SALVO ANDÒ*

Within the context of the debate on the competence and the functioning of the International Criminal Court, the problems of its organization have not been as yet tackled adequately. This is understandable for many reasons.

a) Although it is agreed that setting up an International Criminal Court is of little use unless it is given the necessary means to function, it is however evident that the question of its means - which and how many - is conditioned by the procedural model chosen, and most of all by the quality and quantity of the crimes which will fall within its competence. To date the problems to be solved in this field are many.

b) There is another reason for the little attention that has up to now been given to the organizational problems.

The ICC's jurisdiction is of the complementary type: that is a jurisdiction which has the aim of making up for the lacunae of the national jurisdictions, when these are not in a position to function, or are prevented from functioning, or do not guarantee a serene and impartial form of justice. At the present stage of the debate the most relevant question appears to be how to work out the complementarity between the two jurisdictions.

The project of a Statute drawn up by the ILC, which has undergone amendments on many points by the Preparatory Committee, has wisely opted for compromise solutions. The only point on which it seems that there cannot be significant adaptations is the one concerning the so-called consensual principle. The "founder" States must accept the jurisdiction of the ICC for the various crimes committed if the ICC is to function. And the States - by accepting such jurisdiction - must cooperate with the International Court. The "founder" States must therefore guarantee by all means the proper functioning of the apparata with which the ICC will be endowed, considering that there will be an ad hoc Committee, the Committee of States Parties, which will make it possible for them to be constantly

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* *Professor of Public Law, Faculty of Law, University of Malta.*

aware of its needs and difficulties. Therefore the organizational problems, as problems of the ICC, will also be the problems of the "founder" States.

c) The problems of organization cannot be tackled and solved on paper, which means that the provisions of the Statute will not be enough to solve the practical problems of the running of the ICC. It will therefore be necessary to consider the type of collaboration that the ICC will receive from the States who will from time to time be involved in its activities and also the difficulties encountered in the different territories, for example for the arrest of persons responsible for the crimes against which proceedings are instituted and for the collection of evidence.

From this point of view it is worthwhile to reflect on the experiences of the two ad hoc Courts which have been active for some time now.

What is the use, for instance, of allotting substantial budgets if one is then not in a position to spend, or to guarantee legal assistance to defendants if in a given place there are no lawyers in a position to defend, as in the case of Arusha?

On the organizational level, then, besides the responsibility of the States, the Security Council of the UN will also have a significant responsibility to guarantee the proper functioning of the ICC.

With respect to the ICC, the Security Council does not have the role of promoter as it had for the two ad hoc Courts, but it exerts very significant powers which influence the proper functioning of the ICC.

Suffice it so say that:

a) It is the Security Council which has to declare that an armed aggression has taken place. The Court in fact cannot consider individual acts of aggression without the previous verification by the Council of acts of armed aggression.

b) It is up to the Security Council to start legal proceedings (for crimes related to the situations provided for under article 39 of the UN Charter).

c) It is the Security Council which, according to the provisions of article 23 of the Draft Statute, can debar the Court from considering various crimes of aggression, in cases where these are connected with a situation with which the former is dealing within the framework of Chapter VII.

And then, in cases of conflict between States and the ICC, such as when it is being determined whether a State's jurisdiction is willing and able to proceed against persons responsible for international

crimes, the Security Council is not obliged to stay neutral. If a State is not in a position to guarantee the proper functioning of justice, it is the duty of the Security Council to intervene, precisely to guarantee peace. The refusal or the inability to proceed against such serious crimes, and the contextual refusal to allow the ICC to start proceedings (in the case where the States have signed the Treaty setting up the ICC) do not represent normal situations of denied justice. But they show up a grave institutional crisis. And in cases where not even the ICC can operate, due to the limits of its jurisdiction, then humanitarian or perhaps even military intervention will be necessary.

All in all, if the States having the duty to collaborate with the ICC refuse to do so, or if they assume attitudes which obstruct or defy investigations approved by the ICC or the decisions taken, these actions do not constitute subversive acts against the jurisdiction of an International Court, whereby the Security Council would have instruments to intervene. This means that in today's world there will be an ever stronger link between a given system of international legality and the maintenance of peace. Whoever moves out of international legality, also vis-à-vis the respect of human rights, will be effectively endangering the peace. The move from the protection of crimes against humanity, perpetrated during war or in peacetime, to the protection from the most serious violations of human rights, is at last becoming closer.

One must have faith in the positive mechanisms which should mark the future of international relations. Today the best Statute possible for the ICC is the one which will be accepted by the largest number of States. Having an operational ICC will mean that, besides the right to military and humanitarian intervention, we will also have the right to judicial intervention.

It is all a matter of eroding further in this field some unjustified prerogatives of the sovereignty of the States. It is also a question of spreading, by means of the punishments meted out to the individuals responsible for horrendous crimes, a stronger culture of legality in the international community, one which is not limited to declarations of principle, but which is entrusted mainly to the rules of a fair trial and to the sanctions inflicted by such a trial. The resistance encountered up to now by the attempts to set up the ICC cannot all be explained away as hostility to these principles.

Many people are afraid that the ICC's jurisdiction will not be the same to all; others fear that it is too equal.

Those who are afraid that the power of the stronger States might

take over that of the Court would like to see it written down in the Statute that the Court has priority over national jurisdictions.

On the contrary, those States who have up to now enjoyed the power of establishing the rules of war and peace and the right to declare, through the use of the right to veto in the Security Council, what is right and what is not, are afraid that the activity of a truly neutral juridical organ, which applies the laws and judges according to justice, might create a new international order based on a community of truly equal States. And hence from this point of view the competence of the Court should be reduced. The Court in this instance, must enjoy few powers, and specific ones, only those powers which are conceded by the States.

It is important to take into account both types of resistance in order to succeed in the setting up of the Court in the short term. Flexible solutions are needed, those that can allow the establishment of procedures which will widen the powers of the Court, according to a trend which requires States to increase their ethical duties and decrease arrogant and unjustified displays of national sovereignty.