

THE PROPOSED INTERNATIONAL CRIMINAL COURT

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1 INTRODUCTION

In recent years, efforts to create a supra-national mechanism for bringing individuals to justice for gross violations of international humanitarian law, including the laws related to armed conflict, have entered a phase of intensity unparalleled since the end of World War II. This paper is about those efforts and, in particular, about the Draft Statute for an International Criminal Court (ICC) prepared by the International Law Commission (ILC) during its 1994 sessionⁱ, and since discussed widely. For those interested in seeing respect for humanitarian law at the international level, the proposed ICC presents a vital opportunity. The renewed impetus for the Court takes place, however, in a historical window of opportunity which is potentially narrow. It is therefore essential that advocates turn their minds to the best means by which to realize their aspirations of international justice in the current global order. A number of facets of the Draft Statute deserve careful consideration. Among these are the structure and functioning of the proposed Court, the role of international cooperation and judicial assistance, and the protection of procedural fairness and the rights of the accused. While these may be mentioned here, they are not the subject of this paper. Rather, our focus will be on both the procedural and the substantive aspects of the proposed Court's jurisdiction. Issues such as procedural justice and the rights of the accused, while important, do not affect the interests of States parties as directly as jurisdictional matters do, and so have not occupied as prominent a place in discussions about the Draft Statute. Jurisdiction goes directly to States' vulnerability to intrusions on their sovereignty and for that reason will be crucial to any talks leading to the establishment of the Court. This paper supports the ILC's flexible approach to the jurisdiction of the Court as the best model achievable at present. Such a position is opposed by those who would have such a body do more, and by those who would restrict it to doing less.

2 HISTORICAL DEVELOPMENT

2.1 THE NUREMBURG AND TOKYO TRIBUNALS

Proposals to establish tribunals at the end of World War I to try the German Kaiser and to punish Turkish authorities for the slaughter of the Armenians came to naught. It was the Nuremberg and Tokyo Tribunals at the end of World War II which saw the first large-scale efforts to try individuals for crimes under international law. These ended in a substantial number of convictions.

Three major criticisms have been made of the trials at Nuremberg and Tokyo. The first is that the law -- especially as regards crimes against peace and crimes against humanity-- was applied retroactively, contrary to the principle of *nullum crimen sine lege*. Secondly, it is said that these tribunals were an

example of subjective Victor's Justice, with the Allies both prosecuting and judging, but not themselves being vulnerable to investigation or prosecution. Finally, problems of procedural fairness existed, including a lack of appeal rights and the use of the death penalty.

In 1946 the newly-formed General Assembly (GA) endorsed the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. It then established the ILC, which it instructed to formulate the Nuremberg principles for incorporation into a Draft Code of Offences against the Peace and Security of Mankind. It was in 1948 that the ILC was first asked to study the possibility of establishing an international court of criminal jurisdiction. In subsequent years reports were made on this subject, but at the end of 1954 the GA instructed the ILC to halt its work on these matters.

During the Cold War, from 1948 to 1989, countries on both sides of the iron curtain saw the exigencies of national security as precluding the creation of an international court to deal with such crimes as aggression and terrorism. We may now conclude that one reason for this was that the two superpowers were themselves engaged in violations of international criminal law, as were their satellites and respective friendly countries.

Much has occurred, since the end of the Cold War, to renew the impetus for a criminal court and for a code of offenses. One cannot, however, understand these events without considering the *ad hoc* tribunals for Rwanda and the former Yugoslavia.

2.2 THE FORMER YUGOSLAVIA

The Security Council asked the Secretary General in October 1992 to set up a Commission of Experts to advise on allegations of violations of the Geneva Conventions and other international law in the former Yugoslavia. The February 1993 Secretary General's report, which included the Experts' report, suggested that a tribunal be established to deal with the crimes which had apparently taken place. Security Council Resolution 808 instructed the Secretary General to draft a statute for such a tribunal. The resulting statute was adopted by Security Council Res. 827 of May 1993, thus creating the International Criminal Tribunal for the Prosecution of Persons Responsible For Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

The statute empowers the Tribunal to prosecute, within the temporal and territorial limits of its jurisdiction, persons responsible for serious violations of international humanitarian law, namely, Grave Breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity. The Office of the Prosecutor was set up and in November 1994 presented its first indictment against Mr. Tadic, a Serb found in Germany. At the time of writing, Mr. Tadic's trial has begun, and the

Tribunal has indicted some 57 individuals, including 46 Serbs, eight Croats and three Bosnian Muslims. Less than half a dozen of those indicted are in custody, however, and most of those are of low rank. Whether major accused --such as Bosnian Serb political leaders Radovan Karadzic and General Ratko Mladic-- will ever come within the control of the Tribunal remains to be seen.

2.3 RWANDA

Security Council Res. 955 of November 1994 approved the statute of the International Tribunal for Rwanda. The Tribunal was given jurisdiction over acts of genocide and other serious violations of international law committed by persons within the territory of Rwanda and neighboring States between 1 January 1994 and 31 December 1994. This involved adding two trial chambers and a Deputy Prosecutor to the Yugoslav Tribunal structure. The same Prosecutor, Appeals Chamber and Rules of Evidence and Procedure serve for both courts. Prosecutions of individuals for violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II --both covering internal conflicts and neither generally considered to be part of customary international law-- was made possible by the fact that Rwanda was a signatory to these instruments. In January 1995 the Deputy Prosecutor was appointed and an investigative office set up in Kigali. At the time of writing, ten individuals have been indicted, and three have entered not-guilty pleas before the severely under-funded tribunal, which sits at Arusha, Tanzania.

These two *ad hoc* courts represent a great advance beyond the Nuremberg and Tokyo Tribunals. This is because their prosecutorial and trial functions are independent of the control of an interested party, they provide significant procedural protections for the accused (including a right of appeal from judgment), and they derive jurisdiction from firmly established customary international law and laws in force in the countries in question. Nonetheless, their mandate is restricted by the fact that they were established under the Security Council's powers under Chapter VII of the UN Charter as a means of assisting with the restoration and maintenance of international peace and security.

2.4 THE PROPOSED INTERNATIONAL CRIMINAL COURT

In November 1990 the GA asked the ILC to resume work on the subject of a permanent Court. The ILC outlined a general approach in July 1992. The Assembly endorsed this and instructed the ILC to produce a draft statute. The ILC produced its final draft in July 1994, recommending that a conference of plenipotentiaries be held to prepare the treaty for the proposed Court. The GA in December 1994 established an *Ad Hoc* Committee to address the administrative and substantive problems involved in creating such a body. Meeting in April and August 1995, that Committee submitted its report to the GA in September 1995. The *Ad Hoc* Committee's report was debated in the Sixth (Legal) Committee in the

autumn of 1995 and on the Sixth Committee's recommendation, the GA in December 1995 established a Preparatory Committee to consider further the Draft Statute. This committee, like its predecessor, has held April meetings, and will hold a second session in August 1996. Its report, to be submitted to the GA in September 1996, will contain a summary of further discussions on issues arising out of the ILC text, as well as a consolidated Draft Statute incorporating the results of the committee discussions. The GA will then decide whether to call a conference of plenipotentiaries to be convened, possibly, in 1997.

Among the many non-governmental contributors to this process, two should be mentioned here. The first is Amnesty International, which provided a detailed and thorough critique of the ILC model.ⁱⁱ The second is the committee of experts which in July 1995, after meetings in Freiburg and Siracusa, produced the *Siracusa Draft*, a modified version of the ILC Statute.ⁱⁱⁱ

3 THE INTERNATIONAL LAW COMMISSION DRAFT STATUTE

3.1 OVERVIEW

The Draft Statute is divided into eight parts, with 60 articles: Establishment (Part 1, Arts. 1-4), Composition and Administration (Part 2, Arts. 5-19), Jurisdiction (Part 3, Arts. 20-24), Investigation and Prosecution (Part 4, Arts. 25-31), The Trial (Part 5, Arts. 32-47), Appeal and Review (Part 6, Arts. 48-50), International Cooperation and Judicial Assistance (Part 7, Arts. 51-57) and Enforcement (Part 8, Arts. 58-60).

Subject to a limited role for the Security Council, the Draft Statute sets up a consent-based judicial mechanism. The ICC would be established by treaty, would itself be associated with the UN by written agreement, and would have its jurisdiction regulated by the will of its signatories. It would be, at least at first, a part-time forum. The potential jurisdiction of the proposed Court would be wide, but its inherent jurisdiction narrow, allowing States parties to opt in or out of its jurisdiction over most crimes. Recognition of the sovereignty of States parties is basic to the proposed Court's organisation. The 1994 ILC report states that the Court:

is intended to operate in cases where there is no prospect of [persons accused of crimes of significant international concern] being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements. [ILC 1994, at 44]

This fundamental character informs the structure of the Draft Statute as a whole. It also lies at the root of the criticisms levelled against the ILC model and against Part 3 (Jurisdiction) in particular. Creation by treaty puts responsibility upon States parties for the Court's administration and financing. It therefore becomes vital to maximise the number of signatories to the treaty.

3.2 PART 3: JURISDICTION OF THE COURT

The five articles of this Part are the heart of the Draft Statute. It is these, with the articles concerning procedural fairness, which most embody the strategy outlined by the ILC where it states:

It is ... by the *combination* of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the Statute seeks to ensure, in the words of the preamble, that the Court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. [ILC 1994, at 69]

Part 3 lists the crimes within the Court's jurisdiction (Art. 20), lays out preconditions to the exercise of that jurisdiction (Art. 21) including, where necessary, a State's acceptance of the Court's jurisdiction over a particular subject matter (Art. 22), provides for action by the Security Council (Art. 23), and obliges the Court to satisfy itself that it has jurisdiction in any given case brought before it (Art. 24).

3.2.1 SUBSTANTIVE ASPECTS OF JURISDICTION

Article 20 names the crimes over which the Court would exercise its powers. The definition of those crimes is left to other sources. The ILC intended the Draft Statute to be adjectival and procedural in nature, avoiding, so far as possible, any foray into the substantive. The article lists genocide (Art. 20(a)), aggression (Art. 20(b)), serious violations of the laws and customs applicable in armed conflict (Art. 20(c)), crimes against humanity (Art. 20(d)), and crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern (Art. 20(e)). With the exception of those based on treaty, the crimes in Art. 20 are crimes under general or customary international law.

Since the drafting process began, it has been asked whether the latter crimes were too vague and open-ended to form a legal prohibition. The principle of legality --recognised in Art. 39 of the Draft Statute-- states that the act alleged must be contrary to the law as it stood at the time of the act. It was suggested, both in the *Ad Hoc* Committee proceedings and in the *Siracusa Draft*, that definitions of the crimes under customary law be included in the text of the Statute. There is a real possibility, however, that the complexities of codification might overwhelm and ultimately stifle efforts to create an ICC. The very success of the ILC in preparing the Draft Statute lies partly in the de-linking of it from the long and complex codification efforts relating to the Draft Code of Crimes Against the Peace and Security of Mankind, to which it had formerly been tied. From this point of view, it might be far better to keep the Draft Statute entirely procedural. Regardless, the ILC should be asked to proceed on a priority basis with the codification process, so that the ICC's Statute may eventually incorporate by reference a Code of Crimes. Such incorporation should be provided for in the text of the Statute.

Specific problems with aggression, crimes against humanity and treaty crimes should be mentioned. It would appear that the majority of delegates to both the *Ad Hoc* and Preparatory Committee hearings favour dropping aggression from the ICC's jurisdiction. This regrettable decision stems from dissatisfaction, partly with the role of the Security Council under Art. 23(2) in determining whether an act of aggression has taken place, and partly with the uncertainty as to the scope of the prohibition, the requirement of a connection to a 'war of aggression,' and its application to individuals. With regard to crimes against humanity, which are particularly important because of their application to internal as well as to international conflicts, Amnesty International has been vocal in calling for an ICC with wide jurisdiction over internal crimes [AI 1994, at 11-13], encompassing also Art. 3 common to the Geneva Conventions of 1949 and Additional Protocol II (1977) to the same conventions. These were excluded from the ILC Draft, apparently because, while both set out substantive prohibitions, neither expressly provides for individual criminal responsibility.^{iv} While the ILC intended that the crimes in the Draft Statute give rise at customary law to individual responsibility, the April 1996 hearings of the Preparatory Committee have seen support for the inclusion in the Statute of an express provision relating to individual responsibility. Thus, it may be that the rationale for the exclusion of these provisions will disappear. If so, they should be written into the final text. As for treaty crimes (Art. 20(e)), there has been disagreement in the 1995 - 1996 Committee meetings as to whether these should be within the ICC's jurisdiction at all. Some argue that the inclusion of such crimes would undermine the authority of the court by overloading it with relatively trivial cases. In the interests of an effective Court, however, one should support the inclusion of these crimes. The treaties deal with matters of real international concern, such as terrorism and narcotics, and a rigorous (perhaps statutorily defined) threshold of seriousness would reduce the problem of overload.

3.2.2 PROCEDURAL ASPECTS OF JURISDICTION

Articles 21 to 24, in Part 3, as well as Article 25, in Part 4, determine the procedural preconditions of the Court's exercise of jurisdiction, and thereby determine the relationship of the Court to its States parties and to the Security Council. Article 21 determines when complaints must be brought, and by which States, in order for the Court to exercise its powers. Further preconditions of acceptance by States parties of the Court's jurisdiction over particular crimes are laid out in Art. 22, and provision is made for action by the Security Council (Art. 23). A duty of the Court to satisfy itself that it has jurisdiction in any particular case is imposed (Art. 24). Article 25 describes the process of lodging a complaint, which bears importantly on the matter of the Court's powers in any particular case. These provisions exhibit the ILC's desire to maintain a distinction between support for the institution of the Court, which should be as wide as possible to confer legitimacy and moral authority upon it, and acceptance of its jurisdiction with regard to particular crimes or particular situations [ILC 1994, at 66].

Opt-in v. inherent jurisdiction

Where genocide is concerned, the Court could (by Art. 21(1)(a)) exercise jurisdiction whenever a complaint was brought under Art. 25(1) by a State party to the Genocide Convention. The simplicity of this procedure reflects the ILC's conviction that "the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited" that States ought to be subject to the Court's jurisdiction over it simply by signing the Statute, with nothing more [ILC 1994, at 67]. The Draft Statute would require States to decide before signing the Statute whether they wished to have the ICC exercise its powers over this crime in relation to them. With other crimes, that decision could be made after becoming a party. The ILC considered that providing for a narrow inherent jurisdiction in the case of this most egregious crime would not undermine adherence to the Statute. The continuing general support for such jurisdiction in the 1995 - 1996 committee process appears to vindicate the ILC's judgment in this regard.

With crimes other than genocide, Art. 25(2) allows a State to bring a complaint where that State has accepted the Court's jurisdiction with respect to that crime. However, Art. 21(1)(b) requires first that an acceptance of the Court's jurisdiction under Art. 22 be registered by both the custodial State and the State on the territory of which the alleged act or omission took place. If the custodial state has received a request under an international agreement for extradition for purposes of prosecution, the requesting state must also accept the Court's jurisdiction regarding the crime (Art. 21(2)). It is therefore possible that the acceptance of the Court's jurisdiction would be required of as many as four States before a prosecution could be entertained.

The acceptance required of States may be given with regard to any or all of the crimes listed in Art. 20 (Art. 22(1)) and may be either general or particular (with regard to conduct and to time)(Art. 22(2)). This power to 'opt in' freely is subject to an important safeguard imposed to prevent States from withdrawing their acceptance once an investigation or prosecution is underway. Article 22(3) prohibits the withdrawal of an acceptance made for a specified time before the date provided and, where the acceptance is indeterminate, before the expiry of six months from the notice of withdrawal being given.

The 'opt in' scheme, by acknowledging State sovereignty, expresses the desire of the ILC to attract wide signature to the Draft Statute, and thereby to augment the authority, profile, and stability of the Court. The subject of inherent jurisdiction continues to be contentious. Some delegates to the *Ad Hoc* Committee meetings objected in principle to the surrender of sovereignty which the concept entails. More importantly, prominent NGOs such as Amnesty International and experts groups such as that which promulgated the *Siracusa Draft* would have the inherent jurisdiction of the ICC encompass all the core crimes listed by the ILC. There is much to be said for this proposal. Given the *jus cogens* status of the offences within the Court's jurisdiction, it would be contrary to the

ideals of justice to allow States to choose when and how they will be judged. Nevertheless, the proposals for wide inherent jurisdiction are unrealistic. If we wish to have a truly international court, and not one with few and geographically concentrated signatories, we must recognise the need for a flexible scheme such as the ILC's.

Role of the Security Council

The Security Council may, when acting under the powers conferred upon it by Chapter VII of the U.N. Charter, and notwithstanding the requirements of acceptance of jurisdiction under Art. 21, refer matters to the Court (Art. 23(1)). The Council would refer situations and not individual cases to the Court, leaving the independent Procurator to determine whom to charge. This provision would allow the Security Council to use the Court as a forum for prosecutions such as those of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. Where a complaint relates to an act of aggression, the Security Council must first find that a State has committed an act of aggression (Art. 23(2)). The Court may not initiate a prosecution where the conduct alleged relates to a situation with which the Council is dealing under its Chapter VII powers (Art. 23(3)). The Council would thus have full latitude for action when availing itself of its Chapter VII powers, without involvement by the Court until after an emergency situation had ended. Several voices have called during 1995 and 1996 for greater clarity in the text as to when the Council could delay the Court's actions.

3.2.3 COMPLEMENTARITY / SERIOUSNESS

The ILC anticipated challenges to the ICC's jurisdiction. By Art. 24, the Court has a duty to determine whether it has jurisdiction in each case that comes before it. The accused, at any time, or another interested party, before or at the commencement of proceedings, has the right to challenge the Court's jurisdiction (Art. 34). The Court may refuse to hear a case if it decides that a State with jurisdiction over the matter has investigated and made an apparently well-founded decision not to proceed, that such a State is currently investigating, or that the matter is not of sufficient gravity to warrant further action (Art. 35). The Court may refuse to confirm an indictment on the same grounds (Art. 27).

There would be two main forms of objection to the jurisdiction of the ICC. The first goes to the character of the criminal act in question. Each crime listed in Art. 20 has a required threshold of seriousness which must be met before the ICC could take jurisdiction: for example, crimes against humanity require the alleged acts to be part of a systematic and widespread policy. The objection that this element of the *actus reus* had not been met could be made either as a no- or insufficient-evidence motion at trial, or as an objection under Arts. 27 or 35 on the basis that the crime in question is "not of such gravity as justify further action." Under the second possible objection, the party disputing the jurisdiction of the ICC would argue for the appropriateness of the exercise of a national jurisdiction over the crime on the basis of the

factors listed in Art. 35. Together, these two modes of objection reflect a conception of the ICC's role as supplementary to national tribunals. They form the seeds of the jurisprudence of 'seriousness' which would surely develop if the ICC were set up. This subject of complementarity was extremely contentious during the hearings of the *Ad Hoc* Committee. The concept of complementarity had apparently, indeed, become something of a tool for those who seeking to ensure that the ICC either never came to pass, or came to pass in an ineffectual form. Those advocating a broad inherent jurisdiction for the Court should be mindful of the fact that, if such a jurisdiction were favoured, it would be on the issues of complementarity and seriousness that the major faultline would be found. The Court's jurisdiction would be challenged here most frequently. If the ILC model with its narrow inherent jurisdiction is favoured, this issue would remain important, but would result in fewer jurisdictional challenges because of the possibility of opting out.

4 THE IMMEDIATE FUTURE

There are two main threats to the success of negotiations leading to the establishment of the Court. The first results from efforts to endow the Court with a broad inherent jurisdiction. A number of the crimes in the Draft Statute have a political component. For this reason, adherence to the fullest possible inherent jurisdiction will ensure that the number of signatories will be so low as to undermine the Court's effectiveness as a deterrent, and its financial support limited enough to threaten its very existence. The other threat results from conceptions of the Court which are too narrow, and see it as concerned only with treaty crimes related to narcotics and terrorism, or as having prosecutions initiated entirely by the Security Council. Proposals for such limited mechanisms would likely fail, either because of the politicisation of debate, or because of the international community's lack of interest in funding such a narrow endeavour.

The ultimate purpose of the proposed ICC should be to strengthen international respect for the rule of law. The Draft Statute, by situating itself realistically in "the existing system of national jurisdiction and international cooperation [ILC 1994, at 31]," will promote this end. An affirmation of the unlawfulness of major crimes against international humanitarian law would have the power to shape public discourse and, ultimately, to direct public policy and action. A growing weight of opinion in favour of respect for these laws would increase the moral --if no other-- pressure on reticent states, pushing them towards conformity. To achieve this effect, however, the Statute of the Court would have to be widely adhered to. The ILC, while respecting State interests in protecting their sovereignty, prepared an instrument suited to this aim.

The position taken by Amnesty International in October 1994 and the *Siracusa Draft* in July 1995 is that the Court ought to have a wide inherent jurisdiction and the States parties unhindered ability to bring the complaints which begin the prosecutorial process. While the result may accord more with certain ideas of justice it would

necessarily result in fewer States signatory, and more jurisdictional challenges on the issue of complementarity. Neither with an opt-in nor with an inherent jurisdiction would there be perfect justice. With a flexible jurisdiction, however, there would be wide adherence to the Statute and therefore greater viability for the ICC as an institution. With a wide inherent jurisdiction, the existence of the Court itself could well be put in question.

5 CONCLUSION

The General Assembly, with the report of the Preparatory Committee before it, will address the issue of an International Criminal Court in its 51st session. It may be that a resolution calling for the conference of plenipotentiaries which would draft the Statute of the Court will be passed within months.

The possibility of establishing the Court therefore looks very real. Like the opportunity which preceded the Cold War, however, the current potential for significant consensus is potentially fleeting. If proposals for a court with a wide inherent jurisdiction win the day, the resulting treaty will have very few signatory nations, and these limited geographically. If, on the other hand, proposals for an extremely restricted jurisdiction are favoured, the Court would also stand less chance of receiving the wide support it would need to be financially viable. The ILC Draft has gaps and shortcomings, but its realistic approach in recognising State sovereignty is still the only real prospect of success for the Court.

ⁱReport of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, 49 UN GAOR Supp. No. 10, UN Doc. A/48/10 (1994).

ⁱⁱAmnesty International, *Establishing a Just, Fair and Effective International Criminal Court* (London: Amnesty International, 1994).

ⁱⁱⁱInternational Association of Penal Law, International Institute of Higher Studies in Criminal Sciences, Max Planck Institute for Foreign and International Criminal Law, *Draft Statute for an International Criminal Court: Alternative to the ILC-Draft* (Siracusa, Freiburg, 1995).

^{iv}For Additional Protocol II, see ILC 1994 at 145; for crimes against humanity, see T. Meron, "War Crimes in Yugoslavia and the Development of International Law" (1994) 88 Am. J. Int'l L. 78 at 80; and J.C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia" (1993) 87 Am. J. Int'l L. 639 at 646-647.