On November 14, 1989, United States Representative Jason Abrams delivered the United States response to Agenda Item 152 to the General Assembly: "Nevertheless, my delegation must confess that its enthusiasm for the proposal to create an international criminal court is tempered by several serious questions regarding the feasibility and usefulness of such a court. In this connection, . . . we wish to remind the Committee that the creation of an international criminal court is an idea with a long, and largely disappointing history."

An examination, however cursory, of the efforts to create an international criminal tribunal reveals a struggle similar to that of Homer's "Sisyphus" and his effort to roll a rock up to the top of a mountain. According to Greek mythology, Sisyphus, the King of Corinth, was condemned by the gods to eternally roll a heavy rock up a steep mountain, "whence the stone would fall back of its own weight," making Sisyphus's ordeal both futile and unending. For his part, Sisyphus does not cease from his endeavor and continues to go back to the bottom to start anew.

For the better part of this century there have been efforts to establish an international crimes court. Since the Nuremberg and Tokyo trials in 1945 and 1946, there have been several proposals for both an international crimes

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* Judicial Law Clerk, Hon. Theodore McMillian, United States Court of Appeals for the Eighth Circuit. LL.M. Georgetown University Law Center, 1992; J.D. Saint Louis University School of Law, 1991.


3 Id. at 119.
tribunal and an international crimes code. Although these efforts have for
the most part, been soundly critiqued or simply ignored by the community
of nations, like Sisyphus, international legal scholars and others continually
renew efforts for their acceptance. This continued effort is evidenced by
current attempts to foster consensus for the creation of an international
crimes court.

According to Homer, the impetus for Sisyphus’s predicament is subject to
various and widely differing explanations. Similarly, the failure to establish
an international criminal court has been attributed to different concerns on
the part of some members of the international community. While some
concerns are extremely valid and need to be addressed, others are more
disingenuous and somewhat transparent. For example, in 1989, the
Permanent Representative of the Republic of Trinidad and Tobago proposed
the establishment of an international crimes court with jurisdiction to try
individuals. Arguing that an international criminal tribunal would provide
an alternative to the present system of aut dedere aut judicare (extradite or
prosecute), the proposal called for an international criminal tribunal with its
own code. The code would limit the jurisdiction of the court to crimes such
as international trafficking in illicit narcotic drugs. This limitation, however,
would allow for the further expansion and elaboration of a greater variety of
international crimes in the future.

This proposal provided that an international criminal court would have
jurisdiction only if such is conferred explicitly by both the state of which the
accused is a national, as well as the state or states in which the crime is
alleged to have been committed. Further, the proposal contained the proviso
that consent to jurisdiction could not be presumed.

In response, United States Alternate Representative Jason Abrams, while
pointing to the disappointing history of proposals to create an international

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4 M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute
5 Id. at 11.
6 International Criminal Responsibility of Individuals and Entities Engaged in the Illicit
Trafficking in Drugs Across National Frontiers, and Other Transnational Criminal Activities:
Establishment of an International Criminal Court with Jurisdiction over such Crimes, U.N.
(statement of Marjorie R. Thorpe, Permanent Representative of the Republic of Trinidad and
Tobago in the U.N. Sixth Committee of the General Assembly) [hereinafter Statement of
Marjorie R. Thorpe].
7 Id.
criminal jurisdiction, put forward the question of "whether there is something inherent in the very concept of an international criminal court, and the derogation from state sovereignty which it represents, that would prevent such a court from receiving the broad acceptance which would be required to make it effective."

Proclaiming the creation of an international criminal tribunal a "complex endeavor," Abrams called for careful deliberation and thoughtful study. He proposed a series of issues that should be addressed before the world is ready for an international criminal court, such as: How will evidence be obtained, who will investigate and prosecute the case, what rules of procedure would apply, and who would incarcerate the offenders? Furthermore, he questioned whether states would be more willing to relinquish an accused to an international criminal court than to prosecute the alleged offender themselves, or extradite him or her to another state.

Issues such as rules of procedure, collection of evidence, investigation and prosecution of cases, and power of incarceration are important and require an intelligent response. Those issues, however, are not as critical to the establishment of an international criminal court as is the question of whether states that are disinclined to participate in the current international process of prosecuting or extraditing would be more willing to participate in an international crimes tribunal.

According to the Greeks, Sisyphus's disdain for the gods, his irreverence for death, and his joy for life earned him the penalty wherein his entire existence is dedicated toward the accomplishment of nothing. Such is the price he paid for devouring life's passions. Unlike Sisyphus, mankind cannot afford to suffer the same fate. While myths are made for the imagination, the problems facing the international community with the continued growth of transnational and international crimes are very real. Terrorism, genocide, torture, crimes against diplomats, and trafficking in illicit narcotic drugs all constitute a continued threat to international peace and security and must be addressed.

This article will examine initiatives that have been undertaken since the Nuremberg and Tokyo trials to establish an international crimes tribunal including the most recent proposals by the United Nation's International Law

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1 Statement of Jason Abrams, supra note 1, at 2.
9 Id.
10 Id. at 2.
11 CAMUS, supra note 2 at 120.
Commission and the American Bar Association. It will also examine how these proposals address issues such as the scope of jurisdiction and composition of the court. Further, it will discuss the arguments for and against the establishment of an international crimes court. Finally, it will propose how these issues should be solved in light of the historical problems associated with the establishment of other international tribunals and their eventual solution.

I. INITIATIVES TO ESTABLISH AN INTERNATIONAL CRIMES COURT

In the last fifty years there have been several initiatives towards the establishment of an international crimes tribunal. In 1951, the International Law Commission submitted a draft statute for an international crimes court, which was revised in 1953. In 1982, the International Law Association, while meeting in Montreal, adopted a draft statute for an international crimes tribunal. Furthermore, the Instituto Superiore Internazionale di Scienze Criminali (International Institute of Higher Studies in Criminal Sciences) also adopted a draft statute for an international criminal tribunal. More recently, the International Law Commission of the United Nations and the American Bar Association have also made proposals for the establishment of an international crimes court. Although there have been other proposals and attempts to instigate the establishment of an international crimes court, these constitute the more substantive approaches. Hence, an

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12 Some of the issues addressed in sub-sections A, B, and C of this section have been raised in a report to Congress prepared under the supervision of the Judicial Conference Committee on Criminal Law and Probation Administration. The report, which was transmitted to Congress in October of 1991, was approved by the Judicial Conference of the United States. See Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court (September, 1991) (handout) [hereinafter Judicial Conference Report].


16 In 1990, the American Bar Association International Law Section recommended the establishing of an International Criminal Court with limited jurisdiction. The Court's jurisdiction would be limited to offenses enumerated in the 1988 United Nations Convention.
individual review of the respective initiatives and proposed draft statutes will illustrate the different issues involved in the creation of an international crimes tribunal.

A. 1953 United Nations Draft Statute

In 1949, the United Nations, by way of the International Law Commission and the Committee on International Criminal Jurisdiction, began work on both an international crimes code and on a statute creating an international crimes court.

The draft statute was finalized after much haggling in 1951, and later revised in 1953. However, it failed to get much support from the international community. The draft code, also finalized in 1951, was largely criticized because of its failure to define what it meant by the term “aggression.”

The Committee on International Criminal Jurisdiction, in drafting the statute, envisioned three different methods by which an international criminal court could be established: 1) by an amendment to the United Nations Charter; 2) by establishment of a multilateral convention; and 3) by resolution of the General Assembly. Further, the Committee looked to the possibility of creating the court by way of resolution by the General Assembly, followed by multilateral conventions that would confer jurisdiction on the court. Apparently a majority of the Committee members preferred the creation of an international crimes court by multilateral convention, stating that they thought it was “the best and most feasible


19 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT 40-43 (1980).
21 Id.
method for some time to come.\textsuperscript{22}

Under article 2 of the proposed draft statute, the court would apply international law, and where appropriate, national law. This could only be done if the court had a draft code which would provide substantive law for the jurisdiction of the court. In the revisions, the number of judges was increased from nine to fifteen.\textsuperscript{23}

The court's jurisdiction is not presumed, but must be specifically conferred, and conferring jurisdiction on the court would not imply that a state would divest its national courts of the power to deal with a crime or case.\textsuperscript{24} An individual could not be tried by the international criminal court unless both the state of which he was a national and the state in which the offense was committed conferred jurisdiction upon the court.\textsuperscript{25}

The statute also provided for a five-judge panel that would make a pre-trial determination as to the sufficiency of the evidence to support a conviction.\textsuperscript{26} Under article 34, the prosecutor would be appointed by the complaining state. Apparently, the United States, concerned with its constitutional framework, convinced the Committee to allow trial by jury in cases where the instrument conferring jurisdiction called for it.\textsuperscript{27}

In an effort to deal with the possible politicization of the court, article 29 provided that proceedings may be instituted by any state that had conferred jurisdiction to the court over offenses involved in the case. It allowed, however, for the United Nations to halt any proceedings in a particular case in the interest of maintaining peace.\textsuperscript{28} Under articles 35 and 36, the court must give notification of the indictment to the offender, the state of which the accused was a national, the state in which the crime was alleged to have been committed, and where possible, to the victim's state.\textsuperscript{29}

Article 38 provides that the accused is to be presumed innocent, as well as have the right to be present at all stages of the proceedings, to conduct his own defense, and be defended by counsel. Further, article 38 provides that the proceedings be translated into the language of the accused. It also allows the accused to conduct discovery of evidence, and it extends the right to the

\textsuperscript{22} Id. at 6.
\textsuperscript{23} Id. art. 5.
\textsuperscript{24} Id. art. 26.
\textsuperscript{25} Id. art. 27.
\textsuperscript{26} Id. art. 33.
\textsuperscript{27} Id. art. 37, See also FERENCZ, supra note 19, at 43.
\textsuperscript{28} 1953 U.N. Draft Statute, supra note 13, art. 29.
\textsuperscript{29} Id. arts. 35, 36.
defendant not to testify, as well as to have no negative inferences drawn from the failure to take the stand.\textsuperscript{30}

Once the court has jurisdiction, article 40 empowers the court to issue arrest warrants. It must be noted, however, that there is no provision for the service or execution of the warrant.\textsuperscript{31} Further, although article 42 gives the court the power to compel attendance and produce evidence, there is no mechanism provided that allows compulsion of third party witnesses, or for the production of evidence by third parties.\textsuperscript{32}

Article 50 provides double jeopardy protection by prohibiting the trial of an individual by a national court of the state conferring jurisdiction for the same offense for which that person was tried in the international tribunal. This provision appears to allow for prosecution of an individual by a state that has not conferred jurisdiction to the court over the same offense, and it seems to allow for the prosecution by the international court of a person who has already been tried in a national court for the same offense.\textsuperscript{33}

Finally, there are some points on which the Committee either did not reach agreement or intentionally left open for further discussion. Among these points were the issues of the contents of a convention creating the international crimes court, and what limitations, if any, would be put on states' rights to make reservations to the jurisdiction of the court.\textsuperscript{34}

Furthermore, there was very little unanimous support for any of the articles of the draft statute. In fact, the final version that was to be submitted to the General Assembly gave the impression that there was nothing final about any of the articles of the statute.\textsuperscript{35} Moreover, with the work on the draft code still in progress under the International Law Commission, the draft statute was tabled to await the completion of the draft code. The final version of the draft code caused much disagreement because, as stated above, it failed to define what it meant by the term "aggression."

\textsuperscript{30} Id. art. 38.
\textsuperscript{31} Id. art. 40.
\textsuperscript{32} Id. art. 42.
\textsuperscript{33} Id. art. 50.
\textsuperscript{34} Id., chap. 8, at 22.
\textsuperscript{35} FERENCZ, supra note 19, at 44-45.
In 1954, a Committee on Defining Aggression\(^{36}\) was established by the Sixth Committee with a mandate to report back to the General Assembly in 1956.\(^{37}\) In turn, the effort to create an international crimes tribunal stalled, and with the beginning of the cold war it effectively came to a standstill.

**B. International Law Association Draft Statute**

During its 60th Conference held in Montreal in 1982, the International Law Association (ILA) adopted a draft statute of an international criminal court. Although originally drafted in Montreal in 1982, the statute was amended at the 61st Conference held in Paris in 1984.\(^{38}\) For purposes of this analysis the amended version will be used.

The statute called for an international crimes court with jurisdiction over "natural persons," which would apply "general principles of law recognized by nations."\(^{39}\) The statute in article 23, calls for concurrent jurisdiction under which a person may be tried by the national court or, if referred by the state, to the international crimes court.\(^{40}\) It also provides that a state may confer jurisdiction on the Court by "convention, special agreement or unilateral declaration."\(^{41}\)

Under article 1, the statute contained the proviso that, in order for jurisdiction over the person to attach, the person must be charged with any of the offenses itemized in a number of United Nations conventions.\(^{42}\) For example, the statute provides the court with jurisdiction over offenses in, among other conventions, the Convention on the Prevention and Punishment of the Crime of Genocide,\(^{43}\) the Convention for the Suppression of unlawful

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\(^{37}\) *Id.* at 45.


\(^{39}\) *Id.* arts. 19, 22.

\(^{40}\) *Id.* art. 23.

\(^{41}\) *Id.* art. 19(2).

\(^{42}\) *Id.* art. 1.

Seizure of Aircraft (hijacking), the Convention on the High Seas (piracy), the Slavery Convention, the Single Convention on Narcotic Drugs and the Convention of Psychotropic Substances (narcotics trafficking), the International Convention for the Suppression of Counterfeiting in Currency, the International Convention for the Prevention of Pollution of the Sea by Oil, the Convention against the Taking of Hostages, the Convention on the Suppression and Punishment of the Crime of Apartheid, and the four Red Cross Conventions of 1949, which prohibit the mistreatment of civilians and military personnel during wartime.

There are some notable differences between this statute and the 1953 U.N. Draft Statute above. For example, under article 21 of the ILA Draft Statute, only one of the interested states must confer jurisdiction. In contrast, the 1953 U.N. draft statute calls for jurisdiction to be conferred by both the state in which the accused is a national and the state in which the crime is alleged.
to have been committed. Furthermore, under the ILA Draft Statute either the state in which the accused has citizenship or the state in which the accused is present may confer jurisdiction on the court to try the individual.

An important difference between the ILA Draft Statute and the 1953 U.N. Draft Statute is the ILA Draft Statute's double jeopardy provision contained in article 45, whereby no individual tried in a national court may be tried again by the international tribunal, and, likewise, no person tried by the international court can be tried in the national court of any contracting state. Under the 1953 U.N. Draft Statute above, an individual may theoretically be tried by the international tribunal even though he or she was tried by a national court for the same offense. Moreover, under the 1953 U.N. Draft Statute, an individual could conceivably be tried by a national court of a state that has not conferred jurisdiction to the international court.

Another difference between the ILA Draft Statute and the 1953 U.N. Draft Statute is that although article 35 of the ILA Draft Statute provides procedural rights like a fair trial, the right to be present at all proceedings, the right to have the proceedings translated to the defendant's language, the right to remain silent and not testify, and the right to submit evidence and cross-examine witnesses, there is no provision for the right to subpoena witnesses or compel testimony.

Article 40 of the ILA Draft Statute provides that, in order for an individual to be convicted, a two-thirds majority of the judges participating in the trial is needed. Additionally, although the court may alter its judgment upon discovery of decisive facts which were previously unknown, as in the 1953 U.N. Draft Statute, the judgment of the court is final and cannot be appealed.

Further, under article 31, once jurisdiction has been obtained by the court, a Commission of Criminal Inquiry may indict, dismiss, or recommend a settlement of the case. However, no standard of proof is provided for the

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56 ILA Draft Statute, supra note 38, at art. 21.
57 Id. art. 45.
59 Id.
60 Id.
61 ILA Draft Statute, supra note 38, art. 40.
62 Id. arts. 44, 46; 1953 U.N. Draft Statute, supra note 13.
Commission to judge the sufficiency of the evidence.\textsuperscript{63} Under article 37, when jurisdiction has been conferred, the court may issue arrest warrants only upon "strong suspicion and belief on reasonable and probable grounds" that an individual has committed a crime.\textsuperscript{64}

Finally, like the 1953 U.N. Draft Statute, article 33 of the ILA Draft Statute provides that, upon indictment, the accused (as well as the state from which the individual is a national or the state in which he or she is a habitual resident) and the state in which the crime is alleged to have been committed must be notified of the indictment.\textsuperscript{65}

Although the ILA Draft Statute fails to provide a mechanism, article 1 leaves open the possibility that other offenses which might be included in other conventions may fall under the jurisdiction of the court, provided that "such offenses have been defined with sufficient precision."\textsuperscript{66}

C. Institutio Superiore Internazionale di Scienze Criminali 1990 Draft Statute

In 1990, a Committee of experts in international criminal policy met in Siracusa, Italy. The meeting was held at the Institutio Superiore Internazionale di Scienze Criminali (ISISC) under the auspices of the Italian government for the purpose of drafting a statute for an international criminal tribunal.\textsuperscript{67} The final result was a draft statute which was greatly influenced by Professor M. Cherif Bassiouni,\textsuperscript{68} and based on other models, primarily on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid (Siracusa Draft Statute).\textsuperscript{69}

The Siracusa Draft Statute was published under the byline A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control, and Suppression of International and Transnational Criminality, Including The Establishment of an International Criminal Court (Compre-

\textsuperscript{63} ILA Draft Statute, supra note 38, art. 31.
\textsuperscript{64} Id. art. 37.
\textsuperscript{65} Id. art. 33; 1953 U.N. Draft Statute, supra note 13, art. 36.
\textsuperscript{66} Id. at 280.
\textsuperscript{67} Blakesley, Committee on Experts Considers International Criminal Court Proposal, 6 INT'L ENFORCEMENT L. REP. 1 (1990).
\textsuperscript{68} Professor of Law, Depaul University.
hensive Approach).  

The Siracusa Draft Statute calls for an international criminal tribunal (whose jurisdiction includes both natural persons and legal entities) with universal jurisdiction over offenses enumerated in an annex to the Convention creating the Court.  

Unlike the ILA Draft Statute above, however, which provided that the international crimes tribunal would have jurisdiction over offenses enumerated in several international Conventions, this statute does not specify the type of crimes over which the court would have jurisdiction. Instead, it leaves the question for another day when a Draft annex to the Convention creating the court is provided.

Further, the statute provides that the Court may obtain jurisdiction over crimes and cases not enumerated in the annex, by way of "transfer of criminal proceedings" from the state that has jurisdiction over the case. In those cases, the international court would apply the substantive law of the transferring state, but would apply its own procedural rules.

Additionally, unlike the ILA Draft Statute and the 1953 U.N. Draft Statute that provide for proceedings to be initiated by a state, this statute allows for proceedings to be initiated by anyone delivering a complaint to the "prosecuracy," who serves as the prosecutorial and investigative arm of the court. The complaint may also be initiated by the prosecuracy itself.

Contemplating that the international crimes tribunal's orders would be enforced by contracting states, the statute provides for the court to issue warrants, injunctions, search warrants, subpoenas, and what the commentary calls a "non-exhaustive list of orders." These orders would then be executed pursuant to the laws of the particular state in which the order is to take effect.

Under this draft statute, a case will not go forward unless it has been determined in a preliminary hearing that:

a. The case is reasonably founded in fact and law;

b. No prior proceedings before the Tribunal or elsewhere bar the process in accordance with principle ne bis in idem or fundamental notions of fairness; and

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70 Bassiouni, supra note 15.

71 Id. at 390.

72 Id. at 382.

73 Id. at 396.

74 Id. at 399.
c. No conditions exist that would render the adjudication unreliable or unfair.\textsuperscript{75}

It must be noted that Subparagraph (c) apparently foresees the possibility that non-cooperation by non-Parties to the convention could impair the effectiveness of the tribunal. For example, if there were no cooperation from a state through intentional failure to provide material evidence which exculpates or incriminates an accused, a trial before the court would conceivably become an unfair proceeding to any or all of the parties involved, and in turn impair the reputation of the court.\textsuperscript{76}

Although the standard of proof is not explicitly referred to in the Siracusa Draft Statute, the decision of a chamber of three judges who hear the case must be based on facts proved beyond a reasonable doubt.\textsuperscript{77}

Unlike the 1953 Draft Statute and the ILA Draft Statute, which provide no mechanism for appeal and whose decisions are final, the Siracusa Draft Statute provides for an appeal process. Appeals from a guilty verdict or imposed sanctions are to be made to the court en banc, but only if written notice is given within 30 days of the entry of judgement or order,\textsuperscript{78} and only if such appeals are based on questions of law.

Additionally, the court may revise the decision if evidence discovered after the judgment or order has been entered would have had a material effect on the determination, if the court was flagrantly misled, if the facts alleged are not proved beyond a reasonable doubt, or on other grounds which the court may provide.\textsuperscript{79}

Like the 1953 Draft Statute and the ILA Draft Statute, the Siracusa Draft Statute provides the accused with procedural protections such as speedy trial, the right to cross-examine, the right to remain silent, and the right of presumption of innocence. However, this statute also provides an exclusionary rule, which calls for the exclusion of illegally obtained evidence “which constitutes a serious violation of internationally protected human rights.”\textsuperscript{80}

Finally, the Siracusa Draft Statute contemplates and calls for the cooperation and assistance of the international community—specifically, of

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 401.
\textsuperscript{77} Id. at 404.
\textsuperscript{78} Id. at 405.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 418.
the contracting states. Their assistance is expected, not only in enforcing the court’s orders as stated above, but also in matters of extradition, letters rogatory, procuring evidence, transfer of prisoners, and execution of sentences.81


In 1989, the General Assembly of the United Nations asked the International Law Commission (ILC) to consider the feasibility of creating an international crimes court, to be reported in its forty-second session held in 1990.82 This was somewhat of an unusual request, as only once in the history of the ILC had it been asked to act so expeditiously.83

After reviewing the historical efforts by the United Nations to establish an international criminal tribunal, the ILC considered several issues that it saw as essential to the establishment of such a court. It focused its examination on the court’s jurisdiction and competence, its structure, as well as the legal force of the court’s judgments and other issues pertaining to penalties, implementation of judgments, financing, and possible international trial mechanisms other than the court.84

Regarding the jurisdiction and competence85 of an international crimes

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81 Bassiouni, supra note 15.
83 In fact, the only other time that the ILC was asked to act so expeditiously was in 1972 when it was asked to draft a proposal providing for the protection of diplomats. The ILC response in that occasion was the framework that led to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. McCaffrey, supra note 64, at 931 (citing UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 72 (4th ed. 1988)).
85 There is an apparently hair-splitting debate among criminal law experts as to whether there is a distinction between jurisdiction and competence. Jurisdiction, the argument goes, deals with the court’s geographic, subject-matter and in personam authority. Competence on the other hand, like in the theory of La Competence de la Competence which allows the International Court of Justice to establish its own competence, establishes the particular
tribunal, the ILC recognized three different issues: subject-matter jurisdiction, jurisdiction over persons, and the nature of the court's own jurisdiction.

As to subject-matter jurisdiction, the ILC found that the court had three alternatives: the tribunal could exercise jurisdiction over the crimes defined in its own code; the court could exercise jurisdiction over only some of the crimes defined in its code; or the court could be established independently of a code, exercising only the jurisdiction that states would confer over all crimes, particularly those under existing international conventions.86

As to the first alternative of exercising jurisdiction over crimes defined in its own code, this option would have the disadvantage of having to wait for a draft code to be completed to create the court. On the other hand, it would have an advantage in that the crimes defined in such code would meet criminal law standards, specifically the rule of *nullum crimen sine lege* or no crime without a law.

Under the second alternative, if the court exercised jurisdiction over only some of the crimes in its code, at its inception, it would create problems of reciprocity and universality. For example, certain states could conceivably confer competence only to the court for particular crimes, while others could continue to prosecute these same crimes through their national courts.

However, if the court was created independently of a code and would in turn exercise jurisdiction solely over crimes enumerated in existing conventions, much of the delay inherent in the drafting of a code would be eliminated.87

In regard to in personam jurisdiction, the ILC code currently being drafted deals only with individuals. It does not cover legal entities like states and organizations, unlike the ISISC draft statute above that contemplates court jurisdiction over all legal entities. Although the issue of extending the court's jurisdiction to states was discussed, it was left for future consideration.88

The third jurisdictional issue addressed by the 1990 ILC Report was the nature of the court's jurisdiction. Here again, the Commission recognized

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87 Id. at 47.
88 Id.

powers of the tribunal "with respect to its jurisdiction and provides the legal framework of reference for the tribunal's exercise of its jurisdictional authority." Bassiouni, supra note 15 at 392 (citing I. Shihata, *The Power of the International Court to Determine its own Jurisdiction*, THE HAGUE: NUHOFF (1965)).
three alternatives: exclusive jurisdiction, concurrent jurisdiction, and review jurisdiction.  

Under exclusive jurisdiction, individual states would abstain from exercising jurisdiction over crimes falling within the competence of the international tribunal. Under concurrent jurisdiction, both the international and national courts would have competence to try a case, leaving to the state the decision of whether to bring the case before its national court or before the international tribunal.  

There are, however, some difficulties with concurrent jurisdiction. For example, in regard to where a state elects to try a case, one state may choose to proceed with a case in its national court, while another state may elect to proceed with the same case before the international tribunal. Another problem would be that of uniformity; specifically, that while some states would bring their cases before the international court, others might choose instead to use their own national courts for similar offenses.  

Finally, with review jurisdiction, the court would only have competence to review decisions of the national tribunals. In the case of granting the court the power to issue legal opinions, it could take two forms: binding opinions and advisory opinions.  

The last jurisdictional issue that the Commission considered was the question of who could bring a case before the court. The Commission recognized six different options: all states; all states parties to the court’s statute; any state which has an interest in the proceedings (because the crime was committed within its territory, the victim was its national, the accused was its national, or the accused was captured within its territory); intergovernmental organizations of a universal or regional character; non-governmental organizations; or individuals.  

Furthermore, the Commission discussed two possible restrictions on the right to submit cases: 1) requiring the consent of all states which have an interest in the case and 2) requiring authorization either from the General Assembly or the Security Council. The Commission also considered the

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89 The Commission also discussed granting competence to the court as a complement to any of the above options, allowing the court to issue legal opinions on issues of international crimes. Id. at 48.
90 Id.
91 Id.
92 Id.
93 Id. at 49.
possibility that the international tribunal would act to harmonize international criminal law, while the national courts would be left with the function of deciding the merits of the case.\textsuperscript{94}

In addressing the issue of the court's structure, the Commission questioned whether the court would be a permanent or an ad hoc body. The Commission was concerned that an ad hoc body would raise issues of uniformity. Furthermore, the Commission considered the issues of court composition, election of judges, who would handle the prosecution, and pre-trial procedures.\textsuperscript{95}

The Commission also had some concern regarding the question of the legal force of judgments; namely, the interplay between judgments of the international criminal court and those of the national courts. For example, if under concurrent jurisdiction the international tribunal rendered a judgment before a national court in a particular case, the Commission felt that a national court could not re-examine that case. On the other hand, if the national court entered a decision before the international tribunal's judgment, then, according to the Commission, the international criminal court could re-examine the case provided: 1) another interested state had grounds to believe that the decision was not based on proper law or facts; 2) the offense was tried as an ordinary crime, although characterized as being under the jurisdiction of the court; or 3) the case was appealed to the international tribunal by a convicted individual.\textsuperscript{96}

The Commission further addressed issues such as: penalties (where the Commission recognized the need to satisfy the rule of \textit{nulla poena sine lege} or no punishment without law); implementation of judgments (under which two options were considered: an international detention facility or implementation under the national systems); and financing of the court (for which two options were considered: financing by the member states or financing by the United Nations).\textsuperscript{97}

Finally, the Commission considered the feasibility of establishing separate courts for different crimes, concluding, however, that the best alternative was a single institution. In addition, it considered the possibility of entrusting the International Court of Justice (ICJ) with jurisdiction over criminal matters, although it discarded the idea because an amendment to the ICJ's statute

\textsuperscript{94} Id. at 48.
\textsuperscript{95} Id. at 50.
\textsuperscript{96} Id. at 51.
\textsuperscript{97} Id. at 51-52.
would be needed. Yet another possibility considered by the Commission was supplementing national courts with judges from other legal systems when national courts were dealing with international crimes. 96

The Commission concluded that, although different views existed as to the structure and scope of jurisdiction of the court, there was broad consensus for the creation of a permanent international criminal court. 99

E. American Bar Association Task Force Report on an International Criminal Court

In February, 1991, the House of Delegates of the American Bar Association, in consultation with the President of the ABA, as well as the Section on International Law and Practice and the Section on Criminal Justice, established a task force to examine the feasibility of creating an international criminal court (Task Force). The Task Force, which was chaired by former U.S. Attorney General Benjamin R. Civiletti, issued its report in January 1992 after consulting with the International Affairs Office of the Legal Advisor of the State Department, the Criminal Division of the Department of Justice, and with distinguished members of the legal profession. 100

The Task Force recommended that the United States Government "work toward finding solutions to the numerous important legal and practical issues identified in the accompanying report, with a view toward the establishment of an international criminal court. ..." 101 It suggested that the court have concurrent jurisdiction with member states. Under this arrangement, the court’s jurisdiction becomes dependent on the particular crimes that the individual states decide to recognize within the court’s jurisdiction. 102

The report further recommended that the international criminal court should not try anyone without first having jurisdiction conferred by both the state or states of which the accused is a national, and by the state or states

96 Id. at 52.
99 Id.
101 Id.
102 Id.
in which the crime is alleged to have been committed. In addition, the report calls for the fundamental rights of the accused to be protected by the court’s constituent instruments, including its rules of evidence and criminal procedure.\textsuperscript{103}

The Task Force also suggests that the international crimes court be “complementary in nature” and that steps should be taken to continue ongoing efforts with regard to mutual legal assistance. To accomplish this goal, the Task Force calls for structures “to be created that supplement and reinforce existing schemes” so that the establishment of an international crimes tribunal would not erode the present system.\textsuperscript{104} Additionally, judges selected for the court must be unbiased and of the highest professional competence and integrity so as to avoid politicization of the court.\textsuperscript{105}

As to the issue of jurisdiction, the Task Force identified four possibilities under which the court could have jurisdiction over a case: exclusive; concurrent; transfer of proceedings (under which a state having original jurisdiction would transfer the case to the international court without losing jurisdiction, whereby the court would apply the substantive law of the transferring state, including its penalty provisions); or appellate review jurisdiction.\textsuperscript{106}

These jurisdictional provisions closely resemble those in the 1990 ILC Report above, with the exception of the transfer jurisdiction issue. Importantly, the concurrent jurisdiction recommended by the ABA task force differs from that recommended by the 1990 ILC Report. Concurrent jurisdiction under the ILC proposal would allow the individual state to decide the particular cases to be turned over to the international tribunal for trial.\textsuperscript{107} Under the Task Force proposal, however, states decide what specific crimes they would recognize to be within the court’s jurisdiction.\textsuperscript{108}

As to exclusive jurisdiction, the report points out that if the United States would agree to it, this provision would probably violate article III of the

\textsuperscript{103} Id.
\textsuperscript{104} Id. at 14.
\textsuperscript{105} Id. at 15.
\textsuperscript{106} Id. at 16-17.
\textsuperscript{107} 1990 ILC Report, supra note 87, at 53.
\textsuperscript{108} ABA Task Force Report, supra note 100, at 11.
The report also suggests that there would be similar constitutional problems under a transfer jurisdiction proceeding. The Task Force argues that, although under either exclusive or transfer jurisdiction the court would be applying United States substantive law, the tribunal would not have been established by Congress, with its judges appointed by the President with the advice and consent of the Senate. However, this argument fails to take into consideration the possibility that the international crimes tribunal might be created by way of a multilateral convention. If established by multilateral convention—which would have to be ratified by the Senate thereby becoming the supreme law of the land—the argument becomes less viable. Moreover, many conventions and treaties allow for reservations and understandings by the different states ratifying the instrument. Consequently, if the international crimes tribunal was created pursuant to such a multilateral convention, the United States would be in a position to make reservations that would take into account its constitutional framework.

The Task Force makes the same argument with regard to appellate review jurisdiction. Specifically, that it would encounter similar constitutional objections not only in the United States but in other states as well.

The report makes the point that it finds it "highly unlikely" that the United States would relinquish jurisdiction to an international tribunal in a case where the crime is committed within the United States and the accused is in custody in the United States, as it would raise "perhaps insurmountable constitutional" objections, specifically the right to jury trial. However, it must be noted that in the 1953 U.N. Draft Statute above, the United States prevailed in obtaining a provision that would allow for a jury trial in an international criminal court, providing the instrument conferring jurisdiction called for it.

Furthermore, the Task Force argues that if the accused were a U.S.

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109 Article III, Section I of the U.S. Constitution provides:
The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. U.S. CONST. art. III, § 1.

110 ABA Task Force Report, supra note 100, at 17-18.

111 Id. at 18.

112 Id. at 21.
national who is alleged to have committed a crime in another state, the
United States might prefer that the U.S. national be tried in an international
tribunal and not in the national courts of another state.\textsuperscript{113}

As to the scope of the jurisdiction of the international criminal court, the
report identifies four alternatives: the jurisdiction of the court would include
all crimes listed in an international criminal code;\textsuperscript{114} the court's jurisdiction
might be limited, at least at its inception to international drug trafficking;\textsuperscript{115}
the court's jurisdiction might be expansive, which would include drug
trafficking plus several other crimes;\textsuperscript{116} and "accordion or Chinese menu"
jurisdiction, under which individual states choose from a list of crimes,
allowing the court to exercise jurisdiction in regard to that state.\textsuperscript{117}

The Task Force also considered issues such as: the composition of the
court and the risk of politicization (as stated above, the report recommends
that judges be disinterested individuals who are of the highest professional
character and integrity, as well as experts in international criminal law);\textsuperscript{118}
who could institute proceedings before the court; and what would be the
applicable law.\textsuperscript{119} Furthermore, it argued that crimes should be defined in
the court statute as in the London Charter for the Nuremberg tribunals.\textsuperscript{120}

Regarding proceedings at trial, the ABA Task Force Report argues that
because the jury system is a common law creature—as opposed to the
inquisitorial system employed in civil states—there should be a combination
of both (without any real explanation as to how this would be accom-
plished).\textsuperscript{121}

In addressing the questions of imposition of sentence and incarceration, the
report suggests that the court should impose the sentence from a schedule of
penalties specified by the court's statute.\textsuperscript{122} As to incarceration, the Task
Force suggests that the sentence be served in the state where the crime was

\textsuperscript{113} Id.
\textsuperscript{114} Id. at 23.
\textsuperscript{115} Id.
\textsuperscript{116} The report suggested court jurisdiction over genocide, torture, crimes against diplomats,
and international trafficking in illicit and narcotic drugs. \textit{Id.} at 24, (citing statement of
Marjorie R. Thorpe, \textit{supra} note 6, at 1).
\textsuperscript{117} Id. at 24-25.
\textsuperscript{118} Id. at 26.
\textsuperscript{119} Id. at 30.
\textsuperscript{120} Id. at 31.
\textsuperscript{121} Id. at 32-33.
\textsuperscript{122} Id. at 34.
committed, arguing that it would neither be "feasible nor desirable to set up a 'Devil's Island' type of permanent detention center. . . ."\textsuperscript{123}

II. THE CASE FOR AN INTERNATIONAL CRIMES COURT

The case for an international crimes court has mostly been couched in terms of facilitating the prosecution of crimes committed in violation of "fundamental principles of human rights."\textsuperscript{124} The goal of the proponents of an international crimes court is to bring to justice those who perpetrate crimes against the human race. The struggle, very much like that of Sisyphus, has not been easy. Up until now it has been seemingly futile and unending.

The efforts for such an organ go as far back as 1895, when the Red Cross suggested a tribunal to deal with continued violations of war.\textsuperscript{125} The presence of a court has seldom deterred crime, or so the argument goes. However, as Ricardo Alfaro, the former President of Panama stated in his report to the International Law Commission regarding the feasibility of an international crimes tribunal in 1950:

The cynic and the skeptic will surely remark that wars are not stopped by means of international tribunals and penal codes. In the municipal organization it may be observed also that there are murderers and thieves despite the fact that there are criminal courts and penal codes, but only God knows how many murders and robberies are not committed precisely because there are judges and penalties. . . .

The administration of justice in the community of States will not be complete until a criminal jurisdiction is established to cope with international crimes. The necessity for such a jurisdiction seems to be a fact established beyond reasonable doubt . . . If the rule of law is to govern the community of States and protect it against violations of the international public order, it can only be satisfactorily established by the promulgation of an international penal code and by the

\textsuperscript{123} Id. at 38.
\textsuperscript{124} Id. at 9.
\textsuperscript{125} FERENZ, supra note 19, at 6.
permanent functioning of an international criminal jurisdiction.\textsuperscript{126}

Alfaro was not without opposition even then. The United Kingdom representative, in opposition to the creation of an international crimes court, opined, "the only possible realistic view [is] that the time [is] not ripe. . . ."\textsuperscript{127} The Venezuelan representative concurred, feeling that international cooperation had not progressed to the point where the creation of such a court would be feasible.\textsuperscript{128}

Currently, many who question the effectiveness of an international crimes court argue that the presence of an alternative court would not cause the dissolution of the threat to criminals. Furthermore, they assert that a country currently refusing to cooperate with the existing system of "extradite or prosecute"—a system largely dependent on the existence of international conventions addressing particular crimes—would be no more likely to extradite to an international tribunal than to another country perceived to be hostile toward its citizens or charges. Under the proposed system, even the United States might be unwilling to extradite its nationals to a tribunal perceived to be guided by shifting political winds.

The current system of prosecution or extradition—which calls for states to not only enact national legislation criminalizing certain acts, but to also prosecute or extradite offenders—does have its difficulties. For example, some states refuse to extradite certain criminals for fear of political or physical retaliation by groups within their borders. This has often been the case when the United States has sought extradition of an offender and the political climate in the offender's state resists U.S. efforts to punish its nationals. With an international tribunal, the thinking goes, states would be less likely to fear retaliation at home since they would be turning over their nationals to neutral third parties who would investigate and prosecute the charges.

The establishment of an international crimes court would not be difficult, per se. However, the nations of the world must summon the political will to do so. For example, in 1978, a year in which hijacking was prevalent, several nations, including the United States, the United Kingdom, France, Canada, and others, decided that their respective governments would not

\textsuperscript{126} Id. at 25.
\textsuperscript{127} Id. at 38.
\textsuperscript{128} Id.
allow airline flights to any state refusing to extradite hijackers seeking refuge within its boundaries. Unfortunately, most of the nations determined to implement these extradition rules were dependent upon petroleum exports from the offending states, thereby making implementation of the plan economically and politically difficult.129

A. International Terrorism

1. Pan Am Flight 103 and U.T.A Flight 772

The need for an international crimes tribunal has recently been emphasized by a number of international incidents of terrorism.130 A bomb destroyed Pan American (Pan Am) Flight 103 in 1988 while over Lockerbie, Scotland,131 killing 270 persons. A bomb was also detonated on France's Union of Transport Aeriens (U.T.A.) Flight 772 a year later, killing 171 persons.132 In both of these cases, evidence lead investigators to conclude that Libyan nationals and officials were responsible for these acts.133 In connection with the latter bombing, France issued international arrest warrants for four Libyan nationals (one of whom was a former foreign minister), and sought two other Libyan suspects for questioning.134 As to the bombing of Pan Am flight 103, in November of 1991, a U.S. federal grand jury handed down a 193-count indictment against Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah, both Libyan officials.135

The United Kingdom, France and the United States asked Libya to cooperate in bringing these suspects to justice by extraditing them to their

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129 Id. at 82.

130 According to a report from the counterterrorism office of the State Department, international terrorism incidents increased twenty-two percent in 1991. Although the report attributed the increase to the Persian Gulf War, Ambassador A. Peter Burleigh, head of the Counterterrorism Office, maintained that "the threat of terrorism, particularly state-sponsored terrorism remains." The report although focussing on Iraq, Libya and Iran, also continued to list Cuba, North Korea and Syria "as sponsors of terrorism." See Bill McAllister, 1991 Increase in Terrorism Reported, WASH. POST, May 1, 1992, at A24.


133 However, some commentators have suggested that the evidence points to Syria and Iran as well. See Libya on the Block, WORLD PRESS REV., May, 1992, at 6.

134 Turning Rivers Around, supra note 132, at 44.

respective states for trial. In its refusal, Libya stated that its main objection was that the courts of these states would not be impartial, and hence would not provide a fair trial for its nationals. Furthermore, Libya claimed that, under current international law it did not necessarily have to extradite its nationals, but could instead prosecute the accused in its own country. Libya then asked that the United Kingdom, France and the United States provide all evidence and pertinent information for the purpose of trying the suspects in Libya.

Rejecting this request, the British Ambassador called for the two individuals charged with the bombing of Pan Am flight 103 to be tried either in “Scotland or the United States.” Libya finally proposed that it turn over the suspects to an international court for trial. However, because none existed, Libya suggested that the accused be tried in a neutral state—perhaps Malta—this suggestion was also rejected.

Instead, the United Kingdom, France and the United States sought assistance from the United Nation’s Security Council. The Security Council, in response to the request, unanimously adopted Resolution 731, which called for Libya to extradite the two indicted suspects to face trial. The Resolution also called on Libya to cooperate with the French investigation of the bombing of U.T.A. flight 772.

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136 Id.
137 William Drozdiak, World Court Rejects Libyan Bid to Avert Sanctions, WASH. POST, Apr. 15, 1992, at A34.
138 In another development, on April 28, 1992, Cuba asked the Security Council to demand that the United States extradite two Cuban nationals accused of bombing a Cubana Airlines jetliner over Barbados, in 1976. Cuba Takes Cue From U.S. in U.N. Demand, WASH. POST, Apr. 29, 1992, at A26. The request came despite the fact that the two suspects have already been tried in Venezuela for the bombing which killed 73 persons. Id. Cuba’s demand, apparently prompted by the Libyan incident, and in an attempt to embarrass the U.S. government, was triggered by what its Ambassador called a “judicial aberration.” Id. Apparently Cuba views the trial and the sentences imposed and served by the two Cuban exiles (one of which has been described by former Attorney General as an “unreformed terrorist”), as attempts by the American Government to cover up its involvement. For additional discussions and detailed account of Cuba’s demand, See id.
139 Lewis, supra note 131, at A8. The Resolution reads in part:

DEEPLY CONCERNED over results of investigations which implicate officials of the Libyan government . . . [and with] requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland and the United States of America in connection with the legal procedures related to the attacks carried out against Pan Am Flight 103 and U.T.A. Flight 772.
For its part, Libya has in effect ignored the Security Council Resolution, instead offering to turn over Al-Megrahi and Fhimah to the Arab League, who would in turn hand them over to the United Nations. Furthermore, Libya went to the International Court of Justice seeking a declaration "that the Pan Am 103 case is covered by the 1971 Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation."\(^{140}\)

Libya argued that under the Convention it has the right to try the suspects, and has no obligation to extradite them to another state for prosecution. Moreover, Libya argued that it did not have extradition treaties with either the United States or the United Kingdom, and that failure to provide Libya with the evidence to prosecute the accused was in effect a violation of international law.\(^{141}\) The United Kingdom, France and the United States vigorously objected to this characterization and sought a resolution imposing sanctions from the Security Council.

Although Libya would like to try its nationals accused in both the Pan Am Flight 103 and the U.T.A. Flight 772 bombings, it cannot prosecute them. Those involved are charged not only as individuals but as government officials, in effect naming the Libyan government a party to the crimes charged. Consequently, the trial would lack the required perception of independence and impartiality.\(^{142}\)

The Security Council passed Resolution 748, which banned all flights to and from Libya and prohibited the sale of arms to that country.\(^{143}\)

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**DETERMINED to eliminate international terrorism,**

1. **CONDEMNS** the destruction of Pan Am Flight 103 and U.T.A. Flight 772 and the resultant loss of hundreds of lives.

2. **STRONGLY DEPLORES** the fact that the Libyan Government has not yet responded effectively to the above requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against Pan Am Flight 103 and U.T.A. Flight 772.

3. **URGES** the Libyan Government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism; . . .


\(^{141}\) Id.

\(^{142}\) See id. (relating comments by Columbia University International Law Professor Oscar Schachter).

Security Council did not, however, impose a sanction against Libya’s main source of income, the sale of oil. It has been argued that the reason for this failure was that, with the Iraqi sanctions in place—which prohibited the commercial sale of oil by Iraq—a ban on Libyan oil could produce a world crisis. Furthermore, because some states such as Germany, Italy, Spain and others are heavily dependent on Libyan oil, an embargo against it would prove counterproductive.

Resolution 748 took effect on April 15, 1992, but not before Libya returned to the International Court of Justice seeking an injunction prohibiting the Security Council from enacting the proposed sanctions. The International Court of Justice, however, ruled by a vote of 11 to 5 that in effect, it lacked the competence to block compliance with Security Council Resolutions.

To date, Libya has refused to cooperate with the Security Council Resolutions, and its leadership has proclaimed that “Libya cannot be humiliated and [that] its dignity and sovereignty cannot be violated.” Arguably with an international crimes court in place, Libya would have no plausible reason for refusing to turn over the two suspects in the bombing of Pan Am Flight 103 for prosecution, nor would it have any excuse to refuse to cooperate with the investigation of U.T.A. Flight 772.

Moreover, Libya’s offer to turn the suspects over to the Arab League or the United Nations is somewhat transparent, as both the Arab League and the United Nations lack the necessary mechanisms or criminal jurisdiction to effectively try these individuals.

2. The Rainbow Warrior

Another incident of terrorism that accentuates the need for an international crimes tribunal occurred on July 12, 1985. While berthed in Auckland Harbour, New Zealand, the British-registered Rainbow Warrior was sunk by a squad of French military security service agents. A series of explosives

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144 Lewis, supra note 131, at A8.
146 Id. at A6.
147 Id. at A1 (quoting Abdul-Salam Jalloud, Chief Lieutenant to Libyan President Muammar el-Qaddafi).
148 Goshko, supra note 140, at A31 (discussing the comments of Columbia University International Law Professor Oscar Schachter).
destroyed the vessel owned by the environmental group Greenpeace, resulting in the drowning of a crew member, Fernando Pereira.  

Greenpeace had planned to use the Rainbow Warrior to lead a flotilla against the French nuclear tests being conducted in Murora Atoll in the South Pacific. A few days after the sinking, New Zealand authorities arrested Major Alain Mafart and Captain Dominique Prieur, both French military officers, and charged them with conspiracy to commit arson, the use of explosives to intentionally sink the Rainbow Warrior, and the murder of Fernando Pereira. Although no extradition treaties existed with France, New Zealand police also issued warrants and demanded the extradition of other agents who were involved but had fled to France.

The arrested French agents originally plead not guilty, but subsequently changed their pleas to guilty after the charges were reduced to manslaughter and willfully causing damage to the Rainbow Warrior. In the meantime, France admitted that the suspects involved were not only its agents but also conceded, although somewhat reluctantly, that they were acting on its behalf. Furthermore, France demanded New Zealand extradite the accused back to France, arguing that the suspects were acting pursuant to official orders and hence could not be charged with any crimes in New Zealand. France then imposed trade sanctions against New Zealand to underscore its resolve to have its agents returned. France prohibited the import of lamb and lamb brains from New Zealand, and threatened to bar the continued entry of New Zealand butter into European Communities.

For its part, New Zealand was willing to extradite the French agents, with the caveat, however, that they continue to serve their sentences. As to the trade barriers, New Zealand registered its disapproval with France, and formally filed a complaint with the European Community Trade Commissioner. After much prodding by the Community, France admitted that it had

151 Pugh, supra note 149, at 656.
152 Id.
153 Id. at 656-57.
154 Id. at 657.
156 Pugh, supra note 149, at 657.
imposed the sanctions but refused to rescind them. Efforts by other European states to resolve the dispute failed.\textsuperscript{157}

Despite economic sanctions, the primary point of contention between the parties was the agents' convictions and prison sentences. France argued that, under its law, an individual can only be imprisoned as a result of a judgment rendered by a French court, or as a result of provisions in an international convention relating to the transfer of prisoners. France also contended that under its law, any "homicide, wounding or striking" ordered by law or lawfully sanctioned will not result in a criminal offense mandating a prison sentence.\textsuperscript{158} Therefore, its two agents incarcerated in New Zealand who had been acting under official orders could not be tried or imprisoned for their actions if returned to France.\textsuperscript{159} The French Government offered to extend to New Zealand an apology for its actions, admit its wrongdoing, and proposed to financially compensate New Zealand for damages.\textsuperscript{160}

New Zealand rejected France's demands and asserted that an action contrary to its court decisions, sentencing, or law, would seriously undermine the foundation of its judicial system. Furthermore, New Zealand argued that the agents' sinking of the Rainbow Warrior was a serious violation of both international and New Zealand law, and hence the crimes deserved the sentences imposed.\textsuperscript{161}

As to France's claim that its agents were acting under official orders, New Zealand countered that under its criminal laws the defense of "superiors orders" was not recognized, and hence not a ground upon which to release
the French agents.\textsuperscript{162} New Zealand further demanded a formal and unqualified apology from France as well as $9 million (U.S.) in compensation from the French government.\textsuperscript{163}

The two parties could not reach a settlement after a series of negotiations, despite the urging of the European Communities and others. The lack of a mechanism or international tribunal that could reconcile the differences in the penal codes of France and New Zealand with international law made the matter worse because of the diverse treatment of the agents' actions. Ultimately, the issues were submitted to binding arbitration by (then) United Nations Secretary-General Javier Perez de Cuellar to decide the issues \textit{ex aequo et bono}, or in justice and fairness.

The Secretary-General ruled that: 1) France should convey to New Zealand a formal and unqualified apology for the sinking of the Rainbow Warrior in violation of international law; 2) France pay $7 million (U.S.) to New Zealand as compensation; and 3) New Zealand release the two agents to French Authorities on the condition that they be immediately transferred to the island of Hao in French Polynesia and kept in the French military facility there for a period of three years without the benefit of any contact with the outside world.\textsuperscript{164}

All of the Secretary-General's rulings were carried out by the respective parties. Looking back at the original dispute and the final resolution, one concludes that the only true stumbling block to an earlier resolution of the dilemma was differing views with regard to the conviction and sentencing imposed on the French nationals. An international crimes court would have provided the parties a neutral mechanism to reconcile their differences. In fact, there would have been no reason for both parties not to submit their respective cases to an impartial tribunal which would have decided the case to the benefit of the world community.

\textbf{B. International Narcotics Trafficking}

Finally, another crime begging for an International Crimes Court is trafficking in illicit narcotics. Since 1980, almost 200 judges, eleven of whom were Justices of the Supreme Court, have been assassinated by drug traffickers.

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} at 400.
\item \textsuperscript{163} Clark, \textit{supra} note 155, at 398.
\item \textsuperscript{164} \textit{Id.} at 398-400.
\end{itemize}
lords in Columbia.\textsuperscript{165} The principal reason for these killings is the fear of the \textit{narcotrafficantes} or drug traffickers' fear of extradition to the United States. In fact, they have gone as far as to adopt a slogan "Better a Tomb in Columbia Than a Jail Cell in the U.S."\textsuperscript{166}

The international war on narcotics has largely been fought by way of Multilateral Conventions that call for states to criminalize certain acts and to either prosecute or extradite violators of those acts. The battle began as early as 1909 with the meeting in Shanghai of thirteen states in an effort to control the major narcotics problem of the time, opium. The result of their efforts was the International Opium Convention at the Hague.\textsuperscript{167}

From 1912 to 1961, a series of international agreements was reached in an effort to stay abreast of the battle against narcotics trafficking. For example, in 1925, the Second International Opium Convention was established in Geneva.\textsuperscript{168} In 1931, the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs was enacted.\textsuperscript{169} And in 1936, the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs was agreed to in Geneva.\textsuperscript{170} Additionally, a number of Protocols to the above Conventions were agreed to between 1936 and 1953.

The Single Convention on Narcotic Drugs was agreed to in New York in 1971, for the purpose of coordinating some of the provisions that were included in the Conventions and Protocols dealing with international narcotics trafficking.\textsuperscript{171} Unfortunately, international narcotics trafficking continued to grow in geographical scope as well as in the number of substances available. For example, synthetic drugs such as hallucinogens and other medical stimulants and sedatives were being manufactured for the sole purpose of street sale and use.

This development gave way in 1977 to the Psychotropic Substances

\textsuperscript{165} George J. Church, \textit{Going Too Far}, \textit{TIME}, Sept. 4, 1989, at 12.
\textsuperscript{166} \textit{Id.} at 13.
\textsuperscript{167} International Opium Convention, Jan. 23, 1912, T.S. No. 612, 8 L.N.T.S. 187.
\textsuperscript{168} International Convention, Second Opium Conference, Feb. 19, 1925, 81 L.N.T.S. 317.
\textsuperscript{169} Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, T.S. No. 863, 139 L.N.T.S. 301.
\textsuperscript{170} Convention of 1936 for the Suppression of the Illicit Traffic of Narcotic Drugs, June 26, 1936, 198 L.N.T.S. 299.
Convention, in Vienna. The Psychotropic Convention prohibits the manufacturing for distribution, trade, and use of psychotropic drugs, except for scientific and medical purposes. In 1972, the Single Convention on Narcotics Drugs was bolstered by way of Protocol. This Protocol not only prohibits the manufacture, use and traffic in narcotics, but also provides for states to initiate rehabilitation treatment for drug abusers.

Working under the various Conventions and Protocols, the international community was able to gain some insight into the mechanism employed by the various drug cartels. Concerned by the continuing escalation of the international drug trade, the United Nations, by way of the Commission on Narcotic Drugs, began searching for methods to bring the existing Conventions up to date. In 1985, the Commission on Narcotic Drugs, one of the functional commissions of the Economic and Social Council, began drafting a Convention that would supplement the other Conventions on international narcotics trafficking. Finally, on December 19, 1988, after much work with the different states and organizations, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted (Convention).

The Convention, whose instrument of ratification was deposited by the United States with the United Nations on February 20, 1990, provides that state signatories undertake certain obligations. Among other things, states are compelled by the Convention to escalate their fight against international drug trafficking, namely by enacting measures that would enhance their capacity to not only make effective arrests, but also to prosecute both domestic as well as international drug offenses. It also provides that states continue providing legal assistance to other states by investigating, seizing, and confiscating the products and proceeds of the international drug

177 Id.
trade. Furthermore, it calls upon states to criminalize certain activities and to either prosecute or extradite the offenders.

The international community has made great efforts to establish multilateral Conventions in order to combat international drug trafficking. Despite these efforts, however, the international drug trade continues to grow. As of 1986, the international sale of cocaine alone was a twenty billion dollar a year business. One of the principal problems in fighting the wave of international drug trafficking is the lack of an international tribunal that could provide uniformity of laws and act as a forum to reconcile different criminal codes.

C. The World Court

Aside from the proposals for an international criminal tribunal in part I of this article, a recent proposal calls for the establishment of a "World Criminal Court." Under this proposal, the jurisdiction of the International Court of Justice would be extended to handle criminal matters. This proposal calls for the jurisdiction of the Court, at least at its inception, to be limited so that only states could request that cases be heard before it.

However, there are problems with extending the jurisdiction of the International Court of Justice. Aside from the fact that expansion of the Court's jurisdiction requires a resolution from the "General Assembly upon recommendation of the Security Council," there are other problems. For example, the proposal establishing the ICJ, which ultimately replaced the Permanent Court of International Justice, was met with much opposition. One of the more serious objections to the creation of the ICJ was the issue of jurisdiction.

In 1945, as states negotiated the new court's jurisdiction, states were only

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178 Id.
179 Id.
182 Id. at 14.
183 Id. at 14-15.
willing to confer jurisdiction to the Court by two different methods: (1) under Article 36(1), which allows the court to seize jurisdiction on "all cases which the parties refer to it";\(^{185}\) and (2) by way of Article 36(2) or the "Optional Clause." Under this clause:

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\text{states may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.}\(^{186}\)
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Therefore, the Court's jurisdiction is compulsory if voluntarily accepted. Furthermore, under Article 36(3), jurisdiction may be conferred by a state for "a certain time," often limited to a number of years.\(^{187}\) Thus, if the jurisdiction of the Court is extended to include criminal matters, any state may opt out of the Court's jurisdiction by merely withdrawing its consent to the Court's jurisdiction as to criminal matters. This would severely weaken the tribunal and create problems of uniformity.

In fact, in 1985, this is exactly the problem that New Zealand encountered in its dispute with France in the case of the Rainbow Warrior. Originally, New Zealand announced that it would seek legal recourse through the ICJ. It then gave notice that it would ask for financial compensation for the violation of its sovereignty by France, pursuant to international law and United Nations Conventions.\(^{188}\)

However, New Zealand was prevented from bringing any action before the ICJ, because, among other things: (1) France's consent to the jurisdiction of the ICJ had expired in 1973, and was never renewed; (2) France would not accept the Court's jurisdiction in this case because France felt that, by accepting the court's jurisdiction in 1966 pursuant to Article 36(2), it

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\(^{185}\) Statute of the International Court of Justice art. 36(i).

\(^{186}\) Id. at art. 36(2).

\(^{187}\) Id. at art. 36(3).

\(^{188}\) Pugh, supra note 149, at 664.
reserved the Court’s jurisdiction as to "disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defense;"  

(3) New Zealand’s acceptance of the Court’s compulsory jurisdiction in 1977 also contained a reservation that excluded:

disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute: or where the acceptance of the Court’s compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court;  

and (4) the same declaration of acceptance of jurisdiction by New Zealand further included a statement of reciprocity honoring other states’ acceptance of the ICJ’s jurisdiction.

III. CONCLUSION

Over the last two years, the international community has been the beneficiary of an increasing climate of cooperation and goodwill among States. Nowhere has this cooperation been more evident than within the United Nations. In 1990, during the Iraq/Kuwait conflict, the Security Council passed twelve resolutions in an effort to solve this conflict. All the resolutions received overwhelming support from the Security Council, and nine of the twelve were either passed unanimously or with just one or two abstentions.
On February first of this year, a ceasefire ending a 15 year civil war took effect in El Salvador. The ceasefire was largely the result of the work of the United Nations and the tireless efforts of (then) Secretary-General Javier Peres de Cuellar. More recently, as seen above, the Security Council, again acting unanimously, passed two Resolutions in response to the bombings of Pan Am Flight 103, and U.T.A. Flight 772. This spirit of cooperation and goodwill makes the prospects for an international crimes court far more viable than it was two years ago, before the break-up of the Soviet Union.

The community of nations should take advantage of this cooperative environment to create an international crimes tribunal by way of a Multilateral Convention. Such a Convention would provide the court with jurisdiction to hear cases involving any of the offenses listed in the different Multilateral Conventions. Moreover, the court would be competent to hear cases against states, individuals, and all legal entities. The Convention would also allow for limited reservations by states which ratify the convention. These reservations would not significantly impair the effectiveness of the court. The reservations would pertain only to those matters that are mandated by domestic laws or constitutions (for example, a reservation that would call for trial by jury if the constitution of a particular state guarantees that right to its citizens).

Under this Convention, the court would have concurrent jurisdiction, which would require that only the state in which the offense was committed could grant the court consent to hear a case. Concurrent jurisdiction would allow the state in which the crime was committed to retain the right to try the case if for some reason the international tribunal is unable to conduct the trial. This concurrent jurisdiction would also be subject to the condition that double jeopardy will apply to secure the rights of the accused not to be subjected to double prosecution for the same crime in either the international or national court.

Furthermore, the Convention would provide that once consent to the court's jurisdiction has been granted, it could not be unilaterally withdrawn. This would follow the model of the International Center for Settlement of

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194 See supra text accompanying notes 138-139.
195 For a partial list of the Conventions involved, see supra notes 167-176.
Although the court would have jurisdiction over offenses listed in the different Multilateral Conventions, the court’s subject-matter jurisdiction would be limited at its inception to no more than two types of crimes—namely narcotics and terrorism—with the capacity for expansion in the future.

Despite the elaborate work and time dedicated to drafting the above proposals, international response has been, at best, non-committal as states continue to either invent or recycle objections to the establishment of an international criminal tribunal. Today, objections to the creation of an international crimes court include claims that such a court would interrupt the existing system or that the court might become politicized. Questions range from whether states not currently cooperating in the prosecution of international crimes will be more inclined to cooperate with an international criminal court, to whether such an international court will infringe upon the sovereignty of states.

However, these objections have been addressed by at least one of the proposals above, and the ABA Task Force proposal answers both questions. Similarly, more general questions persist which address such issues as court composition, access to witnesses, appropriate punishment, and others.

In the end, most objections to the establishment of an international crimes court are simply that—objections. Thus, they do not present serious questions which must be addressed in order to cultivate consensus and move forward with the creation of an international crimes court. Unfortunately, as we leave the fabled Sisyphus at the foot of the mountain, ready to carry his charge and concluding “all is well,” the family of nations cannot be so content.

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197 CAMUS, supra note 2, at 123.