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An International Criminal Court for the Future

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At the end of the Twentieth Century, the prospects for creating a permanent international criminal court seem brighter than ever. For the first time in nearly fifty years an international criminal court is in existence, on an ad hoc basis, to deal with situations in the former Yugoslavia and Rwanda. In addition, a Draft Statute for a permanent international criminal court, after forty years of development, has been reported to the U.N. General Assembly for action.[1] However, the forces that caused a lapse of nearly five decades between the operation of the international military tribunals at Nuremberg and Tokyo and the establishment of a tribunal for former Yugoslavia and Rwanda have not disappeared. Accordingly, it may be premature to assume that a suitable vehicle for international criminal law enforcement is about to emerge. Instead, now may be the time to reexamine assumptions about the manner by which a suitable court can be created, the ideal characteristics of such a court, and the realistic limits of what can be achieved.

This article begins with a brief exploration of perceptions, goals, and realities relating to creation of a permanent international criminal court. It then critiques the 1994 International Law Commission (ILC) Draft Statute in terms of goals and realities. Finally, it concludes with an exploration of alternative strategies in terms of the process for creating such a court and for enhancing its potential.

I. PERCEPTIONS, GOALS, AND REALITIES

A. The Nuremberg Paradigm

Contemporary thinking about an international criminal court is transfixed by the example of the post-World War II trials in which it seemed that the justice of humankind simply imposed itself on the former leaders of States. This has led to a hope that a future international criminal court will be able to do the same—to supervene the politics of States, vindicating the values of humanity by punishing persons irrespective of their affiliations with particular States.

However, it must be noted that the trials at Nuremberg gave the impression of simplicity only because of an unusual situation involving the alignment of the States' interests and the nature of the

1. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter *1994 ILC Report*].

Nazi leaders' conduct. The Big Four Allies were firmly united in their desire to punish the leaders of their enemy, Germany, and no countervailing German interest could find expression because the Big Four had occupied Germany and had installed themselves as the German government. Moreover, the conduct of the Nazi leaders was of such a nature as to obviously and deeply offend the basic values of humankind. They waged not merely a war of dubious justifiability using highly questionable tactics, but they deliberately contrived a war that embroiled most of the world and employed utterly shocking methods. As a result, punishment of the Nazi leaders coincided with the interests of humanity as well as the interests of relevant States, obscuring the potential for division between them.

The Nuremberg process also appeared seamless because the Big Four created a single tribunal for the major cases, and, as the Allies controlled not only Germany but also most adjacent States, witnesses, evidence, and suspects were found and delivered smoothly for a dramatic international trial. However, trials by the Big Four were possible and perhaps necessary due to the destruction of German governmental structures. This also suited the interests of the Big Four in dramatically branding those convicted as enemies of humanity.

B. Essential Goals

It is natural to hope that future international criminal courts will be able to achieve goals similar to those achieved at Nuremberg, but it must be recognized that such future courts may often have to function under less favorable circumstances. Accordingly, re-creation of the Nuremberg process is not in itself a goal. Instead, one must distill the actual goals attained at Nuremberg and consider new means to advance those goals under new circumstances. It seems fair to describe the goals achieved at Nuremberg as follows:

1. Vindicating the interests of humanity rather than the distinguishable interests of one or more States;

2. Reaching accused persons without regard to their positions of power within a State or other claims to protection by a State;

3. Punishing not only leaders but also subordinates by limiting the use of obedience to superior orders as a defense to international crimes; and

4. Pursuing the above goals without interference from political forces on the national *or international* level.

C. Realities

One can appreciate how ambitious these goals are under usual circumstances by considering the following realities. First, there is no authoritative law-making process that directly focuses on the interests of humanity. International law can be made only by States whose individual and collective interests may vary from those of humanity, particularly with respect to elimination of State protection for persons who act on their behalf, elimination of the defense of obedience to superior orders, and elimination of international political factors from operation of an international criminal court. Moreover, there is not even an international legislative body for States. Aside from special situations involving threats to world peace, the only way to achieve the equivalent of international legislation is to convene a conference of State representatives to draft a multilateral convention. However, any such convention would not ordinarily be binding on non-signatories.

Second, except when suspects are found in territory directly controlled by States that are single-mindedly devoted to international criminal justice, obtaining custody of such persons will involve international politics. For example, when suspects are leaders of a State that has not been vanquished in war, they will not readily direct their own surrender. Even if such leaders were to flee to another State, that State may have interests that militate against surrender, particularly if the two States have been allied or have other important common interests. Similar problems can be expected with respect to obtaining evidence and witnesses.

Third, efforts to overcome such resistance to the demands of international criminal justice will inevitably depend on the cooperation of other States individually or through cooperative forums like the U.N. Security Council. In any event, cooperation with the court may depend on international political factors.

In view of the above realities, it would not be surprising if a draft statute for an international criminal court, produced through the United Nations, would be less than ideal. However, it is still possible to assess such a draft in terms of its success at achieving the Nuremberg goals.

II. CRITIQUE OF THE 1994 ILC DRAFT STATUTE

The commentary to the ILC Draft Statute is brutally candid when it states: "The Court is envisaged as a facility available to States Parties . . . and in certain cases to the Security Council."[2] Indeed,

2. *Id.* art. 25 commentary, para. 1.

the court to be created by this Draft Statute would be little more than a stand-by court to serve the same Security Council purposes as the ad hoc Yugoslav and Rwanda Tribunals because the Security Council would, in reality, largely control its activities.

In theory, the court could deal with cases of genocide upon the application of any State party to the treaty creating the court, provided that the applicant is also a party to the Genocide Convention.[3] However, even an investigation of such a crime could be barred if the Security Council were considering the matter,[4] and the court may decline to pursue such a case if it were under investigation by a State "which has or may have jurisdiction over it";[5] in the case of genocide, that could be any State.

The court could also theoretically deal with many other international crimes upon application of a State-party, but the applicant would have to be a party that had accepted jurisdiction of the court with respect to the particular crime.[6] Consent would also have to be affirmatively manifested by both the State having custody of the accused and the State within whose territory the crime occurred[7]—even if those States are not parties to the treaty creating the court.[8] Finally, the matter must not be under consideration by the Security Council unless it has affirmatively given its approval to proceed with the case.[9]

However, the court could not deal with any crimes relating to aggression without affirmative action by the Security Council.[10] The requirement of consent from custodial and territorial States for crimes other than genocide could be obviated only by affirmative Security Council action.[11]

When the theoretical clutter is stripped away and realistic probability is considered, the court may never have occasion to deal with any cases except upon affirmative action by the Security Council. This is because the Security Council will deal with

3. *Id.* arts. 21(1) & 25(1).

4. *Id.* art. 23(3).

5. *Id.* art. 35(b).

6. *Id.* art. 25(2).

7. *Id.* art. 21(1)(b).

8. Commentary to Article 22 removes any doubt on this point. *Id.* art. 22 commentary, para. 6. However, this conclusion was well-supported by the language of Article 21(1)(b). *Id.* art. 21(1)(b).

9. *Id.* art. 23(3).

10. *Id.* art. 23(2).

11. *Id.* art. 23(1).

instances of genocide, while action on other crimes will be blocked by lack of consent from a custodial or territorial State.

These factors make consideration of the kinds of "other crimes" to be within the theoretical competence of the court relatively trivial. In fact, with respect to war crimes, crimes against humanity, and many so-called treaty crimes,[12] the ILC court would have less power than national courts, which do not require consent of territorial States and need not withhold action if the Security Council takes up a related matter.[13]

Requiring consent of States that are not parties to the treaty creating the court underscores the narrowness of the ILC model. Making consent of such States unnecessary would have both provided an incentive for nonparties to become parties and would have been in accordance with the powers of national courts.

The Draft Statute and commentary also eliminate, without adequate justification, the possibility of a prosecution for aggression in the absence of Security Council action.[14] It is true that the General Assembly's definition of aggression recognizes a role for the Security Council in determining whether to treat a given use of armed force as aggression,[15] but even the ILC commentary acknowledges that this deals with conduct of States, not individuals.[16] In addition, ample room exists for argument that what is considered aggression for the purposes of Security Council action is very different from what is aggression for the purposes of individual culpability. However, the commentary asserts that no individual can be guilty of aggression unless the State on behalf of which the individual acted is first found by the Security Council to have engaged in aggression.[17] Moreover, the ILC notes that the role it assigns to the Security Council in relation to its court would place nonmembers of the Security Council at a disadvantage in terms of influencing court behavior,[18] yet the ILC shrugs off this inequality.

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12. *Id.* para. h, at 37.

13. Consider, for example, Canadian prosecutions of World War II crimes and prosecutions relating to the former Yugoslavia brought in Danish, German, and Austrian courts.

14. *1994 ILC Report, supra* note 1, art. 23(2) & commentary, para. 8.

15. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/RES/3314 (XXIX) (1975).

16. *1994 ILC Report, supra* note 1, art. 20 commentary, para. 6.

17. *Id.* art. 23 commentary, para. 8.

18. *Id.* art. 23 commentary, para. 15.

Still another example of the narrowness of the ILC's approach is the requirement of an application by a qualified State-party or an authorization by the Security Council as a prerequisite for initiation of a prosecution.[19] This again leaves the court weaker than national courts, before which prosecutors can bring cases on their own initiative without higher or external authority. The suggestion in the commentary that, as a practical matter, only States would be capable of supplying suitable information[20] is absurd.

Finally, the ILC Draft denies its court even the power to render advisory opinions, explaining merely that the International Court of Justice can perform this role.[21] This disposition suggests a disregard for the expertise of the court in its own subject matter. Such disregard may be intertwined with the provision that judges of the court must be experts in criminal law, international human rights law, or international humanitarian law—not in international criminal law![22]

The ILC Draft raises a number of other important issues,[23] but they are far less fundamental than the questions of what purpose the court is to serve and how it is to relate to the United Nations. The court's purposes are implicitly settled by the Draft, while its relation to the United Nations remains open for future decision.[24]

The fact that the ILC court would effectively function as a stand-by tribunal for ad hoc use by the Security Council does not per se make the court illegitimate or useless. However, this role does threaten to blur two important delineations. One is the limit on the power of the Security Council under Chapter VII to provide for trials that continue after a threat to the peace has subsided. The other is the distinction between consistent dedication to international criminal justice and responsiveness to international political forces.

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19. *Id.* art. 25 & commentary, para. 2.

20. *Id.*

21. *Id.* art. 19 commentary, para. 14.

22. *Id.* art. 6 & commentary, para. 2.

23. One issue is how appeals should be handled, in terms of prosecutor's rights to appeal, and whether appeals should be on the basis of "appel" or "cassation." *See id.* art. 49 & commentary. Another issue is how to govern sentences. *See id.* arts. 59 & 60. A third is whether it is wise to permit the prosecutor to choose on his own not to bring a case that was brought by a State party. *See id.* art. 26. A fourth and perhaps the greatest issue is whether rules of procedure and evidence, including matters relating to provisional and pretrial detention, can be left to the judges for elaboration. *See id.* arts. 19(1)(b), 28 & 29.

24. *Id.* at 34 & Appendix III, at 157.

However, to say that the planned court is not illegitimate and not useless is far from a ringing recommendation.

III. COURT CREATION RECONSIDERED

A. Focusing the Process

It seems essential to recognize that creating a court to serve the interests of the Security Council is not the same as creating a court to serve the interests of humanity or even the interests of States that are not members of the Security Council. It is also important to note that the United Nations cannot by itself even create an international criminal court. Rather, it will have to rely on the action of States through either an amendment of its Charter or through a diplomatic conference producing a separate treaty. In such actions, there is no need for replication of the oligarchic inequalities of the power structure crystallized in the Security Council five decades ago.

Accordingly, the weight to be given to the interests of the Security Council or of its permanent members, is a relatively open question. The United Nations is an important feature of the world order. The Security Council is the United Nations crucial organ, but it is essentially a political body—having a very narrow legislative role and no judicial one. After all, the Security Council is merely authorized to deal with aggression and threats to the peace—it is not required to do so, and it has avoided doing so on occasion.[25] Accordingly, while it may be appropriate for an international criminal court and the Security Council to assist one another on some occasions, it is far from obvious that assuring usefulness of the court to the Security Council is the central objective of establishing such a court.

As for the permanent members of the Security Council, they continue to be important States in many respects, but they are not the only States of great importance and are few in number. Accordingly, it is far from obvious that the wishes of these States should be pivotal to creation of a court that would serve the interests of the world at large. Indeed, the blessings of States that have both inherent power and power derived from permanent seats on the Security Council may be difficult to obtain at a reasonable price, for such States have more *de facto* freedom to lose from effective

25. The most obvious recent example has been the situation regarding the Khmer Rouge in and near Cambodia; the earlier events in Portuguese Timor are another example.

enforcement of international criminal law than many weaker States. Accordingly, it may be unwise to give too much deference to the views of such States in any process of creating an international criminal court.

Moreover, there are other States, not so easily classified, which may be strongly disinclined to support the establishment of an effective international criminal court. If such nations are permitted to participate fully in the development of a treaty creating such a court, they may simply work to weaken the court as much as possible, then refuse to join in the treaty regardless of how much the court has been weakened. Accordingly, it may be very important to proceed toward development of a court in two phases. In the first phase, States would formulate the guidelines for creation of such a court and agree to adhere to a treaty creating a court within those guidelines. In the second phase, only parties to the prior agreement would participate in the final drafting.

Once the process for creation of such a court is finally divorced from the tangentially relevant Security Council and insulated from would-be saboteurs, participants should refocus on the goals that were accomplished at Nuremberg and seek suitable means to pursue those goals in new situations. This will entail a review of models for such a court and drafts of suitable substantive prescriptions, of which there are several, including those marshalled by Bassiouni,[26] a 1993 ILC Draft,[27] the Statute of the Yugoslav Tribunal,[28] and the Draft Code of Crimes Against the Peace and Security of Mankind.[29]

It is beyond the scope of the present paper to re-examine all of the options that have been presented in the past and to make specific recommendations. For the present, it is sufficient to note that

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26. Of particular interest is the book, M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987), which has an extensive bibliography, and M. CHERIF BASSIOUNI, DRAFT STATUTE, INTERNATIONAL TRIBUNAL (1993). A predecessor version of the draft statute can be found in M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the "Apartheid" Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

27. 1994 ILC Report, *supra* note 1.

28. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. SCOR, Annex, U.N. Doc. S/25704 (1993), *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993).

29. *Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 238, U.N. Doc. A/46/10 (1991).

evaluation, selection, and adaptation of prior proposals should be undertaken with attention to the goals, realities, and procedural possibilities described above.

B. Neglected Issues

The literature concerning the creation of an international criminal court is vast, yet there are at least three significant issues that have been neglected in the past. The first relates to the preoccupation with international trials in the Nuremberg mold. Such trials were necessary and desirable in the context of Nuremberg, but they may be unnecessary, undesirable, and even impossible in most contexts. For example, in the case of the conflicts in the former Yugoslavia, each of the warring parties is capable of conducting trials of accused persons within their custody. For an international prosecution to be possible, the international prosecutor must be deeply involved in investigations as early as possible, so that the international prosecutor has the opportunity to participate in trials held by courts of a State or faction in order to promote and monitor fairness. If the prosecutor can do this, it is not obvious that permitting a trial by such courts would be improper if the possibility of review by an international criminal court on an appellate basis were assured. Conversely, if the international prosecutor is unable to participate meaningfully in the investigation process, an international trial will be unsuitable. Accordingly, it may often be sufficient for an international criminal court to function on an appellate rather than trial level,[30] and appeals may often not be necessary when a warring side finds one of its own guilty or acquits an enemy.

Indeed, noninternational trials may be desirable for at least four important reasons. The first is that attempting to formulate an *international* trial procedure poses difficulties in blending civil law and common law approaches that have yet to be fully addressed, much less surmounted. The second is that there is little use in creating an international trial process since international trials could give defendants celebrity status, and the use of procedures unfamiliar to all involved would promote confusion or suspicion of bias. The third is that, in cases of armed conflict, there may be far more cases than could be brought to trial internationally, so that funds would be better spent in monitoring national or factional courts' handling of cases, reserving international trials for unusual cases. The fourth reason is that this will at least delay problems

30. This has been suggested by the International Law Commission. *Report of the International Law Commission on the Work of its Forty-Second Session*, U.N. GAOR, 45th Sess., Supp. No. 10, at 36-54, U.N. Doc. A/45/10 (1990).

relating to States whose laws forbid extradition of nationals, with many such issues being mooted by acquittals affirmed on review, and with others posing novel—but perhaps solvable—issues concerning effects of an international review mandated under national law.

A second major issue that has been neglected is the problem of persons, factions, or States that refuse to cooperate with an international criminal court, including refusal to surrender a suspect. One thought on this subject that is implicit in the 1994 ILC Draft is the possibility of Security Council action, such as sanctions against a recalcitrant State. However, this re-creates the very problems of punishing States for the acts of individuals that an international criminal court was designed to avoid by placing responsibility on individuals.

What is needed is a means for threatening individuals responsible for noncompliance. A new crime of obstruction of international justice would be a suitable vehicle for this purpose. Such a provision would work smoothly when an individual refuses to cooperate without being forced to do so by national law. However, in many instances national law will bar cooperation, and it would be unfair to punish an individual who is truly crushed between conflicting legal obligations. Nevertheless, national leaders and lawmakers may have discretion to change national laws in order to permit cooperation, and it may be possible to threaten them with punishment if they choose not to exercise their discretion in an acceptable manner. Drafting suitable provisions for this purpose will entail great care because the issues are novel, but attempting such a draft seems advisable.

The third issue has not been totally neglected, but it may not have been fully explored. It concerns efforts to encourage surrender of persons in accordance with the mandate of the international criminal court. It has been assumed expressly or implicitly that such persons would be largely immobilized by the fact that surrounding States might apprehend them at the request of the international criminal court, and that this may convince some individuals to surrender themselves. However, there may be a wider range of adverse consequences that can be inflicted on such persons and on those who shelter them in obstruction of international justice. For example, it might be possible to freeze their assets abroad, or prevent business organizations in which they have an interest from functioning abroad. Other possible measures deserve consideration.

IV. CONCLUSION

There are interests to be served beyond those of the Security Council. The processes necessary for creating a permanent international criminal court will provide an opportunity for those interests to find expression. This opportunity must be seized.

Elements of a suitable model for such a court may be found in the prior literature on this subject, but choosing among such elements will require care. It would be a mistake to select a model simply for its similarity to the Nuremberg phenomenon because the new court will have to function in a very different environment. It may be wise to question the prior assumptions that international trials are the chief function of such a court. New methods must be sought to augment the court's effectiveness through renewed focus on individual accountability.