

January 1997

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### Recommended Citation

Christopher L. Blakesley, Jurisdiction, Definition of Crimes, and Triggering Mechanisms, 25 Denv. J. Int'l L. & Pol'y 233 (1997).

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## Jurisdiction, Definition of Crimes, and Triggering Mechanisms

### Keywords

Crimes, Jurisdiction, Criminal Law, International Courts and Tribunals, International Criminal Law, International Criminal Court

# Jurisdiction, Definition of Crimes, and Triggering Mechanisms<sup>1</sup>

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1. This report has been adapted from the following works by the author: Christopher Blakesley, *Atrocity and its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia & Rwanda, Ch. 8*, in *WAR CRIMES: A SYNTHESIS OF NATIONAL APPROACHES* (1996); Christopher Blakesley, *Comparing the Ad Hoc Tribunal for Crimes Against Humanitarian Law in the Former Yugoslavia & the Projèt for an International Criminal Court Prepared by the International Law Commission*, 67 *REVUE INT'L DE DROIT PÉNAL* 1, 33-46 (1996). Christopher Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 *FLETCHER F. WORLD AFF.* 77 (1994) [hereinafter *Blakesley, Obstacles*]; CHRISTOPHER BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY*, chs. 1, 2 & Conclusion (1992) [hereinafter *BLAKESLEY, TERRORISM*]; COVEY T. OLIVER ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS*, chs. 3, 10, 11, 16, 17 (1995). See also M. CHERIF BASSIOUNI, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996); VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* vols. 1&2 (1995); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, Occasional Paper No. 2 (DePaul U. Int'l Hum. Rts. L. Inst., 1996); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 *AM. J. INT'L. L.* 140 (1994); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *FOR. AFF.* 122 (1993); Herman Woltring, *General Rapporteur, Report at the International Meeting of Experts on the Establishment of an International Criminal Tribunal*, in *Vancouver, Canada*, (Mar. 22-26, 1993); Kayal et al., *The Forty-Fourth Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Special Session of the Commission on Human Rights on the Situation in the Former Yugoslavia*, 15 *HUM. RTS. Q.* 410 (1993); Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 *HUM. RTS. Q.* 262 (1993); Gualtieri, *Draft, Comparison of Proposals for an International Criminal Tribunal* (DePaul U. Int'l Hum. Rts. L. Inst., June 22, 1993). See also generally, ROGER S. CLARK AND MADELINE SANN, *THE PROSECUTION OF INTERNATIONAL CRIMES* (1996). I would like to thank Leila Sadat Wexler for all of her superb help and to thank Jordan J. Paust and Roger S. Clark for their fine critique and suggestions. I would also like to thank my research assistant Imelda Fisher for her excellent work.

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## I. INTRODUCTION

A. *General*

Some have said that the potential creation of an international criminal court "could transform the United Nations into a third generation international organization capable of meeting the new imperatives of human security."<sup>2</sup>

1. Obstacles Abound<sup>3</sup>

The opportunity to create an international court that provides fair, equitable, and efficient justice is rare and important. It requires expertise in comparative and international law. Problems are serious, however. Failure to address the formidable problems could cause the Court to run a risk of failure that could be disastrous for international law, for the victims of the horrors that have occurred and that will occur, and for the world. Failure could come in at least two forms: (1) the Court could merely be a conduit for retribution after a pro-forma kangaroo court or (2) it will not have sufficient funding or expertise to prosecute fairly, justly, and efficiently, so that all or most of the perpetrators will escape justice, unless national or regional courts take action. International law may be disparaged as meaningless. The victims of the horrific violations of the laws of humanity will have to live with the knowledge that the perpetrators, who flaunted the laws of humanity in the most cruel ways, walk free. The perpetrators and their victims know that fact. The cause of justice and international law or the cause of an international criminal court or set of courts could be set back badly.<sup>4</sup>

This point is not to suggest that we should not go forward with prosecuting those who commit atrocities. Rather, we should not do so to make *us* feel good, but to succeed. Failure could harm not only values that we all hold to be important, but also could weaken international law.<sup>5</sup> The danger of failure is a mockery of international law giving impetus to those who suggest that it is not law at all! Now that

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2. Richard J. Ponzio, *Beyond 1995: Negotiating a New United Nations Through Article 109*, 20 FLETCHER F. WORLD AFF. 149, 152 (1996) (footnote omitted).

3. See Blakesley, *Obstacles*, *supra* note 1.

4. One member of the Committee felt that the risk of failure was overstated by the author. In the views of that member, reading between the lines, the real fear of most democratic governments (including our own) concerning the ICC is not that it will fail, but that it will succeed — that is, that there will be established a tribunal that will be independent enough to try to hold governments (including superpower governments) accountable. The writer of this report feels that the fear indicated in this footnote reinforces the need to make certain that the court meets the *highest* standard of protecting the rights of the accused. Otherwise it will provide a rationale for opposition or refusal to participate.

5. My point is that pretending to do something is worse than doing nothing, so we must not allow this to be mere pretense.

the process has begun, we owe it to ourselves and to all humanity to make it succeed. This report will attempt to provide some insight into some of the problems facing the creation of an international criminal court, so that we may understand and resolve them. This report will analyze relevant portions of the Statute of the International Law Commission (ILC) for the Creation of an International Criminal Court.<sup>6</sup> Where appropriate, this piece will refer to the experiences of the *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda. I will focus on the articles and issues that I find to be of interest or about which there is some significant discrepancy among the Statutes or those which pose serious policy-based or interpretive problems.<sup>7</sup>

## 2. Problems Caused by Trying to Merge Two Systems

Both the *Ad Hoc* Tribunals and the ILC Draft Statute have attempted to combine essential aspects of the so-called "adversarial" or "common law" and "civilian" or "inquisitorial" systems. This effort is

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6. *Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute of an International Criminal Court, 2 May-22 July 1994*, U.N. GAOR, 49th Sess., Supp. No. 10, at 51, U.N. Doc. A/49/10 (1994) [hereinafter *1994 ILC Draft Statute*]. The *Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3917th mtg, U.N. Doc. S/RES/827 (1993) [hereinafter *ICTY Statute*] is currently functioning in the Hague, having indicted several persons at this writing. These indictments include the July 11, 1996, indictment of political leader Radovan Karadzic and General Ratko Mladic for War Crimes in the former Yugoslavia. They are each charged with genocide. See Marlise Simons, *Broader Warrants Issued for 2 Bosnia Serbs*, *N.Y. Times*, July 20, 1996, at 1, col. 1; Bruce Zagaris, *Yugoslavia Tribunal Issues New Arrest Warrants Against Karadzic and Mladic and Initiates Investigation against Serbian President*, 12 INT'L ENF. L. REPR. Issue 8, at 312 (Aug. 1996). In addition, several other Bosnian Serbs have been charged with raping at least fourteen Muslim women. *Indictment of Gagovic & Others*, Case No. IT-96-23-I (June 26, 1996), noted in the Aspen Institute, *Justice and Society Program, Int'l Human Rts. Update* at 3 (Spring 1996). An investigation the Serbian President Slobodan Milosevic currently is being undertaken by the ICTY, The Hague, to determine whether he shares any responsibility for the atrocities that occurred in Bosnia. See Zagaris, *supra*, note 6, at 314; Julius Strauss, *Man of the Sword Forged in Heat of Twisted History*, *THE EUROPEAN*, July 18-24, 1996, at 3, col. 1; Stephen Kinzer, *Hague Tribunal Weighs International Arrest Warrants for 2 Top Bosnia Serbs*, *N.Y. TIMES*, July 9, 1996, at A10; Jonathan Randal, *Tribunal Hears Testimony That Mladic Was at Bosnia Massacre Sites*, *WASH. POST*, July 4, 1996, at A25, col. 4. Although the continued viability of the ICTY remains uncertain, its prospects for success and positive impact are improving.

7. To have jurisdiction, the Tribunal must find that there has been a violation of international humanitarian law which entails individual criminal responsibility. Antonio Cassese, President, International Criminal Tribunal for the Former Yugoslavia, *Memoandum, Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence* 5 (Mar. 26, 1996), at 5 [hereinafter *Cassese Memorandum*], sent to Members of Preparatory Committee on the Establishment of an International Criminal Court. See also *The Prosecutor v. Dusko Tadic*, Case No. IT-94-I-5 (Trial Chamber) [hereinafter *Tadic I*], Case No. IT-94-1-AR72 (2 Oct. 1995) (Appeals Chamber) [hereinafter *Tadic II*]. U.N. Security Council, *Report of the Secretary-General Pursuant to ¶ 2 of S.C. Res. 808 (S/25704, 3 May 1993)* [hereinafter *Secretary General's Report*].

laudable and ultimately ought to be done. It must be balanced very carefully, however, with attention being paid to subtlety and detail. Institutions of different systems are not fungible. Conceptualization and function and substance and process are often totally different in one system from what they are in another. Examples abound: cross-examination was allowed in the Nürnberg Trials, but most German defense counsel had no experience and were incapable. Care and discretion in choice and application are required. The defense team for Mr. Tadic in the Hague seem to be doing quite well, but, as more and more individuals are tried, education in general may be necessary. Counsel and judges from diverse legal systems must be taught the essentials of the various concepts, institutions, and procedures of the systems of which they are not generally participants.

*B. Legal Basis For and Authority to Establish an Ad Hoc Tribunal or Permanent Court*

Although the following section is not directly focused directly or solely on jurisdiction, crimes or the triggering mechanisms, it is necessary as a preliminary matter. Proper analysis of these topics depend on the points made directly below.

1. Approaches

Several possible approaches are available: (1) tribunal created by a statute — multilateral convention; (2) tribunal created pursuant to the authority of the Security Council under Chapter VII of the U.N. Charter (either permanent or *ad hoc*); (3) tribunal created pursuant to the authority of the General Assembly alone (under Article 22) or combined with that of the Security Council (per Chapter VII); (4) a tribunal created by amending the U.N. Charter, specifically calling for its creation, in a manner similar to the International Court of Justice. Members of the International Law Commission debated the issue of which method would be the most appropriate and efficient.

2. Possible Creation by the U.N. Security Council

The traditional, most authoritative, means to create a permanent international criminal court would be by multilateral convention.<sup>8</sup> The Security Council, on the other hand, may have the authority, arguably, pursuant to Chapter VII of the U.N. Charter.<sup>9</sup> The Security Council took the latter approach, creating the *Ad Hoc* Tribunal for the Former

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8. Secretary General's Report, *supra* note 7, ¶ 19; e.g., *Charter of the Int'l Military Tribunal or London Charter*, 59 Stat. 1544, 1546 (1945) [hereinafter *IMT Charter*].

9. See, e.g., Colin Warbrick, *The United Nations System: A Place for Criminal Courts?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 237 (1995); Roger S. Clark & Ved P. Nanda, *An Introduction to the Symposium on International Criminal Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. i (1995); Blakesley, *Obstacles*, *supra* note 1.

Yugoslavia. The ILC took the *conventional* approach in its recommendation for a permanent court. It can be argued that the creation of the Tribunals pursuant to the authority of the U.N. Charter and under the auspices of the Security Council is done by treaty. One practical problem with this view, however, is that the U.N. Charter is not seen as self-executing in the United States.

The *Ad Hoc* Tribunals, thus, operate pursuant to the authority of Chapter VII. It may be maintained that nations which are members of the U.N. have agreed *ab initio* to abide by the will of the Security Council when it acts consistently with its authority under the Charter. Are non-member nations also subject to authoritative decisions of the Security Council? Are they bound by decisions of a Tribunal created pursuant to the authority of the Security Council? What is the authority under international law to require non-member states to abide by such rulings? Does customary international law so provide?<sup>10</sup> The Tribunal and its proponents, of course, argue affirmatively.<sup>11</sup>

### 3. Creation of the *Ad Hoc* Tribunals

The Secretary-General argued that the treaty approach would take too long and would be too arduous. Security Council Resolution 808 required quicker action,<sup>12</sup> so the Secretary recommended that Chapter VII of the UN Charter provide the basis.<sup>13</sup> Chapter VII covers "*Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.*" The creation of the *ad hoc* Tribunals was thus a "*measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.*"<sup>14</sup> All states would be under a binding obligation to take whatever action is required to carry out an enforcement measure under Chapter VII.<sup>15</sup> The *ad hoc* ap-

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10. See *contra*, e.g., GRIGORY TUNKIN, *THEORY OF INTERNATIONAL LAW* 123-33 (1974) (international law is based on consent); G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 76-82 (1983); Blakesley, *Obstacles*, *supra* note 1.

11. Opposing positions are put elsewhere. See, e.g., presentation in Blakesley, *Obstacles*, *supra* note 1. See also, BLAKESLEY, *TERRORISM*, *supra* note 1, at chs. 1 & 2; A. D'Amato, *Is International Law Really Law*, in *INTERNATIONAL LAW: PROCESS & PROSPECT* ch. 1 (1987); Anthony D'Amato, *Is International Law Law?*, ch. 3 in *INTERNATIONAL LAW ANTHOLOGY* (1994). See also, U.N. CHARTER art. 2, ¶ 6.

12. Secretary-General's Report, *supra* note 7, ¶¶ 20-21.

13. *Id.* ¶ 23.

14. *Id.* ¶ 22 (emphasis added).

15. *Id.* ¶ 23. *UN Charter article 41*: "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures . . . ." U.N. CHARTER, art. 41. *Article 42* adds:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations,

proach ought only to be a stop-gap, rather than a permanent approach; it would be a mistake to have a series of *ad hoc* tribunals rather than a permanent court or set of permanent (regional) courts.<sup>16</sup>

### C. *Individual Criminal Responsibility — The Issue of Impunity*

The following discussion is an aside, but it seems important to understanding issues of jurisdiction, crimes and triggering mechanisms.

#### 1. Nürnberg Principle No. I

Nürnberg Principle No. I (1946) provides the basis for the creation of the *Ad Hoc* Tribunals for the Former Yugoslavia and for Rwanda and for a permanent international criminal court for prosecuting violations of humanitarian law. It reads: "[A]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." As the IMT held, crimes against humanity are committed by human beings, not by abstract entities. The principle retains its currency amidst the horrors of the "modern," post-cold-war era.

Hitler emphasized the previous inability to prosecute or to sanction crimes against humanity, when at Nürnberg in 1936, he said, "[a]nd who now remembers the Armenians?"<sup>17</sup> Indeed, it is particularly

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blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. CHARTER, art. 42. It would seem that if use of force is allowed as a "measure" under article 42, *a fortiori*, the creation of an *ad hoc* international criminal court should be.

Will the *Ad Hoc Tribunal* have authority to continue its prosecutions after "peace" and "security are restored" in the former Yugoslavia? Authority to do so depends on whether its mandate calls for more than restoration of peace. Articles 41 and 42 seem to provide this authority. Article 42 empowers the Security Council to restore and maintain peace and security. This seems to include the power to create an effective war crimes tribunal to help restore or maintain peace and security. Blakesley, *Obstacles*, *supra* note 1; Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 270 (1994). The "life-span" of the tribunal was "linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto." See Secretary-General's Report, *supra* note 7, ¶ 28; U.N. CHARTER, ch. VII, especially arts. 41 & 42, discussed *infra*. If this means that the Tribunal will cease to exist when "peace" and security are "restored," it may pose a serious problem and would not promote justice or restore or maintain peace or security. The term "maintenance" of peace and security should be interpreted to mean that the Tribunal may continue to function as long as it helps to restore or maintain peace or security. This allows prosecutions to occur after the conflict.

16. On the other hand, a sub-set of individuals in the International Law Commission have argued that the more appropriate approach would be to allow the Security Council to establish a new tribunal or to extend the mandate of the Yugoslav tribunal.

17. J.F. WILLIS, PROLOGUE TO NÜREMBERG 173 (1982) citing Sir Ogilvie-Forbes' report of August 1939, with enclosures of Hitler's speech to Chief Commanders and Commanding Generals, August 22, 1939, Great Britain, Foreign Office, DOCUMENTS ON BRITISH FOREIGN POLICY, 1919-1939 (E.L. Woodward et. al., 3rd series, 9 vols. 1949-55).



revealing that he would preface his policy of extermination of Jews, Gypsies, Slavs and others by revealing that the absence of interest from the world community, in effectively prosecuting such conduct and in creating appropriate international structures to enforce this prescription, gave him the comfort of knowing that he might get away with it, as others had in the past. This sense of impunity breeds contempt. The claimed dichotomy between peace and justice is a chimera. It is not true and it is dangerous to suggest that somehow not punishing those who commit atrocities lends itself to peace. Even if some sort of "peace" erupts when one side or the other of a conflict wins, the failure to bring those who have committed atrocities to justice will fester and breed the next set.<sup>18</sup> A fair and competent tribunal will be careful not to indulge self-destructive *Robespierre justice*.

## 2. The Essence and Purpose of a Tribunal

Beccaria knew that impunity, especially for certain horrific crimes, impeded both peace and justice: "The conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."<sup>19</sup> Individual criminal responsibility must be the cornerstone of any international criminal court. It is the cornerstone of any prosecution of international crime. Article 7 of the *Ad Hoc* Statute explicitly provides for individual responsibility.<sup>20</sup> The 1994 ILC Draft Statute, however, never addresses this primordial point, although its very existence is based on its assumption. The creation of a permanent court reinforces the idea of individual criminal responsibility and provides a mechanism to fight the tendency of some to feel impunity for conduct like the commission of

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18. See BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1.

19. Beccaria, *Dei delitti e delle pene* (1764), translated in JAMES FARRER, *CRIMES & PUNISHMENTS* 193-94 (1880).

20. ICTY Statute, *supra* note 6, art. 7.

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

extra-judicial executions, disappearances, torture, and other gross violations of international criminal law.<sup>21</sup>

## II. CRIMES — THE NEED FOR AN INTERNATIONAL PENAL CODE

An international criminal code is crucial. The nature of international society, the sophistication and transnational nature of modern crime, and ever increasing interdependency among States all call for the promulgation of a new code of international crime. It may be argued that the ILC Draft Code of Crimes is too controversial, vague, and weak to provide the needed definition and codal coherency required to comply with the principle of *légalité* or *nullem poena sine lege*. Some argue that customary international law is sufficient, but others suggest that some "customary international law offenses" are too vague.<sup>22</sup> It is important that any prosecution be based on offenses that have specific, well defined elements. Cooperation can take place at a bilateral level, but must also take place at the multilateral level. The member states of the Council of Europe have realized that bilateral cooperation alone is wholly insufficient. They have developed a number of multilateral conventions on interstate cooperation in penal matters.<sup>23</sup> In recent times, the Organization of American States (O.A.S.) has embarked on the same course of conduct, for the same reasons.

## III. STATUS AND LEGAL CAPACITY

Article 4 of the 1994 ILC Draft Statute provides that the Court would be a permanent institution. The United States would like it to function only on an *ad hoc* basis.<sup>24</sup> The ILC Draft provides for immunity of its institutions from constraints usually imposed pursuant to state sovereignty. It "shall enjoy such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes," in the territory of each State party.<sup>25</sup>

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21. See AMNESTY INTERNATIONAL, ESTABLISHING A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 2 (Oct. 1994).

22. I am among those of the latter group.

23. See, e.g., EUROPEAN INTERSTATE COOPERATION IN CRIMINAL MATTERS, (Ekkehart, Müller-Rappard, M. Cherif and Bassiouni, 3 Vols. 1987); CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY (1994); B. RISTAU & M. ABELL, 3 INT'L JUDICIAL ASSISTANCE (revised 1994); PHIL FENNELL, CHRISTOPHER HARDING, NICO JORG, & BERT SWART, CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY, Chs. 18-19 (1995).

24. *Comments of the Government of the United States of America on the Draft Articles for a Statute of an International Criminal Tribunal* 3 (June 1, 1994).

25. 1994 ILC Draft Statute, *supra* note 6, art. 4(2).

## IV. JURISDICTION

A. *Territorial & Temporal Competence*

The jurisdiction of the *Ad Hoc* Tribunals is limited in time and space. The first covers conduct occurring since January 1, 1991, in the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters.<sup>26</sup> The second is limited to breaches of international humanitarian law in Rwanda between January 1, 1994, and December 31, 1994.<sup>27</sup> A permanent tribunal would not be so limited. Article 4 of the 1994 ILC Draft Statute provides that "[t]he Court is a permanent institution . . . [which] shall act when required to consider a case submitted to it. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purpose." The Court's temporal and territorial jurisdiction, however, may be limited by the regime of state consent and the triggering mechanism used to bring cases to the Court, as described below.

B. *Jurisdiction Ratione Materiae — What Crimes are Covered?*

## 1. Conventions, General Principles, and Customary International Law

The sources of law and prescriptive jurisdiction for either an *ad hoc* or a permanent international criminal court involve concentric circles of overlapping, possibly antagonistic or redundant prescriptive jurisdiction. Extremely complicated elements of proof and concomitant jurisdictional prerequisites may tend to trigger even more conflict.<sup>28</sup> On the other hand, treaty law, general principles of a *jus cogens* nature and customary international law, as well as universal jurisdiction, provide a system of laws prohibiting the conduct that most instinctively consider to be serious crimes.<sup>29</sup> These efforts must be articulated clearly, as mentioned above in Part II. Generally, the statutes under consideration in this report may be considered to cover crimes against humanity, genocide, violations of the customary law of war, and grave breaches of the Geneva Conventions. These acts, in turn may include:

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26. *Secretary-General's Report*, *supra* note 7, ¶¶ 60-63; 1994 ILC Draft Statute, *supra* note 6, art. 8.

27. *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States*, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, arts. 2-8, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter *Rwanda Statute*].

28. See Wedgwood, *supra* note 15, at 271; Blakesley, *Obstacles*, *supra* note 1, at 87-90.

29. See, e.g., BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1 (attempting to establish the parameters and nature of these offenses).

*inter alia*; slavery; apartheid; unlawful human experimentation; torture; unlawful use of weapons; use of unlawful weapons; piracy, hijacking, and sabotage of vessels and aircraft; attacks against and seizures of internationally protected persons; hostage taking; destruction or theft of national treasures; theft of nuclear materials; cutting international submarine cables; and environmental harm.

The language of the statutes, arguably, also could cover violations of customary law relating to violations of human rights, the substance of Protocols I and II Additional to the Geneva Conventions of August 12, 1949. Although the ICTY Statute language does not include common Article 3 of the Geneva Conventions or Protocols I and II, the language of the statutes also could cover violations of customary law relating to violations of human rights, the substance of Protocols I and II Additional to the Geneva Conventions of August 12, 1949. The jurisprudence of the Appeals Chamber, in *Tadic*, supports the inclusion of common Article 3, within ICTY Statute Article 3.<sup>30</sup> Protocol I is covered clearly in the ILC Draft and apparently in the Rwanda Statute,<sup>31</sup> but not in that of the *Ad Hoc* Tribunal for Bosnia. On the other hand, the ILC Draft's language does not specifically cover conduct prohibited by Common Article 3 or Protocol II, which relates to the Protection of Victims of Non-International Armed Conflict. This deficiency is a serious one. Internal armed conflict may be the most wide-spread type of violent conduct today. It may be considered a travesty that egregious violations of humanitarian law may go unpunished due to this hiatus. It is possible to argue, however, that the egregious internal conduct is covered by customary international law or by *jus cogens* principles.<sup>32</sup>

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30. See *Tadic Decision*, U.N. Doc. IT-94-1-AR72, at 71, ¶ 137, 35 I.L.M., at 71; noted in Virginia Morris & M. Christiane Bourloyannis-Vrailas, *Current Developments: The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AM. J. INT'L L. 491, 503 (1996).

31. UN Doc. S/1995/134, at 3-4, ¶ 12 (Secretary General's Report, regarding the Rwanda Statute, noting that the Security Council decided "to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal." Discussed in Akhavan, *Current Developments*, *supra* note 38, at 503-504. The Report also suggests that the Security Council has included, therefore, "international instruments regardless of whether they were considered part of customary international law or whether they customarily have entailed the individual criminal responsibility of the perpetrator of the crime." *Id.* at 504.

32. See, e.g., argument for the existence of a *common core of values* and, hence, a *common core of crimes*, based on *jus cogens*, in BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1; see also, Amnesty International, *supra* note 21; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL'Y. 499, 504-05 (1994) [hereinafter Paust, *Applicability*]; Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 64-67, & authority in n. 42 (1990); OLIVER ET AL., *supra* note 1, at chs. 3, 16 & 17.

## 2. The Principle of *Légalité* or *nullum crimen sine lege*

Although both the *Ad Hoc* Tribunal's Statute and the 1994 ILC Draft Statute ostensibly incorporate this principle, they also potentially violate it. Article 39 of the 1994 ILC Draft Statute provides:

An accused shall not be held guilty: (a) in the case of a prosecution with respect referred to in article 20(a) to (d) [*see infra*], unless the act or omission in question constituted a crime under international law; (b) in the case of a prosecution with respect to a crime referred to in article 20(e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred.

We will consider below, the deficiencies of both treaty and customary international law, which ostensibly is included by reference or implication in the statutes. Essentially, the problem is that the elements of the offenses arising out of general international law may be too vague if their definition does not provide the elements required by international criminal and human rights law. A person may not be convicted of a crime without explicit and specific iteration (promulgation) of the elements to be proved. Failure to do this will end-up making a mockery of international criminal law and of the Tribunal.

The ICTY Statute, commentary to Article 1 (*Competence of the Tribunal*), and Article 2, do a better job at providing more explicitly and adroitly the elements of the proscribed conduct, although there are still deficiencies. Article 1 proscribes "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." The Commentary (really the Secretary-General's Report on this point) provides that:

The international tribunal shall prosecute persons responsible for serious violations of international humanitarian law. . . . While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

In the view of the Secretary-General, the application of the principle *nullem crimen sine lege* requires that the international tribunal should apply rules . . . which are, beyond any doubt, part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. . . . The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945 [Nüremberg] [footnotes omitted].

This analysis is correct, but it does not go far enough. It is necessary that the particular offense be proscribed clearly (i.e., not vaguely) by a treaty or by some other authoritative source of international law, e.g., *jus cogens* principles or customary international law. The wording of the commentary and of the statutes themselves may not measure up. This deficiency pervades both *Ad Hoc* Statutes and the ILC Draft Statute. The deficiency is potentially devastating! Professor Bassiouni and other international criminal law experts who understand both the international law and the criminal law issues, have resolved some, but not all of the problems. *Ad Hoc* Statute Articles 2-5, provide an example at some criminal law input and these articles are much better than the prescriptions in the ILC Draft, which apparently were adopted without much input from experts in the criminal law.

C. *Crimes—Prescriptive Jurisdiction: Content of Humanitarian Law and Catalogue of Offenses*

1. The *Ad Hoc* Tribunal for the former Yugoslavia

Article 1, *Competence of the International Tribunal*, 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."<sup>33</sup> This authority derives from the mandate set out in paragraph 1 of S.C. Res. 808 (1993). It is interesting to note that humanitarian law has traditionally included the *Hague* and *Geneva* rules. Is the nature and content of this changing? Article 2 then lists, as punishable offenses, committing or ordering to be committed grave breaches of the relevant Geneva Convention specified below:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly [apparently it must be both wanton and unlawful];
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;<sup>34</sup>

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33. *Secretary-General's Report*, *supra* note 7, arts. 1-5; see also *id.* ¶¶ 33-49.

34. One cannot help but notice some potential for inconsistency here. In a military trial in Bosnia, the defendants were convicted after confessing, but their confessions were not corroborated and defendants claimed that they were issued under torture and repeated beating, which seemed to be corroborated by medical evidence. If a trial is egregiously unfair, do the statutes of the Tribunals allow for prosecution of those who were

- (g) unlawful deportation or transfer or unlawful confinement of a civilian; and
- (h) taking civilians as hostages.

Article 3 specifies that the Tribunal has jurisdiction to prosecute "violations of the laws or customs of war" and illustratively lists:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4, *Genocide*, provides:

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of persons committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) genocide;
  - (b) conspiracy to commit genocide;
  - (c) direct and public incitement to commit genocide;
  - (d) attempt to commit genocide;
  - (e) complicity in genocide.

Article 5, *Crimes Against Humanity*, reads:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed

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responsible for violations of rights in trials such as that which take place in war-ravaged places? See *Bosnia Convicts and Sentences to Death 2 Serbs*, 9 INT'L L. REP. 147 (No.9, Apr. 1993); John F. Burns, *2 Serbs Shot for Killings and Rapes*, N.Y. TIMES, Mar. 31, 1993, A6, col.4; David B. Ottaway, *Bosnia Convicts 2 Serbs in War Crimes Trial*, WASH. POST, Mar. 31, 1993, A21, col.1. Certainly, the fairness of the trials must be ensured, but will prosecution for unfair trials apply to all sides? Jim Nafziger notes that, indeed, the power of individuals in the U.N. Forces or in the employ of the Tribunal might be such that it could be abused. The system should ensure the sanction of those who so abuse their power. This is discussed *infra* at notes 110-112, and accompanying text.

conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Article 4 provides for jurisdiction over the crime of genocide and Article 5 covers crimes against humanity. Note, the last item on the list is "other inhumane acts."<sup>35</sup> The Statute takes some license on "crimes against humanity," adding some that are not included in the Geneva Convention (IV), but which are in the Genocide Convention. Although Geneva law covers inhumane or inhuman acts, these phrases may still be too vague and imprecise. Does this vagueness pose a potential violation of the principle or legality or *nullum crimen sine lege*? Whatever conduct is covered must be clearly and explicitly proscribed by relevant international law.<sup>36</sup> The Rwanda Statute does not require that the inhumane acts occur in armed conflict. With twenty-two categories of international crimes represented in 314 international instruments enacted between 1815 and 1988, many of which do not properly define in criminal law terms the offenses proscribed or provide their elements, it is necessary that the offenses be codified or otherwise clearly defined. Some of the vagueness may have been eliminated by customary international law or by general principles arising out of domestic refinement of the ambiguous terms of treaties.<sup>37</sup>

Articles 2-5 of the ICTY Statute, provide that the Tribunal shall have jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>38</sup> The Secretary General's Report notes that only

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35. *ICTY Statute*, *supra* note 6, art. 5 (I). The Rwanda Tribunal Statute, art. 6(c), unlike the ICTY Statute, art. 5, requires expressly that the prosecution prove that the enumerated "inhumane acts" be committed against a civilian population, "on national, political, ethnic, racial, or religious grounds." See discussion on Genocide, *infra*.

36. See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 27-31 (1942); *quoted in* the International Military Tribunal (Nuremberg), Judgment and Opinion, Oct. 1, 1946, *reprinted in* 44 AM. J. INT'L L. 172, 220 (1947).

37. This is what the United States and many other countries did with hostage taking and hijacking, for example.

38. On crimes against humanity, see generally M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992); and Roger Clark, *Crimes Against Humanity*, ch. 7, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* (Ginsburgs & Kudriavtsev eds., 1990). See also Jordan Paust, *Threats to Accountability After Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 N.Y.L. SCH. J. HUM. RTS. 547 (1996) (arguing that many of these crimes are defined clearly enough).



crimes which have clearly and beyond any doubt become part of customary law may be prosecuted.<sup>39</sup> How much this helps any legality problem is still open to some discussion, but it is intended to include the law applicable in armed conflict as embodied in the Geneva Conventions, the Hague Convention (IV) of 1907, and the Regulations annexed thereto.<sup>40</sup> The Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948;<sup>41</sup> and the Charter of the International Military Tribunal of August 8, 1945.<sup>42</sup> It certainly would include more, but this would have to be established and the elements clarified.<sup>43</sup>

Although the ICTY Statute, Article 2, makes reference to Protocols I and II and to the Geneva Conventions, a question still could be raised as to whether the conflict on the territory of the Former Yugoslavia is international or internal and as to what exact impact this determination will have.

Article 3 does not specifically address rape as such, but rape is covered in other provisions, such as ICTY 5(g). Crimes against humanity were explicitly recognized in the Nürnberg Charter and Judgment and in Control Council Law No. 10.<sup>44</sup> These rules have clearly become part of customary international law and indeed, articulate "general principles of law recognized by civilized nations."<sup>45</sup> Rape is *not listed* in the Nürnberg Charter, but *is listed* in Control Council Law No. 10, which also deleted "in execution of in connection with any crime within the jurisdiction of the Tribunal."<sup>46</sup> In *Indictment of Gagovic & Others, Case No. IT-96-23-I* (June 26, 1996), the ICTY indicted eight Serbian military, paramilitary and police men, charging them with raping fourteen Muslim women. This is the first time that rape has been charged as a specific and separate indictable war crime. The indictment details

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[hereinafter Paust, *Threats to Accountability*].

39. *Secretary-General's Report*, *supra* note 7, ¶¶ 34 & 35.

40. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto, Oct. 18, 1907, 36 Stat. 2277.

41. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277.

42. *IMT Charter*, *supra* note 8. *Secretary General's Report*, *supra* note 7, ¶¶ 37-49 spells out these various offenses.

43. See, e.g., Paust, *Threats to Accountability*, *supra* note 38.

44. See *Secretary-General's Report*, *supra* note 7, ¶ 47. Letter from the late Frank C. Newman to Professor Blakesley, September 21, 1993.

45. See *Statute of the International Court of Justice*, at art. 38, ¶ 1(c); BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1.

46. For a general discussion, see M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper No. 1, (DePaul Int'l Hum. Rts. Inst. 1996)]. Furthermore, "[a]trocities and offenses included but not limited to [murder, etc.]" was substituted for "namely" and a specific list. Thanks to the late Justice Frank C. Newman for this latter point. See also Paust, *Applicability*, *supra* note 32, at 516-17; JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES & MATERIALS* 1020-21 (1996).

acts of sexual assault, charging the perpetrators with committing crimes against humanity, grave breaches of the Geneva Conventions, and of violating the laws or customs of war.<sup>47</sup>

Crimes against humanity include crimes aimed at any civilian population and are prohibited regardless of whether they are committed in an international or internal armed conflict.<sup>48</sup> Questions are raised by some of the language of the ICTY Statute. Other inhumane acts of a very serious nature, proscribed by relevant international law, refer to such as wilful killing, torture, or rape against any civilian population on political, racial, or religious grounds. Does ICTY Article 5's phrase "in armed conflict" mean during armed conflict? Why does Article 5(1), unlike control Council Law No. 10, use the term "crimes" instead of "atrocities and offenses" and "directed against" instead of "committed against" and why does (2) delete "including but not limited to?"<sup>49</sup> Finally, to be consistent with Law No. 10, indicated above, Article 5 of the statute should have concluded as follows: "(g) rape, or (h) other inhumane acts committed against any civilian population or (i) persecutions on political, racial or religious grounds." In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including forced prostitution.<sup>50</sup> The tribunal, thus, has the authority to prosecute persons responsible for the indicated crimes — murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts — when committed in an armed conflict, whether international or internal in character and directed against any civilian population.<sup>51</sup>

## 2. The 1994 ILC Draft Statute

Article 20 provides that,

the Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) genocide;
- (b) aggression;
- (c) serious violations of the laws and customs applicable in armed conflict;
- (d) crimes against humanity;

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47. *Indictment of Gagovic & Others*, Case No. IT-96-23-I (June 26, 1996), noted in the Aspen Institute, *Justice and Society Program, Int'l Human Rts. Update* at 3 (Spring 1996).

48. *Secretary-General's Report*, *supra* note 7, ¶ 47.

49. Again, thanks to Frank Newman.

50. *Secretary-General's Report*, *supra* note 7, ¶ 48. See Bassiouni & McCormick, *supra* note 46.

51. *Secretary-General's Report*, *supra* note 7, ¶ 49, citing ICTY Statute art. 5.

(e) crimes, established under or pursuant to the treaty provision listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

The strategy of the ILC contemplated having the treaty as the instrument for defining what was proscribed and punishable under the Statute. While accepting treaty as the primary source, it went beyond the definitions in the treaty in incorporating by reference other crimes derived from other sources. Other sources include: crimes under general international law, and certain crimes "under national law," aimed at enabling the so-called "suppression conventions."<sup>52</sup> These incorporate or call upon notions of both customary international law and general principles of international law. The "Mercenaries Convention" (not yet in force) is excluded, but the Narcotics Convention, the Torture Convention, and, the Genocide, Hijacking, crimes against internationally protected persons, war crimes, the four Geneva Conventions of 1949, and Protocol I to the Geneva latter conventions and the Apartheid Convention are all included.

The inclusion of the term offenses against "general international law," which was in the prior draft, was controversial within the ILC and was eventually removed. Some such crimes may still be included, if one deems custom and general principle to be a source of criminal law. These are crimes falling within "a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals."<sup>53</sup> These are the so-called *common core of crimes*.<sup>54</sup> The referenced conduct is certainly criminal, but the problem and controversy relate to the term itself and the often vague and defective nature of the definition of these offenses in international law. Specificity of elements and definition is not often significantly improved by extant conventions. International criminal law conventions have often been negotiated and drafted by international lawyers sometimes unfamiliar with criminal law. Hence, the rigid and rigorous requirements of criminal law and criminal justice have often been wanting. Specific elements must be clear so that they may be proved by the evidence. This undertaking requires generally an *actus reus* and a *mens rea*, which combine to cause a specifically pro-

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52. Crawford, *supra* note 1, at 143.

53. See Crawford, *supra* note 1, at 144; BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1 & 3.

54. For elaboration and analysis of the *common core of crimes*, see BLAKESLEY, *TERRORISM*, *supra* note 1, at ch. 1; IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (2nd ed. 1979); BASSIOUNI, *supra* note 38, at 470-98; Int'l Committee of the Red Cross, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS ¶ 3539 (1987). The problem of whether crimes established by custom are part of U.S. federal "common law" is troublesome. See, e.g., Curtis A. Bradley & Jack A. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

hibited social harm. Crimes must be promulgated with specificity, either in treaties or in implementing legislation or even in judicial interpretation of the broad or vague standards so as to create sufficiently clear and provable material elements. If the definition and elements are wanting, however, conviction violates human rights law. The listing of crimes in Article 20 (a)-(e) is some improvement but still not sufficient.

With respect to war crimes, Article 20 of the 1994 ILC Draft Statute may be sufficiently broad to cover offenses prohibited under the terms of Protocols I and II. It clearly covers Protocol I. On the other hand, the ILC Draft's failure to include acts prohibited by Common Article 3 of the Geneva Conventions or by Protocol II is unfortunate.<sup>55</sup> It is possible that Article 20(c) of the ILC Draft, which reads: "serious violations of the laws and customs applicable to armed conflict . . ." is broad enough to include violations of humanitarian law in both international and non-international armed conflict.<sup>56</sup>

Article 21(1)(a) calls for inherent jurisdiction over genocide. Professor Wedgwood argues persuasively, however, that genocide is difficult to define.<sup>57</sup> These offenses are intimidating to any judge and risk injustice, because their complexity and difficulty increases geometrically each time an element of proof is added, especially when each element is vague.<sup>58</sup> For example, argues Professor Wedgwood, the "specific intent" element for genocide, "intent to destroy in whole or in part" a religious, ethnic, national, or racial group, is very difficult to establish.<sup>59</sup>

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55. *But see* Paust, *Applicability*, *supra* note 32, at 511-12 & 512 n.40 (grave breaches provisions can reach common Article 3).

56. *See Amnesty International*, *supra* note 21, at 11; Paust, *Threats to Accountability*, *supra* note 38.

57. Wedgwood, *supra* note 15, at 271. Article 3 of the Ad Hoc Statute refers to the "violations of the laws or customs of war," which some argue has traditionally referred to violations of humanitarian law in *international armed conflict*, essentially those offenses stemming from the IVth Hague Convention of 1907, its annexed Regulations, and the Geneva Conventions. *See* Blakesley, *Obstacles*, *supra* note 1, at 88; *Amnesty International*, *supra* note 21, at 12. Secretary of State (then-Ambassador) Albright and others have argued that Article 3 of the Ad Hoc Tribunal is broad enough to include offenses such as those covered by common article 3 of the Geneva Conventions. Ambassador Albright, *Statement*, U.N. Doc. S/PV.3217, at 15 (25 May 1993), *quoted in* Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 82 (1994); PAUST ET AL., *supra* note 46, at 969, 975-76, 991-94. To cover the conduct in Rwanda, the applicable standards must apply to offenses which occur in *internal armed conflict*. For this to occur under the current Ad Hoc Tribunal rules, Common Article 3 of the Geneva Conventions and Additional Protocol II can be applied by extension via customary international law or *jus cogens*, *see Amnesty International*, *supra* note 21, at 12; ICTY, *supra* note 6, art. 4 (referring to Common Article 3 and Additional Protocol II in a non-exhaustive list, and applicable as part of the "laws of war" or "humanitarian law."). *See, e.g.*, Jordan J. Paust, *Nullum Crimen and Related Crimes*, 25 DENV. J. INT'L L. & POL'Y 328 (arguing that it is neither difficult to define nor to prosecute.)

58. Wedgwood, *supra* note 15, at 271.

59. *Id.* Note U.S. Reservations and Understandings Relating to the Convention on

The difficulty is evident, for example, in circumstances where a given commander is charged with specifically intending to destroy, in whole or in part, a relevant group, when the evidence indicates that his soldiers ran amok. Generally, there will be no relevant contemporaneous statements from the commanders or from the soldiers.<sup>60</sup> Proving specific intent to kill is one thing; proving the specific invidious intent required for genocide is another.

### 3. Distinction between "internal" and "international" conflicts

In October 1995, the Appellate Chamber of the Yugoslav Tribunal affirmed the Trial Chamber's ruling, rejecting defendants Tadic's, defense that the Tribunal had no jurisdiction because the conflict was civil, not international, and noted that there has been a gradual blurring of the distinction between the customary international law rules governing international conflicts and those governing internal conflicts.<sup>61</sup> President Cassese interprets: there has been a "convergence of two bodies of international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts."<sup>62</sup> To arrive at this conclusion to protect the participants in hostilities by application of international humanitarian law rules, the Appellate Chamber considered the practice of various states and the interpretations and practice of various international, including regional, organizations.<sup>63</sup> President Cassese summarizes the Appellate Chamber's position as follows: "[T]his convergence has come about due largely to the following four factors: (1) the increase in the number of civil conflicts; (2) the increase in the level of cruelty of internal conflicts; (3) the increasing interdependence of States; and (4) the influence of universal human rights standards."<sup>64</sup>

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Genocide, 1989, reprinted in 28 I.L.M. 779, 782.

60. *Id.* Of course for criminal responsibility for lesser forms of the offenses discussed in this report are possible upon proof of a lesser *mens rea*. *E.g.*, criminal liability based upon command responsibility may be established by proving that the commander "knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." *ICTY Statute*, *supra* note 6, art. 7.3.

61. *Tadic I*, *supra* note 7; *Tadic II*, *supra* note 7; see also *Cassese Memorandum*, *supra* note 7.

62. *Cassese Memorandum*, *supra* note 7, at 5.

63. *Id.* citing *Tadic II*, *supra* note 7, ¶¶ 100, 102, 104, 108, including its consideration of State practice during the Spanish Civil War; the practice of States applying parts of the Geneva Conventions, per common Article 3; the unilateral willingness of States to abide by international humanitarian law in their internal conflicts; and actions of the ICRC; UN General Assembly Resolutions; declarations made by Member States of the European Union; Additional Protocol II of 1977; and some military manuals. Obviously some of these are problematical on several counts, including their persuasiveness toward the creation of international custom.

64. *Id.* citing *Tadic II*, *supra* note 7, ¶ 97.

Some argue that this broad proposition of jurisdictional interpretation as applied to the 1994 ILC Draft Statute or any other statute for a permanent international criminal court, raises some difficulty. Sovereignty concerns, among others, certainly will be raised.<sup>65</sup> President Cassese puts several limitations to the expanse of the blurring of civil and international strife:

(1) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts and (2) this extension has not taken place in the form of full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.<sup>66</sup>

President Cassese notes that the 1994 ILC Draft Statute is broader than the Statute for the Tribunal for the former Yugoslavia. Whereas the Appellate Chamber in the *Tadic* case considered armed conflict to be a trigger of jurisdiction, it was not necessary that the armed conflict be occurring at the time or in the place of the crime.<sup>67</sup> ILC Draft Statute Article 20(d) (crimes against humanity) and Rwanda Statute Article 3 cover the same ground as Article 5 of the Yugoslav Tribunal Statute, but do not require any nexus to armed conflict. The statutes are broader, therefore, and any distinction between internal versus international conflict becomes irrelevant.

4. Is there a gap in the coverage of conduct in internal armed conflict in relation to Common Article 3 and Protocol II?

Is there conduct that constitutes a crime against humanity, but is not covered by the 1994 ILC Draft Statute? It should be emphasized that crimes against humanity are not limited necessarily to conduct against *civilian* populations.<sup>68</sup> Crimes against humanity in the 1994 ILC Draft Statute are not and should not be linked to War Crimes. The commentary to ILC Draft Article 20, defines crimes against humanity as: "inhumane acts of a very serious character involving widespread or systematic violation aimed at the civilian population in whole or in part." Professor Paust considers this language needlessly

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65. James Podgers, *Cover Story: The World Cries Out for Justice*, 82 A.B.A.J. 52, 62 (Apr. 1996).

66. Cassese Memorandum, *supra* note 7, at 6. President Cassese does not elaborate. I am not at all sure what this means or whether it is meaningful at all. I worry about prosecuting "general essences."

67. *Id.* at 7, citing *Tadic II*, *supra* note 7, ¶ 70.

68. See *Amnesty International*, *supra* note 21, at 13; PAUST ET AL., *supra* note 46, at 1028-31, 1035, 1062, 1075-78; Cf. *Corfu Channel Case*, 1949 I.C.J. 4; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* 1984 I.C.J. 392; Rwanda Statute, *supra* note 27, art. 6, however *does* require the civilian population nexus.

limiting of responsibility recognized under the customary instruments pertaining to crimes against humanity.<sup>69</sup> The commentary to the ICTY Statute suggests and Rwanda Statute Article 6(e) explicitly provides, that the above-noted language applies to crimes based on "national, political, ethnic, racial or religious grounds."<sup>70</sup> There is no reason that such a limitation should apply and the commentary in that regard should be ignored. International law today is not limited in application to crimes against the peace or war crimes, as the judges at Nürnberg worried.<sup>71</sup> Control Council Law No. 10, provided that "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds . . . [are punishable]."<sup>72</sup>

Klaus Barbie and Paul Touvier subsequently were prosecuted for crimes against humanity independent of any crimes against the peace or war crimes.<sup>73</sup> The Commission of Experts on Rwanda concluded that crimes against humanity need not be connected to crimes against the peace or war crimes.<sup>74</sup> The 1994 ILC Draft Statute also refers to the crime of torture as defined in the *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*U.N. Torture Convention*). The Annex also includes reference to Apartheid and offenses relating to hijacking, sabotage, and other terrorist offenses. The U.S. Government has been opposed to Apartheid being included.

## 5. Distinction between "War Crimes" and "Crimes against Humanity"

President Cassese notes that the distinction has become concrete. Professor Orentlicher notes that

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69. Paust, *Threats to Accountability*, *supra* note 38.

70. *Amnesty International*, *supra* note 21, at 14. This is similar to Rwanda Statute, *supra* note 27, art. 6(c), which explicitly requires this criteria.

71. Blakesley, *Obstacles*, *supra* note 1; Meron, *supra* note 57, at 85; *Amnesty International*, *supra* note 21, at 14.

72. Blakesley, *Obstacles*, *supra* note 1; *Amnesty International*, *supra* note 21, at 14; Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

73. Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOCIAL INQ. 191 (1995); Wexler, *Interpretation*, *supra* note 72; Blakesley, *Obstacles*, *supra* note 1; see also *Justice Case* (Case 3), under Control Council Law No. 10.

74. Rwanda Statute, art. 3; *Commission of Experts on Rwanda, Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935* at 26-27 (Sept. 29, 1994), reported in *Amnesty International*, *supra* note 21, at 15.

[i]n the International Law Commission's fourth report on the draft Code of Offenses Against the Peace and Security of Mankind, its Special *Rapporteur* asserted that the autonomy of crimes against humanity from war crimes has now become absolute. Today, crimes against humanity can be committed not only within the context of armed conflict, but also independently of any such conflict. . . .<sup>75</sup>

Of course, the same conduct during an armed conflict might, nonetheless, constitute both a war crime and a crime against humanity.

#### 6. Vagueness & Inconsistency — A Serious Weakness in Both Statutes

Vagueness in some aspects of the 1994 ILC Draft Statute is even more serious than that of the *Ad Hoc* Tribunals. The ILC Draft Statute prohibits systematic or mass violations of human rights, aggression, genocide, torture (listed in the text of article 20 in the commentary or in the Annex), and "serious crimes of international concern." This last phrase is vague. According to some, the articles incorporate by reference the criminal law weaknesses in those treaty "offenses" and fail to specify the mental state required for conviction and punishment. The mental state may vary, depending on the particular offense. It is also argued that they also fail to specify adequately the nature and scope of the defenses. The applicability of national law to instances in which the treaty does not define an offense with sufficient precision may play an important role. The ICTY Statute commentary recognizes the need for clarification.<sup>76</sup>

National law, to the extent that it creates general principle or custom, may provide a valuable means to establish or to recognize the elements or definition of crimes in relation to procedural and evidentiary rules, as well as to constitutional or human rights concerns. National law is important for the omnipresent question of what is international law? The elements of any specific offense charged perhaps may be established not only by customary international law, but also by general principles determined by a comparative analysis of the law of all states. This proposed foundation has particular relevance for criminal law, because the law of virtually all nations requires clear definition and specific material elements. These criteria may be seen as general principles of international law. The Tribunals must apply them. These general principles, even as custom, may establish the elements of the relatively small common core of crimes subject to prosecution before the Tribunal.<sup>77</sup>

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75. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2589 (1991); Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 226, n. 180 (1995).

76. *Secretary-General's Report*, *supra* note 7, at 15, ¶ 72

77. Some elucidation of this idea is found in BLAKESLEY, *TERRORISM*, *supra* note 1, at



## V. TRIGGER MECHANISMS & JURISDICTION

ILC Statute Article 21 provides the trigger mechanism or sets the preconditions for jurisdiction to be exercised. This trigger or these preconditions relate to Articles 20 (crimes), 25 (genocide), and 22-28 (acceptance of jurisdiction).

### A. *States' Acceptance of Jurisdiction, Based on Principles of Prescriptive Jurisdiction. ILC Statute Articles 21-28*

#### 1. States, the Security Council, and the General Assembly

For a court to be independent and viable, it must be the judge of its own jurisdiction. Article 24 so provides. Article 21 outlines the ways states accept the Court's jurisdiction. A state party may express its consent to be bound by declaration lodged with the depositary [Art. 22(1)(a)]. Alternatively, a state may accept the Court's jurisdiction by declaration lodged with the Registrar with respect to Article 20 crimes [Art. 22(1)(b)]. A state's declaration of acceptance of the Court's jurisdiction may be general or may be limited to particular conduct or to conduct that occurred during a particular period of time [Art. 22(2)]. When a declaration is made accepting the court's jurisdiction for a specified period, it may not be withdrawn before that period ends. If the declaration is for an unspecified period, six-months notice is required for withdrawal. Withdrawal will not affect proceedings commenced prior to the withdrawal's effective date [Art. 22(3)]. Under Article 21, if acceptance of a state which is not party to the statute is required, that state may consent to the Court's jurisdiction by lodging its acceptance with the Registrar [Art. 22(4)].

Article 23 provides for the Security Council to refer Article 20 crimes to the Court pursuant to U.N. Charter Chapter VII. Acts of aggression may not be so referred, unless the Security Council has first determined that such an act occurred. The Court may not commence prosecution of any conduct related to an "act of aggression or breach of the peace under Chapter VII," being "dealt with by the Security Council," unless the Security Council "otherwise decides."<sup>78</sup>

#### 2. Controversy over triggering mechanisms

In the ILC itself, concerns were raised over what institutions, States, or individuals should be allowed to trigger the Court. With regard to the Security Council, some delegations worried that the process could undermine the role of the Security Council in dispute resolution. Others were concerned that the statute might confer more authority on the Security Council than it had already under the U.N.

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ch. 1.

78. 1994 ILC Draft Statute, *supra* note 6, art. 23.

Charter. Others worried that the relationship between the Court and the Security Council could undermine the judicial independence and integrity of the Court or the sovereign equality of states.<sup>79</sup>

Should submissions of cases to the court be limited to States-Parties? This limitation would encourage membership, but may restrict prosecution. Who should have discretion to limit acceptance of cases? How broad should that discretion be? The significant powers of the Security Council have emerged as formidable in the context of the conflicts in the former Yugoslavia and in Rwanda. Does the Statute of the ILC Court provide the capacity to expand or to restrict Security Council power? Some ILC members felt that situations in which Chapter VII was at issue rather than other cases ought to be signaled to the Court by the Council. If the Council can do more than refer to such situations, it was argued, what would happen to the independence of the Procuracy or the Court itself? Dangers of influence on the Procuracy, inequality of treatment or justice, especially given the possibility of a Security Council veto, gave pause to several on the ILC.<sup>80</sup>

3. Should the General Assembly be able to refer cases to the Tribunal?

The General Assembly is the primary organ of the U.N. and, arguably, the most representative body. It has primary authority, moreover, in matters of human rights and residual competence in matters of international peace and security. It has the facility of acting when the Security Council cannot because of the veto. On the other hand, what are the legal consequences of a General Assembly decision to refer a criminal case? Does a General Assembly Resolution have even similar authority? Should state consent be required before a case is submitted to the Court? Should *ad hoc* consent of the state which has custody of the accused be required? Consent would seem necessary. Consent should be necessary before the Tribunal or its organs could conduct any investigation inside a particular country. This requirement is true for cases referred by the Security Council as well. States, however, could consent in advance by treaty to such investigations and to render any fugitive to the tribunal. Cooperation in the traditional sense should be required. Anything less would raise the specter of diminished sovereignty to the point that opposition would overwhelm adoption. Some offenses, such as genocide, ought to trigger inherent

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79. U.N.G.A., Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March — 12 April 1996* at 39, A/AC.249/1, 7 May 1996 (Rapporteur, Mr. Jun Yoshida).

80. See ILC, *Draft Report of the International Law Commission on the Work of its Forty-Sixth Session, Ch. II, Draft Code of Crimes Against the Peace & Security of Mankind*, at 11 (2 May — 24 July 1994), U.N. Doc. A/CN.4/L.496, 13, 17 (1994) [hereinafter *Draft Report*].

jurisdiction in the Tribunal. Inherent jurisdiction over the conduct, however, would not obviate the necessity of cooperation both from the theoretical and the practical point of view. There is also some question as to which offenses will trigger inherent jurisdiction. Is "aggression" part of the prerequisite base? Multiplicity of concurrent jurisdiction and the risk of harassment prosecution will cause some states to be hesitant.

## B. *Competence Ratione Personae and Individual Criminal Responsibility*<sup>81</sup>

### 1. The *Ad Hoc* Statute and hierarchy of jurisdiction

Yugoslav *Ad Hoc* Statute, Article 6 reads: "[T]he International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present statute." Are juridical, non-natural, persons subject to jurisdiction?<sup>82</sup> The Secretary General recommended against jurisdiction over juridical persons, such as associations or organizations and against jurisdiction based solely on membership in such organizations.<sup>83</sup> The Secretary General's Report, moreover, provides that jurisdiction and responsibility are to attach on the basis of individual, not vicarious or imputed liability.<sup>84</sup> The ILC Statute provides similarly.<sup>85</sup> Command responsibility, however, does not contradict this provision.<sup>86</sup> Command responsibility does obtain liability, and ought to, for lesser versions or degrees of the offenses discussed herein, based on a lesser *mens rea*. For example, criminal liability for an manslaughter type homicide based upon command responsibility may be established by proving that the commander "knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."<sup>87</sup>

### 2. More Specifics on Triggers

ILC Draft Statute Article 21, "Preconditions to the exercise of jurisdiction," reads:

[T]he Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 (*supra*), if:

81. *Secretary-General's Report*, *supra* note 7, ¶¶ 50-52.

82. *Id.* ¶ 50.

83. *Id.* ¶ 51.

84. *Id.*

85. *See, e.g., 1994 ILC Draft Statute*, *supra* note 6, art. 20-30.

86. *But see*, PAUST ET AL., *supra* note 46, at 22-23, 32-43, *passim*.

87. *ICTY Statute*, *supra* note 6, art. 7.3; *cf.*, Irwin Cotler & Judith Hippler Bello, *Regina v. Finta, Comment on Canadian Supreme Court War Crimes Decision*, 90 AM. J. INT'L L. 460 (1996).

(b) in any . . . case [other than genocide, where there is inherent jurisdiction per Arts. 21(a) and 25] . . . a complaint is brought under Article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under Article 22:

(i) by the State which has custody of the suspect . . . ('the custodial State'); and

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

2. If, with respect to a crime to which ¶ 1(b) applies, the custodial state has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

In other words, the consent of both the State on whose territory the offense occurred, the state on whose territory the defendant is now found and even the state whose nationals were injured or killed by the accused must consent.

### 3. Ceded Jurisdiction

The ILC Draft Statute operates on the basis of what might be called "ceded jurisdiction," except in relation to genocide.<sup>88</sup> Except for genocide, for which the Tribunal has inherent jurisdiction, jurisdiction applies to the set of offenses indicated by Article 20, if the suspect is present within the territory of the state of his nationality, of the state in which the offense was committed or if his extradition has been approved to a state having a proper basis of jurisdiction, the consent of each of those states is required.<sup>89</sup> Consent, thus, is the apparent basis of the Tribunal's binding authority. On the other hand, ILC Statute, Article 23 provides that notwithstanding Article 21 (*preconditions to exercise of jurisdiction, infra*), the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20 (*crimes within the court's jurisdiction*), as a consequence of referral by the Security Council acting under Chapter VII of the U.N. Charter. The Security Council, therefore, may refer cases to the ILC Tribunal, thus triggering priority jurisdiction. Of course, the very statutes of the *Ad Hoc* Tribunals are based on Security Council authority pursuant to Chapter VII. Ultimately, as is the case with any independent judicial body, the Tribunal is the judge of its own jurisdiction, although one could argue that ceded jurisdiction in some forms negates this principle.<sup>90</sup>

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88. See Crawford, *supra* note 1, at 143.

89. 1994 ILC Draft Statute, *supra* note 6, arts. 20-22 especially art. 21; see Crawford, *supra* note 1, at 143-44.

90. See 1994 ILC Draft Statute, *supra* note 6, art. 24; See The Norwegian Loas Case, 1957 I.C.J. 9 (especially Judge Lauterpacht's separate opinion), discussed in OLIVER ET AL., *supra* note 1, at 48-53.

Ceded jurisdiction under ILC Statute Article 22 operates in a manner similar to that of the International Court of Justice. A state party may consent to jurisdiction in a wholesale manner at the moment it becomes a party to the Convention.<sup>91</sup> It may agree to the Tribunal's jurisdiction only for certain offenses.<sup>92</sup> The state may agree at some time later than when it became a party to the treaty, by so indicating in a declaration lodged with the Registrar.<sup>93</sup> Here, it may accept to be subject to the jurisdiction of the Court for all covered offenses or the offenses indicated in its declaration.<sup>94</sup> A declaration may even be made for a specified period of time; however, the state may not withdraw during the indicated period unless it gives six-months notice of intent to withdraw.<sup>95</sup> Withdrawal does not affect proceedings already commenced at the time of the notice.<sup>96</sup> Article 22(4) allows a non-state-party to consent to jurisdiction in a given case only for a particular crime, by declaration lodged with the registrar or a complaint tendered to the Tribunal.<sup>97</sup> The United States is opposed to this latter provision.<sup>98</sup>

#### 4. Jurisdiction and the U.N. Security Council

The ICTY operates pursuant to the authority of U.N. Charter Chapter VII. It may be maintained that nations which are members of the UN have agreed *ab initio* to abide by the will of the Security Council when it acts consistently with its authority under the Charter. Some questions arise. Are non-member nations also subject to authoritative decisions of the Security Council? Are they bound by decisions of a Tribunal created pursuant to the authority of the Security Council? What is the authority under international law to require non-member states to abide by such rulings? Does customary international law so provide?<sup>99</sup> The Tribunal and its proponents, of course, argue affirmatively.<sup>100</sup>

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91. See 1994 ILC Draft Statute, *supra* note 6, art. 22(a). See the general discussion in OLIVER ET AL., *supra* note 1, at 40-66.

92. 1994 ILC Draft Statute, *supra* note 6, art. 22(1) & (3).

93. *Id.* art. 22(1)(b).

94. *Id.*

95. *Id.* art. 22(3).

96. *Id.*

97. See *id.* arts. 26 & 22.

98. U.S. Report, *supra* note 24, at 14.

99. See *contra*, e.g., TUNKIN, *supra* note 10; VAN HOOF, *supra* note 10; Blakesley, *Obstacles*, *supra* note 1.

100. Opposing positions are put elsewhere. See, e.g., authority in Blakesley, *Obstacles*, *supra* note 1. See also BLAKESLEY, *TERRORISM*, *supra* note 1, at chs. 1 & 2; Anthony D'Amato, *Is International Law Really Law*, in *INTERNATIONAL LAW: PROCESS & PROSPECT* 1 (1987); Anthony D'Amato, *Is International Law Law?*, ch. 3 in *INTERNATIONAL LAW ANTHOLOGY* (1994).

C. *Obtaining Jurisdiction over the Accused, Correlation of Prescriptive and Enforcement Jurisdiction*

There is obligation under both the *Ad Hoc* and the ILC Statutes to "bring to justice, to extradite, or to transfer the alleged fugitive," e.g., 1994 ILC Draft Statute Article 53(2)(c). Article 22 of the 1994 Draft Statute deals with submitting to the Tribunal's Jurisdiction, and opting in and out.

All States Parties apparently must cooperate with the Tribunal upon a request to prosecute for the crime of genocide.<sup>101</sup> All States who have accepted the Court's jurisdiction for international crime in general apparently must cooperate with a request to arrest and to transfer an accused to the Court albeit with exceptions.<sup>102</sup> If a State has not accepted the Court's jurisdiction for offenses listed in the Annex (e.g., torture, or grave breaches of the Geneva Conventions and of the Additional Protocol I), it must either transfer the accused to the Court or extradite him to a nation that will prosecute him or prosecute him itself.<sup>103</sup> For other circumstances, the state party must determine whether its own law and constitution will allow it to transfer, extradite or prosecute the requested individual.<sup>104</sup>

The premise of the ILC Report was to promote the widest possible acceptance of jurisdiction and to require certain elements of cooperation, even when jurisdiction was rejected in a given instance.<sup>105</sup> Nevertheless, acceptance of the Court's jurisdiction created disagreement within the ILC Working Group. The appropriateness of *ad hoc* acceptance and the form that it might take is at the bottom of this disagreement.<sup>106</sup> An early draft provided for an "*opting in*" approach modeled after Article 36 of the Statute of the International Court of Justice. This approach would have allowed a state to "opt in" at any time, on the basis of a specific offense having been committed.<sup>107</sup> For example, Libya could have accepted jurisdiction of the Court for the suspects in the Lockerbie incident. Here, U.S. or U.K. consent apparently would not have been required, although Libya's consent would be required before its nationals could be prosecuted before the Tribunal.<sup>108</sup> This approach would have avoided the problem that most continental nations and those whose law and constitutions follow the continental tradition

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101. 1994 ILC Draft Statute, *supra* note 6, art. 53(2)(a)(I).

102. *Id.* art. 53(2)(a)(ii).

103. *See id.* 53(2)(b).

104. *See generally Amnesty International, supra* note 21, at 18-19.

105. Crawford, *supra* note 1, at 144; *See e.g., Articles* 58(1), 62, 63(3)(c), and 65. *See Working Group Report on the Draft Statute for an International Criminal Court, Annex to Report of the International Law Commission on the Work of its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 255, U.N. Doc. A/48/10 (1993).

106. *See generally* Crawford, *supra* note 1, at 144.

107. *Id.*

108. *Id.*; *see* 1994 ILC Draft Statute, *supra* note 6, art. 24(1)(a) & (2).

which requires a state to refuse to extradite its own nationals.<sup>109</sup> On the other hand, a second alternative, "*opting out*," would require a state to declare, with at least six months notice, that it will no longer be subject to jurisdiction of the Tribunal.<sup>110</sup> Finally, the ILC Draft adopted a position in which a State has the right and the obligation to send the fugitive to the court, to extradite or to prosecute [Art. 53 (2),(3)-(6)]. If a State has a basis of jurisdiction to prosecute and has requested extradition and had the request approved, that State's consent is also needed. [Art. 21 (2)(6)]. Article 53 of the ILC Statute requires all states parties to cooperate in matters related to the Statute. In fact, jurisdiction of the ILC Court is designed to be integrated into the extant framework of international cooperation in criminal matters. There is some debate over whether an International Tribunal ought to be the mechanism of last resort; to become activated when the pertinent state that otherwise has jurisdiction either refuses or otherwise cannot either prosecute or extradite the fugitive.<sup>111</sup> Consent to jurisdiction in some form appears to be required for offenses other than genocide.<sup>112</sup>

Some members of the ILC felt that the rule on submission to jurisdiction being required for genocide and voluntary as to other offenses set the appropriate balance between an aggressive or ambitious versus a more cautious approach. Others argued that this approach was too timid. They felt that the Tribunal ought to have a limited inherent jurisdiction for a common core of the most serious offenses, at least when the jurisdictional state was either unwilling or unable to prosecute or extradite. This more vigorous option raised the fear of abuse for political reasons and the potential for human rights violations. Still others felt that the Statute ought to provide simply a facility for states to supplement rather than to supplant their domestic jurisdiction. Some felt that the Tribunal ought to have the authority to decline a case if it felt that it was of insufficient gravity and could be handled by the domestic court.<sup>113</sup> The States-parties, at any rate, have obligations under the Statute (pursuant to Articles 22-24 and Article 53). The Court's capacity to exercise jurisdiction, however, may be undermined by the mechanisms for opting out, in Article 53.

#### D. *Enforcement Jurisdiction*

The ILC Draft provides in Article 4, that the "Court shall be permanent and shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the

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109. Crawford, *supra* note 1, at 144; BLAKESLEY, *TERRORISM*, *SUPRA* note 1, at 203, et seq.

110. 1994 ILC Draft Statute, *supra* note 6, art. 22; Crawford, *supra* note 1, at 144.

111. See Draft Report, *supra* note 80.

112. See 1994 ILC Draft Statute, *supra* note 6, art. 53(2)(c).

113. Draft Report, *supra* note 80.

fulfillment of its purposes." This provision raises several questions: does the Court have authority to run an investigation in other States? Does it have authority to subpoena witnesses or to participate in searches and seizures pursuant to their investigation of pertinent crimes? The phrase, "such legal capacity as may be *necessary*" to perform its functions is broad. Is it "necessary" that some sort of mutual assistance treaty be established between the Court and the relevant State-situs of such investigation? Does it have the power to secure the person of an accused for trial in the Court? If so, how exactly will that occur? The ICTY Statute is even broader and the above-mentioned questions obtain even greater importance.

### 1. Cooperation and Judicial Assistance

Article 29 of the ICTY Statute provides:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) the identification and location of persons;
  - (b) the taking of testimony and the production of evidence;
  - (c) the service of documents;
  - (d) the arrest or detention of persons;
  - (e) the surrender or the transfer of the accused to the International Tribunal.

The ICTY was established on the basis of a Chapter VII decision.<sup>114</sup> This origin creates a binding obligation on all States-Parties to the United Nations to take whatever steps are required to implement the decision.<sup>115</sup> All States are obliged to cooperate with the Tribunal and to assist it in all stages of the proceedings; to ensure compliance with requests for judicial or other legal assistance in the gathering of evidence; hearing of witnesses, suspects, or experts; identification and location of persons; the arrest and detention of persons; the surrender or transfer of the accused to the tribunal; and service of documents.<sup>116</sup> States are obligated to effectuate all orders issued by the Trial Chamber [or prosecutor's office?], such as warrants of arrest, search warrants, warrants for the surrender or transfer of persons, and any other

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114. See *Draft Report*, *supra* note 80, ¶ 23.

115. *Draft Report*, *supra* note 80, ¶ 125; 1994 ILC *Draft Statute*, *supra* note 6, art. 29.

116. *Draft Report*, *supra* note 80, ¶ 125; 1994 ILC *Draft Statute*, *supra* note 6, art. 29; see also Jordan J. Paust, *When We Meet an Alleged War Criminal in Bosnia*, ASIL Int'l Crim. Law Interest Group Newsl. no. 1, at 6 (1996); PAUST ET AL., *supra* note 46, at 79-80.



orders necessary for the conduct of the trial(s).<sup>117</sup> The order to transfer an accused or other persons to the *ad hoc* Tribunal is considered to be a Chapter VII enforcement measure.<sup>118</sup> Several of these obligations raise serious issues, including many of those noted in the first paragraph of this section. Others include whether it is appropriate or legal under various domestic legal systems to require a state to transfer a case to the *ad hoc* Tribunal, if the state is already vigorously prosecuting or planning to prosecute the defendant? Will the Tribunal be as effective as the state? What if the state prosecutors believe in good faith that they can do a better job? Is it proper to require them to transfer the fugitive to the Tribunal? These issues were actually pertinent to the *Tadić* case currently being prosecuted before the *ad hoc* Tribunal in the Hague, after transfer from Germany. Nevertheless, transfer is clearly required by the statute. If transfer were not required, of course, the danger of sham prosecution would arise. On the other hand, what sanctions will the Security Council really be able to impose for disobedience, given the veto?

## 2. Is Sending a Fugitive to the Court Extradition?

Another related question, not to be addressed at length herein, but one that is significant, is whether the rendering of the fugitive is an extradition. The issue is important, because in States like the U.S., extradition triggers certain constitutional and statutory protections, which may not be ignored but which are ignored by both the ICTY and the 1994 ILC Draft Statutes.<sup>119</sup> Failure to conform to the rules protecting accused fugitives, provided to accused fugitives in the realm of extradition, will thwart their being "rendered" to the tribunal, whatever the statute drafters choose to call the transfer.

## 3. The Importance of a Treaty or Implementing Legislation

If transfer of a defendant to an international tribunal is extradition, the question of whether the statute functions as a treaty is crucial for the United States, unless other legislation covers it. The U.S. Supreme Court has held that extradition from the United States is not possible without an applicable extradition treaty.<sup>120</sup> One could argue

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117. *Draft Report*, *supra* note 80, ¶ 125.

118. *Id.* ¶ 126.

119. *See, e.g.,* *Coumou v. United States*, 1995 WL 2292 (E.D.La. 1995) ("[T]he Court relies on the testimony of [Professor] Christopher Blakesley, [who establishes the notion of "de facto" or "functional" extradition.] The Court agrees with Blakesley's use of the phrase . . . [although it] agrees with defendant's argument that these words have no [prior] legal recognition, and so, apparently, does Blakesley (Transcript 518). They do, however, pretty well articulate the events which occurred. . . .") 1995 WL 2292 at 11; *Coumou v. U.S.*, 1997 WL80441 (5th Cir. 1997) (approving the decision).

120. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); *Valentine v. U.S. ex rel. Neidecker*, 199 U.S. 5, 18 (1936). *See discussion in* Blakesley, *Extradition Between France & the U.S.: An Exercise in Comparative and International Law*, 13 VAND. J. TRANSNAT'L L.

that it is extradition, whatever it is called: a rose by any other name is still a rose. If so, it is necessary that some form of an extradition type treaty or clause be entered into and that it receive the advice and consent of the Senate or that legislation be promulgated to do so.<sup>121</sup> It may be necessary that the treaty or clause call for the extradition, rendition or other relevant action to deliver the fugitive to the tribunal for trial. Is it an extradition, as called for by U.S. jurisprudence when a fugitive is being sent to an international tribunal rather than a State? While these are questions that will likely be answered in the affirmative, they will have to be addressed by the courts in the United States. It could be argued that the U.N. Charter, via the above-mentioned provisions and Article 25 could function like an extradition treaty. It could be considered, at least, as a treaty-based mechanism for the rendition of individuals. One must ask whether this approach will be upheld under Supreme Court jurisprudence, if a fugitive were to be requested from the U.S. A new treaty creating a permanent court could satisfy U.S. law with an extradition clause, such as Article 10(2) of the Hostages Convention.<sup>122</sup> This problem has been obviated, perhaps, by the promulgation of a law that provides for extradition or rendition to the tribunal.<sup>123</sup> This law authorizes the rendition of fugitives to the *ad hoc* Tribunal and could apply to any Permanent Court and cover the incidents and issues relating to that rendition. Its constitutionality remains to be tested, but it is likely to prevail.

The U.S. Supreme Court insisted on a treaty for the U.S. to extradite, because the U.S. extradition statute so requires.<sup>124</sup> A statute, therefore, may be sufficient, assuming that a *prima facie* case and all other requirements are established for surrender. A statute is necessary because of the principle that individuals cannot be apprehended without general legislative authorization. *This point is very important!* It is certainly necessary in the U.S. that there be enabling or implementing legislation for the process to work. The Council of Europe is

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653, 656-62 (1980); BLAKESLEY, *TERRORISM*, *supra* note 1, at 185-92; OLIVER ET AL., *supra* note 1, at 217-24.

121. *E.g.*, International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, art. 10(2), *reprinted in* 18 I.L.M. 1456 (1979).

122. *Id.*

123. The A.B.A. Task Force calls for this arrangement. *See* Report of the American Bar Association Section of International Law and Practice Task Force on War Crimes in Former Yugoslavia, at xii (Proposed Final Draft, June 22, 1993) [hereinafter A.B.A. Task Force Report] (and what has been done for the *Ad Hoc* Tribunals for Rwanda and the Former Yugoslavia). *See* 18 U.S.C. § 3184 (1994), as amended by Pub. L. No. 104-106, § 1342, 110 Stat. 486 (1996); *see* Robert Kushen & Kenneth Harris, *Surrender of Fugitives by the United States to the War Criminal Tribunals for Yugoslavia and Rwanda*, G.O.A.J.I.L. 510 (1996).

124. *Factor v. Laubheimer*, *supra* note 120; *Valentine v. United States*, *supra* note 120. The Valentine Statute covers international tribunals. The U.S. has amended its extradition statute to cover international criminal tribunals. *See* 18 U.S.C. § 3184, as amended 1996, *supra* note 123.

working on model implementing legislation. This drafting has been done for the ICTY and Rwanda Tribunal.

*E. Non-bis-in-idem — Nexus between Jurisdiction and the Rights of the Accused*

Article 10 of the Yugoslav *ad hoc* Statute reads:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
  - (a) the act for which he or she was tried was characterized as an ordinary crime; or
  - (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

The principle of *non bis in idem*, whereby no person shall be tried twice for the same offense, thus, is incorporated.<sup>125</sup> Given the primacy of the Tribunal's jurisdiction, subsequent trial before a national court should be forbidden, although the Secretary-General's Report notes that subsequent trial by the International Tribunal would be appropriate when: (a) "the characterization of the act by the national court did not correspond to its characterization under the statute, or (b) considerations of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts."<sup>126</sup> Should the Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, the former should take into consideration the extent to which any penalty imposed by the national court has already been served.<sup>127</sup> The use of the phrase, "the characterization of the act by the national courts did not correspond to its characterization under the statute" may be problematic. It might have been more appropriate to indicate that if the conduct alleged to have been committed did not constitute an offense of the same gravity, the Tribunal will not be precluded from re-trying the case. The characterization of the offense is not the key. Rather, the key is the nature of the criminal conduct and its punishability under inter-

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125. *Secretary-General's Report*, *supra* note 7, ¶ 66.

126. *Id.*

127. *Id.* ¶ 68.

national law and the Tribunal's statute. The language of the ICTY *Ad Hoc* Statute Article 10 still poses somewhat of a problem in this regard, but it is better than the language of the Report. Article 10(2)(b) indicates that retrial may take place if the "national court proceedings were not impartial. . . ." This language probably refers to a situation of the kind suggested by the next phrase, which speaks of the accused being "shielded from international criminal responsibility." It may well be important also to include, in any statute for a permanent court, situations where the International Tribunal will be more protective of the human rights of the accused than would be a national court which may not be "impartial" or "well-disposed."

#### F. *Trial in Absentia*

While the *ad hoc* Tribunal for the Former Yugoslavia rejected trial in absentia, the ILC Draft Statute, Article 37 provides for trial *in absentia* under some circumstances in what appears to be a compromise:

1. As a general rule, the accused *should* be present during trial.
2. The Trial Chamber may order that the trial proceed in the absence of the accused if:
  - (a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;
  - (b) the accused is continuing to disrupt the trial; or
  - (c) the accused has escaped from lawful custody under this Statute or has broken bail.
3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:
  - (a) that all reasonable steps have been taken to inform the accused of the charge; and
  - (b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.
4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:
  - (a) recording the evidence;
  - (b) considering whether the evidence establishes a *prima facie* case of a crime within the jurisdiction of the Court; and
  - (c) issuing and publishing a warrant of arrest in respect of an accused against whom a *prima facie* case has been established.
5. If the accused is subsequently tried under this Statute:
  - (a) the record of evidence before the Indictment Chamber shall be admissible;
  - (b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

The Statute for the ICTY *Ad Hoc* Tribunal wisely did not adopt trial *in absentia*. Some have argued vigorously in favor of trial *in ab-*

*sentia*.<sup>128</sup> Others argue less vigorously, but would allow such trials.<sup>129</sup> Those favoring it have succeeded in the ILC Draft Statute. Often systems which allow trials in *absentia* provide that the party who was tried *in absentia* has a right to a trial *de novo*. The protections afforded the accused in a trial *in absentia* and its trial *de novo* are chimerical. Adoption of trial *in absentia* is dangerous and unacceptable; it is a serious defect in the ILC Draft. Trial *in absentia* certainly accommodates the likely difficulty such a tribunal often will face in not being able to obtain the person of the accused. Trials *in absentia*, however, are anathema to the Common Law systems. Some of the arguments against trials in *absentia*, presented immediately below, apply to continental criminal justice systems in general. The point is that there may be a tendency in the world community to adopt a European model for the war crimes tribunal. Trial *in absentia*, however, raises serious problems for those from the "common law" or "adversarial" model of criminal justice.<sup>130</sup> Trials *in absentia*, moreover, necessarily violate Article 14(3)(d) of the International Covenant on Civil and Political Rights, which recognizes the right of any accused "[t]o be tried in his presence."

Continental criminal justice systems have built-in protections for individuals accused of crime. These protections have not been incorporated into the statutes of the *Ad Hoc* Tribunal or the ILC Draft. One can argue that sending a person to the Tribunal after a conviction *in absentia* cannot lead to a new trial that will be compatible with U.S., Canadian and other adversarial system constitutional standards or even continental standards.<sup>131</sup> The same is likely true of New Zealand,

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128. Of the vigorously approving side, see Letter Dated 10 Feb. 1993 from the Permanent Resident of France to the U.N. addressed to the Security Council, ¶ 108, U.N.Doc. S/25266 [hereinafter *Report of the Committee of French Jurists*]; see also Schütte, *Comments at Conference on the Ad Hoc Tribunal at the Max Planck Institute, Freiburg, Germany*; Julian Schutte, *Comments at the XV Congresso Internacional de Direito Penal*, Rio De Janeiro, September 5-10, 1994; Julian Schütte, *Comments at the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights, In Cooperation with the U.N. and the AIDP*, Dec. 2-5, 1992.

129. Of the less vigorous, yet still approving side, see Wedgwood, *supra* note 15, at 267-70 (1994).

130. For more analysis on this, see Blakesley, *Obstacles*, *supra* note 1; Blakesley, *Atrocity and its Prosecution*, *supra* note 1.

131. It seems to me that one should be hard pressed to accept trial *in absentia*, unless one is willing to accept it under one's own domestic law. *But see* Hirota v. MacArthur, 338 U.S. 197, 198 (1948) (no habeas corpus when sending a person to an international tribunal); PAUST ET AL., *supra* note 46, at 275. Moreover, disruptive defendants have been removed from the courtroom in the United States, although this may be distinguishable, if still not acceptable. It seems to me that just because a given system in times of stress or hysteria tends to take action that is violative of fundamental fairness, it should not be made or accepted as a rule of law. Why should it be acceptable? One can understand by the hysteria surrounding war and atrocity and serious improper (one might say "illegal," in a fundamental sense) conduct by a state, which is even approved

Australia, and now South Africa. In terms of minimum standards of protection for an accused person in International Human Rights Law, increasingly, U.S. requests for extradition and hand-overs under Status of Forces agreements have been overridden by international and foreign courts that have ruled international human rights provisions take precedence. In two of the cases, concerns over capital punishment in the U.S. have resulted in litigation in which courts outside the U.S. have held that turning persons over to states in the U.S. with the death penalty would in certain circumstances violate provisions of international human rights conventions.<sup>132</sup> International human rights conventions contain rights that sometimes are equivalent to protections guaranteed by the U.S. Constitution. In particular, the provisions guaranteeing the right to fair trial, equality of arms and access to court,<sup>133</sup> the presumption of innocence,<sup>134</sup> the right to confrontation, and the right to counsel of choice.<sup>135</sup> The problem is in the scope of these rights, which are written into human rights treaties in abstract terms. For example, in many European systems, although one has the right to counsel, the right does not obtain until the dossier has been finalized and handed-over to the indictment court. There is no right to counsel even during "custodial interrogations." In most jurisdictions, the dossier is evidence and the case against the accused is virtually complete by that time.<sup>136</sup>

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by the judiciary. See, e.g., *Koramatsu v. United States*, 323 U.S. 214 (1944). This situation, however, is not acceptable unless one trusts that due process protections may properly be dismissed by authorities who, perhaps, have some sense about who is a "terrorist," a "war criminal," or other evil type. More on this tendency is discussed in John Dugard, *The Judiciary in a State of National Crisis — With Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477 (1987). My position is that one should not trust one's domestic governmental officials with such power; why should one give it to an international institution? If a trial *in absentia* were followed, necessarily, by a trial *de novo* in which none of the prior *dossier* or prior evidence could be used, it would be more acceptable. Again, however, one might be skeptical about the impact that this evidence might have.

132. For background on the cases, see, e.g., *Söering v. United Kingdom*, 11 HUM. RTS. L. J. 3-35 (1990); Steinhardt, *Recent Developments in the Söering Litigation*, 11 HUM. RTS. L.J. 1073 (1990).

133. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), U.N.T.S. 222.

134. *Id.* art. 6(2).

135. On human rights and due process, see PAUST ET AL., *supra* note 46, at 734-41; BLAKESLEY, *TERRORISM*, *supra* note 1, chs. 1, 2, 4 & Conclusion.

136. See, e.g., *CRIMINAL PROCEDURE IN THE EUROPEAN COMMUNITY* (Christine Van den Wyngaert ed.) ch. 1, Belgium; ch. 5, Germany; ch. 6, Greece; ch. 10, The Netherlands; and most of the others (1993); HENNING FENNELL, JÖRG, & SWART, *CRIMINAL JUSTICE IN EUROPE*, ch. 1, the Netherlands (1995). The Italian attempt at improvement has not fared very well in application.

IV. MORE ON TRIGGERING MECHANISMS — OTHER SIMILARITIES AND DIFFERENCES BETWEEN THE *AD HOC* TRIBUNAL AND ANY FUTURE PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

Although the *Ad Hoc* Tribunals are being created solely for the purpose of prosecuting violations of international humanitarian law in the former Yugoslavia since 1991 or in Rwanda, they will have an impact on the development of a permanent international criminal tribunal. This impact will be positive or negative, depending on whether the *ad hoc* Tribunals are fashioned and proceed in a manner that brings credit to the international legal system. The ICTY seems to be proceeding in this way, with the assistance of excellent judges, prosecutors, and defense teams, but they must also be perceived as being effective in obtaining the person and prosecuting major perpetrators of the indicated crimes in a manner that comports with the international human rights protections afforded accused individuals. They must be perceived as producing results, i.e., convicting perpetrators. Failure on any of these fronts could damage the development or acceptance of a permanent tribunal.

Dangers abound: difficulty in obtaining evidence in a manner that comports with protections guaranteed accused persons; difficulty in obtaining custody of accused individuals; difficulty in protecting victims of the atrocities while obtaining meaningful and usable evidence against accused persons; and many, many other crucial problems face the *Ad Hoc* Tribunals.<sup>137</sup> Proper resolution of these problems is indispensable if this enterprise is not to damage the effort to establish a permanent tribunal.

Some of the problems actually facing the *Ad Hoc* Tribunal, however, are different from those that would face a permanent tribunal. Armed forces in the territory of the former Yugoslavia appear not to have kept good records; some of the alleged atrocities may have been perpetrated by loosely controlled members of local militia type groups, for which it may be difficult to establish a clear command responsibility leading to major order givers and other higher-ups. It appears that the groups which are alleged to have perpetrated many of the atrocities are now in control of areas where evidence or perpetrators may exist. This situation makes it difficult to expect and to receive their cooperation. These are some of the harsh realities of the situation currently facing the *Ad Hoc* Tribunals. The Rwanda Tribunal's prospects diminish as chaos again descends on that terror-ridden land. To the extent that these difficulties may not face a permanent tribunal the

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137. For example, there is an inconsistency between the defendant's right to cross-examine witnesses pursuant to Article 21(4)(e) of the Statute and the victims' and witnesses' right to be protected from appearing before the Tribunal under Article 22. See also ICTY Statute, *supra* note 6, art. 20(1).

differences must be emphasized by those interested in promoting the Tribunals.

A. *The Power and Authority of the Prosecutors Office — More Significant Dangers*

1. General

The relationship of the Prosecutors Office in the ILC Tribunal and the *Ad Hoc* Tribunals to the Tribunal itself is a fascinating and important one, especially given the nature of the Tribunals which straddle the Common Law and European models. Questions were raised in the ILC whether the permanent tribunal's prosecutor should be a collegial body rather than an individual. The prosecutor must be independent and must have the financial and political wherewithal to meet the high burden of investigation and prosecution of such significant offenses. In addition, the issue of the Procuracy's role, training, and approach must be addressed more carefully than it has been up to now. The system created for the *Ad Hoc* Tribunal for the Former Yugoslavia, for example, straddles precariously between the Anglo-American or Common Law Systems and those of the "Civil Law" world. This balance is not bad in itself; indeed, it is good. However, making systemic decisions and providing organization, resources and training, without a thorough study of how the system is to work, could be disastrous. The Continental System trains its *procureurs* as judges, inculcating the instincts to protect civil liberty and human rights. They do not depend on the adversarial system to counter-act the "win at any cost" mentality that can take over the common law approach.<sup>138</sup> During the Nürnberg Trials, aspects of the adversarial system were adopted. The judges understood that model and stood by as umpires for the battle. The problem was that many of the defense attorneys for the Germans had absolutely no training in the techniques or mindset of the advocate in the adversarial world. Lack of care or attention to detail could establish a system that incorporates the worst of each system, rather than the best. Here follows a discussion of some of the pitfalls of which one must be wary. While the points made below are harsh and are generalizations, they are accurate. The protections vary from nation to nation, but they are essentially of the same sort. They are based on a model in which the protection of society, including the accused, is dependent on the quality and good-faith of the prosecutor and judge.

ILC Draft, Article 12, provides that the Procuracy is an "independent organ of the Court" (continental model). The essence of its nature is the same as that indicated above and discussed below.

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138. One may wonder, however, whether European prosecutors, despite a good faith desire to be neutral, do not develop a particular theory of this case and become "adversarial" to the persons they suspect committed the crime.



## 2. The Prosecution in the ILC Approach

ILC Article 13, Composition, Functions, and Powers of the Procuracy, states:

1. The Procuracy shall be composed of a Prosecutor, who shall be Head of the Procuracy, a Deputy Prosecutor and such other qualified staff as may be required.
2. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. They shall be elected by a majority vote of the States parties to this Statute from among candidates nominated by the States parties thereto for a term of five years and be eligible for re-election.
3. The States parties shall, unless otherwise decided, elect the Prosecutor or Deputy Prosecutor on a standby basis.
4. The Procuracy, as a separate organ of the Tribunal, shall act independently, and shall not seek or receive instructions from any Government or any source.
5. The Prosecutor shall appoint such staff as are necessary to carry out the responsibilities of the office.
6. The Prosecutor, upon receipt of a complaint pursuant to article 28, shall be responsible for the investigation of the crime alleged to have been committed and the prosecution of the accused for crimes referred to in articles 22 and 26.
7. The Prosecutor shall not act in relation to a complaint involving a person of the same nationality. In any case where the Prosecutor is unavailable or disqualified, the Deputy Prosecutor shall act as Prosecutor.

Prosecution may commence on the basis of a criminal complaint brought by a State Party.<sup>139</sup> Also, a Party that does not have prescriptive or *in personam* jurisdiction or that does not wish to bring a criminal complaint within its own jurisdiction, may petition the Procurator-General of the Tribunal to inquire the potential direct prosecution by the Court. In such cases, the request by a State Party will be confidential and only after the Procurator-General of the Tribunal has deemed the evidence sufficient will the case for prosecution be presented to the Court *in camera* for the Court's action. In such a situation, the Tribunal's Procuracy acts as a Judicial Board of Inquiry.<sup>140</sup> Once the Procuracy (sitting as the Judicial Board of Inquiry) has decided

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139. 1994 ILC Draft Statute, *supra* note 6, art. 21.

140. See *id.* art. 12. BLAKESLEY, DRAFT MODEL FOR PROPOSED INTERNATIONAL COMMISSION [OR BOARD] OF CRIMINAL INQUIRY, part of DRAFT MODEL INTERNATIONAL CRIMINAL TRIBUNAL, adapted, with analysis from earlier DRAFT MODELS BY M.C. BASSIOUNI and that cited for the *Istituto Superiore Internazionale de Scienze Criminali*, Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality for the Establishment of an International Criminal Court, Siracusa, Italy, 24-28 June 1990; analysis, and alternative draft, in 1995.

whether to prosecute, the Procurator-General will issue an indictment and request the surrender of the accused by the State Party where the accused may be found. The Convention includes provisions on surrendering the accused to the Tribunal and providing the Tribunal with legal assistance (including administrative and judicial assistance) for the procurement of evidence (both tangible and testimonial).<sup>141</sup>

### 3. The Prosecutor in the *Ad Hoc* Tribunals

The role, authority, and power of the prosecutor are important. The prosecutor has significant triggering power. ICTY Article 16, The Prosecutor, (and comparatively, Rwanda Statute Article 15) provide:

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or to receive instructions for any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

The Prosecutor for the *Ad Hoc* Tribunals was appointed by the Security Council, upon the nomination of the Secretary-General. The obligation was to appoint someone of the highest level of competence and experience in the conduct of criminal investigations and prosecutions and be of high moral character. He was appointed for a four-year term (eligible for re-appointment). His, or potentially her, terms and conditions of service shall be the same as those of an Under-Secretary-General of the United Nations.<sup>142</sup> The Prosecutor's role seems to be based on a somewhat mixed (common law/continental) model. He or she shall be responsible for the investigation and prosecution of persons responsible for the offenses within the competence and jurisdic-

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141. See, e.g., THE EUROPEAN CONVENTION ON MUTUAL LEGAL ASSISTANCE, Apr. 20, 1959 (E.T.S. No. 30), and the various bilateral Conventions between various states. See, e.g., Allan Ellis and Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 151 (1986).

142. *Secretary-General's Report*, *supra* note 7, ¶ 86; ICTY Statute, *supra* note 6, art. 16(4); Rwanda Statute, *supra* note 27, art 15(3).

tion of the Tribunal.<sup>143</sup> The Prosecutor is to be an independent organ of the Tribunal and is not to seek or to receive instructions from any government or other source.<sup>144</sup> The Prosecutor's Office will be composed of the Prosecutor and other qualified staff, "as may be required" to perform the functions entrusted in an effective and efficient manner.<sup>145</sup> The staff will consist of an investigation and a prosecution unit,<sup>146</sup> to be appointed by the Secretary-General on the recommendation of the Prosecutor.<sup>147</sup> The staff must meet rigorous criteria of professional experience and competence; they must have relevant experience in their own countries as investigators, prosecutors, criminal lawyers, law enforcement personnel or medical experts [and] [g]iven the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women.<sup>148</sup> Most of the qualification criteria for staff are spelled out only in the Report, not the Statute.

#### VII. TRIGGERING INVESTIGATION & PRE-TRIAL PROCEEDINGS<sup>149</sup>

ICTY *Ad Hoc* Tribunal Statute, Article 18 and Rwanda Article 17, Investigation and Preparation of Indictment set out investigation and preparation of an indictment as follows:

1. The Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by his in any such case if he does not have sufficient means to pay for it, as well as to neces-

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143. *Secretary-General's Report*, *supra* note 7, ¶ 85; ICTY Statute, *supra* note 6, art. 16(1); Rwanda Statute, *supra* note 27, art. 15(1) (different temporal and geographic competence).

144. *Secretary-General's Report*, *supra* note 7, ¶ 85; ICTY Statute, *supra* note 6, art. 16(2); Rwanda Statute, *supra* note 27, art. 15(2) (different temporal and geographic competence).

145. ICTY Statute, *supra* note 6, art. 16(3); *Secretary-General's Report*, *supra* note 7, ¶ 87.

146. This division of labor is indicated in the Report, but not in the Statute.

147. *Secretary-General's Report*, *supra* note 7, ¶ 87; ICTY Statute, *supra* note 6, art. 16(5).

148. *Secretary-General's Report*, *supra* note 7, ¶ 88.

149. *Id.* ¶¶ 98-98; ICTY Statute, *supra* note 6, arts. 18 & 19.

sary translation into and from a language he speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Status. The indictment shall be transmitted to a judge of the Trial Chamber.

ICTY Article 19 and Rwanda Article 18, Review of the Indictment, state:

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge 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.

In the *Ad Hoc* Tribunals, the Prosecutor will initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental, and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.<sup>150</sup> The standard of proof to allow prosecution is that of a *prima facie* case.<sup>151</sup> The Prosecutor seems to have discretion somewhat like that of a Common Law prosecutor. On the other hand, the Prosecutor is an organ of the Tribunal, a characteristic obviously of civilian origin. The Prosecutor, in conducting investigations, will have the authority and power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.<sup>152</sup> Once the Prosecutor believes that a *prima facie* case is established, he or she will prepare an indictment concisely stating the facts and the crimes with which the accused is charged pursuant to the Statute.<sup>153</sup> The indictment will be transmitted to the Trial Chamber for review and decision as to its confirmation or dismissal.<sup>154</sup> It is not clear whether the review and decision of confirmation or dismissal of the indictment is to be made by

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150. *Secretary-General's Report*, *supra* note 7, ¶ 93; ICTY Statute, *supra* note 6, art. 18(1); Rwanda Statute, *supra* note 27, art. 17(1).

151. *Secretary-General's Report*, *supra* note 7, ¶ 95; ICTY Statute, *supra* note 6, art. 18(4); Rwanda Statute, *supra* note 27, art. 17(4).

152. *Secretary-General's Report*, *supra* note 7, ¶ 94; ICTY Statute, *supra* note 6, art. 18(2); Rwanda Statute, *supra* note 27, art. 17(2).

153. *Secretary-General's Report*, *supra* note 7, ¶ 95; ICTY Statute, *supra* note 6, art. 18(4); Rwanda Statute, *supra* note 27, art. 17(4).

154. *Secretary-General's Report*, *supra* note 7, ¶ 95; ICTY Statute, *supra* note 6, arts. 18(4) & 19(1); Rwanda Statute, *supra* note 27, arts. 17(4) & 18(1).

the whole Trial Chamber or by a single judge. If the indictment is confirmed, the Tribunal shall issue, at the request of the Prosecutor, such orders, and warrants for the arrest, detention, surrender and transfer of persons, or any other orders as may be necessary for the conduct of the trial.<sup>155</sup>

If the Prosecutor questions suspects as part of the investigation, the suspect has the right to be assisted by counsel of his or her own choice, including the right to have this representation without payment, if the accused cannot afford the cost. The same is true for the cost of translation.<sup>156</sup> One problem with this arrangement is similar to that faced by many Continental and Common Law nations. At what point does a person become a suspect, as opposed to a witness. Obviously, the line between witness and suspect may be blurred and since the right to the presence of counsel obtains only for suspects, there is room for abuse. The A.B.A. Task Force noted that the Statutes have no provisions for pre-trial release or *habeas corpus* type protection for the accused pending trial.<sup>157</sup> There is danger of abuse in a Tribunal such as this one, where there is no strict political accountability. Some sort of pretrial protection and oversight is necessary.

#### VIII. TRIAL & POST-TRIAL PROCEEDINGS

##### A. *Trial Fairness. ICTY Ad Hoc Tribunal Statute, Article 20. Commencement and Conduct of Trial Proceedings*

ICTY Article 20 dictates:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedures and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

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155. *Secretary-General's Report*, *supra* note 7, ¶ 97; ICTY Statute, *supra* note 6, art. 19(2); Rwanda Statute, *supra* note 27, art. 18(2).

156. *Secretary-General's Report*, *supra* note 7, ¶ 96; ICTY Statute, *supra* note 6, art. 18(3); Rwanda Statute, *supra* note 27, art. 17(3).

157. A.B.A. Task Force Report, *supra* note 123, at x.

The trial is to be conducted expeditiously and fairly, in accordance with the rules of procedure and evidence, with the Trial Chamber ensuring that the rights and interests of the accused, the witnesses and victims are given full respect and protection.<sup>158</sup> A person against whom an indictment is confirmed is to be informed of the charges against him and shall be taken into custody and transferred to the tribunal for prosecution; trials *in absentia* will not be allowed, being considered contrary to the International Covenant on Civil and Political Rights.<sup>159</sup> The trial shall be public unless the Trial Chamber decides to have it closed, pursuant to its rules and procedures.<sup>160</sup>

#### IX. DAMAGES IN TORT AND *LA PARTIE CIVILE*

It would be interesting and was suggested in the Meeting of Experts on the *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda and the possibilities for a Permanent Tribunals *Association Internationale de Droit Pénal*, December 4-8, 1994, Siracusa, Italy, that the ILC Draft include language that would allow the possibility of some sort of tort action by the victims or even for a mechanism for a victim to be a *partie civile* as in France and other continental nations.<sup>161</sup> The *partie civile* is essentially the victim of the crime who has the right to have his civil action associated with the criminal prosecution. In civil law jurisdictions, this victim's right has existed for ages. He or she has the opportunity to feel a part of the action against the defendant. It also provides the victim with cost-free means to have his or her tort case established. Damages are not a problem in civil law jurisdictions, because the range is statutorily set. In addition, the burden of proof problem is not presented, because the standard is the same in Europe for both criminal and civil actions; the judge (or jury) must come to a *conviction intime* (literally intimate conviction).

*Une conviction intime* is the innermost conviction of conscience that the individual committed the crime/wrong. Commentators explain:

[I]n the system of *l'intime conviction*, the judge appreciates and weighs all of the evidence presented in total liberty.<sup>162</sup> He decides in accordance with his conscience to convict, to mitigate or to ac-

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158. *Secretary-General's Report*, *supra* note 7, ¶ 99; ICTY Statute, *supra* note 6, art. 20(1); Rwanda Statute, *supra* note 27, art. 19(1).

159. *Secretary-General's Report*, *supra* note 7, ¶¶ 101-102; ICTY Statute, *supra* note 6, art. 19(2) (the explicit statement prohibiting trial *in absentia* is not in the Statute); Rwanda Statute, *supra* note 27, art. 20(2) provides similarly. International Covenant on Civil and Political Rights, U.N.T.S., vol. 999, No. 14668, p. 171, and vol. 1057, p. 407.

160. *Secretary-General's Report*, *supra* note 7, ¶ 103; ICTY Statute, *supra* note 6, art. 20(4); Rwanda Statute, *supra* note 27, art. 19(4).

161. See, e.g., *Belgian Code de Procédure Pénale* arts. 82, 63, 108; *French Code de Procédure Pénale*, arts. 85-89; Gaston Stefani, Georges Levasseur, Bernard Bouloc, *PROCÉDURE PÉNALE* §§ 494, et seq.; 537, et seq. (14th ed. 1990); *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* 17, 18, 170-171 (Christine Van Den Wyngaert ed., 1993).

162. *French Code de Procédure Pénale*, *supra* note 161, arts. 353, 485 & 543.

quit, in accordance with whether he is convinced or not of the defendant's culpability, without being obliged to give any justification whatsoever, of the probative impact or force that he attached to any of the evidence. . . .<sup>163</sup>

This system burden of proof, of course, may not work in the "adversarial context." First, the burden of proof for a crime is beyond a reasonable doubt; too high for a civil plaintiff. Second, in an adversarial setting, the attorney representing the *partie civile* would likely pit himself against another defendant or in some other way develop friction between him and the judge. One way to ameliorate this problem is to have the recovery of damages from defendant be totally dependant on the conviction. This solution, however, would not resolve the problem of the difference in standard of proof. These difficulties may cause the *partie civile* approach not to work well, but it is worth consideration and an attempt to resolve the difficulties.

Damages in tort ultimately may be the more efficient and fruitful method of deterring violations of humanitarian law and promoting its value. Justice and Professor Frank Newman noted this in a panel discussion in which I participated at the American Society of International Law Annual Meeting, April 1994.<sup>164</sup> Al Rubin recommended this some time ago as an alternative to prosecution in relation to the Iranian Air Bus and the Lockerbie incidents, among other things.<sup>165</sup>

## X. TRIGGERING APPELLATE AND REVIEW PROCEEDINGS

### A. Generally

The Secretary-General's Report and the Statute for the ICTY and the Rwanda *Ad Hoc* Tribunal recognize the fundamental nature of the right to appeal, as incorporated in the International Covenant on Civil and Political Rights.<sup>166</sup> The *Ad Hoc* Tribunal's appellate process, thus, allows a person convicted or the prosecution to appeal errors on questions of law that would invalidate the decision and on errors of fact which would occasion a miscarriage of justice.<sup>167</sup> The Appellate Cham-

163. *Id.* arts. 353, 427, & 536; STEFANI, LEVASSEUR, & BOULOC, *supra* note 161, § 37 & 44-45.

164. See Christopher L. Blakesley, *Remarks on the Ad Hoc and Permanent War Crimes Tribunal*, 88th Annual Meeting, ASIL 243, 244, 254-55, 257 (1994); Frank Newman, *Comments on my presentation in same panel discussion*; *Id.* at 253; see also Jordan Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage Taking*, 31 VA. J. INT'L L. 351 (1991); Alfred P. Rubin, *Remarks on the Ad Hoc Tribunal for the Former Yugoslavia*, 87 ASIL PROCEEDINGS 32-35 (1993); Alfred P. Rubin, *International Crime & Punishment*, 33 THE NAT'L INTEREST 73 (1993).

165. See, e.g., Alfred P. Rubin, *Remarks on the Ad Hoc Tribunal for the Former Yugoslavia*, 87 ASIL PROCEEDINGS 32-35 (1993); Rubin, *International Crime & Punishment*, 33 THE NAT'L INTEREST 73 (1993); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 198-203, 212 (1996).

166. *Secretary-General's Report*, *supra* note 7, ¶ 116.

167. *Id.* ¶ 117; *ICTY Statute*, *supra* note 6, art. 25; *Rwanda Statute*, *supra* note 27,

ber may reverse, affirm, or revise the decisions of the Trial Chambers<sup>168</sup> by way of decision rendered publicly and accompanied by a reasoned opinion, to which other opinions, either concurring or dissenting, may be appended.<sup>169</sup> The decision of the Appellate Chamber is final.<sup>170</sup> The ILC Draft Statute is similar. ICTY Article 25 and Rwanda Statute Article 24 - Appellate Proceedings

*Ad Hoc* Tribunal, ICTY Article 25 and Rwanda Article 24 Appellate Proceedings, provide that:

[t]he Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

#### B. *ILC Draft Statute Article 42*

The ILC Draft Statute, Article 42, provides for the prosecution as well as the defense to be able to appeal adverse decisions. The appeal is a civilian-type appeal of errors of fact as well of errors of law. Article 42 provides:

[T]he Appeals Chamber, has all the powers of the Trial Chamber. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may: (a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial; (b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial. If in an appeal against sentence, the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with Article 47 [applicable penalties]. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court. Six judges shall constitute a quorum. Subject to Article 50 [on revision, *infra*], the decision of the Chamber shall be final.

#### C. *Serious Problems Depending upon What System*

Obviously, prosecutorial appeal of acquittal is problematic for those from countries having adversarial systems. Double jeopardy, *non-bis-in-idem* in civilian countries, the right to a jury trial, among other basic constitutional protections of accused individuals, seem to

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art. 24.

168. *ICTY Statute*, *supra* note 6, art. 25; *Rwanda Statute*, *supra* note 27, art. 24.

169. *ICTY Statute*, *supra* note 6, art. 25; *Secretary-General's Report*, *supra* note 7, ¶ 118.

170. *ICTY Statute*, *supra* note 6, art. 25.



be put aside. Nations like the United States might be hard put to enter into a treaty that would allow such practice.

*D. The Qualifications and Election of Appellate and Trial Level Judges*

ILC Article 6, *Ad Hoc* Tribunal Statute Article 13 (ICTY), and Rwanda Article 12 also pose controversial and significant issues. Should the appellate judges have different qualifications from those of the trial judges? Should they be elected separately? From the common law or adversarial perspective, it is important that there be separate elections and separate qualifications for the two types of judges because they do significantly different type of work. On the other hand, from a civilian or continental perspective and based on the continental nature of the tribunals under the statutes, this differentiation of expertise, talent, and election is not necessary. A related issue is that of judicial rotation from the trial chambers to the appellate chamber in the *Ad Hoc* Tribunal. This problem has proved serious for the *Ad Hoc* Tribunals, but has been avoided in the ILC Draft. As the number of cases mount in the *Ad Hoc* Tribunal, it will become more and more difficult to manage. A judge cannot sit on appeal if he or she has had any prior relationship to the case. Potentially and eventually, no judges will be available for appellate work.

*E. Review Proceedings*

Article 26 of the ICTY *Ad Hoc* Tribunal, Article 25 (Rwanda), and Article 50 of the ILC Draft Statute present a similar problem. Article 26 of the *Ad Hoc* Tribunal Statute provides that, when a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement. Article 50 of the ILC Draft Statute allows the prosecutor or the person convicted to do the same.

*F. Potential U.S. Constitutional Problems*

The related questions of meaningful appellate review and prosecutorial authority to appeal or to have an acquittal revised, present potentially devastating defects from the U.S. Constitutional point of view. Having merely one level of review is problematic. In addition, does allowing the prosecution more than a mere interlocutory appeal of errors of law, which would trigger a new trial for the same offense, violate the principle against double jeopardy? To comport with the protection against being subject to jeopardy twice for the same conduct (double jeopardy) from the perspective of United States constitutional law, the defendant only, not the prosecution, should be allowed this prerogative. The same is true for the notion of revision.

## XI. CONCLUSION

The attempts to protect and enforce human rights through prosecution of those who commit serious violations of humanitarian law are important and laudable. The success of the tribunals, indeed, the viability of both peace and justice, depends on promulgation, interpretation, supplementation, application, and enforcement. The *Ad Hoc* Tribunals for the Former Yugoslavia and for Rwanda and the proposed ILC Draft Statute fall short, but they are all subject to being modified in a manner that will make them functional. This modification must be done.