

TOWARDS AN INTERNATIONAL LAW OF CO-PROGRESSIVENESS

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Chapter 7

A PROPOSAL TO REFORMULATE ARTICLE 23 OF THE ILC DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT*

I. Introduction

The operations of the proposed International Criminal Court (the Court)¹ will no doubt be intimately related to the functions of the United Nations Security Council (the Security Council). As envisaged by the International Law Commission (ILC), the Court would be empowered to take jurisdiction over the crimes of

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¹ It has been the aspiration of the international community to establish such a criminal court since shortly after World War II. In 1994, the International Law Commission (ILC) adopted a Draft Statute for an International Criminal Court (ILC Draft Statute). See Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 43-160, U.N. Doc. A/49/10 (1994) [hereinafter ILC Report]. In 1994, the General Assembly decided to establish an Ad Hoc Committee to work on the matter. See G.A. Res. 53, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/53 (1994). In 1995, the General Assembly decided to establish a Preparatory Committee to further study the issues arising out of the ILC Draft Statute. See G.A. Res. 46, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/46 (1995). A draft of this commentary was informally presented to certain members of the Preparatory Committee during its first meeting held in New York from March 25 through April 12, 1996.

genocide and aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and other crimes punishable under certain treaty regimes.² The situations that would give rise to such crimes will most likely impact upon international peace and security and therefore be dealt with by the Security Council. As a result, it is imperative to strike a proper balance between the role of the proposed International Criminal Court and that of the Security Council. The attempt by the ILC to do so, as embodied in Article 23³ of its Draft Statute for an International criminal Court, is less than satisfactory. Chief among the criticisms lodged against the ILC draft Article 23 is that it would substantially hinder the independence of the Court and interfere with its judicial functions. In its current form, Article 23 would permit the Security Council to control the Court by merely placing an item on its own agenda and dealing with the matter itself.⁴ With respect to the crime of aggression in particular, Article 23 would preclude the Court from functioning merely because of inaction by the Security Council, and would mandate that the Security Council substitute for the Court in its decision-making role with respect to the existence of aggression, an essential element of the crime of aggression.⁵ The role envisaged by the ILC for the Security Council with respect to the crime of aggression is contrary to the basic norms of judicial function and has caused some to advocate removing the crime of aggression from the jurisdiction of

² ILC Draft Statute, art. 20, in ILC Report, *supra* note 1, at 70.

³ Article 23 of the ILC Draft Statute provides:

Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.
2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.
3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

ILC Draft Statute, art. 23, in ILC Report, *supra* note 1, at 84-85.

⁴ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, at 28, para. 125, U.N. Doc. A/50/22 (1995) [hereinafter Ad Hoc Committee Report].

⁵ *Id.*, para. 123.

the Court.⁶

The current ILC Draft Statute would give the Security Council more power than it has under the United Nations Charter (the Charter), both with respect to the general functioning of the Court and with respect to the crime of aggression in particular. The crime of aggression—the crime of crimes—should be part of the jurisdiction of the Court. Otherwise, the diplomatic conference for the establishment of an International Criminal Court would bear, in the annals of human history, the stigma of making retrogressive development of international law. The current proposal would only empower the Court to remedy minor symptoms, rather than enable it to eliminate one of the primary causes of breaches of international peace and security—the crime of aggression.

I believe that draft Article 23 can be reformulated to place the Court in a position essentially analogous to that of the International Court of Justice (ICJ), strengthen the Court's independence, preserve the prerogatives of the Security Council under the Charter and, last but not least, retain the Court's jurisdiction over the crime of aggression.

II. Proposed New Article 23

The proposal for a reformulation of Article 23 is as follows:

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations. Such referral is not, however, binding on either the Prosecutor or any Chamber of the Court with respect to whether there is enough evidence for initiating an investigation or prosecution proceeding against an individual or for individual responsibility.

2. The Security Council may, on its own motion or upon request by any interested person or government, pardon, commute or reduce the sentence imposed by the Court on a person convicted of the crime of (a) aggression, (b) threat of aggression, or (c) a crime against the peace, if the

⁶ *Id.*; see also International Commission of Jurists, Third Position Paper on the International Criminal Court, Aug. 1995.

interests of peace and justice so require. Such action by the Security Council shall not have any effect on the conviction itself.

3. The Court shall stay any judicial proceeding (other than investigative operations) upon the request by the Security Council when it, acting under Chapter VII of the Charter of the United Nations, concludes that such a stay is necessary as part of its enforcement measures to maintain or restore international peace and security. Such a stay shall be lifted and the proceeding shall continue, however, when:

- (a) the Security Council notifies the Court that such stay is no longer necessary; or
- (b) all relevant sanctions including both military and economic sanctions, if any, imposed by the Security Council have been suspended or terminated; or
- (c) in the absence of active involvement of the Security Council, the Court decides that such stay is no longer necessary to maintain or restore international peace and security, having given due regard to the relevant actions and views of the Security Council.

III. Commentary

A. Paragraph 1

Paragraph 1 of the proposed Article 23 is essentially the same as the first paragraph of the ILC draft Article 23. This paragraph is desirable as it provides a mechanism for the Security Council to utilize the Court, without the consent of the affected States, when it deems such use necessary to maintain or restore international peace and security. Otherwise, the Security Council would have to, where necessary, create ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. However, the last sentence of the proposed paragraph has been added to ensure that the independence of the Prosecutor and the Court do not suffer merely because of a referral from the Security Council.

B. Paragraph 2

Paragraph 2 is a substantial revision of the ILC draft Article 23. Paragraph 2 as drafted by the ILC gives the Security Council the exclusive power to determine the existence of the act of aggression. The ILC language would make it a necessary condition precedent to the bringing of a complaint related to an act of aggression that the Security Council has first determined that a State has committed the act of aggression. Its commentary intimates that such a finding by the Security Council would also be binding upon the Court, leaving it only the remaining task of determining the role of individuals involved in the act of aggression,⁷ much in the same style of a compensation commission administering individual claims after a country such as Iraq has been determined to be liable for all amounts.

Several criticisms may be made of the ILC formulation. First, giving the Security Council the exclusive power to determine the existence of the act of aggression is unwarranted. Under Article 24 of the Charter, the Security Council has “primary responsibility for the maintenance of international peace and security.” The ICJ has held, however, that “primary” responsibility is not exclusive responsibility.⁸ There is nothing in the Charter that excludes a judicial decision with respect to the act of aggression. Second, the ILC Draft Statute would require prior action by the Security Council in order to institute an action relating to aggression. In this way, the Security Council’s inaction could prevent any judicial proceedings

⁷ ILC Report, *supra* note 1, at 86 (“Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the Court to decide.”). Although there is some ambiguity in the ILC draft Article 23 and its commentary, it has been understood that the current draft would give the finding of the Security Council binding effect. See *Ad Hoc Committee Report*, *supra* note 4, at 15, 28; *Int’l Commission of Jurists*, *supra* note 6. See also *Draft Code of Crimes against the Peace and Security of Mankind*, art. 15, paras. 4(h), 5, in *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 244, U.N. Doc. A/46/10 (1991). The status of this provision is unclear at this moment. Recently the Special Rapporteur has recommended deleting much of this article. See *Report of the International Law Commission on the Work of its Forty-Seventh Session*, U.N. GAOR, 50th Sess., Supp. No. 10, at 33-39, U.N. Doc. A/50/10 (1995).

⁸ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, 1984 I.C.J. 392, 434 (Nov. 26).

on aggression from taking place.

Third, endowing a finding of the Security Council which relates to an act of aggression with binding force is unsupported by the Charter and violates basic norms of judicial functions and human rights. Nowhere does the Charter give the Security Council any power to substitute its decisions for those of judicial bodies. The ILC Draft Statute does not distinguish judicial decisions by the Court and political decisions by the Security Council. The determination of an act of aggression by the Security Council is solely for the purpose of exercising its own functions in maintaining and restoring international peace and security. On the other hand, a judicial decision by the Court on an act of aggression is intended for the determination of individual responsibility. Permitting the Security Council, a political body, to decide certain elements of a crime entailing individual responsibility violates the basic human rights norm that requires judicial determination of every element of the crime. For this reason, it is likely that the Court would invalidate the ILC draft provision to the extent that it would invest Security Council findings of aggression with binding force; theories for and judicial decisions asserting the power to review Security Council decisions have now emerged.⁹ Whatever powers a criminal court has or does not have, it should never cooperate with violations of fundamental norms of human rights. If necessary, the Court should stay clear of such violations by declining to exercise jurisdiction. Of course, this is not to say that decisions of the Security Council acting under Chapter VII should have no value. These determinations will inform the decisions of the Court, but the Court must have the ultimate power to reach its own determination.

The reformulated paragraph 2 would leave the Court free to reach its own conclusions on acts of aggression while, at the same time, preserving the prerogatives of the Security Council under the Charter by giving it the power to pardon or reduce the penalty without removing the conviction. This is analogous, although not identical, to the power that the Charter gives to the Security Council regarding non-compliance with ICJ judgments. Under Article 94(2) of the Charter, if any party to a case fails to carry out a judgment of the ICJ, the Security Council may in its wisdom, but is not obligated to, make recommendations or take measures to enforce the judgment. Wide discretion is granted to the Security Council. In making its decision whether to enforce a judgment of the ICJ, the Security Council may consider a variety of factors, including political considerations.¹⁰ If enforcing such a judgment would endanger international peace and security, the Council should not

⁹ See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, 5-24 (Appeals Chamber, the Int'l Crim. Trib. for the Former Yugo. 1995).

¹⁰ See Oscar Schachter, *International Law in Theory and Practice* 234 (1992).

(and presumably would not) enforce it since it has the responsibility under the Charter to maintain international peace and security. Thus, one may say that peace is given priority in this context over other considerations.¹¹

Similarly, the reformulated paragraph 2 would give the Security Council the power to alter the punishment to be meted out by the Court where appropriate. For example, if the Security Council believes that there are factors that the Court has failed to consider or feels that a downward alteration of the sentence is necessary for the maintenance or restoration of international peace and security, it may respond accordingly. Such power, of course, is not the power to review the judgment of the Court, because the conviction cannot be affected.

The reformulated paragraph 2 is consistent with the Nuremberg precedent and State practice. The power to reduce or commute the sentence without affecting the judgment of guilt was granted by the Nuremberg Charter to the Control Council for Germany.¹² Eventually, the Control Council altered the sentences of several defendants.¹³ At the national level, the executive branch of the government generally has the power to pardon and to commute or reduce sentences. In some countries, the power to pardon may be very broad and completely discretionary. The power granted by the reformulated paragraph 2 is somewhat circumscribed in that the judgment of conviction by the Court may not be affected by actions of the Security Council.

C. Paragraph 3

Paragraph 3 is also a substantial revision of the ILC Draft Statute. The ILC Draft Statute precludes the simultaneous consideration by the Court of a situation being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII, unless the Security Council decides otherwise. The ILC Draft Statute has the effect of permitting the Security Council to prevent any prosecution relating to such a situation merely by placing an item on its agenda and dealing with the situation itself. If there is inaction by the Security Council after it has placed the relevant item on its agenda, the Court will forever be precluded from acting on the matter. This would have a serious effect on the Court as almost

¹¹ Cf. Richard Falk, *Reviving the World Court Case Concerning Military and Paramilitary Activities In and Against Nicaragua*.

¹² Charter of the International Military Tribunal, art. 29, reprinted in Telford Taylor, *The Anatomy of the Nuremberg Trials* 653 (1992).

¹³ See *id.* at 600-18.

all prosecutions contemplated for this Court will be, in one way or another, related to such a situation. This treatment is unjustified. The expressed basis for this provision is Article 12 of the Charter.¹⁴ However, the ILC Draft Statute has read more into Article 12 than it deserves. As the ICJ has held, “[w]hile in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the [ICJ].”¹⁵ Similarly, there should not be such a provision with respect to the Security Council and the proposed Court. Moreover, as the ICJ ruled, there was nothing irregular in the simultaneous exercise by the ICJ and the Security Council of their respective functions.¹⁶ Judicial functions and actions of the Security Council are complementary more often than not.

This is not to say, however, that the Security Council should not have any influence in the proceedings of the Court. Although the reformulated paragraph 3 would not permit the Security Council to request a stay of investigations, it would permit the Security Council to request a stay of the judicial proceedings, a request which the Court must respect. This is intended to preserve the prerogatives of the Security Council acting under Chapter VII of the Charter. Although there is no justification for precluding the Court from exercising its judicial functions as soon as a situation is addressed by the Security Council, once the Security Council has made its decisions with respect to the situation, its enforcement measures must reign supreme unless such measures would violate *jus cogens*.¹⁷ Under Articles 25 and 103 of the Charter, decisions of the Security Council must be carried out. As the creature of a treaty made mostly by member States of the United Nations, the Court

¹⁴ ILC Report, *supra* note 1, at 87. Article 12 of the Charter provides:

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

U.N. Charter art. 12, para. 1.

¹⁵ *Nicaragua v. U.S.*, 1984 I.C.J. 392, 435 (Nov. 26).

¹⁶ *Id.*; *United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3, 21 (May 24).

¹⁷ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 1993 I.C.J. 325, 440-41 (Sept. 13) (separate opinion of Judge Lauterpacht, *judge ad hoc*). The questions whether and how Security Council decisions should be subject to judicial review are beyond the scope of this commentary.

should also carry out decisions of the Security Council so long as the essential judicial character of the Court is not impaired. Granting a stay of a judicial proceeding without terminating the entire proceeding is the appropriate solution. Under this formulation, merely placing an item on the agenda of the Security Council would not preclude judicial consideration of the same matter. Nor would inaction by the Security Council prevent the Court from functioning. The Security Council must affirmatively reach a decision and make a request to the Court before the Court is required to grant a stay. Finally, the Court is not required to stay investigations, as timely investigation is essential to preserving evidence. However, the Court may, in its wisdom and in the interests of justice, grant such a stay.

The reformulated paragraph 3 also lays down the conditions for lifting the stay granted upon the request of the Security Council. The stay, of course, should be lifted upon notification by the Security Council that it is no longer necessary. In the absence of such notification, if all relevant sanctions are no longer in effect or, if the Security Council is not actively involved in the situation at all and if the Court determines that the stay is no longer needed, the stay should also be lifted. These provisions will cover basically all situations when the stay is no longer necessary.#

Postscript. After the publication of this paper in the spring of 1996, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June-17 July 1998 at Rome (Rome Conference), adopted the Rome Statute of the International Criminal Court (A/CONF.183/9; <http://www.icc.int>). Article 16 of the Rome Statute states:

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

