The first proposal for a permanent international criminal court

by Christopher Keith Hall

On 15 June 1998, a diplomatic conference in Rome will open a five-week session to remedy one of the long-standing gaps in the implementation system for international humanitarian law by adopting a treaty to establish a permanent international criminal court.[1] Although the current effort within the United Nations to set up a permanent court began half a century ago with a proposal in 1947 by Henri Donnedieu de Vabres, the French judge on the International Military Tribunal at Nuremberg,[2] it is not widely known that the first serious such proposal appears to have been made more than a century and a quarter ago by Gustave Moynier, one of the founders, and longtime President, of the International Committee of the Red Cross. He wrestled with many of the same problems which will face the drafters of the statute at the 1998 diplomatic conference and the strengths and weaknesses of his proposal still have relevance today. This short essay describes that proposal and its origins, reviews the reaction to it of his contemporaries and its impact on subsequent history and concludes with an assessment of the merits of Moynier's plan.

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[1] United Nations General Assembly resolution 52/160, of 15 December 1997.

[2] On 13 May 1947, Mr Donnedieu de Vabres, as France's representative on the UN General Assembly's Committee on the Progressive Development of International Law and its Codification, proposed the establishment of an international criminal court, and submitted a memorandum on the subject two days later. (Memorandum submitted by the delegate of France, Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction, UN Doc. A/AC.10/21 (1947)).

Until Moynier suggested a permanent court, almost all trials for violations of the laws of war were by *ad hoc* tribunals constituted by one of the belligerents — usually the victor — rather than by ordinary courts or by an international criminal court. The earliest *ad hoc* international criminal court appears to be the tribunal of judges from towns in Alsace, Austria, Germany and Switzerland, established in 1474 to try Peter de Hagenbach for murder, rape, perjury and other crimes in violation of the "laws of God and man" during his occupation of the town of Breisach.[3] Nevertheless, it appears that nearly four centuries were to elapse before anyone seriously considered the idea of a permanent international criminal court.

Gustave Moynier was not originally in favour of establishing a permanent international criminal court. Indeed, in his 1870 commentary on the 1864 Convention concerning the treatment of wounded soldiers,[4] he considered whether an international court should be created to enforce it. However, he rejected this approach in favour of relying on the pressure of public opinion, which he thought would be sufficient. He noted that "a treaty was not a law imposed by a superior authority on its subordinates (but) only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but, in this respect, the Geneva Convention shares an imperfection that is inherent in all international treaties".[5] Nevertheless, he believed that public criticism of violations of the Geneva Convention would be sufficient, "because public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down. . . . The prospect for those concerned of being arraigned before the tribunal of public conscience if they do not keep to their commitments, and of being ostracized by civilized nations, constitutes a powerful enough deterrent for us to believe ourselves correct in thinking it better than any other."[6] He also hoped that each of

[3] For a short account of this trial and references to other accounts, see Georg Schwarzenberger, *International law as applied by courts and tribunals*, Volume II, Stevens & Sons, London, 1968, pp. 462-466.

[4] Convention for the amelioration of the condition of the wounded in armies in the field, of 22 August 1864 ("the Geneva Convention").

[5] *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne*, Paris, 1870, p. 300. (English translation of the quotations in: Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross*, Henry Dunant Institute, Geneva, 1963, p. 282.)

[6] *Ibid.*, pp. 301-302.

the States parties to the Geneva Convention would enact legislation imposing serious penalties for violations. He was to be disappointed on both counts.

Several months later, the Franco-Prussian War broke out. The press and public opinion on both sides of that conflict fanned atrocities. Moynier was forced to recognize that "a purely moral sanction" was inadequate "to check unbridled passions".[7] Moreover, although both sides accused each other of violations, they failed to punish those responsible or even to enact the necessary legislation. Therefore, he presented a proposal for the establishment by treaty of an international tribunal at a meeting of the International Committee of the Red Cross on 3 January 1872. His proposal was published in the *Bulletin international des Sociétés de secours aux militaires blessés* (the predecessor of this *Review*), under the title: *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève.*[8]

Moynier was not discouraged by the failure of other proposals to establish international criminal courts because they were designed to enforce ill-defined customary law, rather than a convention. It was not surprising that the model for the new international criminal tribunal was the arbitral tribunal which had been established the year before in Geneva pursuant to the Treaty of Washington of 8 May 1871 in order to decide claims by the United States against Great Britain for damage caused to American shipping by the Confederate raider, the *Alabama*, and which would hand down its decision on 14 September 1872. Although this model had the advantage of being familiar to governments and the general public, as an *ad hoc* body designed to resolve disputes between States, it was not entirely suited for a criminal court. Nevertheless, it would be unfair to criticize Moynier for following one of the few models available. Those drafting the statute for a permanent international criminal court today have the examples of four *ad hoc* international criminal tribunals, more than a dozen other international courts and dozens of proposals for a permanent international criminal court over more than a century to consider, as well as an international organization in which to place the new institution; apart from arbitral tribunals, Moynier had only a few examples of international

[7] Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, p. 122. (Translation of the quotations by the author.)

[8] *Ibid.*, pp. 122-131. - For the text of the draft convention see the annex to this article.

judicial or quasi-judicial institutions, such as the tribunals established in 1831 concerning free navigation on the Rhine,[9] or of mixed claims commissions.

In developing his proposal, he examined in turn legislative, judicial and executive powers related to criminal law before concluding that an international institution was necessary to replace national courts. Since the States had been reluctant to pass the criminal legislation which he believed that they were morally obligated, as parties to the Geneva Convention, to enact in order to prevent violations, he argued that the creation of international criminal law was necessary, noting the analogy of recent copyright treaties. He did not think that it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they could at any moment be subjected to pressure. An international institution composed of judges from both belligerent and neutral States, or exclusively neutral States, would, theoretically at least, offer better guarantees of impartiality, and this would encourage belligerents to use it. He argued that the governments themselves had nothing to fear from such a court since they would not be directly implicated in the violations. Indeed, "it would be absurd to imagine a superior order in contempt of international obligations formally recognized".[10] The executive function of carrying out sentences, however, should be left to States.

The proposal consisted of ten short articles. The tribunal would have been, in effect, a permanent institution, which would be activated automatically in the case of any war between the parties (Article 1). The President of the Swiss Confederation was to choose by lot three adjudicators (called *arbitres*, but performing functions closer to those of judges than arbitrators) from neutral States party and the belligerents were to choose the other two (Art. 2, para. 1). If there were more than two belligerents, those that were allied would select a single adjudicator (Art. 2, para. 3). If one of the neutral States which had nominated an adjudicator were to become a belligerent during the war, there would be a new selection by lot to replace that judge (Art. 2, para. 4). There would be no permanent seat for the tribunal, but the five adjudicators would meet as quickly as possible at the location chosen provisionally by the President of the Swiss Confederation (Art. 2, para. 2). The judges would decide

[9] See the Conventions of Mainz of 1831, B.F.S.P., 2, p. 52, and of Mannheim of 1868, B.F.S.P., 18, p. 1076.

[10] *Loc. cit.* (note 7), p. 126.

among themselves the place where they would sit (Art. 3, para. 1), thus permitting the tribunal to sit at the place most convenient to the defendants and witnesses.

The proposal left it to the adjudicators each time the tribunal was convened to decide upon the details of the tribunal's organization and the procedure to be followed (Art. 3, para. 1). Certain aspects of the procedure were to be the same, however, in all cases. The tribunal would conduct an adversarial hearing (Art. 4, para. 3) and it would reach its decision in each case by a verdict of guilty or not guilty (Art. 5, para. 1). The complainant State would perform the role of prosecutor. If the guilt of the accused was established (suggesting that the burden of proof remained on the complainant), the court would hand down a sentence, in accordance with international law, which would be spelled out in a new treaty separate from the Geneva Convention (Art. 5, para. 2).

Only "interested governments" were to be permitted to file complaints (Art. 4, para. 1) as Moynier feared that the court would be overwhelmed by frivolous complaints. If any person with a complaint against the enemy were to have the right to address the tribunal directly, "the claims would multiply to infinity, and the adjudicators would risk becoming the playthings of those who would not be ashamed to instigate frivolous investigations". Therefore, it was essential to require that governments submit their nationals' complaints for preliminary examination, and to bring only those complaints before the tribunal which were determined to be sufficiently well founded.[11] He recognized that this requirement would mean that "not all complaints would necessarily be considered by the tribunal. But what is more important is that when a foreigner was concerned, he could not be deprived of the international tribunal's protection" because governments were required to submit all cases involving foreigners to it (Art. 4, para. 2).[12] Thus, the tribunal would have exclusive jurisdiction in all cases involving a foreigner. When the complainant, the accused and the judges were all of the same nationality, there would be no prejudice to anyone requiring international action "but the obligation to go before the adjudicators must be imposed in every other situation".[13]

Recognizing that the terms of the Geneva Convention were inadequate to impose criminal responsibility, Moynier proposed defining violations

[11] *Ibid.*, p. 128.

[12] *Ibid.*

[13] *Ibid.*

and penalties of its provisions in a separate instrument (Art. 5, para. 2), but did not attempt this difficult task himself.

The court was to determine innocence or guilt in each individual case (Art. 5, para. 1) — thus rejecting collective punishments — after an adversarial inquiry (Art. 4, para. 3). All participating States, particularly belligerents, were required to provide "every facility" to the tribunal (Art. 4, para. 3). The penalties, to be specified in a separate convention, would have to be "in accordance with the principles of international criminal law" (Art. 5, para. 2), thus excluding the possibility of different penalties for the same acts, based on different national laws, such as the law of the country in which the crimes occurred or of the accused's or victim's, country of origin. The tribunal would send copies of the judgments to the interested governments, which would be required to carry out the penalty imposed (Art. 6).

In addition to imposing punishment, the court could award victims compensation, but only if the complainant government sought compensation (Art. 7, para. 1). The government of the offender would be responsible for implementing the award (Art. 7, para. 2). Moynier explained that the obligation for the person responsible for a wrong to pay damages was fundamental and found in the laws of most States. He argued that, similarly, a violation of the Geneva Convention could give rise to a claim for damages, with interest, and "what could be more natural than to confer on the international tribunal the power to decide such a claim and to determine the amount of the award?"[14] Moreover, it was appropriate in such a case that the government of the offender should shoulder the responsibility for payment of the award "because the Convention could scarcely be violated but by the agents of authority. In addition, one could say that governments are the cause of all the evils of war, and they ought to face the consequences. It would not be fair for victims to be deprived of compensation by the personal insolvency of those responsible. And, finally, it is no bad thing that governments have a direct and pecuniary interest in the Convention being faithfully observed by their nationals."[15]

As a deterrent, the tribunal would send copies of the judgment to all States party to the Geneva Convention, which would, "where necessary, translate them into their national language and publish them as soon as

[14] *Ibid.*, p. 127.

[15] *Ibid.*

possible, in its official gazette" (Art. 8, para. 1). In addition, the tribunal would do the same with "any decisions which the adjudicators consider should be publicized in the interests of their work, in particular those relating to the penalty and the payment of damages and interest". Moynier explained that he wished "to ensure the widest possible publicity for the work of the tribunal" as that was the way "to shape and enlighten public opinion, which would serve as a base of support for the tribunal".[16]

The court's expenses were to be paid as they were incurred by the belligerents, rather than on a more secure long-term basis by all States (Art. 9, para. 1). The financial accounts of the tribunal would be the subject of a final report which would be publicized in the same manner as the judgments (Art. 9, para. 2) and the tribunal's archives would be amalgamated with those of the Swiss Confederation (Art. 10).

Moynier's proposal led to a flurry of letters from some of the leading experts in international law, including Francis Lieber, Achille Morin, de Holtzendorff, John Westlake and both Antonio Balbin de Unquera and Gregorio Robledo on behalf of the Central Committee of the Red Cross of Spain. All were published with a commentary by Gustave Rolin-Jaequemyns a few months later in the *Revue de droit international et de législation comparée*.[17] Although some of these experts welcomed Moynier's initiative to strengthen implementation of the Geneva Convention, most of them argued that the proposal to establish an international criminal court would not be as effective as other methods and all were critical of various aspects of the proposal. Some of the experts criticized the very idea of an international criminal court, preferring other methods. Lieber supported traditional arbitration between States and called for a large international meeting of experts to fill the existing gaps in international law. De Holtzendorff and Rolin-Jaequemyns argued that the priority should be to establish international commissions of inquiry and strengthen the protection for humanitarian aid societies. De Holtzendorff emphasized the importance of teaching in the rules of the Geneva Convention. Lieber argued that the absence of a police force to implement the tribunal's decisions was fatal and Westlake questioned whether it would be possible to force military witnesses to appear during a war. Morin emphasized the

[16] *Ibid.*, p. 128.

[17] Gustave Rolin-Jaequemyns, "Convention de Genève: Note sur le projet de M. Moynier, relatif à l'établissement d'une institution judiciaire internationale, protectrice de la convention", *Revue de droit international et de la législation comparée*, IV, 1872, pp. 325-346.

importance of distinguishing between accidental, minor violations, where the tribunal should make a civil finding of fault; and serious, criminal violations, to be defined in a supplementary convention, where he said the tribunal should issue a declaration concerning criminal responsibility, leaving it to the government of the accused's country of origin to carry out the penalties specified in the convention. The Central Committee of the Spanish Red Cross, on the other hand, fully approved of the proposal, though it stated that it would be difficult to impose a requirement on governments to guarantee the payment of compensation, that all the adjudicators should be neutrals and that the role of convening the tribunal should not be left to the President of the Swiss Confederation. In addition, Rolin-Jaequemyns reported that one of the major European powers was, after careful examination, prepared to sign a convention along the lines suggested by Moynier. Given the cool reception by the legal experts, however, no government publicly took up the proposal.

The direct impact of Moynier's proposal on subsequent history is difficult to trace. The idea of creating an international tribunal to deal with violations of the laws of war was discussed at a meeting of the *Institut de droit international* (Cambridge, 1895), but the proposal was not followed up.[18] However, apart from that renewed initiative, it seems to have been largely forgotten. Some of the leading advocates of a permanent international criminal court who came after Moynier and most of the major histories of the development of proposals for a permanent international criminal court do not even mention Moynier's proposal.[19] Indeed, the ICRC has not even referred to the proposal in its recent statements at the United Nations Preparatory Committee on an International Criminal Court.[20]

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[18] Benjamin Ferencz, *An International Criminal Court: A Step Toward World Peace — A Documentary History and Analysis*, 1980, p. 6.

[19] See, for example, M. Cherif Bassiouni, *Draft Statute: International Criminal Tribunal*, 1993, pp. 1-45; Ferencz, *loc. cit.* (note 18), pp. 1-7; Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime", in *The Law of War Crimes: National and International Approaches*, Timothy L.H. McCormack & Gerry J. Simpson (Eds), 1997, pp. 31-63; Memorandum by the Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc. A/CN.4/7/Rev.1, 1949; Vespasian Pella, *Towards an International Criminal Court*, American Journal of International Law, Vol. 44, 1950, p. 37.

[20] It has not been entirely forgotten by the ICRC. See, for example, Pierre Boissier, *loc.cit.* (note 5), pp. 281-284, for a brief account of the proposal. It was also mentioned in an article by André Durand, "The role of Gustave Moynier in the founding of the Institute of International Law (1873)", *IRRC*, No. 303, November-December 1994, pp. 543-563.

After more than a century of rapid development in humanitarian law and international judicial institutions, it is difficult to assess the merits of Moynier's proposal in the light of his own time. Moreover, a brief proposal consisting of ten articles should not be judged as if it were a carefully drafted treaty emerging after years of preparation and negotiation in a diplomatic conference. Moynier explained that he would be satisfied "if the proposal merely leads to a serious study by competent men of the question I have raised".[21] Nevertheless, the following preliminary observations, even if to some extent anachronistic with respect to the late nineteenth century, may have some relevance to current discussions concerning the shape of the proposed permanent international criminal court.

It is not easy today to understand what a radical departure the proposal for an international criminal jurisdiction was. Although there may have been dozens of politicians, legal scholars and other writers, such as Rousseau, who mentioned before 1872 the idea of a permanent international court to resolve inter-State disputes — usually only in passing and often to reject it as impractical — it appears that Moynier's proposal was the first serious effort to draft a statute for a permanent international criminal court with jurisdiction over violations of humanitarian law. Moreover, the proposal contained many progressive ideas, some of which are still in advance of the views of many governments today, such as exclusive jurisdiction over certain cases and compensation for victims.

Although it had the advantages of familiarity to governments and the general public, the choice as a model of an arbitration tribunal, rather than a court, led to problems in the structure of the institution, some of which are echoed in the draft statute prepared by the International Law Commission. For example, the tribunal would not have been an institution with permanent judges, prosecutor, registrar and staff. Perhaps this decision reflected the optimism of the late nineteenth century that wars were largely a thing of the past which in the future would be rare and between European powers with shared values in maintaining the existing system of international law and relations, regardless of the differences concerning distribution of power between them. The lack of permanent tribunal personnel, however, would have meant that there would be no continuity or institutional memory and there would be significant delays each time the tribunal was convened, thus decreasing its deterrent value before wars broke out.

[21] *Loc. cit.* (note 7), p. 129.

One significant weakness, which would no doubt have been remedied had the proposal been considered seriously by governments, was the failure to accompany the proposal with a draft of the convention defining violations of the Geneva Convention as crimes and specifying the penalties. Of course, this would not have been an easy task. Indeed, despite more than a century spent developing a broad and nearly comprehensive body of humanitarian law and human rights law (e.g. the prohibitions on torture, genocide and crimes against humanity) the architects of the permanent international criminal court are still wrestling with the problems of defining violations of humanitarian law in a way which satisfies the principles of legality and appropriate penalties.

It is perhaps understandable that his proposal was cautiously limited to the immediate problem of imposing international criminal responsibility for violations of the Geneva Convention in wars between States. Governments of the day might not have been willing to consider extending jurisdiction much further. Nevertheless, it is disappointing that the court would not have had jurisdiction over violations of customary law either during international armed conflicts, or, despite the horrors of the American Civil War a few years before (exemplified by the Andersonville trial) during internal conflicts.[22] Indeed, it would have been easier to draft a proposal to give the tribunal jurisdiction over violations of humanitarian law in internal armed conflict as this law, set out in the Lieber Code,[23] had been used as the basis for national criminal prosecutions, was already widely accepted as reflecting customary law for internal armed conflict (and had a major impact on the development of humanitarian law governing international armed conflict) and could have been easily adapted for use by the tribunal. The States were not willing at that time to impose international criminal responsibility for violations of humanitarian law in internal armed conflict. Indeed, it was only with the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda that it has generally been accepted that such violations incur international criminal responsibility. However, Moynier did note that it would be advantageous to extend the jurisdiction of the court to other

[22] The Confederate Major Henry Wirz, who was the commandant of a military prison in Andersonville, Georgia, where approximately 14,000 Union prisoners died of disease, inadequate shelter and malnutrition, was convicted by a United States military commission for causing the deaths. See 8 House Exec. Docs., No. 23, serial No. 1381, 40th Cong., 2d Sess. 764 (1868); 8 *Amer. State Trials* 666, J.D. Lawson ed., 1918.

[23] Otherwise known as Instructions for the Government of the Armies of the United States in the Field, by Order of the Secretary of War, Washington, D.C., 24 April 1863.

treaties, particularly to the 1856 St Petersburg Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight, and that it would be likely that in time, once such a tribunal was established, it would be given jurisdiction over other treaties. However, he did not include a provision in his proposal for amendment. The present-day Preparatory Committee is considering a Danish proposal for a review procedure to consider whether crimes under international law apart from genocide, other crimes against humanity and serious violations of humanitarian law should be added to the court's jurisdiction once it is established.

Although the provision stating that the tribunal would determine its own rules of procedure (Art. 3, para. 1) had the merit of flexibility in responding to differing circumstances as wars and international law evolved, the arbitration model meant that the rules lacked any certainty, a serious flaw in an international judicial institution. It would be entirely possible for the tribunal to have an almost completely different structure and a different procedure each time it was convened in successive wars or even in wars taking place at the same time. A defendant might have the right to cross-examination, to free legal assistance and the exclusion of hearsay in one war, while another defendant in a different war could be denied them, leading to a not guilty verdict in one and a conviction in the other, both based on similar facts.

At a time when there was no widely accepted international body of law and standards concerning the right to fair trial, and only a few general principles of criminal law, such as *nemo debet esse judex in propria causa* (no one ought to be a judge in his or her own case), it is not entirely unexpected that the proposal had almost no guarantees of the right to a fair trial which are today considered indispensable.[24] Nevertheless, it is disappointing that Moynier did not attempt to identify some of these general principles or to spell out certain aspects of the procedural guarantees of fairness in criminal cases which would be the subject of great controversy and emotion. Such principles were just beginning to be identified in claims by States exercising diplomatic protection, on the basis

[24] These standards are found in the provisions of a large number of international instruments, including Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; the United Nations Standard Minimum Rules for the Treatment of Prisoners; the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the United Nations Declaration on the Independence of the Judiciary; the United Nations Basic Principles on the Role of Lawyers and the United Nations Guidelines on the Role of Prosecutors; as well as in regional human rights treaties.

of an emerging doctrine of an international standard of justice, on behalf of their nationals who had been denied justice for injuries suffered in other countries.[25] Moreover, the use of the term "inquiry" suggests something more akin to the informal procedure before a commission of inquiry than that of a trial. A failure to set out adequate fair trial guarantees is, however, also found in most of the subsequent proposals before the current drafting effort.[26]

Unfortunately, Moynier limited complaints to interested governments (Art. 4, para. 1). He could not have been expected to predict that States would almost never use the State complaint mechanisms of twentieth-century human rights treaties to address violations of the rights of individuals, whether their own citizens or not.[27] One danger of limiting complaints to "interested governments", presumably those whose nationals or residents have been victims, was that since most such governments would be belligerents, there might be a shared incentive to refrain from bringing complaints in situations in which both sides had committed violations, in favour of diplomatic solutions at the expense of the rights of victims. To some extent, this problem was addressed by requiring the participating States to submit to the tribunal any cases they wished to pursue and all cases in which a foreigner was involved (Art. 4, para. 2), but the proposal

[25] See, for example, Lord Palmerston's famous speech to the House of Lords on 25 June 1850 during the Finlay and Pacifico controversy with Greece rejecting the argument that States could not object when their nationals were tortured or persecuted by other States who did the same to their own citizens. 112 Hansard's Parliamentary Debates, 3rd Ser., 1850, 381-388. For further information concerning this incident and the history of the concept of denial of justice from the thirteenth century until Moynier's proposal, see Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights*, 1973, pp. 23-58.

[26] For a discussion of the inadequacy of the procedural guarantees in the International Law Commission's draft statute, see Amnesty International, *The international criminal court: Making the right choices — Part II: Organizing the court and guaranteeing a fair trial*, AI Index: IOR 40/11/97, 1997, pp. 42-92.

[27] As of 30 January 1998, no states had used the State complaint procedures in Art. 41 of the International Covenant on Civil and Political Rights; Art.21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 45 and 61 of the American Convention on Human Rights or Art. 47 African Charter on Human and Peoples' Rights. Only 12 complaints have been filed by States pursuant to Articles 24 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Since 1951, when the Convention for the Prevention and Punishment of the Crime of Genocide entered into force, only one State has submitted a dispute to the International Court of Justice pursuant to Art. IX claiming that citizens of another State had committed genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro])*, filed 20 March 1993.

left it to the States themselves to determine whether a case fell within the jurisdiction of the tribunal and whether a foreigner was involved. The requirement that all participating States, particularly belligerents, were to provide "every facility" to the tribunal (Art. 4, para. 3), was a remarkably forward-looking provision concerning State cooperation. An attempt at the December 1997 session of the Preparatory Committee to insert a clause in the draft statute for a permanent international criminal court imposing a general obligation on all participating States to cooperate with the court was one of the most contentious issues of the session.

Today, there is an increasing recognition that the obligations of humanitarian law are obligations *erga omnes*, which all States have a duty to repress although there are some governments on the Preparatory Committee attempting to restrict the States allowed to file complaints to "interested states", i. e. the States having custody of the accused, the State where the crime occurred, the State of which the accused is a national and the State of which the victim is a national. As a result of the perceived problems arising from allowing only States to bring complaints, many governments, independent observers and non-governmental organizations have argued that there should be an independent prosecutor, like the prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, who is authorized to initiate investigations and prosecutions, subject to appropriate judicial review, based on information from any source.[28]

One radical aspect of Moynier's proposal was that the tribunal would have exclusive jurisdiction over any case falling within its jurisdiction which the complainant State wished to pursue and any case in which a foreigner was involved (Art. 4, para. 2), although the only remedy if an interested State failed to submit such a case to the tribunal would be if another interested State did so itself. The statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the International Law Commission's draft statute for the permanent international criminal court provide for concurrent jurisdiction, but they also provide that in cases where the States are unable or unwilling to investigate

[28] Art. 18 of the Statute of the International Criminal Tribunal for the former Yugoslavia provides that "the Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed." Art. 17 of the Statute of the International Criminal Tribunal for Rwanda is identical.

and prosecute persons suspected of crimes, international tribunals or courts could exercise jurisdiction.[29]

Another significant aspect of Moynier's proposal was that the tribunal could award victims compensation, but only if the complainant State included a demand for damages and interest in the complaint (Art. 7, para. 1). Although the proposal did not expressly state that the tribunal would award the damages directly to the victim or the victim's heirs, it is clear that Moynier intended that the victims should not be disadvantaged by the insolvency of the guilty party. The International Law Commission's draft statute left the issue of reparations for victims and their families to national courts, but it is hoped that the Preparatory Committee will recommend that the permanent international criminal court have the power to award reparation.

Moynier recognized that the tribunal would be a more effective deterrent if its work were widely known. The requirement that the judgments, decisions and financial report must be published in the official gazette of each State party (Articles 8 and 9, para. 2) was an important way of ensuring that these decisions would be known to government officials, legislators and the press. Although all judgments and many decisions of the International Criminal Tribunals for the former Yugoslavia and for Rwanda are now published on the Internet, these bodies could consider requiring that their judgments and decisions be published in the gazettes of all States, thus giving them official recognition and making them more accessible to the public. The Preparatory Committee could also propose that the statute of the future permanent international criminal court contain a similar requirement applicable to all participating States and request that other States publish them as well.

One serious problem with Moynier's proposal was that the court's expenses were to be paid as they were incurred by the belligerents, rather than on a more secure long-term basis by all States (Art. 9, para. 1). Given experience with arbitral tribunals, where the States concerned paid, without major difficulties, the costs of the arbitrators and their own costs out of self-interest, it was not unreasonable for Moynier to assume that this method of financing would be sufficient. Nevertheless, with hindsight it

[29] See Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 10 (2); Statute of the International Criminal Tribunal for Rwanda, Art. 9 (2); draft statute for an international criminal court, Art. 42 (2), Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN GAOR Supp. (No. 10), p. 43, UN Doc. A/49/10 (1994).

seems that this approach could have led to serious problems, particularly in a conflict in which there were large numbers of violations requiring extensive investigation, as the adjudicators and staff could not make plans for their temporary employment with any degree of certainty that they or the necessary expenses of the tribunal would be promptly paid. The Preparatory Committee has yet to resolve the problems of financing the future permanent international criminal court. Some States have argued that, somewhat as with Moynier's tribunal, complainant States should finance the court. Others have argued that all participating States should do so, while still others argue that long-term, secure financing for the court should be ensured as part of the regular United Nations budget (as with the International Court of Justice) and perhaps supplemented by the peace-keeping budget (when cases are referred by the Security Council) or by voluntary contributions to a trust fund.

Despite the weaknesses of Moynier's proposal, had it been adopted, even in modified form, States would no doubt have agreed at the 1899 and 1907 Hague Peace Conferences to give it jurisdiction over violations of the Hague Conventions. Such a step could have had a significant impact on public attitudes, as well as on planning for war by military commanders and civilian leaders and the conduct of troops during the wars that have plagued the twentieth century. One can only speculate on the impact that an international criminal court with jurisdiction over the Geneva Convention of 1864 and the 1907 Hague Conventions would have had on the behaviour of troops in the Russo-Japanese War, the Balkan Wars and the First World War, and the development of humanitarian law in civil wars and other internal armed conflicts.

A century and a quarter after Gustave Moynier's daring proposal, the prospects are increasingly bright that the international community will adopt a treaty establishing a permanent international criminal court. In dramatic contrast to the response of leading international law experts in 1872, more than three hundred non-governmental organizations throughout the world have joined forces in an NGO Coalition for an International Criminal Court to mobilize public support for the prompt establishment of an effective court. Nevertheless, the Preparatory Committee is considering a draft statute that has yet to resolve some of the problems which Moynier faced. It will be up to the public to ensure that government representatives at the diplomatic conference draft a statute worthy of Moynier's vision.

Annex

Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention[30]

by Gustave Moynier

Geneva, 1872

Article 1

In order to ensure the implementation of the Geneva Convention of 22 August 1864, and of its additional articles, there will be established, in the event of a war between two or more Contracting Powers, a tribunal to which may be addressed complaints concerning breaches of the aforementioned Convention.

Article 2

The tribunal will be set up as follows:

As soon as war has been declared, the President of the Swiss Confederation will choose by lot three Powers which are signatory to the Convention, excluding belligerents.

The governments of these three Powers, as well as those of the belligerent States, will each be invited to nominate an adjudicator. The five adjudicators chosen will meet, as promptly as possible, at a place which will be notified to them, on a provisional basis, by the President of the Swiss Confederation.

If the conflict involves more than two sovereign States, those which are on the same side will consult on the selection of a single adjudicator.

If, during the war, a neutral State which has provided one of the adjudicators itself becomes a belligerent, a new selection by lot will be held to replace the adjudicator nominated by that State.

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[30] Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, pp. 129-131. — Translated from the French original by the ICRC.

Article 3

The adjudicators will decide on the definitive choice of the place where they will sit. The details of the organization of the tribunal, and the procedures to be followed, will be left to their discretion.

They will also decide when it is possible to end their activities.

Article 4

The tribunal will only deal with breaches which are the subject of complaints addressed to it by interested governments.

The latter must defer to the tribunal all those cases which they wish to pursue and in which foreigners are involved.

The tribunal will submit all facts to an adversarial inquiry, which must receive every facility from governments signatory to the Convention, and in particular from the belligerents.

Article 5

The tribunal will present its decision, for each individual case, as a verdict of guilty or not guilty.

If guilt is established, the tribunal will pronounce a penalty, in accordance with provisions of international law. The latter shall be the subject of a treaty which is to be complementary to the present Convention.

Article 6

The tribunal will notify its judgments to interested governments. The latter shall impose on those found guilty the penalties which have been pronounced against them.

Article 7

Where a complaint is accompanied by a request for damages and interest, the tribunal will have the competence to rule on this claim and to fix the amount of the compensation.

The government of the offender will be responsible for implementing the decision.

Article 8

The tribunal's judgments will be communicated to all governments which are signatory to the Convention, which will, where necessary,

translate them into their national language and publish them, as soon as possible, in their official gazette.

The same will apply to any decisions which the adjudicators consider should be publicized in the interests of their work, and in particular those relating to the penalty and payment of damages and interest.

Article 9

The costs of the tribunal, including the adjudicators' salaries and travelling expenses, will be provided in equal parts by the belligerent States which must, as and when required, provide the tribunal with the necessary funds.

The financial accounts of the tribunal will be covered in a final report which will receive the same publicity as the tribunal's decisions.

Article 10

The tribunal's activities will be amalgamated with those of the Swiss Confederation at Berne.
