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A Proposal for Alternative Jurisdiction of an International Criminal Court

A. Impediments to United States Ratification of a Statute for an International Criminal Court

For over fifty years, proposals for an International Criminal Court have been propounded as a means of combatting crimes of an international nature.¹ One of the major impediments to United States participation in a statute for such a tribunal has been constitutional in nature. There is doubt whether the Constitution allows the entry by the United States into a convention granting an international tribunal jurisdiction over American citizens.

Article III, § 1 vests the judicial power of the United States in a Supreme Court. From the tribunal's name and functions, it may be inferred that appeal does not lie to another judicial body. Article III, § 2, clause 1 states: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their Authority. . . ." Proceedings within the jurisdiction of the courts of the United States removed for trial to an international penal court pursuant to treaty would thus be subject to constitutional attack.

Article III, § 2, paragraph 3 asserts: "The trial of all crimes . . . shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." If the seat of the International Criminal Court were located without the United States, the court could constitutionally hear cases over which American courts had jurisdiction, if the offenses were not committed within any State. In such a case, Congress would have to assent to the proceedings being held without the country.

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¹For concise chronologies of the various proposals, see Ambion, *Organization of a Court of International Criminal Jurisdiction*, 29 PHILIPPINE L.J. 345, 348-350 (1954); Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L. Q. 1255, 1266-1269 (1964); Brierly, *Do We Need an International Criminal Court?* 8 BRITISH YEARBOOK INT'L L. 81 (1927); Hudson, 32 AM. J. INT'L L. 549 (1938); Weis, *International Criminal Justice in Time of Peace*, 28 TRANS. GROTIUS SOC'Y 27, 39 (1962).

Past draft statutes have also clashed with the constitutional rights of United States citizens and precepts of common law jurisprudence. Article 37 of the Committee on International Criminal Jurisdiction's Draft Statute for an International Criminal Court is typical in its denial of the right to a jury trial.² This is in direct conflict with the sixth amendment which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."³

This defect was left unremedied by the Bellagio-Wingspread Draft of 1972.⁴ While the 1972 statute contained no explicit provision excluding the right to trial by jury, a perusal of the instrument leaves no doubt that the intention of the drafters was such.⁵

The 1971 Draft Statute had provided in article 37: "Trials shall be without jury, except where otherwise provided for in the instrument by which jurisdiction has been conferred upon the Court." The possibility would have thus existed for the United States to confer jurisdiction upon the court with provision made for trial by jury in cases involving its own citizens.⁶

The 1971 Draft Statute left unanswered the question of the composition of the jury. The sixth amendment requires "an impartial jury of the State and district wherein the crime shall have been committed." It is doubtful whether a jury composed of nationals of foreign lands could pass muster constitutionally. Article 37 did not state how the jury was to be chosen nor how many jurors would constitute a complete panel. More fatally, the article did not resolve the conflict where involved states had conferred jurisdiction upon the court providing for diverse modes of trial.

Past drafts have provided that judgments and sentences were to be pronounced on the basis of a less than unanimous verdict. Whereas article 46 of the United Nations Draft Statute and article 37 of the 1937 Convention for the Creation of an International Criminal Court⁷ foresaw majority decisions, article 41 of the 1972 Statute provided that "(a)11 questions shall be decided by a two-

²The text of the Draft Statute may be found in 46 AM. J. INT'L L. SUPP. 1-11 (1952).

³U.S. CONST. amend. 6. article II, § 2, paragraph 3 states, *inter alia*: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ."

⁴The 1972 Statute for an International Criminal Court was preceded by the Draft Statute for an International Criminal Court prepared by the First International Criminal Law Conference in September, 1971. The Statute for an International Criminal Court is reprinted in A REPORT ON THE FIRST AND SECOND INTERNATIONAL CRIMINAL LAW CONFERENCES 16-21 (1973).

⁵See articles 40-43.

⁶Such conferral of jurisdiction would remain subject to objections grounded in Article III of the Constitution. See discussion, p. 1, *supra*.

⁷The 1937 Convention may be found in 3 PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE REPRESSION OF TERRORISM 4-18 (1938).

thirds majority of votes of the Judges participating in the trial.”⁸ These provisions are far removed from the unanimous verdict generally required in the United States.

Finally, draft conventions have invariably stated the desire of their drafters that the bench should “represent the main forms of civilization and the principal legal systems of the world.”⁹ The difficulties inherent in attempting to establish an International Criminal Court which would apply the penal procedure of diverse cultures and legal systems may be insurmountable. These difficulties have led some to propose the formation of regional courts which would apply the concepts of legal systems with common underlying rationales.¹⁰

B. Alternative Jurisdiction of an International Criminal Court

It might be more realistic to consider alternative grounds of jurisdiction for an International Criminal Court rather than concentrating on traditional proposals for a tribunal which would have the competence to try cases before it in their entirety. The so-called smorgasbord approach might be applied to the ratification of a statute for an International Criminal Court. The proposed convention would envisage three types of jurisdiction for the tribunal. States might, as provided for in prior drafts, assent to the court’s having jurisdiction to conduct trials in those matters in which its jurisdiction is invoked. Alternatively, contracting parties might agree to the court’s power to issue preliminary rulings or advisory opinions. The parties might agree to any of the three alternative jurisdictional functions vested in the court.

The courts of a country such as the United States which face constitutional obstacles in relinquishing judicial authority to an International Criminal Court might, while retaining jurisdiction over a proceeding before them, ask for a preliminary ruling on matters of international penal law. These rulings would be binding upon the court from which the request arose. This process would be analogous to that followed in the European Communities’ Court of Justice.¹¹

⁸Article 35 of the 1926 International Law Association Draft embodied the same principle of a two-thirds majority. The Draft may be found in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE THIRTY-FOURTH CONFERENCE 110 (1972).

⁹Article 6 of the 1972 Draft Statute is representative of this philosophy.

¹⁰See Mouat, *A Gradualist Approach: Establishment of a Free World Court System*, 49 A.B.A.J. 735 (1963).

¹¹Article 177 of the Treaty of Rome reads:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

A lower court would have the option of asking the International Criminal Court for a preliminary ruling on a question of international penal law if that was necessary for it to pronounce judgment. If such a question arose in a case before a national tribunal from which there was no appeal, the national court would be obligated to refer the question to the International Criminal Court. The rationale for the dichotomy in treatment for lower courts and courts of last resort is that the latter courts' decisions mold the body of law for their respective judicial systems.

Preliminary rulings would further the aim of achieving greater uniformity in international penal law as a body of international jurisprudence became established. While achieving greater uniformity in the substantive realm, the individual's constitutionally protected procedural rights under his national law would remain intact. This would avoid the long-standing debate over whether an International Criminal Court would be violative of a defendant's rights granted under the United States Constitution.¹² United States citizens would thus retain the right to a jury trial and the assurance that their guilt would be determined beyond a reasonable doubt by a unanimous verdict.

Jurisdiction to try the case would remain with the domestic courts of the United States. Such a convention would thus not be violative of article III, § 1 or article III, § 2, clause 1 of the Constitution. As any judgment would be enforced by national authorities, the infirmity of international courts not having a concomitant international body to enforce their judgments would be avoided. Article III, § 2, paragraph 3 would be met as trials would continue to be held within the state where committed.

Alternatively, a contracting party might adhere to that part of the convention giving the court advisory jurisdiction. The exercise of such jurisdiction has played an important part in the role of the International Court of Justice. One need only look to *Reparation for Injuries Suffered in the Service of the United Nations*,¹³ *Reservations to the Convention on Genocide*,¹⁴ and *Certain Expenses of the United Nations*¹⁵ to witness the affirmative role advisory opinions have

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision of the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The text of article 177 may be found in 51 AM. J. INT'L L. 865 (1957).

For a discussion of article 177, see Hay, *Supremacy of Community Law in National Courts*, 16 AM. J. COMP. L. 524 (1968).

¹²See Parker, *An International Criminal Court: The Case for Its Adoption*, 38 A.B.A.J. 641 (1952) and Finch, *An International Criminal Court: The Case Against Its Adoption*, *id.* at 644.

¹³(1949) I.C.J. 174.

¹⁴(1951) I.C.J. 15.

¹⁵(1962) I.C.J. 151.

had in the molding of public international law. Such judgments would not be binding upon the court which had submitted the request, but would be entitled to great persuasive force.

One commentator, when noting the paucity of United Nations members which had accepted the jurisdiction of the International Court of Justice, made a statement which is equally applicable to the establishment of an International Criminal Court:

. . . [I]t might be more realistic to follow a wise saying that we should elevate our sights a little lower, perhaps much lower. Instead of adopting an all-or-nothing attitude, we might explore a step-by-step approach which would gradually increase the Court's permanent jurisdiction.¹⁶

¹⁶Sohn, *Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice*, 58 AM. SOC'Y INT'L L. PROC. 131 (1964).

