# ANALYSEN UND BERICHTE

## Towards a Permanent International Criminal Court

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### 1. Introduction

In view of the thaw of Cold War tensions a new era is claimed to be blooming, described by former President Bush with the concept of the so-called 'New World Order'. Co-operation, peace and security have been attributed a new meaning in a world that intends to realize the ideals of international solidarity and respect for fundamental human rights. However, the end of the Cold War did not result in the end of international problems. Artificially frozen nationalist and cultural tensions, come to the fore again in a very violent way. These conflicts put the New World Order severely to the test, leading many to ask if it is not more appropriate to speak of a new world *dis*order.

What has reemerged, on the other hand, is a willingness among world leaders of all camps to cooperate and to tackle the many problems of security, terrorism and violence together. In this connection, the idea of establishing a permanent International Criminal Court (ICC) has gained momentum. Scholars speak of the 1990's a "a propitious time for an ICC",[1] and of "an historic opportunity to advance the international rule of law"[2].

The idea of establishing such a court is not new at all. The very first example can be traced back to 1474, when Peter von Hagenbach was brought before 27 judges of the Holy Roman Empire for his violations of the "law of God and man"[3]. After World War I, the allies intended to prosecute Kaiser Wilhelm II by an international tribunal, an idea which was

1 *J. Cavicchia*, The Prospects for an International Criminal Court in the 1990's, Dickinson Journal of International Law 10 (1992), p. 229.

2 *M.C. Bassiouni*, The Time Has Come for an International Criminal Court, Indiana International and Comparative Law Reviews 1 (1991), p. 1.

3 *M. Keen*, The Laws of War in the Late Middle Ages 23 (1985), cited in: *Bassiouni* (id.). See also *Cavicchia, supra* note 1, at p. 224.

abandoned after his flight to the Netherlands.[4] The first concrete examples of war crimes tribunals were the post World War II Nuremberg and Tokyo trials. These inspired the world community to engage in the further codification of international crimes. This work of codification provided a firm ground for the establishment of the latest examples of international tribunals: the Tribunals for Yugoslavia and Rwanda. All the precedents in history, however, were established on an *ad hoc* basis, with a specific function and timespan.

This article discusses the possibilities and difficulties of the establishment of a permanent International Criminal Court. It discusses the main developments of international law relating to the establishment of the *ad hoc* war crimes tribunals after the second World War (Chapter 2) and those recently established for Yugoslavia and Rwanda (Chapter 3). Chapter 4 deals with the prospects for an ICC. After an account of the history of the ideas of a criminal code and court, the latest draft statute (July 1994) for an ICC from the International Law Commission and its jurisdiction will be thoroughly discussed, as well as comments and objections to this version. The conclusion sums up the difficulties and pleads for decisive action.

## 2. The Nuremberg and Tokyo Precedents

The establishment of the Nuremberg[5] and Tokyo[6] Tribunals constitute an important landmark in the development for international criminal law. Firstly, they make a clear pronouncement that aggressive warfare is an individual crime and set a precedent for enforcement against individuals who commit war crimes.[7] Secondly, they have developed the definition of certain crimes, namely those stated in Article 6 of the Charter of the Military Tribunal (Nuremberg) dealing with the jurisdictional basis of the Tribunal. This article encompasses the following crimes: a) crimes against peace: the planning, preparation,

4 Kaiser Wilhelm II of Hohenzollern obtained refuge in the Netherlands, which declined to extradite him, alleging that the offenses with which he was charged were political and not punishable under Dutch law (*Cavicchia, supra* note 1, at p. 225). It should also be mentioned that the Treaty of Sèvres (between the Allies and Turkey, 1923) provided for the prosecution of the responsible Turkish officials for the killing of an estimated 600,000 Armenians. This treaty, containing the notion 'crimes against humanity', was however never ratified. The replacement treaty of Lausanne (1927) gave amnesty to the Turks (*Bassiouni, supra* note 2, at p. 3).

5 The Charter of the International Military Tribunal was signed on August 8, 1945.

6 The tribunal in Tokyo for the trial of war criminals from the Far East was put up in 1946. See *B.V.A. Röling*, Tokyo Trial, EPIL 4 (1982), pp. 242-245; *B.V.A. Röling / A. Cassese*, The Tokyo Trial and Beyond. Reflections of a Peacemonger, 1993.

7 Article 8 of the Charter of the International Military Tribunal reads: "The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility", showing individual accountability. Charter of the International Military Tribunal in Nuremberg, AJIL 39 (1945), p. 260.

initiation, or waging of a war of aggression; b) war crimes: violations of the laws or customs of war; and c) crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population [...] on political, racial, or religious grounds.[8] Such clear definitions gave an impetus to the formulation of substantive law.[9]

Nevertheless, criticism against the Tribunals was raised at the time for various reasons. It was said that the Tribunals were unfair because they were constituted by only one side of the war, thus applying the victor's law over a defeated enemy. A second argument was that the applied law was *ex post facto*.[10] The Nuremberg Tribunal countered the criticism by stating that individual states were entitled to combine their efforts to try aliens for offenses against the law of nations, and to constitute an international tribunal. It took great pains to show that the rules applied were declaratory of pre-existing international law, resting upon general principles of justice, affirmed by several international declarations[11], which stated that aggressive war was an international crime.[12]

The three headings enumerated in Article 6 of the Nuremberg Charter have developed into the 1949 Geneva Conventions and the 1977 Additional Protocols; the Genocide Convention of 1948; the UN and European Torture Conventions; as well as other multilateral agreements regarding crimes against humanity. The principles established in Nuremberg

8 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, AJIL 39 (1945), p. 260.

9 With Nuremberg the idea developed that crimes against humanity were punishable under international law even if unrelated to war and regardless of the nationality of the victims. This was reaffirmed in UN General Assembly Resolution 95 (1945) endorsing individual responsibility in international law. Action by the UN confirmed and expanded the scope of crimes against humanity (genocide, draft Code of Offenses against the Peace and Security of Mankind). See Chapter 4 *infra* and *Ferencz*, Crimes against humanity, EPIL 8 (1985), pp. 107-109.

10 This means that the law which defines a certain act as criminal, is constituted after the act took place. This argument was used in defense of the Nazi's who stood trial in Nuremberg (and Tokyo), stating that their actions were not regarded as criminal by international law at the time committed.

11 Such as the 1928 Pact of Paris (Kellog-Briand Pact), binding 63 nations including Germany, Japan and Italy.

12 The Kellog-Briand Pact of 1928 (*supra* note 11) outlawed war as a means of national policy, i.e.: The continuation of a policy with military means, and stated that the waging of an aggressive war was illegal under international law. (The travaux préparatoires, however, show that all parties reserved the right to go to war in self-defense, and in the case of violations of vital interests.) However, the concept that an aggressive war was an international crime for which individuals would be responsible had not yet been mured. See *B.V.A. Röling*, Crimes against peace, EPIL 3 (1982), pp. 132-136.

and Tokyo have also added important sanctions outlawing war as an instrument of national policy, as reflected in the later Geneva Conventions.[13]

Inspite of this codification work, the world had to wait nearly half a century for a follow-up. It was only until the recent events in Yugoslavia that the world community decided to establish yet another international tribunal. The main tenets of the Nuremberg Trials are reflected in the Statute of the Tribunal for former Yugoslavia.

## 3. Recently Established Tribunals: Yugoslavia and Rwanda

### *3.1 The Yugoslavia Tribunal*

#### *3.1.1 Statute: Legal Basis and Competence*

The Statute for the 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991' was adopted by the Security Council (SC) in Resolution 827 of 25 May 1993, referring to Chapter VII of the UN Charter. Under article 29 of the UN Charter the SC may establish subsidiary organs, such as this Tribunal.[14]

The competence of the Tribunal derives from the mandate set out in paragraph 1 of the Resolution 808 (1993), and is composed of four fundamental elements: subject-matter, personal, territorial and temporal jurisdiction, as well as the question of concurrent jurisdiction. This is described in articles 1-10 of the Statute. Article 1 of the Statute reads:

> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present statute.[15]

The body of law mentioned in article 1 (subject-matter jurisdiction) exists in the form of both conventional and customary law. The International Tribunal shall apply rules of inter-

13 These 'Geneva' or 'Red Cross' Conventions have codified the principles of international humanitarian law (IHL), concerned with the treatment and protection of victims in armed conflict. It must be distinguished from human rights, which are concerned with the protection of the individual in general. See on this topic: *K.J. Partsch*, Human Rights and Humanitarian Law, EPIL 8 (1985), pp. 292-294; *K.J. Partsch*, Humanitarian Law and Armed Conflict, EPIL 3 (1982), pp. 215-219.

14 The Tribunal is an *ad hoc* body. The need for a swift answer made establishment by a treaty impossible, for this would have taken years, if it would have come into being at all. See *infra* 4.2. for the establishment by treaty and its prerequisits.

15 UN Doc. S/25704 (1993), at p. 9.

national humanitarian law which are beyond any doubt part of customary law[16], to meet the principle *nullum crimen sine lege*.[17] These rules are: the Geneva Convention of 1949; the Hague Convention (IV) of 1907; the Convention on Prevention and Punishment of the Crime of Genocide of 1948; and the Charter of the International Military Tribunal of 8 August 1945. The corresponding articles in the Statute are:

Article 2: Grave breaches of the Geneva Conventions of 1949
Article 3: Violations of the laws and customs of war
Article 4: Genocide
Article 5: Crimes against humanity.

Unlike Nuremberg, the Yugoslavia Tribunal has jurisdiction only over natural persons (Article 6), not over associations or organizations. Article 7 reaffirms the Nuremberg tenet of individual criminal responsibility. The Tribunal and national courts shall have concurrent jurisdiction to prosecute those described in article 1, with the understanding that the former shall have primacy over the latter (Article 9). Finally, Article 10 states that no person can be tried twice for the same crime[18], except when he is tried by a national court for serious violations of IHL which were characterized as ordinary crimes or if the proceedings at the national court were not impartial or independent.

### *3.1.2 Developments and Obstacles*

With the establishment of the Yugoslavia Tribunal the Nuremberg tenets of individual criminal responsibility are reaffirmed and enlarged. Now, for the first time, the Security Council's jurisdiction was extended to 'natural persons' (individuals). Unlike the Nuremberg and Tokyo Trials, there can be no doubt that the Yugoslavia Tribunal is based on existing IHL, because it applies those rules of IHL which are clearly part of customary law.

Also new is the idea that violations of IHL constitute a 'threat to peace'. It creates an important precedent. The utilization of justice in the name of peace is certainly one of the most important innovations related to this Tribunal. The Tribunal's creation under Chapter VII as a binding enforcement measure "may foreshadow more effective international responses to violations of humanitarian law."[19]

16 *Id.*

17 This principle is put down in Article 15 (1) of the International Covenant on Civil and Political Rights: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed."

18 The *ne bis in idem* principle. See *infra* note 23 (Article 14 (7) of the ICCPR).

19 *T. Meron*, War Crimes in Yugoslavia and the Development of International Law, AJIL 88 (1994), p. 79.

By treating the Yugoslav conflict as an international armed conflict, the applicability of the entire body of international humanitarian law, including the Hague and Geneva Conventions, has been triggered. Universal jurisdiction is derived only from grave breaches of those Geneva Conventions that deal with international conflicts. The grave breaches provisions of these conventions, however, do not apply to violations of common article 3 of the Geneva Conventions, dealing with internal conflicts.

The Tribunal confirms IHL as customary law, which not only encompasses the traditional field of crimes of war or armed conflict, but also crimes against humanity and crimes of genocide. In the field of codification, a broader meaning is given to crimes against humanity, now including torture and rape. Together with the recognition that rape can be a war crime or a grave breach[20], this strengthens the case for prosecution of this crime. Furthermore, Resolution 771 specifically condemned the horrible practice of 'ethnic cleansing'. According to the Commission of Experts,[21] this practice constitutes a crime against humanity and can be assimilated to specific war crimes. It has now also been accepted that 'ethnic cleansing' amounts to genocide, thus facilitating the punishment of those responsible for it. By guaranteeing certain rights of the defendants in the trial proceedings[22] – in particular those contained in Article 14 of the International Covenant on Civil and Political Rights[23] – the link between IHL and human rights is strengthened.

Some aspects of the statute raise questions and will need further explanation. What about, for instance, the applicable law: international law. This law contains no detailed definition of many of the offenses listed in the statute. What is meant with " other inhumane acts" of Article 5? Also the description in Article 3 that breaches "shall include, but not be limited to ..." is not clear. Can the Security Council, apart from requiring respect for international

20 For the development of this argument, see *E.-I.A. Daes*, New Types of War Crimes and Crimes Against Humanity: Violations of International Humanitarian and Human Rights Law, International Geneva Year Book 7 (1993), pp. 55-78.

21 An impartial Commission of Experts was established by Resolution 780 (1992) for the collection and analyzing of information of violations of IHL.

22 UN Doc. S/25704 (1993), at p. 27.

23 Article 14 of the International Covenant of Civil and Political Rights counts seven paragraphs and reads *inter alia*:

1. All persons shall be equal before the courts and tribunals. [...] [E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.
5. Everyone convicted of a crime shall have the right to this conviction and sentence being reviewed by a higher tribunal according to law.
7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted [...].

law and establishing mechanisms for its enforcement, make new international law? Hazel Fox thinks not. Nor can it, according to her, "reach essentially judicial determinations concerning the criminal responsibility of individuals."[24]

The cooperation of (third) states can be halted because of legal obstacles. Most countries can extradite individuals to another country but not to an international organization. Several countries, among which Germany, have changed their constitution to solve this matter. Because of this adaptation, Germany was able to hand over the Tadic case to the Yugoslavia Tribunal on the latter's request for deferral. This is a new development. The constitution of former Yugoslavia, however, did not even allow the extradition of its nationals to another country, let alone to an international organization.

The constitution of the Tribunal is a good reaction to the crimes committed in the Yugoslavian conflict. By taking a clear stand that such violations are not tolerated in this world, the credibility of international humanitarian law is enhanced. If the international community does not continue on the road it has taken when establishing the Tribunal, it will undermine the principles of justice it stands for. The credibility of a 'New World Order' with respect for international law and fundamental human rights, will suffer a severe setback. In this respect it is a positive sign that also elsewhere, in Rwanda, a case-specific Tribunal has been set up, widening the use of justice for the sake of peace.

### *3.2 The Rwanda Tribunal*

The horrific nature and scope of the killings in Rwanda in 1994 resulted in the establishment of yet another international tribunal, based on SC Resolution 955 of 8 November 1994. Again, the SC acted under Chapter VII of the UN Charter, making cooperation obligatory for all states. This tribunal has been installed for a purely internal conflict, for the very first time in history.

The International Tribunal for Rwanda has competence to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (Article 1). The Tribunal has the power to prosecute persons committing the following crimes:

[24] *H. Fox*, An international Tribunal for war crimes: Will the UN succeed where Nuremberg failed?, The World Today 49 (1993), p. 195.

Article 2: Genocide
Article 3: Crimes against humanity
Article 4: Serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

The Tribunal has jurisdiction over natural persons only (Article 5). Persons charged with any of the crimes referred to in Articles 2 to 4 shall be individually responsible for the crime (Article 6).

The Prosecutor of the Yugoslavia Tribunal will also serve as Prosecutor of the Rwanda Tribunal.[25] In both cases the Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source. It is up to the prosecutor to decide whether there is sufficient basis to proceed.[26]

Although the Yugoslavia and Rwanda Tribunals are in many ways similar, there is a major difference between them regarding the scope of subject-matter jurisdiction. In the case of the Rwanda Tribunal, common Article 3 to the Geneva Conventions and Additional Protocol II thereto apply. These deal with violations of international humanitarian law in internal armed conflict. This is a necessary and logical step, considering that we are dealing here with an internal conflict. If these provisions had not been included, the scope for prosecution would have been much narrower, and the burden of proof necessarily much greater. By including the relevant articles applying to internal armed conflict in its Statute, the Rwanda Tribunal has widened the scope of international jurisdiction. Perhaps a precedent has been set for future internal violations and international involvement there in. In that case, the sometimes artificial distinction between internal and international conflicts might be avoided, as well as the (political) question of what kind of conflict is at issue. However, questions may be put concerning the applicability of Article 4 of the Rwanda Tribunal regarding its status as customary law. In the Yugoslav Statute, common Article 3 to the Geneva Conventions and Additional Protocol II are explicitly not mentioned, because these were considered as treaty law only, not yet evolved into customary law, which was to be the sole basis for the jurisdiction of the Yugoslavia Tribunal. In any case, it may be concluded that the drafters of the Rwanda Tribunal, as compared to the Yugoslav case, intended "something completely different"[27].

25 At the moment this is Judge Richard Goldstone from South Africa.

26 Respectively Articles 18 and 17 of the Statutes of the Yugoslavia and Rwanda Tribunals.

27 *Frits Kalshoven*, 16 February 1995, The Hague, Conference on Public International Law: 'The International Criminal Tribunal for former Yugoslavia', organized by the T.M.C. Asser Instituut.

## 4. Towards a Permanent International Criminal Court

### *4.1 Evolution of the Idea of an International Criminal Code and Court*

In 1949, the UN created the International Law Commission (ILC) to work out a draft code containing international offenses, which was intended to be the jurisdictional basis for a permanent international criminal court (ICC). The ILC submitted a first draft code in 1950, reaffirming aggression, war crimes and crimes against humanity as international crimes. But "the attempt of nations to agree upon a definition of aggression elicited more aggression than definition"[28]. The General Assembly (GA) decided that no international criminal code or court could be established until the matter of 'aggression' was solved. Only in 1974, consensus on the definition of aggression was reached.[29] The ILC succeeded in 1991 in agreeing upon a first draft of a Code of Crimes Against the Peace and Security of Mankind.[30] This code is far from complete and not free from ambiguity.[31]

As for the establishment of an international court, action was deferred pending an agreement on a code, which depended in turn on the definition of aggression. In 1990, the ILC reported that there was "broad agreement [...] on the desirability of establishing a permanent international criminal court within the United Nations system. (...) The international climate now appears particularly favorable for the establishment of such a court"[32]. The installment of the Yugoslavia and Rwanda Tribunals has put some speed behind the creation of draft statutes for a permanent court. But in these cases, we are confronted with *ad hoc* tribunals. The establishment of a permanent ICC has far greater implications. Problems regarding state sovereignty and the definition of jurisdiction have been impediments to the realization of an ICC. Since 1990, the ILC has issued several proposals for a draft statute, adapted over the years. The idea that a common code of offenses is a *sine qua non* for an

28 *B.B. Ferencz*, An International Criminal Code and Court: Where they stand and where they're going, Columbia Journal of Transnational Law 30 (1992), p. 377.

29 On December 14, 1994, the UN General Assembly adopted Resolution 3314 which defined 'aggression' as "armed force by one state against another", and adopted eight different articles defining the aggression.

30 Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc. A/46/10 (1991), at pp. 238-250.

31 See for an elaborate discussion of the Draft Code: *C.M. Bassiouni* (ed.), Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind (1993). For a shorter discussion, see: *Ferencz, supra* note 28, at pp. 375-399.

32 *S.C. McCaffrey*, The Forty-Second Session of the International Law Commission, AJIL 84 (1990), p. 930.

ICC has now been abandoned. This has opened up the way for the creation of an ICC in the near future, reflected in the ILC's latest Draft Statute of 22 July 1994.[33]

### *4.2 The ILC's 1994 Draft Statute for an International Criminal Court*

After many years of hard work and several drafts, the Working Group on a Draft Statute for an International Criminal Court of the ILC issued a new draft statute in July 1994. This is the most elaborate one so far. It is not completely finished and has already been criticized from various sides.[34] We are probably closer than ever in history to the realization of an ICC, although, realistically, this will still take some more years. The Draft Statute[35] prepared by the Working Group is divided into eight main parts.[36] Here, the parts dealing with the establishment of the Court and its jurisdiction will be highlighted.

The preamble sets out the main purpose of the Draft Statute, which is to further cooperation in international criminal matters, to provide a forum for trial and for appropriate punishment, especially where there is no prospect of national trials. Thus, the jurisdiction of the Court is intended to be complementary to that of national jurisdiction, not excluding it. The Court is to have jurisdiction only over the most serious crimes, those who are of concern of the international community as a whole.

As for the establishment of the Court – treated in Part 1 of the Statute – the question arose in what way this should be done and in particular what the relationship to the UN should be. The various options, as explained in the commentary to Article 2, are: 1) creating a court as a subsidiary organ of the UN by a SC or GA resolution, or 2) creating a court as an organ of the UN , which needs amendment of the Charter; 3) establishing a court by way of a treaty amongst the States parties. The ILC prefers a treaty-basis to the other two options. A treaty commitment imposes binding obligations on its signatories and has the force of law within participating states. However, states on whose territory terrible crimes are committed would not necessarily be parties to the Statute. This could give the impression of a circle of 'virtuous' states between whom no involvement of the Court would arise. The

33 This Draft Statute has been subject to discussion by the GA at its fiftieth meeting, autumn 1995. The result of that discussion were not available to the author at the time of writing, and are therefore not included in this article.

34 See 4.3.

35 Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, 49 UN GAOR Supp. (No. 10=, UN Doc. A/49/10 (1994) [hereinafter: 1994 ILC Report].

36 Part 1 on Establishment of the Court; Part 2 on Composition and Administration of the Court; Part 3 on Jurisdiction of the Court; Part 4 on Investigation and Prosecution; Part 5 on the Trial; Part 6 on Appeal and Review; Part 7 on International Cooperation and Judicial Assistance; and Part 8 on Enforcement.

relationship with the UN has been described in Article 2 as "an agreement establishing an appropriate relationship between the Court and the United Nations"[37].

Part 3, dealing with the jurisdiction of the Court, is central to the statute because it limits the range of cases which the Court may deal with. Two basic ideas underlie the jurisdictional strategy of the statute. The first is that the Court should exercise jurisdiction over crimes of an international character, defined by existing treaties. Because a mere reference to crimes under general international law is found highly uncertain and would give excessive power to the Court, the jurisdiction of the Court has been restricted to a number of specified cases, as defined in Article 20. The second presumption is that there should be a distinction between participation and support for the Court on the one hand and acceptance of its substantive jurisdiction on the other. Only with respect to genocide the Court is given 'inherent' jurisdiction (or 'compétence propre').[38] The other crimes require the consent of the States parties. This process of acceptance is comparable to that of Article 36 of the Statute of the International Court of Justice.

Article 20 lists the crimes within the jurisdiction of the Court. It contains two categories of crimes: crimes under general international law (paragraphs (a) to (d)) and crimes of international concern defined by treaties (paragraph (e) and Annex). Article 20 (a)-(d) is not intended to be an exhaustive list, but it is limited to those crimes under general international law which the Commission believes should be within the Court's jurisdiction at this point in time. It was guided in its choice by the fact that three of the four crimes are singled out in the Statute of the Yugoslavia Tribunal.[39] The crime of genocide (para. (a)) is the only crime over which the Court is given inherent jurisdiction. It is clearly and authoritatively defined in the 1948 Genocide Convention which is widely ratified, and which envisages referral to an international criminal court. The crime of aggression (para. (b)) is the only crime that is not mentioned as such in the Statute of the Yugoslavia Tribunal. Its definition is more problematic because most international documents deal with aggression by states, not with the crimes of individuals. [40] Notwithstanding doubts about whether these resolutions deal with inter-State law or with the criminal responsibility of individuals,

37 1994 ILC Report, at p. 45.

38 This means that the Court has jurisdiction over this crime when the Statute is signed. A state can not revoke the Court's jurisdiction on this point after signing.

39 See Articles 3 to 5 of that Statute.

40 GA Resolution 3314 (XXIX) of 14 December 1974, article 5 (2) on the Definition of Aggression reads: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility". The Friendly Relations Declaration (GA Resolution 2625 (XXV) of 24 October 1970), Principle 1 states: "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law". Both cited in 1994 ILC Report, at p. 73.

some members of the Commission thought their language ought to be taken into account.[41] Article 20 (c) refers to 'serious violations of the laws and customs applicable in armed conflict'.[42] The Commission acknowledges the existence of the category of war crimes under customary international law. It overlaps with, but is not identical to, the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977. The Commission preferred the modern usage of 'rules applicable in armed conflict' to 'laws of war' because of the uncertainty of the status of 'war'. The term 'serious violations' is used to avoid confusion with the technical term 'grave breaches'.[43] Subparagraph (d) deals with crimes against humanity. Also with respect to this crime difficulty exists with regard to the definition, partly because of the absence of an applicable treaty regime. The ILC's interpretation encompasses inhumane acts against any civilian population of a very serious character, of a large-scale and systematic nature.[44]

The Annex to the Statute lists multilateral treaties to which the Court's jurisdiction extends, defining as criminal specified conduct of international concern (Article 20 (e)). The Court's jurisdiction is further limited in this case, as it will be a preliminary question under Article 34 for the court to determine whether these constitute "exceptionally serious crimes of international concern" in any case.[45] The Annex includes only treaties in force of universal scope, defining crimes of an international character and establishing a broad jurisdictional basis to trial of such crimes.

After a complaint is lodged by a state (Article 25) which has accepted the jurisdiction of the Court (Article 22), there are still preconditions to the exercise of the Court's jurisdiction, as set out in Article 21. Acceptance is required (in the case of crimes other than genocide) by any state which has custody of the accused in respect of the crime, and by the state on whose territory the crime was committed. The system of acceptance of the Court's jurisdiction (Article 22) can be characterized as an "opting-in" model. This means, as described above, that jurisdiction is not conferred automatically on the Court by becoming a party to

41 They also relied on Article 6 (a) of the Charter of the International Military Tribunal of 1945 (Nuremberg Charter), covering (only) the waging of a war of aggression.

42 It reflects provision in the Statute of the Yugoslavia Tribunal (Article 3: "Violations of the laws or customs of war") and in the Draft Code of Crimes against the Peace and Security of Mankind (Article 22: "Exceptionally serious war crimes").

43 This is term used in the 1949 Geneva Conventions and Additional Protocol I of 1977.

44 The particular forms of unlawful act (murder, enslavement, torture etc.) or their being targeted against the civilian population in whole or in part, are less crucial to the definition than the factors of scale and deliberate policy.

45 1994 ILC Report, at p. 69.

the Statute. States parties have to express their consent by way of a special declaration, which can be made at the time of becoming a party to the Statute or subsequently.[46]

Not only states but also the Security Council can refer a matter to the Court, if acting under Chapter VII (Article 23). This provision enables the SC to make use of the Court, "as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind"[47]. This does not mean that the SC can act against individuals directly. It can refer a "matter" – a situation to which Chapter VII applies – to the Court. The Prosecutor then determines whether, and which, individuals should be charged with crimes as enumerated in the Statute. The Statute does not confer power on the General Assembly to refer a case to the Court[48], as the GA lacks authority under the UN Charter to bind states against their will.

From the articles and provisions discussed above, two things become clear. Firstly, the Statute envisages close ties between the Court and the UN. Secondly, the Statute limits the jurisdiction of the Court considerably.

### *4.3 Comments and Objections*

From all sides, the 1994 Draft Statute is seen as an excellent framework for an International Criminal Court and as a significant improvement of the 1993 draft. However, there are still some gaps and questions that need to be addressed. The International Commission of Jurists's (ICJur) "Campaign for the Establishment of the International Criminal Court"[49] and Amnesty International's (AI) report "Establishing a Just, Fair and Effective International Criminal Court"[50], make propositions for the improvement of the Statute. Their comments and objections, together with that of other sources, are summarized in this chapter.

46 The counterpart of this system is the "opting-out" system, whereby states on becoming parties to the Statute would have to publicly declare that they do not accept jurisdiction over specified crimes. A number of members favored this system but did not get a majority in the Commission. One member expresses profound reserve at a system of acceptance of jurisdiction which would, in his view, empty the Statute of real content so far as the jurisdiction of the Court is concerned (1994 ILC Report, at p. 84).

47 *Id.*, at p. 85.

48 Although some members favored this idea, especially in case the SC is blocked by a veto.

49 International Commission of Jurists (1995) "ICJ Campaign for the Establishment of the International Criminal Court", Geneva, Switzerland, Update: February 1995 [hereinafter: 1995 ICJ Campaign].

50 Amnesty International (1994), "Establishing a Just, Fair and Effective International Criminal Court", AI Index: IOR 10/05/94, October 1994.

In its commentary to Article 2, the ILC explained the different possibilities for the creation of the Court and their implications for the relation with the UN. The preference of the Commission is a Court established by way of a treaty, with close ties to the UN through a special agreement. The Draft Statute, however, does not contain treaty provisions, nor does it specify the number of ratifications necessary for the entry into force of such a treaty. In the view of AI, the number of ratifications required should be low enough to enter into force quickly. The ICJur, on the other hand, points out the trend in international law that fewer ratifications as a minimum are required for entry into force.

AI prefers amending the UN Charter and establishing an independent judicial organ of the UN, like the International Court of Justice. This would be binding on all members of the UN and would enhance the Court's permanence, legitimacy, authority, universality and acceptance. AI recognizes that amendment of the Charter (which is possible under Article 108 of the UN Charter) can be a lengthy procedure. Such an amendment is also very unlikely, bearing in mind the needed approval of two thirds of the UN members, including all five permanent members. Enlarging the Court's authority means automatically that the jurisdiction of States will diminish. States are not very eager to give up their sovereignty, which will be partly the case if an ICC will be established with criminal jurisdiction.

The provisions in the Statute on the jurisdiction of the Court aroused quite a stir. Concern exists about the "exhaustive" enumeration of treaties in the Annex, as mentioned in Article 20 (e). A provision concerning the inclusion of later treaties is absent. How, for example, will the Code of Crimes against the Peace and Security of Mankind (if ever coming into being) be included?[51] Also questioned is the consent needed by states for jurisdiction. The Court only has inherent jurisdiction over genocide. Jurisdiction over all other crimes mentioned in Article 20 is consensual. This approach is too restrictive according to both AI and the ICJur. It does not guarantee that the Court will have a 'common core of crimes' within its jurisdiction, other than genocide.[52] Instead, the jurisdiction of the Court should extend to all universally recognized crimes. Crimes against humanity or serious violations of the laws and customs applicable to armed conflict are no less international in its effect than genocide. Jurisdiction to deal with them should therefore also be universal.[53]

AI is neither in favor of an 'opting-in' system, nor of the 'opt-out' system; no reservations at all should be admitted.[54] The problem with this kind of provisions is that a too broad juris-

51 1995 ICJ Campaign, at p. 4.

52 AI, Establishing a Just, Fair and Effective International Criminal Court, at p. 17.

53 1995 ICJ Campaign, at p. 2.

54 AI, Establishing a Just, Fair and Effective International Criminal Court, at p. 18.

dictional basis for a Court might scare states away from signing such a treaty, in their fear of loss of sovereignty over criminal jurisdiction.

A different jurisdictional matter relates to the act and crime of aggression as mentioned in Article 20 (b) of the Draft Statute. It is unclear what is meant by 'aggression'. Reference to general international law does not clarify the meaning of the word. Besides, the crime of aggression can only be lodged against an individual of the SC has determined that a state has committed the act of aggression (Article 23). This is a political decision rather than a legal one and gives the SC an effective veto over state complaints in cases of aggression and its prosecution. If the ICC has no judicial review of the determination made by the SC, then the ICC will not have the capability of adequately trying the crime of aggression, and should not have jurisdiction over it.[55]
Article 20 (c) seems wide enough to cover also common Article 3 of the 1949 Geneva Conventions and Additional Protocol II thereto, both dealing with internal armed conflicts. These were not included in the Yugoslavia Tribunal. This *ad hoc* tribunal spoke of "violations of the laws and customs of war", which refers to the Hague Convention IV of 1907, dealing with violations in international armed conflict. The ICC Statute speaks of "serious violations of the laws and customs applicable to armed conflict". This seems wide enough to include internal armed conflict, as is the case in the Rwanda Tribunal. Indeed, nothing in the Commentary suggests that Article 20 (c) is limited to international armed conflict. But the Statute or Commentary should clarify that these are included and specifically mention them in the Annex.[56]

The role of the Prosecutor in the Statute for an ICC is more limited than the corresponding role in the Yugoslavia and Rwanda Tribunals. Within the framework of those tribunals, he can initiate investigations. In the Draft Statute, the Prosecutor can only start an investigation after a complaint is lodged by a state or after referral of a matter by the SC. For the sake of real judicial independence, the Prosecutor should be able to begin an investigation on his own initiative, with respect to any crime as to which the Court has jurisdiction. He also should be able to use information about crimes or suspects given by intergovernmental organizations, non-governmental organizations and individuals, which is not provided for in the 1994 ILC Statute.

What is also lacking in the Draft Statute is a procedure by which victims of crimes under international law can lodge complaints. Some international bodies already have this possibility, so it is not new. Moreover, "States which have accepted the Statute of the Court are obliged to comply with it, both with respect of other States, as well as with respect to their

55 1995 ICJ Campaign, at pp. 3-4.

56 See the Annex of the Statute regarding the Crimes pursuant to Treaties (as mentioned in Article 20 (e) of the Statute).

own people".[57] Regarding the nature of this international body-to-be, such rights for victims fit in well. Finally, AI urges that safeguards on the right to a fair trial be incorporated in the Statute, in accordance with the provisions in the International Covenant on Civil and Political Rights and other relevant international standards.[58]

All these comments lead to the conclusion that there is still a long way to go before the Statute ensures the international criminal court to be a just, fair and effective one.

## 5. Conclusion

The scope of international criminal jurisdiction has developed ever since its first implementation in the Nuremberg and Tokyo Tribunals. The tenets established there – aggressive warfare as a crime against peace, individual responsibility for war crimes, and crimes against humanity – were further elaborated in international treaties and conventions, such as the Genocide Convention, the Geneva Conventions and the Torture Convention. These became generally accepted and developed into customary law, which formed the jurisdictional basis of the Yugoslavia Tribunal. The fact that violations of international humanitarian law were conceived as a threat to the peace enhanced the importance of this body of law, now including genocide and crimes against humanity. Its influence on the ICC can be found in the Draft Statute, which states that "[c]arefully note was also taken of the various provisions regulating the Yugoslavia Tribunal"[59]. The subsequently established Tribunal for Rwanda enlarged even further the possibilities for international criminal jurisdiction, by allowing for jurisdiction over violations of international humanitarian law in internal armed conflicts. Hopefully, this will serve as a precedent and will be included firmly in the Draft Statute for a permanent ICC.

The 1994 Draft Statute for a permanent ICC prepared by the ILC embodies international jurisdiction of the most serious crimes. It limits the jurisdiction of the Court to those crimes which are of concern to the international community as a whole. It is further limited – except for genocide, over which it has inherent jurisdiction – by the 'opting-in' system, whereby states party to the Statute are not automatically bound by the jurisdiction of the Court. They have to give their explicit consent by the way of a special declaration, which can be revoked.

57 1991 ICJ Campaign, at p. 3.

58 AI, Establishing a Just, Fair and Effective International Criminal Court, at pp. 31-41.

59 1994 ILC Report, at p. 43.

Although an elaborate Statute, the 1994 version still contains many loopholes. The jurisdictional basis for the Court is too narrow. Inherent jurisdiction should stretch out to all serious violations mentioned in Article 20 of the Draft Statute. All the possible reservations which states can make prevent the realization of a common core of crimes, which should be the basis of such a Court. Some provisions are unclear, such as Article 20 (b) on aggression. Others are not explicit enough: are internal armed conflicts also covered by Article 20 (c) of the Statute? Also, not all provisions are sufficiently worked out, such as safeguards for a fair trial. It is also regrettable that the competence of the Prosecutor has been restricted, since his role is more elaborate in the recently established *ad hoc* Tribunals. The way the ILC envisages the establishment of the Court – by a treaty – might result in a club of virtuous states. Amending the UN Charter and making the ICC part of the UN system, seems a better guarantee for its universality, but there remains the problem of political realizability.

This brings us to the core dilemma of establishing international bodies with large fields of competences. If the jurisdiction of an international criminal court is too wide, states will hesitate to become parties to the Statute, gearing a loss of their (criminal) jurisdictional sovereignty. The result will be membership restricted to those interested states who are not expected to occupy the Court anyway. If, on the other hand, the Court's jurisdiction is too narrow, there will be a large membership but still no (or few) cases may reach the court, because of all the reservations the states parties are likely to attach.

However, let all these difficulties not be an excuse for inaction. Too often, gross violations of human rights and grave breaches of humanitarian law go unpunished, eroding the authority of and respect for the rule of law. The *ad hoc* Tribunals are an important step in putting an end to such impunity. But the *ad hoc* approach is not a satisfactory solution in the long run to the problem of enforcing international law. International criminal law remains a dead letter if an International Criminal Court does not come into being. National jurisdiction has proven to be insufficient. This cycle of impunity must be broken. Respect for the rule of law and for the body of international humanitarian law, developed over the last decades, must be maintained.

# ABSTRACTS

## Towards a Permanent International Criminal Court

By *Nina Huygen*

Since the establishment of the *ad hoc* Tribunals of Nuremberg and Tokyo and those recently established for former Yugoslavia and Rwanda, a new impulse has been given to the advancement of the international rule of law with the 1994 Draft Statute for a permanent International Criminal Court (ICC), prepared by the International Law Commission. The ILC has been working on this issue since 1950, but the political will was lacking to live by a universally binding rule of international criminal law. Action was deferred pending an agreement on an international penal code, which depended in turn on the definition of aggression.

The installment of the Yugoslavia and Rwanda Tribunals have put some speed behind the creation of draft statutes for a permanent court. Time now seems ripe for the discussion of a permanent ICC, even though a code of offenses still does not exist. This has opened up the way for the creation of an ICC in the near future, reflected in the ILC's latest Draft Statute. Urgent action is needed or else, some think, the momentum might again be lost and the world community will have to wait until other abhorrent criminal acts are committed.

This article draws a picture of the main developments of international law relating to the establishment of former war crimes tribunals, and the impetus these might have on the establishment of a permanent International Criminal Court. It gives a critical assessment of the 1994 Draft Statute, notably on its jurisdictional scope. The draft envisages a court – established by treaty – which should exercise jurisdiction over crimes of an international character, defined by existing treaties. A second presumption is that there should be a distinction between participation and support for the Court on the one hand and acceptance of its substantive jurisdiction on the other. Although an elaborate version, there still remain some gaps and questions. The jurisdictional basis for the Court is, in the author's view, too narrow. Some provisions are unclear, not explicit enough or not good enough.

This, however, ought not halt the realization of a permanent ICC, without which international criminal law remains a dead letter. Impunity of gross violations of human rights and grave breaches of humanitarian law – violations of fundamental norms – should be stopped.