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CHALLENGES AHEAD FOR THE UNITED NATIONS PREPARATORY COMMITTEE DRAFTING A STATUTE FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

It is now more than half a century since the trial of Axis leaders for crimes against peace, war crimes and crimes against humanity opened before the International Military Tribunal at Nuremberg on November 20, 1945. Hopes that this would usher in a new era in which national courts would bring people to justice for such crimes have been dashed. Only a handful of people have been brought to justice for the millions of crimes against humanity and serious violations of humanitarian law committed since the end of the Second World War.[1] Neither states where these crimes have occurred nor states where persons suspected of such crimes have taken refuge have been able or willing to fulfill their responsibility to bring suspects to justice in trials which were neither unfair nor shams designed to shield those responsible. The inability or unwillingness of states to bring those responsible for such crimes committed in former Yugoslavia and Rwanda to justice led the Security Council to establish the *ad hoc* tribunals for former Yugoslavia in 1993 and for Rwanda in 1994.[2] Such *ad hoc* tribunals, however, are only stop-gaps pending the establishment of a permanent international criminal court.

In implicit recognition of the failure of the system of national prosecutions for such crimes and the limitations of *ad hoc* tribunals, the United Nations (UN) General Assembly decided on December 11, 1995 during its fiftieth anniversary session to establish a Preparatory Committee to draft a statute for a permanent international criminal court.[3] The statute is to be based on the 1994 draft statute prepared by the International Law Commission (ILC), the work of the Ad Hoc Committee on the Establishment of an International Criminal Court in 1995 and comments by non-governmental organizations.[4] The Preparatory

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[1] A number of states have initiated investigations or prosecutions for acts committed in their territories or elsewhere, based on universal jurisdiction, since the Second World War which were serious violations of humanitarian law or were grave human rights violations or abuses of a systematic or widespread nature possibly amounting to crimes against humanity. Only a handful of states have investigated or prosecuted officials of the government in power, including Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the United States. The bulk of the investigations and prosecutions, however, have not involved a direct threat to the current government. For example, a private citizen was convicted in 1994 in Brazil of genocide committed in 1963. A few states have exercised universal jurisdiction over persons suspected of having committed crimes in other states with a view to prosecution in their own courts, including Austria, Belgium, Canada and Denmark, or with a view to transfer to an international tribunal, including Belgium, Bosnia and Herzegovina, France, Germany, Kenya, the Netherlands, Switzerland, Zaire and Zambia. The majority of states began investigations or prosecutions only after a new government took office, including Argentina, Bolivia, Cambodia, Central African Republic, Cuba, Equatorial Guinea, Ethiopia, Germany, Greece, Honduras, Latvia, Republic of Korea, Rwanda and South Africa, or after victory in war, such as India and Kuwait. In most of these states, however, only a small percentage of the total number of potential suspects have ever been investigated or prosecuted. Moreover, investigations or prosecutions have been interrupted or prevented by amnesty laws or peace agreements in many states, such as Argentina, Brazil, Chile, Croatia, El Salvador, Haiti, Honduras, Liberia, Nicaragua, Peru, South Africa, Suriname and Uruguay. Moreover, many of the proceedings have fallen short of international standards or amounted to sham trials.

[2] The Security Council established the International Criminal Tribunal for the former Yugoslavia [hereinafter Yugoslavia Tribunal] on May 25, 1993. SC Res. 827 (1993). The Statute of the Yugoslavia Tribunal is annexed to Resolution 827 [hereinafter Yugoslavia Statute]. On 8 November, 1994, the Security Council established the International Criminal Tribunal for Rwanda [hereinafter Rwanda Tribunal]. SC Res. 955 (1994). The statute of the Rwanda Tribunal [hereinafter Rwanda Statute] is annexed to Resolution 955.

[3] GA Res. 50/46 (Dec. 11, 1995).

[4] The 1994 draft statute and the ILC Commentary are found in Report of the International Law Commission on the work of its forty-sixth session 2 May - 22 July 1994, 49 UN GAOR Supp. (No.10) paras 23 -91, UN Doc.

Committee is to complete its work in two sessions (March 25 to April 12 and August 12 to 30, 1996) and report to the General Assembly at its fifty-first session beginning in September 1996. At that session, the General Assembly is to decide on the convening of an international conference of plenipotentiaries "to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and duration of the conference".[5] Italy has offered to be the host for such a diplomatic conference, and a substantial number of states have urged that the conference take place no later than 1997. With sufficient political will, it is conceivable that the conference could complete the work of drafting a treaty incorporating a statute for a permanent international criminal court in 1997 and that a sufficient number of states could ratify the treaty for it to enter into force as early as 1998.

It remains to be seen whether the force of international public opinion can instill sufficient political will in governments to set up a court by this date. The result of the last attempt nearly half a century ago by the General Assembly to establish a permanent international criminal court suggests that this is not a foregone conclusion.[6] Nevertheless, there are a number of encouraging factors today which were not present in the early 1950's. First, the 1994 draft statute is far better than the draft statutes considered by the General Assembly in 1951 and 1953. It provides for a court to be established by treaty with three independent branches, jurisdiction over the gravest crimes under international law and a number of important fair trial guarantees. It also excludes the death penalty. The preparation of the statute by the ILC Working Group in only two sessions was a remarkable achievement which lays a solid foundation for future work by the Preparatory Committee.[7] Second, the failure of states to bring to justice significant numbers of persons suspected of genocide, other crimes against humanity or serious violations of humanitarian law committed in the four decades since 1953 has convinced many states that a permanent international criminal court is necessary. Indeed, in contrast to the debate in the Sixth Committee in 1951 and 1953, most states - including the United States for the first time - during the debate in the Sixth Committee in 1995 supported the establishment of a permanent court, although they disagreed about

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A/49/10 (1994). For summaries of the discussions in the Ad Hoc Committee and the Sixth Committee of the General Assembly in 1995 on the court, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50 UN GAOR Supp. (No. 22), UN Doc. A/50/22 (1995) and *The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AJIL (forthcoming) (1996). It is to be hoped that the Preparatory Committee will invite staff of the three branches of *ad hoc* tribunals to attend its sessions so that it can benefit from their practical experience in addressing many of the same problems the court will face and that it will not yield to pressure from certain governments seeking to exclude representatives of non-governmental organizations.

[5] GA Res. 50/46 (Dec. 11, 1995).

[6] The General Assembly first asked the ILC to study the possibility of establishing a permanent international criminal court on December 9, 1948. GA Res. 260 (III). The ILC studied this question at its 1949 and 1950 sessions and concluded that such a court was desirable and possible. Report of the International Law Commission covering its Second Session 5 June - 29 July 1950, 5 UN GAOR Supp. (No. 12) at para. 140, UN Doc. A/1316 (1950). Two successive Committees on International Criminal Jurisdiction appointed by the General Assembly submitted reports to that body with draft statutes for such a court in 1951, 7 UN GAOR Supp. (No. 11, UN Doc. A/2136 (1952), and 1953, 9 UN GAOR Supp. (No. 12), UN Doc. A/2625 (1954), but no further action was taken by the General Assembly.

[7] For a brief description of the 1994 draft statute and a cautiously optimistic assessment of its prospects, see James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AJIL 404 (1995).

many aspects of the 1994 draft statute.[8] Third, the progress the *ad hoc* tribunals have achieved so far, despite the many obstacles in their paths, demonstrate that an international criminal court can work, provided that it receives adequate resources and sufficient cooperation from states.[9] Fourth, many governments recognize that a permanent court would be more satisfactory than a series of *ad hoc* tribunals established by the Security Council. The Security Council is a political body which has established such tribunals in only two situations. Since it has the power to rescind its resolutions at any time, bodies created by Security Council resolutions have no security of tenure.

Nevertheless, dangers do lie ahead. Despite the broad support for the establishment of a permanent court of some sort, many governments at the Ad Hoc Committee and the Sixth Committee advocated changes in the 1994 draft statute which would weaken the court. The Preparatory Committee, however, needs to strengthen that draft significantly in many respects to ensure that the court will be just, fair and effective. Amnesty International published an extensive analysis of the strengths and weaknesses of the 1994 draft statute in October 1994.[10] Rather than repeat those points here, only four aspects of the 1994 draft statute, which are critical to its ability to complement national courts effectively, are briefly addressed below: (1) initiation of investigations and prosecutions, (2) the power of the court to ensure states bring to justice suspects or transfer them to the court when they are unable or unwilling to do so, (3) definitions of core crimes and principles of criminal liability and (4) fair trial guarantees.

I - THE PROSECUTOR SHOULD BE ABLE TO INITIATE INDEPENDENT INVESTIGATIONS AND PROSECUTIONS

A common theme which emerged in government statements in the Ad Hoc Committee and the Sixth Committee was that the court should complement, not supplant, national courts, which had the

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[8] On October 15, 1995, President Clinton stated: "This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg - a permanent international criminal court to prosecute such violations. And we are working today at the United Nations to see whether it can be done." Remarks by the President at the Opening of the Commemoration of "50 Years after Nuremberg: Human Rights and the Rule of Law", University of Connecticut, Storre, Connecticut, 15 Oct. 1995.

[9] The number of states which have contributed staff, equipment and funds and practical cooperation in terms of gathering evidence and arresting or transferring suspects to the tribunals is slowly starting to increase. Nevertheless, it is a matter of concern that as of February 15, 1996, only 14 of the 185 UN Member States (Australia, Bosnia and Herzegovina, Denmark, Finland, France, Germany, Iceland, Italy, the Netherlands, New Zealand, Norway, Spain, Sweden and the United States) and one Observer (Switzerland) were known to have enacted legislation permitting cooperation with the tribunal for former Yugoslavia. Only six were known to have done so for the Rwanda tribunal (Australia, Denmark, New Zealand, Norway, Switzerland and the United States). Three states (Republic of Korea, Singapore and Venezuela) have said that no legislation is necessary. Draft legislation permitting cooperation with both tribunals has been pending in Congress since August 1995. S. 1124, 104th Cong., 1st Sess. Sec. 1342 (1995). It is also a matter of concern that neither tribunal has received an adequate budget from the General Assembly.

[10] Amnesty International, *Establishing a just, fair and effective international criminal court* (AI Index: IOR 40/05/94). See also Association Internationale de Droit Pénal *et al*., *Draft Statute for an International Criminal Court - Alternative to the ILC Draft (Siracusa Draft)* (July 1995); Human Rights Watch, *Commentary on the Proposed International Criminal Court* (1995); International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper* (Aug. 1995); International Federation of Human Rights Leagues, *Justice for Humanity: Towards the Creation of a Permanent International Criminal Court*, La Lettre Hebdomadaire de la FIDH, No. 613-614/2 (Nov. 1995) (Special Issue).

primary responsibility to bring to justice those responsible for grave crimes under international law. According to the principle of "complementarity", as expressed in the Preamble to the 1994 draft statute, the court "is intended to be complementary to national criminal justice systems in cases where such procedures may not be available or may be ineffective". These statements are a welcome acknowledgement of the primary responsibility of states and may herald a new commitment by states to carry out this responsibility more vigorously. Nevertheless, if the court is to be an effective complement to national courts, it must be able to act in any case falling within its jurisdiction when states are unable or unwilling to do so. One important way to help achieve this goal is to ensure that the Prosecutor is able to initiate investigations and prosecutions of persons suspected of crimes within the court's jurisdiction based on information from any reliable source.

The 1994 draft statute provides only two ways to initiate an investigation and prosecution: state complaints and referrals by the Security Council, neither of which is likely to ensure that all those responsible for crimes within the court's jurisdiction are brought to justice. States and the Security Council are *political* bodies. The court is a *judicial* body and, under the UN Guidelines on the Role of Prosecutors, its Prosecutor must have the independence to decide whether to investigate or prosecute.[11] If these two methods are not supplemented by independent investigations and prosecutions by the Prosecutor, the court could be crippled at birth. States parties to the statute which are also parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[12] would be able to lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed (Article 25 (1)).[13] Any state party to the statute which has accepted the jurisdiction of the court over another crime could lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed (Article 25 (2)).[14] The Security Council could refer a matter to the court under Article 23 (1) when acting pursuant to Chapter VII of the UN Charter to address a threat to or breach of international peace and security or an act of aggression.[15] Such referrals would avoid the establishment of more *ad hoc* tribunals and ensure that those responsible for grave crimes under international law in Chapter VII situations could be brought to justice even if the relevant state party had not consented to the court's jurisdiction. The ILC Commentary to Article 25 indicates that the Security Council would have the power to refer not only entire situations, but also individual cases to the court, although the latter would not "normally" be the case.

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[11] UN Guidelines on the Role of Prosecutors, Guidelines 11 to 14, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders on Sept. 7, 1990, and welcomed by the General Assembly on Dec. 14, 1990, GA Res. 45/121.

[12] Dec. 9, 1948, 78 UNTS 277, *reprinted in* 45 AJIL (Supp. 1951) [hereinafter Genocide Convention].

[13] "A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed." 1994 draft statute, Art. 25 (1).

[14] "A State party which accepts the jurisdiction of the Court under article 22 [on methods of acceptance] with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime has been committed". 1994 draft statute, Art. 25 (2).

[15] "Notwithstanding article 21 [on preconditions to the exercise of jurisdiction], the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 [listing crimes within the court's jurisdiction] as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations." 1994 draft statute, Art. 23 (1).

These two methods are likely to lead to only a limited number of the cases within the court's jurisdiction which national courts are unable or unwilling to pursue being investigated or prosecuted by the Prosecutor and to an unbalanced or biased selection of cases to be brought to the Prosecutor's attention. There is a risk that few states would bring complaints against nationals of other states because such complaints might be viewed as infringing the sovereignty of those states or as interfering with diplomatic relations with those states. Not many states have used the state complaint procedures in human rights treaties.[16] State complaints could be brought for political reasons (the requirement in Article 25 (3) that complaints include "such supporting documentation as is available to the complainant state" does not seem to be an adequate safeguard), against suspects only from unpopular states or against only certain people suspected of a particular crime. Complaints by states or referrals of individual cases by the Security Council might put undue pressure on the Prosecutor to initiate an investigation or prosecution in a particular case. Indeed, under Article 26 (1) of the 1994 draft statute the Prosecutor would be required to initiate an investigation after receiving a state complaint or Security Council referral "unless the prosecutor concludes that there is no possible basis for a prosecution". Similarly, the Security Council, a political body, whose decisions need the assent of the five permanent members, might not refer all matters which would involve Chapter VII of the UN Charter, even if crimes within the court's jurisdiction might have occurred. Moreover, many of the gravest crimes have occurred in situations where the Security Council could not invoke Chapter VII or declined to do so.

In addition, under the 1994 draft statute, even if the Prosecutor were to become aware during the course of an investigation or prosecution that crimes had occurred which were not mentioned in a state complaint or Security Council referral of individual cases, the Prosecutor could not initiate an independent investigation or prosecution. Although the Prosecutor would have the power to initiate investigations and prosecutions if the Security Council referred a *situation* to the Prosecutor, that power could be limited. The Security Council could restrict the scope of a situation to a particular time or to particular nationalities (as it did when it established the Rwanda Tribunal) and prevent the Prosecutor from investigating the planning of crimes before that time, crimes committed after the date a new government took power or crimes committed by citizens of certain states.[17] The Security Council could refer individual cases against only certain suspects of a particular crime or series of crimes, thus preventing the

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[16] As of January 31, 1996, no states had used the state complaint procedures in Article 41 of the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR]; Article 21 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, UN GA Res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1985) [hereinafter UN Convention against Torture]; Articles 45 and 61 of the American Convention on Human Rights *adopted* Nov. 22, 1969, OAS Treaty Series No. 36, at 1, OEA/Ser.L./V/II.23 doc. Rev. 2 (1969); or Article 47 of the African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, *reprinted in* 21 ILM 58 (1982). Only 11 state complaints have been filed pursuant to Articles 24 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 UNTS 222. Since 1951 when the Genocide Convention entered into force, only one state has submitted a dispute to the International Court of Justice pursuant to Article IX claiming citizens of another state committed genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), filed* March 20, 1993. The *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India),* Request for the Indication of Interim Measures of Protection, Order, 1973 ICJ Rep. 328, involved a dispute concerning the jurisdiction of India to try Pakistani prisoners of war for genocide.

[17] Article 1 of the Rwanda Statute limits the power of the Prosecutor to prosecute to "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994".

Prosecutor from investigating and prosecuting equally culpable individuals. Moreover, the 1994 draft statute further limits the independence of the Prosecutor by providing in Article 23 (3) that the Prosecutor may not initiate a prosecution arising from a situation being dealt with by the Security Council under Chapter VII "unless the Security Council otherwise decides".[18]

To ensure that cases are selected for investigation and prosecution throughout the world on neutral, non-political criteria, the Prosecutor should have the power to initiate an investigation and prosecution of any person suspected of having committed a crime within the jurisdiction of the court, provided that the relevant state has consented to jurisdiction, based on information received from any source. This power should apply in all circumstances, even when the Security Council is dealing with a situation under Chapter VII. This would ensure that the court has the same independence as the International Court of Justice.[19] Article 18 of the Yugoslavia Statute provides that

> "[t]he Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

Article 17 (1) of the Rwanda Statute is identically worded. A similar provision should be included in the statute of the court as a supplement to the system of state complaints and Security Council referrals.[20]

II - THE COURT SHOULD BE ABLE TO ENSURE THAT A SUSPECT IS BROUGHT TO JUSTICE BY A STATE PARTY OR TRANSFERRED TO ITS JURISDICTION

The existing system of national criminal investigations and prosecutions of the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law has failed. This system relies on states where the crime occurred (territorial states) or with custody of the suspect (custodial states) to bring the suspect to justice or to extradite the suspect to a state willing to do so (requesting state). If the statute is to reinforce and significantly improve the existing system, then the court must be able to ensure in a case before it whether a state party has fulfilled its responsibilities to bring the suspect to justice or, when the state is unable or unwilling to do so in a trial which is neither a sham nor unfair, be able to compel the state party to transfer the suspect to the court. Thus, the

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[18] "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides." 1994 draft statute, Art. 23 (3).

[19] The International Court of Justice has considered cases on a number of occasions which were being considered by the Security Council under Chapter VII. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Order of 13 Sept. 1993, 1993 ICJ Rep.325; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v.US)*, Provisional Measures, 1992 ICJ Rep. 3. See also Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AJIL 643 (1994).

[20] The judges of the Yugoslavia Tribunal have recommended that the 1994 draft statute be amended to permit the Prosecutor to institute criminal proceedings. Ad Hoc Committee on the Establishment of an International Criminal Court, Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, UN Doc. A/AC.244/1 (1995).

jurisdiction of the court should be fully integrated into the existing *aut dedere aut judicare* (extradite or try) system for repressing these crimes, whether they are defined in treaties or part of customary law. To complement national courts effectively, the court should at least be able to exercise the same territorial or universal jurisdiction in any case as a state party to bring the suspect to justice and, to the extent that such state jurisdiction may be lacking, the statute should fill any gap.

The 1994 draft statute only partially satisfies these requirements. Even though each of these core crimes are the gravest crimes under international law, the 1994 draft statute provides that the court would have inherent jurisdiction only over genocide (Article 20 (a)). Thus, the court could entertain a complaint of genocide by any state party to its statute which has also ratified or acceded to the Genocide Convention with respect to any other state party which is a party to this Convention (Article 21 (1) (a)). Such inherent jurisdiction would be concurrent with states. All states parties to the statute, however, would have to cooperate with a request to arrest or transfer to the court a person accused of genocide (Article 53 (2) (a) (i)), so the court could assert jurisdiction if those states were unable or unwilling to bring the suspect to justice.

If the relevant states parties had consented to the court's jurisdiction over crimes against humanity (Article 20 (d)), serious violations of the laws and customs applicable in armed conflict (Article 20 (c)), including grave breaches of the Geneva Conventions for the Protection of War Victims of August 12, 1949 and its Protocol I,[21] and torture as defined in the UN Convention against Torture,[22] then the court could compel the states parties which are unable or unwilling to bring the suspect to justice or to extradite the suspect to a state willing to do so, to transfer the suspect to the court (Article 53 (2) (a)). Providing the court with inherent jurisdiction over each of these core crimes would solve the problems in the 1994 draft statute of inadequate integration of the jurisdiction of the court into the *aut dedere aut judicare* system and the state consent requirements.

The 1994 draft statute partially links the court to the *aut dedere aut judicare* system with respect to certain crimes defined in treaties listed in the Annex - grave breaches under the Geneva Conventions and Protocol I and torture as defined in the UN Convention against Torture. A state party to the statute which was a party to one of these treaties, but had not consented to the court's jurisdiction over grave breaches or torture, would have three options when it received a request from the court to arrest a person accused of one of these crimes. It would either have to transfer the accused to the court,

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[21] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, *reprinted in* 16 ILM 1391 (1977) [hereinafter Protocol I].

[22] In addition to these crimes, the 1994 draft statute provides that the court would have jurisdiction over the crime of aggression (Article 20 (b)) and certain crimes defined by treaties, including hijacking, apartheid, attacks on diplomats, hostage-taking, offences on the high seas and drug offenses (Annex). Concern that the continuing disagreement about the definition or inclusion of these crimes could delay adoption of a statute led Denmark to propose in the Ad Hoc Committee that the jurisdiction of the court be limited initially to certain core crimes and that the treaty provide for periodic reviews so that additional crimes could be included in the future when agreement was reached on definition or inclusion. This proposal received significant support.

extradite the accused to a requesting state willing to try the accused or prosecute the accused itself (Article 53 (2) (b)).[23] Article 53 (3) provides that the transfer of a suspect to the court would satisfy the *aut dedere aut judicare* obligation under these treaties of only states parties to the statute which had accepted the jurisdiction of the court over the crime.[24] It is disappointing that Article 53 (3) does not also provide that the transfer would satisfy the extradite or try obligation with respect to *other* states parties to these treaties. Such a transfer would satisfy the requested state's obligation under these treaties to bring the suspect to justice - the object and purpose of the *aut dedere aut judicare* requirement in the Geneva Conventions, Protocol I and the UN Convention against Torture.[25] The interest of the requesting state - repression of crimes - is the same as any other party to these treaties and it is difficult to see that it would be harmed by transfer of the suspect to a court which may be more likely to afford the suspect a fair trial than a small state with inadequate resources.[26]

It is not certain whether the court would have jurisdiction if the trial in one of these requesting states were a sham proceeding or unfair. Although Article 42 (2) (b) would permit the court to try someone who had been convicted in a proceeding in another court when the proceedings "were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted", this does not give the court the power to compel a transfer in the situation covered by Article 53 (3).

Unfortunately, the statute does not incorporate the jurisdiction of the court into the framework of customary law permitting or requiring states to extradite or try persons suspected of core crimes. When states parties have not accepted the jurisdiction of the court over core crimes other than grave breaches or torture, the statute fails to require them to bring persons suspected of such crimes to justice or to extradite them to a state which will do so. The ILC Commentary to Article 54 states that the Working Group gave careful consideration to whether an equivalent obligation should be imposed on all states

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[23] "Upon receipt of a request [for arrest and transfer of the accused] . . . in the case of a crime to which article 20 (e) [crimes defined in treaties] applies, a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution[]". 1994 draft statute, Art. 53 (2) (a).

[24] "The transfer of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution." 1994 draft statute, Art. 53 (3).

[25] The drafters of the Geneva Conventions envisaged the possibility that a state could satisfy its *aut dedere aut judicare* obligation by transferring a suspect to an international criminal tribunal. International Committee of the Red Cross, I *Commentary on the Geneva Conventions of 12 August 1949,* Commentary on Article 49, Geneva Convention No. I ("[T]here is nothing in [Article 49 (2)] to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law.").

[26] "As long as the penal repression of grave breaches is ensured, the right of each Contracting Party to choose between prosecuting a person in its power or to hand him over to another Party interested in prosecuting him therefore remains absolute, subject to the legislation of the Party to which the request is addressed, and to any other treaties applicable in the case in question." *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* para. 3577 at 1029 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds. 1987) .

parties with respect to acts of aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. It decided that this would be difficult to accomplish "in the absence of a secure jurisdictional basis or a widely accepted extradition regime". This approach is unduly restrictive since grave breaches and other serious violations of humanitarian law and crimes against humanity are widely accepted as crimes of universal jurisdiction, *permitting* any state to bring those responsible to justice.[27] Indeed, most, if not all, are now crimes which *require* states to extradite or try those responsible.[28] Nevertheless, it should not matter whether crimes subject to universal jurisdiction are also subject to an extradite or try obligation; as long as the crime is subject to universal jurisdiction, it is appropriate for an international criminal court designed to be an improvement over the existing system to be able to require a state party to bring persons suspected of such crimes to justice, to extradite them to states willing to do so or to transfer them to the court.

The other major weakness in the 1994 draft statute which would make it difficult for the court to be an effective complement to national jurisdictions is that Article 21 (1) (b) provides that in state complaints both the territorial state and the custodial state, if different, must consent to the court's jurisdiction over the crime.[29] This means that the court actually has *less* power to bring to justice the

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[27] Any state party to the Geneva Conventions of 1949 and Protocol I may bring to justice a person suspected of having committed or having ordered to be committed a grave breach of those treaties. See I *ICRC Commentary on the Geneva Conventions*, Commentary on Article 49 of Geneva Convention No. 1, *supra* note 25 365. It has been recognized that some war crimes under customary law are crimes under international law which any state may punish. See, *e.g*., *ICRC Commentary on the Additional Protocols*, *supra* note 26 para. 3539 at 1011; Ian Brownlie, *Principles of Public International Law* 305 (4th ed. 1990). It has been convincingly argued that violations of humanitarian law in internal armed conflict are subject to universal jurisdiction. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 576 (1995); Michael Bothe, *War Crimes in Non-international Armed Conflicts*, 24 Israel Y.B. Hum. Rts 241, 247 (1994). It is also now generally accepted that most, if not all, crimes against humanity are crimes of universal jurisdiction. See, *e.g*., M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* 510-27 (1992); *Principles of Public International Law*, *supra*, at 304; Nigel Rodley, *The Treatment of Prisoners under International Law* 101-02 (1987). Although the Genocide Convention expressly provides that the state where the crime occurred and an international criminal court have jurisdiction over genocide, it is increasingly considered that genocide is a crime under customary law over which states may exercise universal jurisdiction. Meron, *supra* at 569; *Rodley*, *supra* at 156; Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 835-837 (1988); Restatement (Third) of Foreign Relations Law Sec. 702, reporter's note 3 (1986).

[28] See, *e.g*., *Brownlie*, *supra*, note 27 at 315 (war crimes and crimes against humanity); *Rodley*, *supra*, note 27 at 102 (war crimes); *Bassiouni*, *supra*, note 27 at 499-508 (crimes against humanity); Geneva Conventions of 1949 (Convention No. 1, Art. 49; Convention No. 2, Art. 50; Convention No. 3, Art. 129; Convention No. 4, Art. 146) (grave breaches); Protocol I (Arts 85 (1), 88 (2)) (grave breaches); Meron, *supra* note 27 at 569-571 (violations of humanitarian law in internal armed conflict); UN Convention against Torture (Article 7 (1)); UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 18), ESC Res. 1989/65 (Annex), welcomed by the General Assembly on December 15, 1989, GA Res.44/159 [hereinafter UN Principles on Extra-legal Executions]; UN Declaration on the Protection of All Persons from Enforced Disappearance (Article 14), GA Res.47/133 [hereinafter UN Declaration on Disappearances].

[29] "The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:
(a) in a case of genocide, a complaint is brought under article 25 (1);
(b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22 [procedures for acceptance of jurisdiction]:
(i) by the State which has custody of the suspect with respect to the crime ("the custodial state"); and
(ii) by the State on the territory of which the act or omission in question occurred."

suspect than either the territorial state or the custodial state, each of which could bring the suspect to justice without the consent of any other state. In certain cases, the state which has a pending extradition request must also consent (Article 21 (1)).

The effect of this requirement is illustrated by the example of a small custodial state which is a party to the UN Convention against Torture and has consented to the court's jurisdiction over torture. The custodial state could exercise universal jurisdiction over the suspect, but lacks the resources to bring a suspect to trial. It also does not wish to extradite the suspect either to the territorial state from which the suspect fled, because it believes the suspect will receive a sham trial, or to another state party to the UN Convention against Torture which had a pending extradition request, because it feared the suspect would not receive a fair trial. In these circumstances, which could be fairly common, the custodial state could not transfer the suspect to the court unless the other two states consented.

Similarly, it would appear that the court under the 1994 draft statute could not indict a suspect whose whereabouts were unknown (if the custodial state was also unknown) or who had fled to a custodial state which had not consented to the court's jurisdiction over the crime, even if the territorial state's judicial system had collapsed or was ineffective. This all too common situation would seem to be one where the court should be able to complement the national criminal justice system. Although an arrest warrant could not be immediately served, it would limit the suspect's ability to evade international justice to the hopefully diminishing number of states which had not yet consented to the court's jurisdiction over core crimes. The state sheltering the suspect would come under increasing international public pressure to surrender the suspect to the court and to consent to the court's jurisdiction. The suspect's problems are analogous to those of a suspect indicted by one of the *ad hoc* tribunals who flees to one of the states which have refused in practice to cooperate with the tribunals.

III - THE CORE CRIMES AND PRINCIPLES OF RESPONSIBILITY SHOULD BE CLEARLY DEFINED

The core crimes of serious concern to the international community - genocide, other crimes against humanity and serious violations of humanitarian law - and principles of individual criminal responsibility should be clearly defined and those definitions should strengthen international law. The ILC did not define these crimes or their defences in the 1994 draft statute. In 1991, however, it adopted on first reading a draft Code of Crimes against the Peace and Security of Mankind (1991 draft Code).[30] The 1991 draft Code, which defines these core crimes and certain principles of responsibility, but leaves the defences to be determined under general principles of law, has been severely criticized by governments and commentators.[31] The ILC is now considering revisions proposed by its Special Rapporteur.[32] As

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1994 draft statute, Art. 21 (1).

[30] Report of the International Law Commission on the work of its forty-third session 29 April - 19 July 1991, para. 173, 46 UN GAOR Supp. (No.10), UN Doc. A/46/10 (1991).

[31] See, *e.g.*, Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind, 11 Nouvelles Etudes Pénales (M. Bassiouni ed. 1993).

[32] Report of the International Law Commission on the work of its forty-seventh session 2 May - 21 July 1995, 50 UN GAOR Supp. (No. 10), UN Doc. A/50/10, paras 27-43 (1995).

discussed below, neither the definitions in these proposed revisions nor those in other instruments, such as the statutes of the two *ad hoc* tribunals and the Nuremberg Charter, are fully satisfactory.

Defining the core crimes

In spelling out the court's jurisdiction over core crimes, the statute will need to clarify and strengthen definitions of these crimes found in treaties, other international instruments and customary law. To be fully consistent with the principle of *nullum crimen sine lege* and an improvement over the statutes of the *ad hoc* tribunals, the statute should specify the elements of these crimes, including the appropriate *mens rea*. In defining the court's jurisdiction, however, the statute should make clear that nothing in its definitions should be read to limit the jurisdiction of national courts over such crimes as defined in customary law or in other instruments.

Genocide. The Commentary to Article 20 of the 1994 draft statute states that genocide "is clearly and authoritatively defined" in the Genocide Convention. Most governments addressing the issue in the Ad Hoc Committee agreed, but Egypt argued that the definition should be expanded to protect political and social groups.[33] Attempts to expand the definition at this time, however desirable such an expansion might be, could delay adoption of a statute because of strong opposition from certain governments and undermine the emerging government consensus concerning inherent jurisdiction over genocide. It could lead to public confusion about the scope of the definition if there were two different definitions.[34] In any event, many of the acts sought to be prohibited with respect to such groups would constitute crimes against humanity, which do not present the same difficulties of proof of intent to destroy a particular group. The statute of the court should follow the approach in Article 4 of the Yugoslavia Statute and Article 2 of the Rwanda Statute by using the definition of genocide in the Genocide Convention.[35] In defining the elements of this crime, it will be necessary to ensure that the difficulties in proving intent to destroy a particular group are not increased by requiring the same specific intent for those carrying out the genocide as for those who planned and ordered it.

Crimes against humanity. In contrast to genocide, where the accepted definition is clearly spelled out in a treaty, there is no single instrument containing a generally accepted definition of crimes against humanity. Some of the differences between the instruments are significant while others are matters of detail. Despite these differences, it should be possible to agree on a definition which obtains general acceptance and which covers most, if not all, acts which should be classified as crimes against humanity. The jurisdiction of the court should include grave human rights violations or abuses directed against a civilian population which are committed or condoned by governments or armed political groups,

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[33] In 1946, when the General Assembly called for the drafting of a convention on genocide, it stated that genocide was a crime "whether the crime is committed on religious, racial, political or any other grounds". UN GA Res. 96 (I) (Dec. 11, 1946).

[34] This has been a prominent issue in the current trial of members of the former government of Ethiopia who have been charged with genocide and crimes against humanity under Article 281 of the Penal Code, which defines these crimes as including the intent to destroy political groups.

[35] The Special Rapporteur of the International Law Commission has proposed a revised version of Article 19 of the 1991 draft Code with a definition of genocide which is worded slightly differently from the definition in the Genocide Convention and addresses conspiracy to commit genocide and complicity in genocide in a separate Article 3. Report of the International Law Commission on the work of its forty-seventh session 2 May - 21 July 1995, 50 UN GAOR Supp. (No. 10) paras 4, 78-83, UN Doc. A/50/10 (1995).

acts which are not necessarily linked to persecution and crimes against humanity committed in peace as well as war. The statute will also have to define clearly which acts are crimes against humanity.

The statute should distinguish crimes against humanity, which should fall within the court's jurisdiction, from ordinary crimes, which do not pose the same threat to the international community. At a minimum, the statute should address not only grave human rights violations carried out by order of a government or with its acquiescence, but also grave human rights abuses by armed groups with a political dimension distinguishing them from purely criminal organizations. Thus, crimes against humanity would include crimes committed or condoned by the state, but not crimes committed for private reasons or in violation of an enforced state policy. Restricting crimes against humanity to crimes involving state action or policy, however, as suggested by M. Cherif Bassiouni,[36] would exclude crimes committed against civilians in a civil war by insurgent groups before they overthrew the government and crimes committed by forces of the deposed government as they retreated. The concept of crimes against humanity should also include crimes committed on the authority of an armed political group and in accordance with its policy to commit such abuses or to allow those under its authority to commit such abuses. This definition would exclude abuses committed for private reasons which are shown, for example, through preventive measures and disciplinary action, to have been the acts of individuals in violation of enforced orders.

One of the Trial Chambers of the Yugoslavia Tribunal on October 20, 1995 restricted crimes against humanity within the tribunal's jurisdiction to crimes against humanity to those which are organized, systematic and of a certain scale or gravity. The Trial Chamber stated that there are three distinct components of crimes against humanity as defined under Article 5 of the statute of that tribunal:

> First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organized and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.[37]

In internal armed conflicts, armed political groups often will be acting in a more disorganized fashion than government forces, but in accordance with a general policy, such as killing or torturing prisoners. It is to be hoped that when the Yugoslavia Tribunal next considers the definition it will take these concerns into account and revise the definition. Article 3 of the Rwanda Statute limits the jurisdiction of the tribunal over crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population", which avoids the possible problems of the "organized" requirement.

The jurisdiction of the court over crimes against humanity should include extrajudicial executions, "disappearances", torture, including rape,[38] prolonged arbitrary detention, forcible expulsions across national frontiers and forcible relocations of population within a territory. These crimes will have to be

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[36] *Bassiouni*, *supra* note 27 at 248. The ILC Commentary to Article 21 of the 1991 draft Code indicates that it would include crimes committed by "private individuals with de facto power or organized in criminal gangs or groups".

[37] *Prosecutor v. Dragan Nikolic a.k.a. "Jenki"*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Oct. 20, 1995, para. 26, Case No. IT-94-2-R61. The ILC Commentary states that Article 21 of the 1991 draft Code covers crimes which are either systematic or mass-scale. The Special Rapporteur's proposed revision would limit the definition to crimes which were systematic.

[38] See Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 426 (1993).

carefully defined. Article 5 of the Yugoslavia Statute, modelled on Allied Control Council Law No. 10,[39] covers most of these acts. Article 5 includes murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts, but it does not expressly include "disappearances" or forcible expulsions or relocations of populations. The list of crimes in the proposed new Article 21 of the draft Code fails to include imprisonment and rape, but it does include the "forcible transfer of population", although the meaning of that term is unclear.

It is increasingly recognized that "disappearances" are crimes against humanity.[40] They are certainly "inhumane acts of a very serious character" within the meaning of the Commentary to Article 20 (d) of the 1994 draft statute, but it would be better expressly to include them within the jurisdiction of the court. With regard to rights relating to freedom of movement, in some circumstances, deportations or relocations of persons may be permissible under international law, and, therefore, some further precision in wording may be necessary. Indeed, as regards freedom of movement, there is clearly a need, given the experience of the conflict in former Yugoslavia, to examine closely the numerous ways this freedom was restricted and to determine whether there is a basis for concluding that forcible expulsion and relocations alone adequately cover the types of serious violations which should be of concern. For example, there is a need to criminalize not only the act of formally organizing expulsions of people from their own countries on the basis of their religion, ethnic identity, political views or similar criteria, but also the carrying out of acts of terror and intimidation which are clearly intended to sow fear and panic among sections of the population in order that they leave the territory.

There should be no requirement that the above acts be part of a persecution of particular groups, although certain acts of persecution should fall within the court's jurisdiction. Article 5 of the Yugoslavia Statute, like Article 6 (c) of the Nuremberg Charter, does not require that these acts be committed as part of a persecution of particular groups, but, like the Charter, it limits the jurisdiction of the tribunal over persecution to that directed against political, racial or religious groups. Article 3 of the Rwanda Statute, however, restricts the tribunal's jurisdiction over crimes against humanity to those committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". Not only does this unduly limit the scope of the tribunal's jurisdiction and introduce potentially difficult questions of proof of intent as with genocide , but it also appears to make the separate prohibition of persecution in that article on political, racial or religious grounds redundant.

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[39] Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946, at xx, *reprinted in Crimes against Humanity in International Criminal Law* at 590. Article 6 (c) of the Nuremberg Charter contained a shorter list of crimes. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279, *reprinted in* 39 AJIL 257 (1945) [hereinafter Nuremberg Charter].

[40] In a resolution adopted on November 17, 1983, the General Assembly of the Organization of American States (OAS) declared that "the practice of the forced disappearance of persons in the Americas . . . constitutes a crime against humanity". OAS GA, 13th Sess., Res. 666 (XIII-0/83) (1983). On June 10, 1994 the OAS General Assembly adopted the Inter-American Convention on the Forced Disappearances of Persons. The Convention reaffirms that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity". On September 26, 1984 the Parliamentary Assembly of the Council of Europe called for the adoption of a UN declaration recognizing enforced "disappearances" as a crime against humanity. Eur. Parl. Ass., 36th Sess., Res. 828 (1984). The UN Declaration on Disappearances, adopted by the UN General Assembly in Resolution 47/133 on December 18, 1992, states that "the systematic practice of such act is of the nature of a crime against humanity".

It is now generally accepted that crimes against humanity in peacetime which are not directly connected with armed conflict or preparation for armed conflict violate customary international law. Although the International Military Tribunal at Nuremberg interpreted its jurisdiction under the Nuremberg Charter not to extend to crimes against humanity unless they were committed in execution of or in connection with a crime against peace or a war crime, nothing in the judgment of that court should be read to suggest that crimes against humanity in other circumstances were not prohibited under international law.[41] Neither Article 3 of the Rwanda Statute nor the proposed revision of Article 21 of the 1991 draft Code limit jurisdiction over crimes against humanity to those committed during armed conflict or those linked to violations of humanitarian law. Although Article 5 of the Yugoslavia Statute limits the jurisdiction of that tribunal over crimes against humanity to those committed in armed conflict, the Appellate Chamber of that tribunal concluded after a careful review of state practice that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict" and "customary international law may not require a connection between crimes against humanity and any conflict at all".[42]

Serious violations of humanitarian law. Some of the gravest violations of human rights and humanitarian law since the end of the Second World War have occurred in the context of internal armed conflict rather than in classic international wars. It would be unthinkable if a permanent international criminal court were not to have jurisdiction over serious violations of humanitarian law committed in both international and non-international armed conflict. Criminal jurisdiction over such violations in both types of conflicts would be consistent with the jurisdiction of the Yugoslavia Tribunal, as interpreted by its Appellate Chamber, the position of the United States and other governments, the Rwanda Statute and the views of commentators.

Neither common Article 3 of the Geneva Conventions of 1949 and Protocol II[43] expressly impose international criminal responsibility on parties to an internal armed conflict, and, until recently, it was not generally accepted that violations of their provisions incurred such responsibility.[44] It is now well established, however, that acts prohibited by these instruments do incur international criminal responsibility. The Appellate Chamber of the Yugoslavia Tribunal has concluded that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".[45] The

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[41] See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AJIL L 78, 85 (1994).

[42] *Prosecutor v. Dusko Tadic alias "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 141, Case No. IT-94-1-AR72.

[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 609, *reprinted in* 16 ILM at 1442 [hereinafter Protocol II].

[44] See, *e.g*., Denise Plattner, *The penal repression of violations of international humanitarian law applicable in non-international armed conflicts*, Int'l Rev. Red Cross 409, 414 (No. 278, Sept.-Oct. 1990) ("[International humanitarian law] applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations.").

[45] *Prosecutor v. Dusko Tadic a/k/a "Dule", supra* note 42, para.134.

United States has taken a similar view.[46] Article 4 of the Rwanda Statute expressly provides that the tribunal "shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977". An increasing number of authorities agree that humanitarian law imposes international criminal responsibility during internal armed conflicts.[47]

The ILC apparently intended that the 1994 draft statute include violations of humanitarian law applicable to international and non-international armed conflicts. The Annex includes grave breaches of the Geneva Conventions of 1949 and Protocol I of 1977, but it does not expressly include acts prohibited by common Article 3 or Protocol II. Nonetheless, the ILC Commentary indicates that Article 20 (c), addressing "serious violations of the laws and customs applicable to armed conflict", was based in part on Article 22 of the 1991 draft Code, which applies to both types of conflicts. Article 2 of the Yugoslavia Statute contains an exhaustive list of grave breaches, but Article 3 of that statute concerning violations of the laws or customs of war and Article 4 of the Rwanda Statute concerning common Article 3 and Protocol II are open-ended. The elements of each violation are not spelled out in either tribunal's statute. It would be more consistent with the principle of *nullum crimen sine lege* if these violations were exhaustively listed and the elements were spelled out in the court's statute.

Principles of criminal responsibility

If possible, the statute should spell out the elements of each crime within its jurisdiction in more detail than in the Nuremberg Charter, the statutes of the two *ad hoc* tribunals and other instruments.[48] It should also spell out principles of individual criminal responsibility to ensure that superiors and subordinates are held responsible for all acts and omissions consistent both with principles of natural justice and the need to deter grave crimes. A person in a command position, regardless of rank or status, who orders a subordinate to commit genocide, other crimes against humanity or serious violations of humanitarian law should be held equally responsible for the crime with the subordinate. As stated in Article 7 of the Nuremberg Charter, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Article 7 of the Yugoslavia Statute and Article 6 of the Rwanda Statute contain the same principle. Article 13 of the 1991 draft Code, however, would weaken this principle by failing to exclude the possibility that the official position of a defendant could mitigate punishment.

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[46] At the time the Security Council adopted Resolution 827 establishing the Yugoslavia Tribunal, the United States Ambassador stated that the term, "laws or customs of war" as defined in Article 3 of the statute of that tribunal was broad enough to include the entire body of humanitarian law "in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions". UN Doc. S/PV.3217, at 15 (May 25, 1993). See also the statements by the Ambassadors of France, Hungary and the United Kingdom. *Id.* at 11, 20 and 19. No member of the Security Council disagreed.

[47] See, *e.g.*, Christa Meindersma, *Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia*, XLII Neth. Int'l L. Rev. 375, 396 (1995); Meron, *supra* note 27 at 559-565.

[48] It should not be impossible to reach agreement in the Preparatory Committee on the main elements of the core crimes despite the differences in various legal systems, particularly since the Committee will be able to draw on the experience of the *ad hoc* tribunals in defining these elements based on general principles of law. Nevertheless, if it becomes impossible to reach agreement on all elements of the core crimes, to avoid delay it would be appropriate to leave the definition of other elements to the court to develop in the rules.

A superior should also be held equally responsible if he or she knew or had reason to know that a subordinate had committed or was about to commit such a crime and failed to take necessary and feasible steps within his or her power to punish or prevent the crime. Article 7 (3) of the Yugoslavia Statute appears to satisfy most of these requirements. It states that the fact that any of the acts within the court's jurisdiction "was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof". Article 6 (3) of the Rwanda Statute is identical. A superior would have reason to know if there were widespread press or other reports that would have been known to a person in the same position. The ICRC Commentary on Article 86 (2) of Protocol I, which contains a similar definition of command responsibility, explains that the negligence of the superior "must be so serious that it is tantamount to malicious intent".[49] A superior who fails to take measures to punish crimes which the superior knows or has reason to know the subordinate has committed will send a message that such crimes can be committed with impunity; a superior who fails to take measures to prevent such crimes may justly be held responsible for such crimes.[50] It would be just to expect superiors to take all measures which are "necessary", as required by Article 7 (3) of the Yugoslavia Statute, and "feasible and within their power", as required by Article 86 (2) of Protocol I and Article 12 of the 1991 draft Code, to punish or prevent such crimes. To expect the measures to be simply "necessary and reasonable", as set forth in Article 7 (3) of the Yugoslavia Statute may risk setting too low a standard for a person with command responsibility, who should be expected to do his or her utmost to punish or prevent such crimes. The approach suggested above would appear to make it less likely that principles of command responsibility could be applied in the strict way they were in the highly criticized *Yamashita* case or in the lax manner of the *Medina* case, where the court required actual knowledge of the subordinate's acts. [51]

The statute should also define defences clearly. One defence which must be excluded is the defence of superior orders. Article 8 of the Nuremberg Charter states that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires." Control Council Law No. 10, Article 7 (4) of the Yugoslavia Statute and Article 6 of the Rwanda Statute exclude the defence of superior orders in similar terms. International instruments adopted by the General Assembly have adopted a similarly strict standard and have emphasized the duty to disobey orders to commit grave crimes.[52] This standard should not be weakened. Subsequent

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[49] *ICRC Commentary on the Additional Protocols, supra* note 26 at para. 3541at 1012.

[50] See Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 100-101 (1995).

[51] For comments on *In re Yamashita*, 327 U.S. 1 (1945), see *Bassiouni, supra* note xx at 376-382; Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982); W.H. Parks, *Command Responsibility for War Crimes*, 28 Mil. L. Rev. 1 (1973); Ann Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 Hum. R. Q. 303 (Aug. 1992); A. Frank Reel, *The Case of General Yamashita* (1949). For comments on *U.S. v. Medina*, 20 USCMA 403, 43 CMR (1971), see *Bassiouni , supra*, note 27 at 385-386. Captain Ernest R. Medina was the immediate superior of Lieutenant William R. Calley, Jr., who was convicted of murder of civilians in 1968 at My Lai in Viet Nam.

[52] See UN Convention against Torture, Art. 2 (3) ("An order from a superior officer or public authority may not be invoked as a justification for torture."). Principle 3 of the UN Principles on Extra-legal Executions and Article 6 (1) of the UN Declaration on Disappearances not only rule out superior orders as a justification for extrajudicial

interpretation of this principle by courts and commentators is not consistent, but some authorities have introduced two qualifications which tend to undercut its plain meaning. Under these qualifications, the defence of superior orders may be available in certain circumstances if the order is not manifestly illegal or if the defendant had no moral choice but to comply. If the subordinate was coerced to obey, the norms of coercion should apply as excuse or mitigation of punishment, rather than as a defence or justification.[53] Some authorities, however, have concluded that when the subordinate is faced with an imminent, real and inevitable threat to the subordinate's life, the superior order is a defence.[54] The United States argued at the time the Security Council established the Yugoslavia Tribunal that superior orders which were not manifestly illegal are a defence even if the subordinate had not been threatened.[55] If a state made disobedience to orders in armed conflict a capital crime or failed to train soldiers in international standards, could it ensure that those who complied with illegal orders would avoid punishment or even conviction? The Preparatory Committee will have to examine these precedents with a great deal of care and define the scope of the principle in a way which effectively deters grave crimes.

IV - FAIR TRIAL GUARANTEES SHOULD BE STRENGTHENED

The statute of the court should make clear that all defendants are entitled to a fair and prompt trial before an independent and impartial tribunal affording all internationally recognized safeguards at all stages of the proceedings - from the moment the suspect is first interrogated with a view to prosecution until exhaustion of all legal remedies - and incorporate these standards expressly or by reference. These standards are found not only in Articles 9, 14 and 15 of the ICCPR, but also in the extensive framework of internationally recognized standards which have been adopted or welcomed by the UN General Assembly, for the most part during the three decades since the ICCPR was opened for signature on 16 December 1966.[56] It would be helpful if they were recalled in the Preamble and if the Preamble

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executions and "disappearances", but declare that any person receiving such orders has "a right and a duty" to disobey them.

[53] See *Bassiouni, supra* at note 27 at 437.

[54] See, for example, *R. v. Finta*, 28 C.R. 265, 314-315 (1994) (Sup. Ct. Canada).

[55] "It is, of course, a defence that the accused was acting pursuant to orders where he or she did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful." Statement of Ambassador Madeline Albright, UN Doc. S/PV.3217, at 16 (May 25, 1993).

[56] These standards include Articles 9, 10 and 11 of the Universal Declaration of Human Rights, GA Res. 217 A (III), Dec. 10, 1948, UN Doc. A/810, at 71 (1948); the UN Standard Minimum Rules for the Treatment of Prisoners, *adopted* Aug. 30, 1955, the First UN Congress on the Prevention of Crime and the Treatment of Offenders [hereinafter UN Crime Congresses], UN Doc. A/CONF/6/1, Annex I, A (1956); *adopted* by Economic and Social Council Res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, UN Doc. E/3048 (1957), *amended* ESC Res. 2076, 62 UN ESCOR Supp. (No. 1) at 35, UN Doc. E/5988 (1977 (adding Art. 95) [hereinafter UN Standard Minimum Rules]; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 43/173, 43 UN GAOR Supp. (No. 49), UN Doc. A/43/49 at 297 (1988) [hereinafter UN Body of Principles]; Articles 7 and 15 of the UN Convention against Torture; the UN Basic Principles on the Independence of the Judiciary, *adopted by* the Seventh UN Crime Congress (Aug. 26 to Sept. 6, 1985) and endorsed by the General Assembly in GA Res. 40/32 of Nov. 29, 1985 and GA Res. 40/146 of Dec. 13, 1985. They also include two important instruments adopted by the Eighth UN Crime Congress on Sept. 7, 1990 and welcomed by the General Assembly on Dec. 14, 1990, GA Res. 45/121: the UN Basic Principles on the Role of Lawyers and the UN Guidelines on the Role of Prosecutors. The 1994 draft Statute also fails to mention the important fair trial guarantees in the Geneva Conventions of 1949 and the two Protocols, some of which afford greater protection for the rights of defendants

declared that one of the purposes of the statute was to ensure that all proceedings satisfied international standards for fair trial. The statute should also contain an unequivocal statement similar to the broad statement in the Secretary-General's report on the Yugoslavia Statute making clear that any enumeration of rights in the statute does not exclude any other internationally recognized rights so that the court can take into account evolving concepts of fairness.[57] To the extent that it is decided not to incorporate these standards in the statute or to refer to them in the commentary, they should be incorporated in the rules of the court.

The 1994 draft statute contains some important safeguards for defendants at all stages of proceedings, including most of the rights found in Article 14 of the ICCPR, and it appears to strike an appropriate balance between the rights of victims, their families and witnesses and the rights of defendants, although there are a number of ways the rights and interests of the former could be better protected without prejudice to defendants.[58] It also contains some important advances over current international standards, including those found in the statutes and rule of the *ad hoc* tribunals. For example, Article 26 (6) (a) (i) expressly recognizes that suspects have the right to silence and provides that their exercise of that right may not be a consideration in the determination of guilt or innocence. Nevertheless, in some provisions these rights are defined more restrictively than in internationally recognized standards and some important rights recognized in Article 14 are omitted entirely. The draft statute also omits a wide range of internationally recognized rights found in instruments other than the ICCPR. It is essential that these fundamental guarantees be included in the statute or the rules of the court, whether expressly or by reference.

The following instances illustrate some of the problems. The 1994 draft statute fails to protect adequately the rights of suspects who have been provisionally arrested at the request of the court by national authorities. In part, this appears to be the result of ambiguities in drafting and oversight. For example, Article 28 (2) could lead to indefinite detention of suspects without charge. It requires a suspect to be released if the indictment has not been confirmed within 90 days, "or such longer time as the Presidency may allow". Suspects who have been provisionally arrested do not have a right under the statute to prompt access to a lawyer, an important safeguard against torture or ill-treatment by national authorities, as well as essential to the preparation of a defence. This right is recognized in Principles 15, 17 and 18 of the UN Body of Principles and Principle 7 of the UN Basic Principles on the Role of Lawyers.

Article 41 (1) (b) provides that the accused has the right "to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing". This guarantee is the same as that in Article 14 (3) (b) of the ICCPR, Article 21 (4) (b) of the Yugoslavia Statute and Article 20 (4) (b) of the Rwanda Statute. Nevertheless, these articles omit an essential component of that right - the right to communicate confidentially with one's lawyer. This right is recognized in such international standards as Rule 93 of the UN Standard Minimum Rules; Principle 18 of the UN Body of Principles; and Principle 8 of the UN Basic Principles on the Role of Lawyers.

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than those in the draft statute.

[57] "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of the proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 106 (1993).

[58] See *Amnesty International*, *supra* note 7 at 54-59.

Although Article 41 (1) (d) guarantees legal assistance in all cases, it would be better if the statute were to establish an independent public defenders office with trained lawyers and investigators.

In contrast to the statutes of the two *ad hoc* tribunals, Article 37 (2) permits trials *in absentia* on a variety of grounds, including situations where the accused was present and not obstructing proceedings, such as ill-health of the accused or security risks against the accused. Trials *in absentia* risk being show trials and could undermine the authority of the court if the accused is later acquitted in a trial in which the accused was able to discredit testimony by assisting counsel to do effective cross-examination. The Rule 61 procedure of the Yugoslavia Tribunal where the court can confirm an indictment and issue an international arrest warrant after a public hearing may prove to be an acceptable alternative to trials *in absentia*.[59]

CONCLUSION

Even if a permanent international criminal court were established and the necessary improvements were made in the 1994 draft statute, would it work? The answer is yes, if one has a realistic view of its role as an effective complement to national investigations and prosecutions of the gravest of all possible crimes, genocide, other crimes against humanity and serious violations of humanitarian law. The court cannot and should not try all these cases itself, but it should be able to act in cases when states are unable or unwilling to do so. It would serve as a spur to national courts to assume their responsibility to bring to justice those responsible for such crimes and a model for national courts. As such, it would be a significant step forward in the struggle to end impunity for perpetrators of the gravest crimes under international law.

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[59] Rule 61, Rules of Procedure and Evidence, UN Doc. IT/32/Rev.6 (1995).