

AMERICAN ASSOCIATION OF JURISTS

DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT: SOME OBSERVATIONS AND SUGGESTIONS

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This document discusses some aspects of the Draft Statute for the International Criminal Court elaborated by the U.N. International Law Commission (1994 Yearbook of the International Law Commission, Vol. II, Second Part, doc. A/CN.4/SER.A/1994/Add.1, Part Two). Subsequently, several U.N. preparatory committees considered the Draft Statute elaborated by the Commission. These committees made a number of proposals. None of them, however, obtained full agreement. Consequently, all the issues contained in the original document of the Commission remain relevant. The Inter-Sessional Meeting, held from 19 to 30 January, in Zutphen (The Netherlands), which took place before the Third Prepcom, elaborated a consolidated document incorporating all the proposals made so far and modified the structure as well as the numbers of the articles of the original Draft. In the observations which follow the original numbers of the articles of the Draft elaborated by the Commission is maintained. The numbers of the articles of the consolidated document of the Inter-Sessional Meeting (doc. A/AC.249/1998/L.13) appear in brackets.

It should be pointed out that the Draft Statute would deserve a more analytical study than the present document. We have limited ourselves to the most fundamental aspects of the Criminal Court.

I. COMPETENCE AND JURISDICTION OF THE COURT

1. Competence of the Court. Article 20 [5] enumerates the crimes within the competence of the Court: crime of genocide, crime of aggression, serious violations of the laws and customs applicable in armed conflicts, crimes against humanity and the 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. The Annex mentions the four Geneva Conventions of 1949, Protocol I Additional to the Geneva Conventions, Apartheid, crimes involving the illicit traffic in narcotic drugs and psychotropic substances, torture and other crimes which include acts of terrorism.

Among the crimes within the competence of the Criminal Court which are not included, one should mention: the enforced disappearance of persons, rape and other sexual abuse, both of them contained in art. 18 of the Draft Code of Crimes against the the Peace and Security of Mankind, adopted by the International Law Commission in 1996, as well as other international crimes such as the traffic of children and international illegal adoptions. The enforced disappearance of persons and rape and other sexual abuse are included in one of the proposals which enumerates crimes against humanity. No proposal has been made, however, to include the illicit traffic of children and international illegal adoptions.

We are of the opinion that the generic denomination of crimes against humanity is not sufficient and that it would be necessary to enumerate explicitly each of

them (a proposal has been made along those lines) as it has been done in the Statute of the International Tribunal for ex-Yugoslavia (art. 5) and in article 18 of the Draft Code of Crimes against the Peace and Security of Mankind.

The Draft Statute does consider neither grave and massive violations of economic, social and cultural rights, contained in the International Covenant on Economic, Social and Cultural Rights, nor violations contained in a number of basic conventions of the International Labour Organisation, such as the ones dealing with the adoption of economic measures causing grave suffering to the population or the systematic persecution of union organizations and their leaders, forced labour, etc ... (There is no proposal covering such violations).

2. Jurisdiction of the Court. In accordance with art. 21 [6], the Criminal Court may exercise its jurisdiction:

A) in the case of genocide, if a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide has lodged a complaint (art.25, par.1) [45], and;

B) for any other cases, art. 21, para. b [45] stipulates that the Court may exercise its jurisdiction provided that:

1) the complaint is lodged by a State Party to the Statute which has accepted the jurisdiction of the Court with respect to the crime in question (art.25, par. 2) [45];

2) in relation with the crime denounced the jurisdiction of the Court has been accepted by:

a) a State on the territory of which the presumed culprit is detained (art. 21, 1, b), 1) [45];

b) a State on the territory of which the act or omission in question occurred (art. 21, 1, b) 1) [45] and;

c) in the case a third Party has requested the extradition of the presumed culprit, unless such request has been rejected, it is necessary that the third Party has recognized the jurisdiction of the Court (art. 21, 2).

In those cases where the acceptance of a State which is not a party to the Statute is necessary, the State in question may make a declaration accepting the jurisdiction of the Court with respect to the crime in question (art. 22, para.4).

However, all these preconditions enabling the Court to exercise its jurisdiction are not sufficient in the case of a crime of aggression.

Indeed, art. 23, para 2 [10] of the Draft Statute stipulates that a complaint of or directly related to an act of aggression may not be brought to the Court unless the Security Council has first determined that the act of a State that is the subject of the complaint is an act of aggression in accordance with Chapter VII of the Charter of the United Nations. This implies that even the State subject to an aggression cannot lodge a complaint to the Court against the aggressor(s) unless there is a decision of the Security Council in accordance with Article 39 of Charter.

It is not difficult to imagine what may happen in the case the aggressor State has the right of veto in the Security Council.

However, all these preconditions which must be fulfilled in order for the Court to exercise its jurisdiction become unnecessary if the Security Council, on the basis of a formal decision under Chapter VII of the Charter, seizes the Court (art. 23, para. 1 of the Draft Statute [10]). There are several proposals to reduce the intervention of the Security Council. None of them, however, aims at providing a real independence to the Court from the Security Council.

In other words, those Member States controlling the Security Council do not need to comply with any of the preconditions (be a State Party to the Statute and accept the jurisdiction of the Court) in order to lodge a complaint to the Court with respect to acts occurred in the territory of any State of the world, whether or not the State in question has accepted the competence of the Court. The Great Powers may lodge a complaint against the national of any other State without having to accept that their own nationals may eventually have to be in the defendant's seat.

In the course of recent years, we have witnessed the flexibility with which the Security Council has interpreted Chapter VII of the Charter utilizing it as a pretext to become a world government.

In the hypothetical case that all the preconditions foreseen in art. 21 are fulfilled and the Court plans to exercise its jurisdiction, the Security Council may still stop the action of Court if the Council decides to be seized of the matter in question in accordance with art. 23, para.3 [10].

Article 22 [9] foresees the acceptance of the jurisdiction of the Court "at the will" of the States with respect to a specific crime or crimes as well as for a specified period of time.

ARTICLE 8 (JURISDICTION RATIONE TEMPORIS), ARTICLE 15 (NULLUM CRIMEN SINE LEGE) AND ARTICLE 16 (NON-RETROACTIVITY) WHICH APPEAR AMONG THE PROPOSALS CONTAINED IN THE CONSOLIDATED TEXT OF FEBRUARY 1998 BUT ARE NOT INCLUDED IN THE ORIGINAL DRAFT ELABORATED BY THE INTERNATIONAL LAW COMMISSION, MAY PREVENT TO PURSUE AND BRING BEFORE THE COURT PERSONS UNPUNISHED AND WHO ARE RESPONSIBLE FOR HAVING COMMITTED CRIMES, INCLUDING THE MOST HORRENDOUS, RECOGNIZED BY THE INTERNATIONAL COMMUNITY, BEFORE THE ENTRY INTO FORCE OF THE STATUTE OF THE COURT.

II. THE PROCURACY (art. 12 of the Draft Statute [36]).

This organ is unipersonal. The Prosecutor is elected by the State Parties. The Prosecutor conducts investigations and prosecutions before the Court. However, the Prosecutor is not empowered to initiate investigations by proprio motu. Article 36 and 46 of the consolidated text contain a number of proposals regarding the composition, independence and activities of the Procuracy.

III. INDEPENDENCE OF THE JUDGES.

Article 10 [34] of the Draft Statute stipulates that the judges of the Court shall not while holding the office be members of the legislative or executive

branches of a State. Until the two thirds of the State Parties do not decide that the judges must dedicate themselves exclusively to the work of the Court, the judges may have private jobs. This issue relates to article 4 of the Draft Statute which foresees a hybrid permanent Court which meets when the Court's caseload requires it. Since the exclusive dedication of the judges, with its correspondent honoraria, is not foreseen, the Draft Statute does not exclude the possibility for the Judges of the Court to work simultaneously for a private firm or in the National Administration of their respective countries. One cannot see to what extent the condition of parliamentarian is less favorable for the independence of the judges that to work for a private firm or in the National Administration.

IV. LACK OF EFFECTIVE REMEDIES AND OF A STAND FOR THE VICTIMS BEFORE THE COURT.

Article 8 of the Universal Declaration of Human Rights and article 2, para.3 (a), of the International Covenant on Civil and Political Rights guarantee explicitly an effective remedy to the victims whose rights have been violated.

However, these provisions have been completely ignored. Indeed, the Draft Statute does not foresee any juridical personality for the victims: either directly as denouncers, even less as complainants; or indirectly through the Prosecutor (since this organ does not initiate any action) or through any form of popular action such as the lodging of a complaint by a non-governmental organization. Namely, the Draft Statute has neither included the right of the victims for an effective remedy, nor has inspired itself on the European or American systems which provide the direct and indirect access of the victims respectively to the European Court of Human Rights and to the Inter-American Court of Human Rights.

This violating omission of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights has as a consequence that no provision is foreseen in the Draft Statute concerning the question of the reparation to the victims, which was partially dealt with in the text of the Draft Statute of 1993 (restitution of goods).

A number of proposals have been made enabling the victims to denounce violations to the Prosecutor and providing the Prosecutor to initiate action ex officio.

V. CONCLUSION OF THE OBSERVATIONS TO THE DRAFT STATUTE.

The Draft Statute, as elaborated by the International Law Commission, foresees an international criminal jurisdiction which main elements may be characterized as follows:

- 1) Exclusion of the victims of the violation, who are not provided any legitimation to lodge a complaint either directly or indirectly;
- 2) Neither the Court nor the Prosecutor may initiate an investigation since these two organs will only be able to act upon after a complaint has been lodged either by a State Party or by the Security Council;
- 3) Any initiative on the part of the State Parties before the Court will be extremely limited since there exist a number of preconditions with regard to

the jurisdiction (concerning the complaining State, concerning the territory of the State where the acts occurred, concerning the territory of the State where the presumed culprit is detained, etc...) which may be difficult to fulfil.

4) The Security Council alone shall have in fact the initiative either to set in motion an action or to stop one already initiated by the Court.

In other words, the Draft Statute foresees a Court which will be the instrument of the Security Council: namely, a geopolitical arm in the hands of the Great Powers.

5) The Draft Statute does not represent any progress in relation with the present state of the international law of human rights and a number of rights guaranteed at the national level. Indeed, the principle of universal jurisdiction, namely the possibility to extradite and to judge the presumed offender (*aut dedere aut judicare*), is already contained in a number of international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against the Recruitment of Mercenaries, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Declaration on the Protection of All Persons from Enforced Disappearance.

In addition, a number of domestic legislations apply this principle. For example, the French legislation, which already foresaw the pursuit of an offender responsible for an act perpetrated outside the French territory if the author or the victim had French nationality, has now established, in accordance with the Convention against Torture, that the tribunals may judge any case involving an offender who is in French territory, indistinctly of his/her nationality and the nationality of the victim (articles 689, 689.1 and 689.2 of the French Code of Criminal Procedure, reform in force march 1994).

Similar provisions are contained in the Spanish legislation (art. 65 of the Organic Law of the Judicial Power, in accordance with the reforms of 1994), the Italian legislation etc.... These provisions have allowed the courts of those countries to pursue in different countries persons presumed to be responsible of criminal acts in Rwanda, ex-Yugoslavia and against Argentinean and Chilean army officers responsible of grave human rights violations.

As mentioned in the resolution of the European Parliament of March 1998, the Draft Statute must be amended in order to provide the Court with an independent Prosecutor with the power to conduct investigations and prosecutions by *proprio motu* without the previous consent of the State Parties. Also, and as stipulated in the resolution of the European Parliament, the Statute must guarantee the respect of the rights of the accused, the victims, the offenders and the witnesses through the whole trial.

VI. SOME PROPOSALS AIMING AT THE ESTABLISHMENT OF A TRUE INDEPENDENT AND IMPARTIAL INTERNATIONAL CRIMINAL COURT WHICH WOULD RESPOND TO THE CRITERIA OF UNIVERSALITY, OBJECTIVITY AND EQUALITY FOR ALL PERSONS AND STATES BEFORE THE LAW FOR THE CONSIDERATION OF THE PLENIPOTENTIARY CONFERENCE OF ROME.

1. The victims - individually or collectively - and/or their representatives should have access to the Court and be able to lodge complaints, either directly as it is done in the European system or indirectly as it occurs in the

Inter-American system.

The indirect channel of access to the International Criminal Court to lodge a complaint by the victims could be through the Committee on Human Rights and the Committee on Economic, Social and Cultural Rights and other treaty bodies established by international human rights conventions. These bodies, after having considered the complaint, would decide on its admissibility.

2. The General Assembly, the Commission on Human Rights, the Office of the High Commissioner for Human Rights and the two Committees established by the International Covenants on Human Rights should be competent to lodge a complaint to the Court.

3. The Security Council should be able to lodge a complaint within the scope of its specific functions in accordance with Article 24 of the Charter of the United Nations. The Council should utilize this power without making any distinction between permanent and non permanent members, that is, the right of veto and the principle of unanimity of the permanent members.

4. Paragraph 2 of article 23 [10] of the Draft Statute should be withdrawn. Indeed, it is not for the Security Council but for the Court to determine whether or not certain acts constitute a crime of aggression. The function of the Court is to determine whether or not the acts described in the complaint correspond to the criminal type defined in the norm. The norm in question is the definition of aggression adopted by the General Assembly in its Resolution 3314 (XXIX) of 14 December 1974. The power granted to the Security Council under Article 39 of the Charter, namely to "determine the existence ... (of an) act of aggression and ... (to) make recommendations..." constitute the foregoing step before the Council may exercise the specific functions conferred under Chapter VII of the Charter of the United Nations. It does not, however, grant the Council the faculty to interfere in the functioning of the International Criminal Court.

Paragraph 3 of article 23 [10] should also be eliminated since it prevents the Criminal Court to initiate (or continue) a trial when the Security Council is seized of the same complaint within the scope of Article VII of the Charter of the United Nations.

5. The competence of the Court *ratione materiae* should comprise all fundamental human rights violations contained in contractual or customary international norms. As a bottom line, the Court should be given the competence to deal with all the crimes contained in articles 16 to 20 of the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission in 1996.

6. The fact of becoming Party to the Statute of the Court should also imply the "de jure" acceptance by States Parties of the jurisdiction of the Court in respect of all the crimes within its competence. The acceptance "at the will" of the State Parties of the Court's jurisdiction is against the fundamental principles of international law.

7. The Procuracy should be able to initiate investigations by proprio motu or following a complaint lodged by the victims. The Procuracy should not be a unipersonal organ but a collegiate one with equitable geographical distribution of membership and with representation of the principle legal systems.

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