SECOND SESSION:

FOR AN EFFECTIVE INTERNATIONAL LAW: FROM THE PREPARATORY COMMITTEE TO THE DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT - THE COMMITMENT OF THE INTERNATIONAL COMMUNITY

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Mr Chairman, Distinguished Participants,

It is a great pleasure and honour for me to have been invited to speak at this Conference which has managed to assemble such distinguished personalities, many of whom have long been involved in the movement supporting the creation of a Permanent International Criminal Court. In our view the importance of this meeting is further enhanced by its timing. The efforts to create an International Criminal Court are at a crucial stage, as witnessed by the current debates within and outside the Preparatory Committee. It is our hope that the deliberations of this Conference will assist in facilitating the achievement of widespread State support for the establishment of an International Criminal Court.

The quest for international justice through the setting up of a permanent International Criminal Court is a challenge that has faced the international community for a long time. The crimes of dictators, torturers or death squads are usually committed because the perpetrators rely on impunity. They know that there is little chance of their prosecution within their territory. It was a sad reflection of the state of world affairs throughout the Cold War, that the

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[1] The contents of this paper reflect the personal views of the authors.

Nuremberg experience was left dormant for so long. This procrastination has led to a great loss of human lives and much human tragedy. Our generation now faces a unique test which it cannot afford to fail, if we are to save succeeding generations from the scourge of crimes against humanity and other crimes which cause untold sorrow to humankind.

It may be useful to recall that the idea of an International Criminal Court was first proposed to member States by the UN General Assembly in the early 50's when it appointed the Committee on International Criminal Jurisdiction.[2] The divisions of the Cold War were largely responsible for the lack of widespread support for the setting up of the Court. Indeed, decades after Nuremberg, the enforcement of the international criminal responsibility of individuals has had to be left to national courts[3] or to ad hoc tribunals.[4]

The demise of the Cold War has provided the international community with a rare opportunity to enhance the implementation of international justice. It has the possibility of establishing an International Criminal Court which the very founding fathers of the UN considered to be an essential element in the quest to achieve world wide respect for fundamental human rights.

It is ironic that it was the atrocities in the former Yugoslavia, and Rwanda that largely fuelled the renewed interest in establishing the International Criminal Court. Naturally, much valuable work has been undertaken by the International Law Commission particularly through its revised draft statute for the Court, and other projects such as the Code of Offences against the Peace and Security of Mankind which has incorporated much of the principles established in the Nuremberg process. Furthermore, customary international law relating to individual criminal responsibility has developed and been affirmed in relation to genocide, grave breaches of the 1949 Geneva Conventions (and the1977 Protocols). and apartheid. Indeed, the 1948 Genocide Convention[5] and the 1973

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[2] See Q. Wright. 4 A.J.I.L. (1951) pp. 60 *et seq*.

[3] War crimes committed in the Second World War have been prosecuted in the Courts of Israel, France and most recently Italy.

[4] For example, the Nuremberg and Tokyo, more recently the Yugoslav and Rwanda Tribunals.

[5] Article 6.

Apartheid Convention[6] even contain contingent provisions referring to an "international penal tribunal".

It is possible to consider the work of the UN General Assembly and in particular its latest resolution on the establishment of an International Criminal Court[7] as the consolidation of these legal developments. The work of the UN General Assembly has been largely undertaken by its Ad Hoc Committee on the Establishment of an International Criminal Court and the Preparatory Committee established by Resolution 50/46 of 11 December, 1995. It is hoped that the culmination of this work will be the convening of a Diplomatic Conference of Plenipotentiaries in 1998 to finalise and adopt a Convention on the Establishment of an International Criminal Court.

The proposed judicial body would represent the embodiment of the fundamental principles of International Criminal Law, and hold individuals personally responsible for violations of the said law; particularly in cases where States are unwilling or unable to prosecute. In other words, the jurisdiction granted to the International Court of Justice has to be a reflection of the need to achieve an effective balance between, on the one hand the respect for the sovereignty of States; and on the other hand, the need to ensure that International Criminal Law is respected.

It is submitted that the ILC Draft Statute is a valuable proposal which could ensure that the Court is able to administer justice fairly and effectively. There are, however, areas where considerable thought is required to ensure that the effectiveness of the Court is strengthened and consolidated. In this respect, it may be pertinent to comment on the number of issues raised by the Draft Statute. Of paramount importance is the mechanism for instigating prosecutions which should be as independent as possible.[8]

One has to ask whether the complaint process as envisaged by the ILC text is satisfactory in the light of historical experience. Should the power to raise complaints be restricted to State parties[9] and the Security Council?[10] Should not any State, International

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[6] Article V.

[7] Resolutions 51/207.

[8] Article 12.

[9] Article 25.

[10] Article 23 and 26.

Organisation, or individual be granted direct access to the complaint mechanism? Should the prosecutor not be allowed the power to investigate and prosecute on an *ex officio* basis?

The establishment of the Court is to "enhance the effective prosecution and suppression of crimes of international concern". It is well recognised that these crimes interest the international community as a whole. In the words of the Barcelona Traction (Second Phase) Judgment (1970), States have an obligation *erga omnes* not to perpetuate such crimes as aggression and genocide.[11] It would, therefore, seem reasonable to suggest that under customary international law, all States have a legal interest in their protection.[12] Clearly, therefore, the position under customary law supports the idea that the obligations of States in this field go beyond any treaty or contractual bonds. The time many also be ripe for granting the individual - particularly the victim - direct access to the Prosecutor. Allowing the process to be restricted to State parties may increase the risk of "conspiracies of silence" which are not uncommon even amongst States.

The right of referral granted to the Security Council is a realistic manifestation of international politics. It is of course a positive step. Nevertheless, the history of the Security Council's performance in the Cold War period, and its voting structure, would suggest that this recourse should not be overestimated. Whilst its availability is praiseworthy, its reliability as a "collective system of referral" may be limited in periods of crisis in international relations. Admittedly, the co-habitation between the UN's foremost political body and the future Court is no easy task. The discussions at the recent meeting of the Preparatory Committee bear witness to this challenge. In the ultimate analysis, however, the Court's long-term credibility could depend on this relationship. It may be worth recalling the sensitiveness faced by the International Court of Justice in the 1992 Case "Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libya vs United States). This crucial issue will be examined further shortly in relation to the crime of aggression.

Another area which deserves close attention relates to the

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[11] Para 34.

[12] Para 33 vide also the Addressing Opinion in the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) p. 23.

jurisdictional basis of the International Criminal Court. Whilst the list of proposed crimes that fall within the jurisdiction of the Court is commendable[13], it may be pertinent to ask whether the list should be an exhaustive one. There are a number of considerations which should be borne in mind when considering this issue. Certain crimes have long defied generally accepted definitions. An example in this respect is the crime of aggression. The Nuremberg Charter refers to "crimes against peace"; the UN General Assembly resorted to a political definition of aggression. The difficulties of arriving at a widely accepted legal definition of aggression remain. In this respect, the "filtering" mechanism proposed in Article 23 further complicates the problem. Clearly, the role of the Security Council, particularly in its capacity as the ultimate guardian of international peace and security as provided in Chapter VII of the Charter, has primary importance in questions relating to acts of aggression. However, the formula found in Article 23 would seem to suggest that the judicial process as proposed will largely rely on the political interpretations of acts of aggression.

The Court should have clear and comprehensive definitions of the crimes which fall under its jurisdiction. Given the immense problems which this desirable goal presents, the Court should be given the power to ensure that it does not lack jurisdiction in the face of technical and restrictive arguments. It is submitted that the Court should be granted jurisdiction in the event that the crime is of "international concern", even if such a crime is not covered by the provisions of Article 20. The reference to crimes established under particular treaties is useful and desirable.[14] It not only concerns the jurisdictional web of the Court, but consolidates further the internationalisation of the said crimes which range from the unlawful seizure of aircraft, to hostage taking, to unlawful acts against the safety of navigation.[15]

Another important factor to be taken into account, when considering the exhaustive nature of the list of crimes in Article 20, is the risk that lack of jurisdiction may occur with respect to crimes which are currently unknown. Sadly, the heinous side of the human intellect is often far more creative than the legal draftsman.

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[13] Article 20.

[14] Article 20 (c).

[15] Vide Annex.

Atrocities should not escape the jurisdiction of the Court because the drafters of the Statute failed to foresee such eventualities. The Court should be allowed the right to exercise reasonable discretion in such cases. Furthermore it should be made clear that crimes against humanity fall within the Court's jurisdiction if committed in peace or in war.

The "exhaustive" nature of Article 20 should also be seen in the light of another deficiency relating to the Court's jurisdiction. The automatic jurisdiction of the Court is too restrictive. The resort to this process in the case of genocide[16] is an important step forward. Of concern, however, is the position with respect to other crimes. In such cases, the Draft Statute grants the State party the option to select the crimes over which they would recognise the jurisdiction of the Court. This option would seem to greatly weaken the effectiveness of the Court. Would it not be reasonable to suggest that with respect to "crimes of international concern" (at the very least those enlisted in Article 20), the Court should be empowered to claim jurisdiction even if a State does not agree? Moreover, the jurisdiction of the Court is further restricted as in all crimes other than genocide both the "Custodial State"" and the State where the crime has been committed, have to accept its jurisdiction. It may not be unusual if one of these very States would have an interest in ensuring that the Court is rendered powerless to act. It may therefore, be advisable for the Court to be given jurisdiction on the basis that the alleged offender is in the custody of any State party. In such cases, the Court would be able to try the said offender without the risk of having its work vetoed.

There are, of course, many other issues that deserve our further consideration. The Court's findings, the Court's site, protection of victims and witnesses, collection of evidence, and standards of prosecution, are just some of the questions which loom around the creation of the International Criminal Court. The limited time available does not permit us to dwell upon these vital matters. It is hoped that the deliberations of our Conference will shed light on these areas. In this respect, we welcome the work of the Preparatory Committee and are encouraged by the steady - if slow - progress it is making. It is our view that if the goal of convening a diplomatic

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[16] Articles 21-22.

conference of plenipotentiaries in 1998 is to be achieved, considerable work has still to be undertaken. It has to be noted that if the ensuing Convention is to be effective it has to be widely accepted. Our challenge is to provide the diplomatic conference with a draft statute which balances political realities with legal firmness, fairness and justice.