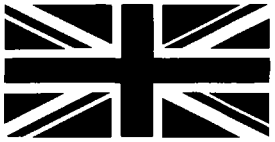

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AD HOC COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Summary of observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5 , 6 and 7 April 1995

The Ad Hoc Committee is engaged in a most important undertaking: discussion of the major issues which arise from consideration of the establishment of a new international criminal court. The Government of the United Kingdom is not committed one way or another as regards the establishment of such a court. The results of this discussion will inform decisions to be taken on the matter. The remarks of this delegation about the items in the list of major substantive and administrative issues should be seen in that context.

ESTABLISHMENT AND COMPOSITION OF THE INTERNATIONAL CRIMINAL COURT

(a) Method of establishment)
(b) Relationship with the UN)

We agree that any such court should be established by treaty. With regard both to the method of establishment and the relationship with the United Nations the ILC draft adopts the right approach.

(c) Nature of the court as a permanent institution

We agree with the course proposed in the draft Statute envisaging a permanent court, but one without full-time judges. The judges should be available if and when needed.

(d) Appointment of judges and prosecutors

Judges: if a new court is to be established, it must be of the highest legal and moral authority. It should always be borne in mind that this is to be a criminal court; all the judges must therefore be qualified in criminal law. The quota system envisaged by the ILC Statute is too rigid; its operation could, conceivably, result in a court (or trial chamber) composed of judges none of whom had experience in criminal cases. It should be made a requirement that all judges have experience in criminal law. The precedent of the Yugoslav Tribunal is not a good one in this respect.

As regards the nomination of judges, it would be desirable to expand, at least in the first instance, the pool of nominating states beyond States Parties. Provision might be made for national candidates to be nominated by national groups (as is done in the case of the election of judges to the ICJ).

As regards the election process, the question is: who votes? Is the election to be done by a plenary body such as the General Assembly, or by States Parties to the court's Statute (as presently contemplated)? There is a strong argument to be made that, in order to have the necessary international standing, a court should be made as close to the UN as possible; election by the General Assembly would be a concrete way of establishing and demonstrating this link. It would also ensure that all Member States of the UN have some measure of involvement in the creation

of the court, thereby possibly enhancing the prospects of its ultimate acceptability. If the General Assembly were to elect the judges, two different precedents ought to be considered: the precedent of the Yugoslav and Rwanda Tribunals, where the Security Council acts as filter, and the precedent of the ICJ election procedure where both General Assembly and Security Council, voting independently, elect the judges. Whatever method of election is chosen, the vote required should be increased from a simple majority to a two-thirds majority.

Prosecutor: the selection of the Prosecutor is of fundamental importance. A primary concern is to ensure that the Prosecutor has the requisite qualifications: extensive experience in the investigation and prosecution of criminal cases. The qualifications for appointment should include a requirement for investigative experience; the precedent of the Yugoslav Tribunal Statute might be followed. The methods of nomination and selection should also be reconsidered. Consideration might be given to appointment of the Prosecutor by the court, on the nomination of States Parties. Alternatively, the Prosecutor could be nominated by the judges and elected by States Parties.

(e) Adoption of the Rules of Court

We agree with those speakers who have drawn attention to the need for states themselves to draw up the Rules of Court and not to leave this function to the judges. The Rules of Court will include matters of fundamental importance; they are not merely procedural rules. They relate to the conduct of proceedings, rules of evidence (including procedures for obtaining evidence), and the rights of the defendant. Our other concern is that if the judges, rather than States Parties, are left to draft the rules, this would lead to delay.

ISSUES PERTAINING TO JURISDICTION

JURISIDCTION

The ILC have listed crimes, rather than describing what those crimes consist of. While we understand the reasons for this approach, clear definitions are essential to fulfil the requirement of certainty.

Genocide

Thus, consideration might be given to spelling out the crime of genocide in the terms of the Genocide Convention

Aggression

As the ILC commentary notes, there is no treaty definition, nor is there a clearly defined customary law crime of aggression. The Charter of the Nuremberg Tribunal gave jurisdiction over "the planning, preparation, initiation or waging of a war of aggression

or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy of the foregoing". But there is no definition of a war of aggression. The General Assembly resolutions on the Friendly Relations Declaration and on the Definition of Aggression similarly contain no definition for the purpose of individual criminal responsibility.

More work needs to be done on the question of a definition. But we remain to be convinced that even with further work, it is possible to come up with a definition that is sufficiently certain to justify inclusion within the Statute and which does not create new law.

Violations of laws and customs applicable in armed conflict

Again there needs to be a definition; this group of crimes is not clear enough as it stands. The Statute of the Yugoslav Tribunal is a good source. But the list of crimes in that Statute is not exhaustive.

Crimes against humanity

These need to be set out. There are precedents - eg Nuremberg Tribunal, Yugoslav Tribunal, Rwanda Tribunal. But the precedents do conflict. There needs to be some kind of codification. A clear exhaustive definition of unlawful acts falling within this category must be provided. Simply naming the category is not sufficient to satisfy the requirement of legal certainty.

Treaty crimes

- The Geneva Conventions present no problem.

- International crimes of terrorism:

The UK does of course consider that such offences are serious and they must be dealt with.

The multilateral conventions make provision for the offences to be dealt with; states already have obligations under international law to create offences, recognise them as serious offences, and prosecute or extradite. The very existence of these conventions renders the jurisdiction of the court over these crimes unnecessary. The network of conventions allocates national jurisdiction to a large number of states. That jurisdiction must be exercised. The present arrangements under which states have the obligation to prosecute or extradite are by and large effective.

We also foresee enormous practical difficulties if this jurisdiction is given to the Prosecutor and the Court - such that it cannot be foreseen that the arrangements would actually work. Perhaps worse, giving jurisdiction to the Court could actually damage or at least undermine or set back the effective work of

investigating and preventing terrorist incidents. The comments of the United States of 30 March appear to the United Kingdom to give a well argued and salutary warning of the dangers to the successful investigation, intelligence gathering and international cooperation that has been built up over the last 25 years.

- Drugs offences

We would not wish to see these included within the jurisdiction of an international court. The UN Convention does not establish treaty crimes. We consider that Convention is the proper way forward rather than giving jurisdiction to an international court: under the Convention there is provision for national action to establish criminal offences; enforcement of national law; and international cooperation.

We are not unaware of the difficulties which some states experience in prosecuting major drug offences. But in such cases the solution is to look to international cooperation, including extradition arrangements, so that offenders can be prosecuted elsewhere.

In sum, we oppose inclusion of such crimes in the jurisdiction of an international court because:

(i) there is no definition of the crimes concerned;

(ii) it would distort the aim of the court, which is to be complementary to national systems; and

(iii) in many cases the same kind of practical problems would arise as with terrorist crimes.

APPLICABLE LAW

This consists of Article 33 (Statute, applicable treaties and principles and rules of general international law, and to the extent applicable, any rule of national law) and Article 47(2) (penalties - but this is dealt with later).

It is essential that all concerned - Court, Prosecutor, national authorities, accused persons - should know what law is to be applied. It is fundamental as a matter of principle that there is certainty and that:

(i) individuals know what conduct is subject to the jurisdiction of the Court, and

(ii) accused persons know how the Court functions and what are their rights of defence and other rights.

Article 33

This gives rise to unacceptable uncertainty - "principles and

rules of general international law": what does this mean in the context of criminal law?

There is even more uncertainty about the applicability of national law: both as to its extent and as to its identification

- As to its extent - what topics of national law will the Court have recourse to, eg defences (eg self-defence, provocation) or the content of particular crimes, eg murder (in Geneva Conventions): must there be an intention to kill or cause grievous bodily harm or is it also murder, as in some countries, where there is a killing after too much force is used or a different offence?

- As to identification of national law - which national law is to be used - eg that of the state where the crime was committed or where the accused is held - or are there other alternatives?

EXERCISE OF JURISDICTION

(a) Inherent jurisdiction

We do not favour a broader approach to inherent jurisdiction than is provided in the draft Statute. The principle of consensuality should be followed, except with regard to genocide, where jurisdiction is inherent.

(b) Mechanism for accepting jurisdiction)
(c) Trigger mechanism)

We are reasonably satisfied with the approach taken in the ILC Statute to the manner in which states accept the Court's jurisdiction, the consents required from states and the complaints procedure. But we shall need to consider the matter again carefully in the light of any decisions taken with regard to the crimes subject to the Court's jurisdiction. We do not regard it as necessary to allow a victim of a crime to bring a complaint to the Court; a victim should be able to find a state within the necessary jurisdiction to bring the complaint.

(d) Conditions for the exercise of jurisdiction

The second preambular paragraph of the draft Statute refers to jurisdiction being exercised only over serious crimes of international concern. This principle is partly reflected in the Statute by the restricted list of offences, and by the reference in Article 35(c) to the gravity of the crime. Some speakers have suggested that the principle of seriousness should be further incorporated in the Statute. We shall be interested in further development of this proposal.

Article 35 sets out the present grounds of inadmissibility. We have three points on this Article:

First, all the grounds of inadmissibility should be included in the Article, including Article 42(2) *(ne bis in idem)* and Article 55 (speciality). Secondly, Article 35(a) should be redrafted so that a case would be inadmissible if it had been duly investigated by a state and there was no reason to believe that that state's decision not to prosecute was ill-founded (that is, the second clause in sub-paragraph (a) should be reversed). Thirdly, we are not satisfied that Article 35 is adequate to cover all cases in which a prosecution should not be brought. At present, the Prosector is obliged to investigate and prosecute if the conditions in Article 27 are met - that is, that there is a *prima facie* case with regard to a crime within the Court's jurisdiction, and that having regard to the points mentioned in Article 35, the case should be heard. We should like to ensure that the Prosecutor is permitted not to prosecute in cases where, for example, the complaint made is an abuse of the process of the Court. There is a provision in human rights conventions of a similar nature which can be drawn upon. We also believe that consideration should be given to cases where the circumstances of the alleged offender - eg he or she is very young, very old or very sick - make it unjust to prosecute him or her. At present, this is not provided for in the Statute.

(e) Role of the Security Council

The question whether the Council should be able to refer cases to the Court is one of great difficulty. Arguments against such a proposal include the fact that the Council is a political body; great care would have to be taken in defining the reference to the Court to avoid referring an individual case rather than a situation. Arguments in favour of a power of referral include the fact that there is a general desire to obviate the necessity for the Council to establish new Ad Hoc Tribunals. But new Ad Hoc Tribunals might be necessary if the Council were not given the power to refer situations to the Court and accordingly to impose obligations upon states under Chapter VII. If there is to be a Court at all, it looks as if the choice might be between having a Court which allows Security Council reference, obviating the need for future Ad Hoc Tribunals on the one hand, and having a Court without a power of Security Council reference but with additional Ad Hoc Tribunals set up by the Council.

METHODS OF PROCEEDING

Articles 25-50

Such matters as the principle of "due process" and standards of fair trial will be absolutely vital to the credibility of any court which is established. As indicated, our Government has not yet formed a view, one way or the other, on the establishment of the court. But the effectiveness and essential fairness of the procedures, under the Statute and Rules, will be among the matters which the Government will need to take into account.

The Prosecutor's powers of investigation: the United Kingdom has reservations about the extent of the powers which it is proposed in the draft Statute should be vested in the Prosecutor. Under Article 26, he would appear to be able to do various things himself, such as to ask suspects and witnesses questions. We do not consider that his power need go this far. Questions may, of course, need to be asked, but the better way to proceed, in our view, and consistent with existing international judicial cooperation arrangements, would be for the Prosecutor to request the cooperation of the State where the person concerned is. If that State does not or cannot cooperate, then it is unlikely that the Prosecutor would be able to undertake the questioning there or conduct an on site investigation there himself. We see no point in empowering the Prosecutor to do this.

Next, there is the issue of safeguards for the rights of those who are to be questioned. Protection for witnesses against self-incrimination is fundamental. Similarly, a suspect must be assured of those basic safeguards which are needed but no more than are absolutely necessary.

In connection with Article 28(2), if the indictment has not been confirmed within 90 days of arrest, the United Kingdom asks whether the person should not be discharged, that is to say no longer liable to be dealt with at all, rather than merely released from arrest. Further, is 90 days too long?

On Article 28(1) and the grounds for issuing a provisional warrant, there is some confusion here about the stage at which the arrest is being resorted to, which stage in turn feeds through into the kind of case which has to be shown against the suspect when a provisional arrest warrant is sought. The United Kingdom suggests that a case has to be made out. The question is what would be the appropriate nature of the case. Draft Article 28(1)(a) refers to "probable cause". Is this right, however, for arrest at each stage?

Article 29

Article 29(1) envisages that the suspect will be brought before a national court on his arrest under a provisional warrant. This is so that a check that the warrant has been duly served and that the suspect's rights have been respected can be made. This is clearly an important stage and it is right that the accused's rights should be fully guaranteed. It seems important also, however, that consideration is given to which rights are to fall to the judicial officer to confirm and what he should do if he is satisfied that they have not been respected. Some elaboration is called for. This Article is a key Article in what is at this part of the Statute an extradition regime and it seems to the United Kingdom right, therefore, to compare the Article with the equivalent stage in an extradition case. Should the accused be able to challenge his arrest and detention on the ground that a *prima facie* case has not been made out? This is a safeguard

which is a feature of extradition arrangements, which many countries represented in the working group have entered into. Is it satisfactory to surrender to the international criminal court without some examination by the judicial officer as to the sufficiency of the Prosecutor's case? Should it be possible to raise Article 35 admissibility grounds before the judicial officer? Other grounds for challenge may also be appropriate, such as that the warrant is not authentic, that the suspect is not the person named in it, that the offence charged is not a crime within the jurisdiction of the international criminal court, or that the necessary State consents have not been given. One might also consider other safeguards in States' extradition laws to see whether reference to them would be appropriate in relation to these procedures.

Article 29(2) provides for release pending trial. It would be a matter for concern that a suspect might be held for long periods in detention pending trial and the United Kingdom would be interested to hear of suggestions for minimising these. Consideration should be given to how applications for release under Article 29(2) are to be dealt with. Would suspects have to be transferred to the court and, if not released, would the court need power to retransfer the person to the custodial State? If he is not to be transferred, how is his application for release to be made and dealt with?

Paragraph 3 of Article 29 provides for compensation to be paid for unlawful arrest or detention. Who should be liable for this, at least in cases where the national authorities have not behaved unlawfully and the fault lies with the court?

Moving on to the conduct of a trial, there seems to the United Kingdom delegation a number of points to be made. They are, however, points of detail which suggest that further work is needed, for example on Articles 27(5), 38 and 41. A specific example of where further work is needed relates to sensitive documents. The Prosecutor may well have acquired such documents during the course of his investigation which, for example, reveal the existence or identity of an informer whose life may be put at risk if the information is revealed, or which indicate the extent of a State's awareness of the activities of a group of individuals but whose premature disclosure could jeopardise other investigations or operations to prevent the commission of serious offences. There is here a balance to be struck between arrangements which enable such information to be protected and ensuring full rights for the defence.

The United Kingdom agrees that a closer comparison with Article 14 of the International Covenant on Civil and Political Rights in connection with Article 41 of the Statute would appear to be justified.

A further issue of concern to the United Kingdom is double jeopardy. Article 42 suggests that the court may retry someone who has been tried by a national court where the acts in question were characterised as an "ordinary" crime. The United Kingdom suggests that the distinction between ordinary crimes and international criminal court crimes is not appropriate, nor that it is appropriate for the international court, as a court of last resort, to retry individuals in the circumstances envisaged in Article 42(2)(a).

The United Kingdom supports the comments made in particular by the United States' delegate on Article 44(5).

Trials in absentia.

The general rule in Article 37 is one which the United Kingdom delegation strongly supports. Equally strongly, however, we would suggest that the exceptions, particularly in paragraph (2)(a) merit careful consideration. We question whether these go too far. We applaud the inclusion of arrangements to enable evidence to be preserved if a trial cannot be held, but would want to consider most carefully the arrangements for the use subsequently of the evidence so as to minimise any adverse effect on the accused's rights at that stage and wonder whether it is satisfactory for an indictment to be confirmed on the basis of uncontested evidence.

Applicable penalties

Consideration should be given to whether the court should be guided not only as to the length of a sentence of imprisonment or the amount of a fine, but the circumstances in which the one kind of penalty is more appropriate than the other. For reasons of principle which the working group has recognised in its discussions on Article 33, certainty as to the law to be resorted to in relation to sentencing is crucial. The United Kingdom has doubts whether Article 47(2) secures this because of the reference to various national laws to which recourse may be made. In any event, we question whether the apparent emphasis on or priority of the law of the nationality of the convicted person over that of the State where the offence was committed is appropriate.

The issue of sanctions against untruthful witnesses needs further consideration. It would be more appropriate for the international criminal court to have jurisdiction to deal itself with instances of perjury.

Finally, we wonder if the circumstances in which the Appeals Chamber can intervene under Article 49 are adequate. The Article contemplates unfair proceedings or errors of law or fact. A conviction may be unsafe for other reasons, however, where there is a lurking doubt, a residual doubt, whether the accused has been shown to be guilty as charged beyond reasonable doubt. Such a doubt may not arise because of an error of fact but on a

reappraisal of all the known facts. We suggest this needs to be looked at. Similarly, the United Kingdom delegation questions whether the criteria for revision are sufficiently broad, for example to deal with developments in national law where, for example, a domestic court may have ruled in a later case on the scope of a defence and that ruling means that the accused before the international criminal court had a defence after all.

A final question: should the person who is successful in his application for revision and is exonerated be entitled to compensation and, if so, in what circumstances and from whom? One can imagine only too clearly the trauma and disruption of enduring what would inevitably be a high profile arrest, trial and possibly sentence of imprisonment where the person was actually innocent. Compensation for a miscarriage of justice would seem called for and would be consistent with Article 14(6) of the International Covenant on Civil and Political Rights.

RELATIONSHIP BETWEEN STATES PARTIES, NON-STATES PARTIES AND THE INTERNATIONAL CRIMINAL COURT

In considering this cluster of items, we should always bear in mind the principle of complementarity: the court must be one of last resort. Further, the principles of cooperation should follow the lines of existing rules of international judicial cooperation.

Article 53: This raises issues of competing extradition on transfer requirements. These are difficult questions and they will need further work. The case in paragraph (2)(b) is one where there is no obligation to surrender to the International Criminal Court. It seems to us questionable to appear to suggest, as does this paragraph, that what is or may be an option of surrendering to the court could take priority over an international treaty obligation to extradite or prosecute.

We have similar concerns with paragraph (2)(c), which seeks to displace an international legal obligation under an international treaty by voluntary surrender to the court.

Paragraph (4) also raises questions about competing extradition obligations. We do not think it is appropriate to provide, even "as far as possible" as does this paragraph, for the court's request to be given priority, but we do see some place for guidelines to assist states in their decision.

Whilst Article 53 concerns requests for surrender to the court, it does not appear to take account of the possibility that an accused may successfully challenge the state's intention to transfer him to the court when he appears before the national judicial officer under Article 29. The article should be qualified to provide for this possibility.

Article 55: This article concerns the rule of speciality, whereby a person transferred to the court shall not be prosecuted for any

crime other than that for which he was transferred. National laws under extradition arrangements frequently provide for a person to be dealt with by the requesting state for another offence if the requested state agrees. We wonder whether we should contemplate an equivalent provision being included in this article. Similarly, the court might be permitted to try an offence which concerns the same essential facts as those in issue in connection with the offence for which the accused was surrendered, but which is a lesser offence within the court's jurisdiction.

Articles 51 and 52: Detailed provision is needed in relation to the matters in Article 51(2). We suggest, for example, that the purpose of arrest or detention be specified in (2)(d) since this will be relevant to the legislation which a state party may need to have in place to comply with the article, and that (2)(e) needs elaboration. The court's request could involve action being taken against rights or property of individuals by a state party. The law of that state party will, therefore, have to enable this to be done. Greater detail in (2)(e) would enable states to ensure that their domestic legal provisions enable them to do what may be asked of them.

Where a request for provisional measures is made, the state party will need to know the basis of the court's request and why the requested action is needed if it is to be able to seek and obtain for its courts warrants, for example to seize documents. Article 52 (2) suggests a formal request under Article 57 would follow on later but the state will need information of the kind mentioned in Article 57(3) at the point the initial request is to be made to the domestic court, so that it has some basis on which to issue the necessary arrest or search warrant.

BUDGET AND ADMINISTRATION

We consider questions of financing essential to the consideration of the establishment of a court. Resources for the investigation and prosecution of criminal offences are not unlimited. We must constantly bear in mind this question: is it the best use of limited resources to undertake international investigations and prosecutions with all the difficulties and duplication of personnel that that involves, or should those resources continue to be devoted to national prosecutions?

The ILC commentary touches on financing in Appendix I. It points to two possibilities for funding: direct financing by the States Parties, or total or partial financing by the United Nations. It is probably too early to enter into an in-depth discussion of either of these two options without being clearer about the nature of a court and its general acceptability.

Similarly, it is difficult at this stage to do anything more than ask questions on other matters of financing, as the paper by the Secretary-General makes clear. One thing is plain: the costs of the court are likely to be substantial once criminal investiga-

tions and prosecutions begin, as has been pointed out in the written comments of the United States. Furthermore, although it is intended that the method of setting up the court - a permanent court but not full-time judges - as recommended by the ILC should be cost-effective, we must recognise that this concept of a court will give rise to administrative and financial difficulties. The costs of the "core" court (Presidency, Chambers/Judges, Procuracy and Registry) will have to allow for rapid expansion of professional personnel, so as to permit new cases being investigated and prosecuted as and when needed. This may entail empty offices and unused office equipment, waiting for the time when the court will spring into life. There may also have to be suitably-qualified personnel (eg investigators/forensic experts) on call. It will be difficult to write the budget for such a court. These potential difficulties will have to be examined further. A further question is the extent to which financial arrangements should mirror the International Court of Justice; justification would have to be provided if it were desired to accord to the judges allowances on the same basis as ICJ salaries.