

COMMENTS ON THE INTERNATIONAL CRIMINAL COURT

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I understand that I am substituting for Cherif Bassiouni. Those are big shoes to fill, and instead of providing the very detailed discussion of the history of the International Criminal Court (ICC) and all its component parts which he is uniquely qualified to deliver, I will instead provide my own very brief overview of where we are on the proposal to establish an ICC.

This is an exciting time in the history of the consideration of the ICC. Over the past few years, we have moved from a rather academic study of the prospects for having an ICC, to the verge of serious negotiations. In the context of major treaty negotiations and diplomacy, it is as if we have gone from crawling to sprinting in mere moments. We are all trying to figure out whether we can, in fact, perceive the finish line somewhere in the distance.

Let me begin by describing how we got to where we are, then describe the outlines of the current ICC proposal now being considered, and finally outline what we are now discussing at the United Nations about next steps.

The recent movement in the United Nations toward an ICC began several years ago with an initiative from the Caribbean states. They felt that an international court could help them, as small states, deal with major drug traffickers. They demanded that the issue be considered seriously. Not long thereafter, events in the former Yugoslavia, resulting in the creation of the United Nations' ad hoc tribunal, brought international prosecution of war crimes to the fore in a way not seen since the Nuremburg and Tokyo trials. The widespread support for the Yugoslavia and Rwanda tribunals has been absolutely essential to making the ICC proposal a viable one.

In addition, the world began to recognize, as never before, that people were being subjected to horrendous crimes—we see this on CNN

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every night—in places where there is no effective government to investigate and prosecute manifestly criminal acts. It was natural, especially in light of the ad hoc tribunal precedents, to refocus attention on the proposal for an ICC.

In 1992, the General Assembly asked the International Law Commission (ILC), an independent group of experts which works closely with the United Nations, to prepare a draft statute for a court. In a single year (actually a session of three months), it came up with not only a draft but one that because of the extraordinary care and thought put into it, moved the court proposal from the drawing boards and into the realm of reality. All of a sudden, the world community had a tangible work product before it—one that was (and continues to be) well-regarded as a basis for further work by governments. In 1993, the United Nations General Assembly asked the ILC to review its draft in light of comments by states. The Commission did so, and in 1994 presented to the United Nations an even more polished draft, along with a recommendation that the United Nations General Assembly convene a conference of plenipotentiaries to finalize the statute for adoption.

Despite the progress made, a number of states felt that there were still many uncertainties with the draft, and the time was not ripe for a conference. As a result, the United Nations General Assembly established an ad hoc committee open to all states, which met for four weeks in two sessions during 1995 to review the major issues presented in the ILC text.

The Committee's work was a success. It produced a fifty-odd page report which outlines key issues. In some important areas, there was a clear convergence of views among delegations as the discussions continued. In others, while consensus has not been reached, at least the contours of the issues have become clear.

What kind of a court are we talking about? First, there is overwhelming support for establishing a court by means of a treaty, as opposed to having the court established by the Security Council, or by amendment of the United Nations Charter as a new organ of the United Nations. This means that it would bind only the parties to it—the states which join it voluntarily. As a result, it must appeal to the broadest range of states, big and small, rich and poor, otherwise it will end up having little practical impact.

The court will handle crimes of individuals, not states. There have been a number of proposals for the subject matter jurisdiction of the court. The ILC suggested the following: crimes under international humanitarian law, such as war crimes, both under customary law and under the 1949 Geneva Conventions, genocide, as defined in the Genocide Convention, and crimes against humanity, plus crimes under a series of treaties dealing

with terrorism—hijackings, hostage-taking, etc., and drug crimes. In addition, the ILC proposed that the court include the crime of aggression within its jurisdiction.

In the past year, we have seen broad support develop for the proposition that the court's jurisdiction be limited to "core" crimes, in this context meaning the international humanitarian law crimes—in general terms, the same crimes which are part of the jurisdiction of the Yugoslavia and Rwanda tribunals.

There has come to be much less depth of support for inclusion of drug crimes and crimes under the terrorism conventions. States wanting to include drug crimes were not able to win sufficient support for the idea, given the concern that an international drug court would be flooded with cases, and could not deal effectively with a type of crime which relies on networks of criminal activity.

With respect to aggression, the Russians and some others support its inclusion, arguing that to fail to do so would be a regression from what was acknowledged at Nuremberg, basically that individual criminal responsibility exists for the crime of aggression or waging aggressive war. Most delegations, including that of the United States, would not include aggression—even if there had to be a predicate finding by the Security Council that the state in question had committed aggression, and only then would the ICC bring a case against the leader or leaders of that state. The reasons include the difficulties associated with defining aggression, and the very difficult political issues attached to getting the court into the business of handling this momentous crime. In sum, most states are willing to at least begin with an ICC having jurisdiction over international humanitarian law violations, and perhaps add more later, for example by means of a periodic review mechanism.

What about the role of the Security Council, and its mandate under the Charter to maintain and restore international peace and security? One of the best reasons for establishing an ICC is to avoid the inconvenience of the Council having to act each time to set up ad hoc tribunals. The ILC envisioned a relationship between the ICC and the Council which calls for the Council to be able to refer situations to it, for the Council to, in effect, pre-empt prosecutions in relation to situations of which the Council is seized, and for the Council to make a predicate finding with respect to aggression by a state, before the ICC could hear a related case involving the commission of the crime of aggression by an individual. The United States supported this proposal with the exception of preferring that aggression not be within the jurisdiction of the court in any circumstances, and would also require, generally, that all humanitarian law situations be referred by the Council. Other states want only a limited role for the

Security Council, or none at all, in order to avoid what they consider would be a politicization of the court.

One more point, and then I promise to get out of the procedural weeds, is the repeated mention in the ad hoc committee of something called "complementarity." I don't know who came up with the term, but I can assure you that not everyone agrees on what it means. All delegations strongly agree with the proposition that the ICC is intended to be complementary to national criminal justice systems in cases where trial procedures may not be available or may be ineffective. The ILC draft statute says so in its preamble. So much so good—we agree that the ICC is not supposed to replace national courts. But what does this mean in practice? For one group, it means that the ICC comes into play only when interested states agree that it should. For others, it means that if, in the sole judgment of the court, the court is better able to handle a case than, say, the courts of Mexico, Thailand or the United States, then the ICC could decide that it will take the case—regardless of the fact that a state stands ready and willing to prosecute.

Thus, on the one hand there are those who envision a court which, from the beginning, would have jurisdiction over the broadest range of crimes under international law, with the ability to reach into states which are parties to the ICC and pluck out defendants for prosecution regardless of the views of interested states. On the other hand are those who would set up a court only as a stand-by, leaving cooperation with it in large measure optional. Something in between would be acceptable to most states.

There is more: Issues related to due process, extradition, structure, funding, sentencing, etc. Rather than address those issues here, I will simply recommend that you read the ILC's draft statute and the report of the Ad Hoc Committee.

Today we finished a week of debate in the Sixth Committee of the United Nations General Assembly on this subject. The General Assembly will adopt a resolution near the end of the year on next steps, and we are negotiating the text of that resolution now. The major issues under discussion are:

- 1) Although it is clear that more work prior to the commencement of the 51st General Assembly in September, 1996 will be commissioned, the question is how long? Proposals range from two to ten weeks, with most bets currently in the four to six range.
- 2) What would the group be called? Would we continue the Ad Hoc Committee, or convene something called a "preparatory committee." The phrase "prepcom" implies strongly that we

are preparing for something, in other words, a diplomatic conference, and that such a conference should be expected at some time in the near future.

- 3) What type of work will it do? Would it simply continue the discussions of the Ad Hoc Committee, or would it combine discussions with drafting of texts—in effect beginning serious negotiation of a consolidated draft for submission to a conference of plenipotentiaries?
- 4) Finally, when will a diplomatic conference be called? Should we decide now, by superimposing a timeframe on the preparatory work, or should we wait until next fall, and judge then what progress we have made? Italy has offered to host a diplomatic conference, and would like that conference to take place in 1997. Other states, including the United States, feel that the decision about when to convene a conference is premature until we see how far our work progresses.

I cannot comment in any detail on the negotiations, but I will say that most states seem favorable to having a series of meetings, called a “prepcom.” If that is what transpires, we will have a very ambitious schedule of meetings to discuss all the key issues raised by the ILC statute, and any other key issues we can think of.¹

So I began by saying that this is an exciting time for consideration of the issue of establishing an ICC. Even the President is interested. At the dedication of the Dodd Center at the University of Connecticut on October 15, 1995, he said that “nations all around the world who value freedom and tolerance [should] establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law.” Such a permanent international court, in the President’s words, “would be the ultimate tribute to the people who did such important work at Nuremburg.”

1. In fact, in its subsequent resolution 50/46 of December 11 1995, the United Nations General Assembly decided to

establish a preparatory committee open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries, . . .

In that resolution, the General Assembly decided that the preparatory committee would meet from March 25 to April 12 and from August 12 to 30, 1996.

The challenges are great—even daunting. On some key issues there are very significant differences among states. In addition, there is an incredible amount of work still to be done. The United States and others believe that it is essential to have developed the rules of procedure and evidence for the court in conjunction with the statute. This is necessary to protect the due process rights of defendants and should not be left to the court's judges. There are many complex issues concerning the relationship of the court to national judicial systems. One example close to home is the role of national courts in transferring persons to the court. In the United States, extradition requires a judicial finding of extraditability. Wouldn't that be needed for surrender of persons from the United States to an international criminal court, even if we don't use the word "extradition?" But if our courts can undertake a review of whether someone should be extradited, can't the courts of other states? Would the ICC be able to overrule a U.S. court that found someone not properly surrenderable to the ICC?

What about the role of the court's prosecutor? Should he or she be able to bring cases on his or her own? Would he or she have powers allowing him or her to demand production of documents? Witnesses? Or would the prosecutor primarily rely on state authorities, and their good faith?

An issue of a different dimension is that we have seen a lack of involvement and participation by developing states in the work of the Ad Hoc Committee. All delegations realize and are explicit in their speeches about the need for broader participation. Otherwise, the court, if established on the basis of a treaty, would be unlikely to attract broad acceptance. You can imagine that a court which is primarily comprised of western states would not be capable of fulfilling its promise. We must guard against that result.

We are now in the process of shaping an institution that would have an important impact on world society. More serious work by governments was done on the subject of the ICC in 1995 than ever before. In 1996 we will see an even greater level activity. Success is by no means guaranteed, but the elements are in place for moving ahead. It will be an exciting and interesting year for the ICC proposal.