

ORGANIZATION OF A COURT OF INTERNATIONAL CRIMINAL JURISDICTION *

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At the turn of the century, a respectable sector of world opinion regarded proposals for the establishment of permanent international tribunals with skepticism.¹ A doctrinal, nay obstinate adherence to the traditional theory of absolute sovereignty in the exercise of which States refuse to part with any portion of their powers constitutes the principal obstacle to the adoption and execution of such progressive plans.² Nevertheless, the desirability and practicability of such plans as well as the untiring efforts of the advocates of the adjudicative techniques in the settlement of international controversies culminated in the creation of the glorious Permanent Court of International Justice and of its equally worthy successor the International Court of Justice. Since the Permanent Court of Arbitration is neither a court, nor is it of a permanent nature, in all fairness, there-

* FOREWORD—Heretofore several projects for the creation of an international penal tribunal have been earnestly advanced by various jurists, scientific groups, and international organizations. At this juncture the writer has in mind the International Criminal Court as proposed by the 1951 and 1953 Committees on International Criminal Jurisdiction of the United Nations General Assembly. During his graduate studies at the Harvard Law School, the feasibility of such a proposal had been seriously considered by the writer while taking courses in Public International Law under Judge Manley O. Hudson, Professor Louis B. Sohn, and Professor Clive Parry. No permanent international criminal court has ever existed before, thus the establishment of one really constitutes the breaking of new ground. Following the general pattern of the evolution of human institutions, the novelty therefore besets the project with many problems and difficulties. Nevertheless, the writer subscribes to the desirability and practicability of setting up the International Criminal Court, for the organization of which the present is considered as a propitious moment.

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¹ For a representative discussion which describes these projects for the creation of permanent international courts as glittering and chimerical proposals, see T. BATY, *INTERNATIONAL LAW*, pp. 9 ff. (1909).

² Under this classical concept, international law is not enthroned above the nations, but it is the law between or among and not over the States. Cf. H. LAUTERHACHT, *The Law of Nations and the Punishment of War Crimes*, *BRITISH YEAR BOOK OF INTERNATIONAL LAW*, p. 58 (1944). But the age of Grotius has drawn to a close and the national sovereign state must give way to a universal society, some form of an international government where the collective will prevails over the individual will of the sovereign state. Cf. JOSE MANUEL DE AGUILAR, *THE LAW OF NATIONS AND THE SALAMANCA SCHOOL OF THEOLOGY*, p. 218 (1947); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS*, p. 2 (1952); HAROLD J. LASKI, *REFLECTIONS ON THE REVOLUTION OF OUR TIME*, p. 246 (1943).

fore, it can be stated that the first international court in modern times which sat permanently and thus possessed of continuing powers and functions, was the Central American Court of Justice.³

RECENT WORLD COURT PROJECTS

Man's ever progressive nature contemplates the grant of greater jurisdiction to the present International Court of Justice, and also the application of the international judicial process to the individuals. In advocating for a world law, a writer sincerely recommends that political disputes must also be justiciable by the World Court.⁴ With respect to the proposed application of the judicial machinery to individuals, greater opposition is naturally expected since this involves a deviation from the classical doctrine that States and not the individuals are the subjects of international law. Under this traditional view individuals are only the objects of international law.⁵

A plan for an international judicial machinery with civil and criminal jurisdiction over individuals has been regarded as a star-like aspiration. A British jurist, Sir Cecil Hurst, advocated the setting up of an international *pie-poudre* court.⁶ After all the seven

³ Similar to the Court of Justice of the European Coal and Steel Community, the Central American Court of Justice was a regional court. It is regrettable, however, that this precursor of permanent international tribunals was short-lived. MANLEY O. HUDSON, *The Central American Court of Justice*, 26 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, p. 759 (1932); See also ANTONIO SANCHEZ DE BUSTAMANTE, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE*, p. 4 (1925); and MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE*, pp. 7-8 (1944).

⁴ WALLACE T. HALLIDAY, *World Law or Anarchy*, 35 *AMERICAN BAR ASSOCIATION JOURNAL*, pp. 641-644 (1949). Regarding the problem of "justiciability" of international disputes, see discussions by HANS KELSEN, *Compulsory Adjudication of International Disputes*, 37 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, pp. 397 ff. (1943) and LOUIS B. SOHN, *Exclusion of Political Disputes from Judicial Settlement*, 38 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, pp. 694 ff. (1944); HANS KELSEN, *THE LAW OF THE UNITED NATIONS*, pp. 477-483 (1951). Speaking of matters other than international disputes, the legal and the political may overlap and merge with each other, though it is generally conceived that what is legal is the antithesis of that which is political and vice-versa—as discussed by VICENTE G. SINCO, *PHILIPPINE POLITICAL LAW*, p. 2 (1954), 10th Edition.

⁵ Cf. GEORG SCHWARZENBERGER, pp. 34-35, *A MANUAL OF INTERNATIONAL LAW* (1951), also JESSUP, *op. cit.*, p. 15.

⁶ The dusty feet of the suitors—who were merchants—gave the name to the court which was incident to every town fair and market and had jurisdiction to administer justice for commercial injuries and minor offenses arising in said affair. *BLACK'S LAW DICTIONARY*, p. 432 (1951). Cf. SIR CECIL J. B. HURST, *Wanted! An International Court of Piepowder*, *BRITISH YEAR BOOK OF INTERNATIONAL LAW*, pp. 61 ff. (1925). Along the same vein is an article by ROBERT B. ELY III, *World Law for Individuals—Now* (A Reply) 4 *NS ARBITRATION JOURNAL*, pp. 119-122 (1949).

Hague Conferences on Private International Law which seek to embody such law in a conventional or codified form, there exists a body of private international law ready for interpretation and enforcement and for which an international tribunal is sadly lacking.⁷ Advocates of the plan for an international court with civil as well as criminal jurisdiction over individuals have suggested that the proposed court be created by the United Nations General Assembly under its duty to encourage the progressive development of international law, and its authority to establish such subsidiary organs as it deems necessary. Under the proposed set-up, the International Court of Justice will still remain the principal judicial organ of the United Nations.⁸

Lately, the proposals are for the creation of international penal tribunals in recognition of the Nuernberg and Tokyo principle of criminal responsibility of the individual under international law.⁹ An international body has been planned for the exclusive purpose of protecting human rights. A European movement met in Brussels in February, 1949 to draft a convention for the establishment of a

However he advocates merely the grant of a civil jurisdiction and anent the criminal competence, he suggests that we await till the criminal *corpus juris gentium* has taken an exact and definite form.

⁷ As regards these Hague Conferences on Private International Law, see G. C. CHESHIRE, *PRIVATE INTERNATIONAL LAW*, pp. 15-17 (1947).

KURT H. NADELMANN, *The United States and the Hague Conferences on Private International Law*, I *AMERICAN JOURNAL OF COMPARATIVE LAW*, pp. 258 ff. (1952).

HESSEL E. YNTEMA, *The Seventh Hague Conference on Private International Law*, I *AMERICAN JOURNAL OF COMPARATIVE LAW*, pp. 275 ff. (1952).

⁸ Refer to Articles 13, 22, and 92 of the United Nations Charter. Articles written by Friedmann, Orfield, Bentwitch and others deal with the idea of an international equity tribunal. See W. FRIEDMANN, *THE CONTRIBUTION OF ENGLISH EQUITY TO THE IDEA OF AN INTERNATIONAL EQUITY TRIBUNAL* (1935); Consult MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS—PAST AND FUTURE* (1944) for discussions relative to proposed international tribunals, among which are the projects for the establishment of an International Prize Court, an International Claims Tribunal, an Inter-American Court of International Justice, an International Loans Tribunal, an International Commercial Tribunal, and also Administrative Tribunals of International Organizations—the last exemplified by the United Nations Administrative Tribunal. Concerning the non-judicial methods for the pacific settlement of international disputes refer to LOUIS B. SOHN, *CASES AND OTHER MATERIALS ON WORLD LAW* (1950) and C. DE VISSCHER, 4 *REVUE DE DROIT INTERNATIONAL ET LEGISLATION COMPAREE*, pp. 21-36 (1923).

⁹ Cf. HANS KELSEN, *Collective and Individual Responsibility in International Law with particular regard to Punishment of War Criminals*, 31 *CALIFORNIA LAW REVIEW*, pp. 532 ff. (1943). U.N. Doc. No. A/AC.48/4 now distributed as U.N. Doc. A/2136.

European Court of Human Rights.¹⁰ It was believed that success would be much easier to achieve in such a regional court which has a limited sphere of operation.¹¹ On a world-wide basis, however, is the proposed International Criminal Court, intended as an international judicial organ for the trial of genocide and other crimes under international law. Its draft statute has been prepared by the 1951 Committee on International Criminal Jurisdiction appointed in pursuance of a Resolution of the General Assembly of the United Nations. Another Resolution of the General Assembly established a 1953 Committee on International Criminal Jurisdiction which formulated a Revised Draft Statute for an International Criminal Court.¹²

HISTORICAL ANTECEDENTS OF THE PROPOSED INTERNATIONAL CRIMINAL COURT

As soon as the first World War was ended, the need for an international criminal court was fully recognized. After the tragic loss of twenty million lives in this first global conflict, nebulous ideas of utopian pacifism which "adumbrated the possibility of outlawing war and punishing individual or collective actions likely to disrupt international understanding," became concrete and formalized.¹³ The creation of an International Criminal Court was provided for under Articles 227-230 of the Treaty of Versailles.¹⁴ Article 227 declared that ex-Kaiser William II of Hohenzollern would be tried by a special tribunal of five judges for the supreme offenses against international morality and the sanctity of treaties but he was never tried, nor punished. The German government was to have delivered to the allied and associated powers all those accused of violations of law and customs of war. Due to the pusillanimity of inter-allied policy, the inter-allied military tribunals had never been set up, so that the German Supreme Court of Leipzig which tried these persons convicted only six out of the 896 persons originally appearing on the list of the Allies. By virtue of the principle of *nullum crimen, sine lege*,

¹⁰ RICHARD YOUNG, Recent Developments in Human Rights, 37 AMERICAN BAR ASSOCIATION JOURNAL, p. 402 (1951). Refer also to H. LAUTERPACHT, The Proposed European Court and Commission for Human Rights, INTERNATIONAL LAW AND HUMAN RIGHTS, pp. 435-463 (1950).

¹¹ SIR DAVID MAXWELL FIFE, Towards an International Criminal Court, 21 REVUE INTERNATIONALE DE DROIT PENAL, pp. 17-21 (1950).

¹² For the Draft Statute refer to Annex I of U.N. Doc. No. A/AC.48/4. See Resolution 489 (V), December 12, 1950, of the General Assembly. For the Revised Draft Statute, see U.N. Doc. A/AC 65/L.13. Cf. Resolution 687 (VII), December 5, 1952, of the General Assembly.

¹³ VESPASIAN PELLA, Memorandum Concerning the establishment of an International Criminal Court, U.N. Doc. No. A/AC.48/3.

¹⁴ ANTOINE SOTTILE, The Problem of the Creation of a Permanent International Criminal Court, 29 REVUE DE DROIT INTERNATIONAL, pp. 267 ff. (1951).

nulla poena sine lege, the ex-Kaiser continued to live at the Doorn Castle. And Netherlands refused the demand for extradition.¹⁵ The German government remained adamant and held to its constitutional disability to surrender German citizens, and from the very light sentences ranging from six months to ten years imprisonment, imposed by the German court, repression of war crimes proved to be trivial under the Treaty of Versailles.¹⁶

The Committee of Jurists which drafted the Statute of the Permanent Court of International Justice recommended in 1920 the creation of a separate High Court of International Justice which would try crimes constituting a breach of international public order or against the universal law of nations. The Council of the League of Nations was not however, enthusiastic about the project and the first Assembly of the League of Nations stated that the whole question was too premature, as there was as yet no international penal law recognized by all nations and that if ever there be any international criminal jurisdiction, it would be more practical to establish a special chamber in the Permanent Court of International Justice.¹⁷

The idea had been taken over by various scientific groups and international organizations. In 1922 the International Law Association led the movement for the establishment of an international penal tribunal.¹⁸ Conferences had been held at Buenos Aires, Stockholm, and Vienna where in 1926 the International Law Association decided that a criminal court should be established and it adopted a draft statute for a permanent international court with criminal jurisdiction.¹⁹ A *vœu* concerning an International Criminal Court was adopted in Brussels in 1926 by the International Congress of Penal Law. In 1925 the Inter-Parliamentary Union passed a resolu-

¹⁵ VESPASIAN V. PELLA, *Towards an International Court*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 38 (1950).

¹⁶ A corollary decision of the Allies to ask for the extradition from foreign countries of war criminals was announced by President F. D. Roosevelt on October 7, 1942.

The irksome problem of extradition can be obviated by the creation of an international criminal court to which the requested neutral state is a party. A state would be less hesitant in delivering an accused officer of a vanquished state for trial to an impartial international criminal tribunal, than to having him handed to the courts of the victors. Cf. ROBERT G. NEUMANN, 45 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 495, 508 (1951).

¹⁷ Cf. MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE*, p. 85 (1943).

¹⁸ H. DONNEDIEU DE VABRES, *DE L'ORGANIZATION D'UNE JURISDICTION PENALE INTERNATIONALE*, p. 1 (1948).

¹⁹ H. E. MEGALOS CALOYANNI, *Proposals of M. Laval for an International Permanent Tribunal in Criminal Matters*, XXI TRANSACTIONS OF THE GROTIUS SOCIETY, p. 79 (1935).

tion on the criminality of wars of aggression and the organization of international repressive measures. A draft statute for the Creation of a Criminal Chamber of the International Court of Justice was prepared by Professor Vespasian Pella in 1928, for the International Association of Penal Law, and was revised in 1946. A draft convention for the creation of an International Criminal Court was also adopted by the London International Assembly in 1948.²⁰

Interest in the organization of an international penal tribunal had been renewed upon the assassination in 1934 at Varseilles of the King of Yugoslavia and of M. Barthou, Foreign Minister of France.²¹ A convention for the creation of an International Criminal Court for the trial and punishment of terrorism was adopted in Geneva in 1937 but it did not come into force for lack of ratifications. An agreement for the establishment of an International Military Tribunal for the trial of war criminals was entered into in London, on August 8, 1945, as a consequence of which the Nuernberg trials had been held. The agreement was concluded by the United States, United Kingdom of Great Britain and Northern Ireland, Union of the Socialist Soviet Republics, and France. There were nineteen accessions so that the Nuernberg International Military Tribunal could therefore be considered as an *ad hoc* international criminal court. In the same manner, an International Military Tribunal for the Far East was created at Tokyo by virtue of a proclamation on January 19, 1946, of the Supreme Commander for the Allied Powers in pursuance of a decision arrived at in Moscow on December 26, 1945. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in Paris on December 9, 1948, and came into force on January 12, 1951. By Article VI of this Convention persons accused of genocide shall be tried by such international penal tribunals as may have competence with respect to those signatories which shall have accepted its jurisdiction.²²

UNITED NATIONS DRAFTS AND PROPOSALS FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT

No permanent international penal tribunal has ever existed before. All that has been done on the matter appears in treaties, con-

²⁰ U.N. Doc. No. A/AC.48/1.

²¹ CALOYANNI, *op. cit.*, pp. 77 ff.

²² U.N. Doc. No. A/AC.48/1. Refer also to U.N. Doc. No. A/CN.4/5 which is the Charter and Judgment of the Nuernberg Tribunal (1949). U.N. Doc. No. A/CN.4/7/Rev./ which is the Historical Survey of the Question of International Criminal Jurisdiction (1949).

MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE, pp. 180 ff. (1944).

ventions, drafts, and proposals which emanated from governments, and international organization particularly the United Nations, and from international associations of private character. Among such drafts and proposals is the draft convention for the establishment of a United Nations War Crimes Court.²³ The establishment of an international court of criminal jurisdiction had been proposed in May, 1947, by the French representative in the Committee on the Progressive Development of International Law and its Codification.²⁴ The Committee drew the attention of the General Assembly to the fact that the implementation of the principles of the Nuernberg Tribunal and its judgment as well as the punishment of other international crimes recognized by international multipartite conventions may render desirable the existence of an international penal tribunal.²⁵ In June, 1947, the United Nations Secretariat with the assistance of Professor Vespasian Pella and two other experts, prepared a draft convention for the prevention and punishment of genocide, to which had been attached two draft statutes for the establishment of an international criminal court—one for an *ad hoc* court and the other for a permanent court.²⁶ The *ad hoc* committee instituted under Economic and Social Council Resolution 117 of March 3, 1948, prepared a draft convention on genocide which, among other things, provides that the persons charged with genocide should be tried by the competent national court or by a competent international tribunal.²⁷

At the third session of the General Assembly, while the Sixth Committee was discussing the *ad hoc* Committee's draft, the question was raised whether it was possible to adopt a text relative to the competence of an international penal court without first going into its organization.²⁸ The French delegation submitted a draft convention on genocide which contained provisions relating to the International Criminal Court.²⁹ The draft stated that the Statute

²³ Cf. U.N. Doc. No. A/CN.4/7 Rev. 1.

²⁴ U.N. Doc. No. A/AC.10/21.

²⁵ U.N. Doc. No. A/332.

²⁶ U.N. Doc. No. E/447. But the texts of these draft statutes had not been discussed by the governments in their comments on the draft convention on genocide, nor by the Economic and Social Council nor by the Sixth Committee in the second session of the General Assembly. U.N. Doc. No. E/623, E/623/Add. 2 and E/623/Add. 3. The governments were primarily concerned with the principal convention—the proposed genocide convention.

²⁷ U.N. Doc. No. E/794.

²⁸ Cf. YUEN-LI LIANG Notes on Legal Questions Concerning the United Nations: The Question of the Establishment of an International Criminal Jurisdiction. 43 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 478 ff. (1949).

²⁹ U.N. Doc. No. A/C.6/211.

of the International Criminal Court would be treated in the Annex but the said Annex was not transmitted to the Sixth Committee.³⁰ The General Assembly, on December 9, 1948, adopted Resolution 260 (III) stating that "There will be an increasing need of an international judicial organ for the trial of certain crimes under international law" and thus invited the International Law Commission to study the desirability and possibility of establishing such a judicial organ, in particular, as a Criminal Chamber of the International Court of Justice.³¹ At its second session in 1950, the International Law Commission decided that it was desirable and possible to establish an international criminal court.³²

In order to determine whether the establishment of an international penal tribunal is desirable and practical the Sixth Committee believed that it would be necessary to have a text which would constitute a concrete basis for discussion. Thus, the General Assembly in its Resolution 489 (V) of December 12, 1950, decided to appoint a special committee for the purpose of "preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court."³³ This Committee on International Criminal Jurisdiction (hereinafter referred to as the 1951 Committee) was composed of representatives of seventeen Member States, of which only fifteen sent their representatives.

The 1951 Committee convened at Geneva from August 1, 1951 to August 31, 1951, and concluded its work after thirty-one meetings.³⁴ Its report is accompanied by Annex I which is the Draft Statute for an International Criminal Court and Annex II which expresses the *voeu* that together with the instrument creating the International Criminal Court, a protocol be drawn up conferring jurisdiction upon said Court with respect to the particular crime of

³⁰ U.N. Doc. No. A/CN.4/7 Rev. 1.

³¹ See report of the Sixth Committee of the General Assembly, U.N. Doc. No. A/760.

³² U.N. Doc. No. A/CN.4/SR.43. Mr. Schelle, Chairman of the Commission explained that it was not asked to decide the competence of such a court.

³³ Cf. U.N. Doc. No. A/AC.48/4.

³⁴ India and Peru did not send representatives. Following are the representatives and their alterates of the other Member States participating in the work of the Committee: William Anstey Wynes (Australia); Gilberto Amado (Brazil); Hua-Cheng Wang (China); Luis del Valle, Luis Valdec Roig (Cuba); Max Sorensen (Denmark) Rapporteur; Abdel Monem Mostafa Bey (Egypt); Rene de Lacharriere, Roger Pinto (France); Khosro Khasrovani (Iran); Jacob Robinson, Haim Cohn (Israel); Bernard Victor A. Roling (Netherlands); Muhammad Munir (Pakistan); Abdul Wahab Homad Salah el dine Tarazi (Syria); Sir Frank Soskice, Lionel J. Gordon, E. C. Jones, Ian D. Turner (United Kingdom); George Maurice Morris, Chairman, John Maktos (United States); Luis E. Pineyro Chaim (Uruguay).

genocide. Together with these Annexes, the Report had been submitted to the governments of Member States for comments and recommendations.³⁵ Such observations had to be submitted not later than June 1, 1952, so that the question may be placed on the agenda of the seventh session of the General Assembly.³⁶ By September 10, 1952, observations had been received from the governments of eleven Member States.³⁷ On September 15, 1952, replies from two more member states had been submitted.³⁸

During the Seventh Session of the General Assembly, the Legal Committee considered the feasibility or desirability of establishing an International Criminal Court. Particular reference had been made to the report of the 1951 Committee on International Criminal Jurisdiction. The amended Swedish resolution postponed consideration of the matter for a year until the Eighth Session of the General Assembly.³⁹ In the interim, governments which had not as yet submitted their comments or observations on the Draft Statute had been urged to do so. The General Assembly considered the report of the Legal Committee. The Netherlands representative submitted amendments to the recommended resolution and a new seventeen-member committee had been created by a resolution of the General Assembly. They met at the United Nations Headquarters in New York City from July 27 to August 20, 1953.⁴⁰ The special committee was empowered to explore the implications and consequences of establishing an international criminal court and the various possible methods of its establishment, to study the relationship between such court and the United Nations Organization and its organs, as well as

³⁵ U.N. Doc. No. A/AC.48/4 later distributed as A/2136 Official Records of the General Assembly, Seventh Session, Supplement No. 11.

³⁶ See *Preparing Draft Statute for an International Criminal Court*. XI United Nations Bulletin, p. 194 (1951).

³⁷ U.N. Doc. No. A/2186 covering the observations of the governments of Australia, Chile, France, Israel, the Netherlands, Norway, Pakistan, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, India, and Iraq. These comments together with the remarks of representatives on the Sixth Committee appeared in U.N. Doc. No. A/AC.65/1.

³⁸ U.N. Doc. No. A/2186/Add. 1 stating the answers of China and Denmark. For the subsequent comments of the government of Belgium, see U.N. Doc. No. A/AC.65/3.

³⁹ For report of the Legal Committee to the General Assembly on this matter, see U.N. Doc. No. A/2275.

⁴⁰ The President of the General Assembly announced the following members composing the new or 1953 committee on International Criminal Jurisdiction: Argentina, Australia, Belgium, China, Denmark, Egypt, France, Israel, Netherlands, Pakistan, Panama, Peru, Philippines, United Kingdom of Great Britain and Northern Ireland, United States, Venezuela, and Yugoslavia. However, Pakistan did not send a representative.

to re-examine the Draft Statute. This committee, otherwise known as the 1953 Committee, adopted a report containing its deliberations. A Revised Draft Statute for an International Criminal Court has been attached to the Report. The Report and Annex will be submitted to the Ninth Session of the General Assembly meeting this fall of 1954 in New York.⁴¹

PROBLEMS OF AN INTERNATIONAL CRIMINAL JURISDICTION

A principal contention against the operation of an International Criminal Court is that it would be violative of the principle of territoriality of criminal law.⁴² The principle of territorial jurisdiction is basic in Anglo-American jurisprudence and has found its way into the national codes of at least fifty-seven countries.⁴³ It has further been contended that the functioning of such an international penal tribunal will seriously impair the sovereignty of states. If these contentions are tenable then there must equally be excluded certain other principles which are now generally accepted regarding the extra-territorial application of penal laws.

Various legal systems adhere to the principle of active personality by which a State extends its criminal jurisdiction to its subjects committing offenses abroad. Some states also adopt the principle of passive personality by which they assume jurisdiction where their subjects are the victims even though the offenses be committed abroad. Another is the principle of real protection by which the State applies its own penal laws for the protection of certain of its interests irrespective of the place and perpetrator of the crime. Lastly some legal systems admit the principle of universality—sometimes also referred to as the principle of world administration of justice—with respect to offenses committed by foreigners abroad regarded as prejudicial to the interests of all nations.⁴⁴

⁴¹ Refer to VII International Organization, pp. 107-109 (1953). For an enlightening discussion on the major decisions of the 1953 Committee and the significant substantial amendments to the 1951 draft statute, refer to YUEN-LI LIANG, Notes on Legal Questions Concerning the United Nations—The Establishment of an International Criminal Jurisdiction: The Second Phase, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 638-657 (1953).

⁴² VESPASIAN V. PELLA, Towards an International Criminal Court, p. 44, AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 46 (1950).

⁴³ Cf. Supplement to 29 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 481-482 (1935).

⁴⁴ PELLA, *op cit.*, p. 46. See also MANLEY O. HUDSON, CASES AND OTHER MATERIALS ON INTERNATIONAL LAW, pp. 323, 330 (1951); for an extensive discussion of the extraterritorial application of penal laws, refer to LUIS YOUNG REYES, LA EXTRATERRITORIALIDAD DE LA LEY PENAL, pp. 47 ff. (1942).

The other contention that the establishment of an international criminal jurisdiction will violate the principle of sovereignty is not tenable since the same contention did not prosper when raised in connection with the organization of the international community, which is now existing.⁴⁵

Doubts raised relative to the existence of an international criminal law constitute another problem in the constitution of an international criminal jurisdiction. It has been asserted that no criminal liability attaches to the State as there cannot be any *mens rea*. It is further averred that the individual cannot incur any criminal responsibility in international law as he is not a subject thereof. Assertion has also been made to the effect that such individual criminal responsibility under international law pertains more to the *de lege ferenda* rather than the *lex lata*. Various quarters had questioned the legal validity of the Nuernberg and Tokyo judgments and consequently it had been contended that these could not be precedents for such individual and collective criminal responsibility arising from crimes against peace, war crimes, and crimes against humanity. As to the first contention, Professor Lauterpacht retorts that "it is impossible to admit that individuals when grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation."⁴⁶ Instances can be mentioned wherein international law attaches individual criminal responsibility as in piracy *jure gentium* and also in treason and espionage even if the latter are with the passive assistance of the States.⁴⁷

International criminal law is not the product of an international legislature. Thus, the law of war is to be found not only in treaties, but also in the customs and practices of states which have gained universal recognition and from general principles of justice applied

⁴⁵ Progress in international law, maintenance of international peace, and of independent national states, are ultimately dependent upon a partial surrender of their sovereignty so as to make possible the progress of international legislation and existence of a rule of law through international tribunals with compulsory jurisdiction. L. OPPENHEIM (LAUTERPACHT, I INTERNATIONAL LAW, p. 120 (1948).

⁴⁶ Cited in GEORG SCHWARZENBERGER, The Problem of an International Criminal Law, III CURRENT LEGAL PROBLEMS, p. 275 (1950).

⁴⁷ F. B. SCHICK, International Criminal Law—Facts and Illusions, 11 MODERN LAW REVIEW, p. 290 (1948).

Even if international law imposed duties directly on the individuals, in the case of piracy, yet the actual legal set-up has also been explained in terms of state rights. International law, with respect to piracy, removes the usual limitations on the jurisdiction of states and authorizes any State capturing a pirate to penalize him. PHILIP C. JESSUP, A Modern Law of Nations, p. 178 (1952).

by jurists and military courts. Like other laws, this law is not at repose but is also changing with the needs of the time. Treaties on the matter, therefore generally express and define the principles of law already in existence.⁴⁸ International criminal law ought not to retain any longer the customary character it hitherto had; it must therefore be formulated into a code of offenses against peace and security of mankind or an International Criminal Code.⁴⁹

Protagonists of international criminal law usually refer to the *Lusitania* and *Corfu Channel* cases to bolster their stand.⁵⁰ The sinking of the *Lusitania* had been termed in Allied diplomatic notes and public statements "ranging from description of this illegal measure of unrestricted submarine warfare as piracy, to its denunciation as an international crime." However, the United States-Germany Mixed Claims Commission was not empowered by the terms of its Charter—the Treaty of Berlin—to award vindictive, exemplary, or punitive damages. In the *Corfu Channel* case, Sir Alexander Cadogan referred to Albania's clandestine mining of the Channel as "an international crime of the most serious sort and amounting in substance to something very much of the character of a mass murder." The American and French representatives described it as a "crime against humanity."⁵¹

A further development towards international criminal law is shown in powers of some international institutions. The International River Commissions—as the European Danube Commission, Central Commission of the Rhine, and the International Commission of the Elbe—had some limited powers to punish violations of their

⁴⁸ *Trials of War Criminals*, XLV INTERNATIONAL LAW DOCUMENTS, U. S. NAVAL WAR COLLEGE, pp. 241- ff. (1946-47).

⁴⁹ PELLA, *op. cit.*, p. 49.

As a concomitant of this movement towards the creation of an international penal tribunal, there had also been projects of an international penal code. See FRANCESCO CONSENTINE, *ESSAI D'UN CODE PENAL INTERNATIONAL DRESSE SUR LA BASE COMPARATIVE DES PROJETS ET TEXTES RECENTS DE CODES PENALUX*, pp. xxii-xxiii (1937) and also HANS FRANK, *INTERNATIONAL PENAL POLICY*, pp. 3, 11 ff. (1935).

⁵⁰ Refer to the *Lusitania Cases*, U.S.-Germany Mixed Claims Commission, 1923, *Decisions and Opinions*, 1925, p. 17; 18 *AMERICAN JOURNAL OF INTERNATIONAL LAW*, p. 361 (1924). *Corfu Channel Case*, *INTERNATIONAL COURT OF JUSTICE REPORTS*, 1949, p. 23; also MANLEY O. HUDSON, *CASES AND OTHER MATERIALS ON INTERNATIONAL LAW*, pp. 236 ff., 584 ff. (1951).

⁵¹ Cf. GEORG SCHWARZENBERGER, *The Problem of an International Criminal Law*, III *CURRENT LEGAL PROBLEMS*, pp. 263-264, 275, (1950), in which article, the author enumerates the six meanings or senses of international criminal law, as the term has been used by those who consider international criminal law to form a part of the existing law of nations.

agreement for the regulation of river police.⁵² Another far-reaching development in this branch of international law has been brought about by the Nuernberg and Tokyo trials which for the first time asserted that nations of the international community are endowed with the right to bring to justice individuals responsible for violating the peace of the said community.⁵³ The Nuernberg Tribunal held: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁵⁴

Some quarters have questioned the judgments of the Nuernberg and Tokyo tribunals, labelling them as of "doubtful value in the legal sense."⁵⁵ It has even been contended that with respect to the Tokyo tribunal, there is nothing judicial about it and everything is merely a manifestation of power—a war measure *simpliciter*.⁵⁶ The trials

⁵² SCHWARZENBERGER, *supra*, pp. 279 ff.

⁵³ These International military tribunals may therefore be referred to as the first *ad hoc* international criminal courts to try individuals for war crimes, crimes against humanity and crimes against peace. As discussed before, ex-Kaiser William II had not been tried by the special tribunal provided for in the Treaty of Versailles, and neither had the accused German leaders been tried by inter-allied tribunals, but only by the German Supreme Court at Leipzig. Relative to Napoleon Bonaparte's case, Lord Eldon's comments had been greatly influenced by the then prevailing widely-accepted concept of State sovereignty which excluded individuals as subjects of international law. He thought it possible to consider Napoleon neither as a French subject, nor rebel, but as King of Elba, thus a distinct enemy independent of any relations to the sovereignty of France. Napoleon was kept a permanent prisoner of war at St. Helena in conformity with Lord Eldon's theory. Before Waterloo, the Commissioner of Powers declared however, that Napoleon, by violating the convention which established him at Elba, became "an enemy and a disturber of the tranquility of the world * * * liable to public vengeance." Cf. QUINCY WRIGHT, Proposal for an International Criminal Court, 46 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 61 (1952). Refer also to F. B. SCHICK, International Criminal Law—Facts and Illusions, 11 MODERN LAW REVIEW, p. 290.

⁵⁴ Transcript of Proceedings, p. 16878; 41 American Journal of International Law, p. 220 (1947) cited in L. OPPENHEIM (LAUTERPACHT) I INTERNATIONAL LAW, pp. 309-310 ff. (1950).

⁵⁵ F. HONIG, War Crimes Trials—Lessons for the Future, 26 INTERNATIONAL AFFAIRS, pp. 522 ff. (1950).

⁵⁶ K. K. BASU, Tokyo Trials, 3 INDIAN LAW REVIEW, pp. 25 ff. (1949). He contended that Professor Schwarzenberger's explanation relative to the valid establishment of the Nuernberg Tribunal since its jurisdiction was derived from the sovereign power of the State exercised by the governmental machinery of Germany during the war, was not applicable to the Tokyo tribunal. The Japanese governmental machinery survived the war and actually executed instruments of surrender, wherein *inter alia* the Potsdam Declaration of 1945 had been accepted. Only precedents for the assumption of such jurisdiction would be a treaty or as extra-legal war measure. He stated that the precedents cited by Professor Schwarzenberger did not bear him out. The case of the Boer War Criminals had been governed by a treaty, Wallace (1305 for treason), Haggenbach (1474 involving right of *disaveu* implicit in feudal

were claimed to be unique. The composition of the tribunals varied. There was lack of uniformity of procedure.⁵⁷ It has also been contended that the Nuernberg International Military Tribunal did not have the character of a truly international court since its legal basis has been established by a unilateral act of the four prosecuting powers without Germany's consent.⁵⁸ One writer claimed that the International Military Tribunal for the Far East, could not apply international law and did not apply common law.⁵⁹

CRITIQUE OF THE NUERNBERG AND TOKYO JUDGMENTS

Oppositions to the Nuernberg and Tokyo judgments, especially with respect to convictions for crimes against peace, simmer down to the basis of the judgments. The bases must be the Nuernberg Charter itself and its Tokyo counterpart, customary international law and the Kellogg-Briand Treaty. If based on the Charter, unless the Charter merely declared existing law, the objection could be made that the victors had disregarded the maxim of *nulla poena sine lege*. However, if the Charter merely codified existing law then the Tribunal must find that by customary international law, aggressive war was a criminal offense—which the Nuernberg Tribunal did find although state practice is to the contrary.⁶⁰

law unless it also came under tyrannicide), Le Strange (1644 for espionage during war and so charge was for treason) all appeared to have been trials under municipal law. The execution of king Corraden in 1268 was a war measure. A more antiquated case was that of Longinus in 273 A.D. who was merely a counsellor of the vanquished state. Joan of Arc's trial in 1431 would have been a good precedent were it not for the constitution of the Court. The "Court Christian and Inquisition" that tried her was a neutral body, set up by a neutral—the Pope—who claimed jurisdiction over both belligerents. The charge was high treason against God—which modern equivalent can be the crimes against peace and humanity.

⁵⁷ However it is of interest to mention that some sort of an international common law has been developed due to the eclectic process from the various systems of municipal laws. Defense of duress or fear of future punishment did not carry the same weight in all the municipal systems, so war crimes judges are given considerable latitude in passing over the same. TELFORD TAYLOR, *An Outline of the Research and Publication Possibilities of the War Crimes Trials*, 9 LOUISIANA LAW REVIEW, p. 501, (1949).

⁵⁸ As already pointed, nineteen states had acceded to the agreement, so that Professor Pella regarded this international military tribunal as an *ad hoc* international criminal court.

⁵⁹ Refer to GORDON IRELAND, *Uncommon Law in Martial Tokyo*, THE YEAR BOOK OF WORLD AFFAIRS, pp. 54 ff. (1950).

⁶⁰ Majority of civilized states acquiesced in the Japanese War of aggression against China, the disguised Axis war against the Spanish Republic, Russia's war against Finland, and the recognition of the King of Italy as Emperor of Ethiopia. HONIG, *op. cit.*, pp. 522 ff.

It was contended that the Kellogg-Briand Treaty merely condemned war as a solution for international disputes, and renounced war only as an instrument of national policy. Therefore the argument goes, it did not follow from such declaration and renunciation that war was illegal and that those who plan and wage war are committing a crime, though the wars be acts of State. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy, necessarily involves the proposition that such war is illegal in international law and that those who plan and wage such war are committing a crime. Wars of aggression are therefore outlawed by the Treaty.⁶¹ Those who deny that an aggressive war is a crime must also maintain that no agreement between nations creates an enforceable obligation, that war is the only arbitrament recognized by international law, and that it adheres to the principle of might is right.⁶² The contention that the Kellogg-Briand Treaty did not expressly declare such acts as crimes, nor prescribe penalties, nor set up courts for the trial of those who plan and wage war was not upheld by the Tribunals. The best answer could be found in the laws of war contained in the Hague Convention of 1907 which prohibited certain methods of waging war such as the inhumane treatment of prisoners, employment of poisoned weapons, improper use of flags of truce, and other similar matters. As a matter of fact, these practices were prohibited even before 1907 but they certainly became crimes since the date of the Convention. Military tribunals have tried and punished individual violators of the rules of land warfare of the Hague Convention, although the Convention did not characterize such practices as crimes, nor was any sentence prescribed, nor reference made to any court.⁶³

⁶¹ A statement to this effect was made by Mr. Henry L. Stimson, U.S. Secretary of State in 1932.

U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, p. 255 (1946-47). For other important documents relative to war crimes, as the London Agreement of August 8, 1945, U.S. Executive Agreement Series 472, Charter of the International Military Tribunal, Nuernberg, Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, U.S. Department of State Publications No. 3080, Int. Org. and Conf. Series II, European and British Commonwealth 1, Special Proclamation and Charter of the International Military Tribunal for the Far East in Department of State Bulletin, vol. XIV, No. 349, p. 361, and others, see LOUIS B. SOHN, CASES AND OTHER MATERIALS ON WORLD LAW, pp. 974-1034 (1950). With regard to genocide, it is worthwhile to refer to OLIVER SCHROEDER, JR., INTERNATIONAL CRIME AND THE U.S. CONSTITUTION, pp. 27 ff. (1950). See also RAPHAEL LEMKIN, Genocide as a Crime under International Law, 41 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 145-146 (1947).

⁶² R. Q. QUINTIN-BAXTER, The Task of the International Military Tribunal at Tokyo, 25 NEW ZEALAND LAW JOURNAL, p. 133 (1947).

⁶³ Cf. U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, p. 255 (1946-47).

From the Nuernberg Tribunal's judgment that the Charter is merely declaratory of existing international law, the maxim *nulla poena sine lege* is not therefore applicable. International law analysts say that the maxim is not applicable in international law, although it is in national law.⁶⁴ That criminal acts can be punished though there be no statutory definition had been asserted by Justice Jackson.⁶⁵ The maxim is a safe-guard against a national legislature. But in the community of nations there is no super-legislature against whom the maxim will safeguard the individual. Such protection will be afforded by the universal conscience of such sovereign nations and which conscience shall be the ultimate criterion in determining right and wrong.⁶⁶ This same conscience sets the minimum requirements for a fair trial of the war criminal and the expeditious conduct of hearings. Though the ordinary rules of evidence and the due process clause of the Fifth Amendment of the United States Constitution are not applicable in the trials of war criminals, yet such rules prescribed must be in conformity with justice, honor, humanity, and the laws and usages of war.⁶⁷ Along the same line are the efforts made in the war crimes trials to apply age-old principles and practices employed domestically, on an international plane.⁶⁸

⁶⁴ Cf. SOLON C. IVRAKIS, NUERNBERG, CONFUSION AND CATHARSIS, pp. 5 ff. (1950). See also J. B. KEENAN and B. F. BROWN, CRIMES AGAINST INTERNATIONAL LAW, pp. 47-51 (1950).

⁶⁵ ROBERT H. JACKSON, NUERNBERG IN RETROSPECT, XXVII CANADIAN BAR REVIEW, p. 777 (1949) cited in IVRAKIS, *op. cit.*, p. 11.

⁶⁶ Cf. IVRAKIS, *supra* p. 16. Refer also to J. B. KEENAN and B. F. BROWN, CRIMES AGAINST INTERNATIONAL LAW, pp. 46 ff. (1950).

⁶⁷ CHARLES FAIRMAN, LAW OF MARTIAL RULE, pp. 264-265 (1943), cited by ARTHUR K. KUHN, International Law and National Legislation in the Trial of War Criminals—The Yamashita Case, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 562, (1950).

See *Ex Parte Quirin*, 317 U.S. 1 (1942).

⁶⁸ SHELDON GLUECK, The Nuernberg Trial and Aggressive War, 59 HARVARD LAW REVIEW, pp. 455-456 (1916).

It is of interest to note that war crimes trials break down into four categories, namely: (1) two trials—Nuernberg and Tokyo—conducted by four or more of the great nations jointly pursuant to *ad hoc* international agreements, (2) over a dozen trials held under the principal auspices of one nation, but pursuant to international agreements or arrangements, as trials in the different zones of occupation in Germany, (3) thousands of war crimes trials held by tribunals set up by one nation, and (4) trials arising out of war as treason and "Quisling Trials," also concerned with war guilt and atrocities. TELFORD TAYLOR, An Outline of the Research and Publication Possibilities of the War Crimes Trials, 9 LOUISIANA LAW REVIEW, pp. 496-97 (1949). See also PAUL M. HERBERT. The Nuernberg Subsequent Trials, XVI INSURANCE COUNSEL JOURNAL, p. 227 (1949).

In bringing to a close this discussion on the problems of international criminal jurisdiction, it would be well to quote the words of General Telford Taylor as regards the importance of these war crimes trials and the actual existence of an international criminal law:

"From the standpoint of law and contemporary morality the importance of the trials is perhaps even greater. International penal law—a mere embryo a few decades ago—has developed with phenomenal rapidity. Many concepts and doctrines previously embodied chiefly or solely in treaties, addresses and textbooks have now been expounded and applied in judicial proceedings. Rulings by the tribunals on procedural questions will be of the utmost importance as precedents in developing a true system of international legal procedure. Indeed, it is not too much to say that these trials, more than anything else * * * have brought international law out of the lecture hall and into the courtroom almost overnight. *International penal law has become a living reality.*"⁶⁹ (Emphasis supplied.)

Codification of this international criminal law is also a task of the moment which should go hand in hand with the creation of an international criminal court.⁷⁰ Dr. C. A. Pompe believed that the rule of aggressive war being an international crime must be incorporated by the United Nations in a system of international penal law. But we should attach greater emphasis on the establishment of the tribunal. Professor Jean Graven, whom Professor Pella quoted with approval, warned us that as long as there is no judicial organ for international crimes, there will be neither a serious codification of international criminal law nor a serious application of an international sanction.⁷¹

College of Law
University of the Philippines

⁶⁹ TAYLOR, *op cit.*, p. 498.

⁷⁰ SCHICK, *op. cit.*, p. 1.

⁷¹ VESPASIAN V. PELLA, *Towards an International Criminal Court*, 44 AMERICAN JOURNAL OF INTERNATIONAL LAW, p. 47 (1950).

COLLEGE OF LAW NEWS

Change in Law Curriculum

The College of Law has embarked on a new great endeavor: the revitalizing of the law curriculum. This has been done through the action of the University Council, on the initiative of Dean Vicente G. Sinco, who saw the great need for it. Heretofore, emphasis on law study has been placed on the "bread and butter" courses, hardly touching upon the cultural and intellectual aspect that should go hand in hand with the study of purely technical law subjects. The new approach acquires more cogency when it is considered that lawyers in general have been the traditional policy planners and makers as well as responsible government functionaries of the country. Dean Sinco's views on legal education and the revitalization of the law curriculum are contained in the lead article.

SEATO Conference

Dean Vicente G. Sinco of the College of Law was unanimously elected Chairman of the Eight-Nation Working Committee of the Southeast Asia Treaty Organization Conference. He was picked for this important technical position upon nomination of Douglas MacArthur II, technical representative of the United States delegation.

Faculty Members to New Positions

The President of the Philippines, through the recommendation of the Secretary of Justice, has appointed to the Judiciary the following members of the faculty: Professor Carmelino S. Alvendia, judge of the Court of First Instance of Manila; Professor Felix V. Makasiar, judge of the Court of First Instance of Occidental Negros; Professor Magno S. Gatmaitan, judge of the Court of First Instance of Manila. The President has also recently appointed Professor Ernesto Y. Sibal as member of the Board of Regents of the University of the Philippines.

The Secretary of Justice recently appointed Professor Vicente Abad Santos as chief of the Legal Division of the Department of Justice.

Professor Enrique M. Fernando has left the College of Law for a new assignment in the Code Commission. He will complete the membership of the Code Commission, which is charged with the task of codifying Philippine substantive law upon the basis of the *obliuacs* of the Filipino people and the modern trends in law and jurisprudence.

Law Convocation

Professor Jerome E. Hall of the Indiana University School of Law was a recent visitor to the College of Law. He was guest speaker in a convocation held August 18. He spoke on the recent trends and developments in the field of law and jurisprudence.

Order of the Purple Feather

Under the sponsorship of Dean Vicente G. Sinco, a new student group, "The Order of the Purple Feather," was organized recently. The organization is composed of students with high scholastic records, namely the first top twelve in the fourth, third, and second years. The activities of the new organization is principally intellectual and cultural, and has for its purpose the fostering and promotion of scholarship. Its next activity will be a symposium on the Philippine Judiciary which will be held on September 24.

The following were elected officers: Bartolome S. Carale, chancellor; Sotero B. Balmaceda, vice-chancellor; Belinda Ty, recorder; Amelia C. Custodio, bursar; Juan R. Remulla, seneschal; Manuel P. Dumatol, rapporteur. Professor Bienvenido C. Ambion was designated the faculty adviser.

IN THIS ISSUE

The recent Supreme Court decisions in the succeeding pages were reviewed by: Luis R. Mauricio, *Administrative Law*, with the aid of Miss Pacita R. Calfizares, who helped in checking on authorities and digesting cases, and Misses Perpetua R. Manotok and Leonida G. Tansinsin, who digested the cases; Manuel P. Dumatol, *Commercial Law*; Francisco D. Rilloraza, Jr., *Criminal Law*, with the aid of Rodolfo I. Publico and Fernando C. Campos, who helped brief the cases; Teodoro Q. Peña, *Labor Law*, with the aid of Miss Luz M. Villamor and Jose C. Laureta, Jr., who digested the cases; and Jose S. Balajadia, *Municipal Corporations*.

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