

TO THE EDITOR IN CHIEF:

December 15, 1990

It was most encouraging to read in Professor Stephen C. McCaffrey's valuable report on the current work of the International Law Commission (84 AJIL 930 (1990)) that there is "broad agreement, in principle, on the desirability of establishing a permanent international criminal court within the United Nations system." He confirms that "[t]he international climate now appears particularly favorable for the establishment of such a court . . . and it would be unfortunate if this opportunity were lost" (*id.* at 933). This historic development deserves the attention and support of the international legal community.

A draft Code of Offences against the Peace and Security of Mankind and a related international criminal jurisdiction were extensively debated at the United Nations between 1948 and 1954.¹ The Cold War forced the item off the international agenda until 1978.² Leading states were not enthusiastic about having either a code or a court that might condemn some of their actions as international crimes.

In 1989 Trinidad and Tobago, ravaged by the drug trade and inspired by its Harvard-educated Prime Minister A. N. R. Robinson, led a coalition of Caribbean states in support of an international criminal court to deal with drug trafficking and other international crimes.³ Myanmar (formerly Burma, a notorious drug center) noted that "there did not seem to be any urgency for taking new initiatives."⁴ The United States took a similar view, and felt "it might well be harmful." It listed procedural and other problems—most of which had been settled by U.S. Justice Robert Jackson when he led the creation of the International Military Tribunal at Nuremberg in 1945.⁵

In 1990, despite the favorable report from the ILC, the U.S. position remained essentially negative. An international criminal court was characterized as "a real danger" since it might disrupt the "satisfactory implementation of the existing system."⁶ Others that had previously opposed such a court were shifting positions and even the USSR, China, France and Israel now conceded that an international criminal court was worthy of further consideration.⁷

Recent events in the Persian Gulf gave new impetus and justification for the warming trend in favor of an international criminal court. In a televised warning to Iraq's President Saddam Hussein, President Bush made reference to Nuremberg, and Britain's Prime Minister Margaret Thatcher publicly called for a Nuremberg-type prosecution of Hussein. In the Sixth Committee of the UN General Assembly, the British representative declared, "there may be international crimes where some form of international criminal jurisdiction will be necessary in order to deal effectively with them . . . such as aggressive war, crimes against humanity and such like."⁸ U.S. Secretary of State Baker was reported to be sympathetic to the idea.⁹ Indeed, on October 27, 1990, a law was passed requiring the President

¹ See 2 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT (1980).

² See Ferencz, Current Developments Note, 75 AJIL 674 (1981).

³ UN Docs. A/C.6/44/SR.38-41 (1989).

⁴ UN Doc. A/C.6/44/SR.39, at 13.

⁵ UN Doc. A/C.6/44/SR.40, at 3-4.

⁶ UN Doc. A/C.6/45/SR.36, at 13 (1990).

⁷ The item was considered between October 29 and November 19, 1990. See UN Docs. A/C.6/45/SR.29-38 (1990).

⁸ UN Doc. A/C.6/45/SR.35, at 8 (1990).

⁹ Eric Cox and Walter Hoffman reported that on September 4, 1990, at a House hearing, Congressman Jim Leach asked Secretary James A. Baker III about the proposed court, which might deal with Saddam Hussein and possibly Pol Pot. Baker responded, "I think that the suggestion is a good one in terms of an international criminal court." Bulletin from World Federalist Association of Washington (Oct. 5, 1990). See also H. Con. Res. 66, 101st Cong., 1st Sess. (1989) (calling for the creation of an

to report to Congress, by October 1, 1991, "the results of his efforts in regard to the establishment of an International Criminal Court."¹⁰

A Code of Crimes against the Peace and Security of Mankind and an international criminal jurisdiction have been on the international agenda for over forty years. The problems have been debated in great detail by highly competent jurists. Recent drafts by independent experts are readily available.¹¹ Those who urge more study need simply study the existing record and models.

The UN Charter requires all members to refrain from the use of force and to maintain international peace and security by peaceful means and in conformity with the "principles of justice and international law." The Security Council has called upon states to collect evidence of the war crimes committed by Iraq in Kuwait.¹² To condemn international crimes and yet to oppose an international criminal court to deal with such crimes can only encourage criminality.

When he addressed the joint session of Congress on September 11, 1990, President Bush noted that the crisis in the Persian Gulf offered a rare opportunity from which "a new world order" could emerge. He repeated that point to the UN General Assembly on October 1.¹³ President Mitterand of France said: "We are faced with a choice between the law of the jungle and the rule of law."¹⁴

There is no need for the innocent to fear the rule of law. Unilateral use of force, or military action by a hastily assembled posse, is not consistent with either the UN Charter or the U.S. Constitution. We cannot have international law and order without an international criminal tribunal. Let us follow Professor McCaffrey's sage advice and see that this new opportunity to create an international criminal court will not be lost. Nations will be well-advised to turn to law before they turn to war.

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CORRECTION

The footnote identifying the authors of the article *Whales: Their Emerging Right to Life* (85 AJIL 21 (1991)) should have referred to Sudhir K. Chopra as working for the U.S. Environmental Protection Agency, Region 6, Dallas. The disclaimer should have made clear that no official support or endorsement by the EPA or any other agency of the U.S. Government was intended or should be inferred.

international criminal court); Specter, *A World Court for Terrorists*, N.Y. Times, Sunday op-ed, July 9, 1989; Leach, *Don't Help Pol Pot. Try Him*, N.Y. Times, op-ed, Sept. 27, 1989.

¹⁰ See 136 CONG. REC. S16,216 (daily ed. Oct. 19, 1990).

¹¹ M. C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987). C. L. Blakesley of the Louisiana State University Law Center, on May 15, 1990, drafted a model for a regional criminal court. See also 1982, 1983 and 1986 International Law Association, *Report of Conference*, and Reports of the International Association of Penal Law.

¹² SC Res. 674 (Oct. 29, 1990).

¹³ UN Doc. A/45/PV.14, at 68 (1990).

¹⁴ UN Doc. A/45/PV.4, at 36 (1990).

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