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Just Say No: The Case Against Expanding the International Criminal Court's Jurisdiction to Include Drug Trafficking

HEATHER L. KIEFER*

I. INTRODUCTION

Currently, those who are responsible for drug trafficking and related offenses cannot be prosecuted in the International Criminal Court (ICC). The ICC is not a court of general jurisdiction; it has jurisdiction only over the offenses enumerated in the Rome Statute.¹ Because drug trafficking is not among the offenses included in the Statute,² it falls outside the Court's subject matter jurisdiction. But the contents of the Rome Statute are not set in stone. The Statute, including its jurisdictional provisions, may be amended at any time "[a]fter the expiry of seven years from the [Statute's] entry into force"³ That date—July 2, 2008—has now arrived. Any state party to the Statute may now propose an amendment.⁴ If the Assembly chooses to consider the proposal, it can either "deal with the proposal directly or convene a Review Conference if the issue involved so warrants."⁵

Indeed, sometime in the first half of 2010, the Assembly will convene a Review Conference in Kampala, Uganda to consider

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1. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 900, 37 I.L.M. 999 [hereinafter Rome Statute].

2. *Id.*

3. *Id.* at art. 121(1).

4. *Id.*

5. *Id.* at art. 121(2).

amendments to the Statute.⁶ The Conference will likely consider, among other things, proposals to expand the Court's jurisdiction to include terrorism and drug trafficking offenses.⁷

Although there are numerous multilateral treaties addressing the issue of drug trafficking, it is debatable whether the global issue of drug trafficking is sufficiently addressed through the current regime or if it should also be incorporated into another multilateral treaty that contains a stronger enforcement mechanism, namely the ICC. Part II of this article examines the current treaty regime that deals with the problem of drug trafficking. Part III discusses the drafting of the Rome Statute and analyzes whether drug trafficking meets the Statute's requirements for being considered an international crime. Part IV then considers whether the Rome Statute should be amended to explicitly include drug trafficking within the Court's jurisdiction and concludes that the Court's jurisdiction should not be expanded to include drug trafficking.

II. THE HISTORY OF INTERNATIONAL LEGAL APPROACHES TO COMBAT DRUG TRAFFICKING

The recognition of drug trafficking as an international concern dates back to the Opium Wars of the mid-nineteenth century⁸ and culminated in the Shanghai Opium Conference of 1909.⁹ The greatest accomplishment of the Shanghai Conference was that it created a global conscience and consensus on the issue of opium trafficking.¹⁰ The effort to suppress the abuse of opium

6. I.C.C. Res. ASP/7/Res. 2, ¶ 1, I.C.C. Doc. ASP/7/2 (Nov. 21, 2008) (“[T]he Review Conference shall be held in Kampala, Uganda, during the first semester of 2010, for a period of five to ten working days, at dates to be established by the Bureau of the Assembly in close consultation with the Government of Uganda . . .”).

7. See David Scheffer, *Blueprint for Legal Reforms at the United Nations and the International Criminal Court*, 36 GEO. J. INT'L L. 683, 700 (2005) [hereinafter Scheffer, *Blueprint for Legal Reforms*]. This is hardly a new development. In 1998, the delegates to the Rome Conference recommended that these two offenses be considered at a review conference even though, at the time, they declined to include drug trafficking in the Statute. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Final Act*, Annex I(E), U.N. Doc. A/CONF.183/10 (July 17, 1998) [hereinafter Conference on the Establishment of an International Criminal Court].

8. See S.K. CHATTERJEE, *LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL* 13-14 (1981).

9. *Id.* at 24.

10. *Id.* at 43.

and other narcotics came with the Hague Opium Convention of 1912.¹¹ The international community continued to convene to address this issue, as evidenced by the two additional Hague Opium Conventions.¹²

The method employed to address the narcotics issue shifted with the formation of the League of Nations. Under Article 23 of the League of Nations Covenant, the League was specifically entrusted with the power to supervise the “execution of agreements with regard to . . . the traffic in opium and other dangerous drugs.”¹³ The inclusion of such a provision demonstrates the shift to an international-institution approach to combating trafficking.¹⁴

In addition, the League of Nations established an advisory committee to secure cooperation and advise the League Council on matters related to drug trafficking.¹⁵ Although the initial role of the committee was to collect and analyze information on the drug trade and encourage compliance with the convention, its role was expanded to encompass formulating policies to suppress drug trafficking and ensure that drug offenders receive severe penalties to prevent safe havens from forming.¹⁶ The existence of this committee, with the primary job of advising the League Council, demonstrates the deference given to the international community to address the problem of drug trafficking. Although the international-institution approach for combating drug trafficking started by the League of Nations ultimately survived the demise of the League, its implementation through the creation of the United Nations (UN) was different.

Under the UN system, the international community no longer relied on centralized, institutional enforcement mechanisms. Instead, the new system addressed the drug problem by using the UN’s ability to facilitate treaty making and monitor compliance.¹⁷ The UN system was forced to utilize this method because, unlike

11. *Id.* at 45. *See also* International Opium Convention pmbl., Jan. 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187.

12. CHATTERJEE, *supra* note 8, at 45, 52.

13. League of Nations Covenant art. 23(c), para. 9(c).

14. This phrase is used to emphasize the fact that, for the first time, states came together and empowered an international institution to combat trafficking as opposed to merely coordinating anti-trafficking measures between states.

15. NEIL BOISTER, PENAL ASPECTS OF THE UN DRUG CONVENTIONS 28-29 (2001).

16. *Id.*

17. *Id.* at 42-43.

the founding document for the League of Nations, the UN Charter does not specifically reference narcotics or the UN's responsibility to combat drug trafficking.¹⁸ The most influential treaties created with the assistance of the UN were the Single Convention on Narcotic Drugs in 1961,¹⁹ the Convention on Psychotropic Substances in 1971,²⁰ and the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988.²¹

The Single Convention on Narcotic Drugs (1961 Single Convention) created rules regarding the agricultural production, manufacture, trade, and consumption of the four different schedules of drugs.²² The UN's role was then to monitor compliance on the part of the parties to the Convention.²³ This method of enforcement put the obligation mainly on sovereign nations rather than on an international institution, which only had an indirect role.²⁴ Additionally, it established the framework for the International Narcotics Control Board (INCB), which is responsible for monitoring the implementation of UN conventions on drug control.²⁵ This method exemplifies how the international institution, in this case the UN, had the role of supervisor rather than primary enforcer or advisor.

Over time, there were significant shifts in the types of drugs being abused.²⁶ These shifts required the international community to implement new rules to control not only narcotic substances, but also psychotropic substances.²⁷ The main international device created to address the growing abuse of psychotropic substances

18. See UN Charter.

19. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204.

20. Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

21. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, U.N. Doc. E/CONF.82/15 (1988), 28 I.L.M. 493 (1989) [hereinafter 1988 UN Convention Against Illicit Drug Traffic].

22. See Single Convention on Narcotic Drugs, *supra* note 19, at arts. 2, 21-32.

23. BOISTER, *supra* note 15, at 43.

24. *Id.*

25. International Narcotics Control Board, Mandate of INCB (2004), <http://www.incb.org/incb/mandate.html>.

26. See, e.g., SARAH W. TRACY & CAROLINE JEAN ACKER, ALTERING AMERICAN CONSCIOUSNESS: THE HISTORY OF ALCOHOL AND DRUG USE IN THE UNITED STATES, 1800-2000 (2004) (documenting trends in American drug usage).

27. BOISTER, *supra* note 15, at 46.

was the Convention on Psychotropic Substances (1971 Psychotropic Convention).²⁸

The 1971 Psychotropic Convention, like the 1961 Single Convention, divided substances into different schedules depending on the risks and dependence-producing potential of each substance.²⁹ Unlike the 1961 Single Convention, however, the 1971 Psychotropic Convention did not limit the cultivation of plants from which the substances were made.³⁰ It did require that parties to the 1971 Psychotropic Convention limit the use of psychotropic substances to medical and scientific uses.³¹ Additionally, the 1971 Psychotropic Convention attempted to control the manufacture and export of such substances by reliance on prohibition, inspection, and licensing.³² In addition to creating a new category of controlled substances, the 1971 Psychotropic Convention was innovative in that, under Article 20, it contained provisions for rehabilitation and social re-integration for drug abusers.³³

The United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 UN Convention) is the most recent, comprehensive, and overarching of the UN treaties on drug trafficking. The preamble of the Convention not only recognizes drug trafficking as “an international criminal activity,” but it also acknowledges the UN’s competence in dealing with this matter.³⁴ Other provisions codified by the Convention were: the requirement of parties to criminalize, under their national legal systems, certain offenses related to drug trafficking; the requirement to cooperate in the investigation and prosecution of such offenses; the requirement to confiscate property, proceeds, and instrumentalities used in drug trafficking; the requirement that parties either extradite or prosecute those offenses that occur in their territory or are committed by their

28. *Id.*

29. Convention on Psychotropic Substances, *supra* note 20, List of Substances in the Schedules.

30. BOISTER, *supra* note 15, at 46.

31. Convention on Psychotropic Substances, *supra* note 20, at art. 5.

32. *Id.* at arts. 8, 13, 15.

33. BOISTER, *supra* note 15, at 47.

34. *Id.* at 57-58; 1988 UN Convention Against Illicit Drug Traffic, *supra* note 21, at 497.

nationals; and the ability to use the Convention as a legal basis for extradition.³⁵

More recently, the UN reaffirmed its commitment to suppressing illicit drug trafficking and increased its efforts toward combating the problem. In 1997, the UN reorganized and reestablished the Office for Drug Control and Crime Prevention (ODCCP) to better address drug trafficking and related crimes.³⁶ Then in 1998, the UN issued a Political Declaration reasserting its commitment to drug control.³⁷ Additionally, it enhanced international cooperation in addressing the problem by implementing programs, like the Container Control Pilot Program, and assisting in the establishment of regional agencies, like the Central Asian Regional Information and Coordination Centre (CARICC) and the Tajikistan Drug Control Agency (DCA).³⁸

This history demonstrates the extensive measures taken by the international community to combat drug trafficking. Currently, however, the UN and its agencies are the only international means of dealing with such a large-scale problem. When drafting the Rome Statute, the international community spent a great deal of time considering whether the ICC should become another international mechanism for combating drug trafficking and related crimes.³⁹

III. DRUG TRAFFICKING AND THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

Currently, the jurisdiction of the International Criminal Court encompasses genocide, crimes against humanity, war crimes, and crimes of aggression.⁴⁰ Given the present contents of the Rome

35. Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 88-89 (2000).

36. The Secretary-General, *Report of the Secretary-General to the General Assembly, Renewing the United Nations: A Proposal for Reform*, 49, U.N. Doc A/51/950 (July 14, 1997).

37. Martin Jelsma, *Drugs in the U.N. System: The Unwritten History of the 1998 United Nations General Assembly Special Session on Drugs*, 14 INT'L J. DRUG POL'Y 181, 181 (2003).

38. United Nations Office on Drugs and Crime, Law Enforcement, <http://www.unodc.org/unodc/en/organized-crime/law-enforcement.html> (last visited Feb. 1, 2009).

39. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 285 (2005).

40. Rome Statute, *supra* note 1, at art. 5.

Statute, the origins and motivation of the effort to establish the International Criminal Court are somewhat surprising. While international tribunals of various sorts existed prior to the creation of the ICC, the ICC itself was initially conceived as a means to combat a crime not previously within the jurisdiction of any international tribunal: drug trafficking.⁴¹ Led by Arthur Robinson, the Prime Minister of Trinidad and Tobago, seventeen Caribbean and Latin American states proposed the idea of an international court with subject matter jurisdiction covering drug trafficking offenses—a proposal the UN General Assembly quickly embraced.⁴²

In 1994, the International Law Commission (ILC) prepared a Draft Statute for an International Court.⁴³ The Annex of the Draft Statute included in the subject matter jurisdiction of the Court crimes under several previous international conventions, including the 1988 UN Convention.⁴⁴ The Draft Statute created a court with broader jurisdiction than the original proponents of the ICC had envisioned,⁴⁵ but the Court's function as an international tribunal to try drug trafficking offenses was nevertheless preserved.

Following the release of the Draft Statute, the General Assembly created the Preparatory Committee on the

41. CRYER, *supra* note 39, at 285; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 226-27 (2001). See also Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1270 (2007); McConville, *supra* note 35, at 90-91; Faiza Patel, *Crime Without Frontiers: A Proposal for an International Narcotics Court*, 22 N.Y.U. J. INT'L L. & POL. 709, 709-10 (1990) (proposing an international court whose subject matter jurisdiction would be limited to drug trafficking).

42. See McConville, *supra* note 35, at 90. Even the United States expressed some support for the idea of an international drug court in the form of the ICC. *Id.* at 90-91. In the end, the United States declined to ratify the Rome Statute, possibly due to objections to the subject matter jurisdiction of the court. See *id.* at 91.

43. See generally Draft Statute for an International Criminal Court, in U.N. Int'l L. Comm'n, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. Doc. A/49/10 (1994):

44. *Id.* at 36.

45. Article 20 of the Draft Statute established jurisdiction for the following crimes: the crime of genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. *Id.* at 16. It further provided jurisdiction for "crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern." *Id.* The Annex of the Draft Statute expressly incorporated the drug trafficking offenses of the 1988 UN Convention Against Illicit Drug Traffic, placing trafficking crimes within the jurisdiction of the Court. *Id.* at 36.

Establishment of an International Criminal Court.⁴⁶ The Committee's main function was to consider and resolve the more controversial points of the Draft Statute.⁴⁷ During the Committee's proceedings, two schools of thought emerged regarding the question of whether to include drug trafficking crimes within the subject matter jurisdiction of the ICC.⁴⁸ On one hand, some delegations argued:

[D]rug trafficking should not be included because these crimes were not of the same nature as those listed in other paragraphs of Article 20 and were of such a quantity as to flood the court; the court would not have the necessary resources to conduct lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements.⁴⁹

The last point was one made emphatically by Kazakhstan, whose delegation expressed the view that the inclusion of trafficking violated the fundamental principle of complementarity.⁵⁰ On the other hand, another group of delegations to the Preparatory Committee "expressed the view that particularly serious drug trafficking offenses which involved an international dimension should be included" because the current regime of controlling and punishing trafficking had serious shortcomings.⁵¹

The literature predating the convening of the Committee also helps to illuminate the reasons for supporting the creation of an international court with subject matter jurisdiction over drug trafficking offenses. To proponents of the inclusion of such offenses within the jurisdiction of an international court, drug trafficking was viewed as international in character, having very serious and harmful effects, and requiring international

46. See McConville, *supra* note 35, at 91-92 (citing Conference on the Establishment of an International Criminal Court, *supra* note 7).

47. See Narayana Rao Rampilla, *Towards Prosecuting the Illicit Drug Traffickers Before the Proposed International Criminal Court—A Challenge Beyond 2000*, in GLOBAL DRUGS LAW 395, 401-02 (D.C. Jayasuriya et al. eds., 1997).

48. *Id.* at 401-02.

49. *Id.* at 402.

50. See KITTICHAISAREE, *supra* note 41, at 226.

51. See Rampilla, *supra* note 47, at 401-02.

cooperation.⁵² These characteristics supported the notion that drug trafficking was an international crime even in the absence of positive law (such as the 1988 UN Convention) establishing its criminality.⁵³ Given the magnitude of the trafficking problem, its perceived status as an international crime, and great discrepancies in the willingness and ability of states to prosecute traffickers, proponents urged the creation of an international court to handle the prosecution of drug crimes.⁵⁴ Proponents believed that such a court was not only eminently desirable, but also feasible.⁵⁵

By 1998, states came to a consensus regarding the subject matter jurisdiction of the ICC. The consensus was on the side of a narrower, more limited jurisdiction that did not include drug trafficking offenses.⁵⁶ Despite that consensus, however, the second version of the Draft Statute, finalized in 1998, still included drug trafficking among the offenses within the Court's jurisdiction.⁵⁷ Although the second Draft Statute was transmitted to the Rome Conference, the final product of the Rome Conference, the Rome Statute of the International Criminal Court,⁵⁸ contained no mention of drug trafficking—neither explicitly nor by incorporation—because there were problems with defining the scope of the offense with an acceptable degree of precision.⁵⁹ There is some measure of irony in this result: the impetus for the movement to create the ICC was the desire to create an international court to try drug traffickers, and yet, the result of that movement, the Rome Statute, deprived the Court of jurisdiction over drug trafficking offenses.

52. See, e.g., Patel, *supra* note 41, at 711-17.

53. *Id.* at 711-12.

54. *Id.* at 709-10.

55. *Id.* at 729-37.

56. Jelena Pejić, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 311-12 (1998). See McConville, *supra* note 35, at 92.

57. International Law Commission, *Draft Statute on the Establishment of an International Criminal Court*, 29, U.N. Doc. A/CONF/183/2/Add/1 (1998). Unlike the earlier version of the Draft Statute, this version contained, within the text of the statute itself, a complicated set of definitions and provisions that would have been included under the article on jurisdiction (i.e., what is now Article 5 of the Rome Statute). The Preparatory Committee included notes throughout the document to guide the delegations at the actual conference. *Id.*

58. See Rome Statute, *supra* note 1.

59. See KITTICHAISAREE, *supra* note 41, at 226-27.

This irony was not lost on those who had started the movement. Trinidad and Tobago, widely cited as the state behind the movement to create the ICC, abstained from voting to adopt the Rome Statute.⁶⁰ It abstained for two reasons. First, as discussed above, the Rome Statute did not expressly provide for jurisdiction over drug trafficking—the very reason Trinidad and Tobago had pushed for an international criminal court.⁶¹ Second, some delegations, including Trinidad and Tobago, wanted the Rome Statute to provide for capital punishment, and the final version of the treaty did not allow for that penalty.⁶² Despite the abstention, however, Trinidad and Tobago became the second state to ratify the Statute.⁶³

Once the Rome Statute entered into force, states that found themselves on the losing end of the jurisdictional battle were still left with two possibilities to achieve their objective of including drug trafficking in the Court's jurisdiction. One possibility was that the states could wait for the Review Conference, at which point the states could push to amend the Statute to include drug trafficking as an offense within the Court's jurisdiction.⁶⁴ The making of this proposal is widely anticipated.⁶⁵ Second, states could espouse the *implied jurisdictional theory* discussed below.

A. *The Status of Drug Trafficking under the Current Statute:
An Implied Theory of Jurisdiction?*

The second possibility for states would not require an amendment to the Statute. Before the Review Conference convenes or in the absence of sufficient support for an amendment, states might espouse the view that crimes currently

60. *Id.* at 227 n.64.

61. Rome Statute, *supra* note 1, at art. 5 (illustrating that drug trafficking, as well as terrorism, and crimes against UN personnel, were not incorporated into the Rome Statute). *See also* KITTICHAISAREE, *supra* note 41, at 226-27 (noting that a majority of the delegations felt that the inclusion of drug trafficking would flood the ICC's docket and create investigatory complications).

62. Rome Statute, *supra* note 1, at art. 77 (providing for imprisonment, fines, and forfeiture, but not capital punishment).

63. *See* KITTICHAISAREE, *supra* note 41, at 227 n.64.

64. *See also* Rome Statute, *supra* note 1, at arts. 121, 123 (Article 121 describes the amendment procedures and requirements and Article 123 states that a review conference is to take place seven years after the statute's entry into force).

65. *See* Scheffer, *Blueprint for Legal Reforms*, *supra* note 7, at 700; David Scheffer, *The Future U.S. Relationship with the International Criminal Court*, 17 PACE INT'L L. REV. 161, 175 (2005).

covered by the Statute implicitly include drug trafficking and related offenses. There is some support for the view that drug trafficking offenses can be read into the Statute despite the deliberate choice of the drafting participants not to include this category in the offenses expressly covered by Article 5. The support for this view comes not from the Rome Conference, but from the deliberations surrounding the ILC Draft Code of Crimes against the Peace and Security of Mankind.⁶⁶

During the Draft Code deliberations, some states expressed the view that drug trafficking should be considered a crime against humanity while others argued that it would be better categorized as a crime against the peace.⁶⁷ The states that advocated for categorization as a crime against humanity were of the view that drug trafficking constituted “an attack on the health of all humanity,” and consequently “ought to be treated as a crime against humanity.”⁶⁸ Those states that advocated drug trafficking as a crime against peace believed that “illicit traffic in narcotic drugs as a crime against peace had a State aspect, either on an internal or on an international plane. It was because it threatened the stability of States or jeopardized international relations that it could be characterized as a crime against peace.”⁶⁹ Some states even argued that drug trafficking should be treated as a crime of aggression.⁷⁰ In those debates, it seems that categorizing drug trafficking as a crime against humanity prevailed. The majority of states agreed that, “in view of its many characteristics, international illicit traffic in narcotic drugs clearly fell within the category of crimes against humanity, since it was directed against all the peoples of the world and its physical result was the destruction of human life in all countries.”⁷¹ This is still the

66. See International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, art. 1, cmt. 4, U.N. Doc. A/51/10 (1996) (noting that the Commission chose not to propose exact definitions for crimes against the peace and security of mankind, but rather left it to practice and further developments in order to determine the exact contours of these concepts).

67. International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Second Session*, ¶ 28, U.N. Doc. A/45/10 (July 20, 1990) [hereinafter *Report of the Forty-Second Session*].

68. *Summary Records of the 2100th Meeting*, ¶ 24 [1989] 1 Y.B. Int'l L. Comm'n 29, U.N. Doc. A/CN.4/SER.A/1989. It should be noted that these comments were made prior to the Rome Conference but after the release of the 1988 Draft Statute.

69. *Report of the Forty-Second Session*, *supra* note 67, ¶ 81.

70. *Id.* ¶ 80.

71. *Id.*

prevalent view in the international community, as evidenced by the following excerpt from the Political Declaration adopted by the 1998 UN General Assembly Special Session on the World Drug Problem:

Drugs destroy lives and communities, undermine sustainable human development and generate crime. Drugs affect all sectors of society in all countries; in particular, drug abuse affects the freedom and development of young people, the world's most valuable asset.⁷²

This is an important debate with respect to the Rome Statute, because only crimes against humanity fall within the jurisdiction of the ICC.⁷³

Under the implied jurisdictional theory, it would be plausible to categorize drug trafficking as a crime against humanity. Specifically, categorizing drug trafficking as such could only be done under Article 7(1)(k), which defines a crime against humanity as: "inhumane acts of a similar character [to those included in 7(1)(a)-(j)] intentionally causing great suffering, or serious injury to body or to mental or physical health."⁷⁴ Those acts must be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."⁷⁵

Yet drug trafficking and its associated crimes fail to meet the basic definition of a crime against humanity for a number of reasons. First, crimes in this category need to be "part either of a governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced in by a government or a de facto authority."⁷⁶

This is not the case for drug trafficking because most, if not all, governments actively legislate against and attempt to suppress drug use and trafficking.⁷⁷ Afghanistan is a prime example. Afghanistan, which supplies 93 percent of the world's opium, has implemented various programs to battle the production and

72. G.A. Res. S-20/2, U.N. Doc. A/RES/S-20/2 (Oct. 21, 1998).

73. Rome Statute, *supra* note 1, at art. 5.

74. Rome Statute, *supra* note 1, at art. 7(1)(k).

75. *Id.* at art. 7(1).

76. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64 (1st. ed. 2003). *See also* Rome Statute, *supra* note 1, art. 7(2)(a).

77. *See generally* CATHERINA GOVIS ROMAN ET AL., ILLICIT DRUG POLICIES, TRAFFICKING, AND USE THE WORLD OVER (Lexington Books 2005).

distribution of opium, the primary ingredient in heroin.⁷⁸ On January 17, 2002, the Afghan Interim Authority under acting president, Hamid Karzai, issued a decree banning opium poppy cultivation, heroin production, opiate trafficking, and drug use.⁷⁹ Since 2005, the Afghan government has eradicated nineteen thousand hectares of opium poppy.⁸⁰ Although this is only a small percentage of the opium poppy that is being grown in Afghanistan, and these efforts may ultimately prove counterproductive to combating trafficking, they at least demonstrate the commitment of the Afghan government to fighting drug trafficking.⁸¹ Additionally, Afghanistan is working with the international community to prevent the production of drugs. Specifically in 2003, Afghanistan worked with the United States, United Kingdom, and UN Office of Drugs and Crime to draft a national drug control strategy.⁸² The Afghan government has also utilized the resources provided by various nations including Germany, the United Kingdom, and the United States to train tens of thousands of police to contribute to the anti-narcotics effort.⁸³ All of these actions support the notion that drug trafficking is often not—and certainly is not in the case of Afghanistan—a “government policy,” or a policy supported by the government, as is required for a crime against humanity.

At the same time, in other states, such as Colombia, an argument can be made that drug trafficking and related crimes are a widespread practice perpetuated by *de facto* authorities. Although the Rome Statute contemplates that attacks may be carried out pursuant to a “State or organizational policy,”⁸⁴ commentators have interpreted this language as requiring action by the state or a *de facto* authority, not just any organization.⁸⁵ In Colombia, the Revolutionary Armed Forces of Colombia (FARC)

78. Christopher M. Blanchard, *Afghanistan: Narcotics and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, Dec. 6, 2007, at 1, available at <http://www.fas.org/sgp/crs/row/RL32686.pdf>.

79. *Id.* at 24.

80. *Id.* at 33.

81. Though the government supports the counternarcotics effort officially, there have been suggestions that widespread corruption in the Afghan government has served to protect, or even promote, the drug trade. See, e.g., James Risen, *Reports Link Karzai's Brother to Afghanistan Heroin Trade*, N.Y. TIMES, Oct. 4, 2008, at A1.

82. Blanchard, *supra* note 78, at 24.

83. *Id.* at 26.

84. Rome Statute, *supra* note 1, at art. 7(2)(a).

85. CASSESE, *supra* note 76, at 64.

might be viewed as a de facto authority based on the government's tactics to negotiate with them, the amount of land and resources they control, and the government's ceding of territory to the group under the Pastrana administration.⁸⁶ The FARC is thought to be responsible for more than half of the cocaine entering the United States.⁸⁷ And the money obtained from this criminal enterprise is used to fund the FARC's other activities, including military operations.⁸⁸ Thus, it can be argued that the FARC, a de facto authority, does indeed condone and acquiesce in drug trafficking as a widespread practice.

On the other hand, the actual government of Colombia, which is the only internationally recognized authority, is vigorously combating drug production in Colombia. This has been evidenced by the interdiction of almost seven hundred metric tons of cocaine, coca base, and heroin between 2004 and 2007 by Colombian security forces.⁸⁹ Even if the FARC could be considered a de facto power that tolerated, condoned, or acquiesced in drug trafficking, it would still not meet the "odious offenses" threshold language used by Judge Cassese,⁹⁰ or the terminology of the Rome Statute, both of which are typical requirements for crimes against humanity.

The Rome Statute specifically uses the phrase "attack directed against any civilian population" to define actions that fall within the definition of crimes against humanity.⁹¹ Drug trafficking, which encourages drug use and abuse, does not fall within the definition of the phrase under the Statute. The Statute's definition of the phrase requires "a course of conduct involving the multiple commissions of acts referred to in [Article 7] paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."⁹²

A problem arises due to the reference to paragraph 1, which does not include any acts that are implicated by drug trafficking. The closest provision is in subparagraph (k), which includes acts that "intentionally caus[e] great suffering, or serious injury to body

86. U.S. Dep't of State, *Background Note: Colombia*, <http://www.state.gov/r/pa/ei/bgn/35754.htm> (last visited Feb. 1, 2009).

87. *Id.*

88. ROMAN, *supra* note 77, at 68-69.

89. U.S. Dep't of State, *supra* note 86.

90. CASSESE, *supra* note 76, at 64.

91. Rome Statute, *supra* note 1, at art. 7(1).

92. *Id.* at art. 7(2)(a).

or to mental or physical health.”⁹³ Judge Cassese characterizes these types of crimes (i.e., crimes against humanity) as “particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings.”⁹⁴ Drug traffickers are trafficking with the intention of making money, not harming civilians. Thus, drug trafficking does not meet the intent requirement set forth in the Rome Statute. Further, under Cassese’s interpretation, drug trafficking does not meet the odiousness requirement. Drug trafficking is a serious problem, but it does not violate fundamental human rights in the way that other crimes against humanity do. Because of these characteristics, drug trafficking does not fall within the Rome Statute’s definition of a crime against humanity.

Despite the attractiveness of an implied jurisdictional theory to those who wished for a court with more expansive jurisdiction, there have been no attempts to test these arguments through the commencement of a prosecution under the theory. Should such a prosecution arise, however, it will be important to return to the history of the Draft Articles debates.

IV. THE CASE AGAINST THE CREATION OF A NEW OFFENSE UNDER THE STATUTE

In the interim, the more pressing question is whether the Review Conference should consider amending Article 5 to expand the Court’s jurisdiction so that it includes drug trafficking offenses. It is still useful to refer back to the Draft Articles debates to determine if there is an actual consensus among states as to whether drug trafficking offenses rise to the same level of severity as the other types of prosecutions over which the ICC has jurisdiction. Examining those debates, the existence of any consensus is doubtful. Even if there was a consensus then, it would not necessarily prevail if the outcome would run contrary to the consensus reached by the Rome Conference, which deliberately omitted drug trafficking offenses from Article 5. Further, any consensus must be balanced against the myriad of political and administrative problems that would arise if we were to create a

93. *Id.* at art. 7(1)(k).

94. CASSESE, *supra* note 76, at 64.

more expansive and more ambitious ICC. These concerns are discussed in greater detail below.

A. Cultural Differences Regarding Drug Use

Drugs have been used throughout history by various cultures for various purposes. Archaeological evidence suggests that as far back as 2000 B.C., opium was used in Cyprus, Crete, and Greece for various ritualistic purposes.⁹⁵ In Colombia, indigenous cultures such as the Muisca have used the coca leaf, the main ingredient in producing cocaine, for many rituals and as a means of healing various ailments.⁹⁶ Although these examples may suggest that cultural uses of drugs are a thing of the past, the Netherlands provides a prime example of how drugs, specifically marijuana, have become a part of modern cultures as well. Since 1976, Amsterdam has been notable for its relaxed restrictions on marijuana possession within its coffee shops and coffee-shop culture.⁹⁷ Portugal provides another example of liberal drug laws. Portugal decriminalized drug use, possession, and acquisition for both "casual users" and addicts as of July 1, 2001.⁹⁸ Even states that do not accept cultural uses of drugs permit certain drugs for medicinal uses. Parts of Europe and certain American states, such as California, allow for the medicinal use of marijuana.⁹⁹

These differences in drug policies between states underscore the problems that arise when trying to determine which drugs should be illegal and under what circumstances. Different states have different views about how each substance ought to be regulated, and these different views imply discrepancies concerning the severity of drug trafficking offenses, if such activities are criminalized at all.¹⁰⁰ This could severely impinge on

95. CHATTERJEE, *supra* note 8, at 3.

96. Gloria Helena Rey, *Columbia: The Chibcha Culture—Forgotten, But Still Alive*, Inter Press Service, Nov. 30, 2007, <http://ipsnews.net/news.asp?idnews=40290> (last visited Feb. 1, 2009).

97. ROMAN, *supra* note 77, at 116.

98. U.S. Drug Enforcement Administration, *Portugal: Decriminalization of All Illicit Drugs*, <http://www.usdoj.gov/dea/ongoing/portugal.html> (last visited Feb. 1, 2009).

99. U.S. Department of Justice, *Speaking Out Against Legalization*, May 2003, <http://www.usdoj.gov/dea/demand/speakout/index.html>.

100. Countries may of course regulate the import and export of narcotics without attaching criminal sanctions to violations of those regulations. Countries adopting a regulatory model—rather than a prohibition model—would likely not support the view that trafficking in regulated substances is a crime of grave concern to the international community.

the consensus that is needed to create treaties and regulations on drug trafficking. The problem is exaggerated with respect to the ICC because so much more is at stake. States may feel compelled not to be a party—or opt out of a previous commitment—to the Rome Statute because of disagreements over drug trafficking provisions, despite their agreement with other provisions of the Statute. Lack of consensus on drug trafficking could jeopardize the prosecution of crimes against humanity, genocide, war crimes, and crimes of aggression currently under the jurisdiction of the ICC.

Cultural differences not only present obstacles to consensus, but also to establishing a key element of international criminal law: double criminality. Double criminality is “[t]he punishability of a crime in both the country where a suspect is being held, and a country asking for the suspect to be handed over to stand trial.”¹⁰¹ Generally, in order for a state to be willing to extradite a national, as required by the 1988 UN Convention and 1961 Single Convention, states require that the offense for which its national is being extradited is a crime under their domestic law.¹⁰² Often, differing fiscal and economic structures prevent drug trafficking crimes from meeting the double criminality threshold.¹⁰³ The state of nationality may not legally be able to prosecute the individual because the individual did not violate any laws and the state may refuse to extradite its nationals for an action the state does not deem a crime.

B. Punishment Differences

The vague language of treaties exacerbates the dilemma caused by variations in culture and drug trafficking penalties. There are large discrepancies in the punishments that countries implement for drug trafficking violations. These discrepancies are based on three major policy differences: (1) the classification of different drugs by seriousness and quantity; (2) the nature of penalties imposed; and (3) the primary goal of the state’s drug policy.

Due to their dissimilar histories, each country has a unique perspective on which drugs should be allowed and in what

101. BLACK’S LAW DICTIONARY 528 (8th ed. 2004) (definition of “double criminality”).

102. 1988 UN Convention Against Illicit Drug Traffic, *supra* note 21, at art. 6.

103. See Patel, *supra* note 41, at 728.

amounts. For example, the United States,¹⁰⁴ the Netherlands,¹⁰⁵ Italy, and Thailand¹⁰⁶ categorize drugs by their level of potential harm.¹⁰⁷ The penalty for trafficking in these countries thus depends on the classification of the drug that is being trafficked. In the Netherlands, for example, the maximum penalty for international trafficking of hard drugs such as heroin, cocaine, amphetamines, and LSD is twelve years imprisonment.¹⁰⁸ Trafficking soft drugs, on the other hand, such as hashish or marijuana, when not part of an organized crime group, can result in a maximum penalty of only two years imprisonment and a fine.¹⁰⁹

In some states, the quantity of drugs trafficked and whether there is an association with an organized crime group are factors in determining the severity of the penalty. In some states, these two factors are considered to be aggravating circumstances that warrant increased penalties. For example, in the Netherlands, the prison sentence can be extended by up to three years if the offender is part of an organized crime group.¹¹⁰ Similar factors are considered in Slovakia and Germany, where the prison sentence can be extended by fifteen years based on these factors.¹¹¹ In Latvia, the prison term can be extended from ten years to thirteen years if large amounts of drugs are being trafficked.¹¹² In other states, these two factors are the exclusive determinants of trafficking penalties, and drug classifications are irrelevant. This is the case in Italy, where penalties are determined based solely on the amount of drugs trafficked and whether the trafficker is a member of an organized criminal enterprise.¹¹³ These examples

104. ROMAN, *supra* note 77, at 24-26.

105. ROMAN, *supra* note 77, at 116.

106. ROMAN, *supra* note 77, at 187-88.

107. See also European Monitoring Centre for Drugs and Drug Addiction, *Coordination Mechanisms In the Field of Drugs*, <http://profiles.emcdda.europa.eu/html.cfm/index19701EN.html#nlaws> (Italy).

108. ROMAN, *supra* note 77, at 116.

109. *Id.*

110. *Id.* at 116.

111. European Monitoring Centre for Drugs and Drug Addiction, *Country Situation Summaries: Slovakia*, Feb. 1, 2007, <http://profiles.emcdda.europa.eu/html.cfm/index19737EN.html#nlaws>; European Monitoring Centre for Drugs and Drug Addiction, *Country Situation Summaries: Germany*, Jan. 31, 2007, <http://profiles.emcdda.europa.eu/html.cfm/index19685EN.html#nlaws>.

112. European Monitoring Centre for Drugs and Drug Addiction, *Country Situation Summaries: Latvia*, Jan. 31, 2007, <http://profiles.emcdda.europa.eu/html.cfm/index19707EN.html#nlaws>.

113. ROMAN, *supra* note 77, at 105.

illustrate the fact that states differ both as to which drugs are the most severe and, perhaps more significantly, whether a classification system should be used at all to determine trafficking penalties.

Additionally, there are discrepancies over which penalties should be administered for drug trafficking, regardless of the drug classification. Drug trafficking penalties range from fines and imprisonment to the death penalty. Countries that imprison offenders for drug trafficking include Colombia,¹¹⁴ Costa Rica,¹¹⁵ the Netherlands,¹¹⁶ Poland,¹¹⁷ and Israel.¹¹⁸ On the lower end, the Netherlands imposes a two-year prison sentence for trafficking soft drugs.¹¹⁹ For the same offense, Poland imposes a fine and deprivation of liberty for up to a maximum of five years.¹²⁰ In the middle of the range, Colombia and the Netherlands (for traffickers of hard drugs) sentence traffickers to a maximum of twelve years imprisonment.¹²¹ Costa Rica,¹²² Austria,¹²³ and Israel¹²⁴ have maximum prison sentences of twenty years for drug trafficking. Some countries, including Israel, also impose fines in conjunction with imprisonment. In Israel, these fines can amount to as much as \$908,000.¹²⁵

In other states, particularly those in Africa, drug trafficking punishment follows a different methodology. For example, in Nigeria, the legal system does not provide for jury trials or plea-bargaining.¹²⁶ Instead, traditional dispute resolution mechanisms are often used to impose sentences.¹²⁷ As a result, Nigeria falls outside the traditional punishment framework—typically,

114. *Id.* at 69.

115. *Id.* at 78.

116. *Id.* at 116-17.

117. *Id.* at 134.

118. *Id.* at 158.

119. *Id.* at 116-17.

120. European Monitoring Centre for Drugs and Drug Addiction, *Country Situation Summaries: Poland*, Aug. 6, 2007, <http://profiles.emcdda.europa.eu/html.cfm/index19728EN.html#nlaws>.

121. ROMAN, *supra* note 77, at 69, 116.

122. *Id.* at 78.

123. European Monitoring Center for Drugs and Drug Addiction, *Drug Situation, Country Overviews: Austria*, Sept. 26, 2008, <http://www.emcdda.europa.eu/publications/country-overviews/at#nlaws>.

124. ROMAN, *supra* note 77, at 159.

125. *Id.*

126. *Id.* at 204.

127. *Id.*

imprisonment and fines—employed by the majority of countries. In addition, some drug trafficking punishment regimes include the use of corporal punishment. Iran, for example, penalizes drug trafficking with fines and lashes.¹²⁸

Some countries are more severe and impose the death penalty for drug trafficking. While Trinidad and Tobago supports capital punishment for trafficking and other offenses,¹²⁹ many other nations do not and the Rome Statute currently does not provide for capital punishment as a penalty.¹³⁰ In 1995, twenty-six countries allowed capital punishment as a penalty for drug trafficking.¹³¹ Notable in this statistic is the fact that the number is not limited to less developed countries or certain cultures; the countries represented in this statistic are fairly diverse in terms of economic development and culture. Fifteen of the countries that provide for capital punishment in drug trafficking crimes are in Asia, ten are in the Middle East and North Africa, and one is in North America—the United States.¹³² Although capital punishment is supported in a significant number of states, some of those states do not provide for capital punishment for drug trafficking.¹³³ Thus, even where punishment ideologies are similar, states impose a variety of punishments for drug trafficking. The differences in punishments can be attributed largely to the different priorities of each state with regard to their drug policies.

Just as states differ in their foreign policy agendas, they also differ in their national drug strategies. The differences in these national strategies are one factor that states use to determine which penalties should be imposed for drug trafficking offenses. The national drug policy of some states is based around a public health model. The Netherlands, which embraces a public health model, has less severe punishments.¹³⁴ The punishments are a result of the state's focus on treatment and rehabilitation as the

128. *Id.* at 155.

129. *See supra* Part II.

130. *See supra* note 62 and accompanying text.

131. Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 530 (1997).

132. *Id.* at 530-31. A recent Supreme Court decision striking down the death penalty for child rape left open the possibility that the imposition of the death penalty for certain drug trafficking offenses is constitutional. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (“We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State.”).

133. Hood, *supra* note 131, at 530-31.

134. ROMAN, *supra* note 77, at 119.

best method to combat drugs and rejection of the notion that strict penalties will prevent drug use and trafficking.¹³⁵ Other countries, including Australia¹³⁶ and Ireland,¹³⁷ focus their resources on harm reduction. The goal of harm reduction is to minimize the damage to both the individual and society caused by drugs.¹³⁸ States that view drug trafficking as against their moral or religious values have the most severe punishments. This is often the case in countries where religion and law are intertwined, as in Iran, where penalties for drug trafficking include both corporal punishment and the death penalty.¹³⁹

C. *The Problem of Complementarity*

Another complication created by the proposal to add the offense of drug trafficking to the Rome Statute as a separate jurisdictional category stems from the concept of complementarity. Some have argued that ICC jurisdiction over drug trafficking would support the principle of complementarity, articulated in the preamble and Article 1 of the Rome Statute.¹⁴⁰ Article 1 states: “[The Court] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”¹⁴¹ With respect to drug trafficking, if a country did not prosecute or extradite an offender, the ICC could prosecute that offender. The principle of complementarity when applied to drug trafficking, however, presents numerous problems.

First, the jurisdiction of the ICC does not extend to nationals of non-signatory states as long as those persons remain in the territory.¹⁴² As a result, offenders from some countries would not be prosecuted while offenders from other, signatory states are held responsible. This sends an inconsistent notion of justice to the

135. *Id.*

136. *Id.* at 215.

137. European Monitoring Centre for Drugs and Drug Addiction, *Country Situation Summaries: Ireland*, Feb. 1, 2007, <http://profiles.emcdda.europa.eu/html.cfm/index19698EN.html#nds>.

138. *Id.*

139. ROMAN, *supra* note 77, at 154.

140. McConville, *supra* note 35, at 94.

141. Rome Statute, *supra* note 1, at art. 1.

142. *Id.* at art. 12.

international community and weakens the argument that ICC jurisdiction will provide a strong deterrent for drug traffickers.¹⁴³

The second complication is the possible infringement of state sovereignty. The United States provides an apt example of this complication. In the United States, the intelligence community, which is responsible for investigating drug trafficking, has a responsibility to protect its sources and methods used to gather intelligence.¹⁴⁴ In order for the ICC to determine if a state is "unwilling or unable genuinely to carry out the investigation or prosecution,"¹⁴⁵ a requirement for complementarity, the United States might have to provide information likely to compromise the intelligence community's sources and methods. In so doing, it would be giving up its sovereign right and self-imposed responsibility to protect its sources and methods of gathering intelligence.¹⁴⁶

Another problem with the principle of complementarity with respect to drug trafficking stems from the requirements of the 1988 UN Convention¹⁴⁷ and 1961 Single Convention¹⁴⁸ that a state either prosecute a drug trafficking offense or extradite the offender to another requesting state. The Conventions' terminology only necessitates that the state abide by the prosecute-or-extradite requirement if the offense is "serious."¹⁴⁹ Although this language provides a safety mechanism to prevent politically or racially motivated prosecutions, it also provides a loophole with regard to local prosecutions, extradition, and ICC jurisdiction. In some instances, a state may not prosecute or extradite an offender if the crime is not sufficiently serious.¹⁵⁰ In addition, the ICC may not have jurisdiction if the state could provide convincing evidence that the crime is not serious.¹⁵¹ Thus, it is possible that a state can prevent prosecution both to another country and to an

143. McConville, *supra* note 35, at 95-96.

144. Exec. Order No. 12,333, 3 C.F.R. 200, 203 (1982).

145. Rome Statute, *supra* note 1, art. 17(1)(a).

146. Exec. Order No. 12,333, *supra* note 144, at 203.

147. 1988 UN Convention Against Illicit Drug Traffic, *supra* note 21, at art. 6(9).

148. Single Convention on Narcotic Drugs, *supra* note 19, at art. 36(2).

149. Patel, *supra* note 41, at 720.

150. *Id.*

151. See Rome Statute, *supra* note 1, at art. 5. ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. . ."). See also *id.* at art. 17 (the Court shall determine that a case is inadmissible where "[t]he case is not of sufficient gravity.").

international tribunal. This too would lead to inconsistent notions of justice.

D. Insufficient Resources

One of the most persuasive arguments for not allowing the ICC to have jurisdiction over drug trafficking cases is the lack of ICC resources. There are approximately one hundred sixty million cannabis users and, in 2005, global cannabis herb production was estimated at forty-two thousand metric tons.¹⁵² There are approximately sixteen million opiate users, and in 2006, two hundred one thousand hectares were being used for illicit opium poppy cultivation.¹⁵³ In 2005, there were 13.4 million consumers of cocaine and nine hundred eighty tons of potential cocaine production.¹⁵⁴ These large numbers regarding both the consumption and production of illicit drugs emphasize the epidemic nature of drug use and trafficking. These figures also suggest that the resources required to fight the epidemic must be vast.

One of the main obstacles for the ICC would be evidence gathering. Cannabis alone is cultivated in 172 countries and territories.¹⁵⁵ In order to collect the evidence needed for prosecution, the ICC would have to undertake the expensive and time-consuming task of sending investigators around the globe. Mahnoush Arsanjani, the Director of the Codification Division of the UN's Office of Legal Affairs, points out that the evidence-gathering obstacles shaped the development of the Rome Statute's jurisdictional provisions:

The opposition [to including drug trafficking] was based on the fact that the nature of investigating the crimes of drug trafficking and terrorism, which requires long-term planning, infiltration into the organizations involved... makes them better suited for national prosecution.¹⁵⁶

152. Seventeenth Meeting of Heads of National Drug Law Enforcement Agencies, Latin America and the Caribbean, Quito, Ecuador, Oct. 15-19, 2007, *Statistics on Drug Trafficking Trends in Americas and Worldwide*, 4-5, U.N. Doc. UNODC/HONLAC/2007/CRP.1 (Aug. 2, 2007).

153. *Id.* at 6.

154. *Id.* at 8.

155. *Id.* at 4.

156. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 29 (1999).

There are good reasons to think these perceptions were, and are correct. In 2005, the ICC budget totaled approximately €69,564,000¹⁵⁷ or \$86,634,310 at then-prevailing exchange rates.¹⁵⁸ In contrast, the United States appropriated \$2.141 billion dollars to its Drug Enforcement Agency in 2005 alone.¹⁵⁹ Some might argue that this demonstrates that states need to dedicate more resources to the ICC as well as other international institutions. But the gap between the investigative expenditures of international institutions and states is so large that it is hard to imagine that the latter would be willing, or could even afford, to dedicate similar resources to the ICC. Moreover, if states completely ceded their investigative role to the ICC, it would render the principle of complementarity irrelevant.

V. CONCLUSION

The problem of drug trafficking is dealt with in part through the comprehensive treaty regime currently in place. In spite of this regime and other efforts to coordinate anti-trafficking measures between states, drug trafficking remains a constant threat to both developed and developing states. Under the Rome Statute, however, the existence of a wide-scale problem is not sufficient to vest in the ICC jurisdiction over the offense. Specific provisions must instead, provide for the Court's jurisdiction over particular categories of offenses. This article has demonstrated that, even under a broad reading of the Statute's jurisdictional provisions, no such provision is included, either explicitly or by reasonable inference.

At the same time, the Statute can be changed. Despite the superficial attraction of including additional offenses within Article 5, however, the Review Conference should refrain from doing so. Debates over the Statute itself and the Draft Code show

157. International Criminal Court Assembly of State Parties, Third Session, The Hague, Neth., Sept. 6-10, 2004, *Draft Programme Budget for 2005*, Document ICC-ASP/3/2 (July 12, 2004).

158. The dollar figure was arrived at using the yearlong average of the interbank exchange rate between the two currencies. See OANDA, FXHistory: Historical Currency Exchange Rates, http://www.oanda.com/convert/fxhistory?lang=en&date1=01%2F01%2F05&date2=12%2F31%2F05&date_fmt=us&exch=EUR&exch2=&expr=USD&expr2=&margin_fixed=0&&SUBMIT=Get+Table&format=HTML&redirected=1 (last visited Feb. 1, 2009).

159. U.S. Drug Enforcement Administration, DEA Staffing & Budget, <http://www.usdoj.gov/dea/agency/staffing.htm> (last visited Feb. 1, 2009).

that there is no real consensus over whether drug trafficking offenses rise to the same level of severity as the other offenses currently included in Article 5. With no consensus on the subject, the inclusion of the offense would ignore the significant differences in cultural attitudes toward drug use and trafficking, as well as the appropriate punishment for such offenses. Moreover, the investigation of drug trafficking is complex and expensive. Beyond these practical challenges, the inclusion of drug trafficking threatens to devalue one of the Court's fundamental principles: complementarity. These problems, taken together, could create insurmountable obstacles for a court trying to establish its institutional competence and legitimacy.

