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THE INTERNATIONAL CRIMINAL COURT:

Making the right choices - Part III
Ensuring effective state cooperation

> ***". . . we cannot and must not set up a wholly ineffective Court which is capable of making no more than empty gestures in the face of appalling atrocities being committed. That would be to do a great injustice to the victims of these crimes."***
>
> **Lionel Yee, Head of the Singapore delegation to the Preparatory Committee on the Establishment of an International Criminal Court, "Finding the Right Balance", 5 *The International Criminal Court Monitor* (August 1997), p. 14**

INTRODUCTION

This is the third position paper of a series by Amnesty International in support of the establishment of a just, fair and effective international criminal court. They are designed as easy-to-use manuals for decision-makers addressing topics scheduled to be discussed at the four sessions in 1997 and 1998 of the United Nations (UN) Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). Each section of this paper discusses the relevant international law, standards and practice; identifies the strengths and weaknesses of the International Law Commission's 1994 draft statute (ILC draft statute) and makes recommendations for improvements (in bold type).

This position paper addresses some of the topics scheduled to be addressed at the third session in 1997 of the Preparatory Committee (1 to 12 December 1997), including state cooperation with the international criminal court. Discussion of some of the topics now scheduled for December began at the February or August 1997 sessions, so the earlier papers in this series should be consulted for Amnesty International's positions on those topics. For ease of reference, the topics addressed in the three position papers are indicated below:

> Complementarity, definitions of core crimes, general principles of law, permissible defences and penalties. *The international criminal court: Making the right choices - Part I: Defining the crimes and permissible defences and initiating a prosecution* (AI Index: IOR 40/01/97) (*Part I*)
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> Organization of the court, protecting victims and witnesses and guaranteeing the right to fair trial. *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial* (AI Index: IOR 40/11/97) (*Part II*)
>
> State cooperation with the international criminal court. *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation* (AI Index: IOR 40/13/97) (*Part III*)

Although there is some inevitable overlap with topics discussed in the two previous position papers, the focus in *Part III* is on the obligation of states to cooperate with the permanent international criminal court and to comply with its orders and requests.

It is anticipated that the Preparatory Committee at the December 1997 session will consider the remaining issues concerning permissible defences which were not addressed at the February 1997 session; penalties, which were originally scheduled for the February 1997 session, but not discussed; and the remaining issues concerning procedural matters which were not resolved at the August 1997 session. The Preparatory Committee is also expected to consider a proposal by members of the North Atlantic Treaty Organization (NATO) concerning the definition of the court's jurisdiction over serious violations of humanitarian law. This proposal is designed to bridge the gap between the position of the United States, on the one hand, and New Zealand and Switzerland, reflecting the position of the International Committee of the Red Cross (ICRC), on the other hand. The Preparatory Committee is also expected to have available an abbreviated compilation of proposals concerning state cooperation to be prepared at an intersessional meeting in Siracusa, Italy of government experts, staff of the two *ad hoc* tribunals and representatives of non-governmental organizations, all in their personal capacity, sponsored by the International Institute of Higher Studies in the Criminal Sciences (16 to 22 November 1997).

What is at stake. The issues of state cooperation are among the most important which the Preparatory Committee and the diplomatic conference will have to resolve. Even if all the other major political issues are resolved satisfactorily, including eliminating the Security Council veto of prosecutions in situations being considered under Chapter VII of the UN Charter, defining the core crimes broadly, giving the court the same universal jurisdiction as each of its states parties, guaranteeing fair trials and assuring secure financing as part of the regular UN budget, all could be for naught if a state party is free to disregard international court orders on behalf of the world community on narrow grounds of national self interest.

Although some aspects of state cooperation with the permanent international criminal court are complex and technical, the fundamental issues at stake are very simple. Will a state party be permitted to paralyse international investigations and prosecutions of genocide, other crimes against humanity and serious violations of humanitarian law on grounds of national interest and existing national law? Will the statute and rules ensure that the court's inherent power as a criminal court to issue orders and requests for assistance be implemented fully and without delay by states parties and individuals? Will the court have the power to determine whether a state party is fulfilling its obligations under the statute? To ensure the right answers to these questions, states will have to be creative in devising new systems of international cooperation so that their court is effective in repressing the worst crimes in the world. As explained below, these solutions will necessarily differ in significant respects from traditional state-to-state mutual assistance and extradition, but the drafters of the statute will be able to draw upon the extensive experience of state cooperation with the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda.

Copies of *Parts I, II* and *III* are available on the Amnesty International Italian Section's World Wide Web page: http://www.amnesty.it and on the NGO Coalition for an International Criminal Court World Wide Web page: http://www.igc.apc.org/icc

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BASIC PRINCIPLES CONCERNING STATE COOPERATION WITH THE PERMANENT INTERNATIONAL CRIMINAL COURT

States parties, including their national courts and officials, must provide full cooperation, without delay, to the permanent international criminal court at all stages of the proceedings, including the period before the relevant chamber determines whether it has jurisdiction.

The statute should confirm the basic principle of full cooperation without delay required from states parties, leaving the details of cooperation to the rules.

States parties must bring to justice those responsible for crimes within the court's jurisdiction, extradite them to a state able and willing to do so in a fair trial which is not a sham or transfer them to the permanent international criminal court pursuant to court order.

States parties accept by adherence to the statute that the permanent international criminal court is an impartial body implementing procedural guarantees and substantive law which satisfies their legitimate interests.

States parties must provide the permanent international criminal court with the same support and cooperation they would provide their own courts.

States should implement fully and without delay court orders to arrest and transfer suspects and accused. None of the grounds for states to refuse *extradition* to other states apply to court orders to *transfer* suspects and accused to the permanent international criminal court.

States should implement fully and without delay court orders and requests to provide international assistance, including those requiring logistical support, searches and seizures, appearance of witnesses and production of documents. None of the traditional grounds for states to refuse *mutual assistance* to other states apply to orders or requests for *international assistance* by the permanent international criminal court.

The permanent international criminal court, not national courts or authorities, should determine whether a state party is fulfilling its obligations under the statute and rules to cooperate.

States parties which have failed to implement court orders fully and without delay are in breach of their obligations under international law and should be subject to appropriate sanctions.

All other states should be encouraged to become parties to the statute and to cooperate with the permanent international criminal court.

I. OBLIGATION OF STATES PARTIES TO COOPERATE WITH THEIR COURT

The permanent international criminal court will be created by states to ensure the existence of an international institution able to repress the worst possible crimes imaginable. It will be designed to do so in a manner which necessarily satisfies their legitimate interests, but is, above all, *just, fair and effective*. Their adherence to the statute will affirm that the impartial body is implementing substantive and procedural law fully consistent with their legitimate interests. Therefore, each state party must provide the international criminal court with the same support and cooperation they provide their own *domestic* courts. Failure to do so would paralyze their *international* court.

In creating the permanent international criminal court as an effective complement to national criminal justice systems when they are unable or unwilling to bring to justice those responsible for core crimes, it will be essential ensure that states parties cooperate fully and promptly with the court and comply with its orders and requests without delay. As with the two *ad hoc* international criminal tribunals, the international criminal court will not have its own police force when it is established and will depend to a large extent on cooperation by states at every stage of the proceedings:

> "Notwithstanding the emergence of international and regional organizations with competence in a wide range of areas, the international legal system is still primarily a decentralized system of independent sovereign States, particularly in the field of criminal law. Given the absence of an international criminal justice system, the cooperation of States will be essential to the effective functioning of the International Tribunal at every stage of its work, from the initial investigation to the enforcement of a final judgment."[1]

Although there are significant differences between the basis of the obligation to cooperate with the two *ad hoc* international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal), and the basis for the obligation of states parties to cooperate with the international criminal court, both are rooted in state consent. The obligation to cooperate with the two tribunals created by the Security Council pursuant to its authority under Chapter VII of the UN Charter, a treaty to which all members of the UN consented, was spelled out in the resolutions creating the two tribunals.[2] The obligation of states parties to the statute of the international criminal court to cooperate with *their* court will also be based on state consent on ratification or accession. It will be necessary to draw upon the experience of the two *ad hoc* international criminal tribunals with state cooperation to build on the strengths of that system of cooperation and to learn from the problems which the two tribunals have encountered.[3]

[1] Virgina Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1995), p. 311.

[2] S.C. Res. 827, 25 May 1993 (establishing the Yugoslavia Tribunal); S.C. Res. 955, 8 Nov. 1994 (establishing the Rwanda Tribunal).

[3] For an analysis of the strengths and weaknesses of such cooperation legislation, see Amnesty International, *International criminal tribunals: Handbook for government cooperation* (AI Index: IOR 40/07/96), and its three supplements containing the text of such legislation (IOR 40/08/96, IOR 40/09/96 and IOR 40/10/96).

A. Priority of the statute and rules over internal law

> ***"Although it is a general principle of international law that it is for the State to determine how it will fulfil its international law obligations, a State cannot impose conditions of form on the fulfilment of these obligations by enacting national legislation which results in derogation thereof."***
>
> ***Prosecutor v. Blaki_*, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Case No. IT-95-14-PT (Trial Chamber, 18 July 1997**

If the court is to be effective, the statute should reinforce the inherent powers of the court to enforce international criminal law by expressly providing that all states parties, as well as individuals under their jurisdiction or control, must comply with court orders and requests issued pursuant to the statute and rules. The statute should also encourage and facilitate cooperation by other states. This approach is consistent with obligations of states parties to the constituent instruments of other international courts and judicial or quasi-judicial bodies established by treaty, and consistent with the powers of other international criminal courts. **The statute should also expressly provide that states parties may not use their internal law to prevent or delay compliance with court orders or requests.** As with other international treaty commitments, states parties may have to amend existing legislation or enact new legislation to fulfil their treaty commitments. There is ample precedent from a wide variety of legal systems in the legislation amended or enacted by states to fulfil their obligation to cooperate with the Yugoslavia and Rwanda Tribunals. In the case of referrals by the Security Council of situations when acting pursuant to its powers under Chapter VII of the UN Charter, the Security Resolution is likely to reinforce the obligations of states parties under the statute and rules and to spell out the obligations of non-state parties, as it specified the obligations of UN Members in the resolutions establishing the two *ad hoc* international criminal tribunals.

The statute should provide that all states parties shall comply with court orders and requests when the court is acting with respect to the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law, which should be within the court's inherent (automatic) and concurrent jurisdiction.[4] It is increasingly unlikely that the so-called treaty crimes in the Annex mentioned in Article 20 (e) of the ILC draft statute will fall within the initial jurisdiction of the court (apart from those, such as grave breaches of the Geneva Conventions, which are to be included in one of the core crimes), but some of them or other crimes of international concern may be included at a later date under an opt-in provision similar to that in Article 22. If so, it will be necessary to amend the statute to distinguish between the obligations of states parties which have accepted the original inherent jurisdiction over core crimes and those which have also accepted jurisdiction with respect to the additional crimes. Simplicity, convenience, ease of operation and understanding require the same jurisdictional regime for all crimes in the court's initial stages.

[4] Amnesty International takes no position on whether the crime of aggression or waging a war of aggression should fall within the jurisdiction of the court, but if it does fall within its initial jurisdiction, convenience and simplicity dictate that it should fall within the inherent jurisdiction of the court and that the obligations of all states parties should be the same.

States cannot interpose national law as an obstacle to international treaty commitments. The Vienna Convention on the Law of Treaties provides that a state party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[5] This is a rule of customary international law.[6] International scholars are in accord:

> "Furthermore, if a state's internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international law. It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law was defective or contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement which in the circumstances cannot be met or severe practical or political difficulties would be caused."[7]

To avoid any ambiguity, however, the statute should expressly provide that states parties must enact any legislation needed or amend existing law to fulfil their treaty obligations.

B. Obligation to cooperate with international courts established by treaty

[5] Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), *done at Vienna* 23 May 1969, *entered into force* 27 January 1980, Art. 27. The Vienna Convention in large part reflects customary law, Louis Henkin, Richard C. Pugh, Oscar Schacter & Hans Smit, *International Law: Cases and Materials* (St. Paul, Minnesota 1980), p. 580, and as the authorities cited below indicate, Article 27 reflects a rule of customary law.

[6] *Prosecutor v. Blaski_*, Judgement on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR-108 *bis* (Appeals Chamber), 29 October 1997, para. 54 (*Blaski_* Appeals Chamber judgment); *Treatment of Polish Nationals in Danzig*, Advisory Opinion No. 44, 4 February 1932, 1932 P.C.I.J. (Ser. A/B), p. 24 ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"); *Greek and Bulgarian Communities* Case, 1930 P.C.I.J. (ser. B), No. 17, p. 32 ("it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty"); *Norwegian Claims* Case, U.N. Rep., Vol. I, p. 307 (Perm. Ct. Arb. 1932); *Georges Pinson* Case, U.N. Rep., Vol. V., pp. 327, 393 (Perm. Ct. Arb. 1928); *Affaire d l'Alabama*, Lapradelle-Politis, Vol. II, pp. 713, 891 (1872). See also *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ Rep. (1988), Advisory Opinion, pp. 12, 34 (citing "the fundamental principle of international law that international law prevails over domestic law").

[7] Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (London: Longman 9th ed. 1996), Vol. I, pp. 84-85 (footnotes omitted); D.P. O'Connell, *International Law* (London: Stevens & Sons 2d 1970), Vol. I, p. 47.

The obligation of states parties to cooperate with international judicial and quasi-judicial organs established by treaty or international agreement is just as important for their effectiveness in strengthening the rule of law at the international level as it is for *ad hoc* tribunals established by the Security Council (see Section I.C below). The statute should ensure that the obligation of both states parties and individuals to comply with court orders and requests is clearly and unambiguously spelled out.[8] The obligation of states to comply fully and without delay with decisions of international courts, tribunals, arbitrators and quasi-judicial commissions where they have consented to jurisdiction is a reflection of the basic principle *pacta sunt servanda*. In some cases, the obligation is spelled out in the treaty establishing the judicial organ, but it is axiomatic that once states have freely consented to the jurisdiction of a judicial body, they must carry out the decisions of that body when it is exercising its jurisdiction. They may not pick and choose which decisions to implement or decide the scope of the implementation:

> "The State concerned is under an obligation to comply with all the consequences of the judgment: If a title to jurisdiction is recognized or denied, the State is bound to assure that all national State organs exercise their competence within the limits of this title. If the judgment directs the performance of an act, the government is obliged to perform it, either through its executive branch or through any other organ which can contribute to this effect."[9]

As a general rule, states parties fulfil their obligations to comply with judgments of such courts and quasi-judicial bodies (see Section V below). Nevertheless, the statute should require states parties and individuals to comply fully and without delay with judgments, orders and requests.[10] Such provisions are incorporated in the statutes of other courts established by treaty, both those deciding cases involving individuals and those deciding inter-state disputes. Under Article 32 (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the states parties to that treaty "undertake to regard as binding on them any decision which the Committee of Ministers" of the Council of Europe takes to confirm a decision by the European Commission of Human Rights that there has been a violation of the treaty and to specify the time limit for compliance.[11] Similarly, under Article 53, the states parties which have accepted the jurisdiction of the European Court of Human Rights "undertake to abide by the judgment of the Court in any case to which they are parties". States parties which

[8] "Treaties instituting judicial organs usually define the effects of judgments of that organ." Hermann Mosler, "Judgments of International Courts and Tribunals" *in* 1 *Encyclopedia of Public International Law* (Amsterdam: North-Holland Publishing Company 1981), pp. 111, 115.

[9] Mosler, *supra*, n. 8, p. 116.

[10] Treaties instituting judicial organs not only impose obligations upon states parties with respect to a particular case, as in Article 59 of the Statute of the International Court of Justice, but they may also

> "provide for a stronger effect of judgments, and attribute to them a direct effect within their national domain . . . . Such an effect has only been accorded to judgments of international courts where individuals or other legal persons of municipal law are admitted as parties."

Mosler, *supra*, n. 8, p. 115. The parties before the permanent international criminal court would, of course, involve individuals, as well as states which were making jurisdictional objections. Such treaty bodies whose decisions have a direct effect on individuals date back more than a century to the Central Commission for the Rhine, established pursuant to Article 43 of the Convention of Mannheim of 17 October 1868. *Id*.

[11] *Signed* 4 November 1950, *entered into force* 3 September 1953, 213 UNTS 222.

have accepted the jurisdiction of the Inter-American Court of Human Rights "undertake to comply with the judgment of the Court in any case to which they are parties".[12] Although the International Court of Justice decides inter-state disputes, the same principle applies with respect to the separate consent by parties to its statute for classes of disputes. Once they have consented, the states are then bound to implement the decisions and judgments of the International Court of Justice; they do not have the option to negotiate the extent to which they will comply or the manner in which they will comply. States parties to the Statute of the International Court of Justice "may at any time declare that they recognize as compulsory *ipso facto* and without special agreement in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal issues" concerning certain matters.[13] **States parties to the statute should undertake to implement all judgments and decisions of the court fully and without delay.**

C. Necessity to comply, as well as cooperate, with international criminal courts

> ***"A criminal court must have the ability to ensure that its functioning is not frustrated at the inclination of obstructive individuals."***
>
> ***Prosecutor v. Blaski_*, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Case No. IT-95-14-PT (Trial Chamber), 18 July 1997**

The need of international criminal courts, whether established by treaty or by Security Council resolution, to have the power to issue binding orders to states, and, in some cases, individuals, is even greater than the need of international judicial and quasi-judicial bodies established by treaty to resolve disputes between states to have such power.

[12] American Convention on Human Rights, Art. 68 (1). In contrast, the Inter-American Commission on Human Rights has the power to make recommendations "and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined". *Id*., Art. 51 (2).

[13] Statute of the International Court of Justice, Art. 36 (2). See also Article 59 (indicating that decisions of the International Court of Justice have "binding force").

The permanent international criminal court when established will, necessarily, have inherent power as an international criminal court to issue binding orders to the states parties which have established it.[14] It will also have inherent power as an international criminal court over persons in the territory of states parties or subject to their jurisdiction.[15] Nevertheless, the inherent power of the court to issue binding orders should be reinforced, as in the Yugoslavia and Rwanda Statutes and Rules of Procedure and Evidence by express powers.[16] In as much as the Appeals Chamber in the *Blaski_* case considered that the Yugoslavia Tribunal did not have inherent jurisdiction to compel state officials to testify or produce documents and that the statute of that tribunal did not give it this power, it will be essential for states establishing the permanent international criminal court to clarify that their court will be able to compel state officials to testify and produce documents. As explained below in Section II.B.3, the court will need to have the power to do so if it is to be effective in bringing to justice superiors and state officials.

The ILC draft statute does not adequately reinforce the inherent power of a criminal court to issue binding orders, thus creating unnecessary ambiguity about the scope of its power. Article 51 (1) of the ILC draft statute requires states parties to *cooperate* with the international criminal court, but the ILC commentary indicates that this provision does not oblige states parties to *comply* with court orders or requests. That provision states that "[s]tates parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute." Article 51 (2) states that the Registrar may transmit to any state, not just a state party, "a request for cooperation and judicial assistance with respect to a crime" and Article 51 (3) provides that states parties "shall respond without undue delay to the request" in cases of genocide or in other cases where they have accepted the court's jurisdiction with respect to the crime. Article 51 also does not expressly provide that the court will be able to issue binding orders to states, their officials and private individuals.

[14] *Blaski_* Appeals Chamber judgment, para. 33.

[15] See *id.*, para. 48 (inherent power over individuals acting in their private capacity).

[16] Article 19 (2) of the Yugoslavia Statute provides that a judge of the Trial Chamber "may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention , surrender or transfer of persons, and any other orders as may be required for the conduct of the trial". Article 18 (2) of the Rwanda Statute is identical. Rule 54 of the Yugoslavia Rules provides that a Judge or Trial Chamber may issue subpoenas. Rule 54 of the Rwanda Rules is identical.

The International Law Commission in its commentary on Article 51 recognized that "[t]he effective functioning of the Court will depend upon the international cooperation and judicial assistance of states." Therefore, it explained, "States parties to the Statute should cooperate with criminal investigations conducted by the Prosecutor and respond without undue delay to any request from the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, etc." It added that "Article 51 states this general obligation in terms adapted from article 29 of the Statute of the International Tribunal for the Former Yugoslavia, it being understood that issues of implementation will be worked out between the Court and the requested State." However, Article 29 of the Yugoslavia Statute not only requires states to cooperate with the Yugoslavia Tribunal, it provides that "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber".[17] Thus, despite the seemingly mandatory language in Article 51 and the clearly mandatory wording of Article 29, the International Law Commission appears to have envisaged a system based solely on *cooperation* by states parties where the cooperation in implementation of each request and order will be *negotiated* with each requested state party, not automatic *compliance* by states parties with all orders and requests, as required with respect to other international courts.

A criminal court which must rely solely upon discretionary cooperation by states parties when exercising its jurisdiction without ultimately being able to order compliance with treaty obligations will not be an effective complement to states which are unable or unwilling to bring to justice those responsible for the worst crimes in the world. The permanent international criminal court must have the same power to issue binding decisions and judgments as any other international court. The current wording, which fails to make this clear, risks paralysis. **The statute should eliminate any ambiguity by expressly stating that the court has power to issue binding orders to states parties, their officials and individuals in the territory or jurisdiction of a state party and that they comply fully and without delay.**

II. INTERNATIONAL ASSISTANCE TO THE COURT

A. State cooperation and assistance required to ensure that the prosecution and defence can conduct effective investigations

There is a wide variety of investigative activities which the office of the prosecutor and defence counsel (who, in contrast to some civil law jurisdictions, will be expected to conduct some investigative work on behalf of the client) must be able to carry out to ensure an effective criminal investigation. Each type of investigative activity will require different levels of international cooperation or assistance by states parties and other states. Many of the most important activities will simply require that the state concerned permit the office of the prosecutor and defence to carry out on-site investigations, such as interviewing witnesses, without the assistance of state authorities or their interference (see Section II.B.1 below). The second type of on-site investigative work may need logistical assistance from state authorities, such as exhumation of graves and autopsies, or travel documents in restricted areas and permission to take aerial photographs (see Section II.B.2 below). In some cases, such investigations may need security assistance from states. The first two types of

[17] Yugoslavia Statute, Art. 29 (2). Article 28 (2) of the Rwanda Statute is virtually identical.

cooperation and assistance are essentially the same as passive assistance in the context of traditional inter-state mutual assistance. They are also the most common type of cooperation and assistance provided by states to the Yugoslavia and Rwanda Tribunals. A third type of investigative activity will require the office of the prosecutor and the defence to rely on compulsory process. The most effective system of compulsory process would be direct enforcement by the permanent international criminal court of its orders served on officials and individuals. However, it is possible that the court will also rely to some extent on national courts and authorities to use compulsory process to produce evidence and the attendance of witnesses (see discussion below in Section II.B.3).

The specific obligation of states and their officials to comply with orders and requests issued by the permanent international criminal court is addressed above in Section I.C and below in Section II.B.3. Since the pre-indictment arrest of suspects should be for narrowly limited circumstances and for the shortest possible time, not as an investigation tool for the convenience of the prosecutor, as in some legal systems, pre-indictment arrest is discussed below in Section III.A.

1. International assistance different from inter-state mutual assistance

The traditional exceptions developed by states based on concerns about the impartiality and fairness of the criminal justice systems of other states in state-to-state mutual assistance are not required in the context of international assistance to a permanent international criminal court created by the collective action of all states at a diplomatic conference and designed to meet internationally recognized standards of fairness. Similarly, exceptions based on concern about the substantive criminal law of other states have no place in the context of the core crimes of greatest international concern: genocide, other crimes against humanity or serious violations of humanitarian law.

Although traditional inter-state mutual assistance in criminal matters is the source of some useful precedents and a familiar foundation for developing a system of international cooperation and assistance, many of the provisions in mutual assistance instruments are too restrictive to serve as appropriate models for cooperation with the permanent international criminal court. These instruments give states a large number of grounds to refuse assistance based on national law and procedure and leave it to the requested state to decide whether grounds to cooperate exist. As explained below, Amnesty International is deeply concerned that the provisions in the ILC draft statute concerning state cooperation and many of the proposals for amending the draft statute are based on the restrictive forms of cooperation between states in mutual assistance instruments. Such proposals, if adopted, would seriously, perhaps completely, undermine the effectiveness of the court. State cooperation and assistance in the context of an international criminal court will require new approaches and solutions. In many cases, such new approaches and solutions have been developed in the Yugoslavia and Rwanda Statutes, Rules and Guidelines concerning practical cooperation between states and the tribunals. **The basic principles of cooperation should be spelled out in the statute of the permanent international criminal court; the details should be left to the rules.**

International assistance. The term "international assistance" is used for convenience in this paper to cover all forms of assistance by national authorities to the permanent international criminal court, apart from surrender or transfer of persons to the

court, and to distinguish it from traditional state to state cooperation. The assistance required by the international criminal court is analogous in some respects to *international judicial assistance* or *international legal assistance* by states to other states in *civil* matters and to *mutual assistance* or *mutual legal assistance* by states to other states in *criminal* matters.[18] The International Law Commission used the term "international cooperation and judicial assistance" in the title of Part 7 of the ILC draft statute, but the term "international assistance" is preferable, not only because it is shorter, but because it makes clear that it covers the new concept of assistance to an international criminal court. Instruments concerning mutual assistance between states include the UN Model Treaty on Mutual Assistance in Criminal Matters (UN Mutual Assistance Treaty),[19] the European Convention on Mutual Assistance in Criminal Matters (European Convention on Mutual Assistance),[20] the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Commonwealth Scheme),[21] the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (ECOWAS Convention)[22] and the Inter-American Convention on Mutual Assistance in Criminal Matters.[23] These instruments are supplemented by a large number of bilateral treaties and agreements. Nevertheless, as the practice of state cooperation with the Yugoslavia and Rwanda Tribunals demonstrates, these forms of cooperation between sovereign states are of a different nature from cooperation by a state with an international court and the latter will often require different solutions.

[18] A leading authority on traditional state-to-state cooperation explains: "In the context of civil proceedings, international judicial assistance is primarily concerned with the service of documents, 'process' of one sort or another but also extrajudicial documents of significance, and the taking of evidence; post-trial assistance, in the form of the enforcement of judgments and orders, ..." David McClean, *International Judicial Assistance* (Oxford: Clarendon Press 1992), p. 2. With respect to state-to-state cooperation in criminal matters, "the term 'international judicial assistance' tends to be replaced in this new context by 'mutual assistance in criminal matters' or simply 'mutual legal assistance'. The concepts are, however, very similar and address many of the same problems." *Id.*, p. 4. Terminology has not always been consistent in the field of inter-state cooperation in criminal matters, however. Earlier authorities sometimes used the terms, "international judicial assistance in criminal matters" or "international judicial cooperation in criminal matters". See, for example, Gerhard O.W. Mueller, "International Judicial Assistance in Criminal Matters", 7 Villa. L. Rev. (1961-1962), p. 193.

[19] Adopted by Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug. - 7 Sept. 1990, UN Doc. A/Conf. 144/28/Rev.1, I.A.11, GA Res. 45/117 (1990), 14 Dec. 1990, 45 UN GAOR Sup. (No. 49A) 215, UN Doc. A/RES/45/117. This model treaty is one of a series of "widely accepted models" adopted by the UN to which states could refer "as a type of international form book" in drafting their own bilateral treaties. Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (Philadelphia: University of Pennsylvania Press 1994), p. 204. The UN Mutual Assistance Treaty is drafted as a bilateral treaty, but is readily adaptable for multilateral use. It was used as the basis for drafting the multilateral ECOWAS Convention.

[20] *Opened for signature* 20 April 1959, E.T.S. 30.

[21] *Adopted* Commonwealth Law Ministers Meeting, July 1986, Harare, as amended by Law Ministers in April 1990, *reprinted in* David McClean., *International Judicial Assistance*, *supra*, n. 18, p. 331. The Commonwealth Scheme is not a treaty, "does not create binding international obligations" and "represents more an agreed set of recommendations for legislative implementation by each government". McClean, *International Judicial Assistance*, *supra*, p. 151.

[22] *Adopted* 1992, *reprinted in* W.C. Gilmore, ed., *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge: Grotius Publications Limited 1995), p. 202.

[23] *Adopted by* Organization of American States General Assembly, 23 May 1992.

One fundamental difference between mutual assistance and international assistance is that the former is a system of cooperation between states on a basis of reciprocity, whereas the latter is state assistance to an international court without a formal requirement of reciprocity, although the court will, no doubt, cooperate with national investigations and prosecutions as a matter of comity when such cooperation will not endanger its own investigations and prosecutions. In addition, as explained below, a further essential difference is that international assistance should be provided invariably by states parties to the international criminal court as part of their obligations under the statute, whereas mutual assistance instruments permit requested states a large measure of discretion to decline requests for assistance. Moreover, the grounds for one state refusing to cooperate with another state or assist it in criminal matters do not apply to international assistance to a permanent international criminal court established by the collective action of the states parties. Although some of the mutual assistance instruments oblige states to provide the widest possible assistance and to do so promptly,[24] these differences demonstrate that it is essential that mutual assistance instruments and practice be seen only as providing some useful experience in developing an effective system of international assistance, not as the model for such assistance. Indeed, it can be said that if the statute were to rely solely on the mutual assistance model for defining the requirements of international assistance, as some states have suggested, the court could be paralysed by lengthy delays or outright refusals of states parties to cooperate. The court would then be an almost completely ineffective complement to national judicial systems in the repression of crimes under international law. A far more appropriate model is the recent, but rapidly expanding experience of international assistance provided by states to the two *ad hoc* international criminal tribunals, although the flaws in some of the legislation enacted by states to fulfil their responsibilities under Security Council Resolutions 827 and 955 identified in Amnesty International's *Handbook for government cooperation* and by the Appeals Chamber in the *Blaski_* case should be avoided.[25]

2. Traditional grounds for refusal of mutual assistance to a state do not apply to international assistance to an international criminal court

None of the wide variety of grounds for states to deny mutual assistance to other states are relevant to international assistance by states to a permanent international court established by treaty. Although states have legitimate concerns with respect to the criminal justice systems of some other states, it is certain that the states drafting the statute will ensure that these concerns are adequately addressed in that instrument and in the rules drafted by the court, as they have been in the Yugoslavia and Rwanda Statutes, Rules and Guidelines. Other state concerns, such as those related to national interests and security, will have to be balanced by the court against the fundamental goal of the statute: to establish an effective international criminal court able to bring to justice those responsible for the worst possible crimes under international law when states are unable or unwilling to do so themselves.

[24] European Convention on Mutual Assistance, Art. 1 (1) ("The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance . . . ."); ECOWAS Convention, Preamble, Art. 2 (1) ("Member States undertake to afford to each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings or investigations. . . ."), Art. 6 (1) ("Requests for assistance shall be carried out promptly . . . .").

[25] *Handbook for government cooperation*, *supra*, n. 3, pp. 48-61; *Blaski_* Appeals Chamber judgment, paras 54-56.

The following brief discussion explains why the grounds for states refusing to provide mutual assistance in criminal matters do not apply to assistance to an international criminal court and how the legitimate concerns which states may have can be adequately addressed in the statute and rules of the court. In any event, even if some of the grounds for states to refuse to cooperate with each other in the investigation and prosecution of domestic crimes were appropriate grounds for refusing to cooperate with an international criminal court in the investigation and prosecution of crimes under international law, it would have to be the responsibility of that court, not state authorities, to decide if refusal was warranted. Some of the grounds are equally inappropriate in the context of transfer of persons and, for the sake of convenience, are discussed at greater length below in Section IV.B.2. **The statute should expressly exclude all traditional exceptions from the field of mutual assistance as grounds for states to refuse cooperation with the permanent international criminal court. The court should decide whether a state is in compliance.**

a. Type of offence

Some mutual assistance instruments permit states to refuse such assistance in criminal matters to other states where the criminal proceedings involve a political offence,[26] a military offence which is not also an ordinary criminal offence[27] or a fiscal offence.[28] As explained below in Section IV.B.2, concerning transfer of persons to the court, none of these exceptions apply to the core crimes of genocide, other crimes against humanity or serious violations of humanitarian law.

b. Fair trial and fair treatment

[26] UN Mutual Assistance Treaty, Art. 4 (1) (b) ("Assistance may be refused if: . . . The offence is regarded by the requested State as being of a political nature."); European Convention on Mutual Assistance, Art. 2 (a) ("Assistance may be refused: (a) if the request concerns an offence which the requested Party considers a political offence"); Commonwealth Scheme, Art. 7 (1) (b) ("an offence or proceedings of a political character"); ECOWAS Convention, Art. 4 (1) (b) ("the offence is regarded by the requested Member State as being of a political nature"). However, Article 7 (4) of the Commonwealth Scheme excludes any political offence from this exception to the obligation to provide assistance "if it is an offence within the scope of any international convention to which both the requesting and the requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence". This would cover some of the core crimes.

[27] UN Mutual Assistance Treaty, Art. 4 (1) (f) ("Assistance may be refused if: . . . The act is an offence under military law, which is not also an offence under ordinary criminal law"); European Convention on Mutual Assistance, Art. 1 (2) ("This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law."); Commonwealth Scheme, Art. 7 (1) (c) ("conduct which in the requesting country is an offence only under military law or a law relating to military obligations"); ECOWAS Convention, Art. 4 (1) (f) ("offences related to military law which do not constitute offences under ordinary criminal law") .

[28] UN Mutual Assistance Treaty, Art. 1, n. 34 (states may wish to include fiscal offences as grounds for refusal); European Convention on Mutual Assistance, Art. 2 (a) ("Assistance may be refused: . . . if the request concerns . . . a fiscal offence.").

Some mutual assistance instruments permit states to refuse such assistance to other states when the courts or authorities of the requested state determine that the criminal proceeding in the requesting state involved persecution,[29] double jeopardy (*non bis in idem*),[30] proceedings pending in the requested state,[31] unfair measures to compel testimony,[32] the absence of probable cause,[33] incompatible concepts of law (such as the absence of dual criminality - meaning the act is criminal in both the requesting and requested state), the use of the death penalty or prosecution after the lapse of a period of limitations.[34] As explained below in Section IV.B.2, none of these grounds have any relevance to state cooperation and assistance to the permanent international criminal court.

Article 41 of the ILC draft statute contains extensive fair trial guarantees which would prevent prosecution motivated by a desire to persecute and prohibit compelling an accused to testify against himself or herself or to confess guilt. The prohibition of double jeopardy under international law does not prohibit a court in one jurisdiction from retrying a person previously tried in another jurisdiction; indeed, one of the purposes of the international criminal court will be to retry persons who have received a sham or

[29] UN Mutual Assistance Treaty, Art. 4 (1) © ("Assistance may be refused if: . . . © There are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that person's race, sex, religion, nationality, ethnic origin or political opinions or in that that person's position may be prejudiced for any of those reasons"); Commonwealth Scheme, Art. 7 (2) (b) (fear of prosecution "on account of his race, religion, nationality or political opinions"); ECOWAS Convention, Art. 4 (1) (c) (prosecution on grounds of "race, sex, religion, nationality, ethnic origin or political opinions").

[30] UN Mutual Assistance Treaty, Art. 4 (1) (d) ("Assistance may be refused if: . . . (d) The request relates to an offence that is subject to investigation or prosecution in the requested State or the prosecution of which in the requesting State would be incompatible with the requested State's law on double jeopardy (*ne bis in idem*)"); Commonwealth Scheme, Art. 7 (1) (d) ("conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country"); ECOWAS Convention, Art. 4 (1) (d) ("an offence that is subject to investigation or prosecution in the requested Member State or the prosecution of which in the requesting Member State would be incompatible with the requested State's law on double jeopardy").

[31] ECOWAS Convention, Art. 4 (3) ("The requested state may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the territory of a requested Member State."), Art. 4 (4) (execution could be subject to conditions if the requesting state accepts). Similar grounds for delay have been included in recent bilateral treaties. "Mutual Legal Assistance Treaties", U.S. *Digest*, Ch. 6, § 6, 86 Am. J. Int'l L. (1992), pp. 548, 552.

[32] UN Mutual Assistance Treaty, Art. 4 (1) (e) ("Assistance may be refused if: . . . (e) The assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction"); Commonwealth Scheme, Art. 8 (1) (authorities of requested state shall use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country"); ECOWAS Convention, Art. 4 (1) (e) (requested state not required "to carry out compulsory measures that would be contrary to its laws and practice had the offence been the subject of investigation or prosecution under its own jurisdiction").

[33] Recent bilateral treaties permit the requested state to refuse to cooperate when its courts or authorities determine that there was no probable cause for the request. See "Mutual Legal Assistance Treaties", U.S. *Digest*, Ch. 6, § 6, 86 Am. J. Int'l L. (1992), pp. 548, 552.

[34] UN Mutual Assistance Treaty, Art. 4 (1), n. 34 (suggesting some states may wish to include these grounds). Commonwealth Scheme, Art. 7 (1) (a) (requested country determines "conduct would not constitute an offence under the law of that country"); ECOWAS Convention, Art. 25 (compliance with request only "if the act on which the request is based would be an offence if committed in the territory of the requested Member State").

unfair trial in a national court.[35] However, Amnesty International has recommended that Article 42 of the ILC draft statute be amended to prohibit retrial by the permanent international criminal court of an accused who has been acquitted or convicted by that court.[36] As explained below in Section IV.B.2.e, the concept of dual criminality has no place in the context of an international criminal court.[37] It is inconceivable that a court created within the framework of the UN would have the power to impose the death penalty.[38] Moreover, statutes of limitation are impermissible for crimes of the magnitude of genocide, other crimes against humanity and serious violations of humanitarian law (see Section IV.B.2.h below). **States should not be permitted to refuse cooperation with the permanent international court on the ground that the proceedings might be unfair since it will be the responsibility of the court which they create to protect the rights of suspects and accused.**

c. National interest

[35] ILC draft statute, Art. 42 (2) (b). See also *Part I*, pp. 63-64.

[36] *Id.*, p. 63.

[37] Even in the context of mutual assistance, however, there is a marked shift away from permitting states to refuse to cooperate with each other on the ground of the absence of dual criminality. See, for example, the recent practice of Argentina, Spain, United States and Uruguay. "Mutual Legal Assistance Treaties", U.S. *Digest*, Ch. 6, § 6, 86 Am. J. Int'l L. (1992), pp. 548, 552.

[38] More than a quarter century ago, the General Assembly declared that "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". GA Res. 2857 (XXVI), 20. Dec. 1971.

Mutual assistance instruments permit states to refuse such assistance in criminal matters to other states when they unilaterally determine that compliance with the other state's request would infringe their national sovereignty, security, public order (*ordre public*) or other national interests.[39] The concept of national sovereignty is no longer seen as permitting states unrestricted license, but as describing their rights and concomitant obligations within an international framework of law:

> "There is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of state rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary are unlimited. Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community."[40]

Moreover, the repression of crimes of the most serious concern to the international community is, by definition, a matter of international responsibility for all states. When they are unable or unwilling to do so themselves, then they must do all in their power to ensure that these crimes under international law will be effectively repressed by an international criminal court. Investigation and prosecution by an international criminal court can only strengthen the international framework of peace and security essential for national sovereignty, security, public order and other national interests to exist. **States should not be permitted to refuse cooperation with the permanent international court on the ground of national interest since it will be the responsibility of the court which they create to ensure that the national interest of an individual state is carefully balanced against the interests of the entire international community in repressing crimes which undermine the entire framework of international law.**

> ***". . . to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions."***
>
> ***Prosecutor v. Blaski_*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108 *bis* (Appeals Chamber), 29 October 1997**

Addressing national security concerns. Many of the crimes falling within the jurisdiction of the permanent international criminal court are likely to involve military

[39] UN Mutual Assistance Treaty, Art. 4 (1) (a) ("Assistance may be refused if: (a) The requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interests"); European Convention on Mutual Assistance, Art. 2 (b) ("Assistance may be refused: . . . (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country"); Commonwealth Scheme, Art. 7 (2) (a) ("contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country"); ECOWAS Convention, Art. 4 (1) (a) ("would prejudice its sovereignty, security and public order").

[40] Jennings & Watts, 1 *Oppenheim's International Law*, *supra*, n. 7, p. 12 (footnote omitted).

officials, in many cases commanders, and to require investigation of sensitive matters of national security. In some cases, states outside the territory of the state where the crime occurred may have information based on sensitive intelligence sources, or, perhaps, because they provided training to military or security forces in the state where crimes occurred. The statute and rules of the court created by the states themselves can adequately address these two legitimate state concerns about national security without sacrificing its effectiveness in repressing crimes of the most serious international concern.

The Appeals Chamber of the Yugoslavia Tribunal has explained why it is essential to provide such information to the court:

> ". . . to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and 'defeat its essential object and purpose'. The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined."[41]

The Yugoslavia and Rwanda Tribunals have demonstrated that legitimate state concerns about sensitive intelligence information can be adequately addressed by permitting states to provide such information on a confidential basis to assist the prosecution in locating admissible evidence without disclosing sources or intelligence operations.[42] However, in all cases, the court itself must review the information and assess the validity of the state's claims, if strictly necessary under Article 14 (1) of the International Covenant on Civil and Political Rights in *in camera* proceedings.[43] The Appeals Chamber of the Yugoslavia indicated a number of possible criteria and practical measures which a trial chamber could use in assessing the validity of these claims, and, although Amnesty International does not necessarily endorse each of them as consistent with the right to a fair trial, they demonstrate that practical solutions to this problem can be found.

B. Types of international assistance required

[41] *Blaski_* Appeals Chamber judgment, para. 65.

[42] Yugoslavia Rules, Rules 66 (c) and 77 (B); Rwanda Rules, Rules 66 (c) and 77 (B).

[43] *Blaski_* Appeals Chamber judgment, para. 68.

The statute should ensure that the court, particularly the office of the prosecutor and the unit or units with responsibility for victim and witness protection and support, have sufficient flexibility to make the necessary arrangements for state cooperation and assistance in the light of experience and rapidly changing technology. Guidelines for most of these arrangements should generally be left to the rules or to internal guidelines developed by the relevant part of the court. Unduly rigid provisions in the statute could limit the ability of the court to respond quickly and efficiently to developments, particularly urgent matters. For example, a requirement that all communications and documentation go through the office of the registrar and through a central authority of the state could seriously impede the court. Most of the cooperation and assistance between the two *ad hoc* tribunals and states has been conducted directly between the branches or units in the tribunals and the state authorities directly concerned, not through the Registrars or through central state authorities. Article 57 (1) and (2) of the ILC statute require all communications to be in writing or forthwith reduced to writing and to go through "the competent national authority and the Registrar" or, when appropriate, through the International Criminal Police Organization (Interpol). Paragraph 3 sets out detailed requirements for the contents of a request for assistance. **Article 57 should be amended to provide that the court shall determine the procedure for requests for assistance and communications, including direct contacts with relevant officials.**

1. State cooperation and assistance not requiring logistical help or compulsory process

> ***"For us, the ability to conduct on-site investigations without the presence of local officials is essential if cases are to be properly investigated in the area where an incident is alleged to have occurred. . . . . we have been obstructed by officials on the ground on many occasions. If our investigations in the area of conflict were required by our own statute to be conducted under the scrutiny of local authorities, the credibility of much of our evidence would have been questionable, many potential witnesses would not have come forward, and much of the documentary and other physical evidence we have managed to collect, often under very difficult circumstances, would never have been disclosed."***
>
> **William Fenrick, Senior Legal Adviser, International Criminal Tribunal for the former Yugoslavia, addressing Working Group 2 of the Preparatory Committee on the Establishment of an International Criminal Court, 4 August 1997**

One of the most important forms of state cooperation with investigations by the prosecutor and counsel for the accused requires no logistical help or use of compulsory process. The experience of the two *ad hoc* tribunals demonstrates that a large part of an effective investigation by an international criminal court can be done simply through on-site interviews of witnesses and visits to places where crimes have occurred by the prosecution or defence investigators.[44] It is essential that these investigators be able to move freely and unaccompanied by local authorities. They must be able to move promptly to follow up leads and, therefore, to be able to visit the territory of a state party

[44] As explained in this section, the suggestion in *dicta* by the Appeals Chamber that on-site investigations, unless authorized by national legislation or special agreements or in the states or entities of the former Yugoslavia, can only be carried out by the Yugoslavia Tribunal through national authorities (para. 55) would not be an effective model for the permanent international criminal court to adopt.

on simple notice without special consent to each visit. The increasing number of precedents for such visits by international bodies, both by prosecution and defence investigators for the *ad hoc* tribunals and under treaties establishing investigation bodies, shows that such access is essential and no danger to state sovereignty. Moreover, states are increasingly providing a wide variety of analogous types of passive mutual assistance which demonstrates that on-site visits by a requesting jurisdiction can further the cause of international justice. Indeed, it can be said that if the prosecution and defence cannot conduct prompt, unaccompanied and unrestricted visits to the territory of states parties without the necessity of obtaining separate consents for each visit, the court will be risk being ineffective in most cases. **The ILC draft statute should be amended to provide that states parties consent by ratifying the statute to on-site investigations on notification to the state party concerned, without requiring separate state consent for each visit.**

The experience of the two* ad hoc *tribunals. The investigators of the Office of the Prosecutor for the Yugoslavia and Rwanda Tribunals, as well as investigators for defence counsel for persons accused by those tribunals, quickly realized that if they were to be able to conduct effective investigations, they had to be able to visit the territory of UN Member States on a moment's notice to be able to interview witnesses in person who might suddenly become available or who were in precarious situations. Thus, the President of the Yugoslavia Tribunal sent Tentative Guidelines for National Implementing Legislation of United Nations Security Council resolution 827 of 25 May 1993 (Yugoslavia Tribunal Guidelines) to UN Members on 15 February 1995 providing that "[w]itnesses and experts in the territory of the State will be interviewed by the Prosecutor and/or Defence Counsel after the competent authorities have been duly notified by the International Tribunal."[45] When states have, despite the Yugoslavia Tribunal Guidelines, required consent for each visit, this has often led to lengthy negotiations and delays which limit the effectiveness of the visits if they ultimately took place. Of course, some countries - not just those where the crimes have occurred - have delayed giving permission to prosecution and defence investigators for years to conduct such visits. As one expert has stated in the context of mutual assistance between states in criminal matters: "Mutual assistance will never achieve the full results of which it is capable, unless its operation is both quick and easy. Speed is imperative if crime is to be fought successfully."[46]

[45] Yugoslavia Tribunal Guidelines, Guideline 9 (2).

[46] Dussaix, "Some Problems Arising from the Practical Application, from the Judicial Point of View, of the European Convention on Mutual Assistance in Criminal Matters", *in* European Committee on Crime Problems, *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters* (1971), pp. 37, 39.

Prosecution and defence investigators also rapidly discovered that it was essential to be able to interview many witnesses in complete privacy without the presence of local authorities, whether the interview took place in Rwanda, one of the countries of former Yugoslavia or in countries far removed from the crimes.[47] Many victims and witnesses were reluctant to tell their story to investigators under any circumstances, such as victims of rape, sexual abuse and forced prostitution. The special needs of victims of these crimes has led to the development of carefully tailored interviewing techniques and the use of specially trained interviewers, particularly women interviewers when the victims were women.[48] The presence of a judge or other national official often made the victim refuse to tell the story or made the interview ineffective. Many of the victims and witnesses in countries remote from the atrocities are asylum seekers or persons without the necessary immigration papers and fearful of any authorities, who are seen as likely to send them back to the places where they saw or suffered the most horrendous crimes. Such victims or witnesses often refuse to tell their story before any local official, even with assurances that they will not face *refoulement*. Similarly, at least one state far from the former Yugoslavia and Rwanda has refused permission to prosecution investigators to interview soldiers without the presence of the commanding officer. Even if the investigator was not seeking information from the soldier concerning possible command responsibility of an officer for crimes or concerning training of military or security forces, the commanding officer's presence could limit the usefulness of the interview. **The statute should provide that prosecution and defence investigators can visit any part of the territory of a state party, unaccompanied, without restriction.** As seen below, most states are parties to treaties in other subject areas permitting investigation bodies to have almost completely unrestricted access to all parts of their territories relevant to the investigation.

Precedents for on-site visits by treaty investigation bodies on notification rather than separate consent for each visit. States have agreed in other contexts to establish international treaty monitoring bodies having the power to conduct thorough on-site investigations of military facilities and weapons factories, as well as of all places of detention, after simple notice, rather than requiring separate consents for each visit. The international monitoring bodies also have been granted power to meet with anyone who has relevant information without hindrance and to meet persons in detention in complete privacy. Such precedents demonstrate that states see such on-site visits by international investigators to investigate the most sensitive matters, such as military installations, defence industry plants, jails and prisons are consistent with state sovereignty.

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[47] The Appeals Chamber in the *Blaski_* judgment noted that in states on the territory of which crimes have been committed where state authorities might be implicated in the crimes

> "to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardise investigations by the Prosecutor or defence counsel. In particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly also his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions."

*Blaski_* Appeals Chamber judgment, para. 53. As explained below, however, related concerns about the presence of state authorities during investigations may exist in other states.

[48] *Part II*, pp. 10, n. 21; 38-39.

Under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), any state party may "request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party" to resolve any question concerning possible non-compliance with the convention and "to have this inspection conducted anywhere without delay by an inspection team".[49] The challenged state party must permit the on-site inspection authorized by the Executive Council elected by the states parties to the convention.[50] The challenged state party has the obligation "to enable the inspection team to fulfil its mandate" and "to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance".[51] Although the state party may "take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to [the] Convention", the determination whether the state has complied with its obligations to provide access during a challenged inspection is to be decided by the Executive Council, based on the report of the inspection team, not by the challenged state.[52] As a safeguard against possible abuse, the Executive Council may, by a three-quarters majority vote decide against carrying out a challenge inspection on the grounds that the inspection request is "frivolous, abusive or clearly beyond the scope of this Convention", but the deliberations "shall not delay the inspection process".[53] As of 29 August 1997, more than four-fifths of the UN member states had signed, ratified or acceded to the convention.[54]

[49] Chemical Weapons Convention, *reprinted in* United Nations Centre for Disarmament Affairs, Disarmament: The Chemical Weapons Convention with Selective Index, UN Sales No. E.95IX.2 (1994), Art. IX (8).

[50] *Id.*, Art. IX (10).

[51] *Id.*, Art. IX (11).

[52] *Id.*, Art. IX (21) and (22).

[53] *Id.* Art. IX (16) and (17).

[54] As of 29 August 1997, 98 states had ratified or acceded to the convention and 60 other states had signed the convention, but not yet ratified it.

Similarly, each state party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention for the Prevention of Torture) agrees to permit visits by the Committee for the Prevention of Torture established under the convention "to any place within its jurisdiction where persons are deprived of their liberty by a public authority".[55] Such visits are carried out on notice to the state party, without a separate requirement of consent by the state party, and the state party must permit the Committee unlimited access to all places of detention without restriction and interview in private persons deprived of their liberty.[56] In exceptional circumstances, a state may request the Committee to make alternative arrangements, but it may not prevent a visit.[57] Almost every member of the Council of Europe has signed or ratified the convention.[58]

[55] European Convention for the Prevention of Torture, Doc. No. H (87) 4 (1987), *entered into force* 1 Feb. 1989, Art. 2. "Visits may take place in any circumstances. The Convention applies not only in peace time, but also during war or any other public emergency." Council of Europe, Explanatory Report, para. 29.

[56] European Convention for the Prevention of Torture, Art. 8. In certain situations, the visits could take place immediately after notification. Council of Europe, Explanatory Report, para. 56. Although the state party may require that an official accompany the Committee "in places which are secret for reasons of national defence or which enjoy special protection for reasons of national security. . . , an accompanying person must not be present at the interviews in private". Council of Europe, Explanatory Report, para. 63. In such private interviews, the Committee "can choose its own interpreters and must not be subjected to any time-limits". *Id*., para. 66. In addition, "[t]he Committee may communicate freely with any person whom it believes can supply relevant information." Convention for the Prevention of Torture, Art. 8 (4).

[57] In "exceptional circumstances", the authorities may make representations to the Committee for the Prevention of Torture "against a visit at the time or to the particular place proposed by the Committee", but "[s]uch representations may be made only on the grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress". *Id*., Art. 9 (1). The "exceptional circumstances" when the authorities may make such representations are to be narrowly construed since "[v]isits may take place in any circumstances", including "war or any other public emergency". *Id*., para. 29. States parties may not prevent the visit, but may simply request other arrangements to be made with respect to the visit. The convention requires that the state party making the representations in these exceptional circumstances and on these limited grounds "immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Committee proposed to visit." *Id*., Art. 9 (2). In all cases, "the Committee should carry out the visit within a reasonable time after the notification". Council of Europe, Explanatory Report, para. 56.

[58] As of 3 July 1997, 35 of the 40 member states of the Council of Europe had ratified the European Convention for the Prevention of Torture and four other member states had signed it. Council of Europe, Chart of Signatures and Ratifications of European Treaties, updating as of 3 July 1997.

The extensive precedents of passive mutual assistance. There is a wide variety of types of passive mutual assistance[59] between states in criminal matters in which the requested state permits the requesting state to conduct investigations on its territory, involving the presence of police or judicial officials from the requesting state. Such passive mutual assistance has included permitting consuls of the requesting state to take testimony in the requested state, authorizing investigations by military police and arrests of the requesting state's military forces on the territory of the requested state, allowing civilian police investigations and the establishment of offices of ministry of justice and treasury officials on the requested state's territory and even permitting the police forces of one state in carefully defined circumstances to cross the border into another state in hot pursuit of suspects. Moreover, in the context of peace-keeping, states have permitted peace-keeping operations to arrest and prosecute persons suspected of crimes or to transfer them to international tribunals.

[59] In the context of cooperation between states in the service of documents, *passive mutual assistance* consists "solely of sufferance of the acts of foreign sovereigns"; *active mutual assistance* consists of a foreign sovereign (requesting state) seeking the aid of another state's court in order to effect service of process of the foreign sovereign's document within the requested state. Gerhard O.W. Mueller, *supra*, n. 18, p. 199.

States frequently permit ***consuls of requesting states to take testimony of witnesses in their territory*** who volunteer to testify, including citizens of the requested state, without seeking separate consent for each witness and without using letters rogatory. For example, "[t]he United States permits a foreign consular officer to receive the testimony of any person, including an American citizen, when requested to do so by a court in his own country."[60] States have also entered into agreements permitting ***military police of armed forces stationed in their territories to conduct investigations of military offences and to arrest the members of those forces***. For example, under the North Atlantic Treaty Organization Status of Forces Agreement, NATO member states implicitly agreed to render "at least passive quasi-judicial assistance, to the extent of suffering military police and shore patrols on the national territory, where necessary to police the armed forces of the visiting nation."[61] There is a long history of states permitting ***foreign police investigators to operate on their national territory***, even including setting up offices for such foreign police investigators. For example, on 4 November 1977, France and Germany agreed to permit police officers of both countries to conduct surveillance on each other's territory[62] and in 1990 the parties to the Schengen Implementing Convention agreed to permit similar cross-border surveillance operations.[63] A number of states permit police officers to be stationed in their countries on mission.[64] The United States Department of the Treasury has maintained an official office and staff of agents in Italy and in several other foreign countries who "are constantly and closely cooperating with the national and local police authorities of the host country" and the Federal Bureau of Investigation (FBI) "has cooperated extensively with the *police judicaire* in other nations".[65] One leading authority has concluded that such passive mutual assistance does not undermine national sovereignty.[66] States are now beginning to permit far more intrusive forms of passive mutual assistance, including ***cross-border***

[60] Gerhard O.W. Mueller, *supra*, n. 18, p. 203; see also McCusker, "Some United States Practices in International Judicial Assistance", 37 Dept. State Bull. (1957), pp. 808, 809, *cited in* Mueller, p. 199, n. 38; Jennings & Watts, I *Oppenheim's International Law*, *supra*, n. 7, p. 1141.

[61] Gerhard O.W. Mueller, *supra*, n. 18, p. 210.

[62] Malcolm Anderson, *Policing the World: Interpol and the Politics of International Police Cooperation* (Oxford: Oxford University Press: 1989), p. 158.

[63] Schengen Implementing Convention, *signed* 19 June 1990, Art. 40.

[64] Anderson, *supra*, n. 62, pp. 159-165.

[65] Gerhard O.W. Mueller, *supra*, n. 18, p. 211. Such informal passive mutual assistance is quite extensive:

> "Information on the movement of suspects engaged in international criminal transactions and of contraband - narcotics in the case of United States Treasury Agents - is being exchanged. Upon the request of the host country the American agents will relay information to the United States, warranting arrests, as well as searches and seizures in the host nation, under United States law, and *vice versa*. It is to be noted that these relations exist in the complete absence of any treaty, executive agreement or official government compact. Evidence of due process violations resulting from such procedures has not come to our attention. It appears that the officers will act only where the law of the country in which the act is to be performed will permit it."

Id. The most comprehensive discussion of these developments is in Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (1993), particularly pp. 103-187.

[66] Gerhard O.W. Mueller, *supra*, n. 18, p. 211 (". . . there seems to be no reason for sovereign objections to the participation of foreign law enforcement officers in the official activities of local law enforcement agencies, if the foreign agents act merely in an advisory or observers' capacity, *e.g.*, for purposes of identification.").

hot pursuits of suspects from one state to another. For example, the parties to the 1990 Schengen Implementing Convention have agreed to permit their police forces to cross each other's national borders in certain circumstances when they are in pursuit of persons suspected of committing crimes.[67]

In the context of peace-keeping, states have ***authorized peace-keeping operations to arrest and prosecute persons suspected of crimes and to arrest and transfer persons indicted by international criminal tribunals to those tribunals***. For example, the United Nations Transitional Administration in Cambodia (UNTAC) was permitted under the peace agreements to issue binding directives to public security agencies, to have "unrestricted access to all administrative operations and information", to supervise and control civil police forces "in order to ensure that . . . human rights and fundamental freedoms are fully protected", to "supervise other law enforcement and judicial processes throughout Cambodia", and to arrest, detain and prosecute offenders.[68] Under the Dayton peace agreement, the multinational Stabilization Force (SFOR) (formerly Implementation Force or IFOR) has the power to arrest persons in the territory of Bosnia and Herzegovina indicted by the Yugoslavia Tribunal and has been repeatedly asked by the Government of Bosnia and Herzegovina to exercise these law enforcement powers.[69]

2. Investigation methods usually requiring logistical support from states

The prosecution and defence investigators will need to have logistical support from states parties for certain aspects of investigations, such as exhumations, identifying and locating witnesses and providing witness protection. The statute will need to ensure that states parties provide such investigative support.

[67] Schengen Implementing Convention, Arts 41-43. Belgium, Luxembourg and the Netherlands had reached a similar agreement in the Treaty of 27 June 1962 Concerning Extradition and Mutual Assistance in Criminal Matters, Art. 27, and Protocol of 1974, *reprinted in* William C. Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge: Grotius Publications Limited, 1995), pp. 97-103, 104-109. For further information about the Schengen Implementing Convention, see the paper by William C. Gilmore in *Action against Transnational Criminality: Papers from the 1993 Oxford Conference on International and White Collar Crime* (London: Commonwealth Secretariat 1994), pp. 148-152, and A.H.J. Swart, "Police and security in the Schengen Agreement and Schengen Convention", *in Internationalisation of Central Chapters on the Law of Aliens, Refugees, Security and Police* (December 1991), pp. 96-109.

[68] Agreements on Comprehensive Political Settlement of the Cambodia Conflict, *signed at* Paris, 23 October 1991, *published in* UN Department of Public Information, DPI/1180, Jan. 1992; Directives 93/1 and 93/2 of Special Representative of the Secretary-General; Amnesty International, *Peace-keeping and Human Rights* (AI Index: IOR 40/01/94), p. 5.

[69] Amnesty International, *Bosnia-Herzegovina: The international community's responsibility to ensure human rights* (AI Index: EUR 63/14/96), p. 9, 64-77.

Although some exhumations of graves containing small numbers of bodies can be conducted by investigators without any logistical support by the host state, many of the cases which will come before the permanent international criminal court will involve the ***exhumation of mass graves*** and require assistance in providing excavation equipment, site security, forensic assistance and electricity for refrigeration units. Article 52 (1) (c) of the ILC draft statute authorizes the court to request state assistance in providing security, but only as a provisional measure, and does not expressly address other types of assistance: "In case of need, the Court may request a State to take necessary provisional measures, including the following: . . . .(c) to prevent . . . the destruction of evidence." In many cases, state authorities will have ***information which will enable investigators to identify and locate witnesses***. Indeed, the Yugoslavia Tribunal Guidelines expressly provide that states should provide such information.[70] Mutual assistance instruments require states parties to help identify and locate witnesses.[71] In many cases, ***victims and witnesses will require effective protection*** under witness protection programs during the investigation, trial and afterwards, often involving relocation of the victims and witnesses and their families to another country temporarily or, in some cases, permanently.[72] In the summer of 1997, the United Kingdom became the first state to enter into a formal agreement with the Yugoslavia Tribunal on witness relocation.

The ILC draft statute contains two provisions authorizing the court to take steps to protect victims and witnesses. Article 43 provides that "[t]he Court shall take necessary measures available to protect the accused, victims and witnesses. . . ." The ILC commentary states that this duty applies "throughout", but it does not apply to suspects. In addition Article 52 (1) (c) states that "[i]n case of need, the Court may request a State to take necessary provisional measures, including the following : . . (c) to prevent injury to or the intimidation of a witness. . . ." **The court should have sufficient power under the statute to be able to require states parties to provide such protection under court supervision, not merely as a provisional measure, but also over the long term for as long as a victim, witness or family member is in danger. To ensure that states share the burden of such protection programs, the court should assign victims and witnesses to states on an equitable basis and the court should permit deferral of the expenses of such programs when they are assumed by least developed countries.**

3. State cooperation and assistance usually requiring compulsory process

[70] "Requests for assistance addressed through the State organs referred to in Article 3 to the police or any judicial bodies shall be complied with. Such assistance may include but is not limited to: (a) the identification and location of persons . . ." Yugoslavia Tribunal Guidelines, Guideline 8 (a).

"At the request of the International Tribunal, courts or other competent authorities will provide all necessary assistance for the identification, location and interviewing of witnesses and experts within the State." *Id.*, Guideline 9 (1).

"Relevant data from police files concerning crimes coming under the jurisdiction of the International Tribunal shall be supplied to the International Tribunal in accordance with instructions given by the Ministry of Justice [or any other appropriate Ministry or authority]". *Id.*, Guideline 10.

[71] Commonwealth Scheme, Art. 13 (a), (14).

[72] For a discussion of the needs of the witness protection, see *Part II*, pp. 36-38.

The most effective system for providing international assistance where the state authorities or individuals must be compelled to provide evidence or take action, such as to protect investigators, evidence or witnesses, is direct enforcement of orders and requests of the permanent international criminal court. Such a system would avoid delay and inefficiency inherent in any system with two layers of responsibility, one international, the other national. As stated above, in the context of mutual assistance between states in criminal matters, speed is of the essence. This is equally true of international assistance by states to an international criminal court which they themselves create. The failure to establish a system of direct enforcement would entail serious risks to the authority and effectiveness of the permanent international criminal court, and states must consider seriously the implications of rejecting a system of direct enforcement. **The statute should provide that court orders are directly enforceable against an individual within the territory or jurisdiction of any state party when the investigation or prosecution is based on a state complaint or on the prosecutor's own motion, based on information from any source; court orders when the investigation or prosecution is based on a Security Council referral should be directly enforceable in all UN Member States.**

Challenges in a national court to implementation by state authorities of the permanent international court's orders would have to be limited to questions concerning compliance with national procedure (provided such procedure was in accordance with international standards); challenges to the order itself or alleging a failure to comply with a state's international obligations, including international standards concerning fair trial, should be raised only in the permanent international criminal court. Any challenges in the national court would have to be heard on an expedited basis. In any event, in all cases, the permanent international criminal court must be able to decide whether a successful challenge in a state court to its orders and requests should be permitted to stand. Otherwise, procedural errors by national authorities could undermine the speedy and efficient course of international justice. Indeed, the two *ad hoc* international criminal tribunals have encountered lengthy delays in some national jurisdictions in the context of international assistance (see Section II.B.1) and transfers of accused.

Service of documents. **The statute should authorize the court to request any state to serve documents and require states parties to comply with such requests for assistance fully and without delay, whether the request is made by a chamber, the registrar or the prosecutor.** Provisions concerning the service of documents are found in the Yugoslavia and Rwanda Statutes[73] and mutual assistance instruments.[74] **Details concerning such requests, however, should be spelled out in the rules.** Article 51 (1) © of the ILC draft provides that the registrar may transmit to any state a request for cooperation and judicial assistance in the service of documents.

Taking testimony and statements. As indicated above, in a large number of cases, prosecution and defence investigators will be able to interview victims and witnesses who tell their stories voluntarily, provided that no third parties are present, and, will be able to persuade them to testify, provided that they are reimbursed their expenses

[73] Yugoslavia Statute, Art. 29 (2) (c); Rwanda Statute, Art. 28 (2) (c).

[74] See, for example, UN Mutual Assistance Treaty, Art. 10; European Convention on Mutual Assistance, Art. 7; Commonwealth Scheme, Art. 15; ECOWAS Convention, Art. 10; Ellis & Pisani, *supra*, n. 7, p. 164; McClean, *International Judicial Assistance*, *supra*, n. 18, pp. 135-136.

to come to the court and, where necessary, receive adequate protection. Nevertheless, in some cases, it will be impossible to secure the testimony of witnesses without a court order. **The statute must ensure that the court has power to compel *the attendance of any witness, whether a state official or a private individual,* before it, at the seat of the court, the place where the trial or hearing is being held or, in exceptional circumstances, in some other location by means of a video link permitting cross-examination by the prosecution and defence in person or by video link.**[75]

[75] See Resolution 95/C 327/04 of the Council of the European Union on the protection of witnesses in the fight against international organized crime adopted on 23 November 1995 for one attempt to define guidelines for such video testimony consistent with the rights of the accused.

If the permanent international criminal court is to be effective, it must have greater power than the Yugoslavia and Rwanda Tribunals to compel witnesses to appear before it. Article 18 (2) of the Yugoslavia Statute gives the Prosecutor the power to question witnesses and to seek the assistance of state authorities; Article 19 (2) provides that a judge may issue orders on the request of the Prosecutor. Article 29 of the Yugoslavia Statute provides that "[s]tates shall comply without undue delay with any request for assistance or order issued by a Trial Chamber, including, but not limited to: . . . . (b) the taking of testimony . . . ."[76] The Yugoslavia and Rwanda Rules expressly provide that the Prosecutor may in the course of the investigation "summon and question suspects, victims and witnesses and record their statements" and seek the assistance of any state or international body to that end and the tribunal Trial Chambers may "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary" for the investigation or trial.[77] Article 9 (3) of the Yugoslavia Tribunal Guidelines provides: "Persons in the State who are summoned by a Judge or a Trial Chamber of the International Tribunal to appear as witnesses or experts, shall comply with that summons." Although on their face these provisions would appear to permit the Yugoslavia Tribunal to issue an order to a state official to testify and to produce documents, the Appeals Chamber in the *Blaski_* judgment, in *dicta* which went beyond the narrow issue of whether the Yugoslavia Tribunal had power to issue a *subpoena duces tecum* ordering the Minister of Defence to produce documents, narrowly limited the scope of the Yugoslavia Tribunal's power to compel state officials to testify or produce documents. States should reject this approach.

The Appeals Chamber stated in *dicta* that Articles 18 (2) and 19 (2) conferred on the Yugoslavia Tribunal "an incidental or ancillary jurisdiction over individuals other than those whom the International Tribunal may prosecute or try", including "individuals acting in their private capacity", such as "State agents who, for instance, witnessed a crime before they took office, or found or were given evidentiary material of relevance for the prosecution of the defence prior to the initiation of their official duties"[78] It also includes "a government official who, while engaged on official business, witnesses a crime within the jurisdiction of the [International] Tribunal being committed by a superior officer" because, although the individual was undoubtedly present at the event in his official capacity; however, arguably he saw the event *qua* individual".[79] Thus, according to the Appeals Chamber, if an officer in the course of a routine transfer to another combat zone overhears a superior office issuing orders to shell civilians, the officer was acting in a private capacity and could be compelled to testify, but, in contrast, "the State official, when he witnessed the crime, was actually exercising his functions, i.e., the monitoring of the events was part of his official functions, then he was acting as a State organ and cannot be subpoenaed", for example, if the official overheard the order to shell civilians while on an official inspection concerning behaviour of the belligerents on the battlefield".[80] Such a distinction should not be adopted in the statute or jurisprudence of the permanent international criminal court. It would make prosecutions of superior officers, commanders and heads of state and government virtually impossible;

[76] Article 28 of the Rwanda Statute is identical.

[77] Yugoslavia Rules, Rules 39 (I), (iii); 54; Rwanda Rules, Rules 39 (I), (iii); 54.

[78] *Blaski_* Appeals Chamber judgment, paras 48-49.

[79] *Id.*, para. 50.

[80] *Id.*

it would also make it difficult to prosecute most serious violations of humanitarian law as the only witnesses would in many cases be fellow combatants. However, the Appeals Chamber did conclude that state officials in an international peace-keeping force and officials cut off from effective control of the central authorities could be compelled to testify and produce documents.[81]

[81] *Id.*; *id.*, para. 51.

Provisions in mutual assistance agreements between states are generally unsatisfactory models for state cooperation with the permanent international criminal court in this respect as they usually permit witnesses to refuse to appear in the court of the requesting state and to refuse testify in the requested state on grounds of privileges under the law of the requested state. Multilateral instruments concerning mutual assistance permit witnesses in the requested state who are at liberty to refuse to appear in the requesting state.[82] Many bilateral mutual assistance treaties are similarly limited in scope.[83] However, at least one bilateral treaty has included a provision requiring that a witness appear in the requesting state to testify, thus demonstrating that requiring that a person located in one state appear as a witness before a court in another state is consistent with state sovereignty.[84] If the permanent international criminal court is to be effective, it must be able to summon any witness in the territory of any state party to appear before it, either at the seat of the court or in some other location where proceedings are taking place. As a leading expert on mutual assistance has noted, "[f]rom the point of view of the prosecution, there are some cases in which progress cannot be made unless the witness attends in the requesting State. . . ."[85]

[82] Thus, a state may request a state to invite a person at liberty in that state to appear in the requesting state as a witness, UN Mutual Assistance Treaty, Art. 14 (1), but a person who does not consent to a request to accept such an invitation "shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure, notwithstanding any contrary statement in the request or summons". *Id.*, Art. 15 (3). Similarly, Article 7 (1) of the European Convention on Mutual Assistance requires the requested state to serve writs issued by the requesting state, Article 8 provides that persons served with a summons incur no penalty for failing to appear:

> "A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned."

Other multilateral mutual assistance instruments also do not require the requested state to compel witnesses to appear in the requesting state. Commonwealth Scheme, Art. 23 (4); ECOWAS Convention, Art. 12.

[83] See, for example, Ellis & Pisani, *supra*, n. 72, p. 165.

[84] Treaty on Mutual Assistance in Criminal Matters with the Italian Republic (United States), *signed at Rome* 9 November 1982, Art. 15 (1), *cited in* Ellis & Pisani, *supra*, n. 72, p.165, n. 94 & pp. 177-178, n. 174. There are serious limitations with this provision, however, which would preclude its use as a model for international assistance to the permanent international criminal court. For example, it permits the requested state to use the requested state's procedures and the requested state may decline to compel the witness to appear on a "reasonable basis" or when the person could not be compelled to appear and testify in similar circumstances in the requested state. *Id.*

[85] McClean, *International Judicial Assistance*, *supra*, n. 18, p. 137.

The court should have the power to compel any witnesses to appear in the territory of a state other than the seat of the court before one of its judges or a specially appointed master to testify by means of a video link permitting cross-examination in person or by video link by the prosecutor and counsel for the accused.[86] The alternative of having witnesses appear before a local judge or a consular official, even when the prosecutor and defence counsel are permitted to examine witnesses, as permitted under some mutual assistance agreements, is not satisfactory since the evidence should be considered under a uniform international procedure, not under inconsistent national procedures devised with different interests at stake from those of the international community.[87] In all cases when witnesses testify in the territory of a state party, the witness should not be permitted to assert privileges under the national law of the state where the witness is testifying, but only privileges recognized in the statute and rules of the court. Whatever the merits may be of mutual assistance agreements permitting a witness to decline to testify in the requested state on the basis of a privilege the witness enjoys under the law of the requested state,[88] those reasons do not apply to testimony before the permanent international criminal court enforcing international law in accordance with international criminal procedure. Such national privileges, including those related to national security, could undermine the effectiveness of the court.

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[86] Article 11 (1) of the UN Mutual Assistance Treaty requires requested states to take the testimony of witnesses in their territory and to require them to produce evidence for transmission to the requested state, but does not require the requested state to send the witness to the requesting state and provides that the testimony is to be taken in accordance with the law of the requested state:

> "The requested State shall, in conformity with its law and upon request, take the sworn or affirmed testimony, or otherwise obtain statements of persons or require them to produce items of evidence for transmission to the requesting State."

The European Convention on Mutual Assistance is similarly restrictive. It provides that a requested state shall execute letters rogatory to obtain evidence such as statements from witnesses, experts and accused, "in the manner provided for by its law", not in accordance with international standards. *Id*., Art. 3 (1); see also *id*., Art. 3 (2) (requested state obliged to compel testimony under oath only if its law permits it); Explanatory report on the European Convention on mutual assistance in criminal matters, p. 14.

[87] Neither the UN Mutual Assistance Treaty nor the European Convention on Mutual Assistance recognizes a right of a judge or prosecutor of the requesting state, defence counsel or counsel for a victim or victim's family appearing as a *partie civile* to *participate* in the hearing of witnesses in the requested state, although they permit them to *be present*. Article 4 of the European Convention on Mutal Assistance requires the requested state to give the requesting state notice of the hearing at which the witness is to give evidence and that "[o]fficials and interested persons may be present if the requested Party consents". Article 11 (2) of the UN Mututal Assistance Treaty provides: "Upon the request of the requesting State, the parties to the relevant proceedings in the requesting State, their legal representatives and representatives of the requesting State may, subject to the laws and procedures of the requested State, be present at the proceedings." This article does not, however, require that they receive notice of the hearing. Article 16 (3) of the Commonwealth Scheme simply says that a state "may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness", but it does not extend the right to ask to the prosecution and does not oblige the requested state to grant the request. Bilateral mutual assistance agreements also permit the presence of the accused, counsel for the accused and any other person requested by the requesting state to be present. Ellis & Pisani, *supra*, n. 72, p. 165.

[88] For example, Article 12 (1) (a) of the UN Mutual Assistance Treaty provides that "[a] person who is required to give evidence where . . . : (a) The law of the requested State permits or requires that person to decline to give evidence in similar circumstances in proceedings originating in the requested State". Article 12 (1)(b) permits a witness to decline to give evidence where the law of the requesting state permits or requires the witness to decline to give evidence. See also Commonwealth Scheme, Art. 19 (1); ECOWAS Convention, Art. 12.

The provisions in the ILC draft statute concerning the court's powers to compel witnesses to appear to testify are inadequate to guarantee that it will be an effective complement to national courts. In particular, they do not make clear that states parties must ensure that any witness ordered to appear before the court does so. In most cases, states parties will have to transfer witnesses from one state to another state where the court is sitting in a particular case. Article 26 (2) (a) provides that the prosecutor may "request the presence of and question suspects, victims and witnesses", and Article 26 (3) provides that the presidency "may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation".[89] These articles do not make clear that such subpoenas or warrants can compel witnesses to appear before the court wherever it is sitting, not just in the territory of the requested state, as is traditional mutual assistance instruments between states. Article 51 (2) (b) provides that "[t]he Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to: . . . (b) the taking of testimony . . ." As indicated above, however, the ILC commentary indicates that it was intended that implementation of each request be negotiated with the state concerned. Moreover, this article does not make clear that the state must ensure that the witness appears before the court wherever it is sitting. **These articles should be amended to make clear that the court can issue warrants compelling any witness to appear wherever the court is sitting and that states parties will implement those warrants fully and without delay.**

The rules should also provide for the special situation of ***persons who are being detained in national custody who are required to appear as witnesses*** in the permanent international criminal court. The Yugoslavia Rules and Yugoslavia Tribunal Guidelines provide detailed guidance to the two tribunals and to states concerning the obligations to transfer and return witnesses and to ensure appropriate conditions of detention; they do not require the consent of the detained person.[90] In contrast, mutual assistance instruments are flawed models because they require the consent of such persons before they can be transferred.[91]

The rules should ensure *witness immunity during transit* through any state on the way to the place where the witness is to testify. Article 11 of the Yugoslavia Tribunal Guidelines provides: "The State guarantees the immunity of persons in transit for the purpose of appearing before the International Tribunal". Mutual assistance instruments also require guarantees of witness immunity during transit.[92] **It is also important for the rules to guarantee that *witnesses must retain any legal status* which they had in the state where they were located when they return from testifying before the court.** Article 9 (4) of the Yugoslavia Tribunal Guidelines provides: "Witnesses and experts who attended a trial before the International Tribunal may return

[89] There is no express provision in the ILC draft statute authorizing defence counsel or counsel for a victim's family appearing as a *partie civile* in the proceedings to request subpoenas or warrants or for the presidency to issue them. Amnesty International believes that the right to equality of arms requires that defence counsel have the same right as a prosecutor to seek and obtain such orders.

[90] Yugoslavia Rules, Rule 90 *bis*.

[91] UN Mutual Assistance Treaty, Art. 13; European Convention on Mutual Assistance, Art. 11; Commonwealth Scheme, Art. 24; ECOWAS Convention, Art. 13.

[92] Commonwealth Scheme, Art. 25; ECOWAS, Art. 15.

to the State without losing any particular status they might have enjoyed before they left the State to testify." **The rules should spell out which *expenses associated with the compulsion of witnesses to testify*, including legal expenses and transfers to appear before the court should be borne by the court and which should be the responsibility of the national authorities**. Several states, including Austria, Finland, Hungary, Spain, Sweden and the United States, have provided in their legislation concerning cooperation with the two *ad hoc* international criminal tribunals for the payment by the requested state of some of the expenses of witnesses.[93] In contrast, mutual assistance instruments generally require the requesting state to bear most of the expenses.[94]

Searching property and seizing evidence. **The statute should expressly recognize the inherent power of the court to issue warrants for search and seizure of property, including documents.** Article 12 of the Yugoslavia Tribunal Guidelines provides: "At the request of the International Tribunal, the competent judicial authority shall order the seizure of evidence, including all objects which are necessary for the investigation of a crime and deliver them to the International Tribunal".

[93] For the text of the legislation, see supplements to *Handbook for government cooperation*, *supra*, n. 3.

[94] Commonwealth Scheme, Art. 23 (travelling, subsistence and other expenses payable by the requesting country); ECOWAS Convention, Art. 14 (3) (allowances and travel and subsistence expenses to be payable by requesting state).

Mutual assistance instruments concerning search and seizure are generally too restrictive to serve as models for international assistance to the permanent international criminal court. For example, some instruments permit the requested state to refuse to execute letters rogatory for search and seizure when its courts make their own independent determination that there was no probable cause for the request, that there was an absence of dual criminality or the offence was not an extraditable offence; they also require that the search and seizure be conducted in accordance with the laws of the requested state.[95] Some mutual assistance instruments permit officials and others from the requesting state to be present when letters rogatory requiring searches and seizure of property are executed. Such agreements, however, provide that such presence is discretionary or subject to national law. They also do not expressly authorize officials from the requesting state to participate in the search or to supervise it.[96] Only one of them requires notice to the officials of the requesting state before a search.[97] Having prosecution investigators who have been involved in investigating the case present will assist local officials in the search. **Therefore, the statute or rules should provide that states parties shall, notify the prosecutor of the search and, in all cases where time permits, permit investigators in charge of the international investigation to conduct or participate in the search.**

The ILC draft statute does not contain express powers to search property and seize evidence or impose express duties on the state and its authorities to conduct searches and seizures pursuant to an order or request by the permanent international criminal court. Unless the phrase "production of evidence" in Article 51 (1) (b) is interpreted to include search and seizure,[98] the court would be forced to rely on general provisions to issue search and seizure orders, such as Article 51 (1) (e), which provides that the registrar "may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to: . . . (e) any other request

[95] For example, Article 5 (1) of the European Convention on Mutual Assistance permits reservations to the obligation to execute letters rogatory for search and seizure on the basis that the offence must be an offence in both the requesting and requested state, that the offence is an extraditable offence and that any searches and seizures be conducted in conformity with the law of the requested state. Article 17 of the UN Mutual Assistance Treaty also authorizes searches and seizures only in so far as the requested state's law permits: "The requested State shall, in so far as its law permits, carry out requests for search and seizure and delivery of any material to the requesting State for evidentiary purposes, provided that the rights of *bona fide* third parties are protected." Article 17 (1) of the Commonwealth Scheme provides that a state "may seek assistance in the search for and seizure of property in the requested country", specifying the information required under the law of the requested country, but does not require that country to grant the request. Thus, these instruments would permit the requested state to review a determination of the relevance of the seized evidence to the trial in the requesting state. Ellis & Pisani, *supra*, n. 72, p. 164; McClean, *International Judicial Assistance*, *supra*, n. 18, p. 134. Such determinations by national courts would be completely in appropriate in the context of a trial in the permanent international criminal court.

[96] Article 4 of the European Convention on Mutual Assistance provides that such persons may be present, but only if the requested state permits it. The UN Mutual Assistance Treaty permits these persons to be present, but subject to the laws and procedures of the requested State. UN Mutual Assistance Treaty, Art. 11 (2).

[97] UN Mutual Assistance Treaty, Art. 4.

[98] The term "procuring evidence" pursuant to a letter rogatory under Article 3 (1) of the European Convention on Mutual Assistance is intended to include search and seizure. Council of Europe, Explanatory report on the European Convention on Mutal assistance in criminal matters (Strasbourg 1969). However, the UN Mutual Assistance Treaty has separate articles concerning the requirement of witnesses "to produce items of evidence", Article 11 (1), and searches and seizures, Article 17, suggesting that there is some ambiguity in the term "production of evidence".

which may facilitate the administration of justice. . . ." This is weaker than equivalent provisions in the Yugoslavia and Rwanda Rules and some mutual assistance instruments. **To avoid possible doubts about the scope of the court's powers, the statute should expressly authorize the court to issue search and seizure warrants which are directly enforceable in the territory or jurisdiction of the state party. If the statute provides that such search and seizure warrants must be executed by the local authorities, then it should require those authorities to implement those warrants fully, without delay, and permit prosecution investigators to participate in the search.**

Production of documents. **The court should have the power to compel states parties, their authorities and others to produce documents.** This power may be seen as incidental to the power of search and seizure of property and the power to compel witnesses to appear and testify before the court, but it will be helpful to list it separately to avoid any ambiguity.[99] These powers are discussed above. Article 51 (1) (b) states that the registrar "may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to: . . . (b) . . . the production of evidence."

4. Other types of cooperation

There are a number of other types of international assistance and cooperation which states should provide to the permanent international criminal court, including informing the court of possible crimes and pending international proceedings, making arrangements to permit the court to sit in the state and, possibly, prosecuting for perjury..

Informing court of possible crimes and pending national proceedings. **The statute or rules should provide that states parties inform the permanent international criminal court of crimes which may fall within the court's jurisdiction and indicate what steps, such as opening investigations or commencing prosecutions, the state has taken.** Some of the national legislation implementing state obligations to comply with the two *ad hoc* tribunals provides for such notice.[100] Such legislation not only ensures that the national authorities will take the initiative in keeping the tribunals informed of matters which might not come to their attention, but also is an incentive to states parties to fulfil their own responsibilities to bring persons responsible to justice for crimes under international law committed in their jurisdiction or, pursuant to universal jurisdiction, elsewhere.

Provision for court to sit in the state. Under Article 3 (3) of the ILC draft statute, "[t]he 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." **States parties should enact legislation to facilitate operations of the court whenever it conducts**

[99] See, for example, Commonwealth Scheme, Art. 1 (3) (h).

[100] Article 6 of the Italian Decree Law No. 544-28, 28 December 1993, and Article 8 of the Swiss law, *Arrêt fédéral relatif à la coopération avec les tribunaux internationals chargés de poursuivre les violations graves du droit international humanitaire, 21 décembre 1995*, require national courts to provide the tribunals with information of any crimes within their jurisdiction which they come across in their proceedings. Article 2 of the French law on cooperation with the Yugoslavia Tribunal requires that it be informed of all pending proceedings relating to acts which may fall within the tribunal's jurisdiction. For the text of this legislation, see supplements to *Handbook for government cooperation*, n. 3.

hearings or other activities outside the host state. In drafting such legislation, states could draw upon the legislation of states which have provided for the Yugoslavia and Rwanda Tribunals to sit outside the host states.[101]

Prosecution for perjury. It would be more effective for the permanent international criminal court to vindicate its own authority by prosecuting witnesses for perjury and contempt than to leave these prosecutions to states parties. The court would have the relevant evidence, and, in many cases, control over the witness before it. If the witness returned to the territory or control of a state party, the statute should provide that the state party should return the witness to the court for trial. **Therefore, the statute not only should define the crime and specify the penalties, but also should provide that the court, rather than states parties, have the power to prosecute persons for perjury.** If, however, the diplomatic conference were to adopt the less efficient method of prosecutions for perjury by states parties, as in Article 44 (2) of the ILC draft statute, then the statute should require states to enact the necessary legislation and to provide appropriate penalties.

C. Provisional measures

In urgent situations, the permanent international criminal court will need to be able to take many of the measures outlined above on a provisional basis to preserve evidence, to protect witnesses and to preserve assets for the recovery of fines, restitution and compensation. It will also need to be able to make provisional arrests of suspects to prevent flight or intimidation of witnesses (see Section III below).

1. General powers to take provisional measures

[101] Articles 41 to 43 of the Australian law provide for the tribunals to sit in Australia and Articles 36 to 40 of the New Zealand legislation provide for the tribunals to sit in that state. For the text of this legislation, see supplements to *Handbook for government cooperation*, n. 3.

The basic power to take provisional measures, as in the Yugoslavia and Rwanda Rules,[102] should be spelled out in the statute and the list of measures should be illustrative, not exhaustive. The details of such measures should be left to the rules. Article 52 of the ILC draft statute expressly lists only three provisional measures which the court may take, but it makes clear that the list is merely illustrative. **Nevertheless, it would help avoid ambiguity if the list of illustrative provisional measures were somewhat longer and expressly included the power to trace, freeze and seize assets** (see following section).

2. Tracing, freezing, seizing and confiscating assets

Among the most important provisional measures which the permanent international criminal court will have to employ, particularly when a suspect or accused is believed to have stolen property from victims and there is a serious risk that the property will be concealed, destroyed, lost or transferred, are the tracing, freezing and seizing of assets. Such provisional measures will be essential to ensure that judgments ordering fines, restitution and compensation to victims are enforceable. Since the issues related to tracing, freezing, seizing and confiscating assets associated with crime pursuant to a judgment largely overlap the issues related to tracing, freezing and seizing assets as provisional measures, they are addressed in this section. **The statute should ensure that the court has power to take such measures to protect its jurisdiction and ability to enforce judgments; the details of these powers should be left to the rules.**

[102] Yugoslavia Rules, Rule 40; Rwanda Rules, Rule 40.

If judgments of the court are to have any value for the purpose of recovering fines or obtaining restitution and compensation, whether awarded by the court, as Amnesty International and other non-governmental organizations have urged,[103] or by states, then the court must have power to freeze assets of suspects and accused pending final judgment. The current patchwork system of mutual assistance between states for tracing, freezing, seizing and confiscating assets associated with crime is simply inadequate to address persons who commit crimes within the court's jurisdiction. The multilateral and bilateral agreements involve only a limited number of states, they cover only a limited number of offences (usually related to drug trafficking) and their methods are not always effective. Many of the persons who will be suspected or accused of crimes within the court's jurisdiction will have been in leadership positions who may have amassed large amounts of property as part of the deportation or forcible displacement of populations. **If the diplomatic conference does not provide the permanent international criminal court with express powers to award fines, restitution and compensation, it should provide that its judgments will have preclusive effect in the courts of states parties concerning the findings of fact to minimize the burden on victims or their families in seeking restitution or compensation in civil proceedings in national courts and to expedite recovery by avoiding duplicative proceedings.**

The permanent international criminal court should have the power to issue orders which accomplish the same objectives as mutual assistance orders in the money laundering field - tracing, freezing, seizing and confiscating assets. There are a number of different types of orders. *Restraint, restraining* or *sequestration orders* are orders which freeze assets.[104] There are two basic types of orders permitting the seizure of assets. *Confiscation orders* require a specified person to turn over the proceeds of a crime, but they do not reach property held by associates, relatives or shell companies.[105] *Forfeiture orders* permit the seizure of property, regardless who holds the property, apart from innocent third parties, whose rights must be protected.[106] Orders freezing or seizing assets will need to include all types of property, including *property related to the crimes* within the court's jurisdiction which the person is suspected or accused of committing and *instrumentalities of the crime* (these could include expensive vehicles, planes, equipment and weapons). The orders should be directly enforceable in all states parties and in non-states parties which consent to enforce them.

Provisional measures by the tribunals to preserve assets. There are no express provisions for provisional measures under the Yugoslavia and Rwanda Rules to trace, freeze and seize assets prior to judgment, although commentators have stated that the Yugoslavia Tribunal, which can order restitution of property or proceeds under its Rule 105, has the power to take "appropriate provisional measures to preserve or protect the property in question pending a determination of the rightful owner".[107] Article 13 of the

[103] See, for example, *Part II*, p. 40; see also Redress, *Promoting the right to reparation for survivors of torture: What role for a permanent international criminal court?* (June 1997), p. 43.

[104] David McClean, "Seizing the Proceeds of Crime: The State of the Art", 38 Int'l & Comp. L. Q. (1989), pp.334, 341.

[105] David McClean, "Seizing the Proceeds of Crime", *supra*, n. 105, p. 339.

[106] David McClean, "Seizing the Proceeds of Crime", *supra*, n. , p. 339.

[107] Morris & Scharf, *supra*, n. 7, p. 285. The work of the Yugoslavia Tribunal "shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law". SC Res. 827, para. 7.

Yugoslavia Tribunal Guidelines states: "An order by the International Tribunal requiring the forfeiture or return of any property or proceeds of crime shall be enforced in the State in accordance with the national Act on . . . , where applicable."

Strengths and weaknesses of mutual assistance instruments. The current system of mutual assistance between states in the field of money laundering[108] for tracing, freezing, seizing and confiscating assets of persons suspected or accused of crime is not adequate to deal with persons suspected of genocide, other crimes against humanity and serious violations of humanitarian law because existing multilateral or bilateral agreements involve only a limited number of states and a limited number of crimes, usually restricted to drug trafficking. Nevertheless, the strengths and weaknesses of these mutual assistance instruments provide some useful guidance in determining the scope of the powers which the court will need to preserve assets and the international assistance which states must provide.

The UN Mutual Assistance Treaty does not include provisions for tracing, freezing, seizing or confiscating the proceeds of crime or instrumentalities of crime, but the Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters Concerning the Proceeds of Crime partially addresses these omissions by authorizing states to trace and freeze the proceeds of crime.[109] Nevertheless, the Optional Protocol is seriously deficient as a model for international assistance to the permanent international criminal court. Article 1 defines proceeds of crime as "any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence", but it does not include instrumentalities of crime (property used to commit the crime, which could include expensive tanks and other vehicles, planes, weapons and equipment). Article 2 requires the requested state to "endeavour to ascertain whether any proceeds of the crime alleged are located within its jurisdiction", but the Optional Protocol does not require the state to override its banking secrecy laws and simply notes that one matter which could be considered in bilateral arrangements "is the need for other provisions dealing with issues related to banking secrecy".[110] Article 3 requires the requested state to "endeavour to trace assets, investigate financial dealings, and obtain other information or evidence that may help to secure the recovery of proceeds of crime". Article 4 requires states to "take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those

[108] Money laundering involves three stages: "the *conversion* of illicit cash to another asset, the *concealment* of the true source of ownership of the illegally acquired proceeds, and the *creation* of the perception of legitimacy of source and ownership." M.E. Beare *et al.*, *Tracing of Illicit Funds: Money Laundering in Canada* (Ottawa: Ministry of the Solicitor General of Canada 1990), p. X, n.1, *quoted in* W.C. Gilmore, "Introduction", *International Efforts to Combat Money Laundering* (Cambridge: Grotius Publications Limited), p. x.

[109] Adopted by Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, UN Doc. A/Conf. 144/28/Rev.1, I.A.11, *welcomed* GA Res. 45/116, 14 December 1990, 45 UN GAOR Supp. (No.49A) 211, UN Doc. A/RES/45/116. The Optional Protocol was added "on the ground that questions of forfeiture are conceptually different from, although closely related to, matters generally accepted as falling within the description of mutual assistance". *Id*., n.

[110] *Id.* The importance of banking secrecy laws as an impediment to the tracing of the proceeds of genocide and other crimes against humanity is demonstrated by the inability for half a century of spouses and children to trace the property held in banks which was seized from those exterminated in death camps during the Second World War.

proceeds by a court of the requesting State", but the Optional Protocol does not require the requested state to amend its legislation to permit speedy and effective freezing of assets in accordance with some agreed upon international standard of effectiveness. Thus, a requested state could fulfil its international responsibilities under the Optional Protocol if it merely set in motion outdated, cumbersome, slow and ineffective procedures. Article 5, concerning final judgments, is similarly flawed. It provides that "[t]he requested State, shall, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State or take other appropriate action to secure the proceeds following a request by the requesting State." It does not require states parties to amend their legislation to ensure effective enforcement. Although Article 6 requires that the parties "shall ensure that the rights of *bona fide* third parties shall be respected in the application of the present Protocol", it is open to the unintended interpretation that this obligation applies to third parties who may have received the property from the suspect or accused, not to victims.[111]

[111] This interpretation is suggested by the footnote to Article 5 stating that "[t]he parties might consider widening the scope of the present Protocol by the inclusion of references to victims' restitution and the recovery of fines imposed as a sentence in a criminal prosecution", although at least one of those involved in the drafting of this provision has stated that Article 6 was not intended to exclude protection of the rights of victims.

The provisions for tracing, seizing, freezing and confiscating assets in other international instruments are similarly defective as models for international assistance to the court, although there are provisions which could be considered when drafting the rules. Most of these instruments focus on the problem of money laundering. In part because many of these instruments address money laundering in connection with drug offences, they are aimed at removing profits from the criminal, not on return of property to the original owners or on compensating the victim. Another serious problem in using these instruments as a model for the permanent international criminal court is that under current international practice, the general rule is that confiscated proceeds are awarded to the state seizing the proceeds, which is free to use the funds as it sees fit. Another problem is that each of the instruments provides that assistance is to be in accordance with the law of the requested state, not some agreed upon international standard, and leaves it to the requested state to determine whether its obligations have been fulfilled. In some of these instruments, there are no provisions overriding national banking secrecy laws.[112]

Amendments needed in the ILC draft statute and measures needed in the rules. Article 47 (1) (b) of the ILC draft statute permits the court to award fines, but the ILC draft statute does not now authorize the court to award restitution or compensation itself, but leaves these matters to the states.[113] Nevertheless, it provides in Article 58 that "States parties undertake to recognize the judgments of the Court" and the ILC commentary to that article indicates that "a judgment of the Court should be capable of founding a plea of *res judicata* or issue estoppel or their equivalents under legal systems which recognized those pleas". **The statute should provide that states parties comply fully and without delay to orders and requests to trace, freeze, seize and confiscate proceeds and instrumentalities of genocide, other crimes against humanity and serious violations of humanitarian law. Article 58 should be amended to permit the court to award restitution and compensation.**

III. ARREST AND DETENTION OF PERSONS

When the permanent international criminal court is established, it will have no police force and will rely largely on national authorities to arrest and detain suspects and accused, except in special situations, such as collapsed states where there are no central

[112] For a comprehensive review of these instruments, see William C. Gilmore, *Dirty Money: The evolution of money laundering counter-measures* (Strasbourg: Council of Europe Press 1995).

[113] The 1993 ILC draft statute permitted the court to order restitution or forfeiture of property used in conjunction with the crime. However, the ILC Commentary to Article 47 states that at the 1994 session,

> "some members of the Commission questioned the ability of the Court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the Court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil than in a criminal case . . . . On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted."

Not only may the Yugoslavia and Rwanda Tribunals award restitution, but many civil law jurisdictions permit criminal courts to award restitution and compensation based on presentations by victims or their families appearing as a *partie civile* in a criminal trial and the patchwork of mutual assistance agreements is still inadequate to provide recovery for core crimes.

authorities or where international peace-keeping operations will have law enforcement powers. The statute must ensure that state authorities and other authorities, such as peace-keeping operations comply promptly and fully with court orders and requests to arrest and detain suspects and accused. The obligation to ensure that witnesses testify before the court has been addressed above in Section II.B.3.

A. Pre-indictment arrest and detention of suspects

The statute should expressly provide that states parties shall enforce orders or requests to carry out a provisional (pre-indictment) arrest of a suspect in any case where the court determines that the suspect may flee, harm witnesses or destroy evidence, and to detain the suspect temporarily pending the prompt issuance of an indictment. In carrying out the provisional arrest, the authorities must comply with all relevant international standards, as well as the express guarantees in the statute.[114] As explained in an earlier paper, the statute appears to afford only limited protection of the rights of a suspect with respect to questioning by national authorities, in contrast to the rights of suspect with respect to questioning by the prosecutor of the permanent international criminal court or detention by the court.[115] As a safeguard and to ensure effective investigation by the court, state authorities should provide timely notice to the prosecutor so that investigators from the office of the prosecutor can be present.[116] Article 52 (1) of the draft ILC statute provides that "[i]n case of need, the Court may request a State to take necessary provisional measures, including the following: . . . (a) to provisionally arrest a suspect". Article 52 should be amended to require that the state provisionally arrest the suspect without delay and that it guarantee the rights of the suspect during the temporary detention. In addition, the rights of the suspect with respect to the national authorities should be strengthened as previously recommended by Amnesty International.[117] **The rules should require the authorities to provide timely notice to the prosecutor before the arrest, and permit investigators from the office of the prosecutor to be present and should incorporate stronger safeguards for the rights of suspects than those provided in the Yugoslavia and Rwanda Rules.**[118]

B. Arrest and detention of accused

1. Duty to arrest

The statute should expressly provide that states parties shall implement warrants for the arrest of an accused without delay. The rules should provide for the transmission of the arrest warrant and any other necessary documents to the official designated by the state to receive such documents or, in the absence of a designation, to the official normally responsible for state cooperation or any other

[114] See *Part II*, pp. 46-62.

[115] *Id.*, p. 45.

[116] Guideline 5 (3) of the Yugoslavia Tribunal Guidelines requires such notice before the arrest of the accused. See following section.

[117] See generally, *Part II*, pp. 46-62.

[118] See Yugoslavia Rules, Rule 40 *bis*.

appropriate official, such as the court or prosecutor in the relevant jurisdiction in the state where the accused is believed to be located.[119] The ability to transmit the warrant directly to the appropriate official or individual in the place where the accused is believed to be located has proved effective in ensuring that warrants of the tribunals can be served without delay.

The rules should provide that when the court transmits warrants to state officials rather than serving them directly, the state authorities must effect arrest warrants promptly. The rules should also provide that the state authorities must give notice to the prosecutor of a planned arrest, so the prosecutor can be present at the time of the arrest, whenever this is feasible, or as soon thereafter as possible. The presence of the prosecutor or others from the office of the prosecutor can ensure that the rights of the accused are respected, that essential evidence is preserved and ensure that arrangements begin immediately for the prompt transfer of the accused from national custody to the custody of the international criminal court.[120] **Similarly, the rules should provide that the state authorities must give notice to the prosecutor and the registrar that an arrest has been made[121] or that they have been unable to effect the arrest.**[122]

2. Obligation of states to protect rights of accused during detention

[119] Article 3 of the Yugoslavia Tribunal Guidelines provides:

> "Without prejudice to the competence of the Ministry of Foreign Affairs, the Ministry of Justice [or any other appropriate Ministry or authority] shall be the central authority responsible for receiving communications and requests from the International Tribunal. The Ministry of Justice [or any other appropriate Ministry or authority] shall verify that a communication or request is in proper form and transmit it to the competent authorities for compliance."

In the context of serving warrants, Article 5 (1) of the Yugoslavia Tribunal Guidelines provide:

> "An arrest warrant issued by a Judge of the International Tribunal will be addressed to the Ministry of Justice [or any other appropriate authority] which will verify that the original documents are in proper form and transmit a copy of the arrest warrant for execution to the Chief Prosecutor [or any other appropriate officials such as Director of Public Prosecutions, Attorney-General, Procureur General, Procuratore Generale, etc.] of the State."

[120] Article 5 (3) of the Yugoslavia Tribunal Guidelines provides:

> "Prior to the execution of a warrant of arrest, the Chief Prosecutor [or any other appropriate officials such as Director of Public Prosecutions, Attorney General, Procureur General, Procuratore Generale, etc.] where he is able to do so, must inform the Prosecutor of the International Tribunal so that he may be present as from the time of arrest."

[121] Article 5 (4) of the Yugoslavia Tribunal Guidelines provides:

> "Upon the arrest of the accused, the Chief Prosecutor [or any other appropriate officials such as Director of Public Prosecutions, Attorney General, Procureur General, Procuratore Generale, etc.] shall promptly notify the Registrar of the International Tribunal."

[122] Article 5 (5) of the Yugoslavia Tribunal Guidelines provides:

> "If the Chief Prosecutor [or any other appropriate officials such as Director of Public Prosecutions, Attorney General, Procureur General, Procuratore Generale, etc.] is unable to execute the arrest warrant, he shall report this fact forthwith to the Registrar of the International Tribunal."

The statute should make clear that the state authorities must respect the rights of the accused from the moment of arrest until transfer to the court. For example, the statute should require that any state authority effecting arrests must inform the accused of his or her rights and of the charges.[123] **The authorities must also ensure the full range of other rights of the accused under the statute and international standards are respected during detention.** As explained in an earlier paper, the statute appears to afford only limited protection of the rights of accused with respect to questioning by national authorities, in contrast to the rights of accused with respect to questioning by the prosecutor of the permanent international criminal court or detention by the court.[124] The only provision in the ILC draft statute expressly imposing these obligations on state authorities conducting an arrest of an accused is Article 29 (1), which provides:

> "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."

The statute should expressly provide that state parties must ensure that the rights of an accused are fully respected from the moment of arrest until tranfer to the custody of the permanent international criminal court. In addition, the rights of the accused with respect to the national authorities should be strengthened as previously recommended by Amnesty International.[125]

IV. TRANSFER OF PERSONS TO THE COURT

A. Transfer

The statute should provide for a simple and expeditious system for arresting and transferring an accused to the custody of the permanent international criminal court who has been charged with core cimes of genocide, other crimes against humanity or serious violations of humanitarian law. Considerations of simplicity and speed of procedure buttress other reasons for inherent jurisdiction over these core crimes. Inherent jurisdiction over all core crimes would mean that the obligations of each state party would be exactly the same, as the court would automatically be able to exercise jurisdiction over a person accused of a core crime, provided, of course, that the admissibility requirements of Article 35 were satisfied. At a minimum, each state party would then in all cases be obliged to bring a person in its territory or jurisdiction to justice, to extradite the person to a state party able and willing to do so or, in any case where the court decided to exercise its inherent jurisdiction in accordance with the statute, to transfer that person without delay to the court.

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[123] Article 5 (2) of the Yugoslavia Tribunal Guidelines provides:

> "The Chief Prosecutor [or any other appropriate officials such as Director of Public Prosecutions, Attorney General, Procureur General, Procuratore Generale, etc.] of the State shall use his best endeavours to ensure the prompt arrest of any person within the State against whom an arrest warrant has been issued and inform the accused at the time of arrest of his or her rights and the charges agains him or her in a language he or she understands."

[124] *Part II*, p. 45.

[125] See generally, *Part II*, pp. 46-62.

Since states have the primary duty to bring those responsible to justice themselves, extradition to another state will not fulfil that duty unless there are adequate assurances that the requesting state will conduct a prompt, thorough, independent and impartial criminal investigation and, if there is a sufficient basis for a prosecution, to prosecute in accordance with international standards for a fair trial. An extradition to a non-state party would mean that the permanent international criminal court would not be able to exercise its jurisdiction over the person effectively if the proceedings in the requesting state "were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted", within the meaning of Article 42 (2) of the ILC draft statute.

The ILC draft statute fails to address these issues adequately. Article 21 (1) (a) provides for inherent jurisdiction over only genocide, but not other crimes against humanity or serious violations of humanitarian law. For the crime of genocide and those crimes over which states parties have agreed that the court shall have jurisdiction, Article 53 (2) (a) provides a simple and speedy system of arrest and transfer in most, but not all cases. Onel exception to the obligation to arrest and transfer an accused could seriously undercut the effectiveness of the court. Article 53 (2) (a) provides that when a state party receives a warrant for the arrest and transfer of a person accused of genocide or a crime over which the state has accepted the court shall have jurisdiction, it "shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court". These paragraphs could lead to lengthy delays in the very cases the court was designed to address under Article 42 (2). Paragraph 5 permits a state party to delay complying with a warrant for arrest and transfer "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." The state party does not have to inform the registrar of the reasons for the delay for up to 45 days, and then the state party may either decide to "agree to the temporary transfer of the accused for the purpose of standing trial" in the court, or comply with the warrant, but only "after the prosecution has been completed or abandoned or the sentence has been served, as the case may be". Thus, a state party could delay implementing the warrant for years, even if 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". Paragraph 6 permits a state party to request a court to delay complying with a warrant for 45 days before it makes an application to the court to set it aside, but it must "take any provisional measures necessary to ensure that the accused remains in its custody or control". **Article 21 (1) (a) of the statute should provide that the permanent international criminal court has inherent jurisdiction over the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. Article 53 (2) (a) should provide that upon a receipt of a warrant for the arrest and transfer of an accused charged with one of these crimes, the state party shall, without any exception, take immediate steps to arrest and transfer the accused to the court.**

The obligation in the ILC draft statute of states to arrest and transfer an accused to the court in cases of genocide or the other core crimes when the state concerned has accepted the court's jurisdiction over these crimes appears to be absolute, apart from the exceptions in Article 53 (5) and (6), but it is not clear from the ILC commentary whether a request by the territorial state to extradite someone under the Genocide Convention or by a state party to the Convention against Torture for acts of torture or ill-treatment amounting to crimes against humanity, if the requesting state were not a party to the

statute, would have priority over the court's warrant. Article 53 (3) provides that a transfer to the court will be deemed to satisfy a state's obligation under an extradition treaty, such as the Genocide Convention or Convention against Torture, to try or extradite with respect to *another state party to the statute*, but the ILC commentary suggests that the statute cannot alter an obligation of a state under an extradition treaty to *a requesting state which is not a party to the statute*. Article 53 (4) provides that a state party which accepts the court's jurisdiction with respect to a crime "shall, as far as possible, give priority to a request under paragraph 1 [of Article 53] over requests for extradition from other States". The ILC commentary explains that this phrase reflects "on the one hand, the inability of the Statute to affect the legal position of non-parties, and, on the other hand, the difficulties of imposing a completely homogeneous obligations on States parties to the Statute given the wide range of situations covered".[126] **Article 53 should be amended to clarify that all states parties must give priority to a warrant for the arrest and transfer of an accused charged with genocide, other crimes against humanity and serious violations of humanitarian law over a request for extradition by any other state.**

The statute should also provide for the prompt transfer of a suspect who has been provisionally arrested by state authorities pursuant to an order of the court pending a prompt decision whether to indict. This will ensure direct supervision of the custody of the judicial body responsible for the deprivation of liberty. Detention under provisional arrest could continue to be in the territory of the state party.

The duty to ensure the appearance of witnesses before the court who decline to appear voluntarily is addressed above in Section II.B.3 concerning the types of international assistance which states parties must provide. **Nevertheless, the statute and rules will have to include effective mechanisms to ensure the rights of witnesses before, during and after their appearance before the court, similar to those applicable to suspects and accused, including the right to challenge the lawfulness of any restraints on their liberty.**

B. The new concept of transfer

The new relationship between states and an international criminal court which they themselves create is greatly different from the traditional relationship between sovereign states in the area of criminal matters and requires new concepts and solutions. As explained below, the transfer of an accused or a suspect to the international criminal court is not extradition between states. Therefore, traditional exceptions to extradition, such as prohibitions on extradition of nationals, political, military and fiscal offence exceptions, dual criminality, territoriality, statutes of limitations and *non bis in idem*, are not relevant to transfers to an international criminal court. The exceptions are traditional, but they are not part of customary law. Moreover, these exceptions are not applicable to the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. **The statute should exclude traditional grounds for refusal of extradition as legitimate grounds for refusal to transfer a person to the permanent international criminal court.**

1. Transfer to the international criminal court is not extradition

[126] For the reasons why transfer to the court would satisfy the try or extradite obligation, see *Part I*, pp. 15-16.

As the ILC commentary to Article 53 of the ILC draft statute makes clear, the term "transfer" was used in that article "to cover any case where an accused is made available to the Court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States". The President of the Yugoslavia Tribunal has repeatedly reminded states that transfer to an international criminal court is not extradition.[127] Article 6 of the Yugoslavia Tribunal Guidelines provides that the relevant national judicial authority,

> "after verifying that the requisite formal conditions are fulfilled, shall approve the transfer of an arrested accused to the custody of the International Tribunal without resort to extradition proceedings. The accused shall be surrendered to the International Tribunal immediately thereafter."

[127] See, for example, Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/50/365-S/1995/728, 25 August 1995, para. 131.

Similarly, the ILC commentary to Article 53 explains that "[t]he term 'transfer' has been used to cover any case where the accused is made available to the Court for the purpose of trial, in order to avoid any confusion with the notion of extradition or other forms of surrender of persons (e.g. under status of forces agreements) between two States". New challenges require new solutions. The Council of Europe has recognized this principle in its Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Illicit Traffic Treaty).[128] In Articles 14 and 15 of that treaty, states are obliged to surrender persons suspected of drug trafficking, not to extradite them, because the drafters recognized that "[a] *sui generis* system, based on surrender of persons and seized property, was widely favoured to specifically cover the unique situation dealt with in the agreement [arrest of persons on the high seas]".[129]

2. Traditional exceptions to extradition are not relevant to transfers

The new context of transfers of accused to a permanent internation criminal court designed by the collective action of states to be fair and to repress crimes of concern to the entire international community, means that the traditional exceptions to extradition between states, based on concerns about the impartiality and fairness of the criminal justice systems or criminal codes of other states, are not needed. Moreover, the traditional exceptions to extradition are simply common in various extradition treaties and agreements, but are not part of customary international law, although some national courts have stated that some of the exceptions may amount to general principles of law.[130] As explained below, however, none of the exceptions are relevant to transfers to an international court for core crimes. Extradition treaties and agreements are usually negotiated bilaterally by states with each other and each treaty contains different arrangements and exceptions. As some commentators have observed, in contrasting transfer to the two *ad hoc* international criminal tribunals, "the granting of extradition is traditionally considered to be within the discretion of a sovereign state, and a sovereign state is free to negotiate whatever terms and conditions for extradition it wishes".[131] They add that the many exceptions to extradition, "despite their prevalence in bilateral extradition treaties cannot be regarded as customary norms of international law, or as rights under international law invocable by a suspect facing extradition".[132]

a. Nationality

[128] Illicit Traffic Treaty, *adopted in* 1995.

[129] Council of Europe, Illicit Traffic Treaty Explanatory Report, para. 69.

[130] One commentator has explained:

> "Much of the material on extradition depends on questions of internal and particularly of constitutional law and the effect of treaties on municipal rules. However, some courts, in giving extradition in the absence of a treaty, have abstracted from existing treaties and municipal provisions certain 'general principles of international law'. "

Ian Brownlie, *Public International Law* (Oxford: Clarendon Press 4th ed. 1990), p. 316 (footnote omitted).

[131] Kenneth J. Harris & Robert Kushen, "Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution", 7 Criminal Law Forum (1996), pp. 561, 587 (footnotes omitted).

[132] *Id.*, p. 587, n. 76.

In contrast to most common law countries, which are generally willing to extradite their nationals, "[m]any civil law countries refuse to extradite their nationals because they have no confidence in the standards of criminal justice applied by requesting states.", but often justify the refusal on the ground that they have jurisdiction over their own nationals.[133] Refusal to extradite on the ground of nationality is listed as an optional ground in the UN Model Treaty on Extradition, but the requested state must take appropriate action against the person concerned.[134] The refusal to extradite one's own nationals solely on the ground of nationality has been criticized as "undesirable".[135] Nevertheless, as demonstrated below, concerns about the possible unfairness of the proceedings in the international criminal court are misplaced and states can easily remedy the flaws in the ILC draft statute by implementing Amnesty International's recomendations in *Part II*, pp. 42-89. **The statute should exclude the nationality of the accused as a legitmate ground for a state to refuse to cooperate with the permanent international criminal court.**

b. Territorial jurisdiction

[133] International Law Association, Committee on Extradition and Human Rights, Second Report (Helsinki 1996), p. 8.

[134] That instrument provides that extradition may be refused:

> "If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition has been requested."

UN Model Treaty on Extradition, *adopted by* Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, UN Doc. A/CONF. 144/28/Rev. 1, 1.A.10, *welcomed in* G.A. Res. 45/116 on 14 December 1990, 45 UN GAOR Supp. (No. 49A) 211, UN Doc. A/RES/45/116., Art. 4 (a). ECOSOC Res. E/1997/26 adopted on 21 July 1997 urges that this provision be modified to permit surrender for serious offences or permit temporary transfer for trial and return for service of sentence.

[135] International Law Association, Second Report, *supra*, n. 133, p. 8.

Some instruments permit extradition only in cases where the alleged crime was committed in the territory of the state requesting extradition.[136] The UN Model Treaty on Extradition lists as one of the optional grounds for refusal that the offence took place in whole or in part on the territory of the requested state, although the requested state must then take appropriate action against the person concerned; it also lists as an optional ground for refusal that the offence took place outside the territory of both the requesting and requested state.[137] Such territorial exceptions which permit states to refuse extradition for offences of universal jurisdiction, such as core crimes, has been severely criticized as inconsistent with customary law.[138] **The statute should exclude as a legitimate ground for refusal to cooperate with the permanent international criminal court any of the traditional territorial exceptions to extradition.**

c. Political offence

Although many extradition treaties and instruments prohibit the extradition of persons charged with a political offence, this exception is not a matter of customary law.[139] Moreover, there are there is no agreed definition of political offences.[140] In any event, as explained below, genocide, other crimes against humanity and serious violations of humanitarian law are either considered as nonpolitical crimes or exceptions to the political offence exception.

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[136] *Id.*, p. 9.

[137] That treaty provides that extradtion may be refused:

> "If the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the requested State shall submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested".

UN Model Treaty on Extradition, Art. 4 (f) (footnote concerning vessels and aircraft omitted). It also permits refusal:

> "If the offence for which extradition is requested has been committed ouside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances".

Id., Art. 4 (e).

[138] International Law Association, Second Report, *supra*, p. 9 ("There can therefore be no justification for the continued use of such restrictive clauses which deny extradition where jurisdiction is to be exercised in accordance with customary international law.").

[139] Jennings & Watts, 1 *Oppenheim's International Law*, *supra*, n. 7, p. 963 ("Although the principle is now widely accepted that political criminals should not be extradited, there is probably no rule of customary international law which prevents their extradition.").

[140] *Id.*, p. 963 ("So far all attempts to formulate a satisfactory and generally agreed definition of the term have failed. The difficulty lies in large part in there being no general agreement as to what degree of politicisation is needed in order to classify an act as 'political', or indeed whether the act is to be regarded as political at all: what in the eyes of one state is a political movement seeking to achieve political ends within a state and as such deserving of protection, may be, in the eyes of another, a band of criminals deserving punishment.") (footnote omitted); M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Dobbs Ferry, New York: Oceana Publications, Inc. 3d ed. 1996), p. 505 ("by its very nature it eludes a precise definition").

The UN Model Treaty on Extradition requires refusal of extradition "[i]f the offence for which extradition is requested is regarded by the requested State as an offence of a political nature", although it suggests that states may wish to include a provision excluding offences where the state has a treaty obligation to extradite or try the suspect.[141] Thus, the Model Treaty recognizes that a state could still extradite persons suspected of torture or grave breaches of the Geneva Conventions, among other crimes under international law, although it does not address obligations under customary international law to extradite or try. There are two different types of political offences:

> "'Pure' political offenses are traditionally defined as those directed against a political regime, and may include treason, rebellion, or incitement to civil war. 'Relative' political offences are common crimes committed in connection with a political conflict."[142]

[141] UN Model Treaty on Extradition, Art. 3 (a) (footnote omitted). A footnote suggests:

> "Some countries may wish to add the following text: 'reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition".

ECOSOC Res. E/1997/26 urges that this provision be modified to say that some countries may wish to exclude from the concept of political offence "acts of violence, such as serious offences involving an act of violence against the life, physical integrity or liberty of a person".

[142] Harris & Kushen, *supra*, n. 131, p. 571 (footnote omitted); "Extradition", Marjorie Whiteman, *Digest of International Law* (1968), Vol. 6, Sect. 15.

The political offence exception found in many treaties does not apply, however, to the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. Article VII of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) expressly provides that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide "shall not be considered as political crimes for the purpose of extradition".[143] The General Assembly has declared that the political offence exception does not apply to crimes against humanity and war crimes.[144] Indeed, it has declared that a state's refusal to cooperate in the extradition of persons accused or convicted of crimes against humanity and war crimes is "contrary to the United Nations Charter and to generally recognized norms of international law".[145] The International Law Commission has provided in the draft Code of Crimes that states are obliged to extradite persons suspected of genocide, other crimes against humanity and serious violations of humanitarian law, to transfer them to an international criminal court or to try them in their own courts.[146] The Additional Protocol to the European Convention on Extradition provides that genocide, grave breaches of the Geneva Conventions and comparable violations of the laws of war are not political offences.[147] Leading commentators agree that the political offence exception does not apply to genocide, other crimes against humanity or serious violations of humanitarian law.[148]

[143] Opened for signature 9 Dec. 1948, 78 UNTS 277.

[144] G.A. Res. 3074 (XXVIII) (Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity), 3 December 1973. See also *R. v. Wilson, ex parte Witness T*, 86 Int'l L. Rep., pp. 169, 179-180.

[145] GA Res. 2840 (XXVI), 26 UN GAOR Supp. (No. 29) at 88, UN Doc. A/8429 (1971).

[146] Draft Code of Crimes, Art. 9. The International Law Commission's commentary to this article states that it "establishes the general principle that any State in whose territory an individual alleged to have committed [one of these crimes] is present is bound to extradite or prosecute the offender". In addition, this obligation "is without prejudice to any right or obligation that such a State may have to transfer such an individual to an international criminal court".

[147] *Adopted* 15 Oct. 1975, Art. 1.

[148] See, for example, Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", 1944 Brit. Y.B. Int'l L., pp. 58, 91 (war crimes).

International agreements and instruments have made clear that crimes such as torture, extrajudicial executions and forced disappearance of persons, which under certain circumstances are crimes against humanity or serious violations of humanitarian law, are extraditable offences to which the political offence exception has no relevance. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) expressly provides that torture is an extraditable offence.[149] The Inter-American Convention to Prevent and Punish Torture provides that states parties shall take the necessary steps to extradite anyone accused of torture and provides that torture shall be deemed to be an extraditable offence.[150] The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that states should try or extradite persons responsible for extra-legal, arbitrary and summary executions, which include extrajudicial executions.[151] The UN Declaration on the Protection of All Persons from Enforced Disappearance recognizes that the crime of forced disappearance of persons is an extraditable offence[152] and Inter-American Convention on the Forced Disappearance of Persons provides that forced disappearances of persons are not political offences for the purposes of extradition and are extraditable offences.[153]

National legislation, such as that of France,[154] and national courts, including those in Argentina,[155] Australia,[156] Ghana,[157] Switzerland,[158] the United Kingdom,[159]

[149] Article 8 (1) of the Convention against Torture provides:

> "The offences referred to in Article 4 [all acts of torture] shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them."

[150] Inter-American Convention to Prevent and Punish Torture, *signed* 9 December 1985, OAE/Ser.L.VIl.92, doc. 31 rev.3, 3 May 1996, *entered into force* 28 February 1987, Arts 11, 13.

[151] Principle 18 requires that

> "[g]overnments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

[152] Article 14 of the UN Declaration provides that persons responsible for this crime must be brought before the authorities of the state in which the crime occurred, "unless he has been extradited.to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force".

[153] Inter-American Convention of Forced Disappearance of Persons, *adopted* 9 June 1994,OEA/Ser.L.VII.92, doc. 31 rev. 3, 3 May 1996, *entered into force* 29 March 1996, Art. V.

[154] Extradition Law of 10 March 1927, Art. 5 (2) (acts committed during a civil war are not political offences if they are "acts of odious barbarism and vandalism prohibited by the laws of war").

[155] *In re Bohne*, 62 Am. J. Int'l L. (1968), p. 784 ("Extradition will not be denied on grounds of the political or military character of the charges where we are dealing with cruel or immoral acts which clearly shock the conscience of civilized people.").

[156] *R. v. Wilson ex parte Witness T*, [1976] 135 CLR 179, 86 Int'l L. Rep. 169 (Australia, High Court, 21 June 1976)..

[157] *State v. Schumann*, 39 Int'l L. Rep. 433 (Ghana, Court of Appeal, Accra, 4 November 1966).

[158] *Kroeger v. The Swiss Federal Prosecutor's Office*, 72 Int'l L. Rep. 606 (Swiss Fed. Trib. 1966) (war crimes and crimes against humanity not within political offence exception).

and the United States,[160] have rejected the application of the political offence exception to core crimes. As one United States court explained:

> ". . . ridding a country of some of its population for such reprehensible reasons [as racial or religious hatred], as part of some larger political scheme, is not a crime of a 'political character' and is thus not covered by the political offense exception to extradition".[161]

The statute should exclude the political offence exception as a legitimate ground for refusal to cooperate with the permanent international criminal court.

d. Military offence

[159] *Re Gross, ex parte Treasury Solicitor*, [1968] 3 All Eng. Rep. 804.

[160] Most United States courts have rejected the applicability of the exception in such cases. Harris & Kushen, *supra*, n. XXX, p. 588, n. 78. *Ahmad v. Wigen*, 726 F. Supp. 389, 401-09 (Sept. 26, 1989 opinion) (violations of the law of armed conflict do not fall within the political offence exception), 726 F. Supp. 1032 (Feb. 14, 1989 opinion) (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063, 1066 (2d Cir. 1990); *Artukovic v. Rison*, 628 F. Supp. 1370, 1376 (C.D. Cal 1986) (crimes against humanity and war crimes not within the political offence exception); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 569-71 (N.D. Ohio 1985). See also *In the Matter of Extradition of Suarez Mason*, 694 F.Supp. 676, 705 (N.D. Cal. 1988). One court interpreted the political offence exception in a United States-Servia extradition treaty as precluding extradition for war crimes, *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383, 393 (C.D. Cal. 1959), although this decision was rejected in the same case 27 years later. A plurality in *Quinn v. Robinson*, 783 F.2d 776, 803-04 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986), stated that the political offence does not apply to crimes against humanity, but did not address the question of war crimes. *See also Eain v. Wilkes*, 641 F.2d 504, 518-23 (7th Cir. 1989), *cert. denied*, 454 U.S. 894 (1981) (attacks on civilians not within political offence exception).

[161] *In re Extradition of Artukkovic*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986).

There are two basic categories of military offences for purposes of extradition. First, there are military offences which also are crimes under ordinary criminal law. These offences do not fall within the military offence exception.[162] Since each of the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law, such as those involving murder or torture, would constitute crimes under ordinary criminal law, as well as under military law, they would not fall within the military offence exception to extradition. Second, there are military offences which relate specifically to military matters, such as desertion.[163] Such military offences have traditionally been defined as acts "punishable only as a violation of a civil law or regulation, if the military law or regulation did not apply."[164] **The statute should exclude the military offence exception as a legitimate ground for a state to refuse to cooperate with the permanent international criminal court.**

e. Dual criminality

[162] Thus, Article 3 (b) of the UN Model Treaty on Extradition requires refusal of extradition: "If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law".

[163] International Law Association, Second Report, *supra*, n. 133, p. 10.

[164] Harvard Draft Convention on Extradition, Art. 6, 29 Am. J. Int'l L. (Supp.) (1933), p. 22.

Under the dual or double criminality exception to extradition, "the act charged must be criminal under the laws of both the state of refuge and the requesting state".[165] In the context of extradition between states, this exception may be used "to prevent extradition which would violate substantive human rights" where the law making the act criminal in the requesting state violates international human rights, such as a law restricting the peaceful exercise of freedom of expression.[166] Such an exception, of course, has no place in the international criminal court where the core crimes are crimes of customary international law of universal jurisdiction which all states should prohibit under their own laws. Indeed, if a state has failed to prohibit such acts under its own laws or, in some cases, to make them subject to universal jurisdiction, it may be in breach of its obligations under international law.[167] **The statute should exclude the dual criminality exception as a legitimate ground for refusal to cooperate with the permanent international criminal court.**

f. Speciality

Under the rule of speciality, "the person surrendered shall be tried and punished exclusively for offences for which extradition had been requested and granted".[168] The rule of speciality has merit in cases of extradition from one state to another state; indeed, it is viewed in this context by some as "an essential human rights enforcement mechanism".[169] For example, "[w]ithout it an unscrupulous requesting state could try for treason a person extradited for manslaughter or embezzlement".[170] Whether this fairly common extradition requirement has any relevance to transfer to an international criminal court which it is hoped will observe the strictest possible international standards of fair trial, is doubtful. The number of core crimes within the court's jurisdiction are likely to be limited and of a similar nature and gravity. Indeed, in many cases, the same acts may be violations of more than one core crime, but the fact that these acts are violations of more than the crimes listed in the indictment or constitute different crimes

[165] Brownlie, *supra*, n. 130, p. 316.

[166] International Law Association, Second Report, *supra*, n. 133, pp. 6-7.

[167] For example, states parties to the Genocide Convention are required to enact the necessary legislation to give effect to the provisions of that convention, and, in particular, to provide effective penalties for the crime of genocide and ancillary crimes. Genocide Convention, Art. V. Each state party to the Convention against Torture must "ensure that all acts of torture are offences under its criminal law", Convention against Torture, Art. 4 (1), and "take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him". *Id*., Art. 5 (2). States parties to the Geneva Conventions "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" and to "take measures necessary for the suppression of all acts contrary to the provisions of [the Geneva Conventions] other than grave breaches". Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 (First Geneva Convention), 6 UST 3114, 75 UNTS 31, Art. 49, para. 1; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 (Second Geneva Convention), 6 UST 3217, 75 UNTS 85, Art. 50, para. 1; Convention relative to the Protection of Prisoners of War, Aug. 12, 1949 (Third Geneva Convention), 6 UST 3316, 75 UNTS 135, Art. 129, para. 1; Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 UST 3516, 75 UNTS 287, Art. 146, para. 1.

[168] Brownlie, *supra*, n. 130, p. 316.

[169] International Law Association, Second Report, *supra*, n. 133, p. 7, *citing* J..A. Frowein, "Male Captus Male Detentus - A "Human Right", *Essays in Honour of Henry Schermers*, pp. 175, 178.

[170] International Law Association, Second Report, *supra*, n. 133, p. 7.

may become known only after transfer. For example, evidence may become available during the investigation after a transfer that the killings with which the accused has been charged as crimes against humanity may also amount to genocide. To the extent that an investigation discovers after an accused has been transfered that other crimes have been committed, the accused should be permitted sufficient time to prepare for the additional charges.

Article 55 (1) of the ILC draft statutue provides that "[a] person transferred to the Court under article 53 [setting out the obligations concerning transfer of an accused] shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred." For the reasons specified above, this provision is unnecessary, and it might unduly restrict the ability of the prosecutor to bring charges based on new evidence discovered after the transfer. Article 41 (1) (b) protects the rights of the accused to have adequate time to prepare a defence to additional charges. **Article 55 (1) of the ILC draft statute should be deleted.**

g. Non bis in idem

The prohibition of double jeopardy (*non bis in idem*) found in many extradition treaties has no relevance to transfers to the international criminal court. Indeed, one of the important functions of the court, as spelled out in Article 42 (2) (b) will be to exercise its concurrent jurisdiction when the proceedings in the national court were not independent or the state has conducted a sham trial "designed to shield the accused from international criminal responsibility". In any event, as explained in an earlier paper, the principle does not prohibit an international criminal court from retrying someone previously tried in another jurisdiction under such circumstances.[171] **Article 42 (2) should not be weakened and the statute should continue to exclude the *non bis in idem* exception to extradition as a ground for refusal to cooperate with the permanent international criminal court.**

h. Statutes of limitation

[171] *Part I*, p. 63.

The UN Model Treaty on Extradition requires refusal of extradition if the person whose extradition is sought is immune from prosecution or punishment because a period of limitations has elapsed.[172] Statutes of limitations, however, are prohibited for the core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. For a discussion of the prohibition under international law of statutes of limitation for these crimes, see *Part I*, pp. 73 to 76. In addition to the sources cited in that document, Allied Control Council Law No. 10 expressly provided that "[i]n any trial or prosecution for a crime herein referred to [crimes against peace, war crimes and crimes against humanity], the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945".[173] Moreover, it has recently been recognized that "[t]he nonapplicablity of such limitations to many violations of international humanitarian law is recognized as an emerging customary norm, and is enshrined in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity."[174] **The statute should provide that there no statutes of limitation for the crimes of genocide, other crimes against humanity and serious violations of humanitarian law and that national statutes of limitation for such crimes not only shall not preclude the court from exercising jurisdiction, but shall not be considered as a ground for declining to investigate or prosecute a case.**

i. Amnesties

> ***"What shall we do with them? We could, of course, set them at large without a hearing. . . . To free them without a trial would mock the dead and make cynics of the living."***
>
> **Justice Jackson's Report to President Truman on the Legal Basis for Trial of War Criminals, 19 Temple L. Q. (1946), p. 148**

[172] Article 3 (e) of the UN Model Treaty on Extradition requires the requested state to refuse to extradite someone: "If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time . . ." A footnote states that some countries may wish to make this an optional ground for refusal. ECOSOC Res. E/1997/26 would add to the footnote that "Countries may wish to restrict consideration of the issue of lapse of time to the law of the requesting State only or to provide that acts of interruption in the requesting State should be recognized in the requested State."

[173] 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 (1946), pp. 50-55, Art. II (5).

[174] Harris & Kushen, *supra*, n. 133, p. 31 (footnote omitted).

The UN Model Treaty on Extradition requires refusal of extradition if the person whose extradition is sought is immune from prosecution or punishment because of an amnesty.[175] However, national amnesties for the worst imaginable crimes - genocide, other crimes against humanity and serious violations of humanitarian law - not only have no place in a permanent international criminal court, but also are prohibited under international law.[176] Allied Control Council Law No. 10 provided that national amnesties for crimes against peace, war crimes and crimes against humanity could not bar prosecutions by the military tribunals established by the Allies.[177] The General Assembly has opposed amnesties for crimes against humanity and war crimes.[178] National amnesties and pardons which prevent the emergence of the truth and accountability before the law are unacceptable and are the functional equivalent of "proceedings . . . designed to shield the accused from international responsibility", which is a ground for the permanent international criminal court to exercise its concurrent jurisdiction over core crimes under Article 42 (2) (b).

National amnesties and pardons which prevent the emergence of the truth and accountability for ***genocide*** are inconsistent with the duty to punish persons who have committed this crime. Every state party to the Genocide Convention undertakes "to prevent and to punish" genocide.[179] Article III of that convention provides that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide "shall be punishable". Under Article V, states parties undertake to enact the necessary legislation, including effective penalties, for these crimes.[180] Article VI requires states parties to bring those responsible for genocide to justice themselves or to transfer them to an international criminal court.[181] There are no exceptions.

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[175] Article 3 (e) of the UN Model Treaty on Extradition requires the requested state to refuse extradition: "If the person whose extradition is requested has, under the law of either Party become immune from prosecution or punishment for any reason, including . . . amnesty". A footnote to this article states that some states may wish to make this an optional ground for refusal.

[176] See generally Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", 59 L. & Cont. Prob. (1996), p. 191 [page proofs]; Diane F. Orentlilcher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", 100 Yale L.J. (1991), pp. 2537-2615; Naomi Roht-Arriaza, ""Combating Impunity: Some Thoughts on the Way Forward", 59 L. & Cont. Prob. (1996), p. 87 [page proofs]; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law* (Oxford: Oxford University Press 1995).

[177] Article II (5) of Allied Control Council Law No. 10, *supra*, n. XXX, provided that no "immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment" for crimes against peace, war crimes or crimes against humanity.

[178] Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. 3074 (XXVIII) (1973), para. 8 ("States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.").

[179] Genocide Convention, Art. I.

[180] *Id.*, Art. V ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

[181] *Id.*, 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 have

accepted its jurisdiction.").

National amnesties and pardons which prevent the emergence of the truth and accountability for ***serious violations of humanitarian law in international and non-international armed conflict*** are inconsistent with the duty to bring to justice those responsible for such crimes. Each state party to the Geneva Conventions of 1949 undertakes "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions.[182] Each state party is also under an obligation to bring such persons to justice in its own courts, to extradite them to another state party willing and able to do so or to transfer them to an international criminal court.[183] These obligations are *absolute* and no state may excuse another state from fulfilling them.[184] States parties are required to repress *all* breaches of the Geneva Conventions, including those taking place in non-international armed conflict, not just grave breaches.[185] This is part of the fundamental undertaking by each state party in common Article 1 of the Geneva Conventions "to respect and to ensure respect for the present Convention in all circumstances". A national amnesty or pardon for breaches of the conventions which are crimes under international law would violate this undertaking.[186]

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[182] First Geneva Convention, Art. 49, para. 1; Second Geneva Convention, Art. 50, para. 1; Third Geneva Convention, Art. 129, para. 1; Fourth Geneva Convention, Art. 146, para. 1.

[183] First Geneva Convention, Art. 49, para. 2; Second Geneva Convention, Art. 50, para. 2; Third Geneva Convention, Art. 129, para. 2; Fourth Geneva Convention, Art. 146, para. 2. The ICRC Commentary makes clear that the drafters of the Geneva Conventioins envisaged that states could satisfy their duty to bring to justice those resonsible for grave breaches by transferring suspects to an international criminal tribunal:

> "[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".

ICRC, I *Commentary on the Geneva Conventions of 12 August 1949* (1952), p. 366.

[184] The common article provides: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches". First Geneva Convention, Art. 51; Second Geneva Convention, Art. 52; Third Geneva Convention, Art. 131; Fourth Geneva Convention, Art. 148. The official commentary by the ICRC makes clear that this common provision removes any doubt that the duty to prosecute and punish the authors of grave breaches is "absolute". ICRC, I *Commentary on the Geneva Conventions of 12 August 1949* (1952), p. 373.

[185] Under an article common to all four conventions, each state party is obliged to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than grave breaches". First Geneva Convention, Art. 49, para. 3; Second Geneva Convention, Art. 50, para. 3; Third Geneva Convention, Art. 129, para. 3; Fourth Geneva Convention, Art. 146, para. 3. States are expected to enact legislation providing for punishment of such breaches, with appropriate penalties, to be imposed after judicial or administrative proceedings. ICRC, I *Commentary on the Geneva Conventions of 12 August 1949*, *supra*, n. 184, p. 368.

[186] Although Article 6 (5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (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", as Amnesty International has pointed out to negotiators of peace agreements, it is clear that this provision was intended to apply to political crimes, such as treason, or ordinary crimes, but not to serious violations of humanitarian law. Commentators subsequently have confirmed this interpretation. According to Naomi Roht-Arriaza, "the placement of the article at the end of a section on penal prosecutions and the language on internees and detainees suggests the drafters were primarily interested in reintegrating insurgents into national life". "Combating

Impunity", *supra*, n. 176, p. 91. Douglass Cassel has commented that "Article 6 (5) seeks merely to encourage amnesty for combat activities otherwise subject to prosecution as violations of the criminal laws of the states in which they take place. It is not meant to support amnesties for violations of international humanitarian law." "Lessons from the Americas", *supra*, n. , p. 212. In an authoritative intepretation by the ICRC communicated in 1995 to the Prosecutor of the Yugoslavia and Rwanda Tribunals in 1995 and reiterated on 15 April 1997:

> "Article 6 (5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as 'combatant immunity', *i.e.*, the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The 'travaux préparatoires' of 6 (5) indicate that this provision aims at encouraging amnesty, *i.e.*, a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law."

Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, to Douglass Cassel, *quoted in* "Lessons from the Americas", *supra*, n. 176, p. 212.

The duty to prosecute or extradite persons responsible for ***crimes against humanity*** [187] ***and grave violations of human rights***, [188] such as extrajudicial executions, [189] forced disappearance of persons, [190] torture [191] and violence against women[192] means that national amnesties and pardons which prevent the emergence of the truth and accountability for such violations are inconsistent with the duty to bring to justice those responsible for such violations and with the rights of victims to justice.[193] Indeed, the Human Rights Committee has found that such amnesties violate the International Covenant on Civil and Political Rights[194] and the Inter-American Court of

[187] M. Cherif Bassiouni, *Crimes against Humanity in International Law* (Dordrecht: Martinus Nijhoff Publishers 1992), pp. 492, 500-501; Carla Edelenbos, "Human Rights Violations: A Duty to Prosecute?", 7 Leiden J. Int'l L. (1994), pp. 5, 8; Orentlicher, *supra*, n. 176, pp. 2585, 2593.

[188] See, for example, Article 25 of the revised set of principles for the protection and promotion of human rights through action to combat impunity prepared by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorites which the Sub-Commission has transmitted to the Commission on Human Rights with a view to transmission to the General Assembly for adoption. UN Doc. E/CN.4/Sub.2/1997/L.60, 26 August 1997. That article provides that "*Les auteurs des crimes graves selon le droit international ne peuvent bénéficier de telles mesures tant que l'Etat n'a pas satisfait aux obligations enumérées au Principe 18*". (Advance copy) Principle 18 obligates states to bring to justice those responsible for such violations: "*L'impunité constitue un manquement aux obligations qu'ont les Etats d'enquêter sur les violations, de prendre des mesures adéquates à l'égard de leurs auteurs, notamment dans le domaine de la justice, pour qu'ils scient poursuivis, jugés et condamnés à des peines appropriées, d'assurer aux victimes des voies de recours efficaces et la réparation du préjudice subi, et de prendre toutes mesures destinées à éviter le renouvellement de telles violations.*". *Id.*

[189] Principle 18 of the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions provides:

> "Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

[190] Article 18 (1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance provides that persons who are alleged to have committed forced disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

[191] Article 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires every state party "in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [an act of torture] is found shall in the cases contemplated in article 5 [recognizing universal jurisdiction], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution".

[192] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, OAS Doc. OEA/ser.L.V/II.92, Doc.31 rev.3 (1996), *adopted* 9 June 1994, *entered into force* 1995, Art. 7 (recognizing duties to pursue policies to punish and diligently to investigate and impose penalties for violence against women).

[193] See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985.

[194] The Human Rights Committee has stated, with regard to torture, that "amnesties are generally incompatible" with the duty of states parties under Articles 2 (3) (guaranteeing the right to a remedy) and Article 7 of the ICCPR (prohibiting torture). General Comment No. 20, para. 4, UN Doc. No. CCPR/C/21/Rev.1./Add.3, 7 April 1992. The Committee has expressed its concern about national amnesties for grave human rights violations. For example, it noted its "deep concern" over Uruguay's Expiry Law preventing prosecution of police and military officials and requiring that pending prosecutions be dismissed, and it recommended that the law be amended to permit victims to have an effective remedy

Human Rights[195] and the Inter-American Commission on Human Rights[196] have found that they violate the American Convention on Human Rights.

The statute should provide that national amnesties and pardons for the crimes of genocide, other crimes against humanity and serious violations of humanitarian law which prevent the emergence of the truth and accountability before the law not only shall not preclude the court from exercising jurisdiction, but also shall not be considered as a ground for declining to investigate or prosecute a case.

j. Possible unfairness of proceedings in the requesting state

The UN Model Treaty on Extradition identifies a wide range of mandatory and optional exceptions to extradition related to concerns about the possible unfairness of proceedings in the requesting state, including fears of torture or ill-treatment,[197] proceedings falling short of those required by Article 14 of the ICCPR,[198] trials by special or *ad hoc* tribunals,[199] trials *in absentia*[200] or persecution,[201] or other human rights concerns, including the use of the death penalty.[202] These concerns are misplaced when it comes to a permanent international criminal court designed by states collectively to be a model of fairness and embodying the strictest possible international standards for a fair trial. **To the extent that the current ILC draft statute falls short of these standards, the**

for human rights violations. Comments of the Human Rights Committee, Uruguay, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, UN Doc. CCPR/C/79/Add.19, 5 May 1993.

[195] *Velásquez Rodríquez Case*, Inter-Am. Ct. H.R. (Ser. C), No. 4 (1988) (judgment), para. 174 ("The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry our a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.").

[196] Inter-American Commission on Human Rights has found that , Report No. 24/92 (Argentina), 82nd Sess., OEA/ser.L/V/II.82, Doc. 24 (2 October 1992); Report No. 26/92 (El Salvador), 82nd Sess., OEA/ser.L/V/II.82 (24 September 1992); Report No. 29/92/ (Uruguay), 82nd Sess., OEA/ser.L/V/II.82, Doc. 25 (2 October 1992).

[197] UN Model Treaty on Extradition, Art. 3 (f) ("If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment").

[198] *Id*. ("If the person whose extradition is requested . . . has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14").

[199] *Id.*, Art. 4 (g) ("If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or *ad hoc* court or tribunal").

[200] UN Model Treaty on Extradition, Art. 3 (g) ("If the judgement of the requesting state has been rendered *in absentia*, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence").

[201] *Id*., Art. 3 (b) ("If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that person's position may be prejudiced for any of these reasons").

[202] *Id*., Art. 4 (d) ("If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out").

statute should be amended to incorporate Amnesty International's recommendations in *Part II*, pp. 42-89.

k. Other exceptions

Some instruments prohibit extradition for humanitarian reasons.[203] Even assuming that such considerations should be taken into account in deciding whether to investigate and prosecute crimes such as genocide, other crimes against humanity and serious violations of humanitarian law, the decision to take them into account must be a decision for the international criminal court, not the state party, to make. **The statute or the rules should provide that the international criminal court should determine in all cases whether an accused is comptent to stand trial.** Some extradition treaties prohibit extradition for certain tax offences.

V. ENFORCEMENT OF ORDERS AND JUDGMENTS

> ***"Once States accept the jurisdiction of a court and agree to appear before it for the settlement of their disputes, they as a matter of course accept its judgment, even if it is adverse to their interests. The history of international adjudication largely confirms this view."***
>
> **Anand, *Studies in International Adjudication* (1964), p. 250**

A. Enforcement of judgments and orders

The statute should expressly provide that states parties shall enforce judgments and orders of the permanent international criminal court within its jurisdiction. It should also provide that findings of fact in judgments and orders have preclusive effect in proceedings in the courts of states parties. There should be no requirement of recognition procedure in national courts, other than a *pro forma* one, as such a recognition procedure could permit a national court to refuse to enforce the judgment or order. The need for effective measures to trace, freeze, seize and confiscate proceeds and instrumentalities of crime have been discussed above in Section II.C.2 concerning provisional measures.

[203] UN Model Treaty on Extradition, Art. 4 (h) ("If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person").

Article 58 of the ILC draft statute, which provides that "State parties undertake to recognize the judgments of the Court", does not satisfy these requirements. It suggests that a recognition procedure in national courts might be required and it applies only to judgments, not to orders or requests. As stated above in Section I. C, states parties must enforce orders and requests. Article 58 also does not expressly provide that the findings of fact in the judgment or other decision are binding in national courts, as in some mutual assistance instruments.[204] The ILC commentary to this article demonstrates that it was intended that "a judgment of the Court should be capable of founding a plea of *res judicata* or issue estoppel or their equivalents under legal systems which recognize those pleas", but the commentary notes that legislation may be necessary to give effect to this obligation. However, Article 58 does not expressly impose such obligations on states parties. **Article 58 should be amended to provide expressly that states parties shall enforce judgments and orders of the court fully and without delay, that they shall be bound by the findings of fact in judgments and decisions of the court and that they shall enact any necessary legislation to fulfil their obligations under the statute.**

B. Ensuring compliance with judgments and orders

Most states parties are likely to comply fully and without delay in the majority of cases and many non-states parties may be willing to cooperate. As a general rule, states comply with judgments of international courts and with arbitral decisions concerning disputes between states parties,[205] although there has been some erosion of that principle in recent decades, and the record of compliance with preliminary orders is not as consistent was with final judgments. Nevertheless, as experience has shown with respect to the two *ad hoc* tribunals, sometimes there are lengthy delays in compliance or even outright refusals to cooperate. There should be appropriate tools available to the court to ensure full compliance without delay with its judgments and orders by states, their officials and private individuals.

Despite initial problems in securing compliance with arrest warrants, which led to significant delays, both *ad hoc* tribunals have achieved some recent successes which demonstrate that political pressure can be effective in persuading recalcitrant states to cooperate with an international criminal court. For example, Croatia has facilitated the surrender of more than a dozen accused to the Yugoslavia Tribunal and one quarter of those publicly indicted are now in detention. It is expected that many others will surrender in the near future. The only two entities to refuse to comply with the Yugoslavia Tribunal are increasingly isolated and under pressure to comply as the price of rejoining the international community. Other states, which had taken a long time to comply with warrants issued by the Rwanda Tribunal, have now done so and more than half of those publicly indicted are now in detention. These are encouraging signs that

[204] TheConvention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS 30 (Strasbourg 8.XI.1990) provides in Article 14 (2) that "[t]he requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision of the requesting Party or in so far as such conviction or judicial decision is implicitly based on them."

[205] ". . . in practice most international decisions have been implemented by the parties". Karin Oellers Frahm, "Judicial and Arbitral Decisions: Validity and Nullity", *in* 1 *Encyclopedia of Public International Law* (Amsterdam: North-Holland Publishers 1981), pp. 118, 120. See also Edwin Borchard, "Limitations on teh Functions of the International Criminal Court", 96 Annals Am. Acad. Pol. & Sci. (1921), p. 135; C. Wilfred Jenks, *The Prospects of International Adjudication* (1964), p. 664; Oscar Schacter, "The Enforcement of International Judicial and Arbitral Decisions", 54 Am. J. Int'l L. (1960), pp. 1, 2.

states parties to a statute establishing an international criminal court as a general rule will fully comply.

Nevertheless, imaginative solutions may have to be devised to ensure that any state which fails fully and promptly to comply with judgments and orders of the court do so.[206] In many cases a simple finding that the state and its officials have failed to comply with a court order may lead to sufficient pressure from other states to comply. Other steps could be consided. For example, no state party which the court determines is failing to comply fully with its judgments or orders should be permitted to participate in meetings of states parties to determine the budget request or nominate or elect judges or the prosecutor. In any case of a refusal to enforce a judgment or order involving a referral by the Security Council under Chapter VII of the UN Charter, the Security Council resolution will no doubt provide, as in Resolutions 827 and 955 establishing the Yugoslavia and Rwanda Tribunals, that all states shall cooperate fully with the court and take any measures necessary under their domestic law to implement the resolution and statute, including the obligation of states to comply with requests for assistance or court orders. If the Security Council takes this approach in the referral resolution, all states would be obliged to comply with court orders or requests concerning any cases arising from the referral.[207] It would then be up to the Security Council to determine what measures pursuant to its powers under Chapter VII of the UN Charter would be appropriate in any case of non-compliance with a court order.

Although the Appeals Chamber in *Blaski_* decided that it had no power under Article 29 of the Statute of the Yugoslavia Tribunal to issue subpoenas to state officials to testify or to produce documents, nothing prevents states from collectively drafting a statute with a more effective procedure. Indeed, unless the court has the power to compel subordinates in a chain of command it may well be impossible to prosecute superiors for responsibility. In many cases, it will be difficult to testify without the eyewitness testimony of fellow soldiers or officers.

VI. STATE COOPERATION IN THE ENFORCEMENT OF SENTENCES

Amnesty International has explained why Article 59 of the statute of the permanent international criminal court must ensure that internationally recognized standards apply to the imprisonment of persons convicted by the court and why the court or a body designated by it should supervise such imprisonment in *Part II*, p. 91. All states parties should share the minimal burden of enforcing sentences either by providing prison facilities or contributing to a common fund which would assist states which do provide such facilities. Some such arrangement should be devised in the statute or the rules to avoid situation where host state or only a small number of states accept persons convicted by the court or are designated to provide facilities because their facilities meet international standards or because they are close to where the families of convicted persons are located, which is likely to be a factor in designating facilities. States parties will need to ensure that their prison facilities satisfy strict international standards. The

[206] For some of the considerations in developing effective methods of ensuring state compliance with international law, see Roger Fisher, *Improving Compliance with International Law* (Charlottesville: University Press of Virginia 1981); C. Wilfred Jenks, *The Prospects of International Adjudication* (1964), pp. 663-726.

[207] See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, paras 125-126.

statute or the rules should facilitate assistance to states parties to meet these standards. In the same paper, at page 92, Amnesty International explained why Article 60 of the ILC draft statute should be amended to guarantee that decisions to pardon, parole and commute sentences must be an international, not a national, responsibility.[208]

VII. COOPERATION WITH THE COURT BY STATES WHICH ARE NOT PARTY TO THE STATUTE

The statute and rules should facilitate cooperation by states not party to the statute pending ratification by those states of the statute. The ILC commentary to Article 56 states that that article "recognized that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes covered by the Statute", and, therefore, "even those States which are not parties to the Statute are encouraged to cooperate with and to provide assistance to the Court". Article 56 permits the court and states a great deal of flexibility in providing such cooperation: "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 56 should be retained.**

[208] See Yugoslavia Tribunal Guideline 14 (2) (providing that decisions on pardon and commutation remain the responsibility of the Yugoslavia Tribunal).