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THE INTERNATIONAL CRIMINAL COURT: ISSUES OF LAW AND POLITICAL WILL

*Jelena Pejic**

INTRODUCTION

Fifty years after the commencement of trial proceedings in Nuremberg, the international community finally seems to be interested, although not yet wholeheartedly committed, to the creation of an International Criminal Court ("ICC" or "Court"). An item entitled the "Establishment of an International Criminal Court" has been included in the provisional agenda of the forthcoming fiftieth United Nations General Assembly session. While it seems unlikely that the ICC will be set up in 1995, it appears that the issue has at least been broached in a major way. Among the many factors contributing to this development that deserve to be noted, three seem to merit particular mention: (1) the end of the Cold War; (2) the establishment of *ad hoc* tribunals for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia and, later, in Rwanda; and (3) the recent dedicated and expeditious work of the International Law Commission ("ILC"), entrusted with the task of drafting the ICC's Statute.

Upon request of the U.N. General Assembly, the ILC in 1993 produced a Draft Statute for an International Criminal Court ("Draft Statute") and upon receipt of comments from governments drafted a Revised Draft Statute for the proposed Court in 1994. It simultaneously recommended that the General Assembly convene an international conference of plenipotentiaries to study the Revised Draft Statute and to conclude a convention on the establishment of the Court. As of April 1995, the Revised Draft is being debated before an *ad hoc* Committee of the General Assembly. If the need arises, the Committee will meet once again, in the second half of August 1995, before the start of the General Assembly's anniversary session.

While the ILC has been, quite correctly, widely credited for having produced a thoughtful and detailed document, there are

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still plenty of issues over which governments, non-governmental organizations ("NGOs"), and experts, to mention just a few, continue to disagree. The differences can, in the most general terms, be categorized as those primarily political in nature and those related to essentially legal problems. As for the first group, states' cautiousness vis à vis the establishment of an International Criminal Court stems from the fact that such a court would, of necessity, present another encroachment on their sovereignty, which is something they are unwilling to accede to. NGOs, on the other hand, particularly those concerned with human rights, want to see an effective International Criminal Court and, to that end, advocate mechanisms that states are still reluctant to accept. As regards experts, they may be found on either side of this broadly sketched divide. It is, in any event, against this backdrop that legal issues unresolved in the Revised Draft Statute need to be considered. In this Essay, an attempt will be made to briefly highlight a few of these issues.

I. *PERMANENCE OF THE COURT*

Under the Revised Draft Statute, the ICC is envisaged as a permanent body, but not one that will, at least initially, function on a full-time basis. As a result, and with several exceptions, judges will not be precluded from holding other salaried positions. It must be mentioned, however, that Article 10 of the Revised Draft Statute does provide for the operation of the Court on a full-time basis if its workload were to so require. However, regardless of the fact that the ILC took pains to enable the ICC's possible transformation from a non-standing permanent body to a full-time organ, it remains unclear why full-time work was not anticipated from the start. Critics of the current text point out that permanence would both enhance the Court's stature and ensure the requisite independence and impartiality of its judges.

II. *COMPLAINT PROCEDURE AND POSITION OF THE PROSECUTOR*

Taking into account states' sensitivity to having their nationals potentially tried before an international criminal jurisdiction, the Revised Draft Statute adopts a restrictive approach as to who may lodge complaints. Pursuant to Article 25, the Court is only open to states, parties, and, in certain cases, to the U.N. Security

Council. In other words, the Prosecutor has no power of initiating proceedings *ex officio* or on the basis of petitions submitted by other sources such as inter-governmental organizations, NGOs, or individuals. Thus, victims of crimes over which the ICC has jurisdiction have no standing to bring cases before the Court. Given, among other things, the expected reluctance of states to lodge complaints against nationals of other states, there seems to be a reasonable fear that many of the crimes the Court is meant to deal with will continue to go unpunished. In addition, it should be mentioned that the Prosecutor of the *ad hoc* Tribunal for the former Yugoslavia, regardless of the different method of its creation, has been entrusted with the authority to initiate investigations both *ex officio* and on the basis of information received from any source.

III. *SUBJECT-MATTER JURISDICTION OF THE COURT*

Since the beginning of work on the Draft Statute, the ICC's subject-matter jurisdiction has been the subject of strenuous debate. According to Article 20, the Court is competent to try persons suspected of genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and crimes specified in treaties listed in the Annex to the Statute that constitute exceptionally serious crimes of international concern. Among the many varied positions taken with regard to the Court's subject-matter jurisdiction the two most divergent deserve to be mentioned. At one end is the view that the ICC's inherent jurisdiction, such as is provided for over the crime of genocide, should be expanded to include serious violations of the laws and customs applicable in armed conflict and crimes against humanity (the crime of aggression will be dealt with shortly). At the other end is the conviction that the U.N. Security Council, and therefore not even individual states, should have the sole authority to determine whether cases involving genocide, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity should be heard by the Court. Treaty-based crimes have also been the cause of intense deliberations. While some governments favor excluding treaties on drug-trafficking and terrorism from the Annex to the Revised Draft Statute, other commentators would not only broaden the list of treaty-based crimes, but would also

leave room for the Court's subsequent assumption of jurisdiction over offenses provided for in the ILC's Draft Code of Crimes Against the Peace and Security of Mankind, a very controversial document, to say the least.

IV. *AGGRESSION*

Linked to the Court's subject-matter jurisdiction is the way in which proceedings against individuals responsible for the crime of aggression are regulated. Article 23 of the Revised Draft Statute provides that a complaint of or directly related to an act of aggression may not be brought under the Statute unless the Security Council has first determined that a state has committed an act of aggression which is the subject of the complaint. According to critics, the inclusion of the crime of aggression is problematic because the very nature of that offense requires a determination that is entirely political in character. What constitutes an act of aggression, it is pointed out, has not yet been defined as a matter of law. It is therefore unclear whether in trying an individual the Court would have judicial review of a determination made by the Security Council. If it would not, the reasoning goes, the sole question for the Court would be to decide whether a person bears responsibility for an act of state deemed illegal. Finally, it needs to be stressed that recent difficulties in determining whether particular armed conflicts are international or internal in character will most likely compound problems if and when attempts at defining aggression are undertaken.

V. *REFERRAL OF CASES BY THE SECURITY COUNCIL*

Article 23 of the Revised Draft Statute also provides that the Court would have jurisdiction over the crimes it is empowered to adjudicate under Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the U.N. Charter. The authority of the Security Council to institute proceedings before the Court has generally not been disputed. There is a widespread realization that if the Security Council were barred from doing so, many serious crimes would never be prosecuted if the only other option was to depend on individual state discretion. There is a lingering concern, however, as to how this provision will be interpreted and

therefore, it appears that there is a need for clarification. The principal dilemma is whether the Security Council is only authorized to refer "matters" to the Court, meaning that it would then be the responsibility of the Prosecutor to establish which individuals should be charged under Article 20 in relation to that "matter," or whether the Security Council can also refer individual cases to the Court. In its Commentary to Article 23 the ILC took the position that the Security Council would not *normally* (emphasis added) refer to the Court a case in the sense of allegations against named individuals. It is, however, precisely this vagueness that worries human rights NGOs and experts, particularly as the Security Council's reading of this provision remains to be seen.

VI. *CONSENT TO JURISDICTION*

Similar to the mechanism adopted in the Statute of the International Court of Justice, the fact that a state becomes a party to the ICC's Statute does not confer automatic jurisdiction on the Court. Article 21 of the Revised Draft Statute spells out which states have to accept the Court's jurisdiction with regard to the crimes within its ambit, whereas Article 22 defines the modes of such acceptance. Generally, acceptance is effected by a special declaration that may be of general or limited application, made for a specified or unspecified period of time.

With the exception of the Court's inherent jurisdiction over genocide, which means that consent is considered given when a state becomes a party to the ICC's Statute, it transpires that in any other case, in order for proceedings to take place, the Court's jurisdiction must be accepted both by the state that has custody of a suspect (the custodial state) and by the state in whose territory the crime involved was committed. In addition, if the custodial state has received an extradition request from another state, unless the request is rejected, the acceptance of the Court's jurisdiction with respect to the crime in question by the requesting state is also mandated. It can be concluded that Article 21 essentially determines the supplementary nature of the Court's jurisdiction and therefore the cause of its potential (in)effectiveness.

While it should be admitted that the ILC laudably disregarded demands to have the consent of an offender's state of

nationality added to those whose acceptance of jurisdiction in a specific case must be obtained, it is also clear that the Revised Draft Statute did not meet calls for enhancing the ICC's authority. Proponents of this view believe that the Court should be able to proceed as long as the custodial state has accepted its jurisdiction over a specific crime, regardless of the consent of other states. It can therefore be expected that this issue will also be the subject of further debate.

VII. *TRIALS IN ABSENTIA*

Under Article 37 of the current text, individuals accused of crimes provided for in the Court's Statute are "as a general rule" to be tried in their presence. Trials *in absentia* would be permitted in the following situations: if the accused is in custody or has been released pending trial and for reasons of security or ill-health it is undesirable for him/her to be present; if the accused is continuing to disrupt the proceedings; or if the accused has escaped from lawful custody or has broken bail. A question that immediately arises upon review of the relevant provisions is why are trials *in absentia* before the ICC under the specified circumstances allowed and, at the same time, not permitted under the Statute and Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia for identical crimes? Why wasn't a comparable procedure adopted, whereby in the absence of the accused there would be no trial, but instead, an open court session at which the indictment would be read and the relevant evidence presented? In this context, it has been pointed out that, if at all, trials *in absentia* before the ICC could be deemed acceptable only if the accused has deliberately removed himself or herself by escaping from lawful custody or by breaking bail. In the other situations enumerated, it is thought that such trials would be unjust, especially as measures to secure the presence of an accused. Instead, the proceedings could be merely delayed in cases of illness and security checks could be conducted and bullet-proof glass could be put in place where threats against the accused could be undertaken. There are, however, also opposing views on this question, with calls for broadening the Court's authority to try absent individuals. Whatever the outcome may be, it should be noted that the Revised Draft Statute does not provide for *de novo* trials where a

judgment has been rendered in absence. This seems to be a regrettable omission.

CONCLUSION

As stated earlier, the primary purpose of this brief review was to draw attention to some unresolved issues related to the establishment of an ICC. It can be said that, at this stage, with the ILC having fulfilled its task, it is up to states to finally make a decision on a crucial point: are they truly committed to creating an (effective) International Criminal Court? Provided the political will to do so exists, strictly legal issues could, undoubtedly, be more easily resolved.