

1. The international system is a dynamic one. It can be compared with a mosaic where the single pieces - actors, institutions - form the picture. The single pieces may move and change their shape and in doing so the whole mosaic moves like a mobile thing and the picture gets a different appearance. The project of an International Criminal Court (ICC) is a new piece within that mosaic that has to fit into the system as it stands now but must also be equipped to move and change.

2. International law has developed from a *ius gentium*, that means the law of peoples, to a law between sovereign states. In this context responsibility for international wrongful acts is primarily an obligation of states. The draft articles of a code on State Responsibility having been provisionally adopted by the International Law Commission (ILC) contain a distinction between crimes and international delicts. In this text (Art. 19) an international crime is defined as the breach of an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime. These interests are identified *inter alia* as the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples as well as the human being and the preservation of the human environment. This catalogue is convincing especially as it is drafted as an open one. Only the "criminalization" of state behaviour is in itself problematic because "punishment" as a consequence of a crime committed by a state cannot be implemented.

3. In fact individuals are acting on behalf of the states, and since the Nuremberg Trials, the principle of individual responsibility and punishment for crimes under international law is settled and has been reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The latter have

*Assistant Professor of International Law, University of Graz, Austria.

been created by the Security Council under chapter VII of the UN Charter, and, as regards to their jurisdiction, are mainly related to serious violations of international humanitarian law and situations of international war respectively national civil war.

4. It is time for a permanent treaty-based International Criminal Court (ICC) to be established to enforce individual criminal responsibility under international law. The Draft Statute prepared by the ILC, which is now under consideration by the Preparatory Committee (PrepCom), gives the court jurisdiction with respect to four crimes enumerated in Art. 20 a-d, as well as treaty-related crimes (Art. 20 e). The PrepCom's working group on the definition of crimes produced detailed definitions on the core crimes which are "genocide", "crimes against humanity", "war crimes" and "aggression". It recommended that the texts defining genocide and crimes against humanity be included in the draft consolidated text of the proposed court's statute. The texts on war crimes and aggression are not consolidated so far; there is still no agreement whether to include the crime of aggression at all in the text. The working group also considered crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances without prejudice to a final decision on their inclusion in the statute.

5. There is another draft adopted by the ILC which is relevant to an international criminal jurisdiction. Already in 1947, in the light of the principle *nullum crimen sine lege* the ILC was requested to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and its Judgement and to prepare a draft Code of offences against the peace and security of mankind. The first version prepared in 1991 comprised a list of 12 categories of crimes; these have been reduced by the ILC to five in 1996. Four of them are identical to the four core crimes now contained in the draft statute of the ICC. The draft Code on offences entailing individual criminal responsibility and punishment extends its scope of application only to crimes against United Nations and associated personnel. Other crimes included before such as mass violations of human rights, international terrorism, illicit traffic in narcotic drugs are now deleted or included under war crimes, such as, for example, the wilful and severe damage of the environment. The considerable reduction of the categories of crimes, and, as a consequence, the scope of the Code itself was made to reach consensus and support

by Governments for adoption. Proposals are now being made to integrate the Code of Crimes against the Peace and Security of Mankind into the Statute of an International Criminal Court.

6. To summarize there are three drafts prepared by the ILC being now under consideration and each defining crimes under international law. The catalogue of crimes within the draft code on state responsibility is the most modern and extended one. For the time being it only seems that a majority of states will not identify them as crimes but as “international wrongful acts of a serious nature” or “exceptionally serious wrongful acts” to avoid the penal implication of the term “crime”. The list of crimes under the two drafts regarding individual criminal responsibility have been reduced to core crimes which are closely related to international or national war situations. The inclusion of crimes committed during peacetime would be indispensable.

7. A too narrow context to war-related violations of international law would hinder an ICC to move within the mosaic as described above and to be open for future or even given requirements. Therefore its jurisdiction has to be formulated in more general terms which would allow for a dynamic interpretation by the court itself as well as by State Parties. That means it should be made clear in the statute that the setting up of an International Criminal Court is a means to pursue the main aims and functions of the international community. If justice is one of these fundamental values as well as goals there are three areas of application of an international criminal jurisdiction: crimes touching upon the general functions of the international community itself; crimes touching upon the inherent rights of states as well as individuals, and crimes touching upon the function of the United Nations and associated personnel.

8. The article defining the jurisdiction of an ICC could therefore be drafted as follows: “The court has jurisdiction in accordance with the statute as regards actions being gross infringements of universally accepted standards of human behaviour that violate the general principles of international law recognized by the community of nations with respect to the following categories of crimes:

- a) any crime resulting in the violation of any of the fundamental values and goals to be pursued by the international community;

- b) any crime resulting in the violation of any of the accepted rights of state parties, peoples, groups of individuals or individuals;
- c) any crime intended to jeopardize the United Nations position and the application of its role by its personnel.

9. The method of accepting the jurisdiction of the court should be regulated as *forum prorogatum*. When a situation is referred to the court it should be up to the court to determine whether it fell within the courts jurisdiction and within its capabilities to try. The court must begin with clear and precise definitions of the grave crimes to come under its jurisdiction. Specified definition of these crimes should not be given in the statute of the court now but be developed by its case law. A standing Committee of State Parties as foreseen in the updated Siracusa Draft would then be an appropriate organ to support the elaboration of a Code containing a well defined catalogue of crimes entailing individual criminal responsibility under international law. The statute should contain provisions for a review mechanism to enable State Parties to agree on such a Code which should be open for further expansion. That means also that the draft code of offences against the peace and security of mankind should not be adopted as it stands now but be adapted in view of the practice of the ICC.

10. Such a concept may be criticised as neglecting the principle *nullum crimen sine lege*. The deficit of the Nuremberg Trials should be overcome by defining the offences over which the proposed court will have jurisdiction. But as such definitions are so difficult to find and to agree upon, the project of an ICC would be hindered and delayed if the statute itself should contain offence definitions. It is accepted under international criminal law that it is not necessarily required that the offence be proscribed by a pre-existing statute, only by pre-existing law and that a tribunal can determine the content of relevant international law.

11. The conclusion is that the idea of an international community ought to be reinforced and the basic principles of international law as they stand now be identified. In 1945 the primary goal of the United Nations was to re-establish and guarantee peace and security in the sense of war prevention. This purely negative peace-concept has changed to a positive one which contains, among others, the protection of human rights and the environment, self-determination

of peoples and sustainable development. The principles of territorial sovereignty and non-intervention in internal matters have a different meaning today as international co-operation and dependency question borders as well as the exclusive national jurisdiction regarding the well established principles of international law. The latter have to be identified on the basis of mutual consent.