

Comments

THE POLITICS OF ESTABLISHING AN INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

Any substantive evaluation of the plan for an international criminal court requires first an understanding of the political currents that underlie the competing proposals. This piece briefly explores the politics of creating a permanent international criminal court. In particular, this comment examines three related issues: (1) the need for an international criminal court, (2) the political obstacles involved in creating such an institution, and (3) the prospects for success in light of these obstacles.

II. THE NEED FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

There have been several published accounts of the evolution of the proposal for an international criminal court.¹ All attest to the fact that, until recently, the proposal has had a long and largely disappointing history. With the creation of the International Tribunal for the

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1. See, e.g., VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA 11-15 (1995); Paul D. Marquardt, *Law Without Borders: the Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L LAW 73-148 (1995); Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77-102 (1994); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L LAW 375-99 (1992); M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1-43 (1991); Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1 DUKE J. COMPAR. & INT'L L. 135, 137-46 (1991).

Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the Tribunal) in 1993, however, the proposal's fortunes suddenly began to look up.²

The Tribunal proved that the creation of a modern day international criminal court was politically and juridically feasible. Having successfully, and quickly, tackled most of the same complex legal and practical issues that had been identified as barriers to a permanent international criminal court, the international community is left with little basis to justify continued delay in creating a permanent court.

The creation of the Tribunal was said to serve five important goals, namely: (1) to deter future violations of international criminal law; (2) to break the endless cycle of ethnic violence and retribution and pave the way for reconciliation and peace; (3) to establish the historical record of atrocities before the guilty could reinvent the truth; (4) to bring the guilty to justice and prosecute them in a fair manner; and (5) to serve as a model for future ad hoc tribunals or for a permanent international criminal court.³

Yugoslavia, unfortunately, is not the only humanitarian tragedy of our time. There are a host of other situations around the world that also cry out for an international judicial response which would fulfill the five objectives of the Tribunal. Indeed, within a year of the creation of the Tribunal, the Security Council faced the mass tribal genocide of over 500,000 people in Rwanda. Comparing the scale of the crimes committed in Rwanda to Nazi Germany and Bosnia, Rwanda's prime minister-designate queried the United Nations Security Council, "[i]s it because we're Africans that a [similar] court has not been set up?"⁴ With this justifiable charge of Eurocentrism ringing through the Security Council, the Council was compelled to establish the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (the Rwanda Tribunal). The Rwanda Tribunal has its own Trial Chambers but shares the Appeals Chamber and the Office of the Prosecutor of the

2. See Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103, 107 (1994).

3. See MORRIS AND SCHARF, *supra* note 1, at 334, citing Andrew Kelly, *U.N. Convenes Yugoslavia War Crimes Tribunal, Amid Doubts*, Reuter's Eur. Comm. Rep., November 17, 1993, available in LEXIS, NEWS file, CURNWS Library.

4. See MORRIS AND SCHARF, *supra* note 1, at 351 (citing Nelson Graves, *Premier-Designate Compares Rwanda to Nazi Genocide*, REUTERS WORLD SERVICE, May 26, 1994).

Yugoslavia Tribunal.⁵

The creation of the Rwanda Tribunal showed that the machinery designed for the Yugoslavia Tribunal could be employed for other specific circumstances and offenses, thereby avoiding the need to reinvent the wheel in response to each global humanitarian crisis. Why then, one might inquire, has a tribunal not been set up for Iraq's violations of international humanitarian law committed during the Gulf War? After all, the Security Council had already condemned these violations, warning that individuals, as well as the Government of Iraq, would be liable for them, and called on Member States to submit information of Iraqi atrocities to the Council for further action.⁶ In light of the scale, brutality, and depravity of the continuing violations of international humanitarian law, which occurred despite Security Council warnings, there would seem to be a moral imperative to attempt to bring responsible persons to justice before an international tribunal. At the very least, an international tribunal for Iraqi war crimes could help develop and preserve the historical record and express international outrage by issuing indictments. Yet, the Security Council shows no signs of taking such action; nor is there serious consideration of setting up a tribunal for the genocide in Cambodia, the terrorism committed by Libya, or the crimes against humanity committed in El Salvador, Haiti, and East Timor.

There are several reasons why the Security Council has proven unwilling or unable to continue with the ad hoc approach that was employed for Yugoslavia and Rwanda. The first reason, which is sometimes referred to as "tribunal fatigue", is that the process of reaching a consensus on the tribunal's statute, electing judges, selecting a prosecutor, and appropriating funds has turned out to be extremely time consuming and politically exhausting for the members of the Security Council.⁷ Second, at least one permanent member of the Security Council—China—has openly expressed concern about using the Tribunal as precedent for the creation of other ad hoc criminal tribunals,⁸ perhaps out of fear that its own human rights

5. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

6. S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990).

7. See MORRIS AND SCHARF, *supra* note 1, at 33-34 (explaining compromises necessary to gain support for the statute), 144-45 (describing difficulties in electing judges), 161-63 (discussing controversy in appointing the prosecutor).

8. See MORRIS AND SCHARF, *supra* note 1, at 344 n.901 (quoting *Statement of Mr. Li Zhaoxing (China)*, U.N. SCOR, 48th Sess., 3217th mtg. at 33, U.N. Doc. S/PV.3217 (1993) (explaining China's position at the time of voting on Security Council Resolution 827, which

record might subject it to the proposed jurisdiction of such future international criminal courts. Third, many of the 183 countries that do not possess permanent membership and a veto in the Security Council view the creation of ad hoc tribunals by the Council as inherently unfair because the permanent members are likely to shield themselves, their friends and their allies from the jurisdiction of such tribunals, notwithstanding atrocities that may be committed within their own borders.⁹ The final reason for hesitance in creating additional ad hoc tribunals is economic: the expense of establishing tribunals¹⁰ is simply seen as too much for an organization whose budget is already stretched too thin.

A permanent international criminal court is hailed by the majority of countries in the United Nations as the solution to the problems that plague the ad hoc approach. On December 9, 1994, the United Nations General Assembly adopted a resolution providing for the establishment of an intercessional committee to meet in April and August of 1995 to review the draft statute for an international criminal court, which was completed in 1994 by the International Law Commission, and to consider arrangements for the convening of an international conference of plenipotentiaries to adopt a statute.¹¹ Yet, most countries acknowledge that establishing a permanent institution is not desirable without the full support and leadership of the United States. There are several obstacles, however, that continue to prevent the United States from taking such action.

III. DOMESTIC POLITICAL OBSTACLES

During the past months, the United States has come light years from the position of the Bush administration, which had sought to prolong without progressing the debate on a permanent international criminal court. The Clinton administration is now trying to work with the international community to create a court that would be accept-

established the Yugoslavia Tribunal)). China later abstained on Security Council Resolution 955, *supra* note 5, which established the Rwanda Tribunal.

9. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 22, at paras. 120-25, U.N. Doc. A/50/22 (1995).

10. The Yugoslavia Tribunal has an annual budget of some \$39 million U.S. dollars. See MORRIS AND SCHARF, *supra* note 1 at 325-27. While running an international criminal justice system is expensive, this cost is not unreasonable when viewed in light of the cost of the U.N. peacekeeping force in the former Yugoslavia (\$570 million U.S. dollars per year) or the UN peacekeeping force in Cambodia (\$1.6 billion U.S. dollars per year). *Id.* at 323.

11. G.A. Res. 49/53, U.N. GAOR, 49th Sess., Agenda Item 137, U.N. Doc. A/49/53 (1994).

able to the interests of both the executive and legislative branches of the U.S. government.¹²

Within the executive branch, the State Department has been the most supportive among the government agencies.¹³ Within the State Department, the members of the U.S. Mission to the United Nations are probably the greatest supporters of an international criminal court, while members of the Office of the Legal Adviser continue to maintain a cautious attitude, which perhaps reflects a residual mistrust of international tribunals.¹⁴ The Departments of Justice and Treasury are firmly opposed to any international criminal court that would have jurisdiction over narco-terrorists, reportedly out of concern that the establishment of an international criminal court would undermine the U.S. government's existing international law enforcement efforts and because, if those cases went to an international court, the departments would lose the sizable funds they now collect through asset forfeiture.¹⁵ The Department of Defense, in turn, opposes any international criminal court that would have jurisdiction over war crimes unless the Security Council would have control over which situations would be within the jurisdiction of such a court. In this way, the United States could exercise its veto if U.S. forces or commanders were ever to be prosecuted before such a tribunal.

The U.S. Congress, under the leadership of Newt Gingrich, Speaker of the House, and Jesse Helms, Chairman of the Senate Foreign Relations Committee, has all but declared war on the United Nations¹⁶ and appears to be in no mood to support the creation of another expensive international institution. The Clinton administration simply cannot unilaterally represent U.S. intentions because any agreement creating an international criminal court would require congressional approval. Consequently, this administration has taken the position that it will support an international criminal court only if the court's jurisdiction is strictly limited to war crimes, genocide and

12. United States Mission to the United Nations, Statement by the Honorable Conrad K. Harper, U.S. Special Advisor to the United Nations General Assembly in the Sixth Committee, U.N. GAOR, 48th Sess., Agenda Item 143, U.S.U.N. Press Release #171-(93) (1993), *reprinted in Scharf, supra* note 1, at 109.

13. *Id.* at 105.

14. *Id.* at 105 n.5.

15. *Id.*

16. *See, e.g.*, The American Overseas Interests Act of 1995, H.R. 1561, 104th Cong. (1995) (\$100 million cut in contribution to U.N. peacekeeping); Foreign Relations Revitalization Act of 1995, H.R. 1561, 104th Cong. § 908 (1995) (\$157 million cut in contribution to U.N. and other international organizations).

crimes against humanity, and if the court's jurisdiction can be triggered only by a decision of the Security Council.¹⁷

IV. PROSPECTS FOR SUCCESS

There are two potential outcomes in response to the new U.S. position. One is that the United States will fail in its efforts and the international community will proceed to establish a more ambitious international criminal court without U.S. participation. The second possibility is that the other countries of the world will reluctantly bow to the United States' wishes to create what essentially would be a Security Council-controlled permanent war crimes court. If the United States works as hard on this issue as it did to achieve favorable amendments to the Law of the Sea Treaty,¹⁸ this possibility, although far from a sure thing, is the more likely of the two outcomes. Moreover, the U.S. concept may be more palatable to countries such as the Caribbean nations that desire an international criminal court to prosecute drug traffickers and terrorists if they are able to supplement such a court with their own regional criminal courts. Such courts would have broader jurisdiction and would operate outside the control of the Security Council.

As critical as the jurisdictional issue is, it is only the first step. A host of procedural issues also had to be addressed at the United Nations' intersessional meetings in March and August.¹⁹ Generally, whether the permanent international criminal court's jurisdiction is expansive or restrictive, the most important thing is to create an

17. See generally, *Comments Received Pursuant to Paragraph 4 of the General Assembly Resolution 49/53 on the Establishment of An International Criminal Court, Report of the Secretary-General*, U.N. GAOR Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, Addendum, at 7-29, U.N. Doc. A/AC.244/1/Add.2 (1995) (setting forth the position of the Government of the United States of America on draft articles for a statute of an International Criminal Court).

18. See Statement by U.S. Department of State, United States to Sign Seabed Mining Agreement: United Nations Convention on the Law of the Sea (Michael McCurry, spokesman, July 1, 1994), reprinted in B. CARTER AND P. TRIMBLE, *INTERNATIONAL LAW* at 1076-77 (2d ed. 1995).

19. See *Summary of the Proceedings of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/AC.244/2 (April 21, 1995). The 85 U.N. delegations that participated in the intersessional meetings agreed to propose to the General Assembly that a procedure be established for drafting "a consolidated text of a convention for an International Criminal Court as a next step towards consideration by a conference of plenipotentiaries." *Report of the Proceedings of the Ad Hoc Committee on the Establishment of an International Criminal Court*, August 14-25, NGO Coalition for an International Criminal Court (August 27, 1995).

institution that is both effective and fair. In this respect, prior to amendment, the original rules of procedure and evidence adopted by the Tribunal were criticized as creating an unlevel playing field favoring the prosecution over the defense.²⁰ To paraphrase Justice Robert Jackson, Chief Prosecutor at Nuremberg, we must never forget that the record by which we judge defendants before an international tribunal today is the record on which history will judge us tomorrow. To pass them a poisoned chalice is to put it to our lips as well.²¹

V. CONCLUSION

On November 29, 1995, as this Article was going to press, the United Nations General Assembly Sixth Committee adopted by consensus the establishment of the an international criminal court. This resolution sets up a preparatory committee to prepare a "widely accepted consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries."²²

I concluded my speech at the symposium at Duke University Law School upon which this comment is based by quoting an old Chinese greeting, "[m]ay you live in interesting times," which seemed appropriate since the coming year should indeed prove most interesting for those involved in the creation of a permanent international criminal court. After the speech, however, one of the other panelists, Cherif Bassiouni, who is known in academic circles for his mastery of ancient proverbs, whispered that this is not in fact a greeting, but rather a curse that the Chinese levy upon their enemies. Viewed in this light and given the difficult politics involved in creating a permanent international criminal court, the saying is perhaps even more fitting than originally intended.

20. See Peter S. Canellos, *Fairness is issue as war crimes tribunal addresses rape*, BOST. GLOBE, June 4, 1995, at 22.

21. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, PART I 51 (His Majesty's Stationery Office, 1946).

22. Establishment of an International Criminal Court, U.N. GAOR 6th Comm., 50th Sess., U.N. Doc. A/C.6/50L.14 (1995).

