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AGENDA ITEM 142: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

UNITED NATIONS GENERAL ASSEMBLY
50TH SESSION
SIXTH COMMITTEE

Mr. Chairman,

On behalf of the Government of the United States, I am pleased to provide our views on agenda item 142 on the subject of the establishment of an international criminal court.

I would like to touch upon where we have been, where we are, and where we are going. Where we have been is the beginning of an important debate on the substance of establishing a new institution, one which would have a far-reaching impact on world society, and thus one which requires considerable care in its construction and a broad consensus for success.

In 1993, the International Law Commission presented the Sixth Committee with a draft statute that allowed us to proceed beyond the largely academic debate of the prior decades, and focused attention on the details of establishing a court. Based on comments by Member States here in the Sixth Committee, the Commission revised and further improved its draft, presented it to us, and challenged us to take the next steps.

As a result, a year ago, we met to consider those further steps. Many States believed that the time was ripe for convening a diplomatic conference to seek agreement on a final text of the statute for a court. The United States and other States believed that there were still many uncertainties with the draft and requested the Sixth Committee to establish instead an Ad Hoc Committee to allow governments to review and assess the issues involved.

The Ad Hoc Committee met for four weeks in two sessions this past year. Delegations came prepared to provide detailed perspectives on the issues presented. The United States provided extensive comments, both in writing and during the Committee sessions. We did so both in comments submitted to the Secretary-General, and in non- papers made available to those participating in the work of the Committee.

In the view of my delegation, the work has resulted in significant progress. This is in no small measure a result of the excellent leadership provided by the Chairman of the Committee, Adriaan Bos, and we join in the universal expression of appreciation for his efforts. We also wish to give our thanks to the Bureau of the Ad Hoc Committee, to the Secretariat, and to the leader of the Committee's working group, Dr. Hafner of Austria. The evident progress made by the Committee also resulted from the fact that it was able to separate out for discussion the key issues involved in the establishment of an international criminal court. We believe that many delegations came to agree with concerns we and others raised, that to make this endeavor ultimately a success, significant further work was required.

As the report of the Committee states, "further work on the establishment of an international criminal court has to be done." We embrace the challenge and look forward to a year of intensive work to improve upon the ILC draft statute,

in our view and will not achieve the broad support necessary for a viable court. We have provided our views on this on a number of occasions, and will continue to do so.

The question of consent deserves further consideration, as the current focus on territoriality will often yield unfair and illogical results. As it stands, moreover, the nationals of a State could be subject to investigation and prosecution when the State itself is not even party to the court. As many have noted, it is also important to elaborate further the principle of complementarity. We believe that bona fide national investigations and prosecutions will always be preferable, where possible, for many reasons. We believe that, for a permanent court which will face many possible and unknown cases, national jurisdiction should enjoy a presumption of regularity. It is not appropriate simply to mirror the War Crimes Tribunal provisions, as these were designed with specific situations in mind, in which one could fairly prejudge the incapacity of national institutions when the statutes were designed. It requires no subtle judgment when institutions are wholly destroyed or incapable of functioning due to armed conflict. It is a much more difficult, intrusive and subtle judgment to say that a functioning national system is not bona fide.

There is an important role for the Security Council to play in the work of the court. We have heard the role of the Security Council criticized as unduly tainting the independence of a judicial body. Ironically, allowing a State unfettered discretion to launch cases against another State, regardless of whether the resulting international prosecution would be necessary or effective, has even greater potential for political misuse. Under the current draft, the initiation of cases would be subject to whatever political agenda a particular State may have, rather than a collective decision by the Council that in fact would be less likely to reflect a political bias than that of an individual State. In any event, the reality of the hard core categories of crimes is that they are in almost all cases relevant to the matters of which the Security Council is likely to be seized, and which are part of the Council's mandate under the Charter of the United Nations to maintain and restore international peace and security. A Primary purpose in establishing a permanent international criminal court is to avoid the necessity of the Security Council establishing ad hoc tribunals to deal with crimes arising under international humanitarian law. The

crimes, terrorism crimes, or violations of the Apartheid Convention within the court's jurisdiction. The crimes of terrorism and drug crimes also present particular problems of investigation and prosecution which the court would inevitably be illequipped to address. These are crimes committed as part of the ongoing activity of international criminal organizations. The investigation of these crimes requires major police and technical resources which the court will not have. The prosecution of these crimes, moreover, does not occur in isolation, but rather as part of an overall investigative and prosecutorial strategy, in which the choice of who to prosecute and when and how is calculated in order to end the workings of the organization as a whole and to reach the key figures at the top. These cases are thus essentially tied to national investigations and would require a fundamentally different regime, which at best would significantly complicate the design and workings of the court.

We also view the inclusion of the crime of aggression as highly problematic on numerous grounds. This is fundamentally a crime of States, as to which the Security Council would have to play a central role. It thus presents all the risks of politicization in a serious form. It is, moreover, a crime which is still very illdefined. The Nuremburg Tribunal did not have to confront this problem, as it was dealing, after the fact, with a clear and specific case. In the abstract, however, it is not at all universally established what fits even within the limited concept of "waging a war of aggression." What are the possible defenses or mitigating factors in connection with such a charge? What if it concerns disputed territory? Where there is a conflict which is settled by reference to the International Court of Justice, for example, does the losing party automatically become guilty of an aggressive war? What about controversial concepts such as humanitarian intervention or a war of liberation? Including the crime of aggression would require clear, universally-accepted answers to these questions. In short, Mr. Chairman, we join those who support focusing, in the first instance, on the core crimes of international humanitarian law for which there is universal support.

The proposal, endorsed by some governments but never proposed by the International Law Commission, that the court have "inherent jurisdiction" over violations of humanitarian law (other than possibly the crime of genocide) is iltconceived

including through discussions of key issues and the drafting of some revised texts.

All of us have undertaken this task not only in the shadows of history, but also among and in response to the atrocities of our own time. The United States Government's support to the two UN war crimes tribunals has been second to none. Recognizing the challenge before us, President Clinton recently 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 ...."

We now need to focus our next steps on what is critically needed to address violations of international humanitarian law and what is pragmatically achievable in a reasonable period of time. This challenge will, however, require an enormous amount of rigorous work. The April and August sessions made progress, but much remains to be done to develop a court that will be acceptable to the international community. The real test will be where we are one year from now in addressing a host of serious issues.

There are many critical issues that need to be explored in greater depth and, we hope, resolved. If we approach the court from an academically pure perspective, without regard for political realities and what States are willing to participate in and fund, we will have wasted our time. The United States has consistently cautioned against unrealistic propositions that would create a court that would be ineffective. Those who wish to accelerate the work of the court need to avoid futile proposals and press for the achievable.

We believe the discussions in the Ad Hoc Committee showed a growing consensus to restrict the jurisdiction of the court to genocide, crimes against humanity and war crimes. We also heard many governments attracted to the proposition that crimes under the Torture Convention and the Convention on the Safety of United Nations and Associated Personnel be incorporated in an appropriate manner into the court's jurisdiction, and we share that attraction. We do not believe that there is enough support to sustain aggression, drug

statute should recognize the authority of the Security Council to refer situations to the court, and to do so in a way, as the delegation of Canada suggested on Monday, that will ensure that all States must cooperate with the court. At the same time, however, it would be for the prosecutor and the court - not the Security Council - to decide which specific cases should be initiated and against whom. As others have noted, the court must be an independent judicial institution, without interference from political bodies. The role of the Security Council thus can be defined so that it in no way undermines the judicial independence of the court, its judges and its prosecutor, but rather strengthens the court in addressing the important cases that would be part of its mandate.

Beyond questions of subject matter jurisdiction, many other issues need to be resolved, including the structure, organization and financing of the court, its primacy in relation to bona fide State jurisdiction, and the rules of evidence and procedure under which it would function. While the UN ad hoc tribunals provide a point of departure, the creation of a permanent institution of more general jurisdiction raises many problems which the drafters of the tribunal statutes did not have to resolve.

It is important to continue work in the same spirit and approach as the Ad Hoc Committee. In particular, we must ensure that all critical issues are carefully reviewed. It is essential not to set unrealistic deadlines for this work. Further deliberation is needed to ensure thoughtful review of the remaining issues and to garner the kind of widespread support needed for a truly effective and global court.

On the basis of the accomplishments of the Ad Hoc Committee, we support that committee's consensus view that additional work is in order. We support that work, and believe that we should fashion a realistic agenda for intercessional meetings in 1996. That agenda needs to take into account the importance of having experts from capitals present for the many categories of technical discussions that will be needed. For large States such as my own, I realize that this poses fewer difficulties than for some others, and my government will provide the resources for its participation. However, in order to make this a global enterprise, we must have participation from a wider group of States than we have previously seen, and the agenda for intersessional work

should take this into account.

In terms of what the agenda of work should contain, we note that the reference to the need for "further discussions and the drafting of texts" in the Ad Hoc Committee's report refers to the fact that while some issues are ripe for drafting, others are not, and will require further discussion. On the latter issues, my delegation understands that drafting will begin only after sufficient discussion and consideration have been given, and the parameters for appropriate solutions, or the issues and alternatives, are relatively focused and clear.

In our prior interventions, we have touched on the many issues that will need to be reviewed. We must ensure that the due process rights of defendants are protected. We must ensure that legitimate efforts of local authorities to investigate and prosecute crimes are not harmed, while at the same time providing the court with sufficient authority so that it can act effectively where it has jurisdiction. There is a long list of items to handle, and I think it is fair to say that we cannot know today how much progress will have been made a year from now. In these circumstances, it would not be appropriate to set a date for a diplomatic conference now. That does not mean that my delegation assumes that sufficient progress will not be made in a year's time -- quite the contrary. But we must not rush a decision that could, as a result of haste, allow us to wind up with a court that is ineffective and not widely endorsed.

In sum, my delegation is ready to move forward with attempts to establish a permanent international criminal court. We are mindful of the difficulties inherent in establishing a new institution of such complexity, but we stand ready to make a diligent effort, in every hope of a successful conclusion.

[This is a scanned document. We regret any errors due to the scanning process. - CICC Secretariat]

STATEMENT

United States Delegation to the Preparatory Committee
on the
Establishment of an International Criminal Court

March 23, 1998

The United States is deeply concerned that at this late stage of the proceedings of the Preparatory Committee, certain fundamental tenets of International Humanitarian Law applicable to non-international armed conflict are still being questioned. It would be regrettable if, before Rome, the Preparatory Committee could not reach an understanding on the deletion of a number of brackets.

To facilitate our progress in Rome, the United States strongly believes that the bracketed text "in armed conflict" should be deleted from the definition of crimes against humanity (paragraph 1, on page 32 of the Zutphen draft). Contemporary international law makes it clear that no war nexus for crimes against humanity is required. (The United States distributed a paper examining this issue on March 25, 1996.) The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect this principle.

Section C of the definition of war crimes (on page 28 of the Zutphen draft), which incorporates common Article 3 of the Geneva Conventions, is currently bracketed. In our view, it is essential that those brackets be removed. The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts.

Finally, the United States urges that there should be a

section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC's jurisdiction.

The United States is eager to work with other delegations to build strong consensus on these matters.