committing Chamber which would consist of judges who would not participate in the actual trial. This Chamber would conduct a preliminary review of the evidence and, if necessary, would certify it to the ICC. This draft further provides for a public prosecutor responsible for filing an indictment of the accused with the ICC and for conducting actual prosecution.²²⁹

The 1984 ILA Draft contains a similar structure. It provides for an International Commission of Criminal Inquiry to examine the criminal complaint, and to either terminate the inquiry, declare the matter settled by consent of all parties, or recommend that a public prosecutor prepare an indictment and conduct the prosecution.²³⁰

A more ambitious scheme is envisioned in the Apartheid Draft and in the Havana Draft. These drafts provide for four ICC organs: judges, a secretariat, a standing committee, and a procuracy.²³¹ The judges are empowered with basic judicial functions,²³² and the secretariat's activities are primarily ministerial in nature.²³³ The concept of a standing committee represents a departure from preceding ICC drafts. Consisting of representatives appointed by each nation party to the ICC, the standing committee is specifically assigned a specific function under the terms of the draft, including the election of judges and a procurator, as well as functions relating to mediation and general assistance.²³⁴

One of the more promising proposals relates to the procuracy, which attempts to integrate the functions of diverse legal systems. This body is envisioned as consisting of three divisions: investigative, prosecutorial, and administrative.²³⁵ The procuracy in the Apartheid and Havana drafts has been considered the embodiment of European-Socialist, Romanist-Civilist, and Common Law principles of investigation and prosecution.²³⁶

The role of a procuracy fashioned in this manner might be cynically considered as a grandiose attempt to woo nations into the ICC

For a discussion of the successful use of assessors in the mixed courts of Egypt, see *infra* note 225, at 76.

229. 1953 ILC Draft, *supra* note 36, art. 33, at 25.

230. See 1984 ILA Draft, *supra* note 48, arts. 27, 31, at 288, 289.

231. See Havana Draft, *supra* note 45, arts. 23-26, at 37-43; Apartheid Draft, *supra* note 46, arts. 3, 14-17, at 548, 553-56.

232. See Havana Draft, *supra* note 45, art. 23, at 37, 38; Apartheid Draft, *supra* note 46, art. 14, at 553, 554.

233. Havana Draft, *supra* note 45, art. 25, at 41; Apartheid Draft, *supra* note 46, art. 14, at 555.

234. Havana Draft, *supra* note 45, art. 26, at 42; Apartheid Draft, *supra* note 46, art. 17, at 555, 556.

235. Havana Draft, *supra* note 45, art. 24, at 40; Apartheid Draft, *supra* note 46, art. 15, at 554, 555.

236. Apartheid Draft, *supra* note 46, commentary to art. 3, at 574.

fold by offering elements of their respective legal systems. Skepticism may be compounded by the belief that the criminal procedures of different nations are based upon profoundly diverse, and potentially irreconcilable, political and social features.²³⁷ However, the judicial organs which would ultimately be the building blocks of any ICC would be, *ipso facto*, the product of many nations and cultures. Therefore, the idea of judicial organs such as the procuracy of the Apartheid and Havana Drafts should not be summarily dismissed. The diversity of legal systems could be put to the advantage of an ICC, instead of being deemed a constantly aggravating obstacle.²³⁸

The most artfully constructed ICC with the ablest jurists in the world would be rendered ineffective if it were to lack a reliable procedure to coordinate its operations with the nations under its jurisdiction. The issue of national assistance has been considered from several perspectives. The Apartheid and Havana Drafts, for example, require that nations shall provide an ICC with all means of legal assistance in accordance with the domestic legislation of the requested nations, and shall enact appropriate implementing legislation when necessary.²³⁹ Meanwhile, the 1953 ILC Draft adopts a more guarded approach. It provides that an ICC may request national authorities to assist in the performance of duties, and that a nation's methods of assistance are to conform with any convention or instrument under which the nation has accepted the obligation.²⁴⁰ The approach of the 1953 ILC Draft has been criticized as being overly cautious. It has been argued that if a nation has become a party to the statute conferring jurisdiction and as elected to submit a specific case to an ICC, then it would be inconsistent with proper procedure if it did not then offer assistance to an ICC.²⁴¹

Notwithstanding this apprehension, the proposal for a separate instrument articulating the specific means of assistance between a nation and an ICC has merit. The ILC has expressed the justifiable concern that if a nation's decision to confer jurisdiction on an International Criminal Court should automatically involve a duty of assistance, the decision to confer jurisdiction may be perceived as too onerous.²⁴² The ILC has further noted that there is nothing to preclude a nation from including in the instrument conferring jurisdiction a

237. See Volkman, *Continental European Procedures: True or Elusive Model?*, 9 AM. J. CRIM. L. 1, 31 (1981).

238. See generally Reid, *The Ombudsman's Cousin: The Procuracy in Socialist States*, 1986 PUB. L. 3 (Discussion of the possibilities for using the procuracy of Socialist nations as a model to complement Western Legal systems.).

239. Havana Draft, *supra* note 45, art. 29, at 50; Apartheid Draft, *supra* note 46, art. 29, at 569.

240. 1953 ILC Draft, *supra* note 36, art. 31, at 25.

241. INTERNATIONAL CRIMINAL LAW, *supra* note 175, at 556.

242. 1953 ILC Draft, *supra* note 36, commentary to art. 31, at 17.

separate obligation to render assistance.²⁴³

Whether in the instrument conferring jurisdiction or in a separate instrument, the delineation of the means and the extent of assistance to an ICC would serve more than a reassurance to a nation that the process of conferring jurisdiction would not be onerous, as the ILC has suggested. This delineation would, moreover, provide a practical method of clarifying a nation's obligation to an ICC through precise documentation of the terms for state assistance, thereby defusing the perception that state assistance to an international tribunal might infringe on sovereign judicial authority.

At its inception, and for some time thereafter, an ICC would likely rely on the assistance in a variety of operations which might eventually come under an ICC's control. Reliance upon state assistance would be especially important in matters relating to the arrest of an accused, securing testimony and evidence, and sentencing and incarcerating a convicted defendant. Some proposed models for international criminal tribunals, such as the Apartheid Draft, contain broad provisions relating to state assistance, which would require nations to provide an Apartheid Court with all necessary means of judicial assistance, including letters rogatory, service of writs, assistance in obtaining testimony and evidence, and the transmittal of records to the Court.²⁴⁴ Nations would be required to recognize the Court's judgments²⁴⁵ and, if no penal facilities were available to the Court, a nation party to the Apartheid Convention might be requested to execute sentence "in that party's correctional system."²⁴⁶

Whether an ICC would be truly international in scope would be dependent upon the extent of state assistance. If, as in the above example of an Apartheid Court, elements such as enforcement and punishment were relegated to Member States, an ICC could be perceived as "semi-international" in nature, whereby "the procedure could be international but the enforcement is kept in national hands."²⁴⁷ Alternatively, an ICC could be "internationalized entirely," and require its separate police force and prisons.²⁴⁸

From a practical standpoint, some measure of state assistance to an ICC would be useful. It may, nonetheless, be advisable to circumscribe the scope of state cooperation in certain instances. For example, state assistance to an ICC through incarceration of ICC defend-

243. 1953 ILC Draft, *supra* note 36, commentary to art. 31, at 17.

244. Apartheid Draft, *supra* note 46, art. 29, at 569.

245. Apartheid Draft, *supra* note 46, art. 30, at 569.

246. Apartheid Draft, *supra* note 46, art. 31, at 569.

247. See statement of Professor Paul Szasz, in *WORLD SECURITY FOR THE 21ST CENTURY: CHALLENGES AND SOLUTIONS — A COLLOQUIUM BETWEEN AMERICAN AND SOVIET LEGAL EXPERTS* 48 (B. Ferencz ed. 1991).

248. *Id.* at 48.

ants in domestic correctional facilities, while obviating the necessity to construct international prisons,²⁴⁹ has possible pitfalls. From a U.S. perspective, the placement of prisoners convicted by an ICC in federal or state prisons might raise the objection that only U.S. law could be controlling over punishments executed within this country.²⁵⁰ Furthermore, from a purely political perspective, housing internationally convicted prisoners in domestic correctional facilities may foster the perception that the ICC system is more a body of domestic, rather than international, origin. In certain instances, it may be more productive to create specific ICC facilities, such as an ICC prison, at a site recognized for its reputation as a center of international conferences and negotiations, such as in Geneva, or at the Hague.²⁵¹

Apart from ICC coordination with individual nations, an ICC would be well served by coordination mechanisms with international organizations. For example, an arrangement with Interpol may be of great use. The idea of Interpol serving as some type of international police force for an ICC is unrealistic. Its ability, however, to serve as a worldwide informational exchange operation for an ICC could be invaluable. In 1981 Andre Bassard, Secretary General of Interpol, envisioned a future where criminals would be pitted "against a superagent, a citizen of the World with a UN passport., having no allegiance to any particular country."²⁵² Interpol may never play such a dramatic role in assisting an ICC. Interpol, as well as other international organizations, nonetheless, may be accorded significant roles in combatting international crime.

VI. Conclusion

As the twentieth century draws to an end, the prospect for an International Criminal Court is dependent upon the ability to avoid the seduction of idealistic visions of a sweeping judicial order. Considering the continuous obstacle of state sovereignty, the focus for an ICC should be for a far more modest scheme. If such a court is perceived as equitable and efficiency in the dispensation of justice, it will lay the groundwork for a broader ICC.

The ICC should, therefore, have a limited subject matter jurisdiction, possibly including certain international crimes relating to illegal narcotics trafficking or certain acts of terrorism, which are currently the subject of multilateral conventions. Inclusion of war

249. *Id.* at 49.

250. L. HENKIN, *supra* note 173.

251. See Wood, *International Criminal Procedure in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT* 292 (J. Stone & R. Woetzel eds. 1970).

252. *Inside Interpol*, *WORLD PRESS REV.*, Jan. 1981, at 12.

crimes, crimes against peace, and other crimes with political overtones should, for the time being, not be under an ICC's jurisdiction. Awaiting United Nations development of a crimes code as a condition precedent to the creation of an ICC will foster an indefinite delay. Indeed, current proposals which envision an ICC developed entirely by convention, with United Nations coordination provided by express provisions, is an increasingly attractive option.

The ICC should have jurisdiction solely over individuals, and with the approval of both the nation of which the defendant is a national and the nation where the alleged crime occurred. The criminal procedure of an ICC should be flexible, possibly consisting of a separate process designed for an ICC, or several such processes reflecting the world's major legal systems.

An ICC should be a creation separate from the International Court of Justice, and should be comprised of judges who represent a diversity of legal systems and who have practical experience in the practice of criminal law. Panels of assessors should be appointed to assist ICC judges. The various bureaucratic organs comprising an ICC should be accorded some flexibility. For example, the creation of a procuracy with separate investigative, prosecutorial, and administrative departments, could prove to be an efficient tool. However, regardless of the type of bureaucracy finally agreed upon, the method of cooperation between nations and an ICC on such critical issues as arrest, evidence gathering, and incarceration of prisoners should be clearly defined.

The satisfactory resolution of these issues is critical to the ultimate success of an International Criminal Court. Nonetheless, a mere resolution of the mechanical and procedural aspects of an ICC will be woefully insufficient and on its own will do nothing to advance an ICC's successful operation. Numerous proposals have been debated for decades and have met fates not dissimilar to the United Nations' draft code of offenses initiatives of the 1950s that had "lain dormant in the drawers of the Secretariat and gathered dust on the library shelves."²⁵³ Nothing short of a major philosophical restructuring of the role of an international criminal tribunal is necessary.²⁵⁴ Those who continue to debate the advantages and disadvan-

253. See INTERNATIONAL CRIMINAL LAW, *supra* note 175, at 597, 598.

254. *World*, *supra* note 52, at 558 (emphasis added). Professor Gardner's endorsement of international organizations of limited jurisdiction is appropriately related to the philosophical approach for development of an ICC when he stated that:

[T]he "house of world order" will have to be built from the bottom up rather than from the top down. It will look like a great "booming, buzzing confusion," to use William James' famous description of reality, *but an end run around national sovereignty, eroding it piece by piece, will accomplish much more than the old fashioned frontal assault* (emphasis added).

Id.

tages of an ICC would do well to heed the observations of Professor Myres S. McDougal who, in discussing public world order, admonished against the use of metaphysical absolutes and procedural gimmickry at the expense of a "continuous clarification of fundamental goal values in terms of particular problems for particular contexts."²⁵⁵

If drawing upon the past may be of assistance in the "clarification of fundamental goal values" for an ICC, the example of the mixed courts of Egypt merits consideration.²⁵⁶ These courts, in operation from 1875 until 1948, were not technically international courts, as they draw their authority from Egypt.²⁵⁷ As a jurisdictional basis, they had cases of "mixed interest," covering civil and commercial litigation between foreigners and natives, and cases between foreigners of different nationalities.²⁵⁸ The courts also had a limited, and somewhat less successful, criminal jurisdiction.²⁵⁹ The judges, selected by the King of Egypt, were Egyptians as well as foreigners.²⁶⁰ Though the concept of these courts was initially perceived by Western nations as an unworkable intrusion upon their consular courts, the mixed courts flourished and served to enhance foreign investment and trade, as anticipated by its creators.²⁶¹

Attempts to exact a specific comparison between the Egyptian mixed courts and any proposed International Criminal Court would be strained. However, if the mixed courts can serve as an illustration of the will of sovereign nations to overcome entrenched apprehensions and form a consensus for a novel, hybrid judiciary for mutual benefit, such an example could serve as an inspiration for the framers of an ICC.

As the past provides sources of inspiration, the present provides sources of opportunity. This article has addressed the receptiveness of some world leaders to the prospects of an ICC. All that can be added is the growing conviction that supranational institutions may be best suited to address a variety of problems crossing national frontiers.²⁶² Is it not reasonable to assume that a viable ICC would be integral to that vision?

Oliver Wendell Holmes once wrote that "[i]t is revolting to have no better reason for a rule of law than so it was laid down at

255. McDougal, *The Impact of International Law Upon National Law: A Policy Oriented Perspective*, 4 S.D. L. REV. 25, 92 (1959).

256. See J. BRINTON, *THE MIXED COURTS OF EGYPT* (1968).

257. *Id.* at 11, 12.

258. *Id.* at 60-71.

259. *Id.* at 177-24.

260. *Id.* at 44-55.

261. *Id.* at 210.

262. Silk, *The "New Order" is a Taller Order*, N.Y. Times, Mar. 17, 1991, at E1, col. 1; E5, col. 4.

the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²⁶³ Perhaps a corollary to Justice Holmes' observation is that the reluctance to advance a rule of law, or a legal concept, simply because it is not ground in established ancient antecedents, should be treated with equal revulsion. To find the idea of an International Criminal Court to be forever incompatible with present realities or, perhaps, far worse, to consign it to some amorphous and undefined future era is to fall too readily into a blind imitation of the past. To find the idea within the grasp of our generation is to strike out on another and more productive course entirely.

263. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (Harcourt, Brace, & Howe eds. 1920).

