



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 57
Issue 1 *Dickinson Law Review - Volume 57,*
1952-1953

10-1-1952

A Proposal for An International Criminal Court; A Critique and An Alternative

Robert B. Ely III

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Robert B. Ely III, *A Proposal for An International Criminal Court; A Critique and An Alternative*, 57 DICK. L. REV. 46 (1952).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol57/iss1/4>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

A PROPOSAL FOR AN INTERNATIONAL CRIMINAL COURT;
A CRITIQUE AND AN ALTERNATIVE
(Copyright 1951—Author)

By

ROBERT B. ELY, III*

Introduction

Charged with a duty to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification,"¹ the General Assembly of the United Nations has thus far been active in its efforts to meet this responsibility. Some of its most significant endeavors along these lines have been in the field of international criminal law. In view of the participation therein by representatives of the United States, and the degree to which the attitude of this country will affect these and related endeavors, the American Bar should know what has thus far been done, and should express its views with regard to the future policy of our government.

Early in its history the General Assembly created the International Law Commission² as a body of experts to assist it in the field under discussion; and a year later the assembly adopted a statute setting out the commission's terms of reference.³ Manley O. Hudson of the United States⁴ was elected in 1948 as its chairman and has since acted in this capacity.

Two years previously the assembly had declared⁵ that "genocide" was a crime under international law. In December of 1948 it had received from its legal committee a "Draft Convention on the Prevention and Punishment of the Crime of Genocide," in Article VI of which it was provided that:

"Persons charged with genocide or [conspiracy in, incitement to, attempts to commit, or complicity in the same] 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." (Italics supplied.)⁶

This draft was adopted by the General Assembly on December 10, 1948, and signed the following day on behalf of the United States.⁷ (It has since been trans-

*B.S., Princeton, 1928; LL.B., University of Pennsylvania, 1931; formerly deputy receiver in Pennsylvania Department of Banking; assistant counsel, Insurance Company of North America; member of Philadelphia and American Bar Associations.

¹ Charter of the United Nations, Art. 13.1(a).

² See Sohn "The Development of International Law," 34 A.B.A.J. 53 (1948).

³ Ibid.

⁴ Former judge of the League of Nations' Permanent Court of International Justice and of the United Nations' International Court of Justice. See 34 A.B.A.J. 1149 (1948).

⁵ By Resolution 96(1) of December 11, 1946.

⁶ For full text of the Convention, see 35 A.B.A.J. Journal 52 (1949).

⁷ Gross, "General Assembly Adopts Convention on Genocide," 19 Dep't. State Bull. 755 (1948).

mitted by the President to the Senate with favorable recommendations,⁸ but has not yet been ratified).

Immediately prior to approving this draft convention, the General Assembly⁹ had invited 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 . . . [paying] attention to the possibility of establishing a Criminal Chamber of the International Court of Justice." In Part IV of the report of its second session¹⁰ the International Law Commission indicated its conclusions that the establishment of such an international judicial organ was both desirable and possible, but that it did not recommend the establishing of the suggested chamber of the I.C.J.

Shortly thereafter,¹¹ the assembly, after reciting the above facts, and expressing the opinion that further decisions could not be reached except on the basis of concrete proposals, appointed a committee of seventeen members of the United Nations¹² "for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court." This committee met in Geneva throughout August, 1951, under the chairmanship of George Maurice Morris, former president of the American Bar Association, and produced a draft statute and a report¹³ which it is the purpose of this paper to analyze and discuss:

The Proposed Statute for an International Criminal Court

The draft statute, consisting of 55 articles, is divided into seven chapters, dealing in order with: General Principles; Organization; Competence; Committing Authority and Prosecuting Attorney; Procedure; Clemency; and Final Provisions.

In *Chapter I (General Principles)* it is to be noted that there is established a *single*,¹⁴ *permanent*¹⁵ International Criminal Court to apply international *and, where appropriate, national law*¹⁶ in the trial of "persons accused of crimes under

⁸ See report of "Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, on the International Convention on the Prevention and Punishment of the Crime of Genocide," Government Printing Office, 1950. Further developments are outlined in the reports of the American Bar Association Special Committee on Peace and Law through the United Nations dated September 1, 1949, September 1, 1950 and September 1, 1951.

⁹ By Resolution 260B(III) of December 9, 1948, recited in the report mentioned in n. 10, *infra*.

¹⁰ For text see 45 Am.J.Int.L. 134 *et. seq.* (January, 1951).

¹¹ By Resolution 489(V) of December 12, 1950, recited in the Report of the Committee on International Criminal Jurisdiction on the session held August 1-31, 1951, General Assembly of the United Nations Document A/AC.48/4, 5 September, 1951 (hereafter cited as "C.I.C.J. Report"). See "Development of International Law," 37 A.B.A.J. 932 (December, 1951).

¹² *I.e.* the committee mentioned in n. 11, *supra*, composed of Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, Netherlands, Pakistan, Peru, Syria, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

¹³ Cited in n. 11, *supra*.

¹⁴ Resolution 489(V) of the General Assembly, n. 11, *supra*, referred to "*an* international judicial organ."

¹⁵ Draft Statute for an International Criminal Court (included in the report cited in n. 11, *supra*, and hereafter cited simply as "draft statute"), Art. 3; "The court shall be a permanent body."

¹⁶ Draft statute, Art. 2.

international law, as may be provided in conventions or special agreements among states (which are) parties to the present statute."¹⁷ The court is to sit "only when matters before it require attention."¹⁸

Chapter II (Organization of the Court) follows a pattern made familiar, with one notable exception, by the statutes of the League of Nations' Permanent Court of International Justice (P.C.I.J.) and the current International Court of Justice (I.C.J.) in dealing with: the qualification,¹⁹ number²⁰ and nationality of judges;²¹ their nomination,²² election,²³ terms,²⁴ oaths of office,²⁵ privileges and immunities,²⁶ occupations²⁷ and disability;²⁸ their disqualification,²⁹ dismissal³⁰

¹⁷ Draft statute, Art. 1.

¹⁸ Draft statute, Art. 3. C.I.C.J. Report, ¶ 25: ". . . This did not mean that [the court] should be in permanent session; the permanence should be understood in the sense of organic, not of functional, permanence. . . . There might be long periods in which the court would have no cases to consider."

¹⁹ Draft statute, Art. 4: ". . . high moral character. . . [qualified by national standards for] highest judicial office. . . recognized competence" This is a *verbatim* copy of Art. 2 of the Statute of the I.C.J.

²⁰ Draft statute, Art. 5. The number is nine.

²¹ Draft statute, Art. 6, provides the same rule as does I.C.J. Statute, Art. 3, for determining which nationality shall govern in the case of persons with multiple nationality. Both articles provide that no two judges may be nationals of the same state. The draft statute, alone, recognizes that a judge may be a person without nationality.

²² Art. 7 of the draft statute provides for nominations by "the states parties to the . . . statute," while Art. 4 of the Statute of the I.C.J. provided for nomination by "the national groups in the Permanent Court of Arbitration." In both the draft statute (Art. 8 and 9) and in the Statute of the I.C.J. (Art. 5 and 7) the Secretary General of the United Nations is to invite nominations and prepare a list of nominees.

²³ In the draft statute, Art. 11, it is provided that the judges shall be elected at meetings of the state parties to the statute, convened by the Secretary General; whereas under Art. 8 to 12 of the Statute of the I.C.J., the judges are elected by the General Assembly and the Security Council, acting independently of one another.

²⁴ Under both Art. 12 of the draft statute and the Statute of the I.C.J., Article 13, the term of a judge is normally nine years, with a possibility of reelection, and a staggering of terms of the initial members.

²⁵ Art. 13 of the draft statute and Art. 20 of the Statute of the I.C.J. are *verbatim* copies of each other in their substantive portions.

²⁶ There is a similar identity in the provisions of Art. 14 of the draft statute and Art. 19 of the Statute of the I. C. J.

²⁷ The provision of Art. 15 of the draft statute, barring only occupations which might interfere with the judge's judicial function during session of the court, or incompatible with his function as a judge, is less stringent than the prohibition in Art. 16 of the Statute of the I.C.J.

²⁸ Both Art. 16 of the draft statute and the Statute of the I.C.J., Art. 17.2 prohibit a judge from participating in any case in which he has previously taken part in any other capacity.

²⁹ Art. 17 of the draft statute makes a provision (not found in the corresponding Art. 24 of the Statute of the I.C.J.) for motion by a *party* to disqualify a judge.

³⁰ Art. 18 of the draft statute is substantially identical with the corresponding and similarly numbered article of the Statute of the I.C.J., providing for dismissal only on the unanimous decision of the other members of the court, that a particular judge is no longer qualified.

and resultant vacancies;³¹ the officers,³² seat (unspecified),³³ pay³⁴ and finances³⁵ of the court. Although the proposed court, like those of the League and of U. N., is designed to act alone in its field, and hence is to be considered a "world court" in this sense; its judges are not to be nominated and elected by general action of the "world organization" (as were the judges of the P.C.I.J.³⁶ and the I.C.J.)³⁷ but by only those states which adhere to the proposed statute, with the administrative assistance of the Secretary of the United Nations.³⁸ In common with the P.C.I.J. and the I.C.J. the proposed court is given power to adopt "rules for carrying out its functions" and in particular "rules of procedure."³⁹

Chapter III (Competence of the Court) is of particular interest. Under its provisions the court shall be competent to judge "natural persons only," including ex-heads or ex-agents of government⁴⁰ upon whom may be imposed "such penalty as the court may determine, subject to any limitation prescribed in the instrument conferring jurisdiction upon the court."⁴¹ However, there is no express provision in the statute for enforcement of these penalties. The court may "request national authority to assist it," but "a state shall be obliged to render such assistance only [as it may have bound itself to do so]."⁴²

"No person shall be tried before the court unless jurisdiction has been conferred . . . by the state or states of which he is a national and . . . in which the crime is alleged to have been committed."⁴³ This jurisdiction may be conferred by general convention, by special agreement as to a particular case, or by unilateral declaration.⁴⁴ But in each such instance approval must be obtained from the General Assembly of the United Nations.⁴⁵

Access to the court is limited to the General Assembly of the United Nations, organizations of states authorized by it, and states which have conferred upon the

³¹ Art. 19 of the draft statute provides, as does Art. 14 of the Statute of the I.C.J., for vacancies to be filled in the same method as laid down for the first election.

³² Draft statute, Art. 20, and Statute, of the I.C.J., Article 21, both provide for a president, a vice president, a registrar, and "such other officers as may be necessary."

³³ As is indicated, Art. 21 of the draft statute leaves the location of the seat of the court unnamed; but gives the court the privilege of sitting wherever necessary. This last privilege also was given the I.C.J. by Art. 22 of its statute.

³⁴ Art. 22, draft statute, provides for travel expenses and daily pay during sessions, in addition to an "annual remuneration," in contrast with only the annual salaries provided in Art. 32 of the Statute of the I.C.J.

³⁵ Art. 23, draft statute, provides for the expenses of the court to be paid out of a fund created, maintained, collected and administered by the parties; whereas Art. 33 of the Statute of the I.C.J. provided for these expenses to be borne by the United Nations.

³⁶ Compare Art. 8-12 of the Statute of the Permanent Court of International Justice with Art. 11 of the draft statute, n. 23, *supra*.

³⁷ Compare Art. 8-12 of the Statute of the I.C.J. with Art. 11 of the draft statute, n. 23, *supra*.

³⁸ In issuing invitations to nominate and preparing the list of nominees, draft statute, Art. 8 and 9.

³⁹ Draft statute, Art. 24; Statute of the I.C.J., Art. 30.

⁴⁰ Draft statute, Art. 25.

⁴¹ Draft statute, Art. 32.

⁴² Draft statute, Art. 31.

⁴³ Draft statute, Art. 27.

⁴⁴ Draft statute, Art. 26.

⁴⁵ Draft statute, Art. 28.

court jurisdiction over such offenses as are involved in the proceedings for which access is sought.⁴⁶ Note that whereas approval of the assembly is required before jurisdiction is conferred (which may be done for a whole class of cases), no such approval is thereafter required for access as complainant. Jurisdiction may be challenged not only by the parties to the proceeding, but also by any of the states of or in which either the accused is a national or the crime is alleged to have been committed.⁴⁷

Chapter IV (Committing Authority and Prosecuting Authority) is in two parts. In the first, provision is made for the establishment "within the framework of the United Nations" of a "Committing Authority." The number, manner of election, terms of office and qualifications of whose members shall be the same as those of the judges of the court.⁴⁸ Its function shall be to examine the proofs offered by the complainant through an agent designated for that purpose, and, after giving the accused a reasonable opportunity to be heard, to certify the sufficiency of the evidence when it so finds.⁴⁹

In the second part of this chapter,⁵⁰ provision is made for a panel of ten persons chosen at the same time and in the same manner as judges of the court, and similarly qualified, from which are to be chosen the prosecutors of each particular case. Their duties shall be to prepare an indictment based on the findings of the Committing Authority and to conduct the prosecution.

Chapter V (Procedure) deals in turn with: the form of indictment;⁵¹ notice thereof to the accused and state(s) concerned;⁵² trial without jury;⁵³ rights of the accused⁵⁴ (to be present, to conduct his defense in person or by counsel, to charge his expenses against funds of the court where unable to meet them, to have the proceedings translated into his own language, to interrogate witnesses and inspect evidence, to produce evidence in defense, to have the court's assistance in obtaining same, and to be heard or refuse without prejudice to speak); public hearings but private deliberations;⁵⁵ warrants of arrest;⁵⁶ provisional liberty of accused;⁵⁷ powers of court;⁵⁸ dismissal;⁵⁹ nol. pros.;⁶⁰ quorum, majority, judgment and opin-

⁴⁶ Draft statute, Art. 29.

⁴⁷ Draft statute, Art. 30.

⁴⁸ Draft statute, Art. 31.1.

⁴⁹ Draft statute, Art. 33.2—33.5.

⁵⁰ Draft statute, Art. 34.

⁵¹ Draft statute, Art. 35.

⁵² Draft statute, Art. 36, *i.e.* the state of which the accused is a national, and that in which the crime is alleged to have been committed.

⁵³ Draft statute, Art. 37.

⁵⁴ Draft statute, Art. 38.

⁵⁵ Draft statute, Art. 39.

⁵⁶ Draft statute, Art. 40.

⁵⁷ Draft statute, Art. 41, *i.e.* bail.

⁵⁸ Draft statute, Art. 42, *i.e.* control of witnesses and evidence, and maintenance of order at trials.

⁵⁹ Whenever "the court is satisfied that no fair trial can be had." Draft statute, Art. 43.

⁶⁰ Called in Art. 44 of the draft statute "Withdrawal of Prosecution," which must be on approval of the Court.

ion of the court;⁶¹ appeals, subsequent trial, revision and execution of judgment.⁶²

Chapter VI (Clemency) provides for a board of five members (whose qualifications are not specified) with "powers of pardon and parole and of . . . alteration of a sentence of the court."⁶³ It shall adopt its own rules of procedure.⁶⁴

Chapter VII (Final Provisions) provides merely that adherence to the statute shall not prejudice the right of any two or more states to "set up special tribunals to try the perpetrators of crimes over which each of such states has jurisdiction according to the general rules of international law."⁶⁵ It is noteworthy that there are no provisions regarding ratification, entry into force, amendment or denunciation. In this respect the committee reported that it did not consider it essential to the performance of its task, to make proposals regarding these matters, which could "be added to the statute at a later stage of its elaboration."⁶⁶

In a separate annex to its report the committee expressed the *voeu* that along with the statute "a protocol shall be drawn up conferring jurisdiction on [the] court in respect of the crime of genocide."

The Difficulties in the Proposal

It is clear at the outset that the proposal is subject, from the American viewpoint, at least to all of the objections which have thus far been raised against the Declaration of Human Rights,⁶⁷ the Covenant thereon,⁶⁸ and the Genocide Convention.⁶⁹ These objections center about the belief (which in the writer's opinion is correct) that the adoption of these proposals would involve abrupt surrenders of national sovereignty and violent dislocations of established national legal procedures, out of proportion to the slight impetus which could be expected to be given to "the progressive development of international law."

These general objections are made specific by reference to certain provisions of the Constitution of the United States. A full consideration of them would extend this discussion beyond reasonable bounds. However, a brief outline will suffice to suggest the directions in which research must go, if more satisfactory alternatives are to be discovered.

In *Article 3 of the Constitution* we find that "the judicial power [of the United States] shall extend to all cases, in law and equity, arising under. . . treaties; to controversies to which the United States shall be a party; to controversies. . . between citizens. . . [of any state] and foreign states,"⁷⁰ and that

⁶¹ Draft statute, Art. 45 to 49.

⁶² Draft statute, Art. 50 to 53.

⁶³ Draft statute, Art. 54.1 and 54.2.

⁶⁴ Draft statute, Art. 54.3.

⁶⁵ Draft statute, Art. 55.

⁶⁶ C.I.C.J. Report, ¶ 167.

⁶⁷ Text is found in 35 A.B.A.J. 32 (1949). For discussions thereof, see n. 78, *infra*.

⁶⁸ Text is found in 36 A.B.A.J. 577 (1950). For discussions thereof, see n. 78, *infra*.

⁶⁹ N. 6, *supra*. For discussions thereof see n. 78, *infra*.

⁷⁰ § 2, clause 1.

"the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."⁷¹ Again in Article 1 we read that "*Congress shall have power. . . to define and punish. . . offenses against the law of nations.*"⁷²

In the *draft statute* it is provided in Article 1 that "there is established an International Criminal Court to try persons accused of crimes under international law, as may be provided in conventions or agreements among parties to the present statute." In shifting from the philosophy of the Constitution to that of the draft statute, one would transfer from the whole Congress to the President and Senate the power to define crimes against international law, and from the federal courts to the proposed tribunal the powers to try defendants accused of committing such crimes in the United States, whether upon complaint of the United States or of foreign countries. This is surely a radical departure from our present concepts of governmental power and of national sovereignty.

A lesser phase of the same difficulty is found when one compares *Article 1, of the draft statute*, recited above, with the provisions of *Article 1, Section 8, Clause 10 of the Constitution* which provides that "*Congress shall have power. . . to exercise exclusive legislation in all cases whatsoever over [the District of Columbia].*" Here, again, adoption of the statute would mean transferring power from the whole Congress to the President and Senate.

Even more numerous and equally serious conflicts are to be noted between the provisions of our Constitution dealing with the rights of accused persons and with criminal procedure, on the one hand, and those of the draft statute, on the other. Taking them in the order in which they are written in the Constitution, we find:

Constitution, Article 1, Section 9, Clause 2, "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety [*of the United States*] may require it." (Insertion and emphasis supplied.) The *Draft Statute* makes no provision for such a writ and has only a sketchy article (mentioned below) on the subject of "Provisional Liberty of Accused."

Constitution, Article 3, Section 2, Clause 3, "The trial of all crimes, except in cases of impeachment shall be by jury. . . ." *Draft Statute, Article XXXVII*, "Trials shall be without a jury."

Constitution, idem, "Such trial shall be held in the state where the said crimes shall have been committed, but when not committed with in any state, the trial shall be at such place or places as the Congress may by law have directed." *Draft statute, Article XXI*, "The court may . . . sit and exercise its functions elsewhere [than at its unspecified seat] whenever the court considers it desirable."

⁷¹ § 1.

⁷² § 8, clause 10.

Constitution, Amendment 4, “. . . .⁷⁸ No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (emphasis supplied). *Draft statute, Article XL*, “The court shall have power to issue warrants of arrest related to crimes over which the court has jurisdiction.”

Constitution, Amendment 5, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” *Draft statute, Article XXXIII*, “There shall be established within the framework of the United Nations a Committing Authority. . . . to examine the evidence offered by the complainant to support the complaint. . . .the authority shall give the accused reasonable opportunity to be heard and to adduce such evidence as he may desire. . . .The authority shall adopt its own rules of procedure.”

Constitution, idem, “Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” *Draft statute, Article 51*, “No person who has been tried and acquitted or convicted before the court shall be subsequently tried for the same offense in any court within the jurisdiction of any state which has conferred jurisdiction upon the court with respect to such offense.” (Emphasis supplied.) *Quaere* how far this is effectively supplemented by Article L, “The judgment [of the proposed court] shall be final.” (Emphasis supplied.)

Constitution, idem, “Nor shall [the accused] be compelled in any criminal case to be a witness against himself. . . .” *Draft statute, Article XXXVIII, paragraph 3*, “The accused shall have the right to be heard by the court but shall not be compelled to speak. His refusal to speak shall not be relevant to the determination of his guilt. Should he elect to speak, he shall be liable to questioning by the court and by counsel.”

Constitution, idem, “Nor [shall the accused] be deprived of life, liberty or property without due process of law.” (Emphasis supplied.) *Draft statute, Article XXXVIII, paragraph 2*, “The accused shall have a fair trial”

Constitution, Amendment 6, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .” The *draft statute* makes no provisions for speedy trial and, as mentioned above, bars a jury. In *Article XXXIX* we find, “The court shall sit in public unless there are exceptional circumstances in which the court finds that public sittings might prejudice the interests of justice.”

Constitution, idem, “[The accused shall enjoy the right] to be informed of the nature and cause of the accusation.” *Draft statute, Articles XXXV and XXXVI*, “The indictment shall contain a concise statement of the facts which constitute each alleged offense and a specific reference to the law under which the accused is charged. . . .The court

⁷⁸ The quoted portion follows an opening provision as to security from “unreasonable searches and seizures.”

shall bring the indictment to the notice of the accused. . . .The court shall not proceed with the trial unless satisfied that the accused has had the indictment or any amendment thereof, as the case may be, served upon him and has had sufficient time to prepare his defense."

Constitution, idem, ". . . [The accused shall enjoy the right] to be confronted with the witness against him [and] to have compulsory process for obtaining witnesses in his favor. . . ." *Draft statute, Article XXXVIII, paragraph 2*, "[The accused shall have] the right to be present at all stages of the proceedings;. . . the right to interrogate, in person or by his counsel, any witness and to inspect any document or other evidence introduced during the trial;. . . the right to adduce oral and other evidence in his defense;. . . the right to the assistance of the court in obtaining access to material which the court is satisfied may be relevant to the issues before the court." However, while it is further provided in *Article XLII* that "the court shall have the powers necessary to the proper conduct of the trial, including the power to require the attendance of witnesses, require production of documents and other evidentiary material," and in *Article XXXI, paragraph 1*, that "the court may request national authorities to assist it in the performance of its duties," still it is provided in the second paragraph of the latter article that "a state shall be obliged to render such assistance *only* in conformity with convention or other instrument in which the state has accepted such obligation." (Emphasis supplied.)

Constitution, idem, "[The accused shall enjoy the right] to have the assistance of counsel for his defense." *Draft statute, Article XXXVIII, paragraph 2(b)*, "[The accused shall have] the right to conduct his own defense or to be defended by counsel of his own choice, and to have his counsel present at all stages of the proceedings."

Constitution, Amendment 8, "Excessive bail shall not be required." *Draft statute, Article XLI*, "The court shall decide whether the accused shall remain in custody during the trial or be provisionally set at liberty, and the conditions under which such provisional liberty shall be granted."

Constitution, idem, "Nor [shall] excessive fines [be] imposed, nor cruel and unusual punishment inflicted." *Draft statute, Article XXXII*, "The court shall impose upon an accused, upon conviction, such penalty as the court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the court."

As the foregoing comparison shows, no portion of the draft statute contains a *verbatim* copy of the corresponding portion of the Constitution. Only in the case of the accused's right to counsel is there an approach to substantive equivalence. In the case of the right to jury trial there is flat contradiction. In the remaining instances, there are varying degrees of similarity and difference.⁷⁴ In sum, the provisions of the draft statute represent a pronounced departure from those of our Constitution.

⁷⁴ This follows from the declared intentions of the Committee on International Criminal Jurisdiction, stated in ¶ 133 of its report, to "avoid terms which have a precise meaning and established implications in the legal language of one country, but not an equally precise meaning in other countries."

There is a school of legal thought to the effect that the treaty-making power of the President and Senate⁷⁵ is so broad that they might legally commit this country to the draft statute as written, regardless of the provisions of the Constitution recited above. On the other hand, it has been argued⁷⁶ that the treaty-making power cannot be construed thus broadly and that the provisions of the Constitution would prevail with regard, at least, to crimes alleged to have been committed within the territory of the United States. There is no conclusive judicial decision on the point.⁷⁷

The fear that the treaty-making power may be properly given the broader construction and that it might be used to abridge our national sovereignty and to alter radically our scheme of government has been the basis of most of the objections stated against the Declaration of Human Rights, the Covenant thereon, and the Genocide Convention.⁷⁸ Such fears are equally justified, and such objections might equally well be made against the Proposed Statute for an International Criminal Court.

Perhaps these difficulties would seem less insurmountable if there were reasons to believe that the establishment of international criminal courts would give some real impetus to "the progressive development of international law"—either by effectively enforcing observance of international law, or by fostering

⁷⁵ U.S. Constitution, Art. 2, § 2, Clause 1 "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

⁷⁶ Ely, "The Constitutionality of International Courts," 36 A.B.A.J. 738 (September, 1950), and authorities cited.

⁷⁷ See comments of Rifkind, J. in *Indemnity Insurance Company of North America v. Pan American Airways*, 58 F. Supp. 338, 339 (1944).

⁷⁸ Generally see Holman, "Treaty Law-Making—A Blank Check for Writing a New Constitution," 36 A.B.A.J. 707 (1950); Ober, "The Treaty-Making and Amending Powers: Do They Protect Our Fundamental Rights?," 36 A.B.A.J. 715 (1950).

For discussion of the subject of human rights, see Holman, "An International Bill of Rights," 34 A.B.A.J. 984 (1948); Lockwood, "Draft of International Covenant and Declaration on Human Rights," 42 Am.J.Int.L. 401 (1948); "International Covenant: House Urges Study of Constitutional Questions," 35 A.B.A.J. 195 (1949); Moskowitz, "Is the U.N.'s Bill of Human Rights Dangerous?," 35 A.B.A.J. 283 (1949); President Holman's comments, 35 A.B.A.J. 288, 360 (1949); "Universal Human Rights' . . . Current Discussions," 34 Mass.L.Q. 45 (1949); Kunz, "United Nations Declaration of Human Rights," 43 Am.J.Int.L. 316 (1949); Simsarian, "Action on Human Rights," 35 A.B.A.J. 305 (1949); "Human Rights Draft Covenant Revised," 21 Dep't. State Bull. 3 (1949); Cohen "Debate on Human Rights," 21 Dep't. State Bull. 617, 659 (1949); Rix, "Human Rights and International Law: Effect of the Covenant on Our Constitution," 35 A.B.A.J. 713 (1949); "International Human Rights—a Symposium," 14 Law & Contemp. Prob. 411, 545 (1949); McDougal and Leight, "Rights of Man in a World Community," 59 Yale L. J. 60 (1949); Kelsen, "Charter Provisions on Human Rights in American Law," 44 Am. J.Int.L. 543 (1950); Simsarian, "Draft International Convention on Human Rights. . . ." 45 Am. J.Int.L. 170 (1951); Turlington, "Human Rights Commission at the Crossroads," 45 Am.J.Int.L. 534 (1951); Fleming, "The Dangers in the Covenant on Human Rights," 37 A.B.A.J. 737, 816 (1951).

As to Genocide: "Genocide—A Commentary on the Convention," 58 Yale L. J. 1142 (1949); "Action of the American Bar Association in Regards to the 'Genocide' Treaty. . . ." 34 Mass. L. Q. 28 (1949); French, "The Genocide Convention," 43 Am.J.Int.L. 498 (1949); Phillips, "The Genocide Convention—Its Effect on Our Legal System," 35 A.B.A.J. 623 (1949); Kunz, "United Nations Convention on Genocide," 43 Am.J.Int.L. 738 (1949); Culston, "Genocide Convention: Problem for the American Lawyer," 36 A.B.A.J. 206 (1950).

the good will to support it. However, such benefits do not seem likely to result.

In contrast with civil courts (of which more will be said below) criminal courts cannot function effectively without the support of police forces and executioners of their own. If the proposed court were set up and, as is suggested, if it were obliged to rely on national forces for apprehension of the accused and execution of sentence, the proposed court could not discharge its functions effectively except in the case of nonentities whose efforts were too obscure to be of any public interest, and whose trial might well be left to national courts. In cases of real importance, such as plots by national leaders to wage war or commit genocide, the defendant's country would probably resist his arrest, trial and sentence, and nothing short of the very occurrence sought to be avoided, i.e. war, could compel his surrender.

However, there is this to be said (and herein seems to be the main merit of the proposal): if a court such as the one proposed were established in advance of such a war, and were called into action when the war had been won, there would then be less grounds for the cries of "victor's justice!" and "*ex post facto!*" which have been raised in some quarters against the tribunals set up in Germany and Japan after World War II. This, nevertheless, seems a slight advantage to balance against the dislocations of our legal system which would result from adherence to the draft statute.

Again, to view the other side of the coin, not only would the proposed court have little chance, under existing circumstances, of being an efficient factor in enforcing international law; it could not expect any greater success in securing *voluntary observance* of international law. Again in contrast with civil courts, criminal courts do not interpret and apply agreements to which the parties have subscribed nor do they interpret and apply generally accepted rules to which all parties, including the accused, are presumed to have agreed. The decision to impose a sentence upon a criminal defendant is not reached by interpreting any mutual agreement *between* the sovereign and the accused. A conviction is a decision that, under the given circumstances, the punitive force of the sovereign shall be exercised *against* the accused.

Even if this were not the case, it seems likely that the proposed court (once more in contrast to civil courts) would only act on rare occasions.⁷⁹ Consequently, its decisions would not be likely to be much of a factor in cultivating the habit of either compulsory or voluntary abidance by international law.

The Significance of these Difficulties

The difficulties inherent in the fields of American constitutional theory,

⁷⁹ In ¶ 25 of the C.I.C.J. Report it is said: "There might be long periods in which the court would have no cases to consider." It was, no doubt, for this reason that the Committee remarked, in ¶ 55 of its report, that the "annual remuneration" provided in Art. 22 of the draft statute should be "of a symbolic nature."

mentioned above, have been widely discussed in connection with the Declaration of Human Rights, the Covenant thereon and the Genocide Convention.⁸⁰

Some members of the committee which drafted the proposed Statute for an International Criminal Court had these objections, and the practical consideration last mentioned, both firmly in mind when they said in their report⁸¹ that the establishment of such a court "could not be recommended," since it "would meet with insurmountable obstacles" and "would involve very real dangers to the further development of international good feeling and cooperation."⁸² Before proceeding with their task of draftsmanship, these members made certain that "it was understood that no member would be debarred from expressing his opinion as to the desirability of setting up such a court [nor]. . . would commit his government to any of the decisions which the committee might eventually adopt."⁸³

In the face of similar objections to the agreements with respect to human rights and genocide the Senate has thus far withheld its advice and consent to ratification of the Declaration, Covenant and Convention. It is not likely that the proposed Statute for an International Court would meet a different fate.

It rather looks as though the United States were drifting, in this field, into the same position, unfortunate both for this country and the rest of the world, in which it stood with respect to the League of Nations. By their active participation in the discussions of major projects for the progressive development of international law, one group of American representatives has inspired high hopes for the realization of those projects, while another group of American representatives with final authority (and, perhaps, the greater wisdom) seems determined to bar further participation by this country.

It is well known that the United States suffered a severe setback in its international leadership as a result of the rejection by the Senate of the proposals which President Wilson had sponsored. A similar setback would be suffered if this country were to flatly reject the current project for an international criminal judiciary, without offering any constructive alternative. It would, therefore, seem vitally important to take all possible steps to avoid such an unfortunate outcome. No stone should be left unturned in the further search for other, and perhaps more acceptable, methods of strengthening the international judiciary.

An Outline of Alternatives

The activities of the General Assembly of the United Nations in the fields of human rights, genocide and general international criminal jurisdiction have been largely inspired by a clear and valid motive. An attempt has been made to capitalize upon the dramatic values of the war crimes trials in Germany and

⁸⁰ See n. 78, *supra*.

⁸¹ ¶ 10.

⁸² (omitted)

⁸³ *Op. cit.*, ¶ 12.

Japan, which have made a vivid impression on the public mind, the world over. The draft statute for an International Criminal Court represents one effort to formulate and implement the principles for which those trials are thought to have stood.⁸⁴

If one can deduce from the precedents of those trials only the single limited proposition that "there are crimes under international law for which individuals may be tried and punished, regardless of any defense which might exist under their national law," then the draft statute under discussion is about all one can devise by way of implementation for it. One can only provide a method by which such crimes can be defined through international agreement, and a court to try defendants accused of committing the crimes thus defined.

However, it would seem that no strain on logic is needed to deduce from the same precedents two rather broader propositions:

First, that "international law exists apart from and superior to national law," and second, that "it is possible and desirable to establish international courts to interpret and apply international law in litigation involving individuals." In searching for implementation of these broader propositions, one finds a much wider field of opportunities opened up.

True, one faces the same *general* problems of how to establish international courts, and how to define the law which they are to apply. The answer to the first question is as simple here as it was in the case of the proposed criminal court. The tribunals can be established by agreement of like-thinking members of the United Nations,⁸⁵ with either the recommendation or approval of the General Assembly.⁸⁶ The answer to the question of what law shall be applied is already given in the Statute of the International Court of Justice:

"The court. . . shall apply. . . .:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations."⁸⁷

⁸⁴ For discussion of the principles deduced by the International Law Commission, and the debates thereon, see Liang, "Notes on Legal Questions Concerning the United Nations," 45 Am.J. Int.L. 514, *et seq.* (1951).

⁸⁵ Authorized by Art. 95 of the Charter of the United Nations, in Chapter XIV—"The International Court of Justice," which reads "Nothing in the present charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals [than the International Court of Justice] by virtue of agreements already in existence or which may be concluded in the future."

⁸⁶ The authority to "make recommendations for the purpose of . . . promoting . . . the progressive development of international law. . . ." necessarily implies the right subsequently to approve actions which it might initially have recommended. On this point note the comments in the C.I.C.J. Report, ¶ 23:

"It was understood that such a convention might be concluded under the auspices of the United Nations, and it was suggested that the General Assembly might elect to call a conference for that purpose. Thereby, a desirable link between the court and the United Nations would be established."

⁸⁷ Statute of the I.C.J. Art. 38.

When one gets to the more particular problems of procedure, one finds that the thus far unexplored field of civil jurisdiction presents considerably fewer difficulties (especially from the American viewpoint) than does the criminal trial field, dealt with in the draft statute under discussion. None of the provisions in our Constitution, which we have discussed above, dealing with the rights of accused, present any difficulties if we treat only with civil jurisdiction. The provisions dealing with procedure on the civil side present very slight obstacles.⁸⁸

Again, one would be much less troubled by the definition of "the judicial power of the United States" if the jurisdiction of the international court was limited to the intermediate appellate field (such as exercised by the Federal Court of Appeals) with final review on certiorari by the Supreme Court of the United States. There would seem to be no trouble at all in this respect, if an international court were given purely advisory jurisdiction, as was done in the case of the International Prize Court.⁸⁹

Moreover, international courts with jurisdiction over the civil litigation of individuals would be much more likely to induce the habit of voluntary compliance with international law, than would their proposed counterpart in the criminal field.

In the first place, as has been said above, the adjudication of a civil dispute represents a *mutual adjustment* of differences and a prescription of future conduct in the case, such that the rights of *all parties* will be protected. Each such case, well decided, makes it more likely that future controversies will be voluntarily submitted to the courts. On the other hand, successful criminal prosecutions have been the opposite (though perhaps equally salutary) effect of inducing prospective criminals to *stay out of court*.

In the second place, the influence of international civil courts would not only be better in quality in the sense just discussed, but greater in quantity. In every jurisdiction the number of civil judgments far outweighs the number of decisions in criminal cases. At the present time there already is a tremendous volume of cases decided by national courts in which non-state parties have been litigants, and in which questions of international law were involved.⁹⁰ In view

⁸⁸ In addition to the previously mentioned provision of Art. 1, § 8, Clause 17 giving the whole Congress (rather than the President and Senate) legislative jurisdiction over the District of Columbia, there is only the final clause of Amend. V, providing that no person shall "be deprived of life, liberty or property without due process of law."

⁸⁹ The United States adhered to the statute of this international tribunal after, but only after, *A Protocole Additionnel* had been added, under which the court was to review only the question in controversy, without affecting the judgment of the national court. See Butts, "The *Protocole Additionnel*," 6 *Am.J.Int.L.* 799, 801 (1912).

⁹⁰ As was said by the International Law Commission in ¶ 55 of its 1950 report to the General Assembly (see 44 *Am.J.Int.L. Supplement* 117, October, 1950), "It would be a herculean task to assemble the decisions, on questions of international law, of the national courts of all states."

of the way in which the international relations of private individuals and organizations are increasing, both in number and in complexity, the volume of this type of litigation is bound to grow. In order that it may have its proper effect as a stimulus to "the progressive development of international law" is to remove from it the set of national trademarks it now bears, and to place on this mass of past and future precedents the official stamp of approval by a duly constituted international judicial authority.⁹¹

A Proposal

It would, therefore, seem highly advisable that the representatives of the United States in the United Nations urge the General Assembly to "initiate studies and make recommendations as to the desirability and possibility of establishing international courts with civil jurisdiction to decide questions arising between non-state parties and involving questions of international law."

In the course of exploring these alternatives, proposals might be formulated involving less renunciation of national sovereignty, less disturbance of established national legal traditions and procedure, and less objections under the Constitution of the United States than are implicit in the Proposed Statute for an International Criminal Court; while at the same time, containing greater potentialities of stimulus to the "progressive development of international law."

If this were the case, then the United States, by accepting such proposals, could preserve intact its present leadership in this field—a leadership which would otherwise be noticeably impaired by the rejection (however, justified) of the present proposal, without the offer of a constructive alternative.

⁹¹ To quote Cardozo, J., in *New Jersey v. Delaware*, 54 S. Ct. 407, 291 U.S. 361, 78 L.Ed. 847 (1933), "International law. . . has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."