EDITORIAL COMMENT

INTERNATIONAL CRIMINAL JURISDICTION

The constitution and functioning of tribunals for the trial and punishment of war criminals and of crimes directed against the international community as a whole have become subjects of primary interest in the development of world organization under the reign of law. The International Military Tribunal before which the Nuremberg trials were conducted and the charter of powers and principles under which it operated constitute a landmark in the development of international criminal jurisdiction. The jurist, the statesman, and the historian will find a mine of source-material contained within its records. It is of the utmost importance to crystallize the experience of these trials while the conscience of mankind in all countries has not yet forgotten the hideous misdeeds there recorded. It now becomes the task of the United Nations through its various organs to extend the institutions of positive international law as a deterrent against the repetition of such crimes in the future.

In his report to the President on June 7, 1945, Justice Robert H. Jackson, as chief counsel for the United States in the prosecution of Axis war criminals, said:[1]

> Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.

On February 5, 1947, President Truman submitted to Congress his first annual report on the activities of the United Nations and the participation of the United States, in accordance with the provisions of the United Nations Participation Act of 1945.[2] The President reported that the representatives of our government had endeavored constantly "to support the United Nations with all the resources we possess . . . not as a temporary expedient but as a permanent partnership." He recounted the various steps taken to perfect the organs and specialized agencies of the United Nations and the political and economic activities of these bodies. It is

[1] This JOURNAL, Vol. 39, No. 3 (July, 1945), Supplement, p. 188.

[2] *Department of State Bulletin*, Vol. XVI, No. 396. The complete report is contained in Department of State *Publication* 2735 (United States and United Nations Reports, Series 7).

notable that the President characterized as "one of the important long range achievements" of the General Assembly's first session the adoption of resolutions introduced by the United States on the codification and development of international law. The President continued as follows:

> The General Assembly unanimously directed its committee on codification to give first attention to the charter and the decision of the Nuremberg Tribunal, under which aggressive war is a crime against humanity for which individuals as well as states must be punished. The Assembly also agreed that genocide—the deliberate policy of extermination of a race or class or any other human group—was a crime under international law. These developments toward the application of international law to individuals as well as to states are of profound significance to the state. We can not have lasting peace unless a genuine rule of world law is established and enforced.

The use of the controversial phrase "world law" is not to be taken too literally. It must be restricted to the context. The great advance in international jurisprudence of the post-war period is the recognition of the principle that certain behavior of individuals violates the common conscience of mankind. The advance represented in the International Agreement of August 8, 1945, signed between the United States, Great Britain, France, and the Soviet Union, to which nineteen other nations have since adhered, is a decisive step in advance of the Hague Regulations and the Geneva Protocol of October 2, 1924. The charter contained in the agreement of 1945 not only specifically describes and defines the crimes within the jurisdiction of the Tribunal but also declares that it has the power to try and punish persons who were guilty of such crimes "whether as individuals or as members of organizations" (Art. 6). A further advance is represented by the extension of the definition of the punishable offenses to crimes against peace and crimes against humanity which are not war crimes in the strict sense. Thus there is a recognition that the punishment of such crimes is the responsibility of the international community as such, against which, in the last analysis, such crimes are directed. It is in this sense that we must understand the President's reference to "a genuine rule of world law."

Penologists of recognized reputation have pointed out that the Nuremberg trial, conducted before a military tribunal created *ad hoc,* should have been made possible by agreements before war ensued, thus establishing the necessary basis for the punishment of war crimes and crimes against humanity. This is the contention of Dr. Raphael Lemkin [3] who originated the word "genocide" and also of the eminent Roumanian jurist Professor Vespasien Pella.[4] Both authors believe that the failure to establish the necessary basis for jurisdiction between the two world wars was a

[3] Raphael Lemkin, *Axis Rule in Occupied Europe,* Washington, 1944.

[4] Vespasien V. Pella, *La Guerre-Crime et les Criminels de Guerre,* Paris, 1946.

lamentable error of foresight by the statesmen of the world. Judge Megalos Caloyanni, the eminent Greek jurist who served in several cases of the Permanent Court of International Justice as judge *ad hoc*, drew to the attention of the Academy of International Law at The Hague in 1931 the danger of losing an opportunity for international society to protect itself while yet there was time. Judge Caloyanni pleaded for the establishment of permanent penal jurisdiction for international crimes because repressive law and sanctions have always been the preventive and protective methods for every collective society, great or small.[5]

The initial problem is whether the creation of an international jurisdiction competent to punish international crimes should precede the precise definition of such crimes or whether such jurisdiction must await a more or less comprehensive codification. One is reminded of the old question whether the egg or the chicken came first. Caloyanni predicted in 1931, with a remarkable degree of accuracy, that those who would insist upon the rule *nulla poena sine lege*, would find the problem insoluble, but that those whose institutions of state recognized the binding character of customary law would not hesitate to press first for the establishment of a competent jurisdiction. In this he anticipated the action of the Allied Governments in 1945.

The plans for an international jurisdiction for the punishment of international crimes foundered after World War I because of the too ambitious nature of the various projects. The Committee of Jurists which drafted the statute for the Permanent Court of International Justice in 1920 recommended also the establishment of an International Criminal Court. The Assembly of the League pronounced the plan premature. Later a draft was prepared for the International Law Association by Dr. Bellot and adopted at its Vienna Conference in 1926. The Inter-Parliamentary Union tentatively adopted a draft at its Washington Conference in 1925 prepared by Professor Pella. The International Association for Penal Law at its meeting in Brussels in 1926 also adopted a resolution for the setting up of an international jurisdiction for the punishment of certain violations of the law of nations. These drafts were later deposited officially with the Secretary-General of the League of Nations. While differing in detail, they proposed to convey criminal jurisdiction upon the Permanent Court of International Justice through the creation of a Criminal Chamber.

We mention these projects as a reminder that the problem described by President Truman is not entirely a new one to international jurists. The fact is that a favorable political background is necessary for any general grant of criminal jurisdiction and this was lacking during the period between the two world wars, notwithstanding the absurdly inadequate measures to punish war criminals after World War I. It is doubtful even

[5] 38 *Receuil des Cours, Académie de Droit International*, 1931, Vol. IV, p. 752.

after the experiences of World War II whether we may expect the setting up of a permanent court. However two events must be signalized which may direct the evolutionary process in this direction. The first is the fact that the procedure of the Nuremberg Tribunal gave satisfaction to the allied participants as measured by the various standards of their systems of jurisprudence. The other influence is the realization on the part of the United Nations of the necessity for the control by law of all methods of mass destruction. The recognition of this has been manifested by all as an essential of self preservation. If the violation of agreements not to use nuclear energy except for peaceful pursuits can be controlled by law through sanctions operating against individuals as well as against states, a road will have been opened for the establishment of international penal jurisdiction generally.

The International Court of Justice is not the proper forum to implement this control as its statute was not designed for penal jurisdiction. Sir Alexander Cadogan, in reply to a proposal to refer the British charge against Albania of having laid mines in Corfu Channel, is reported to have declared that the World Court was not a "police court."[6] The truth is that no such international penal jurisdiction is lodged anywhere. It must be created. The imperative need for protection against the new forces of mass destruction, atomic and others, may eventually lead the way.

ARTHUR K. KUHN

THE UNITED NATIONS AND INTERNATIONAL LEGISLATION

The phrase in the United Nations Charter which refers to "the progressive development of international law" suggests both an end and a procedure. The end includes the conscious development and extension of international law to meet new conditions and to serve new community needs. Theoretically, the most efficient procedure for achieving these ends might be the enactment of new rules of international law by an international legislative body, acting by majority vote. The United Nations General Assembly is empowered to act by majority vote, either by simple majority or by a special two-thirds majority on important questions; but the power to enact new rules of international law immediately binding on the Members of the United Nations was denied to the General Assembly by the drafters of the Charter. The powers of the General Assembly in this field are apparently limited to the initiation of studies and the making of recommendations, but the procedure followed with reference to the Convention on the Privileges and Immunities of the United Nations indicates that the General Assembly is capable of playing an influential role in the development of international law.

The Preparatory Commission of the United Nations transmitted to the

[6] *The New York Times*, February 22, 1947, p. 4.