

## Establishing an International Criminal Court: Will It Do Justice?

Nancy E. Guffey-Landers

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## ARTICLES

### ESTABLISHING AN INTERNATIONAL CRIMINAL COURT: WILL IT DO JUSTICE?

NANCY E. GUFFEY-LANDERS\*

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## I. INTRODUCTION

The creation of a permanent international criminal court has been considered by some to be the mechanism for meting out justice in the international arena. Presently, no permanent international criminal court exists that has jurisdiction over individuals accused of committing crimes. The existing International Court of Justice ("ICJ"), although a permanent institution, has jurisdiction over member-states only and individuals cannot be brought before it.<sup>1</sup> In addition, a member-state brought before the ICJ must consent to the ICJ's jurisdiction and any decision rendered is not necessarily binding on the parties.<sup>2</sup> In light of the limited jurisdictional and enforcement aspects of the ICJ, an International Criminal Court, as an entirely new institution for prosecuting individuals accused of committing international crimes, has been proposed by some, including the American Bar Association.<sup>3</sup>

Whether an International Criminal Court is capable of carrying out justice is yet to be seen. Currently, violators of crimes that are of international concern are brought to justice through various measures of international judicial assistance. The term "international judicial assistance" refers to the legal assistance that countries are willing to provide to each other in matters that extend beyond one country's borders.<sup>4</sup> A situation requiring international judicial assistance may arise when evidence is located in another country and is needed for a domestic trial, or when one country seeks the surrender of a fugitive from abroad to be tried in a domestic court.<sup>5</sup>

Historically, international judicial assistance was not such a prominent concern of nations since crimes were normally territorial and the ability to enforce crimes committed within a nation's territory could be accomplished without the need for assistance from abroad. With the Industrial Revolution and the development and advancements in transporta-

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1. U.N. CHARTER art. 93, para 1. Article 93 also provides that "a state which is not a Member of the United Nations may become party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." U.N. Charter art. 93, para 2.

2. Statute of the International Court of Justice, 59 Stat. 1055, 1060, 1062 (1945).

3. See American Bar Association Task Force on an International Criminal Court, 28 THE INTERNATIONAL LAWYER 475 (Summer 1994).

4. 3 M. ABBELL & B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE 3 (1990).

5. *Id.* at 3.

tion and technology, however, the need for international judicial assistance has steadily increased.<sup>6</sup> Advanced modes of travel provide easier escape by a criminal to a foreign jurisdiction. Furthermore, technology has increased the possibility of crimes being committed across borders.<sup>7</sup> These developments have led to a body of crimes that have intrinsic international aspects. Included among these crimes are drug trafficking, money laundering, terrorism and human rights violations.

The development of international judicial assistance and the carrying out of justice in the international arena has become of increasing concern in the United States. Up until the 1970s the United States was largely protected from international criminal activity due to geographic restrictions.<sup>8</sup> With the increase in international travel, commerce, and telecommunications, however, this protection eroded.<sup>9</sup> In response, the United States authorized federal courts to extend aid to foreign courts in obtaining testimony in this country for criminal proceedings abroad.<sup>10</sup> In 1964, the U.S. Congress revised the existing statutes and designated the Department of State as the proper authority to administer requests for international judicial assistance between the United States and foreign countries.<sup>11</sup> Since 1964, the U.S. has enacted additional federal statutes pertaining to international judicial assistance. Moreover, in recent years, the U.S. has negotiated several international agreements that provide for international judicial assistance and cooperation in specific criminal matters.<sup>12</sup>

This article will discuss the existing system for carrying out justice at the international level and will forth proposals that may provide a more effective way to bring international criminals to justice. In particular, this article sets forth the proposals for the creation of an effective International Criminal Court, including the proposal for a more active role of the International Criminal Police Organization ("INTERPOL") in fighting international crime.

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6. *Id.* at 5.

7. *Id.*

8. *Id.* at 5-6.

9. *Id.* at 6.

10. Bruno A. Ristau, *Overview of International Judicial Assistance*, 18 INTERNATIONAL LAWYER 525, 526 (1984).

11. *Id.* at 528.

12. *See infra* notes 60-102 and accompanying text.

## II. EXISTING SYSTEM FOR CARRYING OUT JUSTICE AT THE INTERNATIONAL LEVEL

### A. *U.S. Domestic Policies of International Judicial Assistance*

#### 1. Federal Statutory Provisions

##### a. *Evidence Located Within Foreign Jurisdiction*

Under U.S. law, several federal statutes promote and facilitate international judicial assistance. Federal statutory provisions detail procedures for U.S. authorities who seek judicial assistance from abroad, and also procedures that U.S. officials or judges may follow when foreign countries request U.S. judicial assistance.

The United States Department of State is designated as the "Central Authority" for international judicial assistance purposes.<sup>13</sup> As the Central Authority, the U.S. Department of State receives domestic requests for information located abroad and then transmits the request to the appropriate foreign authority.<sup>14</sup> Requests by the Central Authority to the proper authorities of another country are in the form of Letters of Request.<sup>15</sup> Letters of Request are formal written petitions addressed to the appropriate authority of the foreign country seeking information or assistance in an investigation.<sup>16</sup> Requests pertaining to criminal matters are normally processed by the Office of International Affairs, Criminal Division, of the U.S. Department of Justice and transmitted directly to the appropriate foreign official.<sup>17</sup>

Additionally, upon application by the United States, statutes of limitations may be stayed to permit the United States prosecutor to obtain foreign evidence.<sup>18</sup> A U.S. District Court may grant this stay if it finds

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13. 28 U.S.C.A. § 1781(a)(1) & (2)(1994).

14. *Id.*

15. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature March 18, 1970, 23 U.S.T. 2555, 2555, 847 U.N.T.S. 231, 231. The Convention sets forth procedures for signatories to request and obtain evidence located in another signatory's country for use in civil and commercial matters. *Id.* at 241 and 2557. Pursuant to the Hague Convention, signatories are required to establish a "Central Authority" to receive requests from other signatories for evidence located in their countries. *Id.* at 241 and 2558. Since the Hague Convention applies to civil and commercial matters, not criminal matters, it is outside the scope of this paper.

16. Letters of Requests are also referred to as letters rogatory. *See Tiedemann v. The Signe*, 37 F. Supp. 819 (E.D. La. 1941). "Letters rogatory are the medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts . . . to assist the administration of justice in the former country." *Id.*

17. *See* 28 U.S.C.A. § 1781.

18. 18 U.S.C.A. § 3292 (1985).

by a preponderance of the evidence that an official request has been made for foreign evidence and that it reasonably appears that the evidence is located in the foreign country.<sup>19</sup>

*b. Evidence Located in the U.S. Sought by Foreign Officials*

While the Central Authority is the appropriate channel for domestic requests for assistance from abroad, it is also the proper receiver of requests from abroad for information or evidence located in the United States.<sup>20</sup> Once a request is submitted by a foreign authority to the Central Authority, the Central Authority then may direct the request to the proper U.S. District Court. The U.S. District Courts then have the authority to order U.S. residents or citizens to give testimony or produce documents to be presented to a foreign or international tribunal.<sup>21</sup> A person, however, may not be compelled to testify in violation of a legal privilege.<sup>22</sup>

*c. Extradition*

The previous statutes relate to international judicial assistance as it pertains to obtaining information and evidence that is located in a particular country. Yet, the evidence and information is of little consequence if the international criminal cannot be apprehended and brought before the appropriate forum. Therefore, several countries have entered into extradition treaties which complement other existing international agreements relating to evidence gathering. Extradition may be defined as the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within the territorial jurisdiction of the other which, being competent to try and punish him, demands the surrender."<sup>23</sup>

The scope of the U.S. federal statutory provisions on extradition is defined by 18 U.S.C. § 3181, which also lists the countries that have entered into extradition agreements with the United States. According to the statute, extradition of persons located in the United States who are ac-

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19. *Id.* There are some limitations to this practice. Specifically, the total of all periods of suspension for one offense "shall not exceed 3 years and shall not extend a period within which a criminal case must be initiated for more than 6 months if all foreign countries take final action before such period would expire without regard to this section." 18 U.S.C.A. § 3292(c)(1) & (2).

20. 28 U.S.C.A. § 1781.

21. 28 U.S.C.A. § 1782 (1994).

22. 28 U.S.C.A. § 1782(b).

23. See *Tavarez v. U.S. Atty. Gen.*, 668 F.2d 805, 810 (Tex. Ct. App. 1982)(emphasis omitted)(quoting *Ter Linden v. Ames*, 184 U.S. 270, 289 (1902)).

cused of committing crimes in other countries may only occur when the U.S. and that country have entered into an extradition treaty.<sup>24</sup> Ironically, U.S. case law suggests that the United States may surrender a fugitive to a foreign country in the absence of an extradition treaty as a matter of comity.<sup>25</sup>

Other provisions pertain to foreign fugitives located in the United States.<sup>26</sup> Specifically, a judge may issue a warrant for the seizure of any person charged under a complaint with having committed a crime listed under the extradition treaty of another country.<sup>27</sup> A foreign fugitive is not necessarily protected by procedural safeguards while in the United States and during the extradition process. For example, the Federal Rules of Evidence are not applicable in extradition hearings.<sup>28</sup> Consequently, hearsay and other evidence may become a part of the record in an extradition proceeding.<sup>29</sup> A fugitive from another country, who is detained pending actual extradition, may apply to be discharged if the extradition does not take place within two months.<sup>30</sup> However, the judge may refuse to discharge the fugitive if sufficient cause shows that a discharge should not be ordered.<sup>31</sup>

Other procedural aspects of the extradition process are contained in 18 U.S.C. §§ 3189, 3190, and 3191. Section 3189 mandates that extradition hearings conducted pursuant to a treaty or convention be held in a public place. Section 3190 requires proper authentication of documents and other evidence presented at an extradition hearing. This measure purports to ensure the evidence will later be received for evidentiary pur-

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24. 18 U.S.C.A. 3181 (1994).

25. *See* *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825). Chief Justice Marshall declared that nothing precluded a sovereign power from extending recognition to another's penal laws where it chooses to do so and therefore a fugitive could be surrendered to another country as a matter of comity. *Id.* at 122-23.

26. 18 U.S.C. § 3184.

27. 18 U.S.C. § 3184. This Section further states that if upon such a hearing, "the judge deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify same, together with a copy of all testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention, and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." *Id.*

28. *United States v. Taitz*, 134 F.R.D. 288, 289 (S.D. Cal. 1991). Fugitives facing extradition, however, are accorded due process. *See* *Valentine v. United States*, 299 U.S. 5, 9 (1936).

29. 18 U.S.C. §3184.

30. 18 U.S.C. § 3188 (1994).

31. *Id.*



poses in the foreign country. Section 3191 states that an indigent fugitive has a right to have certain witnesses located within the United States to testify on his behalf. The judge may subpoena a witness to testify on the fugitive's behalf. The costs and fees for the calling of that witness are paid in the same manner as a witness who is subpoenaed on behalf of the United States.<sup>32</sup> This provision, as indicated above, pertains to qualified witnesses who are residing in the United States and not to witnesses located in a foreign country.<sup>33</sup>

*d. U.S. Jurisdiction Over Extraterritorial Criminal Acts*

The aforementioned federal statutes relate to the acquisition of evidence, the surrender of fugitives, and the methods and procedures of international judicial assistance in such cases. The federal statutory provisions that are discussed below focus on substantive crimes that are committed outside U.S. borders, but nevertheless are crimes under U.S. law. Several federal statutory provisions make the distribution of cocaine in the United States a criminal offense. For example, the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>34</sup> prohibits the actual distribution of cocaine into the United States, participation in conspiracy to distribute cocaine into the United States, or the manufacture of cocaine for importation into the United States are criminal offenses under U.S. law.<sup>35</sup>

In supplementing RICO, the Bank Secrecy Act attempts to combat the problem of tax evasion and money laundering.<sup>36</sup> The Act imposes reporting requirements on financial institutions, both foreign and domestic, for transactions involving U.S. currency.<sup>37</sup> In turn, the Anti-Money Laundering Act<sup>38</sup> supplements the Bank Secrecy Act by declaring that laundering of monetary instruments and monetary transactions in property derived from specific unlawful activity is a federal criminal offense.<sup>39</sup> The Anti-Money Laundering Act declares it unlawful to knowingly participate in transactions that would promote illegal activity, defraud the Internal Revenue Service, or avoid reporting requirements under federal and state law.<sup>40</sup> Under the act, illegal activities include, but are not limited to, kid-

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32. 18 U.S.C. § 3191 (1994).

33. *Matter of Extradition of Koskotas*, 127 F.R.D. 13, 28 (D. Mass. 1989).

34. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993).

35. 18 U.S.C. §§ 1961(1) & 1962.

36. 31 U.S.C.A. §§ 5311-5314, 5316-5322 (1983).

37. 31 U.S.C.A. § 5313.

38. *See* 18 U.S.C.A. §§ 1956-1957 (West Supp. 1996).

39. *Id.*

40. 18 U.S.C.A. § 1956 (a)(1)(A) & (B).

napping, extortion, defrauding an international bank, concealment of assets, and the manufacture, sale or distribution of a controlled substance.<sup>41</sup> Finally, the act gives the United States extraterritorial jurisdiction over unlawful activity that is committed by U.S. nationals or that is committed by non-citizens living in the United States.<sup>42</sup> Persons violating this act are also subject to criminal penalties of other federal and state law provisions.<sup>43</sup>

Other statutes bestow upon U.S. courts the power to prosecute criminal acts of an international nature, such as terrorism and certain human rights violations, despite the fact that the actual location of the offense may have occurred in a foreign country.<sup>44</sup> Under the "effects doctrine" U.S. federal courts may exercise extraterritorial jurisdiction over such cases.<sup>45</sup> The objective-territorial principle allows the United States to exercise jurisdiction over acts, although committed outside of its borders, that have harmful effects in the country.<sup>46</sup> Moreover, international law allows nations to exercise jurisdiction over acts that harm national interest under the protective principle.<sup>47</sup> Under the passive personal principle a nation may exercise jurisdiction based on the citizenship of the victim.<sup>48</sup> In addition to the objective-territorial principle, the United States may base its jurisdiction on principles of international law.<sup>49</sup> Therefore, such offenses as drug-trafficking, money laundering, and tax evasion (to the extent that there is conduct abroad) may, nevertheless, be subject to United States jurisdiction.

Other acts over which the United States asserts extraterritorial jurisdiction include those set forth in The Sherman Antitrust Act.<sup>50</sup> The Sherman Antitrust Act prohibits activities by individuals who monopolize or attempt to monopolize trade.<sup>51</sup> The Antitrust Division of the Department

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41. 18 U.S.C.A. § 1956 (c)(7)(B) & (D).

42. 18 U.S.C.A. § 1956 (f)(1) & (2).

43. 18 U.S.C.A. § 1956(d).

44. See 28 U.S.C.A. §§§§ 1330-1332, 1350 (1993). Section 1350 grants district courts jurisdiction over civil actions against aliens for torts committed in violation of international law or treaties. Under this provision, acts of torture have been prosecuted in the United States. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

45. See 28 U.S.C. § 1350.

46. *United States v. Smith*, 680 F.2d 255, 257-58 (1st Cir. 1982).

47. *Id.* at 257.

48. *Id.*

49. See Richard D. Gregorie, *Extraterritorial Jurisdiction: Its Use, Its Roots & Its Viability*, 15 NOVA L. REV. 625, 633 (1991)(quoting *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982)).

50. 15 U.S.C.A. § 1-7 (1973).

51. 15 U.S.C.A. § 2. In particular, the Sherman Antitrust Act provides that "every person who shall monopolize, or attempt to monopolize or combine or conspire with any

of Justice is responsible for the "general enforcement, by criminal and civil proceedings, of the federal Antitrust laws and other laws relating to the protection of competition and the prohibition of restraints on trade and monopolization."<sup>52</sup> The new International Antitrust Enforcement Assistance Act of 1994<sup>53</sup> allows the Antitrust Division to enter into international agreements with corresponding agencies from foreign countries in order to enforce U.S. antitrust laws more effectively against violators located outside the borders of the United States.<sup>54</sup>

Under certain circumstances, admiralty and maritime crimes committed outside the territory of the United States may also be brought under United States jurisdiction.<sup>55</sup> Pursuant to 28 U.S.C. § 1333, it is possible for U.S. courts to have jurisdiction over "suits [based] on maritime claims arising out of transactions and occurrences anywhere in the world," but this jurisdiction is subject to the doctrine of *forum non conveniens*.<sup>56</sup>

Moreover, the Export Administration Act<sup>57</sup> and the Securities Exchange Act of 1934<sup>58</sup> also give the U.S. jurisdiction over crimes committed outside its borders. Increased U.S. stock trading by foreign investors, coupled with U.S. nationals' participation in foreign securities, has increased international capital flow, as well as elevated the incidence of securities fraud.<sup>59</sup> This increased activity has led officials to seek prosecution for extraterritorial violations of the Securities Exchange Act. Although the Securities Exchange Act does not specifically grant extraterritorial jurisdiction over violators of its provisions, U.S. courts have applied an "effects" test and "conduct" test to determine whether indi-

other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." *Id.*

52. See 28 C.F.R. § 0.40 (1993).

53. 15 U.S.C.A. §§ 6201-6212 (West Supp. 1996).

54. 15 U.S.C.A. § 6201. Although the U.S. is a signatory to several mutual legal assistance treaties that could theoretically assist it in obtaining evidence located abroad for U.S. Antitrust proceedings, most of the evidence needed for Antitrust cases are either classified or confidential documents. Therefore, the new International Antitrust Enforcement law would enable the U.S. to enter into agreements that would allow each party to provide otherwise classified or confidential documents in the limited circumstances of Antitrust proceedings.

55. 28 U.S.C. § 1333.

56. *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981) (quoting G. GILMORE AND C. BLACK, *THE LAW OF ADMIRALTY* 51 (1975)).

57. 50 U.S.C.A. §§ 2401-2420 (1991).

58. 15 U.S.C.A. § 77g et seq. (1981).

59. See Phillip Wolf, *International Securities Fraud: Extraterritorial Subject Matter Jurisdiction*, 8 N.Y. INT'L L. REV. 1 (1995).

viduals who violate the Securities Exchange Act while outside the United States should still be subject to the jurisdiction of U.S. courts.<sup>60</sup> The “effects” and “conduct” tests determine whether the violations have a significant effect within the United States, or whether the violator’s actions were primarily carried out in the United States.<sup>61</sup>

*B. U.S. Foreign Policy and Participation in International Judicial Assistance in Criminal Matters*

1. International Agreements

In addition to federal statutory provisions, the United States is a signatory to several international agreements which enumerate certain “international crimes” and which attempt to facilitate justice in the international arena. These international agreements provide methods by which countries may seek international judicial assistance from each other. Several of these types of agreements are discussed below.

2. Bilateral Agreements

Bilateral Agreements may be implemented between two countries in an effort to combat a significant mutual problem. An example of a bilateral arrangement is the “Narcotics Cooperation Agreement” between Mexico and the United States.<sup>62</sup> This bilateral agreement arose out of the mutual interest of Mexico and the United States in fighting the importation of narcotics into both nations and the serious consequences of drug addiction.<sup>63</sup> The agreement requires Mexico and the United States to adopt legislative and administrative measures to carry out the agreement’s obligations.<sup>64</sup> Additionally, the parties must consult with each other on actions that may affect the other party in a manner inconsistent with the purpose of the Agreement.<sup>65</sup>

3. Executive Agreements

An executive agreement is another type of bilateral agreement. The President of the United States has the authority to execute executive

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60. *Id.* at 2,4.

61. *Id.* at 5-13.

62. Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, United States-Mexico, 29 I.L.M. 58 (1990).

63. *Id.* at 58-59. See also Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT’L L. POLICY 339, 348-49 (1990).

64. 29 I.L.M. at 59.

65. *Id.* at 59. See also Zagaris *supra* note 63 at 349.

agreements with foreign governments on particular matters which bind the country.<sup>66</sup> Executive agreements are distinct from U.S. treaties because the Senate ratification is not necessary.<sup>67</sup> For example, the United States and the United Kingdom formed an executive agreement concerning international judicial assistance that purportedly entered into force in September, 1982 on behalf of the Cayman Islands.<sup>68</sup> The purpose of this agreement, and similar ones that followed, was to elude business secrecy laws which effectively hid the profits of drug trafficking activities from United States officials.<sup>69</sup> In addition to the agreement on behalf of Cayman Islands, the United States and the United Kingdom negotiated several other executive agreements to provide assistance in combatting the distribution of illegal narcotics from certain British territories, including the Turks and Caicos Islands, Anguilla, the British Virgin Islands and Montserrat.<sup>70</sup> These executive agreements were negotiated and designated as the first step toward establishing a mutual legal assistance treaty, which would have been more time consuming.

The "Lockheed Agreement" is yet another type of executive agreement. This type of agreement includes pacts made between the U.S. Department of Justice and the foreign country's counterpart.<sup>71</sup> These agreements are unique in that they are limited to a specific investigation or a specific investigative matter.<sup>72</sup> Between 1976 and 1982, the Department of Justice entered into several "Lockheed Agreements" in an attempt to investigate and prosecute U.S. aircraft manufacturers accused of bribing foreign officials.<sup>73</sup> The first such agreement, the Agreement with Japan on Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Matter,<sup>74</sup> entered into force shortly after the U.S. learned that payments had been made to foreign officials. The Executive "Lockheed" Agreement created a direct channel for communicating requests for assistance, and required each party to use its best efforts to provide the other with all relevant and material information ob-

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66. U.S. CONST. art. II, § 2.

67. *United States v. Belmont*, 301 U.S. 324, 330-31 (1937).

68. *In re Bank of Nova Scotia*, 740 F.2d 817, 824 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). Specifically, the agreement allowed a representative of the Office of International Affairs to request assistance from Cayman Islands police for criminal violations of the law. *Id.*

69. *Id.* at 829.

70. E. Rotman, *Research Perspectives on International Criminal Law*, 14-15 (April 16, 1993) (American Bar Association Section of Criminal Justice).

71. 3 Abbell & Ristau, *supra* note 4, at 85.

72. *Id.* at 85-86.

73. *Id.* at 84, 85 n.1.

74. March 23, 1976, U.S.-Japan, 27 U.S.T. 946, T.I.A.S. 8233.

tained, including documents, depositions, and business records.<sup>75</sup>

#### 4. Mutual Legal Assistance Treaties

Mutual legal assistance treaties may supplement other international agreements and operate to facilitate international judicial assistance in criminal matters in addition to domestic legislative provisions. Mutual Legal Assistance Treaties are extremely important; without them, prosecutors are often left to rely on letters rogatory and subpoenas in order to obtain evidence from abroad.<sup>76</sup> Using Mutual Legal Assistance Treaties, law enforcement agents are able to make requests directly to appropriate foreign law enforcement agencies and to bypass the bureaucratic process of requests via letters rogatory.<sup>77</sup>

Mutual Legal Assistance Treaties are more effective and efficient than letters rogatory for the following reasons: (1) each country has a duty to provide assistance whereas a request via letter rogatory is not an obligation, but may be granted at the discretion of the requested country;<sup>78</sup> (2) the treaty can, by express provision, stipulate the setting aside of domestic bank and secrecy laws; and (3) the treaty may include procedures that will ensure that evidence obtained will be admissible in domestic courts.<sup>79</sup> For example, the U.S. may require procedures to be followed in an investigation abroad so that any evidence obtained in the foreign country will be admissible in a U.S. court.

The United States Treaty with Switzerland on Mutual Assistance in Criminal Matters<sup>80</sup> was the first U.S. mutual assistance treaty that provided measures for acquiring evidence of criminal matters in an efficient and effective manner from Swiss officials. Instead of the use of letters rogatory, this treaty allowed a more rapid response by allowing a party to ascertain the address of suspects, testimony or statements of witnesses or suspects, and documents and evidence.<sup>81</sup> Under similar U.S. mutual le-

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75. *Id.* at 947.

76. Zagaris, *supra* note 63, at 351.

77. *Id.* at 352.

78. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 and the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 set forth procedures for signatories to obtain evidence and serve process in foreign countries that are signatories to the Conventions. Since both Conventions relate only to civil and commercial matters, not criminal, they are outside the scope of this paper.

79. Zagaris, *supra* note 63, at 352-53.

80. Treaty Between the United States of America and The Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz, 27 U.S.T. 2019, 2033.

81. *Id.* at 206.

gal assistance treaties, the requesting country has the authority to specify the manner in which it wishes to have the requested country execute the request. The authority of law enforcement officers to require that their requests be executed in accordance with procedures that will allow the evidence obtained to be admissible in a domestic criminal trial is invaluable.<sup>82</sup>

### 5. Extradition Treaties

As indicated above, the U.S. has entered into several extradition treaties with other countries. One such treaty, the Treaty on Extradition and Cooperation in Penal Matters,<sup>83</sup> requires the parties to execute expeditiously "requests" for the exchange of information to prevent and curb crimes enumerated in the treaty.<sup>84</sup> Surprisingly, the provisions of the extradition treaty are not the exclusive means for apprehending a fugitive from abroad. In fact, in *Ex parte Lopez*,<sup>85</sup> the court held that the U.S. may recover a fugitive from abroad without complying with the procedures set forth in an existing extradition treaty and still prosecute the accused in the United States.<sup>86</sup>

Lopez fled to Mexico after being charged with violating U.S. narcotics laws.<sup>87</sup> Despite an existing extradition treaty, Lopez was forcibly brought to the U.S. from Mexico, arrested and then prosecuted in U.S. courts.<sup>88</sup> The Mexican government intervened and demanded the surrender of Lopez to Mexican officials.<sup>89</sup> Despite the country's objection, the U.S. refused to surrender Lopez to the Mexican government as required by the extradition treaty.<sup>90</sup> Moreover, the district court supported the United States' abduction by holding that U.S. noncompliance would not bar the prosecution of Lopez in the United States for his violation of

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82. 3 Abbell & Ristau, *supra* note 4, at 133.

83. Treaty on Extradition and Cooperation in Penal Matters, 1984, United States - Uruguay, 35 U.S.T. 3197, T.I.A.S. No. 10850.

84. *Id.* at 3217. Article two of the treaty lists over 30 extraditable offenses. These offenses include murder, abortion, assault, the illegal use of arms, rape, abandonment, prostitution, fraud, bigamy, and unlawful production and distribution of psychotropic drugs. *Id.* at 3201-02.

85. 6 F.Supp. 342 (D. Texas 1934).

86. *Id.* at 344.

87. *Id.* at 343.

88. *Id.*

89. *Id.* at 343. The court held that it did not have jurisdiction over the Mexican government's claim regarding a violation of its sovereignty. According to the court, the issue was one for the Executive Department of the United States — which then refused to surrender Mr. Lopez to Mexico. *Id.* at 344.

90. *Id.* at 344.

U.S. narcotics laws.<sup>91</sup>

## 6. Multilateral Treaties

Multilateral treaties are usually formed to address particular types of substantive crimes that are of concern to many countries. Multilateral treaties focusing on drug trafficking have been in existence since 1961.<sup>92</sup> On December 20, 1984, nations signed the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>93</sup> the most recent multilateral treaty addressing modern problems associated with combating drug trafficking. The Convention was drafted broadly to facilitate the prosecution of individuals involved in a general scheme of illicit activity.<sup>94</sup> Article Three of the U.N. Convention requires signatory nations to adopt domestic laws and measures that make it illegal to manufacture and distribute narcotics or psychotropic substances in any manner.<sup>95</sup> Most importantly, signatory nations to the U.N. Convention agreed to render judicial assistance to one another.<sup>96</sup>

Several provisions of the multilateral treaty require signatories to provide international judicial assistance by obligating them to engage in extradition, to engage in mutual legal assistance, and to provide transfer of proceedings and other forms of cooperation and training.<sup>97</sup> Further, the treaty "mandates the widest measures of mutual legal assistance in investigation, prosecutions and judicial proceedings in relation to criminal offenses" that are enumerated in the treaty.<sup>98</sup> Under the treaty a nation may request mutual legal assistance for the following reasons: "taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining sites and objects; providing information and evidence; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; and identifying or tracing proceeds, property, instru-

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91. *Id.* at 344. See also *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). In *Alvarez-Machain*, a fugitive was forcibly brought to the U.S. from Mexico for violations of U.S. laws without complying with the extradition treaty. *Id.* at 657. Like *Lopez*, although the provisions of the extradition treaty were ignored, the fugitive was brought to trial in the U.S. for his alleged violations of U.S. laws. *Id.*

92. See Multilateral Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1424.

93. U.N. Doc. E/CNF 82/15 (1988), 28 I.L.M. 493 (1989).

94. Zagaris, *supra* note 63, at 343-44.

95. 28 I.L.M. at 494.

96. *Id.* at 343-44.

97. See *id.* at 506-12.

98. *Id.* at 508.



mentalities or other things for evidentiary purposes."<sup>99</sup>

While narcotics and psychotropic substances are important issues and are a focus of multilateral treaties, other international offenses such as terrorism, genocide, and other human rights violations also form the basis of multilateral agreements. For example, the International Convention Against the Taking of Hostages<sup>100</sup> entered into force for the United States on January 6, 1985.<sup>101</sup> While this multilateral treaty relates to the substantive offense of the taking of hostages, it also provides for international judicial assistance in the execution of its provisions. Specifically, Article 11 of the treaty stipulates that "1. States-Parties shall afford one another the greatest measure of assistance in connexion [sic] with criminal proceedings . . . including the supply of all evidence at their disposal necessary for the proceedings [and] 2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty."<sup>102</sup> While multilateral treaties normally include mutual legal assistance procedures, the terms of such assistance are usually vague. Accordingly, member states may need to rely on already existing mutual legal assistance treaties or domestic legislative procedures for international judicial assistance in most international criminal matters.

## 7. INTERPOL

In addition to the numerous agreements that assist nations with the investigation and prosecution of international crimes,<sup>103</sup> the International Criminal Police Organization ("INTERPOL") serves as a unique international organization that furnishes international judicial assistance.<sup>104</sup> INTERPOL has become an increasingly important organization for acquiring evidence and information located in foreign countries for use in domestic criminal proceedings.<sup>105</sup>

"INTERPOL was founded in 1923 when police chiefs from 20 countries met on their own initiative in Vienna."<sup>106</sup> The organization is

99. *Id.* at 508.

100. T.I.A.S. 11081, 18 I.L.M. 1456 (1979).

101. *Recent Actions Regarding Treaties To Which the United States Is a Party*, 34 I.L.M. 590, 591 (1995).

102. International Convention Against the Taking of Hostages, T.I.A.S. 11081 at 11081, 18 I.L.M. at 1461.

103. *See supra* notes 62-102 and accompanying text.

104. *See Re Kendall, Interpol's Co-operation System and Activities Relating to Forensic Science*, 31 J. OF THE FORENSIC SCI. SOCIETY 373 (1991).

105. *Id.* at 374.

106. MICHAEL FOONER, INTERPOL: ISSUES IN WORLD CRIME AND INTERNATIONAL

primarily concerned with combating crimes and providing international judicial assistance in investigating those crimes which have "international ramifications with regard to the person committing the crime, the acts constituting the crime or the consequences flowing from those acts."<sup>107</sup> INTERPOL's involvement usually occurs when criminals either flee to other countries or commit international drug, currency, property or person trafficking.<sup>108</sup>

The United States has been a member of INTERPOL since the 1930s; however, it was not until the 1970s that INTERPOL gained substantial support from the U.S. The authority for U.S. membership and participation in INTERPOL comes from an Act of Congress, which provides that the U.S. shall provide a delegate to INTERPOL and pay its annual fees to the organization.<sup>109</sup> The U.S. has steadily increased its assignment of law enforcement personnel at INTERPOL headquarters and at the United States-National Central Bureau.<sup>110</sup> This demonstration of support by the United States, as well as by numerous other countries, has made INTERPOL's role in providing international judicial assistance in criminal matters a more substantial one.<sup>111</sup>

Unlike most international organizations, INTERPOL was created by individual law enforcement officials of numerous countries, without support from the individual governments.<sup>112</sup> It was established as a private, non-governmental and non-political entity.<sup>113</sup> In fact, INTERPOL's constitution and current obligations prohibit its involvement in political activities.<sup>114</sup>

Since its creation, INTERPOL has survived two world wars, and its infiltration and acquisition by the Nazis.<sup>115</sup> However, the need for effective cooperation in international criminal matters has undoubtedly led to the perseverance of the organization. The legitimacy of INTERPOL

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CRIMINAL JUSTICE page vii (1989).

107. *Id.* at 374.

108. Kendall, *supra* note , at 375.

109. Fooner, *supra* note 107, at 165. *See also*, 22 U.S.C. § 263a. Pursuant to this statute, the Attorney General is authorized to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization, and to designate any departments and agencies which may participate in the United States representation with that organization. All dues and expenses are paid out of sums appropriated for the Department of Justice. 22 U.S.C. § 263a.

110. Abbell & Ristau, *supra* note 4, at 19.

111. *See Dominicans Deport Bloch for U.S. Trial*, N.Y. TIMES, June 1, 1995 at D1.

112. Fooner, *supra* note 107, at 7. *See also* Kendall, *supra* note 104, at 373.

113. Fooner, *supra* note 107, at 40.

114. *Id.*

115. *See* Fooner, *supra* note 107, at 40.

stems from its early association with the League of Nations.<sup>116</sup> At the League of Nations' Convention on Counterfeit Currency, INTERPOL was designated as the enforcement mechanism of the agreement and member parties were obligated to cooperate with INTERPOL in the fulfillment of the provisions of the Treaty.<sup>117</sup>

The primary investigative tasks of INTERPOL are carried out through its National Central Bureau (hereinafter "NCB") network. Each member-state hosts a NCB office which serves as the channel for communication of requests between law enforcement authorities and member-states.<sup>118</sup> Law enforcement authorities within the United States who seek INTERPOL's assistance must submit their request to the U.S.-NCB, which is located within the Department of Justice.<sup>119</sup> Upon receipt of a request, the U.S.-NCB will submit the request to the NCB of the relevant foreign country and/or INTERPOL's headquarters in Lyons, France.<sup>120</sup> The NCB of each country is required to fulfill three services: one, it must provide information to any police office of its own country; two, it must provide assistance and/or respond to requests made directly from another NCB member country; and, three, it must provide assistance with regard to any requests from INTERPOL headquarters.<sup>121</sup>

INTERPOL headquarters and its permanent departments also provide a practical foundation and effective mechanism for the exchange of information and documentation. INTERPOL headquarters complements the INTERPOL NCB network. Any NCB member can request information or assistance directly from any other NCB office.<sup>122</sup> If an NCB member does not know which NCB office from which to request information, or if the NCB requires assistance from several countries, the best route is to make a request to INTERPOL headquarters.<sup>123</sup>

At INTERPOL headquarters, cases and information are processed according to files reflecting international information on an individual or subject matter.<sup>124</sup> INTERPOL headquarters may assist in locating a fugitive located in any one of several countries.<sup>125</sup> An NCB member may request that INTERPOL headquarters issue a "Wanted Notice" regarding a

116. *Id.* at 8.

117. *Id.* at 9.

118. See Kendall, *supra* note 104, at 375-76.

119. Fooner, *supra* note 107, at 116-17, 122.

120. See Art Barnum, *Interpol Officer Urges Chiefs to Attack Crime in Global Way*, CHI. TRIB., April 2, 1993, at D2.

121. See Fooner, *supra* note 107, at 116.

122. Kendall, *supra* note 104, at 376.

123. See *id.* at 376.

124. Fooner, *supra* note 107, at 100-01.

125. See generally Fooner, *supra* note 107, at 127-60.

fugitive.<sup>126</sup> INTERPOL will then, after determining whether the requesting country has an extradition treaty in force with the requested country, issue a "Wanted Notice" through the NCB office of the requested country.<sup>127</sup> INTERPOL headquarters may then inform other countries about the escaped fugitive. This process removes the burden of requiring the requesting country to personally notify each individual country. This type of assistance could not be accomplished without an organization structured like INTERPOL. Without the assistance of the NCBs, police officers from various countries would need to make personal requests to appropriate authorities.<sup>128</sup> This could prove too time consuming and unfruitful in combatting crime, especially for those officers who do not possess foreign contacts.<sup>129</sup>

Agents of INTERPOL consist of members of the NCBs of each member country and members of the staff at INTERPOL headquarters. The staff members at INTERPOL'S headquarters are nationals of several different countries.<sup>130</sup> At present, INTERPOL functions primarily as an information organization with no independent enforcement authority.<sup>131</sup> It assists in the transfer and exchange of information between sovereign police forces around the world. In order to protect privacy and individual rights, INTERPOL agents are bound by certain procedural requirements.<sup>132</sup> The actual issuance of police search and/or arrest warrants are carried out by local, domestic police officers, who are under no obligation to respect an INTERPOL "Wanted Notice."<sup>133</sup> INTERPOL'S "Wanted Notice" system simply alerts local police forces of the existence of an arrest warrant for an individual in another country.<sup>134</sup> Local authorities have discretion in actual enforcement of the warrant.<sup>135</sup> If a fugitive is arrested and detained pursuant to a "Wanted Notice" issued by INTERPOL, the actual process of having the fugitive extradited to the requesting country is normally carried out through diplomatic channels.<sup>136</sup>

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126. *Id.* at 153-56. See also Katherine Ellison, *Merchant of Death? Prove It, He Says*, MIAMI HERALD, May 26, 1995, at A1. (discussing INTERPOL's orders to arrest a well-known Chilean criminal).

127. Fooner, *supra* note 107, at 141-42.

128. *Id.* at 118.

129. *Id.*

130. *Id.* at 92.

131. *Id.* at 90-91.

132. Fooner, *supra* note 107, at 134-36.

133. *Id.* at 154.

134. *Id.* at 142.

135. *Id.* at 154.

136. *Id.* at 140.

While diplomacy may be an excellent avenue for solving disputes between countries, it is not always effective in the area of criminal investigation and prosecution, where political and other considerations may override the pursuit for justice. Since INTERPOL may not work to carry out political objectives, pursuant to its own Constitution, it has not been involved in politically motivated or domestic law enforcement extradition procedures.<sup>137</sup>

In sum, INTERPOL'S intended purpose of fighting international crime is limited. Its assistance only involves the investigation and includes no independent enforcement measures.<sup>138</sup> Like many international agreements and organizations, it lacks enforcement mechanisms, which is its primary obstacle to achieving its goal of effectively fighting international crime.

### III. EFFECTIVENESS OF EXISTING SYSTEM IN CARRYING OUT JUSTICE IN THE INTERNATIONAL ARENA

As evidenced above, international justice is currently carried out in a piece-meal fashion. Countries assist one another in particular circumstances and when political considerations support following through with commitments to international agreements. Even if certain countries provide international judicial assistance to each other in some matters, there is no certainty that in any other similar instance an accused will be brought to justice.<sup>139</sup>

At present, most countries have recognized a number of acts with international aspects as criminal. In fact, most countries have recognized the existence of certain core "international crimes."<sup>140</sup> This is evidenced by the U.N. Security Council's recent establishment of International Criminal Tribunals to prosecute war criminals in Bosnia and Rwanda, and the international community's approval of such measures.<sup>141</sup> Yet, despite the recognition of certain international crimes and the efforts to prosecute violators of "international laws," the current international criminal justice system is less than harmonized.

137. *Id.* at 154.

138. *Id.* at 90-91.

139. For example, a particular country may agree to extradite a national to a foreign country for murder charges, but may refuse the return of another national to another country for the same charges. This is more likely to occur when the particular country considers punishment in another country contrary to its own laws.

140. *See supra* note 44 and accompanying text.

141. *See* Stuart H. Deming, *War Crimes and International Criminal Law*, 28 AKRON L. REV. 421 (1995).

In the midst of the existing U.S. domestic policies, bilateral and multilateral agreements and occasional ad-hoc International Criminal Tribunals, it has been proposed that a permanent international criminal court be established to further the efforts of bringing international criminals to justice. A permanent international criminal court, some argue, would effectively carry out justice in the international arena; however, an International Criminal Court with limited jurisdiction and authority would be no different than the ICJ.<sup>142</sup> By considering and implementing the proposals suggested in this article, an International Criminal Court could develop into a truly recognized and effective institution for carrying out justice.

#### IV. PROPOSALS FOR AN INTERNATIONAL CRIMINAL COURT

##### A. *The International Law Commission's Draft Statute for an International Criminal Court*

At the forty-ninth session of the United Nations General Assembly, members of the U.N.'s Sixth (Legal) Committee (hereinafter "the Committee") considered several proposals submitted by the International Law Commission, including a draft Statute for the establishment of a permanent international criminal court.<sup>143</sup> The Committee considered the various elements of the proposed International Criminal Court and recognized that several aspects of the Court required further consideration.<sup>144</sup> In particular, the proposed draft raised issues regarding the Court's subject matter jurisdiction. These issues were: one, whether genocide would be an exception to the court's consent jurisdiction; two, the Security Council's power to determine actual acts of aggression and authority to refer cases to the court; three, the relationship of the court and the United Nations; and, four, the court's funding.<sup>145</sup> While some members preferred to limit the functions and authority of the Security Council under the draft Statute, the United States favored giving the Security Council the exclusive authority to refer cases involving war crimes, crimes against humanity and genocide.<sup>146</sup>

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142. See, e.g. American Bar Association Task Force on International Criminal Court, *supra* note 3.

143. Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Ninth Session of the UN General Assembly*, 89 AM. J. INT'L L. 607, 613 (1995).

144. *Id.* at 613-15.

145. *Id.* at 614.

146. *Id.*

Despite the apparent disparity over several aspects of the draft statute, it was considered by several Committee members to provide "a solid basis for the negotiation of a treaty establishing such a Court, which would be closely linked to the United Nations by a separate agreement, as envisioned in the draft."<sup>147</sup> In requesting continued efforts to develop an International Criminal Court, committee members "indicated [their] general reluctance to continue . . . [the current methods for prosecuting violators of international crimes, which include] . . . the Security Council[s] [creation] of ad hoc tribunals, which . . . [can] . . . not provide the same level of deterrence or universal application of international criminal law" as an International Criminal Court.<sup>148</sup>

*B. The American Bar Association ("ABA") Task Force's Proposed Statute for an International Criminal Court*

The ABA Task Force's proposed Statute for an International Criminal Court is another example of the current efforts to establish a permanent International Criminal Court.<sup>149</sup> The ABA Task Force, like the International Law Commission, attempts to create an adequate foundation for establishing an International Criminal Court by detailing the purpose, jurisdiction, subject matter and other important elements of the International Court. In particular, the ABA Task Force's proposed Statute sets forth the specific crimes that would fall within the International Criminal Court's jurisdiction under Article 22.<sup>150</sup> In addition, Article 23 provides the methods by which a nation could accept or decline jurisdiction with regard to specific crimes.<sup>151</sup>

Pursuant to Article 23, member-states could refuse to consent to the jurisdiction of the International Criminal Court in any particular case.<sup>152</sup> Accordingly, the Court's jurisdiction would depend on the discretion of the member-states on a case by case basis. This jurisdictional provision, however, would severely weaken the International Criminal Court's effectiveness. Although it may prove difficult for member countries to agree to respect the International Criminal Court's jurisdiction, only the real possibility of being brought before the International Criminal Court will

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147. *Id.*

148. *Id.*

149. *See American Bar Association Task Force on International Criminal Court, supra* note 3.

150. *Id.* at 515. These crimes include genocide and other related crimes, apartheid, hostage takings, crimes against a diplomat, and unlawful seizure of an aircraft. *Id.* at 515-16.

151. *Id.* at 516-17.

152. *Id.*

work to effectively enforce violations of international crimes. The opting out provisions of the ABA's proposed Statute, while similar to several existing international agreements and the International Law Commission's proposed Statute provisions, poses the same problem of ineffective enforcement that plagues most existing international agreements.

Therefore, without any real authority to compel jurisdiction over parties, which is one of the major weaknesses of both the ABA Task Force's and the International Law Commission's draft Statutes, the International Criminal Court will become the criminal equivalent of the ICJ.<sup>153</sup> To the extent that the ICJ accomplishes certain objectives, it is effective primarily because cases brought before the ICJ often involve relatively nonviolent actions and only member-states may be brought before it.<sup>154</sup> Since the nature of ICJ disputes are relatively nonviolent, it is clear that in disputes involving criminal activities, it would be even more difficult to encourage member-states to submit to the International Criminal Court's jurisdiction. Therefore, any International Criminal Court without real compulsory jurisdiction provisions and authority will be of little use to the effective apprehension and prosecution of international criminals. The International Criminal Court's jurisdiction must be compulsory if it is to be effective.

Although an International Criminal Court has yet to be established, once an International Criminal Court is created, enforcement mechanisms will be required. These enforcement mechanisms will include methods for investigating, apprehending, prosecuting and punishing international criminals. The ABA Task Force's proposed Statute allows the Security Council to function as the enforcement mechanism for the "international crimes" listed in the Statute.<sup>155</sup> Article 60 of the proposed Statute recognizes the need for international judicial assistance in order to prosecute cases before the Court and confirm the member-states' right to confer with INTERPOL when conducting international investigations.<sup>156</sup>

Whether the International Criminal Court takes the form of that proposed by the ABA's Task Force or the International Law Commission, or that of an entirely new configuration, it should take a reserved role in the investigation, apprehension, prosecution and punishment of international criminals. In this regard, the proposed permanent International Criminal

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153. See *American Bar Association Section of International Law and Practice and the Standing Committee on World Order Under Law Reports to the House of Delegates*, 29 *THE INT'L LAWYER* 295, 297 (1995).

154. U.N. CHARTER art. 34, para 1.

155. *American Bar Association Task Force on an International Criminal Court*, *supra* note 3, at 494.

156. *Id.* at 530.



Court should not displace any effective remedies that exist today for investigating, apprehending, prosecuting and punishing international criminals. Instead, any investigations and/or arrests (ie: by INTERPOL agents) and any prosecutions and/or punishments (ie: carried out by Prosecutors appointed by the U.N. and prisons operated by the U.N.) should not be initiated unless the existing enforcement mechanisms (ie: mutual legal assistance and extradition agreements) have failed to provide an adequate remedy, and an international criminal would otherwise go without punishment for his criminal action.

C. *The International Law Commission's Proposed Draft International Criminal Code*

In addition to its draft Statute for a permanent International Criminal Court, the International Law Commission, a subdivision of the U.N., has also proposed a draft international criminal code. The proposed Code attempts to define international crimes.<sup>157</sup> One purpose of the draft Code is also to specify certain human rights violations that would fall within the jurisdiction of a permanent International Criminal Court, if and when such a Court is established.<sup>158</sup> In addition to the Law Commission's Code, members of the U.N. also published a draft code in 1980. This code lists terrorism, hijacking, and environmental crimes as incidents that would require solutions from an International Criminal Court.<sup>159</sup> Interestingly enough, several crimes under the Code have already been described as "international crimes" by the international community pursuant to existing international agreements. For example, various international agreements have already labeled genocide, drug trafficking, money laundering and terrorism as "international crimes".<sup>160</sup>

V. ESTABLISHING AN EFFECTIVE INTERNATIONAL CRIMINAL COURT

A. *Creation of an International Criminal Court*

The first consideration in creating a permanent International Criminal Court is the authority and basis for its existence. Several possible methods for creating an International Criminal include an institution cre-

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157. Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U.L. REV. 435, 453 (1995).

158. *Id.* at 454.

159. *Id.*

160. See *supra* notes 92-102 and accompanying text.

ated by the U.N. Security Council, by separate treaty, or by international agreement.

1. An Institution Created by the U.N. Security Council Under the Authority of Art. VII of the U.N. Charter

The Bosnian and Rwanda ad-hoc Tribunals were brought into being by the U.N. Security Council's broad interpretation of its authority under Article VII of the U.N. Charter.<sup>161</sup> In determining "that there [was] a threat to international peace," the Security Council created the Bosnian and Rwanda Tribunals.<sup>162</sup>

Some have argued that the U.N. could create a permanent International Criminal Court under the Security Council's Article VII authority.<sup>163</sup> An important consequence of a permanent International Criminal Court created by the Security Council would be that the U.N. could take action against a member-country who failed to comply with the Court or its objectives. No opting out provisions would be available, as in the ABA Task Force's and the International Law Commission's draft Statutes.<sup>164</sup>

2. A Separate Treaty

In its draft statute for a permanent International Criminal Court, the International Law Commission proposed that a separate treaty create an International Criminal Court.<sup>165</sup> According to the Commission's proposal, the court would operate as a separate entity with an indirect connection

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161. United Nations: Security Council Resolution on Establishing an International Tribunal For the Prosecution of Persons Responsible for Serious Violations of International Law Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), *reprinted* in 32 I.L. M. 1203, 1204 (1993). United Nations: Security Council Resolution 955 (1994) Establishing the International Tribunal For Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994), *reprinted* in 33 I.L.M. 1598, 1601 (1994).

162. Pickard, *supra* note 157, at 438-39.

163. Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245, 253 (1996). Article 39 bestows upon the Security Council the power to "determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. CHARTER art. 39.

164. The Security Council has the power to implement economic sanctions and other enforcement procedures to give effect to its decisions. U.N. CHARTER art. 41-42.

165. *American Bar Association Task Force on an International Criminal Court*, *supra* note 3, at 480.

to the U.N. Security Council.<sup>166</sup>

### 3. Other Proposals

Finally, existing international agreements could form the basis of a permanent International Criminal Court. Several existing international agreements on crimes of international concern, such as terrorism, money laundering and tax evasion, could be amended to provide a permanent forum for the prosecution of the specific criminal acts set forth in the particular agreements. Of course, the methods for investigating, apprehending, prosecuting and punishing international criminals would need further development, but the international agreements could be the foundations for such permanent tribunal(s).

#### *B. Structure of the International Criminal Court System*

Whether the International Criminal Court is created by the U.N. Security Council, a separate treaty, or by any other method, once the International Criminal Court is created, the structure of the international criminal court system will need to be considered.

#### 1. Single International Criminal Court

It is possible that the International Criminal Court would include only one permanent institution as the forum for prosecuting violators of "international crimes." If this were the case, it seems clear that the Court's jurisdiction would be limited to only a few specific crimes that were unquestionably of international concern, such as genocide. If the International Criminal Court had jurisdiction over a number of an "international crimes," the need for additional forums would most likely occur.

#### 2. Several Different Forums of the International Criminal Court

The need for more than one location or set of international judges for the International Criminal Court is apparent in light of the jurisdictional differences between the proposed International Criminal Court and the ICJ. In particular, the ICJ's jurisdiction is limited to its authority over member-states, which are approximately 185 in number.<sup>167</sup> To be effective, the International Criminal Court would have jurisdiction over any

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166. *Id.* at 483-84.

167. David Bills, *International Human Rights and Humanitarian Intervention: The Ramification of Reform on the United Nations Security Council*, 31 *TEX. INT'L L. J.* 107, 108 (1996).

possible individual violator of "international laws" in the world — billions of individuals. Of course, although the majority of the world's population are not violators of "international laws," the jurisdictional consequences and the impracticability of only one forum is evident.

### 3. Other Proposals

Another possible structure of the International Criminal Court system is the creation of Regional Criminal Courts. These Regional Courts could fulfill various functions and could achieve significant results in certain circumstances. For example, a country may not want to surrender a fugitive to another country or prosecute the individual in his own country, yet there may still be a desire to prosecute the individual in an alternate forum. In these instances, Regional Courts (or the International Criminal Court) could be utilized to bring a criminal to justice without surrendering him to another country.

A Regional Court could be established through an existing regional/multilateral treaty or through an entirely new agreement. Alternatively, a Regional Court could be merely a "branch" of the International Criminal Court, and the U.N. could appoint officials to carry out regional investigations and to act as Regional Prosecutors and Judges.

Regional Courts could also be utilized in connection with national court decisions and fulfill an appellate function. For various reasons, a particular country may want to prosecute an individual in its own courts but allow the individual to appeal the national court's judgment directly to a Regional Criminal Court (or directly to the International Criminal Court). Cases brought before Regional Courts (or the International Criminal Court), whether cases of first instance or brought on appeal, would be reviewed *de novo* in order to ensure adequate review of the facts and circumstances of each case.

The ability of those accused and convicted of international crimes to appeal to a Regional Court, the International Criminal Court, or some other International Criminal Tribunal would further ensure that the individuals were afforded adequate procedural protection and that their cases, which involved "international crimes", were heard before unbiased and qualified arbiters.

### C. Jurisdictional Issues

#### 1. Personal and Subject Matter Jurisdiction

Several personal and subject matter jurisdictional issues arise in connection with the implementation of an International Criminal Court. Whether the Court's jurisdiction extends to all individuals everywhere,

only to nationals of member-states who have consented to the Court's jurisdiction, or only over individuals who have consented to the Court's jurisdiction are issues that need to be addressed when considering the establishment of an International Criminal Court.

As mentioned above, both the International Law Commission's and the ABA Task Force's proposed Statutes for an International Criminal Court support the position that a country must consent to the Court's jurisdiction in order for the Court to exercise jurisdiction over a national of that country.<sup>168</sup> As set forth in the International Law Commission's draft, however, the crime of genocide would be an exception to the "consent" requirement regarding jurisdiction. This is largely due to the fact that genocide is recognized as an international crime.<sup>169</sup>

Therefore, according to some, the majority of "international crimes" within the International Criminal Court's jurisdiction would first require a particular country's consent to the Court's jurisdiction. However, as argued above, the effectiveness of the International Criminal Court would be seriously undermined if its jurisdiction was determined by a member-country's "consent" in any given case.

## 2. Compulsory Jurisdiction of the International Criminal Court

Unlike the ICJ, the International Criminal Court would exercise jurisdiction over individuals and therefore, its jurisdiction should be compulsory. The benefits of a compulsory International Criminal Court would be substantial. For example, the International Criminal Court could exist as a permanent tribunal for the prosecution of war criminals without the possibility of an accused escaping trial simply because of a lack of personal jurisdiction due to a lack of consent.<sup>170</sup>

With the creation of an International Criminal Court with compulsory jurisdiction over "international criminals," the establishment of a Nuremberg-type tribunal or one similar to the recent ad-hoc Tribunals in Bosnia and Rwanda would no longer be necessary. Further, it would be much more difficult for war criminals to go free simply because of the complications and delays resulting from the creation of an ad-hoc tribunal.<sup>171</sup> With a permanent International Criminal Court in place, perpetra-

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168. *American Bar Association Task Force on an International Criminal Court*, *supra* note 3, at 516-17.

169. Morris & Bourloyannis -Vrailas, *supra* note 143, at 614.

170. *American Bar Association Task Force on an International Criminal Court*, *supra* note 3, at 516-17.

171. M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *FORDHAM INT'L L. J.* 1191, 1208-09 (1995).

tors of war crimes would be aware — and hopefully would be deterred by the knowledge — that action against them was not only possible, but likely.

For example, if an International Criminal Court with compulsory jurisdiction were in place today, Bosnian war criminals would most likely have already been brought to trial for their violations of international laws, because acts of genocide and torture are recognized as “international crimes” by the international community.<sup>172</sup>

Absent the unconditional consent to the International Criminal Court’s jurisdiction, motivation for accepting the compulsory jurisdiction of the International Criminal Court could be achieved through economic measures. For instance, future agreements similar to the recently adopted North American Free Trade Agreement could require all member parties to agree to the Court’s jurisdiction and to assist in the investigation and prosecution of violators of international laws.<sup>173</sup>

#### *D. Applicable Law*

Once the jurisdiction of the International Criminal Court has been established, a determination of applicable law must be made. It is possible that the International Criminal Court will apply a general “international law” to the cases before it, because to date no “International Criminal Code” exists.<sup>174</sup> Several draft International Criminal Codes have been considered, including the one proposed by the International Law Commission mentioned above, and any one of them could be adopted in connection with the creation of an International Criminal Court.

It might seem today that a world in which one set of rules applies to all is an impossibility. Even today’s “international judicial assistance” system for bringing criminals to justice appears to be accomplishing a great deal and establishing certain activities as “international crimes”, despite the many differences among nations and the divergent national criminal codes. In fact, a world in which a set of systematic procedures

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172. Compulsory jurisdiction over an individual would depend on whether the individual was a national of a signatory country to the treaty establishing the International Criminal Court or whether the crime was actually committed in a signatory country. Consequently, if neither the individual’s country nor the country in which the crime was committed had consented to the International Criminal Court’s jurisdiction, the ICC would not have compulsory jurisdiction over that individual.

173. See 19 U.S.C.A. § 3311 et seq. (West Supp. 1996).

174. Pickard, *supra* note 157, at 453-54. An international criminal code does not exist to date because of the reluctance of nations to surrender a portion of their sovereignty. *Id.* at 453.

and substantive laws are applied to citizens of many different nations may be an appropriate aspiration.

Some have proposed the development of an international code of crimes for several years now.<sup>175</sup> While an International Criminal Code would certainly complement an international criminal court system, it is not necessary for the International Criminal Court's creation. To the contrary, the creation of an International Criminal Court would likely advance the development of a code of international crimes. Cases brought before the court could form the foundation for defining "international crimes." This procedure could develop into customary international law. Furthermore, certain "international crimes" are already recognized as such by the international community.<sup>176</sup> Whether set forth in an International Criminal Code or established by reference to existing international agreements listing "international crimes", the types of crimes that will fall within the subject matter jurisdiction of the International Criminal Court must be determined if the Court is to be effective.

#### *E. Standing to Bring an Action Before the International Criminal Court*

Another important consideration with respect to the development of an International Criminal Court is the question of standing. Whether only international prosecutors (ie: appointed by the U.N.)<sup>177</sup> would be able to bring a case before the Court, whether officials of member-states could appear before the Court to prosecute violators of international laws, or whether individuals could present a case to the International Criminal Court are factors that should be considered in the development of the International Criminal Court.

One option would be to designate U.N.-appointed Prosecutors as the only parties with standing to bring a case before the International Criminal Court. Under these circumstances, certain procedures could be implemented to ensure that member-states and individuals could at least notify the International Criminal Court of violations of international laws. For example, a Probable Cause Panel, formed by U.N. appointees or members of the International Criminal Court, could be established to consider

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175. John W. Rolph, *Perfecting an International Code of Crimes*, 39 FED. B. NEWS & J. 528, 528 (1992). The U.N. General Assembly first initiated work on a criminal code entitled "Draft Code of Offenses Against the Peace and Security of Mankind in 1980." *Id.*

176. See *supra* notes 92-102 and accompanying text.

177. In addition to the appointment by the U.N., international prosecutors could be appointed by member-states of a treaty establishing an International Criminal Court.

claims of international violations submitted by member-states, individuals or other entities. The Probable Cause Panel could forward the matter to a U.N.-appointed Prosecutor if it determined that there was probable cause to believe that a violation of international law had occurred.

*F. Enforcement of Violations of "International Crimes" Within the Jurisdiction of the International Criminal Court*

1. Investigations

*a. Current Methods of Investigation*

Once an individual, a member-state or anyone else determines that an international crime has been or is being committed by another, an investigation of the alleged "international crime" would be the next step in the international criminal justice process.

As mentioned above, several bilateral and multilateral agreements already detail procedures whereby member-states assist one another in conducting criminal investigations that cross borders. The development of an International Criminal Court questions the existing methods of international investigation and whether those methods would be replaced by investigative authority created by the U.N., the International Criminal Court or a treaty created by contracting parties of the International Criminal Court. Any supra-national authority to investigate "international crimes" created in conjunction with the International Criminal Court should be exercised only when existing international judicial assistance agreements or other international practices fail to adequately investigate an international crime.

Of course, determining when existing methods of investigation are inadequate so that a supra-national investigating authority could investigate an international crime would require careful consideration. This issue might best be resolved on a case by case basis by a U.N. or Court-appointed Panel similar to the Probable Cause Panel mentioned above.

Therefore, if the Panel (or similar reviewing authority) determined that further investigation of a particular matter was warranted, it could authorize an international investigation by the supra-national authority. The supra-national investigating authority could then proceed with an international investigation independent of any ongoing national investigation.

*b. INTERPOL Agents as Alternative Investigators*

If the U.N., the International Criminal Court or any other entity was empowered to establish and oversee a supra-national investigating author-



ity, the form of that authority would need to be determined. Clearly, the supra-national investigating authority could take several different forms.

One form could allow the U.N., International Criminal Court, or any other appropriate authority, to appoint supra-national investigators to specific cases when it was determined that national efforts were inadequate. Additionally, selected supra-national investigators could be appointed to investigate all international matters in which national efforts of investigation were determined to be lacking.

Another possible form of the investigating authority could allow the appointment of INTERPOL and its agents. Using INTERPOL agents in supra-national investigations could prove more effective than alternative methods since the INTERPOL agents would have a direct link to the country where the investigation was being conducted.

For example, if a supra-national investigation in Colombia was approved (by a Panel like the one described above or another similar reviewing authority) because it was shown that Colombian officials refused to investigate one a Colombian national who was accused of international drug trafficking by a member-state or an individual, an INTERPOL agent located in Colombia would be assigned to the investigation.

Furthermore, it could be required that the INTERPOL agents who would investigate an international crime would be nationals of the country where the investigation was being conducted. As nationals, the INTERPOL agents would already be familiar with the procedural and substantive laws of the country. The national INTERPOL agents could be assisted by INTERPOL agents from other related countries, but the national agents would be in charge of the investigations. Normally, INTERPOL agents would be bound by national due process and other procedural requirements; however, in exceptional circumstances (such as when national authorities actively thwarted an INTERPOL investigation), INTERPOL agents could request permission from an international Panel to perform certain types of investigations.

### c. INTERPOL Agents as Primary Investigators of International Crimes

Alternatively, the U.N., the International Criminal Court or any other designated authority might want to implement an independent authority for conducting international investigations that would preempt national or other criminal investigating authorities. Under these circumstances, INTERPOL and its agents could be designated as the primary supra-national investigators of international crimes. Furthermore, since INTERPOL agents are nationals of many different countries, appointing them as the primary investigators of international crimes would mean

that no one country would be the world's policeman.<sup>178</sup>

In order to assume a more active role in international investigations, INTERPOL could adopt a resolution and/or amend its the Constitution authorizing the International Criminal Court to adjudicate its cases. INTERPOL's increased authority could also be established by the U.N., by a treaty, or pursuant to the authority of the International Criminal Court.

With the adoption of INTERPOL and its agents as the international investigative authority for international crimes, the role of INTERPOL agents would likely broaden. For example, INTERPOL agents would undoubtedly call upon the assistance of their counterparts in other countries, which would lead to increased dependence and assistance between INTERPOL agents. By making the role of INTERPOL agents more flexible, effective international investigations would be achieved.

Furthermore, by expanding the role of INTERPOL agents in international investigations, INTERPOL agents from any particular country could be assigned to a branch of any other member country to assist in an investigation where that agent would significantly contribute to the investigation. Further, where crimes were frequently committed between particular countries, each INTERPOL office could be assigned agents from each respective country who would assist in carrying out investigations to ensure that the due process and individual rights laws of each country were not violated. Certainly, the expanded role of INTERPOL in carrying out international investigations would result in more thorough and effective investigations.<sup>179</sup>

## 2. Extradition of those Accused of Committing International Crimes

Once one has been accused of committing an international crime that falls within the jurisdiction of the International Criminal Court and the crime has been investigated, methods for apprehending and delivering the accused to the appropriate forum must be determined. Several options are available for this stage of the international criminal process.

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178. See John F. Murphy, *What Ever Happened to the New World Order*, 19 S. ILL. U.L.J. 561 (1995) (discussing the role of the U.S. as the world's policeman under the new world order).

179. The financing of INTERPOL investigations and operations would require special consideration. Since a particular country may be inclined to refuse to pay the salaries of INTERPOL agents and/or the costs for an investigation that the particular country did not support, a separate international mechanism for financing INTERPOL operations would most likely be required. Currently, Interpol member-states are required to pay dues to the organization. In the U.S. INTERPOL membership dues are paid out of the sums authorized and appropriated by the Department of Justice. 22 U.S.C. §263(a).

As mentioned above, the existing methods for apprehending and delivering an accused to an appropriate forum should be sought before any other measures are taken. However, if the national officials fail and/or refuse to apprehend and deliver an accused violator of international laws to the appropriate international forum (i.e., the International Criminal Court), various alternatives are available to bring the accused to justice. One of the fundamental provisions of any treaty establishing an International Criminal Court should be to commit the signatories to extradite criminals for trial before the Court.

Among the other alternatives would be to have INTERPOL agents proceed with apprehending and delivering the accused to the International Criminal Court. Of course, certain procedural requirements would need to be fulfilled in this exceptional circumstance. For example, an INTERPOL agent would be required to receive some type of approval or "international arrest warrant" from a judge sitting on the International Criminal Court or other appropriate authority, such as a Panel similar to the ones discussed above. Pursuant to the "international arrest warrant", the INTERPOL agent would have the authority to surrender the accused to the appropriate facilities designated by the International Criminal Court.

### 3. Prosecution of those Accused of Committing International Crimes

Once an individual accused of committing an international crime is detained in a facility designated by the International Criminal Court, the system for prosecuting that individual is the next issue to be resolved. As indicated above, Prosecutors could be appointed by the U.N. to carry out this function. The Prosecutors could be selected from member-states to fill a full-time position of trying cases before the International Criminal Court, or the U.N. could appoint particular officials of certain countries who were familiar with specific cases to act as temporary Prosecutors before the International Criminal Court.

In addition, cases brought before the International Criminal Court could be decided by one judge or a panel of judges. The International Criminal Court Statute or implementing mechanism would need to set forth the number of judges who would sit on the Court and decide cases. Several different structures of the International Criminal Court could be implemented. For example, an accused could be prosecuted before one judge, a panel of judges or even a judge and jury (although this option is unlikely).<sup>180</sup>

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180. It should be noted that the establishment of an International Criminal Court would also raise U.S. Constitutional considerations, which are beyond the scope of this paper. The International Criminal Court would need to be consistent with the Fourth,

*G. Enforcement of Judgments Rendered by the International Criminal Court*

The enforcement of judgments rendered by the International Criminal Court is an issue that must be addressed once the International Criminal Court is established and its enforcement mechanisms are developed. As a preliminary matter, however, the International Criminal Court would need to have the authority and resources to render any of its judgments. Primarily, this would involve having access to a prison or other facility for housing both individuals accused and convicted of international crimes.

As a possible method for enforcing its judgments and criminal sentences, the International Criminal Court could enter into arrangements with national prisons to take custody of any individuals accused or convicted of an international crime. The International Criminal Court could, however, build and maintain its own prison facilities. At this stage of the International Criminal Court's development, it would most likely be more practical for the International Criminal Court to arrange for the use of national prisons where international criminals could serve out their sentences.

Another concern with regard to judgments issued by the International Criminal Court is the issuing of a just and appropriate judgment (remedy). In deciding an appropriate remedy for a violation of international law, the International Criminal Court should consider the length of imprisonment imposed by the individual's national criminal justice system, when possible, before rendering its decisions. This would promote consistency among the national and international systems.

## VI. CONCLUSION

Will an International Criminal Court do justice? It may be the only solution for carrying out justice at the international level. However, the International Criminal Court should not supplant the existing system that has taken years to develop. Instead, any International Criminal Court system should supplement the existing system to fulfill the objectives of existing international agreements when the existing enforcement mechanisms fail to bring international criminals to justice. If the creation of an

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Fifth and Sixth Amendments of the U.S. Constitution. These amendments forbid unlawful searches and seizures; protect the right of self-incrimination; and provide the right to counsel and trial by trial respectively. See U.S. CONST. AMEND. IV, V, & VI. *But see* Paul D. Marquardt, *Law Without Borders: The Constitution of An International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995) (criticizing the U.S. objection to the establishment of an International Criminal Court on constitutional grounds).

International Criminal Court becomes a reality, its ultimate success will depend on its ability to effectively investigate, apprehend, prosecute and punish violators of international crimes. Perhaps through the implementation of some of the proposals discussed in this paper, the International Criminal Court will prove to be the solution for effectively fighting international crime and bringing international criminals to justice.