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ISSUES OF THE ICC JURISDICTION

The International Criminal Court («the Court») is established as a permanent institution, which shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

The question of the Court's jurisdiction was a cornerstone to the establishment of the ICC.

The draft statute contains two provisions concerning the Court's jurisdiction upon which there is broad agreement. One emphasizes that the Court is intended to have jurisdiction over only «the most serious crimes of concern to the international community as a whole». The second emphasizes that the Court is intended to be complementary to national criminal justice systems, what means the Court would exercise its jurisdiction only in cases where States do not exercise their national jurisdiction, because they are unable or unwilling to do so. This is referred to as the principle of complementarity. The principle is of great importance, because most countries would like to ensure that their own jurisdiction will not be superseded unnecessarily.

Article 5 of the Rome Statute grants the court jurisdiction over four groups of crimes, which it refers to as the «most serious crimes of concern to the international community as a whole». They are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The statute defines each of these crimes except for aggression: it provides that the Court will not exercise jurisdiction over the crime of aggression until a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

Some states wanted to add terrorism and drug trafficking to the list of crimes covered by the Rome Statute; however, the states were unable to agree on a definition for terrorism and it was decided not to include drug trafficking as this might overwhelm the court's limited resources. India lobbied to have the use of nuclear weapons and other weapons of mass destruction included as war crimes but this move was also defeated.

The existence of universal jurisdiction over genocide, crimes against humanity and certain categories of war crimes is well established. Genocide has been acknowledged as subject to universal jurisdiction under customary international law. Crimes qualifying as genocide have been perpetrated since the earliest history of humankind, however the term «genocide» is relatively new. It is said to combine the Greek word *genos*, meaning race or tribe, and

the Latin «*cidium*», which means killing, and was coined to describe the Nazi activity in occupied Europe.

According to the ICC Statute, «genocide» means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The application of universal jurisdiction to crimes against humanity is similarly well established, and can be seen from the jurisdiction of the Nuremberg tribunal and from subsequent domestic litigation.

The definition of crimes against humanity in article 5 of the statute is based on the Nuremberg Charter and takes into account subsequent developments of international law, particularly relating to the recent ad hoc international criminal tribunals. Proposals for the definition of crimes against humanity include acts which would constitute such a crime when committed in a widespread and/or systematic manner, and/or on a massive scale, and/or on specified grounds.

According to the ICC Statute, the definition of this crime would include the following prohibited acts:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

That war crimes are crimes *ex jure gentium* and are thus triable by the Courts of all States has also been widely recognized. The Geneva Conventions specifically provide for universal jurisdiction over grave breaches. It is now

established that such jurisdiction applies in respect of a range of crimes beyond grave breaches, to crimes committed in international and internal armed conflict.

For certain of the war crimes included in the list of crimes in section A, the existence of universal jurisdiction is less clear than for others. In this respect, the ICC statute adopted a progressive approach, in line with trends towards broadening the scope of crimes under customary international law, particular in internal conflict and the reach of the principle of universal jurisdiction.

As it was mentioned above, the Court will not execute jurisdiction over the crime of aggression until it is not be defined. The difficulty lies in framing a workable definition of aggression which would apply to a wide range of situations. The definition must be precise enough for individuals to know what acts are prohibited; and it must be general enough to cover a wide variety of acts which may occur in the future, and which may not yet have been conceived of.

Except these problems some words are to be said on temporal and territorial jurisdiction.

The court's jurisdiction does not apply retroactively: it can only prosecute crimes committed on or after 1 July 2002 (the date on which the Rome Statute entered into force). If a state becomes a party to the Rome statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State.

During the negotiations that led to the Rome Statute, a large number of states argued that the court should be allowed to exercise universal jurisdiction. However, this proposal was defeated due in large part to opposition from the United States. A compromise was reached, allowing the court to exercise jurisdiction only under the following limited circumstances:

where the person accused of committing a crime is a national of a state party (or where the person's state has accepted the jurisdiction of the court);

where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the court); or

where a situation is referred to the court by the UN Security Council.

One of the main features of the ICC jurisdiction is it's complementarity. The ICC is intended as a court of last resort, investigating and prosecuting only where national courts have failed. Article 17 of the Statute provides that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

Article 20, paragraph 3, specifies that, if a person has already been tried by another court, the ICC cannot try them again for the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Thus, we can draw the following conclusions regarding the ICC jurisdiction.

1. The ICC can only exercise jurisdiction over crimes occurring after July 1, 2002, the date on which the Rome Statute entered into force.

2. The Court does not have universal jurisdiction. The ICC can only exercise jurisdiction over crimes committed on the territory or by a citizen of a state that has either ratified the Court's Statute or has specially consented to its jurisdiction over the situation in which the crime occurred.

3. If this is satisfied, then a state party to the ICC Statute or the ICC Prosecutor (with the approval of the judges) can refer a situation in which ICC crimes are suspected of having been committed to the Court for investigation.

4. If the UN Security Council refers a situation to the ICC using the Council's enforcement authority under the UN Charter, the jurisdictional requirements do not need to be fulfilled.

5. The ICC can only look into situations that are «the most serious crimes of concern to the international community as a whole». The ICC is designed as a court of last resort. The court may only begin a prosecution where a state that has jurisdiction over the case (which would normally mean the suspect's home country) shows itself «unwilling or unable genuinely to carry out the investigation or prosecution».