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AN INTERNATIONAL CRIMINAL COURT: RECENT PROPOSALS AND AMERICAN CONCERNS

Timothy C. Evered†

INTRODUCTION

This paper considers the current position of the United States (hereinafter U.S.) toward the proposed international criminal court. An attempt will be made to discern the main sources of that position, note the dominant reservations to a permanent international criminal court and determine whether existing proposals and draft statutes adequately address American concerns. Existing proposals and solutions, which fail to address problems attendant on the creation of an international criminal jurisdiction, give rise to U.S. reservations to the proposed court. An approach will be suggested that may address some of the unresolved problems noted in recent federal government pronouncements.¹

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¹ See Statement of Jason Abrams, United States Representative to the Sixth Committee, (Nov. 14, 1989); Statement of John Knox, United States Representative to the Sixth Committee, (Nov. 9, 1990); Statement of Robert B. Rosenstock, United States Representative to the Sixth Committee of the Forty-Sixth Session of the United Nations General Assembly, November 6, 1991, Press Release USUN 82-(91), (Nov. 7, 1991); Statement by the Hon. Edwin D. Williamson, United States Special Advisor to the United Nations General Assembly in the Sixth Committee, USUN Press Release #113-(92), (Oct. 27, 1992); *Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court* (hereinafter *Judicial Conference Report*) JUD. CONF. OF THE UNITED STATES (Sept. Sess. 1991); Letter from Janet G. Mullins, Assistant Secretary Legislative Affairs, U.S. Dep't of State, to the Hon. Dante B. Fascell, Chairman, Committee on Foreign Affairs, House of Representatives, (Dec. 11, 1991) (on file with the author); U.S. Department of State, *Report of the United States on the Draft Code of Crimes*, (Jan. 1, 1993); *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, U.N. International Law Commission, 45th Sess., U.N. Doc. A/CN.4/452 (1993).

After a brief discussion of the background of this proposal, highlighting its recent progression and contrasting it to the development of the Nuremberg war crimes trials, U.S. comment on the proposals will be identified and reviewed. A consideration of the problems and uncertainties surrounding the proposed court will lead to an overview of recent draft statutes that may become the basis for a permanent court. The subject matter and personal jurisdiction of the proposed court will form the primary concerns of this discussion, which argues for the pursuit of a more elaborate and comprehensive approach than that presently contemplated by the international community. A solution which combines a more effective international criminal law defining mechanism, democratic principles and acknowledges the enforcement authority and prerogative of the United Nations Security Council (hereinafter UNSC), may prove a more appropriate response to transnational crime, acts of aggression and genocide, and breaches of international humanitarian law.

The U.S. actively led the creation of the Nuremberg trials, both during the Second World War and at its close.² It also lends its strong support to the creation of an ad hoc war crimes tribunal for the former Yugoslavia.³ However, official support for a permanent international criminal jurisdiction has been notably absent.⁴ Between 1945 and the end of the cold war, official endorsement or suggestion of a permanent court had been limited due to the perceived threat to national sovereignty implicit in the proposal for a court with compulsory jurisdiction, as well as pragmatic cognizance of cold war realities.⁵ New inter-

² See THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).

³ See Don Oberdorfer, *Eagleburger Urges Trial of Serb Leaders*, WASH. POST, Dec. 17, 1992, at A1; *Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/25575 (1993); Statement of Madeline K. Albright in *Security Council Establishes International Tribunal to Prosecute Violations of Humanitarian Law in Former Yugoslavia*, U.N. SCOR, 3217th mtg., U.N. Doc. SC/5624 (1993); and *Statement by US Ambassador Albright*, U.S. DEP'T OF STATE DISPATCH, March 22, 1993, V. 4 No. 12, at 166.

⁴ Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 375-78 (1992).

⁵ The initial proposal for an international criminal court was frustrated by the international community's inability to agree on a definition of aggression. See

national political circumstances, new problems and the leadership of the United Nations (hereinafter UN) may force a reassessment by the Clinton administration.⁶

While the U.S. as a whole has been cautious on the development of a permanent court, Congress has expressed its support for the study of an international criminal jurisdiction.⁷ Academia, non-governmental organizations and the public have displayed far more support and interest in the development of a permanent court than official Washington. These forces may indicate a greater disposition to rely on international responses to problems which concern the international community rather than the views expressed by Representatives to the Sixth Committee of the UN General Assembly.⁸ Specifically, the changing public perceptions of national sovereignty and greater expectations of, and demands on, the UN suggest that a more elaborate multilateral response to the problem of international crime may be politically viable.

The primary cause of hesitation by national governments to an international criminal court involves the scope of the court's jurisdiction.⁹ UN Member States are understandably appre-

Ferencz, *supra*, note 4. The East-West cold war rivalry significantly diminished the UN's ability to develop a recognized definition of aggression.

⁶ The recent change in the international climate can be attributed to the changed leadership and structure of the former Soviet Union. Recent discussion of a permanent international criminal court has been in relation to international terrorism, drug trafficking, genocide, aggression and violations of human rights.

⁷ See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 895, 896, § 1201; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4265, § 4104; Amendment 3068 to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-513, 104 Stat. 2066, § 599E; Persian Gulf War Criminals Act of 1991; and S.J. Res. 32, 103D Cong., 1st. Sess. (1993), introduced by Senator Dodd, January, 1993.

⁸ See Statement of Jason Abrams, *supra* note 1; Statement of John Knox, *supra* note 1; Statement of Robert B. Rosenstock, *supra* note 1; Statement by the Hon. Edwin D. Williamson, *supra* note 1; and *United States Mission to the United Nations, Statement by the Hon. Conrad K. Harper, Legal Adviser U. S. Dep't of State and U. S. Rep. to the Sixth Committee*, U.N. GAOR, 48th Sess., Agenda Item 143, USUN Press Release 171-(93) (1993).

⁹ BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* 382-390 (1980); Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135 (1991); *World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights*, Int'l Institute of Higher Studies in Criminal Studies (1992) (hereinafter ISISC Report); INTERNATIONAL CENTRE FOR CRIMINAL LAW RE-

hensive about the uncertainties surrounding the establishment of a court that might exercise jurisdiction over their nationals.¹⁰ The risks associated with a court exercising compulsory jurisdiction are closely tied to the court's subject matter jurisdiction and applicable law. The number of proposed draft statutes contributes to the confusion surrounding the proposal and fuels concerns related to its potential infringement on national sovereignty. Further, significant reservations to the draft Code of Crimes¹¹ have called into question its use as a basis for the court's jurisdiction.

The argument has also been raised that an international criminal jurisdiction might disrupt or detract from the existing extradition regime, thus causing damage to the present system of international criminal law enforcement.¹² At best, the relationship between the existing system of international criminal justice and the the proposed court is laden with complex questions that must be answered before U.S. hesitation turns to support. At worst, the complexities associated with the proposed court and its relationship to present transnational systems of extradition and prosecution may adversely impact current international criminal law enforcement mechanisms, regardless of the court's eventual structure and scope. General agreement seems to exist in the international community that solutions can be found to the many complexities associated with an international criminal court.¹³ The establishment of a permanent

FORM & CRIMINAL JUSTICE POLICY, INTERNATIONAL MEETING OF EXPERTS ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL TRIBUNAL (1993); Benjamin R. Civiletti, *American Bar Association Reports With Recommendations to the House of Delegates of the Task Force on an International Criminal Court of the American Bar Association and of the New York State Bar Association*, 1992 A.B.A. SEC. INT'L L. & PRAC. 1; *Report of the International Law Commission on the Work of its Forty-Third Session (1991)*, 44th Sess., U.N. Doc. A/CN.4/LA69 (1992) (hereinafter *1992 ILC Report*).

¹⁰ See *Report of the International Law Commission on the Work of its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 21-42, U.N. Doc. A/48/10 (1993); and Ferencz, *supra* note 4, at 376-99.

¹¹ See *Report of the United States on the Draft Code of Crimes*, *supra* note 1.

¹² See Scharf, *supra* note 9.

¹³ M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); and *1992 ILC Report*, *supra* note 9.

court remains a political question, which is dependent upon perceptions of national sovereignty.¹⁴

Discussions of the U.S. position regarding the proposed court are complicated by the diversity of sources expressing that position, the number of draft statutes circulated in Washington and internationally, and the lack of detailed and comprehensive official comment on these statutes.¹⁵ The statutes given consideration by the Member States, the UN, academia, non-governmental organizations, international conferences and meetings of experts, incorporate different solutions and would establish an international court with a range of jurisdictional purviews.¹⁶ The most recent proposals and discussions intended to address crimes under international law, however, seem to converge on a court with limited subject matter and personal jurisdiction.¹⁷ Current proposals suggest a court limited by the duration of its existence, the region under its authority,¹⁸ and personal and subject matter jurisdiction dependant on State conferral on a case by case basis.¹⁹

¹⁴ See M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

¹⁵ For a historical assessment of the various draft statutes, see FERENCZ, *supra* note 9; and TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (Julius Stone & Robert K. Woetzel eds., 1970). For a compilation of more recent official and unofficial proposals, see Bassiouni & Blakesley, *supra* note 13. A list of historical proposals and draft statutes can be found in *Report of the Working Group on the Question of an International Criminal Jurisdiction*, U.N. GAOR, 44th Sess., U.N. Doc. A/CN.4/L.475 (1992).

¹⁶ See M. CHERIF BASSIOUNI, DRAFT STATUTE, INTERNATIONAL CRIMINAL TRIBUNAL 29-46 (1992); 1992 ILC Report *supra* note 9; and Civiletti, *supra* note 9.

¹⁷ See Steven Masur, *Is an International Criminal Court the Answer to International Crime?* 54 (Feb. 1993) (unpublished manuscript on file with the author); Col. Eric L. Chase, USMCR, *Where Policy, Grand Strategy and Justice Meet: A War Crimes Court for the New World Order* (unpublished manuscript, on file at the ABA Section on Int'l Law); Faiza Patel, *Crime Without Frontiers: A Proposal for an International Narcotics Court*, 22 N.Y.U. J. INT'L L. & POL. 709 (1990); *Report on the Seminar on a Code of Crimes and Universal Criminal Jurisdiction*, U.N. ESCOR, International Diplomatic Symposium of 1991: The Code of Tallories, (Robert K. Woetzel, ed., 1991); ISISC Report, *supra* note 9; INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM & CRIMINAL JUSTICE POLICY, *supra* note 9.

¹⁸ See *Report by the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U. N. SCOR, U.N. Doc. S/25704 (1993), concerning a war crimes tribunal limited to the former Yugoslavia.

¹⁹ See BASSIOUNI, *supra* note 16; BRYAN F. MACPHERSON, AN INTERNATIONAL CRIMINAL COURT: APPLYING WORLD LAW TO INDIVIDUALS, MONOGRAPH No. 10, The Center For U.N. Reform Education (1992); American Bar Association, *Resolution*

The degree of control ceded to an international court, and the extent of State obligation to deliver suspects, assistance and evidence, is of central importance to the success and intended role of the new court. Although current proposals limit the domain of the court, thereby mitigating its potential impact, they may not comprehensively address the more significant international problems the court was originally intended to address. A more extensive proposal, as outlined below, is based on post-cold war conceptions of national sovereignty, where the individual is a primary subject under international law. Such a proposal may better encompass solutions to egregious and significant breaches of international law committed and sanctioned by nation states and their officials.²⁰

BACKGROUND: NUREMBERG TO NEW YORK VIA THE COLD WAR²¹

The leadership of the allied united nations that established the Nuremberg war crimes trials in response to World War II aggression, atrocities and genocide, was insufficient to successfully create a permanent international criminal jurisdiction in the early days of the UN.²² Based on initial drafts prepared by the U.S. Department of Justice,²³ the allied nations successfully indicted, convicted and sentenced the major Axis war criminals.²⁴ Though criticized by some,²⁵ the Nuremberg trials

Adopted on February 13, 1978 By the House of Delegates of the American Bar Association at New Orleans, Louisiana, 1978 A.B.A. SEC. INT'L L. 1.

²⁰ The proposed court could thus address aggression, such as that by Iraq against Kuwait, situations of genocide, as have occurred in the former Yugoslavia, and Lybian style state sponsored terrorism.

²¹ This historical background is incomplete; for a more comprehensive discussion of the history of the proposal for an international criminal court, see BASSIOUNI, *supra* note 16; Ferencz, *supra* note 4; Daniel Hill Zafren, *An International Criminal Court?* CRS Rep. No. 93-298A, 103d Cong., 1st Sess. (revised 1993); John B. Anderson, *An International Criminal Court: An Emerging Idea*, 15 NOVA L. REV. 433-47 (1991).

²² Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L ARB. 37 (1950).

²³ See BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* (1980), and BRADLEY F. SMITH, *REACHING JUDGEMENT AT NUREMBERG: THE UNTOLD STORY OF HOW THE NAZI WAR CRIMINALS WERE JUDGED* (1979).

²⁴ See *WAR CRIMES AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* (Norman Tutorow & Karen Winnovich eds., 1986) (Bibliographies and Indexes in World History Series No. 4); ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (1984); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1984); WER-

stand as an important precedent and are hailed, as enunciated in the Nuremberg Principles,²⁶ as authoritative statements of individual accountability.²⁷ The post war effort to create a permanent international criminal jurisdiction, through the United Nations International Law Commission (hereinafter Commission), succumbed to the East-West conflict and the difficulty of defining aggression.²⁸ UN efforts to establish an international criminal jurisdiction and a code of international crimes were indefinitely postponed in 1954, and were given scant official attention until the late 1980's.²⁹

At the initiation of a group of Caribbean Member States, the General Assembly, in 1989, revitalized the proposal for a permanent international criminal court in the Commission.³⁰ The Eighth,³¹ Ninth,³² Tenth³³ and Eleventh³⁴ reports of the

NER MASER, *NUREMBERG: (A NATION ON TRIAL)* (1979); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

²⁵ For a critical assessment of the trials, see ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1988).

²⁶ See *Affirmation of the Nuremberg Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, U.N. GAOR, Res. 95 (I), U.N. Doc. A/64/Add.1 (1947). The International Law Commission subsequently adopted the *Principles of International Law Recognized by the Charter of Nuremberg and in the Judgement of the Tribunal*, 5 U.N. GAOR, Supp. (No. 12), U.N. Doc. A/1316 (1950).

²⁷ See *THE NUREMBERG TRIALS AND INTERNATIONAL LAW* (George Ginsburg & V.N. Kudriavtsev, eds., 1990); The Rt. Hon. Lord Oaksey, *The Nuremberg Trials and the Progress of International Law* (1946-47); Svetlana Pusonjic, *The Nuremberg Trials and Individual Responsibility for Crimes Against International Law* (1979); Cherif Bassiouni, *Nuremberg Forty Years After: An Introduction*, 18 CASE W. RES. J. INT'L L. 261, 267 (1986); and Gerhard Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 CONN. J. INT'L L. 499, 504 (1987).

²⁸ On the Commission, see *Report of the Committee on the Progressive Development of International Law and its Codification*, U.N. GAOR, U.N. Doc. A/332 (1947).

²⁹ G.A. Res 897, U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890 (1954); and G.A. Res. 898, U.N. GAOR, 9th Sess., Supp. No. 21, U.N. Doc. A/2890 (1954).

³⁰ See U.N. GAOR, 6th Comm., 44th Sess., 38th-41st mtgs., U.N. Doc. A/C.6/44/SR.38-41 (1989); and Ferencz, *supra* note 4, at 384-5.

³¹ *Eighth Report of the Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/430/Add.1 (1990). See also *Draft Report of the International Law Commission on the Work of its Forty-Second Session*, U.N. GAOR, 42nd Sess., U.N. Doc. A/CN.4/L.447/Add.1 (1990); and *Draft Report of the International Law Commission on the Work of Its Forty-First Session*, U.N. GAOR, 41st Sess., U.N. Doc. A/CN.4/L.436/Add.1 (1989).

³² *Ninth Report of the Special Rapporteur on the Topic of the Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/435/Add.1 (1991). See also 1992 ILC Report, *supra* note 9.

Commission's Special Rapporteur on the subject of the Draft Code of Crimes against the Peace and Security of Mankind consider the question of an international criminal court. The Commission, at its 1992 and 1993 sessions established working groups on the topic, which have produced two reports.³⁵

At its 1992 session, the U.S. representative to the Sixth Committee argued for a cautious and conservative approach to the development of an international criminal jurisdiction.³⁶ Previous U.S. leadership on the development of the Nuremberg trials and present support of an ad hoc tribunal for ex-Yugoslavia, contrasts with recent indifference toward a permanent court, suggesting the necessity for an examination of the reservations to the proposed court.³⁷ Importantly, without resolution of the many complexities and problems noted by Washington, the project may not garner adequate support from the U.S. or other powerful Member States, and thus may not have sufficient backing to ensure its establishment and success.³⁸

The modern drive to establish an international criminal enforcement mechanism can be traced to the endorsement, in a speech before the UN General Assembly, of an international criminal court to try drug traffickers by then Soviet President Gorbachev.³⁹ The endorsement of such a court, and other inter-

³³ U.N. GAOR, *supra* note 15; and Doudou Thiam, *Tenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, International Law Commission, 44th Sess., U.N. Doc. A/CN.4/442 (1992).

³⁴ Doudou Thiam, *Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, International Law Commission, 44th Sess., para. 8 at 7, U.N. Doc. A/CN.4/449 (1993).

³⁵ U.N. GAOR, *supra* note 15; *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, U.N. GAOR, 45th Sess., U.N. Doc. A/CN.4/L.490 (1993).

³⁶ See Statement by the Hon. Edwin D. Williamson, *supra* note 1.

³⁷ *Letter Dated 5 April 1993 from the Permanent Representative of the United States to the United Nations Addressed to the Secretary-General*, *supra* note 3. On the tribunal, see *Report by the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, *supra* note 18. For a discussion of U.S. reservations, see Scharf, *supra* note 9.

³⁸ See *supra* note 1. The most significant problems relate to the court's jurisdiction, its relationship to extradition and international criminal law enforcement systems and the court's potential conflict with the U.S. Constitution.

³⁹ See Eric Cox, *Soviet Union Rediscovered U.N. (So Does U.S.)*, N.Y. TIMES, July 13, 1988, at A24; Darrel P. Hammer, *Soviet Union Rediscovered U.N. (So Does U.S.); A Step Backwards*, N.Y. TIMES, July 13, 1988, at A24.

national legal projects and principles by the former Soviet Union made possible the serious consideration of an international criminal court. Though the issue is again on the international agenda, the U.S. has remained cautious and indifferent to a permanent court, and has offered, or stated support for, proposals that would limit the court's jurisdiction and effect.⁴⁰ The causes of this reserved approach are of significant importance to the success of the project.

THE U.S. POSITION TOWARD AN INTERNATIONAL CRIMINAL COURT

Four main sources of the U.S. position have made official and unofficial comment on an international criminal jurisdiction. First, the executive branch and Congress have offered a variety of opinions regarding the proposed court, with Congress expressing greater, although limited, support for the project.⁴¹ Second, international legal professionals and academics have given considerable attention to, and in some instances spirited support for, a permanent court.⁴² They have expressed a greater willingness to explore the proposal than officials in the federal government. Third, non-governmental organizations have been active in the advocacy and consideration of an international criminal jurisdiction, as well as in the education of citizens, lobbying of governmental officials and sponsoring of conferences and publication.⁴³ Fourth, the American public, while not sufficiently aware of the proposals at the UN,⁴⁴ has

⁴⁰ See Charles Bataglia, *Chronology of Contemporary U.S. Positions on the Establishment of an International Criminal Court*, 1 *IND. INT'L & COMP. L. REV.* 39 (1991).

⁴¹ On the executive branch's position and reservations see *supra* note 1. On Congress, see *infra* note 46 and accompanying text.

⁴² The consistent efforts of Bassiouni, Ferencz, Murphy, Woetzel and many others have pushed the project to its present state of development. See *infra* note 56.

⁴³ The Foundation for the Establishment of an International Criminal Court, Parliamentarians for Global Action, the World Federalist Association, the Campaign for UN Reform, the Center for Development of International Law, the American and New York State Bar Associations, Amnesty International and the International Commission of Jurists have been especially active in this regard.

⁴⁴ There is little coverage of initiatives before the Commission in the national press. While the Yugoslavian crisis and the recently established ad hoc war crimes tribunal have generated deserved coverage, the work on a draft code of crimes and permanent international criminal court have received less attention and delibera-

expressed support for the creation of an international mechanism to hold heads of state and international criminals accountable for acts which concern the international community. The existence of this sentiment, combined with a new Administration and less acrimonious international relations, may cause a review of the U.S. approach at the UN. Regardless of changes in national and international political circumstances, the many unresolved and complex issues identified by recent U.S. statements concerning the court require significant attention and resolution.

On a number of occasions in the past decade, Congress has expressed support for a permanent international criminal court.⁴⁵ In reaction to political and drug related terrorism, and as part of a broader legal response to international aggression and genocide, a series of "sense of Congress" bills have been passed, as well as legislation referring to the need to study an international criminal court.⁴⁶ While this legislation suggests a measure of support for the consideration of the proposed court, it can neither be construed as an outright endorsement of a permanent court, nor any specific conception or formulation of the court. This legislation pays little attention to the nuances of various specific proposals for an international criminal court, and provides only an indirect indication of the level of support for the actual establishment of a permanent court. The primary proponents of the proposed court have been Representative Leach⁴⁷ and Senators Specter⁴⁸ and Dodd.⁴⁹

Though the proponents have been more vocal and eloquent than the court's detractors, opposition to the creation of a criminal court which transcends the jurisdiction of the U.S. has been

tion. "A number of panelists, from parliaments in both the North and the South, noted the limited public debate to date in their countries." ISISC Report, *supra* note 9, at 21.

⁴⁵ See generally *supra* note 7.

⁴⁶ See generally *supra* note 7.

⁴⁷ See CONGRESSMAN JAMES A. LEACH & PROFESSOR M. CHERIF BASSIOUNI, PARLIAMENTARIANS FOR GLOBAL ACTION, OCCASIONAL PAPER NO. 1, AN INTERNATIONAL CRIMINAL COURT 1992.

⁴⁸ See 136 CONG. REC. 77, S8080 (daily ed. June 18, 1990) (statement of Sen. Arlen Specter).

⁴⁹ See STATEMENT OF SENATOR CHRIS DODD AT THE FOREIGN RELATIONS COMMITTEE HEARING ON AN INTERNATIONAL CRIMINAL COURT, (May 12, 1993); and 139 CONG. REC. 10 (daily ed. Jan. 28, 1993) (statement of Sen. Dodd).

voiced by elected officials and federal government representatives in hearings and testimony related to the legislation noted above.⁵⁰ Concerns generally converge around issues of due process, the need to ensure fair trials, threats to national sovereignty, the danger of judges from foreign and alien judicial systems convicting American citizens, and unresolved problems related to the court's structure. The most significant objections to a permanent court involve the uncertainties and potential abuse of authority associated with a court which has been granted compulsory or exclusive jurisdiction, the potential detrimental effects of the court, and concern for wasted resources. Like the legislation itself, hearings on this topic have lacked consideration for specific proposals or problems associated with the creation of an international criminal jurisdiction, and are thus poor indications of Congress' preference for certain formulations of the proposed court. However, two threshold issues are the need to ensure that the court will not become politicized, and the extent of the court's jurisdiction.

More specific, yet incomplete, consideration has been given to these proposals by officials in the executive branch.⁵¹ As mandated by Congress,⁵² the Judicial Conference submitted a report on the proposed court that outlines specific concerns and gives consideration to some of the solutions offered by international legal scholars and the Commission.⁵³ The focus of this report is the court's relationship to the federal judiciary, and it echoes the caution noted in statements by members of the U.S. delegation to the UN speaking in the Sixth Committee.⁵⁴ This report, the statements of the U.S. representative to the UN General Assembly's Sixth Committee and Department of State comments on the proposed court and draft Code of Crimes forms the most substantial indication of official U.S. reservations to

⁵⁰ See TESTIMONY OF EDWIN D. WILLIAMSON BEFORE THE COMMITTEE ON FOREIGN RELATIONS OF THE UNITED STATES SENATE (May 12, 1993).

⁵¹ *Judicial Conference Report*, *supra* note 1; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

⁵² Pub. L. No. 101-513, *supra* note 7.

⁵³ *Judicial Conference Report*, *supra* note 1, at 3, which considered the ILC's 1953 draft statute; *Report of the Committee on International Criminal Jurisdiction*, 9 U.N. GAOR, Supp. No. 12, U.N. Doc. A/2645 (1954).

⁵⁴ *Judicial Conference Report*, *supra* note 1; and *supra* note 8.

the court.⁵⁵ The problems identified by the executive branch are further elaborated by academic and legal writers and comprise the basis for this discussion.⁵⁶

While the public, international legal scholars and non-governmental organizations show greater support for the proposal to create an international criminal jurisdiction, as expressed in a limited fashion by Congressional actions, the federal government has appeared less enamored of the project.⁵⁷ In response to progress at the UN, crises such as ex-Yugoslavia and Somalia, and the expected review of a new Administration, the U.S. may exhibit less indifference to the project and greater willingness to resolve the specific problems associated with existing draft statutes. The official U.S. position, indicated by the above mentioned sources, has been cautiously indifferent to the establishment of a permanent international criminal court. Limited endorsement has been suggested for further exploration of the idea, as well as for the creation of a court with restricted jurisdiction, authority and resources.

The formation of a permanent court based on indifference, pessimism and a restricted approach, however, may neither resolve the problems that led to initial calls for an international

⁵⁵ The U. S. outlines three major principles that it suggests should guide the development of the proposed court:

First, the development and implementation of such a tribunal should further, not harm, international law enforcement efforts. This is of particular concern in the case of narco-traffickers and terrorists. Second, such a court should be fashioned so as to minimize the potential for politicization of any sort. Finally, and fundamentally, it is imperative to make sure that the applicable law, rules of procedure and evidence, and appeal are adequately addressed in a realistic, just and workable fashion.

Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction, supra note 1, at 27.

⁵⁶ See Scharf, *supra* note 9; Masur, *supra* note 17; Chase, *supra* note 17; Peter Weigend, How Would Conceptual Differences Among Different Systems of Criminal Justice Impact on the Structure and Procedure of an International Criminal Court? (unpublished manuscript on file at the ABA Section on International Law); Peter Wilkitzki, Transfer of the Accused to Court: Mutual Assistance (unpublished manuscript on file at the ABA Section on International Law); Bassiouni & Blakesley, *supra* note 13; MacPHERSON, *supra* note 19; Patel, *supra* note 17; Bassiouni, *supra* note 14; Ferencz, *supra* note 4; Nanette Dumas, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585 (1990); Sharon A. Williams & Hugo Caminos, An International Criminal Court: Structure and Composition—the Options, (unpublished manuscript on file at the ABA Section on International Law).

⁵⁷ *Supra* notes 46 and 50.

criminal court, nor allay concerns noted by the U.S. A more comprehensive approach, incorporating compulsory jurisdiction and democratic principles, tied to the authority of the Security Council, may better address individual criminal actions of concern to the international community, and resolve the complexities associated with the creation of a permanent court.

U.S. RESERVATIONS TO THE PROPOSED COURT

Though the formation of a clear position on the proposed court has been complicated by the existence of multiple draft statutes and incomplete deliberations⁵⁸ on the subject, a number of themes can be noted. The first and most significant concerns the courts personal and subject matter jurisdiction. The scope of the proposed court's jurisdiction raises important political questions relating to national sovereignty, the separation of international and national authority and the proposed court's interaction with national courts. The second area of complexity involves the relationship of the court to existing systems of international criminal extradition and prosecution. Concern has been expressed that the proposed court might disrupt or detract from existing mechanisms of international cooperation.⁵⁹ Third, the structure of the proposed court, as well as the procedural and evidentiary rules, are still open questions which create concerns for due process and judicial protections. The eventual structure of the court, the scope of its jurisdiction and its procedural rules will be of significance in resolving concerns related to the court's impartiality.⁶⁰ The cost of the court's facilities and bureaucracy, which depend on the court's form and scale, is also an issue of controversy. Finally, rudimentary philosophical reservations exist in the creation of an international criminal authority.⁶¹

⁵⁸ The *Judicial Conference Report*, *supra* note 1, at 12 notes, "The existence of these unanswered questions. . . makes it difficult for judges and lawyers concerned with the practical workings of the judicial system to reach a clear position on the feasibility or wisdom of establishing an International Criminal Court."

⁵⁹ See *Judicial Conference Report*, *supra* note 1; Scharf, *supra* note 9; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1, at 15.

⁶⁰ See Statement of Robert B. Rosenstock, *supra* note 1, at 3; and Letter from Janet G. Mullins, Assistant Secretary Legislative Affairs, U.S. Dep't of State, to the Hon. Dan Quayle, President of the Senate, at 2 (Oct. 1991).

⁶¹ *Supra* notes 46 and 50.

While the above areas of apprehension deserve consideration, and would benefit from further definition, the potential scope of the court's jurisdiction forms the primary interest here. A consideration of the uncertainties surrounding the court's jurisdiction will lead to an assessment of currently proposed drafts. The central question of this discussion remains: Do recent draft statutes address American concerns relating to the establishment of a permanent court? Additionally, will the underlying approach of recent draft statutes address these concerns?

The American Bar Association Report of August 1992 notes four possible conceptions for the courts jurisdictional scope and nature⁶² including ". . . (1) exclusive; (2) concurrent; (3) transfer of proceedings . . . ; or (4) appellate review jurisdiction."⁶³ With this as a starting point, it is clear that recent U.S. statements on an international criminal jurisdiction suggest support for a permanent court with limited, concurrent jurisdiction.⁶⁴

The proposed court's jurisdiction may be conceptually limited in the following respects. First, an international criminal court might be regionally limited, similar to the manner in which the War Crimes Tribunal for the former Yugoslavia⁶⁵ and the Nuremberg trials have been. Second, a court may be restricted temporally, to address a specific incident, conflict or period. Third, a permanent court's subject matter jurisdiction could be restricted to certain crimes or categories of crime. Lastly, an international criminal court's authority could be limited in relation to national court jurisdiction, and be subordinate to the primacy of domestic courts. In this last instance, the international court might gain cognizance over a case by ceded jurisdiction, at the will and agreement of States Parties with original jurisdiction over an accused. While the first, second and third options in this list describe the ad hoc tribunal recently established for the former Yugoslavia, the proposals for a permanent court, as well as U.S. preferences, ap-

⁶² Civiletti, *supra* note 9, at 1(A.B.A. Report).

⁶³ Civiletti, *supra* note 9, at 10(A.B.A. Report).

⁶⁴ See *supra* note 32, devoted to the question of the court's jurisdiction.

⁶⁵ For Art. VIII of the tribunal's statute, see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 18, at 18.

pear to suggest a court limited in the third and fourth respects, by its subject matter and personal jurisdictional authority.

The 1978 Report of the American Bar Association argues for a court with jurisdiction limited solely to crimes associated with acts of terrorism.⁶⁶ The type of court recommended by this report, which was authored during a period of heightened terrorist activity,⁶⁷ would have exercised concurrent jurisdiction over individuals accused of criminal acts described in existing international treaties. This limited approach, which would lessen the court's perceived infringement of national sovereignty by denying the court jurisdiction over State sanctioned crimes such as aggression, genocide and violations of human rights, it was hoped would have generated enough State support to allow for the court's establishment. In contrast to the 1951 and 1953 Commission draft statutes, the 1978 ABA Report attempted to accommodate perceived concern for national sovereignty and establish a court that would have encompassed subject matter widely viewed as criminal under international law.⁶⁸

More recent proposals have been in response to international drug trafficking and related violence that has eluded solution by individual nations and the international community, or which has threatened the security or stability of a State or region.⁶⁹ Accordingly, the call for an international criminal jurisdiction to address large-scale drug trafficking and drug related violence has come from States threatened by powerful drug cartels.⁷⁰ In parallel, a court with jurisdiction limited to international organized crime related to illicit drug trafficking was advocated in the U.S.⁷¹ A symposium called by Senator Spector, in 1990, recommended a regional criminal court limited to crimes related to illicit drug trafficking in the Ameri-

⁶⁶ See *supra* note 19.

⁶⁷ See JAMES P. WOOTTEN, *TERRORISM: U.S. POLICY OPTIONS*, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF, at 12 (1992).

⁶⁸ *Judicial Conference Report*, *supra* note 1, at 3; Ferencz, *supra* note 4; and *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12 at 1, U.N. Doc. A/264 (1954), reprinted in FERENCZ, *supra* note 9.

⁶⁹ See *supra* note 30 and accompanying text.

⁷⁰ See *supra* note 55.

⁷¹ See Arlen Specter, *A World Court for Terrorists*, N.Y. TIMES, July 9, 1989, at § 4, p. 27.

cas.⁷² A regional court that would function in relation to the Organization of American States,⁷³ proposed partially in response to drug trafficking, remains a subject of study.

The question of a permanent court has most recently been raised in the context of acts of state aggression, internal conflicts, and state sanctioned repression and genocide. In response to Iraqi actions in the Persian Gulf,⁷⁴ the question of an international criminal court or universal war crimes tribunal was subsumed by discussions of the trial of Saddam Hussein. Similarly, the recent events in the former Yugoslavia have suggested the need for international responses to internal strife, acts of genocide and war crimes. Both these situations led to calls for an international legal response to address the problems associated with fractured, failed or aggressive States and their leaders. The conflict in the former Yugoslavia has become internationalized, and has allowed the UN to act by creating a war crimes tribunal with jurisdiction over Yugoslavian parties to the conflict.⁷⁵ Both situations suggest greater interest on the part of the world community in international responses that may infringe upon national jurisdiction and narrow conceptions of state sovereignty.

U.S. reservations argue for a court with limited authority that would exercise jurisdiction over a specified area, certain crimes, or address an existing crisis or circumstance. In addition to reservations related to the court's jurisdiction, there exist a number of fundamental issues that deserve identification and incorporation into the courts establishing instrument. Among them are due process, presumption of innocence, right to an attorney, the court's rules of evidence and procedure, and double jeopardy protections. Additionally, the proposed court raises important questions relating to the court's interaction with the existing extradition regime and national constitutions. It has been cautioned that a new international court might undermine existing systems of international cooperation in criminal matters, or divert resources from other important efforts to

⁷² See *supra* note 48.

⁷³ 1992 ILC Report, *supra* note 9.

⁷⁴ Acts of aggression and war crimes against Kuwait.

⁷⁵ U.N. Security Council Adopts Resolution 827 on War Crimes Tribunal, U.S. DEPT OF STATE DISPATCH, June 7, 1993, V. 4, No. 23, at 417.

control international crime.⁷⁶ Beyond these issues lie questions of the court's personal and subject matter jurisdiction, which will require significant attention. These questions, and the fear that the court could become politicized and fail to exercise proper impartiality, form the most significant bases for controversy surrounding the establishment of a permanent international criminal court.

Finally, the philosophical and emotional objections to a permanent international criminal court deserve note. Though these issues form the most intransigent opposition to the proposed court, some of which are avoided in the literature on this topic, they are seldom resolved to the degree that allows universal support for the exploration of a permanent court. Significant concerns have been noted that judges on a permanent court may neither be philosophically nor religiously suited to try American citizens.⁷⁷

RECENT PROPOSALS FOR AN INTERNATIONAL CRIMINAL COURT

Over the last half century, a number of draft statutes for an international criminal court have been considered. The most recent proposals will be entertained here.⁷⁸ In essence, the jurisdiction purview they incorporate reflects perceived American concern for national sovereignty and the relationship between the court and national legal systems. This limited approach, however, is based on the assumption that States are unwilling to yield sovereignty. The desire to address certain and limited international criminal behavior is not without unan-

⁷⁶ Statement by the Hon. Edwin D. Williamson, *supra* note 1; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

⁷⁷ However, Mueller notes that "[b]y participating in the creation of a system of international criminal justice, the United States is not subjecting itself to the will of an alien system. Rather, it is joining in a system which incorporates common values." Mueller, *supra* note 27, at 504.

⁷⁸ This discussion was written before the release of the Commission's most recent report, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court, Addendum*, U.N. GAOR, 45th Sess., U.N. Doc. A/CN.4/L.490/Add.1 (1993). This report includes a draft statute that is somewhat different and more complete than the Commission's previous statute considered here. Reference will be made to this more current statute in the notes to this section. The discussion herein is largely based on the statute prepared by the Special Rapporteur in advance of the Commission's 1993 session, found in Thiam, *supra* note 34.

swered and complex questions, and poses some risk to the present system of international criminal law enforcement. It is argued here that, given these risks and the limited categories of criminal activity under the court's purview, the establishment of a court based on current proposals may not address the need for an international criminal court or American reservations.

Upon review of recent proposals and reports relating to the establishment of an international criminal jurisdiction, it will be argued that the U.S., and the international community, would be better served by the creation of an organizational mechanism that addresses both the absence of an effective and swift system of international criminal law definition, and the lack of enforcement for existing international humanitarian law that applies to acts of state. Additionally, a permanent court with adequate jurisdiction could contribute to the enforcement of the UN Charter's prohibitions on the use of force in international relations.⁷⁹

The UN International Law Commission has been the primary venue for the elaboration of a statute for an international criminal court. As well, considerable attention has been devoted to this project by international legal scholars. In 1992, Professor M. Cherif Bassiouni published a revised version of the draft statute he had originally prepared and circulated in 1980.⁸⁰ Also in 1992, a draft statute prepared by Bryan MacPherson was published by the Center for United Nations Reform Education.⁸¹ Both of these documents, and a more recent draft statute prepared in advance of the Commission's 1993 session,⁸² represent conceptions of a permanent court conditioned by assumptions relating to national sovereignty, cost and the widely accepted conclusion that an evolutionary approach is desirable. These proposals raise a number of complex technical questions, yet may fail to address the most egregious violations of international criminal law and the concerns of the international community.

⁷⁹ U.N. Charter Art. 2 para. 4. The court could also settle questions of individual liability in situations where the inherent right of self-defense, under article 51, is abused as a justification for aggression.

⁸⁰ See BASSIOUNI, *supra* note 16.

⁸¹ See MACPHERSON, *supra* note 19, at 51-70.

⁸² Thiam, *supra* note 33.

The MacPherson draft calls for a court with limited jurisdiction, created by statute, that would be given authority to try cases by subsequent agreement.⁸³ The court would remain inactive and dormant unless and until a State party to the court's statute ceded a case for adjudication.⁸⁴ This conception of the court's jurisdiction excludes any significant state obligation to yield to the court's authority. The proposal thus incorporates concurrent and optional, as opposed to compulsory or exclusive jurisdiction. This approach parallels the direction suggested by the Commission in the 1992 report of its Working Group.⁸⁵

Bassiouni incorporates a solution to the problem of the court's substantive, applicable law in a similar manner by a system of transferred jurisdiction.⁸⁶ In this conception the court would merely be an extension of States' Parties jurisdiction, and would apply the transferring State's criminal law and rules of procedure. Again, however, the court's authority would largely depend on the consent of States to transfer the proceedings of a case involving a crime recognized under international law, and thus under the court's purview.⁸⁷ This approach might address perceived State concerns related to the infringement of national sovereignty, and fears that the accused would be tried by an alien system of criminal law, but it has been criticized, as have other draft statutes, for running afoul of the current extradition regime and national constitutional mandates. Importantly, it has been noted that this system might conflict with Article III, and the fifth and sixth amendments to the U.S. constitution.⁸⁸ The U.S. has accordingly expressed its reservation to such an

⁸³ Thiam, *supra* note 33, at 11, para. 52.

⁸⁴ Thiam, *supra* note 33, at 11, para. 52.

⁸⁵ See 1992 ILC Report, *supra* note 9, para. 35-86.

⁸⁶ BASSIOUNI, *supra* note 16.

⁸⁷ BASSIOUNI, *supra* note 16. Bassiouni's draft calls for jurisdiction to be ceded on a case by case basis or by annexed agreement over specified crimes. Acceptance of the statute does not automatically bring State parties under the court's jurisdiction. While this approach allows States the flexibility to accede to the court's jurisdiction at State convenience, compulsory jurisdiction is not an essential part of the court's statute.

⁸⁸ See *Judicial Conference Report*, *supra* note 1, at 11-14; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

approach.⁸⁹ Regardless of the means of triggering the court's jurisdiction in this approach, the fundamental implications of State acceptance of the court's authority on a case by case basis yields a court with limited power and efficacy.

These two drafts indicate the apparent direction and approach that has emerged in the academic and international legal community, as well as in the Commission. With previous recommendations for a limited court as a basis,⁹⁰ the predominance of recent proposals argue for restricted and compromise jurisdiction. The argument in support of this approach relies on the assertion that States will refuse to give the court compulsory jurisdiction as this would require them to yield sovereignty. Thus, the establishment of a limited court, which may successfully settle non-controversial cases, thereby gaining credibility and recognition, would improve the present system of international criminal law prosecution and perhaps, in time, develop into a more potent institution. This assertion is based on two potentially fallacious assumptions. The first assumption, as previously mentioned, is that states will not submit to an extranational entity exercising compulsory authority. The second is that a limited court, requiring case by case cession of jurisdiction, will develop gradually into a more powerful and accepted court, and thereby address the more significant international criminal problems it was originally intended to resolve. These assumptions are considered in the following section.

A recently completed Commission draft statute,⁹¹ which was considered by the Commission at its forty-fifth session, will form the basis of the following discussion. Similar to the above mentioned unofficial draft statutes, this proposal of the Commission's Special Rapporteur rests on analogous assumptions regarding State willingness to accede to a convention which would grant a permanent court wide authority. This Commission draft therefore incorporates a system of ceded jurisdiction. The court would require the approval of the State of which the

⁸⁹ See *Judicial Conference Report*, *supra* note 1, at 11-14; *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

⁹⁰ See American Bar Association, *supra* note 19; and Patel, *supra* note 17.

⁹¹ The Special Rapporteur's draft, prepared in advance of the Commission's forty-fifth session, is found in Thiam, *supra* note 34. The statute is reprinted with commentary and a brief introduction by the Rapporteur.

accused is a national, as well as the State possessing territorial jurisdiction.⁹² This system of concurrent jurisdiction,⁹³ and the means of State recognition of the court's authority to initiate proceedings, does not differ greatly in principle from proposals offered by the academic community and in discussions in the U.S.⁹⁴ Whereas previous proposals require the approval of multiple States that may have reason to assert jurisdiction over an accused, the Commission's proposal would limit the number of States necessary for the court to exercise authority to two.⁹⁵

The procedure by which States submit cases and accede to the court's jurisdiction is of paramount importance to the court's degree of authority. Specifically, does rendition of an individual from a State which holds custody of an accused who had committed a crime in a different State, both of which had acceded to the court's jurisdiction, automatically establish the court's authority? The statute is silent on the procedure through which the court gains jurisdiction, and fails to specify

⁹² The draft is not explicit about the procedure by which jurisdiction is ceded to the court in a given case. Jurisdiction may be either automatic upon custody by the court of an accused whose State of nationality and the State in which the crime occurred are each a party to the court's statute or it may require the further agreement of both of these States, thereby reserving the right to withhold recognition of the court's jurisdiction. The Rapporteur's commentary indicates the latter, more restricted approach. Thiam, *supra* note 34. The Commission's more recent statute outlines, in Article 23, U.N. GAOR, *supra* note 78, at 23, three possible arrangements by which states might cede jurisdiction to the court, for the General Assembly to consider at its current session. Article 27 of the more recent statute foresees a role for the UNSC in situations of aggression. U.N. GAOR, *supra* note 78, at 31.

⁹³ Article 23 of the Commission's draft statute thus reads ". . . [para.] 2. (a) Any state. . . may, instead of having an accused person tried under its own jurisdiction, refer him to the court." U.N. GAOR, *supra* note 34, at 24, para. 93, art 23 (2)(a). The commentary notes that "paragraph 2, subparagraph (a), establishes the optional and concurrent character of the court in that any state also has the right to have an accused person tried under its own jurisdiction." U.N. GAOR, *supra* note 34, at 24, para. 96. Paragraph 3 of this article states that "on receiving the complaint, the President of the court shall, provided the states are not complainants, inform the state accordingly on whose territory the offence was committed and the state of which the accused is a national." U.N. GAOR, *supra* note 34, at 24, para. 93, art. 23(3). There is unclear indication that the word "inform" implies required consent to initiate proceedings. However, State approval on a case by case basis is clearly suggested by the Rapporteur's commentary.

⁹⁴ BASSIOUNI, *supra* note 16; MACPHERSON, *supra* note 19; and American Bar Association, *supra* note 19.

⁹⁵ U.N. GAOR, *supra* note 34. The introduction thus reads ". . . [the court's jurisdiction] depends on the consent of two States: the complainant State and the State of the territory of the crime." U.N. GAOR, *supra* note 34, at 7, para. 11.

the nature of the court's obligation to receive approval from States with national or territorial jurisdiction. Though a State must refer a case in order for the court to exercise its jurisdiction, the Rapporteur's draft statute fails to address the procedures for submission of cases and the boundaries of the court's authority in the absence of direction from States holding primary jurisdiction over an alleged criminal.

Apparently, if an accused is the subject of domestic proceedings that have already been initiated, the proposed court would have no authority or jurisdiction. Under the Rapporteur's draft, if a State were exercising its jurisdiction based on national or territorial authority, the court would not supersede that authority.⁹⁶ The statute does not, however, make explicit whether the court requires the prior and immediate consent of States to exercise jurisdiction, though this would seem implied in the wording of the draft and commentary. States, rather than individuals and international organizations, would initiate a complaint, and would furnish the prosecutorial resources.⁹⁷ Thus, the court requires the immediate action of at least one state.⁹⁸

The Rapporteur's draft statute offers no provisions for States parties to renounce the court's jurisdiction once it is invoked or acceded to through ratification of the court's establishing Convention. However, Article 24 does allow that "any concerned State may intervene in the criminal procedure, sub-

⁹⁶ *Supra* notes 93 and 95.

⁹⁷ U.N. GAOR, *supra* note 34, at 25, proposes two options. The first, according to the Rapporteur's comments, garnered the predominant support of the Commission, and calls for States to conduct the prosecution. The second, which the Rapporteur suggests the Commission does not prefer, calls for a Prosecutor General to be appointed from among the General Assembly of Judges to conduct prosecutions on behalf of the complainant State.

⁹⁸ U.N. GAOR, *supra* note 34, at 24. Article 23 thus reads "A case shall be submitted to the court on the complaint of a State." U.N. GAOR, *supra* note 34, at 24, para. 93, art. 23(1). The commentary notes, "Paragraph 1 restricts the right of complaint to States. Accordingly, individuals and international organizations are excluded from this right." U.N. GAOR, *supra* note 34, at 24, para. 94. This provision further reduces the possibility that heads of State or governmental officials will be called to the proposed court to answer for crimes against domestic publics. Article 29 of the Commission's more recent draft would similarly limit the submission of complaints to states, but would include the Security Council as a possible complainant. U.N. GAOR, *supra* note 78, at 2.

mit a memoranda and take part in the proceedings."⁹⁹ It is significant to note, according to Article 6, that once the court is engaged on a case, it would "rule on questions relating to its own jurisdiction in a case submitted to it."¹⁰⁰ In situations of third State rendition, the court would appear to possess a default jurisdiction, presuming a State party exercising national or territorial jurisdiction did not invoke its authority previously. Where custody is held by a State with national or territorial jurisdiction over an alleged criminal, the court would rely entirely on State referral.

In addition, the draft makes no provision for the international court to review national proceedings against violations of international criminal law. Furthermore, it apparently would not allow the proposed court to exercise jurisdiction where a State with national or territorial authority had failed or refused to try the accused, and had not referred the case to the international criminal court.¹⁰¹ The statute does not mention the problem of double jeopardy.¹⁰² The enunciation of this interaction with national courts and the authority of the international court to rule on a case previously considered at the national level, or vice versa, has significant implications for the authority and jurisdiction of the proposed court. The authority to pursue an alleged criminal who has been acquitted or granted amnesty by a national proceeding must be resolved and is of

⁹⁹ U.N. GAOR, *supra* note 34, at 25, para. 98, art. 24.

¹⁰⁰ U.N. GAOR, *supra* note 34, at 13. The commentary to Article 6 notes that "... the judge hearing a dispute shall also be the judge of its own jurisdiction." U.N. GAOR, *supra* note 34, at 13, para. 49.

¹⁰¹ *Supra* notes 92, 93 and 97.

¹⁰² U.N. GAOR, *supra* note 34, at 13. Article 7 outlines the judicial guarantees afforded defendants, but does not specifically include protection against double hearings. The commentary to Article 7 refers to a number of international human rights instruments, some of which include protection against double hearings, but fails to specifically incorporate this provision or address the relationship between national court rulings and the proposed international court. Article 45 of the Commission's more recent statute makes explicit the proposed court's authority to retry or review cases concluded by national courts. It provides protections and allows the court to review and retry cases previously concluded at the national level. U.N. GAOR, *supra* note 78, at 24. For a discussion of the double jeopardy problem in the Draft Code of Crimes, see commentary of Bert Swart in COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 173-85 (M. Cherif Bassiouni, ed., 1993).

paramount importance to the extent of the proposed court's jurisdiction.¹⁰³

The central requirement that States must provide subsequent approval or referral, beyond ratification of the court's statute, limits the court's authority. This approach is indicated in the draft statute and introduction to the Special Rapporteur's report, which notes, ". . . provision is made for a simplified rule of handing over the defendant to the court on its simple request, with, however, reservations implying respect for certain principles."¹⁰⁴ Thus, while the specific procedures by which the court will gain jurisdiction are left incomplete in the Rapporteur's proposal, the draft statute, with regard to personal jurisdiction, reflects perceived concerns relating to national sovereignty by requiring State approval to initiate proceedings.¹⁰⁵ It would therefore seem to address and mitigate the complexities and problems outlined in recent U.S. statements toward the proposed court.

While limited jurisdiction would tend to decrease the impact of the court's imperfections and complexities, a number of concerns require attention regardless of the court's authority. Specifically, problems that might be amplified in a court with extensive jurisdiction could still exist and plague a court with limited, concurrent or optional jurisdiction. The creation of a court with limited authority presents itself as an attractive, yet possibly false, solution to the risks apprehended by the creation of a permanent court.

With regard to potential complications and unresolved issues, two approaches emerge from a consideration of the court's

¹⁰³ As Professor Thomas Buergenthal noted recently before the Senate Foreign Relations Committee,

The decision of the Salvadoran Government to immediately amnesty all the individuals who were named by the Truth Commission as responsible for major acts of violence illustrates once again why national remedies alone will seldom serve as effective deterrents. Other countries come to mind - Chile, Nicaragua, Cambodia, to name but a few - where powerful groups responsible for violations of human rights under a previous government were able to negotiate or force amnesties or other forms of protection for themselves.

TESTIMONY BY PROFESSOR THOMAS BUERGENTHAL BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE, at 2 (May 12, 1993).

¹⁰⁴ Thiam, *supra* note 34, at 8, para. 18. In situations involving States not parties to the statute, extradition proceedings would be required.

¹⁰⁵ Thiam, *supra* note 34, at 8, para. 18.

jurisdiction. The first, if one concludes the complexities associated with a permanent court are insurmountable,¹⁰⁶ argues that the jurisdiction of the court must necessarily be limited, if it is to exist at all. Conversely, if the unresolved complexities and concerns attendant on the creation of an international criminal jurisdiction are considered resolvable, then there is the potential for adequate support for a permanent international court with the authority and power to sanction state sponsored crimes and violations of human rights. Thus, an assessment of the Rapporteur's approach to a number of outstanding problems and structural aspects of the court is necessary in order to identify those items that can be resolved. This may allow the exploration of a court with wider authority over problems of significant concern to the international community.

One important concern, raised in the U.S. and elsewhere, is the danger of the politicization of the court.¹⁰⁷ A number of officials have expressed apprehension that proceedings might be initiated for political reasons, and have voiced concern that judges from alien legal systems or adversarial countries will sit in judgement of their nationals.¹⁰⁸ The Commission's draft statute addresses this issue by allowing States parties the right to certify, before handing over an accused, that trials are not pursued for political reasons.¹⁰⁹ While offering a convenient and plausible solution for the danger that the court may become politicized, this provision significantly undermines the authority of the court. States parties are allowed to disregard the court's jurisdiction if they determine that a case is politically charged.¹¹⁰ The prerogative to make such determinations remains with the State in the absence of criteria established at the international level and applied by an impartial, international body. Though this may protect the accused from expo-

¹⁰⁶ See Letter of Janet G. Mullins, *supra* note 60, at 5, which states, ". . . we have become increasingly skeptical about whether achieving consensus on the numerous issues associated with the establishment of such a court would ever be possible. . ." See also TESTIMONY OF EDWIN D. WILLIAMSON, *supra* note 50, at 4.

¹⁰⁷ See TESTIMONY OF EDWIN D. WILLIAMSON, *supra* note 50, at 3.

¹⁰⁸ *Supra* note 104.

¹⁰⁹ Article 28 provides that States parties requested to hand over an accused to the court are required to ensure that "[t]he proceedings have not been instituted on political, racial, social or religious grounds." U.N. GAOR, *supra* note 35, at 28, para. 2(a).

¹¹⁰ Thiam, *supra* note 34, at 29.

sure to politicized international judicial proceedings, it is an instance where the authority of the court is undermined in order to address Member State concerns, perhaps in an unnecessarily detrimental way.

A related problem concerns the selection of judges to serve on the court.¹¹¹ The Commission's proposal calls for the selection of a chamber of judges from a pool or 'General Assembly of Judges', to hear cases brought to the court. Each State party would be allowed to appoint one judge¹¹² to the General Assembly of Judges,¹¹³ which would in turn nominate a president and vice-president of the court to attend to the court's administra-

¹¹¹ Articles 12 and 15 address the appointment of judges and the composition of the court. Thiam, *supra* note 34, at 18, para. 65, art. 12, and at 19, para. 73, art. 15.

¹¹² Art. 12, U.N. GAOR, *supra* note 35, at 18, para. 65. Article 11 of the Rapporteur's draft statute determines the qualifications required of members of the court, and specifies that they must be ". . . jurisconsults of high moral character and recognized competence in international law and, more specifically, international criminal law." U.N. GAOR, *supra* note 35, at 18, para. 64. This would oblige States parties to appoint judges based on apolitical criteria. However, it would neither give individual States parties much sanction over the composition of the General Assembly of Judges nor of the specific chambers of the court. Article 17 allows for the removal of judges by the unanimous opinion of the other member of the General Assembly of Judges. U.N. GAOR, *supra* note 35, at 21, para. 84. It is thus theoretically possible, presuming the following States become parties to the court's statute, for an American citizen to be tried by a chamber of judges which included jurists from 'rouge' nations such as Iran, North Korea, China, Iraq and Libya. It is important to note that the U.S., or another State party, could simply not allow the trial of one of its nationals, thereby avoiding this circumstance. However, this would significantly undermine the court's potential and may doom it to failure. A better approach might be to solve such technical problems in a manner that would guarantee the non-politicization of proceedings before the court and the court's authority to take cases in controversial and important instances. This guarantee may allow the establishment of a permanent court with more extensive jurisdiction.

¹¹³ This body would have few official functions and would exercise the authority to elect the president and vice-president of the court and remove judges by unanimous decision. It possesses a similar role to the 'Standing Committee' suggested in Bassiouni's draft statute, with the exception that the Standing Committee would not necessarily consist of judges but merely State party representatives. The Standing Committee would also have the prerogative to ". . . propose to State Parties international instruments to enhance the functions of the Tribunal." BASSIOUNI, *supra* note 16, at 72, para. 2(h). This would apparently allow the Standing Committee to propose new international legal instruments, additional protocols or definitions to be added to the tribunal's jurisdiction. See M. CHERIF BASSIOUNI, DRAFT STATUTE, INT'L CRIMINAL TRIBUNAL, ASSOCIATION INTERNATIONALE DE DROIT PENAL, at 72, Art. 18, para. 2(h) (1992).

tive tasks.¹¹⁴ The president would have the authority to choose the composition of a chamber of nine judges which could hear cases before the court.¹¹⁵ The president thus has wide control over the composition of the sitting chambers.¹¹⁶

This power, however, is tempered by the prerogative of the General Assembly of Judges to select a president and vice-president by an absolute majority of votes,¹¹⁷ thus indirectly allowing the judges as a whole to oversee that chambers are not stacked for political reasons. Judges could simply remove the president if it becomes apparent that the composition of a chamber is being influenced by political considerations. However, this may be little assurance to States parties that chambers will be assembled without political implications. States parties would have no direct influence over the composition of the court's chambers. States would have to rely on the appointment process to deliver competent, impartial jurists; this provides no guarantee that certain nationals will not be represented in chambers trying their nationals. States might only be left with the choice of not referring cases to the court, an option, if exercised, that would have detrimental implications for the court and its evolution into a body with compulsory authority. Thus, the resolution of this issue, in a manner that would assure the non-politicization of the court, is important with respect to the degree of confidence States will yield to a permanent international criminal jurisdiction. The Rapporteur's solution to this problem probably would not allow Member States to place significant or compulsory authority in the court on a permanent basis.

A final concern regarding the court's scope is its subject matter jurisdiction. The court's applicable law, as indicated in the Rapporteur's draft statute, would include conventional international law.¹¹⁸ The crimes and specifications within the

¹¹⁴ U.N. GAOR, *supra* note 34, at 19, para. 69, art. 13.

¹¹⁵ See Thiam, *supra* note 34, at 7, para. 8; and U.N. GAOR, *supra* note 78, at 19, art. 41.

¹¹⁶ Thiam, *supra* note 34, at 19, para. 73.

¹¹⁷ U.N. GAOR, *supra* note 78, at 19, art. 41.

¹¹⁸ U.N. GAOR, *supra* note 78, at 10, para. 5. Article 4 thus reads, "The Court shall apply international conventions and agreements relevant to the crimes within its jurisdiction (as well as general principles of law and custom). . ." U.N. GAOR, *supra* note 34, at 10, art. 3.

court's jurisdiction would be defined either in an additional agreement or in the Commission's draft Criminal Code, if and when it is ratified.¹¹⁹ It is not likely that the court will be tied to the draft code in any meaningful way, but will find its subject matter jurisdiction in treaties in force and subsequent agreements. The body of international criminal law within the court's purview requires further attention, definition and agreement. This is a source of ongoing concern to Member States observant of both the draft code and the proposed court. If the proposed court is limited to subject matter that does not include the most significant criminal acts, such as State aggression and human rights violations, it may engender less controversy and resistance, yet fail to address the problems that form the main impetus behind the establishment of an international criminal court.

One of the initial criteria suggested by the U.S. in assessing the proposed court is the utility¹²⁰ of a new international court.¹²¹ The proposal to establish an international criminal jurisdiction has been advanced to address gaps in the present system of international criminal law enforcement.¹²² As mentioned above, recent proposals have been directed at specific types of international crime or at a range of non-controver-

¹¹⁹ U.N. GAOR, *supra* note 78, at 11, art. 34. Problems associated with the use of existing international criminal conventions, the definition of crimes therein, and the viability of the draft Code of Crimes were specifically raised by the U.S. Mission to the UN in commentary on these projects. See *Report of the United States on the Draft Code of Crimes*, *supra* note 1, and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1, at 25. These reports note that international instruments establishing crimes under international law have, in most cases, presumed trial in national courts, that the draft code of crimes is vague and seriously flawed and that the crimes enunciated in international conventions and the draft code lack the requisite specificity to allow trial of an alleged at the international level without violation of the principles *nulla poena sine lege* and *nullem crimen sine lege*.

¹²⁰ Though an empirical assessment of the need for added mechanisms to enforce international criminal law is an important aspect in the determination of the utility of an international criminal court, and the efficacy of the various options related to the court's structure and jurisdiction, a more thorough consideration must be dealt with elsewhere. For the purposes of this discussion, the existing system, while evolving and not without numerous advantages, fails to address significant problems that may be beyond unilateral or bilateral solution. See Civiletti, *supra* note 9, at 6-10(A.B.A. Report), 2-5(N.Y.S.B.A. Report). See generally Bassiouni & Blakesley, *supra* note 13.

¹²¹ See Statement of Robert B. Rosenstock, *supra* note 1.

¹²² See Bassiouni, *supra* note 14; and Bassiouni & Blakesley, *supra* note 13.

sial criminal activities that do not implicate states or their representatives.¹²³ More importantly, the initial proposal for a permanent international criminal court was inspired by the need to sanction the use of aggressive force as well as State directed human rights violations on the international plane.¹²⁴ Thus, while any proposed statute for a new international mechanism to improve the enforcement of international criminal law must address the problems and risks associated with its establishment, it must also be assessed in relation to the international problems it is intended to solve. The evolutionary and restricted approach reflected in the Commission Rapporteur's draft statute and contemporary writings on the subject, may not address significant international problems or substantially alleviate the risks associated with its creation.

Since the Rapporteur's proposal incorporates an optional and concurrent jurisdictional system, an international court based on such a limited approach would be unable to control acts conducted by heads of State and government officials. This conception would effectively relegate the court to less significant criminal acts, though also of great importance to the international community, such as hijacking and smuggling that involve private individuals. Further, the proposed institution would not improve the development or the definition of international criminal law. The Commission Rapporteur's draft statute would neither solve the important problem created by the lack of adequate specification of international criminal law, nor would it create a more effective procedure by which to create new international criminal law.

Finally, the Rapporteur's draft statute does not guarantee that judges from rogue nations will not sit in judgement of U.S. citizens. In addition to these flaws, the Commission Rapporteur's proposal raises other significant issues, noted by officials of the U.S. government, which cannot be addressed here in a manner comparable to their importance.¹²⁵ The focus here is

¹²³ *Supra* notes 17 and 94.

¹²⁴ The move to create a permanent international criminal court in the immediate post-war period was driven largely by the international desire to address State acts of aggression and genocide.

¹²⁵ For an outline of specific questions raised by the proposed court, see *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1. The Department of State notes

the underlying approach and its implications for the scope and efficacy of the court.

ASSUMPTIONS UNDERLYING A RESTRICTED APPROACH

The limited and restricted approach undertaken by the Commission,¹²⁶ echoed in current writings on the subject,¹²⁷ is apparently based on a number of assumptions, some of which remain unscrutinized and may be specious. An attempt will be made to identify and consider the assumptions that form the basis of this restricted approach, and to suggest the implications of these assumptions, if they prove to be unfounded.

The first and most significant assumption underlying the Commission's approach relates to perceptions of national sovereignty.¹²⁸ It has been remarked, though not fully argued, that the establishment of a permanent international criminal court might significantly infringe upon the sovereignty of States parties. If the court were given compulsory jurisdiction to try individuals for State sponsored crimes or other crimes of concern to the international community, it follows that the court might infringe upon national sovereignty. This assertion suggests a narrow definition of sovereignty that may not be plausible or

“. . . it is clear that further consideration is required on how best to resolve many of the difficult questions which it raises. . . .” *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1, at 27.

¹²⁶ See Thiam, *supra* note 34; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

¹²⁷ See Masur, *supra* note 17; Chase, *supra* note 17; *Report on the Seminar on a Code of Crimes and Universal Criminal Jurisdiction*, *supra* note 17; Mueller, *supra* note 27; American Bar Association, *supra* note 19; and Civiletti, *supra* note 9.

¹²⁸ James N. Rosenau, *Sovereignty in a Turbulent World* (May 3, 1992) (unpublished manuscript, on file with author). Rosenau argues, in a paper prepared for presentation at the Conference on Sovereignty and Collective Intervention sponsored by Dartmouth College and the United Nations University, May, 1992:

Given the ambiguous and contradictory understandings of sovereignty in a rapidly changing world, it can easily be argued that the concept ought to be abandoned and replaced by new, more elaborate analytic equipment and a new, more appropriate vocabulary. That is, since the concept is under siege by phenomena that do not fit readily under its traditional rubric, it is misleading, to say the least, to continue using the concept as if its contents were self-evident.

Id. at 3.

realistic¹²⁹ in the present and increasingly interdependent international system.¹³⁰ Further, it may be espoused that an international criminal court with review jurisdiction over individual actions, even those associated with acts of state, would afford the same protections and responsibilities as those presently existing under national jurisdictions. Thus, state sovereignty, broadly defined, may not be significantly impacted by a court with extensive jurisdiction. If traditional definitions of sovereignty remain relevant,¹³¹ it will be important to question whether an international criminal court would impact sovereignty as it presently exists. The increasing recognition of the individual under international law may suggest the waning of State sovereignty.¹³²

The second assumption that should be considered is the argument that states would not accept the infringement of traditional sovereignty. This assertion is often referred to as indisputable in any discussion of new authority for international organizations.¹³³ Significantly, as indicated in statements by Member State Representatives in the Sixth Committee, some States are prepared to support the creation of an international criminal jurisdiction with compulsory or exclusive authority.¹³⁴ This support, and the reasons behind it, de-

¹²⁹ See CHANGING CONCEPTIONS OF SOVEREIGNTY: CAN THE UN KEEP PACE? 7,8 (The Stanley Foundation, ed., 1992).

¹³⁰ See Boutras Boutras-Ghali, *Empowering the United Nations*, 72 FOREIGN AFFAIRS 89 (1993).

¹³¹ See Statement of M. Cherif Bassiouni Before the Senate Committee on Foreign Relations, (May 12, 1993), in which he argues that a narrow definition of sovereignty may be counter to national interests. Louis Henkin argues, "It is time to bring sovereignty down to earth; to examine, analyze, reconceive the concept, cut it down to size, break out its normative content, repackage it, perhaps even rename it." *Notes From the President: The Mythology of Sovereignty*, AM. SOC'Y OF INT'L L., March-May 1993, at 6. Rosenau poses the question thusly, ". . . is the relative balance between the sovereign rights of states and those of their international organizations presently undergoing transformation and, if so, at what pace toward which extreme of the sovereignty continuum?" Rosenau, *supra*, note 128, at 6.

¹³² Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

¹³³ See generally ISISC Report, *supra* note 9, at 16. As Rosenau notes ". . . our imaginations are paralyzed by the sovereignty concept. . . ." Rosenau, *supra*, note 128, at 4.

¹³⁴ A number of Member States argued for the establishment of a more elaborate court in the Sixth Committee's 1992 session, U.N. GAOR, *supra* note 30; and *United Nations, General Assembly, Forty-Seventh Session, Provisional Verbatim Record of the 12th Meeting*, U.N. Doc. A/47/PV.12 (1992).

serve adequate consideration before the conclusion is reached that a court with wide authority cannot gain Member State support. Even if one accepts the validity of traditional definitions of state sovereignty, states may still yield jurisdiction over international crime to a permanent and well conceived international criminal court.

This support has also been observed in the Commission. Though it appears that the majority of the Commission favors a court with limited authority and an evolutionary approach,¹³⁵ it may neither reflect the opinions of the Commission as a whole nor represent Member State interests. If the Commission's approach is based on the potentially false assumption that States will not accept an infringement of sovereignty, then careful scrutiny of this assumption is of considerable importance to the eventual scope of the project. Some members of the Commission and UN member states favor a more elaborate approach than that endorsed by the Commission as a whole.¹³⁶

The assumption that Member State publics are concerned with the infringement of national sovereignty forms the third basis for the Commission's approach. In fact, there seems to be increasing indication that publics would prefer greater scrutiny of national governments by organs at the international level. There is some indication that individuals support the establishment of an international criminal court with the authority to try persons for State sanctioned acts that violate international criminal law.¹³⁷ Especially in countries with non-representa-

¹³⁵ See *Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 15, paras. 9-32.

¹³⁶ A number of UN member states strongly encourage establishment of a court with broad authority.

¹³⁷ See ALAN F. KAY, STANLEY B. GREENBERG, FREDRICK T. STEEPER & HAZEL HENDERSON, *GLOBAL UNCERTAINTIES*, SURVEY #21, *AMERICANS TALK ISSUES*, May 10, 1993; and ALAN F. KAY & HAZEL HENDERSON, *STRUCTURES FOR GLOBAL GOVERNANCE*, SURVEY #23, *AMERICANS TALK ISSUES*, May 10, 1993. The latter survey report notes:

The support. . . for amending the UN charter to create an International Criminal Court is both extremely high and extremely resistant to counter arguments. Creation of such a court with the authority to try terrorists and hijackers was favored by 82% five years ago in May of 1988. In this survey, supermajorities of 83%. . . , 82%. . . , and 87%. . . are in favor of the UN, with due process of law, arresting individuals, including heads of state, accused of certain serious crimes and trying them before an International Criminal Court. Crimes which 78% or more of Americans agree should be placed

tive regimes, it should not be assumed that official government positions can represent the will of the people.¹³⁸

Fourthly, the move to establish an international criminal court with limited jurisdiction assumes that a court with optional jurisdiction will address questions of significance to the international community. As mentioned above, the creation of a court with limited jurisdiction effectively excludes a number of important criminal activities from its purview, most notably those related to acts of state. An assessment of the court's potential impact on other areas of international criminality, such as drug trafficking and terrorist crimes, must also be pursued. It has been argued that initial consideration should be given to the court's utility.¹³⁹

The fifth assertion deals with the issue of whether a court with optional jurisdiction will sufficiently address less significant crimes and thereby gain the confidence of State parties. It is therefore assumed that a restricted court will evolve into an institution with wider authority, encompassing the more controversial acts that may come under the court's authority. In this view, a restricted approach would eventually yield an international criminal court that addresses acts such as State aggression. The acceptance of a court that relies on subsequent State recognition of its jurisdiction, it is argued, will bring the international community one step closer to the establishment of an international court with the recognized authority to rule on acts of more substantial concern.¹⁴⁰ This may prove to be false gradualism if the court is not given the authority to address more important criminal activities, and if it fails to convince

under the court's jurisdiction *include seriously damaging the global environment, invading and occupying a neighboring country, and serious human rights violations. . . .* When it was stated that *it is conceivable that a President of the U.S. might someday be arrested by the UN under the charter revision creating an International Criminal Court*, support for the court nevertheless remains 78%. . . and 86%. . . (emphasis in original).

STRUCTURES FOR GLOBAL GOVERNANCE, SURVEY #23, *supra*, at 7.

¹³⁸ There are people who argue that the court will require the surrender of national sovereignty to an international tribunal, which must be critically assessed before the court's authority and jurisdiction are decided.

¹³⁹ Scharf, *supra* note 9; and *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1.

¹⁴⁰ U.N. GAOR, *supra* note 15, at 13-14.

Member States of its ability to enforce international criminal law where less significant crimes are concerned.

The sixth assumption regarding the proposed court, underlying the call for a restricted, evolutionary approach, suggests that other mechanisms will address the more significant problems plaguing the international community. The continued reliance on unilateral and multilateral ad hoc solutions may be insufficient to address acts of State aggression and violations of human rights, or may appear illegitimate, arbitrary and self-serving. Greater reliance on the Security Council in recent crises would seem to support this assumption, yet the Council may not have the will or the resources to solve the many problems related to international criminal activity that presently evade solution by individual Member States or the international community.

The above noted assumptions, where accepted without sufficient scrutiny, lead many to conclude that a permanent court with restricted authority will effectively address international concerns, develop into a more credible and powerful institution, and gain the acceptance of the international community. Further, the reasoning behind these assumptions, especially those related to sovereignty, suggests that the only court acceptable to Member States and their constituencies would possess merely limited jurisdiction. Traditional conceptions of State sovereignty, the conviction that such concerns are still widely held, and the perceived impact an authoritative permanent court may have, make consideration of a more elaborate approach incomprehensible for many in the U.S. and elsewhere. However, it may be the case that a more extensive proposal, perhaps similar to the one outlined below, would address not only the more egregious international criminal problems, but also resolve concerns related to its establishment.

THE MINILATERAL APPROACH

A minilateral approach,¹⁴¹ involving those Member States willing to accept a permanent court with compulsory and exclusive jurisdiction, that would incorporate democratic principles

¹⁴¹ For a consideration of multilateral vs. minilateral collective action problems, see Miles Kahler, *Multilateralism With Small and Large Numbers*, 46 INT'L ORGANIZATION 681 (1992).

and the development of international criminal law, and which would integrate the proposed court into the Security Council's mandate, may allow for the establishment of an international court with greater authority. Importantly, such an approach may address the more substantial concerns outlined by American officials. Though the unilateral conception outlined here is in contradiction to the prevailing approach and the assumptions underlying it, a restricted court would not, by definition, address State acts such as aggression and genocide; whereas a unilateral approach, incorporating compulsory jurisdiction, may provide the institutional means to sanction State conducted criminal activity.

The lack of a complete and specific body of international criminal law could be overcome if a permanent court, that allowed for the subsequent definition of criminal law by a General Assembly of Judges, were established. Giving this Assembly the authority to define international crimes, such as those found in treaties in force and, perhaps, based on UN General Assembly resolutions,¹⁴² would create international criminal law of adequate specificity to form the basis of an international criminal trial. The definition of international criminal law emanating from an international source, rather than from a series of bilateral or multilateral agreements, may have greater legitimacy, and provide swifter response, than the present system of international criminal law creation. Additionally, were the Security Council given some role in creating new or more fully defined international criminal law, perhaps by a vote of the Council or an appointed sub-council employing modified voting and procedural rules, the resultant corpus of international criminal law would have greater authority and respect. This would acknowledge the prerogative and power realities of the Security Council, which might be called upon to enforce the court's rulings, and allow for the further definition of international criminal law through the General Assembly of Judges.

The appointment of judges to the court's Assembly could also be modified to assure States parties that the law defined by

¹⁴² On the impact of General Assembly resolutions on international law, see Christopher C. Joyner, *UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L. J. 445 (1981).

this body would be democratic,¹⁴³ and that the judges selected to hear cases would be from countries with representative systems of government. Where States parties practice democracy, the judges of this Assembly could be directly appointed by governments, in the same manner as that outlined in the Commission Rapporteur's proposal.¹⁴⁴ However, where States parties to the court's statute do not have a legitimate electoral process, their representatives to the General Assembly of Judges would be chosen by direct election.¹⁴⁵ This may offer an incentive to Member States to move toward national elections, while resolving the problem of judges from non-democratic States trying U.S. citizens.

A final benefit of this approach relates to the enforcement of the court's rulings. A court, trying criminal acts based on well defined law that the Council had a role in creating, would have greater authority. The problem of respect for the court's authority, and the illegitimacy associated with the unilateral enforcement of international criminal law, would thus be obviated by the incorporation of the Council. The Council, as mentioned, would more likely move to sanction violations of international criminal law it had a hand in creating.

Thus, a more authoritative court, incorporating the democratic enunciation of new and more clearly defined international criminal law, as well as a means of certifying judges appointed to the court and the authority of the Security Council, could address the problems implicit in the creation of an international criminal jurisdiction. If the assumptions underlying the contemporary approach are reassessed, a more elaborate court, which would address State sanctioned criminal acts and problems associated with the creation of an international criminal jurisdiction, may be possible.

¹⁴³ See generally, BUILDING A MORE DEMOCRATIC UNITED NATIONS, (Frank Barnaby, ed., 1991).

¹⁴⁴ Thiam, *supra* note 34, at 18, para. 65, art. 12(a).

¹⁴⁵ The legitimacy of the electoral process might be certified by the UN. See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

CONCLUSION

The position of the U.S. toward the proposed international criminal court can be characterized as cautious and indifferent.¹⁴⁶ While some organs of the federal government have advocated support for the project under consideration at the UN, others have expressed outright opposition to the establishment of a permanent court.¹⁴⁷ The executive branch has given some attention to the problems raised by the proposal and, at the urging of Congress, has outlined a number of unresolved complexities surrounding the court.¹⁴⁸ Academics and non-governmental organizations have given support and attention to the effort, consistently voicing a positive attitude toward the proposed court, by offering draft statutes and reports, and lobbying officials in Washington and New York. Despite the completion of a number of reports on the subject, there has not been an official American attempt to comprehensively solve the many problems identified by the U.S., international legal scholars and the International Law Commission. The leadership on the most recent draft statute has come from the UN. The American public,¹⁴⁹ while hardly well informed on the subject, may be more supportive of the concept than recent U.S. participation would indicate.

Recent efforts to create a permanent court, and U.S. commentary thereon, have focused on a court with limited jurisdiction and authority.¹⁵⁰ The current consensus, both in the U.S. and the Commission, appears to endorse a court restricted in its subject matter and personal jurisdiction. This approach is based on a number of assumptions related to national sovereignty and the complexities implicit in the creation of a new international criminal law enforcement mechanism. Significantly, it is assumed that a court with more than op-

¹⁴⁶ Ferencz, *supra* note 4, at 387.

¹⁴⁷ For a discussion of opposition to the court, *see supra* notes 46-49 and accompanying text. Congress has been most inclined to endorse the concept.

¹⁴⁸ For a discussion of these problems, *see generally* *Judicial Conference Report*, *supra* note 1; *Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction*, *supra* note 1; Scharf, *supra* note 9; and Ferencz, *supra* note 4, at 387-390.

¹⁴⁹ *See supra* note 137.

¹⁵⁰ For commentary on the proposed court, *see supra* note 1. For a discussion of proposals for the establishment of the proposed court, *see supra* note 17.

tional jurisdiction will infringe upon Member State sovereignty or pose insurmountable risks to the present system of international criminal law enforcement. These assumptions, while associated with important considerations, are seldom adequately assessed and militate against the consideration of a court with the authority to try acts of aggression and State sanctioned human rights violations.

However, the problems associated with the establishment of an international criminal court which relate to the degree of State support for the project, may also exist in a court with limited jurisdiction, perhaps even to a greater degree. Thus, absent the inclination to consider a more comprehensive proposal and thoroughly resolve the complexities such a court would involve, a compromise, restricted approach may neither address the most pressing and tragic problems in the international system, nor receive adequate scrutiny to assure that it is without significant flaws.

It has been argued here that the establishment of a permanent court with compulsory jurisdiction, incorporating democratic principles, an improved system of international criminal law definition, and the authority of the UN Security Council would better address the concerns of the international community. Such an approach may also allow for the incorporation of mechanisms which alleviate the dangers associated with the establishment of an international criminal jurisdiction. If the assumptions forming the basis of the current effort are reassessed, a permanent court with the authority to compel censure of serious violations of international criminal law may be possible and may better serve the international community and the U.S.