

# *Nova Law Review*

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*Volume 15, Issue 2*

1991

*Article 4*

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## An International Criminal Court-An Emerging Idea

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## **Abstract**

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**KEYWORDS:** criminal, court, international

## An International Criminal Court—An Emerging Idea

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The articulation of a need for an International Criminal Court began perhaps as long ago as the beginning of the nineteenth century. At this time, during the Congress of Vienna in 1815, discussions were held among various nation-states concerning the need to punish those engaged in the slave trade. One might push the date back even further by tracing its origins to the sixteenth century when the ideas of Bodin were instrumental in creating the modern concept of state sovereignty. It was Bodin's construct which in turn led seventeenth century writers like Huber to assert that the force of all law is territorial. Its extension beyond the borders of a state, therefore, necessitated a doctrine of international comity, a conceptual precursor to modern international relations.<sup>1</sup> Professor Hessel E. Yntema has pointed out that it was Huber in his *De Jure Civitatis* who viewed the problem of conflicts law, "not in the tradition of the statutists but as an aspect of the law governing the administration of public affairs."<sup>2</sup> Having taken this approach to private international law, he concluded that it then became relevant to consider the reciprocal obligations owed by those involved in legal disputes who came from different countries.<sup>3</sup> This would inevitably involve a consideration of extra-territorial observance of foreign laws, and it would become a matter of commercial necessity that nations respect the obligations imposed upon their citizens by the laws of foreign States. Their refusal to make this concession would thwart any efforts to foster necessary forms of actions to ascertain rights and obligations in matters involving the nationals of two or more states. Laws were based on a theory of territoriality, and the principle of absolute sover-

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1. See generally E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 2.2, at 8-10 (1982).
2. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 1, 25 (1966).
3. *Id.* at 25, 26.

eignty applied to all subjects within the territory. These would include all persons who are found within its metes and bounds. Also, as mentioned above, even "if not required by treaty or by some other reason requiring subordination, the reason of the common practice among nations" sometimes requires nations to recognize the laws of another, or commerce would simply cease.<sup>4</sup>

Joseph Story, who was to become the first important American expositor of the basic principles of private international law, lent further support to Huber's comity doctrine in his *Commentaries on the Conflict of Laws, Foreign and Domestic*:

The true foundation on which the administration of international law must rest is that the rules which are to govern are those that arise from mutual interest and utility, from a sense of inconveniences which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return.<sup>5</sup>

Although written well over a century and a half ago, Story's *Commentaries* could well be cited for the predicate that a body of international law is needed as a means of insuring its observance and execution in a way that benefits the international community.

As Professor M. Cherif Bassiouni has pointed out in his monumental compilation and digest,<sup>6</sup> we have seen a vast proliferation of more than 300 international instruments, conventions, and agreements, some of which are sufficiently penal in nature to rise to the level of substantive international criminal law.<sup>7</sup> However, few if any of these conventions, statutes, and treaties are self-enforcing. Few of them provide for much more than consultative arrangements.

Thus, the remission of violations to national courts for adjudication and the infliction of penalties is currently the norm. Although many of these international treaties and conventions are nominally under the aegis of the United Nations or one of its specialized agencies,

4. *Id.* at 26.

5. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1841).

6. See generally M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985 (1986).

7. See generally Bassiouni, *The Penal Characteristics of Conventional Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

powers of enforcement are noticeably lacking. Most proposals to remedy this defect are noteworthy for their extreme generality. For example, in a document submitted to the 1988 General Assembly of the United Nations, the Soviet Union called for a "broad international dialogue about ways of insuring comprehensive security in military, political, economic, sociological, humanitarian *and other fields*."<sup>8</sup> In calling for an enhanced role for the United Nations in the solution of global problems, the Soviet document did make reference to increasing the authority of the International Court of Justice in the Hague.<sup>9</sup> However, the institutional structure which would be required to deal with international crimes clearly does not exist at present. There simply is not a world judicial body with jurisdiction extending to cases involving individuals. Any attempt to amend the jurisdiction of the present Court would have the extremely undesirable consequences of distracting it from what should be its main role of attempting to settle those disputes between nation-states that present a threat to world peace.

An international criminal tribunal with limited subject matter jurisdiction would have sufficient matters before it to justify that it exists independently of the International Court of Justice in the Hague. The exponential growth of the world drug trade has a clear linkage with what has come to be called "narco-terrorism."

Huge illicit profits derived from the illegal sale of drugs have been used to fund revolutionary activities, and to attempt to further the accomplishment of political goals and objectives. This is a further dimension of the drug trafficking problem which makes it an even greater matter of international concern. There is, of course, the freestanding problem of international terrorism which would exist, and indeed is on the sharp rise, quite independently from the world commerce in drugs. The taking of hostages as a weapon of choice in virtually every international dispute has become commonplace. This international anarchy in defiance of every civilized norm of conduct between and among nations has led to a growing recognition that this has become a problem which is raging beyond control. There is the further recognition that it is one where, unless individual states are willing to risk war or pay tribute, there is little in the way of either deterrent or retributive justice availa-

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8. U.N. Doc. A/43/629 (1988) (emphasis added). The letter, dated September 29, was from Deputy head of the Delegation of the Union of Soviet Socialist Republics to the 43d session of the General Assembly and was addressed to the Secretary-General.

9. *Id.*

ble as a remedy. The problem, in short, is only destined to become worse.

Counterbalancing this gloomy, if not utterly grim, prognosis has been the fortuity of a complete transformation of East-West relations. From the time that Stalin consolidated his vice-like grip over the U.S.S.R. at the end of the 1920's until Mikhail Gorbachev's accession to power in March of 1985, law was simply a tool of the state both in a domestic and international sense. Although there was a facade of a legal regime, "despite its Western Structure, the entire purpose of the civil law was to harness the energies of the Soviet citizen in service to the policies of the party."<sup>10</sup> In the arena of world affairs, the spoken promissory commitment of the Soviet Union to the rule of law masked its determination to maintain the correlation of forces in a manner that would preserve and expand the Soviet empire. Although a signatory to many of the treaties and conventions of the post-war period cited in Professor Bassiouni's compilation,<sup>11</sup> the Soviet Union evinced no desire to have Soviet law supplanted by an international code administered and implemented by an international tribunal.

There has been a change in Soviet attitude since the term "*Perestroika*" was added to the lexicons of the world. In his address to the General Assembly of the United Nations in New York on December 7, 1988, General Secretary Gorbachev said:

Our ideal is a world community of States with political systems and foreign policies based on law. This could be achieved with the help of an accord within the framework of the UN on a uniform understanding of the principles and norms of international law; their codification with new conditions taken into consideration; and the elaboration of legislation for new areas of cooperation.<sup>12</sup>

From this comment, coupled with the domestic reforms that President Gorbachev has introduced and his willingness to accept the clear loss of the Soviet empire which was sealed on the third of October, 1990 with German reunification, it seems clear that the auguries for a new world order which will witness, if not universal, nevertheless vastly increased international cooperation undergirded by a regime based on the rule of

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10. Thornburgh, *The Soviet Union and the Rule of Law*, 69 FOREIGN AFF. 17 (Spring 1990).

11. M.C. BASSIOUNI, *supra* note 6.

12. U.N. Doc. A/43/PV.72 (1988) (address at the United Nations before the General Assembly in New York).

law are, for the moment at least, bright.

This is not to imply that the dimensions of the foregoing problems just discussed are only latitudinal. In the areas of narco-terrorism and the drug trade, in particular, there is a very troublesome and difficult North-South dimension as well. However, the clearly predictable end of the Cold War has for a number of reasons created a more beneficent climate in world opinion for international cooperation on problems and in areas which were given short shrift when nations were preeminently preoccupied with an East-West military threat to world peace and security.

Although supranationalism is not yet ready to supplant a more Hobbesian view of world affairs, there is a far readier disposition to acknowledge the growing political and economic interdependence of the global village as well as the commonality of our social problems in such areas as the physical, socio-economic, and cultural environment. As bloc political approaches hopefully disintegrate on both sides of the East-West relationship, hopefully the North-South dimension of world problems will also come under the influence of a multilateralism which, as mentioned above, needs to be extended particularly to such problem areas as narco-terrorism and drug trafficking. In other words, when the two superpowers - and the alliances which they have previously led - undergo the dramatic transformation which began in 1989 and is still continuing, it is not too much to hope and believe that the rest of the world will also take note.

Even Iraq's aberrant behavior under the dictatorial leadership of Saddam Hussein has certainly not detracted from the vastly changed attitudes of world powers toward cooperation on a broader range of problems heretofore defined exclusively in nationalistic terms. Indeed, the converse may well be the final result. The adoption, at the time this article was being prepared, of no less than thirteen United Nations Resolutions calling for the imposition of economic sanctions of the most comprehensive sort and their implementation is activity unparalleled in the forty-five year history of the organization. It is not irrationally optimistic to express both the hope and belief that this represents one of the most significant turning points in history since nation-states came into existence. It does not take a Kierkegaardian "leap of faith" to postulate that this can be an extremely far-reaching precedent for taking joint action. It is not unlikely that simply the experience of so many nations working together (not only the fifteen members of the UN Security Council, but others as well in the more than score of nations who are cooperating militarily in the Persian Gulf region) can lay the foun-

dation for international cooperation in quite different areas of mutual concern. The consultative procedures, rule-making, and general cooperation being employed in this instance can help develop institutional capabilities for the detailed work that must necessarily precede the drafting, and ultimate passage, of a statute for an international criminal court.

However, any outlining of a rosy scenario must be tempered with the realization that the tradition and the temptation to deal with these problems unilaterally has not yet been subdued. Witness our own actions against Colonel Qaddafi in Libya and General Noriega in Panama as two of the most conspicuous examples. One of these cases involved terrorism, while the other was allegedly based on both international drug smuggling and money laundering, and incidents directly involving the safety and well-being of American citizens in the Canal Zone. These are the very types of offenses which are envisioned as important subjects of jurisdiction for an international court. Unquestionably, these are examples of the most difficult types of cases, i.e., those cases involving a dispute which is in part, and perhaps even in large part, political and the party being charged with the commission of offenses is a national leader. Under some theory that the greater offense includes the lesser, there obviously could be a wish and a desire to pursue the political agenda through direct, unilateral intervention as the more expeditious route. However, a powerful case can be made that yielding to the desire for quick satisfaction for transgressions against national honor will create as many problems as it solves. Surely it is not difficult for the so-called Great Powers to see that their lack of consistency in following the rule of law when punishing international crimes, however defined, will only make more difficult the task of inducing the cooperation among the more than 165 nations of the world which is needed to deal effectively with transnational offenses.

Borders are becoming increasingly porous. In Eastern Europe it was the opening of borders which facilitated a flood of refugees and would-be emigres which in turn brought down governments. Clearly, it was the opening of the Hungarian border to East Germany in 1989 and the opening of West German embassies in Warsaw and Prague to East German nationals which were among the important factors that led to the downfall of the German Democratic Republic. By analogy, the ease with which borders can be crossed can also contribute to the collapse of any effort to contain the effects of criminal law violations to a single state. Reports of Italian Mafia taking up residence in certain South American countries to assist in running laboratories and developing

trade channels for the export and sale of unrefined coca paste to countries which refine and resell the drug is an example of how thoroughly internationalized drug trafficking has become.

The effects in the fields of drug trafficking and terrorism clearly have consequences which are oblivious to national borders. The drugs which are landed in the Ports of Marseilles and Rotterdam are destined for the channels of commerce all over the Western hemisphere. Turning to the field of international terrorism, similarly, the plotting of the terrorist action that resulted in the mid-air explosion of an airliner over Lockerbie, Scotland took place in some other country. Those who conspire to influence political judgments around the globe through the pressure of terrorism are heedless of national boundaries. A proper response to situations like those described above fairly cries out for action by a world community acting through institutions specifically created and chartered for the purpose of effectuating a credible response.

There are, of course, extensive political considerations involved in the creation of an international criminal court. At the most fundamental level, the argument can be made that such a court is unnecessary. The United States Congress has already demonstrated the capacity and will to deal by specific statute with such matters as terrorism and the taking of hostages which would provide a significant share of the subject matter jurisdiction that would be confided to an international court. The most recent such act was the Omnibus Diplomatic Security and Anti-terrorist Act of 1986.<sup>13</sup> In this Act, Congress expanded United States extraterritorial jurisdiction to foreign nationals who committed acts of international terrorism which caused injury to United States citizens.<sup>14</sup>

The expansion of extraterritorial jurisdiction was premised on the use of the passive personality principle and the universal theory as bases for United States Courts exercising jurisdiction. The passive personality principle can be defined as allowing a state the right to claim jurisdiction over the defendant in a criminal case because he has committed an offense harmful to a national of the state asserting the jurisdiction. The Restatement (Third) of the Foreign Relations Law of the

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13. Pub. L. No. 99-399 § 1202, 100 Stat. 853, 896-97 (codified at 18 U.S.C. § 2331) (1986).

14. 18 U.S.C. § 2331 includes within the meaning of "terrorist acts:" (a) homicide, (b) attempt or conspiracy with respect to homicide and, (c) other conduct. The section provides that section (c) applies to acts of physical violence with the intent or result of causing serious bodily injury to a United States national.

United States incorporates this jurisdictional basis by establishing jurisdiction over "conduct outside . . . [United States] territory that has or is intended to have substantial effect within its territory . . . ."<sup>15</sup>

The Restatement (Third) also recognizes the somewhat less controversial universal theory as a basis for extraterritorial jurisdiction.<sup>16</sup> Of great relevance here is an observation by the district court in *Attorney General of Israel v. Eichmann*.<sup>17</sup> The district court expressed its view that: "[I]n the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try cases under international law are universal."<sup>18</sup>

In general terms, the universal theory extends jurisdiction to cover a variety of different offenses conceived to be so heinous that they give a state jurisdiction over an offender if apprehended within its territory or otherwise coming under its control, regardless of any other connecting factor with its judicial system.<sup>19</sup> The potential misuse of this jurisdictional theory is at the foundation of its weakness as a viable long-term alternative to the existence of an international criminal court. It is not difficult to imagine American citizens subjected to the jurisdiction of foreign venues for allegedly committing offenses in the United States which violated the law of a country with whom the United States enjoyed less than cordial relations, although such conduct was not proscribed by domestic law.

There has been a reluctance in the past to embrace the universal theory which includes within its ambit crimes regarded as so heinous that all mankind would classify them as outside all conceivable norms of civilized behavior. It has been suggested that there is a substantial clue to the difficulty of broadening the list of crimes which would be

15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) [hereinafter RESTATEMENT (THIRD)].

16. *Id.* at § 404. "Universal Jurisdiction to Define and Punish Certain Offenses:" "A state has jurisdiction to define and prescribe punishment for certain offenses . . . of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in section 402 is present."

17. 36 I.L.R. 18 (Isr. Dist. Ct.-Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962), *excerpts reprinted in* 56 AM. J. INT'L L. 805.

18. *Id.* at 26.

19. The Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (Supp. 1935).

included under the universal theory of jurisdiction by looking to the Restatement (Third).<sup>20</sup> The Restatement (Third) lists only the following offenses as coming within the scope of United States universal jurisdiction: piracy, slave trading, attacks on or hijacking of aircraft, genocide, and war crimes.<sup>21</sup> Thus, it has been asserted that this shows the inherent difficulty that would be involved in broadening the list through international negotiations and an agreement to include additional offenses within the presently accepted definition of the universal theory.<sup>22</sup>

However, I do not find that argument altogether persuasive. Although it is true that at the time this opinion was offered there was only one international agreement that dealt specifically with terrorism to which the United States was a party. Along with twelve Latin American nations, the United States had adopted the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes Against Persons and Related Extortion that are of International Significance.<sup>23</sup> However, the growth of the threat of terrorism, not just to the United States but to nations in virtually every quarter of the world, has increased exponentially in the almost two decades that have passed since that treaty was adopted. In the current situation in the Persian Gulf, a fear of terrorist reprisals has been one shared in common by the broad grouping of nations who have joined in the coalition of opposition to Saddam Hussein's invasion and occupation of Kuwait. Voices have been heard not just from the United States, but from other quarters as well, suggesting that Saddam Hussein, the Iraqi leader, should be held personally responsible and accountable for acts of terrorism that may occur.<sup>24</sup>

The question of a precise legal definition of terrorism admittedly

20. See generally Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987) [hereinafter *Extraterritorial Jurisdiction*].

21. RESTATEMENT (THIRD), *supra* note 15, at § 404.

22. *Extraterritorial Jurisdiction*, *supra* note 20, at 602.

23. O.A.S. Doc. AG/doc.88, reprinted in 27 U.S.T. 3949, T.I.A.S. No. 8413 (Feb. 2, 1971). The 12 Latin American countries to join the United States in the Convention were Columbia, Costa Rica, Dominican Republic, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, Uruguay, and Venezuela (Chile voted against the Convention while Bolivia and Peru abstained).

24. Balz, *President Warns Iraq of War Crimes Trials; Bush Calls Invader's Acts 'Hitler Revisited'*, Wash. Post, Oct. 16, 1990, at A19. The article reported that British Prime Minister Margaret Thatcher had joined President Bush in his belief that Saddam Hussein should face war crimes charges for the taking of civilian hostages.

remains a difficult one. However, the chastening experiences that many nations have undergone through suffering the tremendous consequences of terrorist attacks have presumably sharpened their definitional skills. It seems difficult, in light of that history of events, to accept the verdict of some commentators that simply because a universally acceptable definition has not previously been formulated, it is an impossible task. I concur in the conclusion reached by Professor Kenneth C. Randall.<sup>25</sup> After studying the jurisdictional provisions of the various hijacking, terrorism, apartheid, and torture conventions adopted in the modern, and particularly the post-war era, he concludes they should be interpreted together with other developments in the general field of international criminal law and the *ergo omnes* and *jus cogens* doctrines.<sup>26</sup> They comprise the synergy for an emerging world legal order capable of defining the jurisdictional terms and bases for prosecuting a variety of extraterritorial offenses.

From this same perspective, it makes equally questionable the pessimistic assertion that "[a]lthough many nations condemn terrorism, never will a significant number of states reach such a consensus on a satisfactory definition of the term."<sup>27</sup> Recent events in other areas of the criminal law with international aspects lend genuine credence to the notion that the time is right politically both within the United States and in many other nations whose cooperation would be vitally necessary, for the creation of an international criminal court.

On November 11, 1990, a new international agreement, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, became effective.<sup>28</sup> It has already been accepted as binding by the United States and twenty-six other nations, and sixty-two additional nations as well as the European Economic Community have given strong indications that they too will accept the Convention.<sup>29</sup> Thus, virtually two-thirds of the world's nations will be treaty partners in the battle against drug traffickers. The new United

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25. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 832 (1988).

26. *Id.*

27. *Extraterritorial Jurisdiction*, *supra* note 20, at 612 n.6; see also Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 717 (1984).

28. United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 28, 1988, 28 I.L.M. 493 (1989) [hereinafter *Convention Against Illicit Traffic*].

29. *Id.*

Nations Convention has some truly extraordinary provisions, some of which are heightened forms of cooperation previously existing only on an informal basis. Some, like the provision to allow shipments of drugs to pass into and through countries as though unnoticed and undetected simply to allow police agencies to trace the shipments to their consignees for apprehension, are new in international law.<sup>30</sup> Other significant provisions exemplify the new spirit of international comity in the area of drug trafficking. The Convention provides that all signatory nations share and exchange criminal evidence, extradite those suspected of drug trafficking, and generally co-operate to eliminate so-called "safe havens."<sup>31</sup> Nations that are signatories are pledged to adopt laws that will permit seizure and forfeiture of drug traffickers' records and assets.<sup>32</sup> There are guarantees of the monitoring of chemicals and additives which are potential constituent elements of any controlled substance.<sup>33</sup> Additionally, international carriers will be subject to surveillance and inspection on a cooperative basis among the signatories to the Convention.<sup>34</sup> Certainly, it is not a great leap into the unknown by the nations acceding to the terms of this convention to agree that international judicial enforcement by a tribunal created for that purpose in the war against drug trafficking is a step that is logical and necessary.

There is another category or subhead of jurisdiction which could be exercised by a new international criminal court involving crimes which result in the degradation and spoliation of the environment. Again, recent history clearly underrates that there is a surge of interest in protecting what Grotius once called the "common heritage of all mankind." He was speaking of the world's oceans. Today we refer to it in far broader terms as the biosphere or the environment of the world's global village. In November of 1990, the signatories to the London Dumping Convention,<sup>35</sup> adopted twenty years ago by nations including

30. *See generally id.* at art. 11.

31. *See generally id.* at arts. 6-7.

32. *Id.* at art. 5, § 2 ("Each party shall also adopt such measures as may be necessary to . . . identify, trace, and freeze or seize proceeds, property, instrumentalities . . . for the purpose of eventual confiscation.").

33. *See generally* Convention Against Illicit Traffic, *supra* note 28, at art. 12 ("Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances").

34. *Id.* at art. 9, § 1(b).

35. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No.

the United States, Great Britain, Germany, France, the Soviet Union, Japan, and most of the industrialized nations of the world, took a further enormous step forward in international environmental cooperation. In an action binding on all signatories, the dumping of industrial waste at sea is scheduled to be progressively phased out, resulting in a total ban by 1995.<sup>36</sup> Delegates to the conference which resulted in the ban also recommended the creation of a "global mechanism for controlling land-based pollution of the sea."<sup>37</sup> It does not seem either wildly futuristic or unreasonably optimistic to see this action and the recommendation for future action as encompassing the distinct possibility that the enforcement mechanism for these new treaty obligations could potentially be an international criminal court which could put teeth into this ambitious environmental protection program by imposing sanctions where needed.

From a political perspective, the inclusion within the jurisdiction of an international criminal court of matters involving terrorism, drug trafficking, and environmental protection make that idea highly salient to some of the most pressing concerns today in a wide band of nations. Their international components are clearly demonstrable. Obviously, there will be concerns about possible intrusion on national sovereignties. However, from the cases discussed above it would seem that the post World War II period has witnessed a growing belief in the United States that the traditional jurisdictional bases of territoriality and nationality must be expanded to accommodate and acknowledge the growing political and economic interdependence of the world. With the very recent evidence of the resurgence and dynamism of the United Nations because of its resolute posture in the midst of the crisis in the Persian Gulf comes further substantiation of a political mood in the world which sees institution building as a necessary corollary to the emergence of new areas for international cooperation. In addition, surely a powerful impetus for this mood, at least on a regional basis, is evidenced by the decisions being made by the European Economic Community. There the ideas of supranationality have found expression mainly in the field of economic cooperation. However, as that proceeds apace with the goals of "Europe - 1992" (the almost total dismantling of trade barriers), it should induce cooperation on a broader plane in such areas as would be embodied within the jurisdiction of an interna-

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8165.

36. *Id.*

37. N.Y. Times, Nov. 3, 1990, § 1 at 7.

tional criminal court.

It will be necessary to be careful to qualify the extension of jurisdiction under any of the three subheads that have been suggested, terrorism, drug trafficking, and environmental protection, to serious and well-defined offenses. In *United States v. Yunis*,<sup>38</sup> Judge Parker acknowledged that with respect to asserting jurisdiction on the basis of the passive personality principle, many international legal scholars agree only that it is the most controversial of the five sources of jurisdiction.<sup>39</sup> The fear quite obviously is that under the guise of protecting its nationals while they are abroad, the passive personality principle could lead to a kind of judicial imperialism which would invite indefinite criminal liability for a nation's citizens, while they are in foreign states, for actions taken elsewhere which were unknown to them as illegal. However, Judge Parker concluded that the authors of the Restatement (Revised) of the Foreign Relations Law of the United States<sup>40</sup> had, in fact, withdrawn from their original stance on the issue of the passive personality.<sup>41</sup> The authors of the Restatement (Third) accepted the idea that "perpetrators of crimes unanimously condemned by members of the international community, should be aware of the illegalities of their actions."<sup>42</sup> Therefore, qualified application of the doctrine to *serious and universally condemned crimes* will not raise the specter of unlimited and unexpected criminal liability.<sup>43</sup>

The *Yunis*<sup>44</sup> case involved violation of both the Hostage Taking Act<sup>45</sup> and the Aircraft Piracy Act.<sup>46</sup> These acts are obvious examples of clearly defined and "serious and universally condemned crimes." In contrast to this case, there obviously are offenses which, although they violate internationally recognized values of the world community, are

38. 681 F. Supp. 896 (D.D.C. 1988).

39. *Id.* at 901. In his opinion, Judge Parker does, however, go on to assert that the international community recognizes its legitimacy: "Most accept that 'the extraterritorial reach of a law premised upon the . . . principle would not be in doubt as a matter of international law.'" *Id.* (quoting Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 203 (1983)).

40. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tentative Draft No. 6 1985) [hereinafter RESTATEMENT (REVISED)].

41. *Yunis*, 681 F. Supp. at 902.

42. RESTATEMENT (REVISED), *supra* note 40, at § 402, comment g.

43. *Yunis*, 681 F. Supp. at 902.

44. *Id.*

45. 18 U.S.C. § 1203 (1984).

46. 18 U.S.C. § 32 (1984).

far less easily defined. Professor M. Cherif Bassiouni in his report submitted to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders<sup>47</sup> concedes the difficulty of the problem. He singles out as an example the efforts by the United Nations since 1947 to develop a Code of Offenses Against the Peace and Security of Mankind, an effort which he suggests has faltered because of a lack of clear perception of what constitutes an international crime.<sup>48</sup> Obviously, an International Court of Criminal Justice would not have its more limited jurisdiction sweep so broadly. Nevertheless, the problem of definition of cognizable offenses will be present.

One suggestion is that initially it seek to define offenses and accordingly subject individual defendants to its jurisdiction on the basis of crimes which are most generally recognized and spelled out in broadly comparable language under the national legislation of the signatory powers. This principle might be extended, particularly in an area like environmental protection, to include offenses which can be clearly and substantively derived from obligations which all signatory powers have undertaken under treaties and conventions dealing with the general subject matter. With the passage of time, the accumulation of experience, and the acceptance of the validity of the idea of an international court, surely other ideas will emerge for the refinement and clarification of its jurisdiction and how and under what circumstances it should attach to individual citizens and foreign nationals of the signatory powers.

In its inception, a willingness on the part of the newly formed and created court to recognize concurrent jurisdiction would seem wise. Although acceptance of that principle might seem to carry with it the danger of slowing its growth, some deference to preexisting national courts who are willing to undertake to hear cases would seem prudent. Indeed, I foresee, and this has been borne out in some of the recent comments made by leaders of small states where their judicial systems have been literally under siege by a powerful drug cartel,<sup>49</sup> that it

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47. A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Court, A/Conf. 144 NGO ISISC, July 31, 1990.

48. *Id.* at 5-6.

49. In an address to the United Nations on October 9, 1990, the Prime Minister of Trinidad and Tobago, A.N.R. Robinson called for the establishment of an international criminal court to deal with drug traffickers and extremists who can destabilize small emerging democracies like those in the Caribbean and Latin America.

would initially be the small states who would most welcome the judicial resources that would be provided by an international criminal court. As the court developed its expertise and usefulness to the international community, this would hopefully attract not only the attention, but also the participatory interest and involvement of larger states as well.

### CONCLUSION

On October 28, with the strong backing of Senator Arlen Specter of Pennsylvania, the United States Congress passed into law a bill in support of an international criminal court.<sup>50</sup> The law declares that "the United States should explore the need for the establishment of an international criminal court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions . . . ." <sup>51</sup> The law insures executive action by mandating that the President report to Congress by October 1, 1991, "the results of his efforts in regard to the establishment of an International Criminal Court" and that "[t]he Judicial Conference of the United States . . . report to the Congress by October 1, 1991, on the feasibility of and the relationship to, the Federal judiciary of an International Criminal Court."<sup>52</sup> What this law represents is the recognition by Congress that efforts by the United States to act unilaterally in an attempt to punish crimes of international scope lack both efficacy and legitimacy. Congress has joined the growing number of voices in the international community who have come to the realization that an international criminal court is an institution whose time has come: an institution which has become both necessary and feasible in light of the current climate of international cooperation on matters of great global importance.

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50. H.R. 5114, 101st Cong., 2d sess. § 599(e) (1990). The bill was *Foreign Operations, Export Financing, And Related Appropriations Act of 1991 (1990)*. It was initially approved by the Senate on October 19, 1990, and was read into the record by Senator Specter. See 136 CONG. REC. S16, 216 (daily ed. Oct. 19, 1990) (statement of Senator Specter).

51. H.R. 5114, *supra* note 50, at § (b)(1).

52. *Id.* at § (c), (d).