From An International Criminal Court:
A Step Toward World Peace [i]

By Benjamin B. Ferencz

Introduction by Professor Louis Sohn, Bemis Professor of International Law, Harvard Law School

A few years ago Benjamin B. Ferencz made available to the discerning public a collection of documents depicting mankind's search for an instrument defining and prohibiting aggression. Now that a war of aggression has been defined by the United Nations as "a crime against international peace" giving rise to international responsibility, means need to be found for orderly punishment of those responsible for this gravest of crimes, and for other crimes against international law. The most logical way of accomplishing this would be to establish an international criminal court.

In his new book Mr. Ferencz traces the history of proposals relating to the establishment of such an international criminal court. Making these materials available to those who are now officially studying the subject should facilitate the work of the United Nations when, as requested by Resolution 33.97 of the General Assembly (of December 16, 1978), the 1980 session of the General Assembly will be considering the replies of the governments concerning the Code of Offences against the Peace and Security of Mankind, an instrument closely connected with the establishment of an international criminal court.

The concepts of an international criminal code and an international criminal court are the result of the confluence of two trends in international law—the need to punish individuals for international crimes and the need for an impartial international tribunal. The author traces the history of international tribunals, both arbitral and judicial over the last two hundred years; and the emergence of the idea of a separate tribunal to deal with crimes committed by individuals. There is no need to repeat here the details of that story.

It might be useful to note, however, the parallel evolution of the

notion of an international crime, and its transfer from the domestic to the international sphere. International law applies primarily to States; it defines their rights and duties. If a State violates international law, it is responsible for that violation to the other State or States concerned and is obliged either to re-establish the situation which would have existed if the wrongful act had not taken place or, more often, to pay an appropriate reparation. One can generalize this by saying that for a long time international law has recognized only international torts (delicts), not crimes. It was only in the 1920's that a "war of aggression" was declared to be "an international crime" and attempts were made to devise means for "ensuring the repression of international crimes" and attempts were made to devise means for "ensuring the repression of international crimes." (The Geneva Protocol of 1924.) But the reluctance in domestic law to try legal persons for crimes has had its counterpart in international law, and no international tribunal was ever established to try a State for an international crime.

Another way needs to be found, therefore, for punishing an international crime. The first breakthrough occurred when international law accepted the concepts that pirates are "enemies of mankind" and that piracy is "an offense against the law of nations." The Constitution of the United States in 1789 took the pioneering step of empowering the Congress to define and punish "piracies and felonies committed on the high seas, and offenses against the law of nations." A law enacted by the United States in 1819 provided quite simply for the punishment of piracy "as defined by the law of nations"; and in the very next year that law was applied by Justice Story in United States v. Smith (5 Wheaton 153).

Once this concept of an international crime was developed in one are, it was soon applied by analogy in other fields. Various treaties of the nineteenth century authorized States to punish persons engaged in the slave trade as pirates; and bipartite tribunals established by a series of treaties concluded by Great Britain with other States were empowered to condemn, destroy or confiscate vessels engaged in the slave trade and to arrange for delivering the masters and crews of such vessels to their national States for proper punishment.

A treaty, prepared at the Washington Disarmament Conference of 1922, declared that persons violating certain rules concerning submarine warfare should be "liable to trial and punishment as if for an act of piracy." While this treaty did not enter into force, the Nyon arrangement of 1937 characterized certain submarine attacks on merchant shipping during the Spanish civil war as violations of international law and declared that they "should be justly treated as acts of piracy."

Many recent treaties oblige States to punish a variety of activities which are considered in violation of an international legal order: violations of the laws of war, willful breaking of submarine cables, counterfeiting of currency, white slave traffic I narcotic drugs or psychotropic substances, and unauthorized broadcasting from the high seas. In order to cope with these crimes, the usual rules of international law relating to the territoriality of criminal jurisdiction and to the exclusively of the jurisdiction on the high seas of the flag State of a vessel, have been considerably relaxed. Recent concern about genocide, terrorism, hijacking, torture, and apartheid has also resulted in branding these gross violations of human rights as international crimes or crimes against humanity. Various international instruments on these subjects have been prepared or are in preparation.

Several of the international conventions and drafts which deal with international crimes provide for universal jurisdiction to punish them, allowing any State which has caught the criminal to punish him, regardless of his nationality or the place in which the crimes committed. Some of these treaties impose the obligation on a State either to punish the criminal of to extradite him to the country where the crime was committed or to his national State. Various difficulties have arisen about these procedures. Frequently, a hijacker or terrorist might escape to a country which is sympathetic to his cause, and a just punishment might not be meted out to him. On the other hand, if extradition to the country against which the crime has been committed should be insisted upon, the person concerned might be punished without due proves of law by a court of vengeance rather than justice. Similar objections have been raised to the trial of war criminals who are nationals of the defeated aggressor countries by the tribunals established by the victors. Even where these tribunals have been trying hard to be as objective as possible, some lawyers not only in

the defeated countries have raised objections to various aspects of the proceedings and the rules applied by the tribunals.

To remedy these procedural and psychological defects of proceedings by tribunals dealing with international crimes, and to encourage general acceptance of their verdicts, some lawyers (and governments) have been advocating the establishment of an impartial, really international, tribunal with broad jurisdiction over various international crimes and the power to interpret and apply international conventions relating to international crimes as well as extradition treaties.

The efforts in this field in the inter-war period by such eminent lawyers as Elihu Root, Henri Donnedieu de Vabres, Vespasien V. Pella, Constantin T. Eustathiades and Antoine Sottile, have now been joined by a new group, to which belongs the author of these volumes, Benjamin B. Ferencz, who since the 1940's has devoted a large part of his life to the prosecution of international criminals and the obtaining of adequate compensation for their victims.

These volumes describe in detail the attempts to establish international criminal courts for various purposes, and the related efforts of codifying the substantive rules relating to offences against the peace and security of mankind. As a complete history of these developments could have filled up many volumes, the author had to choose judiciously the highlights, concentrating on documents which show either the important steps forward on this difficult road or point out the pitfalls which need to be avoided in the future. As noted at the beginning of this introduction, after lying dormant for a quarter of the century, the question of an international code, and the connected question of an international court, has been brought forward in the General Assembly of the United Nations and a new debate on it has been started. This book provides both the background and the ammunition for those who will be involved in this debate, and to those outsiders who might wish to influence its outcome. Criminal law is today in a state of flux and turmoil, both domestically and internationally. We need a better understanding of the issues involved. This book illuminates an important facet of the problem.

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