

The quest for international justice: Defining the crimes and defences for the international criminal court

1. INTRODUCTION

Amnesty International is calling for the establishment of a just, fair and effective permanent international criminal court as part of its work to end impunity for grave human rights abuses such as genocide, other crimes against humanity and serious violations of humanitarian law. Although states have the primary duty to bring those responsible for these grave crimes to justice in their own courts no matter where the crimes occurred or to extradite them to states able and willing to do so, they have largely failed in the half century since the end of the Nuremberg and Tokyo trials to fulfil this responsibility. A permanent international criminal court would be able to act when states are unable or unwilling to do so. It would demonstrate the international community's condemnation of these crimes and its willingness to take concrete steps to bring those responsible for the most serious crimes to justice when states have failed to do so. It would serve as a model for national courts, spur them into action and help deter these crimes.

On 17 December 1996 the United Nations (UN) General Assembly decided to convene a diplomatic conference for the adoption of a treaty establishing a permanent international criminal court in 1998. In 1994 the International Law Commission (ILC), an expert body of the UN, submitted a draft statute for an International Criminal Court (ICC) to the UN General Assembly. The court, according to the draft statute, would have jurisdiction over genocide, other crimes against humanity, serious violations of humanitarian law, aggression and certain crimes defined or made punishable by treaties. In 1996, the ILC submitted a second version (reading) of a draft Code of Crimes Against the Peace and Security of Mankind (Code of Crimes) to the UN General Assembly.

In 1997 a UN Preparatory Committee on the Establishment of an International Criminal Court (Prep Com), open for participation to all UN member states, will meet in three sessions of two weeks each in February, August and December. A fourth session of the Prep Com is planned for March-April 1998. The Prep Com's task is to prepare a widely acceptable consolidated text of a treaty that can be submitted to the diplomatic conference.

1.1 Making the right choices

Since October 1994, Amnesty International published several documents setting out the organization's position on the need for an international criminal court and on important issues addressed by the draft statute and during the negotiations between the UN member states.

In January 1997 Amnesty International issued an updated 100-page position paper for the February 1997 Prep Com session aimed at government decision makers, taking into account two years of preparatory work by UN member states. This paper summarizes the main issues in that position paper, entitled *The international criminal court: Making the right choices -Part I* (AI Index: IOR 40/01/97). The position paper states Amnesty International's views on the crimes which should be included in the statute, definitions of the crimes, general principles of criminal law, permissible defences and penalties. Most of these issues will likely be discussed by the Prep Com in its February 1997 session and might be addressed again in later sessions. The paper also covers the relationship between the international criminal court and national jurisdictions (complementarity) and how criminal investigations and prosecutions should be initiated (trigger mechanisms). Amnesty International plans to publish other position papers before future sessions of the Prep Com and before the diplomatic conference. For a full explanation of AI's position on the issues discussed in this summary paper, please consult the updated position paper.

1.2 Jurisdiction, definitions and defences

To ensure that an international criminal court will be an *effective* complement to national criminal justice systems and that its subject matter jurisdiction will cover crimes that are of concern to the international community, Amnesty International calls upon UN member states to ensure that the statute of the future court will be in conformity with the following principles.

- **Core crimes:** the court should have jurisdiction over the three core crimes of genocide, other crimes against humanity and serious violations of humanitarian law applicable to international and non-international armed conflict.
- **Clear definitions:** each of the core crimes and applicable defences should be clearly defined in the statute, its annex or court rules.
- **Impermissible defences:** impermissible defences under international law, such as superior orders, should be excluded.
- **Penalties:** the statute must exclude the death penalty and clearly state the penalties.
- **Effective complement:** States have the primary duty to bring those responsible for grave crimes under international law to justice, but the court must be able to act as an effective complement to states when they are unable or unwilling to fulfil this duty. The court must have the power to determine whether to exercise its concurrent jurisdiction in such cases.
- **Automatic jurisdiction:** the court should have the same universal jurisdiction which any state party has over the core crimes under international law. Thus, it should have inherent (automatic) jurisdiction over each of these core crimes, so that the court can exercise concurrent jurisdiction with respect to each state party in appropriate circumstances.
- **Initiation of investigations:** the prosecutor should be able to initiate investigations in any case where the court has jurisdiction, even in the absence of a referral by the Security Council or a state complaint, based on information from any source and to submit an indictment to the court.
- **Security Council:** the statute of the court should permit the Security Council to submit to the court situations involving threats to, or breaches of, international peace and security and acts of aggression, but not individual cases. The statute should not, however, permit the Security Council to prevent the investigation and prosecution of cases involving such situations.

2. Defining the jurisdiction of the court

According to the draft statute for an international criminal court, delivered by the ILC in 1994, the court would have jurisdiction over genocide, other crimes against humanity, serious violations of humanitarian law, aggression and certain crimes defined or made punishable by treaties. This draft statute has been the basis for treaty negotiations between UN member states since then. Amnesty International believes that the court should have jurisdiction over the crime of genocide, other crimes against humanity and serious violations of humanitarian law applicable in international and non-international (internal) armed conflict. Among UN member states there is vast support for inclusion of these three so-called core crimes in the jurisdiction of the court. Each of these crimes and permissible defences should be clearly defined in the statute, its annex or court rules.

Amnesty International has taken no position on whether crimes other than the three core crimes should be within the jurisdiction of the court. Some states have argued that the crime of aggression should also be part of the court's jurisdiction. Other states argue that attacks on UN personnel should be made criminal under the statute. (Such attacks would be prohibited by the Convention on the Safety of United Nations and Associated Personnel when it enters into force.) Several states have urged that the court should have jurisdiction over such crimes as hijacking,

hostage-taking, attacks on diplomats and environmental crimes. It is possible that the lack of consensus concerning whether such crimes should be included or whether they all constitute crimes under international law could delay ratification of the treaty establishing the court. Amnesty International agrees that the court, as stated in the Preamble to the ILC draft statute, should have jurisdiction “only over most the serious crimes of concern to the international community as a whole”. The omission of particular crimes from the jurisdiction of the court at the initial stages for pragmatic reasons should not be seen as an indication that these crimes are not part of customary international law. These crimes could be added at a later stage if a review mechanism is added to the statute requiring states parties after a certain number of years to consider possible amendments to the statute.

2.1 Genocide

The crime of genocide should be within the jurisdiction of the permanent international criminal court, as envisaged in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Although there have been proposals to widen the definition of genocide to other than national, ethnical, racial and religious groups, such as political and social groups, Amnesty International believes that the statute of the international criminal court at this stage should incorporate without any change the more limited definition of genocide which was incorporated in the Genocide Convention.

This definition was reiterated in identical words in the statutes of the Yugoslavia Tribunal (Yugoslavia Statute) and the Rwanda Tribunal (Rwanda Statute). Any attempt to change the definition for the purposes of the statute at this date could lead to weakening the definition and prolonged debate which would risk delaying the establishment of the international criminal court. In addition, it might be difficult to obtain ratifications of the treaty setting up the court if there were two separate bodies of law on genocide, one under the Genocide Convention and the other under the statute of the international criminal court. Moreover, some of the limits in the scope of the application of the Genocide Convention are addressed in the definition of crimes against humanity.

DEFINING GENOCIDE

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) Causing serious bodily or mental harm to member of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures to prevent birth within the group;
- (e) Forcibly transferring children of the group to another group.

(Convention on the Prevention and Punishment of the Crime of Genocide, Art. II)

The essential elements of the definition of this crime, which must be included in the definition in the statute, are the requisite intent (*mens rea*) to destroy certain groups because of their very nature as particular groups and committing a prohibited act (*actus reus*). The crime of genocide requires a specific intent to commit certain prohibited acts. As the ILC has explained in its 1996 report to the UN General Assembly, the prohibited acts: “are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence.

2.1.1 Subordinates and non-state actors

Nevertheless, the definition of genocide applies to subordinates who carry out the order as well as those who plan or order the genocide, even though the subordinate may not have the same

level of knowledge about the plan or policy as the planner or superior. As the ILC has explained concerning this critical point: "The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the relevance of the destructive effect of this criminal conduct on the group itself."

DEFINITION OF CRIMES

Definitions of crimes have basically two elements: the physical (*actus reus*) and the mental element (*mens rea*).

The physical element of a crime consists of three components: (i) a voluntary act (or failure to act contrary to a legal obligation), that (ii) causes (iii) a specific harm.

The mental element of a crime is the particular state of mind provided for in the definition of that crime. The mental element may be defined in different ways for different crimes. The definition of the crime of genocide, for instance, requires the intention to destroy a national, ethnical, racial or religious group as such. Without that intention one cannot be guilty of the crime of genocide. In the case of murder (not as an instance of genocide) the mental element of the crime is the intent to kill another person, evidenced from the premeditated and deliberate character of the act.

To find someone guilty of a crime both the physical and the mental element must be proved, without justification or excuse.

An essential aspect of the crime of genocide is that persons committing genocide or any of the other prohibited acts, "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals" (Genocide Convention, Art. IV). Thus, the crime can be committed by persons unconnected to the state or even acting in opposition to the state. Therefore, it follows that there is no requirement that genocide be part of a state policy or plan.

Another important aspect of the crime of genocide, a crime against humanity, is that it may be committed in time of peace or war.

2.1.2 ...in whole or in part...

The intention must be to destroy the group "as such" (because of its national, ethnical, racial or religious character) but there is no requirement that the aim be the total destruction of the group. It suffices if the purpose is to eliminate portions of the population marked by specific racial, religious, national or ethnic features. Moreover, there is no requirement in the term, "in part", that the aim must be the destruction of the whole of a group in a particular geographic region or that the aim must be the destruction of a substantial part of the group. It would be incorrect to require that the accused have intended to destroy a substantial part of the entire group or even a substantial part of the group in a particular geographic region or town; it is sufficient to impose criminal responsibility for genocide if the accused aimed to destroy a large number of the group in a particular community.

2.2 Crimes against humanity

DEFINING CRIMES AGAINST HUMANITY

The definition of crimes against humanity “should include the following acts when committed on a systematic or large scale basis and directed against a civilian population: murder, extermination, “disappearances”, torture, rape, enforced prostitution and other sexual abuse, arbitrary deportation and forcible transfers of population, arbitrary imprisonment, enslavement, persecution on political, racial or religious grounds and other inhuman acts.”

Amnesty International, *The International Criminal Court, Making the right choices, Part I, AI Index IOR 40/01/97, February 1997.*

Amnesty International believes that other crimes against humanity besides genocide should be included in the jurisdiction of the future court. In contrast to the definition of genocide, which has been embodied in a single treaty and remained unchanged for nearly half a century, the definition of crimes against humanity is to be found in a number of instruments and has evolved and become further clarified since these crimes first received explicit international legal recognition in the St. Petersburg Declaration of 1868. The latest definition can be found in the 1996 ILC draft Code of Crimes. The 1994 ILC draft statute for an international criminal court did not contain a definition of crimes against humanity.

The jurisdictional definition for purposes of the statute should make clear that, like genocide, other crimes against humanity can be committed in time of peace as well as armed conflict. Since these crimes can be committed by non-state actors, such as armed opposition groups or even by private individuals, there is no requirement that they be committed as

part of a state policy or plan and the intent requirement must be the same at every level in the hierarchy of the state or other group to ensure that all those responsible for these grave crimes are brought to justice. Moreover, there is no requirement that an entire civilian population be targeted.

2.2.1 Murder and extermination

The crime of murder when committed on a systematic or widespread basis is a crime against humanity which should be included within the jurisdiction of the court. The definition of murder in the statute should cover extrajudicial executions, which are unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence. The unlawfulness of extrajudicial executions distinguishes them from justifiable killings in self-defence, deaths resulting from the use of reasonable force in law enforcement, killings in armed conflict which are not forbidden under international law and the use of the death penalty when imposed in conformity with international procedural and substantive standards.

Murders which constitute crimes against humanity also include deliberate and arbitrary killings by armed opposition groups committed on a widespread or systematic basis. They are arbitrary in that they are not countenanced by any internationally recognized standard of law. They contravene fundamental standards of humane behaviour, such as national criminal laws prohibiting murder, international humanitarian law and international human rights standards. Their arbitrary character distinguishes them from killings in self-defence or the defence of others from an immediate threat, and from killings in armed conflict which may occur as a consequence of an attack or a defence of a military objective, such as killings in the course of clashes between violent opposing forces, killings in cross-fire or attacks in general on military and security personnel. They are committed on the authority of an armed opposition group and in accordance with its policy at some level deliberately to eliminate specific individuals, or groupings or categories of individuals, or to allow those under its authority to commit such abuses. Deliberate and arbitrary killings can be distinguished from killings for private reasons, which are shown, for example,

through preventive measures and disciplinary action, to have been the acts of individuals in violation of higher orders.

It goes without saying that the crime of extermination should be within the jurisdiction of the court. The draft Code of Crimes explains the difference between murder and extermination as follows: “[e]xtermination is a crime which by its very nature is directed against a group of individuals. In addition, the act of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared.”

2.2.2 “Disappearances”

The crime of forced disappearance of persons on a systematic basis or large scale should be expressly recognized as a crime against humanity within the jurisdiction of the international criminal court. Although “disappearance” falls squarely within the category “other inhumane acts” which are recognized as crimes against humanity, it deserves to be expressly defined as a crime against humanity to send a clear signal to those who commit this crime of the determination of the international community to bring them to justice wherever they may be found. The crime is not listed explicitly as a crime against humanity in the 1994 ILC draft statute, but the ILC mentioned “forced disappearance of persons” as a separately listed crime against humanity in its draft Code of Crimes.

The definition of the crime of forced disappearance of persons in the statute should be consistent with the definition approved by the UN General Assembly in the Preamble of its Declaration on the Protection of All Persons from Enforced Disappearance and take into account the definition in the Inter-American Convention on the Forced Disappearance of Persons. In developing the definition, the Preparatory Committee should draw on the extensive work which has been done so far in drafting the UN Convention on the Protection of All Persons from Forced Disappearance of Persons. Amnesty International has stated that “[t]he ‘disappeared’ are people who have been taken into custody by agents of the state, yet whose whereabouts are concealed, and whose custody is denied.” It considers that a “disappearance” has occurred whenever there are reasonable grounds to believe that a person has been taken into custody by the authorities or their agents, and the authorities deny that the victim is in custody, thus concealing his or her whereabouts and fate.

2.2.3 Torture

BASIS FOR A DEFINITION OF TORTURE

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from or incidental to lawful sanctions.

Convention against Torture, Art. 1(1)

The systematic or large scale practice of torture is a crime against humanity which should be within the jurisdiction of the international criminal court. The definition of torture should be based on, but not limited to, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). Although the definition for purposes of the Convention is limited to acts "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", the definition is, according to Article 1 (2), without prejudice to any international instrument or national legislation which does or may contain provisions of wider application". The ILC has explained that this principle is particularly appropriate in the context of crimes against humanity, which may be committed not only by governments but by organizations or groups, and that, therefore, acts of torture are crimes against humanity "if committed in a systematic manner or on a mass scale by any government, organization or group".

2.2.4 Rape, enforced prostitution and other sexual abuse

Rape of detainees by government officials or by armed opposition groups on a systematic or large scale is a crime against humanity which should be within the jurisdiction of the international criminal court. Rape in such circumstances is a form of torture, but because of its unique characteristics it also deserves being identified as a separate crime against humanity. Enforced prostitution on a systematic or large scale when government officials or armed opposition groups force detainees to carry out such conduct should also be considered as a crime against humanity which should be within the court's jurisdiction. Some forms of other sexual abuse of detainees by government officials or armed opposition groups committed on a systematic or large scale may amount to crimes against humanity. For the same reasons that they are prohibited in international and non-international armed conflict, they should be considered crimes against humanity.

2.2.5 Arbitrary deportation and forcible transfer of population

The prohibition of deportation should at a minimum include the systematic arbitrary exile of persons from their own country, particularly when this is practiced on a large scale. Such a prohibition would include forced population transfers or exchanges carried out without the free consent of the individuals affected. Moreover, it should be clear that this prohibition extends not only to formal measures taken to deport people from their own country (for example, de-nationalization coupled with an organized and forced departure), but also to the carrying out of acts of terror and intimidation which are clearly intended to sow fear and panic among sections of the population to compel them to leave their own country.

In addition to prohibitions on forcing people out of their own country, the statute should criminalize the systematic or large scale forcible relocation of people within the borders of their own country, when this is done for reasons of their race, religion, language, ethnic or social origin, or political opinion. Again, the prohibition in such situations should cover both formal and informal measures of forced relocation.

A third freedom of movement issue that should be covered by the statute is the *refoulement* (forcible return) of people to countries where their lives, security or freedom are at risk. The prohibition of *refoulement* is a principle of customary international law, and is well supported in conventions covering both peacetime and situations of war. Thus, where a state ignores this obligation and forcibly returns refugees or asylum-seekers back to a country where they will be arbitrarily imprisoned, tortured, “disappeared” or killed, it is acting in breach of its international obligations. When such a policy is pursued on a systematic basis or large scale it should be a crime under international law.

2.2.6 Arbitrary imprisonment and enslavement

The systematic and large scale prolonged detention of political prisoners without a fair and prompt trial in accordance with international standards and their detention after unfair trials, as well as detention of prisoners of conscience, amounts to a crime against humanity which the court should have power to address. Amnesty International works toward the release of prisoners of conscience, that is, persons imprisoned, detained or otherwise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, colour, language, national or social origin, economic status, birth or other status, provided that they have not used or advocated violence. Amnesty International also opposes the detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms.

Systematic and large scale enslavement should be within the jurisdiction of the international criminal court. It is closely related to the crime of arbitrary imprisonment in that it may involve matters of concern to Amnesty International, including detention of political prisoners without charge or trial, often because of such factors as the nationality, race, language or religion of the persons detained. Persons detained on such grounds may also in certain circumstances be considered prisoners of conscience. When committed in an armed conflict, enslavement is a serious violation of humanitarian law.

2.2.7 Persecution on political, racial or religious grounds

The international criminal court should have jurisdiction over systematic or large scale persecution on political, racial or religious grounds as a crime against humanity. Persecution is a separate crime against humanity, independent of the other crimes, such as murder, extermination and “disappearances”. Persecution covers crimes against groups that are not covered by the definition of genocide and also acts that do not carry with them the intent requirement of the crime of genocide, the destruction in whole or in part of the group as such.

2.2.8 Other inhumane acts

NO CRIME WITHOUT LAW

Nullum crimen sine lege (No crime without law) or the principle of legality is one of the first principles of probably every system of criminal law. No one may be held criminally responsible (and hence no one may be punished) unless his or her conduct was defined criminal before he or she acted.

The principle of legality has a few important corollaries:

- criminal statutes should be understandable to reasonable people; persons of common intelligence must not guess at its meaning or differ as to its application
- there shall be no undue discretion in the application of the law by police, prosecutor, jury or judge
- ambiguous statutes shall be interpreted in favour of the accused.

The category of “other inhumane acts” ensures that new forms of crime against humanity which are developed will not escape international criminal responsibility and should be included in the statute. Inhumane treatment is prohibited by common Article 3 of the Geneva Conventions and the ICRC Commentary on that article makes clear why that article does not attempt to elaborate a complete list of acts which are inhumane:

“ . . . it is always dangerous to try to go into too much detail - especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording is flexible and, at the same time, precise.” (I *ICRC Commentary on the Geneva Conventions*, p.54.) A similar approach is taken by the Convention against Torture and courts have been able to interpret the term “other cruel, inhuman or degrading treatment or punishment” consistently with the principle of *nullum crimen sine lege*.

2.3 Serious violations of humanitarian law

Most of the serious violations of humanitarian law which should fall within the jurisdiction of the permanent international criminal court are unquestionably violations of customary law and violations which entail individual international criminal responsibility. Other violations are contrary to generally accepted norms of behaviour in most societies and so serious

that they should fall within the jurisdiction of an international criminal court established by treaty, even if they may not have yet reached the status of customary law. In addition, in the light of recent developments in international law and the changing nature of warfare, serious consideration should be given to making certain acts which are criminal in international armed conflict also crimes in non-international armed conflict which would be within the jurisdiction of the international criminal court.

2.3.1 International armed conflict

The court should have jurisdiction over grave breaches of the four 1949 Geneva Conventions, as provided in the 1994 ILC draft statute. The Geneva Conventions aim to protect the wounded and sick in armed forces in the field, the wounded, sick and shipwrecked members of armed forces at sea, prisoners of war and civilians in time of war as international armed conflict.

It is generally accepted that the grave breaches provisions of the Geneva Conventions reflect customary law. Indeed, as of October 1996, 188 states - more than the entire membership of the UN - were parties to the Geneva Conventions. Reopening a debate about the content, meaning or applicability of the grave breaches provisions should be avoided, because it could delay the establishment of an international criminal court. In addition, it might be difficult to obtain ratifications of the treaty establishing the court if there were two separate bodies of law on war crimes that are considered to be grave breaches

under the Geneva Conventions. Therefore the statute of the international criminal court should keep to the definition of grave breaches as provided for in the Geneva Conventions.

GRAVE BREACHES

The following acts are among the grave breaches of the Geneva Conventions if committed against prisoners of war and certain civilians and others in the hands of a party to the conflict or an occupying power:

- wilful killing
- torture or inhuman treatment, including biological experiments
- wilfully causing great suffering or serious injury to body or health
- compelling the protected person to serve in the forces of the hostile party
- wilfully depriving a protected person of the rights of fair and regular trial.

Each state party to the Geneva Conventions is under the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches. Each state party shall try or extradite to a state willing to try such a person.

The international criminal court should also have jurisdiction over grave breaches of Additional Protocol I (1977) to the Geneva Conventions. Many of the prohibitions of grave breaches in Additional Protocol I, as well as many other aspects of that treaty, are now considered to reflect customary law. There is widespread adherence to the Protocol. Indeed, as of July 1996, 146 states - more than three-quarters of the UN members - were parties to Additional Protocol I.

Grave breaches of Additional Protocol I fall into four groups: (1) grave breaches of the Geneva Conventions against persons not protected by those treaties; (2) acts seriously endangering physical or mental health; (3) attacks on civilians; and (4) certain other acts. According to Article 85 (3), among these grave breaches are the following acts "when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health": "(a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians (...); (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (...); (d) making non-defended localities and demilitarized zones the object of attack; (e) making a person the object of

attack in the knowledge that he is *hors de combat*; (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol."

2.3.2 Non-international armed conflict

The international criminal court should have jurisdiction over serious violations by individuals of humanitarian law governing non-international (internal) armed conflict, including violations of common Article 3 of the Geneva Conventions (applicable in armed conflicts not of an international character) and Additional Protocol II to the Geneva Conventions (relating to the protection of victims of non-international armed conflicts). Crimes such as inhumane treatment of civilians and others who are not taking an active part in the conflict, attacks on the civilian population, starvation of the civilian population, forced deportations, among others, are matters of international concern. It is now well established that acts prohibited by common Article 3 and Protocol II entail international criminal responsibility.

Each of the prohibitions in common Article 3 of the four Geneva Conventions should be included without change as part of the jurisdiction of the international criminal court. Common Article 3 (1) requires all parties to an internal armed conflict to apply, "as a minimum" these provisions: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms

and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The statute should ensure that the jurisdiction of the international criminal court includes the acts prohibited by common Article 3. It would be unfortunate if the permanent international criminal court were to have a more restrictive jurisdiction than the *ad hoc* tribunals.

Among the crimes prohibited during certain internal armed conflicts by Additional Protocol II which, at a minimum, should be included within the jurisdiction of the international criminal court are violations of Article 4 (1) and (2), spelling out certain fundamental guarantees; Article 6, guaranteeing fair trials; Article 13, prohibiting making the civilian population an object of attack; Article 14, prohibiting starvation of civilians as a method of combat; and Article 17, prohibiting the unlawful deportation or transfer of civilians. Some of these prohibitions are already part of customary law and some entail international criminal responsibility. Indeed, the Rwanda Statute includes serious violations of Additional Protocol II within its jurisdiction without any express limitation concerning the provisions covered, although it is likely that the Rwanda Tribunal will determine that some provisions are too vague to entail criminal responsibility.

According to the presumption of innocence, in a criminal trial the prosecutor has the burden to prove the accused guilty beyond a reasonable doubt. But even if the prosecutor proves that the defendant voluntarily and intentionally acted in a criminal way, the defendant may seek to raise defences. If proven these defences may result in his or her acquittal for the crime(s) of which he or she was charged or result in being convicted for a lesser crime.

Normally the burden of providing evidence for defences lies with the defendant. Defences may have very different characteristics. Some, like self-defence, are known as justifications - justifying acts or behavior that would be criminal under circumstances that normally apply. Others, like intoxication and insanity, are often referred to as excuses - claiming that although he or she acted criminally the defendant should not be punished. There are also defences that are not related to the acts or behavior of the defendant, such as the statute of limitation defence.

Defences aim to exclude punishment. Mitigation presupposes that someone is liable to be punished, but aims to reduce the severity of punishment.

3. DEFENCES, MITIGATION AND PENALTIES

3.1 Individual criminal responsibility

The statute should provide for individual criminal responsibility and prohibit any form of collective punishment. It is a basic tenet of international law that individuals are individually responsible for crimes under international law. A corollary of the fundamental principle of individual responsibility is that there can be no collective penal responsibility for acts committed by one or several members of a group.

3.1.1 *Official position and superior responsibility*

A person's official position should be neither a defence nor a mitigating factor in determining appropriate punishment. The statute should ensure that superiors and subordinates are held responsible for both acts and omissions in accordance with international law. 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 as the subordinate. A superior should also be held equally responsible with the subordinate 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 steps within his or her power to prevent or punish the crime.

3.1.2 *Incitement, attempt, and joint responsibility*

The statute should provide that individual criminal responsibility exists for genocide, other crimes against humanity and serious violations of humanitarian law, not only when someone has committed the crime directly, but also when someone has directly and publicly incited someone else to commit such crimes, has attempted to commit one of these crimes, has acted as an accomplice to another in committing one of these crimes or has planned or conspired with another to commit one of these crimes.

Each of these forms of individual responsibility exist under international law with respect to genocide and there are no justifiable reasons for them not to exist for other crimes against humanity or for serious violations of humanitarian law. Moreover, there is ample precedent for imposing international criminal responsibility on these grounds with respect to crimes against humanity and serious violations of humanitarian law.

3.2 Defences and negation of responsibility

To be fully consistent with the principles of legality, the statute or the rules should spell out the permissible defences and the factors which can be taken into account in determining the appropriate sentence. Amnesty International takes no position on whether the following principles should be classified as

defences, excuses, exonerations, justifications or some other form of negation of criminal liability (such as the absence of an essential element of the crime), although for convenience the term “defence” is used in this paper. There are a wide variety of approaches to these questions in different national legal systems. Attempts to harmonize the approaches in more than 185 *national* legal systems in the statute as if drafting a detailed national criminal code would be a difficult, if not impossible task, and could delay indefinitely the establishment of an *international* criminal court.

The primary issue in drafting the statute of an international criminal court is whether particular principles negate international criminal responsibility for the gravest imaginable crimes or not, regardless how the principles are characterized in various national legal systems. Some of these principles, however, may be relevant in certain circumstances to the mitigation of punishment. Therefore, it would be better for the statute simply to state the fundamental principles which the international community believes should guide the court in determining whether particular acts or omissions should subject an individual to international criminal responsibility or not and whether they should be taken into account in mitigation of punishment. These general principles should be further elaborated in the rules of the court and the court’s jurisprudence, based on the positive aspects of the jurisprudence of the four *ad hoc* international criminal tribunals since the Second World War and of national courts which have applied international criminal law.

3.2.1 The non-applicability of statutes of limitation

The statute must include a provision prohibiting statutes of limitation for genocide, other crimes against humanity and serious violations of humanitarian law. None of the international instruments defining these crimes or providing international jurisdiction over them contain statutes of limitation. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that “[n]o statutory limitation shall apply” to genocide, other crimes against humanity and war crimes “irrespective of the date of their commission”.

If, under the statute, the court will have the duty to satisfy itself that the rights of the accused have been respected, it could decide that a case should not proceed if it were not possible through lapse of time for the accused to receive a fair trial.

3.2.2 The prohibition of superior orders as a defence

The defence of superior orders must be excluded. A Trial Chamber of the Yugoslavia Tribunal has reaffirmed in the *Erdemovi*₂ case what had already been stated in the Nuremberg Charter, namely that superior orders are not a defence to crimes against humanity, although they may be considered in mitigation of punishment. This standard should not be weakened by characterizing the prohibited defence of superior orders as a permissible defence of duress or coercion.

3.2.3 The inappropriateness of duress or coercion as a defence

Duress - sometimes called compulsion or coercion - should not be a defence to the crimes of genocide, other crimes against humanity and serious violations of humanitarian law which involve killing or inflicting bodily harm on innocent victims, although it is a factor which could be considered in certain circumstances in determining whether mitigation of punishment is appropriate. Permitting the defence of duress with respect to the worst conceivable crimes when they involve the intentional killing or inflicting bodily harm on innocent third parties, particularly when the duress is in the form of a superior order, would risk

undermining the deterrence of the international criminal court, as well as national courts enforcing international law. It would, in effect, permit a superior orders defence by another name and would be inconsistent with principles of criminal law in many jurisdictions.

Duress is an unlawful threat which causes a person reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or herself or to another is to engage in conduct which violates the law and which causes the person to engage in that conduct. Duress - compulsion by another person - is to be distinguished from necessity - compulsion by natural forces or circumstances - although certain legal systems use the term necessity to include both types of compulsion. In most national jurisdictions, however, the defence of duress is not available to the most serious crimes, such as murder. Moreover, the rationale for society permitting a defence of duress to lesser crimes - that the conduct which violates the literal language of the criminal law is justified because the person has avoided a greater harm - does not apply when an individual, to save his or her own life, kills innocent members of society.

Even in the less serious cases where the defence of duress is permitted in national law, the circumstances are strictly limited. The threats must cause a reasonable fear of immediate or imminent death or serious bodily harm - not future death, non-serious bodily harm or an unreasonable fear - and the defence is unavailable where the person does not take advantage of a reasonable opportunity to escape. Thus, the defence of duress should not be available to persons who voluntarily place themselves in a situation where they know or have reason to know that there is a risk that they will have to commit crimes, such as by joining a unit which is known to commit such crimes.

3.3 Mitigating factors

As indicated above, certain factors which are impermissible defences to genocide, crimes against humanity and serious violations of humanitarian law may, in appropriate circumstances, be considered in determining whether to mitigate punishment, such as superior orders, duress and necessity. Some of the factors existing at the time of the crime which are inappropriate as defences, such as superior orders and duress, may be appropriate mitigating factors in certain cases. International and national jurisprudence, however, indicate that the court must take into account certain other factors in determining whether superior orders are relevant to mitigation, including the ability of the accused to evade the situation, the danger of immediate death or death in the short-term, the lack of moral choice, the rank of the accused, the lack of knowledge of the illegality of the order and the degree of discipline in practice at the time of the crime. Nevertheless, if the order had no influence on the illegal behaviour because the accused was predisposed to carry it out, it would not be a mitigating circumstance.

Duress may be considered as a mitigating factor in certain circumstances and a superior order may be evidence of duress, but essentially the same conditions would have to be satisfied in this situation as in the case where a superior order was being advanced as a mitigating factor on its own. Otherwise, the restrictions on this mitigating factor could lose any effectiveness.

The accused's position as a head of state or government official may not be considered as a mitigating factor.

3.4 Penalties

In a welcome development, the ILC draft statute, like the Yugoslavia and Rwanda Statutes, excludes the death penalty as a possible punishment. The draft statute permits the court to impose a sentence of a

term of life imprisonment or of imprisonment for a specified term of years and a fine. The decision to exclude the death penalty, a penalty which Amnesty International considers to be a violation of the right to life and the right not to be subjected to cruel, inhuman and degrading punishment as recognized in Articles 3 and 5 of the Universal Declaration of Human Rights, is consistent with the position of the majority of countries in the world which have abolished the death penalty in their law or practice.

The ILC draft statute provides inadequate guidance about the appropriate penalties for particular offences. None of the treaties concerning crimes under international law since the Nuremberg Charter specify appropriate penalties. The ILC draft statute also fails to tackle this problem and leaves this issue to be decided by reference to national law. Unlike the statutes of the two tribunals, however, which refer to penalties applicable in the territory where the crimes occurred, the 1994 ILC draft statute in Article 47 (2) allows the court to “have regard to the penalties provided for by the law of: (a) the State of which the convicted person is a national; (b) the State where the crime was committed; and (c) the State which had custody of and jurisdiction over the accused.”

To be consistent with the principle of *nulla poena sine lege* (no punishment without law), an essential corollary of the doctrine of *nullum crimen sine lege*, the penalties should be spelled out with greater precision. The ILC draft statute does not outline any basic principles for deciding which national law is to apply to assure certainty in sentencing. As a result, this article could lead to inconsistent and arbitrary application of penalties to different defendants in the same case.

4. AN EFFECTIVE COMPLEMENT TO NATIONAL COURTS

4.1 Effective complementarity

The permanent international criminal court should be able to act as an *effective* complement to national courts whenever they are unable or unwilling to bring those responsible for genocide, other crimes against humanity or serious violations of humanitarian law to justice. This principle of *effective complementarity* is partially reflected in the preamble to the draft statute. In the preamble, the states parties declare that they wish to establish a permanent court “to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern” which “is intended to be complementary to national criminal justice systems in cases where trial procedures may not be available or may be ineffective”. However, the statute should also make clear that states have the primary duty to bring persons responsible for core crimes to justice and that when they fail to exercise their concurrent jurisdiction over persons suspected of these grave crimes the international criminal court may determine that it should do so.

Some states have emphasized the discretionary *right* of states to bring persons to justice rather than their absolute *duty* under international law to do so. Such an approach, however, would be a fundamental mischaracterization of the concept of complementarity and could suggest that states rather than the court would determine when and if the court could assert its concurrent jurisdiction, despite the evidence of more than half a century. This characterization could also lead to limiting the obligation of states parties to cooperate with the court and to increasing the hurdles before the prosecutor could investigate or prosecute a case.

The court should have the same power to exercise its concurrent jurisdiction with states parties when they are unable or unwilling to bring to justice those responsible for grave crimes as the Yugoslavia

and Rwanda tribunals. These international tribunals may exercise their jurisdiction in several situations even if proceedings are pending in national courts. Under their statutes, respectively according to Article 10 (2) and Article 9 (2): “A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.” In addition, the Trial Chambers may grant a request by the Prosecutor to request states to defer national proceedings when what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.

4.2 Automatic jurisdiction

Amnesty International believes that the court should have inherent (automatic) jurisdiction over each of the three core crimes. Inherent jurisdiction would simply mean that the court would have automatic concurrent jurisdiction with national courts over these crimes; it would only exercise such concurrent jurisdiction, however, when states parties failed to fulfil their duty to exercise it. Thus, the court would be able to act in cases where such action was necessary without requiring the consent of both the state with custody of the suspect (custodial state) and the state on the territory of which the crime occurred (territorial state) and whose officials may be implicated in the crime, as currently required in the ILC draft statute, or of other states. Requiring all these states to consent could be a recipe for paralysis rather than an effective complement to national jurisdictions.

Each of the core crimes is a crime of universal jurisdiction over which each state may and, indeed, must exercise jurisdiction or extradite the suspect to a state willing to do so or transfer the suspect to an international criminal court.

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 determine 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 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 universal jurisdiction in any case as a state party has to bring the suspect to justice and, to the extent that such state jurisdiction may be lacking, the statute should fill any gap. The ILC draft statute only partially satisfies these requirements, because it only provides that the court would have inherent jurisdiction over genocide.

4.3 Trigger mechanisms

The International Committee of the Red Cross has urged that the court have inherent jurisdiction over the three core crimes:

“The court should be established in order to provide an adequate judicial response to the gravity of such crimes. In addition, it should be competent as soon as one of those crimes is committed. It should be noted that imposing *additional conditions*, such as obtaining the consent of the State on whose territory the act was committed, that of the State of which the victims are nationals, that of the State of which the presumed perpetrator is a national, and that of other States concerned, would make it *difficult for the court to function* or might even give it a *de facto* optional character. Such an accumulation of conditions would *run counter to the purpose* of establishing the court and might render it ineffective. The *universal jurisdiction* that already empowers any State to prosecute those responsible for such acts, without requiring the agreement of any other State, would be implicitly *weakened*. As soon as a State becomes a Party to the statute of the court, it should thereby accept the court’s competence and no longer have to give its consent for a case to be submitted to the court.”

ICRC, statement at the UN General Assembly Sixth Committee, 28 October 1996.

To ensure that the court will be an effective complement to national courts in cases of genocide, other crimes against humanity and serious violations of humanitarian law, it must be able to exercise its jurisdiction in any case falling within its jurisdiction when states are unable or unwilling to bring to justice those responsible for such crimes. One essential method to ensure that the court will be able to do so is for the prosecutor to have the power to initiate investigations based on information from any reliable source and to conduct prosecutions without political interference.

4.3.1 The need to ensure that the prosecutor can initiate investigations

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 particular country situation under Chapter VII of the UN Charter. This would ensure that the court has the same independence as the International Court of Justice. 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.

The ILC 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. If these two methods are not supplemented by independent investigations and prosecutions by the prosecutor, the court could be crippled at birth. States and the Security Council are *political* bodies. The court is a *judicial* body and, consistently with the UN Guidelines on the Role of Prosecutors, its prosecutor must have the independence to decide whether to investigate or prosecute.

4.3.2 Independence of the prosecutor

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 the ILC 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”.

In addition, under the ILC 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. The Security Council could refer individual cases against only certain suspects of a particular crime or series of crimes, thus preventing the prosecutor from investigating and prosecuting equally culpable individuals.

Moreover, the ILC draft statute further limits the independence of the prosecutor by providing 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”.

4.3.3 The appropriate role of the Security Council

Amnesty International believes that referral of situations being considered by the Security Council to the prosecutor should be one way of bringing cases before the permanent international criminal court. Permitting such referrals will make unnecessary the establishment of *ad hoc* tribunals and avoid criticism by those who still believe that the Security Council lacks such power. It could also enable the Security Council in Chapter VII situations to exercise its powers under that Chapter to assist the court in implementing its orders and judgments, particularly when there has been a complete breakdown of national systems or even defiance of the international criminal court. Nevertheless the Security Council should not be able to refer individual cases, but only entire situations. The referral must not limit the power of the prosecutor to investigate on his or her own initiative individual cases within the natural geographic and temporal scope of the situation or to suspects of a particular nationality, in contrast to the geographic limits on the Prosecutor with regard to former Yugoslavia and Rwanda and the temporal and nationality limits with regard to Rwanda. The Security Council, a political body, must not be able to prevent or delay a prosecution either of the nationals of its members or those of other states by an international criminal court. Such a power would give the Security Council the ability to give persons suspected or accused of the gravest possible crimes under international law blanket amnesties, undermining rule of law and the very reason for a permanent, international criminal court. It would be inconsistent with the fundamental principle that there can be no peace without justice.