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With more than fifty years after the end of the Second World War, with the unspeakable international crimes committed against civilian populations culminating in the holocaust and the annihilation of 6 million Jews, followed by the Judgment of the International Military Tribunal at Nuremberg, the international community is now embarking on the bold and noble project of establishing a permanent treaty-based international Criminal Court.

Large-scale atrocities committed in an ever-increasing number of States demand that such jurisdiction will ensure that the perpetrators of these crimes be brought to justice and any further occurrence be adequately deterred.

In our view such a jurisdiction should rest on a consensual treaty-basis providing for the establishment of an independent tribunal dealing with the most heinous crimes of international concern and intended, in the language of the preamble to the Statute of the ICC, "to be complementary to national criminal justice systems in cases where such trial procedures may not be available or not be effective".

To be effective, such jurisdiction should be objective, impartial, independent, free from political pressure or influence of any kind, and accepted by a large element of the international community.

Turning now to the issue of the jurisdiction of the ICC under Article 20 of the Draft Statute, two matters are here involved:

a) the categories of crimes which should be subject to the jurisdiction of the Court;

b) the proper definition of the crimes to be included.

There is at this stage general agreement that the crime of genocide, crimes against humanity and war crimes in the broader sense of this term, namely both serious violations of the laws and customs applicable in armed conflict and grave breaches of the Four Geneva Conventions of 12 August 1949 should be included.

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There are differences of opinion as to whether the crime of aggression should be included, whether jurisdiction in respect of grave breaches of the Four Geneva Conventions should be extended so as to include Additional Protocols I and II of 1977 to these Conventions, and whether the jurisdiction of the Court should cover also what had been termed "Treaty crimes".

There is no question that the crime of genocide should be subject to the jurisdiction of the ICC. In our view, the definition of the crime should follow the principles enshrined in the Genocide Convention of 1948, which have been defined by the International Court of Justice in its Advisory Opinion of 1951 as representing rules of customary international law recognized as binding upon States without any conventional obligation.

The inclusion of the crime of aggression poses difficulties.

As we are dealing here with criminal offences, the principle of legality requires that the crime in question should be capable of a sufficiently precise definition to be included in a criminal statute and should have been so defined.

The definition of the crime of aggression is at this stage fraught with great difficulties and a generally accepted definition is so far wanting.

The Charter of the International Military Tribunal of Nuremberg referred to aggression within the specific context of planning or waging a war of aggression [Article 6 (a)], the definition does not include participation in aggressive acts short of war, and the relationship between State and individual responsibility would require further clarification.

The definition contained in the Annex to General Assembly Resolution 3314 of 1974 was intended for the guidance of the Security Council when determining, in accordance with Article 39 of the Charter, the existence of an act of aggression. The definition refers to an act of aggression committed by a State against a State and is not concerned with acts of aggression committed by individuals though attributable to a State.

The definition recently included in Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind bears witness to the serious difficulties encountered in formulating a suitable definition for the crime of aggression. This Article actually defines the term "aggression" by the very term which itself requires definition in providing that an individual who is an active party to aggression committed by a State shall be responsible for a crime of aggression. The question as to what is the meaning of the term "aggression"

remains open. The crime of aggression to which individual responsibility is attached must be directly related to the international crime itself. So long as the components of the crime have not been precisely defined, the crime itself will not be ripe for inclusion in the Statute of the ICC.

To overcome these difficulties the assistance of the United Nations Security Council has been enlisted. However, the involvement of the Council under its powers under Article 39 of the Charter in the judicial process of the Court, may introduce difficult problems into the relationship between the ICC and the Council, may adversely affect the independence of the Court, tamper with the right to due process of the accused in his trial by the Court and may introduce political matters into the judicial process of the Court.

Insofar as crimes against humanity are concerned, it is our view that no nexus between the commission of such crimes and War Crimes or other crimes within the jurisdiction of the Court should be required.

Nonetheless, care should be taken that the definition of the crime will be such as to prevent that the Court will be abused for political purposes and will not be turned into an instrument for the lodging of trivial or frivolous complaints. The fact that the criminal act in question belongs to a category of crimes subject to the jurisdiction of the Court does not imply the automatic exercise of the jurisdiction of the Court in respect to that particular criminal act.

It would be necessary to provide that not only the nature of the crime itself be of a heinous nature, but also that the specific criminal act itself should have been committed as part of a widespread or systematic attack on a large scale against any civilian population.

There has been general agreement that War Crimes should be subject to the jurisdiction of the Court.

Such jurisdiction should also extend to crimes committed in an armed conflict not of an international character at least within the purview of Common Article 3 of the Four Geneva Conventions of 1949, taking also into account that some of the most abhorrent atrocities were committed within the context of internal armed strife, and the commission of these atrocities will often have the most serious international repercussions.

Article 3 of the Statute of the International Tribunal for Rwanda may here be usefully referred to.

However, the fact that an act constitutes a war crime under customary international law does not necessarily qualify the act for the exercise of jurisdiction by the ICC. Such outcome would be

overburdening the Court with a multitude of individual complaints which in many cases may relate to trivial matters or may be motivated by political considerations.

What we have said in regard to crimes against humanity in this context applies with equal force to war crimes, and the relevant provisions of the chapeaux to Articles 18 and 20 of the Draft Code of Crimes against the Peace and Security of Mankind may here be usefully referred to.

Consideration should also be given in regard to the inclusion in the jurisdiction of the Court of acts in violation of instruments which have not as yet been generally accepted or adhered to, and their having crystallised into rules of customary international law is still in doubt.

In this context we refer here in particular to Additional Protocols I and II to the 1949 Geneva Conventions.

In order to encourage the wide acceptance of the jurisdiction of the Court we would propose that any definition be based on those acts which have been defined as grave breaches in customary law or in conventions which undoubtedly embody customary law.

As for crimes pursuant to Treaties, it should be noted that five of the Treaties mentioned in the Annex to the Statute of the ICC were concluded for the purpose of combating international terrorism. The crimes in question are of serious international concern and of sufficient gravity to qualify for inclusion in the Statute, and it may be assumed that in regard to many of the criminal acts in question national jurisdictions may either not be available or may be unwilling or ineffective to cope with them.

Insofar as the exercise of the jurisdiction of the ICC is concerned, this should conform to the concept of complementarity, in other words, the ICC will not be competent to investigate or try a case where national jurisdictions are available or effective and are willing and able to act.

As opposed to the Statutes of the former Yugoslavia and Rwanda, the ICC is not, under the Draft Statute, given primacy over national Courts, and it is not intended to have the Courts replaced by the jurisdiction of the ICC as long as these Courts are willing and able to act.