Denver Journal of International Law & Policy

Volume 2
Number 1 *Spring*

Article 7

January 1972

Politicide: The Necessity of an International Court of Criminal Justice

Luis Kutner

Politicide: The Necessity of an International Court of Criminal Justice

Keywords

International Courts and Tribunals, War Crimes, Genocide, International Law: History, War, Crimes, Crimes Against Humanity, Human Rights Law

POLITICIDE: THE NECESSITY OF AN INTERNATIONAL COURT OF CRIMINAL JUSTICE

LUIS KUTNER*

Professor Kutner's contention is that a major contribution to the possibilities of peace could be made by an international criminal court. While such a court should avoid the inadequacies of the Nuremberg experience, it should be structured so that it is able to adjudicate crimes of politicide. ED.

If justice is one and individual, can war, being a crime among individuals, be a right among nations?

One God, one man as a species, one law as a rule of the human race!

John Baptist Alberdi, LL.D.**

Let us focus instead on a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions — on a series of concrete actions and effective agreements which are in the interest of all concerned.

And is not peace, in the last analysis, basically a matter of human rights — the right to live out our lives without fear of devastation, the right to breathe air as nature provided it, the right of future generations to a healthy existence?

John F. Kennedy***

Within the world community exists a vacuum of international law with regard to the commission of ultimate international crime — politicide. Politicide — a crime against world peace — consists of the planning, preparation, initiation, or waging of a war of aggression; or a war in violation of international treaties, agreements or assurances; or participation in a common plan or conspiracy for the accomplishment of any of the aforementioned.

*LL.B., J.D.; Member Illinois Bar; Congressional Nominee for the 1972 Nobel Peace Prize. Former visiting Associate Professor, Yale Law School; Chairman, World Habeas Corpus Committee, World Peace Through Law Center; former Consul, Ecuador; former Consul General, Guatemala; former Special Counsel to the Attorney General of Illinois; and, author of numerous law journal articles and several books, including WORLD HABEAS CORPUS and I, THE LAWYER.

**JOHN BAPTIST ALBERDI, THE CRIME OF WAR 26, 35 (1913).

***JOHN F. KENNEDY, *Toward a Strategy of Peace*, in WORLD PERSPECTIVES ON INTERNATIONAL POLITICS 79, 85 (W. Clemons, Jr. ed. 1965).

The vacuum of international law in regard to politicide presents one of the most neglected areas of judicial protection for universal human rights and an area which possesses the potential to make the greatest contribution to world peace through the rule of law. The crime of politicide has existed since men first discovered the need to live in tribal organizations for collective security and the protection of their territory. A historical analysis of politicide would necessarily include an evaluation of the acts of Alexander the Great, Julius Caesar, Napoleon and Hitler.[1] These men are but a few of the many who could be accused of politicide. Turning to more contemporary events, the conflicts in the Middle East, those between India and Pakistan, and the United States' involvement in Asia emphasize the need for and potential benefit of an international court to determine whether in fact the crime of politicide has been committed.

In the particular instance of United States' involvement in Southeast Asia, the role of such a court would be valuable. The United States, as a world power purporting to stand for an established legal system as well as for the ideals of democracy, has a vital interest in the promotion of a world legal order. The intensity of the debate between legal scholars as well as the serious nature of the divisions between them, point towards the potential usefulness of an international court of criminal justice.[2] In this instance adjudication by an appropriate international tribunal as to who is legally right could make a valuable contribution to world public order.

The Necessity of an International Court of Criminal Justice

The necessity for the development of a working legal system in the field of international criminal justice is demonstrated by the contemporary prevalence of the crime of politicide. The lawlessness evidenced by warfare can be curtailed by an international tribunal.[3]

In 1947, the United Nation's General Assembly created the International Law Commission to draft a code of international law; specifically, to draft the principles of international law governing war crimes, including the possibility of defining offenses against the peace and security of mankind. The Commission began with a draft of the Declaration of the Rights and

[1] For an excellent historical analysis of this concept, *see* C. BRINTON, J. CHRISTOPHER & R. WOLFF, 1 A HISTORY OF CIVILIZATION 14 (1963).

[2] For an example of the divergent views being expressed, *see* I, II THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1969).

[3] J. ALBERDI, THE CRIME OF WAR 45 (1913).

Duties of States which included the right to political independence, to govern the state's territory and to use force in self-defense.[4]

The Commission has prepared a draft of a Code of Arbitral Procedures,[5] and another for the international laws of nationality and statelessness.[6] It has made studies on the possibility of setting up an International Criminal Court to try people accused of international crimes such as genocide. There is much difference of opinion among member states, however, not only as to what acts would amount to aggression, but also as to whether it is wise to prepare a list of them. Some members fear that an aggressor, if provided with an exact list, would find means of committing politicide not specifically included, and thereby render such a classification impotent.

In considering the possibility of preserving peace through law, lawyers naturally focus their thinking on judicial organs. In a sense, the creation of effective judicial organs to settle international disputes is more simple than the establishment of legislative or executive institutions. Even states that are most reluctant to restrict their normally uncontrolled right to determine their international obligations or to participate in the creation of any international force greater than their own may be willing to yield to some extent to judicial organs whose impact is necessarily restricted to the particular case under consideration. The world wide support for World Habeas Corpus and Regional International Courts of Habeas Corpus validates this view.[7]

The readiness to seek a court decision in a particular case unfortunately cannot always be extrapolated into a willingness to agree *a priori* to accept such decisions in all cases. Thus at present the submission of a particular dispute almost always requires the *ad hoc* consent of all states concerned, including that of the putative aggressor (*i.e.*, the potential defendant).

However, the incentive for nations to accept such decisions *a priori* would be increased by the creation of an institution such as an International Court of Criminal Justice composed of

[4] Amado, *(Twenty-fifth) Formulation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, [1949] Y. B. INT'L L. COMM'N 183, U.N. Doc. A/CN.4/SER. A (1956).

[5] Amado, *(Sixth) Arbitral Procedure*, [1949] Y.B. INT'L L. COMM'N 50, U.N. Doc. A/CN.4/SER. A (1956).

[6] Amado, *(Fifth) Law of Nationality*, [1949] Y.B. INT'L L. COMM'N 45, U.N. Doc. A/CN.4/SER. A (1956).

[7] Kutner, *World Habeas Corpus, Human Rights and World Community*, 17 DEPAUL L. REV. 9-10 (1967).

members which are least prejudiced by their national allegiances. The benefits as well as the necessity of such a mandatory legal system must be made apparent to the "peace-loving" members of the United Nations who shall be contributing to the formation of this judicial system.

A mandatory permanent legal system would avoid the inherent inequities which surrounded the Nuremberg Tribunal. The Tribunal was established for the sole purpose of trying the war criminals of the Axis countries; the charter removed from the jurisdiction of the Tribunal Allied war criminals, who were to be tried by the military courts of their own governments. Hence, the Tribunal was not an international court established to try international crimes, but an Allied court established to try Nazis. In a definite sense it was a victor's judicial vengeance and a most dangerous *ex post facto* precedent.

Further, in formulating a mandatory legal system, enforcement should not be considered a part of the judicial process. When a national court enforces a decree it does so in its administrative rather than its judicial capacity. Where suits are instituted against the state or its autonomous subdivisions, enforcement is undertaken not by the judicial body that rendered the decision but by separate legislative or administrative proceedings. The only function of the court is to determine the abstract question of the merits of the particular case. This principle should apply to both arbitral and judicial proceedings between states appearing before international tribunals.

While a national court acts for and in the name of the sovereign state, this concept is entirely absent in the idea of an international tribunal. The distinguishing feature of an international tribunal is that its decision would be purely declaratory. The enforcement process is political in nature ond could neither be undertaken nor directed by the international tribunal.

Under the United Nations Charter enforcement might be undertaken by the Security Council. Where a state refuses to adhere to a determination of the tribunal it would be subjected to the censure of public opinion. Enforcement might be undertaken by the appropriate regional organization or by application of sanctions pursuant to the United Nations Charter. States committed to the principle of world public order could induce a recalcitrant state to comply.

The problem in the prevention of the crime of politicide

is to inscribe these rules on the public conscience so that a perpetual external enforcement of them would be unnecessary. Cases should be referred to such a tribunal with caution. The proposed criminal tribunal would be but one mechanism for the resolution of conflict. The resolution of a particular conflict may be best achieved through negotiation and mediation rather than through submission to a tribunal to determine which cause is just. Indeed, in some instances the finding that one party is criminal may actually create a psychological barrier to conflict resolution. However, where a party commits or threatens to commit an act of aggression and refuses to seek a peaceful accommodation of an issue, referral to a criminal tribunal would become imperative.

Conclusion

If a person is incapable of a minimum degree of peaceful coexistence his welfare will be harmed by the loss of his neighbor's cooperation and the ensuing disorder. Peaceful coexistence is the product of respect for individual human dignity or what has been labeled *Inalienable Rights.*

Although man may analytically know what is needed for his coexistence with other men he has not yet been able to implement that knowledge. Most societies of civilized men have discovered the necessity of establishing rules of conduct enforceable by punitive sanctions. "An eye for an eye, a tooth for a tooth" is a Mosaic principle which was found necessary to implement the rules of human conduct expressed in Hammurabi's Code. Its degree of harshness has lessened but slightly as a functional sanction throughout the ages.

Men have always sought a way to live together with respect for the individual.[8] The fact that institutions of various kinds have failed to eliminate degradations of human beings[9] cannot overshadow the fact that many others have fostered an invaluable contribution to social order and human rights. Those societies with successful legal institutions expound a legal system responsive to its sense of justice and cognizant of the unique quality of each human being. They use their legal institutions for the preservation of the rights of each member of the community through the utilization of a well sanctioned body of law.

Yet, while each man is entitled to his inalienable rights he also inherits inalienable obligations. Unless each person

[8] *Id.* at 4.
[9] *Id.*

observes his duty to respect and protect the inalienable rights of others, peaceful coexistence is made impossible. Therefore, man's need to recognize his interdependence is as necessary as his need to recognize his uniqueness.

World peace like community peace requires that men live together in mutual tolerance, submitting their disputes to a just and peaceful settlement. The world community must recognize that the interdependence of nations represents a higher level of human relations. While each nation has its inalienable rights as a sovereign it must also recognize its obligations.

Dag Hammarskjold, the late Secretary-General of the United Nations, commented extensively on the need for development of a working international legal system.

> Between sovereign nations conflicts arise to a large extent in a political context. But the substance of the disputes is all so often in fact a question of law. While it is natural that the conflicts tend to be treated in forms adequate to political problems, it is also true that they could be resolved on a basis of law much more frequently than is now the case. If the position of the judiciary inside the international constitutional systems so far is weak, in practice, this may be explained primarily by the fact that it often seems most safe for a sovereign state to define a conflict as a matter for political reconciliation. The system of international law is still fairly undeveloped and there are wide margins of uncertainty. Why, one may ask, run the risk of a possibly less favorable outcome reached on the basis of law instead of a more advantageous one that might be achieved by skillful negotiation and under the pressure of political arguments? Why? Is not the reason obvious? First of all, is it not in the interest of sound development to restrict as much as possible the arena where strength is an argument and to put as much as possible under the rule of law? But there is a further consideration. If we regret the undeveloped state of international law, should we not use all possibilities to develop an international common law by submitting our conflicts to jurisdiction wherever that is possible? I apologize for having gone into these matters so ably and with such competence covered here by Judge Hackworth. I have done so only because it appears to me on the basis of daily experience that the world of order and justice for which we are striving will never be unless we are willing to give it the broadest possible and the firmest possible foundation in law.[10]

World War II witnessed politicide on an international scale; politicide resulted in the death of 14 million soldiers and 40 million civilians. These statistics should convince all nations of the existence of the crime of politicide and of the necessity for developing a legal system to control it.

[10] D. Hammarskjold, Servants of Peace 96-7 (1963).

The development of such a legal system depends on there being an acceleration in the evolution of the national institutions which have proven to be successful in promoting the coexistence of men into an international institution which is capable of the same result. All men must recognize that their interdependence in the world community is similar to their interdependence in a national community. The dynamic administration of a comprehensive body of international law, recognizing the existence of politicide, and recognizing the importance of protecting human interests, is man's best hope of achieving world peace.