A Functional Response to International Crime: An International Justice Commission

Farrah Hussain

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A FUNCTIONAL RESPONSE TO INTERNATIONAL CRIME: AN INTERNATIONAL JUSTICE COMMISSION

Since the end of the Cold War and the consequent demise of the bipolar order, international crime has been on the rise.1 Due to the lack of a central organization to enforce international law, our society is wholly unequipped to deal with crime at the international level.2 The United Nations was established in 1945 to foster peaceful and cooperative relations among states.3 The premise behind its creation was that collective security, shared values, and cooperation were in the interest of every state.4 At

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3 U.N. CHARTER art. 1. The United Nations has been recognized as the primary international organization for the maintenance of international peace. MALEKIAN, supra note 1, at 1. The fundamental principles of the United Nations are formulated in its Charter which was signed at the United Nations Conference on International Organization on June 26, 1945, and which came into force on October 24, 1945. Id. at 1 n.4. The law of the Charter is binding upon all United Nations members, and its obligations may be enforced upon even non-member nations for the purpose of maintaining international peace and security. U.N. CHARTER art. 2, para. 6. The United Nations, however, has no authority to intervene in matters which are within the domestic jurisdiction of the states. U.N. CHARTER art. 2, para. 7.

Article 7 of the United Nations Charter established six principal organs of the U.N.: the General Assembly, the Security Council, the Trusteeship Council, the Economic and Social Council, the International Court of Justice, and a Secretariat. U.N. CHARTER art. 7, para. 1.

4 Boutros Boutros-Ghali, The Role of International Law in the Twenty-First Century: A Grotian Moment, 18 FORDHAM INT'L L.J. 1609, 1609 (1995); see 2 M. CHERIF
that time, the primary threat to international peace was aggression by states against one another.⁵ Since then, however, there has been a significant change in the international climate with conflict erupting both within and among states.⁶ This global destabilization has resulted in an upsurge in international crime.⁷

Because international criminal law is still in its infancy and is faced with a number of limitations,⁸ it is not adequately equipped to respond to the explosive growth of international crimes.⁹ Namely, international crime is not recognized by all

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⁵ Boutros-Ghali, supra note 4, at 1610. The bipolar system of the Cold War, however, significantly reduced that threat and served to maintain an overall peace among nations. Id.


⁷ See supra note 1 (discussing explosive growth in amount of international crime since end of Cold War).

⁸ LEONARD J. HIPPCHEN & YONG S. YIM, TERRORISM, INTERNATIONAL CRIME, AND ARMS CONTROL 158 (1982); see id. at 13 ("Crime prevention at the international level, although offering greater potential for long-run crime reduction, is yet in its infancy."). The main goal of international criminal law is to protect the international legal system by deterring crimes which may jeopardize the international legal order and its peace. MALEKIAN, supra note 1, at 26. International criminal law, therefore, is a body of law which works together with other areas of international law as well as with domestic legal systems in all states to bring the perpetrators of international or national crimes within the respective criminal jurisdiction. Id.

⁹ See HIPPCHEN & YIM, supra note 8, at 8 ("[A]s mankind is being confronted with new forms and dimensions of criminality, it is being discovered that crime control systems developed during the nineteenth and twentieth centuries no longer are adequate to cope with these problems."); Barton & Carter, supra note 6, at 535 ("International law and institutions have evolved rapidly since [World War II], but
nations, and no central organization has been established to monitor the enforcement of its rules. These impediments have effectively crippled the enforcement of criminal law at the international level. Therefore, individual states are left to decide the level and extent of domestic enforcement of international crime.

Owing to the lack of an international criminal legal system, the burgeoning scope and high incidence of international crime pose problems that require an immediate and functional international response. Although drug trafficking and terrorism remain the most serious international crimes, other common

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1 See HIPPCHEN & YIM, supra note 8, at 158 (discussing unresolved issues which limit effectiveness of international law). "Neither general international law nor the Charter of the United Nations obliges States to submit their disputes to courts or arbitral bodies." Hermann Mosler, Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years After the Founding of the World Court, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 4 (1974); see Helmut Steinberger, The International Court of Justice, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 193, 195-201 (discussing reservations of several countries concerning issue of compulsory jurisdiction of International Court of Justice). Many contend that "although the Court cannot solve problems of a political nature, or prevent the actual outbreak of war, the Court makes important contributions to the peaceful coexistence of independent states." HIPPCHEN & YIM, supra note 8, at 166.

Thus, "experienced observers of international relations are right when they consistently note that the function of international law and of international jurisdiction in the area of the peaceful settlement of highly political disputes, and in particular of disputes containing a threat to peace or international security [such as international crime], is of necessity quite limited." Steinberger, supra, at 207.


12 MALEKIAN, supra note 1, at 28; see also Barton & Carter, supra note 6, at 540-41 (discussing "lack of bite" of International Court of Justice).

13 Gianaris, supra note 11, at 88; see HIPPCHEN & YIM, supra note 8, at 6 ("For the past 10-20 years the world community has been faced with an increase in the sophistication and organization of criminal activities..."); SIR LEON RADZINOWICZ & JOAN KING, THE GROWTH OF CRIME 3 (1977) ("The incidence [of crime] seems to be going up in all parts of the world, whatever the stage of development and among all segments of society...").

14 Experts often refer to these crimes as "multinational, systematic crimes." JOHN M. MARTIN & ANNE T. ROMANO, MULTINATIONAL CRIME: TERRORISM, ESPIONAGE, DRUG & ARMS TRAFFICKING 1, in Studies in Crime, Law, and Justice
crimes such as murder, rape, kidnapping, and white collar crime are quickly becoming more prevalent in the international arena.

Vol. 9 1992. Multinational systematic crimes are crimes committed by various types of organizations that operate across national boundaries and in more than one country simultaneously. Id. Each of these crimes is seen as a threat to a country’s national security. Id.; see, e.g., Jill Smolowe, Reading the Coca Leaves: A Drug Case Ensnares Top Officials and Raises Questions About What Castro Is Up To, TIME, July 10, 1989, at 30 (discussing arrest of Major General Arnaldo Ochoa Sanchez and six other military and Interior Ministry officials in Cuba for drug trafficking). As the world becomes more economically, socially, and politically interdependent, multinational crime systems become more expansive and more powerful. MARTIN & ROMANO, supra, at 3.


See Gianaris, supra note 11, at 69 (citing increase in nontraditional international crime as reason behind creation of international criminal court); see also HIPPCHEN & YIM, supra note 8, at 5 (“Fears concerning societal safety stem not only from well-organized international terrorists and criminals, but also from quite unpredictable and randomly occurring street crimes, i.e. murder, assault, rape, robbery.”); Joel S. Solomon, Forming a More Secure Union: The Growing Problem of Organized Crime in Europe as a Challenge to National Sovereignty, 13 DICK. J. INT’L L. 623, 628-33 (1995) (analyzing increasing presence and power of organized crime in Europe); Brian R. Allen, Comment, The Banking Confidentiality Laws of Luxem-
Part I of this Note examines the ineffectiveness of the numerous extradition treaties which make up the present system used to address the new trend of international crime. Part II discusses the proposal for an international criminal court and the problems associated with such a tribunal. Finally, Part III sets forth what appears to be the most workable solution: the creation of an International Justice Commission.

I. THE INEFFECTIVENESS OF EXTRADITION TREATIES: THE PROBLEM OF "FORUM LIVING"

Absent a system of international criminal law, extradition treaties are the sole means by which a state can gain jurisdiction over an individual outside its borders whom it seeks to prosecute for an alleged wrongdoing.20 As stated by the United States Supreme Court:

[The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled ... the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.]21

Consequently, this process is so largely flawed as to render it

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International surveys of street crimes conducted by the United Nations show that reported crime has increased annually at a rate of approximately two percent. Hippchen & Yim, supra note 8, at 6-7. Accordingly, it can be estimated that from 1970 to 1980, world street crime increased by approximately twenty percent. Id. at 7. Between 1970 and 1975, it was found that the greatest increase in crime was reported for drug abuse (114%), robbery (179%), theft (46%), and homicide (20%). Id.

21 See M. Cherif Bassiouni, International Extradition and World Public Order 13 (1974) (tracing history of international extradition practices as well as role extradition fills in modern international law). American extradition law defines the process as:

A process by which, in accordance to treaty provisions and subject to its limitations one state requests another to surrender a person charged with a criminal violation of the laws of the requesting state who is within the jurisdiction of the requested state, for the purposes of answering criminal charges, stand trial or execute a sentence arising out of the stated criminal violation.

Id. at 27(citations omitted).

22 Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (citations omitted); see United States v. Rauscher, 119 U.S. 407, 411-12 (1886) (noting duty of extradition between nations exists only in treaty).
Extradition provides for the transfer of an accused person from one nation to another so that such person may face criminal charges.\textsuperscript{22} The premise behind extradition is that the accused individual has affected an interest of the requesting state in some way.\textsuperscript{23} Both treaties and principles of comity between nations govern the extradition process.\textsuperscript{24} These treaties, usually bilateral agreements, "provide nations with a means to avoid

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\item \textsuperscript{22} BASSIOUNI, supra note 20, at 47 ("The classical definition of extradition is that it is a process by which one state (the state of refuge or asylum) surrenders to another (the requesting state) an individual (the relator) accused or convicted in the requesting state of an offense for which the requesting state is seeking to subject the relator to trial or punishment.").
\item \textsuperscript{23} BASSIOUNI, supra note 20, at 202. Prior to requesting the surrender of an individual, a state must determine if it has jurisdiction over the subject matter of the alleged conduct, because the state of refuge will not entertain such a request unless it finds that the requesting state has proper jurisdiction over the matter. See id. at 203. The rationale behind this requirement is that every state exercises jurisdiction over all persons (i.e., nationals, resident aliens, associations) and objects within its physical boundaries. Id. at 206. Thus, when a state requests the extradition of an individual, it asserts that it has jurisdiction over the conduct allegedly performed by the individual, it is a competent forum to prosecute the offender, and that when the individual is extradited, he or she will be properly submitted to its judicial authorities. Id. at 270. The act with which the fugitive is charged must be an extraditable crime in both the requesting state and the state of refuge. Charles Kallenbach, Note, Plomo O Plata: Irregular Rendition as a Means of Gaining Jurisdiction over Colombian Drug Kingpins, 23 N.Y.U. J. INT'L L. & POL. 169, 174 (1990). See generally BASSIOUNI, supra note 20, at 311-60 (discussing extraditable offenses). The state of refuge may extradite the fugitive even if its authorities are competent to prosecute and where the offense was committed in whole or in part within its own boundaries. Id. Extradition will be denied if any of these conditions is not met. Extradition can also be denied if certain exceptions or exemptions apply. Id. at 368; see Marian Nash Leich, Contemporary Practice of the United States Relating to International Law: Extradition, 76 AM. J. INT'L L. 154, 157-59 (1982) (discussing U.S. extradition procedure).
\item \textsuperscript{24} Kallenbach, supra note 23, at 169; see also 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW & PRACTICE 10 (2d ed. 1987) (stating that delivery of individuals to a requesting sovereign was usually based on pacts or treaties, and also on the basis of reciprocity and comity); Richard Downing, The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil, 26 STAN. J. INT'L L. 573, 577 (1990) ("[A]bsent a formal treaty, friendly nations will often surrender fugitives to the United States out of comity....").
\end{itemize}
disputes stemming from extraterritorial abduction.\textsuperscript{25} They have, however, proven to be virtually ineffective.\textsuperscript{26}

Extradition treaties bind only signatory states.\textsuperscript{27} Thus, there is no general duty on the part of non-signatory states to assist in bringing fugitives to justice.\textsuperscript{28} Consequently, this method of

\textsuperscript{25} Kristin Berdan Weissman, Comment, Extraterritorial Abduction: The Endangerment of Future Peace, 27 U.C. DAVIS L. REV. 459, 467 (1994); infra notes 33-45 and accompanying text (discussing extraterritorial abductions as means to obtain jurisdiction over fugitives); see also United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding that extradition treaty did not prohibit extraterritorial abduction). Currently, the United States is party to over 102 extradition treaties. Weissman, supra, at 467. The absence of treaties with 56 countries, including Iran, Libya, and Syria, has precluded prosecution of terrorists acting against the United States and its nationals abroad. \textit{Id.}

\textsuperscript{26} See infra notes 27-52 and accompanying text (discussing problems and failures of extradition treaties); \textit{see also} BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES -- A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 2 (1991) ("International extradition practices, as they currently exist, are not functioning adequately."); Downing, supra note 24, at 575 ("Removal of fugitives from foreign nations by means other than formal extradition has received increased attention, perhaps because of perceived failures of the multilateral system of extradition treaties.").

\textsuperscript{27} YARNOLD, supra note 26, at 13-14 ("One of the major problems with extradition treaties, whether they are multilateral or bilateral, is that they bind only the signatory states, or those states that have entered into formal agreement."); \textit{see} Factor v. Laubenheimer, 290 U.S. 276 (1933) (holding that there is no obligation to extradite in absence of treaty); Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959) (stating that right of foreign states to demand extradition only exists when created by treaty); I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 22 (1971) ("The existence of a treaty commitment to the requesting [state] is an express condition precedent to extradition ...."); Catherine Logan Piper, Note, Reservations to Multilateral Treaties: The Goal of Universality, 71 IOWA L. REV. 295, 296 (1985) ("Only those states that have joined the treaty are formally bound by the law that it creates."); \textit{cf.} BASSIOUNI, supra note 20, at 1 (discussing historical practice by states of surrendering fugitive upon mere request of other state as feature of friendly relations between sovereigns); SHEARER, supra, at 22 ("[E]xtradition may take place in the absence of a treaty but as an act of grace rather than of obligation ...."); YARNOLD, supra note 26, at 12 ("[S]ome states do voluntarily extradite individuals ....").

\textsuperscript{28} BASSIOUNI, supra note 24, at 10. Classical commentators on international law have differed as to the existence of a legal or moral duty requiring the state of refuge to surrender accused persons to the rendering state. \textit{Id.} For example, Hugo Grotius asserted that the state of refuge was obligated to either extradite or prosecute the individual sought after. \textit{Id.} Hence, he coined the maxim \textit{aut dedere aut judicare}. \textit{Id.}; \textit{see} Rebecca J. Cook, \textit{U.S. Population Policy, Sex Discrimination, and Principles of Equality Under International Law}, 20 N.Y.U. J. INT'L L. & POL. 93, 131-32 (1987) ("One can argue that international conventions on human rights even impose obligations on non-signatories because of their capacity to establish minimum standards of civilized conduct, which must be observed by all international entities as a condition of their status as states."). \textit{But see} BASSIOUNI, supra, at 10 (discussing contrasting views of Puffendorf arguing "duty to extradite was only
Rendition lacks uniformity in practice, thus diminishing the legitimacy of formal extradition as a means of bringing offenders to justice. To be sure, fugitives often choose the state of their asylum based upon the existence of an extradition treaty: a problem known as "forum shopping." Even where a treaty exists between states, however, the state from which extradition is sought may choose not to honor it. For example, strained diplomatic relations between countries sometimes leads to the denial of extradition notwithstanding the existence of an extradition treaty. In such a case, the

an imperfect obligation which required an explicit agreement ... to become fully binding under international law

YARNOLD, supra note 26, at 14; see BASSIOUNI, supra note 24, at 31 ("Bilateral treaty practice in extradition is the most cumbersome form that can be relied upon because of the lack of uniformity among treaties, and the greater flexibility in treaty provisions.").

BASSIOUNI, supra note 24, at 54 ("This situation makes it more difficult to ascertain the precedential value of decisions interpreting a given treaty with respect to other treaties."); YARNOLD, supra note 26, at 14. The problem with treaties embodying whatever provisions can be negotiated is that the resulting lack of consistency in the practice of extradition leads to potential jurisprudential confusion.

YARNOLD, supra note 26, at 15; see Gianaris, supra note 11, at 92 (stating that non-signatory nations often served as safe havens for fleeing criminals); see also Michael P. Shea, Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering, 17 YALE J. INT’L L. 85, 136 (1992) ("[F]aced with [the safe haven] problem, some ... suggest inserting a clause into all extradition treaties to allow the requested state, if it refuses to extradite, to try the fugitive on its own soil.").

SHEARER, supra note 27, at 27 ("Extradition is not looked upon as an absolute international duty ...."); YARNOLD, supra note 26, at 19; see Gianaris, supra note 11, at 92 ("Signatory nations [do] not always fully abide by these treaties...."). But see BASSIOUNI, supra note 20, at 21-22 (discussing case in Venezuela where court surrendered American national to Panama in absence of extradition treaty because surrender was "in conformity with the public law of nations"); see also SHEARER, supra note 27, at 27-34 (discussing extradition in absence of treaty). There are four grounds upon which a denial of extradition may rest:

1. Grounds relating to the offense itself (i.e., political, military, fiscal);
2. Grounds relating to the relator (i.e., nationals, persons performing official acts, and persons protected by special immunity);
3. Grounds relating to the prosecution of the offense charged (i.e., legality of the offense charged, trial in absentia, statute of limitation, and immunity);
4. Grounds relating to the penalty and punishability of the relator (amnesty and pardon, double jeopardy, death penalty, cruel and unusual punishment).

BASSIOUNI, supra note 20, at 368-69.

Downing, supra note 24, at 576 ("[A]n extradition treaty may become temporarily suspended due to a break in diplomatic relations...."). One of the main reasons for states’ reluctance to surrender individuals located within their borders to a requesting country is national pride and sovereignty. Gianaris, supra note 11, at 106; Kallenbach, supra note 23, at 175. Many other factors, such as resentment harbored by the state of refuge toward the requesting state, or intimidation by the
requesting state cannot compel the state of refuge to adhere to the extradition treaty.\textsuperscript{34} Extradition law is a doctrine of convenience between respective states, not a right which an individual or a state can claim.\textsuperscript{35} For example, when the crime involves a political offense,\textsuperscript{36} states are often reluctant to comply with ex-

criminals' terrorist tactics, may also spur this lack of commitment to extradition treaties. \textit{Id.} Furthermore, the development of new crimes may render treaties obsolete. \textit{Id.; see also BASSIOUNI, supra note 4, at 99} (discussing effect of war on efficacy of extradition treaties). Consequently, it appears that extradition is an ineffective means of dealing with complex international crimes.

\textsuperscript{34} BASSIOUNI, \textit{supra} note 20, at 50.

\textsuperscript{35} Id.

\textsuperscript{36} See generally BASSIOUNI, \textit{supra} note 24, at 383-451 (discussing political offense exception). A political offense is generally defined as conduct directed against a sovereign which constitutes a threat to a political, religious or racial ideology or its supporting structures without having the elements of a common crime. BASSIOUNI, \textit{supra} note 20, at 379. The elements of a common crime are lacking because the perpetrator of the offense acts as an agent of a political or religious movement and "is motivated by ideology or belief but does not cause a private harm." \textit{Id.} at 382. The conduct is deemed criminal because the interest to be protected is that of the sovereign rather than a private individual. \textit{Id.} at 379. The state criminalizes such conduct in order to protect itself. \textit{Id.} at 380. Examples of purely political offenses, or offenses directed at the state, are treason, sedition, and espionage. \textit{Id.} Although extradition was traditionally granted for these offenses, modern treaties usually exclude them from extradition. Kallenbach, \textit{supra} note 23, at 175; \textit{see also BASSIOUNI, supra} note 24, at 384 n.11 (demonstrating typical language of political offense exception); SHEARER, \textit{supra} note 27, at 166-193 (defining and discussing political offenses); Daniel H. Derby, \textit{A Democratic Response to Foreign Political Offenses: The Need for Legislation to Counter Anti-Terrorism Excesses}, 1 \textit{TOURO J. TRANSNAT'L L.} 1, 5 (1988) (distinguishing "mixed" and "pure" political offenses). Thus, while "[g]overnments are the subjects of [the regulation of extradition] .... individuals are the objects of its outcome." BASSIOUNI, \textit{supra} note 20, at 49. Restrictions and defenses which exist under extradition law are primarily designed for the benefit of the states involved. \textit{Id.} at 50. For example, with the political offense exception, it is within the discretion of the state of refuge to recognize or reject the accused's contention that his conduct falls within the scope of the political offense exception. \textit{Id; see also} Kallenbach, \textit{supra} note 23, at 175 ("[T]he political offense exception generally is open to interpretation by the asylum state .... [t]his means that the asylum state is free to interpret this provision of the treaty as broadly or as narrowly as it chooses and can change interpretations to match different circumstances."). One must realize that this will be done in light of the state's own needs. \textit{Id.; see also BASSIOUNI, supra} note 24, at 6 ("[T]here is a nexus between the interests of the respective states and the granting or denial of extradition.").

Currently, with the spread of violent crimes, many states have begun to renegotiate extradition treaties exempting violent crimes from the political offense exception. Michael P. Scharf, \textit{The Jury Is Still Out on the Need for an International Criminal Court}, 1 \textit{DUKE J. COMP. INT'L L.} 135, 155 (1995). For example, eight European countries have accepted the European Convention on the Suppression of Terrorism, which narrows the scope of the political offense exception eliminating certain violent crimes from exemption. \textit{Id.} at 155-56. Thus, these states no longer exempt those involved in aircraft hijacking, sabotage, attacks against diplomats,
tradition treaties because of the potential political backlash connected with taking such action.\textsuperscript{37} Thus, states often ignore the treaty and except the individual from extradition as a political refugee entitled to asylum.\textsuperscript{38}

A further constraint on the legitimacy of extradition treaties is that, in spite of their existence, incidents of illegal international extradition continue to occur.\textsuperscript{39} Extradition is not seen as an “absolute” international duty.\textsuperscript{40} Thus, the difficulties encountered in securing fugitives and the length and costs of formal extradition proceedings, often lead even those states with extradition treaties to resort to these extralegal means of rendition.\textsuperscript{41}

 hostage taking, kidnapping, use of explosives and automatic firearms, from extradition. \textit{Id.} at 156.

\textsuperscript{37} See, e.g., David M. Kennedy et al. \textit{The Extradition of Mohammed Hamadei}, 31 \textit{HARV. INT'L L.J.} 5, 12-20 (1990) (discussing same); Scharf, \textit{supra} note 36, at 152 (discussing Colombian drug barons’ use of wealth to organize private armies, purchase weapons and “bribe, intimidate, and terrorize the Colombian justice and political systems”) (citation omitted); \textit{id.} at 150-51 (examining Greece’s denial of extradition request of Mohammed Rashid, Palestinian terrorist, in response to PLO threats of political repercussions); Kallenbach, \textit{supra} note 23, at 171 (explaining difficulty of extradition in Colombia due to inherent disadvantages as well as political influence of drug kingpins fearful of being tried in America); Mark A. Synnes, Comment, \textit{The Attempted Extradition of Mohammed Hamadei: Discretion and the U.S.-West German Extradition Treaty}, 8 \textit{WIS. INT'L L.J.} 123 (1989) (discussing West Germany’s refusal to extradite terrorists to United States for prosecution because of political pressure); Emily MacFarquhar & Jennifer Griffin, \textit{Under Attack in Pakistan Americans Died, but Benazir Bhutto is a Political Target, Too}, \textit{U.S. NEWS \& WORLD REPORT}, Mar. 20, 1995, at 52, 56 (“Prime Minister Benazir Bhutto’s government ... is increasingly seen by Pakistanis as too compliant with American interests ...”).

\textsuperscript{39} See \textit{YARNOLD, supra} note 26, at 19-20 (discussing various factors which influence government’s decision to except person from extradition). \textit{But see} United States v. Verdugo-Urquidez, 939 F.2d 1341, 1350 (9th Cir. 1991) (rejecting U.S. government’s contention that it is free to invoke or ignore extradition treaties at will).

\textsuperscript{38} \textit{YARNOLD, supra} note 26, at 1. This method of rendition is based on the concept of reprisal. Weissman, \textit{supra} note 25, at 465. A reprisal occurs when an entity takes something, or in the case of an abduction, someone, from another entity in satisfaction for a harm caused by them. \textit{Id.} These abductions occur both in situations where a treaty does exist and where there is no treaty in effect. \textit{Id.} at 467.


\textsuperscript{41} See \textit{BASSIOUNI, supra} note 20, at 123; \textit{SHEARER, supra} note 27, at 67 (“States sometimes resort to alternative methods of rendition ... although extradition procedures are available and applicable to the fugitive in question [because] other methods of disposing of the problem appear swifter and less demanding in terms of trouble and expense.”); see, e.g., Kai I. Rebane, Note, \textit{Extradition and Individual Rights:}
Examples of such extraterritorial abductions include the abduction of Adolph Eichmann by Israel in 1960, the United States' invasion of Panama and subsequent "extradition" of General Manuel Noriega in 1989, and the forceful kidnapping of Dr. Alvarez-Machain from Mexico in 1992.


See BASSIOUNI, supra note 20, at 124 (stating that abduction and kidnapping are devices "characterized by the fact that agents of one state acting under color of law unlawfully seize the body of a person within the jurisdiction of another state without its consent and in violation of its sovereignty and territorial integrity").


United States military forces disregarded the existing extradition treaty, ousted former dictator Manuel Noriega and escorted him back to the U.S. for trial on drug charges. See United States v. Noriega, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990): Kallenbach, supra note 23, at 172; see also Weissman, supra note 25, at 483 (stating that "although it is unlikely that Noriega would have extradited himself if the United States had formally requested it, the U.S. invasion of Panama made such a request impracticable"). See generally YARNOLD, supra note 26, at 59-66 (examining U.S. political motives for extraditing Noriega); Charles E. Hickey, Note, The Dictator, Drugs and Diplomacy by Indictment: Head-of-State Immunity in United States v. Noriega, 4 CONN. J. INT'L L. 729, 730-31 (1989) (asserting that Supreme Court's upholding of indictment was correct but that Executive Branch's decision to indict was diplomatically inappropriate).

Extraterritorial abduction offends the sovereignty of the target state by intruding upon its territorial integrity and poses a grave threat to international peace and security. These violations are not made more acceptable simply because they are done for the purpose of capturing alleged criminals and bringing them to justice. Furthermore, customary international law, which is comprised of principles that have evolved over time to obtain the status of law in the international forum, prohibits extraterritorial abduction. Because international custom reflects the foundation of international relations, all nations are bound by those norms that proscribe extraterritorial abduction. Extraterritorial renditions violate international law and endanger

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46 See Restatement (Third) of the Foreign Relations Law of the United States §432 cmt. c (1987) (stating that nation's agents may not seize individual from another nation without consent of other nation's government). "A state enjoys full sovereignty and self-determination over its territory and over persons and property in that territory unless international law contains specific rules to the contrary." Ingrid Detter DeLupis, International Law and the Independent State 21 (2d ed. 1987); see Yarnold, supra note 26, at 69 (noting that sovereignty exists and may be violated by extralegal remedies to extradition). Acts of kidnapping and abduction as methods of rendition involve three major violations: (1) they disrupt the world public order; (2) they infringe on the sovereignty and territorial integrity of states; and (3) they violate the human rights of the individual unlawfully seized. See Bassioumi, supra note 20, at 124; see also Kallenbach, supra note 23, at 211 (discussing contention that irregular rendition disregards human rights guarantees in U.N. Charter, OAS Charter, Universal Declaration of Human Rights, other treaties, court decisions, and UN resolutions).

47 Yarnold, supra note 26, at 70. But see Weissman, supra note 25, at 484 (acknowledging that many commentators believe that extraterritorial abduction, in certain situations, is acceptable method of bringing criminals to justice).

48 See, e.g., U.N. Charter art. 2, para. 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ... "). "Because extraterritorial abduction is a type of armed reprisal," some experts believe it is prohibited by the U.N. Charter. Weissman, supra note 25, at 471. But see U.N. Charter art. 51 (allowing member states to use individual or collective self-defense if attacked by another nation); Kallenbach, supra note 23, at 194-95 ("Although criticized by some international law experts, [irregular rendition] may be allowable under international law .... ").

the international community. It is therefore in the best interest of the international community to oppose such seizures and to work to eliminate their occurrence.\(^5\)

The sophistication of modern crime and the increasing interdependency of the international world order have rendered legal enforcement mechanisms of the past ineffectual.\(^6\) Accordingly, the global community needs a more advanced mechanism for addressing the changing needs of the international sphere.

II. THE WRONG ANSWER: AN INTERNATIONAL CRIMINAL COURT

In recent years, there has been much discussion regarding the creation of an international criminal court to remedy the jurisdictional problems which arise when criminals cross territorial borders and the ineffectiveness of extradition treaties in obtaining jurisdiction over them.\(^2\) Such a court would replace the ad hoc tribunals that have been set up in the past to try indi-

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\(^5\) See Weissman, supra note 25, at 492.

\(^6\) See Downing, supra note 24, at 576 (stating that domestic government's enforcement capabilities are inadequate); Kallenbach, supra note 23, at 214 ("Extradition, which is the established method of gaining jurisdiction over criminals, has proved, and will continue to prove, to be a failure in Colombia."); Andrea Sachs, A Fate Better than Death: What's the Best Way to Escape Capital Punishment? Maybe Fleeing the Country and Fighting Extradition Proceeding Abroad, TIME, Mar. 4, 1991, at 52.

\(^2\) "The proposals to establish permanent international courts took more tangible form following World War I." Hippchen & Yim, supra note 8, at 172; see, e.g., M. Cherif Bassiouni, The Time Has Come for an International Criminal Court, 1 IND. INT'L & COMP. L. REV. 1, 10-11 (1991) (discussing various United Nations proposals with respect to establishment of international criminal court); Gianaris, supra note 11, at 109 ("[T]he United States should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide and torture that are condemned as criminal acts in the international conventions ....") (quoting H.R.J. Res. 66, 101st Cong., 1st Sess. §2 (1989)). One of the first proposals for the creation of an International Criminal Court was made in 1926 by the International Law Association. Hippchen & Yim, supra note 8, at 170. After the failure of that proposal, another attempt was made in 1951. See DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction), 7th Sess. U.N. GAOR, Supp. No. 11, at 21, U.N. Doc. A/2136 (1952). This, too, failed and a revised version was resubmitted. REVISED DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, 7th Sess. U.N. GAOR, Supp. No. 12, at 23, U.N. Doc. A/2645 (1954). Since then several private groups have been active in attempting to promote the establishment of an international criminal court through alternative means. Hippchen & Yim, supra note 8, at 170. See generally Scharf, supra note 36, at 135 (discussing historical development of proposal for international criminal court).
individuals accused of war crimes and crimes against humanity.\textsuperscript{53} Proponents of the court assert that it would provide an effective forum to handle international problems which are currently left unaddressed.\textsuperscript{34} These proponents also contend that this entity would afford an alternative forum to states reluctant to extradite a criminal to another state to be tried,\textsuperscript{35} while also providing a common platform for the prosecution of crimes which threaten the security of the international community.\textsuperscript{56} Such crimes in-

\textsuperscript{53} See, e.g., HIPPCHEH & YIM, supra note 8, at 168-69 (discussing Nuremberg International Military Tribunal and International Military Tribunal for the Far East established after World War II); Bassiouni, supra note 52, at 4-5 (discussing same). These tribunals were precedents for a permanent international court. \textit{Id.} at 1; see also Michael D. Greenberg, Note, \textit{Creating an International Criminal Court}, 10 B.U. INT'L L.J. 119, 122-25 (1992) (discussing precedents for international criminal tribunal). \textit{But see} Scharf, supra note 36, at 138 ("[T]he experience gained through the Nuremberg and Tokyo tribunals is largely inapplicable to the creation of a standing international criminal court in our time.").

\textsuperscript{54} M. Cherif Bassiouni & Christopher L. Blakesley, \textit{The Need for an International Criminal Court in the New International World Order}, 25 VAND. J. TRANSNAT'L L. 151, 151 (1992). The current system relies on a series of international conventions which define certain offenses and require states to criminalize conduct and prosecute or extradite the offenders. Scharf, supra note 36, at 147-48. "Such conventions cover crimes against peace, aggression, war crimes, crimes against humanity, genocide, torture, apartheid, drug offenses, counterfeiting, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes against officials and diplomats, and hostage taking." \textit{Id.} (citations omitted) (emphasis in original). Room for improvement, however, exists within the system. \textit{Id.} at 149. "[T]errorism, international narcotics trafficking and human rights crimes continue to burden the modern world." Greenberg, supra note 53, at 128-29. These types of criminal activities have not been adequately prevented by existing bilateral agreements, international conventions, or ad hoc criminal tribunals. \textit{Id.} at 129. Thus, there is an opportunity and a need to advance international law by "establishing an international criminal court to preserve peace, advance the protection of human rights and reduce international and transnational criminality." Bassiouni, supra note 52, at 1.

\textsuperscript{55} Gianaris, supra note 11, at 109; see also Greenberg, supra note 53, at 131 ("An international criminal court ... would present an attractive extradition option for nations ... which have sometimes refused, when threatened with terrorist retaliation, to extradite terrorists to requesting governments."); Scharf, supra note 36, at 150 (stating that "the availability of [an international court] ... may, in itself, be of value where states wish to accommodate their international duties, but are reluctant to extradite a fugitive for fear of diplomatic, political, or security-related consequences."). Thus, for countries whose governments lack the ability to extradite or prosecute terrorists or drug traffickers, the availability of an international criminal court could facilitate prosecution and ease political tensions connected with extradition. \textit{Id.} at 153.

\textsuperscript{56} See Rebane, supra note 41, at 1674 ("An [International Criminal Court] would provide a neutral forum with uniform laws applicable to all who came before the Court."); Greenberg, supra note 53, at 126; Scharf, supra note 36, at 157 ("[T]he basic advantage of establishing an international criminal court would be the promotion
clude terrorism, international drug trafficking, money laundering, weapons trafficking, human rights violations, war crimes, and environmental crimes.\textsuperscript{37}

Advocates of the international criminal court also point out that it could be a vehicle for eliminating the political offense exception to extradition.\textsuperscript{38} They contend that the justifications for the political offense exception in extradition treaties would not even apply to trials conducted by the international court because it would provide for a fair and neutral forum in which to try accused criminals.\textsuperscript{39} In general, advocates of this view assert that the creation of an international criminal court is imperative in the context of the changing nature of international society, the sophistication of modern crime, and the increasing interdependency of the international world order.\textsuperscript{40}

Opponents of an international criminal court, identify five major obstacles to the creation of an effective international criminal tribunal.\textsuperscript{41} First, there is no international criminal code.\textsuperscript{42} This lack of consensus as to the governing international law has interfered with the creation of an international criminal court.\textsuperscript{43} Although drafts of an international criminal code have been introduced many times, the United Nations has repeatedly failed to adopt any version.\textsuperscript{44} Thus, the principle \textit{nullum crimen

\textsuperscript{37} Greenberg, supra note 53, at 126.
\textsuperscript{38} Scharf, supra note 36, at 154. For a discussion on the political offense exception, see supra note 36 and accompanying text. The political offense exception was created in response to two main concerns. First, the humanitarian concern for a fugitive who may not receive a fair trial in cases of political offenses, and second, the desire to avoid choosing sides in the domestic conflicts of another state. Id. at 155.
\textsuperscript{39} See Gianaris, supra note 11, at 110.
\textsuperscript{40} Bassiouni & Blakesley, supra note 54, at 154.
\textsuperscript{42} See Pickard, supra note 61, at 441.
\textsuperscript{43} Id.
\textsuperscript{44} In 1949, the United Nations began to codify international criminal offenses through the International Law Commission and the Committee on International Trade. Baez, supra note 1, at 293; Benjamin B. Ferencz, \textit{An International Criminal Code and Court: Where They Stand and Where They're Going}, 30 \textit{COLUM. J. TRANSNAT'L L.} 375, 375-76 (1992). In 1954, however, efforts were stalled by the failure to define the principal international crime, aggression. Id. at 377. Without this
sine lege, nulla poena sine lege becomes particularly poignant. No nation can legitimately recognize an international court which has no laws to enforce. Second, the reluctance of states to submit themselves or their nationals to the jurisdiction of an international authority has posed an obstacle to the creation of an international criminal court. Like all international institutions, such a court would define, there would be no international criminal code. Id. Soon thereafter, the need for a legal mechanism to control the violent behavior of states became apparent. Id. Accordingly, work on a code of crimes resumed. That same year, the International Law Commission submitted the Draft Code of Offenses Against the Peace and Security of Mankind to the United Nations. See U.N. GAOR, 9th Sess., U.N. Doc. A/2693 (1954); see also Ferencz, supra, at 380 (discussing provisions of ILC Draft Statute). The draft, however, was far from complete and many changes needed to be made. See Melissa Gordon, Note & Comment, Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda, 1 ILSA J. INT'L & COMP. L. 217, 237-39 (1995) (discussing imperfections in ILC draft statute and its direct effect on development of international criminal court). The Code has been reintroduced over the past thirty-nine years, but has never been adopted. Pickard, supra note 61 at 443.


See Pickard, supra note 61, 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 which can be deemed to give notice to potential offenders. Marquardt, supra note 65, at 104 (discussing contention that “purported international crimes to be prosecuted in an international court are too vague and malleable to give fair notice of prohibited conduct.”). Thus, many opponents of the establishment of an international criminal court state that international criminal law is so ill-defined, that it is “void for vagueness” under the U.S. Constitution. Id.; see Ferencz, supra note 64, at 382-91 (discussing causal link between failed efforts in creating international criminal court and lack of criminal code). But see Greenberg, supra note 53, at 133 (stating that creation of international criminal court would assist in development and codification of international criminal law); Bassiouni & Blakesley, supra note 54, at 176 (“The prospect of arriving at a sufficient, coherent, and systematic code of offenses that will meet criminal justice standards of legality does not appear insurmountable, in view of the already-proposed Draft International Criminal Code and the proposed Statute of an International Criminal Court, if the political will to do so is achieved.”).

See Pickard, supra note 61, at 440-41. Traditionally, states have been reluctant to submit to any authority having compulsory jurisdiction. See, e.g., Steinberger, supra note 10, at 195-201 (discussing reservations of states with respect to compulsory jurisdiction of International Court of Justice); Pickard, supra note 61, at 443-47 (discussing unwillingness of nations at Hague Peace Conferences in 1899 and 1907 to submit to jurisdiction of international court); Raymond Ranjeva, Global Justice -- Compulsory Jurisdiction and the Role of the ICJ, 17 HARV. INT'L REV. 16, 16 (1995) (“Sovereignty and the International Court of Justice (ICJ) are one of international law's odd couples.”); see also 140 CONG. REC. S121, S123 (daily ed. Jan. 26,
depend largely upon voluntary participation. A voluntary arrangement among states, however, would not be sufficient in cases where non-party governments refused to submit to the jurisdiction of the court, or when a government is defeated after a military conflict leaving no government in its place to comply with a court order. Thus, provisions for compulsory jurisdiction, either exclusive, concurrent, or a combination of the two, of all three approaches, the one for exclusive jurisdiction is the most difficult to achieve politically. Bassiouni & Blakesley, supra note 54, at 169. This approach requires states to relinquish their jurisdiction with respect to crimes coming under the jurisdiction of the international criminal court. See Scharf, supra note 36, at 160. The court's jurisdiction can extend to all offenses or select ones. Id.; see Bassiouni & Blakesley, supra note 54, at 169 (explaining that states would most likely grant court exclusive jurisdiction with respect to those crimes unlikely to occur on their territory such as genocide, apartheid, or slavery thereby creating appearance that they are responsible participants in international processes). Under this approach, therefore, national courts would be precluded from exercising jurisdiction with regard to offenses over which the international criminal court has jurisdiction. Scharf, supra note 36, at 160. The advantage of this approach is that it facilitates "the development of a coherent and consistent body of law." Id. (citing statement by Patrick Robinson, Representative of Jamaica to the UN Sixth Committee on November 7, 1990 at 13-14) The disadvantage, however, is that this approach requires the most significant relinquishment of national sovereignty. Id.; see Bassiouni & Blakesley, supra note 54, at 169 (explaining that "[s]tates are reluctant to relinquish jurisdiction to an international criminal court for a variety of xenophobic reasons, as well as legitimate political and practical concerns"). "Concurrent jurisdiction implies that a state having jurisdiction under any of the four internationally recognized areas of jurisdiction, namely territorial, nationality, passive personality, and protected interests, would be able to exercise that jurisdiction." Bassiouni & Blakesley, supra note 54, at 170. The Court would also have jurisdiction over the matter. Id. "Under [this] approach, a state chooses whether to institute an action before a domestic court, or to extradite the offender to another state for prosecution, or to institute an action before the international [criminal] court." Scharf, supra note 36, at 160. Therefore, preserving sovereign powers, countries would not be compelled to turn over offenders to the international court. Id.; see also Joel Cavicchia, The Prospects for an International Criminal Court in the 1990s, 10 DICK. J. INT'L L. 223, 244 (1992) (emphasizing that concurrent jurisdiction would assure member states that their sovereignty would remain intact).

The major disadvantage of this concurrent approach is that it could lead to conflicts of jurisdiction between states having a joint interest in a case. See Scharf, supra note 36, at 161; see also Bassiouni & Blakesley, supra note 54, at 170-71 (discussing disadvantages of concurrent jurisdiction). Under a proposed jurisdictional option, the Jurisdiction on the Basis of Transfer of Criminal Proceedings approach, "the state with original jurisdiction 'would not lose jurisdiction, but [would] merely transfer the criminal proceedings to the
would be required for a court to succeed.\textsuperscript{73} States are unwilling to surrender any control within their own territories. Unfortunately, states strongly object to subjecting their citizens to the jurisdiction of an international court because they fear it will erode their sovereignty and impair their freedom of government action.\textsuperscript{74}

Third, there is a concern that an international criminal court will disrupt the existing system of international law.\textsuperscript{75} For example, opponents of an international criminal court assert that if the court were to have exclusive jurisdiction over particular offenses, a state's obligation to surrender a fugitive to the jurisdiction of the international criminal court would conflict with

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\textsuperscript{73} See Greenberg, supra note 53, at 138-39 (discussing need for limited compulsory jurisdiction provision). \textit{But see} Gordon, supra note 64, at 241 (stating that "the [c]ourt would ... have consensual, rather than compulsory, jurisdiction").

\textsuperscript{74} See Marquardt, supra note 65, at 142 ("Many in the United States criticize an international criminal court on the ground that subjecting United States citizens ... to the potential jurisdiction of an international criminal court will erode the sovereignty of the United States and impair the freedom of action of its government."); \textit{see also} Bassionuni & Blakesley, supra note 54, at 161 ("A number of states are fearful of losing control of the adjudicatory or prosecutorial process because they believe that sovereignty requires it, that their own constitutions require it, or that this loss of control may produce adverse results."); Cavicchia, supra note 71, at 229 ("Some nations expressed concern that ... establishment [of international criminal court] would be inconsistent with national sovereignty...."). \textit{But see} Ferencz, supra note 64, at 391-92 stating that:

\textit{[T]he notion of absolute state sovereignty is obsolete ... Every time a nation enters into a treaty ... it cedes some of its rights. But it also gains something in return. The correct notion of sovereignty, the power of the sovereign to better serve his people, is not diminished by treaties but rather is enhanced [by them].}

\textit{Id.}

\textsuperscript{75} See Timothy C. Evered, \textit{An International Criminal Court: Recent Proposals and American Concerns}, 6 PACE INT'L L. REV. 121, 124 (1994) ("The argument has ... been raised that an international criminal jurisdiction might disrupt or detract from the existing extradition regime, thus causing damage to the present system of international criminal law enforcement."). "This is a real danger, and one that we believe should be considered very carefully." Scharf, supra note 36, at 164 (quoting John Knox, Representative of the United States to the U.N. Sixth Committee, on November 7, 1990, at 4).
\end{quote}
its obligations to extradite the fugitive to another state or to un-
dertake its own prosecution.\textsuperscript{66} If, on the other hand, the court
were to be given concurrent jurisdiction, it is not clear what in-
centive states would have to turn offenders over to an interna-
tional court rather than prosecute the offenders themselves or
extradite them to the state where the crime occurred.\textsuperscript{77} Fur-
thermore, opponents of an international criminal court are con-
cerned that the creation of such an institution would “divert re-
sources and attention away from more practical and readily
achievable means for combating international criminal activi-
ties.”\textsuperscript{78} These opponents contend that some of the long term goals
of the international community have always been to secure ac-
ceptance by more countries of existing international conventions
that contain the “prosecute or extradite” concept to ensure ad-
herence by signatories to these conventions, and to establish
conventions which would address newly emergent issues.\textsuperscript{79} In
addition, these opponents suggest that the pursuit of an inter-
national court would overshadow the progress already made in
achieving these goals.\textsuperscript{80}

International criminal court opponents further contend that

\textsuperscript{66} Scharf, \textit{supra} note 36, at 160; \textit{see also} Evered, \textit{supra} note 75, at 122-23
\textit{(noting risks associated with court exercising compulsory jurisdiction).}
\textsuperscript{77} See Scharf, \textit{supra} note 36 at 160-61 (discussing conflicts that would result
when more than one state simultaneously has jurisdiction over offense and propos-
ing possible solutions); \textit{see also} Gordon, \textit{supra} note 64, at 241 (recognizing that
“concurrent jurisdiction may cause bitter conflicts,” but stressing that “the expected
positive results of the International Criminal Court, such as improved extradition
and prosecution, will greatly outweigh those instances of inconvenience when those
conflicts occur”).

\textsuperscript{78} See Scharf, \textit{supra} note 36, at 164 (quoting John Knox, United States Repre-
sentative to the United Nations, Sixth Committee, on November 7, 1990, at 4); \textit{see
also} Evered, \textit{supra} note 75, at 131 (highlighting “concern for wasted resources” as
one of foremost objections to establishment of international criminal court). “It has
been cautioned that a new international court might ... divert resources from other
important efforts to control international crime.” \textit{Id.} at 136-37.

\textsuperscript{79} Scharf, \textit{supra} note 36, at 164-65 (citing letter from Janet G. Mullins, Assis-
tant Secretary for Legislative Affairs, U.S. Department of State, to Congressman
Dante Fascell, Chairman of the House Committee on Foreign Affairs (Dec. 12, 1990)
(on file with L/EI)).

\textsuperscript{80} See Gordon, \textit{supra} note 64, at 241 (citing arguments of critics of international
criminal court as to danger that resources will be diverted from more mundane con-
cerns such as efforts to combat crime). \textit{See generally} Report of the International
vantages associated with disrupting implementation of existing system by creation
of court).
the trial of terrorists in an international criminal court would "glamorize" the offender's position by all the publicity sure to accompany such a trial. Finally, opponents are concerned that the tribunal would evolve into a politicized body which would, in turn, make unjustified or groundless accusations against public officials for political purposes. These opponents suggest the possibility that the court would be a "mechanism for propaganda" inflicting harm and feelings of contempt upon the targeted administration. Thus, it appears that an international tribunal embracing "victor's justice" would do more harm than good in light of the current international climate. Justice Jackson's statement that, "[t]o pass ... defendants a poisoned chalice is to put it to our own lips as well ...," is a fitting analogy given the inherent risks of a corrupt and discriminatory court.

Nevertheless, cases exist in which corruption or political posturing have caused the failure of both domestic prosecution and bilateral cooperation. Although an international criminal

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81 Gordon, supra note 64, at 165; see also Cavicchia, supra note 71, at 233 ("Some fears have been voiced that an ICC would hinder other law enforcement endeavors by glamorizing the accused's position by providing him with an international forum."). But see Greenberg, supra note 53, at 132 (stating that international criminal tribunal would in fact deter future crime). The mere existence of an international criminal court would warn potential offenders of the international community's intolerance for crime. Id.

82 Bassiouni & Blakesley, supra note 54, at 162; see also Evered, supra note 75, at 131 (stressing "need to ensure that the court will not become politicized"). "A number of officials have expressed apprehension that proceedings might be initiated for political reasons, and have voiced concern that judges from alien legal systems or adversarial countries will sit in judgement [sic] of their nationals." Id. at 145 citing Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, International Law Commission, 44th sess., para. 8 at 7, U.N. Doc. A/CN.4/442 (1993). But see Marquardt, supra note 65, at 144 stating that:

[It] is not clear that high-profile defendants in international cases receive depoliticized treatment under the current system .... [and] institutional constraints on politicization ... have been built into the latest draft statute for the international criminal court. There are at least three levels of screening that any charges of international criminality must pass before they may be brought before the proposed international court.

See id. at 145-46 (discussing these constraints).

83 Bassiouni & Blakesley, supra note 54, at 162. But see Bassiouni, supra note 52, at 12-13 (finding that real opposition comes from governmental officials hoping to shield themselves from international accountability, as well as to avoid embarrassment).

84 See Ferencz, supra note 64, at 392 (quoting ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 7, 90-91 (1949)).

85 See Scharf, supra note 36, at 151-52 (finding that when country chooses prosecution over extradition, obtaining conviction is more difficult since evidence is
court with compulsory jurisdiction may not be the correct solution, an international tribunal of another sort is a viable option.

III. THE ONLY SOLUTION: AN INTERNATIONAL JUSTICE COMMISSION

The solution to the problems associated with the increasing magnitude and sophistication of international crime appears to be the establishment of an International Justice Commission. This Commission would address common crimes which threaten the fabric of society.\(^{8}\) From Nairobi to New Orleans, from Budapest to Buenos Aires, from Uganda to the United States, crimes such as murder and rape are committed on a daily basis.\(^{87}\) The continuing failure of the international community to address these atrocities will result in nothing short of disaster. Currently, no entity exists to govern states and to enforce international criminal law.\(^{88}\) As a result, most of these crimes go unpunished. This Commission, however, with equal representation from all member states, would be responsible for the enforcement of international extradition laws.\(^{89}\) A universal extradition treaty signed by all member states would facilitate this task. Therefore, if a person were to commit an enumerated offense within the borders of a member state, the Commission would en-

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\(^{8}\) See supra notes 13-19 and accompanying text (discussing common crimes).

\(^{87}\) See supra note 19 (discussing prevalence of these “street crimes”); see, e.g., Meron, supra note 16, at 424-25 (discussing abuses in Bosnia-Hercegovina).

\(^{88}\) See M. Cherif Bassiouni, Policy Considerations on Inter-state Cooperation in Criminal Matters, 4 PACE Y.B. INT'L L. 123, 129 (1992) (noting that “substantive international criminal law is enforced indirectly by the cooperation of member-states”).

The “indirect enforcement scheme” derives from the notion that states obligate themselves, through various regional and international instruments, to carry out the enforcement of international criminal law. The “direct enforcement scheme”...presupposes the existence ... of an international criminal court, and the existence of international enforcement machinery.

Id. at 128 n.13 (citing M. Cherif Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR A INTERNATIONAL CRIMINAL TRIBUNAL (1987)).


The offenses should be based on the minimum demands of civilized behavior. The list should exclude political crimes because “one man's terrorist is another man's freedom fighter or hero.” WILLIAM L. WAUGH, JR., INTERNATIONAL TERRORISM 2 (1982); see also Scharf, supra note 36, at 158 (discussing lack of agreement on specific crimes that should be covered by International Criminal Code).
sure the extradition of the accused to the state where the incident occurred. If the country from which extradition was sought were to fail to comply with the Commission's demands, then all of the member states would impose penal sanctions, both fiscal and economic in nature, upon that country.91

This proposal circumvents those obstacles which stand in the path of an international criminal court. First, the lack of consensus as to the governing international law has no bearing on the success of an International Justice Commission.92 The Commission would merely enforce the extradition agreement among states, it would not impose its law upon them. The state where the incident occurred would apply its own law in trying the offender. Second, the reluctance of states to surrender their sovereignty would be alleviated because the member states would retain their sovereign rights to try offenses which occurred within their borders in their own domestic courts.93

The Commission would simply ensure compliance with a universally

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91 One important theory of international criminal law is that which deals with the penalization of certain given conduct. MALEKIAN, supra note 1, at 37. Because this system would break down, as with bilateral extradition treaties, if there were no penalties imposed on states harboring criminals, penal sanctions should be applied to these states. See, e.g., Gianaris, supra note 11, at 117 (discussing economic sanctions currently being applied against Libya by United Nations to compel surrender of suspects in Lockerbie bombing). "When a nation refuses to cooperate, the appropriate official could go to the U.N. Security Council and request that economic sanctions be applied to encourage cooperation." Id.; see also Paul C. Szasz, Alternate Strategies for the United Nations' Fight Against Terrorism, 3 ALB. L.J. SCI. & TECH. 343, 352 (1993) ("It would be possible to establish a special sanctions system ....").

International criminal sanctions are those rules, provisions, regulations, and customs which approve or permit acts to be taken against any individual, organization, or state violating the system of international law. MALEKIAN, supra note 1, at 40. These sanctions are "designed to secure enforcement measures by imposing a penalty for violations." Id.; see Kenneth W. Abbott, Economic Sanctions and International Terrorism, 20 VAND. J. TRANSNAT'L L. 289, 300-24 (1987) (considering rationales for economic sanctions).

Traditional penal sanctions, such as an international prison, international community service, or international parole may not be the best means of enforcing extradition treaties. Non-retributive forms such as fines, political and moral obligations, economic compensation, and military or community service may prove to be a more functional way of punishing criminals. See Sandra L. Jamison, A Permanent International Criminal Court: A Proposal That Overcomes Past Objections, 23 DENY. J. INT'L L. & POL'Y 419, 441 (1995).

92 See supra notes 61-66 and accompanying text (discussing lack of consensus and absence of international criminal code).

93 See supra notes 67-74 and accompanying text (noting reluctance of states to relinquish any of their sovereignty).
accepted extradition treaty; it would play no part in the actual adjudication of the offenders. Moreover, the creation of this institution would not in any way risk disrupting the existing system of international law. If anything, the Commission would enable international law to function more efficiently and help the “prosecute or extradite” principle to become a reality. Finally, because the Commission would not enforce bilateral agreements, it would not be at risk of becoming a politicized institution. Rather, it would act as an umbrella organization representing each member state equally. Consequently, there could be no retaliatory actions against one member state without affecting each and every other member state. Thus, the creation of the International Justice Commission appears to be the best policy for the advancement of international law and for the prevention and control of international and transnational criminality.

CONCLUSION

Human societies have generally had two kinds of law: divine and positive. Divine law embodies the rules and teachings received through the Word of God, while positive law has always been enshrined and enforced by the authorities in power. International law is positive law and is a relatively new creation.

In the application of international law to contemporary political situations, the body empowered to interpret and enforce it plays a critical role. The existing system of extradition is ineffective for several reasons. First, extradition treaties fail to function efficiently because there is no authoritative body to enforce them. Even where a treaty exists between two states, the various “escape clauses” render these treaties porous and ineffective. The proposed International Justice Commission would resolve these issues by enforcing a universal extradition treaty among states. It would ensure that nations adhere to the terms of the agreement and impose penalties upon those who did not. An international criminal court would also fail to resolve the

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94 See supra notes 75-80 and accompanying text (expressing concern that commission would disrupt existing system of international law).
95 See supra notes 82-83 and accompanying text (addressing fear of politicization).
97 Id.
problems present in the international arena. The legitimate reluctance of individual states to relinquish their sovereignty to an international tribunal, coupled with the lack of consensus as to the governing international law, has frustrated efforts to create such an entity. The proposal for a Commission, however, eliminates the concerns of states as to the loss of sovereignty by ensuring compliance with the extradition treaty among all member states without partaking in the actual adjudicatory proceedings of offenders. Furthermore, because the member states themselves would compile a list of universal offenses which all members agreed would be “extraditable” offenses, an International Criminal Code would not be required.

The increasing magnitude of international crime demands that we create a system that addresses the problems that plague the international sphere and successfully eliminates the threat to the current world order. The International Justice Commission appears to be the institution best equipped to accomplish these goals. Not only would it successfully curb international crime, but the Commission would also unify states in their battle to ensure that offenders of the law are brought to justice.

Farah Hussain