



**UNHCR**

**United Nations  
High Commissioner for Refugees**

**UNHCR AND THE ESTABLISHMENT OF  
AN INTERNATIONAL CRIMINAL COURT:  
SOME COMMENTS ON THE DRAFT STATUTE**

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## I INTRODUCTION

1. UNHCR strongly supports the establishment of an international criminal court. Its own experiences in such places as the former Yugoslavia and the Great Lakes region, where refugees and displaced persons under its mandate have been victims or witnesses of serious international crimes, show that criminal justice has an important part to play in reconciliation and peace-building. Where crimes of international concern have been committed and national criminal justice systems are unable or unwilling to cope, an established system of international justice would ensure that such crimes are not committed with impunity. An international criminal court with jurisdiction over international crimes would have a deterrent effect on such crimes, thus impacting positively situations which give rise to refugee flows.

2. At the same time, UNHCR, as a UN humanitarian body, along with other humanitarian agencies, is increasingly operating in situations where "war crimes" and "crimes against humanity" may be committed. In these situations, UNHCR staff can become witness to such crimes thereby exposing themselves to serious risk of reprisals. UNHCR, therefore, has an interest in issues relating to co-operation with the Court as well as in the powers granted to the Court to ensure protective measures for witnesses appearing before the Court.

3. This paper sets out UNHCR's position on a number of specific issues of direct concern to the Office covered in the Draft Statute.

## II THE EXCLUSION CLAUSES IN THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE STATUTE OF UNHCR

4. The Statute of UNHCR as well as the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as "the 1951 Convention") contain "exclusion" clauses whereby persons in respect of whom there are serious reasons for considering that they have committed

certain types of crimes, including a "crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes" are excluded from the benefits of international protection.

5. The drafting history of the 1951 Convention reveals that the definitions of "crime against peace", "war crime" and "crime against humanity" in the exclusion clauses are not limited to those found in "international instruments" existing at the time the 1951 Convention came into force. Thus, in interpreting the exclusion provision, UNHCR has resorted to guidance from such recent instruments as the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for Rwanda (ICTR). In this regard, the Statute of the Court will constitute another authoritative international instrument which will guide UNHCR as well as States in the interpretation of concepts employed in the exclusion provision.

6. Additionally, the Court's criteria for deciding on an indictment will provide guidance to UNHCR for evaluating the "threshold" for exclusion. It may be noted that UNHCR has previously deemed as "excludable", a number of individuals on the basis of their indictment by the ICTR. In the Great Lakes region, UNHCR continues to encounter large numbers of excludable asylum-seekers and UNHCR's collaboration with the ICTR has facilitated its complex task of deciding on the excludability of individuals.

7. Furthermore, the existence of an international criminal tribunal which has jurisdiction for prosecuting perpetrators of international crimes would serve as a complement to the work of UNHCR in ensuring a mechanism whereby certain excluded persons are effectively brought to justice.

## III GENOCIDE

8. In applying the exclusion clause to asylum-seekers, UNHCR considers genocide as a "crime

against humanity". Thus individuals in regard to whom there are serious reasons for considering that they have committed "genocide" are excluded from the ambit of international protection. UNHCR therefore welcomes the inclusion of "genocide" as a crime within the jurisdiction of the Court. UNHCR believes that the definition of genocide contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide constitutes an adequate basis for the definition of this crime for the purpose of the Court's jurisdiction. The reaffirmation of this definition in the Court's Statute would also promote uniform jurisprudence in this field of international law.

#### IV CRIME OF AGGRESSION

9. The 1951 Convention as well as the Statute of UNHCR also provides for the exclusion from international protection of those individuals in regard to whom there are serious reasons for considering that they have committed a "crime against peace". On the basis that a "crime of aggression" is essentially a "crime against peace", UNHCR takes the position that "crime of aggression" should be included within the jurisdiction of the Court.

#### V WAR CRIMES

10. The 1951 Convention as well as the Statute of UNHCR further provide for the exclusion from international protection of individuals in regard to whom there are serious reasons for considering that they have committed a "war crime". UNHCR therefore welcomes the inclusion of "war crimes" within the jurisdiction of the Court.

11. UNHCR takes the position that in order to have an effective Court, it is imperative that the Court be granted jurisdiction over all serious violations of international humanitarian law. These include not only "grave breaches" of the Geneva Conventions and serious violations of the laws and customs of war, but also other serious violations of international humanitarian law. On this

basis, the definition of "war crimes" should be drawn from a variety of existing relevant international instruments, such as the London Charter of the International Military Tribunal, the Fourth Hague Convention of 1907, the Geneva Conventions of 1949, the Protocols Additional to the Geneva Conventions, the more recent Statutes of the ICTY and the ICTR as well as other relevant treaties relating to means and methods of warfare considered as unacceptable by the international community.

12. In the contemporary context, when internal armed conflicts are more prevalent than international armed conflicts, UNHCR takes the position that "war crimes" should be defined to include criminal acts committed in the context of internal armed conflicts as well international armed conflicts. Indeed, this has been the experience in both the former Yugoslavia and the Great Lakes region. Criminal acts committed in internal armed conflicts are in no way less reprehensible than those committed in international armed conflicts; to limit the jurisdiction of the Court to "war crimes" committed only in international armed conflicts may send the signal that the international community is less concerned about humanitarian law violations committed in internal armed conflicts than in international armed conflicts. In addition, it is often crimes committed in internal armed conflicts which States may be unable or unwilling to prosecute.

13. With regard to "other serious violations of laws and customs applicable in international armed conflicts", UNHCR would like to underline the following concerns:

i) **Intentional attacks against civilian population.** In UNHCR's experience with refugees and displaced persons, civilian populations are innocent victims of war; thus any deliberate attack on them is morally unjustified and particularly heinous. Protocol I to the Geneva Convention specifically prohibits attacks against civilian populations. Additionally, in light of increasing attacks on United Nations humanitarian as well as other humanitarian personnel working in areas of armed conflict, UNHCR also supports an interpretation of "civilian population" which includes humanitarian personnel so that attacks on such personnel

would fall within the Court's jurisdiction.

(ii) **Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment.** Long-term and severe damage to the natural environment has serious consequences for the populations in the areas affected and may result in their displacement. The employment of methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment is prohibited under Protocol I to the Geneva Conventions.

(iii) **Making non-defended localities and demilitarised zones the objects of attack.** Attacks on non-defended localities and demilitarised zones are prohibited under Protocol I to the Geneva Conventions. Where such "non-defended localities" and "demilitarised zones" are established, attacks targeted at such areas are militarily unjustified and therefore prohibited. Additionally, in light of experiences in the former Yugoslavia with "safe areas" such as Sarajevo, Srebrenica, Gorazde, Bihac, Zepa and Tuzla, UNHCR advocates that consideration be given to including attacks on "UN declared safe areas" within the ambit of this criminal act.

(iv) **Intentional starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival as well as the wilful impeding of relief supplies.** The intentional starvation of civilians as a method of warfare is an act prohibited under Protocol I and II Additional to the Geneva Conventions; and impeding of relief supplies may result in starvation of civilians. UNHCR's own experiences demonstrate that in many modern-day conflicts the denial of humanitarian access to vulnerable populations is often intentional and used as an instrument of warfare. Such acts lead to grave suffering and, in certain situations, to the death of innocent civilians.

(v) **Within the context of international armed conflicts, the deportation or transfer of the population of an occupied territory within or outside**

**this territory** and within the context of internal armed conflict, **ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.** The former amounts to a grave breach of the Geneva Convention while the latter constitutes an act prohibited under Protocol II Additional to the Geneva Conventions. Its own experience in the former Yugoslavia has convinced UNHCR that the deliberate displacement of civilians as the objective of a conflict is particularly deplorable and heinous.

(vi) **Use of anti-personnel mines.** Injuries caused by landmines are indiscriminate and excessive; and they can be inflicted long after a conflict is over. It is noteworthy that the *1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction* imposing a total ban on the use of antipersonnel mines received overwhelming support in Ottawa. Additionally, UNHCR takes the position that the criminalisation of the use of landmines should not be limited to the context of international armed conflict; landmines deployed in internal armed conflicts are just as deadly and heinous.

(vii) **Outrages upon personal dignity, humiliating and degrading treatment as well as rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilisation, and other forms of sexual violence** within the context of both international and internal armed conflict. Including these acts would signal a sensitivity toward gender-related crimes. In this regard, the special vulnerability of children during times of conflict should also be taken into account. Consideration should be given to acts of "using" children to take part in acts of sexual exploitation.

(viii) **Recruitment of children into armed forces or groups.** Consideration should be given to acts of inducing children into armed forces or groups. Thus, UNHCR supports a broader definition to include "using" children in armed forces or groups. UNHCR endorses the age of 18 years as the minimum age of military recruitment.

## **VI CRIMES AGAINST HUMANITY**

14. In excluding from international protection individuals in regard to whom there are serious reasons for considering that they have committed a "crime against humanity", UNHCR uses the London Charter of the International Military Tribunal as a basis for the definition of this crime. UNHCR considers that this international instrument constitutes the basic reference which should guide the definition of this crime for the purpose of the Court's jurisdiction. However, in today's context, the nexus of war or conflict should no longer be a pre-requisite. This view was taken by the ICTY in the Tadic Judgement on this point.

15. Following from this, there should also be no prescription that this crime is limited to acts committed against "civilian populations", rather acts committed against "any population" should be within its ambit.

16. Crimes against humanity are, in essence, crimes which are so heinous that they shock the human conscience; therefore they should be distinguished from common crimes. UNHCR supports the inclusion of elements which denote such heinousness, such as the elements of "widespread" or "systematic" (in the alternative) as well as the inclusion of a general motivational requirement. The general motivational requirement should, however, be more extensive than that in respect of genocide and should cover political and social grounds. At the same time, UNHCR considers that a single criminal act may also amount to a "crime against humanity" if it is committed as part of a "system" and therefore the requirement for "on a massive scale" is unjustified.

17. UNHCR welcomes the extended list of criminal acts, in particular the inclusion of torture, rape, sexual abuse and enforced prostitution in the Draft Statute. As regards the term "persecution", UNHCR does not support inclusion of the qualification "against any identifiable group or collectivity" on the basis that this unnecessarily limits the definition which is already restricted by the inclusion of the motivational grounds required. As regards the motivational grounds for persecution, UNHCR supports the inclusion of "social" grounds to allow a wider and more effective exercise of jurisdiction by the Court (motivational

grounds would not be necessary if these are included as a general requirement for this crime).

## **VII CRIMES AGAINST UNITED NATIONS AND ASSOCIATED PERSONNEL**

18. UNHCR advocates the inclusion of such crimes within the jurisdiction of the Court. United Nations personnel undertake their duties on behalf of the international community and any criminal attack against them ought to be a matter of serious concern to the international community. United Nations humanitarian workers (both local and international) are particularly vulnerable to criminal attacks as they, along with other humanitarian aid workers from other relief agencies, increasingly have to operate in highly volatile and lawless environments. The security of these workers may be seriously violated, not only due to situations of general conflict and violence, but also as a result of attempts by conflicting parties to prevent these workers from becoming witnesses to criminal acts these parties commit. Since 1992, some 140 UN staff members have been killed and at least 25 incidents of abduction involving aid workers have taken place. At least 50 UN staff members currently remain detained or are missing. During the conflict in former Yugoslavia, eight UNHCR staff members were killed, many while driving relief convoys.

19. UNHCR takes the position that any single serious criminal act committed against any one United Nations or associated personnel is sufficient to warrant international criminal jurisdiction. UNHCR therefore does not support the qualifying element of "systematic manner" or "on a large scale" for this crime. At the same time, in order to distinguish such serious crimes from ordinary crimes which ought to be dealt with by national courts, UNHCR advocates the addition of the qualifying element that links the criminal act to the status of the person attacked, that is, the criminal act must have been committed intentionally and with a view to preventing or impeding that person from carrying out his functions or duties on behalf of the United Nations (rather than "with a view to preventing or impeding that operation from fulfilling its mandate").

20. Additionally, UNHCR takes the view that crimes against United Nations and associated personnel falling within the jurisdiction of the Court should not be limited to only those committed in the context of United Nations peace-keeping operations. Many United Nations humanitarian bodies operate in areas where there are no peace-keeping operations, yet which are nonetheless highly unstable or insecure. In such areas, United Nations humanitarian workers should be well protected against serious forms of criminal attacks, to which, their duties as UN personnel might expose them.

### **VIII POWERS OF THE PROSECUTOR**

21. UNHCR supports the granting of power to the Prosecutor to initiate investigations *ex officio* or on the basis of information obtained from any source, "in particular from Governments, United Nations organs and intergovernmental and non-governmental organisations." This will help ensure the independent powers of the Court and guard against undue political influence in initiations of investigations. In UNHCR's experience, a prosecutor with independent powers to initiate investigations will facilitate collaboration between UNHCR and the prosecutor as regards possible prosecution of individuals who have been excluded from international protection on the ground that there are serious reasons for considering that such individuals have committed a "crime against peace", a "war crime" or a "crime against humanity".

### **IX INTERNATIONAL CO-OPERATION AND JUDICIAL ASSISTANCE/WITNESS PROTECTION MEASURES**

22. UNHCR's position is that given the importance of ensuring the effective functioning of the Court, the international community, including intergovernmental organisations should co-operate with the Court, and, to the extent possible, provide it with relevant information. At the same time, it must be realised that providing information in the course of criminal investigations and

trials raises a number of serious security and operational concerns for international organisations such as UNHCR. Such concerns should be taken into account in formulating any cooperative framework between the Court and international organisations.

23. In UNHCR's experience in co-operating with the ICTY, issues of staff security as well as security of operations are of special importance. Staff members of an international organisation providing information to investigators of an international criminal tribunal may place themselves, as well as other concerned staff members of that organisation, at risk of reprisals, particularly if that organisation remains operational in the geographical area where the alleged criminal acts were committed. At the same time, the security, integrity, as well as perceived neutrality of the concerned organisation's operations may be put in jeopardy if its co-operation with such a tribunal becomes known to parties to the conflict. Confidentiality of the identity of staff members providing information or testifying, their protection, as well as the confidentiality of organisational identity are important if any co-operation with an international criminal tribunal is to be effective. In this regard, it is imperative that an international criminal tribunal be able to operate under rules of non-disclosure as well as effectively implement adequate witness protection measures so that the identity of those persons and organisations cooperating with the tribunal along with the information they provide is adequately safeguarded.

24. It should be noted that United Nations staff and archives are immune and inviolable from legal process under the 1946 Convention on the Privileges and Immunities of the United Nations. Therefore, any involvement of staff members of the United Nations in the legal process of an international tribunal and access to documentary information in United Nations archives would be subject to specific waivers of immunity by the Secretary-General of the United Nations.

25. On this basis, UNHCR takes the position that under Article 86 of the Draft Statute, compliance by any intergovernmental organisation in providing "information" or "documents" as well

as "other forms of co-operation and assistance" should be subject to the security concerns of staff members providing information as well as of any other affected persons; to the security of refugees and other persons of concern to UNHCR; to concerns regarding the security, integrity as well as efficiency of that organisation's operations; to laws relating to the immunity of United Nations staff and the inviolability of United Nations archives; to rules of non-disclosure; and to the implementation of adequate witness protection measures.

26. In this regard, UNHCR has the following comments on Article 68 of the Draft Statute (on Witness Protection Measures):

- **Paragraph 1**- It is suggested that the following be added at the end of the Paragraph; "The Court may also order any other measures to protect the identity and security of witnesses and victims, and as appropriate, the organisations they work for."

- **Paragraph 2** - It is suggested that two additional "factors" be taken into account by the Prosecutor when considering appropriate measures to protect victims and witnesses: the current place of residence of the witness and the employment or work of the witness. It is also suggested that the following phrase be added at the end of this Paragraph; " The Prosecutor shall also take into consideration and respect the security and operational concerns of international organisations whose staff members are victims or witnesses".

- **Paragraph 6** - UNHCR supports the inclusion of this Paragraph, and suggests that the words "or any other concerned person" be added so as to cover a broader category of persons. The idea is to include colleagues of witnesses working in the same organisation.

- **Paragraph 7** - Reference should be made also to the 1946 Convention on Privileges and Immunities of the United Nations.

- **Paragraph 9** - It is suggested that in addition to States, "international organisations" may also make applications for necessary protective measures. Protective measures should also extend to documentary evidence; therefore, it is proposed that the following be added at the end of Paragraph 9, "...including access to United Nations documents and archives".

## X REPARATIONS

27. Apart from the imposition of penalties on convicted persons, the granting of reparations would enhance the sense of justice among victims. UNHCR considers that the Court which hears and judges the case would be in the best position to decide on reparations rather than national courts. UNHCR therefore supports the Court making orders on reparations by the convicted person as proposed in Art. 73 (2) (a) of the Draft Statute as well as by States in certain situations as stipulated in Art. 73 (2) (b).

Address: UNHCR, Division of International Protection, Case Postale 2500, CH-1211, Geneva, 2 Depot, Switzerland.