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Sovereignty, Judicial Assistance and Protection of Human Rights in International Criminal Tribunals

Kenneth S. Gallant

University of Arkansas at Little Rock William H. Bowen School of Law, ksgallant@ualr.edu

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*Kenneth S. Gallant**

INTRODUCTION

Systematic murder, torture, rape and genocide in places such as Rwanda, Bosnia, Cambodia and Somalia has focussed attention on the need to hold individuals responsible for gross violations of international humanitarian law. As a result, the United Nations, through the Security Council, has established two *ad hoc* international tribunals, to prosecute alleged violators of international humanitarian law in the former Yugoslavia and in Rwanda. Interest has also grown in the proposal before the International Law Commission to establish a permanent international criminal tribunal, whose jurisdiction might or might not be limited to serious violations of international humanitarian law and the laws of war.

International law has traditionally defined the rights and responsibilities of states with regard to each other. During the past century, the development of international humanitarian and human rights law has focussed attention on the protection of individuals. This has recently led to the development of regional adjudicatory bodies for human rights law such as the European Court of Human Rights and the Inter-American Court of Human Rights. States have given to these supra-national bodies the authority to pass binding judgments against them in order to enforce regional human rights covenants.

Concomitantly, an understanding has grown that it is persons who cause the abstract entities called states to take actions. The indirection of saying that 'states' may not commit mass rape in pursuit of war aims, for example, has not prevented certain men of Serb ethnicity from raping hundreds of women because they were Muslim. This is not to say that holding states responsible for human rights violations has been thoroughly ineffective. This method does, however, needs supplementation.

Modern cases of genocide and other systematic crimes against humanity occur when the individual perpetrators are acting on behalf of state policy, as in the case of Nazi Germany, or when a state of rebellion has prevented the central government from protecting human rights, as in the case of atrocities in the rebel held areas of

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* Fulbright Lecturer, National Law School of India University, and Professor and Director of Clinical Programs, University of Idaho School of Law, Moscow, Idaho, USA. This paper is based upon a presentation to the NLSIU Continuing Legal Education Workshop on Human Rights Law and Practice, Bangalore, India on 18 October 1995. The material has been updated with a few references to the Dayton Peace Accords, initialed in November 1995 and signed in December 1995, which as of the current writing hold out promise for ending the war in the former Yugoslavia.

Bosnia, or where order has so broken down that it is difficult to determine whether an effective government exists, as in the case of Rwanda. Merely holding a state responsible after the fact of these atrocities cannot effectively deter persons from committing human rights violations in the future.

In each of these types of cases, the state (or would-be state such as the Bosnian Serb entity[1]) is unwilling or unable to prosecute the perpetrators of atrocities. Other nations will have difficulty prosecuting the perpetrators under theories of universal jurisdiction. In most cases they will not have access to most of the potential defendants and they may be perceived as having a political agenda for such prosecution. Thus the idea of establishing an international tribunal has become very attractive as a means of imposing individual responsibility for these types of crime.

JUDICIAL ASSISTANCE, SOVEREIGNTY AND INTERNATIONAL CRIMINAL COURTS

The unwillingness or inability of states to punish violations of international humanitarian law is the chief motivation for establishing an international criminal court.[2] To be effective in these cases, and to deter future crimes, an international criminal court must have the legal authority to obtain the presence of defendants and to gather evidence, even in the face of government inaction or opposition. Legal authority must be backed up by an enforcement mechanism to ensure cooperation of states and execution of court warrants and orders.[3]

The Ad Hoc Criminal Tribunals

The current *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) and the International Criminal Tribunal for Rwanda (ICTR) have been established by the United Nations Security Council as enforcement measures to reestablish and maintain international peace under Chapter VII of the United Nations Charter.[4] A state which fails or refuses to obey an order of one of the Tribunals to

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1 The Republika Srpska, which under the November 1995 Dayton Peace Accords, signed in Paris in December 1995 is a constituent 'Entity' of the State called 'Bosnia and Herzegovina'. Constitution of Bosnia and Herzegovina, Art. 3 (unofficial text).

2 Some would add the inability or unwillingness of states to prosecute international drug trafficking and other major international economic crimes as well.

3 In this paper 'authority' will be used for legal authority as stated in operative legal documents such as Security Council Resolutions, statutes and treaties. 'Power' will refer to the physical, political and moral force necessary to ensure compliance with court orders or warrants. 'Enforcement mechanism' will apply to the legal, political and other structures which can provide the power to enforce compliance.

4 U.N. Security Council Resolution 827, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (hereinafter S.C. Res. 827); U.N. Security Council Resolution 808, U.N. Doc. S/RES/808 (1993) (hereinafter S.C. Res. 808); *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 & Add. 1 (1993), reprinted in 32 I.L.M. 1163 (hereinafter Secretary-General's Report). S.C. Res. 827 enacted the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTFY Statute), which repeats the basis of the creation of the Tribunal.

transfer or surrender a suspect commits an international wrong and is subject to referral to the Security Council for appropriate action.[5] Whether or not the Security Council will actually use its power and enforce the arrest warrants and requests for surrender of the ICTFY remains to be seen.[6]

The ability to enforce orders is a necessity to the functioning of an international criminal court in a situation in which one or more States has an interest in protecting persons from prosecution. Nonetheless, this authority derogates from the traditional sovereign rights of states.[7] Under the ICTFY Statute, for example, states do not retain their traditional freedom, in the absence of an extradition or other treaty, to determine whether and when to surrender persons to another state.

This is an important development in international law. Unlike the previous War Crimes Tribunals, at Nuremberg and Tokyo following World War II, the ICTFY and ICTR do not claim jurisdiction over individuals on the basis of their status as prisoners of war of a victorious sovereignty. Instead, they claim jurisdiction as supranational entities, subsidiary organs of the United Nations, with authority over states.

In fact, the authority of the Tribunals may be greater than even that of the International Court of Justice (ICJ). First, the Tribunals have primacy of jurisdiction over national courts. A State cannot exempt itself, its nationals, or others within its territory from the Tribunal's authority. By contrast, the jurisdiction of the International Court of Justice is limited to cases brought before it by agreement of states, and cases brought by and against States who have consented to the mandatory jurisdiction of the ICJ.[8]

The International Tribunal for Rwanda was established on a similar basis. U.N. Security Council Resolution 955, S/RES/955 (1994) (hereinafter S.C. Res. 955), which enacted the Statute of the International Criminal Tribunal for Rwanda (hereinafter ICTR Statute).

5 The author has discussed this issue at some length in K.S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 Crim. L. Forum 557 (1994).

6 The plans of the various entities involved to cooperate with the ICTFY as of the beginning of 1995 is set out in D. Cotic, *Introduction (to A Critical Study of the International Tribunal for the Former Yugoslavia)*, 5 Crim. L. Forum 223 at 234-35 & nn. 26-29 (1994) (citing sources). The situation is fluid following the initialing of the Dayton peace agreements in November 1995, and their signing in December.

7 *See*, R. A. Kolodkin, *An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia*, 5 Crim. L. Forum 381 at 385-86 and n. 11, citing Note Verbale from the Permanent Representative of Mexico to the Secretary-General, March 12, 1993, U.N. Doc. S/25417, and Letter from the Permanent Representative of France to the Secretary-General, February 10, 1993, U.N. Doc. S/25266. Professor Rubin presents the view that the ICTFY Statute wrongly derogates from the sovereign equality of states. A. P. Rubin, *An International Criminal Tribunal for Former Yugoslavia?* 6 Pace Int'l L. Rev. 7 (1994).

8 Statute of the International Court of Justice, Art. 36 (hereinafter ICJ Statute).

Second, under the United Nations Charter, "If any party to a case (before the ICJ) fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[9] By contrast, the Report of the Secretary-General proposing the Statute of the ICTFY states that an Order of the Tribunal "for the surrender and transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measures under Chapter VII of the Charter of the United Nations."[10] This indicates that the orders of the Tribunal for surrender and transfer (and, by implication, arrest warrants) have at least the same force as final judgments of the ICJ.

Additionally, the Statute of the ICJ states that judgments of the Court are not binding except between the States concerned on the matter in controversy.[11] The Statutes of the two Security Council tribunals are silent on the *stare decisis* effect of their judgments. The fact that the Appellate Chamber of the two Tribunals is to be made up of the same judges suggests that there is a hope that they will develop a consistent body of international criminal law. If the tribunals begin deciding cases on the authority of their prior cases, they will be taking a further step towards the expansion of international judicial powers.[12]

The derogation from sovereignty implied by the Statutes of the Security Council tribunals is justified by the accession of United Nations members to the United Nations Charter. They can be held to have submitted to the authority of the Security Council to enact binding resolutions to "maintain or restore international peace and security following the requisite determination or the existence of a threat to the peace, breach of the peace or act of aggression."[13]

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9 U.N. Charter, Art. 94(2).

10 Secretary-General's Report, para. 126; *see* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 3 (1995) Rule 59 (hereinafter ICTFY); *see generally* discussion in Gallant, *supra* note 5 at 565.

11 *See* ICJ Statute, Arts. 59, 61.

12 Compare ICJ Statute, Art. 38(d) (making the "judicial decisions... subsidiary means for the determination of rules of law"). Note there are the possibilities that the tribunals will assert that their decisions are precedential only as to procedure and possibly evidence, but not as to the substance of international criminal law; or that the tribunals will use their prior decisions concerning the definition of crimes within their jurisdiction and defenses. The latter claim can be seen as indirectly asserting a lawmaking authority.

13 Secretary-General's Report, para. 22. The Rules of the ICTFY, adopted by the Judges of the Tribunal, go further, defining a state as "A State Member or non-Member of the United Nations or a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a State or not;.... " ICTFY Rule 2. In the case of the ICTFY, this definition of state might conceivably be justified on a theory that all states or would-be states now in the territory of the old Federal Republic of Yugoslavia have succeeded to its duty to comply with the United Nations Charter. As a general proposition, however, this theory is insufficient to apply to states that are not and never were U.N. members, although the ICTFY Rule purports to include such application.

The Proposed Permanent International Criminal Court

The issue of derogation from sovereignty cannot be escaped so easily for a proposed permanent international criminal court. The inability or unwillingness of States to prosecute severe violations of international humanitarian law is the chief reason for seeking establishment of such a court. This means a permanent court, to be effective, will require powers similar to those of the ICTFY and ICTR that may place permanent limits on the traditional sovereign prerogatives of States.

A permanent international criminal court will need an enforceable regime of judicial assistance that will operate from the beginning of a criminal investigation through trial. In general, the dependence of the international criminal court on assistance will be greater than that of national courts.

In the typical case before an international criminal court, the international prosecutor will need to investigate and gather evidence concerning an alleged crime from the beginning. The prosecutor's office will typically not be located in the national jurisdiction in which any of the victims, witnesses, evidence or defendants will be found. Thus, the prosecutor will need to engage in a wide-ranging investigation which will require operation in or assistance from all jurisdictions in which any of these may be found. Additionally, defense counsel will similarly need assistance in investigation and to compel the appearance of witnesses and evidence at trial. Thus, the assistance that the international criminal court will need will included searches for and seizures of evidence, enforcement of the right of prosecutorial officials and investigators to travel, observe the scenes of alleged crimes and interview witnesses, enforcement of the compulsory attendance of witnesses and production of evidence at the international criminal tribunal, and enforcement of orders to arrest and produce defendants before the international criminal tribunal.

There is one new theory on which consent can be based: the new Constitution of Bosnia and Herzegovina, adopted as part of the Dayton Accords initiated in November 1995 and signed in December, states:

> ... Bosniacs, Croats, and Serbs, as constituent peoples (along with others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:
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> Article I – Bosnia and Herzegovina – 1. *Continuation.* The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

Constitution of Bosnia and Herzegovina, Preamble and Art. I. Sec. 1 (unofficial text). If this Constitution does in fact end the dispute over the status of quasi-states such as the Bosnian Serb entity, then the renewed submission of the entire nation-state of Bosnia and Herzegovina to the Charter of the United Nations might be held to render moot any claim that the ICTFY's jurisdiction does not extend to any place within, or citizen of, Bosnia and Herzegovina. *See also* Cotic, "Introduction," *supra* n. 6 on the position of entities regarding cooperation with the ICTFY.

By contrast, a national prosecutor seeking international judicial assistance generally is operating on a complaint from a victim or on other evidence found within his or her national jurisdiction. Judicial assistance required is usually limited to producing named defendants or witnesses or specifically identified evidence to the courts in which the prosecution is occurring.

The breadth of necessary investigations in cases before a permanent international criminal court defines the necessary parameters for mandatory international judicial assistance. As mentioned, the prosecutor must have the compulsory ability to investigate alleged crimes and to search for victims, witnesses and other evidence. The prosecutor must be able to compel the appearance in the international tribunal of defendants, witnesses, and evidence. Defense counsel must similarly be able to investigate the case and compel the appearance of witnesses and evidence.

These needs define a limited, but significant, imposition upon national sovereignty. Such a permanent imposition will be most legitimate, and most likely to be enforceable, if consented to by states. This suggests that a permanent international criminal court should be set up by multilateral treaty.[14] This would ensure that all state parties to the treaty have consented to the restrictions on sovereignty. In order to be effective, however, it requires near-universal accession to the treaty. One difficulty is that states most likely to enact policies requiring or allowing their officials to commit serious violations of international humanitarian law are those least likely to accede to such a treaty. Another difficulty is the possibility of new states or would-be states carved out of the territory of existing states asserting that they are not within the jurisdiction of the court because they have not assented to the treaty establishing the court.

Additionally, a permanent court will need an enforcement mechanism to play the role that Security Council plays with regard to ICTFY and ICTR. Such a structure will not be easy to establish as part of a treaty.[15] The weakness, described above, of the well-established ICJ suggests the difficulty of giving mandatory powers to a new tribunal.

Many decolonized nations are reluctant to enter agreements that limit national sovereignty. Some wonder whether it is consistent to insist on national sovereignty

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14 Kolodkin, *supra* n. 5 at 385, describes this as the 'orthodox' method, after the terminology of A. Pellet, *Le Tribunal criminal international pour l'ex Yougoslavie: poudre aux yeux ou avancée décisive?*, 98 Revue Généralé de Droit Internationale Public 7 at 25 (1994).

15 The International Law Commission 1993 and 1994 draft statutes suggest that the Security Council might refer cases to the proposed permanent international criminal court, but other aspects of the relationship between the Court and the Security Council are unclear, including whether the Security Council would have the power to take enforcement action where a state refused to surrender or arrest a defendant, even in cases in which the original reference had come from the Council. *See Report of the International Law Commission on its Forty-sixth Session*, U.N. G.A.O.R., 49th Sess., Supp. No. 10, at 43, U.N. Doc. A/49/10 (1994) (hereinafter ILC 1994 Draft); *Report of the Working Group on a Draft Statute for an International Criminal Court*, in *Report of the International Law Commission on its Forty-fifth Session*, U.N. G.A.O.R., 48th Sess., Supp. No. 10, at 245, U.N. Doc. A/48/10 (1993) (hereinafter ILC 1993 Draft).

in one area of international relations, but abandon it in other areas.[16] However, almost all international agreements imply some limitation on the sovereignty of the states making the agreement, in return for benefits that the states hope will flow from the agreement. Once this principle is admitted, there is no inconsistency in determining that for the common good some particular attribute of sovereignty will be surrendered, while insisting on the retention of others.[17] One of the most important questions for diplomats and politicians of all nations in the twenty-first century will be: in what areas of law, and to what extent, should national sovereignty be subordinated to international (regional or global) organizations and arrangements?

Another possibility is that a permanent international criminal court could be established as part of the much-discussed future restructuring of the United Nations system, including a potential expansion of the Security Council's membership and functions.[18] Part of the expansion of function could include an enforcement power for orders of an international criminal tribunal. This would require an amendment of the United Nations Charter, which can be achieved only by a two-thirds approval by United Nations member states, including all permanent members of the Security Council.[19]

The treaty method assures that every affected state consents to limitations on sovereignty.[20] The Charter amendment process does not, but only provides for a supermajority of state ratifications. The Charter amendment process, however,

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16 This issue was raised in discussions at the Workshop on Human Rights Law and Practice by an advocate of Indian economic self-sufficiency who questioned the wisdom of India's acceptance of limitations on its sovereignty contained in the World Trade Organisation agreements, and who wondered if he could consistently agree to limitations on sovereignty designed to protect human rights.

17 The current debates about sovereignty are in some ways richly ironic. The nations of Europe, who developed current notions of sovereignty and the nation-state at roughly the same time they were expanding their empires, are currently the ones who are most in favour of limitations on sovereignty and of the universalization of human rights. The lesser-developed nations, such as the Group of 77, are the ones most in favour of preserving the sovereign prerogatives of nations. Yet it is these countries which have been worst affected by the unbridled exercise of sovereignty by the former imperial powers; and they are least equipped to face the unrestricted might of the current great powers on even terms.

Interestingly, the United States, of which the author is a citizen, is in an uneasy position between that of Europe and the Group of 77. Sovereigntists such as former United Nations Ambassador Jeane Kirkpatrick vie for intellectual and political supremacy with internationalists such as former President Jimmy Carter. The author agrees more with the former President.

18 As of this writing, a number of states, including Germany, Japan, India and others, are seeking to become permanent members of the Security Council in such a restructuring.

19 U.N. Charter, Arts. 108, 109. More than an affirmative vote by General Assembly members is needed. A two-thirds majority (including all permanent Security Council members) must ratify the change to the Charter under their own constitutional procedures.

20 Even the treaty method does not completely address the issue of successor states or would-be states.

provides an easier mechanism for providing for enforcement of a new permanent court's orders.

One possibility for addressing both the need of an international criminal court for enforcement powers and the issue of voluntariness of surrender of sovereign powers would be to link the creation of a court by treaty to the amendment of the United Nations Charter. The treaty could provide for reference to the Security Council of the action of any State which fails or refuses to obey an order of the international criminal court. The amendment to the United Nations Charter could provide that the Security Council would have the authority to take enforcement action in the case of failure or refusal to obey an order of the court, whether or not other criteria for Security Council action – such as a current threat of breach of international peace – existed.[21]

PROTECTING HUMAN RIGHTS FROM VIOLATION BY A PERMANENT INTERNATIONAL CRIMINAL COURT

Any criminal process can be abused, whether deliberately or negligently. Within the national judicial systems of most democracies, constitutional protections, supplemented by statutes and court rules, seek to ensure that the essential human rights of defendants and others are not violated in the course of law enforcement. While there is controversy over the use of extradition procedures on behalf of individual rights, in fact these procedures sometimes prevent human rights abuses in the requesting state.[22]

In the case of an international criminal court, however, national protections must be overridden to prevent a hostile (or hostage) state from protecting its own wrongdoers. The prosecutor in an international criminal court will need to be able to compel assistance from all states in the investigation of international humanitarian crimes, and the production of witnesses, evidence, and defendants before the tribunal. Protection of human rights must therefore occur, if at all, in the international tribunal itself.

An international criminal tribunal is not a state. Therefore it cannot be bound by treaties such as the International Covenant on Civil and Political Rights that define international obligation to respect individual rights. This means that the treaty, statute or other documents establishing an international criminal tribunal need to specify the minimum set of individual human rights that the tribunal will respect.

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21 *C.f.* U.N. Charter Art. 94(2) (allowing state "recourse to the Security Council" if an opposing state party in an ICJ case "fails to perform the obligations incumbent upon it under a judgment rendered by the Court").

Such a change to the United Nations Charter might be phrased in general language, so as to allow for the creation by treaty and addition to the United Nations system of other international courts.

22 *See* 1 Satyadeva Bedi, *International Extradition Law and Practice* 23-28 (1991).

What protections should be afforded invididuals in the constitutive documents of an international criminal court? The substantive rights most often invaded by local and national criminal authority worldwide are the rights to be free from arbitrary arrest and imprisonment and to be secure from arbitrary searches and seizures - essentially the rights to freedom and privacy. These rights are protected in the International Covenant on Civil and Political Rights:

> Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
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> ...
>
> No one shall be subjected to arbitrary... interference with his privacy, family, home or correspondence...[23]

These rights can be protected by setting general standards for filing of charges, arrest, and searches and seizures. The statute of an international criminal court might require that there be evidence of a *prima facie* case before charges are filed; or that there be reasonable cause or probable cause to believe that the defendant has committed a crime within the court's jurisdiction before an arrest warrant is issued or a warrantless arrest made. Similarly, a court statute could require reasonable cause or probable cause to believe that evidence of a crime within the court's jurisdiction will exist at a specified place before a search and seizure or electronic surveillance could be conducted by the court's investigatory arm or by a State authority acting at its request or direction.[24]

Without such protections, persons in all countries may become vulnerable to the abuses of overzealous, politicized, incompetent or corrupt international prosecutors. The Prosecutor for ICTFY and ICTR embodies none of these flaws. Courts and criminal justice systems must, however, be constituted so that they can withstand the violence that persons involved in them may do.

Much concern has been given to the right of persons not to be convicted in international criminal courts for acts which were not crimes at the time they were committed (the principle of *nulla peona sine lege* and the prohibition of *ex post facto* criminal laws).[25] Most proposals for an international criminal court have responded to this concern by including lists of crimes within the court's jurisdiction. The ICTFY and ICTR Statutes are clear about the crimes that are within their jurisdiction,

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23 International Covenant on Civil and Political Rights, Arts. 9(1), 17(1) (hereinafter ICCPR); *see also*, Universal Declaration of Human Rights, U.N.G.A. Res 217 (III) (1948), Arts. 9, 12 (hereinafter UDHR).

24 The formulation of 'reasonable cause' or 'probable cause' is based upon the common law tradition. It is not presented as the only possible language that can protect the rights to liberty and privacy.

25 *See* ICCPR, Art. 15(1); UDHR, Art. 11(2).

and limit themselves to crimes that were prohibited by international law at the times they were allegedly committed.[26]

These rights are part of the core of human rights that enjoy near-universal recognition, although they are not always honoured in practice. They are rights that are too important to be left to the implementing procedures of a court, and should therefore be included in the constituent documents of any future international criminal court.

There is not time in this paper to examine all the rights which need to be protected in an international criminal court. There is, however, an important procedural right that may be under threat even in the ICTFY and ICTR, as well as in proposed permanent international criminal tribunals. That is the right to present a fair factual defense to charges.[27] The ICTFY and the ICTR provide for the right to counsel and the power to summon defence witnesses and to prepare an appropriate defence. However, to the author's knowledge, adequate resources have not been made available for factual investigation to challenge the evidence that the prosecution presents and to discover evidence favourable to the defendant. Unless this is done, there will always be an opportunity for wrongdoers to assert that they are unjustly punished, and a reasonable possibility that innocent persons will be convicted. In funding the current *ad hoc* tribunals, and in designing a funding scheme for future international criminal courts, appropriate attention must be paid to the provision of a fair opportunity for defence investigation and the preparation of a factual defence.

CONCLUSION

Concern for state sovereignty in international law is often seen as opposed to concern for individual human rights. Often, states are accused of asserting sovereignty as a screen to cover up human rights violations. But it is not the case that these interests are always opposed.

An international criminal court, to be effective, must have some powers that are inconsistent with the traditional right of sovereign states to refuse to hand over alleged wrongdoers in the absence of treaty. In order to protect individual human rights, however, states should insist upon guarantees of a fair criminal procedure and substantive criminal law before surrendering this attribute of sovereignty to a permanent international criminal court.

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26 *See* ICTFY Statute Arts. 2-5; Secretary-General's Report, paras. 33-49; ICTR Statute Arts. 2-4.

27 *See* ICCPR, Art. 14(3)(b) (those criminally charged shall have the right "(t)o have adequate time and facilities for the preparation of his defence"); *c.f.* UDHR, Art. 11(1) (presumption of innocence until after trial at which defendant "has had all the guarantees necessary for his defence.").