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Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur

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QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION

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I. INTRODUCTION

1. The General Assembly of the United Nations, by resolution 260 B (III), adopted 9 December 1948, requested the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and in carrying out this task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

2. The International Law Commission, in turn, at its meeting of 3 June 1949, charged Judge A. E. F. Sandström, of Sweden, and myself to present reports on the question stated in the resolution, for consideration at the second session of the Commission, to be opened at Geneva, 5 June 1950.

3. According to the terms of reference, the topic of my report comprises the following points:
   (1) The Commission must study whether it is desirable and possible to establish an international judicial organ for the trial of certain crimes;
   (2) The General Assembly contemplates the trial of persons charged
      (a) with genocide; and
      (b) with other crimes over which jurisdiction will be conferred upon the judicial organ by international conventions;
   (3) The Commission must also study the possibility of establishing a Criminal Chamber of the International Court of Justice.

4. It seems right to assume that with regard to the crimes referred to in 2 (b), the General Assembly had in mind those which are the subject matter of the charter of the Nürnberg Tribunal and its judgment, as well as those liable to be defined in a code of offences against the peace and security of mankind. The formulation of such principles and the drafting of such a code were entrusted to the International Law Commission, by resolution 177 (II) of 21 November 1947. The inference is that the General Assembly had in mind, besides genocide, the crimes dealt with by the Nürnberg Tribunal and its judgment, to wit: crimes against peace; war crimes; crimes against humanity.

5. Therefore, the three points of the resolution constitute in fact the broad question of the creation of an international criminal jurisdiction for the trial of crimes affecting the supreme interests of mankind. Such a question is answered by me in the terms set forth in the following pages.

II. EVOLUTION OF THE IDEA OF AN INTERNATIONAL CRIMINAL JURISDICTION

(1) Human reaction to the horrors of the First World War

6. After the termination of the First World War, the conviction crystallized in the minds of thinking people that the horrors of war must be spared to men, that war is a crime against humankind and that such a crime must be prevented and punished. Great was the clamour against the atrocities perpetrated in violation of the laws and customs of war, as embodied in the unwritten law of humanity and civilization as well as in the positive provisions of The Hague and Geneva conventions and other international agreements. But, after all, the atrocities resulting from the actual conduct of hostilities and the occupation of invaded countries were an effect of the basic crime of planning and waging a war in violation of international law. This crime constitutes the root of the problem. It is this crime that the community of States must stamp out of international life.

(2) Action by the Peace Conference. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 1919

7. The reaction against the crime of bringing about the war of 1914-18 and its attendant horrors took a concrete expression in the efforts made during the Peace Conference of 1919 to set up an international tribunal for the trial of crimes committed by the Central Powers and by their civil and military authorities. A body was created for the purpose of considering the question, under the name of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and this Commission divided such crimes into two classes, namely:
   (a) Acts which provoked the World War and accompanied its inception.
   (b) Violations of the laws and customs of war and the laws of humanity.

8. Long and interesting debates took place in which no agreement was reached among the victorious powers on the subject of establishing the proposed tribunal for the exercise of an international jurisdiction of a general character. There was agreement, however, on the point that the German Kaiser should be arraigned as responsible for the war and its horrors, and such agreement was embodied in article 227 of the Treaty of Versailles, which reads as follows:

   "The Allied and Associated Powers, publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

   "A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

   "In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

   "The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial."

9. This provision of the Versailles Treaty became a dead letter, for William of Hohenzollern took refuge in
In September 1924, Professor Bellot presents a Draft Statute to the Stockholm Conference of the International Law Association. In October 1924, Professor Donnemier de Vabres published a learned paper on The Permanent Court of International Justice and its vocation for criminal matters.

In August 1925, on the occasion of a course of lectures given at the Academy of International Law of The Hague, Professor Saldaña formulated a Draft International Penal Code.

In November 1925, Counsellor Caloyanu published an interesting study on The Permanent Court of International Criminal Justice.

It must be recalled in conclusion that the Romanian Inter-Parliamentary Group, on the occasion of the publication of Professor Pella's work on The Collective Criminality of States and the Penal Law of the Future (January 1926) made an extended investigation among statesmen and specialists in international law and penal law, and the investigation resulted in the unanimous concurrence of those consulted, as all of them opined in favour of the creation of an international penal jurisdiction. The principal opinions were those of Barthou, Bellot, Barthélémy, Caloyanu, Carton de Wiart, Donnemier de Vabres, E. Ferré, Garofalo, P. Garraud, Guerrero, Hugueney, Le Fontaine, Lapradelle, G. Le Bon, Loder, R. Poincaré, Politis, Rappaport, Roux, Saldaña, Schlicking, Speare and A. Weiss.4

3 It seems pertinent in this connexion to transcribe in English the following note from the above quoted book by Professor Pella (pp. 3-4):
   Among the plans designed to outlaw war, reference is made to the plan elaborated in 1921 by Mr. S. O. Levinson, of Chicago. In 1922 Professor Bellot presented to the Conference of the International Law Association held in Buenos Aires a Report relative to the creation of an international criminal jurisdiction. In the same year Lord Phillimore deals with the same subject in The British Year-Book of International Law (vol. III, 1922-1923, pp. 79-86).
4 Ibid., p. 10.
International Justice another Criminal Court, and that it is best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure. If crimes of this kind should in future be brought within the scope of international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature." 8

17. This action reflected the views of those who had opposed the establishment of an international jurisdiction for the trial of the First World War criminals, for certain legal reasons, to wit: that there was no defined notion of international crimes; that there was no international penal law; that the principle nulla poena sine lege would be disregarded; that the different proposals were not clear; and that inasmuch as only States were subjects of international law, individuals could only be punished in accordance with their national law. But no statement was ever made to the effect that it was not desirable or possible to prevent and punish crimes against the international public order. The inference of everything that was said in those early debates, is that if the difficulties could be overcome, an international criminal jurisdiction was necessary and desirable to prevent the calamities of war and to consolidate peace among nations.

(4) THE INTERNATIONAL LAW ASSOCIATION, 1922-1926

18. The first unofficial body to take up the question was the International Law Association, at its Conference of 1922, in Buenos Aires. Dr. Hugh H. L. Bellot read an extensive report in which he advocated the establishment of a permanent international criminal court, whereupon a resolution was passed in these terms:

"In the opinion of this Conference the creation of an International Criminal Court is essential in the interests of justice, and the Conference is of the opinion that the matter is one of urgency." 6

19. A draft statute of the proposed criminal court was presented by Dr. Bellot to the Association at the meeting held in Stockholm in 1924. His idea was that an international penal court should be established as a division of the Permanent Court of International Justice and that the jurisdiction of the proposed criminal court should cover the following offences:

(a) Violations of international obligations of a penal character committed by the subjects or citizens of one State or by a stateless person against another State or its subjects or citizens;

(b) Violations of any treaty, convention or declaration binding on the States adhering to the Court, and regulating the methods and conduct of warfare;

(c) Violations of the laws and customs of war generally accepted as binding by civilized nations.

20. The Bellot draft was referred to a special Committee, which in reporting back to the Association at the Vienna Conference of 1926, declared:

"... that after a careful study of the question, it had come to the conclusion that the creation of a permanent international criminal court was not only highly expedient, but also practicable." 7

(5) THE INTER-PARLIAMENTARY UNION, 1925

21. The Inter-Parliamentary Union, gathered in conference in Washington in 1925, after hearing a report of the eminent penologist Professor V. V. Pella on the subject of an international criminal jurisdiction, resolved:

"To institute a permanent sub-committee within the Committee for the Study of Juridical Questions;

(a) To undertake the study of all the social, political, economic and moral causes of wars of aggression to find practical solutions for the prevention of that crime;

(b) To draw up a preliminary draft of an International Legal Code."

22. The Pella report was accompanied by an annex laying down fundamental propositions of penal law, such as the responsibility of individuals as well as of States; the application of the principle nulla poena sine lege to international penal law, and other important details designed to meet objections of previous debates. 6

(6) THE INTERNATIONAL ASSOCIATION OF PENAL LAW, 1926-1928

23. Another authoritative expression of the world's legal thought in the matter of an international criminal jurisdiction is found in the voluminous work accomplished by the International Association of Penal Law, a specialized scientific organization presided by the above-mentioned Professor Pella, of the University of Bucharest, author of a large number of substantial works on international penal law. 9

1Ibid., pp. 12-13.

2The full text of the resolution and the annex may be consulted in Ibid., p. 70, which took it from Union interparlementaire, Compte rendu de la XXIII Conference, Washington, 1925, pp. 46-50.

3A list of the works of Professor Pella, up to 1947, may be found in his book L'Association Internationale de Droit Pénal et la Protection de la Paix, Sirey, Paris, pp. 2-3.


* Ibid., p. 12.

* Ibid., p. 12.
24. At the Congress of the Association in Brussels, in 1926, papers were submitted by no less than thirteen jurists, among them Donnedieu de Vabres and Pella, whose "conclusions" were adopted by the Congress, as the basis for its discussions. A resolution was passed comprising twelve points, the most substantial of which were:

(a) That the Permanent Court of International Justice should have criminal jurisdiction; (art. 1)

(b) That the Court should have competence to try States for an unjust aggression and for all violations of international law; (art. 3)

(c) That the Court should also be competent to try individuals for international criminal responsibilities; (arts. 4, 5, 6)

(d) That offences and penalties should be defined and pre-established by precise texts. (art. 6) 11

25. The Congress further charged Professor Pella with the preparation of a draft statute of an International Criminal Court, a task which he satisfactorily performed. His draft was adopted by the Association in 1928 and communicated to the League of Nations and to Governments represented in the Congress. This draft was revised by its author in 1946 and it might be used by the International Law Commission as a basis for discussion of the concrete problem of the organization of the court. 12

(7) THE GENEVA CONVENTIONS FOR THE PREVENTION AND PUNISHMENT OF TERRORISM AND FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT, 1937

26. A Convention for the Creation of an International Criminal Court was opened for signature at Geneva on 16 November 1937, and signed by thirteen States. It provided for the trial of persons accused of crimes defined in another convention, namely, the Convention for the Prevention and Punishment of Terrorism; and while these two conventions did not deal with crimes incidental to war, they are significant for the fact that they embodied the principle of the universality of repression of offences having an international scope and liable to disturb international peace. This was the first time in which States agreed on the establishment of an international criminal court, having a permanent character and in which the feasibility and expediency of such jurisdiction was officially recognized.

(8) THE LONDON INTERNATIONAL ASSEMBLY, 1941

27. The London International Assembly was an unofficial body set up in the British capital in the year 1941, but its members were designated by the Allied Governments, and it adopted in June 1943 a series of "conclusions", the substance of which is as follows:

That an International Criminal Court shall be instituted, and that it shall have jurisdiction over the following categories of war crimes;

(a) Crimes in respect of which no national court of any of the United Nations has jurisdiction;

(b) Crimes in respect of which a national court of any of the United Nations has jurisdiction, but which the State concerned elects not to try in its own courts;

(c) Crimes which have been committed or which have taken effect in several countries or against nationals of different countries; and

(d) Crimes committed by Heads of State.

28. In harmony with these principles, the International Assembly prepared a draft Convention for the Creation of an International Criminal Court. 13

(9) THE INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT, 1942

29. Another body of a semi-official character was set up in London under the name of International Commission for Penal Reconstruction and Development. With regard to the trials of persons accused of crimes perpetrated in connexion with the Second World War, which was being fought at the time, this body expressed serious doubts and objections, the main one being that the application of a new code of penal law to the war criminals would be open to the criticism that it was an ex post facto law. Nevertheless, the Commission categorically stated its belief that "the time is ripe for the establishment of a Permanent International Criminal Court". 14

(10) THE ST. JAMES DECLARATION, 1942

30. In the evolution of the idea of an international criminal jurisdiction, there are two acts of the Allied Powers which have a deep significance, namely, the St. James Declaration of 1942 and the Moscow Declaration of 1943.

31. At a time when the belligerent and neutral countries were overrun by the victorious forces of the Berlin-Tokio Axis, and the most shocking atrocities were being systematically perpetrated by them in the battlefields, on the high seas, in the prison camps and in the occupied countries, the powers who were victims of the aggression could not but be dominated by a strong sense of retribution. Yet, they did not clamour for "vengeance". They asked for "justice". On 13 January 1942, nine Allied Governments signed in the palace of St. James, in London, the Inter Allied Declaration on Punishment of the War Crimes. After referring to the war crimes that historic document states:

"International solidarity is necessary in order to avoid the repression of these acts of violence simply
by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilised world."

32. Further on, the signatory powers declare:

"(They) place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them", (and resolve)

"To see to it in a spirit of international solidarity, that

(a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged;
(b) that the sentences pronounced are carried out."

33. "It is clear that condemnation of the atrocities as crimes under law—a condemnation to be pronounced in judicial proceedings—was a prime objective of the St. James Declaration, quite as important as, if not more important than, the punishment of individual perpetrators of atrocities. And the view that war crimes should be handled by legal process was echoed by the United States, Britain and the Soviet Union in their acknowledgments of the St. James Declaration. Roosevelt warned those guilty of atrocities that 'the time will come when they shall have to stand in courts of law... and answer for their acts'. Churchill declared that the accused 'will have to stand up before tribunals', and the Soviet reply stated that the Nazi leaders must be 'arrested and tried under criminal law'."

34. Perhaps nowhere is the spirit of the St. James Declaration so vividly and eloquently expressed as in the words spoken by Lord Simon in December 1943, in the House of Lords:

"From our point of view, the British point of view, we must never fail, however deeply we are tried, and however fundamentally we are moved by the sufferings of others, to do justice according to justice. There must be no mass executions of great numbers of nameless people merely because there have been frightful mass executions on the other side. We shall never do any good to our own standards, to our own reputation and to the ultimate reform of the world if what we do is not reasonably consistent with justice... whatever happens, do not let us depart from the principle that war criminals shall be dealt with because they are proved to be criminals, and not because they belong to a race led by a maniac and a murderer who has brought this frightful evil upon the world."

(11) THE MOSCOW DECLARATION, 1943

35. During the Conference held at Moscow in October and November 1943, the United States, Great Britain and the Soviet Union issued a Declaration on German Atrocities in Occupied Europe in which they stated:

"At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein."

... "The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies." 19

(12) THE UNITED NATIONS WAR CRIMES COMMISSION, 1943

36. The first official body created for the exclusive purpose of investigating the war crimes and providing for their punishment by means of an international judicial organ, was the United Nations War Crimes Commission, set up as the result of a conference of the Allied Governments which met in London in October 1943. This Commission approved a draft of a Convention for the Establishment of a United Nations War Crimes Court, in September 1944. Chief provisions of this draft Convention were the following:

"Article 1"

"1. There shall be established a United Nations War Crimes Court for the trial and punishment of persons charged with the commission of an offence against the laws and customs of war.
"2. The jurisdiction of the Court shall extend to the trial and punishment of any person—irrespective of rank or position—who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfill a duty incumbent upon him has himself committed, an offence against the laws and customs of war.
"3. The jurisdiction of the Court as defined above shall extend to offences committed by the members of the armed forces, the civilian authorities or other persons acting under the authority of, or claim or colour of authority of, or in concert with a State or other political entity engaged in war or in armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties."

"Article 18"

"The Court shall apply:

(a) General international treaties or conventions declaratory of the laws of war, and particular treaties or..."
conventions establishing laws of war between the parties thereto;

"(b) International customs of war, as evidence of a general practice accepted as law;

"(c) The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience;

"(d) The principles of criminal law generally recognized by civilized nations;

"(e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war." 19

(13) THE NURNBERG AND TOKYO INTERNATIONAL MILITARY TRIBUNALS, 1945-1946

37. Official action passed from mere desiderata or plans to actual deeds, when in August 1945, and in conformity with the aims stated in the St. James and Moscow Declarations, the Governments of the United States, France, Great Britain and the Soviet Union, concluded in London the Agreement providing for the establishment of an International Military Tribunal, for the trial of war criminals of the European Axis whose offences had no particular geographical location. Nineteen other Governments of the United Nations did subsequently adhere to the agreement. A Charter annexed to the Agreement defined and detailed the constitution, principles, jurisdiction and functions of the Tribunal. "The heart of the Charter" — as pointed out by Taylor — "was Article 6, defining the crimes within the jurisdiction of the Tribunal. These crimes, corresponding to the "legal charges" outlined in Justice Jackson's report (and later included in the four counts of the indictment), were described as "crimes against the peace" (the planning or waging of aggressive war, or conspiracy for the accomplishment thereof), 'war crimes' (violations of the laws and customs of war), and 'crimes against humanity' (atrocities and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal)." 20

38. This was the Tribunal which functioned in Nürnberg, Germany, tried the major criminals of the Second World War, convicted nineteen of them, condemned them to penalties ranging from death to prison terms of from ten years to life and acquitted three of the accused.

39. I am not unmindful of the criticisms that have been levelled against the Nürnberg trial, but of course, it would be out of the scope of this paper to discuss them. My purpose here is simply to advert to the fact that an international criminal jurisdiction has already operated in the world and that its feasibility has been demonstrated. Verily, the Nürnberg Tribunal was only a temporary institution and serious objections have been raised against it, chief among them the following:

40. Leaving aside the question of whether some or all of these objections, or any others, are right or wrong, I will merely remark here that the creation of an international criminal jurisdiction as advocated in this paper, is predicated on propositions which eliminate previous objections, because

1. The tribunal exercising the international criminal jurisdiction would be permanent;

2. The tribunal would be organized on a strictly legal basis in every respect;

3. The judges would be jurists specialized in penal law and chosen without distinction as to nationality;

4. The tribunal would exercise its jurisdiction over offences defined in an international penal statute or in particular treaties between States.

41. Another International Military Tribunal was set up in Tokyo in accordance with a Declaration signed at Potsdam on 26 July 1945 by the United States, China and Great Britain, to which the Soviet Union adhered later on. The Declaration stated that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners". In pursuance of the vast powers conferred upon the Supreme Commander of the Allied Forces by the Instrument of Surrender signed on 2 September 1945 in the Bay of Tokyo by Japan and nine Allied Nations, General MacArthur established the International Military Tribunal for the Far East by a special proclamation dated 19 January 1946. Judges representing eleven nationalities sat on this Tribunal. It functioned in a manner and under principles almost identical with those of the Nürnberg Tribunal. The remarks previously made with regard to that tribunal are applicable mutatis mutandis to the one established in the Far East.

42. For the first time in the history of the world, two international tribunals exercising a criminal jurisdiction and composed of judges from different nations, tried persons accused of crimes against the peace of the world and the dictates of humanity. It was done by means of judicial proceedings in which the defendants had the benefit of counsel and all the guarantees necessary to prove themselves not guilty, and in which they were given a fair trial by judges bent upon doing, as Lord Simon said, "justice according to justice."

(14) THE UNITED NATIONS COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION, 1947

43. This body was set up by the General Assembly of the United Nations by resolution 94 (I) of 11 December 1946. It consisted of seventeen Members, representing the following States: Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, The Netherlands, Panama, Poland, Sweden, Soviet Union, United Kingdom.

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19 For text of this draft convention, with an explanatory note, see Ibid., pp. 112-119.
47. It is pertinent to recall the manner in which the Genocide Convention was finally adopted by the unanimous vote of the third session of the General Assembly of the United Nations. A draft resolution on the repression of genocide, proposed by the Delegations of India, Cuba and Panama, was acted upon by the General Assembly on 11 December 1946 by requesting the Economic and Social Council to undertake the necessary studies for the drafting of a convention. The Council in turn instructed the Secretary-General to accomplish such a task in the manner set forth in its resolution 47 (IV). A draft convention was prepared by the Secretary-General and referred to the Committee on the Progressive Development of International Law and its Codification. The Committee returned the draft to the Secretary-General without expressing any opinion in the matter and recommending that Member Governments be consulted. The Economic and Social Council established an ad hoc Committee which was charged with the preparation of the draft convention. The ad hoc Committee prepared the draft convention and submitted it to the seventh session of the Economic and Social Council, which in turn transmitted it for action to the General Assembly.

48. The matter was fully debated by the Legal Committee of the third session of the General Assembly and on the basis of the Committee's report, the General Assembly, by resolution 260 (III) of 9 December 1948, unanimously approved the Convention on the Prevention and Punishment of the Crime of Genocide. Both the draft of the Secretary-General and the draft of the ad hoc Committee contained proposals for the establishment of an international criminal jurisdiction to deal with the crime of genocide, although differing as to form and scope. There was lengthy discussion in the Committee itself and in the Economic and Social Council on the pros and cons of the proposal. The ultimate result, however, was that the draft approved by the ad hoc Committee contained this provision: (article VII, later renumbered VI)

"Persons charged with genocide or any of the other acts enumerated in article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal."

49. The draft was referred to the Sixth Committee of the General Assembly. An intensive debate took place in the Committee arising out of objections to the final phrase, "or by a competent international tribunal". At one time there was a majority decision to delete it, but the decision was reconsidered. Several delegates made the categorical statement that they had voted for the deletion not because they were opposed in principle to an international criminal jurisdiction, but because the phrase objected to expressed a hope and not a reality, since it referred to a jurisdiction which did not exist. A conciliation formula was proposed by the delegation of the United States and after painstaking discussion of several amendments proposed by the delegations of France, Belgium, India and the United States, the article was finally adopted in these terms:

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of
which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

(16) THE COMMISSION ON COMMON INTERNATIONAL LAW, 1948

50. This private scientific body, denominated in French Commission du droit commun international, was set up in Paris by the Mouvement National Judiciaire. In 1948 this Commission formulated a draft convention containing a definition of the “crimes against humanity” referred to in the judgment of the Nürnberg Tribunal, and proposed conferment of jurisdiction over them on a special international penal court also proposed by the Commission to deal with violations of human rights in conformity with another draft convention denominated Convention Internationale sur les droits de l’homme. A draft statute of the court was also produced by this organization.

(17) CORRELATION OF THE QUESTIONS OF INTERNATIONAL CRIMINAL JURISDICTION, FORMULATION OF THE NURNBERG PRINCIPLES AND ELABORATION OF AN INTERNATIONAL CODE OF OFFENCES

51. In view of the above stated facts and circumstances, it is my belief that the United Nations should consider and decide as inseparable and mutually complementary, the three questions of the international criminal jurisdiction, the formulation of the Nürnberg principles and the elaboration of an International Penal Code. It may not be amiss to quote in this connexion a statement contained in the Secretary-General’s memorandum, and made with reference to the representative of France in the Committee on the Progressive Development of International Law and its Codification:

“He further argued that there was a close connexion between the Nürnberg principles and an international criminal jurisdiction.”

52. In another passage relative to a proposal by the representative of the Netherlands:

“The question of an international criminal court was so closely connected with the Nürnberg principles that its mention was inevitable.”

53. In conclusion, it may be recalled that the General Assembly resolution 177 (II) of 21 November 1947 charged the International Law Commission with the formulation of the principles recognized in the Charter of the Nürnberg Tribunal, as well as the preparation of a draft code of offences against peace and security.

III. THE CONTEMPORARY OPINION ON THE QUESTION OF UNIVERSAL REPRESION OF INTERNATIONAL CRIMES AND THE CRIMINALITY OF WAR

Basic concepts

54. In the preceding pages we can see an imposing array of official and unofficial thought and action which for the last thirty years has manifested itself in favour of the establishment of an international criminal jurisdiction for the prevention and punishment of crimes against humanity. The proposals of jurists, statesmen, thinkers, governmental bodies and scientific institutions reflect the feelings of a generation which still shudders at the recollection of the atrocities of the last war and is gripped by the fear of a new conflagration. They also represent the considered opinion of the world with regard to war and its attendant horrors and respecting the imperative need of delivering humanity from those frightful evils.

55. The proposals are indeed widely diversified, but in their great majority they coincide in certain fundamental concepts, to wit:

1. That war is a crime against the human race;
2. That there are crimes, other than war, of which mankind is also the victim;
3. That it is necessary to define by international convention all crimes against mankind;
4. That it is also necessary to have some form of international criminal jurisdiction, vested with power to try and punish those responsible for crimes defined in an international code of offences.

Let us examine these propositions.

(1) THE CONCEPT OF WAR AS A CRIME

56. The notion of war from a legal standpoint, shows a fundamental change which has been evolving for the last three decades. Contemporary legal thought has manifestly forsaken the standards of international law generally accepted until the beginning of the first world conflagration, that waging war is simply an unrestricted attribute of sovereignty, the legality of which was not questioned. After the advent of the new international order created by the Covenant of the League of Nations, the world witnessed the tremendous effort of Governments and public opinion to eliminate the possibility of war by the strengthening of the methods of pacific settlement, by the adoption of measures designed to guarantee the independence and integrity of nations, by the definition and condemnation of aggression, and by the outlawry of war.

57. The outrages of the Second World War, perpetrated on a gigantic scale, with an unprecedented display of cruelty combined with scientific efficiency, intensified the struggle for the suppression of war and the consolidation of systems of pacific settlement. It also caused a decided reversion to the conception of the old masters of international law, who classified wars as just and unjust, thereby implying a condemnation of the unjust war.

58. Vitoria, who, as stated by James Brown Scott, was the “unconscious founder of the modern law of
nations as Grotius was its conscious expositor", was very
categorical in his condemnation of unjust wars. Of them
Vitoria gave these specific examples:

"I. Difference of religion is not a cause of just
war.
"II. Extension of empire is not a just cause of war.
"III. Neither the personal glory of the prince nor
any other advantage to him is a just cause of war."

59. And he rounded up his thought when he said:
"There is but a single and only just cause for commencing
a war, namely, a wrong received ". In this sentence
Vitoria did simply proclaim the right of self-defence, the
legitimacy of a defensive war. 27

60. In line with this doctrine, Suárez in Disputation
XIII of his works, stresses the difference between
aggressive and defensive war and ends his discourse On
War in these terms:

"Our fourth proposition is this: in order that a war
may be justly waged, a number of conditions must be
observed, which may be grouped under three heads.
First, the war must be waged by a legitimate power;
secondly, the cause itself and the reason must be just;
thirdly, the method of its conduct must be proper,
and due proportion must be observed at its beginning,
during its prosecution and after victory. All of this
will be made clear in the following sections. The
underlying principle of this general conclusion, indeed,
is that, while a war is not in itself evil, nevertheless,
on account of the many misfortunes which it brings in
its train, it is one of those undertakings that are often
carried on in evil fashion; and that therefore, it
requires many (justifying) circumstances to make it
righteous." 28

61. Grotius, who was greatly influenced by the old
Spanish precursors, distinguished between just and unjust
wars. The whole structure of his treaties on the law
of war is predicated on the conception that war may be
waged only to redress a wrong, to defend justice, to
resist attack. At the beginning of Chapter II of his
Book I he says:

"Having seen what the sources of law are, let us
come to the first and most general question, which is
this: whether any war is lawful, or whether it is ever
permissible to war."

Further on, in the same chapter, he adds:

"6. It is not, then, contrary to the nature of society
to look out for oneself and advance one's own
interests, provided the rights of others are not
infringed; and consequently, the use of force which
does not violate the rights of others is not unjust."

62. On the specific point of the legitimacy of defensive
war, Grotius quotes Cicero as saying:

"Since there are two ways of settling a difference,
the one by argument, the other by force, and since
the former is characteristic of man, the latter of brutes,
we should have recourse to the second only when it is
not permitted to use the first. What can be done
against force without force? " 29

Bynkershoek commenting on his own definition of war,
says:

"The definition also specifies 'for the sake of asserting
their rights'. In other words, the only correct
ground for war is the defence or recovery of one's
own." 30

63. Even among modern writers and despite the
doctrine generally accepted in the XIX century, we find
the distinction between just and unjust wars; between
right or wrong wars; between wars of aggression and
defensive wars; between "jural" and "non-jural"
war; between a "legal" or "legitimate" war and an
"illegal" or "illegitimate" war; between a war that can
be justified and one that cannot be justified. The
following excerpt from Woolsey is very much in point:

"War may be defined to be an interruption of a
state of peace for the purpose of attempting to
procure good or prevent evil by force; and a just war is an
attempt to obtain justice or prevent injustice by force,
or, in other words to bring back an injured party to
a right state of mind and conduct by the infliction of
deserved evil. A justifiable war, again, is only one
that is waged in the last resort, when peaceful means
have failed to procure redress, or when self-defence
calls for it. We have no right to redress our wrongs
in a war of violence, involving harm to others, when
peaceful methods of obtaining justice would be success-
ful." 31

64. However, the contemporary trend has been in the
sense of suppressing not only aggression but also those
wars which might be called "just", "legal", "jural"
or "justifiable". Modern conscience condemns in prin-
ciple the use of force for the settlement of any controversy,
even if the State resorting to war can prove that a wrong
has been committed against it.

65. This line of thought is strengthened by the fact
that in the days of old, wars were justified for the
redress of wrong, because there did not exist in the
international community an authority vested with power
to decide controversies between States. "The only justi-
fication for war, in the opinion of enlightened theologians,
from St. Augustine down", — says Scott — "was that
between equal states there was not and could not be in
the then state of affairs, a court of the superior. We of
today have solved the difficulty by creating a court of
the superior, the superior in this instance being none
other than the international community and to this

27 J. B. Scott, Francisco de Vitoria and his Law of Nations, ed.
208-209.
28 F. Suárez, Selections from Three Works, Translation Williams,
Waldron and Davis, ed. Carnegie Endowment, Oxford, The
29 H. Grotius, De Jure Belli ac Pacis, Translation by Francis
1925, pp. 51-54.
30 C. van Bynkershoek, Questionum Juris Publici, Translation
p. 15.
31 Woolsey, Introduction to the Study of International Law,
The fight for the outlawry of war began when the great majority of the civilized States became parties to the Covenant of the League of Nations. Humanity had been deeply impressed with the dramatic utterance of Wilson that the conflagration of 1914-1918 was "a war to end all wars". When the States of the world decided to organize the community of States on a conventional basis, the feeling became stronger than ever that a society where the members can take justice in their hands is bound to disintegrate and that even in the case of a just war, even when a nation waged war to redress a wrong, that nation is taking justice in her own hands.

That sentiment was reflected in Article 11 of the Covenant:

"Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations..."

This provision of the Covenant is remarkable in that it does not distinguish between kinds of war. It refers to "any war or threat of war" and declares it a matter of concern to virtually the whole community of nations, since the League was its living organ. War is not outlawed in words, but it is outlawed in fact. Resort to war in violation of the obligation to submit controversies to methods of peaceful settlement, as per Articles 12, 13 and 15 of the Covenant, is pronounced by Article 16 to be "an act of war against all other Members of the League", which is tantamount to aggression against the community of States. Such an aggression in violation of international law, customary as well as positive, and against the supreme interest of humanity, can only be conceived as a crime against humanity.

That such a conception existed in early League and Governmental circles, is witnessed by Article 1 of the Treaty of Mutual Assistance, of 1923, which reads as follows:

"Art. 1. The High Contracting Parties solemnly declare that aggressive war is an international crime, and severally undertake that no one of them will be guilty of its commission."

As expressed in the preamble, this treaty was negotiated for the chief purpose of "facilitating the application of Articles 10 and 16 of the Covenant and the reduction and limitation of armaments".

The same conception governed the Geneva Protocol of 1924, officially denominated Protocol for the Pacific Settlement of International Controversies. In its preamble we read:

"Recognising the solidarity which unites all members of the international community;

"Affirming that war of aggression constitutes an infraction of such solidarity and an international crime".

As stated by Edouard Benes with reference to the Commission handling the matter in the League Assembly, "our purpose was to make war impossible, to annihilate it, to kill it", and it was only logical that for those purposes war had to be declared a crime, as it was in express terms. The Protocol was unanimously recommended to the General Assembly by the vote of forty-eight delegations but the subsequent opposition of the British Government to the extension given the system of arbitration caused the failure of both the Protocol and the Treaty of Mutual Assistance.

However, the principles and aspirations which inspired the two instruments did not die. Quite the contrary, they remained alive and active in the conscience of statesmen and the common people. The concept of the criminality of war was categorically expressed by the Inter-Parliamentary Union in its Conference of 1925 when it instructed the permanent Sub-Committee of its Committee for the Study of Juridical Questions,

"to undertake the study of all the social, political, economic and moral causes of wars of aggression to find practical solutions for the prevention of that crime".

Those same principles animated the treaties of Locarno concluded in 1925, which constituted a noble and constructive effort to strengthen and fortify peaceful settlement among the great European powers as the best method of preventing the scourge of war from again bringing woe unto mankind. Repudiation of war was the governing principle of those celebrated agreements, fourteen years later trampled upon by the criminal action of aggressors and treaty-violators.

The same psychology had prevailed in the councils of the Western Hemisphere. A resolution of the First Pan-American Conference of Washington, 1889-1890, condemned the principle of conquest and proclaimed the non-recognition of territorial acquisitions made by force or threat of force. Another resolution upheld the principle of obligatory arbitration in very ample terms.

In the Sixth Conference, held at Havana in January 1928, a resolution was passed whereby the American republics declared that they adopted the principle of obligatory arbitration for the solution of their differences and called an arbitration and conciliation conference to be held in Washington next December. The first consideration of that resolution read:

"The American republics do hereby express that they condemn war as an instrument of national policy in their mutual relations."

A second resolution on the subject of aggression was more explicit in proclaiming the criminality of aggressive war, as per these terms:

"Considering..."
Article I: defence; may be made for the purposes of this report: as the Briand-Kellogg Treaty, article I of which reads: "illicit, outlawed."

78. In the third consideration of another resolution adopted by the seventh Pan-American Conference, of Montevideo, 1933, relative to the ratification of pacific settlement agreements, this statement is found:

(Such) conventions, treaties and agreements ... would suffice to avoid the crime of war . . . ."

79. The Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro in 1933, stated in Article I:

"The High Contracting Parties do solemnly declare that they condemn wars of aggression in their mutual relations or with other States . . . ."

80. The Declaration of American Principles made by the Eighth Conference in Lima, in 1938, contained this clause:

"3. The use of force as an instrument of national or international policy is illicit."

81. A resolution of the same Conference on teaching recommended inter alia, the study of agreements declaring the outlawry of war.

82. The Inter-American Treaty of Mutual Assistance concluded in Rio de Janeiro in 1947, in a special conference held in pursuance of the agreements and decisions of the Conference on the Problems of Peace and War (Chapultepec Conference) of 1945, provides in Article I:

"The High Contracting Parties do formally condemn war and bind themselves in their international relations not to resort to war or threat of war in any manner incompatible with the provisions of the Charter of the United Nations or of this Treaty."

83. The whole international life of the American continent is pervaded by thought and action inspired by the conception that international conflicts must be settled by peaceful methods only; that war is a crime against mankind; and that as a crime it is repudiated, declared illicit, outlawed.

84. Some six months after the Havana resolution of 1928 had been subscribed to by the American republics, the announcement was made of the signing in Paris of the Pact for the Renunciation of War, otherwise known as the Briand-Kellogg Treaty, article I of which reads:

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

85. With regard to the Briand-Kellogg Treaty, and giving up as unnecessary a repetition of its well known history, its aims and its scope, the following remarks may be made for the purposes of this report:

1. The Pact did not interfere with the right of self-defence;

2. It was not inconsistent with such coercive action as could be taken by the community of States under the Covenant of the League of Nations;

3. It was not inconsistent with the use of force under the Locarno treaties, for such use was authorized against specific acts defined as aggression;

4. No distinction was made between classes of war, as it renounced war, any form of war, as an instrument of national policy;

5. Renunciation of war, in the terms of the treaty and in accordance with its manifest intention, was in substance the outlawry of war.

86. A close harmony is apparent between the treatment of war by the Briand-Kellogg Pact and the Charter of San Francisco. It is thus evident that by the time the Second World War broke out, there was a well-defined consensus of universal public opinion that war, and a fortiori aggressive war, was an international crime. In support of the conception of aggressive war as an international crime we can invoke the opinion of the precursors, founders and early expositors of the law of nations and the consistent thought and action of Governments, institutions and jurists during the thirty years elapsed since the termination of the First World War. As stated by Justice Jackson in his famous report on the proposal to set up the Nürnberg Tribunal:

"Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war .... By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal."

87. It may be recalled in this connexion that in 1919, in the memorandum of reservations of the United States to the report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, the American representatives had declared:

"They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a crime."

88. The new international order created after the termination of the Second World War is consonant with the principles which animated all the anti-war pacts, agreements, declarations, movements, studies and proposals of the previous decades. According to the San Francisco Charter, to maintain peace and security is the supreme purpose of the community of States, and for the realization of that purpose it must take "collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace" (article 1, paragraph 1).

89. According to article 2, paragraph 4,

"All Members shall refrain in their international relations from the threat or use of force against the

\[\text{Department of State Bulletin, Vol. 12 (1945), pp. 1076-1077.}\]

\[\text{Historical Survey, op. cit., p. 54.}\]
terrestrial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

90. According to this provision, war, any form of war, is illegal, prohibited, outlawed. A Nation can only use force in exercise of "the inherent right of individual or collective self-defence, if an armed attack occurs", and even this permissible use of force must cease as soon as "the Security Council has taken the measures necessary to maintain international peace and security" (article 51).

91. For these reasons, I have always thought that the difficulty — heretofore considered insuperable — of defining aggression, could perhaps be overcome today by simply introducing into the definition the element of self-defence, and making lack of that element the test of aggression. Without attempting any enumeration of specific acts constituting aggression, I would propose this definition: Aggression is the use of force by one State against another State under conditions which do not constitute self-defence against armed attack.

92. Force could also be used by the United Nations under the provisions of Chapter VII of the Charter on "Action with respect to threats to the peace, breaches of the peace and acts of aggression" (articles 39 to 50).

93. It is incontrovertible, therefore, that the concept of the criminality of war, affirmed by the principles of the Nürnberg Tribunal and its judgment, is part of the international law of our day. Whatever words are used in condemning war; whether it is called illegal or declared outlawed, renounced as an instrument of national policy or branded as a crime; whether war is divided in the two categories of just and unjust, or contemplated in an abstract manner as simply the recourse to force and violence for the solution of controversies between States, the fact stands that in the minds of Governments and peoples, statesmen and jurists, and in conformity with the positive provisions of the world's Magna Charta, war is a crime. If the use of force is pronounced an act against international order, and war a "scourge which has brought untold sorrow to mankind"; if war is repudiated, condemned and renounced as an instrument of national policy, it is because war, i.e., the unauthorized use of force, is an international crime, a crime against mankind.

94. It is not necessary to make a specific reference to aggression or aggressive war, as in several of the official utterances of the recent past. The contemporary international order does not recognize the legitimacy of war waged for the purpose of redressing a real or alleged wrong. There are no "just", or "jural", or "legal", or "justifiable" wars in the new international order. The only justifications for the use of force, as above stated, are self-defence or coercive action by the community of States. When either of these two elements is lacking, all war is illicit, all war is a violation of the Charter of the United Nations, all war is aggression, all war an international crime.

(2) INTERNATIONAL CRIMES OTHER THAN WAR

95. Besides the crime of war, there are other crimes which affect the community of States and hence should be subject to an international jurisdiction. The planning and waging of aggressive war, of course, is the principal crime mentioned in the first category of the Nürnberg charter, designated under the heading of "crimes against peace". Then there are the crimes comprised within the second and third categories, i.e., "war crimes" (violations of the laws and customs of war); and "crimes against humanity" (atrocities and other inhumane acts committed against any civilian population, before or during a war, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried out in connexion with crimes of the first and second categories).

96. Then we have the crime of genocide, as defined in the Genocide Convention, which might also come within the jurisdiction of an international criminal court, in respect of those States which should accept such jurisdiction, as per article VI of the Convention.

97. And lastly, there are certain offences which have always been known as "crimes against the law of nations", such as piracy, slave trade, traffic in women and children, traffic in narcotics, currency counterfeiting, injury to submarine cables. To these might be added terrorism of an international character, as defined by the Convention of 1937 on the Prevention and Punishment of Terrorism.

98. It is pertinent to recall, furthermore, that the International Law Commission has been called upon, by resolution 260 B (III) of the General Assembly, to "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions ".

99. On the other hand, General Assembly resolution 177 (II) of 21 November 1947 instructs the Commission to

(a) Formulate the principles of international law recognized by the charter of the Nürnberg Tribunal and its judgment; and

(b) Prepare a draft code of offences against the peace and security of mankind, clearly indicating therein the place that should be accorded to the Nürnberg principles.

100. Therefore, having in mind the resolutions of the General Assembly and the possible scope of the prospective international penal code, it seems logical to conclude that the international criminal jurisdiction may have to deal with the following crimes:

(a) Crimes against the peace;

(b) War crimes;

(c) Crimes against humanity;

(d) Genocide;

(e) Other undetermined crimes over which jurisdiction be conferred upon the international criminal court by international conventions, among which might be the following:

Piracy;

Slave trade;

Traffic in women and children;

Traffic in narcotics;

Currency counterfeiting;
Circulation of obscene publications;
Injury to submarine cables;
Terrorism.

101. In connexion with items (c) and (d); it must be borne in mind that while genocide by its nature is a crime against humanity, it is not comprised within the enumeration made by the charter of Nürnberg under the caption "Crimes against humanity". This third category of the charter refers to "persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal". The charter, therefore, referred only to specific persecutions carried out in connexion with crimes against the peace and war crimes. The statements hereinafter made are intended only to mention the offences that may come under the proposed system of universal repression, but of course, they do not mean an attempt to deal with the specific subject matter of the international penal code, which is to be covered by a separate report.

(3) Necessity to define by international convention all crimes against mankind

102. When the powers, victims of the aggression started in 1939, after five years of terrific fighting, finally won the war and decided to arraign those responsible for its horrors, there was a great deal of discussion as to the manner in which the war criminals should be punished; as to whether war was or was not a crime under international law; as to whether individuals could be tried in an international tribunal for acts committed by them as representatives of Governments; and finally, as to whether the proposed exercise of criminal jurisdiction did or did not constitute a violation of the principle nullum crimen, nulla poena sine lege.

103. With regard to the International Military Tribunal created by the London Agreement of 1945, there has been criticism of the charter, of the trials, and of the judgment. It is obviously impossible for me to discuss the copious literature that has appeared on the subject. Fully one hundred monographs and studies are listed on the subject of Nürnberg in the bibliography prepared by the Legal Department of the United Nations in December 1949. Moreover, such discussion would be useless and out of place in this paper. For the purposes of my report it suffices to advert to the fact that violation of the principle mentioned above has been the gravest charge formulated against the Nürnberg trial and the one most insistently and abundantly made; that the norm nullum crimen, nulla poena sine lege is a dogma of penal science; that it is universally recognized as a basic guarantee of the individual; and that it has been solemnly reaffirmed by the United Nations in its Universal Declaration of Human Rights, Article 11 of which reads as follows (paragraph 2):

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

104. While many learned and authoritative opinions might be quoted in support of the proposition that war of aggression was a crime under international law at the time the war was begun by Hitler in 1939, many equally learned and authoritative writers maintain the contrary view. As a sample I will quote from one of the latest studies I have read on the subject:

"I believe that these facts and considerations must lead to the conclusion that the punishable character of the war of aggression stipulated in the Charter does not correspond to a general legal conviction in force in 1939, but that it is new law and that to this extent the principle of nullum crimen sine lege has been violated." 37

105. While it is a fact that there is controversy regarding the past, there can be no doubt regarding the general legal conviction of our day that launching a war is a crime both under customary and conventional international law and that this crime, together with other hideous crimes against the peace and security of mankind, must be prevented and punished.

106. It would be unthinkable to plan for the establishment of a universal system of prevention and punishment of such crimes without a law to be applied by the judicial organ created for that purpose. The necessity for a definition of all offences against mankind seems imperative in the international order of our day. As said thirty-one years ago by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,

"It is desirable that for the future, penal sanctions should be provided for such grave outrage against the elementary principles of international law". 38

107. And the Third Committee of the League of Nations Assembly in 1920, remarked:

"There is not yet any international penal law recognized by all nations . . . ." 29

108. The necessity for a criminal law in the repression of crimes against peace is ably expressed by Finch in these words:

"The prime requisite to the establishment of a community of States under the protection of an enforceable international peace is the unambiguous denunciation of breaches of the peace and acts of aggression as violations of the law of the community. To leave the definition of such violations to ex post facto determination by a political group, one of which may veto the very existence of a violation however flagrant it may be, or to ex post bello decision by a victor against the vanquished only; is a perversion of process which by no stretch of the imagination can be called due process of law." 40

109. A resolution of the Inter-Parliamentary Union,
question of international criminal jurisdiction

15

passed during its Washington session of 1925, contained the following recommendation:

"To draw up a preliminary draft of an International Legal Code". 41

Again, at the 37th Conference of the Union in Rome in 1948, it was declared:

"That the collectivity of States must adopt as soon as possible an international penal code..." 42

110. In the first International Congress of Penal Law held in Brussels in 1926, the following aspiration (vœu) was expressed:

"All offences which may be committed by States or individuals must be specified and approved. International conventions shall define offences within the cognizance of the court and shall specify which penal and security measures may be employed." 43

111. In a letter dated 12 November 1946, President Truman said:

"That tendency (toward peace) will be fostered if the nations can establish a code of international criminal law to deal with all who wage aggressive war. The setting up of such a code... is indeed an enormous undertaking, but it deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations." 44

112. By resolution 95 (I) of 11 December 1946, the General Assembly directed the Committee on the Progressive Development of International Law and its Codification,

"to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the charter of the Nürnberg Tribunal and in the judgment of the Tribunal".

113. Subsequently, by the oft-quoted resolution 177 (II) of 21 November 1947, the General Assembly charged the International Law Commission with the formulation of the Nürnberg principles, as well as,

"the preparation of a draft code of offences against the peace and security of mankind...".

114. Now, in order to comply with the manifest desire of the General Assembly of the United Nations; in order to avoid in the future the criticisms of the past; in order to establish an international criminal jurisdiction upon sound and solid bases of penal law; in order to enable an international criminal court of the future to apply pre-established law to those who are found guilty of international crimes, it is obvious that an international code of offences must be adopted, enacted and promulgated by the United Nations, by means of such convention or conventions as may be deemed necessary and adequate.

(4) The Necessity to Have an International Jurisdiction Vested with Power to Try and Punish Persons Responsible of International Crimes

115. The facts stated in Part II of this report show that for the last thirty years the public opinion of the world has been clamouring for the establishment, in one form or other, of an international jurisdiction competent to deal with international crimes.

116. During that time the following official and unofficial entities representing the world's legal and political thought have strongly advocated the creation of an international criminal jurisdiction:

The Advisory Committee of Jurists, 1920;
The International Law Association, 1922, 1924, 1926;
The Inter-Parliamentary Union, 1925 and 1948;
The International Association of Penal Law, 1926, 1928;
The League of Nations, 1937;
The London International Assembly, 1941;
The International Commission for Penal Reconstruction and Development, 1942;
The United Nations War Crimes Commission, 1943;
The United Nations, 1945;
The United Nations Committee on the Progressive Development of International Law and its Codification, 1947;
The Commission on Common International Law, 1948.

117. The League of Nations actually proceeded to the creation of an international criminal jurisdiction by the Convention of 1937 for the trial of persons accused of offences defined in the Convention for the Prevention and Punishment of Terrorism. The United Nations, on the other hand, did set up the International Military Tribunals of Nürnberg and Tokyo, which exercised their penal jurisdiction in a complete and effective manner.

118. Draft statutes of an International Penal Court have been formulated, presented to or adopted by,

The International Law Association;
The International Association of Penal Law;
The League of Nations;
The London International Assembly;
The United Nations War Crimes Commission;
The United Nations Committee on the Progressive Development of International Law and its Codification; and
The Commission on Common International Law.

119. Of all these drafts I consider as the most complete and up to date, the one prepared in 1926 for the International Association of Penal Law by Professor Pella, and revised in 1946. 46

120. After the shocking experiences of the Second World War and amidst the restlessness and alarm prevailing in our day, the establishment of an inter-

41 Historical Survey, op. cit., p. 71.
42 Ibid., p. 14, note.
45 For full text of these drafts, see Historical Survey, op. cit., Appendices, pp. 47-147.
46 Ibid., pp. 75-88.
national criminal jurisdiction would be received by the peoples of the earth as a new ray of hope in their quest for peace and security, as a pledge by the United Nations that it will not allow another catastrophe to befall humanity.

121. The cynic and the skeptic will surely remark that wars are not stopped by means of international tribunals and penal codes. Perhaps that is true, up to a certain point. In the municipal organization it may be observed also that there are murderers and thieves despite the fact that there are criminal courts and penal codes, but only God knows how many murders and robberies are not committed precisely because there are judges and penalties.

122. When the individual head of State, government official or army commander knows that the planning and waging of a war is a crime for which he may be personally tried by an international tribunal and sentenced if he is found guilty, he will surely be deterred by that consideration if he should some day feel tempted to follow the path that leads only to death, savagery, misery and ruin.

123. In 1925 Raymond Poincaré asserted:
"A judicial penal organisation and the application of sanctions to crimes that may be committed, that is the aim which humanity must pursue if it desires that its beautiful dream of universal peace become an enduring reality." 47

124. In the same year the French jurist J.A. Roux, speaking of an International Criminal Court, said:
"Time works for it, because history, justice and common sense stand by its side. To an international crime must correspond an international jurisdiction." 48

125. And when the proposal for the establishment of a High Court of International Justice was made by Baron Descamps to the Advisory Committee of Jurists in 1920, two of its most eminent Members, Lapradelle and Altamira, expressed the view that since the object of the League of Nations was to prevent a repetition of the calamities which gave rise to its creation, "a judicial organisation was necessary which could take action against those guilty of crimes against international justice". 49

126. The administration of justice in the community of States will not be complete until a criminal jurisdiction is established to cope with international crimes. The necessity for such a jurisdiction seems to be a fact established beyond reasonable doubt.

IV. CONCLUSIONS

The three questions

127. After reviewing the facts and considerations relative to the broad question of the establishment of an international system of repression of international crimes, it is time to consider the concrete questions proposed by the General Assembly to the International Law Commission by resolution 260 B (III) of 9 December 1948, and submit the answers which in my judgment the Commission might desire to give the General Assembly. Those questions are:

1. Is it desirable to establish an international judicial organ for the trial of persons charged with genocide and other crimes?

2. Is it possible to establish such a judicial organ?

3. Is it possible to establish a Criminal Chamber of the International Court of Justice?

Let us consider each of these questions separately.

(1) Desirability of the International Judicial Organ

128. That it is desirable to establish a judicial organ for the trial of international crimes, seems to be evidenced by all the facts, declarations, studies, proposals, recommendations, plans and decisions which have marked for a period of over thirty years the birth and growth of the idea of an international criminal jurisdiction. In fact, more than something desirable, it is a thing desired, an aspiration of Governments, institutions, conferences, jurists, statesmen and writers. Part III, section 4 of this report furnishes in my opinion abundant proof of my assertion.

(2) Possibility of the International Judicial Organ

128. That it is possible to establish an international criminal organ of penal justice is demonstrated by actual experience. A judicial organ of that type was created by the Geneva Convention of 1937 for the trial of persons responsible for acts of international terrorism. Two International Military Tribunals were set up by multilateral agreements, one in Nürnberg in 1945, the other in Tokyo in 1946. These two tribunals did actually function and fulfil their mission. Seven different drafts for statutes of an international judicial organ have been formulated, plus the charters of Nürnberg and Tokyo, and their texts show that the constitution of an international court is possible and feasible, despite the many differences existing among them.

129. One objection worthy of some consideration has been raised against the creation of a permanent international court of penal justice, namely, the question of sovereignty. It has been argued that for States to relinquish their domestic penal jurisdiction and to be obliged to deliver their own nationals to an external jurisdiction would be contrary to the classical principle of sovereignty, doubtless meaning absolute sovereignty. This objection, which of course covers an immense field of discussion, might be countered with the remark that certain crimes perpetrated by Governments or by individuals as representatives of Governments, could hardly be tried by territorial courts. Only an international court can properly try certain international crimes. Consequently, for the repression of crimes against the peace, war crimes, crimes against humanity and genocide, an international court is essential. A more general but equally direct answer is that the principle of absolute

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49 "Historical Survey, op. cit., p. 9."
sovereignty is incompatible with the present organization of the world. The very existence and functioning of the United Nations implies a relinquishment of part of the sovereign rights of nations. Against the theory of absolute sovereignty stands the incontrovertible, palpable fact of the interdependence of States. Interdependence regulates life in the community of States, very much in the same manner as limitations to individual freedom regulate life in the national society. For States as well as for individuals, the right of every one is limited by the rights of others. The sovereignty of the State is subordinated to the supremacy of international law.

130. I submit that an international criminal jurisdiction may be established upon the following bases:

1. That an International Penal Court or a Criminal Chamber of the International Court of Justice be created by the United Nations;

2. That such a judicial organ be vested with power to deal with crimes against the peace and security of mankind, genocide and such other crimes in respect of which jurisdiction may be conferred on it by international convention;

3. That the jurisdiction of the international organ of penal justice be exercised over States as well as over individuals accused of any of the crimes above mentioned;

4. That the judicial organ be competent also to decide certain controversies relative to the administration of criminal justice;

5. That all crimes for which States or individuals be tried by the international judicial organ be defined in an International Penal Code;

6. That the judges of the Criminal Court or Chamber be jurists of high qualifications elected in the same manner as the judges of the International Court of Justice and chosen without distinction as to nationality;

7. That the Criminal Court or Chamber shall be a permanent body, but shall sit in plenary session only when it is seized of proceedings for an offence within its jurisdiction;

8. That a Permanent Division of the Court or Chamber be constituted, in such manner as may be determined by the Statute, to attend to current business and to convene full meetings when necessary;

9. That international criminal proceedings shall be started only by the Security Council or by a State duly authorized therefor by the Security Council;

10. That defendants appearing before the international judicial organ shall have all the guarantees necessary for their defence and that hearings shall be public.

131. It is my humble opinion that upon these bases, or such other bases as may be acceptable to the Commission, the creation of a judicial organ for the trial of persons, charged with genocide and other crimes, is possible.

(3) POSSIBILITY OF ESTABLISHING A CRIMINAL CHAMBER OF THE WORLD COURT

132. The creation of a Criminal Chamber of the International Court of Justice is also a question in which an abundance of favourable opinion is found in the plans and proposals formulated in connexion with the problem of repression of international crimes. The creation of such a Chamber in the defunct Permanent Court of International Justice or in the present International Court of Justice has been proposed in draft Statutes or otherwise, by the Third Committee of the Assembly of the League of Nations (Historical Survey, op. cit., p. 11); by the International Law Association (Ibid., p. 61); by the Inter-Parliamentary Union (Ibid., p. 73); by the International Association of Penal Law (Ibid., pp. 75-79); and in the Committee on the Progressive Development of International Law and its Codification (Ibid., p. 119).

133. If the repression of international crimes is attributed to a Chamber of the International Court of Justice, the proposed international criminal jurisdiction, which contemplates the trial of States and individuals, will be vested in the International Court of Justice, of which the Criminal Chamber would be an integral part. Now, Article 34 of the Statute of the Court provides “1. Only States may be parties in cases before the Court.”

134. It is evident that individuals could not be arraigned as defendants before a Criminal Chamber of the International Court of Justice while this provision is in force, as in international criminal cases the parties would be the community of States and the State or individual accused. Therefore, in order to create a Criminal Chamber of the International Court of Justice with power to try States and individuals, as envisaged in the different plans and in resolution 260 B (III) of the General Assembly, it will be necessary to amend the Statute of the Court in such a manner as may be required in order to eliminate in criminal matters the restriction set forth in Article 34. With this proviso the question propounded in the final paragraph of resolution 260 B (III) is answered in the affirmative.

V. FINAL WORDS

135. In conclusion, taking the question of an international criminal jurisdiction in its broadest sense, and having in mind the experiences of the recent past as well as the needs of the future, I will thus sum up my thought:

136. Whether the action of the Nürnberg and Tokyo Tribunals was based upon pre-existing law or not; whether the executions were political or judicial; whether the trials were right or wrong, are now irrelevant questions, proper only for academic discussion. The essential question before the Commission is whether it is desirable and feasible to institute an international criminal jurisdiction for the prevention and punishment of international crimes. My answer to that question is unhesitatingly in the affirmative. The community of States is entitled to prevent crimes against the peace and security of mankind and crimes against the dictates of the human conscience, including therein the hideous crime of genocide. If the rule of law is to govern the community of States and protect it against violations of the international public order, it can only be satisfactorily established by the promulgation of an international penal code and by the permanent functioning of an international criminal jurisdiction.
137. The community of States realizes that another war will mean the destruction of civilization. It has not only a right but also a duty to make sure that civilization — both material and moral — is not destroyed. The community of States has the same right every community of individuals has to protect its existence from crime and provide for its own security through the organization of a permanent system of penal justice.

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by Emil Sandstrom, Special Rapporteur

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I. TERMS OF REFERENCE

1. By resolution 260 B (III) adopted by the General Assembly on 9 December 1948, the International Law Commission was invited to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions”. In carrying out this task the Commission was asked to “pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice”.
