THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (1994): SOME ISSUES AND PROBLEMS

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CERTIFICATE

*This is to certify that the M.Phil dissertation entitled "**THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT(1994): SOME ISSUES AND PROBLEMS**", submitted by **Ms. Latha Varadarajan** in partial fulfilment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** from Jawaharlal Nehru University is an origginal work.This has not ben published or submitted to any other university for any other purpose.*

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CONTENTS

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LATHA VARADARAJAN

INTRODUCTION

The idea that the 'criminality' of certain acts transcends national boundaries and that perpetrators of such acts ought to be punished by law, is not of recent origin. While national courts did try to punish those guilty of such crimes (for instance, the court martials of U.S. soldiers involved in the 1899 Philippines war), an international criminal jurisdiction is undoubtedly a twentieth century concept. The most explicit expression of this idea was Art.227 of the Treaty of Versailles which provided for the trial of Wilhelm II of Germany before a five-member Special Tribunal "for a supreme offence against international morality". History records this as a dead letter article, but among its fallouts was the move to create an international court with powers to try criminal offences; a move which has reached its culmination with the International Law Commission (ILC) draft statute for an International Criminal Court (ICC).

The 1994 draft can be studied on its own merits: as a comprehensive document which tries to balance legal and political interests in order to create an institution, which despite the restrictions under which it would have to function, would be an effective tool to implement international criminal law. However, this study focusses on the draft for other reasons. The draft statute cannot be studied in isolation from the debates raging on international criminal jurisdiction. The fact that such a draft exists and is to be considered by the General Assembly (UNGA) next year can, at a glance, be regarded as an assertion of the desirability of an ICC. But

the concessions made in the provision of the draft statute to reassure the sceptics belies this assumption. The question regarding the desirability of the court is still pertinent and deserves closer scrutiny.

Another related issue is that of feasibility: is it possible to establish an ICC, given the present political situation? Concepts like sovereignty still govern the behaviour of states: would a court with an overarching jurisdiction be acceptable to even a majority of states? Moreover, the 1994 draft envisages a rather ambiguous role for the Security Council (Art.23 of the statute gives the Security Council the right to refer to the court, any case pertaining to Art.20 crimes) : given the subjective criteria for the determination of several categories of crimes mentioned in Art.20 and the questionable impartiality of the Security Council, a blanket power to move the ICC is bound to be regarded as suspect by other states.

Adding to the contestability of the draft is the lack of clarity regarding the subject matter jurisdiction of the court. Despite being based on the premise that the court shall apply only existing laws, Art.20 of the statute has provoked the maximum criticism. One aspect that needs to be kept in mind while dealing with jurisdictional problems is that the Draft Code of Crimes against the Peace and Security of Mankind (which logically ought to have preceded the draft statute and laid down the jurisdictional limits of the court) has still not been accepted by states. Under such conditions can an ICC be a feasible proposition?

The ILC's draft statute for an International Criminal Court (9914) affords a vantage point from which these issues can be addressed. Since the dissertation

focusses primarily on the draft statute, it has relied to a large extent on the records of the ILC, apart from the reports that have been presented by various committees on this issue. The relevance of the works of scholars like George Schwarzenberger. Julius Stone, Manley Hudson and Quincy Wright can perhaps not be overstated. Their views have influenced not just the shape of the introductory chapter, but the entire analysis that has been carried out.

The first chapter provides a historical perspective of the concept of an International Criminal Court. Apart from providing a theoretical overview of the debates on the subject of international criminal jurisdiction, it traces the history of the move towards an international criminal court.

The second and third chapters focus completely on the 1994 draft statute for an international criminal court. Chapter II details the provisions of the draft statute using the categorization provided by the 1992 Working Group, while Chapter III carries out an analysis of the problems with the draft statute.Constraints of time and space have ensured that Chapter III looks primarily at the questions pertaining to the jurisdiction of the court. Other issues such as ones concerning the trial, international cooperation and enforcement are dealt with briefly in the second chapter itself.

The concluding section of this study is an attempt to refocus attention on the questions raised in the preceding paragraphs, based on the analysis of the 1994 draft statue.

CHAPTER 1

A HISTORICAL PERSPECTIVE OF THE INTERNATIONAL CRIMINAL COURT

The development of the notion of an international criminal court has been closely linked to the concept of international crimes. Though open to various interpretations, in the context of a criminal court, the focus here is on what Georg Schwarzenberger called 'international criminal law in the material sense of the word.'[1] The question of whether such a law existed has occupied the minds of legal scholars for several centuries. Their stand on this issue depended to a large extent on how far they viewed international law as a 'Law of Nations'. Acceptance of state sovereignty and the notion that individuals could not be subjects of international law were the reasons why discussion on this matter remained tempered in the period between the Napoleonic wars and the world wars. An illustration of this attitude can be found in the comments of Lord Eldon on the problems of dealing with Napoleon after Waterloo :

> If Bonaparte is to be considered as a French Subject his imprisonment after peace is rather to be justified upon his case forming an exception to general rules of the law of nations than by any stated rule of that law.[2]

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1 Schwarzenberger deals with six different interpretations of the term' international criminal law' which includes varying forms of municipally applicable international law. For a detailed discussion, *see*, Georg Schwarzenberger, "The Problem of an International Criminal Law" in G.O. W. Mueller and E.M. Wise (Ed), *International Criminal Law*, Sweet and Maxwell ltd, London (1965), pp.3-36.

2 J.H. Steward, "The Imprisonment of Napoleon : A legal opinion by Lord Eldon", *American Journal of International Law* (Lancaster, PA), vol.45, 1951, p.574.

The alternative of course was to consider Napoleon as the king of Elba, a distinct entity, independent of any relations with France. As a conquered enemy therefore, Britain could treat him in any manner without violating the law of nations. State practice during this period seemed to be governed by the assumption that criminal jurisdiction was a state prerogative and any assertion of international jurisdiction would be an exception rather than a norm governing international relations.

The two world wars and their aftermath, particularly the charter and judgement of the Nuremberg Tribunal were largely responsible for refocussing attention on the issue of international criminality.[3] With the notion of individual criminal responsibility taking firm root, international criminal law could no longer be relegated to the realm of legal theory. That is not to say, however, that interpretations of this concept were uniform.

INTERNATIONAL CRIMINAL LAW: SOME THEORETICAL VIEWPOINTS

Approaches to international criminal law ranged from an outright rejection of this concept to the assertion that it was a historical phenomenon firmly rooted in the past, which continued its expansion into the present. The strongest advocate of the former position was none other than Schwarzenberger. In a landmark article

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3 Art. 227 of the Treaty of Versailles was a landmark provision as it dealt with the possible trial of the Kaiser before an international tribunal; the charter and judgement of the Nuremberg Tribunal also dealt with the theme of individual criminal responsibility in international law.

published soon after the conclusion of the second world war (*The Problem of an International Criminal Law*)[4],he tackled the question of international criminality headlong and came up with a straight forward answer:

> In the present state of world society, international criminal law in any true sense does not exist.[5]

Schwarzenberger's contention was that law could not be conceived of in a vacuum. There existed a definite relationship between law and specific social context. Even in primitive societies, criminal law originated due to awe of Gods and fear of the priests who were regarded as their intermediaries; in later periods, this changed into a fear of a strong central authority. Unfortunately, international society lacked common rules or the fear of sanctions : conditions on which the rise of criminal law depended. Unlike other scholars who expounded at length on the subject, Schwarzenberger felt that the question of whether or not individuals were subjects of international law was at best of marginal interest. What was to be taken note of was the fact that given the nature of the international system, any attempt to create an international criminal jurisdiction would be hindered by actual power politics.

Diametrically opposed to this view was that of a group of scholars who believed in the existence of a dynamic international criminal law. They held that this branch of international law, however primitive it might be at present, was, particularly important to achieve compliance with interests recognized as essential

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4 Schwarzenberger, n.1

5 Ibid, p.35

to the world community.[6] There was however little agreement on what exactly was the world community and its interests and how they were constructed.

Other jurists adopted a more cautious approach while arriving at their conclusions regarding international criminality. Philip C. Jessup and Charles Fenwick shied away from addressing the concept directly; Jessup defining the nature of international criminal law in terms of jurisdiction, both national and transnational and Fenwick merely referring to international criminality in terms of specific violations of international law or human rights.[7] The most unusual method used to determine whether or not international criminal law existed was conceived by Quincy Wright. His arguments were simple. Since crimes against international law was a well established concept and since liability for those crimes was also an accepted part of international relations, international criminal law did exist.[8] Moreover, Wright, unlike Schwarzenberger also underlined the importance of individuals being recognized as subjects of international law. In the theoretical framework he propounded, this had a direct bearing on international criminal law: for the first time, the international community was seriously considering the creation of international institutions which would strive to protect the human rights and fundamental freedoms' of the individual against violation by even his/her own state.

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6 This group included scholars like W. Freidman, J.G. Starke, Quincy Wright and M.C. Bassiouni. Also see Robert A. Freidlander, "The Foundations of International Criminal Law : A Present-Day Inquiry", *Case Western Reserve Journal of International Law* (Cleveland), vol.15, 1983, pp.13-35.

7 Friedlander, n.6, pp.14.

8 Quincy Wright, "The Scope of International Criminal Law: A Conceptual Framework", *Vanderbilt Journal of Transnational Law*, (Nashville, TN), vol.15, 1975, p.561.

While most scholars focused on the individual in trying to determine the basis of international criminality, one approach deserves mention primarily because of its focus on the role of the state. The doctrine of state responsibility, of which the Romanian jurist Vespasian Pella was one of the earliest proponents holds that if a state, through its conduct violates one of the existing legal norms, its act should be considered criminal and incur the appropriate liability.[9] Though subject to debate, this doctrine has gained credence in the past few decades with even the ILC proposing a draft code on state responsibility for international wrongful acts in 1979.[10]

It must be kept in mind that the approaches listed here did not follow each other in any systematic order. They represent the predominant views on a topic which was of grave concern to the post world war international community. While sceptics like Schwarzenberger held on to their positions, there was a growing consensus on the view that an international criminal law did exist and so did its need. The question which proved more difficult to answer was if an international criminal law existed, how was it enforced in the international community? Could there be a court at the international level which like the municipal courts could have jurisdiction over international crimes? If such a court was indeed created, what would be the nature of the crimes it would have control over? Attempts to deal with

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9 Freidlander, n.6,p.15.

10 18 ILM 1568 (1979), cited in Freidlander, n.6,p.16.

these issues led to the starting of a process which has continued for nearly eight decades- the creation of an international criminal court.

EARLY EFFORTS AT CREATING AN ICC (1920-1945)

Though there are recorded instances of members of the armed forces being tried for violation of the laws of war, it was only in the aftermath of the first world war that steps towards creating an international criminal jurisdiction were taken.[11] The Treaty of Versailles included provisions to bring to trial the head of a state for 'international crimes'. As per Art. 227, Kaiser Wilhelm II was to be tried by a five-member special tribunal for "a supreme offence against international morality and the sanctity of treaties".

The judges were to be appointed by the five great powers : the United States, Britain, Japan, France and Italy and they were to be 'guided by the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality'. The treaty further legitimised the Allied attempt to exercise international criminal jurisdiction by recognizing their right to try persons accused of violating the laws of war and those guilty of crimes against one of their nationals, before their military tribunals.

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11 The earliest step was taken during the Paris Peace Conference of 1919 where the commission on the Responsibility of the Authors of The War and on the Enforcement of Penalties suggested the creation of an Adhoc International 'high tribunal' to deal with four categories of "violations of the laws and customs of war and of the laws of humanity". This proposal is detailed further in Manley O Hudson, "The Proposed International Criminal Court", *American Journal of International Law*, vol. 32(1). 1928, pp.549-54.

Moreover, under the terms of the treaty, Germany was obliged to find the accused and surrender them in order to facilitate the trials.

The debate on the merits of Art. 227 was fated to remain academic; the Dutch government (with whom the Kaiser had sought refuge) refused to surrender him for a trial on the ground that he had been accused of a "political offence". However, by this time the ball had been set rolling : the Advisory Committee of Jurists, whose primary task was to prepare a statute for a permanent international court also began work on the concept of an international criminal court. Through a unanimous resolution adopted on 24 July 1920, the committee proposed the creation of a 'High Court of International Justice'.[12] Its bench would consist of one member from each state, chosen by the group of delegates of each state on the Court of Arbitration. The jurisdiction of the proposed court would extend to try crimes constituting a breach of international public order or against a universal law of nations referred to it by the Assembly or the Council. The most striking feature of the whole proposal was the kind of powers the Committee wanted to invest in the court. The court would have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence, apart from formulating its own rules of procedure.

Not surprisingly, this proposal did not go beyond the drafting stage. At its very first meeting in Geneva (Dec. 1920), the Assembly adopted a recommendation of its committee:

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12 Lord Phillimore, "An International Criminal Court and the Resolutions of the Committee of Jurists", *British Yearbook of International Law*, 1922-23, pp.79-86.

> ...it would be useless to establish side by side with the court of international justice another criminal court and that it is best to entrust criminal cases to the ordinary tribunals, as is at present the custom in international procedure. If crimes of this kind should in future be brought within the scope of an international penal law, a criminal department might be set up in the court of international justice. In any case consideration of this problem is at the moment, premature.[13]

Though the Assembly considered the issue premature, the notion of an international criminal court took firm root in the legal community and was debated at length in the inter-war period. The idea of an international criminal court met with constant support from the International Law Association (ILA). Not only did it consider the creation of such a body essential to the interest of justice, but actually took steps to work on a draft statute for the same. In fact, at its Vienna conference (1926), the ILA adopted a draft statute for the criminal court with an overwhelming majority.[14] Another organization which extended its support to this idea was the Inter-Parliamentary Union (IPU). The conference of the IPU in 1925 came up with the suggestion that a special criminal chamber should be created within the Permanent Court to try individuals accused of international crimes and offences. The IPU further proposed that the international crimes and the sanctions that their commission entailed should be defined in specific terms in treaties/texts before such

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13 Ibid, p.84.

14 At Buenos Aires (1922), the ILA resolved that the creation of an international criminal court was essential in the interests of justice;at Stockholm (1924), it considered the draft statute for such a court proposed by Dr. H.H.L. Bellot; at Vienna (1926), it adopted the draft statute by an overwhelming majority of those present, see Reports of the 31st, 33rd and 35th conferences of the International Law Association, also cited in J.L. Brierly, "Do We Need An International Criminal Court?", *British Year Book of International Law*, 1927, pp.81-88, at p.82

a chamber was established.[15] However not everyone was enamoured with the concept of a criminal court. Among the better known sceptics of this period was, J.L. Brierly who believed that:

> an international criminal court would be neither a desirable nor a practicable development of international organization.[16]

His view was that even if such a court were to be created, it would have jurisdiction only over two kinds of crimes - war crimes and crimes, which would have political repercussions. Believing that war crimes could be banished or even reduced through the deterrent effects of a court was a mere delusion and as for the other type of crime, the League already had a council, which would not only deal with such issues but also refer the matter to the PCIJ for an opinion if the need arose. Though Brierly's categorization was not characterized by clarity, the issues that he raised, ranging from technical problems such as securing attendance of witnesses and investigative procedures to more fundamental doubts regarding the very purpose of such a court served to stem further proposals for an ICC.

It was only in 1936 that the idea re-emerged in a different context. The early 1930's had witnessed a spate of political assassinations which culminated with the killing of Alexander I of Yugoslavia and the French foreign minister in Marseilles on 9 October 1934. Reacting to this, the French government proposed to the Council of the League a series of steps to curb politically motivated crimes. The Council

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15 Cited in Vespasian V. Pella, "Towards an International Criminal Court", *American Journal of International Law*, vol.44 (1), 1950, pp.37-38.

16 Brierly, n.14,p.82.

then set up a Committee of Experts to prepare a draft of a convention "to assure the repression of conspiracies/crimes committed with a political and terrorist purpose".[17] The committee produced two drafts which were submitted for consideration to a diplomatic conference that met at Geneva on 1 November 1937. The first draft, the Convention for the Prevention and Punishment of Terrorism was signed by twenty states and the second, the Convention for the Creation of an International Criminal Court was signed merely by thirteen European states. The convention dealt with the question of jurisdiction of the proposed court by detailing the crimes which were covered by the terrorism convention. These crimes included:

i. Wilful acts causing death or grievous harm to heads of state or their spouses, or to persons charged with the public functions, if they are made victims in their public capacity

ii. Wilful destruction of property devoted to public purpose

iii. Wilful acts calculated to endanger life

iv. Attempts to commit the foregoing offences

v. Manufacture, supply or possession of arms or explosives with a view to committing such offences

vi. Conspiracy to commit, incitement or participation in such offences.

States were under no obligation to bring any accused for trial before the ICC, but if they did, the law applicable would be that of the territory in which the offence was committed or the law of the country which committed the accused for trial,

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17 See Hudson, n.11.

whichever was less severe. Any sentence involving the loss of liberty would be executed by a party chosen with the consent of the accused by the court, such a sentence could be over-ruled by the executing state which would have the power of pardon.[18]

By 1937, the events that led to the Second World war occupied the political centre stage of Europe and this convention never came into force. The draft did have some striking drawbacks. It's application was limited to the case of terrorism, it was optional and it considered the criminal responsibility of individuals only. However, its significance lies in the fact that it proposed the international rendering of judgments in criminal cases. As Manley Hudson remarked in 1938:

> Whether the convention should be brought into force or not, whether if it is brought into force the court as therein envisaged be created or not, certain ideas underlying the convention will certainly attract interest in the future and they may have influence in the further development of international legislation.[19]

One of the lessons that the Allies had learned from the first World war that national courts of the defeated states could not be trusted with the task of applying international criminal law.[20] As the tales of Axis atrocities mounted, the demands

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18 ibid.

19 Ibid, p.552.

20 In the Leipzig trials beginning in 1919, 901 Germans whose names were taken from lists provided by the Allies were tried for their crimes. Of these only thirteen were convicted and sentenced to a few years imprisonment; several escaped with the connivance of their prison wardens. See Rupa Bhattacharya, "Establishing a Rule-of-Law International Criminal Justice System", *Texas International Law Journal*, vol. 31(1), Winter 1996, p.59; also Theodor Meron, "The Case for War Crimes Trials in Yugoslavia", *Foreign Affairs*, vol.72, 1993, p.123.

for adherence to an international rule of law steadily increased. While eschewing retribution, the Declaration of St James demanded that the signatory powers:

> Place among their principal war aims the punishment through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.[21]

A direct response to this demand was the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, which provided for the establishment of an International Military Tribunal.[22] Though the Nuremberg trials were path breaking in every sense of the word, the seminal contribution of the charter and judgement to International law was primarily two-fold: the Nuremberg charter included a new category (apart from the categories of crimes against peace and war crimes) under which the defendants were charged, namely, 'crimes against humanity', which has been the bedrock of a number of important international conventions[23]; the other significant feature of the judgment was that it legitimized individual criminal responsibility as a tenet of international law. The post second

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21 The declaration was signed by the representative of nine governments-in-exile in London. These included Poland, Norway, Luxembourg, the Netherlands, Belgium, Czechoslovakia, France, Yugoslavia and Greece. See Bhattacharya, n.20, p.60.

22 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August, 1945; Charter of the International Military Tribunal, 82, U.N.T.S.

23 The Nuremberg Charter defined 'Crimes against Humanity' as : murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated, Charter of the International Military Tribunal, 82, U.N.T.S. 1945.

world war trend in the development of International law reflects the oft repeated quote of Justice Jackson:

> Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[24]

One of the common defences raised during the Nuremberg trials was that the acts were committed in compliance with orders from a superior authority. The reaction of the tribunal to this view can be summed up in the words of Quincy Wright:

> Criminal law does not ordinarily recognise that an individual's guilt is mitigated by the fact that he was asked or ordered to do the act. Instead, it holds both the ordered and the orderer guilty.[25]

While the Nuremberg trials did draw flak from some quarters as an orchestrated Allied effort to justify Allied wartime policies, it was its counterpart in Tokyo that was by far more controversial. Even as the Nuremberg tribunal was being set up, the Allies publicly announced their intention to prosecute Japanese war criminals:

> We do not intend that the Japanese be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals...
> (Postdam Declaration, July 26)

The mandate of the International Military Tribunal for the Far East (1945) was spelled out by its charter which called for "just and prompt trial and punishment

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24 Cited in J.G. Starke, *Introduction to International Law*, Tenth edn., (Singapore, 1989), p.62.

25 Quincy Wright, "War Criminals", *American Journal of International Law*, vol.39(2), 1945, pp.272-73.

of the major war criminals in the Far East". Not surprisingly the nationality of all the 'chosen' war criminals was Japanese. The manner in which the members of the tribunal were chosen, the charges drawn up, defendants listed, the actual trial conducted and the ultimate judgement pronounced, led many to believe that the International Military Tribunal for the Far East was the epitomization of 'victor's justice'.[26]

The Nuremberg and Tokyo trials can be criticised for one of their main legacies: a belief that international tribunals were much more effective as a means to achieve a 'formalized vengeance', than as genuine instruments of implementing an international rule of law. However, it cannot be denied that these tribunals were the main reason for the re-emergence of interest in the concept of an international criminal court.

THE INTERNATIONAL LAW COMMISSION (ILC) AND THE COURT

In the immediate aftermath of the Second World War, scholars and jurists looked towards the newly established United Nations to extend the jurisdiction of positive law through greater institutionalization. It was also felt that the achievements of Nuremberg and Tokyo should be crystallised before the world had an opportunity to forget the chronicled horrors of the war. A novel view as to why the creation of

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26 The International Military Tribunal for the Far East was established by a special proclamation of the Supreme Allied Commander in 1946. For an account of the nature of the trial, *see* Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, NJ, 1972); also *see* Radhabinod Pal, *International Military Tribunal for the Far East* (Calcutta, 1953); B.V.A. Roling and C.F.Ruter (ed), *The Tokyo Judgement: The International Military Tribunal for the Far East*, vol.I & II (Amsterdam, 1977).

an international court was much simpler in the post-war world was put forth by H.W. Briggs. He believed that the recognition by the United Nations that all instruments of mass destruction ought to be controlled by law had a direct bearing on the development of an institutional mechanism to control international crimes. If nuclear energy could be channelized for peaceful purposes through sanctions against individuals and organizations, then why not other crimes? After all, it would be another element of self-preservation.[27]

Whether or not it was swayed by this argument, in December 1948, the United Nations General Assembly (UNGA) adopted a resolution which stated that:

> in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.[28]

It therefore invited the ILC to study the desirability and possibility of establishing such a judicial organ, in particular as a criminal chamber of the International Court of Justice. This resolution was a continuation of an earlier one (1947) whereby the General Assembly directed the ILC to -

a) formulate the principles of international law recognised in the charter of the Nuremberg Tribunal and in the judgement of the Tribunal; and

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27 In the sense that if misuse of nuclear energy could be curtailed through sanctions against individuals and organizations, similar sanctions could be applied to prevent the commission of other crimes. H.W. Briggs, "International Criminal Jurisdiction", *American Journal of International Law*, vol.41(2), 1947, pp.450-33.

28 GA Resolution 260 B (III) of 9 December, 1948.

b) prepare a draft code of offences against the peace and security of mankind.[29]

The question of the establishment of an ICC arose in the context of preparing the draft code of offences against the peace and security of mankind. The committee on international criminal jurisdiction appointed by the UNGA met in Geneva in August 1951.[30] Its report accompanied by a draft statute for an international criminal court was submitted for comments to the governments of various members states. One of the first questions dealt with by the committee was the process of establishing such a court. After carefully considering various avenues such as amendment of the UN Charter and adoption of a special resolution by the General Assembly, the Committee proposed the establishment of a court through a special convention. It did recognise the fact that if the convention was not widely ratified, the court would be severely constrained in its functioning (as it could not claim the co-operation of non-participating governments in obtaining witnesses and the custody of accused persons). However it felt that the other methods proposed were impractical in the existing political climate. As far as jurisdiction was concerned, the court was limited to the trial of "natural persons": states and corporations (regarded as artificial persons) were beyond the jurisdiction of the court. The functioning of the proposed court was to be fully dependent on the goodwill of the states. For instance, Art 27 forbade the trial of any person, "unless jurisdiction has been

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29 G.A. Resolution 177(II), of 21 November, 1947.

30 See Quincy Wright, "Proposal for an International Criminal Court", *American Journal of International Law*, vol.46,(1), 1952, pp.60-72.

conferred upon the court by the state or states of which he is a national and by the state or states in which the crime is alleged to have been committed". One major implication of this article was that it seemed to overrule the principle accepted in the Nuremberg charter that international criminal law was superior to national legislation. Dealing with the issue of the law to be applied, the committee held that the "court shall apply international law, including international criminal law, and, where appropriate, national law". Given the fact that there was no accepted code of international offences and that states could prevent the court from exercising its jurisdiction, this appeared to be a dead letter article from the very beginning. Commenting on the 1951 draft, Quincy Wright had pointed out that it had failed to address any of the important issues, be it the procedure for establishing the court, its jurisdiction or the law applicable. On the contrary

> ...its detailed provisions tend to nullify its apparent purpose.[31]

The 1951 draft underwent a number of modifications before it was presented to the UNGA, along with a draft code of offences against the peace and security of mankind in 1954.[32] Unfortunately, the UNGA decided to postpone discussion on the draft code. The reason given was that the issues raised by the draft code were too closely related to the definition of 'aggression' a concept for which an acceptable definition had not yet been found whatever be the rationale behind the difficulties of defining 'aggression', it must be accepted that this endeavour kept the GA occupied

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31 ibid, p.60.

32 *Yearbook of the International Law Commission*, 1954, vol.II, pp.150-152.

for nearly two decades.[33] It was only in 1974 (in its seventh session) that a third committee was able to adopt, by consensus, a definition of aggression that was later accepted by the UNGA. This virtually paved the way for another attempt to construct a draft code of international crimes and a statute for an international criminal court. Moreover, the 1970s also saw a spate of conventions attempting to bring a number of recognized 'international crimes' within the purview of positive international law. In these conditions, the invitation accorded to the ILC by the UNGA to resume its work on the elaboration of the draft Code of Offences in 1981 did not really come as a surprise. It took the ILC nearly a decade to adopt a provisional draft code of crimes. Given the controversial nature of that draft and the developments in the former Yugoslavia, the UNGA decided to alter its focus towards the effective enforcement of international criminal jurisdiction rather than being bogged down by the categorization of crimes. Accordingly in 1991, the ILC was asked:

> to further consider and analyse within the formulation of the draft code, the issues relating to an international criminal jurisdiction, paying particular attention for the establishment of an International Crimical Court or other international trial mecahism.[34]

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33 In 1957, the UNGA had established a committee to study the comments of governments in order to advice the Assembly when it would be appropriate to resume consideration of the definition of aggression. By a resolution adopted on 18 December 1967, the UNGA set up a third committee, the Special Committee on the Question of Defining Aggression, with the specific mandate of preparing 'an adequate definition of aggression', Starke, n.24, pp.535-38.

34 GA Resolution 46/54 of 9 December 1991.

CHAPTER II

AN OVERVIEW OF THE 1994 DRAFT STATUTE

As noted already, the adoption of the definition of Aggression by the General Assembly (GA) in 1974[1] removed the main 'stated' obstacle in the path of constructing a draft code of international crimes. Accordingly in 1981, the UNGA invited the International Law Commission to resume its work on the draft code of offences against the peace and security of mankind, " taking into account the results achieved by the process of progressive development of international law".[2]

However, the task of creating a code acceptable to most states was not an easy one. The problems faced by the ILC ranged from defining and categorizing such crimes to deciding on the punishment applicable to them. The ILC's work also reopened the debate on the desirability and feasibility of establishing any kind of international criminal jurisdiction. In this context, the Commission had to take into account both legal and political ramifications of each aspect of the draft code. For instance, while discussing "penalties applicable to crimes against the peace and security of mankind",[3] the Special Rapporteur's ninth report dealt with not just the

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1 In 1974, the UN General Assembly finally adopted the "Definition of Aggression" by consensus on the basis of the recommendation of the Special Committee, See GA Resolution 3314 (XXIX) of 14 December 1974.

2 In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind"; GAOR, 48th Session, Supp.10 (A/48/10), p.22.

3 Ibid., pp.26-41.

political fallout of imposing a uniformly applicable penalty, but also the diversity of concepts and philosophies in international law which was hardly conducive to the development of a uniform system of punishment.

Even as the discussion on the draft articles continued within the Commission, there was a growing awareness of the difficulty in ensuring state acceptance of a comprehensive draft code. As the list of 'international crimes' envisaged by the ILC grew to include categories like aggression, intervention, terrorism and even wilful damage to the environment[4], the question of sovereignty assumed greater significance: most governments began viewing the acceptance of the code as virtually ceding sovereignty. The eventuality of the draft code being rejected outright, or at best being accepted in an extremely watered-down form seemed very real.

This was plausible primarily because of one reason: the situation in the erstwhile Yugoslavia. Conflict in the former Republic became a cause of international concern in the late 1980s and early 1990s. With growing reports of horrifying atrocities and abuses of human rights, the demand for a war crimes tribunal to try the perpetrators of these crimes found more and more supporters. At the same time, a feeling that a permanent international criminal court would prove to have more of a deterrent effect than adhoc tribunals, re-started the debate on the

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4 By 1991, the ILC had prepared a draft code of crimes against the peace and security of mankind which consisted of twenty-six articles detailing crimes such as Aggression (Art.15), Intervention (Art.17), Colonial domination (Art.18), Genocide (Art.19), Apartheid (Art.20), Mass violation of human rights (Art.21), Exceptionally serious war crimes among others; GAOR, 50th Session, Supp.10 (A/50/10), pp.28-62.

ICC.[5] Belief that jurisdiction of such a court would be limited and moreover contingent on the consent of state parties would also make governments more amenable towards accepting a statute for an ICC, rather than a code of crimes against the peace and security of mankind.

Choosing what seemed to be a less controversial course, the General Assembly (in 1989) asked the ILC to address the question of establishing an international criminal court.[6] This resolution was ostensibly the outcome of the discussion in the GA of trans-national crimes such as international durg trafficking and the possibility of establishing an international court with jurisdiction over such crimes. Consequently, this issue was awarded top priority by the Commission in its next meeting. Commencing work on the statute in 1990, the ILC pointed out that:

> the question concerning the draft code's implementation and, in particular, the possible creation of an international criminal jurisdiction to enforce the provisions of the draft code has always been foremost in the (Commission's) mind.[7]

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5 In Yugoslavia after 'ethnic conflict' a series of resolutions passed by the Security Council indicated its active involvement in the ethnic conflict: Res.764 reaffirmed the commitment of all parties to the Yugoslav conflict to humanitarian law, Res.771 condemned violations of humanitarian law with specific reference to the 'ethnic cleansing' and also resolved (by adopting a binding definition under chapter VII) to take further measures if the parties to the conflict did not comply with the provisions of the resolution. S.C.Res. 764, U.N.SCOR, 47th sess., U.N.Doc. S/RES/764 (1992); S.C.Res 771, U.N.SCOR, 47th Sess., U.N.Doc S.C.Res 771 (1991) Also see Interim report of the Kalshoven committee, U.N.Doc. S/25274 (10 February 1993) and the Report of the Security-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N.Doc. S/25704, (3rd May 1993)

6 This took the form of a specific request addressed to the ILC by the General Assembly in Resolution 44/39 of 4 December 1989 entitled, "International Criminal Responsiblity of Individuals and Entitities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes", GAOR, 45th Sessio, Supp.10 (A/45/10), p.38.

7 ibid, pp.37-38.

As early as 1983, the Commission's report to the UNGA had included the view of some members that a code unaccompanied by penalties and a competent criminal jurisdiction would be ineffective.[8] Repeated inquiries to the UNGA about the possibility of extending the mandate of the Commission to include the "preparation of a statute of a competent international criminal jurisdiction for individuals", did not evoke any clear-cut response.[9] However, theCcommission never lost sight of the possibility of establishing an international criminal court. On receiving the specific request from the UNGA, the ILC constituted a Working Group to deal with the issue. The Working Group of 1992 made some preliminary recommendations regarding the nature and scope of the proposed body; this included the suggestion that the court be an established structure which could be called into operation as and when required, according to a procedure determined by its statute, rather a full-time body. As regards the composition of the court, the working group's suggestion was that each state party to the statute would nominate, for a prescribed term, one qualified person to act as a judge of the court. The jurisdiction of the envisaged court would neither be exclusive nor compulsory.[10]

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8 The Report included the paragraph: "Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission asks the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals",GAOR, 38th Session, Supp.10 (A/38/10), para 69 (c) (i).

9 GAOR, 45th Session, Supp.10 (A/45/10), pp.37-38.

10 As far as the relationship between the statute of the envisaged court and the code of crimes, the working group recommended the provision of an option whereby a state could become a party to the statute without becoming a party to the code of crimes, *Year Book of the International Law Commission*, 1992, vol.II, pp.58-77.

The detailed study continued with the eleventh report of the Special Rapporteur which dealt with the draft statute of the ICC (taking cognizance of the comments received from the member states with reference to the General Assembly resolution).[11] This report was a comprehensive document which outlined the main debates on major issues related to the statute; it also provided a strong basis for the drafts prepared by the working groups of 1993 and 1994. The main concern of the final working group (1994) was to re-examine all the articles of the preliminary draft keeping in mind,

(a) the need to streamline the subject matter jurisdiction of the court,

(b) the fact that the court's system should be seen as complementary to national systems, and

(c) the need to coordinate the common articles to be found in the draft statute for an international criminal court and the draft code of crimes against the peace and security of mankind.

The draft statute prepared by the group was divided into eight parts and consists of 60 articles. The completed text was considered and adopted by the Commission in its 46th session.[12]

What follows here is a detailed discussion of various provisions of the draft statute; in order to facilitate a comprehensive review, the provisions of the statute are discussed within the framework of the seven parts envisaged by the 1993

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11 GAOR, 48th Session, Supp.10 (A/48/10), pp.26-41.

12 GAOR, 49th Session, Supp.10 (A/49/10), pp.40-43.

working group.[13] While an attempt has been made to deal with all aspects of the statute, two main issues have been highlighted, viz.,

i) Jurisdiction and applicable law

ii) International co-operation and judicial assistance.

THE DRAFT STATUTE

The preamble of the statute needs to be mentioned mainly because it sets out the limitations of the court: the court's jurisdiction extends only ".. over most serious crimes of concern to the international community" and it would be complementary to national criminal justice systems, playing a role only when there is no municipal remedy or the existing system is ineffective. Considering the fact that the preamble directly addresses the fear of most states, many members of the Commission believed that it should be an operative article of the statute.

I. Establishment and Composition of the Court

The main debate regarding the establishment of the court pertained to the methodology. How was the court to be established? Three views were put forth - through an amendment of the United Nations Charter; through a resolution of the General Assembly or Security Council (SC) or through a multilateral treaty.[14]

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13 The working group of 1994, however, included one more item: Composition and Administration of the Court; ibid., p.41.

14 GAOR, 48 Session, Supp.10 (A/48/10), pp.32-33.

While the first two methods would ensure that the court became an organ of the United Nations, certain inherent disadvantages were perceived: first, the amendment of the charter though probably desirable was unrealistic in terms of its practicality; second, a GA/SC resolution without the backing of a treaty would fail to address important issues like the obligation of a state to transfer an accused person from its own custody to the custody of the court. Therefore, a majority of members preferred the treaty method. At the same time, a close relationship between the court and the United Nations was envisaged though the statute provides no details regarding the exact nature of the relationship (Art.2). The statute follows the suggestion of the 1992 working group by making the court a permanent institution, but one that will be called into operation only as and when required (Art. 4) -- the stated goal of this measure was to provide flexibility and cost reduction.[15]

As far as the election of judges was concerned, the proposals ranged from each party appointing one member for a prescribed period to following the ICJ's election procedure.[16] The statute provides for the election of eighteen judges (for a period of nine years) from among members nominated by state parties. Art. 6 discusses various issues pertaining to the qualification and election of judges, in detail.

The structure of the court provided for three independent organs to carry out the three main functions of the court: the Presidency and various chambers carrying

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15 Yearbook of the International Law Commission, 1992, vol.II, pp.58-77.

16 ibid.

out the judicial functions (Art. 8, 9); investigation and prosecution to be carried out by a procuracy (Art. 12); and administrative tasks to be undertaken by the Registry (Art. 13).

II. Jurisdiction and Applicable Law

The question of the jurisdiction of the proposed court proved to be the most contentious. The debate narrowed down to three aspects of the court's jurisdiction:[17]

(a) Ratione Materiae: the subject matter - crimes over which the court would have jurisdiction.

(b) Issue of complementarity.

(c) Conferment of jurisdiction on the court.

(a) Jurisdiction Ratione Materiae:

That the statute of the court was linked to the draft code of crimes against the peace and security of mankind was undeniable. This led to a proposal from many members that the court have jurisdiction over all the crimes detailed in the draft code. The main drawback of this proposal was that the code was still in the drafting stage. Moreover, giving the court jurisdiction over a list of crimes would be far too ambitious, apart from increasing the fear of infringement of state sovereignty. As an alternative, it was proposed that the court have jurisdiction over some of the crimes

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17 GAOR, 45th Session, Supp.10 (A/45/10), pp.217-223.

enlisted in the draft code.[18] This later changed to a position whereby the ILC favoured restricting the court's competence to try crimes forming the subject of international conventions, on which general agreement existed - which would be listed in an annex.

Art. 20 of the statute which details the crimes over which the court has jurisdiction can be broadly devided into two groups -- 20 (a) to (d), which specify what can be termed as "crimes under general international law" and 20(e), which specifies the treaty crimes.[19] The first category is not exhaustive, but represents a common core of agreement within the Commission. The list of crimes which fall under Art.20(e) is added to the annex of the statute.

(b) The Superiority/Complementarity Question

The three main views on this subject were: the court should have exclusive jurisdiction over the crimes specified in the statute; it should have a concurrent jurisdiction with national courts; it should have the power to review decisions handed down by national courts.[20] The first and third proposals were grounded on the

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18 ibid., pp.220-221.

19 Art.20 of the draft statute states: The court has jurisdiction in accordance with this statute with respect to the following crimes:
(a) the crime of genocide;
(b) the crime of aggression;
(c) serious violations of the laws and customs applicable in armed conflict;
(d) crimes against humanity;
(e) crimes, established under or pursuant to the treaty provision listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

20 GAOR, 45th Session, Supp.10 (A/45/10), pp.218-219.

issue of state sovereignty. Expanding on the second theme, many members of the Commission proposed a mixed solution that would take into account the nature of the crime in determining the extent of the court's jurisdiction. Over such crimes as crimes against humanity, the court would have exclusive jurisdiction. The court could exercise concurrent jurisdiction over other crimes such as war crimes and international drug traficking. However, there was no agreement on what the categorization of the crimes ought to be.[21]

As can be seen with the draft statute, except for the crime of genocide (over which the court is supposed to have an inherent jurisdiction) the court's jurisdiction is dependent on the consent of state parties. Moreover, as the Preamble emphasizes, the court's role is complementary to that of national courts, coming into prominence only when national laws do not cover a particular crime or are ineffective.

(c) Conferment of jurisdiction on the court

From the time the Commission started discussing the question of jurisdiction, it was apparent that this problem was linked to the issue of state consent. Did acceptance of the statute imply a state's acceptance of the court's jurisdiction as well? On one hand, some members argued that acceptance of the statute merely signified a state's willingness to participate in establishing the court; as far as the jurisdiction was concerned, every state affected by the crime would have to give its specific consent. On the other hand, it was felt that most of the crimes enumerated

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21 ibid., p.220.

by the statute are directed not just against states, but against mankind at large. Hence, the question of jurisdiction affected not just individual states but the international community as a whole. Since the court represented the international community, it ought to have complete jurisdiction over all the crimes mentioned in the code without requiring the consent of any state.[22]

However, all the working groups tended to favour the concept of state consent, differing only to the extent of the number of states whose consent was required. Except with regard to genocide, Art. 21[23] of the draft statute provides that in order to exercise its jurisdiction, the court would need the consent of the custodial state[24] and the territorial state. In cases where the custodial state is

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22 ibid., pp.222-223.

23 Art.21 of the draft statute states:

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to it in article 20 if:
   (a) in a case of genocide, a complaint is brought under article 25 (1);
   (b) in any other case a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:
      (i) by the state which has custody of the suspect with respect to the crime ("the custodial state"); and
      (ii) by the state on the territory of which the act or omission in question occured.
2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial state has received, under an international agreement, a request from another state to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

24 The term "custodial state" is intended to cover a range of situations. For example, where a state has detained or detains a person who is under investigation for a crime, or has that person in its control. The term would include a state which had arrested the suspect for a crime either pursuant to its own law or in response to a request for extradition. It would also extend to a state the armed forces of which are visiting another state and which has detained under its system of military law a member of the force who is suspected of a crime: in such a case the state to which the force belongs, rather than the host state, would be the "custodial state" , (GAOR, 49th, Supp.10 (A/49/10), p.80.

requested to extradite the accused by a third state (or prosecution), the acceptance of the court's jurisdiction by the requesting state (with respect to that particular crime) is also required. Art.22 clearly demarcates acceptance of the court's statute and its jurisdiction over crimes.[25] Aggression, included in the statute as a crime under general international law (Art.20(d)) is treated in a completely different manner. Art.23 focuses on the relationship between the court and the Security Council.[26] Not only does the SC have the right to refer cases related to crimes

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25 As per art.22 of the draft statute:

1. A State party to this Statute may:
   (a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or
   (b) at a later time, by declaration lodged with the Registrar.

   accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration

2. A declaration may be of general application, or may be limited a particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of the period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

26 Art. 23 of the draft statute details the action that can be taken by the Security Council. It States;

1. Notwithstanding article 21, the Court has Jurisdition in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of, or directly related to, an act of aggression may not be brought under this statute unless the Security Council has first determined that a state has committed the act of aggression which is the subject of the complaint.

specified in Art.20 of the statute to the court, but also complaints pertaining to an act of aggression cannot be brought under the jurisdiction of the court unless the SC has determined that an act of aggression has been committed. The rationale of this measure was the acknowledgement of the powers of the Security Council especially with respect to Chap.VII of the UN Charter.[27]

Though in the initial stages, the Commission did intend to discuss the possibility of extending the court's personal jurisdiction (rationae personae) to states, in subsequent meetings it was decided that this would extend only to individuals. This decision is reflected in the first line of Art.21, which states that, "The court may exercise its jurisdiction over a person...."

One of the fundamental principles of international law is the principle of legality *nullum crimen sine lege* (no one shall be prosecuted for an act which was not a crime under international law at the time of its commission). Both the Nuremberg and Tokyo Tribunals were criticized for creating new laws and applying them retroactively.[28] In order to ensure that the court did not get mired in a similar

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3. No prosecution may be commenced under this statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

27 Chapter VII of the U.N. Charter details the powers of the Security Council with regard to determining the existence of a threat/act of aggression or a breach of peace and the steps that it can take to deal with it.

28 The argument that the crimes the defendants were accused of (such as committing aggression and individual criminal responsibly) were not crimes under international law at the time they were committed, figured prominently in both trials. See Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, 1972). Radhabinod Pal, *International Military Tribunal for the Far East* (Calcutta, 1953) Robert K. Woetzel, *The Nuremberg Trial in International Law* (New York, 1960); Quincy Wright, "The Law of the Nuremberg Trial", *American Journal of International Law*, vol.41, 1947, pp.38-72.

controversy, the drafters not only included the principle of legality as a separate article (Art.39)[29], but also specified that the court could apply the laws specified in the statute and applicable treaties. If the need arose, the court could also apply any rule of national law (Art.33).[30] By including 'principles and rules of general international law' as part of Art.33, the statute legitimizes the court's taking recourse to a whole corpus of criminal law "whether found in national forums or international practice". If a conflict arises between national and international law, the statute privileges the latter.

III. Investigation and Commencement of Prosecution:

For the court to start proceedings on any case, the crime has to be brought to its attention by some party. While the question of individuals taking up a case before the court never figured in the Commission meetings, the debate centred around the states which had the right to lodge a complaint with the court. As far as genocide was concerned, since the court had an inherent jurisdiction over such crimes, no special acceptance of the court's jurisdiction was needed. However, in case of other crimes, the complainant state would have perforce had to accept the court's jurisdiction under Art.22 before lodging any complaint (Art.25(2)). If a

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29 Art.39 of the draft statute, as already mentioned deals with the principle of *nullum crimen sine lege.*

30 As per Art.33 of the draft state:

> The Court shall apply:
>
> (a) this Statute;
>
> (b) applicable treaties and the principles and rules of general international law; and
>
> (c) to the extent applicable, any rule of national law.

matter were to be referred to the court under Art.23(1) by the Security Council, the court would not have to wait for a complaint to initiate any investigation.

Though there were members who felt that the right of referral ought to be granted to entities other than state such as non-governmental and inter-governmental organisations, the General Assembly and even national liberation movements recognised by the United Nations[31], the final draft statute restricted this category to states who have accepted the court's jurisdiction and, under certain circumstances, the Security Council.

Once a case was brought to the attention of the court, it was felt that in the interest of economy and flexibility, the investigation and prosecution should be handled by the complainant state itself. However, the arguments for a prosecuting body which would "represent the international community and also be above political considerations"[32] prevailed. The draft statute provides that on receiving a complaint, the prosecutor shall initiate an investigation. Moreover, the prosecutor also has the right to decide not to initiate an investigation if he/she feels there is no possible basis for a prosecution under the statute. Though the Presidency has the right to request the prosecutor to reconsider the decision,the final authority to decide whether or not the court would proceed with any case rests with the prosecutor

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31 GAOR, 48 Session, Supp.10 (A/48/10), p.36.

32 ibid., p.29.

(Art.26).[33] Under certain terms and conditions, if the prosecutor so desires, he/she can ask state parties to make persons available to assist in a prosecution(Art.31).[34]

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33 According to Art.31 of the draft Statute:

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an invetigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:
(a) request the presence of and question suspects, victims and witnesses;
(b) collect documentary and other evidence;
(c) conduct on-site investigations;
(d) take necessary measures to ensure the confidentiality of informaton or the protection of any person;
(e) as appropriate, seek the cooperation of any State of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue each subpoenas and warrants as may be required for the purposes of an investigation, including a warrant-under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, *inter alia*, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this statute shall:
(a) prior to being questioned, be informed that the person is a suspect and of the rights:
(i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
(ii) to have the assistance of counsel of the suspect's choice or if the suspect lacks the means to retain counsel, to have legal assistance assigne by the Court;
(b) not be compelled to testify or to confess guilt; and
(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

34 According to Art.31of he draft Statute:

1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.

Most of the provisions in this part were deliberately adopted to ensure that the judicial functions of the court reflect as far as possible, an unbiased and apolitical attitude.

IV. The Trial

Apart from re-asserting the principles of 'nullum crimen sine lege' and 'non bis in idem'[35], the statute also reiterates the rights of the accused as specified in the Covenant on Civil and Political Rights (Art.41).[36] Though it was felt that in

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2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.
3. The term and condition on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

35 *Nullum Crimen Sine Lege* is a well established principle which holds that no person can be prosecuted for an act which was not a crime under international law at the time of commission. The principle of *Non bis in idem* basically implies that a person cannot be tried more than once for the same crime. Various aspects of these two principles are dealt with in Art.39 and Art.42 respectively of the draft statute.

36 Art. 41 of the draft statute details the rights of the accused.

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees;
(a) to be informed promptly in detail, in a language which the accused understands,of the nature and cause of the charge;
(b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;
(c) to be tried without undue delay;
(d) subject to article 37 (2) to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;
(e) if any of the proceedings of or documents presented to the Court are not in a language the accused understand and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;
(g) not to be compelled to testify or to confess guilt.

the interests of justice, all the trials ought to be held in public, the Commission members did take cognizance of the special circumstances under which the court might have to function. The statute therefore provides that in order to protect the accused, victims and witnesses, the court may not just conduct closed proceedings; but also allow presentation of evidence by electronic or other means (Art.43).

Another aspect of the trial which was the focus of much deliberation pertained to the presence of the accused during the trial. While many members felt that 'in-absentia' trials would only serve to undermine the credibility of the court in the long-run, they were gradually won over to a more realistic viewpoint.[37] Keeping in mind the various scenarios under which the court would be called upon to perform its duties, the chance of recalcitrant states not surrendering an accused to the custody of the court were quite high. Under such conditions, nullifying the option of on 'in-absentia' trial would be an incentive for accused persons to seek refuge in such states. While punishing an absent person for an international crime would not really be an effective remedy, it would at least serve as indication of the international community's faith in the criminal justice system. Art.37 of the draft statute accordingly provides that under certain conditions, the Trial Chamber may order the trial to proceed in the absence of the accused.[38]

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37 GAOR, 48th Session, Supp.10 (A/48/10), pp.37-38.

38 Art.37 (2) of the draft statute discribes the conditions under which in - absentia trials can take place. It states:

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;

Unlike the draft code of offences, the draft statute does not envisage a single penalty for all crimes. The court has the right to impose a term of life imprisonment or a fine on a person convicted of any crime under the statute (Note: The death penalty does not figure in the statute). The extent of the court's relationship with national law is further underlined by the provision by which the court could take recourse to the national laws of various states involved in the case (the national state of the convicted person, the state where the crime was committed, the custodial state) in order to determine the length of the term of imprisonment or the amount of fine to be imposed (Art.47).[39]

V. Appeal and Review

In order to provide as many safeguards as possible for a fair trial, the draft statute has a separate segment dealing with the right of appeal. This right extends not just to the convicted person but also to the prosecutor; the grounds for appeal against any decision would have to be specified under the category of procedural error, factual or legal error or disproportion between the crime and the sentence.

(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.

39 The applicable penalties under Art.47 (1)
The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:
(a) a term of life imprisonment, or of imprisonment for a specified number of years;
(b) a fine.

(Art.48).[40] The Appeal Chamber has the right to reverse or amend a decision or even order a new trial (Art.49).[41] If either the Prosecutor or the convicted person feels that newly discovered evidence could have had a decisive impact on the judgement, they can apply to the presidency for revision (Art. 50).[42]

The rationale for extending this right to both the prosecutor as well as the convicted person is the belief that it is not just the defence which has an interest "in securing a just and reliable outcome in proceedings brought under the statute".[43]

VI International Cooperation and Judicial Assistance

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40 Art.48 holds:

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

41 As per Art.49:

1. The Appeals Chamber has all the powers of the Trial Chamber
2. If the Appeals Chamber finds that that proceedings appealed from were unfit or that the decision is vitiated by error of fact or law, it may:
   (a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;
   (b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.
3. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.
4. The decision of the Chamber shall be taken by a mjority of the judges, and shall be delivered in open court, Six judges constitute a quorum.
5. Subject to article 50, the decision fo the Chamber shall be final.

42 Art.50 deals with ground for the revision of a judgement. Subpara (1) provides that:
The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the appliant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

43 GAOR, 49th Session, Supp.10 (A/49/10), p.128.

The functioning of the court depends to a large extent on the nature of the co-operation extended to it by states. If states parties proved recalcitrant, the court would not just find it difficult to take custody of the accused, but also be unable to proceed in any manner against him/her. A recognition of this need as well as the importance of state co-operation can be found in Art.51(1) of the draft statute which provides that:

> State parties shall cooperate with the court in connection with criminal investigations and proceedings under this statute.

Art.53 of the statute is an attempt to deal with various levels of obligation states parties to the statute may have accepted.[44] This can range from not being a party to a relevant treaty defining a crime to having accepted the jurisdiction of the court over such crimes in all cases. On receipt of a request from the court to arrest or transfer an accused, all states parties are under an *aut dedere aut judicare* obligation. As far as the relationship between the regime established by the court and existing extradition treaties are concerned, the statute clearly indicates that transfer of an accused to the court would be regarded as "... sufficient compliance with the provision of any treaty requiring that a suspect be extradited or the case referred to competent authorities of the requesting state for the purpose of prosecution" (Art. 53 (3)). Despite the arguments of many Commission members to the contrary, the statute also provides that the court's request for the transfer of an accused be given

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44 Art. 53 (1) states:

> The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of any accused under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

priority over requests for extradition from other states. Moreover, unlike the statute of the International Tribunal for the former Yugoslavia [art.9(2) of which proclaims the Tribunal's "primacy over national courts"], the draft statute operates on the basis of the principle of concurrent jurisdiction. As far as states not parties to the statute were concerned, there could be no binding obligation on them to co-operate with the court. However, they could, through unspecified agreements with the court or through unilateral declarations, provide assistance to the court in specific cases.

The provision concerning non-parties to the statute is included as Art.56, keeping in mind the fact that if the statute is adopted by means of a multilateral treaty, there might be states which would not be signatories to the treaty but whose cooperation would be essential for the functioning of the court.[45]

VII. Enforcement of Sentences

While imprisonment was regarded as a viable penalty, the proposal for constructing an international detention facility was rejected as unviable. Instead, the draft statute provides that a sentence of imprisonment be served in a state chosen by the court from a list of states which have indicated their willingness to accept convicted persons. In case no such state is chosen, the convicted person will serve his term in a prison facility provided by the host state (Art.59). The sentence would

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45 According to Art.56 of the draft statute:

> States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an *ad hoc* arrangement or other agreement with the Court.

moreover be served in accordance with specific laws (regarding pardon, parole or communication of sentence) of the state of imprisonment.

Keeping in mind, the substantial costs that would be involved in the incarceration of convicted persons for a long period of time, the Commission also recommended that all state parties share the burden of the costs as expenses of the court.

The international Law Commission had the unenviable task of drafting a statute which would be acceptable to all states and at the same time lay the foundation for an effective court; a statute which would reflect a universal criminal jurisdiction while retaining elements of various specific legal systems. As the report of the ILC states:

> In drafting the statute, the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole, the most appropriate elements for the goal envisaged, having regard to existing treaties, earlier proposal for an international court or tribunals and relevant provisions in national criminal justice systems within different legal traditions.[46]

Acceptance of the statute by states and the effective functioning of the court can be the only indicators of the extent of the Commission's success.

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46 GAOR, 49th Session, Supp.10 (A/49/10), p.42.

CHAPTER III

PROBLEMS WITH THE DRAFT STATUTE

The draft statute for an international criminal court was deliberated upon by the Sixth Committee during the 49th session of the General Assembly. Though the ILC's efforts to draft a comprehensive document was appreciated, most of the delegations pointed out certain gaps in the draft, which needed to be considered more carefully. Accordingly, a decision was taken to establish an Adhoc Committee with the specific mandate to look at various issues pertaining to the draft Statute.[1] During the course of the two meetings that were held in 1995 (open to all states members of the UN and members of the specialized agencies), the Adhoc Committee debates revealed a certain attitude common to almost all the states : a fear of encroachment of sovereignty which found expression in calls to elucidate on the concept of complementarity and to limit the subject matter jurisdiction of the court to a core group of 'well-defined' international crimes.[2]

While many delegations expressed their belief that it was the right time for the establishment of an ICC, the overriding sentiment was that, in order to promote wider acceptance of the proposed court, the draft statute would have to take into account the political unwillingness of states to experiment with a new international

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1 The Adhoc Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 3rd to 13th April and from 14th to 25th August 1995, in accordance with General Assembly Resolution 49/53 of 9th December 1994.

2 Report of the Adhoc Committee on the Establishment of an International Criminal Court, GAOR, 50th Session, Supp. No.22, (A/50/22).

criminal justice system. The main advantage of the Adhoc Committee meetings was that it made states parties carefully scrutinize the draft statute and come up with proposals-viable or otherwise-to redraft articles pertaining to key issues such as complementarity, jurisdictional law and judicial cooperation.[3]

The Adhoc Committee debates had been the initial steps towards reaching a consensus among states with regard to the provision of the draft statute; in order to continue the work the UNGA recommended the establishment of a Preparatory Committee to discuss the major substantive and administrative issues arising out of the draft statute.[4] The Prep Com has the advantage of being able to take account of the different views expressed, as can be seen in the report of the Adhoc Committee and written comments by the states. The mandate of this committee is to prepare a universally acceptable, consolidated text of a convention for an ICC which would be considered by a conference of diplomatic plenipotentiaries in 1997.

While the issues that cropped up in various discussions pertaining to the draft statuts have ranged from the mode of establishment of an ICC to budgetary and administrative matters, it is felt that the main problem with the draft statute concerns the jurisdiction of the proposed court. The efficacy of the court, as mentioned earlier, depends upon the degree of its acceptance by states parties. This in turn is related to the manner in which states perceive the jurisdiction of the court. In order to be a viable alternative to adhoc tribunals, the court needs to have a comprehensive

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3 Ibid, pp.6-48.

4 General Assembly resolution 50/46 of 11 December, 1995. It should be noted that the Sixth Committee changed the name of the Adhoc Committee to Preparatory Committee.

subject matter jurisdiction. At the same time (to put at rest fears regarding infringement of state sovereignty) these should not overlap with national jurisdiction. Moreover to substantiate the principle of *nullum crimen sine lege* (specified in Act 39 of the draft statute)[5] the statute needs to define clearly the crimes over which the court can exercise jurisdiction. That the 1994 draft statute has been unable to tackle these questions, is its main drawback. The following sections are an attempt to analyse the gaps in the draft statute with the focus being primarily on provisions dealing with jurisdictional issues.

JURISDICTION RATIONE MATERIAE

The subject-matter jurisdiction of the court is dealt with in the draft statute in Act 20 which states:-

> The court has jurisdiction in accordance with this statute with respect to the following crimes :
>
> (a) the crime of genocide;
> (b) the crime of aggression;
> (b) serious violations of the laws and customs applicable in armed conflict;
> (d) crimes against humanity;
> (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

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5 Act. 39 of the draft statute states that:

An accused shall not be held guilty :

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20(e), unless the treaty in question was applicable to the conduct of the accused at the time the act or omission occurred.

Act 20, in effect, comprises of two categories of crimes: those under general international law (subparas (a) to (d)) and those crimes under or pursuant to certain treaties (para (e) and Annex). In its drafting of this provision, the ILC was guided by the belief that the statue is primarily an adjectival and procedural instrument and therefore its function is not to define new crimes. It was felt that reference to a general category of crimes under international law would lead to confusion; therefore, the statute confers jurisdiction on the court with reference to specific crimes.[6] In its commentary to the draft statute the ILC defends its choice of the four specific crimes (viz. - genocide, aggression, serious violations of the laws and custom applicable in armed conflict and crimes against humanity) by pointing out that three of the four crimes are singled out in the statute of the International Tribunal for the former Yugoslavia as crimes under general international law falling within the jurisdiction of the Tribunal.[7] Though the issue of aggression is slightly different, the commission felt that subject to certain safeguards, it too should be included.

> The inclusion of these four crimes represented a common core of agreement in the Commission, and is without prejudice to the identification and application of the concept of crimes under general international law for other purposes.[8]

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6 Report of the International Law Commission on the work of its forty-sixth session, GAOR, 49th Session, Supp. No. 10 (A/49/10), pg. 71.

7 Art. 3-5 of the Statute of the International Tribunal for the Former Yugoslavia deals with violations of the laws and customs of war, genocide and crimes against humanity respectively.

8 Report....., n.6, para 3, p.71.

GENOCIDE

Of the categories of crimes included in Act.20, genocide presents the least problems. The authoritative definition is provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and is regarded as binding on all states as a matter of customary law.[9] Moreover, Art.VI of the 1948 convention makes it easier for the court to claim the right of inherent jurisdiction over the crime of genocide.[10] While many states favoured reproduction of relevant provisions of the Convention in the statute (as had been done in the cases of the statutes for the ad hoc tribunals in Rwanda and Yugoslavia),[11] the Adhoc committee also saw states suggesting the expansion of the definition of genocide in the convention to encompass social and political groups. The viability of this suggestion was undermined by the fact that such an exercise may have meant different definitions of the crime of genocide in the Convention and statute, possibly leading to a

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9 The definition of genocide included as part of Art 4 of the statute of the International Tribunal for the former Yugoslavia is based on the 1948 Genocide convention. It provides that: Genocide means any of the following acts committed with intent to destroy, in whole or in part, national, ethnical, racial or religious groups, 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 transfering children of the groups to another group; Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) SCOR, S/25704, 3 May 1993.

10 Act. VI of the 1948 convention provides for the establishment of an international criminal court to try complaints of genocide which can be brought to the court by any state party. See Convention on the Prevention and Punishment of the Crime of Genocide, December 9,1948, 78, U.N.T.S.

11 Security Council Resolution 827 of 25 May 1993 established an International Tribunal for Yugoslavia, S/Res/827 (1993); Resolution 955 (November 8, 1994) established the International Tribunal for Rwanda, S/Res/955 (1994).

situation where the ICJ and the ICC would have rendered conflicting decisions with respect to the same case, under two separate instruments.[12]

While the definitional problems with regard to the crime of genocide can be overcome by reproducing the relevant provision of the Convention, one major grey area needs clarification. This is related to the issue of 'intention'.[13] Can a general intent criterion apply to all involved in the crime, from responsible decision-makers and planners to the actual perpetrators of the genocidal acts; or should there be some distinction in the intent required of various categories of responsible individuals? Even though the statute provides for the inherent jurisdiction of the court in the case of genocide, it falls short of clarifying how this jurisdiction could be exercised. If there is to be different categories of intent, a wide range of individuals could be held criminally responsible for the commission of the same act. Political realities make it difficult to envisage a situation where the court puts a current or ex-head of state on trial for the commission of a genocidal act.[14] In these conditions, can the trial

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12 Report of the Adhoc Committee, n,2, pp.12-13.

13 Ibid.

14 For instance, the first trial that is being conducted by the International Tribunal for the Former Yugoslavia is that of a small-time Serb prison guard, Dusko Tadic and not that of any of the prime instigators of the Balkan conflict. The tribunal has invoked rule 61 proceedings (publicizing the highlights of the cases against the accused in their absence, thereby seeking to strengthen the hue and cry for greater efforts to bring them to justice) against some of the prominent accused like Milan Martic, Radovan Karadzic and Ratko Mladic. However, some of the prime instigators of the conflict like Franco Tudjaman and Slobodan Milosevic have been accorded international legitimacy. For an indepth analysis of the functioning of the Yugoslavia Tribunal, see, Christopher Greenwood, "The International Tribunal for the former Yugoslavia", *International Affairs*, vol. 69 (4), 1993, pp.641-55; George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, *American Journal of International Law*, vol. 90, 1996, pp.64-69; Monroe Leigh, "The Yugoslav Tribunal : Use of unnamed Witnesses Against Accused", *American*

of a low ranking officer or soldier really serve the interests of justice or impartiality. The question is: when does a crime become serious enough to attract the ICC's jurisdiction. The problem was similar to the distinction between major and lesser war criminals. This is not to deny that genocide is by virtue of customary law, recognized as an international crime and should be included in the subject matter jurisdiction of the court. But, without clarification of certain key concepts related to genocide, the statute falls short of being even a procedural instrument.

AGGRESSION

The problem with accepting aggression as a crime under general international law falling within the jurisdiction of the court stems from two factors -

(a) the lack of a treaty definition.

(b) the role to be played by the Security Council in referring cases of aggression to the court.

The accepted 1974 definition of aggression deals with aggression by states and not with the crimes of individuals. It was moreover "designed as a guide for the Security Council, not as a definition for judicial use".[15] Since the proposed court is to have jurisdiction over individuals and not states, the need for a proper definition becomes all the more urgent. The ILC took cognizance of the need to have a more specific definition but claimed that, "given the provisions of Art.2(4) of the

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Journal of International Law, vol. 90, 1996. pp.235-38; Cedric Thornberry, "Saving the War Crimes Tribunal", *Foreign Policy*, (104), Fall 1996, pp.72-85.

15 Report of the International Law Commission... n.6, p.72.

charter of United Nations[16], the resolution offers some guidance, and a court must today, be in a better position to define the customary law crime of aggression than was the Nuremberg Tribunal in 1946."[17]

States supporting the inclusion of aggression as a crime of concern to humanity as a whole, also drew attention to Art. 6(a) of the Nuremberg Charter which in their opinion reflected the views of the 20 states participating in the London Agreement on the principle of individual criminal responsibility for aggression. It was further asserted that in the context of the existing scenario, to exclude aggression from the jurisdiction of an ICC, fifty years after Nuremberg would be a retrogressive measure.[18]

The main drawback with this line of argument is that both the aforementioned international agreements become almost irrelvant in the context of the draft statute; the Nuremberg Charter referred to a war of aggression that had already been waged and characterized as such; as for the 1974 definition, it was never even meant to address the question of individual criminal responsibility. Moreover, both instruments refer to wars of aggression distinct from acts of aggression.[19] Another

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16 Art. 2(4) of the Charter of the United Nations states that:
> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

17 Report of the International Law Commission..., n.6, p.72.

18 Report of the Adhoc Committee..., n.2, pp.13-14.

19 The definition of aggression can be regarded as unhelpful for criminal law purposes for two reasons: (a) the list of acts of aggression contained in its Art.3 are not exhaustive; and (b) it differentiated between wars of aggression, which were described as criminal, and acts of aggression, which amounted to international torts entailing state responsibility. Yet it did not

problem with the concept of aggression arises from the role the Security Council plays in determining the existence of aggression. In order to reconcile the role that would be played by the Security Council and the proposed Court, Art. 23 of the draft statute makes it very clear that complaints related to acts of aggression cannot be brought to the court until and unless the Security Council has determined that, "a state has committed the act of aggression which is the subject of that complaint". What the draft fails to recognize is that it may not be easy for the court to establish individual criminal responsibility for an act which has been characterized as a 'state act' by the Security Council.

Moreover allowing the Security Council to determine the existence of an act of aggression prior to the commencement of its own activities would undermine the court's independence: for instance, would it be possible for the court to find an individual (say a Head of State) not guilty, after the Security Council has determined that the state concerned has committed an act of aggression? It must be kept in mind that the Security Council is a political body whose behaviour is influenced by political exigencies. While not denying its primary responsibility towards the maintenance of international peace and security, it is very difficult to imagine the Security Council characterizing any act as "an act of aggression" if one of the five permanent members are involved in its commission. To hold the court at ransom

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provide any criterion for such a differentiation. The question still is whether an "armed attack" *(aggression armee)* under article 51 of the UN Charter is the same thing as a war of aggression; ibid, p.14.

through the means of an instrument like the veto not only undermines its independence, but also would lead to questions regarding its legitimacy.

Aggression is undoubtedly a breach of a fundamental norm of international law and that such conduct was not justiciable in the past is no reason not to include it as part of the subject matter jurisdiction of the proposed court. However, the statute needs to find a proper balance between the roles that are to be played by the Security Council and the court.

SERIOUS VIOLATIONS OF LAWS AND CUSTOMS APPLICABLE TO ARMED CONFLICT

Subpara (c) is inspired to a large extent by provisions in both the statute of the International Tribunal for the former Yugoslavia and the Draft code of Crimes against the Peace and Security of Mankind. In both these documents, there is a category of war crimes which can be regarded as distinct from the grave breaches of the Geneva conventions of 1949. While the statute of the Yugoslav Tribunal speaks of the 'violations of the laws and customs of war', the draft code elucidates 'exceptionally serious war crimes'.[20] While one cannot really argue with the modern usage of 'rules applicable in armed conflict' as against the traditional 'Laws

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20 Art.3 of Statute of the International Tribunal for the Former Yugoslavia deals with "violations of the laws or customs of war". This provision includes use of weapons calculated to cause unnecessary suffering; wanton destruction not justified by military necessity; attacking undefended towns/ dwellings; seizure, destruction or wilful damage done to religious, charitable and educational institutions, historical or cultural monuments. The comparable provision in the Draft Codes of Crimes against the Peace and Security of Mankind is Art.22 which apart from having categories mentioned in the statute also includes "acts of inhumanity, cruelty or a barbarity directed against the life, dignity or physical or mental integrity of persons".

of War', the terminology of the Art. 20(c) leaves a lot to be desired. In its commentary to the draft statute, the ILC had stated that not all breaches of war would be of sufficient gravity to justify their falling within the jurisdiction of the court and therefore the term 'serious violations' in subpara (c) acts as a limiting factor. However, nowhere in the draft do we find any explanation of how 'serious' a violation should be for it to invite action by the court. To add to the confusion, the ILC commentary further holds that the term 'serious violations' is not the same as "grave breaches" which is a technical term in the 1949 Geneva convention and Additional Protocol I of 1977 : an act clarified as a 'grave breach' as per the terms of either of the latter mentioned conventions need not necessarily constitute a 'serious violation' though it might do so. What are the criteria to be used to determine the transition from 'grave' to 'serious' ? If the Geneva Convention could be included in the subject matter jurisdiction of the court as part of Act 20(e), why was it not considered feasible to have a more comprehensive and detailed list of acts which could be categorized as 'violations of rules and customs applicable to armed conflict'? Usage of vague terminology combined with a lack of definitive descriptions leads to the development of subjective criteria : a situation with which most states parties are extremely uncomfortable.

CRIMES AGAINST HUMANITY

The category which gives rise to the largest number of unresolved questions is subpara (d) which deals with "crimes against humanity". Unlike genocide or

aggression (which despite many problems associated with the basic concept have some kind of a definitional basis to proceed on):

> there is no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity.[21]

This term, first used more than fifty years ago, in the London charter has at different times come to include categories as varied as extermination, deportation, enslavement, torture, rape and even persecution. The Nuremberg Charter, Tokyo Tribunal charter and statutes of the Yugoslavia and Rwanda Tribunals could to a certain extent provide some guidance in helping define this concept: however, there has to be some attempt to reconcile the differences in the definitions, apart from elaborating the specific content of the offenses. Moreover, in many instances (like in the charter of the Adhoc tribunal for the former Yugoslavia), there is a reference to "other inhumane acts",[22] which makes the entire definitional problem more complicated. Another issue that arises from the categorization of crimes in the statute pertain to the relationship that exists between 'genocide and 'crimes against humanity'. Is genocide not a crime against humanity? If it is, quite obviously the

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21 Report of the Adhoc Committee..., n.2, p.17.

22 Art.5 of the Statute of the International Tribunal for the Former Yugoslavia reads:
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;	(f) torture;
(b) extermination;	(g) rape;
(c) enslavement;	(h) persecution on political
(d) deportation;	social, and religious ground;
(e) imprisonment;	(i) other inhumane acts;

See SCOR, S/25704, 3 May 1993.

seriousness of the nature of that particular crime has led the drafters of the statute to include it as a separate element of the subject matter jurisdiction of the court. That leads one to conclude that subpara (d) is meant to deal with all recognized crimes against humanity other than genocide.

That, in order to be comprehensive, the statute needs to include a proper definition of 'crimes against humanity' seems to be beyond argument. The definition would probably need to reflect a fundamental belief that has developed about the concept of crimes against humanity: that the crimes should comprise of a widespread or systematic attack against any section of a civilian population (not isolated acts or war crimes). However, even a comprehensive definition is not going to solve all the problems associated with this concept. A question that will arise time and again in this context is: in the absence of an applicable treaty regime, when are acts classified as 'crimes against humanity' triable as international crimes. The relevance of a reworked draft would depend to a large extent on whether it attempts to provide an answer to this query.

TREATY CRIMES

The final group which completes the subject matter jurisdiction of the court is what one might term as 'treaty-crimes'. Based on the list of treaties included in the Annex, Art.20(e) can be said to be a medley of five types of crimes.[23]

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23 This categorization can be found in a discussion on paper on the ILC's 1994 draft statute authored by V.S. Mani; See V.S. Mani, "The ILC's 1994 Draft Statute for an International Criminal Court: Some Random Comments".

i) War crimes (grave breaches of the 1949 Geneva Convention and 1977 Geneva Protocol I).

ii) Apartheid (which could be regarded as a crime against humanity)

iii) Torture and other cruel, inhuman or degrading treatment or punishment (violations of human rights).

iv) Acts of terrorism in respect of civil aviation, maritime transport, taking of hostages and specially protected persons.

v) Drug offences.

In the commentary to the draft statute the ILC has explained the criteria used for including certain treaties in the Annex: that the crimes were defined in the treaty itself so that the ICC could apply the appropriate treaty law (thus conforming with the principle of *nullum crimen sine lege* mentioned in Art.39 of the draft statute); that the treaty created either a system of universal jurisdiction or provided for the possibility of aninternational criminal court to try the crimes.[24]

It is true that all the treaties included in the Annex conform to the above mentioned requirements. But one just needs to look to the issue raised by states parties during the course of various meetings to understand the problems associated with this category. A common fear that was expressed was that subpara (e) looked more like an afterthought - a medley of 'crimes' which were not really considered as serious threats to humanity as a whole and, as such, their inclusion would undermine the seriousness of the whole project of construction of an international

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24 Report of the International Law Commission..., n.6, p.78.

criminal court.[25] While this particular argument may not be too convincing another issue that arises from the formulation of Art. 20(e) deserves a closer look. Most of the treaties included in the Annex provide for a fairly satisfactory regulation of the crimes dealt with: either through national courts or through international cooperation. In such cases, extending the jurisdiction of the court would not just result in overburdening the court but would also raise fundamental questions regarding the principle of complementarity.

In order to reaffirm the position of the draft on this principle, it was said that the ICC was not meant to

> "...replace existing mechanisms for the prosecution of such treaty crimes as terrorism and other related offences. Rather, it was meant to be an option available to States parties to the statute, which would determine whether a particular crime was better dealt with at the domestic or international level".[26]

Moreover, a further limitation on the crimes listed in 20(e) is achieved by the specification which states that the crime alleged should have constituted an exceptionally serious crime of international concern. However, as is the case with most of the formulations in the draft statute, this leaves a lot to be desired. The looming sceptre of an overarching jurisdiction seems too real to be ignored. Apart from that, many of the crimes that are listed in subpara (e) could as well be a part of 'crimes under general international law'.

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25 Report of the Adhoc Committee..., n.2, p.17.

26 Report of Adhoc Committee...., n.6, p.18.

The drafters of the statute not only accept the existence of overlaps between the two categories (crimes under general international law and treaty crimes), but also claim that they were never meant to be mutually exclusive. While defending the classification of crimes under Art.20 a-d, the ILC commentary states that:

> [it was] never intended as an exclusive list of crimes under general international law. It is limited to those crimes under general international law which the commission believes should be within the jurisdiction of the court at this stage, whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences.[27]

While accepting this line of reasoning one cannot afford to forget the rationale behind the construction of a comprehensive draft statute. If the idea was to have a clear statement of the nature and extent of the proposed court's jurisdiction, one fails to understand the logic behind the murky classification and usage of confusing terminology. In order to serve its purpose, Art.20 needs to be redrafted to not just include definitions of the existing 'crimes under general international law', but also possibly reformulation of the categories.

COMPLEMENTARITY OF JURISDICTION

The questions raised by interpretations of Art.20 do tend to overshadow many of the other problems that mar the draft statute. But one cannot afford to overlook them especially as many are related to the issue of jurisdiction of the court. One such provision which deserves special mention concerns the principle of complementarity. The preamble of the draft statute provides that the establisment of

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27 Report of the International Law Commission..., n.6, p.77.

an international criminal court "is intended to be complementary to the national criminal justice systems *in cases where such trial procedures may not be available or may be ineffective."*

To begin with, the formulation of this provision and its placing leaves a lot to be desired. Though one could quote the Vienna Convention on the Law of Treaties to emphasize the role of the preamble in contextualizing a treaty,[28] the importance of this principle makes the creation of a separate provision far more desirable. In the present situation, there is no single legal system which deals with all the crimes that are under the court's jurisdiction. The multiplicity of jurisdictional mechanisms would only give rise to a scenario of endless challenges to the court's jurisdiction. Usage of phrases like 'not available' or 'ineffective' with regard to national justice systems further compounds the problems. Nowhere in the draft statute can one find a clear answer to the question of who decides when a national judicial system has failed to provide a proper trial. In this context, fears of the court infringing on state sovereignty seem to be justified.

To establish a universal criminal jurisdictional system at a time when the concept of 'international crime' is still being debated is an over-ambitious project. As the initial steps of this project, an international criminal court will need to work in tandem with various national criminal jurisdiction systems. To provide for that, the draft statute needs to do much more than merely present an abstract definition of the principle of complementarity, as part of its preamble.

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28 Art.31 of the Vienna Convention on the Law of Treaties provides that the Preamble to a treaty should be considered part of the context within which a treaty should be interpreted.

Among the other issues that could be looked at while reworking the draft statute, the relationship between the draft code of crimes against the peace and security of mankind and the ICC should figure preeminently. If the ICC is the end (in term of its implementation of an international criminal jurisdiction), the draft code of crimes is the means. Acceptance of the draft code would clarify the entire subject matter jurisdiction of the court. To push for an international criminal court while still debating over the nature of the acts which can be classified as 'international crimes' makes the whole exercise seem futile.

The draft statute was intended to ensure that the international criminal court would function from a position of strength: that its subject-matter jurisdiction would be clear and comprehensive, that the extent of its jurisdiction would be specified so as to put to rest any fear of encroachment of sovereignty, that the clarity of the provisions would ensure wider acceptance and greater cooperation from states parties. Unfortunately, in its present form the draft statute fails to achieve its purpose. While the attempts made by the ILC to make the draft comprehensive and acceptable to a majority of states are indeed commendable, the statute remains an ambiguous document. Unless this ambiguity is removed, the statute would only serve to undermine the efficacy of the court.

CONCLUSION

Over fifty years ago, Georg Schwarzenberger had declared that international criminal law was a non-existent concept and therefore, efforts at creating an international criminal court ought to be viewed with suspicion. To a large extent, this study has been an exercise carried out with the aim of testing the validity and relevance of this observation today. Using the ILC's 1994 draft statute for an international criminal court as a basis, it has attempted to focus attention on certain questions:

Is there an uncontested body of rules and regulations that can be classified as 'International Criminal Law'? Whatever be the answer to this query, given the nature of the international political system, is it desirable or feasible to have an International Criminal Court with an overarching jurisdiction?

Before addressing these issues, one needs to keep in mind the three strands that could sum up the debate on international criminal jurisdiction:

i) That International Criminal Law does not exist and hence, there is no question of creating any court.

ii) That International Criminal Law does exist and the creation of a court is not merely desirable but should also be made feasible.

iii) That while International Criminal Law might be a reality, an International Criminal Court is neither desirable nor feasible at the present juncture.

The study carried out in the preceding pages leads to the conclusion that the third contention might be the closest to reality.

If, by the term 'International Criminal Law', one means a codified corpus of laws, then probably Schwarzenberger's contention might still hold true. However, taking this concept to mean an ongoing process of normative development, I believe that it not only exists, but is taking firm roots in the international system. Certain acts have been identified as 'international crimes' and definite conventions have been constructed to deal with them. These conventions (for instance, the Genocide Convention) have become part of international customary law. This is not to say that they have never been violated or that violations of humanitarian law have visibly diminished in the past five decades; but any post-facto rationalization attempted by the parties involved has had to take cognisance of the existing laws. While this may not bear legal scrutiny, it must be remembered that the first step in any norm-creating process is the growing conviction regarding the 'rightness' of the norm.

It can be argued that the main drawback with most of the rules dealing with identified 'international crimes' is the lack of an implementational mechanism at the international level and that this can be overcome by establishing an international criminal court. The basic flaw in this argument is that it fails to take into account the fluid nature of international criminal law. Apart from the great moral revulsion felt by people after the holocaust, one major reason that conventions dealing with humanitarian law were accepted by states was the lack of a proper implementation mechanism. While the world has moved towards greater institutionalization since then, states still remain the dominant actors and it might be difficult to get them to accept an institution which will undoubtedly redefine the notion of sovereignty. This

obviously is one aspect of the feasibility problem. Another issue that probably deserve a closer look is that pertaining to desirability.

Is it desirable to have an international criminal court under the given conditions? Attempts to create a court imply a certain level of homogenization of norms. Has the international system reached a level of integration where uniform norms would be acceptable to all states? If it hasn't, is creating an 'international court' with a limited jurisdiction a possible solution? The concept of 'crime' has a cultural connotation: what might be regarded as criminal in one society may not be so in another (for instance, the practice of public flogging in certain Islamic societies is often regarded as 'barbaric' by many 'liberal democracies'). Is it essential to overcome these cultural barriers and move towards a universal criminal code? Any draft for an international criminal court would have to look at the relevance of the concept of cultural relativism for the development of international law. Not doing so would mean wilfully ignoring a very pertinent question.

The problems with the 1994 draft statute have been elaborated in Chapter III, but are worth a second look. In the form currently envisaged, the international criminal court would have to function under severe restraints. Its jurisdiction remains unclear and therefore, will be easily contestable. The exact nature of its relationship with the Security Council again falls into the realm of the unspecified. The court's efficacy could be undermined by the non-acceptance of its jurisdiction by a majority of states. Even if its jurisdiction was accepted, the question of implementation of its judgement needs to be addressed. Functioning under such conditions, an international

criminal court would probably be more of a hindrance than a help in establishing an international criminal jurisdiction.

The issue of jurisdiction leads to a rather more puzzling aspect of the move towards an international criminal court. If the draft code of crimes against the peace and security of mankind was found to be so problematic as to require constant redrafting for over a decade and a half, why should a statute for a court which would presumably (and logically) have jurisdiction over the crimes mentioned in the draft code, be more acceptable to states? What needs to be looked at more closely is why the entire time span for the proposal (for the establishment of a court) and drafting of a statute was less than a decade. In what way did the situation change so dramatically in the late 1980's that it became absolutely imperative to press for the creation of an international criminal court. Of course, it is undeniable that the demand for such a court has been made in the past, but these movements were intermittent in nature. If the court is to be established, the reasons for the current interest in this concept have to be studied more carefully.

One could be cynical and quote Schwarzenberger to say that the reason for the current trends in political ideology is:

> the weakness of international law in an overriding system of power politics... (and) an understandable temptation to hide this state of affairs from oneself and other by means of elaborate images.[1]

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1 Georg Schwarzenberger, "The Problem of an International Criminal Law" in G.O. W. Mueller and E.M. Wise (ed.), *International Criminal Law*, Sweet and Maxwell Ltd., London (1965), p.3.

I would like to believe that this is too extreme a stance: that there exists in human beings a desire to achieve a certain degree of order and using law to regulate crimes is an expression of that desire. However, using the international criminal court to push the development of international law, in the present situation would be a mistake. For one, the code of crimes against the peace and security of mankind is still in the drafting stage. Establishing a court without a code would be the proverbial putting the cart before the horse.

The 1994 draft statute exposes the limitations under which a court would have to function if it is based on laws which are not fully developed. International Criminal law, as mentioned earlier, is still undergoing the process of normative development. The international system of states, for better or for worse, has a long way to go before it can seek to establish an effective international criminal court.

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