An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice

Patricia A. McKeon
AN INTERNATIONAL CRIMINAL COURT:
BALANCING THE PRINCIPLE OF
SOVEREIGNTY AGAINST THE DEMANDS
FOR INTERNATIONAL JUSTICE

For the first time in nearly four decades, the international community's aspiration of establishing a permanent international criminal court seems close to becoming a reality.¹ A permanent international criminal court would provide a forum for the adjudication of cases left unresolved by unavailable or ineffective national systems.² One of the main obstacles facing its creation, however, is the principle of sovereignty.³ This principle forbids the


³ See Jelena Pejic, Panel, The Tribunal and the ICC: Do Precedents Matter?, 60 ALB. L. REV. 841, 860 (1997) (noting sovereignty has always been explicit obstacle to permanent court's creation); see also Kai I. Rebane, Extradition and Individual Rights: The Need for an International Court to Safeguard Individual Rights, 19 FORDHAM INT'L L.J. 1636, 1664 (1996) (stating sovereignty concerns have perpetually barred creation of permanent court); Daniel B. Pickard, Comment, Security Council Resolution 808: A Step Toward a Permanent
exercise of jurisdiction by one state over matters and parties within the territorial limits of another independent state. Sovereignty has long been considered the most fundamental right a nation can possess. A permanent international criminal court, with the power to establish its own jurisdiction as it deems necessary, could potentially erode this right.

The goal of an international criminal court is to provide a forum in which individuals are held accountable for their crimes under international law. This position represents a new way of acquiring subject matter jurisdiction over defendants. Essentially, ju-


4 See U.N. Charter art. 2, para. 7. This section states: “Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” Id.; see also Oyvind Osterund, Sovereign Statehood and National Self Determination. A World Order Dilemma, in Subduing Sovereignty 30 (Marianne Heiberg ed., 1994) (proclaiming that sovereignty and non-intervention are norms of international order).


6 See Jelena Pejic, Essay, The International Criminal Court: Issues of Law and Political Will, 18 Fordham Int’l L.J. 1762, 1763 (1995) (discussing concerns that International Criminal Court would encroach on state sovereignty); see, e.g., Jack Yost, A True International Court, San Diego Trib., Nov. 22, 1995, at B7 (reporting that governments view court as threat to sovereignty and therefore seek to limit its jurisdiction). See generally Jamison, supra note 1, at 431 (commenting on general opinion that any interference with sovereignty is impermissible threat).

7 See Grossman & Bradlow, supra note 5, at 24, 25. The authors discuss accountability in the context of international law as the right of a state or group to hold intervenors responsible for the consequences of their actions. Id.; see, e.g., The Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, G.A. Res. 260(A)(III), 78 U.N.T.S. 278 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. The Genocide Convention specifically addresses individual accountability for crimes committed in violation of international human rights law. Id. See generally David Stoelting, The Proposed International Criminal Court, N.Y.L.J., Aug. 8, 1996, at 1. The International Criminal Court should be distinguished from the International Court of Justice at the Hague, which has jurisdiction over states, not individuals. Id.

risdiction would be found using international norms (jus cogens) and a violation of those norms would vest jurisdiction in all nations.

The question of whether individuals can be held accountable for violations of international law, regardless of their rank or political position, has been debated since the Nuremberg trials. By establishing individual accountability, the Nuremberg judgments explicitly rejected the argument that state sovereignty could be used as a defense for unconscionable acts.

---


11 See Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS 41-43 (1992). The Nuremberg trials prosecuted war crimes committed during World War II. Id. These proceedings were later harshly criticized because they were carried out by the victorious powers and charges were only brought against the vanquished Germans and Japanese. Id.; see also Robert F. Drinan, S.J., Is a Permanent Nuremberg on the Horizon?, 18-Fall FLETCHER F. WORLD AFF. 103, 104 (1994). Nuremberg is credited and hailed for repudiating the notion that individuals are not culpable if they acted pursuant to the orders of a superior. Id. See generally Ved P. Nanda, World Needs Permanent Criminal Court, DENVER POST, Nov. 26, 1995, at E3, available in 1995 WL 10203335. The article heralded the 50th anniversary of the Nuremberg and Tokyo post World War II war crimes trials, noting that the world community has continuously failed to establish a permanent international criminal court to punish individuals guilty of war crimes. Id.

12 See Henry T. King, Nuremberg and Sovereignty, 28 CASE W. RES. J. INT'L L. 135, 136-37 (1996) (proclaiming Nuremberg penetrated veil of sovereignty); see also Nanda, supra note 11, at E3 (noting "lofty" principles of Nuremberg: those responsible for wars of aggression will go unpunished; war crimes are responsibility of individuals who cannot hide behind cloak of sovereignty). See generally Ronald A. Brand, External Sovereignty and International Law, 18 FORDHAM INT'L L.J. 1685, 1690 (1995) (explaining mechanisms through which sovereign conduct is accountable to international norms).
While no longer considered an absolute right, the principle of sovereignty still thrives in international law and appears to be incompatible with the aspirations of a permanent court. The conflicting demands of national sovereignty and international order have crippled prior attempts to establish such a court. Its viability will depend on the continuation of individual accountability under international law established at Nuremberg. For this to occur, there must be a shift in the balance between the sovereign rights of the states and the authority of the larger international community.


15 See Joel Cavicchia, The Prospect for an International Criminal Court in the 1990s, 10 DICK. J. INT'L L. 223, 223 (1992) (calling court's establishment inconsistent with national sovereignty); see, e.g., Iliya B. Levitine, Constitutional Aspects of an International Criminal Court, 9 N.Y. INT'L L. REV. 27, 28-29 (1996) (stating United States' position that trying head of state by international tribunal was incompatible with sovereignty).

16 See Cavicchia, supra note 15, at 223 (claiming that competing forces of "sovereignty and international order" have previously frustrated promulgation of permanent court). See generally Richard C. Hottelet, This is No Time for Routine Diplomacy in Bosnia, CHRISTIAN SCI. MONITOR, July 19, 1996, at 19 (claiming sovereign rights cannot be roughly overridden without disturbing world system).


18 See Pickard, supra note 3, at 460 (stating that insistence upon adhering to archaic concept of sovereignty has prevented creation of international criminal court); see also Ca-
This Note explores the principle of sovereignty and its relation to the creation of a permanent international criminal court. Part I of this Note examines sovereignty and its evolution in international law. Part II discusses the legal issues surrounding the establishment of a permanent international criminal court and how those issues may be reconciled with the principles of sovereignty. Part III addresses the problems that sovereignty may pose to the enforcement mechanisms of an international criminal court. Finally, this Note concludes that an international criminal court will actually assist nations in protecting their sovereign rights by empowering them to prevent criminal behavior.

I. SOVEREIGNTY: ALIVE AND WELL IN INTERNATIONAL LAW

The English word sovereignty is derived from the French term souverain: "A supreme ruler not accountable to anyone, except perhaps to God." As various state systems developed, so too did the definition of sovereignty. Today, the meaning of sovereignty depends upon its context.

Generally, sovereignty encompasses two distinct yet interrelated meanings. First, sovereignty in its internal, domestic sense provides for a state's power and authority "over all persons, vicinia, supra note 15, at 223 (recognizing that countervailing, forces of "national sovereignty and international order" have frustrated attempts to establish court); Yost, supra note 6, at B7 (noting governments see promulgation of international criminal court as threat to sovereignty, and therefore seek to limit its jurisdiction).

19 See Fowler & Bunck, supra note 5, at 4 (citing Ivo D. Duchacek, Nations and Men: International Politics Today 46 (1966)) (discussing origins of English word sovereign); see also Johan D. van der Vyver, Sovereignty and Human Rights in Constitutional and International Law, 5 Emory Int'l L. Rev. 321, 324 (1991) (relating first theory of sovereignty as "the supreme power over actions and subordinates," which were not subject to law).

20 See Caroline Thomas, New States, Sovereignty, and Intervention 11 (1985) (discussing sovereignty as political concept which later became transformed); see also Fowler & Bunck, supra note 5, at 4 (discussing multiple meanings of sovereignty); see, e.g., Louis Henkin, Human Rights and State "Sovereignty", 25 Ga. J. Int'l & Comp. L. 31, 33 (1996) (noting that international system has moved beyond state sovereignty values and toward human values).

21 See Brand, supra note 12, at 1689 (noting that throughout history, sovereignty has had both internal and external components); see also Fowler & Bunck, supra note 5, at 6 (noting that meaning of sovereignty has varied according to issue addressed or question raised); W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int'l L. 866, 866 (1990) (relating sovereignty's long varied history during which it has had various "meanings, hues and tones" depending upon objectives of those invoking it).

22 See Brand, supra note 12, at 1685, 1686 (describing two tiered notion of sovereignty); see also van der Vyver, supra note 19, at 419 (suggesting two tiered approach accounts for external independence as well as internal autonomy in international relations).
things, and territory within its reach.”

Second, sovereignty in an external and international context concerns a state’s right and ability to independently manage its own affairs, without outside interference or intervention. International law consistently reinforces these two meanings by continuing to stress the importance of the complete autonomy of the sovereign state to manage its own internal affairs. Sovereignty is also relevant in foreign relations because it establishes each nation’s international status. This enigmatic concept is universally recognized to the extent that is has been made tangible via the U.N. Charter.

Sovereignty has less abstract functions as well. This principle serves as a potent political weapon used to defend state independence. It also contributes to a state’s sense of dignity. Most importantly though, is the continuation of a sovereign state’s power to provide security and protection to its citizens.

A. Sovereignty is Limited in Certain Circumstances

Sovereignty in the external or international context continues to be strong, however, it is not as absolute as its definition sug-

23 See J.E.S. Fawcett, The Law of Nations 39 (1968) (discussing nature of internal sovereignty); see also van der Vyver, supra note 19, at 417 (explaining various theories of internal sovereignty which are limited by international human rights law; equating sovereignty with independence).

24 See van der Vyver, supra note 19, at 417-18 (commenting that sovereignty denotes authority of state to manage its territory and its citizens).

25 See Grossman & Bradlow, supra note 5, at 1 (asserting that modern, fundamental principle of sovereignty is that each state is master of its own territory).

26 See generally Fowler & Bunck, supra note 5, at 11-32 (detailing why sovereignty remains important today).

27 See Thomas, supra note 20, at vii (noting that maintaining international system in orderly fashion requires departure from traditional rules of governing); see also Fowler & Bunck, supra note 5, at 11-20 (stating sovereignty is declaration of political responsibility for governing, defending and promoting welfare of human community); Antti Korkeakivi, Consequences of a “Higher” Law: Evaluation Crimes of State and Egra Omnes, 2 J. Int’l Legal Stud. 81, 117 (1996) (noting that sovereignty is desirable because it provides predictability).

28 See U.N. Charter art. 2, para. 7 (reaffirming belief that state autonomy should be preserved in international system).

29 See Fowler & Bunck, supra note 5, at 20-24 (describing sovereignty as “handy tool” that is used in international politics to defend state independence).


31 See Brand, supra note 12, at 1696 (discussing vital role of sovereign as provider of peace and security).
gests.\textsuperscript{32} No state, however powerful, has been able to shield its affairs completely from external influence.\textsuperscript{33} Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities and privileges it carries have been subject to increased limitations.\textsuperscript{34} These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice.\textsuperscript{35}

B. A Combination of Important Factors Have Emerged to Compromise Sovereignty

Classical notions of sovereignty have faded, largely due to the growing interdependence of the international community.\textsuperscript{36} Improved levels of technology and communication have ostensibly shrunk the world that we live in.\textsuperscript{37} As a result, people are increasingly linked into broader communities.\textsuperscript{38} New international concerns such as the deterioration of the environment\textsuperscript{39} require many nations to act in concert.\textsuperscript{40} In some areas of international concern, the need for states to exert influence over others is necessary for

\textsuperscript{32} See Jamison, supra note 1, at 432 (asserting that notion of absolute sovereignty is "no longer tenable"); see also Reisman, supra note 21, at 866-69 (stating no serious scholar supports notion that sovereignty is absolute).

\textsuperscript{33} See Oyvind Osterud, Sovereign Statehood and National Self-Determination: A World Order Dilemma, in SUBDUING SOVEREIGNTY, supra note 4, at 19 (calling uses of sovereignty "murky and ambiguous", hardly more than regulative idea; not supreme authority); see also J.L. Brierly, THE LAW OF NATIONS 48-50 (4th ed. 1949) (finding problems with implication that sovereignty exempts states from being subject to international law).

\textsuperscript{34} See Brand, supra note 12, at 1695 (describing various mechanisms making sovereign conduct accountable to international norms).

\textsuperscript{35} See Crawford, supra note 8, at 408 (noting conflicting preferences for national jurisdiction as opposed to internationalism in 1994 Draft Statute); Henkin, supra note 20, at 33-35 (describing how changing values have led to clear departure from sovereignty principle).

\textsuperscript{36} See, e.g., Brand, supra note 12, at 1695-96 (asserting that as world becomes interrelated through transportation and technology, distance between individuals contracts)

\textsuperscript{37} See THOMAS, supra note 20, at 5 (describing advances in communication as making “mockery” of notion that states are impermeable); see also Grossman & Bradlow, supra note 5, at 11 (discussing how technological changes over past twenty years have globalized international community).

\textsuperscript{38} See Johan Jorgen Holst, Keeping a Fractured Peace, in SUBDUING SOVEREIGNTY, supra note 4, at 136. Current international economic interdependence and the penetration of borders by technology, news and lifestyles constrain the exercise of sovereignty. \textit{Id.} This in turn acts in contravention to the established notion that the sovereign territorial state is a constituent unit of international society. \textit{Id.}; see also THOMAS, supra note 20, at 5. Individual nations have become increasingly inter-reliant due to economics, financial trade structures, and availability of resources. \textit{Id.}

\textsuperscript{39} See Grossman & Bradlow, supra note 5, at 14 (discussing growing recognition of global environment which has impacted on jurisdictional boundaries).

\textsuperscript{40} See id. at 14, 15 (noting that international collaboration involves surrender of certain national prerogatives along with willingness to surrender sovereignty to satisfy goals of international community).
successful resolution of disputes. The corollary to this is the diminished significance given to sovereignty.

Another important factor limiting sovereignty and receiving increased attention in recent years is the increased international concern for human rights. For example, the atrocities committed in Rwanda and the former Yugoslavia prompted intervention by the United Nations to stop the gross human rights violations occurring there. Additionally, various international agreements have propelled the importance of individual rights to the forefront of international law.

A more active role on the part of the international community is consistent with a sovereign's responsibility to protect its people, and enhances rather than detracts from this notion of sovereignty. Although a nation cedes some sovereignty when it be-


45 See MAGDALENA M. MARTIN MARTINEZ, NATIONAL SOVEREIGNTY AND INTERNATIONAL ORGANIZATIONS 66 (1996) (claiming most significant inroads into traditional concept of sovereignty were made by creation of international organizations); see also Nancy Arniston, International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?, 17-Sum FLETCHER F. WORLD AFF. 199, 207 (1993) (noting that when states fail to protect people's basic civil rights, international community should interfere); Brand, supra note 12, at 1696 (claiming sovereign must participate in development of international law in order to fulfill its role of providing security for its own subjects); Henkin, supra note 20,
comes a party to an international agreement, it also receives certain protections which broaden its sovereignty.⁴⁶ If sovereignty is viewed as the power of a nation to protect its citizens, as it should, fortifying itself with the aid of the international community only enhances this objective.⁴⁷ Therefore, the future development of international law, which includes an international criminal court, may hinge upon the continuing evolution of this rationale.⁴⁸

The rationale that sovereignty is enhanced through international cooperation provides the context which allows the United Nations to thrive in its humanitarian efforts.⁴⁹ It is also the context in which the need for a permanent international criminal court becomes more feasible.⁵⁰ Arguably, whatever sovereign

at 43 (announcing that collective human intervention is current norm which must triumph over arguments supporting sovereignty); Ravi Mahalingam, Comment, The Compatibility of the Principles of Non-Intervention with the Right of Humanitarian Intervention, 1 UCLA J. INT'L L. & FOREIGN AFF. 221, 253 (1996) (pointing out consistency between sovereignty and international protection of human rights).


⁴⁷ See Ferencz, supra note 46, at 391-92 (asserting sovereign's ability to protect is strengthened by participating in international organizations); see also Gregory H. Fox, The Right to Political Participation in International Law, 17 YALE J. INT'L L. 539, 607 (1992) (observing that international law is often concerned with reaffirming nation-state as essential forum for political activity by assuring that all citizens have political rights); Reisman, supra note 21, at 869 (noting that international law focuses on people's sovereignty as much as state sovereignty).

⁴⁸ See Anthony P. Maingot, Sovereign Consent Versus State-Centric Sovereignty, in BEYOND SOVEREIGNTY 190 (Tom Farer ed., 1996) (calling gradual dilution of state sovereignty not merely historic phenomenon but also "moral imperative"); see also Brand, supra note 12, at 1686 (asserting twenty-first century international law will be determined by continuing evolution of perception of sovereignty).

⁴⁹ See Fox, supra note 47, at 550-51 (noting that popular sovereignty became prominent in conjunction with development of United Nations, each giving force to other); Kristen Walder, An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law, 26 N.Y.U. J. INT'L L. & POL. 173, 180-81 (1994) (observing that United Nations' intervention to prevent human rights abuses is consistent with its position respecting sovereignty); see also Roger Myers, A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 73-74 (1990) (proposing that because human rights violations are largely domestic, they require international intervention); Rebane, supra note 3, at 1664 (detailing U.N. involvement in universal acceptance of individual rights).

⁵⁰ See Peter Burns, An International Criminal Tribunal: The Difficult Union of Principle and Politics, 5 CRIM. L.F. 341, 380 (1994). The major difficulty in garnering support for an international criminal court has been the principle of sovereignty, but the current focus on
rights are forfeited by submitting to the jurisdiction of an international criminal court may be regained by the protection it will provide. Thus, the evolution of sovereignty and the increasing need for international justice have now converged to the extent that the next logical step is the creation of an international criminal court.

II. RECONCILING THE PRINCIPLE OF SOVEREIGNTY WITH THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT

World War II demonstrated the dangers inherent in an international legal order based upon absolute sovereignty. The lessons learned from viewing sovereignty in this manner provided the impetus for the international community to take action to prevent these atrocities from recurring. The international community’s response was the establishment of international organizations, most notably the United Nations, which serve to protect the sovereign interests of each of its members.

International human rights may overcome this barrier. See also Roger J.R. Levesqu, Future Visions of Juvenile Justice: Lessons from International and Comparative Law, 29 Creighton L. Rev. 1563, 1569-70 (1996). International human rights law reaches past national boundaries and covers private individuals, thus breaking barrier of state sovereignty. Id.; see, e.g., Rebane, supra note 3, at 1663, 1664. The author renews the call for a uniform international criminal forum. Id. See generally Drinan, supra note 11, at 108. The fact that human rights have been addressed so pervasively since World War II has made opponents of an international criminal court based on sovereignty grounds reassess their position. Id.

See Bhattacharyya, supra note 1, at 75 (arguing that International Criminal Court would serve as deterrent against actions likely to threaten state’s security); Brand, supra note 12, at 1696, 1697 (delegating sovereign functions to international community to provide security should not be combated); see also Jules Deschenes, Towards International Criminal Justice, 5 Crum. L.F. 249, 252 (1994) (intimating that resistance to International Criminal Court is largely result of some heads of state concerned about being prosecuted for their actions which threaten citizen’s security). See generally Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int’l L. 554, 554 (1995) (observing that internal atrocities have far greater impact on international human rights laws because it occurs with greater frequency than with international conflicts).

See Grossman & Bradlow, supra note 5, at 2 (calling World War II “a powerful and tragic lesson” on dangers of absolute sovereignty); Michael Scaperlanda, Polishing the Tarnished Golden Door, 1993 Wis. L. Rev. 965, 1009 (noting that atrocities perpetuated by Nazi Germany during World War II compelled modern world to limit notions of absolute sovereignty); see also Nagan, supra note 13, at 150 (observing that notions of absolute sovereignty were overruled by Nuremberg).

See generally Martinez, supra note 45, at 67-69 (discussing creation of international organizations).

See id. at 67 (noting that even “advanced” European Community is based upon recognition of its member state’s sovereignty); see also Grossman & Bradlow, supra note 5, at 2-4 (explaining that new organizations formed following World War, such as United Nations and International Trade Organization, were organized with respect for sovereignty); see, e.g., U.N. Charter art. 2, para. 7 (preventing organization’s interference in members’ domestic affairs with only limited exception).
Such a response has continued in light of events such as the atrocities committed during the wars in the former Yugoslavia and Rwanda. Two ad hoc tribunals have been created under United Nations auspices to prosecute those responsible for grave human rights violations. Protest that these tribunals impermissibly encroached upon state sovereignty were overcome because these tribunals were touted as temporary and situation specific. These ad hoc tribunals later served as the impetus for the efforts to create a permanent international criminal court. Despite these efforts, establishing a permanent tribunal for crimes violative of international law within the principles of sovereignty will be a challenge.

In 1994, the International Law Commission submitted a draft statute to the United Nations which provided a blueprint for an international criminal court. As the possibility of a permanent international criminal court grew, so did the debate over the form and jurisdiction of such a court. Predictably, concerns over

55 See BLACK's LAW DICTIONARY 41 (6th ed. 1990). Ad hoc means that the tribunals were created “for this special purpose.” Id.
56 See Payan Akhavan, Current Development, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 90 Am. J. Int'l L. 501, 501 (1996) (criticizing establishment of tribunals because of their failure to take preventive steps to stop war crimes); see also Jennifer Green et al., Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 HASTINGS WOMEN'S L.J. 171, 173 (1994) (observing that Yugoslavian War Crimes Tribunal was first to try victors in war); Podgers, supra note 8, at 52 (reporting that ad hoc tribunals will greatly advance international law); Robert B. Rosenstock, Essay, 1994 McLean Lecture on World Law: The Proposal for an International Criminal Court, 56 U. PIT. L. REV. 271, 279 (1994) (noting that only question regarding establishment of war crimes tribunal for Rwanda was whether to create one separate from Yugoslavia or extend Yugoslavian Tribunal's jurisdiction).
57 See Podgers, supra note 8, at 52 (claiming Tribunals broke down “psychological barrier to international criminal court movement”); see also Lauren Comiteau, Tribunal Chief Less Pessimistic on Bosnia Trials, CHRISTIAN SCI. MONITOR, Sept. 11, 1996, at 6, available in 1996 WL 5044162 (interviewing Tribunals' Presidents regarding their extraordinary significance); Cedric Thornberg, Saving the War Crimes Tribunal, FOREIGN POL'Y, Sept. 1, 1996, at 72, available in 1996 WL 10201057 (reporting on tribunals' potential to leave “a legacy of hope”).
58 See Blakesley, supra note 1, at 81 (noting that principle of sovereignty might prevent states from sending citizens out of country for criminal prosecution); see also Burns, supra note 50, at 380 (observing that major barrier to past attempts at creating permanent tribunal was conflict between sovereignty and proposed tribunal's jurisdiction). See generally Podgers, supra note 8, at 52 (remarking on “galvanizing effect” of tribunal upon international criminal court movement).
59 See 1994 ILC Report, supra note 2; see also Crawford, supra note 8, at 406 (providing background information on 1994 Draft Statute). See generally Bassiouni, supra note 1, at 1200 (revealing that General Assembly of United Nations requested draft statute for permanent international tribunal as early as post World War II years).
60 See Cavicchia, supra note 15, at 235 (noting that early debate focused on whether there was need for codified international penal law); Stuart H. Deming, War Crimes and
ereignty lurked behind these discussions. The debate focused on two key questions: First, over what criminal acts would a permanent court have jurisdiction, and second, when could a permanent court exercise that jurisdiction.

A. Subject Matter Jurisdiction

It has been suggested that the world is becoming increasingly unified by universal norms. This assertion is dubious because many nations, although willing to unite for some purposes, still


See Report on the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995). The Committee was most concerned with the jurisdiction of the proposed Court. Id.; see also Evered, supra note 77, at 124. Members of the United Nations are worried about an international court exercising its jurisdiction over their citizens. Id. There is a direct link between the court's subject matter jurisdiction and the exercise of compulsory jurisdiction. Id.; Virginia Morris & M. Christine Bourloyannis-Vrailas, Current Development, The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly, 90 AM. J. INT'L L. 491, 496-97 (1996). Many on the committee favored only a limited number of crimes under the jurisdiction of the Court, while others favored a more expansive list. Id.

See Johan Jorgen Holst, Keeping a Fractured Peace, in SUBDUING SOVEREIGNTY, supra note 4, at 138 (noting that some values are universally accepted while others only are accepted by portion of international community); see also Elliott, supra note 9, at 19 (jus cogens norms are based on "fundamental values of all states"); Parker & Neyon, supra note 9, at 413 (noting jus cogens governs most areas of human concern).

See Thomas, supra note 20, at viii. In theory, there are no exceptions to the norm of non-intervention into the internal affairs of another sovereign state. Id. "The concept of intervention suffers from a lack of definitional clarity." Id. at 17. Intervention is usually surrounded by contention. Id. at 20; see also Friedrich Kratochwil, Sovereignty's Dominium: Is There a Right of Humanitarian Intervention?, in BEYOND WESTPHALIA 33-41 (Gene M. Lyons & Michael Mastanduno eds., 1995). The various reasons offered to justify intervention in the name of humanitarian justice are discussed therein. Id. at 21-42. International lawyers have been engaged in debate for years about the legitimacy of using force to remedy serious human rights violations. Id. See generally Fernando R. Teson, Changing Perceptions of Domestic Jurisdiction and Intervention, in BEYOND SOVEREIGNTY, supra note 48, at 35. Controversy is invariably created whenever the U.N. Security Council uses its
maintain vastly different philosophies on politics, economics and social orders. In the context of a permanent international criminal tribunal, these differences are manifested by the differing views nations have as to what constitutes an offense against the international community.\textsuperscript{65} As a result, determining the subject matter jurisdiction of the international criminal court also proved difficult.\textsuperscript{66}

The International Law Commission attempted to incorporate different conceptions of criminal justice in its initial proposal.\textsuperscript{67} The provisions of this statute stipulated that the court would have jurisdiction over the following crimes:\textsuperscript{68} genocide;\textsuperscript{69} aggression;\textsuperscript{70} discretion to determine what situations justify its intervention. \textit{Id.} Recent situations in Iraq, Somalia and Haiti demonstrate this controversy. \textit{Id.} at 37.

\textsuperscript{65} But see Hari M. Osofsky, Domesticating International Law: Bringing Human Rights Violators to Justice, 107 YALE L.J. 191, 204 (1991) (noting that changing view of national sovereignty under human rights doctrine has resulted in norms transcending national borders).


\textsuperscript{67} See Crawford, supra note 8, at 406-07 (discussing numerous dilemmas posed by attempts to satisfy various standards of due process, treaties and international law in general); see also Leigh, supra note 9, at 114 (noting criticism offered by United States that categories of offenses are too broad); Levitine, supra note 15, at 43 (observing that it was difficult to placate American concerns that statute would not recognize idiosyncrasies in United States criminal procedure law).

\textsuperscript{68} See 1994 ILC Report, supra note 2, art. 20.

\textsuperscript{69} See id.; see also id. Commentary to art. 20, at 72. The inclusion of the crime of genocide has not been problematic, as it has already been authoritatively defined at the Genocide Convention. \textit{Id.} Pursuant to Article 2 of the Convention, genocide means "acts committed with intent to destroy... a national, ethnic, racial or religious group." \textit{Id.} The 1948 Genocide Convention expressly states that the crime of genocide may be referred to an international criminal court. \textit{Id.} The side-scale membership to that convention allows for this court to have inherent jurisdiction, as the principles of that agreement allow for such jurisdiction. \textit{Id.; see, e.g.,} Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951), art. 14 [hereinafter Genocide Convention]. The Convention allows for an international criminal tribunal to hear cases involving genocide. \textit{Id.} See generally FRANCIS ANTHONY BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE: PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 10 (1996). Genocide is likely to be included within the court's subject matter jurisdiction without much opposition. \textit{Id.;} Stephen P. Marks, Forgetting "The Policies and Practice of the Past": Impunity in Cambodia, 18-Fall FLETCHER F. WORLD AFF. 17, 25 (1994). One major criticism of the Genocide Convention has been its lack of use considering the many instances in which genocide still occur. \textit{Id.}

\textsuperscript{70} See 1994 ILC Report, supra note 2, art. 20; see also id. Commentary to Art. 20, at 72. Defining the crime of aggression and determining that it's existence presents special problems because there is not an international agreement comparable to the one for geno-
serious violations of the laws and customs applicable in armed conflict (war crimes); serious crimes against humanity; and crimes that are serious enough to warrant international concern.
The draft statute exposes the underlying tension between state sovereignty and the need for international justice. This tension resulted from trying to obtain state consent to the mechanics of criminal justice while still effectuating a community of interests. It appears that in order to progress any further, the international community must somehow separate what states rightfully view as their individual concerns from those issues common to the rest of the world. The drafters sought a compromise between the competing interests by limiting the jurisdiction of the proposed Tribunal to crimes which have received unequivocal universal condemnation. This approach accentuated the potential gain of international protection and justice while simultaneously quelling fears of a loss of sovereignty.

1. Crimes Selected Based on a Variety of Factors

There has been great difficulty in selecting the crimes for which the Court would have subject matter jurisdiction, largely because of the retention of classical views of sovereignty. The crimes enu-
merated in the draft statute reflect a combination of treaty law, customary law and human rights law.  

Treaties are formal agreements between states, while customary law is derived from state practice and international legal norms. Both depend on state consent, which is a manifestation of the principle of sovereignty. Human rights law is problematic in this context because it is difficult to define.  

Human rights law represents a hybrid between treaties and international customary international law, derived from contemporary, core human values. Human rights law varies considerably from state to state and binds parties without consent, an essential feature of international law.  

The danger in creating jurisdiction based on sweeping categories of human rights law is that the more powerful states will impose their morality onto others which creates a direct threat to

---

79 See 1994 ILC Report, supra note 2, at Introduction (noting that many members were concerned that inclusion of treaty law would leave too many deficiencies).

80 See Henkin, supra note 20, at 35 (distinguishing between customary and treaty law).

81 See The Paquette Habana, 175 U.S. 677, 694 (1900) (finding that customary law results from "general assent of all nations"); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (noting customary law principles are established by "consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law"); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (discussing that customary law emanates from states following customs out of sense of legal obligation); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (asserting that "customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

82 See Henkin, supra note 20, at 35 (asserting customary and treaty law are based on consent).

83 See Fernando R. Teson, Changing Perceptions of Domestic Jurisdiction and Intervention, in BEYOND SOVEREIGNTY, supra note 48, at 33 (asserting that human rights violations have been protected internationally and, as such, been subtracted from exclusive domestic jurisdiction of states).

84 The UN General Assembly routinely adopts resolutions concerning human rights. See, e.g., A/Res/46/242 (Bosnia); A/Res/46/133 (El Salvador); A/Res/46/134 (Iraq); A/Res/46/132 (Burma). See generally Henkin, supra note 20, at 32. The author discusses the difficulty in applying human rights law in practice, as it often contradicts the principles of sovereignty. Id.

85 See Henkin, supra note 20, at 37 (claiming human rights law has altered principles of international law and sovereignty).


87 See Crawford, supra note 8, at 408 (noting natural tendency of each nation to prefer its own criminal justice system's values and institutions).
their sovereignty. To reduce this risk, the selection of crimes over which the proposed tribunal shall have jurisdiction has been limited to offenses the international community has collectively condemned in the past. Limiting jurisdiction in this manner ensures the prosecution of universally condemned offenses while avoiding undue encroachment onto Nation’s sovereignty.

2. The Need for Concise Definitions

Each sovereign state should not only be allowed to participate in determining what crimes are within the court’s jurisdiction, but also be involved in actively defining those crimes. The final outcome should reflect both domestic and international dimensions. It is imperative to arrive at narrow definitions in order to remove ambiguities stemming from nations defining crimes differently. The final statute should leave no doubt as to what constitutes criminal conduct under international law. The opportunity of each state to take part in formulating concise definitions should alleviate any objections a State might have.

88 See Freidrich Kratochwil, Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?, in Beyond Westphalia 23 (Gene M. Lyons & Michael Mastanduno eds., 1995). The sovereign is still “subject to natural law and bound by his conscience.” Id.; see also Fernando R. Teson, Changing Perceptions of Domestic Jurisdiction and Intervention, in Beyond Sovereignty, supra note 48, at 33. The author states that human rights are no longer a matter of exclusive domestic jurisdiction. Id.

89 See 1994 ILC Report, supra note 2, arts. 22, 26. The court’s subject matter jurisdiction should only contain laws of “such a fundamental character that their violation gives rise to the criminal responsibility of individuals.” Id.; see also Blakesley, supra note 1, at 112. Existing multilateral treaties, as well as crimes generally derived from accepted principles of international law, will provide the basis for the proposed court’s subject matter jurisdiction. Id.; Leigh, supra note 9, at 118. The jurisdiction of the Court is limited to crimes under general international law because of the magnitude, recurrence and the predictable international consequences of those crimes. Id.

90 See Grossman & Bradlow, supra note 5, at 23 (asserting that it is essential for all affected parties to have meaningful participation in formulation of decisions).

91 See id. at 23 (suggesting that any process to develop new legal norms should accommodate all participants and incorporate both domestic and international issues).


93 See Pickard, supra note 3, at 442. The idea of an international criminal court is often challenged on the ground that there is no clear compilation of prohibited conduct pursuant to international law that gives adequate notice to potential offenders. Id.; see also Hussain, supra note 92, at 770. The principle “nullum crimen sine lege, nulla puena sine lege” is also important in this context. Id. See generally Black’s Law Dictionary 176 (6th ed. 1990). Literally translated, this phrase means “no crime without law, no punishment without law.” Id.
based on sovereignty concerns. Furthermore, the draft statute envisions a permanent court established by treaty. The democratic process of treaty negotiation and formation ensures each State the ability to retain their sovereignty in international affairs.

B. When the Court May Exercise Its Jurisdiction

Further debate exists over when a permanent international criminal court may exercise its jurisdiction. Currently, a nation has the power to submit to only portions of a multilateral agreement and the proposed statute adheres to this by allowing signatories latitude in deciding which offenses should qualify for the proposed Court's jurisdiction. The lone exception to this procedure is the crime of genocide: If a state is a party to both the Statute and the Genocide Convention, the Court would have inherent jurisdiction over the commission of this crime.

94 See M. Cherif Bassiouni & Christopher L. Blakesley, The Need for an International Criminal Court in the New International World Order, 25 VAND. J. TRANSNAT'L L. 151, 176 (1992). "The prospect of arriving at a sufficient, coherent, and systematic code of offenses that will meet criminal justice standards of legality does not seem to be insurmountable." Id.

95 See Keith Highet et al., International Courts and Tribunals, 31 INT'L LAW. 599, 608 (1997) (explaining Preparatory Committee's view that establishing court by treaty ensures its independence and authority).

96 See id. (explaining international treaty process).

97 See Podgers, supra note 8, at 62 (stating that debate over form and jurisdiction of permanent criminal court intensifies as reality of its formation approaches); see also Law Without Borders, supra note 8, at 111-12 (discussing jurisdictional issues involved with international criminal court).

98 See 1994 ILC Report, supra note 2, Commentary to Arts. 21 and 22, at 79-84 (discussing when Court's jurisdiction is invoked); see also Crawford, supra note 8, at 410 (discussing jurisdictional system of ILC Draft Statute); Jamison, supra note 1, at 435 (stating that Draft Statute proposes that states be allowed to choose their own obligations under multilateral conventions); Krass, supra note 10, at 362 (discussing when Court could exercise jurisdiction).

99 See 1994 ILC Report, supra note 2, art. 22; see also Task Force, supra note 60, at 475 (defining jurisdiction of International Court as concurrent with that of member states, covering established international crimes and contingent on individual member state's stipulation that court's jurisdiction covers specific crime); see e.g., Crawford, supra note 8, at 143 (stating that Article 24 defines when consent or acceptance of jurisdiction is needed for court to deal with specific crime). See generally Michael P. Scharf, The Jury Is Still Out on the Need for an International Criminal Court, 1991 DUKE J. COMP. & INT'LL. L. 135, 141 (discussing problems associated with state's conferring jurisdiction on international criminal court for certain crimes).

100 See 1994 ILC Report, supra note 2, arts. 21, 25 (setting forth genocide provisions); see also Crawford, supra note 8, at 411 (explaining genocide's status as only crime within "inherent" jurisdiction of Court).

101 See 1994 ILC Report, supra note 2, art. 21 (proposing "inherent jurisdiction" solely over crime of genocide); Crawford, supra note 8, at 412 (asserting Genocide Convention reinforces "inherent jurisdiction" of international criminal court over genocide). But see
The International Law Commission notes the importance of mandating genocide because of the extreme nature of the offense\textsuperscript{102} coupled with the safeguard that it is easy to prove.\textsuperscript{103} Therefore, in genocide cases, the court could proceed without the consent of the affected States.\textsuperscript{104}

1. Inherent Jurisdiction

Inherent jurisdiction gives a court the power to hear cases without receiving an express grant of authority.\textsuperscript{105} States are generally leery of this type of jurisdiction because it encroaches upon the principles of national sovereignty.\textsuperscript{106} Inherent jurisdiction would appear to limit sovereignty because it allows external forces to encroach upon the internal mechanisms of administering justice absent prior consent.\textsuperscript{107} Inherent jurisdiction is also incompatible with the U.N. Charter, which prohibits the United Nations

Levitine, supra note 15, at 36 (noting Genocide Convention did not delegate to international tribunal ability to punish, but instead created concurrent jurisdiction with domestic courts).

\textsuperscript{102} See 1994 ILC Report, supra note 2, Commentary to Art. 21, at 81, 82 (discussing general consensus that genocide is widely condemned internationally); see also Leigh, supra note 9, at 118 (asserting that Commission viewed prohibition of genocide to be of "fundamental significance"). See generally Robert C. Johansen, Will We Do Nothing? Preventing Genocide, CHRISTIAN CENTURY, Mar. 20, 1996, at 316 (discussing inability of present system to prevent genocide, whose commission has become alarmingly common).

\textsuperscript{103} See 1994 ILC Report, supra note 2, Commentary to Art. 21, at 81, 82 (noting relative ease in proving acts of genocide); see also Leigh, supra note 9, at 118 (agreeing that disputes about proving whether or not genocide actually occurred were "limited").

\textsuperscript{104} See Leigh, supra note 9, at 118-19 (asserting that Court should have inherent jurisdiction over genocide by virtue of State's participation in Draft Statute).

\textsuperscript{105} See BLACK'S LAW DICTIONARY 782 (6th ed. 1990) (defining inherent powers as those which are above and beyond those expressly granted); see, e.g., Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 809 (1st Cir. 1981) (describing Executive's inherent power to confer authority on President to settle foreign claims).

\textsuperscript{106} See Jamison, supra note 1, at 431 (commenting on belief that any interference with sovereignty is threatening to individual nations); see also Brand, supra note 12, at 1686 (predicting future development of international law will be determined by continuing evolution of sovereignty); see, e.g., Scharf, supra note 99, at 160 (stating that inherent jurisdiction of international court requires states to relinquish their jurisdiction). See generally John Linarelli, An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind, 18 SUFFOLK TRANSNAT'L L. REV. 1, 44 (1995) (discussing controversy concerning International Court's inherent jurisdiction in light of sovereignty issues).

\textsuperscript{107} See HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 23-28 (1996) (stating that since inherent jurisdiction of outside court is incompatible with sovereignty this goal is impossible to achieve); see also Reisman, supra note 21, at 866 (explaining various meanings of sovereignty). See generally 48 C.J.S. INTERNATIONAL LAW §§ 25-29 (1981) (covering exercise of sovereignty).
from intervening "in matters which are essentially within the domestic jurisdiction of any state."¹⁰⁸

Inherent jurisdiction, however, is not necessarily an encroachment on state sovereignty.¹⁰⁹ It is commonly believed in the international community that a state forfeits its sovereignty when its actions are universally condemned.¹¹⁰

The main role of a sovereign state is to provide security and protection for its own people.¹¹¹ Often, especially in internal armed conflict, domestic courts are incapable of handling matters relating to that conflict; providing a mechanism for international assistance will provide order and security.¹¹² This ensures that sovereignty concerns are met.¹¹³

2. Complementary Jurisdiction

The Draft Statute intends for the court's jurisdiction to complement those national criminal justice systems whose trial procedures are unavailable or ineffective.¹¹⁴ Domestic courts are often fully capable of handling matters enumerated in the proposed

¹⁰⁸ U.N. CHARTER art. 2, para. 7 (stating that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”); see also Holly A. Osterland, Note, National Self-Determination and Secession: The Slovak Model, 25 CASE W. RES. J. INT’L L. 655, 670 (1993) (discussing principles of national sovereignty and its application to U.N. Charter).

¹⁰⁹ See Arniston, supra note 45, at 207 (contending that sovereignty carries humanitarian duties and responsibilities that when breached, “eviscerate sovereignty”).

¹¹⁰ See Quinn v. Robinson, 783 F.2d 776, 799 (9th Cir. 1986) (stating that human rights violations are abuse of sovereignty if carried out under authority of state); see also Martínez, supra note 45, at 12 (differentiating between limitations to sovereignty which are revocable, versus transfer of sovereignty, which is not); see, e.g., Judicial Intervention, supra note 61 (expressing concern over increasing instances of war crimes). See generally Fowler & Bunck, supra note 5, at 41-45 (explaining that sovereign state’s failure to protect its inhabitants is tantamount to transferring its sovereign power to one who will).

¹¹¹ See Brand, supra note 12, at 1696 (describing sovereign state’s obligation to protect and provide security for its citizens).

¹¹² See Jamison, supra note 1, at 432. An international criminal court will help nations to protect their sovereign rights and actually empower them in their goal of protecting their inhabitants. Id.

¹¹³ See id. “[B]y limiting its sovereignty, a state proves it is a sovereignty.” (quoting M. Cherif Bassiouni & Ved P. Nenda, A TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II, Jurisdiction and Cooperation 17 (1985)).

¹¹⁴ See 1994 ILC Report, supra note 2, Preamble (stating Court “is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole . . . [and] to be complementary to national criminal justice systems in cases where [their] trial procedures may not be available or may be ineffective”); see also Bhaṭṭacharyya, supra note 1, at 82 (noting that Statute seeks to limit Court’s jurisdiction to appropriate cases). See generally Crawford, supra note 8, at 410 (discussing jurisdictional system of ILC Draft Statute).
Therefore, in spite of the Court’s jurisdiction, each state’s national court system remains the more appropriate venue to hear cases and that power would not be usurped. This principle is known as “complementarity” and it refers to the relationship between the International Criminal Court and national judicial systems. It allows for the international court to complement or take over prosecutions only when national courts are unwilling or unable to function effectively.

The difficulty with complementarity arises in its application. The principle concern of nations is a loss of sovereignty through arbitrary decision-making regarding the availability and effectiveness of their own prosecutorial functions. There is a fear that an international court will have too much power to criticize the

115 See 1994 ILC Report, supra note 2, Commentary to Art. 23, at 82-84 (noting domestic prosecutions, if feasible, are preferable to international adjudication); see also Jamison, supra note 1, at 435 (stating that exclusive jurisdiction of International Criminal Court over certain crimes entails states giving up jurisdictional rights over such crimes); see, e.g., Scharf, supra note 99, at 160 (noting that exclusive jurisdiction would require countries to “relinquish, in advance, their authority to undertake domestic prosecutions” with respect to certain categories of crime). See generally Krass, supra note 10, at 1366 (stating that exclusive jurisdiction would mean sole jurisdiction over certain international crimes).

116 See 1994 ILC Report, supra note 2, Commentary to Preamble, at 44 (emphasizing that International Court intends to operate only when it is unlikely person would be tried nationally); see also Evered, supra note 77, at 138-41 (discussing various proposals that would allow States to retain jurisdiction within international court system); see, e.g., Howard S. Levie, Evaluating Present Options for an International Criminal Court, 149 MIL. L. REV. 129, 134 (1995) (noting that Draft Statute for International Criminal Court provides solely for concurrent jurisdiction).

117 See Bassiouni & Blakesley, supra note 93, at 160-62 (discussing implementation of International Court with respect to jurisdiction and complementarity).

118 See 1996 Proceedings, supra note 72 (defining “complementarity”); see also Walsh, supra note 6, at 111 (reporting that individual nations have not fulfilled their duty to prosecute most human rights violators); see, e.g., Leigh, supra note 9, at 122 (discussing complementary nature of jurisdiction of court). See generally Task Force, supra note 60, at 499 (discussing most compatible options for International Court that would complement, rather than compete with, prosecutions in national tribunals).


120 See 1996 Proceedings, supra note 72 (noting there is no system in place to determine when national system is inadequate); see also Scharf, supra note 99, at 160 (noting grave concern over court’s power to decide when it will intervene since it will require significant relinquishment of sovereignty). See generally Leigh, supra note 9, at 122 (noting that United States considers many provisions in Draft Statute at odds with principle of complementarity).
procedures of national courts. To further complicate matters, it is unclear as to who will make such determinations or what criteria would be used.

These concerns are meritorious and mandate that only after clearly defined criteria are met may the International Court take over prosecutorial functions. A formal procedure for making such a determination must clearly be established before the court is vested with this power. The balancing of interests falls on vesting the Court with this power because it eliminates the possibility that wrongdoers will use sovereignty as a veil to avoid unwanted interference. The concepts of international justice should therefore mandate that the international community retain this power. Empowering an international criminal court to step in, when national systems prove incapable or unwilling to punish the perpetrators of serious crimes, ensures that its establishment will not be of limited value.

121 See Committee Continues Considering, supra note 119 (describing debate over complementarity and its implications); see also Warbuck, supra note 72, at 243 (asserting that International Criminal Court is not intended to supplant national criminal jurisdiction).

122 See M. Cherif Bassiouni, Policy Considerations on Inter-State Cooperation in Criminal Matters, 4 Pace Y.B. Int'l L. 123, 144-45 (1992) (discussing ways in which complementary processes will work efficiently without sacrificing proper legal procedures or violating individual human rights).

123 See Bassiouni & Blakesly, supra note 94, at 169 (lamenting that approach for exclusiveness is most difficult to achieve politically); see also Scharf, supra note 99, at 160 (noting disadvantage of this approach is that it requires most significant relinquishment of sovereignty); see, e.g., Evered, supra note 77, at 141 (stating that United States in particular has grave reservations about proposed authority of Court); Leigh, supra note 9, at 123 (asserting that Court's jurisdiction must be properly addressed within concept of complementarity).

124 See Committee Continues Considering, supra note 119. Suggestions offered by the delegates have merit: France recommended that the International Court prosecute only when it was clear that national courts would free the accused from international responsibility, or deliberately undertook a bad faith prosecution. Id. Australia hoped that the International Court would not defer to sham proceedings by States not prosecuting in good faith. Id. The United States suggested utilizing a check list of criteria to determine exactly what constitutes bad faith. Id.

125 See, e.g., Bassiouni & Blakesly, supra note 94, at 169 (detailing how system will limit practice of invoking defense of national sovereignty).

126 See Scharf, supra note 99, at 160 (noting that Court's ability to make final decision of whether to prosecute will facilitate development of "coherent and consistent body of law"). See generally Jamison, supra note 1, at 426 (explaining how Court's jurisdiction will function).

127 See Morris & Bourloyannis-Vrailis, supra note 62, at 496 (reporting that principle of complementarity is considered to be essential to acceptance of permanent court); see, e.g., Leigh, supra note 9, at 123 (detailing United States' position in favor of complementarity).
3. Opt-in Jurisdiction

For the other enumerated crimes, the draft statute gives States the option to submit to the Court's jurisdiction.\(^{128}\) This system allows states to "opt-in" because jurisdiction is conferred upon the Court only by consent of the member State.\(^{129}\) This declaration can contain any or all applicable crimes, conduct, or time periods that the State chooses, and limits the Court's jurisdiction to those specifications.\(^{130}\)

There is considerable opposition to the opt-in approach, primarily because it allows for variations creating inconsistency and unpredictability.\(^{131}\) Many argue that all enumerated offenses should be subject to inherent jurisdiction to remove these problems and ensure proper enforcement.\(^{132}\) Adding further complication is the fact that the enumerated crimes are often committed in one occurrence and the opt-in approach, with its allowance for variation, creates waste in handling these matters.\(^{133}\)

The opt-in approach, however, is probably a necessary evil in order to facilitate acceptance from member States, as it respects the prevailing value placed on sovereignty in the international community.\(^{134}\) In other words, the opt-in approach is consistent

\(^{128}\) See 1994 ILC Report, supra note 2, art. 22 (proscribing acceptance of jurisdiction of court); see also Krass, supra note 10, at 355 (enumerating possible jurisdictional options). See generally Levittine, supra note 15, at 35-38 (discussing proposed jurisdiction).

\(^{129}\) See 1994 ILC Report, supra note 2, Commentary to Art. 22, at 82-84 (noting Article was drafted to facilitate state acceptance of both Statute and Court's jurisdiction).

\(^{130}\) See id. (noting that formal declaration by individual states is needed before Court obtains jurisdiction over them). But see Jamison, supra note 1, at 426 (asserting that many states actually prefer inherent jurisdiction approach). See generally Nanette Dumas, Note, Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals, 13 Hastings Int'l & Comp. L. Rev. 585, 593 (1990) (describing Court's various jurisdictional options).

\(^{131}\) See 1994 ILC Report, supra note 2, Commentary to Art. 22, at 84 (claiming that this type of jurisdiction would empty statute of any real content); see also Evered, supra note 77, at 142-45 (elaborating on various objections to opt-in jurisdiction).

\(^{132}\) See Morris & Bourloyannis-Vrailis, supra note 62, at 496-99 (offering rationale for objections to opt-in jurisdiction); see also Jamison, supra note 1, at 426 (noting that many states prefer inherent jurisdiction approach).

\(^{133}\) See Bassiouni & Blakesly, supra note 94, at 162 (noting that opt-in approach could ostensibly allow jurisdiction over only selected crimes, even if others are simultaneously committed); see also Universality of International Criminal Court Requires Participation of All States Preparatory Process, M2 Presswire, Nov. 7, 1996, part I, available in 1996 WL 13549264, part II, available in 1996 WL 13549265 (highlighting discussions of Preparatory Committee).

\(^{134}\) See 1994 ILC Report, supra note 2, Commentary to Art. 22, at 82 (noting Article 22 was drafted to facilitate acceptance by states); see also Morris & Bourloyannis-Vrailis, supra note 62, at 496 (predicting that several states likely will not accept court without jurisdictional guarantees).
with the present day concept of sovereignty, which presumes that each sovereign state can only be bound by those commitments it willingly enters into with other sovereign states.

4. The Role of the Security Council

The Security Council is a body of the United Nations, consisting of five permanent and ten temporary nations. There has been a great deal of controversy over the possible control the Security Council may exert in the exercise of the International Court's jurisdiction. The United States, a permanent member of the Security Council, favors a “triggering mechanism” through which the Council would select which cases would eventually be heard by the International Criminal Court.

The 1994 draft statute states that “[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council . . . unless the Security Council otherwise decides.” This provision has raised concerns that the Council could effectively preclude proceedings before the Court.


See 1994 ILC Report, supra note 2, art. 23 (establishing Security Council’s role in selecting suitable crimes for court to adjudicate); see also Carter, supra note 119, at 300 (suggesting that jurisdiction of international criminal court should be granted to Security Council). See generally Human Rights: U.S., Western Powers Hit for Ignoring Abuses, INT'L PRESS SERVICE, Dec. 4, 1996, available in 1996 WL 14476668 (characterizing Security Council's opposition to international criminal court as "a low point").


135 See 1994 ILC Report, supra note 2, art. 23 (stating that court may not prosecute matters before Security Council). See generally Task Force, supra note 60, at 480-84 (discussing procedure to invoke Article 23 rights for individual states).
simply by taking the matter up under for itself.139 Given the political nature of the Security Council, this provision could affect the Court's independence.140

While it may appear as though the Security Council would exert too much power over the proposed Court, the active role the Council would play would alleviate concerns relating to the Court's impermissible infringement on sovereignty.141 Maintaining the Court's subordinate status to the Security Council is appropriate because it ensures that the Council satisfies its obligation to preserve international peace and security,142 it would help to provide political backing to the Court's decisions143 and would prevent the arbitrary use of the Court.144 It also should be observed that it is

139 See Sienho Yee, A Proposal to Reformulate Article 23 of the ILC Draft Statute for an International Criminal Court, 19 HASTINGS INT'L & COMP. L. REV. 529, 529-31 (1996) (describing reactions to triggering mechanism aspect of Article 23); see, e.g., Evered, supra note 77, at 139 (predicting U.S. would not accept Court without triggering mechanism). See generally Task Force, supra note 60, at 489 (explaining application of triggering mechanism).

140 See Burns, supra note 50, at 348 (detailing political nature of Security Council, particularly its effect on court); see also Evered, supra note 77, at 142-45 (describing U.S. position); Yee, supra note 139, at 529-31 (noting Article 23 allows Security Council to control Court merely by placing item on its own agenda). But see Morris & Bourloyannis-Vrailas, supra note 62, at 614 (claiming United States is in minority with its cautious approach to Court).

141 See Diego A. Rotsztain, The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution, 96 COLUM. L. REV. 1940, 1954 (1996) (asserting that U.S. sovereignty would be impermissibly compromised if foreign laws were allowed to interfere with domestic prosecutions); see also Jamison, supra note 1, at 452-54 (asserting that United States will be most difficult nation to convince). See generally Edward K. Kwakwa, The Role of International Law in U.S. Foreign Policymaking, 86 AM. SOC'Y INT'L L. PROC. 434, 450-53 (1992) (describing U.S. foreign policy in relation to international law).

142 See U.N. CHARTER art. 39. The Security Council is authorized to “determine the existence of any threat to peace, breach of peace, or act of aggression” and to determine actions to “maintain or restore international peace and security.” Id.; see also Evered, supra note 77, at 142-45. The United Nations is concerned that the Court will exert too much authority. Id.

143 See Mendez & Dicker, supra note 137, at A1 (describing benefits of screening process); see also Burns, supra note 50, at 346 (explaining screening process); cf. Leslie Deak, The UN Ad Hoc Tribunal for the Former Yugoslavia, 97 AM. SOC'Y INT'L L. PROC. 20, 22-23 (1993) (suggesting that politics should be kept out of prosecutorial proceedings).

144 See Mendez & Dicker, supra note 137, at A1 (endorsing use of Security Council); see also 140 CONG. REC. S 96-01 (daily ed. June 23, 1996) (statement of Sen. Helms) (expressing concern that representatives of terrorist countries could sit in judgment of American citizens); Levitine, supra note 15, at 43 (asserting that U.S. criminal law and procedure lies at heart of its objections to statute); Scharf, supra note 98, at 163 (suggesting that applying law of transferring state would run afoul of U.S. Constitution); William Pfaff, International Court Could Deter War Crimes By Indicting the Leaders, CH. TRIB., July 30, 1996, at A17 (claiming opportunity to establish important precedent of individual accountability for war crimes is being discarded for American domestic political reasons). See generally Michael D. Greenberg, Creating an International Criminal Court, 10 B.U. INT'L L.J. 119, 134-35 (1992) (discussing U.S. concern that transnational law would oppose carefully laid common and constitutional law).
not an abdication of sovereign authority to delegate functions and authority to a global system of law when it is appropriate to effectuate international justice.\textsuperscript{145}

III. ENFORCEMENT MECHANISMS OF THE INTERNATIONAL COURT

In order to be a truly effective adjudicatory body, the proposed Court must establish mechanisms allowing for the extradition, prosecution and punishment of those committing acts that trigger its jurisdiction.\textsuperscript{146} Sovereignty, however, poses a direct obstacle to these enforcement powers.\textsuperscript{147} Historically, states have been reluctant to intervene in the affairs and territory of other sovereign states.\textsuperscript{148} A permanent international criminal court would require states to interfere in the sovereignty of other states\textsuperscript{149} so that extradition, fact finding and resource gathering could be effectuated.\textsuperscript{150}

\textsuperscript{145} See Brand, supra note 12, at 1696 (noting in many cases, it is abdication of sovereign authority not to delegate it); see also Levitine, supra note 15, at 35-38 (suggesting that Court does not threaten sovereignty of nations but may in fact help it).

\textsuperscript{146} See David Stoelting, International Courts Flourish in 1990's: Nations Cede Authority, N.Y.L.J., Aug. 4, 1997, at S2 (commenting that proposed Court's lack of enforcement mechanisms or police force means individual countries will be relied upon to provide assistance, surrender indicts and gather evidence); see also Osofsky, supra note 65, at 204 (noting that practical limitation of international system is that it lacks enforcement mechanisms); Farhan Haq, Rights: Support Growing for "Effective" Criminal Court, Int'l Press Service, Dec. 10, 1997, available in 1997 WL 13258070 (noting fact that some governments want Court to face same extradition laws because other courts will complicate things).

\textsuperscript{147} See United States v. Otto Ohlendorf et al., Case No. 9, reprinted in IV Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10411, 462 (1950) (stating enforcement mechanisms are constrained by practicalities of national sovereignty); see also Law Without Borders, supra note 8, at 139 (noting Court will be ineffective unless nations are willing to use power to bring perpetrators to justice and enforce court's judgments).

\textsuperscript{148} See Pamela Brondo, International Law: The Use of the Torture Victims Protection Act as an Enforcement Mechanism, 32 Land & Water L. Rev. 221, 225-26 (1997) (asserting that in spite of presence of human rights, declarations, conventions, customary norms and treaties, enforcement and implementation remain problematic); see also Brand, supra note 12, at 1689 (discussing role of sovereign as provider of peace and security); see, e.g., Stoelting, supra note 147 (reporting that ad hoc tribunals for Rwanda and Former Yugoslavia have been hampered by lack of state cooperation). See generally Burying the Dead in Yugoslavia. Families: Serbs Hiding a Massacre, Newsday (New York), Mar. 11, 1998, at A16 (noting China's position that ongoing violence in Serbia is domestic matter and action by U.N. would be inappropriate).


\textsuperscript{150} See David P. Fidler, Caught Between Traditions: The Security Council in Philosophical Conundrum, 17 Mich. J. Int'l L. 411, 436 (1996) (calling present cooperation of international organizations "a facade" that does nothing to effectively limit sovereignty); see also
In discussing enforcement, scholars have tended to divide international crimes into two groups: Crimes perpetrated by states (state-led) and crimes perpetuated by individuals (individual non-state actors).\textsuperscript{151} The sanctions of the U.N. Charter, such as the interruption of economic relations, severance of diplomatic relations, and blockades, are typically imposed for state led crimes.\textsuperscript{152} These sanctions serve to punish the perpetrators while also punishing the population as a whole.\textsuperscript{153} Therefore, traditional penal sanctions such as an international prison or international community service seem to be the preferable punishment mechanism of an international criminal court because these types of sanctions are limited to punishing only the responsible State.\textsuperscript{154}

In reality, the enforcement by such a court is complicated because a state must consent to intervention by participating in the International Criminal Court.\textsuperscript{155} Such participation is tantamount to consenting to intervention in a state's internal affairs.\textsuperscript{156} Enabling a state to give its prior consent to intervention by the international court will placate sovereignty concerns, however, it will not eliminate them.\textsuperscript{157}

\textit{Law Without Borders, supra} note 8, at 139 (asserting that court's success depends upon full cooperation of entire international community).


\textsuperscript{153} \textit{See Bassioune, supra} note 152, at 14 (suggesting usual U.N. sanctions are inappropriate against individual actors).

\textsuperscript{154} \textit{See Jamison, supra} note 1, at 439 (asserting that imprisonment is more effective to punish individual actors than economic sanctions levied against state); \textit{see also} Ososky, \textit{supra} note 65, at 208 (noting that while sanctions are inadequate, imprisonment will raise logistical difficulties without help from national prison systems).

\textsuperscript{155} \textit{See Scharf, supra} note 99, at 160 (discussing how state's participation in international court will affect manner in which court may intervene in state's affairs).


\textsuperscript{157} \textit{See Scharf, supra} note 99, at 160 (noting such consent will protect principle of sovereignty); \textit{see also} David J. Scheffer, U.S. DEP'T ST. DISPATCH, Oct. 1, 1997, \textit{available in} 1997 WL 1231695 (asserting "shield of sovereignty" has long prevented enforcement of individual responsibility against egregious violators of international law).
Enforcement measures are further complicated by the fact that
the territorial boundaries of a sovereign state are constantly
changing. The nature and identities of states are often elusive. This problem was best exemplified by the United Nation’s
intervention into the war in the former Yugoslavia.

In this conflict, it was widely believed that the gross human
rights violations committed in Yugoslavia justified interven-
tion. This intervention was not viewed as an improper threat to
Yugoslavia’s sovereignty because Yugoslavia had been a signatory
to many of the international agreements which would have al-
lowed it. Therefore, since Yugoslavia had given its prior con-
sent, there should not have been any basis to object to that
intervention.

The newly formed states of Bosnia, Herzegovina and Srpska,
however, contended that they were not subject to any agreements
that bound Yugoslavia. Therefore, they claimed that the en-
forcement measures taken by the U.N. impermissibly violated
state sovereignty. Arguably, this position could be used to refute
the actions of a permanent court as well.

The ad hoc Tribunals adjudicating war crimes in the former Yu-
goslavia and Rwanda are being monitored closely to determine the

---

158 See James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT’L L. 93, 120 (1977) (noting there is no rule that state must be fully defined before it is respected).

159 See Jaret Chopra, *The Obsolescence of Intervention under International Law, in Sub-
duing Sovereignty*, supra note 4, at 34 (noting that although intervention implies crossing
boundaries, borders are less distinguishable); see also Joel Feinberg, *Autonomy, Sovere-
ignty, and Privacy: Moral Ideals in the Constitution*, 58 NOTRE DAME L. REV. 445, 452
(1983) (noting that although international agreements have precisely defined boundaries,
they are frequently subject to dispute).

243, 261 (1997) (dubbing situation in former Yugoslavia “a grim example” of how sover-
eignty constrained much needed intervention).

161 See Joseph L. Falvey, Jr., *United Nations Justice of Military Justice: Which Is the
Oxymoron? An Analysis of the Rule of Procedure and Evidence of the International Tribunal
for the Former Yugoslavia*, 19 FORDHAM INT’L L.J. 475, 481 (1995) (discussing daily news-
casts revealing widespread atrocities committed in former Yugoslavia).

162 See generally Kresock, supra note 14, at 219-20 (discussing history of Yugoslavia’s
involvement with United Nations).

163 See THOMAS, supra note 20, at 48 (noting that non-intervention in domestic affairs
reflects acceptance of sovereign state as fundamental unit of political organization in to-
day’s international system).

164 See Thomas Omestad, *The Brief for a World Court: A Permanent War-Crimes Tribu-
nal is Coming, But Will it Have Teeth?*, U.S. NEWS & WORLD REPORT, Oct. 6, 1997, at 25
(reporting that Bosnian authorities have refused to cooperate, hand over suspects, and con-
tinue to ignore Security Council mandates and signed peace accords).
viability of a permanent court.\textsuperscript{165} To date, seventy seven individuals have been indicted in those tribunals, but only twenty are in custody.\textsuperscript{166} This raises questions concerning the tribunal's enforcement mechanisms and casts serious doubts about the effectiveness of these tribunals and any permanent ones.\textsuperscript{167}

The reluctance of the United Nations or any individual state to bring the accused into custody again reflects the strength of the principles of sovereignty and non-intervention.\textsuperscript{168} Here, the principles of non-intervention are clashing directly with the need for international justice.\textsuperscript{169} The lack of indicted individuals in custody suggests that the principles of sovereignty have prevailed.\textsuperscript{170}

\textsuperscript{165} See William Pfaff, War Crimes Panel Could Set Crucial Precedent, \textit{Int'l Herald Trb.}, July 26, 1996, available in 1996 WL 4092225 (reporting that experience with ad hoc tribunals will guide establishment of permanent tribunal); see also Elisa Massimino, \textit{International Human Rights}, 23 \textit{Hum. Rts.} 10, 10 (1996) (stating many believe fate of permanent court is riding on success of Yugoslavian and Rwandan Tribunals); Symposium, Panel III, Identifying and Prosecuting War Crimes: The Former Yugoslavia and Rwanda, 12 N.Y.L. Sch. J. Hum. Rts. 631, 656 (1996) (noting that International Criminal Court must not only be fair, but also be perceived as such to avoid appearance of “victor's justice,” which was criticism of Nuremberg trials).

\textsuperscript{166} See Charles Trueheart, War Crimes Judge Assails West's Failure to Seize Serb Suspects, \textit{Int'l Herald Trb.}, Sept. 19, 1996, at 12 (reporting that Tribunal's former chief prosecutor has questioned point of keeping tribunals going since no one was willing to arrest suspects); see also News Briefs, N.Y.L.J., Nov. 18, 1997, at A1 (providing grim statistics of prosecutors in ad hoc tribunals). \textit{But see} Danielle Lachman, \textit{Human Right in Bosnia: Implementing an Effective Prosecution}, 8 Fla. L. Rev. 325, 330 (1993) (claiming that indictments alone will deter crime, serving to make suspects “international pariahs” who can never leave their own land).


\textsuperscript{168} See Brondo, supra note 124, at 236. The author asserts that the acceptance of basic human rights in principle has not been enough to end the violations of those rights. \textit{Id.} People, governments and nations continue to violate human rights even with the advent of declarations, conventions and enforcement mechanisms. \textit{Id.}

\textsuperscript{169} See Omestad, supra note 166, at 26 (predicting Court will lack Nuremberg Court's authority to enforce its rulings); see also Scheffer, supra note 159 (calling enforcement of international criminal law “the greatest challenge” of twenty-first century).

\textsuperscript{170} See Gillian Sharpe, \textit{The Tribunal and the Twitch Factor}, N.Y. Newsday, Nov. 17, 1996, at A40 (noting that precious few people seem to care about tribunal; citing lack of reporters still covering story which has been deemed “old news”); see also Bosnian's Casual, Visible 'Wanted', Newsday, Dec. 20, 1997, at A15 (reporting that although locating war crime suspects is relatively easy, finding someone prepared to arrest them is difficult); Slighting Justice, Wall St. J., Jan. 23, 1996, available in 1996 WL 3334822 (claiming U.S. interest in investigating and gathering evidence and funds has dropped).
CONCLUSION

Sovereignty has long been viewed as the most fundamental right of a nation and many nations continue to believe that any infringement on sovereignty is impermissible. The doctrine that a state has absolute authority, independent of the affairs of other nations is outdated and unrealistic. An international criminal court would give the international community the power to act against the crimes of universal concern. It also will protect a state’s sovereign rights over crimes committed by protecting them in an international system when in the past they had no power to act. There is a balance between a society’s right to its sovereignty and the right of the international community to ensure punishment of criminal behavior for certain acts which otherwise would go unpunished. Sovereignty must not be a guise which allows for the continuance of international criminal behavior.

Patricia A. McKeon