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Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur

Topic:
Question of international criminal jurisdiction

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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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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".

1a. The International Law Commission, at its meeting of 3 June 1949, charged Professor Ricardo Alfaro of Panama and myself, as joint rapporteurs, to present reports on the question stated in the resolution, for consideration at the second session of the Commission to be opened at Geneva on 5 June 1950.

2. In interpreting these terms of reference two alternatives offer themselves: the establishment of an international criminal jurisdiction outside the framework of the United Nations by a special group of States, or the establishment of a judicial organ of the United Nations within the framework of the United Nations Organization.

2a. The first alternative presents very few difficulties. A special group of States has certainly the possibility of establishing by agreement a special organ outside the framework of the United Nations for the trial of international criminal cases referred to it by Member States in accordance with that agreement. These States have of course to decide for themselves whether such an organ is desirable in the light of the aims pursued by them.

2b. The difficulties arise only when the question is raised of establishing a judicial organ within the framework of the United Nations with a view to establishing a jurisdiction universal in principle. Considering that the request to study this problem came from the General Assembly, and in view of the circumstances in which this request was made, the latter alternative must be considered as the correct interpretation of the terms of reference.

2c. The resolution therefore must be assumed to aim at a study of the question (1) whether and on what conditions, with regard to the United Nations Charter, the judicial organ as envisaged in the request could be established and (2) whether, in the light of the result of that study, and, in general, in the actual state of organization of the international community, the establishment thereof would be desirable.

II. PROGRAMME OF INVESTIGATION

3. The two questions are interwoven and cannot altogether be kept apart. It would, however, facilitate the investigation, if they were treated separately. As the desirability of an international judicial organ having competence in criminal matters must largely depend on the powers conferred upon it, it is preferable to undertake first the study of the question of the possibility of establishing the organ, as understood in paragraph 2c above, on the assumption that, outside the Charter of the United Nations, there is nothing to prevent its establishment.

III. POSSIBILITY OF ESTABLISHING AN INTERNATIONAL JUDICIAL ORGAN HAVING COMPETENCE IN CRIMINAL MATTERS

A. RELEVANT PROVISIONS OF THE CHARTER

4. Article 7 of the Charter deals with the organs of the United Nations. Paragraph 1 of the Article provides that there are established as the principal organs of the

United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat. In paragraph 2 it is further provided that such subsidiary organs as may be found necessary may be established in accordance with the Charter.

4a. In Article 92 the International Court of Justice is declared to be the principal judicial organ of the United Nations. The Statute of the Court, in accordance with which it shall function, is further declared to form an integral part of the Charter. Article 93 provides that all Members of the United Nations are *ipso facto* Parties to the Statute of the Court.

4b. According to Article 94 each Member of the United Nations undertakes to comply with the decision of the Court in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.

B. PROVISIONS OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

5. The Statute of the International Court of Justice determines in Article 36 the competence of the Court. The provisions in this respect, viewed in the light of the tradition in this field, lead to the conclusion that the competence of the Court does not include international criminal jurisdiction in the sense of a repressive jurisdiction. In this respect it is also of interest to note that according to Article 34 only States may be parties in cases before the Court. In so far as, according to modern views, stress is laid also in the international sphere on individuals as objects of measures of repression, this provision confirms that criminal repressive jurisdiction is not envisaged.

C. IS AMENDMENT OF THE CHARTER NECESSARY FOR ESTABLISHING AN INTERNATIONAL CRIMINAL COURT?

6. The first question that arises against the background of the above provisions of the Charter and the Statute is whether a *special* International Court can be created without an amendment of the Charter.

7. This question, in its turn, seems to depend on whether such an organ should be considered as a principal organ of the United Nations, according to Article 7, paragraph 1, or as a subsidiary organ according to paragraph 2 of the same Article. It seems natural that the United Nations should be able to establish subsidiary organs without having to amend the Charter, whereas with respect to principal organs a contrary conclusion seems to follow from the wording of Article 7, paragraph 1.

8. It might be difficult to decide what is a principal organ and what is a subsidiary one. The analogy with the International Court of Justice seems to point to the conclusion that an International Criminal Court would have to be considered as a principal organ. The establishment of such a Court would mean that the United Nations

would assume another important function and it seems natural that this could be done only by an amendment of the Charter. This confirms the conclusion that such a Court should be considered as a principal organ.

9. The implication of the question whether an amendment of the Charter is necessary is that in such an event the provisions of Article 108 of the Charter must be applied, i.e., the amendment would have to be adopted by a vote of two-thirds of the Members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent Members of the Security Council. In other words the creation of an International Criminal Court would require a special majority and be subject to the veto.

D. HOW CAN CRIMINAL JURISDICTION BE CONFERRED ON A CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE?

10. If, instead of creating a special International Criminal Court, it were contemplated to confer criminal jurisdiction on a Chamber of the International Court of Justice, there is no doubt that this would require an amendment of the Statute. According to Article 69 of the Statute such an amendment shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to the Charter. Consequently, the veto would apply also in this case.

E. TO WHAT EXTENT WOULD A CRIMINAL JURISDICTION BE BINDING UPON MEMBERS OF THE UNITED NATIONS?

11. Another question which arises is to what extent the jurisdiction of an international judicial organ for the trial of criminal cases would be binding upon the Member States, in the event of such a Court being set up according to the relevant rules.

12. It is submitted that legislative power to make the jurisdiction of the Court compulsory is not conferred on the Assembly. The jurisdiction of the Court would depend on the acceptance by the Member State of such jurisdiction. It is also to be noted that in the terms of reference the jurisdiction of the Court is assumed to be conferred upon it by international conventions.

F. CONCLUSIONS

13. As a first conclusion of the study made it can be stated that an international criminal jurisdiction can be established either as a special Court or as a special chamber of the International Court of Justice in accordance with the provisions of the Charter relative to amendments of the Charter, which implies a special majority and possible application of the veto. Secondly, it can be concluded that the jurisdiction of a Criminal Court will not be compulsory but will depend on the submission of the Member State thereto especially — it is assumed — by adhering to conventions conferring jurisdiction upon the Court.

IV. DESIRABILITY OF AN INTERNATIONAL CRIMINAL JURISDICTION

14. Turning now to the question of the desirability of establishing an International Criminal Jurisdiction, it may first be stated that after the experiences of mankind during the two world wars of this century there undoubtedly is an urgent desire for such a jurisdiction. Few things could better satisfy the common craving for justice.

15. Unfortunately, however, there are great obstacles to the creation of an effective criminal jurisdiction in the international sphere. If one keeps in mind that the criminal jurisdiction exercised by a State within its territory is the product of a long development whereby the State has gained sovereignty within that territory, it cannot be taken for granted that in the actual stage of organization of the international community an effective inter-state criminal jurisdiction can be established. Whether, in view *inter alia* of the findings on that point, it is desirable to establish such a jurisdiction, will be the subject of the following investigation.

A. METHOD OF INVESTIGATION

16. When we think of an international criminal jurisdiction, our thoughts are undoubtedly guided by our ideas regarding the repression of crimes as it is organized within the national State.

17. It is submitted that for an effective repression of international crimes the same requirements are needed. Therefore, the answer to the question, as defined above in paragraphs 2c, under (2), and 15, may best be sought by analysing first how the repression of crimes within a State is organized and thereafter proceeding to investigate whether in the light of that analysis the creation of an International Criminal Court would favour the repression of crimes in the international sphere or otherwise be an advantage to the community of States.

B. REPRESSION OF CRIMES WITHIN A STATE

18. In general the repression of crimes in the modern State is so organized that the presumptive author of a crime is brought to trial before a Court which investigates whether the accused is guilty or not and, in case of conviction, metes out a punishment according to a criminal law, whereafter the punishment is executed by the competent authorities.

19. The relevant elements in this process are: (a) a criminal law defining what acts are criminal and the punishment that can be inflicted; (b) courts for the trial and eventual conviction of the accused and the meting out of the punishment; (c) an organization for bringing the criminals before the court and for executing the punishment after the conviction. An effective organization of criminal justice requires that repressive measures be taken whenever a crime is committed and the author is found. Otherwise the repression will lose much of its effect.

20. The purpose of the criminal law is to point out in the precise manner of legislation what the State forbids under penal sanction so that nobody can be in ignorance

thereof. It further aims at the elimination of arbitrariness in the determination of the criminal character of an act, and it safeguards in that way the justified interests of the accused.

21. The trial before a Court has for its purpose to state, on behalf of the community, in an objective and solemn manner whether or not the accused has committed a crime according to the criminal law and it also aims at the elimination, as far as possible, of arbitrary elements in the conviction and the meting out of the punishment. It thus safeguards the interests of the accused.

22. A criminal law and a Court can attain real importance only if there exists an organization which, in the constant manner pointed out in paragraph 19 above, brings the authors of crimes before the Court and executes the punishment. This is in fact the positive side and the essence of the repression. The purpose of the other elements is only to give to the repression an objective and rational character, to prevent an arbitrary handling of the repression and safeguard the interests of the accused. Without the organization mentioned above the trial will be a show which at best will in a solemn form proclaim the culpability of the accused and the disapproval of the community, but will not constitute for the culprit or other prospective perpetrators of crimes a strong inducement to abstain therefrom.

C. HOW WOULD THE REPRESSION OF INTERNATIONAL CRIMES WORK?

23. If, in the light of the aforesaid, we now envisage how a process of repression, on similar lines, of international crimes would work in the actual stage of organization of the community of States, many differences may be noted.

(a) *In view of the development of international criminal law*

24. With respect to the law defining international crimes, there does not exist the same kind of machinery for legislation in the international as in the national sphere. In the international sphere it depends largely on treaties whether acts will be forbidden and subjected to sanctions (compare the terms of reference), and the value of such treaties as bases for the repression of crimes in the international sphere will be considerably influenced by the extent to which the States will adhere to these treaties.

25. When the question of an international criminal jurisdiction was discussed in the League of Nations it was the lack of a criminal law which came into the foreground, and it was considered as an obstacle to the creation of an international criminal jurisdiction.

26. The lack of a legislative machinery, however, does not necessarily mean that there are no international crimes nor rules of international criminal law. Definitions of such crimes and rules of such law may exist also on the basis of customary law.

27. There have been important developments in this field after the era of the League of Nations. Whatever might have been the situation at that time, it is submitted that, in view of the Nürnberg trial, the findings of the

Nürnberg Court and the resolution¹ of the United Nations confirming the principles of the Nürnberg judgement, there now exist, on the basis of customary law, important rules of international criminal law which can be used for the repression of international crimes. Another thing is that further development of international criminal law might be achieved through the conclusion of treaties.

28. In view of the situation with regard to international criminal law as described in paragraph 27 above, it is submitted that the actual stage of development of international criminal law does not, taken by itself, prevent the establishment of an international criminal jurisdiction.

(b) *In view of the conditions under which an International Criminal Court may be established*

29. Reference is made to the conclusions contained in paragraph 13 above. The implications of these conclusions are that even if an international criminal jurisdiction were established, it is very uncertain whether it would have competence in an actual case, and as long as an important group of States are of the opinion that the repression of crimes—even such crimes which have an inter-State character—is a matter within the exclusive competence of the State and not a matter to be dealt with by the international community, there seems to be a very small chance that this uncertainty will be removed in the near future.

(c) *In view of the lack of an organization for bringing the accused before the Court and for executing the judgements*

30. If, at last, we consider the possibilities of bringing the accused before the Court, provided that it be competent, and of executing the judgements, it must be admitted that there exists no international organization whatsoever for this purpose. In the event of a State refusing to appear before the Court, or to bring before it persons being in its territory, or to execute a judgement, there are no means, in the actual organization of the international community, to have this done.

31. There is of course, at least in theory, a possibility of creating the necessary machinery by amending the Charter, even if it is difficult to see how it would be organized and who would consent to act as the policeman. Still in many cases nothing short of war would be sufficient to guarantee results. In any event the bringing of the accused before the Court and the execution of a judgement would remain uncertain.

32. Now it could be said that as a rule international crimes are perpetrated only during a war. That is partly true, though not in all cases (e.g., genocide). But it does not improve the situation. On the contrary, the fact that in a large number of cases international crimes are committed only in war (especially those which customary law hitherto considered as international crimes) creates a special difficulty. What guarantee is there that the

¹ See General Assembly resolution 95 (I).

aggressor will not become the victor or that the war will not result in a draw? In such an event, can it be supposed that the aggressor State will appear as a defendant before the Court or send its nationals before it, even if it had accepted its jurisdiction by a treaty prior to the war?

33. It must be concluded that actually there is no organization for bringing the accused before the Court or for executing its judgements and that on the whole the prospects of setting up an effective organization for that purpose in the prevailing circumstances are not very bright.

V. SUMMING UP

34. The general conclusions can be summed up in the following way:

An international criminal jurisdiction can be set up in accordance with the provisions of the Charter. A qualified majority is needed and the decision is subject to the veto. In so far as the jurisdiction depends on the recognition of international crimes, there exist rules of customary international criminal law recognizing certain important crimes, but for the rest the Court would be limited, to a large extent, to dealing with acts recognized by conventions as criminal with respect to the signatories. The competence of the Court will be restricted to parties having submitted by convention to its jurisdiction. No organization does exist to enforce an appearance before the Court or the execution of its judgements, and it seems difficult to establish such an organization. The jurisdiction therefore is likely to be limited and brought into action in a haphazard way. There are great risks that culprits will not always be brought before the Court. On the whole this will give the impression that the jurisdiction is being exercised in an arbitrary way. Its deterring effect will thus be very doubtful, if any.

VI. PROS AND CONS

A. DOES THE EXISTENCE OF AN INTERNATIONAL CRIMINAL LAW REQUIRE A SPECIAL JUDICIAL ORGAN?

35. In favour of an international criminal Court it has been said that the existence of an international criminal law—even on the basis of customary law—requires a criminal jurisdiction. On the other hand it can be argued that the establishment of an international criminal jurisdiction is a practical question with respect to which one has to weigh pros and cons. If it were found that the disadvantages would outweigh the advantages and, in consequence, a Court were not created, the rules of international criminal law could still be applied by *ad hoc* tribunals and, what is perhaps more important, those rules would lay down in an authoritative way what acts, according to the public opinion of the world, may not, in principle, be committed. It would be a condensed restatement of what exists already in the form of moral precepts. To establish a Court is a step towards execution. A failure would expose the inefficiency of the international organization and thereby harm its prestige

and development. To a certain extent the last argument applies also to the law remaining unenforced, but in view of what has been said before, to a much lesser degree, especially with regard to the rules of customary law.

B. POSSIBILITY OF DEVELOPMENT

36. It could further be argued that a criminal jurisdiction which could be established must necessarily show defects at its initial stage, that at this stage the stress would be mainly on the solemn declaration of guilt before world opinion and that little by little a development would take place.

36a. These reasons would have some weight if the fundamental ideas in all quarters were the same. There exists, however, within an important group of States an opinion against creating anything resembling a Super-State and it is considered that criminal jurisdiction ought to be reserved for the national State. In the presence of such a difference of opinion with respect to fundamental principles, the consensus necessary for establishing a permanent international criminal jurisdiction will be lacking for a long time.

36b. It can further be said against the arguments in favour of establishing a criminal jurisdiction that the judicial organ that could be set up in the actual organization of the community of States would be impaired by such defects that the jurisdiction would thereby be brought into discredit and would, in consequence fail to produce the effect aimed at.

37. Thus, for instance, in the case of an international crime having been committed, it is very uncertain whether the judicial organ would be competent to judge the case. Even if it were competent, it is further uncertain whether the accused could be brought before the Court. It may be answered thereto that the possibility exists of pronouncing a judgement *in contumaciam*. Not all judicial systems, however, recognize such judgements, and it is questionable whether they ought to be introduced into the criminal procedure, especially in the international sphere. One particular argument against introducing them into the international sphere is that one has to deal there with moral concepts and sentiments of such a nature as to reduce considerably the effect of criminal repression, except perhaps in a limited number of cases. In order to produce an appropriate effect, a judgement must be based on solid facts. Otherwise, a judgement would only give nourishment to a propaganda in the country concerned which would diminish the effect of the judgement. There is certainly very little guarantee that a judgement will be based on a solid ground in case of a judgement *in contumaciam*. In this respect it must also be stressed that it will very often be difficult to obtain all the relevant facts, unless the archives of the aggressor State are opened.

37a. Finally, if the culprit is not apprehended so that he can be brought before the Court, there is uncertainty as to the possibility of execution. And in this respect much of what has been said in paragraph 22 is applicable. The effect of a conviction without execution would in most cases be lost.

C. THE NÜRNBERG TRIAL AS AN EXAMPLE

38. The Nürnberg trial has been pointed out as an example, and at the same time the desire to create a permanent international criminal jurisdiction has its origin, to a large extent, in certain criticisms of that trial, which might be met by the establishment of a permanent jurisdiction. Such a permanent jurisdiction would eliminate the impression that the judgement is a victor's vengeance. In this respect one must keep in mind that the Nürnberg trial was the result of an extraordinarily complete defeat and a complete agreement between the victors on the questions involved in the trial. The victors were also able to exercise sovereignty in the defeated countries.

38a. It is very uncertain whether this situation will repeat itself. With regard to the criticisms of the Nürnberg trial, it can further be said that because of the haphazard way in which a permanent jurisdiction would be working, according to what has been said above, and because of the impossibility of foreseeing the

political events, there will be no guarantee against the same criticisms being raised against such a permanent jurisdiction.

VII. FINAL CONCLUSION

39. In my opinion the cons outweigh by far the pros. A permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good. The time cannot as yet be considered ripe for the establishment of such an organ.

40. If such a judicial organ is to be established, it is submitted that, in view of the defects with which it would be impaired, it would be preferable to provide for the possibility of establishing a Criminal Chamber of the International Court of Justice in case of need. The defects would then be less noticeable, and such a possibility could perhaps in a given case meet the criticisms raised against the Nürnberg trial.