

**REFLECTIONS ON THE FUTURE OF THE  
INTERNATIONAL CRIMINAL COURT**

(presented by Dr. Sergio González Gálvez)

During the 57<sup>th</sup> regular session, the author hereof submitted reflections on the topic reproduced in the document CJI/doc.21/00. At the same session the Juridical Committee decided to include in its Agenda “Possibilities and problems of the *Statute* of the International Criminal Court” and appointed the author hereof as rapporteur on the theme. Meanwhile the General Secretariat was requested to obtain from the United Nations General Secretariat the reports of the Preparatory Committee of the International Criminal Court to submit them to the Juridical Committee together with any other documentation considered relevant, in consultation with the rapporteur.

Given the size of the documentation available and its ongoing updates, on 16 October 2000, the OAS Department of International Law informed the Juridical Committee members of the Internet address for rapid inquiries to the aforementioned preparatory papers.

During the 58<sup>th</sup> regular session of the Inter-American Juridical Committee, the Secretariat distributed among the members two large supporting documents on the topic.

Since the beginning of the study on this theme, the rapporteur expressed the importance of having to ensure validity of a permanent International Criminal Court independent of any other international body or organization, as a fundamental premise for ensuring the support that an international court of this nature requires.

Consequently, the rapporteur explained, the intention to include this topic is not to undermine the importance of this international instrument but rather to endeavor to fully understand the problems that the *Statute* may raise as it was approved and, in its case, analyze possible interpretations of those clauses that in the light of the practice of the States, could cause some problem in the future.

The Juridical Committee thereby estimated, according to the decision taken, that it could make an important contribution to the analysis of some of the topics relating to the validity of the *Statute* of the International Criminal Court, which could be discussed at a later Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the Organization, as recommended by the General Assembly of the Organization of American States (OAS) itself.

With this mandate in mind I make the following comments:

1. It is fundamental that the States Parties to the *Statute* fully understand that the Court is complementary to the legislation of each country. That is, each country which accepts the *Statute* of the International Criminal Court must adapt its legislation to what this Convention provides, otherwise the International Court would be competent to know of all cases in which some of the crimes included therein could be classified because there would be no applicable national criminal jurisdiction.

I would like to mention one of the clearest explanations on the principle of the complementary nature of the *Statute* of the International Criminal Court, in the article written by Dr. Cláudia Perrone Moisés from the Department of International Law, Law Faculty of São Paulo University, published in the Brazilian magazine *Política Externa* in its March/April/May

edition v.8, no. 4, by Paz e Terra, São Paulo, in 2000. She is right when she says that the jurisdiction on crimes provided in the *Statute* is based, on one hand, on the obligation to exercise criminal jurisdiction in relation to those responsible for international crimes referred to in paragraph 6 in the preamble of the aforementioned international instrument. On the other, the complementary principle is inspired necessarily on the principle of universal jurisdiction applicable to crimes considered serious "for their particular cruelty, savagery and atrocity", as mentioned in the International Law Committee of the United Nations when studying the subject in 1984.

The aforementioned Brazilian jurist also mentions that the *raison d'être* of the International Court is after all, for political reasons, to prevent underlying economic interests or structural problems of internal jurisdictions that those accused of such crimes go unpunished for the crimes committed by them.

The principle of complementarity expressly acknowledged in paragraph 10 of the Preamble of the *Statute* and article 1 thereof is provided in detail in article 17, which addresses "Issues of admissibility" namely in paragraphs 2 and 3 thereof. Yet because of its importance and consequences, the States should be alerted to the need to update, before or after the *Statute* prevails for them, their relevant military and penal laws and also create in the Inter-American Juridical Committee a group of advisors who can support the countries in this task.

2. The text of article 20 of the *Statute* could put in doubt the validity of the principle of *res judicata* or *non bis in idem*; hence this is when an exchange of viewpoints on the matter would seem convenient.
3. It is of the utmost importance to interpret the scope of article 54 of the *Statute* which states that the Attorney General of the International Criminal Court may undertake investigations in a territory of a State, even without the necessary consent of the corresponding national Attorney General. If this interpretation is not correct perhaps an exchange of points of view would be fitting at this moment.
4. The *Statute* includes as a penalty "Life imprisonment when the extreme gravity of the crime so justifies and the personal circumstances of the convicted person", a precept which undoubtedly could clash with those laws that prohibit life imprisonment, which is without a doubt, an increasingly more widespread opinion worldwide.
5. By a strange parliamentary circumstance, a definition was included in the *Statute* of "non-international armed conflict" taken from a decision in the Appeal Chamber of the International Criminal Court for former Yugoslavia in the *Tadic* case which literally says "It applies to armed conflicts occurring in a State territory, when there is a prolonged armed conflict between the government authorities and organized armed groups or between such groups". This definition goes in fact much farther than the definition which includes the *Protocol II on Non-International Armed Conflicts*.

That clause could cause problems to some States which have action by different kinds of territory armed rebel groups in their territory and which, for different reasons, do not consider it in their interest to apply this definition to those groups.

6. If, as we all expect, the Court will be an independent institution, the link between State and the UN Security Council should concern us, which gives the agency in question the option to ask the Court to postpone for renewable twelve months (article 16) the investigation or early stages of judgement of a crime. This point in our opinion requires careful analysis and on the matter we would like to mention the point of view of the American Association of Jurists on this topic. It considers that a treaty by which it is intended to set up an international court which includes clauses subordinating the jurisdiction activity of the court somehow or other to decisions of another agency and international organization, either to promote it, suspend its

action, delay or paralyze it, could be lawfully null, pursuant to article 53 of the *Vienna Convention on the Law of Treaties*, which establishes a sanction for any convention that is in opposition to an imperative rule of *ius cogens* general international law.

As the aforementioned American Association of Jurists states, clauses that establish this subordination to the Security Council are against the principle of independence of the judiciary and the right of any person to appeal to an independent court to settle the question, which is an imperative rule provided in Articles 10 of the *Universal Declaration of Human Rights*, 14 of the *International Pact of Civil and Political Rights* and 1 and 2 of the *Basic Principles relating to the Independence of the Judiciary*, approved by the UN General Assembly in its resolutions 40/32 and 40/46 of 1985.

7. Another problem raised by the *Statute* and which is relevant in the light of the current international situation, is the fact that the chapter on “War crimes” includes, for example, poisoned weapons and does not include mass destruction weapons, such as nuclear, chemical and bacteriological weapons due to the opposition by some countries on this issue. This could mean that should the *Statute* prevail and an attack of bacteriological, chemical or nuclear weapons occur, as in the fear that it would occur after the terrorist attacks against the USA on 11 September last year, it would be impossible to accuse those responsible before that Court.

8. There are undoubtedly other considerations to be studied, although not with the priority of those mentioned above. I refer, for example, to the provision in article 72 of the *Statute* referring to the cases where dissemination of information or documents of a Party State, at its discretion, could affect its security. Paragraph 5 thereof determines the measures that the acting State may take to satisfy its concern on disseminating information that affects its security interests, among which is included item d) according to which, among the constraints, the procedure could be adopted behind closed doors or unilaterally, which could be incompatible with the minimum guaranties that most laws grant the accused.

9. Likewise, there are clauses, such as those included in article 8 and in article 124 which clearly favor the military powers who have troops beyond their borders, when it states in the chapter on “War crimes” that the International Criminal Court will be competent regarding this type of crime “when they are mentioned as part of a plan or policy or as part of the large scale perpetration of such crimes” which suggests that, if it is an isolated act, despite its seriousness, the phrasing would not apply to the *Statute*, to which in fact the International Committee of the Red Cross objected at the Conference. In the second article mentioned herein there is another provision, also in the chapter on “War crimes”, with respect to a country signing the Convention can state that during a seven-year period, the competence of the Court will not apply, when the perpetration of one of these crimes described in the *Statute* is denounced by its citizens or in its territory; a safeguard which does not apply to other crimes included in the *Statute*, thereby giving unfair benefit to the military powers.

10. Lastly, mention must be made of the concern of some countries for the apparent incompatibility between the so-called “handing over” clause of the accused person before the International Court and the common precept in many constitutions regarding the prohibition against extraditing citizens.

In conclusion, the purpose of considering this topic should, in the best of cases, produce a document that alerts our Councilors to some of the problems that may arise once the *Statute* enters in force. It is not to discuss whether it should enter in force, which could in its case mean presenting interpretative statements from those who have not yet ratified. Or it could mean to outline a common strategy with a view to the first reviewing conference of the *Statute* which, according thereto, shall be called seven years after the aforementioned international document enters in force. Nor should the existing concern be forgotten before the proliferation of international juridical bodies, to which the President of the International Court of Justice, Judge

Gilbert Guillaume refers in a UN General Assembly in October 2000, in a document entitled *The proliferation of international juridical bodies: the outlook of the international legal order*.

Finally, I would like to request that, as my term of office on the Juridical Committee ends this year, another distinguished member of the Juridical Committee be appointed to assume the responsibility of rapporteur, should the topic continue on the Agenda.

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