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Symposium: Should There Be an International Tribunal for Crimes Against Humanity?

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My answer to the main theme of our symposium "Should there be an international tribunal for crimes against humanity," is — yes.

The establishment of an international criminal court, including tribunal for crimes against humanity, would certainly contribute to the cooperation of states, strengthening of universal jurisdiction and uniformity in the implementation of criminal liability on the basis of the existing treaty law. However, such an undertaking might entail both political and technical difficulties. A number of problems would have to be considered, analyzed and resolved if the tribunal is ultimately to achieve universal acceptance. For example, the creation of an international tribunal is feasible only with the expressed consent of states, through an international treaty and only to the extent to which states are willing to be bound by its provisions.

As the debate in the Sixth Committee of the forty-seventh session of the General Assembly has shown [a number of]

> delegations expressed either [their] strong reservations to the establishment of a court or serious doubts as to the feasibility of the idea. They stressed the numerous obstacles involved, including the surrender of a state's sovereignty, the relationship between international law and domestic laws and the undermining of the principle *aut dedere aut judicare*. The remark was also made that . . . it was very difficult to achieve uniformity of opinion on many basic issues concerning the creation of a court, such as who might be entitled to bring a complaint before the court, which State or States would have to give consent for the court to have jurisdiction in respect of an individual charged with a crime, which law would be applicable, what relationship would exist between the court and the Security Council and how compensation procedures should be defined.[1]

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[1] U.N. GAOR International Law Comm., 47th Sess., Report, at 10, U.N. Doc. A/CN.4/446 (1993).

In light of the difficulties I have discussed for the establishment of an international criminal tribunal, it was surprising that the initiative to set up an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, was quickly accepted and implemented by the Security Council. The tribunal has been established by the decision of the Security Council under Chapter VII of the UN Charter without broader consultations with the Member States. As a result, my Government took a cautious approach and expressed a number of reservations particularly concerning the method of the establishment of the Tribunal.

The position of my Government on this matter was stated in a letter of the Foreign Minister of the Federal Republic of Yugoslavia to the Secretary-General dated May 17 1993, from which I quote the following:

> The establishment of an ad hoc international tribunal by the Security Council for the prosecution of persons responsible for grave breaches of international humanitarian law committed in the territory of the former Yugoslavia since 1991 is a precedent in international law and the work of the United Nations.
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> [The FR of] Yugoslavia considers that all perpetrators of war crimes committed in the territory of the former Yugoslavia should be prosecuted and punished under national laws, which are harmonized with international law and by competent judicial authorities, in accordance with the principles of territorial jurisdiction.
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> Yugoslavia is one of the advocates of the idea concerning the establishment of a permanent international tribunal [which should be established on the basis of the respect] for the principle of equality of States and universality[,] and considers, therefore, the attempts to establish an ad hoc tribunal — discriminatory, particularly in view of the fact that grave breaches of international humanitarian law have been committed and are still being committed in many armed conflicts in the world, whose perpetrators have not been prosecuted or punished . . . . [The] war crimes are not committed in the territory of one State alone and are not subject to the statute of limitations, so that the selective approach to the former Yugoslavia is all the more difficult to understand and is contrary to the principle of universality.
>
> Yugoslavia has its doubts about the impartiality of the ad hoc tribunal, particularly because of the one-sided approach of the United Nations Security Council to the responsibility for armed

conflicts in the territory of the former Yugoslavia and [due to] the fact that numerous initiators and advocates of the idea of its establishment have openly stated that this was going to be a tribunal for Serbs.

In view of the fact that, under the Charter of the United Nations, the Security Council has no mandate to set up such a tribunal or to adopt its statute, it is quite legitimate to question the legal basis for the establishment of the ad hoc tribunal. This is borne out by the opinions of many States and a number of draft statutes, including the draft of the Conference on Security and Cooperation in Europe (CSCE), to the effect that such a tribunal could be established only by a convention or as a result of decisive influence of the United Nations General Assembly.[2]

In the report by the Secretary-General of May 3, 1993, . . . it is said that the international tribunal has been set up on the basis of Chapter VII and Article 29 of the United Nations Charter.[3]

Yugoslavia wishes to reiterate that the Security Council has no mandate to establish an international tribunal, nor does Chapter VII of the United Nations Charter provide for the establishment of that tribunal. Invocation of Article 29 of the United Nations is legally unfounded and arbitrary, since Article 29 only provides that the Security Council may establish subsidiary organs as it deems necessary for the performance of its functions. It is obvious that such a tribunal is not a subsidiary organ of the Security Council. No independent tribunal, particularly an international tribunal, can be a subsidiary organ of any [UN] body, including the Security Council.

[The initiative for the] establish[ment] of an international tribunal is politically motivated and without precedent in international legal practice, . . . since members of the international community have not been able to agree on the establishment . . . of an international criminal court for decades. The . . . statute of the international tribunal is inconsistent and replete with legal lacunae to the extent that makes it unacceptable to any State cherishing its sovereignty and dignity.

The establishment of an ad hoc tribunal is also contrary to the provisions of the Constitution of the Federal Republic of Yugoslavia, which prohibits extradition of Yugoslav nationals. Yugoslavia is not convinced of the need that it alone should amend its constitutional provisions pertaining to extradition, which are otherwise contained in appropriate legal documents of other

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[2] U.N. GAOR, 48th Sess., Annex, at 2-3, U.N. Doc. A/48/170 S/25801 (1993).

[3] U.N. SCOR, Report, at 8, U.N. Doc. S/25704, sect. I (1993).

> States as well, even less so if the same obligation is not provided also for other members of the international community. Yugoslavia is a signatory State of all international conventions in the field of international humanitarian law, its legislation is in full harmony with the provisions of those conventions and it is prepared to comply fully with its international commitments under these conventions.[4]

In conclusion, I would like to quote from the very pertinent comment of the Member State, in which it was stated *inter alia* that

> consideration of the establishment of an international criminal court should be governed by three major principles: first, the development and implementation of such a tribunal should further, not harm, international law enforcement efforts . . . . Secondly, such a court should be fashioned so as to minimize the potential for politicization of any sort. Finally, and fundamentally, it is imperative to make sure that the tribunal is both fair and effective - that questions concerning such issues as scope of jurisdiction, applicable law, rules of procedure and evidence, and appeals are adequately addressed in a realistic, just and workable fashion.[5]

I believe that none of the above mentioned principles have been taken into account in the decision-making process for the establishment of the International Tribunal for the former Yugoslavia.

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[4] U.N. GAOR, 48th Sess., Annex, at 2-3, U.N. Doc. A/48/170 S/25801 (1993).

[5] U.N. GAOR International Law Commission, 45th Sess., Comments, at 26-27, U.N. Doc. A/CN.4/452 (1993).