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THE INTERNATIONAL CRIMINAL COURT
Making the right choices - Part I

"The repression, pursuant to the principles of the Nürnberg judgment, of international crimes against peace and humanity, which the General Assembly of the United Nations confirmed by its resolution of 11 December1946, can only be ensured by the establishment of an international criminal court.

This would avoid any future recurrence of the criticism often levelled against the International Military Tribunal for the trial of major war criminals, that it was an ad hoc *court which only imperfectly represented the international community."*

Memorandum submitted to the United Nations Committee on the Progressive Development of International Law and its Codification by Henri Donnedieu de Vabres, representative of France and former Judge of the International Military Tribunal at Nuremberg, 15 May 1947

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.

The United Nations (UN) is closer than it has been in half a century to establishing such a court. In 1994 the International Law Commission transmitted a draft statute for a permanent international criminal court (ILC draft statute) to the UN General Assembly (a copy of the draft statute is annexed as an appendix to this paper). The court would be established by a treaty incorporating the statute and it would have jurisdiction over genocide, other crimes against humanity, serious violations of humanitarian law, aggression and certain crimes defined or made punishable by treaties. Two successive committees appointed by the General Assembly studied the draft statute at length in 1995 and 1996. Based on the results of this extensive work, the UN General Assembly has decided to convene a diplomatic conference in 1998 to adopt a treaty setting up such a court. A UN Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee) established in 1995 is to meet in four sessions in 1997 and 1998 to prepare a consolidated text of a revised version of the ILC draft statute for the court containing various options for the diplomatic conference to consider.

A. Amnesty International's support for the establishment of a permanent international criminal court

This paper is the most recent of a series of papers which Amnesty International has published supporting the establishment of a permanent international criminal court since 1993 as part of a worldwide effort by the movement's more than one million supporters, in cooperation with more than 80 other organizations in the NGO Coalition for an International Criminal Court.[1] In addition to detailed position papers aimed at governments,[2] Amnesty International has published a wide variety of materials aimed at the general public, including briefing papers, leaflets, audio cassettes, posters and postcards. Some of these materials for the general public have been or are being translated into other languages, including Arabic, Croatian, Dutch, French, Hindi, Italian, Nepali, Polish, Romanian, Spanish and Turkish.

This position paper is designed as an easy-to-use manual to assist decision-makers in ministries of foreign affairs, justice and defence and delegates to the Preparatory Committee in preparing a consolidated text by providing detailed information concerning Amnesty International's views regarding the provisions of the annexed ILC draft statute which will be helpful in evaluating the merits of the hundreds of proposed amendments to be discussed at the first session of the Preparatory Committee (10 to 21 February 1997). It is hoped that the position paper will also be useful to members of parliament, the legal profession and interested members of the general public desiring to help shape the position of their governments. Amnesty International plans to publish other position papers before future sessions of the Preparatory Committee and before the diplomatic conference.

This position paper sets forth Amnesty International's views on the following topics which are likely to be discussed at the first session:the crimes which should be included in the statute, definitions of the crimes, general principles of criminal law, permissible defences and penalties. It also addresses the following questions which were originally proposed for the first session, but then reportedly deleted from a proposed list of topics circulated in January 1997 by the Chairman of the Preparatory Committee, Adriaan Bos (Netherlands) shortly before this paper was issued: the relationship between the international criminal court and national jurisdictions (complementarity) and how criminal investigations and prosecutions would be initiated (trigger mechanisms). Subsequent sessions (1 to 12 August 1997, 1 to 12 December 1997 and 16 March to 3 April 1998) are expected to address issues not discussed at the first session, including: the organization of the court; due process and criminal procedure; state cooperation with the court, particularly concerning investigations, production of evidence, arrests and transfer of persons to the court; relationship of the court to the UN and financing of the court. The final schedule of topics has yet to be decided.

B. A brief history of proposals for a permanent international criminal court

[1] The NGO Coalition for an International Criminal Court is an informal coalition of non-governmental organizations working to establish a permanent international criminal court before the end of this century. The NGO Coalition helps its members to coordinate lobbying and distributes information concerning the efforts inside and outside the UN to establish the court. It operates an Internet web site containing most of the UN documents related to the court: http://www.igc.apc.org/icc. Anyone with an e-mail address can subscribe to the NGO Coalition e-mail distribution list by sending the message "subscribe icc-info" to: majordomo@igc.apc.org. Users of an APC-affiliated network (IGC, GreenNet, Web) can access the NGO Coalition "un.icc" computer conference.

[2] Amnesty International, *Establishing a just, fair and effective international criminal court* (AI Index: IOR 40/05/94) (also available in Spanish); Amnesty International, *Challenges ahead for the United Nations Preparatory Commitee Drafting a Statute for a Permanent International Criminal Court* (AI Index: IOR 40/03/96).

Numerous proposals for a permanent international criminal court have been made over the years, but, as the following brief review indicates, they have generally failed for lack of political will rather than because of weaknesses in the proposals. Indeed, four *ad hoc* international criminal tribunals have been created in this century, demonstrating both that international criminal courts are feasible and that a permanent court is necessary to ensure that international justice is available in all parts of the globe.

The first international criminal court to bring to justice someone responsible for what would today be characterized as crimes against humanity was convened more than five centuries ago. In 1474, an *ad hoc* international criminal tribunal of 28 judges from towns in Alsace, Germany and Switzerland, with a presiding judge from Austria, tried and convicted Peter von Hagenbach for murder, rape, perjury and other crimes in violation of "the laws of God and man" during his occupation of the town of Breisach on behalf of Charles, the Duke of Burgundy, at a time when there were no hostilities.[3] Sadly, nearly five centuries were to elapse before the next international criminal tribunal would be established.

Perhaps the first proposal for a permanent international criminal court in modern history was made by Gustav Moynier of Switzerland more than a century ago. Horrified by the atrocities committed by both sides in the Franco-Prussian War in 1870, in January 1872 he proposed the establishment of an international criminal court to deter violations of the Geneva Convention of 1864 and to bring to justice anyone responsible for such violations.[4] Although one European government reportedly declared that it was ready to sign a convention establishing such a court, there was little interest by other governments and many of the leading international experts on humanitarian law criticized the proposal as unrealistic.[5]

Immediately after the end of the First World War, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Peace Conference Commission) appointed on 25 January 1919 by the Paris Peace Conference proposed that an *ad hoc* tribunal be established to try nationals of the Central Powers for violations of the laws of war and the laws of humanity, but this proposal was rejected in favour of provisions in the Versailles Treaty for an *ad hoc* international tribunal to try the Kaiser for "a supreme offence against international morality and the sanctity of treaties" and for Allied military tribunals to try other persons for war crimes.[6] After the Kaiser fled to the

[3] For a short account of this trial and references to other accounts, see Georg Schwarzenberger, II *International Law as Applied by Courts and Tribunals* (London: Stevens & Sons Limited 1968), pp. 462-466.

[4] G. Moynier, *Note sur la création d'une Institution judicaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*, ICRC, 28th circular, 28 January 1872.

[5] Pierre Bossier, *From Solferino to Tsushima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute 1985), pp. 283-284.

[6] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Peace Conference Report), Versailles, March 1919, Conference of Paris 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, *reprinted in* 14 Am. J. Int'l L. (1920) (Supp.), p. 95, 123-124; Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Treaty), Versailles, 28 June 1919, 11 Martens (3d) 323, Arts 227-230. The military tribunals were to be national tribunals established by the states of the victim's nationality or, if the victims were of more than one nationality, international and composed of members of military tribunals of the states of the victims. Versailles Treaty, Art. 229. *See generally* James F. Willis, *Prologue to Nuremberg* (1982).

Netherlands, however, the Allies made no serious attempt to set up the tribunal or seek his transfer and, after objections by Germany, cases which would have been tried by Allied military tribunals were transferred to German courts; only 21of more than 21,000 suspects were tried, most of whom were acquitted or received light sentences.[7] Attempts to bring to justice persons responsible for violations of the laws of war and the laws of humanity in the Ottoman Empire were also eventually abandoned in the face of national opposition and Allied loss of interest.[8]

After these unsuccessful attempts to address war crimes at the international and national level, various proposals were made between the wars to establish a permanent international criminal court. A proposal in 1920 to set up such a court as part of the League of Nations was rejected by the Assembly as premature.[9] Several non-governmental organizations, including the International Law Association, the Inter-Parliamentary Union, the International Federation of Human Rights Leagues and the International Congress of Penal Law urged the establishment of a permanent international criminal court.[10] In 1934, France proposed that the League of Nations establish a permanent court to try terrorist offences, but treaties adopted in 1937 defining the crimes and including the statute of the court never entered into force.[11] Proposals during the Second World War to set up a permanent international criminal court were rejected in favour of *ad hoc* international tribunals at Nuremberg and Tokyo, followed by Allied national military tribunals, to try Axis defendants.

The first serious effort after the Second World War to establish a permanent international criminal court with jurisdiction over crimes against humanity, serious violations of humanitarian law and crimes against peace was made by France in 1947. Its representative on the UN Committee on the Progressive Development of International Law and its Codification, Judge Henri Donnedieu de Vabres, formerly a judge on the International Military Tribunal at Nuremberg, proposed on 13 May 1947 the establishment of such a court.[12] The General Assembly took up the proposal the following year, but abandoned efforts to establish a permanent international criminal court to try cases of genocide as part of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and simply provided for cases of genocide to be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting

[7] *See generally* Claude Mullins, *The Leipzig Trials* (1921).

[8] *See* Vahakn N. Dadrian, "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications", 14 Yale J. Int'l L. (1989), p. 221; David Matas, "Prosecuting Crimes against Humanity: The Lessons of World War I", 13 Ford. Int'l L. J. (1989), p. 86.

[9] Memorandum by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction (Historical Survey), UN Doc.A/CN.4/7/Rev.1 (1949), pp. 8-12.

[10] *Id*., pp. 12-15; 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 (November 1995) (Special Issue), p. 2.

[11] Historical Survey, *supra*, n. 11, pp. 16-18.

[12] He submitted the French proposal, which provided that certain matters would be tried by a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court, two days later. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the representative of France, UN Doc. A/AC.10/21, 15 May 1947. The quotation from the French proposal on the first page of this paper is from a revised translation in Historical Survey, *supra*, n. 9, Appendix 11, p. 119.

Parties which shall have accepted its jurisdiction".[13] However, on 9 December 1948, the same day that it adopted the Genocide Convention, the General Assembly asked the International Law Commission to study the possibility of establishing a permanent international criminal court.[14] The International Law Commission studied this question at its 1949 and 1950 sessions and concluded that such a court was "desirable" and "possible".[15] 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 and 1953, and the International Law Commission adopted a draft Code of Offences against the Peace and Security of Mankind (1954 draft Code of Offences) in 1954, but the General Assembly in 1954 abandoned further efforts to set up a court pending agreement on a definition of the crime of aggression and an international code of crimes.[16]

Although the General Assembly agreed on a definition of aggression in 1974 and substantial work was done by the International Law Commission on a draft code of crimes under international law between 1982 and 1991 based on the work of its Rapporteur, Doudou Thiam (Senegal), the General Assembly did not return to the question of an international criminal court until 1989 after initiatives by President Mikhail Gorbachev of the USSR in 1987 calling for an international criminal court to try cases of terrorism and a proposal by the Prime Minister of Trinidad and Tobago, A.N.R. Robinson in 1989 to establish an international criminal court to try cases of drug trafficking.[17] In December 1989, the General Assembly asked the International Law Commission to resume work on a statute of an international criminal court[18] and in 1993, after the establishment of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) earlier that year (the statute was drafted in just over two months), it asked it to complete work on the draft statute "as a matter of priority" by July 1994.[19] The International Law

[13] Genocide Convention, 78 UNTS 277, 9 December 1948, Art. VI.

[14] GA Res. 260 (III) B, 9 December 1948.

[15] *See* 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.

[16] Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, 7 UN GAOR Supp. (No. 11) at 21, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction 27 July-20 August 1953, 9 UN GAOR Supp. (No. 12), UN Doc. A/2645 (1954); Report of the International Law Commission, 9 UN GAOR Supp. (No. 9) at 11, UN Doc. A/2693 (1954).

[17] *See* John Quigley, "Perestroika and International Law", 82 Am. J. Int'l L. (1988), pp. 788, 794. These government initiatives followed extensive work by non-governmental organizations, particularly the World Federalist Movement and the International Association for Penal Law (*Association Internationale de Droit Pénal*), and tireless efforts by independent experts to demonstrate the feasibility of an international criminal court, in particular, by Benjamin B. Ferencz, a member of the United States prosecution team at the Nuremberg trial, in his book, *An International Criminal Court, A Step Toward Peace: A Documentary History* (London: Oceana Publications 1980), and by Professor M. Cherif Bassiouni. See, for example, among his extensive writings, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Dordrecht: Martinus Nijhoff Publishers 1987).

[18] GA Res. 44/39 of 4 December 1989 (requesting the International Law Commission "to address the question of establishing an international criminal court" with jurisdiction over crimes under the draft Code of Crimes then being prepared, "including persons engaged in illicit narcotics drugs across nataional frontiers"). The General Assembly renewed the request to study the question of an international criminal court the following year. GA Res. 45/41 of 28 November 1990.

[19] GA Res. 48/31 of 9 December 1993.

Commission submitted a draft statute to the General Assembly by this deadline and recommended that it be transmitted to a diplomatic conference, but even though a second *ad hoc* tribunal had just been established, the International Criminal Tribunal for Rwanda (Rwanda Tribunal), a proposal to do this was defeated in the Sixth Committee of the General Assembly. Instead, the General Assembly decided to establish an Ad Hoc Committee on the Establishment of an International Criminal Court to study the issues related to the statute, which met in two sessions in 1995.[20] Later that year, the General Assembly decided to set up another committee, the Preparatory Committee on the Establishment of an International Criminal Court to study the issues further and to draft texts, based on the ILC draft statute, government comments and contributions of relevant organizations, with a view to preparing a widely acceptable consolidated text of a convention for a permanent court as a step towards consideration by a diplomatic conference.[21] The Preparatory Committee met in two sessions in 1996.[22] In July 1996, the International Law Commission completed its second reading of the draft Code of Crimes against the Peace and Security of Mankind (draft Code of Crimes) and sent its report (1996 ILC Report) with the draft Code to the General Assembly.[23] On 17 December 1996, the General Assembly decided that the Preparatory Committee should meet in four sessions of up to nine weeks in 1997 and 1998 "in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference" and that "a diplomatic conference of plenipotentiaries will be held in 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court".[24]

With sufficient political will, the diplomatic conference will adopt a treaty containing the statute of a permanent international criminal court in the summer of 1998 and the court will be established before the end of the century.

C. The growing international support for a permanent international criminal court

[20] GA Res. 49/53 of 9 December 1994. See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 49 UN GAOR Supp. (No. 22), UN Doc. A/50/22 (1995); see also Christopher Keith Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court", 91 Am. J. Int'l L. (1997) (forthcoming).

[21] GA Res. 50/46 of 11 December 1995. The term "other relevant organizations" was intended to include non-governmental organizations. Among the many such contributions, in addition to those published by Amnesty International (see note 2, *supra*), are the following: Association Internationale de Droit Pénal *et al., 1994 ILC Draft Statute for an International Criminal Court With Suggested Modifications (Updated Siracusa-Draft)* (15 March 1996); Human Rights Watch, *Human Rights Watch Commentary for the Preparatory Committee on the Establishment of an International Criminal Court* (August 1996); International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper* (August 1995); International Federation of Human Rights Leagues, *Justice for Humanity*, *supra*, n. 10; Lawyers Committee for Human Rights, *Establishing an International Criminal Court* (August 1996) and *Fairness to Defendants at the International Criminal Court* (August 1996). Many other useful papers have been published by other non-governmental organizations.

[22] The report is in two volumes. The first summarizes the discussion and the second includes the various proposals for amendment of the ILC draft statute. Report of the Preparatory Committee on the Establishment of an International Criminal Court, 51 UN GAOR Supp. (No. 22), UN Doc. A/51/22 (1996).

[23] Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, 51 UN GAOR Supp. (No. 10) p. 9, UN Doc. A/51/10.

[24] GA Res. 51/207, 17 December 1996.

There is widespread and growing support around the world for the establishment of a permanent international criminal court which would be effective. The UN High Commissioner for Human Rights has repeatedly endorsed the establishment of such a court,[25] the UN Special Rapporteur on extrajudicial, summary or arbitrary executions endorsed it in his November 1996 report to the General Assembly[26] and the UN Special Rapporteur on the independence of judges and lawyers endorsed it in his 1996 report to the UN Commission on Human Rights.[27] Regional intergovernmental organizations have also strongly supported the establishment of such a court, including the Parliamentary Assembly of the Council of Europe,[28] the European Parliament,[29] the ACP-EU Joint Assembly[30] and the Third Conference of Ministers of Justice of Francophone Countries.[31] The International Committee of the Red Cross (ICRC) has stated that it gives "its full support to the work of the Preparatory Committee on the establishment of an international criminal court".[32] It has been endorsed by the Inter-Parliamentary Union[33] and supported by the Non-Aligned Movement.[34] The international legal community has endorsed the establishment of

[25] Address by José Ayala-Lasso, United Nations High Commissioner for Human Rights to the Commencement Class of 1996 of the Columbia School of International and Public Affairs, 14 May 1996; Towards a Permanent International Criminal Court, Turin address, 12 October 1996 (available on the Amnesty International Italian section's web site: http://www.amnesty.it/eventi/icc/confer/lasso.htm); Report of the High Commissioner for Human Rights, UN Doc. A/51/36, 18 October 1996, para.41.

[26] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457 (1996), para. 160.

[27] Report of the Special Rapporteur on the independence of judges and lawyers, Dato'Param Cumaraswamy, UN Doc. E/CN.4/1996/37 (1996), para. 79.

[28] Council of Europe, Parl. Ass. Rec. 1189 (1992), para. 9 ("The Assembly, therefore, recommends that the Committee of Ministers call upon member states to act through the United Nations to secure the convening of an international diplomatic conference to prepare a convention on the setting up of a criminal court, and support such action.").

[29] European Parl., Resolution on the establishment of the Permanent International Criminal Court, B4-0992/96, 9 September 1996.

[30] ACP-EU Joint Assembly, Resolution ACP-EU 1866/96/fin. on the establishment of the Permanent International Criminal Court, adopted on 26 September 1996, para. 1 ("Formally invites the ACP-EU Council and its Member States to support the need to establish the Permanent International Criminal Court, and to act in concert at the 51st General Assembly of the UN to ensure that it renews the mandate of the Preparatory Committee and take the decision to convene a Plenipotentiary Diplomatic Conference to establish an International Criminal Court before the end of 1998[.]").

[31] *3ème Conférence des Ministres de la Justice des pays ayant le français en partage, Declaration du Caire*, 1 November 1995, para. 4 (b) ("*Nous prenons les engagements suivants: . . . participer activement à la poursuite des travaux relatifs à la convention instituant une Cour criminelle internationale*[.]") "We undertake the following commitments . . . to participate actively in the continuing efforts concerning the establishment of a permanent international criminal court").

[32] ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 2.

[33] Inter-Parliamentary Union, 86th sess., October 1991, Santiago, Chile.

[34] NAM, Final Document, Cartagena de Indias, Colombia (14 to 20 October 1995), para. 122 ("Further progress is necessary to achieve full respect for international law and . . . a system of international criminal justice with respect to crimes against humanity as well as other international offences.").

an international criminal court, including the International Bar Association,[35] the International Association of Lawyers (*Union Internationale des Avocats*),[36] the Asian-African Legal Consultative Committee,[37] local lawyers groups[38] and former prosecutors of the International Military Tribunal at Nuremberg.[39] As discussed above, it has been supported by a broad international coalition of nearly 80 nongovernmental organizations around the globe, which has recently been augmented by the support of nearly 1500 nongovernmental organizations in 143 countries which are part of the Earth Action Council. Newspapers throughout the world have called for the prompt establishment of an international criminal court.[40]

AMNESTY INTERNATIONAL'S BASIC PRINCIPLES CONCERNING EFFECTIVE COMPLEMENTARITY, DEFINITIONS OF CRIMES AND DEFENCES AND TRIGGER MECHANISMS

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.

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.

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.

Each of the core crimes and applicable defences should be clearly defined in the statute, its annex or court rules.

[35] International Bar Association, Resolution on the Establishment of a Permanent International Criminal Court, June 1995.

[36] International Association of Lawyers, Resolution, Paris, 18 November 1995 ("The International Association of Lawyers . . . Urges State governments to favour the rapid and effective establishment of the Permanent International Criminal Court.").

[37] Recommendation at meeting in October 1996.

[38] See, for example, The Association of the Bar of the City of New York, *Report on the Proposed International Criminal Court*, 20 December 1996.

[39] Nuremberg Prosecutors again Appeal for a Permanent International Criminal Court, Press Release, 1 October 1996, and Resolution for a Permanent International Criminal Court, adopted at a reunion held in Washington, D.C., 23 March 1996; Lord Hartley Shawcross, *Life Sentence* (London: Constable 1995), p. 137 ("International law will never gain its full impact until an international court is established. Nor would the establishment of such a court present any great difficulty whether financially or politically.").

[40] In the past two years, hundreds of articles in countries around the world have been written on the subject. For a comprehensive collection of such articles, contact the NGO Coalition for an International Criminal Court, 777 UN Plaza, New York, New York 10017.

Impermissible defences under international law, such as superior orders, should be excluded.

The statute must exclude the death penalty and clearly state the penalties.

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.

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.

I. ENSURING THAT THE COURT IS AN EFFECTIVE COMPLEMENT TO NATIONAL COURTS

"In the aftermath of the horrors of the 2nd World War, and the trials by the victorious powers of Nazi leaders at Nuremberg, it was generally anticipated by the international community that a new era had begun. An era in which the human rights of all citizens in all countries of the world would be universally respected. It was not to be. The past five decades have witnessed some of the gravest violations of humanitarian law. Those responsible have too frequently escaped trial and punishment by national courts. Indeed, in many cases they have been in positions of leadership and power in their own countries and effectively placed themselves above the law.

There was no mechanism devised by the international community for establishing the guilt of perpetrators and punishing them. Justice was denied to millions of victims of murder, disappearances, rape and torture."

Justice Richard Goldstone, Yugoslavia Tribunal Prosecutor, opening statement in application for a deferral of national court proceedings, 13 February 1995, in *Prosecutor v. Duško Tadi_ a/k/a "Dule"*

As stated by Justice Goldstone, in the more than half a century since the trial of Axis leaders for crimes against peace, war crimes and crimes against humanity ended before the Nuremberg Tribunal on 30 October 1946, only a handful of people have been brought to justice in national courts for the millions of crimes against humanity and serious violations of humanitarian law committed since the end of the Second World War.[41] Neither states where these crimes have occurred nor states where persons suspected of such crimes have taken refuge nor third states which could request extradition 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 to act as an effective complement to national courts, which retained concurrent jurisdiction, in those cases where the states concerned failed to perform their duty.

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, Denmark, Italy, Netherlands and Spain or with a view to transfer to an international tribunal, including Belgium, Bosnia and Herzegovina, Cameroun, France, Germany, Kenya, the Netherlands, Switzerland 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 Bangladesh, India and Kuwait. In most of these states, however, only a small percentage of the total number

The permanent international criminal court should also be able to act as an *effective* complement to national courts whenever they are unable or unwilling to bring those responsible for core crimes of genocide, other crimes against humanity and serious violations of humanitarian law to justice. As the High Commissioner for Human Rights has stated, "Together, we must rid this planet of the obscenity that a person stands a better chance of being tried and judged for killing one human being than for killing one hundred thousand." [42] 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". The preamble states the important principle of effectiveness, which should be a criterion for assessing each provision of the statute, and the principle that the court should be able to act when national criminal jurisdictions are not available or are 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 two *ad hoc* tribunals for the former Yugoslavia and Rwanda. These international tribunals may exercise their jurisdiction in several situations even if proceedings are pending in national courts. Under their statutes,

"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."[43]

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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, Bangladesh, Brazil, Chile, Croatia, El Salvador, Haiti, Honduras, India, Liberia, Nicaragua, Peru, South Africa, Suriname and Uruguay. Moreover, many of the proceedings have fallen short of international standards or amounted to sham trials.

[42] Address by José Ayala-Lasso, *supra*, n. 25, p. 5.

[43] Yugoslavia Statute, Art. 10 (2); Rwanda Statute, Art. 9 (2).

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".[44]

The preamble should be strengthened by emphasizing that it is the primary duty of states to bring to justice persons responsible for such serious crimes and by emphasizing that the international criminal court should effectively complement national criminal justice systems when they are unable or unwilling to fulfil their obligations to bring to trial such persons. Requiring that a national legal system be both unavailable and ineffective or only that it be unavailable would seriously weaken the statute. A judicial system may well be *available but ineffective* in that it would not be able to assure a thorough investigation, effective prosecution, fair trial and effective post-conviction review. If the court were able to act only when the judicial system was *unavailable*, it would be limited to a very few situations, such as Cambodia in the 1970s and Afghanistan, Liberia, Rwanda and Somalia in the 1990s.

II. ENSURING CORE CRIMES ARE WITHIN THE COURT'S JURISDICTION

> *"From this standpoint, Japan would like to associate itself with the view that the jurisdiction of the ICC should, at its initial stage at any rate, be limited to three core crimes - genocide, conventional war crimes and crimes against humanity - and that a review clause be included, so that jurisdiction may be revised whenever it is deemed appropriate to do so."*
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> Statement by H.E. Mr. Hisashi Owada, Permanent Representative of Japan in the Sixth Committee of the General Assembly, 28 October 1996, p. 3

A. The core crimes which should be in the statute

Amnesty International believes that the jurisdiction of the court should, as provided in Article 20 (a), (c) and (d) of the ILC draft statute, include the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. There has been overwhelming support in the Ad Hoc Committee and the 1996 sessions of the Preparatory Committee for including these crimes within the court's jurisdiction. They fully satisfy the purpose of the court "to exercise jurisdiction over the most serious crimes of concern to the international community as a whole".[45] Indeed, genocide and other crimes against humanity are considered to be *jus cogens* (rules of customary law which cannot be set aside by treaty or acquiescence, but only by the formation of a later customary rule).[46]

[44] Yugoslavia Tribunal Rules of Procedure and Evidence, Rules 9 (iii), 10; Rwanda Tribunal Rules of Procedure and Evidence, Rules 9 (iii), 10.

[45] ILC draft Statute, Preamble.

[46] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 4th ed. 1990), p. 513; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. (1995), p. 558; *Case of Roach and Pinkerton*, Inter-American Court of Human Rights, Resolution No. 3/87, Case 9647 (United States), 27 March 1987, *reprinted in* 8 Hum. Rts L. J., No. 2-4, pp. 345, 352 (prohibition of genocide is *jus cogens*); see also *Barcelona*

The court should have jurisdiction over the most serious violations of humanitarian law in both *international* armed conflict, including grave breaches of the Geneva Conventions of 1949 and their Additional Protocol I,[47] as provided in Article 20 (e) of the ILC draft statute, and *internal* armed conflict, including violations of common Article 3 of the Geneva Conventions and Additional Protocol II.[48] As explained below, although violations of humanitarian law in non-international armed conflict are not expressly listed in the ILC draft statute, the International Law Commission believed that they would be covered by Article 20 (c) (serious violations of the laws and customs applicable in armed conflict) and they are identified as war crimes in the draft Code of Crimes.

In reviewing the widespread loss of life in international and internal armed conflicts, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has declared that "[a]ll those responsible for violations of the right to life in situations of armed conflicts must be held accountable."[49] As discussed below in Part V.B, both the Yugoslavia and Rwanda Tribunals have jurisdiction over violations of humanitarian law in non-international armed conflict. Failure to include acts prohibited by common Article 3 or by Additional Protocol II, both of which apply to internal armed conflicts, or acts prohibited by other humanitarian law governing such conflicts, could mean that those committing such acts occurring in internal armed conflict - the most common form of armed conflict today - might go unpunished.

B. The need for inherent jurisdiction over the core crimes

Amnesty International believes that the court should have inherent (automatic) jurisdiction over each of the three core crimes, not just over genocide as in Article 21 (1) (a) of the draft statute. 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 Article 21 (1) (b) of 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,

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Traction, Light and Power Company, Ltd., Judgment, ICJ Reports 1970, p. 32 (genocide is an obligation *erga omnes* involving rights which all states have a legal interest in protecting).

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 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 (Additional Protocol I), *opened for signature* Dec. 12, 1977, 1125 UNTS 3.

[48] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II), *opened for signature* 12 December 1977, 1125 UNTS 609.

[49] UN Doc. E/CN.4/1994/7, para. 707 (discussing both international and internal armed conflicts).

must exercise jurisdiction or extradite the suspect to a state willing to do so or transfer the suspect to an international criminal court. As explained below, a number of provisions in the ILC draft statute will have to be amended to ensure that the system of inherent jurisdiction will be an effective complement to national jurisdictions.

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. Even though each of these core crimes are the gravest crimes under international law, the ILC draft statute provides that the court would have inherent jurisdiction only over genocide (Article 21 (1) (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*[50] with respect to *any other state party which is a party to this Convention* (Article 21 (1) (a)). All states parties to the statute should become parties to the Genocide Convention.[51] 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 its concurrent jurisdiction even if those states were unable or unwilling to bring the suspect to justice themselves.

Integration into the *aut dedere aut judicare* system. If *the relevant states parties had consented to the court's jurisdiction over the core crimes* of 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 and Additional Protocol I, and torture as defined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) (Article 20 (e) of the ILC draft statute),[52] then the court could compel the states parties to the statute which are unable or unwilling

[50] Genocide Convention, Art. VI ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

[51] The General Assembly has appealed to all states on a number of occasions to become parties to the Genocide Convention. *See, e.g.,* GA Res. 795 (VIII), 3 November 1993.

Convention against Torture, *adopted by* the General Assembly in GA Res. 39/46 on 10 December 1984, *entered into force* 26 June 1987. In addition to these crimes, the ILC 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

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 ILC draft statute of inadequate integration of the jurisdiction of the court into the *aut dedere aut judicare* system and the current onerous state consent requirements.

The ILC 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 mentioned in Article 20 (e) - grave breaches under the Geneva Conventions and Additional Protocol I and torture as defined in the 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: (1) have to transfer the accused to the court, (2) extradite the accused to a requesting state willing to try the accused or (3) prosecute the accused itself (Article 53 (2) (b)).[53] Article 53 (3) provides that the transfer of a suspect to the court would satisfy the *aut dedere aut judicare* obligation under these treaties only between states parties to the statute which had accepted the jurisdiction of the court over the crime.[54]

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 which had not accepted the court's jurisdiction over the crime. Such a transfer would satisfy the requested state's obligation under these treaties to bring the suspect to justice - the very object and purpose of the *aut dedere aut judicare* requirement in the Geneva Conventions, Additional Protocol I and the Convention against Torture.[55] 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 in those cases

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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 a subsequent review so that additional crimes could be included in the future when agreement was reached on definition or inclusion. This proposal received significant support.

"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[]". ILC draft statute, Art. 53 (2) (a) (emphasis supplied). If, however, *the requesting state is not a party to the statute*, the court would have no power to assert jurisdiction if the subsequent criminal proceedings were unfair or a sham.

"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." ILC draft statute, Art. 53 (3) (emphasis supplied).

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 (ICRC Commentary on the Geneva Conventions)*, Commentary on Article 49, First Geneva Convention ("[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.").

where the cost of evidence gathering, witness protection and legal assistance might be very expensive than a small state with inadequate resources.[56] Article 53 (3) should be amended to provide that the transfer to the international criminal court would satisfy any *aut dedere aut judicare* obligations under other treaties. Such an approach would appear to be consistent with the subsequent views of the International Law Commission in its commentary to the draft Code of Crimes.[57]

It is not certain whether the court under the ILC draft statute would be able to exercise its concurrent 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 deferral of proceedings in a state party to the statute in the situation covered by Article 53 (3) or in the full range of circumstances authorized under the statutes and rules of the Yugoslavia and Rwanda Tribunals (see discussion above in Part I). To ensure that the court can be an effective complement to national jurisdictions, Article 42 (2) (b) should be amended to make clear that the court has the same power to compel a deferral of proceedings by a state party as the two *ad hoc* tribunals have.

Unfortunately, the ILC draft statute does not fully 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 International Law Commission's commentary to Article 54 states that the Working Group gave careful consideration to whether an equivalent obligation should be imposed on all states parties with respect to acts of aggression, serious violations of the laws and customs applicable in armed

"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* (*ICRC Commentary on the Additional Protocols*), para. 3577 at p. 1029 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds. 1987) .

[57] Article 9 of the draft Code of Crimes recognizes that the duty of states to extradite or prosecute persons responsible for crimes under international law such as genocide, other crimes against humanity and war crimes is "[w]ithout prejudice to the jurisdiction of an international criminal court". The International Law Commission makes clear that such a transfer by a custodial state to an international criminal court

"would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court. The present article merely provides that the obligation of a State to prosecute or extradite an individual alleged to have committed a crime set out in articles 17 to 20 of the Code is without prejudice to any right or obligation that such a State may have to transfer such an individual to an international criminal court."

1996 ILC Report, p. 54. Thus, the International Law Commission now believes that the statute may provide that transfer to the international criminal court could satisfy the custodial state's obligations to try or extradite a suspect under an extradition treaty.

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.[58] Indeed, most, if not all, are now crimes which *require* states to extradite or try those responsible,[59] as the International Law Commission now seems to recognize in the draft Code of Crimes.[60] Nevertheless, it should not matter whether crimes subject to universal jurisdiction also include 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.

Onerous consent requirements. Another major weakness in the ILC 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 if a state makes a complaint both the territorial state and the custodial state, if different, must consent to the court's jurisdiction over the crime.[61] This means

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Any state party to the Geneva Conventions and Additional 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* (commenting on Article 49 of the First Geneva Convention), *supra*, n. 55, p. 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*, n. 46, para. 3539, p. 1011; Brownlie, *supra*, n. 46, p. 305. It has been convincingly argued that violations of humanitarian law in internal armed conflict are subject to universal jurisdiction. Meron, "International Criminalization of Internal Atrocities", *supra*, n. 46 (1995), pp. 554, 576; Michael Bothe, "War Crimes in Non-international Armed Conflicts", 24 Israel Y.B. Hum. Rts (1994) pp. 241, 247. 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* (*Crimes against Humanity*) (1992), pp. 510-27; Brownlie, *supra*, n. 46, p. 304; Nigel Rodley, *The Treatment of Prisoners under International Law* (1987), pp. 101-102. 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, "International Criminalization of Internal Atrocities", *supra*, p. 569; *Rodley, supra*, p. 156; Kenneth C. Randall, "Universal Jurisdiction under International Law", 66 Tex. L. Rev. (1988), pp. 785, 835-837; Restatement (Third) of Foreign Relations Law Sec. 702, reporter's note 3 (1986).

See, *e.g., Brownlie, supra*, n. 46, p. 315 (war crimes and crimes against humanity); *Rodley, supra*, n. 58, p. 102 (war crimes); *Bassiouni, Crimes against Humanity, supra*, n. 58, p. 499-508 (crimes against humanity); Geneva Conventions of 1949 (First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146) (grave breaches); Additional Protocol I (Arts 85 (1), 88 (2)) (grave breaches); Meron, "International Criminalization of Internal Atrocities", *supra* n. 46, pp. 569-571 (violations of humanitarian law in internal armed conflict); 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; UN Declaration on the Protection of All Persons from Enforced Disappearance (Article 14), GA Res.47/133.

[60] Draft Code of Crimes, Art. 9.

"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

that the court actually has *less* power to bring to justice the 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 (2)).

The effect of this requirement is illustrated by the example of a small custodial state which is a party to the 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 Convention against Torture which has a pending extradition request, because it fears 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 ILC 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 need for the court to be an effective complement to the national criminal justice system was the greatest. 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.

The ICRC also has urged that the court have inherent jurisdiction over the three core crimes to avoid unnecessary hurdles which would render the court ineffective:

"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

(ii) by the State on the territory of which the act or omission in question occurred."

ILC draft statute, Art. 21 (1).

accept the court's competence and no longer have to give its consent for a case to be submitted to the court."[62]

C. Other crimes

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 core crimes should include aggression, as provided in Article 20 (b) of the ILC draft statute, and attacks on UN personnel which are prohibited by the Convention on the Safety of United Nations and Associated Personnel, as provided in Article 20 (e) of the ILC draft statute.

Some states have urged that the court should have jurisdiction over other crimes, such as the so-called "treaty crimes" in Article 20 (e) of the ILC draft statute, including hijacking, hostage-taking, attacks on diplomats and environmental crimes.[63] There may well be dangers if too many crimes, particularly those which are not of the same degree of concern to the international community as the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law, are included at this stage. 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 or require a separate consent regime and, possibly, separate procedures and defences. Amnesty International agrees that the court, as stated in the Preamble to the ILC draft statute, should have jurisdiction "only over most serious crimes of concern to the international community as a whole". Some of the "treaty" crimes, other than those defined in the Geneva Conventions and Additional Protocol I and the Convention against Torture, may not satisfy this requirement. Some states have argued that the existing system of state-to-state cooperation under these other treaties is - whatever its flaws - more effective than with respect to core crimes.

Although the definitions of the crimes in the statute will simply be for the purpose of defining the jurisdiction of the court, they will inevitably be strong evidence that the international community believes the crimes included are already crimes under international law. Nevertheless, these definitions must not freeze the future development of international criminal law or limit the ability of national jurisdictions to define other acts as criminal. Moreover, 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

[62] ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 3 (emphasis in original).

[63] These crimes include crimes defined in the following treaties or crimes defined in national law which the states parties must repress: Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971; International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, New York, 14 December 1973; International Convention against the Taking of Hostages, 17 December 1979; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome 10 March 1988; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 19 December 1988. Treaties concerning grave breaches and torture are discussed in this paper in the parts concerning serious violations of humanitarian law and crimes against humanity.

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.

In Parts III, IV and V which follow, Amnesty International states what aspects of the crimes it believes should be included in the definitions of core crimes. It discusses the relevant international standards and interpretation which will be relevant to evaluating the strengths and weaknesses of the proposals which were made during the Preparatory Committee sessions in 1996. Part VI below concerns the general principles of criminal law and the scope of permissible defences.

III. DEFINING JURISDICTION OVER GENOCIDE

> *"The General Assembly, therefore, Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable[.]"*
>
> General Assembly Resolution 96 (I), Preamble, adopted 11 December 1946

The crime of genocide should be within the jurisdiction of the permanent international criminal court, as envisaged in the Genocide Convention.[64] The term "genocide" was devised in 1933 by Professor Raphael Lemkin to define acts aimed at destroying a racial, religious or social group, which he urged should be made a crime under international law, and the General Assembly took an equally broad view of the groups which should be protected when it first considered the question.[65] Nevertheless, 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.[66] This definition was reiterated in identical words in the Statute of the Yugoslavia Tribunal (Yugoslavia Statute) and the Statute of the Rwanda Tribunal (Rwanda Statute), and reaffirmed by the International Law Commission in almost identical terms in the draft Code of Crimes.[67] It is settled that the definition in the Genocide Convention reflects customary law.[68] The definition of genocide in that treaty could at some point be expanded to cover political and social groups, as originally envisaged by the General Assembly, and other aspects of that treaty could be improved. Nevertheless, it is likely that any

[64] The magnitude of this crime throughout history and the failure of states to take effective steps to prevent or punish it are documented in Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, Connecticut: Yale University Press 1981).

[65] Raphael Lemkin, *Les actes créant un danger général (interétatique) considérés comme délits de droit des gens* (Paris: Pedone 1933), *cited in* Study of the question of the prevention and punishment of the crime of genocide, UN Doc. CN.4/Sub.2/416, para. 16; GA Res. 96 (I) of 11 December 1946.

[66] Genocide Convention, Art. II.

[67] Yugoslavia Statute, Art. 4; Rwanda Statute, Art. 2; draft Code of Crimes, Art. 17.

[68] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep. 15, 23 (" . . . the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without conventional obligation"). The Genocide Convention has been ratified by 123 states as of 24 January 1997, equal to two-thirds of the membership of the UN.

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 indefinitely. Moreover, some of the limits in the scope of the application of the Genocide Convention are addressed in the definition of crimes against humanity.

To be consistent with the principles of legality and to facilitate ease of understanding in the general public, the statute should annex the Genocide Convention as a schedule. Although this approach might seem at first glance to be somewhat cumbersome, it is the method taken by a number of states which have fulfilled their responsibilities under the Genocide Convention to make violations of that treaty punishable under national law. This approach has several important advantages. It ensures that a clearly understood definition which has wide acceptance is included in the statute. It avoids the risk of reopening a debate about the content, meaning or applicablility of the definition and other provisions of the Genocide Convention. It avoids the risk that minor changes might be made in the text of particular provisions in the transposing of the provisions to the statute which could lead to serious consequences in terms of scope of application. 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. It also ensures that all the relevant provisions necessary to understand terms such as protected person or combatant are included in the statute and that the court can draw without question on the entire *travaux préparatoires*, commentary and jurisprudence of national courts and international tribunals in its interpretation.

Article II of the Genocide Convention defines genocide for purposes of that treaty as follows:

"In the present Convention, 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 members 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 intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group."

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 International Law Commission has explained, 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. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act."[69]

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 International Law Commission 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. Thus the necessary degree of knowledge and intent may be inferred from the nature of of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore signaled out as the immediate victims of the massive criminal conduct."

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".[70] 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.[71] If all principles of criminal responsibility are to be incorporated in a separate part dealing with general principles of criminal law, then these principles of responsibility for genocide should be included intact in that part (see Part VI below).

The intention must 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,

[69] 1996 ILC Report, p. 88.

[70] Genocide Convention, Art. IV.

[71] Indeed, the Trial Chambers of the Yugoslavia Tribunal have confirmed indictments for genocide which did not allege that they were part of a state policy or plan. See, for example, *Prosecutor v. Radovan Karad_i_*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case Nos. IT-95-5-R61; IT-95-18-R61, 11 July 1996 (issuing international arrest warrants for two non-state actors charged with genocide).

religious, national or ethnic features".[72] 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. As a leading commentator has explained,

> "The addition of the words 'in part' indicates that Genocide has been committed when acts of homicide are joined with a connecting purpose, i.e., directed against persons with specific characteristics (with intent to destroy the group or a segment thereof). Therefore, the intent to destroy a multitude of persons of the same group because of their belonging to this group, must be classified as Genocide even if these persons constitute only a part of a group either within a country or within a region or *witin a single community*, provided the *number* is substantial; the Convention is intended to deal with action against large numbers, not individuals even if they happen to possess the same group characteristics."[73]

Indeed, Judges of the Yugoslavia Tribunal have approved indictments for genocide which have charged individuals with intending to destroy large numbers of persons within a single community.[74] Thus, 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. Of course, there is no requirement that the accused was able to destroy a large number of the group in the community as long as this was the aim.

Another important aspect of the crime of genocide, a crime against humanity, is that it may be committed in time of peace or war.[75]

> Each of the acts prohibited in Article II should be included without change in the definition of genocide in the statute to avoid weakening the definition, delaying adoption of the statute and raising questions concerning the meaning of changed or added provisions. The prohibition of "killing members of the group" is broader

[72] Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs 1960), p. 63. Actual destruction of the group need not occur; the intent is sufficient. *Id.*, p. 58.

[73] Robinson, *supra*, n. 72, p. 63 (emphasis supplied) (indicating that it will be up to the court "to decide in each case whether the number was sufficiently large").

[74] See, for example, *Prosecutor v. _eljko Meaki_*, Indictment, paras 18.1-18.3 (intention to destroy in whole or in part, Bosnian Muslims and Bosnian Croats, based on killings and deliberate infliction of condiitions intended to bring about the destruction of some of the 3,000 members of these groups from the Prijedor *opština* (municipality) detained at the Omarska camp), confirmed on 13 February 1995, *see* Press Release, CC/PIO/004-E, 13 February 1995; *Prosecutor v. Duško Sikirica a/k/a "Sikira"*, Indictment, Case No. IT-95-8-I, 19 July 1995 (same).

[75] *Id.*, Art. I ("The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent or punish.").

than the term murder.[76] The International Law Commission has explained that the term, "causing serious bodily or mental harm to members of the group" covers bodily harm "which involves some type of physical injury" and mental harm "which involves some type of impairment of mental faculties", and the harm "must be of such a serious nature as to threaten its destruction in whole or in part".[77] The International Law Commission has made clear that the phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" would include deportation.[78] "[I]mposing measures intended to prevent births within the group" includes an element of coercion.[79] It, therefore, could include such acts as rapes, which when committed on a systematic or large scale basis on women detainees are crimes against humanity (see discussion in Part IV.E below), followed by forced pregnancies designed to prevent children whose fathers were from the group. "[F]orcibly transferring children of the group to another group" could involve arbitrary imprisonment, a crime against humanity when committed on a systematic basis or large scale (see Part IV.G below).

[76] Genocide Convention, Art. II (a). "The act of 'killing' (subparagraph (a)) is broader than 'murder'; and it was selected to correspond to the French word 'meurtre,' wihich implies more than 'assassinat'' otherwise it is hardly open to various interpretations." Robinson, *supra*, n. 72, p. 63.

[77] 1996 ILC Report, p. 91. Mental harm would include physical injuries to the mental faculties of group members and acts committed through the use of narcotics. Robinson, *supra*, n. 72, p. 65.

[78] 1996 ILC Report, pp. 91-92.

[79] *Id.*, p. 92; Robinson, *supra*, n. 72, p. 64.

Each of the four groups which are protected by the Genocide Convention, national, racial, ethnical and religious, should be included in the definition of genocide in the statute. Unfortunately, the International Law Commission has proposed that the term "ethnical" be replaced by "ethnic" in the draft Code of Crimes, arguing that it would "reflect modern English usage without in any way affecting the substance of the provision" and that it would cover "members of a tribal group".[80] Although there is some merit in the contention that the term "ethnic" would be more consistent with modern English usage, the text should remain unchanged to avoid needless disputes concerning the obligation of states parties to the Genocide Convention. Moreover, the term is a term of art which was inserted at the suggestion of Sweden to extend the protection of the Convention to a linguistic group and a group where race was not "the dominating characteristic, which might rather be defined by the whole of its traditions and its cultural heritage".[81] It certainly includes tribal groups. Any attempt to modernize the English in a treaty provision would suggest that the revisers had doubts about the scope of the original text regardless of any commentary or memorandum by the revisers, particularly if other terms in the treaty were not similarly updated.

Although there is merit to the suggestion that the Genocide Convention should be amended to include social and political groups in accordance with the original definition by Professor Lemkin and the initial view of the General Assembly, individuals in these groups are not entirely without protection under international law and would be protected in many respects by the statute.[82] Many of the acts which constitute genocide under the Convention if committed against individuals who are members of social or political groups would constitute crimes against humanity if committed on a systematic or widespread basis. Indeed, persecution of members of political groups is a crime against humanity.

The Genocide Convention provides that the following acts are punishable:

"(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide."[83]

Each of these acts should be punishable under the statute. As a leading commentator on the Genocide Convention has pointed out, "It is obvious that the purpose of punishing and preventing Genocide would not be achieved by declaring punishable only those acts which

[80] 1996 ILC Report, p. 89.

[81] Sweden: Amendment to article II of the draft Convention (E/794, UN Doc. A/C.6/230/Corr.1 (1948). See also the debate in the Sixth Committee on 13 October 1948.

[82] See Rodley, *supra*, n. 58, p. 148.

[83] Genocide Convention, Art. III.

constitute Genocide in accordance with the provisions of Article II. Persons are accessories to group destruction by cooperating with those directly guilty of Genocide or by performing certain acts preparatory to Genocide."[84] However, if it is decided to include the concepts of conspiracy, direct and public incitement, attempt and complicity in a general part of the statute concerning general principles of criminal law, then each of these provisions should be included in that part. These concepts are discussed below in Part VI.D.

IV. DEFINING JURISDICTION OVER CRIMES AGAINST HUMANITY

> *"... I think ... that this body of Crimes against Humanity constitutes, in the last analysis, nothing less than the perpetration, for political ends and in a systematic manner, of common law crimes, such as theft, looting, ill-treatment, enslavement, murders and assassinations, crimes that are provided for and punishable under the penal law of all civilized States."*
>
> François de Menthon, Chief French Prosecutor, opening statement before the Nuremberg Tribunal, 17 January 1946

Amnesty International believes that other crimes against humanity besides genocide should be included in the inherent jurisdiction of the permanent international criminal court. The jurisdictional definition 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 inhumane acts.

The definition should make clear that, like genocide, other crimes against humanity are independent of other crimes under international law and 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 (see Part VI below). Moreover there is no requirement that an entire civilian population be targeted.

The historical development of crimes against humanity. 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. In that Declaration limiting the use of explosive or incendiary projectiles as "contrary to the laws of humanity", the parties agreed to draw up additional instruments "in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to

[84] Robinson, *supra*, n. 72, p. 66.

conciliate the necessities of war with the laws of humanity".[85] The concept of laws of humanity received further explicit legal recognition when the First Hague Peace Conference in 1899 unanimously adopted the Martens clause as part of the Preamble to the Hague Convention respecting the laws and customs of war on land. This clause provided:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[86]

It has been incorporated virtually unchanged in a wide variety of humanitarian law instruments, including the Convention IV Respecting the Laws and Customs of War on Land (1907 Hague Convention IV) of 1907, the four Geneva Conventions and their Additional Protocols I and II.[87] Although the Martens clause did not identify the particular acts which were prohibited, as crimes against humanity have been further defined and their scope clarified over the past century the number of inhumane acts which have been seen as falling within this definition has expanded.

The first formal indication of some of the crimes which would be included within the definition was given in the Declaration of France, Great Britain and Russia on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as "crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres".[88] The 1919 Peace Conference Commission made clear that these crimes included murders and massacres, systematic terrorism, putting hostages to death, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, deportation of civilians, internment of civilians under inhuman conditions, forced labour of civilians in connection with the military operations of the enemy, imposition of collective penalties and deliberate bombardment of undefended places and hospitals.[89] The Nuremberg Tribunal had jurisdiction over the following crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the Second World War, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Although subsequent legal instruments have further defined crimes

[85] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), *reprinted in* Adam Roberts & Richard Guelff eds, *Documents on the Laws of War* (Oxford: Clarendon Press 2d ed. 1989), pp. 30, 31.

[86] Hague Convention respecting the laws and customs of war on land of 1899, Preamble.

[87] See, e.g., 1907 Hague Convention Hague IV, Preamble; First Geneva Convention, Art. 63; Second Geneva Convention, Art. 62; Third Geneva Convention, Art. 142; Fourth Geneva Convention, Art. 158; Additional Protocol I, Art. 1 (2); Additional Protocol II, Preamble.

[88] Declaration of France, Great Britain and Russia, 24 May 1915, *quoted in* Egon Schwelb, *Crimes against Humanity*, 23 Brit. Y.B. Int'l L. (1946), pp. 178, 181. The date of 28 May 1915 in Schwelb is a misprint. Dadrian, *supra*, n. 8 p. 262 n. 129.

[89] 1919 Peace Conference Commission Report, *supra*, n. 6, pp. 95, 114-115 (the factual allegations are contained in a 29-page annex which is not reprinted in the American Journal of International Law).

against humanity, as explained below, there is widespread agreement about the types of inhumane acts which constitute crimes against humanity, which are essentially the same as those recognized nearly eighty years ago.

Certain essential elements of a crime against humanity. In defining the jurisdiction of the court over crimes against humanity, the definition must include several elements, some of which are identified below. The inhumane acts (see Part IV.A-J below) must be aimed at a civilian population, but it need not aim at the entire civilian population in a particular country, region or community.[90] They may be committed against *any* civilian population.[91] There is no requirement that the inhumane acts be motivated by an intent to discriminate on political, racial or religious grounds, unless the crime of persecution is involved. Jurisdiction should cover inhumane acts which are either committed on a systematic basis or on a large scale. Although this is not a part of the definition of the crime in international instruments such as the Nuremberg Charter and the Yugoslavia Statute, these are the crimes against humanity which should be the priority for the international community.[92] The Rwanda Statute provides that the Rwanda Tribunal has jurisdiction over crimes against humanity "when committed as part of a widespread or systematic attack".[93] The International Law Commission, which has included these alternative requirements in its definition of crimes against humanity in the draft Code of Crimes, has explained that "systematic manner" means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy."[94]

The International Law Commission has defined "a large scale" to mean that "the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim."[95] It explained that this term replaced "mass scale" in the first reading of the draft Code of Crimes in 1991because "large scale" was "sufficiently broad to cover various situations involving a multiplicity

[90] The practice of the Yugoslavia Tribunal demonstrates that only a part of the civilian population need be targeted. A Trial Chamber has held that crimes against humanity "must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts". *Prosecutor v. Dragan Nikoli_ a.k.a. "Jenki"* (*Nikoli_* Case, Rule 61 Decision), Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-61, 20 October 1995, para. 26 (acts within a single detention camp). See also The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, Memorandum submitted by the Secretary-General (The Charter and Judgment of the Nürnberg Tribunal) , UN Sales No. 1949.V.7 (1949), p. 67.

[91] Thus, state officials were convicted for crimes against humanity committed against their own nationals by the Nuremberg Tribunal.

[92] The Secretary-General explained that the crimes against humanity in Article 5 of the Yugoslavia Statute referred to "inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack". Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 48.

[93] Rwanda Statute, Art. 3.

[94] 1996 ILC Report, p. 94.

[95] *Id*., pp. 94-95.

of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[96]

The jurisdictional definition must cover both state and non-state actors, including members of armed opposition groups and individuals acting at the direction of state officials or members of political groups or with their consent or acquiescence, to ensure that the court will have jurisdiction over the widespread crimes against humanity being committed around the world by non-state actors. The International Law Commission has defined crimes against humanity in the draft Code of Crimes to include inhumane acts "instigated or directed by a Government or by any organization or group".[97] It explained that this requirement was

"intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or an organization. This type of isolated criminal conduct would not constitute a crime against humanity.... The instigation or direction of a Government or *any* organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[98]

The definition of the intent required must be the same at all levels of the hierarchy in the state, organization or group to ensure that both those who commit the inhumane acts, as in the *Erdemovi_* Case,[99] and those who planned and ordered the crimes, are subject to international criminal responsibility.

[96] *Id.*, p. 95. One Trial Chamber of the Yugoslavia Tribunal has stated that under Article 5 of the Yugoslavia Statute, crimes against humanity "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. [In addition], the crimes, considered as a whole, must be of a certain scale and gravity." *Nikoli_ Case*, Rule 61 Review, *supra*, n. 90, para. 26. Unfortunately, however, it sets too high a threshold by requiring that the inhumane acts be organized *and* systematic *and* of a certain scale *and* gravity and it is to be hoped that the Appeals Chamber will follow the approach of the International Law Commission.

[97] Draft Code of Crimes, Art. 18.

[98] ILC Report, pp. 95-96 (emphasis in the original) (commenting on Article 18 of the draft Code of Crimes).

[99] *Prosecutor v. Dra_en Erdemovi_*, Judgment, Case No.. IT-96-22-T, 29 November 1996 (convicted of crimes against humanity for killing 10 to 100 prisoners under superior orders).

In addition, as demonstrated in Part IV.K below, the definition must make clear that crimes against humanity are independent of other crimes against international law and can be committed in time of peace as well as armed conflict.

A. Murder

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. Murders and massacres were recognized as crimes against humanity as early as the First World War in the 1915 Declaration of France, Great Britain and Russia and by the 1919 Peace Conference Commission.[100] The crime of murder was included as a crime against humanity in the Nuremberg Charter, Allied Control Council Law No. 10, the Tokyo Charter and the Nuremberg Principles.[101] It was prohibited by the 1954 draft Code of Offences.[102] It is listed as a crime against humanity in the Yugoslavia and the Rwanda Statutes and the draft Code of Crimes.[103]

The definition of murder should not pose significant problems. As the International Law Commission has pointed out, "[m]urder is a crime that is clearly understood and well defined in the national law of every state."[104] Although there are significant theoretical and conceptual differences between various national legal systems, these differences do not appear to have posed a significant problem for states in determining whether to honour a request by another state to extradite a murder suspect where the requested state requires that the crime be analogous to one in its own legal system. 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".[105] Extrajudicial executions can be distinguished from other killings. An extrajudicial execution is a deliberate killing, not an accidental one. It is unlawful. It violates national laws, such as those which prohibit murder, or international standards prohibiting the arbitrary deprivation of life, such as the International Covenant on Civil and Political Rights (ICCPR),[106] the UN Code of Conduct for Law Enforcement Officials[107] and the UN Basic

[100] 1919 Peace Conference Commission Report, *supra*, n. 6, p. 114.

[101] Charter of the International Military Tribunal (Nuremberg Charter), 8 August 1945, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 UNTS 279, 59 Stat. 1544, Art. 6 (c); Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette Control Council for Germany, 20 December 1945(Allied Control Council Law No. 10) (1946), pp. 50-55., Art. II (1) (c); Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, TIAS 1589 (Tokyo Charter), Art. 5 (c); Nuremberg Principles, Principle VI (c).

[102] 1954 draft Code of Offences, Art. 10. Although this article prohibited "inhuman acts", the International Law Commission commentary states that it "corresponds substantially to Article 6, paragraph (c) of the Charter of the Nürnberg Tribunal, which defines 'crimes against humanity'". 9 UN GAOR Supp. (No. 9), at 11, UN Doc. A/2693 (1954), para. 59.

[103] Yugoslavia Statute, Art. 5 (a); Rwanda Statute, Art. 3 (a); draft Code of Crimes, Art. 18 (a).

[104] 1996 ILC Report, p. 96

[105] Amnesty International's 14-Point Program for the Prevention of Extrajudicial Executions, Preamble, in *"Disappearances" and Political Killings - Human Rights Crisis of the 1990s: A Manual for Action* (AI Index: ACT 33/01/94) (*"Disappearances" and Political Killings*), Appendix 9, p. 292.

[106] ICCPR, Art. 6.

Principles on the Use of Force and Firearms.[108] Reference to international standards is essential when national law falls short of such norms or, as in the case of Nazi Germany, national law itself authorizes such killings. The unlawfulness of extrajudicial executions distinguish 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. Extrajudicial executions can be distinguished from killings which are in violation of an enforced official policy because they are carried out by order of a government or with its complicity or acquiescence. Thus, "[a]n extrajudicial execution is, in effect, a murder committed or condoned by the state."[109]

Murders which constitute crimes against humanity also include deliberate and arbitrary killings by armed opposition groups committed on a widespread or systematic basis. Such killings are deliberate, not accidental. They are arbitrary in that they are not countenanced by any internationally recognized standard of law. They contravene fundamental standards of humane behaviour - as reflected in the Martens clause - 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.[110]

B. Extermination

It goes without saying that the crime of extermination should be within the jurisdiction of the court. Extermination was recognized as a crime against humanity in the Nuremberg Charter, Allied Control Council Law No. 10, the Tokyo Charter and the Nuremberg Principles.[111] It was prohibited by the 1954 draft Code of Offences.[112] It is included in the jurisdiction of the

[107] UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly on 17 December 1979 in Resolution 34/169.

[108] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990, and welcomed by the General Assembly on 14 December 1990 in Resolution 45/121. Other relevant standards prohibiting the arbitrary deprivation of life include the Genocide Convention, the Geneva Conventions and their Additional Protocols, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

[109] Amnesty International, *"Disappearances" and Political Killings*, *supra*, n. 105, p. 86.

[110] For further discussion of deliberate and arbitrary killings by armed opposition groups, see *id.*, pp. 205-217.

[111] Nuremberg Charter, Art. 6 (c); Allied Control Council Law No. 10, Art. II (1) (c); Tokyo Charter, Art. 5 (c); Nuremberg Principles, Principle VI (c).

[112] 1954 draft Code of Offences, Art. 10.

Yugoslavia and Rwanda Tribunals as crimes against humanity and is listed as a crime against humanity in the draft Code of Crimes.[113] The International Law Commission has explained the difference between murder and extermination as follows:

"Extermination 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."[114]

C. Forced disappearance of persons

The crime of forced disappearance of persons on a systematic basis or large scale should be expresssly recognized as a crime against humanity within the jurisdiction of the international criminal court. It is a crime of extreme cruelty, not only to the victim who has been "disappeared", but to the victim's family and friends. "Disappearance" is a crime which perhaps uniquely multiplies the tragedy and suffering of those who are affected by it. The initial act of forcible or involuntary abduction; the denial of access to legal representation or family contact; the failure to be brought promptly and charged before a judicial authority; the possible ill-treatment, torture or even extrajudicial execution of the victim - each of these components of the experience of the "disappeared" adds an additional layer of criminality to the phenomenon.

However, this cruel, compounding quality extends further than the suffering inflicted on the victims themselves. For the families, friends and colleagues of the victim are simultaneously imprisoned in an agony of uncertainty about the fate of the "disappeared" person. They are condemned to wait anxiously - sometimes for years at a time - for any scrap of information about where the "missing" person might have been taken, where they may be held, and whether they remain alive.

Rumours of sightings circulate, only to be followed by a silence more painful than before. Secret prisons are said to be discovered, only to prove an empty warehouse or deserted mine shaft. The longing for a place to mourn, for a grave to mark the life abruptly ended devours the personality of those who search and question. Such persons are effectively stranded in time - their lives stopped at the moment when their relative or friend was "disappeared". In the absence of any resolution to the case, they are unable to move forward with their lives. Even as the prospect of a reunion grows dim, they often feel unable to abandon that last shred of hope for a physical "reappearance" - lest a loved one still struggling on in secret custody somewhere should return to find his trust betrayed.

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

[113] Yugoslavia Statute, Art. 5 (b); Rwanda Statute, Art. 3 (b); 1954 draft Code of Crimes, Art. 18 (b).

[114] 1996 ILC Report, p. 97.

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 of "disappearance" appears to have been invented by Adolf Hitler in his *Nacht und Nebel Erlass* (Night and Fog Decree) issued on 7 December 1941. The purpose of this decree was to seize persons in occupied territories

> "'endangering German security' who were not to be immediately executed and make them vanish without a trace into the unknown in Germany. No information was to be given g33 their families as to their fate even when, as invariably occurred, it was merely a question of the place of burial in the Reich.".[115]

Although "disappearance" may have originated as a war crime inflicted on conquered peoples, it has been widely and systematically used since the 1960s by many governments against their own civilian populations as a crime against humanity.[116] As the International Law Commission recognized in Article 18 (i) of the draft Code of Crimes, which prohibits "forced disappearance of persons", "disappearance" is a crime against humanity. The International Law Commission explained that although "disappearance" had not been included in some earlier instruments, it was a crime against humanity "because of its extreme cruelty and gravity".[117] In recent years, international and regional intergovernmental organizations have consistently recognized that the systematic practice of "disappearance" is a crime against humanity. The UN General Assembly, when it adopted without a vote the Declaration on the Protection of All Persons from Enforced Disappearance on 18 December 1992, declared that "the systematic practice of

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[115] William Shirer, *The Rise and Fall of the Third Reich* (London: Pan Books Ltd. 1959), p. 1139. The text of the decree is reproduced in XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (*Trials of War Criminals before the Nuernberg Military Tribunals*) (Nuernberg, October 1946-April 1949) (Washington, D.C.: US Government Printing Office 1949-1953) (15-volume series), pp. 527-528. As Hitler explained, "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal". Quoted in Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), pp. 48-49. A subsequent order issued by Field Marshal Wilhelm Keitel in February 1942 to implement this decree provided that in cases where the death penalty was not carried out within eight days of a person's arrest,

"The prisoners are to be transported to Germany secretly . . . these measures will have a deterrent effect because

(a) the prisoners will vanish without leaving a trace.

(b) no information may be given as to their whereabouts or their fate."

Quoted in Shirer at p. 1140. Keitel was convicted by the Nuremberg Tribunal for his role in implementing this decree. Nuremberg Judgment, *supra*, p. 88.

[116] See, for example, Amnesty International, *"Disappearances" and Political*, *supra*, n. 105, pp. 92-96 (documenting hundreds of thousands of "disappearances" since the 1980s in more than 30 countries).

[117] *Id.*, p. 102. For an explanation of the reasons for the delay in express legal recognition of "disappearance" as a crime against humanity, see Rodley, *supra*, n. 58, p. 191.

such acts is of the nature of a crime against humanity".[118] Regional intergovernmental organizations have also recognized that "disappearance" is a crime against humanity. In a resolution adopted on 17 November 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".[119] On 10 June 1994 the OAS General Assembly adopted the Inter-American Convention on the Forced Disappearance of Persons. The Inter-American Convention reaffirms that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity".[120] In 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.[121]

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, which refers to enforced disappearances of persons occurring in many countries

"in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law."

In addition, the definition should also take into account the definition in the Inter-American Convention on the Forced Disappearance of Persons.[122] 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.[123]

[118] G.A. Res. 47/133, Preamble. The UN Working Group on Enforced or Involuntary Disappearances has reached the same conclusion. Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1995/36 (1994), para. 45.

[119] Resolution 666 (XIII-0/83) in the Annual Report of the Inter-American Commission on Human Rights.

[120] Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly. The Convention entered into force on 29 March 1996.

[121] Resolution 828, adopted on 26 September 1984.

[122] That treaty defines the crime for purposes of that instrument as follows:

"For the purpose of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

Inter-American Convention on the Forced Disappearance of Persons, Art. II.

[123] For the definition in Article 1 of the the current draft, see Note by the Secretariat, Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc .E/CN.4/Sub.2/1996/WG.1/ CRP.2.

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."[124] Amnesty International 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.[125]

D. Torture

The systematic or large scale practice of torture is a crime against humanity which should be within the jurisdiction of the international criminal court. It is listed as a treaty crime in the Annex referred to in Article 20 (e) of the ILC draft statute. Torture has been recognized as a crime against humanity since the First World War.[126] Although it was not expressly listed in the Nuremberg and Tokyo Charters, defendants were convicted of crimes against humanity for acts of torture. It was expressly recognized as a crime against humanity in Allied Control Council Law No. 10, and the Yugoslavia and Rwanda Statutes.[127] It is considered a crime against humanity in the draft Code of Crimes.[128]

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):

> "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."[129]

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 without prejudice to any international instrument or national

[124] Amnesty International's 14-Point Program for the Prevention of "Disappearance", Preamble, reprinted in Amnesty International, *"Disappearances" and Political Killings*, *supra*, n. 105, Appendix 8, p. 289.

[125] For further information concerning the elements of this crime against humanity and the relevant international standards, see Amnesty International, *"Disappearances" and Political Killings*, *supra*, n. 105, particularly pp. 84-85 and 97-107, and Rodley, *supra*, n. 58, pp. 191-218.

[126] 1919 Peace Conference Commission Report, *supra*, n. 6, p. 114 (torture of civilians).

[127] Allied Control Council Law No. 10, Art. II (1) (c); Yugoslavia Statute, Art. 5 (f); Rwanda Statute, Art. 3 (f).

[128] Draft Code of Crimes, Art. 18 (c).

[129] Convention against Torture, Art. 1 (1).

legislation which does or may contain provisions of wider application".[130] One such instrument is the Inter-American Convention to Prevent and Punish Torture.[131] The International Law Commission 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".[132]

E. 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 also a form of torture, but because of its unique characteristics it also deserves being identified as a separate crime against humanity.[133] 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. Each of these crimes when directed at a civilian population is also a form of inhumane treatment of the same nature as other crimes against humanity. Moreover, for the same reasons that they are prohibited in international and non-international armed conflict, they should be considered crimes against humanity.

Rape on a systematic basis or large scale has been considered to be a crime against humanity since the First World War.[134] Rape has been recognized as a crime against humanity in Allied Control Council Law No. 10 and the Yugoslavia and Rwanda Statutes.[135] A Trial Chamber

[130] *Id.*, Art. 1 (2). See also J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers 1988), p. 122 (". . . insofar as other international instruments or national laws give the individual a better protection, he shall be entitled to benefit from it; however, other international instruments or national law can never restrict the protection which the individual enjoys under the *Convention*".) (emphasis in the original).

[131] Inter-American Convention to Prevent and Punish Torture, *signed on* 9 December 1985, *entered into force* 28 February 1987.

[132] 1996 ILC Report, p. 98.

[133] The UN Special Rapporteur on torture has called rape of female detainees as "an especially traumatic form of torture". Report to the UN Commission on Human Rights, 12 January 1995, UN Doc. E/CN.4/1995/34, para. 18. The UN Special Rapporteur on violence against women has stated that rape "is used as an instrument of torture by States against women in detention". UN Doc. E/CN.4/1995/42, para. 173. The Inter-American Commission on Human Rights has found that rape of a woman at her home by a security official amounted to torture under Article 5 of the American Convention on Human Rights. *Fernando and Raquel Mejia v. Peru*, Report No. 5/96, Case 10,970, 1 March 1996, Annual Report of the Inter-American Commission on Human Rights 1995 (1996), p. 157. The European Commission of Human Rights has also found that torture of a female detainee by a government official is torture under Article 3 of the European Convention on Human Rights. *Aydin v. Turkey*, Report of the Commission, Application No. 23178/94, adopted on 7 March 1966; see also Written Comments of Amnesty International submitted to the European Court of Human Rights in this case (Case No. 57/1996/676/866).

[134] 1919 Peace Conference Commission Report, *supra*, n. 6, p. 114.

[135] Allied Control Council Law No. 10, Art. II (1) (c); Yugoslavia Statute, Art. 5 (g); Rwanda Statute, Art. 3 (g).

of the Yugoslavia Tribunal has confirmed at least one indictment for crimes against humanity based on allegations of rape.[136] The General Assembly has reaffirmed that rape in certain circumstances is a crime against humanity.[137] Rape when committed on a systematic basis or large scale is included as a crime against humanity in the draft Code of Crimes.[138] Moreover, rape is prohibited in armed conflict, whether international or non-international, and rape of detainees should similarly be prohibited as a crime against humanity when committed on a systematic basis or large scale by government officials or members of armed opposition groups.[139] Leading commentators have concluded that rape on a systematic basis or large scale is a crime against humanity.[140]

Enforced prostitution was recognized as a crime against humanity at the time of the First World War.[141] Enforced prostitution is prohibited in armed conflict, whether international or non-international, and systematic or large scale enforced prostitution of detainees by government officials or members of armed opposition groups should similarly be prohibited as a crime against humanity.[142]

Other forms of sexual abuse may constitute other inhumane treatment, and, therefore, crimes against humanity when committed on a systematic or large scale. Indeed, any form of indecent assault is prohibited in armed conflict, whether international or non-international, and, therefore, forms of sexual abuse of detainees which amount to other inhumane treatment and which are committed on a systematic basis or large scale by government officials or members of armed opposition groups should similarly be prohibited as a crime against humanity.[143]

F. Arbitrary deportation and forcible transfer of population

Deportation was recognized as a crime against humanity in the Nuremberg Charter, Allied Control Council Law No. 10, the Tokyo Charter, the Nuremburg Principles, the 1954 draft Code of

[136] *Prosecutor v. Dragan Gagovi_* (*Foca* Case), Review of indictment pursuant to Article 19 (1) of the Statute, Case No. IT-96-23-I, 26 June 1996.

[137] GA Res. 50/192, para. 3, adopted 22 December, 1995. In that resolution, the General Assembly reaffirmed "that rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide. . . , and calls upon States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice".).

[138] Draft Code of Crimes, Art. 18 (j).

[139] Additional Protocol I, Art. 76 (1); Additional Protocol II, Art. 4 (2) (e).

[140] See, e.g., Theodor Meron, "Rape as a Crime under International Humanitarian Law", 87 Am. J. Int'l L. (1993), pp. 424, 426-427 ("Moreover, the massive and systematic practice of rape and its use as a 'national' instrument of 'ethnic cleansing' qualify it to be defined and prosecuted as a crime against humanity."). See also M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1996), pp. 589-590.

[141] 1919 Peace Conference Commission Report, *supra*, n. 6, p.114 (abduction of girls and women for the purpose of enforced prostitution).

[142] Additional Protocol I, Art. 76 (1); Additional Protocol II, Art. 4 (2) (e).

[143] Additional Protocol I, Art. 76 (1); Additional Protocol II, Art. 4 (2) (e).

Offences and the Yugoslavia and Rwanda Statutes.[144] It is also included as a crime against humanity in the draft Code of Crimes.[145] The International Law Commission has explained that "[t]he term 'arbitrary' is used to exclude the acts when committed for legitimate reasons, such as public health or well-being, in a manner consistent with international law."[146] Moreover, in the context of an armed conflict, arbitrary deportation is a serious violation of humanitarian law (see Part V below).[147]

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.[148] 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. If the prohibition is limited to deportation across an international frontier, it might omit to cover situations where in an "internal" conflict one or more secessionist groups in a state forces members of a particular ethnic group out of the area of the state they aim to carve out as their own. Again, the prohibition in such situations should cover both formal and informal measures of forced relocation. Thus, whether those forced to relocate are subject to an organized departure, or whether they are terrorized into flight, the result is the same and both situations must be covered by the statute.[149] In in the context of internal armed conflict, forcible relocations of population, apart from temporary meansures which are dictated by the need to protect the civilian population or imperative military necessity, are serious violations of humanitarian law (see Part V below).[150] The same reasons for imposing international criminal responsibility for such acts in

[144] Nuremberg Charter, Art. 6 (c); Allied Control Council Law No. 10, Art. II (1) (c); Tokyo Charter, Art. 5 (c); Nuremberg Principles, Principle VI (c); draft Code of Offences, Art. 10 (inhuman acts); Yugoslavia Statute, Art. 5 (d); Rwanda Statute, Art. 3 (d).

[145] Draft Code of Crimes, Art. 18 (g).

[146] 1996 ILC Report, p. 100.

[147] Fourth Geneva Convention, Art. 49 (deportations of protected persons from occupied territory); Additional Protocol II, Art. 17 (2) ("Civilians shall not be compelled to leave their own country for reasons connected with the conflict.").

[148] Contrary to Article 9 of the Universal Declaration of Human Rights.

[149] For an example of such forcible relocations of population resulting from such human rights violations and abuses, see Amnesty International, *Bosnia-Herzegovina: Living for the day - Forced expulsions from Bijeljina and Janja* (AI Index: EUR 63/22/94).

[150] Fourth Geneva Convention, Art. 49 (prohibiting individual or mass forcible transfers regardless of motive in occupied territories, apart from temporary measures in a particular area "if the security of the population or imperative military reasons so demand"); Additional Protocol II, Art. 17 (1) ("The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.").

armed conflict apply to peacetime forcible and arbitary relocations of civilian population on a systematic or large scale.

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.

G. Arbitrary imprisonment

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.[151] 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.

Imprisonment was recognized as a crime against humanity in Allied Control Council Law No. 10 and the Yugoslavia and Rwanda Statutes.[152] This crime is, of course, limited to arbitrary imprisonment, that is, without due process of law or in violation of fundamental rights. Indeed, the draft Code of Crimes uses the term "arbitrary imprisonment".[153] The term "imprisonment" necessarily includes all forms of detention, not just detention in prison after a trial. The International Law Commission has explained that the concept of arbitrary imprisonment in the draft Code of Crimes "would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention".[154] Arbitrary detention is a violation of human rights law and standards, including the Universal Declaration of Human Rights and the ICCPR.[155] The UN Working Group on Arbitrary

[151] The relevant international standards concerning the right to fair trial are recognized in a number of international instruments, including the following: the Universal Declaration of Human Rights (Articles 9, 10 and 11); the ICCPR (Articles 6, 9, 14 and 15); the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Convention against Torture (Articles 7 and 15); the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers and the UN Guidelines on the Role of Prosecutors. There are also important fair trial provisions in the Geneva Conventions and Additional Protocols, as well as in regional human rights treaties.

[152] Allied Control Council Law No. 10, Art. II (1) (c); Yugoslavia Statute, Art. 5 (e); Rwanda Statute, Art. 3 (e).

[153] Draft Code of Crimes, Art. 18 (h).

[154] 1996 ILC Report, p. 101.

[155] Universal Declaration of Human Rights, Art. 9; ICCPR, Art. 9.

Detention has further defined the concept of arbitrary detention in its consideration of individual cases.[156]

H. Enslavement

The crime of 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 (see Part IV.G above). Enslavement was one of the earliest crimes to be recognized as a crime under international law and the crime of slavery is prohibited under various conventions including the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[157] It has been recognized as a crime against humanity in the Nuremberg Charter, Tokyo Charter, Allied Control Council Law No. 10, the Nuremberg Principles, the 1954 draft Code of Offences and the Yugoslavia and Rwanda Statutes.[158] It is also defined as a crime against humanity in the draft Code of Crimes.[159] Moreover, it is a serious violation of humanitarian law.[160]

I. 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 on political, racial or religious grounds is a crime against humanity which was recognized in the Nuremberg Charter, Allied Control Council Law No. 10, the Nuremberg Principles, the 1954 draft Code of Offences and the Yugoslavia and Rwanda Statutes.[161]

[156] See, in particular, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1992/20, Annex I. The Working Group addresses three types of cases of arbitrary detention: (1) where the detention cannot be linked to any legal basis (such as detention beyond the expiry of the sentence); (2) where the prosecution or conviction is based on the exercise of rights protected by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR; and (3) where detention is in violation of safeguards of the right to fair trial at any stage of the proceedings.

[157] Slavery Convention of 1926, *signed* 25 September 1926, *entered into force* 9 March 1927; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *entered into force* 30 April 1957.

[158] Nuremberg Charter, Art. 6 (c); Tokyo Charter, Art. 5 (c); Allied Control Council Law No. 10, Art. II (1) (c); Nuremberg Principles, Principle VI (c); 1954 draft Code of Offences, Art. (2) (11); Yugoslavia Statute, Art. 5 (c); Rwanda Statute, Art. 3 (c).

[159] Draft Code of Crimes, Art. 18 (d).

[160] Additional Protocol II, Art. 4 (2) (f) (prohibiting "slavery and the slave trade in all their forms").

[161] Nuremberg Charter, Art. 6 (c); Allied Control Council Law No. 10, Art. II (1) (c); Nuremberg Principles, PrincipleVI; 1954 draft Code of Offences, Art. 2 (11); Yugoslavia Statute, Art. 5 (h); Rwanda Statute, Art. 3 (h). The Tokyo Charter included persecution on political or racial grounds within its jurisdiction over crimes against humanity. *Id.*, Art. 5 (c).

Persecution on political, racial, religious or ethnic grounds is a separate crime against humanity in the draft Code of Crimes.[162] The International Law Commission has explained that the common characteristic of such persecution is the denial of internationally recognized rights as recognized in Articles 1 and 55 of the UN Charter and Article 2 of the ICCPR to which every individual is entitled and that the draft Code of Crimes "would apply to acts of persecution which lacked the specific intent required for the crime of genocide".[163]

Persecution has been treated as an independent crime against humanity in most relevant international instruments, including the Nuremberg Charter, the Tokyo Charter, the Nuremberg Principles, the 1954 draft Code of Offences and the Yugoslavia Statute. The Nuremberg Tribunal treated persecution on political, racial or religious grounds as an independent crime against humanity.[164] As the Secretary-General explained, the qualification "on political, racial or religious grounds" in Article 6 (c) of the Nuremberg Charter applies only to persecutions, not to murder, extermination, enslavement, deportation, and other inhumane acts.[165] The provision in the Rwanda Statute limiting the scope of the jurisdiction of the Tribunal to the latter type of crimes against humanity only when they were "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" is, therefore, an unwarranted limitation in the light of the extensive precedent.[166] Moreover, this provision of the Rwanda Statute makes no sense, since it imposes a double requirement of discriminatory motives by requiring that persecutions on political, racial and religious grounds be committed on national, political, ethnic, racial or religious grounds.[167]

J. Other inhumane acts

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 acts were recognized as crimes against humanity under the Nuremberg Charter and Judgment, Allied Control Council Law No. 10, the Tokyo Charter, the Nuremberg Principles and the Yugoslavia and Rwanda Statutes.[168] 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:

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[162] Draft Code of Crimes, Art. 18 (e). This provision also lists ethnic grounds as a prohibited basis for persecution. The International Law Commission noted that persecution on gender grounds could also constitute a crime against humanity under this provision, if the other criteria were met, but it decided to limit the possible grounds for persecution to those contained in existing instruments. Nevertheless, it noted that "gender-based discrimination might also constitute a crime against humanity under [Article 18] (f), although not necessarily a crime against the peace and security of mankind". 1996 ILC Report, p. 103.

[163] 1996 ILC Report, p. 98.

[164] See, for example, its explanation of Baldur von Shirach's guilt of crimes against humanity. Nuremberg Judgment, *supra*, n. 115, p. 113.

[165] The Charter and Judgment of the Nürnberg Tribunal, *supra*, n. 90, p. 68.

[166] Rwanda Statute, Art. 3.

[167] *Id.*, Art. 3 (h).

[168] Nuremberg Charter, Art. 6 (c); Allied Control Council Law No. 10, Art. II (1) (c); Tokyo Charter, Art. 5 (c); Nuremberg Principles, Principle VI (c) (other inhuman acts); Yugoslavia Statute, Art. 5 (i); Rwanda Statute, Art. 3 (i).

"…. 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."[169]

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*.

The International Law Commission has suggested several criteria for determining other inhumane acts amount to crimes against humanity. Article 18 (k) of the draft Code of Crimes covers "other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm". The International Law Commission stated that only acts "similar in gravity" to other crimes against humanity would be included.[170] The Secretary-General in his analysis of the Nuremberg Judgment suggested that depriving part of the civilian population of the means of subsistence might be such another inhumane act.[171] Although the approach of the International Law Commission has merit, care will have to be taken in defining this criteria to ensure that it covers all acts which should be subject to international criminal responsibilty.[172]

K. Crimes in time of peace as well as war

Although crimes against humanity first received international legal recognition in modern times in a humanitarian law instrument, they have always been seen as including systematic or large scale violations of human rights, which can occur in time of peace or armed conflict, as well as violations of humanitarian law. Indeed, nothing in the language of the Martens clause suggests that the principles of international criminal law cited were restricted to those applicable in armed conflict. Crimes against humanity have been seen as independent crimes, even though the jurisdiction of international criminal tribunals over these has sometimes been limited to crimes against humanity which were linked to crimes against peace and war crimes. A majority of the members of the 1919 Peace Conference Commission proposed the establishment of an international criminal tribunal with jurisdiction over violations of "the laws of humanity" which would have included crimes committed both during the fighting which took place in the First World War and in areas far removed from the fighting, such as pillages by Austrian troops in an Austrian town and the massacres of the Armenians and Greek-speaking populations in the Ottoman Empire, and unconnected to war crimes or aggression. Attempts to bring those responsible for some of these violations in the former Ottoman Empire after the war were ultimately abandoned.[173]

[169] I *ICRC Commentary on the Geneva Conventions*, *supra*, n. 55, p.54.

[170] 1996 ILC Report, p. 103.

[171] The Charter and Judgment of the Nürnberg Tribunal, *supra*, n. 90, p. 67.

[172] Other acts which have been suggested as having the same inhumane nature as other crimes against humanity include institutionalized discrimination on racial, ethnic or religious grounds and persecution on ethnic or gender grounds. *See* 1996 ILC Report, pp. 98-100, 102-103.

[173] See generally, Dadrian, *supra*, n. 8.

The Nuremberg Charter expressly provided that the Tribunal had jurisdiction over crimes against humanity before or during the war. Drafters of the Nuremberg Charter considered that they were crimes which could take place in peace as well as war.[174] Article 6 (c) of the Nuremberg Charter, however, limited the scope of jurisdiction of the International Military Tribunal (Nuremberg Tribunal) over crimes against humanity before or during the war to those which were "in execution of or in connection with any crime within the jurisdiction of the Tribunal [crimes against peace and war crimes]". Although the Nuremberg Tribunal narrowly 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 and made a general statement that "it has not been satisfactorily proved" crimes against humanity which took place before the war were in execution of or in connection with such crimes, 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.[175] Indeed, only four months after the Nuremberg Charter was signed and nine months before the judgment of the Nuremberg Tribunal, Allied Control Council Law No. 10, which formed the jurisdictional basis for hundreds of war crimes trials in Germany after the Nuremberg Tribunal, defined crimes against humanity without the limitation imposed by the Nuremberg Charter:

> "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds. . . ."[176]

In *United States v. Ohlendorf* (*Einsatzgruppen* Case) and *United States v. Alstoetter* (*Justice* Case), decided under Allied Control Council Law No. 10, the tribunals treated crimes against humanity as independent of violations of the laws and customs of war.[177]

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[174] In the words of the Chief United States Prosecutor, the proposed charges were to include: "Atrocities and offenses, including atrocities and persecutions on racial and religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as part of International Law since at least 1907." Robert H. Jackson, Report to the President, 7 June 1945, *reprinted in* 39 Am. J. Int'l L. (Supp. 1945), p. 178, *quoted in* Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf 1992), p. 54.

[175] Nuremberg Judgment, *supra*, n. 115, p. 65. The Secretary-General pointed out that Baldur von Shirach "was found guilty of crimes against humanity at least partly committed before the war". The Charter and Judgment of the Nürnberg Tribunal, *supra*, n.90, p. 68. See Theodor Meron, "War crimes in Yugoslavia and the development of international law", 88 Am. J. Int'l L. (Jan. 1994), p. 85. The Tokyo Charter, like the Nuremberg Charter, defined the scope of the Tokyo Tribunal's jurisdiction over crimes against humanity the same way as the Nuremberg Charter. Tokyo Charter, Art. 5 (c).

[176] Allied Control Council Law No. 10, Art. II (1) (c).

[177] *United States v. Ohlendorf* (*Einsatzgruppen* Case), Case No. 9, IV *Trials of War Criminals Before the Nuernberg Military Tribunals, supra*, n. 115, p. 49 (noting that the restriction in the Nuremberg Charter on jurisdiction over crimes against humanity to crimes connected with crimes against peace and war crimes did not appear in Allied Control Council Law No. 10, "which recognizes that crimes against humanity are, in international law, completely independent of either crimes against peace or war crimes. To deny this independence would make the change devoid of meaning."); *United States v. Altsoetter* (*Justice* Case), Case No. 3, III *id.*, p. 974 (noting that Allied Control Council Law No. 10 "differs materially from the Charter" and that the connection with other crimes was "deliberately omitted from the definition"). Although tribunals in other cases under Allied Control Council Law No. 10 concluded that there was such a link, their analysis is flawed. See *United States v. Flick*, Case No. 5, VI *id.*, p. 1213 (concluding that

The UN General Assembly in 1946 retained the Nuremberg Charter formulation of crimes against humanity in two resolutions reaffirming the Nuremberg Charter and later the Judgment. However, the General Assembly never approved the formulation of those principles in the International Law Commission's 1950 Nuremberg Principles requiring a connection to crimes against peace or a war crime.[178] Moreover, the ILC reiterated four years later that crimes against humanity were independent of crimes against peace and war crimes. The 1954 draft Code of Offences (which largely followed the Nuremberg definition of crimes against humanity in defining "inhuman acts by the authorities of a State or by private individuals against any civilian population") did not require that the acts had to be committed in connection with armed conflict or with war crimes or crimes against peace.[179] In addition, the Genocide Convention and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,[180] both of which are considered to involve crimes against humanity, apply to acts committed during times of peace as well as during armed conflict, and Article 1 (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity states that the treaty applies to crimes against humanity "whether committed in time of war or in time of peace".[181] None of these three treaties require that the crime against humanity be committed in connection with a war crime or a crime against peace.

Although the jurisdiction of the Yugoslavia Tribunal over crimes against humanity is limited in Article 5 of its Statute to crimes committed during the conflict in former Yugoslavia, the Commentary to the Statute by the Secretary-General states that these crimes "are prohibited regardless of whether they are committed in an armed conflict".[182] Indeed, the Appeals Chamber of the Yugoslavia Tribunal in interpreting Article 5 has concluded in *Prosecutor v. Duško Tadi_ a/k/a/ "Dule"* (*Tadi_* Case, Interlocutory Appeal):

"It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity

there was no intent to broaden the jurisdiction of the military tribunals to include crimes against humanity unconnected with crimes against peace and humanity, but recognizing that they were crimes); *United States v. Weizaecker*, Case No. 11, XIII *id*., p. 112 (rejecting, without any historical analysis, the concept that "crimes against humanity perpetrated by a government against its own nationals are of themselves crimes against humanity").

[178] GA Res. 3 (I) of 13 February 1946; GA Res. 95 (I) of 11 December 1946; International Law Commission, Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and Judgement of the Tribunal (Nuremberg Principles), in Report of the International Law Commission, 5 UN GAOR (Supp. No. 12), UN Doc. A/1316 at 11. Principle VI.c, however, did not contain any requirement that crimes against humanity be committed *during* an armed conflict.

[179] It merely required that crimes against humanity be committed in connection with some other offence under the Code, such as illegal annexation or genocide. 1954 draft Code of Offences, Art. 2 (10).

[180] Genocide Convention, Art. I; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *adopted by* the General Assembly in Resolution 3068 (XXVIII) of 30 November 1973, *entered into force* 18 July 1976.

[181] *Adopted by* the General Assembly in Resolution 2391 (XXIII) of 26 November 1968, *entered into force* 11 November 1970.

[182] Report of the Secretary-General, UN. Doc. 25704, para. 47.

> and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law." [183]

This conclusion is reinforced by the Rwanda Statute. Article 3 of the Rwanda Statute does not link crimes against humanity to other crimes or to time of armed conflict.[184] Commentators have also concluded that crimes against humanity exist independently of war crimes or crimes against peace,[185] the Commissions of Experts on former Yugoslavia and Rwanda[186] and governments[187] have reached similar conclusions.

In July 1996, the International Law Commission, after reviewing the law and practice concerning crimes against humanity in the past century, adopted on its second reading the draft Code of Crimes. Article 18 of the draft Code, defining crimes against humanity, contains no link to armed conflict or to other crimes. The International Law Commission explained in its commentary to this article why the jurisdictional definition in the Nuremberg Charter was not retained: "The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include these crimes".[188] Most recently, the ICRC declared that it

"supports a definition of **crimes against humanity** which would not include the requirement that such acts be committed in connection with an armed conflict, as this *nexus* no longer represents positive law. Crimes against humanity are equally aberrant and unacceptable whether they are perpetrated during an armed conflict or not: in either case, the international community is bound to take action for the repression of such crimes."[189]

V. DEFINING JURISDICTION OVER SERIOUS VIOLATIONS OF HUMANITARIAN LAW

[183] *Tadi_* Case, Decision on the Defence Motion for Interlocutory Appeal, Case No. IT-94-1-AR72, 2 October 1995, para. 141.

[184] The Secretary-General, contrasting Article 3 of the Rwanda Statute with Article 5 of the Yugoslavia Statute, notes that "Article 3 of the Rwanda statute makes no reference to the temporal scope of the crime; there is, therefore, no reason to limit its application in that respect." Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, at para. 11, note 5.

[185] See, *e.g.*, Bassiouni, *Crimes against Humanity*, *supra*, n. 58, p. 191; Theodor Meron, "War crimes in Yugoslavia and the development of international law", *supra*, n. 175, pp. 85-87 (and sources cited).

[186] Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), Annexed to UN Doc. S/1994/674, 27 May 1994, para. 75; Commission of Experts on Rwanda, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (29 Sept. 1994), pp. 26-27.

[187] The United States delegation at the Preparatory Committee's first session submitted a paper which reviewed the history of crimes against humanity and concluded that "there was no sound reason in theory or precedent" for a link between crimes against humanity and other crimes or to armed conflict. United States delegation, "Crimes Against Humanity: Lack of a Requirement for a Nexus to Armed Conflict", 25 March 1996. Other government delegations stated that they had reached a similar conclusion.

[188] 1996 ILC Report, p. 96.

[189] ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 3 (emphasis in original).

"Each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he can be prosecuted according to penal or disciplinary provisions."

Joint Services Regulations (Zdv) 15/2 of the German Army, promulgated in August 1992, *reprinted in* Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press 1995), p. 528

The jurisdiction of the court should include serious violations of humanitarian law in both international and non-international armed conflict. Serious violations of humanitarian law in international armed conflict include grave breaches of the Geneva Conventions and Additional Protocol I, which are now recognized as war crimes, denials of fundamental guarantees included in Additional Protocol I, the 1907 Hague Convention IV, together with its Regulations, and customary law. Major international armed conflicts with widespread war crimes have continued to occur since the end of the Nuremberg and Tokyo trials, but few of the conflicts today are international wars between states. Indeed, some of the gravest violations of human rights and humanitarian law since the end of the Second World War, such as violations of common Article 3 of the Geneva Conventions and Additional Protocol II, 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. International criminal jurisdiction over such violations in both types of conflicts would be consistent with the jurisdiction of the Yugoslavia Tribunal, as interpreted by its Appeals Chamber, and the jurisdiction of the Rwanda Tribunal, the draft Code of Crimes, the views of the ICRC, the position of a number of governments and the views of leading commentators.

Most of the serious violations of humanitarian law which should fall within the jurisdiction of the permanent international criminal court if it is to be an effective complement to national courts 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.

A. International armed conflict

1. Grave breaches of the Geneva Conventions

The court should have jurisdiction over grave breaches of the four Geneva Conventions, as provided in Article 20 (e) of the draft statute. They are some of the most serious war crimes.[190] Each state party is required "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts", hand such persons over for trial to another state party or transfer such persons to an international criminal court.[191]

It is generally accepted that the grave breaches provisions of the Geneva Conventions reflect customary law. Indeed, as of 3 October 1996, 188 states - more than the entire membership of the UN - were parties to the Geneva Conventions.[192] It is also generally accepted that grave breaches may be punished by any state.[193]

As suggested with regard to the Genocide Convention (see Part III above), to be fully consistent with the principles of legality and to facilitate ease of understanding in the general public, the statute should annex the Geneva Conventions as a schedule. Though this approach might seem to be somewhat cumbersome, it is the method taken by a number of states which have fulfilled their responsibilities under the Geneva Conventions to make breaches of these treaties punishable under national law. This approach has several important advantages. It avoids the risk of reopening a debate about the content, meaning or applicability of the grave breaches provisions. It avoids the risk that minor changes might be made in the text of particular provisions in the transposing of the provisions to the statute which could lead to serious consequences in terms of

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[190] Grave breaches of the Geneva Conventions are now recognized as war crimes. Additional Protocol I, Art. 85 (5) ("Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."). Many other substantive provisions of the four Geneva Conventions also are considered to reflect customary law and might one day be considered appropriate for inclusion within the jurisdiction of the international criminal court. *See* Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (*Human Rights and Humanitarian Norms*) (1989), pp. 45-50.

[191] First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146. The ICRC Commentary makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal court:

> "[T]here is nothing in the paragraph [First Geneva Convention, Art. 49, para. 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."

I *ICRC Commentary on the Geneva Conventions*, *supra*, n. 55, p. 366.

[192] Int'l Rev. Red Cross, No. 313, July-August 1996, p. 503.

[193] Brownlie, *supra*, n. 46, p. 305 ("It is now generally accepted that breaches of the laws of war, and especially of . . . the Geneva Conventions of 1949, may be punished by any state which obtains custody of persons suspected of responsibility.").

scope of application. It might be difficult to obtain ratifications of the treaty setting up the court if there were two separate bodies of law on grave breaches under the Geneva Conventions. It also ensures that all the relevant provisions necessary to understand terms such as protected person or combatant are included in the statute and that the court can draw without question on the entire *travaux préparatoires*, commentary and jurisprudence of national courts and international tribunals in its interpretation of grave breaches.

If it is decided to have self-contained definitions of grave breaches of the Geneva Conventions, they will need to identify the persons protected within each category.[194] Grave breaches include the following acts if committed against wounded and sick of armed forces in the field and at sea, shipwrecked at sea, prisoners of war, members of the medical personnel and chaplains of the armed forces of the parties to an international armed conflict and certain civilians and others in the hands of a party to the conflict or an occupying power:

1. wilful killing;

2. torture or inhuman treatment, including biological experiments;

3. wilfully causing great suffering or serious injury to body or health;

Grave breaches also include the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, if committed against wounded and sick of armed forces in the field and at sea, shipwrecked at sea, members of the medical personnel and chaplains of the armed forces of the parties to an international armed conflict and certain civilians and others in the hands of a party to the conflict or an occupying power.[195]

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

1. compelling the protected person to serve in the forces of the hostile party; and

2. wilfully depriving a protected person of the rights of fair and regular trial.[196]

In addition, the taking of hostages is a grave breach if committed against certain civilians and others in the hands of a party to the international armed conflict or to an occupying power.[197]

[194] Protected persons include: wounded and sick in the armed forces in the field, First Geneva Convention, Art. 13; wounded and sick and shipwrecked at sea, Second Geneva Convention, Art. 13; prisoners of war, Third Geneva Convention, Art. 4; certain civilians and others in the hands of a party to the conflict or an occupying power of which they are not nationals and persons in hospital, safety and neutralized zones, Fourth Geneva Convention, Arts 4, 13-26.

[195] First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Fourth Geneva Convention, Art. 147.

[196] Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147.

[197] Fourth Geneva Convention, Art. 147. "Generally speaking hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces." *Commentaire publié sous la direction de Jean S. Pictet, IV La Convention de Genève relative à la protection des personnes civiles en temps de guerre* (*Genève: Comité International de la Croix-Rouge 1956)*, pp. 247-248 (English translation).

Other provisions of the Geneva Conventions are now considered to embody customary law and additional provisions may well reflect customary law or general principles of law in the future.[198] Each state party is obliged to suppress all acts contrary to the provisions of the Geneva Conventions other than grave breaches by such measures as criminal prosecutions and many of the provisions are so important that violations are matters of international concern.[199] Amnesty International believes that violations of some of these provisions should be considered for being included in the jurisdiction of the court at this stage or as part of a subsequent review of the statute after it enters into force.

2. Grave breaches of Additional Protocol I and denials of fundamental guarantees in that Protocol

The international criminal court should also have jurisdiction over grave breaches of Additional Protocol I, which include some of the most serious war crimes, as provided in Article 20 (e) of the draft statute, and denials of fundamental guarantees recognized in Article 75 of that instrument, some of which would also amount to war crimes under the Geneva Conventions (such as the denial of the right to fair trial). As with genocide and grave breaches of the Geneva Conventions, the entire Additional Protocol I should be annexed in a schedule to the statute. The definition of grave breaches in this treaty extends the scope of protection provided in the Geneva Conventions in terms of crimes prohibited, persons protected and conflicts included. Additional Protocol I applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination", as well as to international armed conflict.[200] The ICRC has declared that the court should have jurisdiction over grave breaches of Additional Protocol I.[201]

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.[202] There is widespread adherence to the Protocol. Indeed, as of 5 July 1996, 146 states - more than three-quarters of the UN members - were parties to Additional Protocol I.[203]

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. The first group includes grave breaches of the Geneva Conventions when committed against several categories of

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198 See discussion in Meron, *Human Rights and Humanitarian Norms, supra*, n. 190, pp. 45-62.

199 First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146. The ICRC Commentary says that this common provision requires each state party to repress all breaches by national legislation and that the state "must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention". I *ICRC Commentary on the Geneva Conventions, supra,* n. 55, p. 368.

200 Additional Protocol I, Art. 1 (2).

201 ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 3.

202 See the discussion in Meron, *Human Rights and Humanitarian Norms, supra*, n. 190, pp. 62-70.

203 Int'l Rev. Red Cross, No. 313, July-August 1996, p. 503.

persons protected by Additional Protocol I. Article 85 (2) defines grave breaches of the Protocol as acts described as grave breaches in the Geneva Conventions

"if committed against persons in the power of an adverse Party protected by Articles 44 [combatants and prisoners of war], 45 [certain persons who have taken part in hostilities] and 73 [refugees and stateless persons] of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol."[204]

The second group includes "violations of the physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation" covered by the Protocol.[205] "Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends" is a grave breach of the Protocol if it subjects such protected persons:

"1. to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty", or

[204] Additional Protocol I, Art. 85 (2).

[205] *Id.*, Art. 11 (1).

2. to physical mutilations or medical or scientific experiments, even with the person's consent, and removal of tissue or organs except in certain cases with the person's consent."[206]

The third group of grave breaches of Additional Protocol I include 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 or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(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, as defined in Article 57, paragraph 2 (a) (iii);

(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."[207]

The fourth group of grave breaches are the following when committed wilfully and in violation of the Geneva Conventions or the Protocol:

"(a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which consitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53,

[206] *Id.*, Art. 11 (1) - (3).

[207] *Id.*, Art. 85 (3).

sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article [covering the first group of grave breaches above] of the rights of fair and regular trial."[208]

Article 75, setting forth fundamental guarantees, many of which are similar to guarantees in common Article 3 of the Geneva Conventions and Articles 4 and 6 of Additional Protocol II, is considered to embody customary law.[209] Other provisions, such as Articles 20, 48, 51, 54, 76 and 77 (1), may also be appropriate for the imposition of international criminal responsibility.

3. Violations of the 1907 Hague Convention IV and Hague Regulations

Many, perhaps all, of the Hague Regulations annexed to the 1907 Hague Convention IV are considered to be customary law and entail international criminal responsibility.[210] Some of the prohibitions are within the jurisdiction of the Yugoslavia Tribunal.[211] The statute should annex this Convention and the Hague Regulations in a schedule.

Among the many provisions which could be considered for inclusion within the court's jurisdiction are: Article 4, requiring prisoners of war to be treated humanely; Article 23, prohibiting killing or wounding prisoners and other inhumane acts; Article 25, prohibiting attacks or bombardments of undefended places; Article 44, forbidding a belligerent from forcing inhabitants of an occupied territory to furnish information about the armed forces of the other party; Article 45, forbidding the compulsion of inhabitants of an occupied territory to swear allegiance to the occupier; Article 46, requiring respect for family honour and rights, the lives of persons, private property and religious convictions and practices; and Article 50, prohibiting certain collective punishments. Although in some cases, these provisions have been supplemented or strengthened by subsequent international humanitarian law, such as Additional Protocol I, they are important with respect to the small number of states which have not yet ratified this treaty.

[208] *Id.*, Art. 85 (4) (a) - (e). The rights to fair trial are further defined in Article 75 (Fundamental Guarantees) of Additional Protocol I.

[209] See, for example, the position of the United States as described in Meron, *Human Rights and Humanitarian Norms, supra*, n. 190, pp. 65, 68.

[210] The Nuremberg Tribunal concluded that violations of Articles 46, 50, 52 and 56 of the Hague Regulations "constitued crimes for which the guilt individuals were punishable is too well settled to admit of argument" and that "by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war". Nuremberg Judgment, *supra*, n. 115, p. 64. The military tribunal in *United States v. Von Leeb*, (*High Command* Case), XI *Trials of War Criminals before the Nuernberg Military Tribunals*, *supra*, n. 115, pp. 462, 532-533, reached a similar conclusion. The Appeals Chamber of the Yugoslavia Tribunal has recognized that the Hague Regulations are part of customary law. *Tadi_* Case, Interlocutory Appeal, *supra*, n. 183,. para. 87.

[211] Yugoslavia Statute, Art. 3.

B. Non-international armed conflict

> *"There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal armed conflicts more leniently than those engaged in international wars."*
>
> Theodor Meron, "International Criminalization of Internal Atrocities", 89 Am. J. Int'l L. (1995), p. 561

The international criminal court should have jurisdiction over serious violations by individuals of humanitarian law governing non-international armed conflict, including violations of common Article 3 and Additional Protocol II. 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. Those responsible must be brought to justice by an international criminal court when national courts are unable or unwilling to do so. Moreover, many of the prohibitions in these instruments reflect customary international law and entail international criminal responsibility. Indeed, some of the fundamental principles applicable in international armed conflict were first codified to govern the conduct of United States armed forces in the American Civil War.[212] For the same reasons as indicated with respect to the Genocide Convention, the Geneva Conventions, Additional Protocol I and the 1907 Hague Convention IV and its Regulations, Additional Protocol II should be annexed to the statute as a schedule.

It is now well established that acts prohibited by common Article 3 and Protocol II entail international criminal responsibility. The Appeals 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".[213] A number of states have taken a similar view.[214] 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".[215] As of 5 July 1996, 138 states - equal to

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[212] Instructions for the Government of Armies of the United States in the Field (Lieber Code), Washington, D.C., 24 April 1863.

*Tadi_* Case, Interlocutory Appeal, *supra* n. 183, para.134.

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 and the 1977 Additional Protocols to these 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.

[215] States have been enacting legislation providing for the arrest and transfer of persons accused of violating Additional Protocol II to the Rwanda Tribunal. The texts of such legislation are reproduced in Amnesty International,

approximately three-quarters of the UN membership - were parties to Additional Protocol II.[216] Even states which are not yet parties to this treaty recognize that many of the provisions of this treaty are part of customary law.[217] The Appeals Chamber of the Yugoslavia Tribunal has stated that "[m]any of the provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles".[218] The ICRC has stated, "Since the majority of armed conflicts today are internal in nature, it is imperative to see that the court's jurisdiction extends to this type of conflict."[219] Morever, an increasing number of authorities agree that humanitarian law imposes international criminal responsibility during internal armed conflicts.[220]

Although the International Law Commission did not expressly list serious violations of humanitarian law in non-international armed conflict as violations of the laws and customs of war within the meaning of Article 20 (c) of the ILC draft statute, it considered that they were included in this category.[221] Moreover, in 1996, it characterized the serious violations of humanitarian law applicable in non-international armed conflict contained in common Article 3 and Article 4 of Additional Protocol II as "war crimes" in the draft Code of Crimes.[222] It stated that including these crimes within the draft Code of Crimes was

"of particular importance in view of the frequency of non-international armed conflicts in recent years. The Commission noted that the principle of individual criminal responsibility for

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International criminal tribunals: Handbook for government cooperation (AI Index: IOR 40/07/96) and its three supplements (AI Index: IOR 40/08/96, IOR 40/09/96 and IOR 40/10/96).

[216] Int'l Rev. Red Cross, No. 313, July-August 1996, p. 503.

[217] See, for example, the statement by the then Deputy Legal Adviser of the United States State Department, Michael J. Matheson:

"[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process".

Humanitarian Law Conference, Remarks of Michael J. Matheson, 2 Am. U. J. Int'l L. & Pol. (1987), pp. 419, 430-31.

[218] *Tadi_* Case, Interlocutory Appeal, *supra*, n. 183, para.117.

[219] ICRC, Statement at the Sixth Committee, General Assembly, 28 October 1996, p. 3.

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, *International Criminalization of Internal Atrocities*, *supra*, n. Xxx, pp. 559-565.

[221] The International Law Commission's commentary on Article 20 (c) of the ILC draft statute states that it reflects both Article 3 of the Yugoslavia Statute and Article 22 of the 1991 version of the draft Code of Crimes. The latter defined an exceptionally serious war crime as "an exceptionally serious violation of the principles and rules of international law applicable in armed conflict". The commentary to Article 22 states that "armed conflict" includes "non-international armed conflicts covered by article 3 common to the four 1949 Geneva Conventions". Report of the International Law Commission on the work of its forty-third session 29 April-19 July 1991, 46 UN GAOR Supp. (No. 10), p. 270, UN Doc. A/46/10 (1991).

[222] Draft Code of Crimes, Art. 20 (f); 1996 ILC Report, p. 118.

violations of the law applicable in internal armed conflict had been reaffirmed by the International Criminal Tribunal for the former Yugoslavia".[223]

Moreover, some of the acts prohibited by common Article 3 and by Additional Protocol II would amount to crimes against humanity when committed against a civilian population, but not necessarily all of them. Indeed, to the extent that crimes against humanity are limited to acts against a civilian population, they would not cover all persons protected by common Article 3 or Additional Protocol II. Therefore, violations of these instruments should fall within the court's jurisdiction.

1. Violations of common Article 3

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."

In addition, common Article 3 (2) requires that "[t]he wounded and sick shall be collected and cared for."

The statute should ensure that the jurisdiction of the international criminal court includes the acts prohibited by common Article 3. As the International Court of Justice determined in the *Nicaragua Case*, the rules in common Article 3

"constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the

[223] 1996 ILC Report, p. 119 (footnote omitted).

> Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22; paragraph 215 above)."[224]

The International Court of Justice considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression".[225] What better way to ensure respect for these general principles than to ensure that they are within the jurisdiction of the international criminal court, an institution embodying the authority of the international community? Moreover, it would be unfortunate if the permanent international criminal court were to have a more restrictive jurisdiction than the *ad hoc* tribunals.

2. Violations of Additional Protocol II

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.[226]

Part II of Additional Protocol II. The rules in Part II are "inalienable and fundamental rights, inherent in the respect due the human person", which include guarantees of humane treatment, in Article 4; minimum standards during detention, in Article 5; and judicial guarantees, in Article 6.[227] The rules in Part II are designed to protect all persons, civilian or military, who do not or have ceased to participate in hostilities from abuses and inhumane treatment by military or civilian *de jure* or *de facto* authorities into whose hands they have fallen.[228] As the ICRC has explained, the fundamental guarantees in these articles develop and supplement rules "already contained, implicitly or explicitly, in common Article 3", "constitute a minimum standard of protection which anyone can claim at any time, and they underlie the whole system of human rights".[229] Indeed, some of the non-derogable human rights are covered in one way or another in Additional Protocol II.[230]

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[224] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Merits, Judgment of 27 June 1986, ICJ Rep., para. 218.

[225] *Id.*, para. 220.

[226] Rwanda Statute, Art. 4.

[227] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 4508, p. 1365 (footnote omitted).

[228] *Id.*, para. 4507, p. 1365.

[229] *Id.*, para.s 4508, 4510, p. 1365.

[230] These include the rights to life, to be free from torture and other cruel, inhuman or degrading treatment or punishment and not to be enslaved. *See* ICCPR, Art. 4 (1).

Violations of Article 4 (1) and (2) of Additional Protocol II spelling out certain fundamental guarantees should fall within the jurisdiction of the international criminal court.

Article 4 (1) of Additional Protocol II. Article 4 (1) contains fundamental guarantees concerning the right to humane treatment of those who are not taking a direct part in the hostilities or who have ceased to do so:

"All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."

In addition to defining the scope of application of Part II, Article 4 (1) requires that those protected "be treated humanely" in all circumstances, a term based on Article 4 of the Hague Regulations, "without any adverse distinction", as provided in Article 2 (1) of Additional Protocol II.[231] The prohibition of declaring that no quarter shall be given is a fundamental guarantee inspired by Article 23 (1) (d) of the Hague Regulations.[232]

Article 4 (2) of Additional Protocol II. Article 4 (2) contains a number of fundamental guarantees applicable to such persons which mirrors similar protections in common Article 3 and other international treaties:

"Without prejudice to the generality of the foregoing [in Article 4 (1) of Additional Protocol II], the following acts shall remain prohibited against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

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[231] *ICRC Commentary on the Additional Protocols*, *supra*, n. 56, paras 4523, 4524, p. 1370. Article 2 (1) states that the Protocol "shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".

[232] *Id.*, para. 4525, p. 1371.

(h) threats to commit any of the foregoing acts."

The following discussion addresses provisions of Article 4 (2) which would include within their scope matters which are of particular concern to Amnesty International. The prohibitions in Article 4 (2) are absolute, do not admit of any exception and, necessarily, preclude reprisals.[233] The prohibition of violence to the life, health and physical or mental well-being of persons in Article 4 (2) (a) is based on common Article 3 (1) (a) of the Geneva Conventions, but is broader. Similar prohibitions are considered to be fundamental guarantees under Additional Protocol I and are expressly subject to criminal prosecution under the Rwanda Statute and the draft Code of Crimes.[234]

The prohibition of collective punishments in Article 4 (2) (b) is a corollary of the concept of individual criminal responsibility and inspired by Article 33 of the Fourth Geneva Convention.[235] Collective punishments are also punishable under Additional Protocol I, the Rwanda Statute and the draft Code of Crimes.[236] The prohibition "should be understood in its broadest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property)",[237] and, thus, would cover the deliberate destruction of houses as punishment for the acts of one member of a family.

The prohibition of the taking of hostages in Article 4 (2) (c) duplicates the same prohibition in common Article 3. According to the ICRC, "hostages are persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts against them".[238] The taking of hostages is a denial of fundamental guarantees under Additional Protocol I and expressly punishable under the Rwanda Statute and the draft Code of Crimes.[239]

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[233] *Id*, paras 4528-4530, p. 1372. As the ICRC has explained,

> "The list of prohibited acts is fuller than that of common Article 3. That being so, and because of the absolute character of these prohibitions, which apply at all times and in all places, there is in fact no room left at all for carrying out protected persons. Such an interpretation was already given in the commentary on common Article 3. In the absence of an express reference to 'reprisals', the ICRC considered that they were implicitly prohibited. . . . The strengthening of fundamental guarantees of humane treatment in Protocol II and, in particular, the inclusion of a prohibition on collective punishments confirms this interpretation without calling into question the refusal of the negotiators to introduce the legal concept of reprisals in the context of non-international armed conflict."

Id. (footnote omitted).

[234] Additional Protocol I, Art. 75 (2) (a); Rwanda Statute, Art. 4 (a); draft Code of Crimes, Art. 20 (f) (i).

[235] *ICRC Commentary on the Additional Protocols*, *supra*, n. 56, paras 4535, p. 1374. Article 33 of the Fourth Geneva Convention prohibits "penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed". IV *ICRC Commentary on the Geneva Conventions*, *supra*, n. 55, p. 225.

[236] Additional Protocol I, Art. 75 (2) (d); Rwanda Statute, Art. 4 (2) (b); draft Code of Crimes, Art. 20 (f) (iii).

[237] *ICRC Commentary on the Additional Protocols*, *supra*, n. 56, para. 4536, p. 1374.

[238] *Id*., para. 4537, p. 1375.

[239] Additional Protocol I, Art. 75 (2) (c); Rwanda Statute, Art. 4 (c); draft Code of Crimes, Art. 20 (f) (iii).

The acts prohibited in Article 4 (2) (d) include not only attacks on protected persons, as in Article 33 of the Fourth Geneva Convention, on which it is based, but also "acts directed against installations which would cause victims as a side effect".[240] These acts are made punishable under the Rwanda Statute and the draft Code of Crimes.[241]

Article 4 (2) (e), prohibiting outrages upon personal dignity, repeats and strengthens the prohibitions in common Article 3. They are denials of fundamental guarantees under Additional Protocol I and crimes expressly punishable under the Rwanda Statute and the draft Code of Crimes.[242] Some of these outrages upon personal dignity, when directed against a civilian population on a systematic or large scale, they are considered to be crimes against humanity.[243]

The prohibition of "slavery and the slave trade in all their forms" in Article 4 (2) (f) is taken from the Slavery Convention of 1926.[244] The prohibition was also intended to include practices similar to slavery prohibited by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, including: debt bondage, serfdom, selling of wives or widows and certain types of exploitation of child labour.[245] As stated above in Part IV.H, enslavement is a crime against humanity.

The ICRC has explained that the crime in Article 4 (2) (h) of making threats to commit any of the foregoing acts enlarges the scope of the list:

"In practice threats may in themselves constitute a formidable means of pressure and undercut the other prohibitions. The use of threats will generally constitute violence to mental well-being within the meaning of sub-paragraph (a) [of Article 4 (2)]."[246]

The Rwanda Statute expressly makes such threats crimes as well.[247]

Article 5 of Additional Protocol II. Article 5 contains a number of important protections of persons whose liberty has been restricted for reasons related to a non-international armed conflict which supplement the fundamental guarantees in Article 4. Some of these provisions lay down absolute obligations which, if violated, would be matters of international concern and could be considered appropriate for the imposition of criminal responsibility. For example, Article 5 (1) (a) lays down the absolute obligation to treat the wounded and sick in accordance with Article 7, which spells out requirements of humane treatment for such persons. Given the serious nature of the obligation to treat all persons humanely, and the grave violations of this right in the 20th

[240] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 4538, p. 1375.

[241] Rwanda Statute, Art. 4 (d); draft Code of Crimes, Art. 20 (f) (iv).

[242] Additional Protocol I, Art. 75 (2) (b); Rwanda Statute, Art. 4 e).

[243] Draft Code of Crimes, Art. 18. See also Additional Protocol I, Art. 75 (2) (b).

[244] Slavery Convention, *signed* 25 September 1926, *entered into force* 9 March 1927, Preamble.

[245] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 4541,p. 1376.

[246] *Id.*, para. 4543, p. 1376.

[247] Rwanda Statute, Art. 4 (h).

century, the failure to carry out this obligation should be subject to international criminal responsibility. However, this obligation may well be covered adequately by Article 4 (1) and (2) (a) and (e), if they are included as crimes within the jurisdiction of the international criminal court. Other provisions in Article 5 are dependent on the resources available to those responsible for the detention and not all of these may be appropriate for imposing criminal responsibility.

Article 6 of Additional Protocol II. Article 6 reinforces and expands the judicial guarantees in common Article 3 (1) (d) of the Geneva Conventions, which prohibits "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 by civilized peoples". Article 6 incorporates many of the principles set forth in the Third and Fourth Geneva Conventions, the fundamental guarantees of Additional Protocol I and the fair trial provisions in the ICCPR.[248] Article 6 is non-derogable. The ICRC Commentary makes clear that "every human being is entitled to a fair and regular trial, whatever the circumstances", including situations of non-international armed conflict.[249] Although the rights expressly listed are not as comprehensive as in Article 75 of Additional Protocol I, the list is simply illustrative, not exclusive. It contains a number of important principles, including individual responsibility, non-retroactivity, the presumption of innocence, the right to be present at one's own trial, the right not to be compelled to testify against oneself or to confess guilt and the right to be informed of judicial remedies and the time-limits within which they must be exercised.[250] Article 6 (4) prohibits pronouncing death sentences upon persons under 18 years at the time of the offence and carrying it out on pregnant women and mothers of young children.

Violations of the provisions of Article 6 of Additional Protocol II spelling out the requirements of fair trial in prosecutions and punishment for criminal offences related to the armed conflict should be within the jurisdiction of the international criminal court. Denial of the right to a fair trial to prisoners of war and to civilians and certain others in connection with an international armed conflict is a grave breach of the Third and Fourth Geneva Conventions.[251] Denial of the right to a fair trial to persons who are in the power of a party to an international armed conflict is a denial of fundamental guarantees under Additional Protocol I.[252] Depriving persons who are not taking part in hostilities in a non-international armed conflict or who have ceased to do so of the right to a fair trial is a violation of common Article 3. The same reasons for making the denial of the right to fair trial in international armed conflict and situations covered by common Article 3 subject to international criminal responsibility apply to non-international armed conflicts covered by Additional Protocol II.

Article 7 of Additional Protocol II. Article 7 reaffirms for wounded and sick the basic principle of humane treatment found in Article 4 (1), as well as in Article 5 (1) (a), which should entail international criminal responsibility (see above).

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[248] Third Geneva Convention, Arts 86, 89-108; Fourth Geneva Convention, Arts 64-78; Additional Protocol I, Art. 75; ICCPR, Arts 6, 9, 14 and 15.

[249] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 4597, p. 1396.

[250] Additional Protocol II, Art. 6 (2) (b) - (f), (3).

[251] Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147.

[252] Additional Protocol I, Art. 75 (4).

Article 13 of Additional Protocol II. Violations of the rules in Article 13 protecting the civilian population from being made the object of attack should be included in the statute. Article 13, which is based on Article 51 of Additional Protocol I, provides:

"1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."

The ICRC Commentary states that "Article 13 codifies the general principle that protection is due to the civilian population against the dangers of hostilities, already recognized by customary international law and by the laws of war as well."[253]

Article 14 of Additional Protocol II. Starvation of civilians as a method of combat, which is a violation of Article 14 should be a crime within the court's jurisdiction. Article 14 provides:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works."

Deliberate starvation, if intended to kill civilians, may in certain cases amount to committing extrajudicial executions. Article 14 is intended to cover a wider field. The ICRC Commentary states:

"The term 'starvation' means the action of subjecting people to famine, i.e., extreme and general scarcity of food. The object of this provision is to prohibit the deliberate provocation of such a situation and to preserve the means of subsistence of the civilian population, in order to give effect to the protection to which it is entitled."[254]

The article is based on Article 54 (1) and (2) (protection of objects indispensible to the survival of the civilian population), develops concepts in Article 23 and 53 of the Fourth Geneva Convention and is "really only a specific application of common Article 3, which imposes on parties to the conflict the obligation to guarantee humane treatment for all persons not participating in hostilities, and in particular prohibits violence to life".[255]

[253] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 4761, p. 1448.

[254] *Id*., para. 4791, p. 1456 (footnote omitted).

[255] *Id.*, paras 4793-4794, p. 1496. The ICRC notes that "starvation may entail the total or partial disappearance of whole groups of people, which could amount to genocide, if brought about intentionally." *Id.*, para. 4794, p. 1496.

Article 17 of Additional Protocol II. The international criminal court should have jurisdiction over violations of the prohibition of forced movement of civilians in Article 17. Article 17 provides:

"1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected to the conflict."

This article is based in part on Article 49 of the Fourth Geneva Convention, which provides protections against deportations, transfers and evacuations in or from occupied territories, and was designed to fill in the perceived gap in protection for non-international armed conflicts, as common Article 3 does not expressly mention these matters.[256] Some of these acts may also constitute crimes against humanity as arbitrary deportation or forcible transfers of population (see Part IV.F above).

VI. GENERAL PRINCIPLES OF CRIMINAL LAW AND PERMISSIBLE DEFENCES

In this part, Amnesty International states what general principles of criminal law it believes should be incorporated in the statute and which defences should be permitted to the worst crimes imaginable. Although it is essential to spell out some of these general principles in the statute, some of them may better be left to be included in the rules of procedure and evidence. There is a significant risk that if the Preparatory Committee attempts to include everything in the statute that the process of drafting a statute agreeable to a majority of states may be greatly delayed.

A. General principles of law

1. Principle of legality (*nullum crimen sine lege*)

The fundamental principle of legality (*nullum crimen sine lege*) should be included in the statute. The ILC draft statute recognizes this principle in Article 39, but, as explained below, it could limit the number of cases that would fall within the jurisdiction of the court and should be amended.

The basic principle of legality is recognized in the Universal Declaration of Human Rights,[257] the Third Geneva Convention and its Additional Protocols,[258] and human rights treaties,

[256] *Id.*, paras 4848-4850, p. 1472 (noting that common Article 3 prohibits inhumane and degrading treatment).

[257] Article 11 (2) of the Universal Declaration provides:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

[258] Third Geneva Convention, Art. 99; Additional Protocol I, Art. 2 (c); Additional Protocol II, Art. 6 (c).

including the ICCPR, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[259] As reaffirmed in the ICCPR, it is clear that nothing in that principle prevents the prosecution of someone for acts which were recognized as criminal under general principles of international law when they were committed:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[260]

The *travaux préparatoires* indicate that the second paragraph of this article was included to confirm and strengthen the principles of the Nuremberg and Tokyo Tribunals "and would ensure that if in the future crimes should be perpetrated similar to those punished at Nürnberg, they would be punished in accordance with the same principles".[261]

Part of Article 39 of the ILC draft statute in its current wording may be unnecessary and part of it unduly limits the number of the cases which the court could consider. Article 39 (a) prohibits a conviction of someone charged with genocide, other crimes against humanity, aggression or serious violations of the laws and customs applicable in armed conflict "unless the act or omission in question constituted a crime under international law" at the time the act or omission occurred. This provision could add an extra hurdle to bringing a case if the definitions of the crimes and defenses are incorporated in the statute by requiring the court in each case to assess whether a particular act or omission was part of customary law even if all the state parties agreed that the court should have jurisdiction over the crime and if the statute applied only to crimes after it entered into force. It is possible that the statute would include some crimes where there is overwhelming support for inclusion but where the prohibition might not yet have achieved customary law status. This provision will require further consideration.

Article 39 (b) would prohibit a conviction for crimes referred to in Article 20 (e), such as grave breaches of the Geneva Conventions and Additional Protocol I and the Convention against Torture, "unless the treaty in question was applicable to the conduct of the accused . . . at the time the act or omission occurred". This would appear to be unduly restrictive since grave breaches and torture are crimes under customary international law and general principles of law and, therefore, applicable to all persons. Nevertheless, the concerns which lie behind this provision

[259] ICCPR, Art. 15; European Convention on Human Rights, Art. 7; American Convention on Human Rights, Art. 9; African Charter on Human and Peoples' Rights, Art. 7 (2).

[260] ICCPR, Art. 15. Article 7 of the European Convention on Human Rights has a similar provision.

[261] M. J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights* (Dordrect: Martinus Nijhoff Publishers 1987), p.332.

identified in the International Law Commission's commentary on this provision could be addressed by making clear that these crimes are serious violations of humanitarian law under Article 20 (c) or crimes against humanity under Article 20 (d) and by making them crimes within the inherent jurisdiction of the court with respect to all state parties.

2. Presumption of innocence

A fundamental principle of criminal procedure which must be incorporated in the statute is the presumption of innocence. Although this principle is usually considered as an essential component of the right to fair trial rather than as a general principle of criminal law, the Preparatory Committee's Working Group on general principles of criminal law discussed this principle. It is likely that it will be considered again at a subsequent session of the Preparatory Committee under the question of procedure.

The presumption of innocence is expressly guaranteed by human rights and humanitarian law treaties, including the ICCPR, the European Convention on Human Rights, the American Convention on Human Rights and Additional Protocols I and II, and is recognized as a general principle of criminal law.[262] Article 14 (2) of the ICCPR provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until guilty according to law." The Human Rights Committee has explained the strict requirements of this principle, which is "fundamental to the protection of human rights":

> "By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt."[263]

The Human Rights Committee has further explained that "the presumption of innocence implies a right to be treated in accordance with this principle" and that "[i]t is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."[264]

The current wording of Article 40 of the ILC draft statute is consistent with international law and should not be weakened in any way. It provides that

> "[a]n accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt."

Unfortunately, however, the ILC Commentary takes a restrictive view of the phrase "according to law". It states that "[s]ince the Statute is the basic law which governs trials before the Court, it is the

[262] ICCPR, Art. 14 (2); European Convention on Human Rights, Art. 6 (2); American Convention on Human Rights, Art. 8 (2); African Charter on Human and Peoples' Rights, Art. 7 (1) (b); Addtional Protocol I, Art. 75 (4) (d); Additional Protocol II, Art. 6 (2) (d). President Jacques Chirac of France recently emphasized that the presumption of innocence, a constitutional principle in France since 1789, was inseparable from the rights and dignity of man (*"inséparable des droits et de la dignité de l'homme"*). *"La justice ne répond pas assez aux attentes des Français", Le Monde*, 22 January 1997, p. 6 (address on 20 January 1997).

[263] Human Rights Committee, General Comment 13, para. 7, UN Doc. HRI/GEN/1.

[264] *Id.*

Statute which gives content to the words 'according to law'".[265] Since the draft statute falls short of international standards in a number of respects,[266] if these are not corrected, the Preparatory Committee should make clear that Article 40 should be read consistently with Article 14 (2) of the ICCPR.

3. Prohibition of double jeopardy (*non bis in idem*)

The statute should incorporate the prohibition of double jeopardy (*non bis in idem*), but the prohibition should be consistent with international standards and the purpose of the court, which is to ensure that it can act when national courts are unable or unwilling to bring to justice perpetrators in a fair trial.

The prohibition of double jeopardy (*non bis in idem*) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the ICCPR, the American Convention on Human Rights, Additional Protocol I and the Yugoslavia and Rwanda Statutes.[267] It prohibits only retrials after an acquittal by the same jurisdiction.[268] Therefore, the international criminal court may retry persons when the court of a state has conducted a sham or unfair trial. Nevertheless, to ensure that the international criminal court is an effective complement to national courts, the statute should also preclude retrial by national courts of persons acquitted or convicted by the international criminal court.

Article 42 (1) of the ILC draft statute prohibits any other court from trying a person who has been tried by the international criminal court. Article 42 (2) permits the court to try an accused who has been tried by another court if the crime was an ordinary crime not within the jurisdiction

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[265] Article 11 (1) of the draft Code of Crimes, guaranteeing the presumption of innocence, omits the requirement of "according to law" and, therefore, falls short of the requirements of international law. The International Law Commission's commentary on this provision states that the prosecution has the burden of proving the responsibility of the person charged "as a matter of fact and law", and that, therefore, the provision is consistent with Article 14 (2) of the ICCPR. This may well have been the intention of the International Law Commission, but the requirement that the prosecution must meet its burden of proof "according to law" should be included in Article 11 (1) of the draft Code of Crimes as in Article 40 of the ILC draft statute to satisfy the requirements of international law. Article 21 (3) of the Yugoslavia Statute is similarly flawed by omitting this guarantee. It replaces "according to law" with "according to the provisions of the present Staute". Article 20 (3) of the Rwanda Statute is worded the same.

[266] See Amnesty International, *Establishing a just, fair and effective international criminal court, supra,* n. 2, pp. 31-54. These shortcomings will be addressed in greater detail in Amnesty International's position paper for a later session of the Preparatory Committee in 1997.

[267] ICCPR, Art. 14 (7); American Convention on Human Rights, Art. 8 (4); Additional Protocol I, Art. 75 (4) (h); Yugoslavia Statute, Art. 10 (1); Rwanda Statute, Art. 9 (1).

[268] The Human Rights Committee has concluded that Article 14 (7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff 1987), pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel 1993), pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press 1991).

of the court, the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted, but the international criminal court would have to take into account any time served under a sentence of that other court. These provisions of Article 42 appear to be consistent with international standards, but the statute should also preclude retrial by the international criminal court after it has finally acquitted or convicted an accused. The ILC draft statute omits this protection.[269]

The statute should also include a provision stating that amnesties, pardons or similar measures that might have the effect of exempting those responsible for crimes under international law which have been granted or made by *national* authorities will not prevent the court - an *international* institution - from trying the accused. Amnesty laws, pardons or other similar measures which have the effect of preventing prosecutions or terminating pending investigations or trials contribute to impunity for human rights violators. The effect of amnesties, pardons or similar measures by one state are only valid within that jurisdiction and have no legal effect on prosecutions in another state and, therefore, should not prevent the court from trying an accused for a crime under international law. [270]

B. Elements of the crimes

Although it would be better if the statute were to spell out the elements of each crime within its jurisdiction in contrast to the Nuremberg Charter, the statutes of the two *ad hoc* tribunals and other international instruments, which do not define the elements of the crimes, if it is not possible to reach agreement on all elements which should be in the statute, these elements should be left to the rules.[271] In any event, these elements should be stated only in a very general way reflecting basic concepts which are acceptable to the international community. Any attempt to spell out the elements in great detail or to harmonize the criminal law systems of 185 UN member states could risk delaying the international criminal court indefinitely.

In the light of the wide variety of legal systems from which judges will be appointed, it will be necessary to provide the court with guidance concerning what type of act (*actus reus*) or omission which will result in criminal responsibility with respect to those crimes where this is not spelled out clearly enough in a treaty defining the crime. Although the international community has already indicated the required mental element (*mens rea*) required to prove certain crimes,

[269] The Yugoslavia and Rwanda Statutes also omit this protection.

[270] Although Article 6 (5) of Additional Protocol II provides that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained[,]" the structure of the provision indicates that is intended to cover political offences, such as the act of rebellion, and ordinary crimes, not crimes under international law such as genocide, other crimes against humanity or serious violations of humanitarian law.

It should not be impossible to reach agreement in the Preparatory Committee and the diplomatic conference on the main elements of the core crimes despite the differences in various legal systems, particularly since the Committee and the diplomatic conference 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.

such as genocide and the grave breach of wilful killing, it will be necessary to indicate what mental element is required in other crimes. The priority for an international criminal court designed to repress the most serious crimes under international law should be intentional crimes. Nevertheless, the statute will have to address the cases where an accused is proved to have acted recklessly or negligently rather than intentionally. Should the accused be convicted of a lesser crime or acquitted? An acquittal would preclude a re-trial in a national court under Article 42 of the ILC draft statute.

C. Individual criminal responsibility

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. As the Nuremberg Tribunal declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[272] This principle of individual criminal responsibility has been repeatedly been recognized in international instruments, including the Versailles Treaty, the Nuremberg Charter, Nuremberg Principles, draft Code of Offences and the Yugoslavia and Rwanda Statutes, the Fourth Geneva Convention and Additional Protocols I and II.[273] The draft Code of Crimes reiterates this principle by stating that "[a] crime against the peace and security of mankind entails individual criminal responsibility".[274] 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".[275]

2. Age of responsibility

Although Amnesty International takes no position concerning what is an appropriate age for individual criminal responsibility, the statute should include some provision concerning the age of criminal responsibility. The ILC draft statute is silent on this point. Neither the Convention on the Rights of the Child[276] nor any of the international instruments concerning genocide, other crimes against humanity or serious violations of humanitarian law define the age of criminal responsibility.

Given the wide range of ages of criminal responsibility in more than 185 national legal systems, and the differing ages when individuals reach the age of maturity, it may be difficult to

[272] Nuremberg Judgment, *supra*, n. 115, p. 42.

[273] Versailles Treaty, Art. 228; Nuremberg Principles, Principle I; draft Code of Offences, Art. 1; Yugoslavia Statute, Arts 7 (1), 23 (1); Rwanda Statute, Arts 6 (1), 22 (1); Fourth Geneva Convention, Art. 33; Additional Protocol I, Art. 75 (4) (b); Additional Protocol II, Art. 6 (2) (b).

[274] Draft Code of Crimes, Art. 2 (1).

[275] *ICRC Commentary on the Additional Protocols*, *supra*, n. 56, p. 1398, para. 4603. Collective punishments are expressly prohibited by a number of international treaties. *See* Additional Protocol I, Art. 75 (2) (d) and Additional Protocol II, Art. 4 (2) (b).

[276] Convention on the Rights of the Child, *adopted by* the General Assembly in Resolution 44/25 on 20 November 1989, *entered into force* 2 September 1990.

reach agreement on a precise age of criminal responsibility satisfactory to a majority of states. Therefore, to avoid delay in seeking to reach agreement on a precise age, it might be better to leave it to the court in individual cases to determine whether the person charged has reached sufficient maturity for the imposition of individual criminal responsibilty. This is the approach taken by the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[277] and suggested by the International Law Commission.[278] Rule 4.1 of the Beijing Rules provides that in legal systems which recognize the concept of the age of criminal responsibility for juveniles, "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The Commentary to Rule 4.1 provides some guidance which the court could draw upon in reaching a decision in an individual case.[279] Another factor which the court could take into account is that international law prohibits the imposition of the death sentence for crimes committed by persons below the age of 18.[280]

3. The irrelevance of official position

The statute should also ensure - in a manner which is consistent both with principles of natural justice and the need to deter grave crimes - that superiors and subordinates are held responsible for all acts and omissions. 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 (see Part VI.B.3 below). A person's official position should be neither a defence nor a mitigating factor in determining appropriate punishment.

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." The Nuremberg Tribunal made clear that official position of a state official does not absolve that official of responsibility for a crime under international law:

> "It was submitted that ... where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this argument] must be rejected.
>
> ... The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by

[277] Beijing Rules, *adopted by* the General Assembly in Resolution 40/33 on 29 November 1985.

[278] 1996 ILC Report, p. 80 (commenting on Article 15 of the draft Code of Crimes).

[279] The Commentary states:

> "The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaaviour. If the age of criminal responsibility is fixed too low or there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.)."

[280] ICCPR, Art. 6 (5).

> international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.
>
> . . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."[281]

Allied Control Council Law No. 10 and international instruments adopted since the Nuremberg Judgment have recognized this principle, including the Nuremberg Principles, the 1954 draft Code of Offences and the Yugoslavia and Rwanda Statutes.[282] The draft Code of Crimes reaffirms the principle recognized in the Nuremberg Charter by providing that "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[283]

The International Law Commission has explained why the official position of a person accused of core crimes should not be a bar to criminal responsibility:

> "... crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the indivduals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."[284]

[281] Nuremberg Judgment, *supra*, note 115, at 41-42.

[282] Control Council Law No. 10, Art. 4; Nuremberg Principles, Principle III; Yugoslavia Statute, Art. 7; Rwanda Statute, Art. 6; draft Code of Offences, Art. 3. Article IV of the Genocide Convention provides that persons committing responsible for genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". The Tokyo Charter, established by military order in contrast to the Nuremberg Charter established by treaty, provided that the official position of the accused was not "of itself, sufficient to free such accused from responsibility for any crime with which he was charged", but it was the only instrument to permit the official position to be taken into consideration in mitigation of punishment. Art. 6.

[283] Draft Code of Crimes, Art. 7.

[284] 1996 ILC Report, commentary on Article 7, p. 39.

Similarly, "[i]t would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."[285]

4. Responsibility of superiors

A superior should be held responsible if he or she orders a core crime to be committed and that crime is committed or attempted by a subordinate. The principle of individual criminal responsibility for ordering a crime to be committed is expressly recognized in the Geneva Conventions and the Yugoslavia and Rwanda Statutes.[286] It is also recognized in the draft code of Crimes, which provides that an individual is responsible for a core crime if the individual "orders the commission of such a crime which in fact occurs or is attempted".[287]

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. The principle of responsibility of superiors has several elements, including: (1) a duty to exercise authority over subordinates; (2) equality of responsibility with the subordinate; (3) actual knowledge of the unlawful conduct planned or carried out by the subordinate or sufficient information to enable the superior to conclude that such conduct was planned or had occurred; (4) failure to take necessary steps; (5) feasibility of such steps; and (6) prevention or repression of the crime. The principle applies both to civilian superiors and military commanders, so the term "superior responsibility" rather than "command responsibility" is used in this position paper, and it applies to each of the core crimes.

Article 6 of the draft Code of Crimes satisfies these requirements. It provides:

"The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."[288]

Article 86 (2) of Additional Protocol I contains a similar definition of command responsibility.[289]

[285] *Id.*, p. 41.

[286] First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146; Yugoslavia Statute, Art. 7 (1); Rwanda Statute, Art. 6 (1).

[287] Draft Code of Crimes, Art. 2 (3) (b).

[288] *Id.*, Art. 6.

[289] It states:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

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 to Article 86 (2) of Additional Protocol I explains that the negligence of the superior "must be so serious that it is tantamount to malicious intent".[290] 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.[291]

It would be just to expect superiors to take all measures which are "necessary", as required by Article 7 (3) of the Yugoslavia Statute, Article 6 (3) of the Rwanda Statue and Article 6 of the draft Code of Crimes and which are "feasible and within their power", as required by Article 86 (2) of Protocol I, 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 and Article 6 (3) of the Rwanda 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.

A provision defining superior responsibility for the conduct of subordinates based on Article 6 of the draft Code of Crimes and Article 86 (2) would probably 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.[292]

D. 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

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Additional Protocol I, Art. 86 (2).

ICRC Commentary on the Additional Protocols, supra, n. 56, para. 3541, p. 1012.

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

For comments on *In re Yamashita*, 327 U.S. 1 (1945), see Bassiouni, *Crimes against Humanity, supra*, n. 58, pp. 376-382; Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982); Bruce D. Landrum, "The Yamashita War Crime Trial: Command Responsibility Then and Now", 149 Mil. L. Rev. (1995), p. 293; W.H. Parks, "Command Responsibility for War Crimes", 28 Mil. L. Rev. (1973), p. 1; Ann Marie Prévost, "Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita", 14 Hum. R. Q.(1992), p. 303; A. Frank Reel, *The Case of General Yamashita* (1949). For comments on *U.S. v. Medina*, 20 USCMA 403, 43 CMR (1971), see Basssiouni, *Crimes against Humanity, supra*, n. 58, pp. 385-386. Captain Ernest R. Medina was the immediate superior of Lieutenant William R. Calley, Jr., who was convicted of the murder of civilians in 1968 at My Lai in Viet Nam.

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. As leading commentators have concluded, these principles are "consistent with the general principles of criminal law which recognize that individuals may participate in and contribute to the commission of a crime in various ways and thereby incur a degree of responsibility for the crime, for example, as a perpetrator, an accomplice or a coconspirator".[293]

The statute should provide that a person is responsible for committing the crimes of genocide, other crimes against humanity and serious violations of humanitarian law when he or she has *directly and publicly incited others to commit* such crimes. This principle of criminal responsibility is recognized in the Genocide Convention, the 1954 draft Code of Offences, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Yugoslavia and Rwanda Statutes and the draft Code of Crimes.[294] This principle aims to ensure that those who incite people in a public place or by means of mass communications to commit these crimes, where there is a greater chance that at least one individual will respond is increased, will be held criminally responsible.[295] The dangers of such direct and public incitement to commit genocide and other crimes against humanity, in particular, is demonstrated by the history of Nazi Germany and recent events in former Yugoslavia and Rwanda. This principle of criminal responsibility will, of course, have to be defined in the statute in a way which is consistent with the right to freedom of expression as recognized in Article 19 of the Universal Declaration of Human Rights.

Persons who *attempt to commit* genocide, other crimes against humanity or serious violations of humanitarian law which do not occur because of circumstances beyond that person's control should be held criminally responsible for those crimes. This principle is recognized in the Genocide Convention, the 1954 draft Code of Offences and the draft Code of Crimes.[296] The

[293] Morris & Scharf, *supra*, n. 291, p. 93; see also Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 54 ("all persons who participate in the planning, preparation or execution of serious violations of humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible").

[294] Genocide Convention, Art. III (c) (direct and public incitement to commit genocide); 1954 draft Code of Offences, Art. 2 (12) (ii) (direct incitement to commit a crime); Convention on the Non-Applicablitiy of Statutory Limitations to War Crimes and Crimes against Humanity, Art. II (directly incite others to the commission of a crime); Yugoslavia Statute, Art. 7 (1) (instigation); Rwanda Statute, Art. 6 (1) (instigation); draft Code of Crimes, Art. 2 (3) (f) (directly and publlicly incites another individual to commit a crime which in fact occurs). The concept of "direct and public incitement to commit genocide" is narrow; the drafters rejected a proposal to make criminal all forms of public propaganda tending to provoke genocide or making it appear as a necessary, legitimate or excusable act. See Robinson, *supra*, n. 72, pp. 66, 125.

[295] Robinson, *supra*, n. 72, pp. 66-67; ILC 1996 Report, pp. 26-27.

[296] Genocide Convention, Art. III (d) (attempts to commit genocide); 1954 draft Code of Crimes, Art. 2 (12) (iv) (attempts to commit an offence); draft Code of Crimes, Art. 2 (3) (g) (attempt to commit a crime by taking action

International Law Commission has explained that criminal responsibility in such cases is justified because of the "high degree of culpability" of someone who attempts to commit the crime but fails because of circumstances beyond his or her control and because the person has "taken a significant step towards the completion of one of the crimes".[297]

Those who *aid, abet or otherwise assist others to commit* genocide, other crimes against humanity or serious violations of humanitarian law should be held responsible for these crimes. Various forms of complicity for crimes under international law are recognized and the statute should include a form which is consistent with fundamental principles of justice. The Genocide Convention provides that complicity in genocide is punishable and other international instruments recognize the concept of complicity in one form or another, including the Nuremberg Charter, the Nuremberg Principles, the 1954 draft Code of Offences, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Yugoslavia and Rwanda Statutes and the draft Code of Crimes.[298]

Finally, the statute should ensure that persons who *plan or conspire to commit* genocide, other crimes against humanity or serious violations of humanitarian law are be held criminally responsible for those crimes. Although the common law concept of conspiracy as a separate crime is foreign to some other *national* legal systems, states which do not have conspiracy as a crime in their criminal codes have accepted that a person can be held criminally responsible for a crime under *international* law where that person planned or conspired to commit that crime. The concept of planning or conspiracy is recognized in the Genocide Convention, the Nuremberg Charter, the Nuremberg Principles, the 1954 draft Code of Crimes, the Convention on the Non-Applicability of Statuory Limitations to War Crimes and Crimes against Humanity, the Yugoslavia and Rwanda Statutes and the draft Code of Crimes.[299] The Nuremberg Tribunal, noting that the separate crime of conspiracy to commit acts of aggressive war was not defined in the Nuremberg Charter, narrowly construed the concept of conspiracy: "But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far

commencing the execution of a crime which does not in fact occur because of circumstances independent of that person's intentions).

[297] ILC 1996 Report, p. 29.

[298] Genocide Convention, Art. III (e) (complicity in genocide); Nuremberg Charter, Art. 6 (accomplices participating in the formulataion or execution of a common plan or conspiracy to commit a crime responsible for all acts performed by any persons in execution of such a plan); Nuremberg Principles, Principle VII (complicity in the commission of a crime); 1954 draft Code of Offences, Art. 2 (12) (i) (complicity in the commission of an offence); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. II (accomplices); Yugoslavia Statute, Art. 7 (1) (persons who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime); Rwanda Statute, Art. 6 (1) (same); draft Code of Crimes, Art. 2 (3) (d) (knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission).

[299] Genocide Convention, Art. III (b) (conspiracy to commit genocide); Nuremberg Charter, Art. 6; Nuremberg Principles, Principle VI; 1954 draft Code of Offences, Art. 2 (12) (i) (conspiracy to commit an offence); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. II (persons who conspire to commit crimes); Yugoslavia Statute, Art. 7 (1) (planning); Rwanda Statute, Art. 6 (1) (planning); draft Code of Crimes, Art. 2 (3) (e) (directly participates in planning or conspiracy to commit a crime which actually occurs).

removed from the time of decision and action."[300] Moreover, it treated the part of Article 6 of the Nuremberg Charter providing that "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan," as not adding "a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan."[301] The statute will have to ensure that the concept of planning or conspiracy is consistent with principles of individual criminal responsibility and due process.

E. Defences and negation of responsibility

> *"In deciding whether to recognize defenses to war crimes and crimes against humanity, it is important that the International Tribunal carefully weigh the consequences of any erosion in the fundamental principles of individual criminal responsibility, which are perhaps the greatest legacy of the Nuremberg Judgment and the greatest protection against the commission of such atrocities in the future. While the law does not require a person faced with the dire consequences of an armed conflict to be a hero or a martyr, the memory of those heroic individuals who defied the criminal policies of their government and the orders of their superiors, and paid the ultimate price for doing so, should not be forgotten. It is one thing to reduce the sentence to be imposed; it is quite another to negate the existence of any crime."*
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> Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1995), p. 111 (footnote omitted)

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.[302] 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

[300] Nuremberg Judgment, *supra*, n. 115, p. 43.

[301] *Id.*, p. 44.

[302] For example, some legal systems distinguish between factors which *justify* an otherwise criminal act (a policeman breaking a speed limit to arrest a fleeing suspect) and those which *excuse* the criminal act (a starving person stealing bread to survive); others do not distinguish between the two situations. There are many other variations, but the common aspect is that in each case the accused is not held criminally responsible or, if held responsible, is not punished, although in some jurisdictions the accused may face civil liability.

systems. Some of these principles, however, may be relevant in certain circumstances to the mitigation of punishment (see, in particular, Part VI.E.8 below).

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. In assessing whether a particular defence recognized in national law is appropriate to a crime under international law of the gravity of the core crimes, it is important to bear in mind not only the horror and scale of these crimes, but also that international instruments, including the Nuremberg and Tokyo Charters, Allied Control Council Law No. 10, the Genocide Convention, the Geneva Conventions and their Additional Protocols and the Yugoslavia and Rwanda Statutes, did not include specific defences. Similarly, the draft Code does not include specific defences.

Of course, principles of natural justice dictate that some circumstances may constitute defences or be relevant to mitigation of punishment. Thus, the Nuremberg Charter provided that each person charged had "the right to give any explanation relevant to the charges made against him" during the preliminary examination and trial, "to conduct his own defense before the Tribunal or to have the assistance of counsel" and "to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution".[303] Although defendants were able to argue that the prosecution had failed to meet its burden of proof and the Nuremberg Tribunal acquitted several defendants of one or more charges on this ground, the Charter did not spell out which defences were permissible.[304] However, the jurisprudence of the national military tribunals established under Allied Control Council Law No. 10 after the Second World War recognized some specific defences in certain limited circumstances.[305] This national jurisprudence, which is sometimes conflicting, has not always reached conclusions which are consistent with the gravity of these crimes under international law or with contemporary principles of international law and it should be consulted with great care. The Preparatory Committee and the diplomatic conference will be able to draw on the jurisprudence of the Yugoslavia and Rwanda Tribunals, which will take into account the developments in international law in the past half century.

1. The non-applicability of statutes of limitation to core crimes

The statute must include a provision prohibiting statutes of limitation for the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. A statute of limitations for crimes against humanity or war crimes would be inconsistent with the pledge of the

[303] Nuremberg Charter, Art. 16 (b), (d) and (e).

[304] Three accused, Hjalmar Schacht, Franz von Papen and Hans Fritzsche, were acquitted of all charges on this ground. Nuremberg Judgment, *supra*, n. 115, pp. 104-107, 118-120, 127-128. Several other accused were acquitted on one or more charges on this ground.

[305] This national jurisprudence concerning defences was summarized by the United Nations War Crimes Commission in a survey of nearly 2000 military court trials. See XV *Law Reports of Trials of War Criminals* (London: H.M.S.O. 1947-1949) (15-volume series), pp. 155-188.

three Allied Powers, the United Kingdom, the United States and the Soviet Union, on behalf of the 33 United Nations in the Moscow Declaration of 30 October 1943 to pursue those responsible for such crimes "to the uttermost ends of the earth" and "to deliver them to their accusers so that justice may be done".[306] None of the international instruments defining these crimes or providing international jurisdiction over them contain statutes of limitation. The Convention on the Non-Applicablity 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".[307] The Convention makes clear that the prohibition of statutes of limitation apply to:

"representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission".[308]

The General Assembly when it adopted the Convention considered that "war crimes and crimes against humanity are among the gravest crimes in international law", noted that "the application to war crimes and crimes against humanity of the rules of municipal law to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes" and recognized that it was "necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".[309] The Council of Europe has also rejected statutes of limitation for crimes against humanity and war crimes.[310] States have also rejected statutes of limitation for crimes against humanity.[311] National jurisdictions have provided that there should be no statutes of limitations for war crimes.[312] Scholarly authority supports the non-applicablity of statutes of limitation for genocide, other crimes against humanity and war crimes.[313]

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[306] Moscow Declaration on German Atrocities of 30 October 1943, *reprinted in* The Charter and Judgment of the Nürnberg Tribunal, *supra*, n. 90, Appendix I.

[307] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Art. I.

[308] *Id*., Art. II.

[309] *Id*., Preamble.

[310] Nonapplicability of Statutory Limitations to Crimes Against Humanity and War Crimes, E.T.S. No. 82, adopted 25 January 1974.

[311] Secretary-General, Question of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (Secretary-General Report on Statutes of Limitations), UN Doc. E/CN.4/906, 15 February 1966, paras 62-100 (noting absence of statutes of limitations for crimes against humanity in certain states); *Touvier*, Court of Appeal of Paris (First Chamber of Accusation), 13 April 1992, para. 388, *reprinted in part in* 100 Int'l L. Rep. 337, 342, *affirmed on this point*, Court of Cassation (Criminal Chamber), 27 November 1992, para. 1115, *reprinted in part in* 100 Int'l L. Rep. pp. 337, 363 (English translation) (interpreting French Law No. 64-1326 of 26 December 1964. *Barbie* Case, Court of Cassation (Criminal Chamber), 6 October 1983, *summarized in* 78 Int'l L. Rep., pp. 125-126 (interpreting the same law).

[312] Secretary-General Report on Statutes of Limitaations, *supra*, n. 311, paras 62-100 (noting absence of statutes of limitations in certain states for war crimes); See, for example, *Loi relative à la répression des infractions graves aux Conventiions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces*

In any event, recent state practice in Australia, Canada, France, Germany, Israel, the United Kingdom and other countries concerning crimes during the Second World War has demonstrated that fair trials can be conducted long after the core crimes took place and that the courts can take appropriate action to ensure that injustices do not occur because of weaknesses in the evidence.[314] Since the court already has the duty under Article 38 (1) 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.[315] Moreover, state practice demonstrates that prosecutors are unlikely to bring cases where the evidence is extremely weak.

2. The prohibition of superior orders as a defence

Conventions, Chapitre II, Art. 8 (Belgium) (no statute of limitations for grave breaches); *Code pénal militaire, Art. 56 bis* (Switzerland) (same). The United States Ambassador to the United Nations, Madeline Albright, stated with respect to the jurisdiction of the Yugoslavia and Rwanda Tribunals, "There is not, and there should never be, any statute of limitations on the force and effect of the tribunals' indictments." (Quoted in David J. Scheffer, "International Judicial Intervention", Foreign Policy (Spring 1996), pp. 34, 42.

One national court, in a decision which has been widely criticized, held that national law could impose a statute of limitations on war crimes, a crime under international law. In the *Barbie* Case, the French *Cour de Cassation* stated:

". . . in contrast to crimes against humanity, war crimes are directly connected with the existence of a situation of hostilities declared between the respective States to which the perpetrators and the victims of the acts in question belong. Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity."

Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie, Court of Cassation (Criminal Chamber), 20 December 1985, *reprinted in part in* 78 Int'l L. Rep. 125, 136 (English translation).

The court cites no legal authority for its position, which is inconsistent with its earlier decision concerning crimes against humanity in the same case (see note xxx, above). This decision could lead to arbitrary results. Prosecutions of a camp commander for the murder of prisoners of war in the camp could be barred by national statutes of limitations, while the prosecution of the camp commander for the torture and arbitrary imprisonment of civilian prisoners in the same camp could proceed.

[313] Friedl Weiss, "Time Limits for the Prosecution of Crimes against International Law", 53 Brit. Y.B. Int'l L. (1982), p. 163 ("The relevant principles of international law indicate that war crimes and crimes against humanity by their very nature as international crimes cannot be subjected to national limitation periods.").

[314] See, for example, *R. v. Finta*, 28 C.R. (4th) (Canada S.Ct. 1994) in Canada, the *Touvier* and *Barbie* cases (cited above) and the case of Maurice Papon in France. For the most recent information about this case, see *Le Monde*, 17 January 1996, p. 10; 18 January 1996, p. 11; *The Times*, 24 January 1997, p. 16. The Israel Supreme Court reversed in *Israel v. John (Ivan) Demjanjuk*, Crim. App. No. 347/88 (Israel Sup. Ct. 29 July 1993) on the ground that the prosecution had failed to meet its burden of proof. On 17 January 1997, a jury determined that Szymon Serafinowicz was unfit to stand trial on charges of crimes against humanity because he was suffering from Alzheimer's disease, not because of evidentiary problems; he had participated in three months of evidentiary hearings the previous year. *The Times*, 18 January 1997, pp. 1, 3.

[315] See Amnesty International, *Establishing a just, fair and effective international criminal court, supra*, n. 2, pp. 41-42 for recommendations on strengthening this provision.

One defence which must be excluded is the defence of superior orders.[316] 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." The Nuremberg Tribunal rejected the defence of superior orders under Article 8:

> "The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment."[317]

Allied Control Council Law No. 10 and the Yugoslavia and Rwanda Statutes exclude the defence of superior orders in similar terms.[318] Although practice by military courts under Allied Control Council Law No. 10 was not entirely consistent, the United Nations War Crimes Commission concluded that the general attitude of the courts, even those which recognized exceptions to the rule prohibiting superior orders as a defence, was that "while obedience to superior orders does not constitute a defence upon which an accused can rely with certainty of being completely protected thereby, it may at the discretion of the court be treated as a factor which justifies mitigation of punishment".[319] International instruments adopted by the General Assembly have adopted a similarly strict standard with respect to torture, extrajudicial executions and "disappearances" and have emphasized the duty to disobey orders to commit such grave crimes.[320] Article 5 of the draft Code of Crimes also excludes the defence of superior orders:

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[316] The defence of superior orders is conceptually distinct from the separate defences of duress (see Part VI.E.4 below) and necessity (see Part VI.E.5 below). A defence of *superior orders* includes situations in which the accused argues that certain consequences would ultimately follow from disobedience, such as the execution of the accused or reprisals against the accused's family. A defence of *duress* covers situations where the accused acted under an immediate threat. A defence of *necessity* is based on the argument that the conduct was justified by the general circumstances. The military courts established after the Second World War and commentators have not used these terms or concepts consistently, which has led to confusion. See generally, United Nations War Crimes Commission, XI *Law Reports of Trials of War Criminals, supra*, n. 305, pp. 155-157.

[317] Nuremberg Judgment, *supra*, n. 115, p. 42. The United States Military Tribunal in the *Hostages* Case reached the same conclusion under Allied Control Council Law No. 10. XI *Trials of War Criminals before the Nuernberg Tribunals, supra*, n. 115, p. 1238 ("International law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although, if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10".). The extent to which the Nuremberg Tribunal accepted the separate defence of duress and whether duress may ever be a defence to genocide, crimes against humanity and serious violations of humanitarian law are discussed below in Part VI.E.3.

[318] Allied Control Council Law No. 10, Art. 4; Yugoslavia Statute, Art. 7 (4); Rwanda Statute, Art. 6 (4).

[319] United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals, supra*, n. 305, pp. 158-159 (footnote omitted).

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 executions and "disappearances", but declare that any person receiving such orders has "a right and a duty" to disobey them. These standards, approved or adopted by the General Assembly, and in absolute terms, indicate that the General Assembly has, like the International Law Commission, squarely rejected Principle IVof

"The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires."

A Trial Chamber of the Yugoslavia Tribunal has reaffirmed in the *Erdemovi_* case that superior orders are not a defence to crimes against humanity, although they may be considered in mitigation of punishment.[321] This standard should not be weakened by characterizing the prohibited defence of superior orders as a permissible defence of duress or coercion. See discussion below in Part VI.E.3.

Subsequent 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 under international law or if the defendant had no moral choice but to comply. Such circumstances would have to be very narrow since these crimes are evil by their very nature (*malum in se*). If the subordinate was coerced to obey, the norms of coercion should apply as mitigation of punishment, rather than as a defence or justification.[322] Some authorities and governments, however, have argued that when the subordinate is faced with an imminent, real and inevitable threat to the subordinate's life, the superior order is a defence.[323] As demonstrated below in Part VI.E.3, however, a defence of duress based upon a superior order is not appropriate for the crimes of genocide, other crimes against humanity or serious violations of humanitarian law involving the killing or infliction of bodily harm on innocent people and, even if such a defence were to be permitted, the conditions would be have to be much stricter than these two requirements.

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

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the Nuremberg Principles, never adopted by the General Assembly, which permits a defence of superior orders: "The fact that a person acted pursuant to an order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." The duty to disobey orders to commit crimes under international law is recognized in national military regulations. For example, German military regulations provide that "it is expressly prohibited to obey orders whose execution would be a crime", such as grave breaches of the Geneva Conventions. Joint Services Regulations (Zdv) 15/2, promulgated for the *Bundeswehr* in August 1992, *reprinted in* Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict* (Oxford: Oxford University Press 1995), p. 37.

[321] *Erdemovi_*, Judgment, *supra*, n. 99, para. 54.

See Bassiouni, *Crimes against Humanity, supra* at n. 58, at 437 (also arguing that superior orders can be an excuse as well as mitigation in these circumstances).

See, for example, *R. v. Finta*, 28 C.R. (4th) 265, 314-315 (1994) (Sup. Ct. Canada). For example, the United States argued at the time the Security Council established the Yugoslavia Tribunal that superior orders which were not manifestly illegal were a defence even if the subordinate had not been threatened. "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).

these precedents with a great deal of care and define the scope of the principle in a way which effectively deters grave crimes.

3. The inappropriateness of duress or coercion as a defence

Duress - sometimes called compulsion or coercion - should not be a defence to the core 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. As a leading scholar has concluded, "The correct approach is that no degree of duress or necessity may justify murder, let alone genocide."[324] Assuming that the international community were to permit duress to be a defence to intentional killings and infliction of bodily harm against innocent men, women and children - whether based upon a superior order or some other form of duress, it would need to limit strictly the circumstances in which could could be successfully asserted to ensure that international criminal law is an effective deterrent to worst possible crimes imaginable.

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.[325] 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.[326] 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.[327] In the words of the Judge Advocate in the trial of a Nazi defendant in a Canadian Military Court in 1946: "There is no doubt on these authorities that compulsion is a defence when the crime is not of a heinous character. But the

[324] Yoram Dinstein, "International Criminal Law", 20 Israel L. Rev. (1985), pp. 206, 235.

[325] Wayne R. La Fave & Austin W. Scott, Jr., *Handbook on Criminal Law* (St. Paul, Michigan: West Publishing Co. 1972), p. 374.

[326] Bassiouni, *Crimes against Humanity*, *supra*, n. 58, p. 441. However, the defence of duress is permitted to serious crimes in some civil law jurisdictions, subject to strict conditions. For example, in France, one of the requirements is that duress (*la contrainte morale*) must be irresistible, that is, it must completely overwhelm the accused's free will. Gaston Stephani, Georges Levasseur & Bernard Bouloc, *Droit pénal général* (Paris: Dalloz 14th ed 1992), p. 308.

[327] In the United Kingdom, the House of Lords has ruled out duress as a defence to murder, *Howe* [1987] 1 AC 417, as has the Judicial Committee of the Privy Council in *Abbott v. The Queen*, [1977] AC 755 (Trinidad and Tobago).

killing of an innocent person can never be justified."[328] This position has particular force in the case of core crimes, many of which will involve the loss of hundreds or thousands of lives of innocent persons.[329] As a Trial Chamber of the Yugoslavia Tribunal stated, "With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole."[330]

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.[331] Thus, persons who voluntarily places 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, the defence of duress should not be available.[332]

There is a danger that the deterrence value of the prohibition of the defence of superior orders could be seriously undermined by permitting a defence of duress to killing and infliction of bodily harm on innocent persons when the duress alleged is the order of a superior. Genocide, other crimes against humanity and serious violations of humanitarian law are often committed by subordinates as members of military units or other groups operating under strict discipline where refusal to obey an order will subject a subordinate to severe sanctions, including death. In many cases, the members join such units or groups willingly with full knowledge of the types of crimes being committed or with reason to know of such crimes. For the same reasons that superior orders are not a defence, but merely a factor which can be taken into account in determining whether to mitigate the punishment, the defence of duress by a superior should be rejected, when

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[328] *Holzer* Case, *cited in* United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 173 (The Judge Advocate stated that the authorities indicated that duress could be a factor considered in mitigation of punishment). The Judge Advocate in a British Military Court in 1948 reached the same conclusion in the *Fuerstein* Case, *reported in id*.

[329] As one leading authority on criminal law, who supports a defence of duress even in cases of ordinary murder, has stated that this rule would not apply atrocities committed by persons in units subject to discipline:

> ". . . The problem of atrocities committed by soldiers and others who are under orders has special features. If members of the armed forces are allowed defences of duress and superior orders, responsibility is confined to a very few people at the top. Perhaps, for overwhelming social reasons, these defences have to be withheld from members of the armed forces (or others subject to discipline) in respect of acts of killing or torturing that are clearly contrary to civilised standards of behaviour."

Glanville Williams, *The Criminal Law* (London: Stevens 2d ed. 1983), p. 628.

[330] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 19.

[331] LaFave & Scott, *supra*, n. 325, p. 378. Thus, "If a person when threatened is able to make resistance or to flee from the wrongdoer, he must of course do so rather than give way to the duress". Williams, *supra*, n. 329, p. 631.

[332] Michael J. Allen, *Textbook on Criminal Law* (London: Blackstone Press Limited 3rd ed. 1995), pp. 152-153 (defence of duress "is denied to the accused who freely undertakes the risk of being subject to duress"). According to a leading authority on criminal law, under English law the defence of duress is not available to people who have voluntarily joined an illegal organization. Williams, *supra*, n. 329, pp. 627-628.

the crime involves the deliberate killing or infliction of bodily harm on innocent persons. The subordinate is under the same duty to disobey the unlawful order or to escape and the balance of harms between the life of the person ordered to kill and the lives of the innocent persons - whose lives the subordinate is under an absolute duty to protect - is the same.

It is true that the Nuremberg Tribunal appeared to suggest in *dicta* that a subordinate ordered to kill or torture, although unable to assert a defence of superior orders, could assert that no "moral choice was in fact possible".[333] The Tribunal did not, however, find that any defendant was in such a situation. Even in the cases where military courts after the Second World War accepted that a defence of duress could be asserted to a war crime or crime against humanity based on a superior order, as a general rule they strictly limited the circumstances when such a defence would be permitted. For example, the United States Military Tribunal in the *I.G. Farben* Case narrowly limited the circumstances in which a defence of duress (which it called necessity) by order of a superior would be permitted:

"From a consideration of the IMT, Flick, and Roechling judgments, we deduce that an order of a superior officer or a law or governmental decree will not justify the defence of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative."[334]

As the United Nations War Crimes Commission concluded, in the cases where military courts accepted that duress could be a defence to a crime against humanity or a war crime, the accused had to demonstrate:

"(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil".[335]

In one recent case in which the court was willing to accept that a defence of duress based upon a superior order might be permitted to a charge of crimes against humanity, it made clear that the requirements for such a defence to succeed would be very strict. In the *Erdemovi_* Case, a Trial Chamber of the Yugoslavia Tribunal emphasized that a soldier had a duty to disobey a manifestly illegal order and that "duty to disobey could only recede in the face of the most extreme distress".[336] Although the court was not prepared to rule out a complete defence based on moral duress and/or a state of necessity "absolutely", it concluded that

"its conditions of application are particularly strict. They must be sought not only in the very existence of a superior order - which must first be proven - but also and especially in the

[333] Nuremberg Judgment, *supra*, n. 115, p. 42.

[334] *United States v. Krauch*, (*I.G. Farben* Case), VIII *Trials of War Criminals Before the Nuernberg Military Tribunals*, *supra*, n. 115, p. 1179.

[335] United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 174.

[336] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 19.

> circumstances characterising how the order was given and how it was received. In this case-by-case approach - the one adopted by these post-war tribunals - when it assesses the objective and subjective elements characterising duress or the state of necessity, it is incumbent on the Trial Chamber to examine whether the accused in his situation did not have the duty to disobey, whether he had the moral choice to do so or to try to do so. Using this rigorous and restrictive approach, the Trial Chamber relies not only on general principles of law as expressed in numerous national laws and case-law, but would also like to make clear through its unfettered discretion that the scope of its jurisdiction requires it to judge the most serious violations of international humanitarian law."[337]

The manner in which the Trial Chamber applied this standard indicates that the circumstances in which it would find a defence of duress based on superior orders in a case where the accused was charged with crimes involving killing or infliction of bodily harm would be rare. It relied on particularly on French law and jurisprudence, which it said had always adopted a strict attitude towards permitting a defence of duress, and required that there not be a disproportion between the criminal act and the gravity of the threat. It placed the burden of establishing the elements of this defence on the accused. As stated above concerning the requirement that there not be a disproportion between the criminal act and the gravity of the threat, the Trial Chamber concluded that with regard to a crime against humanity, "the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole".[338] Applying this strict approach, it concluded that "proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided" and, therefore, the defence of duress accompanying a superior order would "be taken into account at the same time as other factors in the consideration of mitigating circumstances".[339]

Therefore, even if the defence of duress based upon a superior order were to be permitted under the statute to the intentional killing or infliction of bodily harm on innocent persons, it would have to be subject to very strict limitations.

4. The inappropriateness of necessity as a defence

Necessity should not be a defence to the crimes of genocide, other crimes against humanity or serious violations of humanitarian law except in the limited exceptions expressly permitted by humanitarian law, although in certain circumstances it may be taken into account in determining whether to mitigate punishment. Such a defence to these grave crimes is inappropriate for the same reasons that duress is an inappropriate defence to such crimes.

In contrast to duress, which involves coercion by another person, necessity involves the pressure of natural forces or circumstances, such as storms, starvation or the need to take the life of one person in order to save the lives of others, where the person concerned is compelled to violate the criminal law in order to avoid a greater harm. The rationale for the defence, when it is permitted, is that "the law ought to promote the achievement of higher values at the expense of

[337] *Id.* (footnote omitted).

[338] *Id.*

[339] *Id.*, para. 20. The judgment has been appealed to the Appeals Chamber.

lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law".[340] The defence is not available if the person was at fault in bringing about the emergency.[341] Although the defence is permitted in some civil law jurisdictions, it is subject to strict conditions.[342]

It is difficult to imagine a situation involving core crimes where the defence of necessity might be applicable. Certainly, neither a government nor an armed opposition group should be permitted to avoid responsibility for genocide or crimes against humanity for deliberately starving to death one part of the civilian population to feed the other.

The defence of military necessity is limited to a narrow range of circumstances expressly defined in humanitarian law. Indeed, this was the approach taken by military tribunals after the Second World War. The United States Military Tribunal in the *Hostages* Case rejected the defence of military necessity to war crimes, apart from the limited number of situations where this defence was expressly recognized under humanitarian law; indeed, "The rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation."[343] The United States Military Tribunal in the *High Command* Case, in rejecting argument that military necessity included the right to do anything that contributed to the winning of a war, declared that "such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations."[344]

5. The limits on self-defence and defence of others

Self-defence and defence of others may, in strictly limited circumstances, be a defence to a killing or the infliction of bodily harm in an individual case which might otherwise be a crime under international law.[345]

In determining the scope of a legitimate defence of self-defence to a crime under international law, the strict limitations in national law on this defence are relevant. The basic

[340] LaFave & Scott, *supra*, n. 325, p. 381.

[341] *Id*.

[342] For example, in France, under the law in force in 1992, the accused must have been faced with an imminent and certain danger, the response must be the only way of avoiding the danger and the response must be proportional to the danger which was avoided. Stephani, Levasseur & Bouloc, *supra*, n. 326, pp. 292-293. Even if these conditions are satisfied, the accused may still be subject to civil damages. *Id.*, p. 294. Similarly, the doctrine of *la contrainte physique* (another form of necessity) is only available when the physical force is irresistable and there is no prior fault by the accused (*"Dans tous les cas, qu'elle soit d'origine externe ou interne, la contrainte physique n'exclut la responsabilité pénale que si elle a été* irrésistible *et* n'a pas été précédée d'une faute*."*). *Id.*, p. 307.

[343] *Hostages* Case, *cited in* United Nations War Crimes Commission, XI *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 1272.

[344] *High Command* Case, XII *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 93. The United States Military Tribunal in the *Hostages* Case reached a similar conclusion. XI *Trials of War Criminals before the Nuernberg Tribunals*, *supra*, n. 115, pp. 1255-1256, 1272.

[345] The extent to which any defence of self-defence available to states under Article 51 of the UN Charter in cases of aggression may be available to individuals is outside the scope of this position paper.

approaches under the common law and the civil law appear to be similar. In some common law jurisdictions, one who is not the aggressor in an encounter is justified in using a reasonable amount of force against the attacker when the person attacked reasonably believes that he or she is in danger of unlawful bodily harm from the attacker and that the use of force is necessary to avoid this danger.[346] The amount of force which may be used must be proportional to the threatened harm. Thus, one is permitted to use deadly force in the face of a deadly attack, but never deadly force when the attack does not involve the use of deadly force.[347] In addition, the better view is that the person attacked, if not in his or her house or business, must retreat, if this can be done in safety, before using deadly force against someone.[348]

The law in certain civil law jurisdictions appears to restrict the scope of legitimate self-defence in a similar manner. For example, in France the defence (*la légitime defense*) is available when a person is threatened with an imminent, unlawful attack and the response is necessary and proportionate to the severity of the attack, although when the response is disproportionate, the attack may be taken into account in the mitigation of punishment.[349] According to a survey of judgments by the United Nations War Crimes Commission of national military tribunals established under Allied Control Council Law No. 10, "A plea of self-defence may be successfully put forward, in suitable circumstances, in war crimes trials as in trials held under municipal law".[350] The conditions in which such a plea may be successfully asserted are narrowly limited. As the Judge Advocate in the *Tessman* Case in a British Military Court in 1947 explained:

"The law permits a man to save his own life by despatching that of another, but it must be the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?"[351]

Nevertheless, given the nature and scale of the crimes of genocide, other crimes against humanity and serious violations of humanitarian law, it is unlikely that an accused would be able to argue successfully, apart from an exceptional individual case, that a particular killing or infliction of bodily harm was a case of legitimate self-defence.

In the case of defence of others, some civil and common law jurisdictions permit the defence in the same circumstances as in a case of self-defence; some common law jurisdictions limit the scope of the defence greatly, such as to defence of someone with a close relationship to the

[346] LaFave & Scott, *supra*, n. 325, p. 391.

[347] *Id.*, pp. 392-393.

[348] *Id.*, p. 396.

[349] Stefani, Levasseur & Bouloc, *supra*, n. 329, pp. 279-289.

[350] United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 177.

[351] *Cited in id.*, p. 177.

accused.[352] In the context of genocide, other crimes against humanity and serious violations of humanitarian law, however, there may well be dangers that permitting a broad defence of defence of others to an act constituting one of these crimes could undermine the principle of international criminal responsibility. How often are these crimes not justified as a defence of others?

6. The limits on the defence of mistake of fact or law

Ignorance or mistake of fact or law may, in certain limited circumstances, be an appropriate defence to a core crime when it negates the existence of a mental state essential to the crime. Indeed, it may be better not to consider the mistake of fact or law as a defence, but to consider these factors in determining whether the accused has the required *mens rea*.[353]

Regardless which approach is adopted, the circumstances when mistake of fact or law may be invoked when a person is accused of genocide, other crimes against humanity or serious violations of humanitarian law must be strictly limited in the light of the gravity and scale of these crimes. The jurisprudence of the national military tribunals established after the Second World War must be examined with some caution.

To the extent that a mistake of fact has been recognized as a defence or as negating the existence of *mens rea*, it has generally been held that the mistake must concern a material fact relating to an essential element of the crime,[354] that it must be reasonable[355] and an honest error of judgment.[356]

Ignorance or mistake of law can be of two types, with different legal implications for each. First, an accused may be unaware of the legal prohibition of certain conduct. This is ordinarily not recognized as a defence under the basic principle that ignorance of the law is no excuse.[357] The

[352] France, for example, permits the defence of others in the same circumstances as in cases of self-defence. Stefani, Levasseur & Bouloc, *supra*, n. 326, pp. 279-289. For certain common law jurisdictions, see LaFave & Scott, *supra*, n. 325, pp. 397-399.

[353] LaFave & Scott, *supra*, n. 325, pp. 356-357.

[354] 1996 ILC Report (commentary on Article 14 of the draft Code of Crimes), p. 79; La Fave & Scott, *supra*, n. 325, p. 356.

[355] LaFave & Scott, *supra*, n. 325, p. 356.

[356] In the *Hostages* Case, the United States Military Tribunal stated:

"In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error of judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of innocence."

Cited in United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 184.

[357] LaFave & Scott, *supra*, n. 325, pp. 362-363.

justice of this approach is particularly true today, half a century after the Nuremberg Judgment when two *ad hoc* international criminal tribunals are operating, when the acts which constitute genocide, other crimes against humanity and serious violations of humanitarian law are widely known to the general public to be crimes under international law even when permitted under national law or practice. Moreover, the widespread dissemination of humanitarian law by the ICRC makes it difficult for a military commander of government or armed opposition group forces to claim that he or she did not know that particular conduct was not prohibited.[358]

In the second situation, the accused mistakenly relied on the judgment of a court which had no basis in law. For example, a prison officer relying upon a judgment by a court which was in violation of international law might be able to assert a successful defence to a charge of arbitrary imprisonment if the prison officer had no reason to question the authority of the court. This defence would not be available, however, for example, if there were sufficient indications to the accused that court was unlawfully established or imposing death sentences as part of a practice of genocide.[359]

7. The limits on other defences

Some defences are completely inappropriate to the crimes of genocide, other crimes against humanity and serious violations of humanitarian law, such as reprisals, *tu quoque*, consent of the victim and defence of property; others may be better considered under the question of whether the accused had the required mental state at the time of the crime.

Reprisals must have no place as a defence to these crimes. As the ICRC has stated:

". . . measures of reprisal are contrary to the principle that no one may be punished for an act that he has not personally committed; they constitute an inadequate means of restoring respect

[358] See Morris & Scharf, *supra,* n. 291, pp. 109-110. For information about the ICRC efforts to disseminate information concerning humanitarian law, see Hans-Peter Gasser, "Universal acceptance of international humanitarian law - Promotional activities of the ICRC", Int'l Rev. Red Cross, No. 302, September - October 1994, pp. 450-459. The statement in the *High Command* Case that a military commander may presume the legality of superior orders, in the absence of knowledge to the contrary, and cannot be held criminally liable for complying with orders which are not "obviously criminal or which they are not shown to have known to be criminal under international law", XI *Trials of War Criminals before the Nuernberg Tribunals, supra,* n. 115, p. 511, cannot be good law today, although it may be accurate that the commander "cannot be held criminally responsible for a mere error in judgment as to disputable legal questions". *Id.* The commander is held to a stricter duty to know the law. For example, the German armed forces regulations exclude a plea of superior orders "if the subordinate realized or , according to the circumstances known to him, *should have realized* that the action ordered was a crime". Joint Services Regulations (Zdv) 15/2, promulgated for the *Bundeswehr* in August 1992, *reprinted in Handbook of Humanitarian Law in Armed Conflicts, supra,* n. 320, p. 37.

[359] A person who carried executions without trial was acquitted because he mistakenly believed that they were authorized by court judgments, although this might also be characterized as a mistake of fact. *In re Hans,* Norway Ct. App. 1947, 14 Int'l L. Rep. pp. 305, 306 (It is doubtful that on the facts of this case, where the accused had failed to take any steps to ascertain the legality of the execution order or to seek a transfer, that the mistake would be a good defence today.). "The fundamental problem in such circumstances is, of course, to what extent the contention of the accused that he believed in the existence of the imaginary state of affairs is credible." Yoram Dinstein, "International Criminal Law", 20 Israel L. Rev. (1985), pp. 206, 235-236.

for the law, particularly in view of the counter-reprisals which they may provoke, and all this is likely to lead to a general escalation of the conflict."[360]

Under humanitarian law, reprisals by belligerents are "compulsory measures, derogating from the ordinary rules of such law, taken by a belligerent following unlawful acts to its detriment committed by another belligerent and which intend to compel the latter, by injuring it, to observe the law".[361] It is now prohibited to take reprisals against persons protected by humanitarian law and, therefore, they should not be a defence to serious violations of humanitarian law within the jurisdiction of the permanent international criminal court.

Reprisals against persons protected by the Geneva Conventions are prohibited.[362] Additional Protocol I prohibits reprisals against the wounded, sick and shipwrecked and the civilian population.[363] In addition, the Geneva Conventions and Additional Protocol I "incontestably prohibit any reprisals against any person who is not a combatant in the sense of Article 43 (*Armed forces*), and against any object which is not a military objective".[364] Even combatants are protected by restrictions on the use of reprisals which are so strict as to exclude actions which would fall within the jurisdiction of the permanent international criminal court. As the ICRC has made clear, they may only be taken against combatants in accordance with the principles of imperative military necessity, proportionality and the laws of humanity and the dictates of the public conscience.[365] In any event, the establishment of the International Fact-Finding Commission should help to make reprisals unnecessary, even in the limited circumstances where they may still not be prohibited by conventional law.[366] Reprisals are implicitly prohibited under common Article 3 and it is also settled that reprisals which would involve breaches of the absolute prohibitions in Article 4 (2) (fundamental guarantees) of Additional Protocol II are prohibited.[367]

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[360] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 3433, p. 983.

[361] *Id.*, para. 3427, p. 982.

[362] *Id.*, para. 3454, p. 984. Reprisals are also prohibited against objects protected by the Geneva Conventions and by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, but these prohibitions are outside the scope of this paper. *Id.*

[363] Additional Protocol I, Art. 20 (prohibition of reprisals against wounded, sick and shipwrecked); Art. 51 (protection of the civilian population). Additional Protocol I also prohibits reprisals against civilian objects, Art. 52; cultural objects and places of worship, Art. 53 (c); objects indispensable to the survival of the civiilan population, Art. 54 (4); the natural environment, Art. 55 (2); and works and installations containing dangerous forces, Art. 56 (4). These are outside the scope of this paper.

[364] *ICRC Commentary on the Additional Protocols, supra*, n. 56, para. 3456, pp. 986-987.

[365] *Id.*, para. 3457, p. 987 (spelling out these strict requirements in greater detail). These strict requirements demonstrate that the jurisprudence of military courts after the Second World War with regard to the issue of reprisals is largely obsolete.

[366] *Id.*, para. 3585, p. 1033. The International Fact-Finding Commission is designed to investigate alleged grave breaches and other serious violations of the Geneva Conventions and Additional Protocol I and facilitate through its good offices the restoration of an attitude of respect for these treaties. Additional Protocol I, Art. 90 (2) (c).

[367] *ICRC Commentary on the Additional Protocols, supra*, n. 56, paras 4528-4530, p. 1372. A brief summary of the prohibitions and restrictions on reprisals as part of a code of conduct for armed forces is contained in Frédéric de Mulin, *Handbook on the Law of War for Armed Forces* (Geneva: ICRC 1987), p. 53.

The defence of *tu quoque* (you also) should not be a part of the jurisprudence of the permanent international criminal court. Under the doctrine of *tu quoque*, in contrast to the defence of reprisals, a person seeks to justify killing or harming an innocent person by demonstrating that others have also committed such crimes. The crimes of genocide, other crimes against humanity and serious violations of humanitarian law are all *absolute* prohibitions, applicable *at all times* and *in all circumstances*. No one should escape international criminal responsibility for these grave crimes on the specious ground that others have engaged in similar conduct.

The defences of consent of the victim, defence of property and the legality of the conduct under national law are among the defences which are not appropriate defences to the crimes of genocide, other crimes against humanity and serious violations of humanitarian law, particularly those involving the deliberate killing or infliction of bodily harm on innocent persons.[368]

Certain defences, such as insanity, diminished responsibility and intoxication, which primarily involve questions concerning whether the accused had the required *mens rea* at the time of the crime could also be considered in that context.

It is now a basic principle of criminal law in most legal systems that someone who is insane at the time of the crime will not be held criminally responsible. There are a wide variety of formulations of this principle, but the practical differences between them may not be that great.[369] As a matter of fundamental justice, the statute should recognize some form of this defence. It was a factor apparently taken into account by the Nuremberg Tribunal in the case of Rudolph Hess.[370]

Whether the concept of diminished responsibility is one which should be a defence or be simply a factor in determining whether to mitigate punishment is a difficult question. If intoxication is to be taken into account as a defence or as mitigation, then the statute should clearly distinguish between the cases of voluntary intoxication and involuntary intoxication.

8. Aggravating and mitigating factors

The statute or the rules should provide guidance to the court concerning which aggravating and mitigating factors may be taken into account in determining the appropriate punishment of someone who has been convicted of genocide, other crimes against humanity or serious violations of humanitarian law. Athough the Yugoslavia and Rwanda Rules of Procedure and Evidence permit the Tribunals to take into account any aggravating or mitigating circumstance in determining the appropriate sentence, they do not have unbridled discretion and must take into account the general practice in the former Yugoslavia or Rwanda and the extent to which any penalty imposed by a national court for the same act has been served.[371] To ensure predictability of sentencing and

[368] The only conceivable situations when consent of the victim would be relevant are in those crimes where an element of the crime is the absence of consent of the victim, such as the removal of tissue or organs for transplantion in the circumstances permitted under Article 11 (3) of Additional Protocol I.

[369] In the common law, there are at least four versions of this principle. LaFave & Scott, *supra*, n. 325, p. 269.

[370] After reviewing a psychiatric report, the Nuremberg Tribunal concluded that there was "no suggestion that Hess was not completely sane when the acts charged against him were committed". Nuremberg Judgment, *supra*, n. 115, p. 88.

[371] Yugoslavia Rules of Procedure and Evidence, Rule 101 (B); Rwanda Rules of Procedure and Evidence, Rule 101 (B). The extent to which these rules limit the discretion of the Yugoslavia and Rwanda Tribunals is doubtful.

equivalent punishment for similar crimes, and to ensure that the concerns of the international community that an appropriate balance is achieved between the need to ensure that a sentence reflects the gravity of the crime and principles of natural justice, the statute or the rules of the court should similarly guide the court. As indicated above, certain factors which are impermissible defences to these crimes may, in appropriate circumstances, be considered in determining whether to mitigate punishment, such as superior orders, duress and necessity. Nevertheless, for the reasons indicated above at the beginning of Part VI.E, the jurisprudence of the military tribunals after the Second World War must be examined with great care in the light of developments in international law and standards and in regard to the goal of ending impunity for these grave crimes.

Aggravating factors. The Prosecutor of the Yugoslavia Tribunal has suggested in a lengthy brief submitted in the *Erdemovi_* Case (Prosecutor's brief) that "[t]he magnitude or seriousness of an offence is considered an aggravating factor in sentencing an accused in both the civil and common law" and that "[t]he factors to be considered include the individual's role in the incident, number of people killed, or the fact that it is the worst example of the offence likely to be encountered in practice."[372] A Trial Chamber of the Yugoslavia Tribunal concluded in the *Erdemovi_* Case that the crime against humanity committed was a crime of extreme gravity where the accused was responsible for the murder of between 10 and 100 persons, his role in that mass execution was significant and he used an automatic weapon.[373]

Three types of mitigating factors. Three types of factors may be appropriate to take into account in determining the sentence, those which existed at the time of crime, those which arose after the crime and the accused's personal circumstances. Some of the *factors existing at the time of the crime* which are inappropriate as defences, such as superior orders, duress and necessity, may be appropriate mitigating factors in certain cases. As stated in Part VI.E.2, the Nuremberg Charter and Judgment, the Convention against Torture, the draft Code of Crimes and the Yugoslavia and Rwanda Statutes permit superior orders to be considered as a mitigating factor.[374] The 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,[375] the lack of knowledge of the

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The Trial Chamber in the *Erdemovi_* Case noted that national criminal practice allowed it to take into consideration as mitigation all types of defences which have been rejected. *Id.*, Judgment, *supra*, n. 99, para. 56. Moreover, it is free to take into account the sentencing policy of any or all of the republics of the former Yugoslavia concerning only the length of sentence without any clear guidelines concerning which policy should apply.

[372] *Prosecutor v. Erdemovi_*, Prosecutor's Brief on Aggravating and Mitigating Factors, with Schedule of Penalties and the Sentencing Policy in the Former Yugoslavia (Prosecutor's Brief), Case No. IT-96-22-T, 11 November 1996 (annexing a comparative law survey).

[373] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 46.

[374] Nevertheless, the Nuremberg Tribunal, after considering Field Marshal Keitel's plea of superior orders with respect to crimes against peace, war crimes, including implementation of the *Nacht und Nebel* (Night and Fog Decree), and crimes against humanity, concluded: "There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification." Nuremberg Judgment, *supra*, n. 115, p. 92.

[375] *Id.*, paras 89-96.

illegality of the order and the degree of discipline in practice at the time of the crime.[376] 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.[377]

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. Indeed, the Trial Chamber in the *Erdemovi_* Case appeared to consider the question of duress as the result of a superior order as essentially the same as the question of superior orders (it called the mitigating factor, "extreme necessity arising from duress and the order from a superior order").[378] The Prosecutor of the Yugoslavia Tribunal argued that for duress to be a factor considered in mitigation, the threat of danger by another person had to be imminent, the accused could not have escaped the danger or otherwise averted it except by committing the crime and that the decision to commit the crime was one which any other reasonable person would have made in the same circumstances; the claim of duress would be precluded if the accused knowingly placed himself or herself in a situation which would foreseeably lead to the crime.[379] The Trial Chamber inquired about these and other matters in its decision, but concluded that no evidence was presented to corroborate the accused's testimony on these matters.[380]

The International Law Commission has suggested a number of other factors which might be appropriate mitigating factors, pointing out that the Nuremberg Tribunal considered such factors when it decided to reduce the penalties of some of those convicted:

"For example, the court may take into account any effort made by the convicted person to alleviate the suffering of the victim or to limit the number of victims, any less significant form of criminal participation of the convicted person in relation to other responsible individuals or any refusal to abuse a position of governmental or military authority to pursue the criminal policies."[381]

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[376] Prosecutor's Brief, pp. 2-3 (last three factors). Some of the factors which were taken into account in determining whether superior orders could be considered in mitigation by the national military tribunals after the Second World War include: "(a) The degree of military discipline governing the accused at the time of the commission of the alleged offence. (b) The relative positions in the military hierarchy of the person who gave and received the order. (c) The military situation at the time when the alleged offence was committed." United Nations War Crimes Commission, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 159, n. 1.

[377] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 53.

[378] *Id.*, paras 89-91

[379] Prosecutor's Brief, pp. 3-4.

[380] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 89. The Trial Chamber asked: "Could the accused have avoided the situation in which he found himself? Was the accused confronted with an insurmountable order which he had no way to circumvent? Was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards? Did the accused have the moral freedom to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?"

[381] 1996 ILC Report, commentary on Article 15, p. 82.

Among the factors which may be taken into consideration *after the crime has been committed* are the intention of the accused to surrender, a confession and guilty plea, cooperation with the prosecutor and remorse.

The Yugoslavia Prosecutor argued that "in both the civil and common law systems, surrendering to the authorities can be used in mitigation of sentence".[382] The Prosecutor also argued:

"Confession of guilt and acceptance of responsibility are considered mitigating factors in both the civil and common law traditions. The weight given will vary, but as a rule of thumb, the weaker the government's case against the accused, the greater the discount for a guilty plea: from one-fifth to one-third off sentence. However, pleading guilty as only a tactical manoeuver will usually not work to the advantage of the accused. The policy rationale behind the reduction in sentence for a plea of guilty is the saving of court time and expense. The discount for a guilty pleas is normally allowed even in cases of extreme seriousness."[383]

The Yugoslavia and Rwanda Rules of Procedure and Evidence provide that "substantial cooperation with the Prosecutor by the convicted person before or after conviction" is a mitigating factor.[384] In the *Erdemovi_* Case, the Yugoslavia Prosecutor stated that cooperation with the authorities was a "strong factor" to be considered in mitigation under both the civil and common law and that the range of reduction in sentence can vary, depending on the circumstances, from a small amount up to four-fifths of the sentence.[385] Some of the factors which the Prosecutor identified as relevant include:

"genuine co-operation with the authorities, whether or not the information supplied objectively turns out to be effective; the quality, quantity and accuracy of the information; and the consequences to the defendant for giving such information. As a matter of policy, co-operation is rewarded in order to encourage others to do the same."[386]

The Trial Chamber took these factors into account in this case and concluded that the cooperation of the accused with the Prosecutor played a significant role in reducing the sentence.[387]

The Yugoslavia Prosecutor argued that both the civil and the common law permit remorse or contrition to be used in mitigation of punishment and that the reduction in sentence depends on the degree of remorse.[388] The Trial Chamber considered the accused's consistent expressions of remorse before and after surrender as a factor in reducing his punishment.[389]

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[382] Prosecutor's Brief, p. 4.

[383] *Id.*, p. 5 (footnnotes omitted).

[384] Yugoslavia Rules of Procedure and Evidence, Rule 101; Rwanda Rules of Procedure and Evidence, Rule 101.

[385] Prosecutor's Brief, p. 5 (footnote omitted).

[386] *Id.*, pp. 5-6 (footnotes omitted).

[387] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 101.

[388] Prosecutor's Brief, p.6.

[389] *Erdemovi_* Case, Judgment, *supra*, n. 99, para. 50.

It may also be appropriate to consider *certain aspects of the accused's personality* in determining the appropriate punishment, such as the age of the accused, provided that such considerations are consistent with the principles of equality of justice. In the *Erdemovi_* Case, the Trial Chamber took into account the accused's age, family responsibilities, help for another victim, lack of current dangerousness and his ability to be reformed.[390] Although the Trial Chamber considered evidence concerning other factors, such as experience, which were taken into account by some of the national military tribunals under Allied Control Council Law No. 10 in mitigation, these factors were not expressly cited in the judgment as reasons for reducing the sentence.[391]

One factor concerning the accused's personal circumstances which may not, however, be considered as a mitigating factor is the accused's position as a head of state or government official. This factor was ruled out as a mitigating factor in the Nuremberg Charter, Allied Control Council Law No. 10, the Nuremberg Principles, the 1954 draft Code of Offenses, the Yugoslavia and Rwanda Statutes and the draft Code of Crimes.[392]

VII. PENALTIES

A. Excluding the death penalty

> *". . . in order fully to guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries."*
>
> General Assembly Resolution 2857 (XXVI) of 20 December 1971

In a welcome development, the ILC draft statute - like the Yugoslavia and Rwanda Statutes - excludes the death penalty as a possible punishment. Article 47 (1) 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.[393] In addition to the statement more than a quarter century ago by the General Assembly that the offences carrying the death penalty should be reduced with a view to

[390] *Id.*, p. 55.

[391] *Id.*, para. 110. See the survey of sentences imposed in the United Nations War Crimes Commission Report, XV *Law Reports of Trials of War Criminals*, *supra*, n. 305, p. 187.

[392] Nuremberg Charter, Art. 7; Allied Control Council Law No. 10, Art. 4; Nuremberg Principles, Principle III; 1954 draft Code of Offences, Art. 3; Yugoslavia Statute, Art. 7 (2); Rwanda Statute, Art. 6 (2); draft Code of Crimes, Art. 7. Indeed, the International Law Commission has stated that such an official may "be considered even more culpable than the subordinate who actually commits the act". ILC 1996 Report, p. 39 (commenting on Article 7).

[393] Amnesty International, *The death penalty: List of abolitionist and retentionist countries (October 1996)* (AI Index: ACT 50/09/96).

the desirability abolishing the punishment in all countries, the Human Rights Committee has declared that "all measures of abolition should be considered as progress in the enjoyment of the right to life" and has recommended that states parties to the ICCPR consider the abolition of the death penalty[394] and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended that the General Assembly adopt a resolution calling for abolition of the death penalty.[395] Moreover, as some delegations pointed out during the Preparatory Committee, it would be inconsistent with their treaty obligations under the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty or under Protocol No. 6 to the European Convention on Human Rights Concerning the Abolition of the Death Penalty to become party to the statute of a court which included the death penalty.

B. Stating the penalties in the statute

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, like the Yugoslavia and Rwanda statutes, 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, Article 47 (2) of the ILC draft statute 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."

In addition, Article 46 (2) requires the trial chamber to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person".[396]

To be consistent with the principle of *nulla poena sine lege*, an essential corollary of the doctrine of *nullum crimen sine lege* recognized in Article 39 of the ILC draft Statute and in Article 15 of the ICCPR, the penalties should be spelled out with greater precision. Apart from the principles in Article 46 (2) - which are not exclusive - the ILC draft statute does not outline any

[394] Human Rights Committee, General Comment 6, para. 6, UN Doc. HRI/GEN/1; See, for example, Concluding Observations of the Human Rights Committee: Nigeria, UN Doc. CCPR/C/79/Add.65 (1996), para. 31.

[395] Note by the Secretary-General, Extrajudicial, summary or arbitrary executions, UN Doc. A/51/457 (1996), para. 145.

[396] Article 4 (2) of the Convention against Torture requires states parties to make acts of torture "offences which take into account their grave nature" and Article 24 (1) of the Yugoslavia Statute states that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" and Article 24 (2) of that statute provides that "[i]n imposing sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstance of the convicted person." Article 10 (3) of this statute requires that the Trial Chamber in imposing sentence "take into account the extent to which any penalty imposed by a national court on the same person for the same act as has already been served". Articles 23 (1) and (2) and 9 (3) of the Rwanda Statute are similar.

basic principles for deciding which national law is to apply to assure certainty in sentencing. Indeed, the lack of certainty appears to be greater than in the International Law Commission's 1993 draft statute, which required the court to choose one national law; Article 47 (2) seems to permit the court to take into account elements of more than one national law in determining a sentence. The International Law Commission's commentary on this article does not explain the reasons for this change. As a result, this article could lead to inconsistent and arbitrary application of penalties to different defendants in the same case.

Different approaches might be considered to decide which national law should apply, depending on when the crime occurred, which would be consistent with the principle that the punishment be spelled out at the time the offence is committed and the principle of equality of treatment of defendants convicted of similarly grave offences in the same jurisdiction. For crimes committed *before* the establishment of the court (if the court is to have jurisdiction over crimes under international law committed before it is established), the statute should provide for the application of penalties in the national law of the state which is most consistent with general principles of criminal law, including certainty and consistency of application in all cases. The statute might provide that this national law is the law of the state where the offence was committed, the state of the nationality of the defendant or the state which had custody of and jurisdiction over the accused, provided that the penalties in that jurisdiction are consistent with international law and the statute (thus excluding corporal punishment and the death penalty). Instead of permitting the court unfettered discretion to choose which national law would apply in a particular case as provided in Article 47 (2) of the ILC draft statute, the statute should provide that only after the court determined that there was no penalty in the jurisdiction of the state specified in the statute which was consistent with international law and the statute would the court be permitted to look at other national law.[397] This would minimize the possibility of arbitrary application of penalties.

For acts committed *after* the establishment of the court, however, the penalties and permissible limits on discretion should be spelled out in the statute to ensure international consistency in the application of sentences.

[397] When the national law provides for the death penalty for the relevant crime, the court should determine that the maximum penalty which the defendant could face will a be a penalty under that national law for a similar crime which takes into account the grave nature of the crime.

VIII. BRINGING A CASE BEFORE THE COURT (TRIGGER MECHANISMS)

> *"4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.*
>
> *11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest."*
>
> UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and welcomed by the General Assembly in Resolution 45/121 on 14 December 1990

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.

A. 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. This would ensure that the court has the same independence as the International Court of Justice.[398] 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."

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 Am. J. Int'l L. 643 (1994).

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.[399]

The independence of the prosecutor from any political influence in conducting the investigation and prosecution must be effectively guaranteed by ensuring that no political body may prevent the prosecutor from initiating or continuing an investigation or prosecution. Decisions whether to approve an indictment should be solely the responsibility of the court. President Jacques Chirac of France recently emphasized the importance of the independence of prosecutors from political interference by announcing the appointment of a national commission to examine ways to increase the independence of prosecutors from ministerial control in the conduct of cases.[400]

B. The inadequacy of Security Council referrals and state complaints as a substitute for and independent prosecutor

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, under the UN Guidelines on the Role of Prosecutors, its prosecutor must have the independence to decide whether to investigate or prosecute.[401] States parties to the statute which are also parties to the Genocide Convention would be able to lodge a complaint with the prosecutor alleging that a crime of genocide appears to have been committed (Article 25 (1)).[402] 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)).[403] The Security Council could refer a matter to the court under Article 23 (1) when acting pursuant to

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The judges of the Yugoslavia Tribunal have recommended that the ILC 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).

400 "*La justice ne répond pas assez aux attentes des Français*", *Le Monde*, 22 January 1996 (text of presidential address on 20 January 1996).

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.

"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." ILC draft statute, Art. 25 (1).

"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". ILC draft statute, Art. 25 (2).

Chapter VII of the UN Charter to address a threat to or breach of international peace and security or an act of aggression.[404] 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 International Law Commission's 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.

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. The Security Council, a political body, whose decisions on non-procedural matters 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. For example, since 25 May 1993 when the Security Council established the Yugoslavia Tribunal, it has established only one other *ad hoc* international criminal tribunal, for Rwanda, but it has not established other tribunals in other situations which it has determined under Chapter VII involve a threat to or breach of international peace and security or which do pose such a threat or involve such a breach and where national judicial systems have failed to bring those responsible for grave violations of international law to justice. Whatever the reason for the Security Council's practice, the result is that many victims and their families, unable to obtain justice from national courts in *any* state, are also unable to obtain justice from international courts.

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 even though these rationales were squarely rejected by the international community in the at the World Conference on Human Rights in 1993.[405] Not many states have used the state complaint procedures in human rights treaties.[406]

"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." ILC draft statute, Art. 23 (1).

[405] World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, para. 4 ("The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.").

As of 20 January 1996, no states had used the state complaint procedures in Article 41 of the ICCPR; Article 21 of the Convention against Torture; Articles 45 and 61 of the American Convention on Human Rights; or Article 47 of the African Charter on Human and Peoples' Rights. Only 12 state complaints have been filed pursuant to Articles 24 and 46 of the European Convention on Human Rights. 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

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 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.[407] 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.[408]

Moreover, the ILC 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".[409] The ICRC has strongly criticized this provision:

Protection, Order, 1973 ICJ Rep. 328, involved a challenge to the jurisdiction of India to try Pakistani prisoners of war for genocide, which was later discontinued contemporaneously with a decision not to prosecute the prisoners.

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".

[408] The United States, which does not at this time favour letting the prosecutor investigate cases on his or her own initiative in the absence of a Security Council referral or a state complaint, has suggested that both the Security Council and states be limited to submitting situations, rather than individual cases, and that after submission of a situation, "It should be up to the Prosecutor independently to investigate and prosecute indivdual cases relating [to] an overall situation." U.S. Statement on the International Criminal Court, Sixth Committee, 31 October 1996. This position, however, does not address equally serious restrictions on the independence of an international prosecutor in the ILC draft statute, who would still be prevented from investigating cases and initiating prosecutions in other situations where states parties had jurisdiction.

"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." ILC draft statute, Art. 23 (3).

"It seems difficult, however, to reconcile the principle of an independent and impartial court with the fact that, in certain cases, the court would be dependent on the Security Council or subordinated to its action, and might thus be prevented from performing its duties freely. The repression of war crimes, crimes against humanity and the crime of genocide, just like the application of humanitarian law in general, must be effected without taking into account either the nature or origin of the conflict or the causes upheld by the parties."[410]

C. 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, as stated above, 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.

D. Strengthening the effectiveness of state complaints

As indicated above, state complaints have not been a particularly effective means of enforcing human rights obligations. Nevertheless, they remain a useful additional means of bringing cases before the court which have the potential to address the situations where the Security Council has failed to bring the situations to the attention of the prosecutor. The state complaint mechanism under the ILC draft statute must, however, be strengthened and attempts to weaken it must be resisted. Any state party, not just states parties to the Genocide Convention, as provided in Article 25 (1) of the ILC draft statute, should be able to file a complaint. As stated in Part III above, the crime of genocide is a crime under customary international law and the definition is consistent with international law. Moreover, nothing in Article VI of the Genocide Convention suggests that an international criminal court with jurisdiction over the crime would be precluded from considering a case of genocide where the information concerning the crime came from a non-state party. Moreover, such a restriction would suggest that the court should only have jurisdiction over state complaints concerning serious violations of humanitarian law or torture if the state was a party to the Geneva Conventions and their Additional Protocols, the Hague Convention of 1907 and the Convention against Torture.

[410] ICRC, Statement to the Sixth Committee, General Assembly, 28 October 1996, p. 4.

Moreover, since the crimes of genocide, other crimes against humanity and serious violations of humanitarian law are crimes under customary international law, all states are interested in repressing their violations. There should be no weakening of Article 25 of the ILC draft statute to limit the states parties to the statute which could file complaints to certain states, such as territorial states, custodial states, states of the accused's nationality, states of the victim's nationality or other states.

Although there is some merit to the suggestion that state complaints should identify a situation, rather than a particular case, it will be important to ensure that the definition of a situation does not introduce another jurisdictional hurdle by requiring a certain scale of violations not otherwise required by the definition of the crime. It will also be important not to add other obstacles to state complaints, such as requiring more than one state agree to the filing of a complaint. The experience of the Moscow mechanism under the Organization for Security and Cooperation in Europe (OSCE) demonstrates that such a requirement would make state complaints even more unlikely.[411]

GIVING MEANING TO THE WORLD'S CONSCIENCE

"In the international arena, we must, as a matter of urgency, create a permanent criminal tribunal. It is not a pleasant thing to admit, in what we think of as a civilized world, but there can no longer be any doubt that such a body is urgently needed. Three times in the last 50 years, we have had to establish special tribunals, and few would disagree that there have been other occasions on which they would have been appropriate. We have seen, in the former Yugoslavia and in Rwanda, that the ad hoc approach takes too long, is too expensive, and allows the impact of these institutions, which embody and give meaning to the world's conscience, to be diluted. So let the world now agree, that before the half-centennial of the Universal Declaration in 1998, we will establish, appoint, give authority to, and adequately fund a permanent international criminal tribunal to hear and determine allegations of serious crimes, which so often include human rights violations. Those concerned that such a body will be abused, or become the vehicle for political interference within countries, or be burdened with too many cases should be assured that we can build in the protections necessary and still create a mechanism which will give judicial sanction to our commitment that there will be no more Auschwitzes, no more Ntaramas, and no more Srebenicas. On this critical issue, the time for debate is over; the time for action has come!"

Address by José Ayala-Lasso, United Nations High Commissioner for Human Rights to the Commencement Class of 1996 of the Columbia School of International and Public Affairs, 14 May 1996, pp. 3-4

[411] The Moscow mechanism permits an OSCE participating state, if five other participating states agree, to invoke the compulsory procedure to require another participating state to invite a mission of experts to visit that state to address clearly defined questions on its territory concerning human rights. 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, para. 9. The compulsory procedure has been invoked on only two occasions, although a voluntary procedure has been invoked twice.

APPENDIX - INTERNATIONAL LAW COMMISSION'S DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/355 (1994), pp. 3-31, reprinted from an electronic mail version courtesy of the NGO Coalition for an International Criminal Court)

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

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II. DRAFT STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The States parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court to the United Nations

The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court

The Court consists of the following organs:

(a) a Presidency, as provided in article 8;

(b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;

(c) a Procuracy, as provided in article 12; and

(d) a Registry, as provided in article 13.

Article 6

Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

(a) criminal trial experience;

(b) recognized competence in international law.

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected, by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

4. No two judges may be nationals of the same State.

5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for reelection. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for reelection; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

Article 7

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for reelection for a further term.

Article 8

The Presidency

1. The President, the first and second Vice-presidents and two alternate Vice-presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-president, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-president may act in place of either Vice-president as required.

3. The President and the Vice-presidents shall constitute the Presidency which shall be responsible for:

(a) the due administration of the Court; and

(b) the other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

Article 9

Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber, in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of

the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Article 10

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the work-load of the Court requires that the judges should serve on a full-time basis. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and

(b) judges subsequently elected shall not hold any other office or employment.

Article 11

Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

Article 12

The Procuracy

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for reelection.

4. The States parties may elect the Prosecutor and a Deputy Prosecutor on the basis that they will be available to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor so far as possible in conformity with the United Nations Staff Regulations and Staff Rules and approved by the Presidency.

Article 13

The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for reelection and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the
Deputy Registrar will be available to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar so far as possible in conformity with the United Nations Staff Regulations and Staff Rules, and approved by the Presidency.

Article 14

Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 15

Loss of office

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statue, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States parties;

(b) in any other case, by a two-thirds majority of the judges.

4. The judge, the Prosecutor or other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Article 16
Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

Article 18

Working languages

The working languages of the Court shall be English and French.

Article 19

Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

PART 3. JURISDICTION OF THE COURT

Article 20

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Article 21

Preconditions to the exercise of jurisdiction

1. 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:

(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.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Article 22

Acceptance of the jurisdiction of the Court for the purposes of article 21

1. A State party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depository; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

Article 23

Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 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.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. 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.

Article 24

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

PART 4. INVESTIGATION AND PROSECUTION

Article 25

Complaint

1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

Article 26

Investigation of alleged crimes

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) conduct on site investigations;

(d) take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article

23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of

the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) prior to being questioned, be informed that the person is a suspect and of the rights:

(i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and

(ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) not be compelled to testify or to confess guilt; and

(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

Article 27

Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case could on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information.

Article 28

Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Article 29

Pretrial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Article 30

Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;

(b) in any other case, the confirmed indictment;

(c) a statement of the accused's rights under this Statute.

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Article 31

Designation of persons to assist in a prosecution

1. A State party may, at the request of the Prosecutor, designate persons to assist in a prosecution.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be designated under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

PART 5. THE TRIAL

Article 32

Place of trial

1. Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Article 33

Applicable law

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the principles and rules of general international law; and

(c) to the extent applicable, any rule of national law.

Article 34

Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) at any later stage of the trial, by an accused.

Article 35

Issues of admissibility

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.

Article 36

Procedure under articles 34 and 35

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Article 37

Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Article 38

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute have been respected; and

(d) allow the accused to enter a plea of guilty or not guilty.

2. The Chamber shall ensure that a trial is fair and expeditious, and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

5. The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) require the attendance and testimony of witnesses;

(c) require the production of documentary and other evidentiary materials;

(d) rule on the admissibility or relevance of evidence;

(e) protect confidential information; and

(f) maintain order in the course of a hearing.

7. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 39

Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred.

Article 40

Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

Article 41

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of: a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

Article 42

Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

Article 43

Protection of the accused, victims and witnesses

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Article 44

Evidence

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

Article 45

Quorum and judgment

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

4. The deliberations of the Court shall be and remain secret.

5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.

Article 46

Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Article 47

Applicable Penalties

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may 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.

3. Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State the nationals of which were the victims of the crime;

(c) a trust fund established by the secretary-general of the United Nations for the benefit of victims of crime.

PART 6. APPEAL AND REVIEW

Article 48

Appeal against judgement or sentence

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural unfairness, error of fact or of law, or disproportion between the crime and the sentence.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Article 49

Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to article 50, the decision of the Chamber shall be final.

Article 50

Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51

Cooperation and judicial assistance

1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons; and

(e) any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

(a) in a case covered by article 21 (1) (a), all States parties;

(b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

Article 52

Provisional measures

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

(a) to provisionally arrest a suspect;

(b) to seize documents or other evidence; or

(c) to prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

Article 53

Transfer of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) all States parties:

(i) in a case covered by article 21 (1) (a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) in the case of a crime to which article 20 (e) 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;

(c) in any other case, a State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. 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.

4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State party may delay complying with paragraph 2 if the accused is in its custody or

control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime. It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) may agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(c) shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2, but shall take any provisional measures requested by the Court.

Article 54

Obligation to extradite or prosecute

In a case of a crime referred to in article 20 (e), a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

Article 55

Rule of sociality

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it 80 requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of i paragraphs 1 or 2, for the reasons and purposes specified in the request.

Article 56

Cooperation with States not parties to this Statute

States not parties to this Statute may assist in relation to the matters, referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Article 57

Communications and documentation

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States parties shall inform the Registrar of the name and address of their national authority for this purpose.

2. When appropriate, communications may also be made through the International Criminal Police Organization.

3. A request under this Part shall include the following, as applicable:

(a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;

(b) information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;

(c) a brief description of the essential facts underlying the request;
and

(d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.

4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

PART 8. ENFORCEMENT

Article 58

Recognition of judgments

States parties undertake to recognize the judgments of the Court.

Article 59

Enforcement of sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

Article 60

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.

3. If the Presidency decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Annex

Crimes pursuant to Treaties (see art. 20 (e))

1. Grave breaches of:

(i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;

(ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

(iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

(iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

(v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.