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# The Need for an International Criminal Court in the New International World Order.

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## The Need for an International Criminal Court in the New International World Order

M. Cherif Bassiouni\*  
Christopher L. Blakesley\*\*

### ABSTRACT

*In this Article, Professors Bassiouni and Blakesley argue that the institution of an international criminal court would provide an effective means of dealing with international problems that are created by or unaddressed in a unilateral or bilateral international system. Rather than deflecting domestic concentration on law enforcement, the proposed tribunal will be a complementary and incremental effort, which will enhance criminal justice enforcement. The authors address several questions concerning the implementation of the tribunal, including questions related to sovereignty and bases for jurisdiction, which crimes will be within the court's jurisdiction, which law will apply to the cases, and practical concerns related to the court's composition, structure, and procedure. Although an international criminal court admittedly will not be a perfect solution, the authors argue that it must not be approached with a negative attitude, but rather with a view towards making more effective the benefits such a court will provide. The recent*

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*Lybian question is a case pointing to the benefits of this court.*

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## I. HISTORICAL BACKGROUND

The idea of establishing an international criminal court (ICC) could be said to have begun in 1899 with the First Hague Convention for the Pacific Settlement of International Disputes.<sup>1</sup> In this century, an early step toward its establishment occurred in the 1919 Versailles Treaty.<sup>2</sup> In that document, the Allies provided for the prosecution of Kaiser Wilhelm II for the supreme offense against the peace and for the prosecution of German officers and soldiers who committed war crimes.<sup>3</sup> Also in 1919, the Allies established a special commission to investigate the responsibility of acts of war. It provided for the crime against "the laws of humanity." This crime was developed in response to the killing of an estimated one million Armenians by Turkish authorities, as well as by the Turkish populace supported by or abetted by the state's public policy.<sup>4</sup> Unfortu-

1. International Convention for the Pacific Settlement of International Disputes, July 19, 1899, 32 Stat. 1779, 26 Martens Nouveau Recueil (ser. 2d) 720.

2. Treaty of Peace with Germany, June 28, 1919, 2 Bevans 43.

3. *Id.* arts. 227-29, at 136-37.

4. DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32 (1919), reprinted in 14 AM. J. INT'L L. 95 (Supp. 1920); see generally Vahakn N. Dadrian, *Genocide as a Problem of National and In-*

nately, United States opposition prevented that portion of the Commission's report from including that crime among the offenses that an international criminal court would prosecute. Subsequently, the Treaty of Sèvres, which was the Treaty of Peace between the Allies and the Turkish Ottoman Empire,<sup>5</sup> provided for the surrender by Turkey of persons as may be accused of crimes against "the laws of humanity." In 1927, the Treaty of Lausanne<sup>6</sup> unfortunately gave these persons amnesty.

Between the two world wars, a wave of terror-violence developed in Europe, mostly in connection with nationalist claims in the Balkans. As a result, in 1937 the League of Nations adopted a Convention Against Terrorism to which an annexed Protocol provided for the establishment of a special international criminal court to prosecute such crimes.<sup>7</sup> India was the only state that ratified it, and, as a result, it never entered into effect. After World War II, crimes against peace, war crimes, and what became known, with the London Charter of August 8, 1945, as "Crimes Against Humanity" obviously needed to be addressed.<sup>8</sup> The London Charter established the International Military Tribunal (IMT) at Nuremberg, which was designed to prosecute the major war criminals in the European Theater. In 1946, a similar international military tribunal was established in Tokyo to prosecute major war criminals in that theater of operations.<sup>9</sup>

The drafters of the London Charter establishing the IMT at Nuremberg quite clearly had a great deal of difficulty formulating the Statute of

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*ternational Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989).

5. Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), Aug. 10, 1920, *reprinted in* 15 AM. J. INT'L L. 179 (Supp. 1921) (not ratified); *see generally* David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L.J. 86 (1989).

6. Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924); *see generally* James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920).

7. Convention for the Creation of an International Criminal Court, *opened for signature*, Nov. 16, 1937, LEAGUE OF NATIONS O.J. Spec. Supp. 156 (1938); League of Nations Doc. C.547(I)M.384(I)1937V (never entered into force), *reprinted in* 7 INTERNATIONAL LEGISLATION (1935-1937), at 878 (Manley D. Hudson ed., 1941); *see generally* M.D. DUBIN, *International Terrorism: Two League of Nations Conventions, 1934-1937* (1991).

8. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

9. International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

an International Tribunal and defining those crimes committed in Germany upon German citizens as "Crimes Against Humanity," at least for pre-1939 conduct. In fact, the weaknesses of the World War II precedents plagued the legal sufficiency of the instruments and structures sought to be created after World War II.<sup>10</sup>

The short-sightedness and xenophobic tendencies of politicians after World War I had made impossible the advancement of international criminal law and the establishment of an international criminal court, which made the task of establishing Nuremberg and Tokyo more difficult.<sup>11</sup>

In this context, Adolph Hitler, making a speech at Nuremberg in 1936, commented "[w]ho after all is today speaking about the destruction of the Armenians?"<sup>12</sup> Indeed, that Hitler would make such a statement as a prelude to his policy of extermination of Jews, Gypsies, and Slavs is particularly revealing. This statement shows the world community's lack of interest in effectively proscribing this conduct and in creating the appropriate international structures to enforce the laws. This gave Hitler the comfort of an amber light, or, at least, comfort of knowing that he might get away with this policy, as others had in the past.

The need to develop an international criminal code and an international criminal court is indispensable in the context of the transient nature of international society, the sophistication and transnational nature of modern crime, and the ever-increasing interdependency of the new, international world order.<sup>13</sup> As the world becomes a smaller place, the

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10. M. CHERIF BASSIOUNI, "Crimes Against Humanity" in *International Criminal Law* (forthcoming 1992); see generally Matas, *supra* note 5; *The Nuremberg Trial and International Law* (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

11. The same situation arose after World War I. See CLAUD MULLINS, *THE LEIPZIG TRIALS* (1921); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG* (1982).

12. WILLIS, *supra* note 11, at 173 (citing letter Sir G. Ogilvie-Forbes to Kirkpatrick of August 1939, with enclosures of Hitler's speech to Chief Commanders and Commanding Generals, August 22, 1939, Great Britain, Foreign Office, *reprinted in* DOCUMENTS ON BRITISH FOREIGN POLICY, 1919-1939 257 (E.L. Woodward et. al. eds., 3d series 1954)).

13. See generally M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987); Symposium, *Draft International Criminal Court*, 52 *REVUE INTERNATIONALE DE DROIT PENAL* [R.I.D.P.] 331 (1984); *Draft Statute for an International Commission of Criminal Inquiry*, *reprinted in* INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE SIXTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION* 445 (1983); *Draft Statute for an International Criminal Court*, *reprinted in* INTERNATIONAL LAW ASSOCIATION, *supra*, at 454. For other works on the need to establish an international criminal code and international criminal court, see HISTORY OF THE UNITED NATIONS WAR

various parts and peoples are more interdependent and more concerned with the same problems of international and transnational criminality. Therefore, greater cooperation and coordination are required. This cooperation, of course, can take place at the bilateral level, but it also must take place at the multilateral level. The member states of the Council of Europe have realized that the bilateral level is wholly insufficient and, since 1950, have developed a number of international conventions on interstate cooperation in penal matters to enhance their multilateral cooperative relations.<sup>14</sup> In recent times, the Organization of American States has embarked on the same course of conduct based on the same premises.

The recent resolve of the major states in the world led by the United States to establish a new international legal order predicated on consensus and collective action through the Security Council, as well as other organs of the United Nations, is a welcome and encouraging sign, indicating that maybe the United States is willing to abandon a narrow xenophobic perspective of unilateral or bilateral policy.<sup>15</sup> Collective security measures certainly must take into account the need to develop collective measures for the prevention and control of international and transnational criminality. To a large extent, this means that, in addition to the unilateralism and bilateralism to which the United States has in the past been so attached, one must add the additional dimensions of multilateralism and internationalism. As a result of this new perception and in recognition of the growing problem of certain types of international and transnational crimes, particularly in the area of international

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CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 109-120 (United Nations War Crimes Commission ed., 1948); ANTOINE SOTTILE, *THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT* (1951); TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (Julius Stone & Robert K. Woetzel eds., 1970); Fannie J. Klein & Daniel Wilkes, *United Nations Draft Statute for an International Criminal Court: An American Evaluation*, in *INTERNATIONAL CRIMINAL LAW* 526 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

14. See EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS, (Ekkehart Müller-Rappard and M. Cherif Bassiouni eds., 3 vols. 1987).

15. See David D. Caron, *Iraq and the Force of Law: Why Give a Shield of Immunity?*, 85 AM. J. INT'L L. 89 (1991); Lori F. Damrosch, *Constitutional Control of Military Actions: A Comparative Dimension*, 85 AM. J. INT'L L. 92 (1991); Thomas M. Franck & Fuiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991); Michael J. Glennone, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991); Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 AM. J. INT'L L. 104 (1991); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506 (1991); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 526 (1991).

terror-violence and international drug trafficking, the General Assembly in 1989 urged consideration of the establishment of an international criminal court.<sup>16</sup> This was predicated on an initiative taken in 1987 by the Soviet Union, which urged considerations of such a tribunal to investigate acts of international terrorism.

Thus, a dual track concern developed between 1987 and 1989 within the United Nations: international terror-violence and international traffic in drugs. The International Law Commission was requested to issue a report, and a report was presented for the creation of an international criminal court.<sup>17</sup> The Sixth Committee of the General Assembly subsequently addressed the issue in 1991.

In the United States, the 1988 Anti-Drug Abuse Act called for the President to start negotiations on the creation of an international criminal court with jurisdiction over persons who may be engaging in acts of international drug trafficking. This was followed in 1989 by a Resolution of the House of Representatives supporting the idea. Thereafter, the 1991 Foreign Operations Appropriations Bill was passed, which contained a request that the President should "explore need for the establishment of an international criminal court on a universal, regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions."<sup>18</sup> In response to this legislation, the Department of State filed a report with the Speaker of the House of Representatives in 1991 and the United States Federal Judicial Conference filed a report with the Senate on October 28, 1991. The American Bar Association's (ABA) interest in establishing an international criminal court dates back to 1978 in connection with various resolutions dealing with acts of international terror-violence. In 1990, that interest was expanded to include international traffic in drugs. In 1991, a special ABA task force on an international criminal court was established, and the preliminary report to the House of Delegates was issued on January 17, 1992.<sup>19</sup>

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16. For the evolution of United Nations efforts, see M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); see also John B. Anderson, *An International Criminal Court an Emerging Idea*, 15 NOVA L. REV. 433 (1991).

17. See *Report of the International Law Commission*, U.N. GAOR 42d Sess., Supp. No. 10, at 36-54, U.N. Doc. A/45/10 (1990).

18. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, § 599E(b)(1), 104 Stat. 1979, 2066.

19. American Bar Association Task Force on An International Criminal Court, *Preliminary Report to the House of Delegates & Recommendation* (January 17, 1992) (on file in the Office of the A.B.A. Section of International Law and Practice).



A number of efforts have been made by other organizations in recent times, in particular Parliamentarians for Global Action, whose membership consists of members of Parliament from every region in the world. Distinguished members of that group, as well as others such as Senator Arlen Specter in the United States Senate, Congressman Jim Leach in the House of Representatives, British Member of Parliament William Powell, have introduced various statements in their respective parliamentary bodies that were respectively reported in the Congressional Record<sup>20</sup> and in Hansard's Parliamentary Debates.<sup>21</sup>

The efforts of nongovernmental organizations also have been continuing, particularly that of the International Association of Penal Law, which has been the leader in this field since 1926 when it introduced its first Resolution on the establishment of an international criminal court. The formulation of the 1937 Convention against Terrorism and the Amending Protocol were largely developed by the then-President of the International Association of Penal Law, Minister Vaspasian Pella, who represented Romania at the League of Nations and who, in effect, prepared the draft of that Protocol.<sup>22</sup> Subsequently, Professor Bassiouni was commissioned by the United Nations Mission on Human Rights to prepare a Draft Statute for the establishment of an international criminal jurisdiction to implement the provisions of the *Apartheid* Convention.<sup>23</sup> The plan was submitted in 1980,<sup>24</sup> but never was acted upon. A meeting of experts was held at the International Institute of Higher Studies in Criminal Sciences in Siracusa on June 19, 1990 to further elaborate on this plan. A revised text was produced and submitted to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders held in Havana, Cuba (August-September 1990).<sup>25</sup> That doc-

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20. See 136 CONG. REC. S8080 (daily ed. June 18, 1990) (statement of Senator Specter).

21. HANSARD'S PARLIAMENTARY DEBATES 1033 (1991) (statement of Mr. William Powell).

22. See *supra* note 7.

23. *Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. Doc. E/CN.4/1416 (1980) [hereinafter *Draft Statute*].

24. See M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

25. *Draft Statute International Criminal Tribunal*, presented by the AIDP to the 8th U.N. Congress on Crime Prevention and the Treatment of Offenders (Havana 1990), U.N. Doc. A/CONF. 144/NGO7/ISISC, reprinted in 15 NOVA L. REV. 374 (1991).

ument was widely circulated and has been the object of study by the Federal Judicial Conference, as evidenced by its October 28, 1991 report to the Senate and by the 1991 report by the Department of State to the House of Representatives, which referred to its participation in the Siracusa meeting.<sup>26</sup>

The discussion of the Sixth Committee of the General Assembly about an international criminal court in the Fall of 1991 and other governmental discussions have raised a number of questions. This Article will respond to these questions as well as to questions raised by the reports mentioned previously.

## II. BASIC PREMISES

Any inquiry into the merits of an international criminal court must start with resolving three basic issues:

1. Can the tribunal improve international cooperation in law enforcement, add to the capabilities of the various nations in matters of international criminal law, or contribute in any incremental way to the solution of international and transnational criminal law problems by improving the current practice and enhancing the effectiveness of all concerned?

2. Will the recommended system have a better or equal chance of operating as effectively as the best existing systems of national criminal justice?

3. Will the recommended system improve efficiency and cooperation without causing additional problems of a magnitude as great or greater than the solutions it presents?

The first question in the establishment of an international criminal court, therefore, relates to expectations. If the tribunal is burdened with the unrealistic expectation that it will resolve all problems of international and transnational criminality, it is set for failure. If, on the other hand, it is perceived as an instrument that incrementally can add to and contribute to the solution of some of these problems, it will do so. The proposed tribunal will not deflect domestic concentration on law enforcement, but will provide a significant incremental benefit to and a facilitator for each domestic criminal justice system.

Second, some argue that the recommended system must function optimally, without flaws, or it should be rejected. Again, the recommendation is weighted down with the burden of being perfect or being rejected.

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26. Letter to the Honorable Thomas S. Foley, Speaker of the House of Representatives, from Janet G. Mullins, Assistant Secretary of Legislation Affairs, Dept. of State (1991) (on file with author).

The reality is, and the test for the viability of the system should be, whether it will work like any other system of justice. It will have its share of flaws and inadequacies, but overall, the system will function well. The questions appear rhetorical and they are, except that some critics of the recommended tribunal argue that it should not be studied, let alone created, unless these unrealistic expectations are met. The answer is obvious and dictated by experiential logic. No system of national or international justice, no matter how carefully planned or how well administered, is perfect. All systems are human institutions and function more or less well. The task is to see if this recommended institution can work as well as domestic systems and whether it can provide benefit to domestic systems and to the international community. Thus, the initial premise must be that an international criminal court will not be a panacea for all ills in relation to international and transnational crime facing the world community. Rather, the institution will be worthwhile if it merely can provide an additional strategy to deal effectively with these problems in a manner that is likely to produce incremental positive results.

The third issue is whether, even with its flaws, the tribunal will enhance each participating nation's criminal justice system and promote solutions to seemingly intractable problems of cooperation in matters of international criminal law. Will it do this without creating problems that are just as serious or more serious than the problems it resolves? It undoubtedly will resolve many problems in the international criminal law arena. It will not resolve them all. The system even may create some problems as well. The test will be whether the problems can be obviated in the organic statute and the development of the court.

Acceptance of the premise that an international criminal court will solve some of the problems facing the international community inevitably leads to the acceptance of the proposition that it will benefit the international community in matters of international criminal law, as long as it does not create problems as great or greater than those it resolves. Such an evaluation necessarily leads to a qualified acceptance of the idea, subject to a determination of what negatives it will produce and the development of means and methods that are likely to eliminate or reduce negative consequences sufficiently to make the institution worthwhile.

This exercise leads to the examination of the various objections raised against the establishment of an international criminal court to see whether they can be resolved, reduced, or eliminated and whether, ultimately, the benefits exceed the potential problems. Some people are ideologically or philosophically predisposed to reject anything international; those with isolationist premises likely will not accept even the possibility

of an international criminal court. We do not address those who are ideologically or politically predisposed to rejection of the idea. We wish to address the many legitimate questions raised in good faith by those who support the idea, those who support studying the idea to see if it might work, and those who may be skeptical about its validity or its potentiality for effective implementation.<sup>27</sup>

Our analytical framework will be to consider several categories of questions that arise in relation to the development of an international criminal court. These categories include:

1. Sovereignty and Jurisdictional Bases;
2. Jurisdiction of the International Criminal Court Over the Resolution of National Criminal Justice Conflicts;
3. Crimes Within the Court's Jurisdiction;
  - a. the court's exclusive jurisdiction;
  - b. the alternative of concurrent jurisdiction on the basis of transfer of criminal proceedings;
4. Applicable Law Regarding Substantive and Procedural Fairness;
5. Miscellaneous Issues;
  - a. selection of judges
  - b. mechanism of the court.

#### A. *Sovereignty and Jurisdictional Bases*<sup>28</sup>

Questions of sovereignty and jurisdiction are interrelated. The first question is whether a state can relinquish jurisdiction over certain offenses and in certain circumstances and yet remain sovereign. In other words, can a state allow an international criminal court to have exclusive jurisdiction over certain crimes or under certain circumstances? Furthermore, can a sovereign state surrender sovereignty to adjudicate and en-

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27. Professor Blakesley places himself, as do perhaps many others interested in the idea and the project, in category two, or perhaps a combination of all three categories: an enthusiastic, yet moderately skeptical at least to the extent that his legal training has made him perpetually skeptical, supporter of the project to see if it can be developed in a manner that will be efficient, fair, and protective of human and civil rights. Professor Bassiouni recognizes the validity of this skepticism, but is more optimistic about the prospects of finding satisfactory solutions.

28. See generally, CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY* ch. 3 (1992); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 *INTERNATIONAL CRIMINAL LAW: PROCEDURE* (M. Cherif Bassiouni ed., 1986); Christopher L. Blakesley *Jurisdictional Issues and Conflicts of Jurisdiction*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* (M. Cherif Bassiouni ed., 1988) [hereinafter *LEGAL RESPONSES*]; Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 *J. CRIME L. & CRIMINOLOGY* 1109 (1982).

force certain crimes in instances when the court's jurisdiction would supersede national criminal jurisdiction. A related issue is whether the jurisdictional bases of the international criminal court will diminish or enhance the function of any domestic judicial system. Will it enhance or encumber a state's capacity to provide fair and reasonably effective adjudication of those accused of international and transnational crime? Of course, states relinquish jurisdiction to other states through extradition or transfer of proceedings over offenses when both states may have jurisdiction. A state may decide to have another state prosecute such an offense. Allowing an international tribunal do this is not a significant leap.

A number of states are fearful of losing control of the adjudicatory or prosecutorial process because they believe that sovereignty requires it, that their own constitutions require it, or that this loss of control may produce adverse results. These adverse results, in some cases, may be predicated on that state's explicit or implicit desire to shield a given person or type of person from international adjudication for alleged international or transnational crimes. In some other cases, the reverse is true: they fear that the adjudication will not take place or will take place in a manner that will not serve the best interests of effective prosecution. Some states also fear that the tribunal will be used for political purposes. In other words, different nations have various expectations and perspectives, which change over time. Some of these expectations relate to the nature of the offense, while others relate to the way the international criminal court will operate. To deal with these questions at the abstract or theoretical level would not necessarily be conducive to any valid practical results. A better starting point would begin with a pragmatic examination of the jurisdictional bases on which this international criminal court would operate and then would seek to retrace those different jurisdictional tracks to the higher concerns of national sovereignty and international relations.

Jurisdictional bases can probably be divided into three categories:

1) The court may act as a conflict resolution mechanism over certain crimes in cases of concurrent jurisdiction and conflicts between national criminal justice systems.

2) The court may have concurrent jurisdiction with national criminal justice systems, either based on:

- a) a loose concurrent jurisdictional approach, or
- b) a transfer of criminal proceedings from a national criminal justice system.

3) The Court also may have exclusive jurisdiction with respect to certain offenses, certain offenders or upon certain circumstances.

Obviously, these jurisdictional bases can be exercised by an interna-

tional criminal court and each one has its advantages and disadvantages depending upon the goals that this kind of court seeks to achieve. Each one of these bases, however, will be more or less opportune, depending on the person accused and the nature of the crime alleged.

Much of the opposition to the establishment of an international criminal court is based on governmental political concerns. Some of these stem from the desire of public officials to shield themselves and other senior public officials, especially heads of state, from being charged before such a court. These concerns fall into two different categories. Genuine concern and reasonable apprehension may arise that an international criminal court or its prosecutorial arm may become politicized, leading to unjustified or unwarranted accusation of public officials for political purposes. The fear is that the court will be a mechanism for propaganda and a means of producing political detriment to the target country or its political administration. Concern over potential politicization can be addressed in the same manner as any prosecutorial abuse or misconduct. Protection against abuse of power or process can be guaranteed effectively in the substance of the governing rules and the structure and mechanism of the court as controlled in the organic statute of the court. The protection of heads of state and other senior government officials, however, really ought to be no less and no more than the protection afforded any other individual who may be the subject of prosecutorial abuse or misconduct. Moreover, with the tendency of states to expand their own extraterritorial jurisdiction, the protection afforded by the international tribunal may be better than under the current system.

Furthermore, notwithstanding one's profession to the equal application of human rights to all individuals, political reality indicates that some individuals will be more equal than others. Heads of states and senior public officials will perhaps be afforded more protection. Clearly, the more a particular crime contains a political component and the more a given accused embodies or represents a political persuasion, group, or state, the less likely that the court will effectively obtain subject matter and in personam jurisdiction.<sup>29</sup> Consequently, like any domestic criminal

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29. See, e.g., *U.S. v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990) (the objectives of the Panama invasion were, "to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges in the United States."); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdugo-Urquidez*?, 56 Mo. L. Rev. 213 (1991); Steven B. Stokdyk, Comment, *Airbone Drug Trafficking Deterrence: Can A Shootdown Policy Fly?*, 38 UCLA L. Rev. 1287 (1991); Phillip R. Trimble, *International Law, Foreign Policy, and the Reagan Years*, 85 Nw. U. L. Rev. 1041 (1991) (reviewing DANIEL P. MOYNIHAN, *ON THE LAW OF NATIONS*

justice system, circumstances and personalities may reduce the effectiveness of an international criminal court. The converse, however, is equally true.

This observation thus raises another important threshold question: whether to confer jurisdiction to the international criminal court over such international and transnational crimes that have the least political content, or, alternatively to differentiate among the jurisdictional bases stated above in accordance with the nature of the crime. In other words, should the court's jurisdiction be based only on questions of jurisdictional conflicts between states and issues of concurrent jurisdiction or else on questions of transfer of proceedings, thus giving states an opportunity to select the cases it will submit to the ICC and exclude compulsory jurisdiction of the court or exclude original jurisdiction with respect to certain crimes.

Conventional and customary international criminal law recognizes twenty-two categories of international and transnational crimes.<sup>30</sup> In the order of the values they seek to preserve and the harm they seek to avert; they are as follows: aggression, war crimes, crimes against humanity, genocide, slavery and slave-related practices, *apartheid*, unlawful human experimentation, torture, unlawful use of weapons, piracy, hijacking and sabotage of aircrafts, attacks against and seizures of internationally protected persons and diplomats, taking of civilian hostages, international traffic in drugs, destruction or theft of national treasures, theft of nuclear materials, unlawful use of the mail, cutting of international submarine cables, bribery of foreign public officials, international traffic in obscene materials, counterfeiting, and certain types of environmental harm. Some of these crimes clearly cannot be committed without state action or policy, and, therefore, they are among those crimes with the highest political content: aggression, crimes against humanity, genocide, and *apartheid*.

All the other crimes also can be, but are not necessarily, committed pursuant to state action or policy, or, whenever they are abetted by state conduct. Experience indicates that such crimes as international traffic in drugs, taking of civilian hostages, piracy, hijacking and sabotage of airplanes, unlawful use of the mail, torture, unlawful human experimentation, bribery of foreign public officials, cutting of submarine cables, counterfeiting, and international traffic in obscene materials usually are committed by individuals and small groups without state action or policy

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(1990)).

30. See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* lvi-lvii (1985) [hereinafter BASSIOUNI, *INTERNATIONAL CRIMES*]; see also BASSIOUNI, *supra* note 13.

commanding, instigating, supporting, or abetting the commission of such crimes. Others, like war crimes, since World War II, have been committed both with and without state action or policy that commands, instigates, supports, or abets such conduct. While every international and transnational crime is capable of having a political content, however, some by their nature cannot be devoid of it, while others by their nature are indeed devoid of it. Such crimes, particularly when committed without state action or policy, are more likely to result in greater cooperation between states to ensure prosecution or extradition.<sup>31</sup> Therefore, they are among the types of crimes for which offenders are more likely to be surrendered to jurisdiction of an international criminal court. This does not mean, however, that states will be restricted in their ability to act unilaterally and prosecute offenders. It also does not imply that two or more states willing to cooperate in the apprehension, extradition, and prosecution of offenders will be able to do so. The ICC merely will be an added instrument for the effective prosecution of those cases when states, for whatever reasons they may have, elect to have the ICC adjudicate these matters. In other words, the ICC would become an incremental or additional tool to achieve the goal of effective international prosecution without impairing the ability of states willing and capable of doing this to act accordingly.

In addition to the nature of the crime, the personality of the perpetrator and his or her motives also play an equally important role in the determination of the political content of the prosecution. Therefore, a head of state engaging in drug trafficking or supporting international terrorism for his or her personal benefit becomes a more difficult case to prosecute, whether by a national or an international criminal court. The Noriega case stands as a glaring example of when a single accused defendant was the catalyst for a military invasion by one country of another, with the resulting death of an estimated three thousand persons and other grave consequences to that society, not to mention the economic costs of such an operation to the attacker and the nation attacked and its impact on the preservation of world order.<sup>32</sup>

The point is that cases will always arise in which the political content of the offense or the political personality of the accused will be a decidedly negative factor in the court's securing jurisdiction and effectively

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31. See generally JOHN F. MURPHY, *PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES* (1985) [hereinafter MURPHY, *PUNISHING INTERNATIONAL TERRORISTS*]; JOHN F. MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS* (1989).

32. See *Noriega*, 746 F. Supp. 1506; see also sources cited *supra* note 29.



carrying out prosecution. These hard cases, which would face this international criminal court, however, would also face domestic criminal courts. Those unbendingly opposed to the very idea of an international criminal court have raised hard political cases as "straw-people" to be knocked over and the court along with them. Setting up as a model the hard cases is unfair because they are least likely to be resolved as a basis to judge the ordinary operations of an international criminal court, which is not likely to deal on an everyday basis with such hard cases. When a case with serious political content arises, the international tribunal will have international law and the law that the party nations place in its charter to allow it to deal with the problem.

*B. Jurisdiction of the International Criminal Court Over the Resolution of National Criminal Justice Conflicts*

An international criminal court addressing conflicts between national criminal justice systems can have only beneficial results on the resolution of potential international conflicts. Such a jurisdictional function, however, by itself would not be sufficient for the establishment of an international criminal court since these matters are quite amenable to adjudication by the International Court of Justice (ICJ). So far, however, no such cases have been brought before the ICJ. Nothing prevents the ICJ from taking such cases until an international criminal court is established except for the sometimes paramount obstacle of optional jurisdiction. Of course, the ICJ's jurisdiction is over states that submit to its jurisdiction. Should an international criminal court be established, its jurisdiction will be over individuals, so mandatory jurisdiction would be more appropriate with that specialized court and more readily acceptable. The organic treaty statute creating the international criminal court would confer compulsory jurisdiction over the listed offenses and over individuals alleged to have perpetrated them. This is not novel. Compulsory jurisdiction is embodied in other conventions. For example, the Vienna Convention on the Protection of Diplomats confers compulsory jurisdiction in matters of disputes over diplomatic immunity and the treatment of diplomats to the International Court of Justice.<sup>33</sup>

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33. The United States accepts the notion that the ICJ may have compulsory jurisdiction when treaties provide for it. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 107 (1988). Thus, the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, 3375, 500 U.N.T.S. 241, 241, states, at article I: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an applica-

The benefits of compulsory jurisdiction are quite obvious, especially in the arena of conflicting concurrent jurisdiction. One contemporary example deserves mention: the case where the United States and the United Kingdom seek to prosecute two Libyan officials for the sabotage and explosion of Pan American Flight 103 over Lockerbee, Scotland. The position of the Libyan government is that it is willing to prosecute them in Libya in accordance with and as required by its national law, which, like that of virtually all European and Latin American nations, prohibits extradition of its nationals. The position of the United States and the United Kingdom is that it cannot rely on the effectiveness of national prosecution because these individuals were part of a state structure that engaged in such acts of international terror-violence and that they were supported by state action or policy. The United States and the United Kingdom argue that the duty to prosecute in this case is meaningless because the conditions for effective prosecution do not exist. They insist, therefore, that the individuals be surrendered by extradition or other means for prosecution either in the United States or the United Kingdom. The Libyan case indicates the political nature of the current system. The United States and British governments certainly know that Libya legally cannot extradite its nationals. The United States and the British governments, however, actually might not expect extradition, but would prefer the propaganda benefits of condemning Libya for not extraditing.<sup>34</sup> France also has sought the same two Libyans in connection with the sabotage and explosion of a French UTA aircraft.

Thus, three states claim jurisdiction over two individuals, and their home state is offering to prosecute in lieu of extradition. The dispute is not likely to be resolved. If no diplomatic solution is reached, tensions

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tion made by any party to the dispute being a Party to the present Protocol." See also, Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 U.C.J. 7 (Dec. 15) (Request for the Indication of Provisional Measures); B. CARTER & P. TRIMBLE, *INTERNATIONAL LAW* 56-75 (1991); Mark W. Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144 (1987).

34. A similar circumstance occurred in relation to the tragic murder of Leon Klinghoffer. Although the United States Government made considerable noise about wanting to prosecute the perpetrators, United States jurisdictional law, in those pre-Omnibus Anti-Terrorism Act days, would not have allowed prosecution for murder on board a foreign vessel on the high seas. See Robert A. Friedlander, *The U.S. Legislative Approach*, in *Legal Responses*, *supra* note 28, at 3; B.J. George, Jr., *Federal Anti-Terrorist Legislation*, in *LEGAL RESPONSES*, *supra* note 28, at 25; see also Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983).

will increase and perhaps violence will erupt. The presence of an international criminal court would be a viable alternative to resolve such jurisdictional conflicts and could indeed lead to the peaceful resolution of conflicts such as this. The absence of such a mechanism allows states to remain on a conflict collision course. In this particular case, the absence of any meaningful alternative will lead to more and more sanctions being imposed against Libya and possibly even to violent action that could be disruptive of world order. The absence of an international tribunal actually provides a pretext for political machinations at the expense of actual prosecution and the rule of law.

Another instance when an international criminal court could have solved, not only jurisdictional conflicts, but also political and diplomatic crises that developed because of the failure to resolve the jurisdictional conflicts is presented by the tragic Achilles Lauro seizure. In that affair, passengers and crew were taken hostage and an innocent civilian was killed aboard an Italian vessel on the high seas.<sup>35</sup> Traditional international law provides Italy with jurisdiction upon the most basic jurisdictional theory, territoriality. The citizens aboard the ship were of different nationalities. Subsequent negotiations led to the ship docking in Egypt and the seizure of the persons who committed these crimes by Egypt. Diplomatic negotiations led to an agreement that Egypt would transfer custody of those individuals to the Palestine Liberation Organization in Tunis for trial. Egypt pursued the agreement in good faith, but the United States, doubting that such a trial would be effective, violated international criminal law by commandeering the Egyptian civilian airliner carrying the accused perpetrators. The airliner was forced to land in Italy. Thus, a diplomatic crisis developed between the United States on the one side, and Egypt and Italy on the other, wherein the United States used its armed forces to commandeer a plane and to force it to land in Italian territory without Italy's permission. The accused defendants were handed over to Italian authorities and, ultimately, all but one were tried and convicted in Italy.

Another similar jurisdictional dispute raised diplomatic tensions between the United States and Germany. It occurred in connection with the trial of two individuals accused of hijacking TWA Flight 783 in Lebanon. The United States sought their extradition, but Germany declined and prosecuted them instead.<sup>36</sup> In connection with this situation,

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35. See Gerald P. McGinley, *The Achilles Lauro Case: A Case Study in Crisis Law, Policy and Management*, in *LEGAL RESPONSES*, *supra* note 28, at 323.

36. See David M. Kennedy et al., *The Extradition of Mohammed Hamadei*, 31 *HARV. INT'L L.J.* 5 (1990).

two German citizens were kidnapped in Lebanon by the same group of people to whom the hijackers belonged. As a result, the absence of any alternative to prosecution in Germany or extradition to the United States apparently led to German vulnerability to further hostage taking and raised tensions between the United States and Germany.

Numerous other cases of conflict of criminal jurisdiction between states exist, as well as cases involving the unwillingness or inability of a given state to surrender an accused for prosecution to a requesting state. These would be the daily bread-and-butter cases of an international criminal court. These cases arise essentially in connection with international drug trafficking and international terror-violence.<sup>37</sup> The absence of an effective conflict resolution mechanism, such as the one proposed herein, frequently results in the unlawful abduction by the original requesting state of the individual whose surrender by means of extradition was denied by the requested state in whose territory the individual was found. This creates further potential conflict or disruption of friendly relations between these two states.

Finally, complex cases of transnational criminality arise in the area of economic and business crime, as well as in the area of money laundering, whose commission involves more than one state and citizens and legal entities of more than one state. These types of cases also raise conflicts of national criminal jurisdiction in need of resolution and highlight the need for an international criminal court having jurisdiction to try the merits of the case.<sup>38</sup>

The international criminal court's adjudication of questions of conflicts of national criminal jurisdiction, as well as disputes over interpretation of treaty obligations in international criminal law, particularly with respect to the obligation to prosecute or extradite, can only be beneficial, even though some hard cases will arise when, just like in the national courts, the expected positive results are not likely to be produced every time.<sup>39</sup>

### C. *Crimes Within the Court's Jurisdiction*

An international criminal court ultimately must have jurisdiction over the merits of cases involving an international or a transnational crime. Among the first issues to be addressed is whether the court will exercise

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37. See M. Cherif Bassiouni, *Effective National and International Action Against Organized Crime and Terrorist Criminal Activities*, 4 EMORY INT'L L. REV. 9 (1990).

38. See, e.g., INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (Ved P. Nanda & M. Cherif Bassiouni eds., 1987).

39. See MURPHY, PUNISHING INTERNATIONAL TERRORISTS, *supra* note 31, at 1-5.

its jurisdiction only over natural persons or whether jurisdiction will be extended over legal entities such as business entities and states. For obvious political reasons, this is not the opportune time in history to raise the question of international criminal state responsibility and the subjection of states to the jurisdiction of an international criminal court. That time has not yet come, but it will as the world grows more interdependent. Some nevertheless urge that an international criminal court would not only have jurisdiction over individuals, but over legal entities such as corporations. This is particularly significant with respect to economic crimes, money laundering, and a variety of crimes that may be accomplished by individuals making use of legal entities. To some, the solution to the problem merely would be to prosecute individuals, irrespective of the legal entities they may use. That, however, would allow the use of legal entities to provide individuals either with an effective shield or at least would make prosecution more difficult if the legal entity would not be subject to the court's jurisdiction for purposes of securing evidence or tying down the assets and reaching other persons who, in some way, may have aided, abetted, or participated in the commission of such a crime. Also worth consideration is whether the international criminal court would have some form of exclusive jurisdiction, jurisdiction concurrent with that of states, or a combination of the two. Furthermore, which specific crimes will be part of the court's competence within these jurisdictional bases must be determined. Therefore, all of the issues relating to jurisdiction, substance, procedure, and politics are interrelated.

### 1. The Court's Exclusive Jurisdiction

Of all the jurisdictional bases, exclusive jurisdiction is the most difficult to achieve politically. States are reluctant to relinquish jurisdiction to an international criminal court for a variety of xenophobic reasons, as well as legitimate political and practical concerns. States, thus, would be unlikely to agree, in the first stage of the establishment of an international criminal court, generally to grant that court exclusive jurisdiction. Nothing, however, precludes member states to a treaty statute establishing this court to formally grant the court exclusive jurisdiction in certain crimes. Some states quite likely will do so with respect to those crimes they feel may never occur on their territory, thereby allowing them to look as if they are more responsible participants in the international processes. That is likely to be the case with respect to a number of states that would confer to the court exclusive jurisdiction with respect to crimes like genocide, *apartheid*, or slavery. Conversely, in those states in which these practices may exist or may have existed, they probably will not confer such a court exclusive jurisdiction. Of all twenty-two interna-

tional crimes,<sup>40</sup> those less likely to be the subject of original jurisdiction are those having the highest political content, such as aggression, and those having the largest economic interests at stake, such as environmental crimes or bribery of foreign public officials.

Admittedly, however, reticence to confer original jurisdiction upon an international criminal court that has not yet established itself is understandable. Therefore, allowing states freely to confer or withhold jurisdiction as they may deem appropriate, by filing a declaration with the repository of the treaty statute for the court, as well as with the court, would be an appropriate formula. The member states, however, must agree in advance on the list of crimes that may be the subject of such original jurisdiction. The twenty-two international and transnational crimes listed above<sup>41</sup> probably would constitute the basis of that list, subject to expansion in the future as agreed upon by the state parties to the treaty statute.

## 2. The Alternatives of Concurrent Jurisdiction and Jurisdiction on the Basis of Transfer of Criminal Proceedings

These two bases are quite similar. Concurrent jurisdiction implies that a state having jurisdiction under any of the four internationally recognized areas of jurisdiction, namely territorial, nationality, passive personality, and protected interests, would be able to exercise that jurisdiction. It also implies that the court also would equally exercise its jurisdiction with respect to certain defined crimes. Presumably, these crimes would be the ones listed in the treaty statutes whether they be all or some of the twenty-two crimes listed above.<sup>42</sup> The problem with concurrent jurisdiction, however, is that it inherently includes the potential for jurisdictional conflict between two or more states and the international criminal court, something that needs to be avoided.

An alternative would be the development of certain criteria for the exercise of a right of first refusal jurisdiction by national criminal systems before the exercise of the concurrent jurisdiction by the international criminal court. So many possible variations exist, however, that a treaty statute foreseeing all the potential different forms of conflicts of criminal jurisdiction that may arise is quite unlikely. This would be particularly true with respect to complex transnational economic crimes or operations involving money laundering. A number of states might claim

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40. See BASSIOUNI, *supra* note 13.

41. See *supra* text accompanying notes 30-32.

42. See *supra* text accompanying notes 30-32.

jurisdiction, each one of them relying on a different theory of domestic criminal jurisdiction. Each state may not conceive or interpret the jurisdictional bases in the same way.

For example, a given state may claim territorial jurisdiction when one or more of the elements of the offense occurred on its territory (subjective territoriality), while another state could claim jurisdiction because another element of the offense occurred on its territory. Still a third state may claim jurisdiction on the basis of the impact of the offense occurring on its territory (objective territoriality), while a fourth may claim jurisdiction on the basis of the perpetrator's nationality, and a fifth state may claim it on the basis of the nationality of the victim (passive personality), and a sixth state may consider itself to have jurisdiction for having some portions of the transactions relayed through it. Finally, another state may claim it has jurisdiction because the offense impacted on one of its important governmental functions or interests. Each of these claims could obtain in one given offense. Each would be valid. Where would jurisdiction effectively lie when each one of these states can claim it? The international criminal court would also have concurrent jurisdiction because the offense might be one of the twenty-two listed international or transnational crimes. Certainly, the existence of an international criminal court would help to dissipate friction and competition. Problems may still arise, however, in relation to competition among the various states claiming jurisdiction and the international criminal court. This is precisely the sort of ambiguity that needs to be avoided if the court is to operate successfully and obtain consensus in the international community.

The concept of concurrent jurisdiction should be preserved. The way to effectuate such concurrent jurisdiction, which also will fulfill a variety of national sovereignty concerns, would be for the states to allow the member states to transfer the proceedings or otherwise to allow the court to exercise its concurrent jurisdiction without claiming jurisdiction. While the transfer of proceedings mechanism has been established in Europe, it needs to be fine tuned in order to foresee the different possible situations in which such cases could arise and to formulate appropriate provisions in the treaty statute to regulate its function. This mechanism could possibly work in two ways. The first is simply for the state that has jurisdiction on any one of the four bases stated above not to exercise it and thus, by a *de facto* default, the international criminal court could exercise its concurrent jurisdiction. The second formula would be when the state having a jurisdictional basis undertakes affirmatively to transfer the proceedings to the international criminal court and, indeed, to declare that it does not wish to exercise its concurrent jurisdiction in the

case. This will avoid potential conflicts between various national criminal justice systems and the international criminal court. Obviously, in those cases in which a state refuses to acquiesce to ICC's jurisdiction or transfer jurisdiction and affirmatively asserts its own, thus undertaking effective prosecution, the question becomes somewhat moot, unless the state somehow fails to effectively prosecute and only claims to assert its national criminal jurisdiction as a way of shielding the perpetrator either from prosecution or adequate punishment. In this case, another state party may bring an action before the ICC to challenge that state's action. Such a case would imply the application of international norms of state responsibility.<sup>43</sup>

The types of cases that are likely to arise in this category of jurisdiction are: 1) complex economic crimes and money laundering cases, 2) international drug trafficking cases, or 3) international terror-violence cases.

The motivation to relinquish national criminal jurisdiction in favor of the court's concurrent jurisdiction or to transfer proceedings once they have begun in a national criminal justice system will be different in each case. One can advance a number of likely motivations. First, the nature of the crime might subject the state to some type of retaliation, harassment, or hardship because of the nature of the crime or the personality of the actor. Such cases might arise when a state is seeking to prosecute an individual who is engaged in an act of international terror-violence, but may be vulnerable because a group or state supporting that individual may cause harm to the citizens of the state seeking to prosecute. For example, if Germany had extradited the accused persons in the TWA hijacking or transferred the proceedings to an international criminal court, its two citizens, taken as hostages in Lebanon, may have been spared. Germany would not have been vulnerable to blackmail if the persons had been immediately relinquished to the custody of the international criminal court and away from Germany.<sup>44</sup>

Second, the situation of a conflict between a state seeking to extradite and a state seeking to prosecute is also illuminated by the prior Germany-United States example. Surrender of the individual to the international criminal court would have avoided the potential conflict between the two countries. Also, a number of cases involving surrender of individuals in international terror-violence, as well as international drug traf-

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43. See Report of the International Law Commission, U.N. GAOR, 43d Sess., Supp. No. 10, at 255, U.N. Doc. A/46/10 (1991); IAN BROWNIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (1983).

44. See Kennedy, *supra* note 36.



ficking, would be resolved by such a mechanism.

Third, a state might find itself embarrassed to prosecute a certain individual, either because the case has a political scandal component or because it involves senior public officials, who still may have a political following in the country and whose subsequent action during the prosecution of such senior public officials may become destabilizing. One example would have been had President Corazon Aquino, upon being elected in the Philippines, sought to try the late President Ferdinand Marcos in that state. Another example would have been if, after the United States invasion of Panama, General Noriega had been returned there for prosecution by the new government that had been established with the support of the United States. Clearly, both of these instances are indicative of the destabilizing effect on the state by the return of such a prominent personality for prosecution there at a period of time in the history of that state when this person's supporters would likely cause political hardship to the new regime.

The bread and butter cases of the court are not likely to be the high visibility political cases. They are likely to be cases in which the court might render a better service because of the nature of the crime, or because of its complexity, or because witnesses may be in different parts of the world and evidence may be scattered throughout different countries. Most of these cases probably will involve instances when prosecution or extradition is not likely to occur and this system thus will serve as a way of resolving some of the problems that now arise in connection with the difficulties of implementing the prosecute-or-extradite formulae. In some cases, the scenario might be like Libya's desire to prosecute the two individuals sought by the United States, the United Kingdom, and France, and, in other cases, it would be to resolve conflicts such as multiple extradition requests for one individual in a given country and the dilemma of that state in deciding where to extradite the individual. Other cases may involve the political inability of a given country to prosecute individuals or to extradite them to a particular country, and, therefore, surrender to the international criminal court might be the more politically feasible and practical alternative. In short, a politically neutral forum might prove to be the more attractive solution to countries that may find themselves in difficulty over prosecution or extradition.

In this respect, the court would incrementally add to the international efforts of controlling and suppressing international and transnational criminality. Furthermore, such an international criminal court certainly would be a desirable alternative when states are seeking the prosecution of certain offenders, but do not have the material means to conduct an appropriate investigation or the available evidence to conduct an effective

prosecution. Another valuable feature in this respect is that the existence of such a court would resolve other issues relating to the motivation of certain states not to extradite, such as humanitarian motivations that sometimes may be raised under the rubric of the political offense exception or the rule of non-inquiry. The existence of an alternative such as the international criminal court certainly would allow prosecution in a non-hostile setting and would allow a state that might have compunctions about extradition to transfer the case to the international court. This would be a valuable mechanism for the requested state, for the accused, and for the international community. Finally, one must not underestimate the symbolic importance of the demonstrated collective international interest and commitment to the prosecution and eventual punishment of offenders who have committed international and transnational crimes that affect the interest and well being of the world community as a whole.

#### D. *Applicable Law Regarding Substantive and Procedure Fairness*

Among the more serious questions raised in connection with the international criminal court's exercise of trial jurisdiction is the applicable substantive and procedural law. With respect to the applicable procedural law, this issue is not of primary significance because international human rights norms and standards on fairness have reached such a level that developing a common denominator of a sufficiently high standard to satisfy the requirements of most countries of the world is quite possible. At this time, however, the United States stands far above and beyond all other countries with respect to providing effective guarantees to an accused offender because of its Constitution.

As a result, some particular procedural aspects may have to rise above existing internationally recognized norms and standards. Among those are the questions of search and seizure, right to counsel during the critical stages of the investigation, and the right not to testify against oneself during the investigation. During the trial, the right to confrontation and cross examination are paramount. Perhaps of even more significance for the United States are questions relating to trial by jury—would there be a right to a jury trial, and, if so, what sort of jury?—burden of proof, and protections related to evidence production and presentation at trial. The right and mechanism for appeal also are of great import, including whether the appeal will be a trial *de novo*, as in some nations of Europe and elsewhere, or one for errors of law only. Also, will the Court have authority to resolve the problem or merely to *casser* the prior judgment in the manner of the French *Cour de Cassation* and other supreme courts following the same jurisdictional basis? With the exception of the

jury trial, evidentiary rules, and burden of proof, the international norms and standards adopted in the draft statute for the establishment of an international criminal court submitted to the Eighth United Nations Congress on Crime Prevention and Treatment of Offenders seemingly embodies all of these international norms and standards that would conform to the highest standards of fairness.<sup>45</sup> Resolving all of these issues completely is certainly important.

Substantive law questions become more difficult, especially in relation to aspects of: (1) the general part of criminal law; (2) the special part, namely the crimes and their elements; and (3) the penalties.<sup>46</sup> With respect to the general part, the problem easily can be resolved by adopting the formula that the state where the crime territorially has occurred in all or in part will control with respect to that aspect of substantive criminal law. In this case, whether the court relies on its concurrent jurisdiction or on transfer of criminal proceedings, it will use the law of the transferring state or the state with concurrent jurisdiction on the basis of territoriality. In the event that multiple states are likely to exercise concurrent jurisdiction and they all have relinquished their jurisdiction to the court, the court would apply basic rules of conflicts of laws to determine which state has the most significant contacts or relations to the nature of the criminal transaction. This will determine the state whose general part of the criminal law will apply. A number of rules of private international law conflicts can apply without too much difficulty.

The state whose substantive law, the general part, applies will also have its penalties apply. This will avoid the problem of codifying the general part of criminal law in view of the diversity of the various national criminal justice systems and in view of the diversity of penalties. It also provides a rational and logical nexus between the application of the law and the imposition of penalties to the place where the crime was committed. The notion of notice and fairness also would be satisfied by this formula.

With respect to the special part, the creation of an international criminal code seems indispensable. The code must define and provide the substantive elements of those crimes that will be within the concurrent or transfer jurisdiction of the court. Assuming that we are dealing with the twenty-two international crimes listed above, an agreement on the definition of these crimes would have to be reached.<sup>47</sup> The reason for that is

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45. See *Draft Statute*, *supra* note 23.

46. For an attempt to prepare a general part for an International Criminal Code, see BASSIOUNI, *supra* note 13.

47. See sources cited *supra* note 13.

that 315 international instruments deal with these 22 different categories of crimes.<sup>48</sup> Some of them are no longer in force; some of them are relevant for certain aspects of the crime.

Generally, the elements of the crimes are not spelled out in a fashion required by the legality requirement of criminal law. A progressive and harmonious codification is necessary to preserve the principles of legality recognized in the world's major criminal justice systems. People must be on notice of what the prohibited conduct is in order to be held accountable to conform their behavior to such standards. It also is indispensable in order to formulate a precise indictment and to provide the defense with an adequate opportunity to defend. Most of these crimes have already been defined in a number of conventions, and the progressive codification work that would be needed is not that significant.<sup>49</sup>

In fact, Professor Bassiouni has already undertaken this effort, which can serve as a model. The International Law Commission has been engaging in this process now for a number of years in connection with formulating a Draft Code of Crimes against the Peace and Security of Mankind.<sup>50</sup> Unfortunately, the Commission has not had the benefit and input of criminal law and international and comparative criminal law experts to sufficiently be able to formulate the types of definitions that satisfy the standards of the principles of legality, but improvements of such a formulation undoubtedly can be made. The prospect of arriving at a sufficient, coherent, and systematic code of offenses that will meet criminal justice standards of legality does not appear insurmountable, in view of the already-proposed Draft International Criminal Code<sup>51</sup> and the proposed Statute of an International Criminal Court,<sup>52</sup> if the political will to do so is achieved.

#### E. *Miscellaneous Issues*<sup>53</sup>

Among the various miscellaneous questions that are raised are the composition of the court and how it will function as presented in the

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48. See BASSIOUNI, *INTERNATIONAL CRIMES*, *supra* note 30.

49. See sources cited *supra* note 13; see also Yoram Dinstein, *International Criminal Law*, 5 ISR. Y.B. HUM. RTS. 55 (1975); L.C. Green, *An International Criminal Code—Now?*, 3 DALHAUSIE L.J. 560 (1976).

50. For the latest report of the International Law Commission on the work of its 43rd Session from April 29 to July 29, 1991; see U.N. GAOR, 46th Sess. Supp. No. 10, U.N. Doc. A/46/10 (1991).

51. *Draft Statute*, *supra* note 23.

52. See *id.*

53. Many of these questions have been addressed in the Draft Statute International Criminal Tribunal, *id.*; see also BASSIOUNI, *supra* note 13; BASSIOUNI, *supra* note 16.

Draft Statute. The Court's structure and mechanism will be as follows:

### 1. The Selection of Judges

Two formulas are possible to select judges. One formula is whether or not the judges shall be appointed by each of the member states on the basis of criteria that each country will administer, or else whether the member states' representatives collectively will join in electing a number of persons of the highest level of competence and integrity irrespective of their nationality. Believing that representatives of states will not seek to have candidates from their country elected to that position would be naive. Furthermore, believing that geographic representation and political persuasion will not be a factor in the election of judges would be equally naive. These considerations, however, invariably are taken into account at the national criminal justice levels, unless we are dealing with career civil service systems when geographic representation and political persuasion are not factors in the entry into judicial careers. In some respects, one must maintain a certain faith in the belief that even political representatives of the member states will be more concerned with their selection of judges because of its ultimate impact on the reputation of that state, as well as because of their interest in insuring that the court will have the best possible representation.

### 2. Mechanisms of the Court

Probably the most important issues relating to the viability and acceptability of the Court relate to the processes of the court: namely, the mechanisms it would employ to secure the presence of the person, to obtain evidence to conduct investigations, and to administer both the prosecutorial and judicial functions. Some sort of equivalent to the United States Fourth, Fifth, and Sixth Amendments, for example, must be included. These are among the practical and fundamental questions that we have addressed in our consideration of the possibilities of an international criminal court. They are paramount and should be examined.

Among the practical issues is the question of whether the court will have its own location and what would be the facilities of such a tribunal. Will it also have a lockup or prison in which it can keep persons? Will it have some police force at its disposal in order to conduct investigations or to secure the custody of persons or evidence? These are important practical questions that will be the difference between the court's success or failure. The optimal solution obviously is for the court to have its own site where it could be secure from likely attacks or pressures and that

would insure the maximum security, not only of judges and personnel, but also of security and integrity for the process.

This site could well be selected in a remote location, geographically difficult to reach, to maximize the security elements. Many cites around the world certainly could offer these opportunities. For example, numerous locations exist where this court could be installed on the continent of Australia, or maybe even on numerous islands in the Caribbean or the Pacific. Such inaccessible locations would permit the court to have its own complex and its own detentional facilities. In the final analysis, that would be the optimal solution. In this case, the court necessarily will have to have police supporting personnel for investigation and for custody. No reason exists why the court would not have among its administrative personnel police officers that would be assigned to it on a permanent or temporary basis by the member states, based on a screening and selection process that the court would establish. The screening and selection process would apply to all support personnel, including clerks, bailiffs, secretaries, and other administrative personnel.

Having investigative personnel attached to the court has several advantages. The investigative function would be controlled by means of the treaty statute that would provide for the methods of mutual assistance between the court and the various member states. The prosecutor general of the court would communicate the request for mutual assistance to the member states involved by virtue of this type of agreement. The investigating personnel would be either those working in a prosecutorial capacity in the prosecutor general's office or support personnel, among whom would be police investigators that simply would be authorized to go into the country from whom mutual assistance is requested and to work with the local police authorities. The cooperation would be no different from what it is today among nations. The model would be that administratively followed by INTERPOL in relations between collaborating states. A number of practical details undoubtedly would have to be worked out, but those who have some knowledge of the workings of international organizations, as well as international criminal justice systems, would have no difficulty setting out an administrative system for these mechanisms.

### III. CONCLUSION

An international criminal court is both desirable and feasible. Its time has come. It can accomplish a variety of valid and valuable functions in the prevention and suppression of international and transnational crime. Its acceptability, however, depends on the incorporation of protections such as those indicated in this Article. The creation of this court, how-

ever, requires the political will to incorporate those protections and to accept the possibilities of this cooperative venture with a positive outlook on what can be accomplished.

At this time, most of those who seem to oppose it are diplomatic representatives of different states who may not be sufficiently familiar with international and comparative criminal law, and who, therefore, anticipate more problems than really exist and are apprehensive about resolving problems that do exist. Certain criminal justice officials also are opposed because they feel that unilateralism and bilateralism are the best approaches to deal with transnational crime. Their interest in unilateralism and bilateralism, however, generally relates to transnational crimes over which their domestic system has extended jurisdiction. They are less interested in international crimes because these are not usually within their competence. In that respect, they fear that an international criminal court might be a way to reduce their role and importance or to reduce the effectiveness of pressure on those who engage in such transnational crimes over which they do have an interest. Their concerns are not without merit. The problem is that they raise these concerns to the level of insurmountable hurdles. They are not necessarily insurmountable hurdles; their concerns may be resolvable.

The tribunal ought to be pursued as a cooperative and collaborative effort, not as a replacement for current domestic and international institutions. It is an additional alternative vehicle to be applied as a facilitator for the nation-parties to resolve problems in the arena of international criminal law. Rational objections, like those discussed in this paper, undoubtedly are valid and legitimate. They must be addressed and resolved. They cannot be addressed or resolved, however, in a negative, obstructionist spirit.

In other words, if the starting point is just to say "no" because it is considered unlikely that we can move to the positive resolution of these questions or because it is simply easier to maintain current inertia, the outcome indeed will be unfortunate. A more propitious attitude would be to say "yes, but. . ." and to work on the solution of the various "buts." Lastly, an international criminal court is not to be considered as an all or nothing proposition. It can be developed incrementally as well, provided it is given enough standing and competence to develop a record that will permit it to gain more and more confidence and therefore expand its beneficial role. The history of the United States Supreme Court certainly would be the evolutionary model that we would look up to from a national perspective, but certainly the history of the evolution of the European Court of Human Rights would be the international model to be followed. Its success should be enough to reassure anyone who has

had the doubts that were raised in 1950 when that court was established and that are raised now in anticipation of the establishment of an international criminal court.

## Appendix

### I. *Establishment of an International Criminal Court*

#### A. OFFICIAL TEXTS

1. Convention for the Pacific Settlement of International Disputes (Hague I), July 19, 1899, 32 Stat. 1779, 26 Martens Nouveau Recueil (ser. 2d) 720, (entered into force 4 September 1900).
2. Convention Relative to the Establishment of an International Prize Court (Second Hague, XII), signed at The Hague, Oct. 18, 1907, 3 Martens Nouveau Recueil (ser. 3d) 688 (never entered into force).
3. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43 (entered into force Jan. 10, 1920).
4. Convention for the Creation of an International Criminal Court, *opened for signature*, Nov. 16, 1937, LEAGUE OF NATIONS O.J. Spec. Supp. 156 (1938); League of Nations Doc. C.547(I).M.384(I)1937v (1938) (never entered into force).
5. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945).
6. International Military Tribunal For the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (entered into force January 19, 1946).
7. Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), adopted at Berlin, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946.
8. *Draft Statute for an International Criminal Court* (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951), U.N. GAOR, 7th Sess., Supp. No. 11, at 23, U.N. Doc. A/2136 (1952) at 23.
9. *Revised Draft Statute for an International Court* (Annex to the Report of the Committee on International Criminal Jurisdiction, Aug. 20, 1953), U.N. GAOR, 9th Sess., Supp. No. 12, at 21, U.N. Doc. A/2645 (1954), at 21.
10. *Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. Doc. E/CN.4/1416 (1980).

#### B. UNOFFICIAL TEXTS

1. *Report on the Creation of an International Criminal Jurisdiction*, by



V.V. Pella to the Interparliamentary Union, XXII Conference, held in Berne and Geneva, 1924, in *L'Union Interparlementaire. Compte Rendu de la XXII Conference tenue a Berne et a Geneva in 1924, publie par le Bureau Interparlementaire*, 1925; see also *L'Union Interparlementaire. Compte rendu de la XXIII Conference Tenue a Washington et a Ottawa en 1925* (1925).

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

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

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

5. *Project for the Establishment of a Convention for the Creation of a United National Tribunal for War Crimes*, established by the United Nations War Crimes Commission, 1944. See HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (United Nations War Crimes Commission ed., 1948).

6. *L'Union Interparlementaire. Compte rendu de la XXVII Conference Tenue a Rome en 1948*, (1949).

7. *Draft Statute for an International Criminal Court*, in TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (Julius Stone & Robert K. Woetzel eds., 1970).

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

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

10. *Draft Statute for an International Commission of Criminal Inquiry and Draft Statute for an International Criminal Court*, reprinted in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (1983).

11. *Draft Statute International Criminal Tribunal*, presented by the

AIDP to the 8th U.N. Congress on Crime Prevention and the Treatment of Offenders (Havana 1990), U.N. Doc. A/CONF.144/NGO7/ISIS, *reprinted in* 15 NOVA L. REV. 374 (1991).

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

C. OFFICIAL TEXTS

1. Principles of the Nuremberg Tribunal 1950, Report of the International Law Commission, *Principles of International Law Recognized in the Tribunal*, July 29, 1950, U.N. GAOR 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950), *reprinted in* 4 AM. J. INT'L L. 126 (1950).

2. *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, U.N. Doc. A/2693 (1954).

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