THE
CARTER CENTER

The United States and the Establishment of a Permanent International Criminal Court

The United States and the Establishment of a Permanent International Criminal Court

Conflict Resolution Program/Human Rights Committee
The Carter Center
One Copenhill
453 Freedom Parkway
Atlanta, Georgia 30307
(404) 420-5185
Fax (404) 420-5196
http://www.emory.edu/CARTER_CENTER

The United States and the Establishment of a Permanent International Criminal Court

Nov. 13, 1997
The Carter Center
Atlanta, Georgia

Participants

Ozong Agborsangaya, Project Coordinator, Democracy Program/Human Rights Committee, The Carter Center; Cameroon
Harry Barnes, Director, Conflict Resolution Program, and Chair, Human Rights Committee, The Carter Center; United States
David Bederman, Professor, Emory University Law School; United States
Nina Bang-Jansen, Special Counsel, Coalition for International Justice; United States
M. Cherif Bassiouni, Vice Chair, U.N. Preparatory Committee (PrepCom) for the International Criminal Court (ICC), and Professor, DePaul University Law School; United States/Egypt
Harold Berman, Professor, Emory University Law School; United States
Emma Bonino, Commissioner, European Commission for Humanitarian Affairs; Italy
Marino Busdachin, President, No Peace Without Justice; Italy
Roger Clarke, Professor, Rutgers University School of Law-Camden; Australia
Gianfranco Dell' Alba, Member, European Parliament; Italy
Richard Dicker, Associate Counsel, Human Rights Watch; United States
Stephen Bowen, Program Director, International Human Rights Law Group; United States
Marco Cappato, ICC Project Coordinator; Italy
Marco De Andreis, Cabinet Member, European Commission for Humanitarian Affairs; Italy
Clarence Dias, Executive Director, International Center for Law in Development; India
Robert Downey, Diplomat-in-Residence, The Carter Center; United States
Carol Emmons, Executive Director, Georgia Council of International Visitors; United States
Jerry Fowler, Legislative Counsel, Lawyers Committee for Human Rights; United States
Morton Halperin, Senior Vice President, Twentieth Century Fund; United States
Steven Hochman, Associate Director of Programs and Faculty Assistant to President Carter, The Carter Center; United States
Howard Hunter, Dean, Emory University Law School; United States
Benjamin Ferencz, Former Chief U.S. Prosecutor for Nuremberg War Crimes Tribunal; United States
Steven Gerber, Coordinator, Washington Working Group on the ICC; United States

Meg Hartin, Judge; United States
Katherine Huffman, Staff Attorney, Southern Center for Human Rights; United States
Christopher Joyner, Professor, Department of Government, Georgetown University; United States
Tanya Karanasios, Program Officer, International Law and Human Rights Program, Parliamentarians for Global Action; United States
Robert Kushen, Deputy Director, Open Society Institute; United States
Ada Loo, Congressional Aide to Rep. Cynthia McKinney (D-Ga.); United States
Mary Marrow, Outreach Coordinator, Women's Caucus for Gender Justice in the ICC; United States
Kerry McGrath, Deputy Director, Southern Region Office, Amnesty International; United States
Helena Nygren Krug, Human Rights Consultant, Conflict Resolution Program/Human Rights Committee, The Carter Center, and Adjunct Professor, Emory University Law School; Sweden
Roy Lee, Director, Codification Division, Office of Legal Affairs, U.N. PrepCom for the Establishment of an ICC; China
Jeanette Mansour, Program Officer, the Charles Stewart Mott Foundation; United States
Johnny Mason, Judge; United States
Brian McKeon, Minority Counsel, Senate Foreign Relations Committee; United States
Julie Mertus, Visiting Professor, Emory University Law School; United States
Regina Monticone, Executive Assistant, No Peace Without Justice; United States
William Pace, Executive Director, Nongovernmental Organization Coalition for an ICC; United States
Robert Pastor, Director and Fellow, Latin American and Caribbean Program, The Carter Center; United States
Marco Perduca, ICC Project Coordinator for the Americas, No Peace Without Justice; Italy
Matthew Meselson, Professor, Department of Molecular and Cellular Biology, Harvard University; United States
Molly O'Brien, Administrative Professor, Emory University Law School; United States
Stefano Palumbo, Press Agent, No Peace Without Justice; Italy
Jelena Pejic, European Coordinator, Lawyers Committee for Human Rights; United States
Michele Polizzotto, ICC Project Coordinator, No Peace Without Justice; Italy
Michael Posner, Executive Director, Lawyers Committee for Human Rights; United States
Shavia Rafi, Secretary-General, Parliamentarians for Global Action; Pakistan and United States
Bertie Ramcharan, Director, Africa Division, U.N. Department of Political Affairs; Guyana
Elspeth Revere, Associate Director of the General Program, John D. and Catherine T. MacArthur Foundation; United States
His Excellency A.N.R. Robinson, President, Republic of Trinidad and Tobago; Trinidad
Her Excellency Patricia Robinson, First Lady, Republic of Trinidad and Tobago; Trinidad
Karin Ryan, Assistant Director, Conflict Resolution Program, and Vice Chair, Human Rights Committee, The Carter Center; United States
David Scheffer, Assistant Secretary, Ambassador at Large for War Crimes Issues; United States

Eric Schwartz, Special Assistant to the President and Senior Director, Democracy, Human Rights, and Humanitarian Affairs, National Security Council; United States

Frank Sieverts, Assistant to the Head of Delegation, International Committee of the Red Cross; United States

William Spencer, Special Advisor, Bureau of Democracy, Human Rights, and Labor, Department of State; United States

David Stoelting, Co-chair, International Law Section Committee on the ICC, American Bar Association (ABA); United States

Gordon Streeb, Associate Executive Director for Prevention and Resolution of Conflict Programs, The Carter Center; United States

Kirk Wolcott, Project Coordinator, Conflict Resolution Program, The Carter Center; United States

Johan van der Vyver, Professor, Emory University Law School; South Africa

Mark Zaid, Managing Director, Public Information Law and Policy Group, ABA; United States

Table of Contents

Foreword by Jimmy Carter

Fifty years ago, aggression, war crimes, and crimes against humanity during World War II gave rise to the Nuremberg and Tokyo tribunals and sparked a movement to create the Universal Declaration of Human Rights, an unprecedented commitment by nations to freedom and peace. As we celebrate that milestone, we are challenged to create institutions that will reinvigorate the Declaration's promise. To this end, formation of a permanent International Criminal Court (ICC) is essential.

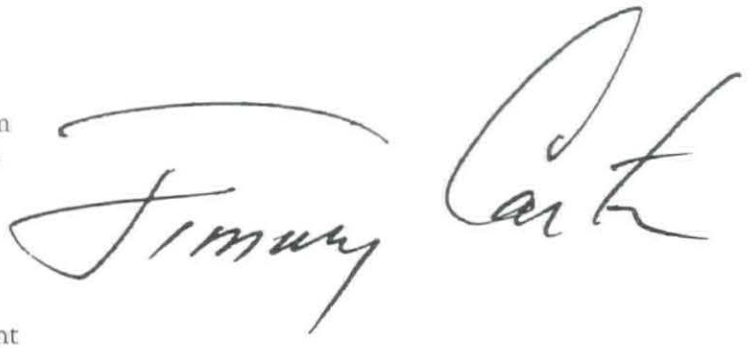
Existing laws have been inadequate to prevent genocide and other modern-day atrocities. For political and financial reasons, ad hoc tribunals mandated to address crimes in the former Yugoslavia and Rwanda have not fulfilled their promises. Only a permanent ICC with adequate resources and a broad mandate can meet expectations for justice, thereby deterring future criminal acts and encouraging reconciliation for past crimes.

On Nov. 13, 1997, The Carter Center and No Peace Without Justice brought key players to Atlanta to discuss the United States and establishment of a permanent ICC. As the final opportunity to prepare a draft treaty approaches in June 1998, I hope this report will delineate potential points of consensus on major outstanding issues.

Most agree the ICC must be independent, impartial, and able to administer justice without political interference. Still, it is far from certain that negotiations about procedural, budgetary, and legal details will produce a sound framework for its operation.

Perhaps most important, the proposal to subject ICC jurisdiction to review by the U.N. Security Council requires serious debate. Granting the Council unrestricted control over prosecutions would undermine the ICC's very purpose. The Council does have a key role to play, but that does not mean it should control the ICC.

An ICC will not be a panacea for all ills, but it will be good for the United States and all nations. It marks the next essential step on the road to a more just, peaceful world, and the United States must lead the way. ■



Preface and Acknowledgments by Harry Barnes

Director, Conflict Resolution Program, and Chair, Human Rights Committee, The Carter Center

Through various wars and bloody campaigns, often waged in the name of ethnic grudges and by despotic rulers, the 20th century has witnessed extreme indifference to human rights. Violations such as genocide, war crimes, and crimes against humanity continue to be perpetrated. Perhaps most tragic, those responsible for such widespread suffering are not held accountable for their crimes, due to the lack of a permanent, effective judicial body through which justice may be served.

While establishment of a permanent International Criminal Court (ICC) has been hotly debated for some time, the international community, particularly in the human rights arena, finally has taken a definitive step toward creating such an institution. Efforts by its advocates have culminated in the 51st U.N. General Assembly's resolution, which calls for convening the Diplomatic Conference in Rome in June 1998 with the mandate of adopting the ICC statute.

The desire that a permanent ICC be fair, effective, and independent has generated numerous questions and controversies. In particular, concerns have been expressed regarding the court's functions, its extent of power, its role in relation to the U.N. Security Council, and the powers of its prosecutor. Despite these reservations, demand for productive, lasting ways to bring these crimes' perpetrators to justice has increased.

The Carter Center and No Peace Without Justice discussed these issues at their November 1997 conference in Atlanta, Ga. The event brought together representatives of government agencies, human rights organizations, the legal community, academia, and heads of state. This variety of participants represents the wide spectrum of thought and debate concerning the ICC. Conferees answered many questions and overall, expressed optimism.

This document is a summary report of conference proceedings. It contains excerpts of transcripts including a welcome address by former U.S. President Jimmy Carter in which he expresses his hope that a permanent ICC will soon be achieved. The report also documents the conference's many panel presentations and discussion sessions. It concludes with a postscript by M. Cherif Bassiouni, vice chair of the U.N. Preparatory Committee for the ICC and professor at DePaul University Law School. The appendices contain the Atlanta Declaration—which sets forth the goals and essential elements of an ICC and which many participants signed—as well as other key documents.

Helena Nygren Krug, human rights consultant to The Carter Center's Conflict Resolution Program/ Human Rights Committee, coordinated and edited this report with the assistance of intern Heather Davies, a student at Emory University Law School. We also wish to acknowledge the invaluable guidance of Professor Bassiouni and editorial assistance of Laina Wilk, Public Information, The Carter Center.

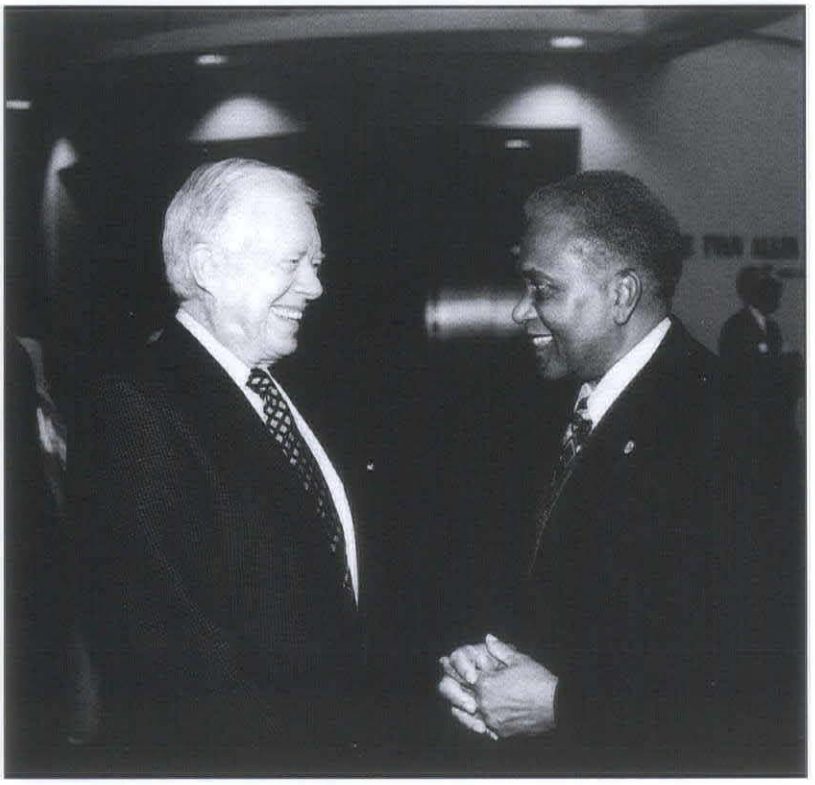
Finally, the Center extends sincere appreciation to No Peace Without Justice for its generous support, which made possible the Conference and this report's publication. ■

Opening

Jimmy Carter

Former U.S. President and Chair, The Carter Center

The idea of an International Criminal Court (ICC) has been in the forefront of many legal minds and of those committed to peace, justice, and human rights for the last 75 or more years. It was largely debated in an unofficial way, without any real opportunity to move toward a final decision until 1989, when Trinidad and Tobago brought before the U.N. General Assembly a specific, official proposal concerning drugs. Since then, momentum has built worldwide—including this meeting—which may lead to an ICC that will fulfill the dreams of many of us.



Corky Gallo, Emory University Law School

Jimmy Carter enjoys a cordial moment with A.N.R. Robinson, president of Trinidad and Tobago, during the ICC conference at The Carter Center in Atlanta, Ga.

The Carter Center is committed to analyzing the world's conflicts, preventing as many as possible, and resolving others. About 110 conflicts exist in the world today. Of those, 71 last year erupted into violence, and 30 are considered major, in which 1,000 or more soldiers have been killed in combat. In modern war, for every soldier killed, about nine civilians perish. These civilians are primarily the most defenseless members of a society, and they die from land mines, spray bullets, bombs, deliberate starvation, exposure to the elements, or persecution by authorities.

At the Center, we also monitor human rights and try to intercede in some of the world's most onerous and disturbing human rights abuses. We have the International Human Rights Council, which includes about 25 human rights experts and activists from around the globe. We try to be preemptive and prevent human rights abuses before they occur. We also try to be all-inclusive and work with each other to magnify individual efforts.

In promoting peace, preventing war, and protecting human rights, there always has been a sad, disturbing omission: the lack of a permanent ICC. When Adolph Hitler's domain was destroyed at the end of World War II, the Nuremberg trials constituted some effort to punish those guilty of the Holocaust and other terrible crimes. Since then, that effort has been undertaken through an ad hoc

approach, which is frustrating, inadequate, and extremely costly in time, expenditure of personnel, and funding.

The two most troubling current cases concern the 1994 genocide in Rwanda and the case of the former Yugoslavia. Culprits who have committed war crimes, genocide, and crimes against humanity, as defined by international agreements, basically have gone free and have been impervious to arrest, trial, or punishment. This sends a counterproductive signal.

Given the lack of alternatives at a war's end, known perpetrators of horrible human rights crimes often receive amnesty. In the former Yugoslavia and Rwanda, although hundreds of criminals have been identified, even indicted, very few have been brought to trial. Even among highly responsible nations, including some of the U.N. Security Council's permanent members, known culprits are given harbor and are not delivered to authorities even though they have been indicted. Something must be done, and that is to establish a permanent ICC.

[The ICC] must have global support. It must be independent and fair, and to be effective, it must be adequately financed.

Such a court must have global support. It must be independent and fair, and to be effective, it must be adequately financed. It is extremely wasteful in monetary terms to create a special court with prosecutors who only investigate crimes perpetrated in one country or region. When I was last in Kigali, Rwanda, 30 full-time officials were investigating the crimes perpetrated. They were not organized but were preparing to commence trials in Tanzania at a later stage. There was no place for incarcerating the accused who were being delivered for the trials. The cost in time and delay as well as the lack of certain conclusion has been horrific. If we had an ICC at that time to quickly bring those indicted to trial, we would have avoided many of the terrible atrocities that occurred in recent months in the aftermath of the Rwanda genocide.

One specific controversy needs to be addressed. I feel strongly that it would be a mistake to give the Security Council veto power over any case that might be brought before the ICC. Having been U.S. president, I know the sensitivity of a great country like ours, France, Russia, Great Britain, or China to submitting possible criminals to an international court for trial when the country feels its own national courts might be adequate. But if we do permit this loophole, it could be self-destructive.

Suppose a nation—"Nation X"—is a permanent Security Council member. Suppose there were some criminals in Bosnia and Herzegovina or Croatia, and Nation X had great interest in the future of trade or commerce or some political alliances with that particular country. It would be easy for Nation X to say "we veto the ICC's administration in that country," and that would be the end of it. It would be very tempting to find almost unlimited loopholes, as political trades are made and sensitivities honored.

This can not be decided at this conference. By June 1998, a final decision will be made as to whether there will there be an ICC. What will be its status? Its degree of autonomy? Its guarantee of fairness and effectiveness? If it can be established (and I pray it will be), it would be a major step toward preventing future wars, perhaps resolving some of those already under way, and protecting human rights everywhere. For these reasons, I believe this conference is important, and I hope we will have a clear commitment (despite some inevitable disagreements about details), that an ICC will be established. ■

Introductory Remarks

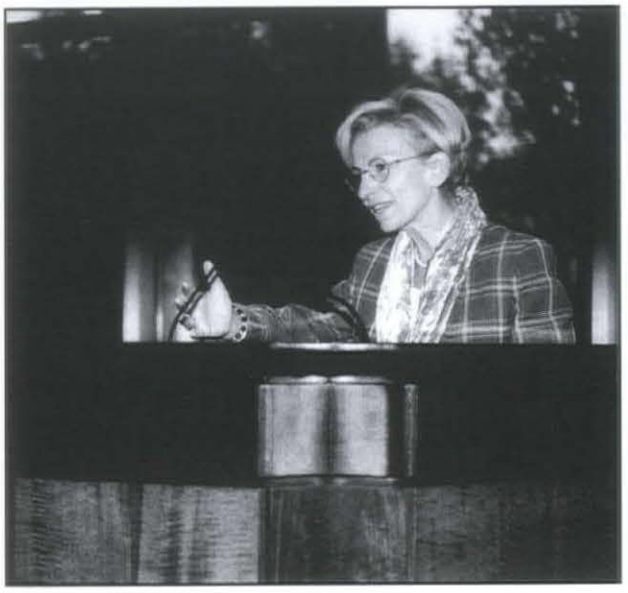
Emma Bonino

Commissioner, European Commission for Humanitarian Affairs

We have in front of us an obstacle to get to the June 1998 conference of plenipotentiaries in Rome. However, we also must look backward to see how far we have come and in doing so, generate some hope, enthusiasm, and the feeling that we have been effective in the past years.

In 1991, the question was if we would have a permanent International Criminal Court (ICC). Then, we campaigned for the ad hoc tribunals, although we were aware they were just temporary solutions. We always meant them to be a step toward a permanent ICC. We have known since the beginning the limits of the ad hoc tribunals. The first limit is that such tribunals lack the deterrence value we think is essential to prevent the feeling of impunity that is spreading throughout the world. Ad hoc tribunals are set up after a genocide has taken place. A permanent ICC would serve as a tool of conflict or barbarism prevention. It would be one of many conflict prevention tools but a very important one, even from a cultural point of view, because it bases international relations on the rule of law, not the rule of the jungle.

The second question was: "When will we have a permanent ICC?" Now that we have a date, the remaining question is: "What kind of ICC?" We are at the stage where the international community must decide if it truly will respond to public expectation or if it will hide behind some alibi. Human rights may be good for a Sunday morning speech but useless—even an obstacle—for business from Monday to Friday. Of course, there are geopolitical and commercial interests in international relations, but human rights should be as important as diamonds or oil. We are not saying the only guidelines should be human rights. Modestly, we are saying, "Let's have a balance between economic interests and moral issues."



Corky Gallo, Emory University Law School

Ms. Bonino introduces key issues to be discussed by Atlanta conference participants.

That's why the months before us are crucial to try to foster dialogue between different positions. We have room to build bridges from one side to the other and to find reasonable solutions so we can tell the public, "This will work." That is, I think, the final goal. As a European commissioner for humanitarian affairs, I will continue to endeavor to make available emergency aid for victims of complex violent crises whenever called upon to do so. One of my most important responsibilities is to assist in prevention. That is why on a personal level, as a citizen of the world, and as a humanitarian commissioner, I attach such enormous value to this campaign.

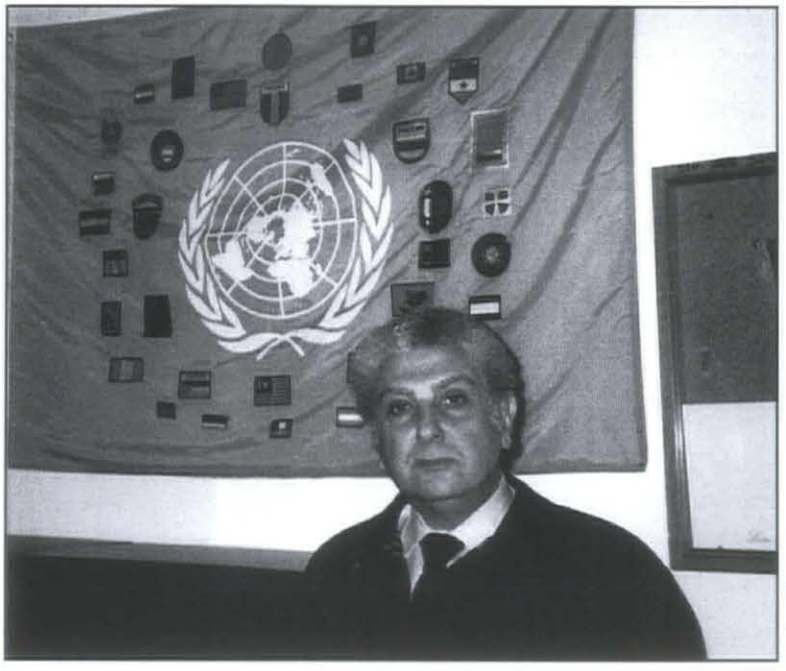
The ICC must be independent, impartial, effective, and fair. Many questions remain, but we

all must play whatever part we can in ensuring a good outcome. We owe this as a tribute to victims of crimes past and present and as a warning to those watching [Bosnian Serb leader] Radovan Karadich and who might be tempted into copycat crimes. This is the snowball effect. Impunity is becoming contagious. Everyone thinks they can do whatever they want without adequate reaction from the international community.

Resistance from some U.N. member states will never be overcome, but we cannot wait for 180 states to agree. We must set in motion a dynamic process in which we hope everybody will join. ■

The First Panel

Morton Halperin, senior vice president of the Twentieth Century Fund, moderated the first panel, which featured discussions on ICC jurisdiction and the role of the ICC prosecutor. Excerpts from some panelists' speeches follow.



M. Cherif Bassiouni

Professor Bassiouni stands before the U.N. flag in Sarajevo's airport. He led the U.N. investigation of war crimes in the former Yugoslavia.

M. Cherif Bassiouni

Vice Chair, U.N. PrepCom for the ICC

How effective, impartial, fair, and independent will the International Criminal Court (ICC) be? This is a big challenge. We must not establish institutions that raise hope that justice will be achieved without being able to fulfill this expectation. We also must not have institutions like those in the former Yugoslavia and Rwanda, which—notwithstanding some of their accomplishments, particularly in Yugoslavia—have been far short of the international community's expectations.

We must not create "Potempkin" tribunals [facades set up to hide an undesirable condition]. We must ensure these tribunals will not be manipulated for political purposes, or they will create a sense of injustice. Aristotle taught us, "Justice is to treat like cases in a like manner and unlike cases in an unlike manner." Thus, to have the world support a permanent ICC's decisions, the ICC must rise in the public's perception as having achieved a certain

level of impartiality, independence, and fairness.

Any of us involved in investigative work in criminal law know well the issue is not when you proceed at a trial but whether you have the evidence. Whether you have the evidence depends on how fast you can secure it, how effective your means and resources are, and how capable you are of transforming that evidence into something usable in court and durable.

The principle questions are ... What crimes should be included? How should those crimes be defined? What jurisdictional trigger mechanisms will there be? And what is the prosecutor's role?

The issues posed by the ICC statute can be divided into two categories: technical and substantive.

Technical issues usually provide the ideal opportunity for those wishing to delay things for political reasons. Although it appears that rules of procedure have little political content, those wanting to delay the process usually fight battles on rules of procedure rather than on substance. Therefore, one technique is to burden the rules of procedure with a very long list of provisions, which delays the process and makes the tribunal ineffective as a functioning institution.

There are other technical issues of a more substantive nature, such as those of general principles of criminal responsibility. The U.N. General Assembly has 185 members, most of who are diplomats. With all due respect to diplomats, they are not the ideal type of experts to deal with the complex dogmatic and doctrinal questions of criminal responsibility in common law and civilist or Germanic legal systems. Consequently, we either get bogged down with detail, or we fall to the lowest common denominator, without being able to move very fast. That too is something that can be overcome.

The principle questions are of a technical as well as political nature. They are: What crimes should be included? How should those crimes be defined? What jurisdictional trigger mechanisms will there be? And what is the prosecutor's role?

There are three core crimes—genocide, crimes against humanity, and war crimes. There is no difficulty defining genocide because of the Genocide Convention.* However, this Convention has loopholes, as it does not protect social and political groups. Thus, one can make the case that 40 percent of the population killed in Cambodia do not fall under genocide because members of the same ethnic group killed each other for political rather than ethnic or religious reasons. Unfortunately, we will not be able to plug that loophole, because states do not want to alter the Convention.

Crimes against humanity go back to Nuremberg Charter Article 6c, which has certain weaknesses in terms of the principles of legality. We should define it more specifically to avoid the claim that one does not know the contents of murder, extermination, deportment, enslavement, and other inhumane acts.

War crimes present the most serious problem, not only from a definitional point of view, but also from a political perspective. Many militaries, including those of the major powers, want to be immune from having to be brought before an ICC. Military personnel want to make sure that if their government puts them in harm's way and limits their ability to act in particular peacekeeping and peacemaking operations, they will not ultimately

* The Convention on the Prevention and Punishment of the Crime of Genocide, U.N. General Assembly resolution 260 A (III), Dec. 9, 1948.

bear the brunt of criminal responsibility for situations over which they may not have had control. Also, they do not want to suffer the embarrassment of having the military's honor dragged before an ICC because some trigger-happy soldier committed an infraction of the laws of war.

Some of these concerns are legitimate, some are not. The legitimate ones are addressed by the concept that priority of jurisdiction is given to national systems, provided these national systems are capable and willing to carry out the obligation. For states unable or unwilling to carry out their obligations, jurisdiction will shift to the ICC. However, the ICC will not assume jurisdiction *ipso facto*. The prosecutor will have to go to a three- or five-member chamber of the court to get approval, so there will be adequate balance and judicial safeguards. Any concerns about major powers' militaries should be allayed by this and other protections that will form an overall matrix of safeguards.

[A]ctions should be brought to the ICC by referrals from the Security Council and U.N. member states, but the prosecutor should have the right to investigate.

There are other issues regarding war crimes. The Geneva Conventions clearly define what grave breaches are. However, we lack definitions for customary laws of armed conflict. We also are concerned about whether certain prohibitions, such as use of chemical weapons under the biological weapons convention, should stand on their own as a specific treaty, or whether they should fall under the general heading of weapons that cause unnecessary pain and suffering, which are part of the customary laws of armed conflict.

Definitions aside, the problem remains with aggression. Do we leave this crime in or not? [See page 22 for General Discussion on Aggression.] If left in, would it be subject to Security Council action? I don't think we should rule back on Nuremberg and Tokyo [tribunals set up after World War II] and all the gains we have made. Therefore, I think aggression should stay. The question is should aggression stay only symbolically, as part of the ICC's jurisdiction but not defined, remanding definition for the first five-year review? Or should we tackle the issue of aggression now? I prefer to put it in, maintain the symbolism, and remand it in five years.

Last, let me address the independence of the prosecutor. I think actions should be brought to the ICC by referrals from the Security Council and U.N. member states, but the prosecutor should have the right to investigate. However, this right is subject to an indictment approved by a three- or five-judge chamber of the court. Thus, the prosecutor will not be the most powerful man or woman in the world, because these judges will review his/her work.

Also important is the concern we have about not giving the Council or any member state veto power over the prosecutor's action. ■

David Scheffer

Assistant Secretary, Ambassador at Large for War Crimes Issues

In his Sept. 22, 1997, speech at the U.N. General Assembly, U.S. President Bill Clinton said, "Before the century ends, we should establish a permanent International Criminal Court (ICC) to prosecute the most serious violations of humanitarian law." The president's vision reflects our longstanding fundamental position in support of a fair, effective, and efficient court and emphasizes a rapid timetable for its establishment.

As we approach the 21st century, individuals of whatever societal rank who participate in serious, widespread violations of international humanitarian law must no longer act with impunity. The time has come to move with determination toward establishing an ICC that serves as a deterrent and mechanism of accountability in years to come.

The United States will continue to play a major role in negotiations and in Rome (June 1998). U.S. participation in an established, permanent ICC will be essential to its effectiveness. History has shown that when new international institutions begin without full U.S. participation—like the League of Nations—they can fail. When they start with U.S. leadership—like the United Nations, the ad hoc war crimes tribunals, and the new organization for the prohibition of chemical weapons—they can succeed. Creation of a fair, effective, efficient court is within reach. All governments and nongovernmental organizations (NGOs) engaged in this historic endeavor must proceed with realistic expectations about its functions and structure.

I wish to discuss parts of the U.S. government position that most concern NGOs and governments. Many provisions in the ICC draft statute are being negotiated in a collaborative, productive manner, and considerable progress is being made. The U.S. delegation has been a leading influence in drafting general principles of criminal law and court procedures. These are no small tasks, because we try to resolve differences between common and civil law systems. Also, much progress had been made on definitions of crimes constituting ICC jurisdiction, which must reflect well-accepted principles of criminal law as they apply to individuals.

There is a tendency in negotiations to transform human rights principles and prohibitions on states into new criminal law principles. However, this treaty-making excursus cannot become a law-making one. The treaty must reflect current international criminal law, not what we hope or confidently predict may one day become criminal law. Our national legislatures will have to be convinced that individuals prosecuted by the permanent ICC are being accused of well-established crimes, not violations of principles which, well-intentioned and important as they are, are prohibitions rather than crimes.

The permanent ICC should not take national courts' place in handling everyday cases. Rather, it should be a significant, powerful international mechanism to deal with situations of exceptional seriousness and magnitude.

The permanent ICC should not take national courts' place in handling everyday cases. Rather, it should be a significant, powerful international mechanism to deal with situations of exceptional seriousness and magnitude. Thus, there should be some overall threshold of seriousness and magnitude to meet before one sets in motion its considerable and expensive machinery. Realistically, the ICC neither can nor should be called on to deal with every unpunished crime, however desirable that might be.

How the ICC initiates cases remains controversial. One group of governments and many NGOs argue for an independent prosecutor with unfettered authority to investigate and prosecute any indi-

Corky Gallo, Emory University Law School

David Scheffer speaks during the Atlanta conference's first panel discussion on Nov. 13, 1997.

vidual anywhere. Another important group of governments believes as strongly that multiple states must consent before the prosecutor can act. There should be a middle ground.

The United States and others have advanced a third viewpoint: The U.N. Security Council should play an essential role in a trigger mechanism, where the prosecutor would exercise considerable independence. This position is sometimes misunderstood and misrepresented, so I want to lay it out clearly.

The U.S. government believes the prosecutor should initiate investigations and prosecutions of individuals, provided the court is seized with an overall situation or matter meaning conflict or atrocity for adjudication. We [the United States] emphasize that the state party should have to refer a situation or matter to the ICC. The state party would not lodge a complaint against one or more individuals, as the International Law Commission draft statute currently envisions but often seems to be taken for granted.

An individual state should not be able to choose who to investigate and then dictate this to the prosecutor by filing a selective complaint. Individual complaints by states parties can only lead to highly politicized behavior by governments, because they target individual suspects following cursory investigations or no investigations at all.

Our proposal for state parties would be similar to the Council's referral procedure, which is acceptable to a wide range of governments. However, if the situation referred by the state party to the ICC concerns a dispute or situation pertaining to international peace or security with which the Council is dealing, the Council should approve referral of the entire situation to the ICC. This would recognize the Council's responsibilities under its U.N. Charter. In most cases, the Council's decision likely would affect the referral's timing and not permanently deny the referral. Once a referral goes to the ICC, the Council would not review individual cases brought by the prosecutor. The Council would not have veto power over any individual case.

Our proposal mirrors the practice of the ad hoc international war crimes tribunals. The prosecutor

would have wide discretion within the perimeters of the situation he/she is charged to investigate by either the Council or a state party, just as Justice Louise Arbour now does in the tribunals. Many have pointed to Justice Arbour's independent position as a model for the kind of functioning prosecutor for the permanent ICC.

The United States has reserved taking a position on the issue of state consent for individual cases until debate on the Council's role and complimentarity settles. Complimentarity—or appropriate deferral to national jurisdiction—is of great importance to our government. Negotiations on this are proceeding well. However, if the U.S. position on the Council's role does not attract more support, our government will need to look more seriously at other procedures to provide appropriate safeguards for U.S. interests.

What are those interests? First, we want to ensure that anyone who commits war crimes against the U.S. military is investigated and prosecuted. We want to ensure that ICC protections also apply to our forces. The benefit of a properly structured ICC will be its potential for helping to protect our military from war crimes by deterrence and enforcement of the law.

Complimentarity—or appropriate deferral to national jurisdiction—is of great importance to our government.

Second, the ICC must be effective and credible. The argument that it will be ineffective if the Council has an important role in its work is extremely shortsighted and oblivious to what the court will require to function effectively.

Third, the ICC must not become a political weapon used perhaps with the best intentions to interfere with important Council efforts to strengthen international peace and security.

Fourth, the United States has an important responsibility as a permanent Council member to engage in efforts to maintain or restore international peace and security. In the post-Cold War world, the U.S. military is called on to undertake missions under U.N. authority, to carry out Council mandates, to fulfill commitments to the North American Treaty Organization (NATO), to help defend our allies and friends, to achieve humanitarian objectives including protection of human rights, to combat international terrorism, to rescue Americans and others in danger, and to prevent proliferation or use of weapons of mass destruction.

No other government shoulders the burden of international security as ours does.

No other government shoulders the burden of international security as ours does. Many others participate in our military alliances, such as NATO, and a much larger number of governments participate in U.N. and other multinational peacekeeping operations. It is in these governments' interests that the personnel of their militaries and civilian commands be able to fulfill their legitimate responsibilities without unjustified exposure to criminal legal proceedings.

There is legitimate concern that an independent prosecutor would have free reign to probe into all decision-making processes in military actions anywhere, at anytime, and under any circumstances. It would be a profound mistake to assume that such concern should inhibit establishing a permanent ICC. Rather, it should be an essential factor in determining an ICC's jurisdiction and functioning.

Two final points: Some governments and NGOs include aggression in the ICC's jurisdiction, which is understandable in light of Nuremberg. However, it is not realistic at this time. There is no broadly accepted definition of aggression for individual criminal culpability. Advocates for including this undefined crime also should consider seriously

whether including it will impose unnecessary risks on, and thus inhibit the use of, military forces that the international community calls on for tough assignments. The ICC's establishment will be delayed if efforts continue to include this crime, and the number of countries joining the treaty will decrease.

We cannot lose sight of the considerable assets the Security Council can bring to a permanent ICC. The Council already has shown willingness to delegate to an independent prosecutor wholesale conflicts and atrocities to investigate. The ICC will no doubt look to the Council to enforce its orders in some circumstances. There will be times when the ICC will want the Council's power to enforce its orders. If the world is seeking to establish a truly effective, busy permanent court, then the Council's role is vital. This is not "mission impossible," nor is it a matter of ignoring reality and creating a theoretically independent court. We are confident that with an acceptable outcome to the negotiations and ultimately with U.S. Senate support, we will see a permanent ICC with strong U.S. participation by the end of this century. ■

Michael Posner

Executive Director, Lawyers Committee for Human Rights

I want to respond to David Scheffer and raise some questions. Before doing that I want to tell an instructive anecdote. A friend of mine, who works at Amnesty International, recently visited Liberia with a long list of points to raise with leaders of that somewhat shaky government.

The leaders, who represent various military factions, said, "We're not interested in your list. We're interested in one thing. We've been sitting here in the only hotel in Monrovia where we can get CNN on the satellite dish, and we've been watching this case from the Hague of a man named Dusko Tadich [a Serbian restaurant owner]. We want to know: Is the tribunal that is prosecuting him coming to Monrovia?"

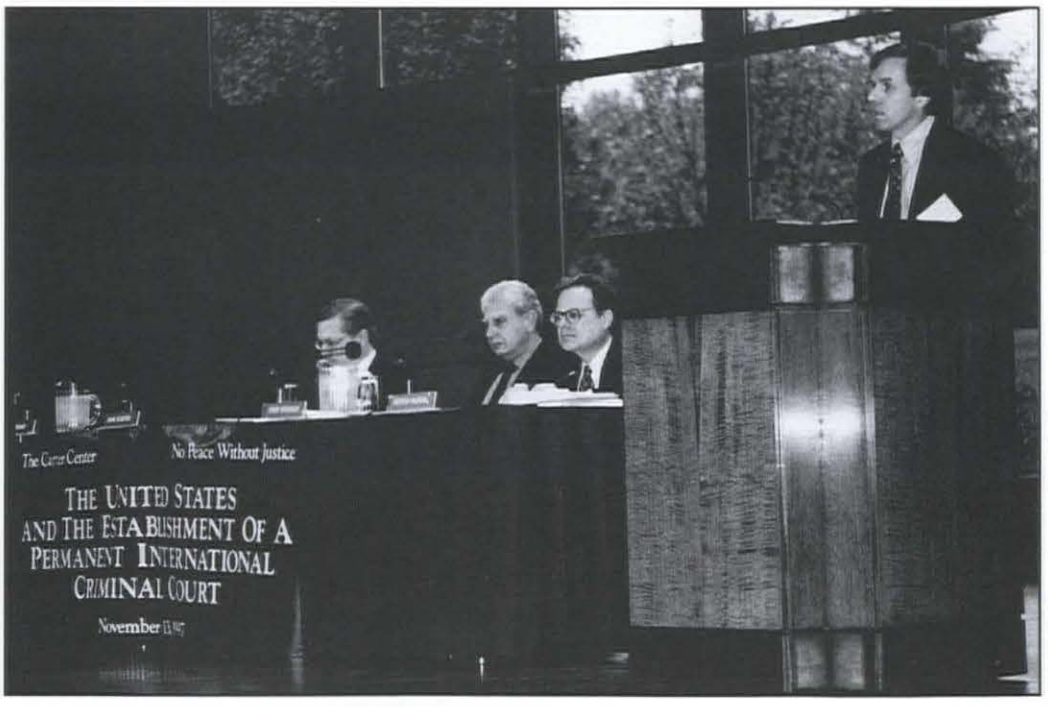
It is not. However, this provides an interesting illustration of the potential effect of a meaningful independent International Criminal Court (ICC). With such a court, people in distant places have hope that there may be justice, there may be a break in the cycle of impunity, and someone may be held responsible for his/her actions. This is the first step toward using justice as a means to peace and reconciliation. Our objective is to recreate that scene globally, so leaders and authorities are aware an ICC may one day come to their homes to look at their actions.

First, regarding the U.S. government's role, I want to echo Ambassador Scheffer. The United States has played an important, active role in the debate and in many respects has been a leader. Mr. Scheffer spelled out U.S. interests, with which I agree. They include:

1) An effective, credible ICC that is not used as a political weapon.

2) Effective procedures for those who commit violations against U.S. service personnel and a fair process in such cases.

3) An ICC without capacity for unjustified exposure to criminal procedures for U.S. or other multilateral military operations.



Corky Gallo, Emory University Law School

Michael Posner speaks about the need for a fair, independent ICC at the November 1997 conference at The Carter Center. Seated panelists include (L to R) David Scheffer, M. Cherif Bassiouni, and Morton Halperin.

This debate has three elements. First, there is the notion of reasonable safeguards for U.S. or other soldiers engaged in legitimate peacekeeping or other military operations around the world. I agree with President Carter that we should find a way to provide necessary safeguards to address U.S. interests outside the U.N. Security Council.

The human rights community believes that measures are built into the draft statute under the guise of complimentarity to the effect that if a national legal system is operating and capable of trying its people, the ICC doesn't have a role. Only when a national legal system is unable (certainly not the case for the United States) or unwilling, would an international prosecution occur. I question how much this notion—that American service personnel should not unjustifiably be brought before the tribunal—is at the center of the problem.

[H]ow do you create an ICC that not only is independent and fair but also is perceived by the world as being so?

The second area to which Ambassador Scheffer alluded is the question of priority-setting or administrative load. This is a big world with many problems. The question is: How does an ICC and its prosecutor work with limited resources to take on really big issues? We don't need to say that the Security Council has to be the political filter for which cases get taken up. However, this question of resources is legitimate: How does an ICC and its prosecutor operate in a complicated world with difficult situations and judge what to do first and when? I'd be interested to know the extent to which the U.S. government has thought about that and how large a factor resources are.

Third, although never spelled out, I think the United States and some of the Council's permanent members would like to control the international process. We see this in various guises, but many states have an underlying concern that this is part of a bigger package, where the United States and other big powers have one set of rules and the rest of the world has another. Whether that's true or not, it is a perception.

Being deliberately conscious, we should discuss: How do you erase that perception, and how do you create an ICC that not only is independent and fair but also is perceived by the world as being so?

I urge us to untangle these three points to generate some practical ways forward. I hope we find alternatives to the Council's position, which by definition makes difficult the perception that this is a fair and independent process. ■

General Discussion on Aggression

Conferees discussed the issue of including the crime of aggression in the ICC's jurisdiction. Paraphrases of remarks made by some of the participants follow.

Benjamin Ferencz

Former Chief U.S. Prosecutor for Nuremburg War Crimes Tribunal

I am concerned about excluding the crime of aggression from the International Criminal Court's (ICC) jurisdiction. To do so is a repudiation of the United States and its policy at Nuremberg, which listed aggressive war as the primary crime, as confirmed by the judgment of the Nuremberg tribunal itself and ratified by the U.N. General Assembly. If we exclude aggression, we will make a short-term gain and a serious long-term mistake.

Aggression is the supreme international crime. It can be defined more clearly than crimes against humanity. The fact that fewer states may be willing to ratify the ICC (which would delay the process of establishing an ICC) applies to crimes besides aggression as well as to other contentious issues. If we want to live in a more peaceful world, we must get out of this war ethic. The notion that we must preserve the right to make war and stop trying to make it illegal is very dangerous in this nuclear age.

David Scheffer (in response)

Assistant Secretary, Ambassador at Large for War Crimes Issues

The United States has tried to define aggression for purposes of individual criminal culpability, but those efforts constantly break down because of an attempt to throw "the kitchen sink" into what is regarded as aggression. States are not willing to specify what is *not* aggression, which is very important to the United States.

Military forces today operate in a new context. They are expected to be involved in things that they were not in 1946. Humanitarian intervention always raises the charge of aggression. Once you determine what it means for a state to commit aggression, how do you decide if an individual is criminally culpable of committing that crime? Also, how do you account for all the activities that military forces need to undertake in today's world? It may benefit those who are seeking a definition of aggression to focus on what it means to commit a crime of aggression alone rather than trying to throw in "the kitchen sink."

I think this issue should be worked further, and it should be the subject of the ICC's first review. I do not think most nations are ready to accept aggression in the ICC's statute, as I do not see empirical evidence for that.

M. Cherif Bassiouni

Vice Chair, U.N. PrepCom for the ICC

The General Assembly took 22 years to arrive at a definition of aggression in 1974, and it is a hodge-podge compromise of a laundry list of what could or could not be the case. As a solution to the variety of problems raised by aggression, its definition, and its specific contents, I suggest identifying one or two specific egregious types of acts of aggression on which everybody can agree.

We should focus on those as a first step without going through a long laundry list including blockades and training of irregulars, etc. After that, you still must work on the relationship of the U.N. Security Council and the ICC prosecutor. ■

General Discussion on the Role of the U.N. Security Council

Conferees also discussed the role the U.N. Security Council would play regarding the ICC. Paraphrases of remarks made by some of the participants follow.

Corky Gallo, Emory University Law School

Jimmy Carter speaks to conference participants while Emma Bonino (sitting) and Morton Halperin look on.

David Scheffer

Assistant Secretary, Ambassador at Large for War Crimes Issues

The U.N. Security Council should not have veto power for any individual case brought to the International Criminal Court (ICC) by its prosecutor. The United States doesn't think the Council has the function of vetoing that kind of professional conduct by the prosecutor. If a state party refers an entire conflict or atrocity to the ICC prosecutor for investigation and prosecution of individuals, and if the Council is dealing with it under its Charter responsibilities, then it is important for the Council to look at that referral—of the entire situation, not against an individual—and judge whether it should proceed to the ICC.

There is a presumption that the Council should not be a player in the process, that it's tainted, that it negatively influences the process, and thus, that we should avoid and marginalize it as much as possible. However, the United States doesn't see it that way. It regards the Council as an effective engine for the referral process, not only to bring new business to the ICC but to enforce current business.

I would like to see the Council and the ICC work in collaboration. For example, on Nov. 30, 1990, the Council adopted a resolution that gave [Iraqi President] Saddam Hussein 60 days to pull out of Kuwait, and at the end of that time, all means were authorized to make him do so. I think the Council, under these circumstances, would have said to the ICC: "For these 60 days, back off, and give him incentive to pull out. Don't box him in further." At the end of that period, if he did not pull out, the Council should have said: "Full steam ahead; prosecute the heck out of him."

The alternative to the Council ignoring its Charter responsibilities and not being a political filter places the issue of political determination in judges' hands. Should judges make political decisions of this magnitude, where an entire situation or conflict is the issue of what goes before the court? Or should the Council, engaged with that conflict as a political body, make these decisions?

The Council is a collective body, and even with veto power, the United States has to garner enough votes to prevail in terms of affirmative resolutions by the Council. It's a much more collective decision-making process than that of a single state government that suddenly decides to prosecute a group of individuals.

The U.S. proposal says the Council could deal with other situations besides Chapter VII of the U.N. Charter. Once interest builds about the overall concept of the Council's role, we would happily engage in detailed discussions about what it means to deal with "a situation," but it would involve both Chapter VI and VII.

Regarding the Singapore proposal, it does not go far enough, because the United States takes seriously the privileges that the Council's permanent members have, one of which is a right of veto. It is important that if the United States can exercise veto power as a permanent Council member, that it is deeply engaged in handling a situation and cannot garner nine votes (or the other super majority of votes that will accrue with an expanded Council).

There is a perception that the United States wants to control the ICC through the Council. In fact, the United States is working hard to expand the Council so its membership is more representative of the developing world. An expanded Council would help it avoid the perception that it is biased as a Western institution.

We must work from the premise that there is a role for the Council, and we should build a bridge between the issue's different sides.

A conferee asked Ambassador Scheffer if the United States saw any limits in U.N. Security Council criteria in determining whether the ICC should stay its hand in a case like South Africa, where it was decided to handle serious abuses through a truth commission. A paraphrase of his response follows.

First, the threshold must be reached that this is on the Council's agenda. Second, the issue is whether or not there would be formal submission of atrocities by a state party to the ICC. If so and if the Council was seized with the matter, then, of course, the Council would have to make a determination. Each case would have to be looked at on its own merits. ■

Bertie Ramcharan

Dr. Ramcharan spoke in his personal capacity.

Perpetrators of heinous crimes should be brought to justice nationally, and if not, then internationally. It is acceptable as a proposition that the Council should be able to send cases to the ICC, but I question its necessity as policy. The Council's record of dealing with human rights issues is limited, and it is exceedingly prudent and defensive in its handling of such issues.

Various international instrumentalities exist that identify situations of massive, flagrant human rights violations, such as the U.N. Commission on Human Rights, its expert and treaty-based bodies, and its high commissioner for human rights. For example, in an extensive 1978-79 investigation, a U.N. special rapporteur found there had been "autogenocide" in Cambodia. Hence, I suggest other instrumentalities than the Council should be able to refer cases to the ICC.

Michael Posner

Executive Director, Lawyers Committee for Human Rights

For the ICC to be effective and perceived as independent in providing justice, the prosecutor must be able to initiate investigations and pursue cases. We should have an objective standard that applies across the board. Having to bring a situation to the Council before the prosecutor can begin initiating an investigation fundamentally undercuts that assumption. Thus, in effect, a political body would select the situations in which the prosecutor could get involved.

The fact that the United States has one veto vote in the Council means no situation can be investigated if the United States opposes it. This is a debilitating constraint, and we need to figure out an alternative. There is a broad public perception that the United States wants to control when Americans will be brought to the ICC. Is there a clear, transparent process and standard by which that determination will be made? The same standard must apply to everyone regardless of nationality in an open and transparent way.

We need to separate legal and political realities. The terms "unavailable" or "unwilling" concern only countries whose justice system has broken down. Neither term will affect Americans who commit war crimes. In legal and practical terms, the ICC will not affect the U.S. military justice system. I fear Sen. Jesse Helms [R-N.C.] and other U.S. leaders who say, "No American soldier should go before this court, period," because if a system does not have neutral, objective criteria applied in a judicious manner, it lacks credibility.

M. Cherif Bassiouni

Professor Bassiouni offered input in light of his experiences as former chair of the U.N. investigation of war crimes in the former Yugoslavia.

It is important to distinguish between investigations and prosecutions while sifting through the Council's various functions under its Chapter VI or VII authority.

Also, the ICC prosecutor needs more flexibility at the investigatory stage to gather evidence and should be more vigilant at returning an indictment and beginning prosecution.

We must minimize the disparity of treatment of like situations. For instance, the Council can decide to not proceed with prosecution or to suspend it without jeopardizing the integrity of the judicial process, provided proper evidence is gathered. Collection of evidence could threaten a delicate political situation. Prosecutors make discretionary decisions daily as to when to act and whether to act with high or low visibility.

The case of Saddam Hussein is an example of when the Council did not act in the best interest of justice, as it failed to reach an agreement (for economic and political reasons) whether to investigate, let alone prosecute, Saddam Hussein and his regime in the war with Iran, against his own people, and against Kuwait.

Roy Lee

Mr. Lee spoke in his personal capacity.

Complimentarity is one hurdle the ICC must overcome before it can exercise jurisdiction. Under the current proposal, the territorial state (the state in which the individual committed the crime) must consent to the ICC's jurisdiction.

The Council can play a critical role by bringing business to the ICC. With Chapter VII, a case could be compulsorily brought before the ICC, including some instances where the ICC could not otherwise exercise jurisdiction.

The ICC will need a certain number of ratifications before it can begin operation. Thus, if the Council refers a case, one should consider whether that could trigger early operation of the ICC, even without the requisite number of ratifications. ■

The Second Panel

Harry Barnes, director of The Carter Center's Conflict Resolution Program and chair of its Human Rights Committee, moderated the second panel, which featured discussions on national security, terrorism, the American Bar Association, and complementarity. Paraphrases of excerpts from some panelists' speeches follow.

Eric Schwartz

Special Assistant to the President and Senior Director, Democracy, Human Rights, and Humanitarian Affairs, National Security Council

I want to reiterate U.S. President Bill Clinton's commitment to establishing an International Criminal Court (ICC). His comments at the U.N. General Assembly reaffirmed our message to the international community and to those of us in government that we should redouble efforts to bring the negotiations to a successful conclusion. There is no great mystery here. The tension we confront is simple and straightforward in pursuing the objective of an ICC: Just how much sovereignty are we willing to cede?

It is because we take international law and the commitments into which we enter so seriously and because we are committed to the ICC process that this is a critical question for the United States. David Scheffer and other U.S. government officials have described some of the tough questions underlying that basic issue. How do we create an effective ICC while preserving the U.N. Security Council's primary responsibility for international peace and security issues and while protecting U.S. government personnel from frivolous complaints?

Some of the national security concerns we confront in thinking about the ICC are not unique to the U.S. government, while others may be. I will here describe some issues that come up in internal discussions as they inevitably affect U.S. government thinking.

First and perhaps most important, we have a national security interest in an effective ICC that, through its very existence, helps deter war crimes, genocide, and crimes against humanity. The ICC should encourage accountability, which has proven necessary for political reconciliation. As we have learned in Haiti, El Salvador, Guatemala, Bosnia, Rwanda, and many other countries, peace without justice—even when not much more than a modicum of justice—can invite instability and unrest. While the quest for justice can and does impose strains on fragile societies in transition, promoting accountability can enhance the likelihood that political transitions offer long-term stability. This is a profound national security objective and one that President Clinton and his senior advisors well recognize.

A second fundamental national security objective is to have an ICC that will promote our worldwide effort—our policy—to promote democracy and respect for the rule of law. This effort may be motivated by altruism, but it also is explicitly and implicitly informed by our conviction that a community of democracies is more amenable to U.S. security interests. As [Trinadad and Tobago] President A.N.R. Robinson said, "[We need] a court that promotes the ideal of equality, encourages respect for democratic principles, and reduces cynicism about democratic processes."

These "procourt objectives" coexist and are, at times, at tension with others. First, the objective of an effective, functioning Security Council is to maintain peace and stability. I am not convinced that M. Cherif Bassiouni's distinction between investigation and prosecution is adequate. Investigations of grave breaches of humanitarian law, even without prosecutions, can and probably should be highly provocative. I endorse Morton Halperin's point that other international institutions may continue to function with respect to a country with

which the Council is involved. Again, I'm not sure this is in itself an argument to disregard the concern. I think it is something we need to think more about and work through.

Another national security objective is to maintain what is. Whether or not you believe in American exceptionalism, the concern is to maintain the United States' unique ability—in particular its military—to play a leadership role in world peace and security issues. That is a statement of reality, not chauvinism. We have unique responsibilities, which the international community has recognized and indeed welcomed. These responsibilities may make us particularly vulnerable to politicization of complaints before the ICC or other U.N. institutions.

Whether or not you believe in American exceptionalism, the concern is to maintain the United States' unique ability—in particular its military—to play a leadership role in world peace and security issues. That is a statement of reality, not chauvinism.

Our military's size, our capabilities' unique nature—from logistics to transport—and much of the world's perception of the United States as an honest broker together have resulted in global military engagement in several critical issues affecting peace and stability. Examples include troops in Macedonia and Bosnia; military assistance personnel in Eastern Slovenia; observers in Haiti, Georgia, the Middle East, and the Western Sahara; the multinational force in the Sinai; support personnel in Peru, Ecuador, and other parts of the world; and a presence on the Korean Peninsula, in other parts of Asia, the Middle East, and elsewhere. We also are engaged in a variety of important humanitarian operations from those as profound and substantial as the military mission to central Africa in 1994 to as recent as October 1997, when we sent a disaster response team to Indonesia.

Even where not deployed in large numbers, our presence usually holds great political and symbolic importance, making us a more attractive target for those who wish to use an ICC or other international institution for political ends. This factor, for better or worse, cannot help but affect our thinking about the sort of trigger mechanism we might be prepared to accept.

Let me make a related point about the U.S. government's willingness and ability to participate robustly in human rights and humanitarian operations overseas, long a goal of human rights and humanitarian communities outside of government. Those of us in government who work on these issues want to increase rather than diminish internal incentives for U.S. government participation in places like central Africa and Bosnia. We want to increase U.S. participation in multinational efforts to end killings, provide relief, or otherwise address human rights and humanitarian emergencies. An ICC regime that creates unreasonable vulnerabilities will create disincentives for such involvement. We want to encourage others, militaries included, to participate in peacekeeping and humanitarian operations.

It's not only the president who has constitutional responsibility to protect U.S. security interests. The fact that Congress and the Senate must consent to the ICC ratification process requires that we make the strongest case to the Senate, a body particularly concerned about sovereignty and historically skeptical about treaties purporting to establish and implement international, human rights, and humanitarian standards. To be sure, President Clinton will be prepared to lead an effort to convince skeptical senators of the value of an ICC treaty that reflects a genuine international consensus.

We're not throwing up our hands saying, "Whatever the most difficult senator says on this issue is the position we must adopt." That is not what leadership is about. However, we cannot afford

to be cavalier about the Senate's role and concerns.

Notwithstanding these challenges, I want to reiterate the importance of the United States and the international community moving together on this issue. As the critical support and leadership we are providing to the two existing war crimes tribunals demonstrates, active U.S. involvement enhances the prospect that an ICC will be an effective, working instrument promoting human rights and humanitarian principles. Our active involvement is essential to the functioning of an effective ICC.

In contrast to past governmental skepticism about such an institution, President Clinton has taken the bold and critical step of endorsing an ICC on several occasions. His administration's remaining three years provide those of us in government and in the nongovernmental community in the United States and elsewhere with the special and perhaps limited opportunity to make that vision a reality. We remain committed to doing everything possible to accomplish that goal. ■

Mark Zaid

Managing Director, Public Information Law and Policy Group, American Bar Association

I'm going to present two viewpoints by wearing two hats. My first hat is an official one as a representative of the committee of the International Law Section of the American Bar Association (ABA) that has drafted a recommendation on the International Criminal Court (ICC).

For the most part, the ABA handles domestic matters. However, it also has a long history of dealing with international matters of concern to American lawyers. This is one such matter. You may recall the ABA's efforts, first in the early 1990s by former U.S. Attorney General Benjamin Civiletti with his task force on war crimes tribunals and then by Monroe Leigh, a former State Department legal advisor with his task force on the former Yugoslavia war crimes tribunal. Since then, the ABA has adopted several recommendations concerning the ICC, but as time moved on and events developed, we felt a need to revisit the issue. Thus, we came up with the ABA recommendation on the ICC (see Appendix 3).

This recommendation has passed several sections. It stands before the International Section again this weekend [Nov. 14-16, 1997], after having been passed in a different version this summer at the ABA's annual meeting. It also has passed the Criminal Justice Section, the Individual Rights and Responsibilities Section, and one of the standing committees. Jerry Shestack, the ABA's 1997 president, is a strong supporter of the ICC. In fact, he came to the Criminal Justice Section last weekend and lobbied for this recommendation's passage, which is unheard of for an ABA president to do.

In February 1998, it goes before the ABA's House of Delegates, which is composed of 500-600 members. If passed, it will become official ABA policy and hopefully one of probably 10 priority items referred to the Government Affairs Office. The ABA then would lobby the recommendation before the U.S. Senate, which will help President Clinton achieve passage of the treaty that emerges from Rome in June 1998.

Let me now take off my ABA hat and put on one to speak of my own viewpoint. For the past several years, I've represented counter-terrorism experts and organizations that specialize in counter-terrorism studies. Most important, since the first lawsuit was filed in 1993, I have represented families of the victims of Pan Am flight 103 in their civil action against the government of Libya. The issue of the ICC or an ad hoc tribunal specifically for this case has loomed greatly over these families. Thus, it is quite dear to my heart. However, the families are by no means united on what they wish to happen in this situation, and the viewpoints that I express do not reflect those of my clients or anyone but myself.

I'm not advocating that terrorism be included in the treaty to be adopted in summer 1998. I'll say only that it should be included later, and I'll leave it to you to decide the appropriate time.

I want to focus on treaty-based crimes within ICC jurisdiction, specifically terrorism. Because of the political nature of where matters stand, I'm not advocating that terrorism be included in the treaty to be adopted in summer 1998. I'll say only that it should be included later, and I'll leave it to you to decide the appropriate time. The original ICC drafts in 1993 and 1994 included enumerated treaties within the court's jurisdiction. Initially, the United States reserved taking a position on these crimes, particularly terrorism. As events developed at the United Nations in 1995, the United States opposed including terrorism based on five points:

1) The ICC may not be as effective in investigating and prosecuting terrorism-based crimes.

2) Libya and other countries might not be willing to cooperate with the ICC.

3) Investigating even a single incident of

terrorism is costly and requires highly skilled resources and investigators, which this court will not have.

4) The ICC will prosecute on behalf of a state that has developed a lot of a case's evidence and has a direct interest in a particular case.

5) We need to protect classified information.

Mark Zaid

In 1995, 270 people died in the terrorist attack on Pan Am flight 103. This memorial wall in Lockerbie, Scotland, lists the victims' names.

These concerns do not necessarily apply to the United States alone, but the United States has been one of the more outspoken nations on terrorism crimes coming before the ICC. However, these objections are disenchanting or unnerving because each has its own merit. If one adopted the argument that we should exclude terrorism based on these concerns, we might as well not have an ICC, because each objection applies equally to any other crime that would be before the court.

The ICC might not have resources to investigate and prosecute a case of genocide any different than terrorism, which we know from having worked with the Yugoslav and Rwandan ad hoc tribunals. These tribunals have had enormous financial difficulties and have lacked states' cooperation in investigating cases. However, I think most of us would agree these tribunals have fared quite well, and there's little difference in whether a crime would be one of terrorism or genocide. To think that classified information is not involved with locating [Bosnian Serb leader] Radovan Karadzic or [General Ratko] Mladic versus locating [Abdel Basset Ali] Al-Megrahi, who is a suspect in the Pan Am 103 bombing, is not persuasive.

National jurisdictions will, except in certain circumstances, have primacy in these instances. Thus, a state that believes it has primary jurisdiction or an obligation to investigate certain terrorist attacks or events that have harmed its nationals or have been against its interests, would always—if it has the "willingness and availability," as the statute now reads—prosecute those cases.

Only in particular incidents would the ICC step in to prosecute a terrorism case. If there's a lack of cooperation (as the United States feels Libya would demonstrate), that type of case (for example, when the Yugoslav tribunal had difficulties with states) would be referred to the U.N. Security Council for appropriate action. The bottom line is that terrorism is a political offense, and this ICC is designed to handle political cases. That is not to say the ICC will be political. Rather, the cases that will come before it are politically sensitive, which is why we need an ICC in the first place.

Mark Zaid

Family members of Pan Am 103 victims often leave flowers at the burial site in Lockerbie, the city where the plane crashed.

I would like to propose two recommendations regarding the U.S. arguments. First, as M. Cherif Bassiouni said, we are talking about very limited circumstances where cases would be brought before this ICC. A mechanism could be set up to allow that if states give consent in certain instances, a case can be referred to the ICC for adjudication. The Pan Am case is a perfect example. If Libya, the United States, the United Kingdom, and France (the nations involved in the Security Council debate) agreed this case should be referred to the ICC, there's no reason why the ICC could not take jurisdiction. To ensure states do not transfer their burden, the ICC could determine whether a case is so serious and of such gravity that it merits its adjudication.

Second, we could have a state substitute as prosecutor. For example, the United States says its interest in a terrorism case is so great as to require the United States to prosecute the case. One American killed in a terrorist attack surely invokes U.S. interest. However, I'm not sure why that type of attack invokes stronger interest than 1 million people killed by genocide. To inject a little humor, we thought if we could redefine certain terrorist acts as "aerial genocide" instead of "aerial terrorism," perhaps we could get the Pan Am case before the court.

State substitution could be as follows: If a state has great interest in an incident and wants to protect classified information, which is a serious concern, that state could step in as prosecutor for that particular incident. This would not affect the ICC's independence. In fact, all prosecutors, while searching for the truth, are bent on securing a conviction. It is the tribunal that must remain impartial, not the prosecutor. Regardless of whether the prosecutor is the ICC's permanent one or a state, the ultimate goal is still being sought and could be obtained.

This was suggested in many treaties that developed early this century, such as the 1938 convention on the creation of an ICC. In 1995, the United States itself suggested state substitution in a footnote to its comments on the International Law Commission draft. I don't know why that interest has changed in the last two years, but the U.S. statement specifically addresses its concerns as to why it doesn't want terrorism brought before the ICC.

Not including terrorism in the ICC's jurisdiction is much in the way as Benjamin Ferencz has been arguing about the crime of aggression, a step back, because if you look at the ICC's history of development, it always has included terrorism. Indeed, early concepts were specifically focused on establishing an ICC for terrorism. The ABA's first resolution on the topic in 1978 was also specifically to create a court for terrorism. And most U.S. Congress resolutions adopted in the 1980s and early 1990s were for setting up a permanent court to address crimes of terrorism.

A mechanism could be set up to allow that if states give consent in certain instances, a case can be referred to the ICC for adjudication.

This takes me back to my hat as a Pan Am 103 attorney. One of my clients, the first who dared to sue Libya in a civil action, adopted the motto: "Justice delayed is justice denied." Suppose we cannot submit some of these terrorist attacks for adjudication because of politics, yet we have the ability or opportunity to try the alleged perpetrators before an ICC, of which each nation involved is a state party and has agreed to be fair. This type of situation is where a permanent ICC may ensure justice is achieved rather than delayed and denied. ■

Note: In February 1998, the ABA's Board of Governors adopted the ICC resolution as official ABA policy (see Appendix 3).

NGO Coalition for an International Criminal Court

Richard Dicker is associate counsel for Human Rights Watch, which belongs to the NGO Coalition for an International Criminal Court. Here, Coalition Convenor William Pace (far right) speaks at a press briefing at the December 1997 U.N. PrepCom in New York.

Richard Dicker

Associate Counsel, Human Rights Watch

I would like to focus on some of Eric Schwartz's concerns, because I think we in the nongovernmental organization (NGO) community need to take them seriously.

The first concern, which I think is a valid one, regards protecting U.S. military personnel from frivolous lawsuits by dealing with the buzzword "complimentarity." I want to put some new facts on the table concerning specific provisions that now exist in Article 35 of the International Criminal Court (ICC) statute—the cornerstone of this question.

A critical theme for us in the human rights movement is that national courts are the first line of prosecution and enforcement against these egregious crimes. We do not want to replace national courts with some supranational mechanism. Indeed, we want to strengthen, not weaken, national courts.

Article 35 deals with cases of admissibility or instances when either individuals accused or state parties can challenge a case's admissibility before the ICC. Language for this Article was adopted without brackets at the August 1997 U.N. Preparatory Committee (PrepCom) session. Keeping in mind Mr. Schwartz's concern about frivolous lawsuits or unreasonable vulnerability for U.S. personnel, this language is restrictive, and the threshold on the draft text on complimentarity is high.

In Article 35's new text, a case is inadmissible before the ICC if it is being or has been investigated or prosecuted by a state with jurisdiction, unless there is "inability or unwillingness" by the state to genuinely carry out investigation for prosecution. But what constitutes "unwillingness"?

In the current draft text, unwillingness is set out in an exhaustive list of criteria. The ICC will consider whether the national court proceedings intended to shield the person from criminal responsibility, whether there was undue delay inconsistent

with the intent to bring the person to justice, or whether the proceedings were not conducted independently or impartially but were held in a manner inconsistent with the intent. I want to underline "intent," because it introduces a subjective factor. This raises considerably the threshold in the draft statute forwarded by the International Law Commission to the U.N. General Assembly in 1994. I hope that this threshold gives comfort to Mr. Schwartz, David Scheffer, and their counterparts in London, Paris, Moscow, and Beijing that their citizens will not easily be subjected to the kinds of lawsuits about which we're concerned.

We in the international human rights community are concerned about the rights of the accused. Again, I pose this in terms of legitimate fears about not subjecting or imposing citizens to unfair standards. The existing statute contains several solid protections for individual rights, but it is not perfect. The sections on criminal procedure and rights of defendants need reinforcing, which I say from an international, not an American, perspective.

At the August 1997 PrepCom, there was broad consensus that to better protect rights of the accused, a pretrial chamber would be established. Previously, the ICC president was responsible for many pretrial matters including determining lawfulness of an arrest or detention and the right to be released. We believe rights of an accused, whether he/she is Bolivian or Botswanan, would be better protected if a collective panel heard and decided the challenge to the lawfulness of his/her arrest. M. Cherif Bassiouni called for a three- to five-judge panel, an important reinforcement to our concerns.

Other suggestions have been made for strengthening protections for rights of the accused. For example, ICC statute Article 28 needs to restrict the time an accused or suspect may be detained prior to indictment. The current 90-day period should be shortened and ruled on by the pretrial chamber. If we continue pressing in the right direction, I don't think citizens from any country will be subject to kangaroo courts.

We are at a historic moment, being seven months away from the start of the Diplomatic Conference [in Rome, June 1998]. We have an opportunity to create something meaningful that will help qualitatively strengthen human rights enforcement and humanitarian law.

Our concern is not that President Clinton would not champion Senate ratification of an ICC treaty, but that the ICC would be more a "Potempkin" village [see page 13 for definition] than a court mandated to do the job that unfortunately the international situation calls for it to do.

I am not optimistic about the process of Senate ratification. From the realpolitik perspective, we should take the long-term view. In other words, let's not chop out the heart of the ICC to get by an isolation-minded Senate. Let's regard U.S. ratification—which is critical, important, and something we want—as being down the road. We will work untiringly to make it happen, but if we sacrifice the ICC's content to prospective and early ratification, the end product will be a step backward rather than forward. ■

A conferee asked Mr. Dicker about lobbying for Senate ratification. His paraphrased response follows:

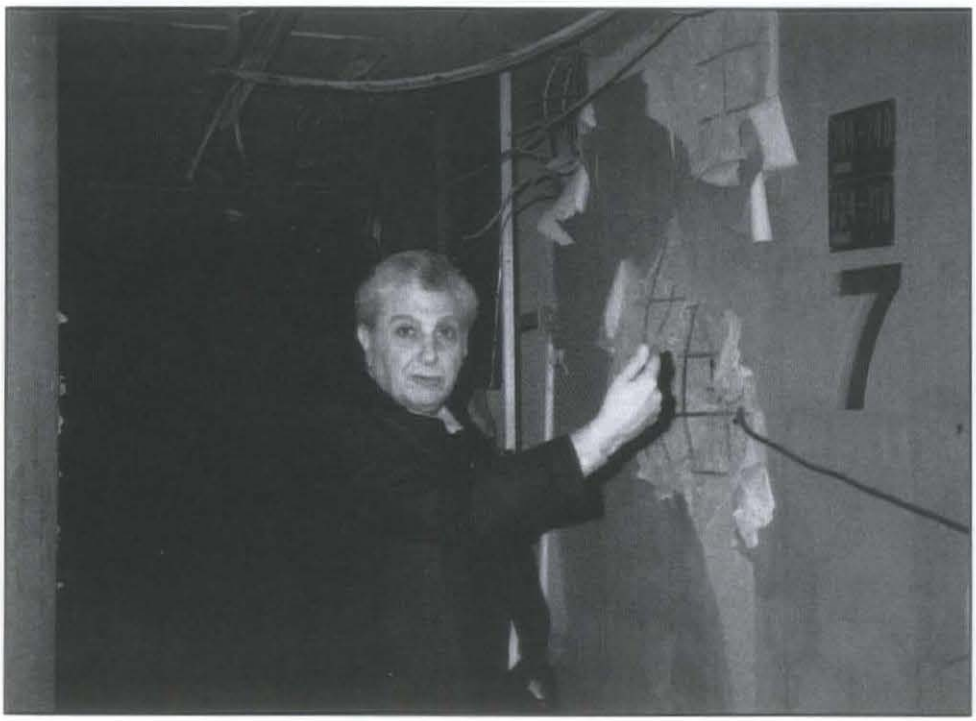
We must go to senators with the statute text and show concretely how extremely unlikely it is, given the complementarity provision, that an American would be brought before the ICC. However, if that did happen, due process would protect the American. In fact, the ICC statute protections are more fair than those of the U.S. legal system.

Given how dear Americans hold justice for victims and accountability for actions, no doubt they would prefer to see a U.S. citizen guilty of genocide, war crimes, or crimes against humanity stand trial before the ICC rather than go free. ■

International Cooperation

M. Cherif Bassiouni

Vice Chair, U.N. PrepCom on the ICC



M. Cherif Bassiouni

Professor Bassiouni chaired the U.N. inspection of war crimes in the former Yugoslavia. Here, he points to a hit by a mortar shell that fell near his room at a Holiday Inn in Sarajevo after Serb forces bombarded the city in April 1993.

Two issues crucial to the ICC's success are not receiving requisite attention. First, we must address the prosecutor's ability to effectively secure evidence. Practical problems of resources, logistics, and applying the same rules to a disparity of contexts combine to become the Achilles' heel of the International Criminal Court (ICC).

The second issue relates to international cooperation. If the trend is to say the prosecutor will be able only to obtain and surrender evidence through national legal systems, then the ICC will be only as good as the worst of all national legal systems, because that will be the lowest common denominator. There are several models, such as the chemical weapons convention, with its inspection powers, that are unlikely to be accepted in any other category. I think the ad hoc Yugoslav and Rwandan tribunal statutes are good models, but we must fine-tune them. When can a judge issue a subpoena for a government to turn over its secret, confidential, or intelligence documents? We must think ahead in terms of what the ICC's power is in obtaining evidence. Also, what power does the prosecutor have? How does he/she get on a preferential track in national systems? How can he/she have a direct role in an investigation?

International cooperation includes several mechanisms: extradition or surrender, mutual legal assistance, transfer of prisoners, transfer of proceedings, recognition of foreign penal judgments, and seizure and forfeiture of assets. National legal systems deal with these modalities in very different

ways. Only four national systems have comprehensive codification of the modalities in some part of their statues. The others either do not have codification or deal with them in bilateral treaties. Hence, the practice is very uneven. It goes through an administrative process, usually offices of international affairs and ministries of justice, with a corresponding office in the ministries of foreign affairs office of legal affairs that deals with international cooperation.

Because of the different modalities, international cooperation is usually slow and ineffective. For instance, extradition is a tedious process, which can be a nightmare if you are going after people involved in genocide, crimes against humanity, and/or war crimes. Cases falling under these crimes are almost always interrelated.

It is important to get several defendants within a relatively short time frame, as one case will help make the other. If this process spreads out in years, you will not only lose a lot on an individual case, but you may lose out on many cases. Imagine trying to make a conspiracy case involving several people, and you can only get one person.

Gathering evidence abroad also concerns me a great deal. Few countries have laws about that type of mutual legal assistance. Most go by bilateral treaties and some by multilateral treaties, many of which are cumbersome. The lag time is significant, particularly when dealing with a public official in the country concerned. By the time the process is in action, the evidence will disappear. A request must be sent through diplomatic channels of the office of international affairs in the Ministry of Justice. This office takes the request to the attorney general, who brings an action in the local court and gets a judgment, which is enforced. By then, the proverbial bird has "flown the coop," and the evidence is not going to be found.

If you are going along the lines that many governments presently are advocating (i.e., that the ICC will have to go through national legal systems), the ICC will not work. Most countries say this because they are looking at it from a sovereignty point of view. Governments that are knowledgeable want to avoid the chemical weapons convention regime, where an international inspection team can come to a country and find evidence.

For example, if you telegraph knowledge of a secret mass grave and give the perpetrator six to eight months before there is an order to investigate the mass grave, by the time you arrive, there won't be a mass grave.

One area not yet touched is the freezing and seizing of assets. Many governments, including that of the United States, have found it useful to freeze the assets of someone who is being prosecuted. This reduces the person's ability to escape and evade legal processes and hire people to destroy evidence.

There will be much resistance against seizure of assets. The U.S. government faces a major obstacle to including drugs in the ICC's jurisdiction because its Department of the Treasury is concerned about loosing $500 million dollars a year of asset forfeitures abroad. The moment you include asset forfeiture of people who commit genocide, which could apply to a former head of state, great opposition will be raised. In most cases, the ability of a dictator responsible for genocide and crimes against humanity will want to get a deal to ensure "a golden parachute," whereby he/she can continue to enjoy life abroad. If the ICC has the power to take away a dictator's money, an important political card will be taken out of the hand of the negotiator who is seeking a solution.

I fear that ultimately, every international cooperation mechanism will be reduced to say, "Here is what you can do, but you must go through the national system." Thus, you will not have any priority or fast-track, which will be the Achilles' heel of the ICC. ■

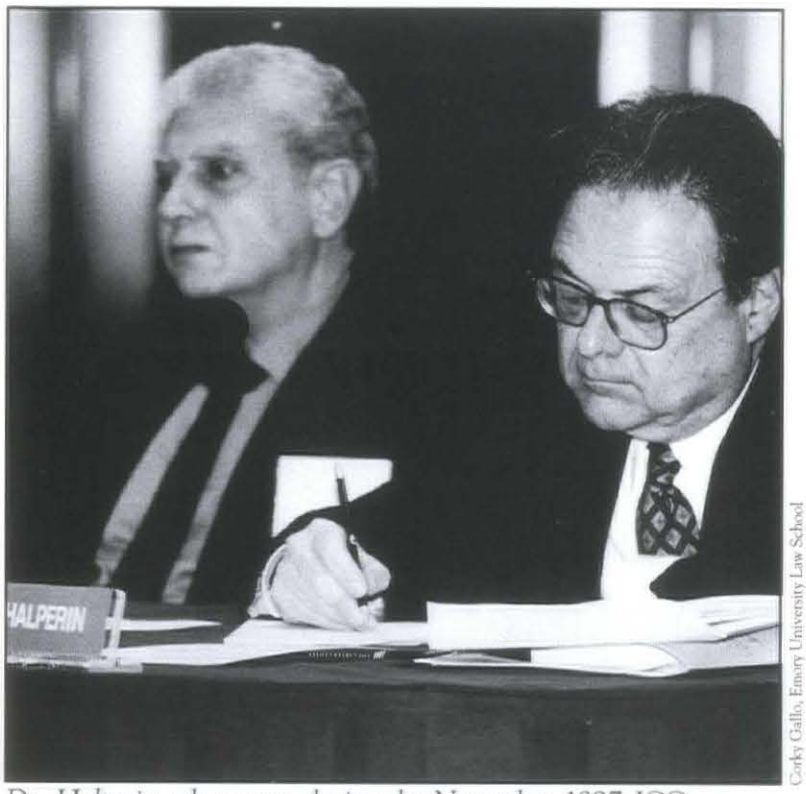
Summary Report of Proceedings

Morton Halperin

Senior Vice President, Twentieth Century Fund

I gathered three main conclusions from today's discussion. First, although we are only seven months away from what is supposed to be a final treaty, in addition to the controversial issues, many technical, complicated questions that require sustained work remain unsolved, such as state cooperation and defendants' rights.

It is essential that when the statute's text sees the light of day in June 1998 and starts being debated in the U.S. Senate, among the American public, and throughout the world, it is regarded as having been done right. This is important because we are creating a permanent institution that we hope will play an increasing role in deterring and dealing with fundamental threats to humanity and if successful, will also have other crimes referred to it.



Corky Gallo, Emory University Law School

Dr. Halperin takes notes during the November 1997 ICC conference in Atlanta, Ga.

Second, we need to find ways to work with the like-minded states in developing a statute text that deals responsibly with key controversial issues. At the same time, we must encourage the states to stand firm. Because of the feeling that the United States must be part of this treaty, there is a danger that compromises will be made. These would fatally weaken the treaty and would make it harder to get Senate support. We could end up with the worst of all worlds—a weak treaty without American participation.

If we had to choose, I think we are better off with an effective treaty that the United States eventually joins than a weak treaty, even if the United States joins. Given Senate politics, the difference between a weak or strong treaty will not greatly impact Senate ratification unless the treaty says, "Given the nature of the United States and its unique role in the world, no U.S. citizen or any other person who the United States cares about can be tried by this ICC without U.S. permission." Anything short of that statement will produce the same level of opposition and hostility.

Third, the time has come to vastly accelerate efforts to make this a public issue in the United States and to educate Washington D.C. press, many of whom don't know the issue exists. I sampled a

small group of reporters who cover foreign policy in Washington, and although some are vaguely aware that "some weird thing" is going on in the United Nations, they don't know the ICC is going to be established soon, and they certainly do not know the issues at hand or what the controversy is within American government.

We must find ways to bring these issues to public debate, as that is the only way to raise the level at which they're decided in the U.S. government. Given the world's interest in the matter, these decisions are made at a level that will not be influenced by debating our friends in U.S. government. It will change only if it becomes a public controversy, only if the U.S. president runs the risk of having his credibility snatched from him (as with the land mines issue), and only if people understand that the U.S. position is not acceptable to the human rights community. I think we can bring about those changes in the American government position.

We should view this conference as beginning the next phase, a phase aimed at engaging a wider public in understanding our concerns about the U.S. government. ■

Closing Remarks

Emma Bonino

Commissioner, European Commission for Humanitarian Affairs

Umberto Stefanelli

On Dec. 1, 1997, No Peace Without Justice held a meeting in New York to discuss establishing an ICC. Here, participants (from left) Marino Basdachin, Aryeh Neier, A.N.R. Robinson, Emma Bonino, Kofi Annan, Jacques Baudin, and Gianfranco Dell'Alba gather at U.N. headquarters.

The United States plays a particular role worldwide, partly because Europeans don't stand up to their full political responsibility. We are discussing an International Criminal Court (ICC) at a moment in history when the United Nations has gained great credibility. This is verified in places like Kigali, Kabul, or Kinshasa more than in U.N. conference rooms, where people debate cost and who is going to pay. Therefore, I was disappointed by the debate on cost without attention to public opinion. If the ICC becomes unacceptably weak, it will create illusion and frustration. It also will be a disappointment, and the international community will loose credibility.

The gap between public expectation and the commitment of the institution we are creating is widening. I understand the United States has difficulties due to power-sharing between the executive branch and the Senate, and I know there is an extremely eccentric personality in the Senate [Sen. Jesse Helms, R-N.C.]. However, that should not be an alibi by which the United States shapes foreign policy.

Another issue that cannot be an alibi is the time factor for ratification. It took 40 years to ratify the Genocide Convention. The Convention on the Elimination of All Forms of Discrimination Against Women was signed in 1980 but has not yet been ratified. The chemical weapons convention—which used exactly the text that the United States

wanted—took five years to be ratified.

We do take into account the existence of the Commission on Foreign Relations and the U.N. Security Council, but shouldn't we also consider public opinion and moral values? Realpolitik is limited in that not only institutions but also real people must accept it.

Our major task from now until June 1998 is to make U.N. member states, congresspeople, senators, and institutions aware of what is at stake. It's not simply to make a tribunal but to create an impartial, effective instrument on which people can rely. There is some European resistance, particularly from France, concerning peacekeeping forces from European Union (EU) member states. Thus, it is not only in the United States where we must clarify matters. Although the EU unanimously favors the June conference, the kind of tribunal it wants is not clear. However, I am confident we will find an effective solution, because I look outside, not inside, institutions.

We cannot continue like this, because impunity generates more humanitarian crises. This past year has been terrible in this regard, and the situation in the field is not improving. Meanwhile, the United Nations holds high-level conferences in Beijing, Cairo, and elsewhere. We keep in mind the problems of sovereignty and our personnel, but in the end, the victims past, present, and future must take precedent. ■

Postscript by M. Cherif Bassiouni

Professor Bassiouni, vice chair of the U.N. PrepCom on the ICC, wrote this post-conference update in April 1998.

Since the 1997 Atlanta conference, many nongovernmental organization (NGO) activities supporting an International Criminal Court (ICC) have taken place in Africa, the Middle East, Latin America, and Europe.

A regional meeting, organized by the International Association of Penal Law and the International Institute of Higher Studies in Criminal Sciences, was held in Cairo, Egypt, in December, with six other Arab states' participation. Chaired by Fathi Sorour, president of Egypt's Parliament, the meeting attracted over 200 officials. Secretary-General of the Arab League Esmat Abdel Megid sent a supporting message, and a declaration supporting establishment of an ICC was adopted.

No Peace Without Justice hosted a gathering in Dakar, Senegal, in February 1998 under the auspices of Senegal President Abdou Diouf. Twenty-five African countries attended, most with delegations headed by ministers of justice or attorneys general. Participants adopted the Dakar Declaration (see Appendix 2), which is similar to the Atlanta Declaration (see Appendix 1) signed by former President Jimmy Carter of the United States, European Commissioner Emma Bonino of Italy, and other prominent individuals.

Since Dakar, Jacques Baudin, Senegal's minister of justice, has been marshaling support by other African states. To that end, he attended the most recent U.N. Preparatory Committee's (PrepCom's)

NGO Coalition for an International Criminal Court

On Feb. 5-6, 1998, representatives from 25 African states gathered with members of the international community in Dakar, Senegal, for the Pan-African Conference on the ICC.

session to meet with African delegations.

Also in February, the Instituto Inter-Americano de Derechos Humanos co-sponsored, with several organizations, a meeting of Latin American countries. Several ministries of foreign affairs and justice attended, but unlike in Dakar and Cairo, they did not issue a declaration.

The American Bar Association (ABA) held a conference in New York in March to celebrate the 50th anniversaries of the Universal Declaration of Human Rights and the Genocide Convention. Eminent presenters led a full day of panel discussions on ICC issues. The ABA already had adopted a resolution in support of an ICC (see Appendix 3).

On a more official level, the PrepCom's Bureau (chair, vice chairs, and general rapporteur) met with working group coordinators in Zutphen, the Netherlands, to consolidate for the first time a text containing all proposals presented during the past two years. This was used as a basis for the PrepCom's final three-week session, held March 15-April 3 in New York.

To assist in delegates' work for the PrepCom's final session, DePaul University's International Criminal Justice and Weapons Control Center, in cooperation with No Peace Without Justice, the International Institute of Higher Studies in Criminal Sciences, and the ICC Committee of the International Law Association-American Branch, produced a commentary on the Zutphen consolidated text, which was published in 13bis Nouvelles Études Pénales. Approximately 1,500 copies were distributed at the PrepCom. DePaul's International Criminal Justice and Weapons Control Center also helped 17 Least Developed Countries (LDCs) each send a delegate to the PrepCom session. Eleven other LDCs also benefited at this session from the U.N. Trust Fund.

The PrepCom session saw some progress by improving some of the consolidated text's provisions and eliminating some optional or bracketed provisions. Work was so intense that delegates left on April 3 without a clean copy of the approved text, which is to be submitted to the Diplomatic Conference, June 15-July 15, 1998, in Rome. However, the text did become available in mid-April. At this session, as in previous ones, the Secretariat was exceptionally helpful.

Also at this session, the rules of procedure for the Diplomatic Conference were adopted, except for certain provisions dealing with voting, which were left with no agreement. (This issue is expected to be resolved in Rome.) In addition, Giovanni Conso of Italy was nominated to serve as conference chair, Adrian Bos of the Netherlands was nominated as chair of the committee on the whole, and I (Egypt) was nominated to chair the drafting committee. Formal elections will be held in Rome.

Twenty-one governments are expected to be elected to the drafting committee, and 26 will be conference vice chairs. To date, the choice of these countries has not been agreed on and is subject to further U.N. consultations between the geographic groups that will be represented in these positions. Hans Correll, legal counsel, will represent the U.N. secretary-general in Rome.

The PrepCom's approved text that will go to the Diplomatic Conference is an accomplishment. However, it is long and requires technical editing. Also, many major political choices concerning key statute provisions have not been made.

The volume of work is daunting. Conferees will have 24 working days in Rome (out of five weeks) to deal with an estimated 120 articles contained in some 100-120 pages of legislative text. There are several inherent problems in some of the choices to be made on certain provisions such as the definition of war crimes, the role of the U.N. Security Council, complementarity, and the prosecutor's right to initiate actions *proprio motu*. Many other pending issues also will require political resolution.

The task in Rome will be arduous, but expectations and hopes are high that on July 17, a treaty establishing an ICC will be opened for signature by all U.N. member states. If this is accomplished, it will be the most significant legal event since the creation of the United Nations in 1946. ■

List of Appendices

Appendix 1

The United States and the Establishment of a Permanent International Criminal Court
Atlanta, Georgia
November 13, 1997

Sponsored by The Carter Center and No Peace Without Justice

ATLANTA DECLARATION ON THE INTERNATIONAL CRIMINAL COURT (ICC)

We the undersigned wish to declare the following:

Since World War II, some 250 conflicts have resulted in more than 150 million victims. In addition to the expected casualties of war, many people have suffered from gross violations of international law such as genocide and other crimes against humanity. National legal systems have failed to hold perpetrators accountable for these offenses, thus creating a feeling that such offenders can escape accountability. Immunity from punishment reduces the prevention and deterrence of subsequent crimes.

The world community strongly supports the establishment of an International Criminal Court. The question is no longer whether there will be a court, but whether it will be independent, impartial, effective, and fair. The United Nations General Assembly has called for a diplomatic conference in June 1998 in Rome to finalize the convention establishing an ICC. We look forward to the successful conclusion of that conference.

The United States must exercise its moral leadership and help bring about the strong ICC that is needed.

We strongly believe the principles of the ICC are in harmony with the most deeply held values of the citizens of the United States of America. The commitment of the United States to the values of due process, criminal justice, and civil and political rights are thoroughly consistent with the basis of the ICC. We believe the mandate of the court, once fully understood, will receive wide support from a strong majority of our population.

We urge our fellow citizens to become familiar with the proposal to establish the ICC, debate these principles, and give enthusiastic support to its creation.

To be independent, impartial, effective, and fair--and with the understanding that it is not meant to be substituted for national courts, which have the primary responsibility for bringing those accused of these crimes to justice--we believe the Court must:

1. Uphold the highest standards of justice so as to ensure that redress and protection are provided to victims, especially women and children, and that those accused of human rights violations are tried fairly and efficiently;

2. Recognize the primary role of national courts to investigate and prosecute these egregious crimes, but take jurisdiction in those situations in which national court systems were either unwilling or unable to carry out their roles and thereby perpetuated impunity for these crimes;

3. Have the ultimate authority to decide whether an individual accused of violating international human rights law should be prosecuted by national courts or the ICC, based on the competence and availability of the national criminal justice systems to carry out such a trial;

4. Provide absolute independence to the Prosecutor, who should be able to initiate investigations based on his or her own findings or on reliable information obtained from any source;

5. Have the independence to operate without United Nations Security Council veto or any form of individual state pressure, recognizing the need for the Security Council to maintain international peace and security or refer situations to the Court. This would preclude states deciding selectively which cases the court would prosecute, thereby undermining the ICC's independence and credibility;

6. Have the authority to make binding requests with the full support and cooperation of all states that ratified the statute and therefore accepted its mechanism of enforcement. To ensure full and fair prosecution of these human rights crimes, compliance with the court's decisions, after an opportunity for challenge, should be a legal obligation.

Signed, Atlanta, November 13, 1997:

[Other conference participants also signed the Declaration]

Appendix 2

Dakar Declaration for the Establishment of the International Criminal Court in 1998

We, the participants of the African Conference in Dakar, Considering:

That since World War II, over 250 conflicts have resulted in more than 170 million victims, and entire populations have gross violations of international law such as genocide, crimes against humanity, and war crimes;

That in general, national legal systems have failed to hold perpetrators accountable for these offenses, thus engendering impunity and preventing all dissuasion and prevention action of conflicts and the crimes that follow;

That the U.N. General Assembly, recognizing the need for the creation of an international jurisdiction, which may sanction the most heinous crimes, has called for a Diplomatic Conference for the adoption of the statute of the International Criminal Court (ICC), which will take place in Rome, June 15-July 17, 1998;

Affirming:

We affirm our commitment to the establishment of the ICC and underline the importance that the accomplishment of this court implies for Africa and the world community as a whole;

That even though the principle of establishing the ICC has been widely accepted, it is essential that the Convention and the statute of the court be adopted at the Diplomatic Conference in Rome;

That the court shall be independent, permanent, impartial, just, and effective;

That a complementarity exists between the ICC and national and regional tribunals, when these are ineffective and where political will is manifestly absent;

That the role of national tribunals in the prosecution of these crimes is primordial, nevertheless allowing the ICC the possibility of determining, with respect to genocide, crimes against humanity, and war crimes, whether these national tribunals are unwilling or unable to carry out legal actions, creating the risk of allowing these crimes to go unpunished;

That the ICC shall be the judge of its own jurisdiction;

That the ICC shall operate without being prejudiced by actions of the U.N. Security Council;

That the independence of the prosecutor and his functions must be guaranteed;

That the cooperation of all states is crucial in order to ensure the effectiveness of the ICC;

That the statute of the court must ensure respect for human rights in all phases of the procedure, namely the rights of the suspects, the accused, the victims, and the witnesses, and consequently that the Preparatory Committee should intensify its efforts to establish a consensus on the question of victim compensation;

That the effectiveness of the ICC requires on a regular and permanent basis financial, human, and technical resources for its functioning;

That the independence and impartiality of the ICC must not be affected by the method of financing.

We:

Thank President of the Republic of Senegal His Excellency Abdou Diouf and his government, as well as No Peace Without Justice, for having taken the initiative of organizing this African Conference in favor of the establishment of the ICC;

Salute the commitment of the Italian government, which has offered to hold the Diplomatic Conference.

Encourage the action taken by all those, starting with the representatives of civil society, in particular NGOs, who have worked to ensure the success of the Diplomatic Conference.

Dakar, Feb. 6, 1998

Algeria, Benin, Burkina Faso, Cameroon, Cape Verde, Ivory Coast, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Guinea, Guinea-Bessau, Lesotho, Morocco, Mauritania, Namibia, Nigeria, Senegal, South Africa, Sudan, Tunisia, Uganda, Zambia, Zimbabwe

Appendix 3

American Bar Association
Section of International Law and Practice
Association of the Bar of the City of New York
Section of Criminal Justice
Section of Individual Rights and Responsibilities
Standing Committee on World Order Under Law

Recommendation

RESOLVED, That the American Bar Association recommends the establishment of a permanent International Criminal Court (ICC) by multilateral treaty in order to prosecute and punish individuals who commit the most serious crimes under international law; and

FURTHER RESOLVED, That the American Bar Association recommends that the United States Government continue to play an active role in the process of negotiation and drafting a treaty establishing the ICC, and that the ICC treaty embody the following principles:

A. (1)The ICC's initial subject matter jurisdiction should encompass genocide, war crimes, and crimes against humanity;

(2) The ICC should exercise automatic jurisdiction over these crimes, and not additional declaration of consent by states parties should be required;

B. The jurisdiction of the ICC should complement the jurisdiction of national criminal justice systems;

C. The United Nations Security Council, states parties to the ICC treaty, and, subject to appropriate safeguards, the ICC Prosecutor should be permitted to initiate proceedings when a crime within the ICC's jurisdiction appears to have been committed; and

D. The rights afforded accused persons and defendants under internationally recognized standards of fairness and due process shall be protected in appropriate provisions of the ICC's constituent instruments and rules of evidence and procedure

Appendix 4

98th INTER-PARLIAMENTARY CONFERENCE
CAIRO, 11-16 SEPTEMBER 1997

Council
Item 9

CL/161/9-P.1
9 September 1997

CONSIDERATION OF A DRAFT UNIVERSAL DECLARATION ON DEMOCRACY

The members of the Council will recall that, at the initiative of President Sorour, the Executive Committee last year launched a process to develop a Universal Declaration on Democracy. In a first stage, several personalities representing the world's different regions were invited to identify the various aspects of democracy. A meeting was arranged in Paris in December 1996 with the support of UNESCO when these experts and Professor Cherif Bassiouni, Professor of Law and President of the International Human Rights Institute, DePaul University College of Law, Chicago (USA) and General Rapporteur for the project, held an initial exchange of views. After the meeting, these experts and the General Rapporteur set out their visions of democracy in written contributions.

In a second stage, the Executive Committee devoted a special meeting on 7 September 1997 to preparing a draft Universal Declaration on Democracy based on this preparatory work. The Council members will find attached the draft of this Declaration which the Executive Committee finalised on 9 September. It strongly recommends that the Council adopt it.

INTER-PARLIAMENTARY UNION

PLACE DU PETIT-SACONNEX
1211 GENEVA 19 (SWITZERLAND)

TELEPHONE (41 22) 919 41 50 - TELEFAX (41 22) 733 31 41 - E-MAIL postbox@mail.ipu.org
TELEGRAPHIC ADDRESS : INTERPARLEMENT GENEVE - TELEX 414217 IPU CH

UNIVERSAL DECLARATION ON DEMOCRACY

Declaration adopted without a vote* by the Inter-Parliamentary Council at its 161st session (Cairo, 16 September 1997)

The Inter-Parliamentary Council,

Reaffirming the Inter-Parliamentary Union's commitment to peace and development and *convinced* that the strengthening of the democratisation process and representative institutions will greatly contribute to attaining this goal,

Reaffirming also the calling and commitment of the Inter-Parliamentary Union to promoting democracy and the establishment of pluralistic systems of representative government in the world, and *wishing* to strengthen its sustained and multiform action in this field,

Recalling that each State has the sovereign right, freely to choose and develop, in accordance with the will of its people, its own political, social, economic and cultural systems without interference by other States in strict conformity with the United Nations Charter,

Recalling also the Universal Declaration of Human Rights adopted on 10 December 1948, as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966, the International Convention on the Elimination of All Forms of Racial Discrimination adopted on 21 December 1965 and the Convention on the Elimination of All Forms of Discrimination Against Women adopted on 18 December 1979,

Recalling further the *Declaration on Criteria for Free and Fair Elections* which it adopted in March 1994 and in which it confirmed that in any State the authority of the government can derive only from the will of the people as expressed in genuine, free and fair elections,

Referring to the *Agenda for Democratisation* presented on 20 December 1996 by the UN Secretary-General to the 51st session of the United Nations General Assembly,

Adopts the following **Universal Declaration on Democracy** and *urges* Governments and Parliaments throughout the world to be guided by its content:

FIRST PART - THE PRINCIPLES OF DEMOCRACY

1. Democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interest of the polity.

2. Democracy is both an ideal to be pursued and a mode of government to be applied according to modalities which reflect the diversity of experiences and cultural particularities without derogating from internationally recognised principles, norms and standards. It is thus a constantly perfected and always perfectible state or condition whose progress will depend upon a variety of political, social, economic, and cultural factors.

3. As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquillity, as well as to create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity for self-correction.

4. The achievement of democracy presupposes a genuine partnership between men and women in the conduct of the affairs of society in which they work in equality and complementarity, drawing mutual enrichment from their differences.

5. A state of democracy ensures that the processes by which power is acceded to, wielded and alternates allow for free political competition and are the product of open, free and non-discriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit.

6. Democracy is inseparable from the rights set forth in the international instruments recalled in the preamble. These rights must therefore be applied effectively and their proper exercise must be matched with individual and collective responsibilities.

7. Democracy is founded on the primacy of the law and the exercise of human rights. In a democratic State, no one is above the law and all are equal before the law.

8. Peace and economic, social and cultural development are both conditions for and fruits of democracy. There is thus interdependence between peace, development, respect for and observance of the rule of law and human rights.

SECOND PART - THE ELEMENTS AND EXERCISE OF DEMOCRATIC GOVERNMENT

9. Democracy is based on the existence of well-structured and well-functioning institutions, as well as on a body of standards and rules and on the will of society as a whole, fully conversant with its rights and responsibilities.

10. It is for democratic institutions to mediate tensions and maintain equilibrium between the competing claims of diversity and uniformity, individuality and collectivity, in order to enhance social cohesion and solidarity.

11. Democracy is founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite

powers and means to express the will of the people by legislating and overseeing government action.

12. The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organise political parties and carry out political activities. Party organisation, activities, finances, funding and ethics must be properly regulated in an impartial manner in order to ensure the integrity of the democratic processes.

13. It is an essential function of the State to ensure the enjoyment of civil, cultural, economic, political and social rights to its citizens. Democracy thus goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs.

14. Public accountability, which is essential to democracy, applies to all those who hold public authority, whether elected or non-elected, and to all bodies of public authority without exception. Accountability entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms.

15. Public life as a whole must be stamped by a sense of ethics and by transparency, and appropriate norms and procedures must be established to uphold them.

16. Individual participation in democratic processes and public life at all levels must be regulated fairly and impartially and must avoid any discrimination, as well as the risk of intimidation by State and non-State actors.

17. Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded. In order for these institutions and mechanisms fully to ensure respect for the rules, improve the fairness of the processes and redress injustices, there must be access by all to administrative and judicial remedies on the basis of equality as well as respect for administrative and judicial decisions both by the organs of the State and representatives of public authority and by each member of society.

18. While the existence of an active civil society is an essential element of democracy, the capacity and willingness of individuals to participate in democratic processes and make governance choices cannot be taken for granted. It is therefore necessary to develop conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise. It is therefore indispensable to ensure the permanent enhancement of, *inter alia*, equality, transparency and education and to remove obstacles such as ignorance, intolerance, apathy, the lack of genuine choices and alternatives and the absence of measures designed to redress imbalances or discrimination of a social, cultural, religious and racial nature, or for reasons of gender.

19. A sustained state of democracy thus requires a democratic climate and culture constantly nurtured and reinforced by education and other vehicles of culture and information. Hence, a democratic society must be committed to education in the broadest sense of the term, and more particularly civic education and the shaping of a responsible citizenry.

20. Democratic processes are fostered by a favourable economic environment; therefore, in its overall effort for development, society must be committed to satisfying the basic economic needs of the most disadvantaged, thus ensuring their full integration in the democratic process.

21. The state of democracy presupposes freedom of opinion and expression; this right implies freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

22. The institutions and processes of democracy must accommodate the participation of all people in homogeneous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance.

23. Democratic institutions and processes must also foster decentralised local and regional government and administration, which is a right and a necessity, and which makes it possible to broaden the base of public participation.

THIRD PART - THE INTERNATIONAL DIMENSION OF DEMOCRACY

24. Democracy must also be recognised as an international principle, applicable to international organisations and to States in their international relations. The principle of international democracy does not only mean equal or fair representation of States; it also extends to the economic rights and duties of States.

25. The principles of democracy must be applied to the international management of issues of global interest and the common heritage of humankind, in particular the human environment.

26. To preserve international democracy, States must ensure that their conduct conforms to international law, refrain from the use or threat of force and from any conduct that endangers or violates the sovereignty and political or territorial integrity of other States, and take steps to resolve their differences by peaceful means.

27. A democracy should support democratic principles in international relations. In that respect, democracies must refrain from undemocratic conduct, express solidarity with democratic governments and non-State actors like non-governmental organisations which work for democracy and human rights, and extend solidarity to those who are victims of human rights violations at the hands of undemocratic régimes. In order to strengthen international criminal justice, democracies must reject impunity for international crimes and serious violations of fundamental human rights and support the establishment of a permanent international criminal court.

After the Declaration was adopted, the delegation of China expressed reservations to the text.

At present, 137 national parliaments are members of the Inter-Parliamentary Union. Representatives from the parliaments of the following 128 countries took part in the work of the Cairo Conference: Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Cape Verde, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakstan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, Zimbabwe.

Appendix 5

THE
CARTER CENTER

AGENDA

THE CARTER CENTER NO PEACE WITHOUT JUSTICE

The United States
and
the Establishment of a Permanent International Criminal Court

November 13, 1997, The Carter Center, Atlanta, Georgia

8:00 a.m. - 9:00 a.m. Registration and Continental Breakfast

Chair: Ambassador Harry G. Barnes, Jr. , Director, Conflict Resolution Program, The Carter Center; Chair, Human Rights Committee

9:00 a.m. - 9:07 a.m. Opening, Former U.S. President Jimmy Carter, Chair, The Carter Center

9:07 a.m. - 9:15 a.m. Introductory remarks, H.E. Emma Bonino, European Commissioner for Humanitarian Affairs

9:15 a.m. - 9:45 a.m. PANEL I:

Moderator: Dr. Morton Halperin, Senior Vice-President of the Twentieth Century Fund

Panelists:

1. Prof. M. Cherif Bassiouni, Professor of Law, DePaul University; Vice Chairman of the U.N. Preparatory Committee for the ICC (Overview)

2. Ambassador David Scheffer, Ambassador at Large for War Crimes Issues (Trigger mechanism, jurisdiction, relations with U.N. and with national justice systems- a U.S. perspective)

3. Michael H. Posner, Executive Director for the Lawyers Committee for Human Rights (Trigger mechanism, role of prosecutor, rules of procedure meeting standards of due process in the U.S.)

ONE COPENHILL · 453 FREEDOM PARKWAY · ATLANTA, GEORGIA 30307 · (404) 420·5151 · FAX (404) 420·5196

9:45 a.m. - 10:00 a.m.	Questions to the Panel by President Jimmy Carter and H.E. Emma Bonino
10:00 a.m. - 10:30 a.m.	Coffee Break
10:30 a.m. - 12:00 a.m.	General Discussion (Q & A with panel from participants)
12:00 p.m. - 1:30 p.m.	Lunch served in the Rotunda. Luncheon Speaker: H.E. Arthur N.R. Robinson, President, Republic of Trinidad and Tobago
1:30 p.m. - 2:00 p.m.	Break- Refreshments in Front Lobby
2:00 p.m. - 3:00 p.m.	PANEL II:

Moderator: Harry G. Barnes, Jr.

Panelists:

1. Eric P. Schwartz, Special Assistant to the President and Senior Director on Democracy, Human Rights and Humanitarian Affairs, National Security Council
(National security concerns, establishment of an ICC)

2. Mark S. Zaid, Managing Director, Public International Law and Policy Group; Member of American Bar Association International Law Section Coordinating Committee on the ICC
(ABA recommendation-what it states and what is going to happen with it; inclusion of treaty-based crimes, particularly terrorism, within ICC)

3. Richard Dicker, Associate Counsel, Human Rights Watch
(Safeguards in the statute to guarantee due process)

3:00 p.m. - 4:00 p.m.	General Discussion
4:00 p.m. - 4:30 p.m.	Coffee Break
4:30 p.m. - 5:00 p.m.	Chair Harry G. Barnes, Jr. Closing of the Conference Oral Summary Report of Proceedings by Prof. M. Cherif Bassiouni Closing Remarks: H.E. Emma Bonino, European Commissioner

Atlanta Journal-Constitution
Nov. 14, 1997
Page 1 of 2

KIMBERLY SMITH / Staff

Former President Jimmy Carter speaks Thursday during a conference at the Carter Center in Atlanta as H.E. Emma Bonino, European commissioner for humanitarian affairs, listens. World leaders met at the conference to discuss the future establishment of an international criminal court, which would prosecute people accused of crimes against humanity.

World leaders debate role of U.S., U.N. in global court

By Elizabeth Kurylo
STAFF WRITER

Fifty years ago, Benjamin Ferencz stood before a military tribunal at Nuremberg and described the Nazi slaughter of millions of innocent Jewish men, women and children during World War II.

On Thursday, the former chief prosecutor at Nuremberg was at the Carter Center in Atlanta lobbying to set up a permanent international criminal court that would prosecute people who commit genocide, war crimes and crimes against humanity around the world.

The court, set up under the auspices of the United Nations, would replace the current ad hoc tribunals such as those investigating war crimes in the former Yugoslavia and Rwanda. International negotiators are drafting a treaty to establish the court. The final treaty will be considered at a conference next summer in Rome.

Atlanta Journal-Constitution
Nov. 14, 1997
Page 2 of 2

Ferencz was one of about 100 human rights experts and officials from the Clinton administration and the United Nations who met at the Carter Center to debate some of the more technical aspects of how the court will operate. Speakers included former President Jimmy Carter, European commissioner for Humanitarian Affairs Emma Bonino and David Scheffer, U.S. ambassador at large for war crimes issues.

Arthur Robinson, the president of Trinidad and Tobago, also addressed the group. In 1989, he was instrumental in getting the United Nations to consider setting up a permanent war crimes court.

The biggest issues appeared to be the U.S. role in setting up the court and deciding how cases will come before it. Human rights organizations are upset by U.S. insistence that the U.N. Security Council have some control over which cases the court would hear. They believe this would compromise the court's independence and integrity.

Scheffer said the U.N. Security Council needs to have some say in which cases go before the court, especially if it already is dealing with a crisis in the country. For example, he said, it would have been unwise for a special prosecutor to have started investigating war crimes in Iraq while U.S. and U.N. officials were still trying to persuade Saddam Hussein to leave Kuwait.

"There is a role for the Security Council," he said. "If the time is not appropriate to create a judicial process for that conflict" the Security Council should be able to halt the court's work, he said.

President Clinton wants to see a permanent international criminal court set up by the end of the century, but he wants to protect U.S. interests, Scheffer said. For instance, the U.S. government wants to ensure that U.S. military personnel stationed abroad are not unfairly targeted by the court.

"No one is trying to eliminate a role for the Security Council," said Richard Dicker of Human Rights Watch in New York. "But it shouldn't have the right to step in and forestall justice. That is a serious step backward."

Michael H. Posner, executive director for the Lawyers Committee for Human Rights, said he doesn't think the U.N. Security Council has to be "the political filter for which cases get taken up."

Many smaller countries think the United States and some of the permanent members of the U.N. Security Council "like to control the international process," Posner said. This leads them to believe that "there is a set of rules for the U.S. and other big powers and another set of rules for the rest of the world," Posner said.

Carter and Bonino said they are confident the differences can be worked out before the treaty is presented next year in Rome.

"The U.S. has justifiable concerns," Carter said, adding that the U.S. Senate will have to ratify the treaty, as well.

Conference participants signed an "Atlanta Declaration on the International Criminal Court," which outlines the principles they think the court should embrace. Bonino said she will present the document to U.N. Secretary General Kofi Annan next month when she meets with him to discuss the permanent court.

"No one is trying to eliminate a role for the Security Council. But it shouldn't have the right to step in and forestall justice. That is a serious step backward."

RICHARD DICKER
Human Rights Watch in New York

U.N. Prosecutor Urges New Criminal Court

Armed Conflicts Within Nations Bring Demand for Major Tribunal

By BARBARA CROSSETTE

UNITED NATIONS, Dec. 8 — The chief prosecutor for the war crimes tribunals in the Balkans and Rwanda spoke out strongly today for a permanent international criminal court with considerable independent prosecutorial power, a position that puts her at odds with the Clinton Administration.

In a speech to a committee of legal experts from around the world meeting here to define the functioning of a court that could be set up by treaty as early as next June, the prosecutor, Louise Arbour of Canada, said a powerful, independent international prosecutor was crucial to the success of a permanent tribunal.

Among the situations that such a tribunal could deal with are "ethnic cleansing" campaigns that have led to a sharp increase in people displaced within their own countries, an increase noted in data released today by the United Nations High Commissioner for Refugees.

"There is more to fear from an impotent than from an overreaching prosecutor," she said, referring to efforts, particularly by United States, to give the Security Council an effective veto over the court's choice of cases. The Pentagon specifically fears the possibility of criminal proceedings against American soldiers abroad.

"An organization should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith, for improper purposes," Ms. Arbour told the conference.

In an interview after her speech, Ms. Arbour said that a court set up to deal with "massive crimes that often take place in an institutional vacuum" is unlikely to have a prosecutor who meddles in the affairs of law-abiding people or nations.

Ms. Arbour said that critics of a powerful independent prosecutor "confuse independence with unaccountability."

"It's better to equip the prosecutor well," she said, "but to keep him or her on some kind of institutional leash by some kind of an impeachment process."

Most nations, including the United States, agree that the creation of a permanent international war crimes tribunal — first proposed after World War II — is long overdue.

Lawyers and human rights groups point to the absence of a court to try Pol Pot, who presided over a radical communist regime in Cambodia that left more than a million people dead in the mid-1970s, or Saddam Hussein, who used poison gas on his Kurdish population in 1988, two years before seizing Kuwait.

Diplomats are becoming uneasy about other methods of dealing with rulers who pose a threat to their own populations or to neighbors. Sweeping embargoes or other sanctions often hurt innocent civilians more than the leaders they are designed to punish, a problem the Security Council now faces in Iraq.

Few nations have much enthusiasm left for military operations, especially since conflicts are not between countries but within them, making traditional peacekeeping problematical.

Richard Dicker, counsel to Human Rights Watch and an expert on the proposed international court, said in an interview today that the tribunal needs powers to intervene in conflicts within nations, which now kill many more people than international wars.

"Given the overwhelming predominance of armed internal conflict in the world today," he said, "the scope of the court's reach to prosecute crimes in that context goes to the heart of its very effectiveness."

Underlining his point, the United Nations High Commissioner for Refugees reported today that as the numbers of traditional refugees fleeing from country to country drops, the number of people displaced within their own nations is rising.

The refugee agency, which cares for about 22 million refugees and displaced people worldwide, believes there may be another 25 million civilians who have been forced to abandon homes in at least 35 civil wars in which driving people out of their traditional communities appears to have been a main goal. Many of these wars are started by factional leaders who should be "brought to account," the report says.

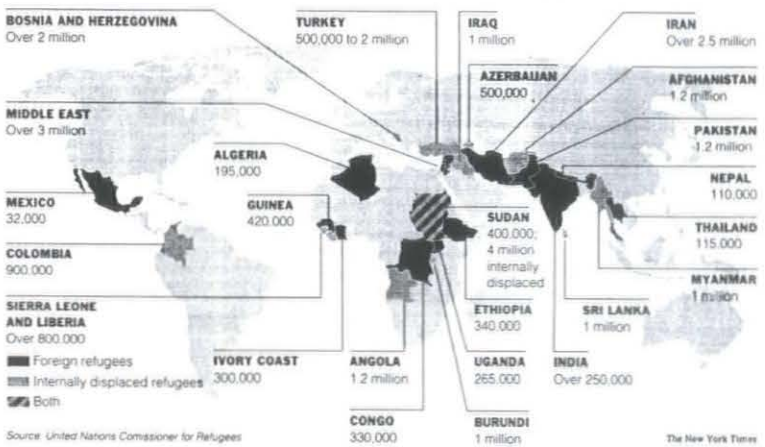
Some developing nations share the concern of the United States that national sovereignty could be infringed by an international criminal prosecutor, but many of the same nations disagree with Washington on the prominent role of the Security Council and the limited role an international prosecutor would have in indicting individuals.

David J. Scheffer, the leader of the American delegation discussing the new court here, said in a speech to an international conference at the Carter Center in Atlanta on Nov. 13 that Washington foresees a prosecutor restricted to pursuing individual investigations only when an overall situation has been referred to the court, whether by a government or by the Security Council — as the Council did in creating tribunals for the Balkans and Rwanda.

In the American view, the Security Council should have the power to block action by the court if the Council was already discussing the conflict or atrocity in question.

AT A GLANCE

The Millions Uprooted: Where the Refugees Huddle



About The Carter Center

The Carter Center brings people and resources together to prevent and resolve conflicts, enhance freedom, and improve health worldwide. It is guided by the principle that people, with the necessary skills, knowledge, and access to resources, can improve their own lives and the lives of others.

Founded in 1982 by Jimmy and Rosalynn Carter in partnership with Emory University, the nonprofit Center undertakes action-oriented programs in cooperation with world leaders and nongovernmental organizations (NGOs). In this way, the Center has touched the lives of people in more than 65 countries.

The Center's programs are directed by resident experts or fellows, some of whom teach at Emory University. They design and implement activities in cooperation with President and Mrs. Carter, networks of world leaders, other NGOs, and partners in the United States and abroad. Private donations from individuals, foundations, corporations, and others support the Center's work.

Paul Dingman

The Carter Center is located in a 35-acre park two miles east of downtown Atlanta.

The Center is located in a 35-acre park two miles east of downtown Atlanta. Four interconnected pavilions house offices for the former president and first lady and most of the Center's program staff. The complex includes the nondenominational Cecil B. Day Chapel, other conference facilities, and administrative offices. The Jimmy Carter Library and Museum, which adjoin The Carter Center, are owned and operated by the National Archives and Records Administration of the federal government and are open to the public. The Center and Library facilities are known collectively as The Carter Presidential Center.

More information about The Carter Center, including Center publications, press releases, and speeches, is available on the World Wide Web at: http://www.emory.edu/CARTER_CENTER. ■