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Codification of International Criminal Law

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CODIFICATION OF INTERNATIONAL CRIMINAL LAW

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I. ROOTS AND BASES OF INTERNATIONAL CODIFICATION

The history of the human civilization appears to have started more than six million years ago while *homo sapiens*, from which we humans descended, first evolved in East Africa about 2.5 million years ago.[1] Throughout this process of evolution and development, *homo sapiens* and other early human species left traces of their existence and development in many locations around the world.[2] Archeologists undoubtedly found scattered evidence, mostly in epigraphy in caves, disclosing the existence of rules of conduct that would later on be called laws and methods of addressing those who violate them. In time, we have come to refer to these laws and methods as a legal system.[3] Surprisingly, throughout this long historical course, legal history did not record significant progress in legal codification.

The first such accomplishment is the Code of Hammurabi in 1772 BCE,[4] followed by what is referred to as the Ten Commandments brought down by Moses from Mr. Sinai and later recorded in the Tanakh and the Old Testament.[5]

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1. In the course of the subsequent two million years at least six human species inhabited the earth, including the *Neanderthals* that evolved in Europe and the Middle East some 500,000 years ago and the *mega fauna* in the Americas. Then about 45,000 years ago the *homo sapiens* migrated to and settled in Australia and some 30,000 years ago the *homo sapiens* migrated to Europe and caused the extinction of *Neanderthals*. The *homo sapiens* also caused the extinction of the *mega fauna* after migrating to the Americans approximately 16,000 years ago. *See* RICHARD LEAKEY, THE ORIGIN OF HUMANKIND (1996). *See also* Richard G. Klein, *Darwin and the Recent African Origin of Modern Humans*, 106 NAT'L A. SCIENCES U.S. 16007, 16007 (2009).

2. Erin Wayman, *How to Retrace Early Human Migrations*, SMITHSONIAN, Sep. 26 2012.

3. Tommaso Beggio, *Epigraphy, in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 43 (Paul J de. du Plessis, Clifford Ando & Kaius Tuori eds., Laurence Hooper trans., 2016). *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 134–143 (5th ed. 2014).

4. *See* GLENN, *supra* note 3, at 97 n.2. *See also* Kathryn E. Slanski, *The Law of Hammurabi and its Audience*, 24 YALE J. L. & HUMAN. 97, 97–98 (2012). *See also* Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13, 13–15 (1995-1996).

5. There is no historic record of the actual occurrence/existence of the Ten Commandments and their passage, therefore by archeologists' standards this would fall under the category of legend, since it cannot be proven. Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & REL. 525 (2000). This is also true of the Old Testament. *See* GLENN, *supra* note 3, at 99–130. *See also* ZEEV W. FALK, HEBREW LAW IN BIBLICAL TIMES (1964);

These and other historical sources and narratives indicate an emerging commonality of human and social values.[6] Certainly as time has passed and globalization has become a binding social and socio-psychological factor to the ever-evolving human society, increased commonality of shared human and social values, have emerged in different aspects of domestic law and gradually in what we have also called international law.[7] This process is evident in the history and evolution of the *jus in bello* and subsequently in the *jus ad bellum*.[8] Both of these subjects have in time become part of international criminal law as the *jus ad bellum* became known as the prohibition of aggression and the *jus in bello* as the law of armed conflict reflected in war crimes.[9]

Even though many legal systems have followed some type of codification approach, mostly as derived from Roman law,[10] international criminal law has

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NAHUM RAKOVER, A GUIDE TO THE SOURCES OF JEWISH LAW (1994).

6. *See* A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 5–15 (M. Cherif Bassiouni ed., 2000) [hereinafter Bassiouni, MANUAL]; *see also* CHARLES FREEMAN, EGYPT, GREECE, AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN (3d ed. 2014); PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (4th ed. 2010). *See generally* ANDREW CLAPHAM & PAOLA GAETA, THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT (2014). *See generally* ARNOLD TOYNBEE, A STUDY OF HISTORY (12 vols., 1961); WILL DURANT & ARIEL DURANT, THE STORY OF CIVILIZATION (11 vols., 1993). *See also* HARRY AUSTRYN WOLFSON, PHILO: FOUNDATIONS OF RELIGIOUS PHILOSOPHY IN JUDAISM, CHRISTIANITY, AND ISLAM (2 vols. 1947); ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., 2d ed. 2000).

7. *See generally* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 F. J. INT'L L. 269, 269 (2010). *See also* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 1 (2014). [hereinafter INTRO TO ICL].

8. ST. THOMAS AQUINAS, SUMMA THEOLOGICA (1485). *See generally* KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO (2011). *See also* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM (Nigel D. White & Christian Henderson eds., 2015).

9. *See generally* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977); LARRY MAY, WAR CRIMES AND JUST WAR (2007). *See* M. CHERIF BASSIOUNI, THE STATUS OF AGGRESSION IN INTERNATIONAL LAW FROM VERSAILLES TO KAMPALA – AND WHAT THE FUTURE MIGHT HOLD (forthcoming 2017).

10. Legal history shows that by about the 18th century there were a number of what we today call, families of legal systems. *See generally* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1978). They included the family that descended from Roman law, which was essentially a codified system and which had developed a technique with respect to codification. Certainly for its time, the science or technique of legislation developed by Roman law codification was an extraordinary progressive and enlightened system, if for nothing else than that the system, in about 1000 BCE, divided legal subjects into categories such as civil law and criminal law and within them other subdivision applied to different normative aspects regulating individual and social conduct. *See* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 275 (2010). The Roman law science or technique of legislation was adopted in different ways in Italy, France and Germany with the latter developing more cultural characteristics than the Italian, which remained the closest to its historical Roman antecedent and then by the French codification under Napoleon starting with the Napoleonic Code or civil code of 1805. *See generally* Pierre Crabites, *Napoleon and the French Code of Civil Procedure*, 10 LOY. L.J. 3, 3 (1929). The modern codifications in Italy are also from that period but German codifications particularly of criminal law started in the 1500s with modern

emerged in a very haphazard and *ad hoc* manner. With the exception of piracy, which emerged from customary international law,[11] all other international crimes have been established by international conventions. A survey made by this writer reveals that 281 conventions have been passed between 1815 and 2005[12] that address a number of categories of international crimes which this author has also identified and ranked as follows:[13]

(1) Aggression;

(2) Genocide;

(3) Crimes against humanity;

(4) War crimes;

(5) Apartheid;

(6) Enforced disappearance and extra-judicial execution;

(7) Slavery, slave-related practices and the trafficking of human beings;

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versions, particularly procedural codes in Austria and Germany around 1875.

The common law remained very resistant even though David Dudley Fields was among those who urged codification in the 1800s. In English, particularly the presentation of the common law techniques, notwithstanding their disparities and for all practical purposes their *ad hoc* evolutionary nature, was more part of the English culture. These characteristics migrated to the United States with the Pilgrims as of the 1600s and subsequently to Canada, Australia and New Zealand, and then as of the 1800s to those colonies that Great Britain had established on different continents.

By the 1700s, philosophical conceptions of systems of governments and the importance of the law started to emerge in Europe, particularly in the writings of Montesquieu and others. In his seminal work *De l'esprit des lois,* Montesquieu added what would today be considered as a substantive dimension to the rule of law. CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS (1748). European codifications, particularly in the field of criminal law followed that approach and notwithstanding historical and cultural differences European countries, with the exception of England and its common law particularities, consolidated the historical evolution of the codification of the laws based on subject matter, which was quite obviously logical. The criminal law codifications there was also an obvious and commonsense approach to the division of these codes into the different social interests sought to be protected and so every code started with the most serious crimes such as those involving life and then the physical integrity of the person, to be distinguished from another part which dealt with the protection of the perpetrator and economic interests. This idea of the right to life, liberty and security of the person was first articulated in positive law in the English Magna Carta of 1215. It was later found in Bill of Rights to the United States Constitution in 1791.

In time, between the 18th and 20th centuries, these questions were seldom addressed except in some legal systems such as Germany where a tradition of legal dogmatics accepted and influenced not only the content but the science and technique of codification of the criminal law. With all of that said, one would have expected that this cumulative world-wide experience would have benefited ICL. But that was not the case, and there are various explanations for it. All of that does not explain why ICL did not develop a legal system of its own.

11. The earliest known international crime is that of piracy, which emerged out of Roman law and then the naval practices of seafaring nations as of the late 1600s and more particularly in the 1700 and 1800s but that was essentially viewed as it is now, as a matter regarding states. ALFRED P. RUBIN, THE LAW OF PIRACY 4–12 (1998). *See also* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices*, 42 VA. J. INT'L L. 81, 108–10 (2001).

12. INTRO TO ICL, *supra* note 7, at 221 (2014).

13. *Id.* at 148–49.

(8) Torture and other forms of cruel, inhuman or degrading treatment;

(9) Unlawful human experimentation;

(10) Unlawful manufacturing, identification, possession, use, emplacement, stockpiling and trade of weapons, including nuclear weapons;

(11) Nuclear terrorism;

(12) Mercenarism;

(13) Aircraft hijacking and unlawful acts against international air safety;

(14) Piracy and unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas and continental shelf;

(15) Taking of civilian hostages;

(16) Threat and use of force against internationally protected persons and United Nations Personnel;

(17) Use of explosives;

(18) Cybercrime;

(19) Financing of terrorism;

(20) Unlawful traffic in drugs and related drug offenses;

(21) Organized crime and related specific crimes;

(22) Illicit trade or trafficking in goods;

(23) Destruction and/or theft of national treasures;

(24) Unlawful acts against certain internationally protected elements of the environment;

(25) Unlawful use of the mail;

(26) Unlawful interference with submarine cables;

(27) Falsification and counterfeiting; and,

(28) Corruption and bribery of foreign public officials.

These crimes and their respective rankings are based on the existence of ten penal characteristics in any given international convention.[14] These characteristics are predicated on the social interests sought to be protected and the social harm sought to be prevented. Curiously, all ten of these characteristics are not contained in all 281 conventions, and there is no explanation for this selective diversity in the inclusion of these penal characteristics. There has never been any explanation for the disparity of inclusion of these ten penal characteristics in conventions that proscribe certain forms of what the international community recognizes as constituting international crimes. The disparity in inclusion of the ten penal

14. The ten penal characteristics are: (1) Explicit or implicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or a crime; (2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; (3) Criminalization of the proscribed conduct; (4) Duty or right to prosecute; (5) Duty or right to punish the proscribed conduct; (6) Duty or right to extradite; (7) Duty or right to cooperate in prosecution, punishment (including judicial assistance); (8) Establishment of a criminal jurisdictional basis; (9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics; (10) No defense of superior orders.

characteristics in all the 281 international criminal conventions is particularly perplexing because it makes no sense, for example to have some but not others of the ten penal characteristics in the nineteen conventions addressing different forms and manifestations of terror-violence.[15] But then, it is equally perplexing to have the international community reject having a comprehensive anti-terrorism convention[16] and instead have multiple overlapping conventions with different parties. That this haphazard legislative approach has been followed for almost a century, while almost every criminal law system in the world has followed a certain technical and legislative policy on the compilation of different categories of crimes, is difficult to explain other than the hidden intentionality of states to create such a haphazard system for political purposes.[17]

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15. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L. J. 83, 83 (2002). *See also* ROBERT A. FRIEDLANDER, TERROR VIOLENCE: ASPECTS OF SOCIAL CONTROL (1982); ROBERT A. FRIEDLANDER ET. AL., TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 1 (1979); ROBERT A. FRIEDLANDER, TERRORISM: A WORLD ON FIRE 4 (1978). *See also* RESEARCH HANDBOOK OF INTERNATIONAL LAW AND TERRORISM (Ben Saul ed., 2014).

16. Draft Comprehensive Convention Against International Terrorism, U.N. Doc. A/59/894, https://www.ilsa.org/jessup/jessup08/basicmats/unterrorism.pdf (last visited Mar. 26, 2017). Mahmoud Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism*, 4 J. INT'L CRIM. JUST. 1031, 1031–32 (2006); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L. Q. 537, 537 (2004).

17. These purposes may include the lack of clarity in the norms of each of the conventions, particularly those applicable to different subjects; the creation of options for governments to become state parties to some and not to others and be able to avail themselves of the opportunity of claiming to be part of international criminal law while in reality avoiding it. An example of the result of such an approach involves the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention) on airplane hijacking, which provides in article 5 that jurisdiction over crimes covered by the Convention is with the state that has physical custody of the offender, while article 7 also gives jurisdiction to the state of nationality of the perpetrator through article 8's extradition provision. International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 21931, 206 (entered into force June 3, 1983). The Montreal Hijacking Convention does not specify the priority of article 5 over article 7 or vice versa, nor does it deny it. It therefore creates an ambiguity, which became obvious in the Lockerbie case.

On December 21, 1988, Pan Am 103 airplane exploded over Lockerbie, Scotland. The United States and United Kingdom issued indictments for two Libyan intelligence operatives alleged to have planted explosives on the plane, killing 259 passengers and 11 people in Lockerbie. The two states sought the extradition of the alleged perpetrators from Libya pursuant to the Montreal Hijacking Convention, but Libya argued it had the priority right to prosecute based on the nationality of the two individuals. The UK and US responded arguing that prosecution in Libya would be ineffective because Libyan authorities were involved in the explosion. Libya filed the case with the International Court of Justice, on the matter of whether the duty to prosecute or the duty to extradite was superior. Ultimately, the ICJ never resolved the matter and instead, by agreement of Libya, the United Kingdom and the United States, the case was held in a Dutch military facility, with Scottish judges applying Scottish criminal law. Thus, the questions raised by the situation remained unanswered. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.) Order, 2003 I.C.J. (Sept. 10). *See* INTRO TO ICL, *supra* note 7, at 497–99. Notwithstanding the case and lack of clarity/judgment, the Montreal Hijacking Convention still has not been amended.

Another related example is why we have 19 conventions on anti-terrorism, which are only distinguished by the means utilized by the perpetrator. The result is that if there is an airplane hijacking there are four

Realpolitik is the only explanation for why efforts at the codification of international criminal law, which was undertaken shortly after WWII beginning in 1947, had failed so miserably by 1996.[18] After half a century, the Draft Code of Crimes Against the Peace and Security of Mankind, containing thirteen articles in 1954[19] was reduced only to five crimes: aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes in 1996.[20] Even so, the draft containing these five crimes was never even put to a General Assembly vote.[21]

It could be said that there has been some limited form of codification of international criminal law in the statutes of international criminal courts established since 1954. This includes the Rome Statute for the International Criminal Court,[22] the statutes of the two *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia[23] and the International Criminal Tribunal for Rwanda[24] established by the Security Council and the six mixed model tribunals in Cambodia,[25] Sierra Leone,[26] East Timor,[27] Kosovo,[28] Bosnia

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conventions that are applicable but if a diplomat is kidnapped only one convention applies and yet strangely enough, if a private individual is kidnapped, there is yet another convention that applies. 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 218 (entered into force Dec. 4, 1969); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 178 (entered into force Jan. 26, 1973); 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *opened for signature* Feb. 24, 1988, 1589 U.N.T.S. 474 (entered into force Aug. 6, 1989). Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 168 (entered into force Feb. 20, 1977). International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 206 (entered into force June 3, 1983). The same is true for the distinction between the 1971 Convention on Psychotropic Substances which separates psychotropic drugs from the natural drugs which are covered by the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol. Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976). Single Convention on Narcotic Drugs of 1961, *opened for signature* Mar. 30, 1961, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964). Protocol amending the Single Convention on Narcotic Drugs, 1961, 976 U.N.T.S. 3 (Mar. 23, 1972). It is impossible to rationalize all of what, from a legislative policy perspective, has to be irrational unless it is intentional and if so it has to be for political reasons, namely to weaken international criminal law and make its enforcement more difficult.

18. JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY 4 (2004).

19. Draft Code of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR Supp. (No. 9) U.N. Doc. A/2693 (1954) [hereinafter 1954 Draft Code].

20. Draft Code of Crimes Against the Peace and Security of Mankind, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532 (1996) [hereinafter 1996 Draft Code].

21. *Id.*

22. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

23. S.C. Res. 827 (May 25, 1993).

24. S.C. Res. 955 (Nov. 8, 1994).

25. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as

and Herzegovina,[29] and Lebanon.[30] But it must be noted, that the two tribunals established by the Security Council were *ad hoc* and that at best, one can consider the definition of crimes contained in their respective statutes as a reflection of customary international law and not as a codification of international criminal law. As to the statutes of the six mixed model tribunals, they are indeed *ad hoc* institutions created by bilateral agreements between the United Nations and the respective governments and they can hardly be said to reflect customary international law, let alone be deemed an exercise in international criminal codification. This only leaves the Rome Statute whose state-parties are, as of 2016, 124 states out of 193 member-states of the United Nations.[31]

Why there has never been a codification of international crimes, which could be divided by subject matter or on any other science or technological basis that would suit a codification undertaking is something that defies legal logic. But it does fit very neatly into a *realpolitik* logic of preventing clarity as a way of reducing enforcement capabilities in order to maximize the opportunities for states to advance their power and wealth interests. This is particularly evident in the new categories of international crimes that deal with illicit trade (which includes everything from trafficking in persons to trafficking Hermès ties, for no clear reason).[32] This brief historical background may explain why the codification efforts of international criminal law have failed so far, as described in the section below.

II. THE CODIFICATION PROCESSES

As described below, the central codification process was within the United Nations and officially proceeded from 1947 to 2010 when it came to its end at Kampala.[33] During that period of time, the United Nations split the process of

amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation).

26. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, available at http://hrlibrary.umn.edu/instree/SCSL/SierraLeoneUNAgreement.pdf [hereinafter SCSL].

27. S.C. Res. 1272 (Oct. 25, 1999).

28. S.C. Res. 1244 (June 10, 1999).

29. The War Crimes Chamber was created in 2003 at the Peace Implementation Council Steering Board Meeting and underwent extensive negotiations until its adoption on January 6, 2005. The Court is subject to the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia rather than the new criminal and procedural codes of Bosnia and Herzegovina. The Court also applies the European Charter on Human Rights, ratified by Bosnia and Herzegovina in 2002. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 230 (2011).

30. S.C. Res. 1757 (May 30, 2007).

31. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties (last visited Nov. 1, 2016).

32. Illicit Trade, OECD, http://www.oecd.org/gov/risk/illicit-trade.htm (last visited Mar. 26, 2017).

33. Dr. jur. h. c. Hans-Peter Kaul, Address on the International Criminal Court: Perspectives after the Kampala Review Conference (June 1, 2011). https://www.icc-cpi.int/NR/rdonlyres/22F9E25C-B4EC-47FF-9F19-

codification into different mandates given to different United Nations mechanisms with the obvious purposes of delaying and hampering the process through bureaucratic means, which ultimately succeeded in wearing out the international community's interest in the subject.[34] The new use of the old Machiavellian[35] technique became bureaucratic and that technique, as well as its attendant allocation financial and personnel resources became the way of controlling international criminal justice.[36] It was the aftermath of WWII that led to the United Nations' efforts to codify international criminal law, and parallel efforts by individual scholars and certain specialized NGOs.[37]

In 1946, the United Nations General Assembly established a committee on international law and its codification[38] and mandated the new committee to "treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."[39] The following year, 1947, after examining the report of the new committee the General Assembly decided to establish the International Law Commission (ILC)[40] and requested that it "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" and to prepare a Draft Code of the Offenses Against the Peace and Security of Mankind.[41]

The newly established International Law Commission formed a subcommittee, appointed special rapporteur Jean Spiropulous and began drafting a draft code in 1949.[42] This committee worked on the 1950 Draft Code and

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34. SIRACUSA GUIDELINES FOR INTERNATIONAL, REGIONAL AND NATIONAL FACT-FINDING BODIES 65–67 (M. Cherif Bassiouni & Christina Abraham eds., 2013) [hereinafter Siracusa Guidelines].

35. NICCOLÒ MACHIAVELLI, THE PRINCE 1513 (N.H. Thompson trans., Dover Publications 1992).

36. Siracusa Guidelines, *supra* note 34.

37. The 1866 Outlines of an International Code by David Duddley Fields inspired the "Peace Society," a group of United States jurists, to seek to develop an international code of crimes beginning in 1872. While the desire to bring about peace through support for an international criminal law system has certainly long existed throughout the world, it was not until the events of WWI that any tangible realization was seen. Following the end of WWI, in 1924 international jurists reorganized the Association Internationale De Driot Pénal or International Association of Penal Law (AIDP), originally founded in 1889 in Vienna, which played an invaluable historic role in the establishment of the International Criminal Court and continues to do so with respect to strengthening the international criminal justice. Pierre Bouzat, Introduction, in M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND STATUTE FOR AN INTERNATIONAL CRIMINAL, XII (1987) [hereinafter BASSIOUNI, DRAFT CODE & STATUTE].

38. G.A. Res. 94 (I) (Dec. 11, 1946).

39. *Id.*

40. G.A. Res. 174 (III) (Nov. 21, 1947).

41. G.A. Res. 177 (Nov. 21, 1947).

42. *Summary Records and Documents of the First Session including the report of the Commission to the General Assembly,* 1 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/13 and Corr. 1–3.

submitted its first report in 1950.[43] The contents of the 1950 Draft Code remained limited to the crimes referred to in its title, namely those that affect the peace and security of mankind.[44] The 1950 Draft Code and its successors limited criminal responsibility to individuals, excluding criminal responsibility for organizations and states.[45]

Concurrently, the international community took steps towards formulating a draft statute for establishment of a permanent international criminal court when the General Assembly requested that the ILC "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."[46] The ILC began by appointing another special rapporteur, Ricardo J. Alfaro, who also submitted a first report to the International Law Commission in March of 1950.[47] Alfaro's report correctly noted that both a code of international crimes and a statute for an international court were needed to supplement one another, but this drafting logic largely went unheeded during the following decades as the work on a draft code and draft statute was assigned to different committees.[48] In 1950, another special rapporteur, Emil Sandström, was appointed to further study the development of an international criminal court,[49] but the two rapporteurs differed on whether the time was right for the establishment of such a court.[50] With the exception of France, the major powers of the time did not support the establishment of an international court, however the work continued as no state wanted to be blamed for interfering with the establishment.[51] In that same year, a

43. Jean Spiropoulous (Special Rapporteur), *Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/25 (1950).

44. COMMENTARIES IN THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 2 (M. Cherif Bassiouni ed., 1993) [hereinafter BASSIOUNI, COMMENTARIES].

45. *Id.* at 3.

46. G.A. Res. 260 (III) (Dec. 9, 1948). This request was made along with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

47. *Report of the International Law Commission on Question of International Criminal Jurisdiction*, U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/15 (1950).

48. *See* Ricardo J. Alfaro (Special Rapporteur), *Report of the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/15 and Corr.1 (1950).

49. Int'l Law Comm'n, Rep. on the Question of International Criminal Jurisdiction, U.N. GAOR 5th Sess., U.N. Doc. A/CN.4/20 (1950).

50. *See* M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: Introduction, Analysis and Integrated Text 56–57 (2005) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC]; 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 18 (M. Cherif Bassiouni & William Schabas eds. 2nd rev. ed., 2 vols. 2016) [hereinafter BASSIOUNI & SCHABAS].

51. The desire to avoid being blamed for the failure of the ICL movement was particularly acute given that the Nuremberg and Tokyo Tribunals were established only a few years prior. States feared that that by publically changing their stance of the establishment of international criminal tribunals they would give more credence to the claims that the post-WWII tribunals were a form of victor's vengeance. BASSIOUNI, COMMENTARIES, *supra* note 44, at 6. *See also* Bert V.A. Röling, *The*

committee was established by the General Assembly for the purpose of drafting a statute for the establishment of an international criminal court.[52] The establishment of such a committee, separate and apart from the committee convened to draft the Draft Code of Offenses Against the Peace and Security of Mankind, was essentially dilatory as there was no valid justification to spilt substance from process, though admittedly the substantive codification included more crimes than those that were to be subject to the eventual jurisdiction of an international criminal court. The latter would presumably have jurisdiction over the gravest international crimes as: aggression, genocide, crimes against humanity and war crimes, as was ultimately the case with the International Criminal Court.[53]

In 1951, the committee for the Draft Statute, comprised of representatives of seventeen states, finished its task and produced the 1951 Draft Statute, structurally modeled in part after that of the International Court of Justice.[54] The Draft Statute extended the court's jurisdiction only to heads of states, and not to other government officials and did not reference state responsibility under international criminal law.[55] The exclusion of state criminal responsibility was the drafter's response to concerns over the acceptance of the 1951 Draft Statute by major powers.[56] But even despite the attempt to alleviate the concerns of the major powers, politics indicated that the project had no chance of acceptance and was politically premature.[57] But western states did not want to assume political responsibility for the demise of an international criminal court within 5 and 6 years of the end of the International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) and so the Draft Statute committee's mandate was extended.[58] After some change in membership, the committee continued to work on the statute,[59] while another committee worked on the Draft Code of Offenses.

In 1953, the committee for the Draft Statute produced a revised Draft Statute text, the 1953 Draft Statute, which was submitted to the General Assembly.[60] The revision was the result of political pressure by states and the committee's desire to

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Nuremberg and Tokyo Trials in Retrospect, *in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 590 (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1972); M. Cherif Bassiouni, *Nuremberg Forty Years Later*, 18 CASE W. RES. INT'L L. 261, 261–62 (1986).

52. G.A. Res. 498 (V) (Dec. 12, 1950). *See also Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 7th Sess., Supp. (No. 11,), U.N. Doc. A/2136 (1952).

53. *See* Rome Statute, *supra* note 22.

54. 1945 Statute of the International Court of Justice, *opened for signature* June 26, 1995, 33 U.N.T.S. 933 (entered into force Oct. 24, 1945). *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 57; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 64.

55. Committee on International Criminal Jurisdiction, *Draft Statute For An International Criminal Court*, 46 AM. J. INT'L L. 1, 36–38 (1952). BASSIOUNI, COMMENTARIES, *supra* note 44, at 9.

56. BASSIOUNI, COMMENTARIES, *supra* note 44, at 9.

57. *See id.* at 59–60.

58. G.A. Res. 486 (V) (Dec. 12, 1950).

59. *Id.* INTRO TO ICL, *supra* note 7, at 580–81.

60. *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. (No. 12,), at 21, U.N. Doc. A/26645 (1954).

produce a draft that was more politically acceptable to major powers.[61] Therefore, the resulting 1953 Draft Statute limited the court's jurisdiction and allowed state parties to retain more control.[62] Upon receiving the 1953 Draft Statute, the General Assembly found it necessary to first consider the International Law Commission committee's work on the Draft Code of Offenses, which was not yet completed. The General Assembly thus tabled the consideration of the Draft Statute until the Draft Code of Offenses was completed.[63]

As to the work of the committee on the Draft Code of Offenses, in December 1952, the General Assembly removed defining "aggression" from the jurisdiction of the committee for the Draft Code of Offenses and established a new special committee tasked with defining "aggression,"[64] thus creating the third parallel codification track. The special committee to define aggression, consisting of government representatives rather than independent experts,[65] was to "draft definitions of aggression or draft statements of the notion of aggression" to be submitted at the General Assembly's ninth session in 1954.[66]

The political strategy was to truncate the comprehensiveness of the undertaking by having three separate bodies with different compositions and different mandates, meeting separately in different venues and at different times, all without any coordination. This eventually produced multiple texts that would necessarily have gaps and overlaps making them unsusceptible to separate adoption.

What follows is the extraordinary sequence of events that evidence how successful the truncated approach was as of 1950 to date.

A year after the General Assembly tabled considerations of the 1953 Draft Statute for an international criminal court because the Draft Code of Offenses was not complete, the ILC's 1954 Draft Code of Offenses was completed and submitted to the General Assembly.[67] The 1954 Draft Code consisted of five articles, listing thirteen separate international crimes.[68] But it lacked a definition of

61. INTRO TO ICL, *supra* note 7, at 581 n.200.

62. *Id.* at 581–82.

63. G.A. Res. 898 (IX), U.N. GAOR, 9th Sess., Supp. No. 21 at 50, U.N. Doc. A/2890 (1954); *see* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 58–9; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

64. G.A. Res. 688 (VII) (Dec. 20, 1952). *See also* INT'L L. COMM'N, *Summaries of the Work of the Int'l L. Comm'n: Question of Defining Aggression* (2015), http://legal.un.org/ilc/summaries/7_5.shtml#a5 [hereinafter INT'L L. COMM'N].

65. M. Cherif Bassiouni, *Challenges to International Criminal Justice and International Criminal Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 385-6 (William Schabas ed. 2016).

66. G.A. Res. 688 (VII), at 2 (Dec. 20, 1952).

67. *See* Third Report Relating to a Draft Code of Offenses Against the Peace and Security of Mankind, U.N. GAOR, 6th Sess., U.N. Doc. A/CN.4/85 (1954). *See* D.H.N. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L COMP. L.Q. 445 (1955); *see generally* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 58-60; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

68. *See* 1954 Draft Code, *supra* note 19. *See also* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC,

aggression due to the General Assembly's decision to remove defining the crime from the committee's purview. Therefore, the General Assembly tabled the 1954 Draft Code until aggression was defined. The domino effect worked: the 1953 Draft Statute for the Court was tabled because the Code of Offenses was not completed, then when the committee on the Code completed its work, the 1954 Draft Code was tabled because aggression was not defined. And that left only the definition of aggression as the last barrier against having to adopt a Code and establishing a Court. And that process also followed an amazingly political, torturous course.

As stated above, 1952, the General Assembly established a special committee to define aggression, which did not complete its task until 1974.[69] Between the special committee's establishment in 1952 and 1974 when it completed its task, there were four special committees that worked on the definition of aggression.[70] The first special committee, consisting of fifteen members, met from August 24th to September 21st, 1953 at the United Nations Headquarters in New York while the committees for the Draft Code met at Geneva to work on the text.[71] A number of texts aimed at defining aggression were produced.[72] The special committee unanimously decided not to put them to a vote but rather to submit them for comments from the General Assembly and Member states – another delaying tactic.[73] The second committee on aggression again met at UN Headquarters in New York three years later in 1956.[74] Why there was a three year hiatus is not too difficult to explain – it was about delaying the outcome. But again the 1956 committee on aggression did not adopt a definition of that crime and yet in another delaying tactic it submitted another report to the General Assembly summarizing various matters, including draft definitions.[75] In 1957, the General Assembly took note of the special committee's report and again mandated a third special committee to study the replies of Member States to the report "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression."[76] The third special committee met only four times over a period of eight years, namely in 1959, 1962, 1965 and 1967 each time bouncing the question of aggression to the General Assembly who in turn sent it back to the committee in a ping-pong like game. But these multiple United Nations reports created the impression of movement and even progress- and so the world's public opinion was politically duped.

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supra note 50, at 58–60. *See* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

69. G.A. Res. 3314 (XXIX), art. 2, 3, 4 (Dec. 14, 1974) [hereinafter 1974 Res. Defining Aggression]; INT'L L. COMM'N, *supra* note 64.

70. INT'L L. COMM'N, *supra* note 64.

71. U.N. International Law Commission, Summaries of the Work of the International Law Commission: Question of Defining Aggression (July 15, 2015), http://legal.un.org/ilc/summaries/7_5.shtml.

72. *Id.*

73. *Id.*

74. *Id.*

75. G.A. Res. 1181 (XII), at 2–3 (Nov. 29, 1957).

76. *Id.*

This lasted until December 1967, when the delaying political games began to wear quite thin, the General Assembly, by resolution, established a fourth Special Committee on the Question of Defining Aggression, stating: "recognizing 'that there is a widespread conviction of the need to expedite the definition of aggression."[77] This fourth Special Committee, comprised of thirty-five Member States representatives held one session each year from 1968 until 1974,[78] yet claiming, "to consider all aspects of the question so that an adequate definition of aggression may be prepared."[79] Finally, in 1974, the fourth Special Committee adopted a draft definition of "aggression" and recommended that the General Assembly adopt it.[80] The definition was adopted by the General Assembly on December 14, 1974,[81] by consensus.

The twenty-two yearlong effort to define "aggression" from 1952 to 1974 resulted in a consensus resolution (not by a vote, so that no state should be held to remember it).[82] More importantly, the resolution was never relied upon in any Security Council decision, the body prescribed in the U.N. Charter under article 39 to deal with "aggression."[83] This consistent negative practice leads to the conclusion that the concept of "aggression" as reflected in the U.N. Charter has fallen into *désuétude*.[84]

1974, in addition to being the year in which a definition of aggression was finally adopted, was also the year that the AIDP elected this writer as the Secretary-General of the Association,[85] which was the starting point of the creation of an alternative Draft Code of Crimes in 1980.[86] To support the United Nations' processes in the drafting of a code of crimes and a statute for the establishment of an international criminal court, this writer, with the support of a number of colleagues in the field of international criminal law, undertook to develop an

77. G.A. Res. 2330 (XXII) (Dec. 18,1967).

78. INT'L L. COMM'N, *supra* note 64.

79. G.A. Res. 2330 (XXII) (Dec. 18,1967).

80. G.A. Res. 3314 (XXIX) (Dec. 19 1974), *supra* note 69.

81. *Id.*

82. G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31), at 142, U.N. Doc. A/9631 (1974).

83. U.N. Charter, art. 39.

84. A common law concept, borrowed from French law known as *désuétude*, meaning fallen into disuse, refers to the notion that the consistent absence of use and application of a legal norm renders it inapplicable or obsolete. While the court has avoided pronouncing on the issue, the concept has been argued in a number of cases before the International Court of Justice. *See generally* Case Concerning Legality of Use of Force (Yugo. v. Belg.), Preliminary Objections of Belg., 134–35, ¶¶ 413, 414, 416 (July 5, 2000); Nuclear Tests (Austl. v. Fr.), Provisional Measure, Oral Arguments on the Request for the Indication of Interim Measures of Protection (May 1973), http://www.icj-cij.org/docket/files/58/9445.pdf. *See also* M. CHERIF BASSIOUNI, THE STATUS OF AGGRESSION IN INTERNATIONAL LAW FROM VERSAILLES TO KAMPALA – AND WHAT THE FUTURE MIGHT HOLD (forthcoming 2017).

85. *Id.*

86. M. Cherif Bassiouni, *International Criminal Court: Ratification And National Implementing Legislation*, 71 REVUE INTERNATIONALE DE DROIT PÉNAL 1-2 (2000); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter 1980 Draft Code].

alternative draft code of international crimes entitled *International Criminal Law: A Draft International Criminal Code,*[87] as well as a later draft statute for an international criminal court. To start this process, this writer began to draft a code of international crimes to be submitted to experts in the field of international criminal law in 1979. But this parallel effort led to nowhere and the United Nations system simply accepted it as another NGO contribution.

Between 1974 and 1978, the United Nations had to tackle another problem. In 1974 aggression was defined and voted upon by the General Assembly.[88] Consequently, the 1954 Draft Code should have presumably been back on the General Assembly's agenda since it was then tabled because aggression had not yet been defined. However, that did not happen until 1978,[89] despite efforts between 1974 and 1978 by a number of governments and NGOs to get the issue back on the General Assembly's agenda.[90] In 1978, the Draft Code was exhumed,[91] and on December 16, 1978, the General Assembly invited Member States and IGOs to submit their comments on the 1954 Draft Code, but it produced few comments as states had mostly forgotten about that initiative, but more to the point, any comments in 1978 about a 1954 text had to be negative due to the passage of time and changing circumstances. Consequently, most states abstained, some seeking a way to revive that historic effort which had survived the Cold War. Two years later, the General Assembly again reiterated its request that states submit their comments in December 1980.[92]

During this period, developments were made on the establishment of an international criminal court, on a different front. In 1979, this writer was commissioned by the United Nations Commission on Human Rights, *Ad Hoc* Working Group on Southern Africa to draft a statute for a specialized international criminal court for the implementation and enforcement of the *Apartheid* Convention.[93] While working on the draft, this writer concurrently continued to work on an alternative draft a code of international crimes with the support of the AIDP.[94] That same year, this writer and the AIDP committees completed their

87. *See* 1980 Draft Code, *supra* note 86.

88. 1974 Res. Defining Aggression, *supra* note 69.

89. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 59–60; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 66.

90. *Id.*

91. *Id.* However, the Draft Statute on the establishment of an international criminal court, tabled in 1953, remained mysteriously tabled and buried.

92. INT'L L. COMM'N, *supra* note 64.

93. The *Apartheid* Convention entered into force in 1976, but at the time there was very little political will to implement the Convention's article V jurisdictional provision which calls for the prosecution of violators by an international criminal tribunal, "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction." International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. V. (July 18, 1976), 1050 U.N.T.S. 244. *See also* 1980 Draft Code, *supra* note 86.

94. *See* 1980 Draft Code, *supra* note 86.

work on an alternative draft code of crimes in July 1979, and submitted the draft to the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders in Caracas, Venezuela in August/September of that year.[95] In fact, less than twenty-four hours after this writer presented the alternative draft code of crimes to the UN Congress in Caracas, this writer presented the draft statute for an international criminal tribunal to implement the *Apartheid* Convention's article 6 to the members of the *Ad Hoc* Working Group in Geneva,[96]in fulfillment of his appointment.[97] The alternative code of crimes was also published in 1980 as *International Criminal Law: A Draft International Criminal Code* (1980 Draft Code), which contained twenty international crimes codified on the basis of then existing international conventions.[98]

In regards to the codification of international criminal law within the United Nations system, the *coup de grâce* came in 1982. That year, the International Law Commission appointed Doudou Thiam as Special Rapporteur for the topic "Draft Code of Offences Against the Peace and Security of Mankind" and established a working group on the same topic.[99] The Special Rapporteur, who was ill-prepared for such a task, produced a flawed text in 1991 which was highly criticized as both exceeding the mandate of the General Assembly as well as overreaching and ambiguous to the point of violating principles of legality.[100] Due to criticism of the report, it was revised and reduced to five crimes that were adopted by the ILC in 1996. [101] The 1996 Draft Code reduced the twelve crimes contained in the 1991 Draft Code to only five crimes, defined by reference to previous definitions. Genocide was defined according to the 1948 Convention, war crimes by reference to the Geneva Conventions and customary international law, and crimes against humanity was a blend between article 5 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and article 3 of the International Criminal Tribunal

95. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 19.

96. *Id.* at 19–20.

97. M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523, 523 (1980-1981).

98. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 19–20. While the draft was discussed at an ancillary meeting of the Congress, no further action was taken on it. *See also* M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code and Statute for an International Criminal* (1987). However, this writer and his colleagues were not dissuaded and continued to push forward with their contributions to the codification of the international criminal law. The 1980 Draft Code was further supplemented by an alternative Draft Statute for the establishment of a permanent international criminal court in 1987 and published under the title, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal. Id.*

99. Rep. of the International Law Commission on the work of its thirty-fifth session, 3 May- 22 July 1983, Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, at 13, U.N. Doc. A/38/10 (1983).

100. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at viii. *See also* INTRO TO ICL, *supra* note 6, at 139–42.

101. M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, Ch. 2, 121 (3rd ed. 2008).

for Rwanda (ICTR).[102] Despite the adoption of this simplistic text by the ILC in 1996, it was never voted on by the General Assembly.[103]

In 1989, another interesting political maneuver played an important role in the bureaucratic mandate gamesmanship of the United Nations. This occurred in connection with the General Assembly's Special Session on the problem of drug trafficking. During that session the late President, then Prime Minister Arthur N. Robinson[104] of Trinidad and Tobago proposed the establishment of a specialized international criminal court to prosecute persons engaged in drug trafficking.[105] A similar effort was undertaken by the AIDP in 1937 to have a special international criminal court for terrorism as a protocol to the League of Nations Terrorism Convention.[106] The General Assembly in 1989 very deftly requested the International Law Commission to examine such a proposal.[107] The referral to the ILC was ambiguous and intended only to avoid having to deal with this question.[108] The ILC responded by producing a short report in 1990, that posed

102. Rep. of the International Law Commission on the work of its forty-eighth session, 6 May- 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, U.N. Doc. A/51/10 (1996).

103. Bassiouni, *supra* note 101, at 121.

104. As one who advised the late president Robinson, and who was also a very dear personal friend, I relied on the 1937 Protocol to the League of Nations Convention for the Prevention and Punishment of Terrorism, which had been elaborated on by distinguished jurists who were then at the League of Nations. One of them Vespasian Pella, who represented his country, Romania, at the League, was also president of the International Association of Penal Law, which had been a long-term proponent of establishing a permanent international criminal court. Pella and others proposed a protocol to the 1937 Terrorism Convention to establish a specialized international criminal court to enforce the Convention. Robinson and I thought that this could also work for drug offenses, even though we were skeptical of the merits of having a permanent international criminal court for one category of crimes, and one which was not amongst the most serious international crimes but we thought it was a way of opening the door to the UN revisiting the question after the long history of failure described above. The 1937 Protocol for the creation of an international criminal court was never adopted, neither was the draft statute for the creation of an international criminal court to enforce the *Apartheid* Convention, which I drafted as the UN's independent expert to the Commission on Human Rights' sub-commission on Southern Africa. Study On Ways And Means Of Insuring The Implementation Of International Instruments Such As The International Convention On The Suppression And Punishment Of The Crime Of *Apartheid*, Including The Establishment Of The International Jurisdiction Envisaged By The Convention, U.N. Doc. E/CN.4/1426 (Jan. 19, 1981). Commission of Human Rights, Interpretation of the International Covenant of the Suppression and Punishment of the Crime of *Apartheid*, U.N. Doc. E/CN.4/1426, Jan. 19, 1981. Robinson was also an active member in the Foundation for the Establishment of an International Criminal Court, organized by the late Robert Kurt Woetzel.
See generally M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523, 523 (1980-1981).

105. G.A. Res. 44/39 (Dec. 4, 1989).

106. *See* Convention for the Prevention and Punishment of Terrorism, League of Nations, Nov. 16, 1937 (discussion of 1937 terrorism convention and attempt to create a specialized international criminal court).

107. G.A. Res. 44/39, ¶ 1 (Dec. 4, 1989).

108. BASSIOUNI, DRAFT CODE & STATUTE, *supra* note 37, at 11. G.A. Res. A/RES/S-17/2, ¶ 82 (Feb. 23, 1990): The mandate stated:

more questions than it answered, but it paved the way for the ILC's initiative in 1994.[109]

The ILC completed its report as mandated by the General Assembly's special session on drugs and submitted it to the 45th session of the General Assembly,[110] but its report was not limited to the issue of drug trafficking, and it was received favorably by the General Assembly, which encouraged it to continue its work.[111] The tables were suddenly reversed as the political climate in the international community favored the establishment of an international criminal court. After all, that was far better a prospect to deal with in *realpolitik* terms than with an enforceable definition of aggression. Thus, the ILC went from a mandate limited to drug trafficking to one encompassing the drafting of a comprehensive draft for an international criminal court.[112] The ILC prepared a preliminary report in 1992,[113] which was favorably received by the General Assembly, and then the ILC produced a comprehensive report in 1993,[114] which was modified in 1994.[115]

In 1994, the International Law Commission's report on a draft statute for the establishment of an international criminal court, headed by special rapporteur James Crawford, was submitted to the General Assembly, which in 1995 had set up the *Ad Hoc* Committee for the Establishment of an International Criminal Court.[116] The *Ad Hoc Committee* met in April and August of 1995 to review the

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"Since the International Law Commission has been requested to consider the question of establishing an international criminal court or other international trial mechanism with jurisdiction over persons alleged to be engaged in illicit trafficking in narcotic drugs across national frontiers, the Administrative Committee on Co-ordination shall consider, in its annual adjustments to the United Nations system-wide action plan on drug abuse control requested by the General Assembly in its resolution 44/141 of 15 December 1989, the report of the Int'l Law Commission on the question."
Adoption of a Political Declaration and Global Programme of Action, Bureau of the Ad Hoc Committee of the Seventeenth Special Session of the General Assembly, ¶ 80 U.N. Doc. VA/S-17/AC.1/L.2 (1990) *quoted in* BASSIOUNI, DRAFT STATUTE, *supra* note 10, at 11 n.35.

109. Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, at 36, U.N. Doc. A/CN.4/430/Add.1 (1990). *See also* BASSIOUNI, DRAFT CODE & STATUTE, *supra* note 37, at 1.

110. Rep. of the International Law Commission on the work of its forty-second session, 1 May- 20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10, at 8, U.N. Doc. A/45/10(1990).

111. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 44, at 62–3; *see* BASSIOUNI & SCHABAS, *supra* note 44, at 68–70.

112. *Id.*

113. Rep. of the International Law Commission on the work of its forty-fourth session, 4 May- 24 July 1992, Official Records of the General Assembly, Forty-seventh session, Supplement No. 10, U.N. Doc. A/47/10 (1992). This writer's draft statute for an international criminal court to prosecute violators of the *Apartheid* Convention served as a model for the ILC's 1993 Draft Statute for an international criminal court. *See* INTRO TO ICL, *supra* note 6, at 584–85, 584 n.217.

114. *See* Revised Report of the Working Group on the draft statute for International Criminal Court- reproduced in document A/48/10, A/CN.4/L.490 and Add. 1 (1993)

115. Report of the International Law Commission on the work of its forty-sixth session, 2 May- 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, U.N. Doc. A/49/10 (1994); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 138–139 (1994).

116. The mandate of the Ad Hoc Committee was: "To review the major substantive and

ILC's draft statute and to consider preparations for the convening of a newly mandated United Nations' body.[117]

The *Ad Hoc* Committee produced its report in 1995,[118] which became the basis for the General Assembly's establishment of the 1996 Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).[119] The PrepCom's mandate was explicit and goal-oriented and was subsequently extended by the General Assembly to 1998, in order to produce a consolidated text of a convention, statute and annexed instruments to submit to a Diplomatic Conference to be held in Rome from June 15th - July 17th, 1998.[120] Despite many obstacles,[121] in April 1998, PrepCom produced a 173-page text containing 116 articles, which was the text that the Diplomatic Conference held in Rome, used to adopt the statute of the International Criminal Court on July 17, 1998.[122]

Yet throughout the work of the PrepCom and those delegates at the Rome Diplomatic Conference there was no agreement on defining aggression. The draft text produced by the PrepCom included three possible options for the definition,[123] but none were included in the final draft of the Rome Statute. Thus, at the time the Rome Statute entered into force in 2002, the International Criminal Court could not hear prosecutions for the crime of aggression as it was not yet defined nor were its jurisdictional conditions set out.[124] Those opposed to aggression won again by delaying the definition, even hoping that it would have never been achieved. But a few committed states and NGOs were not about to let go.[125] But it took a few years

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administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries." Rep. of the International Law Commission of the Work of its Forty-sixth Session, ¶ 2, U.N. Doc. A/C.6/49/L.24 (1994).

117. The 1991 text was subsequently redrafted by the ILC. *See* Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles adopted by the Commission on its forty-eight session., reproduced in YearbookFalse1996, vol. II (Part Two), para 50., U.N. Doc A/CN.4/L.532 (1996) rev'd by U.N. Doc. A/CN.4L.532 [and Corr. 1 and 3]. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 71. BASSIOUNI & SCHABAS, *supra* note 44, at 71–2.

118. Rep. of the Ad Hoc Committee on the Establishment of an International Criminal Court, supp. No. 22, U.N. Doc. A/50/22 (1995).

119. G.A. Res. A/RES/50/46, ¶2 (Dec. 11, 1995).

120. G.A. Res. A/RES/51/207 (Dec. 17, 1997).

121. M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 397–400 (1997).

122. Draft Report of the Preparatory Committee, at art. 5, U.N. Doc. A/AC.249/1998/L.16 (Apr. 2, 1998).

123. *Id.* art. 5.

124. Rome Statute, *supra* note 22, art. 5(2). *See generally* COALITION FOR THE INT'L CRIM. CT, Davis, Cale, Forder, Susan, Little, Tegan, and Dali Cvek, *The Crime of Aggression and the International Criminal Court*, 17 THE NATIONAL LEGAL EAGLE 1, 1–2 (Autumn 2011), http://www.iccnow.org/documents/agression.pdf (last visited Aug. 23, 2016).

125. It must be said, that Kampala would not have taken place had it not been for the concerted efforts of a number of persons, chief among them were Ambassador Zeid Ra'ad Zeid Al-Hussein of Jordan, who served as President of the Assembly of State Parties (ASP), and Ambassador Christian Wenaweser of Liechtenstein, who at that time who was also the president of the ASP. A number of NGOS and other individuals representing civil society organizations and academia were also very

since the Rome Statute was adopted in Rome in 1998 for Kampala to happen in 2010, when the ICC's Review Conference for the Rome Statute, adopted a definition of aggression.[126] Yet, even with a definition, the International Criminal Court cannot yet hear cases regarding the crime of aggression, despite the Kampala Amendments having been ratified by the requisite thirty State Parties.[127] However, more importantly, the Amendments will not enter into force, giving the Court jurisdiction over the crime of aggression, until after January 1, 2017 when a decision is made by State Parties to activate jurisdiction and will apply only to the state parties that have opted in.[128] Aggression as defined in the ICC's Kampala

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active and effective including Benjamin F. Ferencz. The ICC Coalition also deserves recognition.

126. *The Crime of Aggression and the International Criminal Court*, *supra* note 124.

127. Status of Ratification and Implementation, THE GLOBAL CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (last visited Sept. 23, 2016). As of September 1, 2016 the following thirty states have ratified the Kampala Amendments: Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, Czechia, El Salvador, Estonia, Finland, Georgia, Germany, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Norway, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, and Uruguay.

128. Rome Statute, *supra* note 22, art. *8 bis*, 15 *bis*, and 15 *ter*. The amendments are as follows:
Article 8 *bis*: Crime of Aggression
1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. Rome Statute, *supra* note 19, art. 8*bis*.
Article 15 *bis*: Exercise Of Jurisdiction Over The Crime Of Aggression (State Referral, Proprio Motu)

Amendments cannot yet be deemed part of customary international law. It is only enforceable with respect to those state parties to the Rome Statute who have specifically opted into it. Thus, despite the immense strides taken in the codification of international criminal law and the establishment of a permanent international criminal tribunal, the effects of the *ad hoc* or haphazard approach remain.

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1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. *Id.* art. 15 *bis*.
Article 15 *ter*: Exercise Of Jurisdiction Over The Crime Of Aggression (Security Council Referral)
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. *Id.* art. 15 *ter*.

III. CODIFICATION EFFORTS

As evidenced with respect to defining and codifying the crime of aggression, *realpolitik* often serves as an obstacle to efforts for the development and codification of international criminal law. This is evident in the intentional splintering of codification efforts regarding aggression and saw success in stalling the process for twenty-two years. This is also clear in the attempts made, both within the United Nations system and outside of it, to draft an internationally agreed upon code of international crimes. But some efforts are more successful than others.

A. Comparison of 1974 and Kampala Definitions of Aggression

As detailed above, in 1952 the United Nations General Assembly established a special committee with the mandate of defining the crime of aggression, however, it was not until 1974 that the task was complete.[129] The committee was heavily criticized for taking twenty-two years to define the crime but in retrospect its efforts were not without impact, as the 2010 Kampala Amendments providing the International Criminal Court with jurisdiction over the crime of aggression, were adopted in accordance with the definition of the crime adopted by the General Assembly in 1974.[130]

The definition of the crime of aggression adopted by General Assembly resolution in 1974 is as follows:

> Article 2: The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed

129. G.A. Res. 688 (VII), at 63 (Dec. 20, 1952).

130. "Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression..." Rome Statute, *supra* note 22, art. 11, *8bis(2)*.

> forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.
>
> Article 4: The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.[131]

As evidenced by the text of the Kampala Amendment above in section two,[132] the definition adopted in 2010 refers to the 1974 General Assembly resolution adopting the definition of aggression,[133] and the enumerated acts constituting aggression follow the 1974 definition verbatim.[134] Both definitions also explicitly refer to acts of aggression as violations of the United Nations Charter,[135] and both definitions apply regardless of any declaration of war.[136] There are, however, two important differences between the definitions, namely individual criminal responsibility and the role of the United Nations Security Council. The Kampala Amendments explicitly provides for individual criminal responsibility, stating that conduct "by a person in a position effectively to exercise control over or to direct the political or military action of a State," may constitute an act of aggression.[137] There is no comparable provision in the 1974 definition of aggression. Also, differentiating the two definitions is the role of the Security Council in determining acts that constitute aggression. Under the 1974 definition, the enumerated acts are not exhaustive and the Security Council may determine other acts constituting aggression.[138] The Kampala definition does not contain a similar understanding.

131. 1974 Res. Defining Aggression, *supra* note 69.

132. Rome Statute, *supra* note 22, art. 8*bis* ¶ 2.

133. 1974 Res. Defining Aggression, *supra* note 69.

134. *Compare* 1974 Definition, *supra* note 69, art. 3, ¶¶ (a)-(g) *with* Rome Statute, *supra* note 22, art. 8*bis* ¶¶ 2(a)-(g).

135. *See* 1974 Res. Defining Aggression, *supra* note 69, art. 2; Rome Statute, *supra* note 22, art. 8*bis* ¶ 1.

136. *See* 1974 Res. Defining Aggression, *supra* note 69, art. 3; Rome Statute, *supra* note 22, art. 8*bis* ¶ 2.

137. Rome Statute, *supra* note 22, art. 8*bis* ¶ 1.

138. 1974 Res. Defining Aggression, *supra* note 69, art. 2.

Another, albeit more minor, distinction is that the Kampala definition explicitly applies to acts committed against "the sovereignty, territorial integrity or political independence of a State" while the 1974 refers only to acts committed against a State.[139]

The similarities and differences between the two definitions of the crime of aggression highlight an interesting twist on the attempt of the *realpolitik* to avoid defining and legally proscribing aggression. The process may have been stalled time and time again, and the Security Council may continue to avoid referring to any conduct as an act of aggression, but the definition of aggression adopted by the General Assembly in 1974 was given new life thirty-six years later when it was referenced and reiterated in the 2010 Kampala Amendments. But unfortunately, the same cannot be said for all codification efforts.

B. Comparison of Draft Codes of International Crimes within and outside the United Nations system

While ultimately, the United Nations has not yet adopted a code of international crimes, there have been a number of attempts to achieve such a goal, both within the United Nations' system and outside of it. As stated above, within the UN system there were three main draft codes: the 1954 Draft Code of Offenses Against the Peace and Security of Mankind;[140] the 1991 Draft Code of Crimes against the Peace and Security of Mankind;[141] and 1996 Draft Code of Crimes against the Peace and Security of Mankind.[142] Outside of the United Nations' system, the attempt to codify international crimes was undertaken by this writer with the support of the AIDP and came to fruition in the 1980 Draft International Criminal Code.[143] Despite the United Nations' failure to adopted any of the proposed codes, the work of these codes' drafters was not in vain.

As the *ad hoc* and piecemeal approach to the codification of international criminal law continues to this day, it is paramount that the international community recognizes all that can be accomplished through the adoption of a clear, policy-oriented legislative process, and all that is lost in the *ad hoc*, haphazard drafting process often employed within the United Nations' system. For a number of reasons including a lack of political interference, the contributions of highly experienced international jurists and the ability to work on both a draft code and draft statute, the alternative draft code produced by this writer in 1980 was able to succeed in many areas where the Draft Codes from 1954, 1991 and 1996 did not. The ways in which a clear policy and legislative technique succeeded where the piecemeal approach employed by the United Nations did not is evident in the crimes defined and proscribed by the draft codes as well as the structure of the

139. *Compare* 1974 Res. Defining Aggression, *supra* note 69, art. 2 *with* Rome Statute, *supra* note 19, art. 8*bis* ¶ 2.

140. Drafted by a committee of the International Law Commission under a United Nations General Assembly mandate. *See* 1954 Draft Code, *supra* note 17.

141. *See* BASSIOUNI, COMMENTARIES, *supra* note 44.

142. *See* 1996 Draft Code, *supra* note 102.

143. *See* 1980 Draft Code, *supra* note 86.

codes themselves and to whom they were applicable. An analysis of the draft codes within the UN system and how they evolved overtime also evidences all that can be lost when the legislative process must give way to the *realpolitik* at play.

In regards to criminal responsibility, the 1954 Draft Code limited criminal responsibility to individuals for the commission of acts deemed international offenses,[144] while the 1991 Draft Code provided for individual criminal responsibility but did not provide for state responsibility nor for the criminal responsibility of organizations or corporate entities.[145] The 1996 Draft Code provided for individual criminal responsibility, while stating that such individual criminal responsibility does not limit state responsibility.[146] As a whole, the provisions regarding criminal responsibility in all three draft codes within the UN system highlight the inability to reach a collectively agreed upon method for establishing criminal responsibility and how far such responsibility should extend. The 1980 Draft Code was able to achieve a clear notion of criminal responsibility as it provided for criminal responsibility for states as well as for any "group or organization other than a state or an organ of a state, irrespective of the responsibility of its members."[147]

As noted above, the 1954 Draft Code, 1991 Draft Code and 1996 Draft Code were all limited to crimes that feel within the purview of the codes' title, offences/ crimes that affect the peace and security of mankind.[148] The 1980 Draft Code of international crimes drafted by this writer was not limited to such a grouping of crimes and therefore was more comprehensive and detailed than its United Nations counterparts. The 1954 Draft Code is comprised of thirteen international offences against the peace and security of mankind,[149] the 1991 Draft Code includes twelve crimes[150], and the 1996 proscribes only five international crimes.[151] On the other hand, the 1980 Draft Code contains twenty articles, divided into four categories: (i) acts which are deemed international crimes under existing international

144. 1954 Draft Code, *supra* note 17, art. 1 ("Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.").

145. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 113.

146. *See* 1996 Draft Code, *supra* note 102, art. 2, 4.

147. Bassiouni 1980 Draft Code, *supra* note 98, at 95.

148. Highlighting this point is the fact that the first eight offenses included in the Draft Code are related to acts of aggression, territorial aggression or the use of force by one state against another state. *See* 1954 Draft Code, *supra* note 17. *See* BASSIOUNI, COMMENTARIES, *supra* note 44; and *see* 1996 Draft Code, *supra* note 102.

149. 1954 Draft Code, *supra* note 17.

150. The crimes contained in the 1991 Draft Code are as follows: art. 15-agression; art. 16- threat of aggression; art. 17-intervention; art. 18-colonial domination and other forms of alien domination; art. 19- genocide; art. 20- apartheid; art. 21- systematic or mass violations of human rights; art. 22- exceptionally serious war crimes; art. 23- recruitment, use, financing and training of mercenaries; art. 24- international terrorism; art. 25- illicit traffic in narcotic drugs; art. 26- willful and sever damage to the environment. BASSIOUNI, COMMENTARIES, *supra* note 44, at 93.

151. These five crimes are: art. 16-the crime of aggression; art. 17- crime of genocide; art. 18- crimes against humanity; art. 19- crimes against United Nations and associated personnel; art. 20- war crimes. 1996 Draft Code, *supra* note 102, at 42–53.

conventions;[152] (ii) acts which are deemed international crimes pending international conventions before the UN, whose adoption is impending;[153] (iii) acts whose prohibition in the object of certain international conventions but which are not considered international crimes;[154] (iv) acts which are the object of contemporary international concern and about which international conventions are expected.[155] This exemplifies the manner in which over time the crimes defined within the United Nations system were cut short again and again, while a lack of political bureaucracy allowed the 1980 Draft Code to contain a comprehensive listing of international crimes.

As for specific crimes, all four draft codes attempt to codify and proscribe the crime of aggression, albeit with different specificity as to the definition provided therein. The 1954 Draft Code, as stated above, does not provide a definition for the crime of aggression because such a definition did not fall under the drafting committee's mandate.[156] The 1991 Draft Code's definition of aggression almost

152. This category includes the crimes of: aggression; war crimes; unlawful use of weapons; genocide; crimes against humanity; apartheid; slavery and related crimes; torture (as a war crimes); unlawful medical experimentation (as a war crime); piracy; crimes relating to international air communications; threat and use of force against internationally protected persons; taking of civilian hostages; unlawful use of the mails; drug offenses; falsification and counterfeiting; theft of national and archeological treasures (in time of war); interference with submarine cables; international traffic in obscene material. Bassiouni 1980 Draft Code, *supra* note 98, at 25.

153. Torture (as a specialized convention). *Id.*

154. Torture (as a human rights violation); unlawful medical experimentation (as a human rights violation); theft of national and archeological treasures (in a time of peace as a culturally protected right). *Id.*

155. Unlawful medical experimentation (in time of peace); bribery of foreign public officials. *Id.*

156. Rather the task of defining the international crime of aggression was mandated to a special committee established for that very purpose. Despite the lack of a definition for aggression, the second international offenses of the 1954 Draft Code is "[a]ny threat by the authorities of a State to resort to an act of aggression against another State." 1954 Draft Code of Offenses, *supra* note 17, art. 2(2). The following seven offences all relate to the use of force, employment of aggression or interference with the sovereignty of one state by another state. They are:

> (3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.
>
> (4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.
>
> (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.
>
> (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.
>
> (7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same

verbatim follows the definition of aggression adopted by the General Assembly in 1974[157] and the 1996 did not provide a definition for the crime.[158] The 1980 Draft Code contains not only definition for the crime of aggression, but also provides for consequences, the scope of the prohibition and method for interpretation,[159] highlighting the advantage of drafting such a code independent from the political pressure and bureaucratic inference that the UN can have on such a task, as well as the inability of those who opposed codifying the crime of aggression from asserting their delay tactics.

All four draft codes also codify the crime of genocide, although the 1954 Draft Code does not refer to the crime as genocide, rather it just provides its elements. The same is true for crimes against humanity, but both the 1954 and 1991 draft codes do not use the term "crimes against humanity,"[160] again just providing its elements. All four draft codes also criminalize the commission of wars crimes, but the 1991 draft code limits the crime to "exceptionally serious war crimes."[161]

As mentioned above the 1991 Draft Code expanded the number of crimes contained in the code to the point that it was rejected as overly broad, and thus resulted in the extremely curtailed 1996 Draft Code. Crimes contained in the 1991 Draft Code that were not included in any prior or subsequent codes, included: the colonial domination and other forms of alien domination and the willful and severe damage to the environment.[162]

The 1954, 1991 and 1996 Draft Codes were all a product of the United Nations' system and as such evidenced the difficulties of a drafting process intentionally splintered to avoid any real progress. As all three of the UN system draft codes were drafted separate and apart from the drafting of statute for an international criminal court, their codification efforts remained pigeonholed to the drafting of a code of international crimes only. The drafter of the 1980 Draft Code was not limited to a code of crimes exclusively and was free to consider, and even

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character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

Id. art. 2(3)–(9).

157. *Id.* art. 2(3).

158. 1996 Draft Code, *supra* note 102, art. 16 "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."

159. 1980 Draft Code, *supra* note 37, at 52–54.

160. 1954 Draft Code, *supra* note 17, at 150. The eleventh crime contained in the 1954 Draft Code was "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." 1954 Draft Code, *supra* note 17, art. 2(11).

161. BASSIOUNI, COMMENTARIES, *supra* note 44, at 16.

162. *Id.*

draft, a statute for an international criminal court that would have jurisdiction over such crimes when he was undertaking the 1980 Draft Code. Thus, the 1980 Draft Code was structured in a manner that would allow it to be enforced by an international criminal court (direct enforcement model) or through the national criminal justice systems of states (indirect enforcement model).[163] The 1980 Draft Code was drafted to be flexible in its applicable as well as designed with the option of being embodied in a single convention with a draft statute for an international criminal court or as a stand-alone convention.[164] These successes of the 1980 Draft Code evidence what can be achieved when the codification of international crimes is not intentionally separated from the drafting of a statute for a court that would have jurisdiction over such international crimes, as was the case in the United Nations system.

The limited nature of the draft codes within the United Nations' system once again highlights all that is lost when international crimes are codified (or attempts at codification are made) without any clear legislative approach. The UN approach began with the 1954 Draft Code which lacked comprehensive definition of crimes it was attempting to codify; it did not consider the existence of an international criminal court with jurisdiction over such crimes nor did it include all relevant international offenses. The successor to the 1954 Draft Code was the 1991 Draft Code, which had its own issues leading to its demise. The 1991 Draft Code was considered to be overly broad to the point of violating general principles of legality, and it contained crimes considered beyond the mandate of the General Assembly, as they were not yet recognized under international law or had not yet ripened to the level of international crimes.[165] Finally, the 1996 Draft Code was extremely barebones and failed to define or codify a number of international crimes.[166] The 1980 Draft Code therefore was the most comprehensive and inclusive draft code submitted to the United Nations and evidences the great strides

163. 1980 Draft Code, *supra* note 98, at 107–17.

164. *Id.* The 1980 Draft Code contains far more than just a list of crimes and their definitions, as it includes provisions regarding the applicability of the code. The 1954 Draft Code did not go so far and was largely limited to a list of crimes with minimal definitions. The way in which this flexibility was accomplished was through drafting the 1980 Draft Code in three parts, Part I a General Part, Part II a Special Part and Part III a Procedural Enforcement Part. The General Part is necessary for direct enforcement by an international criminal court and therefore contains provisions regarding the applicability of the draft code, jurisdiction, definitions for terms such as 'state,' 'person, individual' and 'group or organization.' The General Part also included an about the references article providing for criminal responsibility for individual and state and non-state organization as well as a more general overview on the application of penalties. This General Part presumes the existence of an international criminal court (i.e. direct enforcement) and therefore may be severed if the code is being enforced by a national judicial system under the indirect enforcement model. The Special Part is applicable no matter the enforcement model as codifies twenty-two categories of international crimes. Finally, the third part, the Procedural Enforcement Part applies to both models of enforcement and contains provisions on extradition, judicial assistance, recognition of foreign penal judgments and other procedural mechanisms.

165. BASSIOUNI, COMMENTARIES, *supra* note 44, at 97.

166. Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L. F. 58, 59 (1997).

that can be made when international crimes are codified - or attempts at codification are made - with a clear legislative approach.

IV. CONCLUSION

As seen in the comparison of the 1954, 1991 and 1996 Draft Codes from the United Nations system and the 1980 Draft Code undertaken by this writer, on the path to the codification of international criminal law there is much to be gained by employing a clear policy-oriented, comprehensive legislative process. The *ad hoc* approach taken within the United Nations has produced little tangible gains, and there is still no comprehensive code of international crimes. Elementary legislative policy, as applied in states' domestic codifications of criminal law on a variety of subjects as it exists in almost every country in the world, is absent in international criminal law. For example, the protected social interest is not always clearly identified,[167] continuity is frequently lacking in successive conventions on the same subject,[168] the same or similar provisions appear in multiple conventions on separate subjects even when these provisions have been found ambiguous or unclear.[169]

The issues regarding the development and codification of international criminal law pose the question, where do we go from here? In order to combat the commission of international crimes, particularly those that threaten global peace and security or offend commonly-shared human and social values, there must be progress in the codification efforts with greater attention paid to legislative and policy-oriented approaches. Despite its roots in early Roman legal codification, the development of international criminal law has strayed from the idea of detailed codification efforts by subject-matter in a continuous, congruent effort and resorted to the haphazard approach seen in the path to defining and proscribing aggression.

Unfortunately, the haphazard or *ad hoc* manner in which the codification of international crimes developed, particularly the crime of aggression, is the

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167. *See* INTRO TO ICL, *supra* note 7, at 504–06. *See generally* M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Daut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

168. *See* 1912 International Opium Convention, Jan. 23, 1912, 1921 U.N.T.S. 17. *See* Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175. This was followed by the 1925 International Opium Convention, the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. Then the 1936 Convention for Suppression of the Illicit Traffic in Dangerous Drugs, the 1946 Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, the Paris Protocol of 1948, the 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and the Use of Opium. *See also* Bernard Leroy, M. Cherif Bassiouni & Jean-François Thony, *International Drug Control System, in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 855, 864–75 (M. Cherif Bassiouni, ed., 3rd ed., 2008).

169. *See* Convention for the Suppression of Unlawful Seizure of Aircraft art. 5-6, Dec. 16, 1970, 860 U.N.T.S. 105 (priority of jurisdiction and the difficulties it created in the Lockerbie case); *see* Michael P. Scharf, *The Lockerbie Model of Transfer of Proceeding, in* INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2008); Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L L. 289, 289 (2000); Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT'L & COMP. L. 355, 356–57 (1999-2000).

paradigm of international criminal law development and not the outlier. The international criminal law system, as explained above, relies on states to push forward its development and with state actors comes states' desires of wealth and power. This world of *realpolitik* has limited the codification and proscription of international crimes acting only when necessary as a result. This pattern can be seen in the new international focus on the illicit trade or trafficking and the many crimes that fall under its broad umbrella.

Illicit trade or trafficking encompasses a number of different international crimes and from a codification or proscription view it is most closely associated with organized crime. Unlike the Roman tradition of codification by subject-matter with clear legislative policy goals at the forefront of criminal codification, the international regime of illicit trafficking developed like the rest of international criminal law. What is referred to as unlawful or illicit trafficking, places in the same category such diverse activities as: trafficking in human-beings (including the most abhorrent of these practices involving trafficking in human-beings for sexual bondage), trafficking in human organs, trafficking in counterfeit materials whether they be medicinal cigarettes, scarves or neckties. Illicit trafficking also covers the trade of cultural property as well as trafficking in obscene materials.

As if foreshadowing the lengthy, piecemeal process that would surround the codification of illicit trafficking, the international focus on illicit trade/ or trafficking began as an attempt to suppress the existence and growth of criminal organizations. Between 1975 and 2000, the international community worked to identify and proscribe conduct of organized criminal enterprises, which included crimes regarding illicit trade and trafficking.[170] This process culminated in 2000

170. In 1975, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders focused on 'Changes in Forms and Dimensions of Criminality-Transnational and National' which centered on crime as a business and encompassed organized crime, white-collar crime and corruption. Dimitri Vlassis, *Challenges in the Development of International Criminal Law: The Negotiations of the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption, in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 907, 908 (M. Cherif Bassiouni, ed., 3rd ed., 2008) [hereinafter Challenges in the Development of ICL]. Five years later at the Sixth United Nations Congress the focus became crimes committed in such a manner that they would be unlikely to be reported to law enforcement agencies or prosecuted, which included organized crimes, bribery and corruption. *Id.* The Seventh Congress, held in 1985, emphasized crimes committed by international criminal networks and the Eighth Congress further examined criminal networks and the need for international institutions focused on prevention efforts, in 1990. The Eighth Congress recommended that the General Assembly adopt an international instrument as well as a set of guidelines for combating organized crimes. Treaties were: the Model Treaties on Extradition, G.A. Res. 45/116. These continuing efforts lead to the General Assembly's 1991 decision to overhaul its United Nations Crime Prevention and Criminal Justice Programme by disbanding the Committee on Crime Prevention and Control which oversaw the Programme and instead establishing a Commission on Crime Prevention and Criminal Justice. Vlassis, *supra* note 170, at 909.

The Commission held its first session in 1992 and its focus was on increasing state corporation in the efforts combat organized crime and the commission of international crimes. The efforts to codify legislation on organized crime resulted in the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, which emphasized the need for states to cooperate in their efforts against organized crime and was adopted by the General Assembly in 1994. Yet it was not until 1998 that these efforts resulted in the establishment of an *Ad Hoc* Committee on the drafting of an

with the General Assembly's adoption of the Convention Against Transnational Organized Crime and its three protocols: Protocol Against the Trafficking in Persons, Especially Women and Children; Protocol against Smuggling of Migrants by Land, Sea and Air; and Protocol against Illicit Manufacturing of and Trafficking Firearms, Their Parts and Components and Ammunition.[171]

While the adoption of the Convention and its Protocols appeared to be a step forward for combatting illicit trade, in the world of *realpolitik* the codification efforts were once again haphazard. The breadth of the crime of illicit trade or trafficking is so broad that illicit trade encompasses everything from human trafficking to trading in Hermés ties or cigarettes. While human trafficking is often considered to fall under the category of international law regarding slavery and slave-related practices, the codification efforts now also place human trafficking alongside trafficking in stolen or counterfeit goods and crimes that fall under the umbrella of organized crime offenses. This categorization from a human and social values perspective is shocking, but like the majority of the development of the codification of ICL, it results from a lack of policy and guidelines for legislative processes.

The attempt to combat illicit trade or trafficking through codification efforts was also undertaken outside of the organized crime regime. The illicit trade of cultural property,[172] has been codified in five different international instruments from 1954 to 2000, including the Convention Against Transnational Organized Crime.[173] The attempt to combat trafficking in illicit drugs also falls under this regime and was proscribed in a number of different conventions described in section one. Trafficking in obscene materials is proscribed in eight international instruments from 1910 to 1949 and additionally, thirty-two other instruments are

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international convention against organized crime.

171. United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 1 (Nov. 15, 2000) (entered into force Sept. 29, 2003); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 41(Nov. 15, 2000) (entered into force Dec. 25, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 53 (Nov. 15, 2000)(entered into force Jan. 28, 2004); Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, at 69 (May 31, 2001) (entered into force July 3, 2005).

172. Cultural property is property which reflects the cultural heritage of people who claim it as their own. James A.R. Nafziger, *Protection of Cultural Property*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 977 (M. Cherif Bassiouni ed., 3rd ed. 2008).

173. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Cultural Convention]; Convention Against Transnational Organized Crime, *supra* note 171.

applicable to the crime.[174] Trafficking in obscene materials poses a unique issue despite the numerous instruments on the topic in that such instruments do not define a substantive crime. The instruments do not criminalize the production of obscene materials, only their international traffic and therefore effective enforcement is greatly limited when the object of the offense is not punishable, only its transportation.[175]

Illicit trafficking also encompasses trafficking in counterfeit goods and fraudulent medicines, including a wide array of goods such as automotive parts, chemicals and pesticides, electrical components, pharmaceuticals and tobacco.[176] The traffic and sale of these goods are proscribed under the Convention Against Transnational Organized Crime.

Like other developments in the codification of international criminal law, in addition to the lack of science or technique involved, the codification efforts apply almost exclusively to non-state actors.

The trafficking/trade of all the previously mentioned objects and persons fall under the purview of illicit trade but have been proscribed in a number of instruments and with the exception of the Convention Against Transnational Organized Crime, there is very little cohesion in the instruments both within each subject-matter area as well as within the regime of illicit trade or trafficking as a whole. It is certainly shocking from a value-perspective to see human trafficking for sexual exploitation put in the same general category as trafficking in unlawfully branded cigarettes, and to see little differentiation in these crimes that are placed in the same category, notwithstanding the diversity of the human and social interests they address, and the human harm they produce.

While the absence of international legislative policy is particularly evident in the failure to rank crimes on the basis of the human and social values sought to be protected, it is also quite troublesome to see convention after convention use the same phraseology and terms applicable to the two most common means of enforcement namely, extradition and mutual legal assistance with as little specificity as they usually contain.[177] One cannot help by being suspicious of the intentions of the drafters who continuously use *de minimus* descriptions of the most important enforcement means, which has led most states not to rely on these enforcement mechanisms.

Like aggression, the codification process for illicit trade or trafficking highlights the lack of a clear policy-oriented legislative process applicable to the development and codification of international crimes. This *ad hoc* approach has continually allowed *realpoliticians* to place their own goals of wealth and power

174. INTRO TO ICL, *supra* note 7, at 214.

175. *Id.* at 215.

176. United Nations Office on Drugs and Crime, *Focus On: The Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime*, https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf (last accessed Oct. 24, 2016).

177. *See* INTRO TO ICL, *supra* note 7, at 504–05; *see generally* Bassiouni & Wise, *supra* note 167.

ahead of the needs of the international community and world's peoples. Whether this *ad hoc* approach is the intentional work of *realpoliticians* or the unavoidable consequence of the difficult process of criminalizing conduct at an international level, the codification of international criminal law has long strayed from its roots in clearly-defined, subject-matter based Roman legal development. The result has once again favored the interests of states over their populations and allowed *realpolitik* to thrive in the face of any real developments in the codification process. Thus, the question remains as to what path international jurists will continue to follow, the haphazard approach of the past or a science and legislative path of the future.