

Instead of making a formal presentation, I would like to address a number of issues that have arisen in the course of the discussion today. Let me start with credentials: I have been in favour of the establishment of an International Criminal Court for the last thirty years: indeed, for the last twenty-five years in collaboration with our distinguished Chairman.

We have been talking about an International Criminal Court when nobody wanted to hear the words, when the idea appeared absurd and bizarre, like a UFO. It is precisely for that reason that I am not obsessed by the deadline of 1998, which is totally artificial. The International Criminal Court has absolutely nothing to do with the Universal Declaration of Human Rights (adopted in 1948), which does not relate to crimes against peace, to war crimes, to crimes against humanity, or for that matter even to genocide.

Furthermore, the genuine deadline has been missed. The genuine deadline should have been 1996, i.e. the 50th anniversary of the Nuremberg judgement. The next appropriate date is perhaps 1999, the centenary of the First Hague Peace Conference. The Hague Conventions at least have some connection, however nebulous, to war crimes. But I, for one, will not be appalled even if the projected convention will enter into force, say, in the year 2005. We meet in Malta, which triggered UNCLOS III, the cradle of the Law of the Sea Convention signed at Montego Bay in 1982. It took many years to reach Montego Bay, and even then, it turned out that the sense of finality was premature. Only recently, the Law of The Sea Convention was amended by a new Protocol meeting the needs of the most important maritime power, the US. Signatories in 1982 might have done the international community some service had they waited longer and avoided the need for an amending Protocol. What is occasionally forgotten is that an international conference which ends with a vote of two-thirds majority in favour of a treaty is like a wedding ceremony. It is very easy to say "I do", but what really

* *Professor of International Law, President of Tel Aviv University, Israel.*

counts is what happens later. We know how many marriages end in divorce!

The question is how many States will ratify a convention establishing an International Criminal Court and, even more importantly what will happen after the entry of the convention into force. Will actual cases be submitted to the Court? This is the crux of the issue. Hence, it is essential to make sure that the text will be acceptable to as many nations as possible. Ending a conference with a convention that will be acceptable to Italy, Malta, Sweden and Iceland, and perhaps five other countries, will prove a fiasco. We must have the consent of the United States, Britain, France, Germany, Russia, and even China. That may take a while, in as much as we are not close to the target yet.

I believe that for the successful operation of an International Criminal Tribunal - like the prototype at Nuremberg - what is required is a complete victory in the field against an aggressor. It was only because of the total victory of the Allies in World War II that the Nuremberg Tribunal succeeded so famously. When there is total victory, you have the run of the land, and several things happen. First of all, you gain all the archives of the other side: you have all the documents and are in a position to collate written evidence. Secondly, all the witnesses who are still alive are in your custody. It is no accident that there exist forty-two volumes of documents and testimonies at Nuremberg. If nobody can argue with Nuremberg today, it is owing to these forty-two volumes. In a sense, the documents are more important than the judgement.

At present, we have two *ad hoc* International Tribunals relating to Rwanda and Yugoslavia. I happen to believe that there are greater chances for success in the case of the Rwanda Tribunal, simply because in Rwanda there has been total victory in the field and you can get hold of most of the major war criminals. In Yugoslavia, we do not know that the major war criminals will necessarily ever be tried.

In the absence of total victory, a crucial question arises: do you prefer the administration of justice or would you rather have reconciliation between the combating parties (which are still there)? It is very easy to say "we want justice at all costs". It is also nice to say that there is no peace without justice. With all due respect to this phrase, I would argue that, equally, there is no justice without peace. I do not believe in the maxim of the Emperor Ferdinand I of the Holy Roman Empire: *Fiat justitia et pereat mundus*. Are we all ready to die in the name of justice? I can assure you that in the

former Yugoslavia, as elsewhere, people would rather have peace first and then justice.

Let me add a few other comments. First, I fully endorse the view that no criminal trials should be held *in absentia*. Such trials serve no purpose and can even be counter-productive if the accused is never apprehended.

Secondly, about crimes against humanity. Let me point out that, under the Nuremberg Charter (in which crimes against humanity were defined for the first time), these crimes had a nexus to war. It is only in subsequent years that crimes against humanity have been contemplated as conceivably existing irrespective of war. But it must be recalled that, whatever their temporal scope, crimes against humanity, must be committed against a civilian population: any civilian population (including your own civilian population, as distinct from the enemy civilian population), but only civilian population and not civilian individuals as such. In other words, the whole philosophy underlying crimes against humanity is completely different from the fundamental concept in which the Universal Declaration of Human Rights is embedded. The Universal Declaration is largely designed to protect every single individual everywhere. Crimes against humanity are only relevant to group protection.

Thirdly, both the Yugoslav and the Rwanda Statutes are conspicuous in that they cover crimes against humanity and numerous other crimes, yet - unlike the Nuremberg or the Tokyo Charter - they do not refer to crimes against peace. This is a *lacuna*, possibly due to the fact that, in recent years, while nobody has denied the validity of war crimes and crimes against humanity, many doubts have been expressed with respect to crimes against peace. I do not share these doubts. In a book that I have written on the subject of "War, Aggression and Self-Defence", I have endeavoured to show that crimes against peace are as significant today as ever. Yet, if in 1991 the Americans would have marched to Baghdad and captured Saddam Hussein, they would have faced a major dilemma whether or not to proceed with an indictment relating to crimes against peace.

I am glad that the Draft Statute of the International Criminal Court reinvigorates the idea of crimes against peace, but I completely disagree with the definition offered by the drafters. For one thing, they treat all cases of aggression as crimes against peace, and this is inconsistent with the Nuremberg-Tokyo definition, which is limited to wars of aggression. We have to be guided by the definition of aggression, formulated by the UN General Assembly in 1974. It is

clear from that definition that aggression can be manifested by an isolated act, which does not lead to full-fledged hostilities. A mere incident, in which fire is opened across an international frontier, can constitute an act of aggression. Nevertheless, this should not qualify as a crime against peace. The notion that the International Criminal Court would acquire jurisdiction over what may be a trifle is, in my opinion, totally untenable.

Another question is whether the Security Council must first determine that an act of aggression has occurred. This is not a realistic proposition. How many times in over half a century has the Security Council determined that aggression (or a breach of the peace, or even a threat to the peace) has occurred? The number of cases is ridiculously low. Thus, on the one hand, the projected jurisdiction of the International Criminal Court is broad enough in substance to encompass every act of aggression (however minute) and, on the other hand, it is narrow enough on grounds of procedure to be confined to the exceedingly rare instances in which the Security Council can issue a binding resolution. I think that it would be better to limit the substantive extent of crimes against peace covered in the definition, yet to unlink these crimes from any action taken by the Security Council.

Fourthly, there are many new issues raised in the Yugoslav and Rwanda Statutes concerning crimes committed during civil wars (non-international armed conflicts). This is a completely novel notion that is attractive but must be studied in depth. After all, we have not noticed, over recent decades, an overeagerness to bring to trial before an international penal tribunal the perpetrators of ordinary war crimes and crimes against humanity (let alone crimes against peace) in international conflicts. Is there any empirical evidence that States are ready and willing to entrust international tribunals with trials of criminals in internal conflicts raging within their territories?

This brings me to the fifth and last point of the primacy of international over national tribunals. In my opinion, the issue is easy to resolve in favour of such primacy, provided that we are not talking about a State's own criminals. Differently put, if you take the former Yugoslavia as an illustration, the real question is which State is requested to recognize the primacy of the Hague Tribunal. If we are talking about a country like Germany, of course it would be willing - in fact, enthusiastic - to hand over to the Hague Tribunal any person in detention within its boundaries who allegedly committed crimes in the former Yugoslavia. From a German

perspective, in all likelihood, this would be a case of being relieved of an unwelcome headache. Conversely, if we are talking about Serbia, and you tell the Serbs that a Serbian national should be handed for trial at The Hague, you will probably hear completely different music.

To conclude, the potential success of a permanent International Criminal Court is fully contingent on delicate negotiations now in progress being crowned with success. My view is that if the process would require a delay of a couple of years, this is a small price to pay. Especially bearing in mind that in the years ahead the Yugoslav and hopefully also the Rwanda Tribunal will deliver judgements that may authoritatively shed light on a number of issues currently unresolved. The real question is not whether a convention establishing an International Criminal Court will be finalized in 1998. It is whether, either in 1998 or shortly thereafter, a workable compromise is found to ensure the successful operation of a Court which all of us here would like to materialize.