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United States Department of State

Washington, D.C. 20520

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DEC 11 1990

Dear Mr. Chairman:

This is in response to your letter of May 16 requesting the views of the Department of State on House Concurrent Resolution 66, which would express the sense of the Congress that the United States should pursue the establishment of an International Criminal Court with jurisdiction over internationally recognized crimes. The Concurrent Resolution also would recommend that the President explore with other nations the feasibility of jointly convening an international conference for purposes of pursuing the negotiation of a multilateral convention establishing such an international criminal court. For the reasons described below, the Department believes that it would be premature for the U.S. Congress to go on record at this time as supporting the general concept of creating an International Criminal Court. Moreover, we note that to the extent that H. Con. Res. 66 would have called on the Administration to explore the need for an international criminal court, it has been rendered redundant by Sec. 599E of the Foreign Operations Appropriations Act, H.R. 5114-88, which was enacted into law on October 26, 1990.

As Secretary Baker stated last March before the Senate Appropriations Subcommittee on Foreign Operations, the proposal to create an International Criminal Court is an interesting idea. However, he also noted that there are substantive, definitional and procedural problems attendant to the proposal. Because of these problems, the idea of creating an International Criminal Court has had a long, and largely disappointing, history. While the Department will continue to examine specific proposals for such a court carefully, we believe it would be premature and unwise for the Congress to go on record in support of such a court or a diplomatic conference to create one, until there is greater indication that these problems can be addressed satisfactorily.

The Honorable
Dante B. Fascell,
Chairman,
Committee on Foreign Affairs,
House of Representatives.

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For example, it is not clear that such a court would actually facilitate the prosecution of international criminals. The current approach of the international legal system is to require states either to prosecute or extradite alleged offenders. We are not convinced that states would be more willing to turn offenders over to an international court than they would be to prosecute offenders or extradite them to another state. We also need to consider the risk that an International Criminal Court could develop into a politicized body, in which case we might find the court interpreting crimes in unhelpful ways and releasing criminals who might no longer be prosecutable.

In addition, given the general reluctance of states to submit themselves or their nationals to the jurisdiction of an international authority, it is highly questionable whether the creation of an International Criminal Court could at this point in time achieve acceptance by a sufficient number of states to be an effective and worthwhile endeavor. This concern is borne out by the lack of enthusiasm most governments have shown for past proposals to create international criminal tribunals.

Furthermore, the creation of an International Criminal Court is an enormously complex matter, requiring consensus on numerous practical issues, such as: What would be the scope of the court's jurisdiction? What would be the court's composition? What rules of procedure would apply? What rules of evidence would apply? How would evidence be obtained? How would the court be funded? Where would offenders be incarcerated? How would the court obtain custody of offenders? Who would conduct the investigation and prosecution? While all of these problems may be potentially surmountable, achieving consensus on them could well prove a difficult if not impossible task, especially in light of the divergence of opinion among the international community on various aspects of international criminal law. The Department has not to date encountered any proposal for the creation of an International Criminal Court which addresses these problems in a serious manner.

Because of their limited jurisdiction, the Nuremberg and Tokyo Tribunals created after World War II did not have to address many of the above issues. For that reason, they provide little guidance for the creation of an International Criminal Court with jurisdiction to hear a broader class of claims against a much larger number of individuals. (Of course, the Tribunals may provide useful guidance for later tribunals set up to adjudicate war crimes.)

We are also concerned that the proposal for an International Criminal Court not divert resources and attention away from more practical and readily achievable means for combatting international criminal activities. We would not want examination of this proposal to detract in any way from such endeavors as encouraging vigorous domestic enforcement of criminal laws, strengthening the work of international organizations such as ICAO and IMO in this area, modernizing extradition treaties, negotiating Mutual Legal Assistance Treaties, devising new international agreements, etc.

These concerns prompted the Department to work with Congressional staff members to develop mutually acceptable legislation on this issue. The result was Sec. 599E of the Foreign Operations Appropriations Act, enacted into law on October 26, 1990. Rather than endorsing the concept of creating an International Criminal Court as H. Con. Res. 66 had done, Sec. 599E requires the Government to "explore the need for the establishment" of such a tribunal. Pursuant to Sec. 599E, the Department will report to the Congress by October 1, 1991, the results of our efforts to explore the need for an International Criminal Court. To this end, we will closely examine the many proposals for the creation of such a court and will participate in discussions of the subject in the U.N. and other fora where the subject may arise.

The issue of establishing an international criminal court was raised in the 44th U.N. General Assembly, where a proposal to create an International Criminal Court with jurisdiction over narcotics trafficking, terrorism and other international crimes was discussed. The United States joined other states in successfully urging the General Assembly to submit the proposal to the International Law Commission to examine the many complex questions raised by the proposal.

The International Law Commission's report, which was recently published, describes many possible options for an International Criminal Court. Unfortunately, the report does not analyze in any detail the advantages and disadvantages of the options. Nor does it address, among other things, crucial questions about prosecution, enforcement, rights of the accused, and potential interference with existing national and international legal mechanisms.

We raised these questions in the U.N. Legal Committee when it recently discussed the report. Many other countries shared our concerns and joined us in urging the International Law Commission to consider the subject in more detail before reporting back to the Legal Committee.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely, ,

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Janet G. Mullins
Assistant Secretary
Legislative Affairs

Enclosure:

Six Copies of Proposed Report.