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The Proposed Permanent International Criminal Court: An Appraisal

Leila Sadat Wexler*

Introduction

The twentieth century has been plagued by wars, human rights abuses, and terrorism. Much of this activity falls under the rubric of international crime. Yet, although hundreds of treaties attempting to address these problems have been signed, their enforcement has been practically nonexistent. Indeed, it is unclear what conduct many of the instruments entered into actually cover. Crimes are undefined or poorly defined in some and others appear to proscribe without actually criminalizing particular behavior. No international criminal justice system exists to interpret and enforce international criminal law, and national criminal justice systems often lack either the authority or the political power to step in. Indeed, where the government itself is engaging in criminal behavior, national criminal justice systems are often part of the problem.

The case for a permanent international criminal court with jurisdiction over serious violations of international criminal law is therefore, as will be shown below,1 a compelling one.2 Legal accountability, if consist-

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1. See infra Part III.A.
ently enforced, would surely bring about much of the good on an international scale that it does domestically, in terms of deterrence of crime, rehabilitation of the victims of crime, retribution for the criminal act, and upholding of the principles of justice and law. Moreover, the creation of the ad hoc criminal tribunals for the Former Yugoslavia and Rwanda suggests that there is a political consensus on creating an international criminal court that was not previously present. At the very least, it indicates a relative openness of mind that is new.


5. The International Criminal Tribunal for the Former Yugoslavia has had problems implementing its mandate due to the lack of cooperation by some States, according to Tribunal President Antonio Cassese. United Nations Press Release, GA/9166, November 19, 1996. The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) will not be discussed in detail. However, references to their statutes, creation and operation will be made where relevant. As one commentator recently noted, almost all the features of the ICTR and ICTY concerning the election of judges, the jurisdiction of the Tribunals and the requirements of State cooperation are unlike the provisions of the proposed permanent International Criminal Court. Colin Warbrick, *The United Nations System: A Place for Criminal Courts*, 5 Transnat'l L. & Contemp. Pros. 237, 246 (1995). Thus, details of the ad hoc Tribunals' Statutes, while interesting, only indirectly inform our understanding of the permanent international criminal court. Id. at 260-61.

6. "For the first time since the Second World War, a variety of factors have converged creating a rare opportunity to augment the international legal structure and advance the rule of law by establishing a permanent international criminal court." Morris & Scharf, supra note 3, at 354.

Political support for the creation of the Court, at least in some countries, has been growing recently. The creation of an international criminal court was endorsed by President Clinton in October 1995 and again in January of this year. Peter Baker, *Clinton Renews Call for Standing War Crimes Tribunal*, Wash. Post, Jan. 30, 1997. More
In 1995, the U.N. General Assembly established a committee (the "Preparatory Committee") to consider the Draft Statute for a permanent international criminal court adopted by the International Law Commission (ILC) in 1994. The Preparatory Committee, open to all members of the United Nations as well as members of specialized agencies, was charged with "preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries." The Preparatory Committee concluded its first two sessions in 1996, and its mandate was renewed by the General Assembly at the end of the year. The Preparatory Committee recently concluded its third session and will continue its work over the next year.

Some countries, of course, remain deeply opposed to its establishment, or at least to its establishment on the terms envisaged by the 1994 ILC draft. Those objecting to the Court's establishment argue that if the Court is unsuccessful its ineffectiveness will undermine the international legal order its creation seeks to bolster. See, e.g., Christopher L. Blakesley, Report to the International Law Association Committee on a Permanent International Criminal Court Jurisdiction, Definition of Crimes and Triggering Mechanism, 13 Nouvelles Études Pénales 177 (1997); Robert B. Ely, III, A Proposal for an International Criminal Court; A Critique and an Alternative, 57 Dick. L. Rev. 46, 56 (1952).

Unlike civil courts, criminal courts cannot function effectively without the support of police forces and executioners of their own. . . . [If the proposed Court] were obliged to rely on national forces . . . it could not discharge its functions effectively except in the case of nonentities whose efforts were too obscure to be of any public interest, and whose trial might well be left to national courts.

8. U.N. GAOR 50/46, 50th Sess., U.N. Doc. A/RES/50/46 (1995). The Preparatory Committee was also instructed to consider "the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts" so as to accomplish its mission. Id. The resolution establishing the Preparatory Committee also decided that the General Assembly would study the report of the Preparatory Committee, and "in light of that report . . . decide on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court." Id.
and a half, leading up to a diplomatic conference which is now scheduled for 1998.\textsuperscript{11} It is hoped that the Court will be operational before the turn of the century.\textsuperscript{12}

Although the 1994 ILC Draft has often been criticized, a careful study reveals a thoughtful and reasonable outline of what the structure of the proposed Court might look like. The Commission’s draft also embodies certain structural flaws, however, which, if “enacted” by States, could prevent the Court from carrying out its intended role. The draft statute denies the Court the permanence and stability needed to develop institutional memory and competence;\textsuperscript{13} subjects its jurisdiction, in all cases except for genocide, to a regime of State consent that could cripple the Court completely;\textsuperscript{14} fails to provide for its financing; and, perhaps most egregiously, subjects the Court in large measure to the will of the Security Council. In the words of one author, “when the theoretical clutter is stripped away and realistic probability is considered, the court may never have occasion to deal with any cases except upon affirmative action by the Security Council."\textsuperscript{15} Finally, in trying to satisfy many different constituencies by granting the Court a subject matter jurisdiction which is unrealistically broad, the proposed statute may end up satisfying no one.\textsuperscript{16}

Yet the ILC’s Draft clearly provides the template upon which any international criminal court, if created, will be modelled. Its detailed study is therefore required, and not just as an academic exercise. American input and support are vital not only for the success of the endeavor but, more generally, to ensure the United States’ adherence to an international institution the consequences of which have been thoroughly explored and understood.

This article examines previous efforts to establish a permanent international criminal court and why they failed. It then analyzes the proposed Court’s structure, jurisdiction and intended role in the enforcement of international criminal law.\textsuperscript{17} The proposed statute will be assessed in light

\textsuperscript{11} Id. See also Preparatory Committee on International Criminal Court Concludes Third Session, United Nations Press Release, L/2824, Feb. 21, 1997.
\textsuperscript{12} Proposed International Criminal Court Should be Operational Before Turn of Century, Preparatory Committee Told, United Nations Press Release, L/2809, Aug. 27, 1996. This statement by the French delegation may be too optimistic, however. The Preparatory Committee ended its second session by concluding that it would continue its discussions on the draft statute of the proposed court with a view to finalizing the text by the end of April 1998, and holding a diplomatic conference later that year. Preparatory Committee for International Criminal Court Concludes Second Session, United Nations Press Release, L/2813, Aug. 30, 1996. This was confirmed by the General Assembly on December 17, 1996. It had previously been hoped that the conference could take place in 1997.
\textsuperscript{13} See discussion infra Part III.B.1.
\textsuperscript{14} See discussion infra Parts II.D.1-4, III.B.4.
\textsuperscript{16} See infra Part III.B.
\textsuperscript{17} Other analyses of the Draft Statute with somewhat different foci can be found in Draft Statute for an International Criminal Court: Suggested Modifications to the 1994 ILC Draft Prepared by a Committee of Experts, Done in Siracusa/Freiburg/Chicago, January
of objections to the creation of an international criminal court that have been raised over time and explores the relative advantages of a permanent Court over trial by ad hoc tribunals or national courts. I conclude that if the problems raised by the ILC’s draft can be remedied, there is reason to believe that the proposed Court will function well, both as a forum for the trial of war criminals and as an institution capable of constructing a framework for the establishment of justice and the international rule of law.

I. History

A. Efforts to Establish a Permanent International Criminal Court Prior to the Second World War

At the end of World War I, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties proposed the constitution of an international “high tribunal” for the trial of “all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity.” The American members of the Commission objected. First, they noted that they knew of “no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime affixing a punishment to it, and declaring the court which has juris-


18. To a large degree, this article focuses on the judicial aspects of the proposed Court. Its prosecutorial aspects will be discussed from time to time as well. For an explanation of the term “Court” as used in the Draft Statute, see infra note 126.

19. As Cherif Bassiouni recently wrote, “[I]nstitutions live and evolve through those who lead them.” BASSIOUNI & MANIKAS, supra note 3, at xvii. The European Court of Justice with a charter that is inordinately short, has accomplished more than any of its founders could have imagined. It has fashioned a “constitutional framework” for the European Union from the laconic command of article 164 of the EC Treaty that it “ensure in the interpretation and application of [the] Treaty the law is observed.” Leila Sadat Wexler, The Role of the European Court of Justice on the Way to European Union, in EUROPE AFTER MAASSTRICHT: AMERICAN AND EUROPEAN PERSPECTIVES 159, 164 (Paul Michael Lützler ed., 1994). There is no reason to believe the permanent international criminal court could not be equally successful: many of the problems that the International Court of Justice has experienced could be avoided by careful planning.


diction over the offence." Second, they argued that the proposed trials would violate the principle of sovereignty, particularly as to the attempt to impose international criminal liability on a Head of State.

A compromise resulted and articles 227, 228 and 229 of the Treaty of Versailles provided for a "special tribunal" that would try William II of Hohenzollern, the German Emperor, for the "supreme offence against international morality and the sanctity of treaties." The trial never occurred, however, for the Netherlands refused to extradite William II. Indeed, the whole affair was generally considered a fiasco.

Following this attempt to establish an international criminal tribunal, proposals for the establishment of a permanent international criminal court issued from many quarters. None were successful. The Advisory Committee of Jurists of the League of Nations submitted a Resolution (Voeu) that a High Court of International Justice be established, composed of one member for each State, which would be "competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations." The Resolution was ultimately ignored.

The International Law Association (I.L.A.) adopted a statute for an

24. Heads of State might be morally "responsible to mankind" but, in the American view, had no such legal responsibility. Legally, a Head of State exercises sovereign rights conferred upon him by his people. As their agent, it is to them alone to whom he must answer in law. Id. at 59-60.
25. Treaty of Peace with Germany, June 28, 1919, art. 227, 2 Bevans 43, 136, reprinted in 11 Martens Nouveau Recueil (Ser. 3) 323 (Fr.) [hereinafter Treaty of Versailles]. The Tribunal was to be international in character, being composed of five judges appointed, one each, by the United States, Great Britain, France, Italy and Japan, respectively. Id.
26. See Matthew Lippman, Nuremberg: Forty-five Years Later, 7 Conn. J. Int'l L. 1, 10 (1991). Similarly, although articles 228 and 229 of the Treaty provided for the surrender by Germany of other accused persons for trial either by national military tribunals or by military tribunals composed of members from more than one Allied power, in the case of "criminal acts against the nationals of more than one of the Allied and Associated Powers." Treaty of Versailles, supra note 25, art. 229, very few trials were held. The few Germans accused of war crimes were tried by the German Supreme Court in Leipzig. Lippman, supra, at 10-11. See also Wexler, Nuremberg Principles, supra note 22, at 300.
28. The Resolution was studied by the Third Committee of the Assembly who rejected it on the grounds that "there is not yet any international penal law recognized by all nations, and that, if it were possible to refer [certain to any jurisdiction], it would be more practical to establish a special chamber in the Court of International Justice." U.N. Historical Survey, supra note 20, at 11 (quoting the Third Comm. of the First Assembly of the League of Nations). The idea was ultimately ignored by the Assembly, who evidently agreed with the Third Committee that consideration of the problem was "premature." Id. at 11-12.
international criminal court in 1926, as did the International Association of Penal Law in 1928. Both drafts envisaged that the court would be a division of the Permanent Court of International Justice and both proposed the trial of States as well as individuals. Neither draft was officially considered.

First, the question of sovereignty was still omnipresent. For example, in discussing the I.L.A.'s proposed statute, many members of the Association found the idea of an international court trying and sentencing individuals simply incompatible with the "present scheme of International Law [which is] based on the conception that it governs the relations between States." With its capacity to arraign individuals, the proposed court was thus an affront to the sovereignty of the State.

Second, critics pointed to the absence of positive law with which...
potential defendants could be charged. At the 1926 meeting of the International Law Association, for example, the question was starkly put: "Faut-il avoir la Cour avant la Loi, ou la Loi avant la Cour?" That is, must an international criminal code be adopted prior to the establishment of an international criminal court?

Third, not all agreed that an international criminal court could help to prevent war, the premise upon which the Court's establishment was based. Of course, no one seriously suggested that the proposed court alone could prevent war. Rather, it was hoped that the Court could contribute to that goal. But some contended that a Court might actually exacerbate international relations:

This Court would render a peace impossible. When the soldiers and sailors had finished fighting, when hostilities were over and the soldiers and sailors on both sides were ready to shake hands with one another, as they are today, the lawyers would begin a war of accusation and counter accusation and recrimination. Such a war would render a peace of reconciliation impossible.

B. The Nuremberg Legacy

The atrocities of the Second World War, like those of World War I, again inspired interest in the establishment of a permanent international criminal court that might prevent such offenses and punish the offenders. Upon winning the war, the victors decided to try the Axis leaders rather

36. The statute as originally proposed by Dr. Bellot gave the proposed Court jurisdiction not only over war crimes (either generally accepted as binding or contained in treaties in force between the States of which the complainants and defendants were subjects or citizens), but also over "all offenses committed contrary to the laws of humanity and the dictates of public conscience." 1924 I.L.A. REPORT, supra note 29, Draft Statute for the Permanent International Criminal Court, art. 25, at 81. An American member objected, stating that this was simply "too vague and indefinite to be the guide of any Court, no matter how constituted." Id. at 102 (comment by the Hon. Charles Henry Butler).

37. "Must one have the Court before the law, or the law before the Court?" 1926 I.L.A. REPORT, supra note 29, at 182.

38. Thinking that the Court would function more as a common law court than a continental court, a majority of the members did not think the code need precede the court. See, e.g., 1926 I.L.A. REPORT, supra note 29, at 179-80 (comments of Dr. Emil de Nagy, M.P. (Hungary)). Nevertheless, this idea troubled many members of the Association, and continues to concern many who might otherwise feel comfortable with the creation of an international criminal court. See infra Part III.A.5.


40. Id. at 154 (remarks of Sir Graham Bower). To this, one member retorted that "the honorable gentleman seems to forget that behind the shake hands [sic] there are millions of mourning widows and crying orphans." Id. at 178.

41. A variety of proposals, some more definite than others, were issued during this time. For example, Hans Kelsen proposed the punishment of war criminals by an international criminal tribunal, HANS KELSEN, PEACE THROUGH LAW 110-24 (1973), and the International Commission for Penal Reconstruction and Development issued a report (but no definitive proposal) discussing the possibility of establishing an international criminal court, U.N. HISTORICAL SURVEY, supra note 20, at 19-20. The United Nations War Crimes Commission, established by a conference of the Allied Governments to investigate war crimes, drafted a convention for the establishment of a United Nations
than shoot them. The Allies had announced their intentions in the Declaration of St. James\textsuperscript{42} in 1942 and at Moscow in 1943,\textsuperscript{43} but the decision to hold a trial was not a foregone conclusion. As Justice Jackson stated to the Nuremberg Tribunal in his opening statement: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."\textsuperscript{44}

So much has been written about the trials at Nuremberg\textsuperscript{45} that only a brief summary, relevant to our discussion here, will follow.\textsuperscript{46} The International Military Tribunal (IMT) at Nuremberg was constituted by an interna-

war crimes court to try war criminals. \textit{Id. See also Telford Taylor, The Anatomy of the Nuremberg Trials 26 (1992).}

One of the more detailed statutes was the proposal of the London International Assembly established in 1941 under the auspices of the League of Nations, see U.N. \textsc{Historical Survey, supra note 20}, at 18-19, which drafted a 62-article statute establishing an International Criminal Court as an organ of the United Nations. Like the current proposal for an International Criminal Court, the Court proposed by the Assembly would have heard only cases in which "no domestic court of any one of the United Nations has jurisdiction to try the accused and . . . [is] in a position and willing to exercise such jurisdiction." \textit{Id. at 97. The Court would have had jurisdiction only over war crimes, fairly loosely defined. \textit{Id.} art. 2. Interestingly, the statute provided for an international constabulary charged with the "execution of the orders of the Court and of the Procurator General [of the Court]." \textit{Id.} art. 25.}

42. Resolution by Allied Governments Condemning German Terror and Demanding Retribution (Jan. 13, 1942), \textit{reprinted in 144 British and Foreign Papers 1940-1942}, at 1072-74 (1952).

43. Declaration of German Atrocities, Nov. 1, 1943, 3 Bevans 816 [hereinafter Moscow Declaration].


46. Although not the first international criminal tribunal in history, the Nuremberg and Tokyo trials are certainly the first relevant precedents of our time. Because much less weight is generally accorded to the judgments issued by the International Military Tribunal for the Far East than to the Nuremberg precedent for a variety of reasons, including the perception that the Tokyo proceedings were substantially unfair to many of the defendants, it will not be discussed further here. Unlike the IMT at Nuremberg which was established by an international treaty, the IMTFE was established by a special proclamation issued by General MacArthur, employing his authority as Supreme Commander for the Allied Powers. \textit{Dep't St. Bull., Mar. 10, 1996, at 361, as amended, Dep't St. Bull., May 26, 1996, at 890. In the Proclamation, MacArthur set out the tribunal's jurisdiction and substantive law (which paralleled, but was not identical to the Nuremberg Tribunal's). The Charter gave MacArthur power to appoint the judges (art. 2) as well as the President of the Tribunal (art. 3(a)), who had a deciding vote in the case of a tie (art. 4(b)). In addition, MacArthur appointed the Chief of Counsel (art. 8(a)) who was responsible for the prosecution of the trials. None of the defendants indicted by the IMTFE were acquitted. On the Tokyo trials, see generally Bassiouni, \textit{supra note 45, at 211-12.}
tional agreement" signed by the four Allied powers on August 8, 1945. Known as the London Accord, the agreement stated the Allies’ intention to try “war criminals whose offenses have no particular geographical location, whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.”

Annexed to the London Accord was the Charter of the International Military Tribunal. The thirteen short articles of the Charter addressed the Tribunal’s composition, rules of procedure and jurisdiction—they also defined, in somewhat summary fashion, the law to be applied. Pursuant to article 6, the Nazis would be arraigned on three charges: crimes against peace, war crimes and crimes against humanity. The Charter also provided that the defendants were individually responsible for the commission of such crimes, notwithstanding their positions as heads of state or the fact that a defendant may have acted pursuant to an order of his Government or of a superior.

48. The Agreement was originally signed by the United States, the Provisional Government of the French Republic, the United Kingdom and the Union of Soviet Socialist Republics. Subsequently, 19 other nations signed it, as well. Secretary General, The Charter and Judgment of the Nuremberg Tribunal at 3, U.N. Doc. A/CN.4/4/5, U.N. Sales No. 1949.V.7 (1949) [hereinafter Secretary General’s Memorandum].
49. London Accord, supra note 47, art. 1. The Accord also bound the signatories to make potential defendants available to the Tribunal, id., art. 3, and specified that the proceedings before the IMT would be without prejudice to the powers of national courts to try war criminals within their jurisdiction and without prejudice to the decision of the Allies that war criminals (other than the major war criminals indictable under the IMT Charter) would be sent back to the countries in which their crimes were committed for trial. Id. art. 4. Article 4 refers to the Moscow Declaration of 1943, supra note 43, in which the Allies formally declared their intention to prosecute German war criminals.
51. The tribunal had four judges, one from each signatory country. The judges elected their President, IMT Charter, supra note 50, arts. 2, 4(b), unless a session of the tribunal was to occur on the territory of one of the four Signatories, in which case the representative of that Signatory on the Tribunal would serve as President. Id. art. 4(b). The judges were to fashion their own rules of procedure, id. art. 13., and were specifically authorized to try a defendant in absentia if the defendant could not be found or if it was, in the judgment of the tribunal, “necessary, in the interests of justice, to conduct the hearing in his absence.” Id. art. 12. No provisions for appeal, pardon or mercy were contained in the Charter, and no provisions for the protection of the accused.
52. IMT Charter, supra note 50, art. 6. These three categories have, in spite of their imperfections, remained the classification upon which most subsequent international criminal law instruments have been based.
53. IMT Charter, supra note 50, art. 8. Somewhat controversially, the Charter also permitted the Tribunal to rule upon the criminality of organizations or groups, and provided that such a determination by the IMT would be binding in any subsequent proceeding brought by or before the national court of a signatory state. Id. art. 10. Finally, in a provision that has given rise to much debate, the Charter stated that “Leaders, organizers, instigators and accomplices” who had participated in the “formulation or execution or a common plan of conspiracy” to commit any of the three crimes were “responsible for all acts performed by any persons in execution of such plan.” Id. art. 6.
Of the twenty-two individual defendants tried by the IMT, nineteen were found guilty and three were acquitted. Although the trials were generally considered to have been conducted in a manner that was fair to the defendants (suggesting that international criminal trials need not be inherently unfair nor impossible to conduct in a manner satisfactory to jurists from diverse legal systems), some argued that the IMT Charter and Judgment was but a (retroactive) droit ad hoc, in which only the vanquished were tried by judges representing the nationalities of the victors. Indeed, there is little doubt that the Charter was drafted quickly and under political constraints. Nor was the Tribunal free from the political and psychological stress of the war.

Notwithstanding, as Justice Jackson pointed out in his final report to President Truman, in October 1946, the Charter was finally adopted by 23 nations who agreed for the first time explicitly, that "to prepare, incite, or

55. See, e.g., BASSIoUNI, supra note 45, at 4, 11-12.
56. CLAUDE LOMBOIS, DROIT PÉNAL INTERNATIONAL 157 (1979). The defense also argued that the prosecution was ex post facto and that it conflicted with the principle of legality since no statute specifically proscribed the defendants' conduct or set out a punishment. The Tribunal rejected both contentions. IMT Judgment, supra note 54, at 216. See also Wexler, Nuremberg Principles, supra note 22, at 307 n.62. With respect to crimes against peace and war crimes, the Tribunal could at least cite various treaties that Germany had signed and arguably violated, such as the Kellogg-Briand Pact and the Hague Conventions of 1899 and 1907, and the Geneva Convention of 1929. With respect to crimes against humanity, however, the Tribunal was on shakier ground, being able to point to no international instruments specifically condemning the defendant's behavior. Some commentators have suggested that this violated the prohibition on retroactive prosecutions. Wexler, Nuremberg Principles, supra note 22, at 307. Even with respect to crimes where some international instrument existed, however, the defendants could still argue, as they did, for example with respect to the application of the Kellogg-Briand pact to their conduct, that the international instrument in question did not specifically criminalize their behavior. Thus, the Tribunal's decision is often criticized either because specific prescriptive norms were lacking (as in the case of crimes against humanity), or because the prescriptive international norms that existed were not associated with criminal sanctions (as in the case of crimes against peace and war crimes), or both. Whether one accepts the Tribunal's response or not probably depends upon one's "choice of an underlying theory of legal philosophy." BASSIoUNI, supra note 45, at 528.
57. It is a fair point that none of the victors were tried for war crimes at Nuremberg, although that fact alone cannot exculpate the Nazis for their crimes. Certainly, I would not agree that one has a fundamental right, as Sir Graham Bower argued, to a judge of one's own nationality. 1926 I.L.A. REPORT, supra note 29, at 153-54. The 1994 Draft Statute provides that the judges should have neither the defendant's nor the accused's nationality, which is probably the proper solution. 1994 Draft Statute, supra note 7, art. 9(7).
58. See, e.g., BASSIoUNI, supra note 45, at 11.
wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible. Thus the Charter seemed to lay to rest, at least as a practical matter, the theory that the constitution of an international criminal tribunal contravenes the sovereignty of states per se.

Finally, having embodied its judgment in a legal precedent, the Tribunal arguably created the positive law thought to be lacking prior to its existence, although some would argue otherwise. At the very least, if Nuremberg left us with a cloudy legal legacy, its moral force is clear: freed from its original limitations, the Nuremberg judgment affirms the idea that war as a means of solving inter-state conflict is morally, legally, and politically wrong.

C. United Nations’ Efforts to Establish an International Criminal Court Following the Second World War

Nuremberg helped overcome objections to an international criminal court on the basis of sovereignty. In addition, over the next 50 years, international criminal “positive law” would develop in the form of a variety of legal instruments enacted as bilateral or multilateral conventions, as well as the attempt by the International Law Commission to produce a Draft Code of Offenses Against the Peace and Security of Mankind. But obstacles to

60. JACKSON, supra note 44, at xv. In issuing its judgment after nine months of trial, the Tribunal addressed many of the objections raised by the defendants to its jurisdiction and the law it was asked to apply. First, in rejecting the defendants’ arguments based on state sovereignty, SECRETARY GENERAL’S MEMORANDUM, supra note 48, at 39-40, the Tribunal held that individuals could be criminally responsible under international law—“[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” IMT Judgment, supra note 54, at 221. Second, the Court affirmed the primacy of international law over national law: “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.” Id.

61. Of course, arguments may be made that this was possible only because of Germany’s unconditional surrender (and subsequent loss of sovereignty). That argument appears more persuasive as an explanation for the de facto power of the Allies to establish the tribunal and try the defendants than as an inherent limitation on the power of the Allies to try a suspect of an international crime (admittedly, very loosely defined) by an international tribunal.

62. As Justice Jackson points out, “[t]he power of the precedent is the power of the beaten path.” JACKSON, supra note 44, at xv (quoting Cardozo, J.). Of course, that is not to say that the IMT’s judgment is binding upon either municipal or international courts. Wexler, Nuremberg Principles, supra note 22, at 311.

63. Wexler, Nuremberg Principles, supra note 22, at 312.

64. Although many countries continued, at least formally, to adhere to this principle. See infra note 70.

65. See infra note 232 and accompanying text.

66. See infra notes 78, 113 and accompanying text.
the Court's establishment still remained.

The topic was immediately considered by the United Nations after the war in connection with the formulation and adoption of the Genocide Convention. Although the Genocide Convention was adopted relatively quickly, efforts to create the international criminal tribunal envisaged in article VI of the Convention failed. Indeed, the reference to an international penal tribunal now found in article VI of the Genocide Convention had been deleted from earlier drafts, and was restored only after extensive debate. In a resolution accompanying the adoption of the Genocide Convention, the General Assembly invited the International Law Commission, along with its work on the codification of international criminal law, to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.”

Thus instructed, the International Law Commission embarked upon what would prove to be a frustrating and long endeavor. The ILC ultimately voted at its Second Session in 1950 to support the desirability and feasibility of creating an international criminal court. However, an examination of the Summary Records and Reports on the topic shows that the Commission was deeply divided on this subject. Indeed, two reports on

67. U.N. HISTORICAL SURVEY, supra note 20, at 25. Genocide was condemned as an international crime on December 11, 1946, by G.A. Res. 96(I), U.N. GAOR, 1st Sess., 55th plen. mtg., reprinted in 1 UNITED NATIONS RESOLUTIONS, SERIES I 175 (Dusan J. Djonovich ed., 1957), which also charged the Economic and Social Council with drafting a convention on the crime of genocide. It was also raised in connection with the General Assembly's request to the International Law Commission that it formulate the Nuremberg principles.
69. U.N. HISTORICAL SURVEY, supra note 20, at 41.
70. The Soviet delegation, in particular, objected to the creation of an international penal jurisdiction on the grounds that it would violate national sovereignty. U.N. HISTORICAL SURVEY, supra note 20, at 35. Others felt that the organization of an international criminal court was premature either because there existed no international criminal law or because there existed as yet no international enforcement mechanism. Id. at 37. Upon the insistence, in particular, of the French delegation and a compromise proposal made by the United States representative who suggested that the jurisdiction of the proposed international penal tribunal become optional, the provision was restored.
72. Id.
74. The ILC adopted a formulation of the Nuremberg principles, discussed the Draft Code, and after heated debate, voted 8-1 with two abstentions, that it was desirable to establish an international penal judicial organ, and 7-3, with one abstention, that the establishment of an international criminal judicial organ was possible. Report of the International Law Commission to the General Assembly, U.N. GAOR Supp. (No. 10), U.N.
the international criminal court were presented to the Commission at this
time. The first, by Ricardo Alfaro, concluded that such a jurisdiction was
both “desirable” and “possible.”\textsuperscript{75} The second, by Emil Sandström, concluded that although the creation of an International Criminal Court was possible, it was not desirable.\textsuperscript{76} Sandström opined that the creation of such a court would “do more harm than good.”\textsuperscript{77}

Although the Commission ultimately adopted a Draft Code of
Offenses Against the Peace and Security of Mankind in 1954,\textsuperscript{78} the General
Assembly removed the question of the court which might enforce such a
code from the ILC, and vested it in a committee composed of the represent-
atives of seventeen Member States.\textsuperscript{79} As was subsequently noted, the Gen-
eral Assembly’s action involved a reversal of roles that was curious, to say
the least: it had asked a body of jurists a political question (whether the
creation of the court was desirable) and had subsequently entrusted a
political body with the technical task of elaborating a draft statute.\textsuperscript{80}

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(Ricardo J. Alfaro, Special Rapporteur). In so concluding, Alfaro outlined the bases
upon which he felt such a jurisdiction could operate, some aspects of which have been
retained in the 1994 Draft Statute. He called for the “international organ of penal jus-
tice” to exercise its jurisdiction over States as well as individuals, and contemplated
that it would try crimes to be defined in an international penal code. Only the Security
Council (or a State authorized by it) would institute proceedings, and he suggested that
the Criminal Court or Chamber would be a permanent body, but would “sit in plenary
session only when it is seized of proceedings for an offence within its jurisdiction.” Id.
Finally, he concluded that it would be possible to constitute the international criminal
court as a chamber of the ICJ, but only if the ICJ’s Statute was amended to permit it to
hear cases against individuals. Id.

76. Id. (Emil Sandström, Special Rapporteur). Although agreeing that international
criminal law had advanced to the stage where such a tribunal would have law to apply,
id. at 21, Sandström considered the lack of an enforcement mechanism and the political
objections of States to be insurmountable obstacles.

77. Id. at 23. In Sandström’s opinion:

No organization does exist to enforce an appearance before the Court or the
execution of its judgements, and it seems difficult to establish such an organiza-
tion. The jurisdiction therefore is likely to be limited and brought into action in
a haphazard way. There are great risks that culprits will not always be brought
before the Court. On the whole this will give the impression that the jurisdic-
tion is being exercised in an arbitrary way. Its deterring effect will thus be very
doubtful, if any.

Id. at 22, ¶ 34.

1954/Add.1.

that the committee was to “meet in Geneva on 1 August 1951 for the purpose of prepar-
ing one or more preliminary draft conventions and proposals relating to the establish-
ment of an international criminal court.” Id.

The Committee on International Criminal Jurisdiction met in Geneva during the month of August 1951, by the end of which it had agreed to a draft statute (the Geneva draft) for an international criminal court. The Committee was careful to point out that it did not consider its terms of reference to include the issue of the desirability of the Court’s establishment; rather, its task was to elaborate concrete proposals for the consideration of the General Assembly to permit it “to appreciate the full scope of the problems involved.”

A detailed examination of the Committee’s work reveals many features that reappear in the 1994 ILC Draft. First, the Committee decided that although establishment of the Court as a United Nations organ would be the most satisfactory course, in light of the practical difficulties involved in amending the charter and the legal difficulties one might encounter in attempting to establish the Court by General Assembly Resolution, a multilateral convention would be the most appropriate mechanism for the Court’s creation. Like the current version, the Court was also envisaged as a “semi-permanent” institution that would hold sessions only when matters before it required consideration.

The statute makes little mention of the proposed court’s subject matter jurisdiction, providing only that it would “try persons accused of crimes under international law, as may be provided in conventions or special agreements among States parties to the present Statute.” This narrow provision was opposed by several members of the Committee “on the...
ground that it might be construed as leaving outside the scope of the court a vast field of international crimes, which could then only be tried by special international tribunals." Opponents could not carry enough votes to remove the limiting phrase, however, and it was retained. The Court would hear cases against natural persons only and only in cases in which the state or states of the accused's nationality and the state or states in which the crime was alleged to have been committed had conferred jurisdiction upon the court.

Proceedings could be instituted either by a State party to the statute, if that State had conferred jurisdiction upon the Court over the offenses involved in the proceedings, or by the General Assembly of the United Nations (or an organization of States authorized by it). After a complaint was filed, an institution called the "Committing Authority," composed of nine individuals elected in the same manner, for the same terms and possessing the same qualifications as the judges, would establish whether the evidence supported the complaint. The prosecution would be conducted

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86. 1951 Committee Report, supra note 81, at 5, ¶ 36.
87. Id. ¶¶ 20, 37.
88. Including heads of state or agents of government. Id. art. 25. The question of the criminality of States is a difficult one that has continually troubled commentators. Although, as Doudou Thiam would point out some thirty years later in his report to the ILC on the Draft Code of Offenses, it might be desirable to impose moral culpability on states, such an endeavor could border, as he put it, on science fiction:

Toppling the State from the lofty pedestal where it was held in awe like the gods of antiquity, making it an immanent creature, susceptible to error and wrongdoing and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would dearly amount to a complete reversal of hitherto prevailing ideas and concepts.

89. 1951 Committee Report, supra note 81, art. 27. This declaration could either be made prior to the crime's commission or afterwards by special agreement or unilateral declaration. Id. art. 26. Finally, article 28 provides that no jurisdiction may be conferred upon the Court without prior approval by the General Assembly. Apparently, the Committee's concern was that otherwise, nothing would prevent two or more states from entering into a convention between themselves conferring jurisdiction on the proposed court over crimes not recognized as such by the prevailing opinion of the world. Id. ¶ 74.
90. Id. art. 29.
91. Id. art. 33. The Committee rejected a proposal that would have permitted the screening process to decide whether a trial was expedient, not only from the point of view of world politics, but more generally whether it was in the public interest. 1951
by an *ad hoc* prosecutor selected on a case-by-case basis by a panel of persons designated by the States' parties for that purpose.\footnote{92} Although the judgment would be final and without appeal,\footnote{93} a provision for revision of the judgment,\footnote{94} as well as a Board of Clemency,\footnote{95} were included in the draft provisions.\footnote{96}

Very few Member States commented upon the proposed statute. The United Kingdom expressed the view that "the whole project [was] fundamentally unsound."\footnote{97} The French and Dutch delegations were more optimistic, and the General Assembly requested the formation of another seventeen member state Committee to re-examine several of the issues and submit another report.\footnote{98}

The second Committee met in New York during the summer of 1953 (the "1953 Committee") and issued its report with an amended version of the Statute annexed thereto.\footnote{99} The 1953 Committee modified the Geneva

\textit{Committee Report, supra note 81, at 13, ¶ 116.} Instead, it was decided that the purpose of the screening process would be limited to determining whether there was a \textit{prima facie} case against the accused. \textit{Id. at 14, ¶ 117.}

\footnote{92. \textit{Id.} art. 34.}
\footnote{93. \textit{Id.} art. 50.}
\footnote{94. \textit{Id.} art. 53.}
\footnote{95. \textit{Id.} art. 54.}

\footnote{96. The statute also provides for the rights of the accused, \textit{id.} arts. 36, 38, 39, 41, 51, and contains very limited provisions on national cooperation. Article 31 permits the Court to request assistance from states, and provides that states shall only be obliged to assist the Court if they have accepted to do so in some other international instrument. Thus, although Article 40 permits the court to issue arrest warrants, nothing obliges states to honor them. Similarly, although Article 32 permits the court to impose the penalties it deems appropriate (subject to any limitations prescribed in the instrument conferring jurisdiction upon the court), nothing obliges states to assist in the enforcement of those penalties. Indeed, Article 52 (execution of sentences) requires the court to make \textit{ad hoc} arrangements for the carrying out of sentences. Finally, the statute provides that it shall not prejudice the right of States to establish special tribunals to try perpetrators of crimes under international law. \textit{Id. art. 55.}}


\footnote{97. \textit{International Criminal Jurisdiction, G.A. Res. 687, U.N. GAOR, 7th Sess., 400th plen. mtg., at 62, U.N. Doc. No. A/2361 (1952).} The debate in the United States is well-expressed by two articles in the 1952 American Bar Association Journal. The first, written by Judge John J. Parker, \textit{An International Criminal Court: The Case for its Adoption, 38 A.B.A. J. 641 (1952),} lauds the Draft Statute as "a triumph of American leadership in a delicate area of international affairs and one which will mean much to the future peace of the world if it is given the support which it deserves." \textit{Id.} In contrast, the second, written by George A. Finch, \textit{An International Criminal Court: The Case Against its Adoption, 38 A.B.A. J. 644 (1951),} notes that the Draft Statute did not include the right to trial by jury and stated that the creation of the court would "involve very real dangers to the future development of international good feeling and co-operation, in the instance where proceedings were instituted against an aggressor with whom the United Nations wanted to reach a negotiated settlement." \textit{Id.}}

\textit{Report of the 1953 Committee on International Criminal Jurisdiction, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2638 (1954) [hereinafter 1953 Committee Report].} Again, many members suggested that the whole idea was premature, although others favored the court's establishment. \textit{Id. ¶¶ 17, 18. Members also debated whether the court should at once exhibit the qualities of stability, permanence, independence, effec-
text in some respects, although not fundamentally. The proposed court's jurisdiction was expanded to "crimes generally recognized under international law," and the number of judges increased to fifteen. The article on attribution of jurisdiction was also modified to specify that "jurisdiction of the Court is not to be presumed," and to state precisely that acceptance of the Court's jurisdiction did not bind a State to bring specific cases before the Court but only permitted a State to do so. The new draft also included an express provision on the powers of States to withdraw jurisdiction once conferred on the Court, and deleted the requirement that jurisdiction be approved by the General Assembly.

Interestingly, although the 1953 Draft removed the power of the United Nations to institute proceedings, it proposed, as one alternative, to permit a United Nations organ "to be designated by the United Nations" to stop proceedings in a particular case "in the interest of the maintenance of peace." This amendment reflected an ongoing debate (which would resurface later) concerning the degree of control that the United Nations should be able to exert over the international criminal court to the extent it feels necessary "to do so" in the interest of peace. The revised draft also departed from the admittedly cumbersome system for the selection of the prosecuting attorney by special panel and adopted a provision whereby the complaining state or states would appoint (and presumably pay) the prosecuting attorney.

The 1951 and 1953 Committee Reports were never implemented for lack of a political consensus on the desirability of creating an international
criminal court. Indeed, the idea was stalled in the United Nations for the next thirty-five years.\textsuperscript{110} The General Assembly was at the time deadlocked on the problem of defining aggression, a task that took the General Assembly twenty years to complete.\textsuperscript{111}

Work on the International Criminal Court was resumed in 1989, when the General Assembly requested the International Law Commission to address the "question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under [the Draft Code of Crimes]."\textsuperscript{112} The ILC provisionally adopted a Draft Code of


\textsuperscript{111} Definition of Aggression, G.A. Res. 3314, U.N. GAOR 6th Comm., 29th Sess., 2319th mtg., at 142, U.N. Doc. A/9890 (1975). Of course, the adoption of the definition by the General Assembly in no way alleviated the thorny question of who could make such a determination. That is, if aggression was to be included in the Draft Code of Crimes, would it be the role of the Security Council or a judicial organ to institute proceedings against offenders accused of committing it? The ILC's discussions on the role of the Security Council are illuminating in this regard. See infra note 190.

Crimes in 1991\textsuperscript{113} and in its forty-fourth session in 1992, created a working group on an international criminal court.\textsuperscript{114} The Working Group produced an extensive report outlining the general bases upon which, in its opinion, the establishment of such a Court could proceed.\textsuperscript{115} Not all the Commission's members were pleased with the relatively modest proposals...
made by the working group. But, as the Group's chair, Abdul Koroma, pointed out, the proposals represented a compromise between those who would have gone much further and those who felt that nothing should be done at all. With one exception, these proposals, which were themselves largely based on the work of the 1951 and 1953 Committees, were substantially adopted in the 1994 Draft Statute.

II. An Analysis of the 1994 ILC Draft Statute for an International Criminal Court

Following the Commission's report, the General Assembly granted the ILC a mandate to elaborate a draft statute "as a matter of priority," even though many countries (including the United States) did not support the Draft Code of Crimes. The project gained momentum after the creation

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116. Id. at 6-7.
117. Article 20 of the 1994 Draft contains a more expansive notion of the Court's jurisdiction than was originally proposed.
119. UNITED NATIONS, INTERNATIONAL LAW COMMISSION, COMMENTS AND OBSERVATIONS ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND ADOPTED ON FIRST READING BY THE INTERNATIONAL LAW COMMISSION AT ITS FORTY-THIRD SESSION, U.N. Doc. A/47/448 and Add.1 (1993), [hereinafter COMMENTS AND OBSERVATIONS]. Comments and observations received from Great Britain and Northern Ireland indicated that the UK did not support the code and shared the widespread view that work on the court should not be coupled with that on the Code. Id. at 85. Specifically, the UK criticized the ILC for producing a code evidencing "haste and lack of precision," id. at 89, and which embodied "little more than political slogans into a code intended as a legal instrument," id. at 91. Comments and observations received from the United States of America stated that:

[the United States ... does not support the present draft Code because it is defective in many fundamental respects. Since many of the offences set forth in the draft Code are already covered by existing international conventions, much of the draft Code is either redundant or disruptive (especially where it deviates from existing statements of the law). Moreover, many of its suggestions for the development of new criminal offences are unacceptable to the United States. Throughout, the draft Code ignores basic concepts of criminal liability (for
of the International Criminal Tribunal for the former Yugoslavia (ICTY) by
the Security Council, which suggested that the need for a permanent
court was not merely theoretical, and that governments, including the
United States, would be willing to support the creation of an international
criminal tribunal, at least under some circumstances. The ILC consid-
ered two draft statutes before finally adopting a final version in 1994.
Although the statute is not entirely coherent, it represents a considera-
table effort and has been quite useful as a basis for further discussion of
the many issues raised by the establishment and functioning of the Court.
The most important features of the draft statute are discussed below. They
are critiqued, however, in Part III.


121. The Commission was divided on the attention that the statute of the ad hoc tribunal should receive. Some members felt that the ad hoc Tribunals' rules and statute should receive particular attention in addressing similar issues arising with respect to the permanent court; others felt that it would be inappropriate to place too much emphasis on the example furnished by the ad hoc Tribunals given the "essential differences" between the two institutions. Report of the International Law Commission on the work of its forty-sixth session, G.A. Res. 49/51, U.N. GAOR, 49th Sess., Supp. No. 49, Agenda Item 137, at 292, U.N. Doc. A/49/51 (1994). See also supra note 5 and accompanying text.


123. This is not surprising, given that the Working Group was trying to "amalgamate into a coherent whole the most appropriate elements for the goals [of the International Criminal Court] envisaged, having regard to existing treaties, earlier proposals for an international court or tribunals and relevant provisions in national criminal justice sys-
tems within the different legal traditions." 1994 Draft Statute, supra note 7, at 42, ¶ 84.

International Criminal Court

Purpose: Prosecution and suppression of crimes of international concern. (Preamble ¶ 1)

Jurisdiction:
— most serious crimes of concern to the international community as a whole (Preamble ¶ 2)
— in cases in which national trials would not occur or would be ineffective (Preamble ¶ 3 & commentary)

Jurisdiction Rationae Materiae

(art. 20)

(a) genocide
   comments
   * defined in 1948 Convention
   * special “inherent” jurisdiction regime, art. 25(1)

(b) aggression
   comments
   * see G.A. res. 3314 of Dec. 14, 1974
   * see U.N. Charter art. 2(4)
   * subject to Security Council determination art. 23(2)

(c) serious violations of the law and customs applicable in armed conflict
   comments
   * see art. 3, ICTY
   * see art. 22 Draft Code
   * Not identical to “grave breaches” under the 1949 Geneva Conventions

(d) crimes against humanity
   comments
   * see art. 5, ICTY
   * art. 21, Draft Code

(e) annex treaty crimes
   comments
   * only treaties in force
   * defining crimes of an international character, and
   * establishing a broad jurisdictional basis for trial of such crimes

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1 “ICTY” is the Statute of the International Criminal Tribunal for the Former Yugoslavia.
2 “Draft Code” is the Draft Code of Crimes Against the Peace and Security of Mankind provisionally adopted by the ILC in 1991. The Draft Code was modified in 1996, see supra note 113. War crimes are now addressed in article 20 and crimes against humanity in article 18.

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A. General Features

As envisaged by the Draft Statute, and as shown in Figure 1, the purpose of the proposed Court is the prosecution and suppression of crimes of international concern.125 The statute contemplates that the Court126

126. In what might be considered somewhat confusing terminology, the Draft Statute means by the term “Court,” not just the judicial organs of the International Criminal
would only hear cases involving the most serious crimes of concern to the international community as a whole, in cases in which national trials would not occur or would be ineffective. This follows the 1992 Working Group’s conclusion that the case for an international criminal court was essentially a case for a trial court rather than an appellate or review body. The twin declarations of purpose in the preamble are given further effect in the provisions of the statute on jurisdiction (article 20) and admissibility (article 35). They are also embodied in the principle of complementarity, which, as defined in the preamble, means that the Court “is intended to be complementary to national criminal justice systems.” As explained in the ILC’s commentary:

[The Court . . . [is] a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

The 1994 Draft Statute, like the drafts produced by the 1951 and 1953 Committees, envisages that the Court will have a close relationship with the United Nations but will be established by multilateral treaty. The ILC thus rejected earlier proposals either that the international criminal court be established as a chamber of the International Court of Justice or that it be constituted as a subsidiary organ of the United Nations primarily because of the need to amend the constituent documents of those organs in

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127. Id. pmbl., ¶ 2 & cmt.
129. Other relevant provisions are article 27, which requires the Presidency to determine whether the admissibility criteria have been met, and Article 34, which permits the accused and interested States to bring jurisdictional challenges. 1994 Draft Statute, supra note 7, at 44.
130. 1994 Draft Statute, supra note 7, at 44.
131. See supra notes 83 and 99 and accompanying text.
132. 1994 Draft Statute, supra note 7, pmbl., art. 2. There was substantial debate at the August Preparatory Committee meetings concerning the number of signatures that should be required for the entry-into-force of the treaty. Some states suggested that the number should not be too high, for practical reasons; others that a high number of signatures should be required in order to demonstrate the universality of the court. Numbers proposed ranged from 30 to 45 States (Australia) to 90 states (Ukraine). Preparatory Committee for International Criminal Court Continues Discussing Creation of Court by Treaty, United Nations Department of Public Information Press Release, L/2808 (Aug. 26, 1996) <http://www.un.org/news/press> (copy on file with author) [hereinafter Preparatory Committee].
order to do so and the political difficulties that such might entail. Article 2 of the statute attempts to forge a compromise between those who believed that creation of the Court as a United Nations organ was essential and those who saw that as impractical or undesirable. The Commentary suggests that the "close relationship envisaged" is necessary for administrative purposes as well as to enhance the Court's "universality, authority and permanence." Too, the Court's jurisdiction in certain instances is dependent on Security Council Decisions. Finally, the question of the Court's financing is sotto voce implied in this "close relationship"—unlike the 1951 and 1953 Committee drafts, the current proposal has no article on how the Court is to be financed, leaving that question, it seems, to State Parties.

B. Jurisdiction Rationae Materiae

The Commission had difficulty achieving a consensus on which crimes to include in the Court's jurisdiction and the level of specificity to be used in their definition. Part of the difficulty is that the proposed Court is oriented towards two different problems. First, the Court will prosecute crimes under international humanitarian law. Subject matter jurisdiction in this case follows the general outlines of the Nuremberg Charter which identified three categories of crimes: crimes against peace, crimes against humanity, and war crimes. But many would like the Court to address other international criminal activity as well, such as drug trafficking, hijacking, piracy, and terrorism.

The dual role thus envisioned is further complicated by the somewhat anarchic structure of international criminal law at present. As the 1993 Draft proposed by the Working Group points out, "international crimes" can be divided into two general categories depending on their source: those defined by treaties and crimes which have their basis in customary international law. The crimes within these two groups can be further

133. This controversy also surfaced in the discussions of the Ad Hoc Committee, which supported the Commission's position based on the fact that the "express consent of states was considered consistent with the principle of state sovereignty and... legal authority of the court." UN Ad Hoc Committee Report, supra note 17, at 3.
134. The issues involving the Court's relationship with the United Nations are further discussed in Appendix I to the 1994 Draft Statute, supra note 7. See also infra Part IIIB.5.
135. 1994 Draft Statute, supra note 7, at 47.
136. Id. See also id. art. 23.
137. This is obviously a serious shortcoming, as discussed infra Part IIIB.5. As pointed out elsewhere, the Court's funding must be sufficient and must be obtained in such a way to avoid compromising the integrity of the Court. Daniel MacSweeney, Prospects for the Financing of an International Criminal Court, WFM/IGP Discussion Paper, August 1996. For a superb analysis of the practical and administrative issues, including financing, relating to the Court, see Thomas Warrick, Organization of the International Criminal Court: Administrative and Financial Issues, 13 Nouvelles Études Pénales 37 (1997).
138. Also relevant, of course, in this respect are the jurisdictional provisions of the Ad hoc Tribunals for the Former Yugoslavia and Rwanda.
139. See supra note 52 and accompanying text.
classified in terms of the type of conduct criminalized. Some address crimes under international law; others "merely provide for the suppression of undesirable conduct constituting crimes under national law." Crimes in the second category generally have their origin in the law of international treaties. Crimes in the first category, however, may have their source in customary international law or treaties or both; indeed, often customary international law as well as one or more treaties may apply to the same behavior.

The 1993 Draft Statute opted for a scheme that included within the "core" jurisdictional article of the Statute only international crimes defined by international treaty. The 1993 Draft then set out a second strand of jurisdiction in article 26, which would cover "crimes under a norm of international law accepted and recognized by the international community of States as a whole as being of such fundamental character that its violation gives rise to the criminal responsibility of individuals." In particular, this would cover the case of genocide in the case of States not parties to the Genocide Convention, and crimes against humanity not covered by the Geneva Conventions.

This resulted in a complicated regime of jurisdiction and State consent that could have made application of the statute to particular cases extremely difficult. The 1994 Draft Statute simplified the jurisdictional regime considerably, but in so doing it papered over some fairly fundamental problems. As illustrated in Figure 1, article 20 of the statute (on jurisdiction) grants the Court jurisdiction over five categories of offenses: genocide, aggression, serious violations of the law and customs applicable in armed conflict, crimes against humanity, and treaty crimes listed in an annex. The nine treaty crimes included in the annex cover international crimes and the transnational aspect of domestic crimes. The crimes under general international law were included, according to the Commis-

141.  Id. at 107.
142.  1993 Draft Statute, supra note 122, art. 22.
143.  Id. art. 26.
144.  Id. at 110.
145.  1994 Draft Statute, supra note 7, art. 20.
146.  See, e.g., Siracusa Draft, supra note 17, at 21-24. The Treaty Crimes included in Article 20(e) are:
1. Grave breaches of the four 1949 Geneva Conventions, and the 1977 Protocol I Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts;
2. The unlawful seizure of aircraft as defined in the 1970 Hague Convention;
3. The crimes defined in article 1 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
4. Apartheid and related crimes as defined in the 1973 Apartheid convention;
5. Crimes against internationally protected persons as defined in the 1973 convention thereon;
6. Hostage-taking and related crimes defined in the 1979 Convention against the Taking of Hostages;
7. Torture, as defined in the 1984 Convention;
8. Maritime crimes, as defined in the 1988 Convention and the 1988 Convention on unlawful acts against the safety of fixed Platforms; and
9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances.
sion, based either on the crime's "magnitude, the continuing reality of [its] occurrence or [its] inevitable international consequences." Treaty crimes were included based on two criteria:

(a) that the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the nullum crimen guarantee . . .
(b) that the treaty created either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern.

In this way the statute attempts to please both those who would like it to cover breaches of international humanitarian law, and those who would like it to address transnational criminal activity such as drug trafficking. All crimes except genocide are subject to a complicated regime of State consent; treaty crimes are subject to an additional requirement that the treaty apply to the conduct in question. Unlike the Statute of the ICTY and article 6 of the IMT Charter, none of the crimes are actually defined in the statute. The Commission took the position that its function was neither to define nor to codify crimes under general international law; rather, it viewed the statute "primarily as an adjectival and procedural instrument." While this is understandable from a political perspective given the extent of States' dissatisfaction with the Draft Code of Crimes, it is less than ideal from a legal perspective.

C. Organs of the Court

The 1994 Draft Statute contemplates that the Court will have four principal organs: the Presidency; the Appeals Chamber, Trial Chambers and other (Judicial) Chambers; the Procuracy; and the Registry.

The "international judicial system" thus constituted includes judicial, administrative, and prosecutorial functions, and sets out the qualifications

147. Id. at 77-78.
148. Id. at 78.
149. See infra notes 175-92 and accompanying text. The State consent regime does not apply, however, if the Security Council refers the matter to the Court. 1994 Draft Statute, supra note 7, art. 23.
150. 1994 Draft Statute, supra note 7, art. 39(b). See infra note 207 and accompanying text.
151. Id. at 71. This position has been severely criticized, and many groups have proposed substantive definitions of crimes to be included in the Court's Statute. See, e.g., Siracusa Draft, supra note 17, at 21-24.
152. The International Law Association's (American Branch) Committee on a Permanent International Criminal Court, while not taking the position that international law requires the definition of the crimes in the Court's statute, has, like other groups, urged the inclusion of definitions in the Court's statute. See I.L.A. First Committee Report, supra note 2, ¶ 13.
153. Id. art. 5. The government of the Netherlands proposed an additional institution of an investigative judge. World Federalist Movement, Preparatory Committee for the Establishment of the International Criminal Court, Summary prepared by Steven Gerber, Aug. 20, 1996, at 1 (electronic source; copy on file with the author) [hereinafter World Federalist Summary].
# Organs of the ICC

<table>
<thead>
<tr>
<th>PURPOSE</th>
<th>COMPOSITION</th>
<th>TERM</th>
<th>ELECTION</th>
<th>QUALIFICATIONS</th>
<th>OTHER</th>
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<tbody>
<tr>
<td><strong>Judiciary</strong></td>
<td>Judicial Function</td>
<td>18 Judges shall be elected. For judicial organization, see Figure 3</td>
<td>Judges are elected for one nonrenewable 9-year term</td>
<td>By secret ballot by an absolute majority of the States parties</td>
<td>10 Judges with criminal trial experience; 8 with recognized competence in international law; high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial office</td>
</tr>
<tr>
<td><strong>Prosecution (art. 12)</strong></td>
<td>Responsible for investigation of complaints and for conduct of prosecutions</td>
<td>Headed by the Prosecutor assisted by 1 or more Deputy Prosecutors who may act in place of Prosecutor if necessary. Prosecutor and Deputy Prosecutors shall be of different nationalities. Prosecutor may appoint other qualified staff as needed. Staff shall be subject to the Staff Regs. drawn up by Prosecutor</td>
<td>5 years (unless a shorter term is decided on at time of election); eligible for re-election</td>
<td>By secret ballot by an absolute majority of the States parties</td>
<td>High moral character; high competence and experience in the prosecution of criminal cases; may be elected on basis that they are willing to serve as required</td>
</tr>
<tr>
<td><strong>Registry (art. 13)</strong></td>
<td>Administrative function; depository of notifications; channel for communications with state</td>
<td>Registrar, Deputy Registrar; Presidency may appoint or authorize Registrar to appoint other staff as necessary. Staff shall be subject to Staff Regs. drawn up by Registrar</td>
<td>Registrar: 5 years; eligible for re-election; Deputy Registrar: 5 years, or less as decided</td>
<td>By Registrar and Deputy Registrar: (on the proposal of the Presidency) elected by judges by secret ballot by absolute majority</td>
<td>Registrar: shall be available on a full-time basis; Deputy Registrar: may be elected on basis that they are willing to serve as required</td>
</tr>
<tr>
<td><strong>Presidency</strong></td>
<td>Administration of the Court - Preliminary and procedural functions where Court chambers not seized - Other functions conferred by Statute</td>
<td>President, 1st and 2nd Vice-President and 2 alternate Vice-Presidents</td>
<td>3 years or end of term of office</td>
<td>Elected by absolute majority of judges</td>
<td>N/A</td>
</tr>
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**Conflict of Interest:**
1) Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality
2) Prosecutor may excuse Prosecutor or Deputy Prosecutor at their request from acting in a particular case. Presidency shall decide cases of disqualification

No 3 Judges of same nationality
Judicial Organization

Appeals Chamber
7 Judges
(President + 6 Judges)
at. 9(1)

Term: 3 years; if necessary, judges shall serve through completion of any case the hearing of which has commenced. Judges may be renewed for a second term.

Qualifications: At least three Judges shall have recognized competence in international law.

Other: *President shall preside over the Appeals Chamber.
*Judges who are not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers, and to act as substitute members of Appeals Chamber if a member is unavailable or disqualified.

Notes: *No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber with the case.
*Presidency may also constitute Indictment Chambers (art. 37) and Pardon, Parole & Commutation of Sentences Chambers (art. 60(3)), as required.

Trial Chambers
(ad hoc)
5 Judges
art. 9(5)

Term: Through the given case.

Qualifications: *At least three Judges shall have criminal trial experience.
*President shall nominate judges in accordance with the Rules.

Other: *Alternate judges may be nominated to attend trial and act as members if a judge dies or becomes unavailable.

Figure 3

for and function of the members of each organ in turn. Only the Judicial organs and the Procuracy will be discussed here, as they are the organs primarily responsible for the Court's critical functions, although somewhat ironically, the one truly permanent organ of the Court is the Registry.154

The current proposal provides for the election of eighteen judges by the States Parties to the Court's Statute.155 The judges of the International Criminal Court, like their counterparts on the International Court of Justice, are to be "persons of high moral character" who possess "the qualifica-

154. See infra note 173 and accompanying text.
155. 1994 Draft Statute, supra note 7, art. 6(3). Article 6 also provides that states are to nominate two qualified persons of different nationality (art. 6(2)), that no two judges are to have the same nationality (article 6(4)), and that the judges are to represent the "principal legal systems of the world" (art. 6(3)).
tions required in their respective countries for appointment to the highest judicial office." 156 Ten of the judges are to have criminal trial experience, and eight are to have recognized competence in international law. 157 One third of the judges will be elected every three years. Cases will be tried to five-judge, ad hoc, Trial Chambers constituted for each case. Appeals will be to a seven-judge Appeals Chamber, presided over by the Court's President (see below), that will be reconstituted after each new election of judges. 159 Judges not members of the Appeals Chamber will be available to sit on Trial Chambers, meaning that only two Trial Chambers may sit simultaneously (although others could be constituted, as long as they were not sitting). 160

The judges elect the three members of the Presidency: the President, the first and second Vice-Presidents (and their alternates). 161 Members of the Presidency are elected for three-year terms, to coincide with the new election of one-third of the judges. 162 As Figures 2, 3, and 5 show, it is contemplated that the Presidency will be responsible for the administration of the Court, and also perform important functions with respect to the

156. Id. art. 6(1). It was also thought necessary to specify in the International Criminal Court Statute, that the judges have, in addition to high moral character, "impartiality and integrity." Id. The ICJ Statute refers to the judge's "independence." Statute of the International Court of Justice, June 26, 1945, art. 2, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. The International Criminal Court statute, unlike the ICJ statute, would not permit persons who would not be qualified for the highest judicial office in their countries to serve if they are "jurisconsults of recognized competence in international law." Id.

157. 1994 Draft Statute, supra note 7, art. 6(1). As the commentary points out, some individuals may have both competencies. In such a case, the nominating States should specify in which capacity the judge is expected to serve. Id. at 51. "The requirement of criminal trial experience is understood to include experience as judge, prosecutor or advocate in criminal cases. The requirement of recognized competence in international law may be met by competence in international humanitarian law and international human rights law." Id.

158. Id. art. 6(6). The 1993 Draft provided for a twelve-year term, which was thought too long. 1993 Draft Statute, supra note 122, art. 7(6); 1994 Draft Statute, supra note 7, art. 6, cmt. Judges may continue in office beyond their term in order to finish a case that has already commenced. Id. The article actually refers to the "hearing" of the case, presumably requiring that the judge be actually involved in the trial (or appeal), in order to qualify for an extension of term. Other articles addressing the judges' roles and performance of their duties include article 7 (judicial vacancies), article 10(1) & (2) (independence of the judges) and article 11 (excusing and disqualification of judges).

159. 1994 Draft Statute, supra note 7, art. 9(1).

160. Id. art. 9(4), cmt. The August Preparatory Committee Session included a lively debate on the composition of the judicial chambers, the qualifications of judges, and the powers of the Presidency. A sample of States' concerns included exploring an age limit for the judges (Lesotho and France), gender balance (Norway), having the judges paid full-time (Germany) and shorter terms with the possibility of re-election (United States and Egypt). World Federalist Summary, supra note 153, at 3, 4.

161. 1994 Draft Statute, supra note 7, art. 8.

162. Id. art. 8(1), cmt. The Draft Statute is silent as to whether the President or Vice-President may be re-elected; the Commentary, referring to the Presidency's "reconstitution" every three years, suggests not.
review of indictments, the constitution of Trial Chambers and the exercise of pretrial and other procedural functions conferred on the Court prior to the seizure of a Trial Chamber in a particular case.

The Procuracy is the organ responsible for investigating complaints and for conducting prosecutions. Like the judges, the officers of the Procuracy (a Prosecutor and one or more Deputy Prosecutors) are elected by the States Parties. Their independence is thought to be guaranteed by a series of limitations contained in article 12 of the Draft Statute: no member of the Procuracy is to seek or act on instructions from any external source, and the Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

One curious, although unsurprising, feature of the Court is its "semi-permanent" nature. Article 4 of the 1994 Draft Statute, consistent with earlier proposals for a permanent International Criminal Court, provides that the Court is a "permanent institution... [which] shall act when required to consider a case submitted to it." This of course has implications for the functioning of its organs, which other than the Registry, are permitted under the Draft Statute to function "intermittently." Thus, article 12(4), on the Procuracy, provides that the Prosecutor and Deputy Prosecutors may be elected on the basis that they are willing to serve "as required," that is, on a "stand-by basis." As for the judges, only the President is to receive an annual allowance; all other judges will be paid a

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163. Id. art. 27.
164. Id. art. 9(5).
165. Id. art. 8(4). The Presidency is also required to convene a Chamber in the case of an application for pardon, parole, or commutation of sentence. Id. art. 60(3). The President is also a member of the Appeals Chamber. Id. art. 9(1).
166. 1994 Draft Statute, supra note 7, art. 12(1).
167. Id. art. 12(2). Staff appointed by the Prosecutor also appears to be considered "members" of the Procuracy for purposes of art. 12. Id. art. 12(2).
168. Id. art. 12(3).
169. Id. art. 12(1).
170. Id. art. 12(5).
171. Professor Derby refers to it as a "stand-by court." Derby, supra note 15, at 311.
172. 1994 Draft Statute, supra note 7, art. 4. Many members objected to the semipermanent nature of the Court as being incompatible with the necessary "permanence, stability and independence of a true international criminal court." Id. art. 4, cmt.
173. Article 13(2) provides that the Registrar shall be available on a full-time basis.
174. The term is Doudou Thiam's, who wrote in 1993 that "[t]he permanence of such a jurisdiction would not be incompatible with an intermittent functioning of its organs." Eleventh Thiam Report, supra note 122, ¶ 58.
175. 1994 Draft Statute, supra note 7, at 59, cmt., ¶ 3. Although, as stated above, States Parties may apparently elect to have him or her (and the Deputy Prosecutors) serve on a "stand-by" basis, the only provision with respect to the salaries (or the financing of their office, as well as the Registry) is a general note in the commentary to article 13, that "financial arrangements for the employment of staff will have to be made in connection with the adoption of the Statute." Id. at 61. This is a problem that will need to be addressed, preferably not in the manner which the 1953 Draft did, which provided that the complainant state would essentially bear the cost. See supra notes 108-09 and accompanying text.
per diem "during the period in which they exercise their functions."\textsuperscript{176} Article 10(4), however, does provide that, if the workload of the Court requires, the Presidency may recommend to the States Parties that the judges serve full-time. Such a decision would require a two-thirds majority of the States Parties. In such case, the judges would receive a full-time salary.\textsuperscript{177}

D. Jurisdiction of the Court and the Initiation of Prosecution

As stated above, and as shown in Figure 1, article 20 sets forth the crimes within the jurisdiction of the Court.\textsuperscript{178} Rather than an elaboration of the principles upon which the Court's jurisdiction \textit{rationae materiae} is based, this section focuses on the triggering of the Court's jurisdiction and the mechanisms by which it can be invoked.

As Figure 4 shows, the drafters added additional requirements to the invocation of the Court's jurisdiction in order to implement the principle of complementarity.\textsuperscript{179} The Commission attempted to accomplish this by having different jurisdictional regimes for each of three categories of crimes within the Court's subject matter jurisdiction: (i) genocide, (ii) aggression, and (iii) all other crimes (i.e., crimes defined by Article 20(c), (d), and (e)).\textsuperscript{180} In each case, the Commission attempted to define which states would be permitted to file complaints, which states, if any, would be required to consent to the International Criminal Court's jurisdiction, and what the role of the Security Council would be with respect to each of the crimes in question.\textsuperscript{181}

1. Genocide

As this crime is clearly and authoritatively defined in the 1948 Genocide Convention, which, in addition envisaged in article VI\textsuperscript{182} the creation of an international criminal court to try cases of genocide, the Commission took the position that the Court should have inherent jurisdiction over this crime, not dependent on the consent of States.\textsuperscript{183} Thus, article 25(1) provides that any state that is a party to the International Criminal Court Statute and to the Genocide Convention will be permitted to file a complaint. The Security Council would not have any special role concerning cases of genocide, but it would have, as a general rule, the right to refer a situation

\begin{itemize}
\item \textsuperscript{176} 1994 Draft Statute, supra note 7, art. 17(1), (3).
\item \textsuperscript{177} Id. art. 10(4).
\item \textsuperscript{178} See supra note 145 and accompanying text.
\item \textsuperscript{179} "It is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the Statute seeks to ensure, in the words of the preamble, that the Court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." 1994 Draft Statute, supra note 7, at 69, cmt.
\item \textsuperscript{180} See Figure 1.
\item \textsuperscript{181} A majority of States, as well as the Commission, have consistently rejected the possibility that individuals or NGOs might bring complaints to the Court, although not all States have agreed. See infra note 197.
\item \textsuperscript{182} See supra note 70 and accompanying text.
\item \textsuperscript{183} 1994 Draft Statute, supra note 7, at 72. See also id. art. 21(1)(a). 
\end{itemize}
involving genocide to the International Criminal Court under article 23(1). In addition, article 23(3) provides that the Court will not be permitted to prosecute cases of genocide (or any crime) without the agreement of the Security Council in situations actually being dealt with as breaches of the peace or acts of aggression under Chapter VII of the U.N. Charter.\textsuperscript{184}

2. Aggression

Under article 21(2), if a State files a complaint under article 25(2), the jurisdiction of the Court is dependent upon several factors. First, the State

\textsuperscript{184} Id. art. 23(3), 87. This, of course, gives the Security Council a veto over judicial proceedings in some cases. Given the International Criminal Court's independent status, how the Security Council would actually exercise this veto is unclear. It would presumably have to be specified in the agreement between the Court and the UN envisaged by article 2.
having custody of the suspect with respect to the crime (the “Custodial State”) must accept the Court's jurisdiction with respect to the crime in question (i.e., aggression). Second, the State on the territory of which the act or omission in question occurred must accept the Court's jurisdiction with respect to the crime. Third, acceptance of a State which has already established or eventually establishes its right to the extradition of the accused pursuant to an extradition request must be obtained. Finally, under article 23(2), the case “may not be brought . . . unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.” Thus, the initiation of any prosecution of the crime of aggression is within the power of the Security Council.

185. The Commentary suggests that this is necessary because of the strong presumption that the Court will have the accused before it for trial, id. at 80, and defines “Custodial State” broadly to cover not only the situation in which a State had arrested the suspect for a crime, but also situations in which a State's armed forces are “visiting” another State and has captured a suspect. In such case the State to which the force belongs and not the host State would be considered the custodian. Id.

186. 1994 Draft Statute, supra note 7, art. 21(1)(b)(i).

187. Id. art. 21(1)(b)(ii).

188. Id. art. 21(2). Presumably the extradition request must precede the Court's attempt to exercise jurisdiction, for the article refers to the Custodial State having “received” the request for extradition. The Statute also provides that the State requesting extradition does not need to consent to the Court's jurisdiction if the Custodial State rejects its extradition request. This effectively allows the Custodial State to block prosecution by the international court or any State requesting extradition, except in the case of Treaty crimes to which that state is a party. In such a case, article 54 of the 1994 Draft Statute provides:

[a] custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21(1)(b)(i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

Id. art. 54. As the Commentary notes, this imposes an aut dedere aut judicare obligation on the Custodial State. Id. at 81.

189. Id. art. 23(2).

190. Aggression has been particularly difficult for the I.L.C. to address. In its debates in 1991 on the Draft Code of Crimes, the Commission split on this question. Many members thought that the problem was one of separation of powers and opposed making the institution of criminal proceedings contingent on prior determination by the Security Council of an act or threat of aggression. They thought that while it might be that a determination that there was aggression should bind the court, it could be shocking if the Security Council did not find aggression because a state exercised its veto, for example. This would create a double standard which although understandable from a political standpoint was not legally permissible. Other members, however, argued that, under the Charter, the determination of aggression is up to the Security Council. The Court was required to respect this, although it could then independently determine the issue of individual responsibility. Report of the International Law Commission on the Work of its Forty-third session, 46 U.N. GAOR Supp. (No. 10), U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), ¶ 154. Aggression is included, but not defined in the 1996 Draft Code. See 1996 Draft Code, supra note 113.
3. Other Crimes

The Court's exercise of jurisdiction over crimes other than genocide and aggression is subject to the same regime of State consent outlined with respect to aggression if a complaint is filed by a State.\textsuperscript{191} The only difference is that, although the Security Council may refer the matter to the Court if it so chooses (in which case no State consent regime is applicable), there is no requirement that it do so.

Thus, in all cases other than genocide and referrals of a matter to the Court by the Security Council, the prosecution of cases is dependent on State consent, the rules of which are detailed in article 22. The 1993 Working Group had proposed three alternative versions to article 22 (which was numbered article 23 in the prior draft). Alternatives A and C embodied an "opting-in" system, similar to that described above. Alternative B was an "opting-out" system whereby states adhering to the Court's statute automatically consented to the Court's jurisdiction with respect to the crimes in the statute unless they declared that they did not.\textsuperscript{192} The 1994 Draft Statute chose the "opting-in" alternative.\textsuperscript{193} Thus, States must declare their acceptance of the Court's jurisdiction in a particular case; they may do so at any time.\textsuperscript{194} Declarations may be limited to certain of the crimes referred to in article 20,\textsuperscript{195} and may be limited to particular conduct or conduct committed during a particular period of time.\textsuperscript{196}

E. Investigation, Prosecution, and Trial

The many details of the current proposal as to investigation, prosecution, and trial will not be taken up in detail here. However, a few words on the overall structure envisaged by the draft are in order. As the preamble and the commentary to the Statute suggest, the Court is seen as a "facility" to States parties and, in certain cases, to the Security Council. Thus, as shown in Figure 5, only the Security Council and States Parties may refer matters to or file complaints with, respectively, the Court.\textsuperscript{197} To maintain the independence of the Procuracy, the Security Council may refer matters, but not specific cases, to the Procuracy. If a Prosecutor decides not to

\textsuperscript{191} Under Article 25(2), a State Party may lodge a complaint with the Prosecutor only as to crimes with respect to which that State accepts the Court's jurisdiction under Article 22.
\textsuperscript{192} 1994 Draft Statute, supra note 7, at 108, art. 23.
\textsuperscript{193} As discussed below, infra notes 290-92 and accompanying text, the choice of an opting-in system is highly a controversial, and some members of the Commission strongly objected to its inclusion at the time of the Statute's adoption. 1994 Draft Statute, supra note 7, at 83-84.
\textsuperscript{194} The only limitation is that States may not withdraw a declaration while proceedings are ongoing.
\textsuperscript{195} 1994 Draft Statute, supra note 7, art. 22(1).
\textsuperscript{196} Id. art. 22(2), (3).
\textsuperscript{197} Id. at 89. This was the subject of debate during the last Preparatory Committee session. Some states such as New Zealand, feel that individuals should be able to file complaints. Others would also permit the Prosecutor to initiate Court action to avoid States and the Security Council paralyzing the Court through their inaction. Preparatory Committee, supra note 132.
investigate a matter, or not to issue an indictment, the Presidency may, upon request by a State or the Security Council, as appropriate, review the decision and request (but may not order) the Prosecutor's reconsideration. The Statute contains detailed provisions on the rights of suspects and the accused, on the form and review of the indictment, on the service of the indictment on the accused, and on pretrial detention and release of the suspect. Subject to certain exceptions, rules of evidence are not set out in the Draft Statute; rather, the judges are to make rules for the functioning of the Court, including its procedure and evidence.

Unlike the IMT Charter, but like the ICTY Statute, the 1994 Draft Statute provides that, as a general rule, the accused should be present during the trial, subject to narrow exceptions. The Statute does permit the constitution of an Indictment Chamber if a trial may not be held because an accused deliberately absents himself. The purpose of the proceeding is to record the evidence, consider whether the evidence establishes a prima facie case of a crime within the court's jurisdiction, and, if so, to issue and publish a warrant of arrest against the suspect. The Statute is silent as to whether the Indictment Chamber's hearing will be public or private, however, the commentary suggests that the drafters had in mind a public hearing that, in the case an "international arrest warrant," would render the accused "in a certain sense a fugitive from international justice." This is consistent with article 38(4) which provides that trials under the Statute will be public, unless privacy is required to protect the accused, victims, and witnesses, or to protect confidential or sensitive information.

198. See, e.g., 1994 Draft Statute, supra note 7, art. 26(6). Article 37 requires that trials occur in the presence of the accused, unless certain exceptions are present. See also article 40 (presumption of innocence), art. 41 (rights of the accused, including the right to be informed of the charge in a language which he understands, to a trial "without undue delay," to have adequate time and facilities to prepare his defence, to legal assistance, to communicate with counsel, and not to be compelled to testify or to confess guilt).

199. 1994 Draft Statute, supra note 7, art. 27. Under article 38(1)(a), indictments will not be public until the beginning of the trial, or as the result of a decision of an Indictment Chamber in the special circumstances envisaged by article 37(4). Id. at 96.

200. Id. art. 30.

201. Id. art. 29.

202. Id. art. 19(1)(b). But see id. art. 44, concerning evidentiary oaths, judicial notice of facts, and an exclusionary rule providing that evidence obtained by means of a "serious violation" of the Statute or "other rules of international law" is not admissible. The Statute also provides that the Prosecutor may request states to make qualified and experienced personnel available to the Prosecutor to assist in a prosecution, id. art. 31. Otherwise, it does not contain very detailed provisions on the functioning of the Prosecution for which it has been criticized. However, the 1994 Draft is certainly an improvement over the 1951 and 1953 texts, which provided only for an ad hoc prosecutor who would be selected on a case by case basis, and in the case of the 1953 Draft, presumably paid by the complainant state. See supra notes 91-92 and 108-109 and accompanying text.

203. Id. art. 37. Compare IMT Charter, supra note 50, and the ICTY Statute, supra note 3, art. 20(2).

204. 1994 Draft Statute, supra note 7, art. 37(4).

205. Id. at 109.

206. Id. arts. 38(4), 43.
tion to be given in evidence.

Two important principles protecting the accused that are enshrined in the current draft are the principle of legality (nullum poena sine lege)\textsuperscript{207} and the principle of non bis in idem (more familiarly known in this country as the principle of double jeopardy).\textsuperscript{208} The inclusion of both principles in the Draft Statute is a significant improvement over many earlier proposals for an International Criminal Court. Of course, their content is still the subject of extensive debate, and many suggestions for modification of the language currently proposed have been made.\textsuperscript{209}

\textsuperscript{207} Id. art. 39. Article 39 provides, somewhat laconically, that an accused shall not be held guilty in the case of a prosecution based on articles 20(a) through (d), “unless the act or omission in question constituted a crime under international law.” This of course begs the question of what acts are considered crimes under international law, presumably leaving this issue to the Trial Chambers to decide, subject to review on appeal. The commentary suggests that there may be cases in which “an individual could be convicted for a crime under international law in an international court although the same person could not be tried in a national court.” Id. at 113-14. The commentary adds that these cases will be “rare.” Id. at 114. In fact, such cases are likely to be quite common. Many countries have no mechanism by which to incorporate international crimes in their municipal law (or have a mechanism which is little used). In the case of prosecutions for Treaty Crimes, the principle, according to article 39(b) requires that “the treaty in question was applicable to the conduct of the accused.” As a result, the comments suggest that if a national of State A commits a crime, and State A is not a party to the Treaty in question, he may not be prosecuted if he commits the crime on State A’s territory, but he may be prosecuted if he commits the crime on State X’s territory, if State X is a party to the Treaty. Id. art. 39(b).

\textsuperscript{208} Id. art. 42. This provision draws heavily on article 10 of the ICTY Statute, with modifications designed to accommodate the possibility that trial might occur in another international court or tribunal. Id. at 117. The provision is intended to cover the effect of prior trials whether by another court or the proposed International Criminal Court; it is also intended to state the effect that another court should accord trial by the International Criminal Court. The prohibition only attaches where “the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials.” Id. at 118.

\textsuperscript{209} See the modifications proposed in the Preparatory Committee Sessions, Preparatory Committee Summary, First Session, supra note 9, at 73-94.
Prosecution

Complaint filed or S.C. decision notified

\[
\downarrow \quad \text{Procuracy}
\]

must investigate unless no possible basis
for prosecution (art. 26(1))

\[
\downarrow \quad \text{Investigation}
\]

- extensive powers
- may provisionally arrest suspect if probable
cause and real risk that suspect's presence
at trial cannot otherwise be assured
(art. 28(1)) (rights in art. 26(6), attach)

Presidency may issue subpoenas
and warrents (art. 26(3))

Indictment Filed with Registrar

Presidency reviews (art. 27)

Amend

Confirm (not a determination of guilt)
1) there is a p/f* case
2) it is admissible

Reject

notify accused

Trial Chamber established (art. 9)
Accused arrested (art. 28(3))
Served with a certified copy of the
indictment (art. 30)

* prima facie case: A credible case which would (if not contradicted by the
defense) be a sufficient basis to convict the accused on the charge.
Comments, p. 95.
F. Judgment, Appeal, and Revision

The processes of trial, appeal, and revision are outlined in Figures 6 and 7, below. Notably, all judgments of the Court, whether Trial or Appellate, are to be issued without dissents or separate opinions, unlike the judgments of the ICTY and ICTR. The Court is not authorized to impose the death penalty, nor is it authorized to order restitution or reparation for victims.

Following a judgment of acquittal or conviction, the Draft Statute implements the right of appeal generally guaranteed by most legal systems and the International Covenant on Civil and Political Rights, although, curiously, it implements this "right" for both the Prosecutor and the Defendant. It is not contemplated that the Appeals Chamber will conduct a new trial, although according to the commentary, it "has all the powers of a Trial Chamber." Rather, it is assumed that it will rely upon the transcript of the trial proceedings. Although it is not completely clear what is envisaged from the proposed language, it appears that the Appeals Chamber will be able to consider questions of law and fact equally, giving it, in the words of the drafters "some of the functions of appel in civil law systems" and "some of the functions of cassation." As shown in Figure 7, the revision of a judgment of conviction is also possible if new evidence is discovered that was not available to the applicant at the time the judgment was pronounced or affirmed and which could have been a decisive factor in the conviction.

G. International Cooperation and Judicial Assistance

Because the proposed International Criminal Court will have no enforce-

210. 1994 Draft Statute, supra note 7, arts. 45(5), 49(4). The language of the Draft is a bit untidy in that it clearly refers to the "sole" judgment of the Trial Chamber, but refers only to "The decision" of the Appeals Chamber. The comment to article 49, however, indicates the drafters' intent to have the same rule for Trial and Appellate decisions. Id. at 127.

211. ICTY Statute, supra note 3, art. 23(2).

212. 1994 Draft Statute, supra note 7, at 124.

213. It was thought that this might interfere with the Court's primary function, "namely to prosecute and punish without delay perpetrators of the crimes referred to in the Statute." Id. at 124. Similarly, the idea of "community service" was rejected as "entirely inappropriate" by some members, given that the Court would only deal with the most egregious of offenses. Id. at 125.


215. Thus, under article 48, a Prosecutor may appeal an acquittal (the only remedy being retrial, art. 49(b)). Under article 50, however, the Prosecutor may not ask for the revision of an acquittal. The drafters do not satisfactorily explain why it violates the non bis in idem prohibition for the prosecutor to ask for revision of an acquittal on the basis that new evidence has come forward that would have changed the result, but does not violate it if the prosecutor requests a retrial based on an error of law or fact (or a disproportionate sentence) on appeal.

216. 1994 Draft Statute, supra note 7, at 126.

217. Id. at 127.

218. Id.

219. Id. art. 50.
Figure 6

ment organ, it is largely dependent on States Parties for assistance with respect to the investigation of offenses, the arrest of suspects, the location and procurement of evidence and witnesses, and the enforcement and rec-

220. Unlike the version proposed in 1943 by the London International Assembly, which would have given the International Criminal Court its own constabulary. See supra note 41.
FIGURE 7

Omitting its judgments. Article 51 states this obligation in imperative terms, providing that "States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute."221 Thus, the Registrar is permitted to request State cooperation and

221. 1994 Draft Statute, supra note 7, art. 51.
judicial assistance with respect to a wide variety of specifically enumerated measures including the identification and location of persons; the taking of testimony and production of evidence; the service of documents; and the arrest or detention of persons.\textsuperscript{222}

Article 51 also contains a “catch-all” provision, permitting the Registrar to request any assistance “which may facilitate the administration of justice” (presumably as defined by the Court), including provisional measures taken to prevent an accused from leaving its territory or the destruction of evidence there.\textsuperscript{223} Article 51(3), however, limits the obligation of States parties to comply with a request from the Court to cases in which they have accepted the jurisdiction of the Court with respect to the crime in question, except in cases where the prosecution was based on genocide (art. 21(1)(a)), in which case they must comply “without undue delay.” Given the complex State consent regime envisaged by Article 22,\textsuperscript{224} this is likely to render the State assistance provision difficult to understand and to enforce. The language is also perhaps imprecise, in that it does not address a situation (which is highly likely to occur if the indictments issued by the IMT, the ICTY, and the ICTR are any example) in which an indictment contains several counts, some of which are within a State's jurisdictional declaration, others not. This limitation is not present in article 52 (on provisional measures), but then again, article 52, unlike article 51, is not phrased in terms of the obligation of the State to comply, but rather the power of the Court to request.\textsuperscript{225}

As Figure 8 shows, States are also required, under certain circumstances, to arrest an accused and transfer him to the Court. Again, States Parties, other than in cases involving genocide, only have this obligation if they have accepted the jurisdiction of the Court with respect to the crime in question.\textsuperscript{226} This “obligation” however, is qualified, because, unlike the ICTY, the 1994 Draft Statute is not based on the principle of primacy over national courts,\textsuperscript{227} but is merely a facility for States parties (i.e., it envisages a system of concurrent jurisdiction). In fact, article 53 sets out a series of options for States receiving an arrest and transfer request under article 53.\textsuperscript{228} It contains a separate regime for arrests depending on

\textsuperscript{222} Id. art. 51(2)(a)-(d).
\textsuperscript{223} Id. at 131, art. 51(2)(e), art. 52.
\textsuperscript{224} See supra notes 191-96 and accompanying text.
\textsuperscript{225} This reading of the article is confirmed by the Commentary which suggests that “[a]rticle 52 is essentially an empowering provision so far as the Court is concerned.” 1994 Draft Statute, supra note 7, at 131.
\textsuperscript{226} Id. art. 53(2). Note that this obligation only applies after confirmation of the indictment by the Presidency pursuant to article 27 (See Figure 5, supra), but does not apply to the provisional arrest of a suspect under art. 28(1), which is governed by article 52(1)(a). Presumably however, States Parties nevertheless have an obligation to cooperate with the Court in as regards provisional measures pursuant to article 51(1) and (2), which refer specifically to provisional measures, arrest and detention.
\textsuperscript{227} See ICTY Statute, supra note 3, art. 9(2).
\textsuperscript{228} Some members of the Commission felt that even this system went “too far in the direction of giving priority to the Court’s jurisdiction as compared with that of a State requesting extradition: they stressed that the Court should in no case interfere with
whether the jurisdiction of the Court is premised on a treaty crime (article 20(e)) or one of the other crimes listed in article 20.

H. Enforcement

Article 58 provides that States Parties undertake to recognize the judgments of the Court. Article 59 provides that sentences shall be served in State prisons, a necessary detail, for at least in the initial stages of the Court's existence, its institutional structure will not include a prison facility. Finally, article 60 on pardon, parole, and commutation of sentences imposes an interesting legal regime which combines international and municipal law. Prisoners may apply to the Court for pardon, parole or commutation of sentence, if "under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct" by a domestic court of that State would be eligible for such relief. If the application for relief appears to be well-founded, the Presidency may convene a Chamber to rule upon it.

III. An Assessment of the Proposed Text

A. Why an International Criminal Court Should Be Established

How one evaluates the proposed Court depends upon what one thinks it ought to do. To some extent, the purpose of a permanent international criminal court differs depending upon who one asks. But, there is probably general agreement on some basic propositions. First, over the last fifty years, the corpus of international instruments defining and codifying international criminal law has increased dramatically. According to one study, as of May 1996 some 315 international instruments addressing twenty-four categories of either international or transnational crimes had been entered into by States. The crimes identified fall roughly into two groups: extremely serious crimes (in terms of their gravity, their widespread nature, or both) which offend a fundamental interest of the international community, and crimes of lesser magnitude with a significant transnational existing and functioning extradition agreements." 1994 Draft Statute, supra note 7, at 134. Article 54 complements article 53 by imposing an aut dedere aut judicare obligation in the case of treaty crimes in cases in which a State is a party to the Statute and the treaty in question, but does not consent to the Court's jurisdiction over that crime. Id. cmt. 229. Id. art. 58.

230. Id. art. 59, cmt. The Commentary also points out that the Statute is silent on how the expenses of incarceration are to be shared, stating that "[t]his will need to be worked out as part of the financial structure of the Statute." Id. at 140.

231. Id. art. 60(1).

232. JORDON PAUST, M. CHERIF BASSOUNI, ET AL., INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 11 (1996). Not all commentators agree, however, on the extent to which each of these instruments, and the customary international criminal law that has developed, particularly since Nuremberg, actually covers particular offenses. As one commentator put it, there is a range of overlapping international and national crimes, and yet there is some doubt as to whether "some of the most serious conduct [is] criminal by international law at all." Current Developments, International Criminal Law, 48 Int'l L. Q. 467 (1995).
Arrest and Transfer of the Accused

**Genocide + Any crime for which the State has accepted the Court’s jurisdiction**
States shall arrest and transfer upon receiving an arrest warrant issued under art. 28 (art. 53(2)(a))

Subject to principle of complementarity

**Treaty Crimes**
(art. 53(2)(b))

- State does not accept ICC’s jurisdiction
  - State not a party to the treaty
    - no direct remedy under Statute
  - State is a party to the treaty
    - transfer to ICC

**All Other Crimes**
(art. 53(2)(c))

- State shall consider whether it can, in accordance with its legal procedures, (art. 53(2)(b))
  - transfer to ICC
  - extradite to a requesting state
  - refer accused to its own prosecuting authorities

Notes:
- *a State which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to requests from the ICC over requests from other states to extradite
- *a State may delay compliance if accused is:
  - in its custody or control, and
  - is being proceeded against for a serious crime or serving a sentence

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FIGURE 8

tional component. One may debate which crimes belong in which group, but the growing number of legal instruments suggests that along with the positive effects of “globalization” such as increased trade, there have been some very nasty side effects. It also suggests a growing awareness that each of us is a member of an international as well as a local and national community. 233 Even where changes in technology have not brought about

233. Professor Mueller believes that this is the “inevitable evolution toward the recognition of a civitas maxima, the ultimate community. . . . Perhaps little has changed since
increased crime, they have shown us its effects: images of starving children, hijacked or sabotaged aircraft, homeless refugees, and bombed cities appear on television screens around the world no matter where the crisis is to be found.

Yet, neither the increase in legal instruments prohibiting international crime nor our heightened awareness of its consequences has served to bring about the effective enforcement of international criminal law. Indeed, the more hideous and large-scale the offense, the less likely it is to be punished. This is unfortunately not surprising, for nations are often ill-equipped and generally indisposed to prosecute international crimes.

As to crimes not committed by a country's nationals or on its territory, often either the statutory authorization to prosecute is lacking, or, if present, is deficient in some manner. Witness, for example, the implementation of the Genocide Convention by the United States, which limits potential prosecutions to cases in which the offense was committed in the United States or the alleged offender is a United States national. Even if a country's laws permit prosecution, there may be serious problems in obtaining the presence of the accused, and, frankly, little incentive to spend time and money prosecuting individuals who have committed offenses in another country. This has recently been demonstrated by the lack of enthusiasm French prosecutors have shown in pursuing Rwandans present in France for crimes against humanity they allegedly committed during the recent conflagration in that country, in spite of the fact that recent French legislation providing for the prosecution of such offenses clearly applies.

It is also apparent in IFOR's refusal to arrest Bosnian Serb war criminals Radovan Karadzic and Ratko Mladic.

As for the criminal justice system in a country where international crimes are occurring, it may very well be paralyzed by the criminal activity and incapable of reacting. Worse yet, prosecutors and judges may be controlled by or become puppets of a government engaging in criminal behav-earliest recorded history: the jurisdictional unit is still the village, except that the village is now the world." Gerhard O.W. Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 CONN. J. INT'L. L. 499, 506-07 (1987). *See infra* notes 253-258 and accompanying text.

234. *See infra* note 246 and accompanying text. Indeed, as Professor Meron recently observed, the atrocities committed by the Pol Pot regime in Cambodia and the use of poison gas against the Kurds in Iran are among the many crimes left unpunished either by national or international courts. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L. L. 554, 554 (1995). *See also* Blakesley, *supra* note 2, at 79.

235. 18 U.S.C. § 1091(d) (1994). Although the Genocide Convention does not require the United States to do more, other countries have. See, e.g., *Code Penal* [C. PEN.] art. 211-1 (Fr.).

236. *See Wexler, supra* note 22, at 366 (discussing the new French law on crimes against humanity). A country might see the prosecution of international drug traffickers or hijackers, as more in its self-interest, however, particularly if harm is occurring within that country or to that nation's citizens as a result of the offender's international criminal activities. An example is United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988).

ior. Certainly this is the case when conflict erupts; this has also proven to be true, to a certain degree, in handling narcoterrorists. Indeed, this is the very reason why the Caribbean nations urged the General Assembly to re-examine the then defunct international criminal court project in the first place.238

Finally, domestic courts and prosecutors lack experience in international law and often interpret international instruments in a manner which is contrary to the express or implied intent of the treaty or convention in question.239 They are also subject to national politics. Thus, they are often poor vehicles for the prosecution of their own nationals, as was graphically demonstrated by the Touvier case in France.240 Touvier, accused of participating in the murder of seven Jews during the Nazi occupation of World War II recently died in jail. His case took more than twenty years to wind its way through the French courts, and many suspected interference by the executive branch. This was confirmed when the late François Mitterand, formerly President of France, announced that he had in fact interfered with the pursuit of Vichy collaborators because he believed that the prosecutions would be divisive.241 National courts may also be poor venues for the trial of foreigners, who they may have difficulty treating fairly.

Thus the rationale for an international criminal court is at least in part, as the International Law Commission has recognized, the need for an international trial court for the prosecution and suppression of the most serious crimes of international concern in cases in which national trials would not occur or would be ineffective,242 and in particular243 for a per-

238. See supra note 112 and accompanying text.
240. Wexler, Nuremberg Principles, supra note 22.
241. Id. at 316-66.
242. 1994 Draft Statute, supra note 7, pmbl., cmt. The United States proposed, in its comments to the Draft Code of Crimes, that, in its view, "the most effective response to the problem of international crime is to strengthen cooperation among Governments in the investigation and prosecution of those committing criminal acts." Comments and Observations, supra note 119, at 95-96. While certainly this will assist in national prosecutions of international crimes, it will only do so in cases in which national governments are willing and able to act. There still remains a large category of offenses for which there will be no prosecutions at all if there is no international criminal court. One point suggested by the above discussion is that different nations may, at different times, have different needs with respect to an international criminal court. While all
manent court to try those responsible of serious violations of international humanitarian law. It is also, perhaps secondarily, an argument for a court which, like the International Court of Justice, could help interpret and develop international criminal law, either through an original or advisory jurisdiction.244

Given the inadequacy of national criminal justice systems in the face of massive violations of international humanitarian law, one alternative is to do nothing. Some have suggested that this is the only alternative, given the fragmented "legal and political nature of the international community."245 But doing nothing has both moral and practical costs. As Jose Avala Lasso, the United Nations High Commissioner for Human Rights recently remarked, it is an "obscenity" that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000."246 Practically speaking, the cost of killings, bombings, and terrorism, in terms of loss of life, loss of human potential, economic destruction, and wasted resources is enormous. There are undoubted risks in using criminal trials to achieve social justice and attempt to right societal wrongs that have occurred on a massive scale. The debate whether legal prosecution or some other method, such as lustration, or South Africa's ongoing experiment with a Truth and Reconciliation Commission247 is a

nations should wish for the prosecution of genocide wherever and whenever it occurs (hence the appropriateness of the International Law Commission's proposal for the Court's inherent jurisdiction over genocide); other countries may need more assistance with crimes such as narco-terrorism or hijacking.

243. Some States believe that the Court's jurisdiction should include only serious violations of international humanitarian law. Others feel it should cover transnational criminal activity such as narcotics traffic and terrorism. See infra Part III.B.6.

244. Indeed, when the ILC resumed work on the question of international criminal court in 1989, it considered models that would have responded to one or both of these needs. The report suggested three alternative models for the International Criminal Court: an ICC with exclusive jurisdiction; concurrent jurisdiction between the ICC and national courts; or an ICC having only review power (this could include advisory opinions requested by a UN organ, or binding opinions requested by a state, which would allow the Court to harmonize the interpretation of international criminal law, leaving to national tribunals the function of deciding on the merits). Report of the International Law Commission on the work of its Forty-second session, supra note 114, at 24-25. It was only later that the scope of the Court's power was reduced, in response to political concerns. See supra notes 115-16 and accompanying text.

245. Warbrick, supra note 5, at 261. See also Rubin, supra note 2, at 7.


247. In July 1995, Nelson Mandela signed legislation establishing a Truth and Reconciliation Commission. The Commission is empowered to issue subpoenas for the sake of gathering information, but it has no prosecutorial function. It is, however, authorized to grant amnesty to all who come forward and describe their actions, assuming they fulfill the criteria for amnesty. The Commission, headed by Archbishop Desmond Tutu, consists of three committees: the first conducts investigations, the second issues amnesties, and the third determines what reparations the government ought to make to the victims. Naturally enough, there is widespread doubt that the Commission can be both effective and impartial. Suzanne Daley, Panel to Investigate Atrocities of the Apartheid Era, N.Y. TIMES, Aug. 27, 1995, at A3. Early on families of victims challenged the amnesty power, charging violation of victim's rights. Suzanne Daley, Victim's Kin Sue to Halt Apartheid-Era Inquiry, N.Y. TIMES, Apr. 11, 1996, at A5. However, South Africa's top Court dis-
better vehicle to promote national reconciliation (at least enough to permit the reestablishment of coexistence without warfare) is ongoing and space does not permit its full exploration here. But legal accountability, if consistently enforced, would surely bring about much of the good on an international scale that it may domestically, such as deterrence of crime, rehabilitation of the victim’s dignity, retribution for the criminal act, and upholding of the principles of justice and law.

Another alternative is to create ad-hoc tribunals. Certainly this permits States and the Security Council a certain flexibility in addressing particular crises. But as others have observed, several problems attend the creation of ad hoc tribunals. As the criticisms of the IMT at Nuremberg show, ad-hoc tribunals give the impression of arbitrary and selective prosecution, no matter how “fair” the actual trial proceedings are. This has been true of the ICTY and ICTR, where both defendants and commentators have raised the issue of the tribunals’ legitimacy, pointing out that their creation depended on action by the Security Council, an inherently political organ.

Second, there is the problem of delay. Ad hoc tribunals represent a post hoc mechanism that takes time to establish—time during which evidence may be destroyed and additional lives lost. A permanent tribunal would arguably provide the international community with an existing mechanism that can promptly investigate and prosecute reported war crimes and other atrocities.

missed these challenges, ruling that without the amnesty program, the truth about what happened during the apartheid years might never be told. Suzanne Daley, Pardon Us, N.Y. TIMES, July 28, 1996, at D2.

248. See Stanley Cohen, State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past, 20 LAW & Soc. INQ. 7, 24 (1995); Mark J. Osiel, Ever Again: Legal Remembrance of Administrative Massacre, 144 U. Pa. L. Rev. 463 (1995). Professor Osiel discusses the extent to which law can address the aftermath of what he terms “administrative massacre,” that is, “large-scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war—civil or international, real or imagined.” Id. at 468.


251. Of course, the ICTY and ICTR, unlike the IMT at Nuremberg (and Tokyo), are not military tribunals but were established by Security Council Resolution. Moreover, the judges are not only nationals of victorious powers passing judgment on the vanquished; the eleven judges on the ICTY, for example come from many different nations. International Criminal Tribunal for the Former Yugoslavia Bulletin, January 1996, at 3. But as has been argued elsewhere, the creation of a tribunal in such a manner is nondemocratic in that it denies most states “a vote” on the Court’s establishment, and sidesteps the right of nations to engage in a debate about their cession of sovereignty. Blakesley, supra note 6, at 181.
Finally, and perhaps most critically, there is no way to build institutional memory and competence with ad hoc tribunals. In each case, prosecutors must be found, staff assembled and trained, and judges procured who are willing and able to leave their existing commitments (and who may have little or no experience in international criminal law). This may impact not only on the capacity of the ad hoc court to conduct an effective prosecution and trial, but also on the rights of the defendant, given the inexperience and certain zeal of those pursuing him and sitting in judgment upon him.

Even if the case for the existence of an international criminal court is strong in theory, it may still be weak in practice. This article will not discuss the political objections to an international criminal court, for it goes without saying that if nations are unable to agree on its creation, the 1994 Draft Statute, like its many predecessors will not be implemented until such time as political agreement is present (or not, as the case may be). Moreover, it is at least arguable that the political winds are currently more favorable than they were in the past. As to the other objections that have historically been raised to the creation of such a court, each will be briefly addressed below.

1. State Sovereignty

Once rigidly defined and raised as an absolute bar to the creation of an international criminal court, it is now clear that, at least in theory, this ought not pose an insurmountable obstacle to the creation of an International Criminal Court. Indeed, international law scholars have begun to express cautious optimism about the evolution of international law from its origins as a rather primitive “law of nations” governing certain limited aspects of inter-State relations to a complex normative system that is “becoming the law of a planetary community of which all human beings are members.”

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252. See supra notes 5-6 and accompanying text.
253. The creation of the IMT at Nuremberg and the creation of the European Union are practical examples of cessions of State sovereignty. But see supra notes 61, 70.
254. This theory was articulated by the Permanent Court of International Justice in the Lotus case. There the Court stated that “[i]nternational Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will.” S.S. Lotus Case (Fr. V. Turk.) 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7) at 6. But as commentators have often noted, this view is illogical, for States constantly enter into treaties which limit their freedom of action.
256. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW ix (1995). Accompanying the notion that there is a complex normative system that one might call international law that goes well beyond inter-State relations, is the corollary that the old system premised on the principle of state sovereignty is now démodé. Just as other entities, such as individuals, have become the creators of international law, they may be constrained by international legal norms which are binding upon them. The new “international law” has, like national legal systems, many components, some created by the transnational activities individuals and aggregates of individuals; some created by intergovernmental entities;
Of course, "[s]overeignty is a powerful idea. No matter how hard theorists have tried to deconstruct or decompose it or to diminish it by treating it as a relative concept, the ideas and feelings expressed by the term 'sovereignty' continue to exercise a strong influence on contemporary political and legal thinking." Moreover, States still maintain formal adherence to principles of sovereignty, and in particular, may raise political objections to its erosion. Thus arguments of sovereignty may serve as an effective political, if not legal, bar to the establishment of a permanent international criminal court. This is particularly true given that, as one author has astutely remarked, once such a Court is established it is more than likely to expand its own jurisdiction at the expense of State sovereignty.

2. Effectiveness and Deterrence

It can, of course, be argued that the Court will be of no use in deterring international crime, although I do not think many would agree that it would make matters worse, as Sir Graham Bower argued in 1926. At least one person has argued that the existence of the Tribunal could send "the message that, once a country engages in war it must do anything at all to eliminate the evidence of war crimes." Given the number of atrocities that are currently taking place, without any prosecution whatsoever, one could argue that the court should be given a try if it has any chance of success at all.

Moreover, it has been persuasively argued elsewhere that the best way to prevent "recurrence of genocide and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors--and to employ the law self-consciously toward this end." Admit-
tedly the proposed Court will depend on State cooperation for the execution of arrest warrants and other forms of enforcement, and the lack of an enforcement arm may indeed prove fatal if State's refuse their assistance. Arguably, however, the uncooperativeness of States should not be assumed.

3. Complexity

The endless drafts and long debates on the topic suggest that the problem of an international criminal court's creation is so complex as to be intractable. However, as Doudou Thiam acerbically remarked, objections based on complexity "instead of pointing to a technical snag, . . . seem to reflect a lack of political will."263 The Treaty of Rome establishing the European Economic Community with over 200 articles was drafted and signed in less than one year, and ratified quickly thereafter.264 It is true that the criminal justice systems of different countries are each delicately balanced to ensure that the interests of both the accused and the State are represented. Merger of these systems into an "amalgamated whole" certainly represents a considerable effort.265 The difficulty of this effort should not, however, be overstated.266

Some American authors have raised questions regarding the appropriateness, or even the constitutionality, of United States' participation in an international criminal court should the Court's statute not guarantee all the rights found in our Bill of Rights (and the Supreme Court's jurisprudence thereon).267 These are serious questions, and any statute must at a minimum provide protections for the accused. Yet, it is important to recall that our system is neither completely fair nor in compliance with international human rights standards (particularly in imposing the death pen-

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In the deeply divided societies where administrative massacre occurs, it is too much to hope . . . that, through criminal law, judges can easily elicit shared sentiments of liberal morality in ways that all will endorse.

But it is not too much to hope that courts might make full use of the public spotlight trained upon them at such times to stimulate democratic deliberation about the merits and meaning of such principles. In the ensuing debate, with the recent memory of official intolerance and repression firmly in everyone's minds, liberal morality will do very well on its own. That debate can signal contribute to the special sort of solidarity—through civil dissensus—to which a modern pluralistic society may properly aspire.

Id. at 286-87.

263. Tenth Thiam Report, supra note 114, ¶ 16. As he pointed out, most of the issues are "no more complex" than those involved in the "establishment of other international judicial organs such as the International Court of Justice and European Court of Human Rights" (and, one might add, the European Court of Justice). Id.

264. GEORGE A. BERGMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 7 (1992). Of course, there were only six signatory states. But the complexity of the legal issues involved, not to mention the cession of sovereignty, were surely greater than what is involved in establishing an International Criminal Court.

265. See supra note 123 and accompanying text.


267. Blakesley, supra note 2, at 100-01; Finch, supra note 98.
aly), nor is the Constitution the bar that is often posited. Indeed, the guarantees of the Bill of Rights were only applied to the States through the process of selective incorporation by the Supreme Court. It is difficult to see how the same process could apply extraterritorially to proceedings conducted by an international criminal tribunal, so as to bar United States’ participation in a multilateral treaty to create an International Criminal Court. But even if one were to do so, which rights would apply? On what criteria would their selection be based?

4. Counterproductiveness

The claim is often made that if an International Criminal Court is created and does not work, international law and justice will be set back decades. The “legislative history” (ILC reports, 6th Committee discussions, etc.) of the effort to establish an International Criminal Court are replete with this argument which is often framed that it is better to “be realistic” and do nothing than to do something that might not work. Yet, international criminal law, and particularly international humanitarian law, as it currently stands is incoherent, incomplete, and practically not enforced. It is not clear why it would be worse if the international community attempted prosecutions and failed because politics intervened—a country failed to hand over the accused, a superpower refused to contribute its share to the Court's operations, or a State refused the Court's jurisdiction. Reading between the lines, the real fear of most democratic governments concerning the international criminal court is not that it will fail, but that it will succeed. That is, that there will be established an institution independent enough to hold governments (including superpower governments) accountable. Given the proposed structure of the Court, that is probably not a possibility. But even were it possible, is this not something from which every citizen could benefit (assuming that the Court was insulated enough from political processes so that its own proceedings would not be trivial, politically motivated, or a sham, of course).


269. The recent increase in international agreements entered into by the United States has clearly placed a strain on the constitutional structure envisaged by the framers. For example, as Professors Ackerman and Golove suggest in their recent article, the twentieth century has seen a remarkable shift in which the Treaty clause, once supreme and capable of defeating the United States' entry into the League of Nations and ratification of the Treaty of Versailles, has become prey to Congressional-Executive agreements such as NAFTA. Professors Ackerman and Golove argue that this transformation is both constitutional and appropriate. Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 801, 803, 916-29 (1995). Professor Tribe disagrees, arguing that such liberal constitutional interpretation threatens to weaken the Constitution. Laurence Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1227 (1995).

270. For a thoughtful analysis of this problem, see Marquardt, supra note 2, at 79 (concluding that the proposed court “easily passes muster under familiar principles of United States law”).

271. See, e.g., supra notes 77, 99, 114, and accompanying text.
5. Absence of International Criminal Law

One of the most serious criticisms levelled at efforts to create an International Criminal Court is the absence of a well-defined corpus of "positive" international criminal law. This charge was raised after World War Two, at the IMT at Nuremberg, and has been a repeated theme of the debate on an International Criminal Court. It is, of course, resurfacing with respect to the ICTY and ICTR.

The situation today is quite different than that which existed fifty years ago. Treaties defining international crimes now abound, although there are some glaring omissions, such as crimes against humanity. The problem with many of them is their lack of precision. Even the genocide convention, which specifically contemplated enforcement, contains no section on penalties, mens rea, or defenses. Some have looked to the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind as the solution to this problem. Unfortunately, the Draft Code has encountered serious resistance from States and although the ILC recently adopted a new version of it, it appears to be shelved for the time being. Others have suggested that it will be the Court itself who will solve these definitional problems by developing an international criminal "common" law. Query, however, whether such a common law approach is consistent with modern notions of legality.

In its 1994 Draft Statute, the ILC opted for a provision on jurisdiction which did not explicitly define the crimes under general international law.

272. See supra note 56 and accompanying text.
273. Crimes against humanity are considered part of customary international law. These crimes were defined, each time slightly differently, in Article 6(c) of the IMT Charter, in art. 5 of the ICTY Statute, and art. 3 of the ICTR Statute. Due to the ambiguities concerning its exact nature, calls have issued for its "codification" by international treaty. M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457 (1994).
275. Although the latest version addresses some of the controversial provisions of the 1991 Draft, it does not grapple with many of the issues raised, and appears no more likely to garner the support of a majority of States.
276. See supra note 38.
277. As Professor Edward Wise has noted, the classic formulation of the principle of legality is the maxim nullum crimen nullum poena sine lege. As he notes, "[a]lmost everywhere (and nowadays, to a large extent, even in countries following English common law), the principle of legality has been taken to require that crimes be specifically proscribed by law in advance of the conduct sought to be punished." E. M. Wise, I.L.A. Committee on a Permanent International Criminal Court, Report on General Rules of Law, December 27, 1996 draft, at 80. Although it is clear that this does not, as a matter of international law, prohibit prosecutions based on customary international law (see art. 15, International Covenant on Civil and Political Rights), "there seems to be emerging broad agreement that not only offense definitions and penalties, but also the general rules of liability and exoneration to be applied by the court, cannot be left to national law, or otherwise permitted to vary from case to case, but must be settled in advance." Id. at 83. But see Jordan J. Paust, Report Prepared for the I.L.A. Committee on a Permanent International Criminal Court, Nullum Crimen and Related Claims, December 27, 1996 draft, at 96.
in subparagraphs (a) through (d), but maintained the Court's statute as a "primarily . . . adjectival and procedural instrument."278 Thus, the Commission essentially decided the issue without deciding it, determining, as would be the case in most national legal systems, that the Court's Statute is not the place to define substantive criminal law.

Many studies of the Draft, and in particular the Siracusa Draft have proposed extensive changes to the Draft Statute which would define the law to be applied by the Court.279 The Working Groups on the Definition of Crimes and General Principles of Criminal Law and Penalties at the Preparatory Committee sessions have produced draft definitions of crimes to be included in the Draft Statute as well as general principles of criminal law and penalties.280 Query whether a consensus can be reached on all the issues before the delegates within a reasonable time period, given the failure, until now, of the Draft Code.

B. Particular Problems with the 1994 Draft Statute

Given these general considerations, how are they addressed by the 1994 Draft Statute. Certainly the statement of the Court's purpose and overall thrust is appropriate. The Court will serve as a trial court for serious crimes of concern to the international community as a whole, in cases in which national prosecutions would not occur (or would be ineffective). Thus far, the Commission's approach seems perfectly consistent with the goals of the proposed International Criminal Court. But there are certain institutional features of the Court which, unfortunately, seriously threaten its ability to function effectively. This Article will not attempt to address all the problems raised by the ILC's draft, but will highlight a few of the more egregious ones.

1. Compensation and Tenure of the Judiciary

To a large extent, the success or failure of the Court will rest on the caliber of its judges and their ability to work together. There are several features of the judiciary contemplated by the 1994 Draft Statute that threaten the Court's ability to function properly. First, as contemplated by the 1994 Draft Statute, judges will not be eligible for reelection under article 6 of the Draft Statute. This is simply unacceptable.281 One of the chief criticisms

278. 1994 Draft Statute, supra note 7, at 71, cmt.
279. See, e.g., Siracusa Draft, supra note 17.
281. The ILC has offered no tenable explanation of why the judges of the proposed International Criminal Court, unlike the members of the International Court of Justice or European Court of Justice, would not be eligible for reelection. Indeed the Commission's commentary on this point is extremely cryptic, stating only that "[t]he special nature of an international criminal jurisdiction militates in favour of that principle [of noneligibility for re-election]." 1994 Draft Statute, supra note 7, at 51.
of ad hoc tribunals is their inability to build up institutional memory and competence. This can only be overcome by creating an independent, effective and competent judiciary. It must be possible for the judges of the Court to acquire, to paraphrase Frederick Pollock, “a judicial habit of mind, and the community of ideas that springs from regular common action . . . .”282 Particularly if the Court functions only “intermittently,” it is hard to see any advantage that may come from disallowing the reelection of judges who may have sat only during part of their first term. Indeed, this feature of the Draft Statute may also make recruitment of high quality judges difficult, many of whom may have to leave prestigious situations to serve on the Court. (The lack of remuneration of the judges will also be a factor in this regard.)

It may be that the International Law Commission thought that judges would be less tempted to structure their decisions along lines that would maximize their reelection chances if they were simply not re-electable. Thus, perhaps the drafters hoped to enhance at least the appearance, if not the reality, of principled decisionmaking and thereby increase the acceptability of the Court to the world public.283 At least one member of the Commission has made this point, alluding to the politicization of the ICJ’s elections to emphasize the correctness of his position.284 The suggestion appears to be that judges who cannot be reelected will be more independent on the bench because they will not be concerned with their reelection. But this view is perhaps naive. Those judges will no doubt be worried about the career they will have in their home state after their (short) tenure is over, meaning that they will not be free from political pressure after all. In any event, the problem of judicial independence is more appropriately addressed not by forbidding judges to stand for more than one term, but by offering them the protection that comes from deciding cases by consensus.285 They are, in this way, insulated from the political process, at least to some extent, and may feel freer to make difficult decisions without fear of reprisal. This has certainly been a positive feature of the European Court of Justice,286 although it is not the model that was adopted for the ICTY.

2. The Semi-Permanent Nature of the Court

Many have argued that semi-permanence was a necessary compromise to achieve political backing for the proposed court. The United States government has repeatedly expressed support for this feature of the Court, which was the model adopted by the ILC’s Working Group on an International

283. I am indebted to Professor Stephen H. Legomsky for this point.
285. See supra notes 210-11 and accompanying text.
286. See Wexler, supra note 19.
Criminal Court from the outset. Although it may make the Court cheaper to operate, because judges and other staff will not be paid full-time salaries unless the States Parties subsequently vote to change their status to full-time, it is hard to see how this feature could improve the Court's functioning. Given the current state of world affairs, the Court is likely to be quite busy. If the Court is to meet the objections raised on the grounds of deterrence, ability to enforce international law and the rule of law, it must develop institutional competence. This goes for the prosecutorial staff as well as the judiciary. The inclusion of this feature of the Court suggests a lack of political will on behalf of States that may indeed be crippling to the proposed institution.

3. The Role of the Court in Developing and Clarifying International Criminal Law

It was originally proposed that the Court have a jurisdictional function like the European Court of Justice's preliminary reference procedure, whereby it could issue binding advisory opinions on international criminal law referred to it by national court systems or by organs of the United Nations. The idea was to permit the Court to assume a role of unifying and constructing international criminal law. As the Special Rapporteur stated in his Ninth Report to the ILC:

The court could also play a very important role in the unification of international criminal law . . . . It could help to remove some uncertainties regarding terminology and the definition of concepts, such as complicity and conspiracy and the attempt to commit such crimes, whose content varies from one country to the next. It could also facilitate clarification of the meaning and the content under international law of a number of principles, such as the principles nullum crimen sine lege and nulla poena sine lege or the non bis in idem rule.

This proposal was rejected by the ILC as too intrusive of state sovereignty. Granting the Court this kind of jurisdiction could have given the Court the workload it needed to justify a “permanent” status, however, as well as responded to objections about the undeveloped nature of international criminal law. Its absence is understandable, but regrettable.

4. State Consent to Jurisdiction

The regime of State consent to jurisdiction is extremely problematic. First, as outlined above, it will add considerable complexity to the prosecution of offenses under the statute because indictments will often contain counts alleging a variety of crimes. Second, the opting-in regime will often permit a State to block the prosecution of an offense even though other States

287. Commentators are divided on this point, however. See, e.g., ABA Task Force, supra note 266, at 491 (Task Force was divided on this issue).
289. 1994 Draft Statute, supra note 7, at 70.
290. See, e.g., supra note 224-25 and accompanying text.
would like prosecution to occur. Indeed, this provision may well have the effect of completely gutting the Court's effectiveness, as noted by the judges of the ICTY in their comments on the Draft Statute.

One could take as an example the case of Dusko Tadic, the first defendant tried before the ICTY in the Hague. Tadic is accused of crimes he committed as a guard at the Omarska detention camp southeast of Prijedor, Bosnia. He was arrested in Germany and the Prosecutor's office of the ICTY asked for his transfer to the Tribunal, which was subsequently effected. He was indicted for crimes against humanity (ICTY Statute, art. 5), Grave Breaches of the Geneva Conventions of 1949 (ICTY Statute, art. 2), and war crimes (ICTY Statute, art. 3). These allegations correspond to articles 20(c) and 20(d) of the 1994 ILC Draft Statute. Under the current regime of State consent, and assuming that the Security Council had not referred the matter (which eliminates the regime of State consent), the complaint must be filed by a State that is not only a party to the Statute but has accepted the Court's jurisdiction under article 22, presumably with respect to both crimes. Germany, as the custodial state, would also be required to consent to the jurisdiction of the ICC, again, presumably with respect to both crimes. Finally, the "territorial state," that is, the State upon whose territory the act occurred must consent to the Court's jurisdiction. The question in this case might be which State—the former Yugosl-

291. The Commission suggests that it abandoned the "opting-out" system because often it would not be obvious until after a complaint was filed, which States' consents were required. This would mean that cases might not be heard even though all the States concerned might be willing for the Court to take the case. 1994 Draft Statute, supra note 7, art. 22, cmt.
292. Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53, U.N. Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.244/1 (1995) at 29. A brief review of the scholarship on the International Court of Justice is equally illuminating. Most commentators have suggested that the ICJ's most debilitating problems have arisen because of its system of compulsory jurisdiction. Under the so-called "Optional Clause" (Article 36(2) of the ICJ's Statute) a State may register unilateral declarations accepting the Court's jurisdiction over future disputes with the Court. The precise legal effect of these declarations is largely a matter of state discretion, as most declarations include special provisions (either "conditions" or "reservations") specifying effective duration, substantive scope, withdrawal mechanisms, etc. A competitive logic is driving most states away from meaningful acceptance of the compulsory jurisdiction. Consequently, the Court now finds itself deluged by a series of increasingly clever devices for seeming to submit to its jurisdiction while in no sense actually doing so. The weakness of the Article 36(2) Optional Clause has proven enormously damaging to the power and prestige of the ICJ. See J. Patrick Kelly, The International Court of Justice: Crisis and Reformation, 12 Yale J. Int'l L. 342 (1987); J.G. Merrills, The Optional Clause Today, 50 [1979] B.R.T. Y.B. Int'l L. 87; Shigeru Oda, Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of Those Declarations: The Effect of the Shultz Letter, 59 [1988] B.R.T. Y.B. Int'l L. 1. But see James Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 1979 B.R.R. Y.B. Int'l L. 63. A more positive view of the ICJ's jurisdiction is provided by Roslyn Higgins (now a member of the Court), who points to increased use of the ad hoc jurisdictional reference as a healthy trend away from over-preoccupation with jurisdictional issues. Higgins, supra note 255, at 191.
294. See Figure 4 supra.
via or one or more of its current components? Presumably, if any of these three States objected to the Court's jurisdiction either as to one or both of the crimes, the Court could not hear the case. Thus, as noted earlier, unless the Security Council refers the matter to the Court, it is unlikely to have very much to do.

5. The Relationship of the Court to the United Nations

The relationship is problematic for two principal reasons. First, as currently envisaged, the Security Council may block submission of matters to the Court in cases being dealt with as a breach of the peace or act of aggression under Chapter VII of the United Nations Charter. Additionally, all complaints based on an act of aggression must be preceded by a Security Council determination of aggression. A political element is thus introduced into the Court's operation which threatens to undermine its impartiality and credibility. Second, the absence of a formal relationship with the United Nations means the Court will need to be financed and supported in some other way. Given the resources problems that have plagued the ICTY and the ICTR, this is likely to be a significant impediment to the Court's successful operation. These points will be taken up in reverse order.

Proponents of the International Criminal Court have, from the very beginning, debated what the relationship of the Court and the United Nations should be. It has generally been thought that the optimal solution would be to establish the International Criminal Court as an United Nations organ in order to "ensure its universality, moral authority and financial viability." The problem with this approach is that it would require the Charter's amendment, which could involve considerable delay and be extremely difficult, it not impossible. The consensus has generally been that the multilateral treaty approach avoids such difficulty. This also means that funding will be on an ad-hoc basis, unless States Parties

295. Although it is not completely clear, the Statute does not appear to mean the specific criminal allegations against Tadic, when it refers to "crimes," but rather that the State in question has consented to jurisdiction over "a crime referred to in Article 20." 1994 Draft Statute, supra note 7, art. 21(1). That is, the Statute does not seem to permit States to pick and choose between various criminal allegations, agreeing to jurisdiction in the case of several murders, for example, but disagreeing in the case of rapes (both of these would fall either under crimes against humanity, war crimes, or both, depending on the context). Nevertheless, one can imagine a State wishing to do exactly that, and bringing pressure to bear on the Prosecutor's office to have certain charges dropped in exchange for a State's consent to jurisdiction. Such exchanges would undoubtedly undermine the Court's prestige and effectiveness by calling into question the Prosecutor's integrity.

296. See supra note 15 and accompanying text.

297. 1994 Draft Statute, supra note 7, art. 23(3) cmt.

298. Id. art. 23(2).

299. See supra note 83 and accompanying text.

300. UN Ad Hoc Committee Report, supra note 17, at 3.

301. Some delegations at the Ad Hoc Committee meetings, however, stated that this problem should not be "overemphasized" given the current discussions concerning the restructuring of the Security Council. Id. at 3-4.
are required to commit resources in advance. Indeed, despite the relatively low cost of creating a court that could potentially "deter future occurrences of [serious international] crimes," compared to the billions spent on weapons used in perpetrating (and arguably preventing) such crimes, the need to create an International Criminal Court that is not "costly" has been a constant theme of the debate. There is little that can be done about this problem, which could, of course derail all efforts in this regard.

The issue of the Security Council's involvement, however, is more susceptible to solution. The 1951 Committee draft permitted the General Assembly to lodge complaints with the Court. The 1953 Draft removed that power but would have permitted (as one alternative) a United nations organ to stop proceedings in a particular case "in the interest of the maintenance of peace." The 1994 ILC Draft Statute essentially adopts this solution, which appears completely inconsistent with the necessary independence of the Court. It permits the Security Council both to file complaints and block proceedings.

Although it is understandable that the United Nations might be empowered to refer matters to the Prosecutor so long as it has no power to influence the outcome of those cases, it is not possible to maintain the Court's independence if the Security Council, which is a political organ, can stop proceedings because it is taking action under Chapter VII. Detailed discussion of this point is beyond the scope of this article, but, particularly if aggression is dropped as a crime from the International Criminal Court's jurisdiction, as is likely, there is no reason to involve the Security Council in otherwise independent judicial proceedings. This is particularly so given the extremely serious nature of the offenses within the Court's jurisdiction and the need for the Court to treat all parties before it equally.

302. It is essential that a financing plan be worked out in advance, given the poor track records of States with respect to the ICTY. The United States Contribution to the ICTY for 1996, for example has been $0. (It was $700,000 in 1995). Canada, on the other hand, contributed US $171,000 in 1995 and US $268,000 in 1996.) International Criminal Tribunal for the Former Yugoslavia Bulletin, N°9/10 14-VIII-1996, at 6. 303. UN Ad Hoc Committee Report, supra note 17, at 3. 304. See supra note 90 and accompanying text. 305. See supra note 106 and accompanying text. 306. The 1994 Draft Statute, however vests the power in the Security Council rather than the General Assembly stating that the "General Assembly lack[s] authority under the Charter to affect directly the rights of states against their will, especially in respect of issues of criminal jurisdiction." 1994 Draft Statute, supra note 7, at 86. 307. Id. art. 23. At the same time, the comment suggests that "if the costs of proceedings are to be met by states parties rather than through the United Nations system, special provisions will need to be made to cover the costs of trials pursuant to Article 23(1)." Id. at 86. 308. There was extensive debate on this issue both by the Ad Hoc Committee and the Preparatory Committee. 309. Many members of the Commission also felt this way, as reflected in the Commentary to article 23. In particular, some members expressed concern that article 23 would introduce inequity between States Parties to the Statute, some of which would be members of the Security Council, others not. 1994 Draft Statute, supra note 7, at 88.
6. Jurisdiction Rationae Materiae

Defining the Court's jurisdiction has been one of the most difficult obstacles in adopting a statute. As noted above, part of the problem is the somewhat diffuse nature of international criminal law. Another part of the problem is that the Commission tried to draft a statute that would cover a very wide variety of offenses in order to respond to the needs of States. The Preparatory Committee Sessions and many NGOs have focussed on the substantive jurisdiction of the Court and have proposed a variety of solutions. Two trends emerge from these discussions, both of which can be considered positive developments.

The first trend is the elimination of many of the treaty crimes which are not international crimes but rather national offenses with international effects. This would probably include drug trafficking, even though a case can be made for its inclusion as an international crime. The problem with the inclusion of treaty-based crimes, such as drug trafficking, is that the expansion of the Court's jurisdiction to include crimes which are not also considered crimes under customary international law substantially complicates the application of the Statute. In addition, particularly with respect to narcotics crimes, an argument can be made that these crimes would overwhelm the Court, even if limited, as article 20(e) requires, to conduct that "constitute[s] exceptionally serious crimes of international concern." Finally, while there is no doubt that many small nations find themselves unable to effectively combat narcoterrorism, this is a case in which the regime of interstate cooperation could prove effective, and in which other larger nations, such as the United States, have a self-interest in doing so. Thus, to include these crimes in the Statute may unnecessarily complicate it and detract from what many perceive to be the Court's central purpose, which is the prosecution of serious violations of international humanitarian law.

The other trouble spot is the crime of aggression. It is likely that this crime will be dropped from any Court Statute finally adopted, which, although disappointing, is probably inevitable. First, although the General Assembly defined aggression in 1974, it did so in a political rather than a legal context. Thus, the definition is unsuitable in certain respects for use by the Court. Obtaining a satisfactory definition is almost sure to

311. 1994 Draft Statute, supra note 7, art. 20(e).
312. A strong counterargument can be made, however, for the inclusion of treaty crimes within the Court's statute. The International Law Association's Committee on a Permanent International Criminal Court has suggested that several treaty crimes be included within the Court's Statute, but that a special Chamber of the Court be established to deal with them. This would encourage States desiring the inclusion of Treaty Crimes to ratify the Court's Statute, but would avoid diminishing its moral strength by having individuals on trial for relatively minor offenses at the same time that major war criminals were being prosecuted. See I.L.A. First Committee Report, supra note 2, ¶ 8.
313. This is ironic given that the General Assembly cited the need to define the crime of aggression as the rationale for dropping the International Criminal Court and Code of Offenses project in the 1950s. See supra notes 110-11 and accompanying text.
pose an insurmountable obstacle to the Statute's adoption given the reluctance of States to agree on this issue. Moreover, it is not clear how much is really gained as a legal matter by the addition of the crime. Most of those who would be guilty of aggression can probably be indicted on other counts, such as genocide or serious violations of the law and customs governing armed conflicts. Although it would be preferable if the Court could declare particular uses of force to be illegal, this will necessarily involve the determination of political questions that could threaten the Court's very existence. Finally, under the current proposal, the Security Council must make a finding of aggression before the Court is permitted to pursue this crime. This raises serious doubts about the Court's independence, doubts which must be allayed if the Court is to function effectively and win the loyalty and support of States. Conversely, if aggression is dropped from the Statute, a case can be made that the right of the Security Council to stop proceedings should be deleted, as there are essentially no "political" questions left to decide. Thus, as others have suggested, it is probably preferable to narrow the Court's jurisdiction to the core crimes representing serious violations of international humanitarian law, rather than try to do too much at once.

Conclusion

It nearly defies human understanding that after two world wars in this century, millions of deaths, disappearances, and other human rights abuses are still occurring. To imagine that an international criminal court could put a stop to this human tragedy overnight is folly. To believe, however, that this tragedy is inherently unrestrainable by law and justice is equally wrong. As Justice Jackson told the International Military Tribunal at Nuremberg:

The real complaining party at your bar is Civilization.

..., Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of International Law, its precepts, its prohibitions and, most of all its sanctions, on the side of peace ...


315. The I.L.A. Committee on a Permanent International Criminal Court was split on the issue of aggression. A majority of the Committee's membership felt that aggression should be within the Court's jurisdiction, for failure to include it would mark a retreat from the principles laid down by the International Military Tribunal at Nuremberg, which considered aggression to be the "supreme" international crime. Moreover, the possibility that the Court's establishment could deter criminal behavior could be seriously weakened were aggression omitted, for those who started a conflict might be insulated from punishment. It is certainly conceivable that, at least in democratic States, a general or Chief of Staff may, in a particular case, feel that a particular military action violates international law and raise objections before rather than after the fact. I.L.A. First Committee Report, supra note 2, ¶ 10.

316. JACKSON, supra note 44, at 94.
In its 1994 Draft Statute, the International Law Commission attempted to produce a document that would be a compromise between those who would have gone much further and those who felt that nothing should be done at all. The Commission was thus in relative agreement about the desirability of creating an international criminal court, but in almost complete disarray as to the form such an institution would take. This schizophrenia is reflected in the 1994 Draft Statute, which, as outlined above can be criticized in many respects. The 1994 Draft nevertheless provides a viable starting point for discussion, as the relatively positive outcome of the two Preparatory Committee sessions thus far indicates. But this is not enough. There are certain features of the proposed statute that threaten to cripple the proposed Court from the outset. It is better to create a strong institution with a narrow compulsory jurisdiction, as some NGOs have argued, than to try to be all things to all States and end up with a structure that cannot function at all.

Over the next year, the Preparatory Committee will continue its discussions with a view to producing a draft text that can be the subject of a diplomatic conference. The governments represented at those meetings have a heavy burden to see that the hopes and aspirations of citizens who suffer from international crime are not traded away in endless negotiations on points of trivia and legal technicalities that, in the long run, are of little import. They have a responsibility to establish an international criminal court that can function as an impartial, independent and credible institution—puppet neither to the Security Council, the Superpowers, or the politics of States. Whether they have the courage to do so, of course, remains to be seen.

317. See, e.g., LAWYERS COMMITTEE, supra note 314, at 5.