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DUE PROCESS OF WAR: AN AD HOC WAR CRIMES TRIBUNAL: A PROPOSAL

*Luis Kutner**

I. Introduction

The state of international society in the 1960's may be described as atavistic. After the defeat of the Axis in 1945, a renewed hope for world order emerged at the San Francisco Conference with a naive belief in big power co-operation.¹ But some forty armed conflicts have occurred during the last 20 years,² even though the states of the world, in adhering to the United Nations Charter, renounced the use of force for the settling of international disputes. The United Nations security system and mechanisms for policing the world have broken up on the shoals of big power rivalry and the frustrated strivings of new nations.

The United States, the world power standing for an established order and the ideals of democracy, has a vested interest and obligation in the promotion of a world legal order. But it has tended to abjure this obligation by its resort to armed force in Viet Nam. Legal scholars have seriously questioned the legality of American involvement, though there are equally sincere advocates of the American position.³ The role of a world policeman was given to the United Nations at San Francisco, but some commentators have maintained that the United States has now assumed this task.⁴ To many, particularly North Viet Nam, the United States appears as the aggressor. Moreover, the American people are unlikely to support such a continuing role for the United States. Furthermore, as was demonstrated by the inability of the United States to act in the Middle East in the spring and summer of 1967, involvement in one area prevents effective action elsewhere.

When the United States fails to set an effective example for the upholding of international order, it is understandable that the newly emerging states, less concerned with notions of legality, would be more inclined to view the norms of international order with contempt. In Africa, despite the adoption of the Genocide Convention, mass murder is being perpetrated in the Congo, in Nigeria

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1 Finklestein, *The United Nations: Then and Now*, 19 INT'L ORG. 367 (1965).

2 Goodhart, *The Binding Nature of Law*, 41 TUL. L. REV. 769 (1967).

3 Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051 (1967); Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, id. at 1095; Standard, *U.S. Intervention in Viet Nam Not Legal* 52 A.B.A.J. 627 (1966); Symposium, *Legality of United States Participation in the Viet Nam Conflict*, 75 YALE L.J. 1086 (1966); Note, *American Actions in Viet Nam: Justifiable in International Law?* 19 STAN. L. REV. 1307 (1967).

4 Arnold, *The Growth of Awareness: Our Nation's Law and the Law Among Nations*, 1 INT'L LAW. 534 (1967).

and in the Sudan.⁵ A form of political gangsterism has been applied with the kidnappings of Moise Tshombe and Ben Bella.⁶ Poison gas has been applied in Yemen.⁷ Further contributing to international anarchy has been the decline in the prestige of the International Court of Justice after its refusal to decide the merits of the Southwest Africa case.⁸

Most indicative of the breakdown of world order has been the failure of the United Nations system to resolve the Palestine question, a matter on which the Security Council and General Assembly have devoted more time than on any other issue. In 1947, the General Assembly adopted a resolution for the partition of Palestine, but despite this decision of the international community, Arab armies invaded Palestine.⁹ The United Nations failed to take effective police action, and its prestige was salvaged only by the victory of Israeli forces. Some prestige was regained with the stationing of contingents of a United Nations Emergency Force in Sinai, the Gaza strip and at the Straits of Tiran following the Suez crisis in 1957. But this prestige was dissipated by the withdrawal of these forces in May of 1967.¹⁰ Despite the clearly announced intentions of the Arab states to destroy Israel and to commit a new crime of genocide, the United Nations failed to act to prevent the subsequent war. Security Council action was paralyzed by the prospects of a Soviet veto, while unilateral action by the United States in the capacity of a world policeman was precluded by involvement in Viet Nam. The Soviet Union, which should act as a responsible world power, had cynically aided and abetted in planning the pending act of genocide by providing the Arab states with extensive arms, though the Western nations did not emerge with clean hands. An act of genocide was again avoided only by an Israeli victory. But the Soviet Union, instead of seeking to promote a peaceful resolution of this conflict, has proceeded to rearm the Arab states.

Elements of justice exist with both contenders in the Palestine dispute. But these matters can only be resolved through negotiation and adjudication. The international community cannot condone genocide, the goals sought by Arab

5 Troeller and Deffarge, *Slaughter in Africa*, ATLAS, Oct., 1967, at 14.

6 *Politik auf Gangster-Art: Menschenraub!*, BUNTE ILLUSTRIERTE, Sept. 6, 1967, at 28.

7 113 CONG. REC. S11364 (daily ed. Aug. 10, 1967) (text of Red Cross report).

8 See Falk, *The South West Africa Cases: An Appraisal* 21 INT'L ORG. 1 (1967); Friedmann, *The Jurisprudential Implications of the Southwest Africa Case*, 6 COLUM. J. TRANSNAT'L L. 1 (1967); Higgins, *The International Court and Southwest Africa, The Implications of the Judgment*, 42 INT'L AFF. 573 (1966).

9 T. LIE, IN THE CAUSE OF PEACE 158-73 (1954).

10 As Abba Eban stated, "The United Nations was revealed, unfortunately, at the very lowest depths of incapacity in the Middle East itself; it fled from the arena like a fire brigade at the first smell of smoke." 113 CONG. REC. H14305-06 (daily ed. Oct. 21, 1967) (Address of Abba Eban, Foreign Minister of Israel, to National Press Club).

Colonel Jonas Waern, who had been commander of U.N. Swedish battalions in the Congo and Cyprus, has commented: "We who have served with United Nations peacekeeping forces in troubled areas of the world regarded the withdrawal of U.N. troops from the Gaza region during the Arab-Israeli crisis as a great failure and defeat." He acknowledges that the Secretary-General may have had sound legal reasons for withdrawing the forces, but objects to the one-sidedness of the termination which meant that ten years of work and self-sacrifice had come to nothing. The very use of U.N. military assignments was questioned. The proposal is made for the establishment of a U.N. command rather than making use of peace-keeping contingents from different countries. Waern, *Diary of a U.N. Peacekeeper*, SATURDAY REVIEW, Nov. 18, 1967, at 19.

rulers.¹¹ Such acts can only mean the destruction of world order. But the world community has proven incapable of action. Nations mouth moralisms on behalf of international law and order but ignore these norms when they conflict with their interests. As U. N. Secretary-General U Thant has despairingly observed: "International morals have degenerated . . . general morals, like good behavior and live and let live. As far as those things are concerned, we're still in the Middle Ages . . . [and] things are getting worse."¹²

Under the aegis of this attitude lies the path to thermonuclear annihilation. The leaders of both the United States and the Soviet Union have admitted that there can be no victors in another war. Human society as presently known could not survive. Clearly a radical innovation is needed to mobilize the conscience of mankind and revive the world order. Such an approach can be buttressed in the formation of an ad hoc International War Crimes Tribunal within the framework of the United Nations. The imperatives of the international situation are such that the implementation of such an entity must be more than mere idle speculation.

A permanent ad hoc International War Crimes Tribunal, the special object of its concern being the deterrence and punishment of the crime of genocide, would serve a dual purpose:

(1) It would act prophylactically to deter war crimes by providing an authoritative institution through which the moral and political force of the world could be focused against a criminal. The threatened or harmed individual, group, or nation could present its case under conditions that would afford the publicity of a fair trial with an unquestioned just decision. The taint of partiality in the punishment which attended the trials of Nazi war criminals would be banished if the court were the expression of a continuing universal consensus as to the criminality of the acts indicted and punished.

(2) More important perhaps than providing established *procedure* for the trial of war criminals, the court would clarify and expand the *substantive law* of war crimes and thus increase that area of international agreement through which war crimes may ultimately be suppressed. The court would be a permanent meeting place in which an already existing consensus could be formalized and expressed in decisions having the force of international law. At the same time it would allow negotiation and agreement among the powers as to the scope of the rights and duties they may demand from each other.

The ultimate aim of such a tribunal would be to establish in the public consciousness as well as in the law of nations the criminality of certain acts and the great principle, announced by the Nuremberg Tribunal and unanimously affirmed by the General Assembly of the United Nations, that individual liability for war crimes may be imposed despite the defenses of "act of state" and superior orders.

11 Hourani expresses similar sentiments in noting the Arab failure to seek the containment rather than destruction of Israel. Hourani, *The Moment of Truth*, ENCOUNTER, Nov., 1967, at 3.

12 Editorial, ATLAS, Oct., 1967, at 7. The cynicism of the states of the Soviet bloc in its championing of the Arab attacks was pointed up by the dramatic action of the Czech writer, Ladislav Mnacko, in speaking out and in visiting Israel, CONGRESS BI-WEEKLY, Sept. 25, 1967, at 15.

While these principles have been accepted in international law, they have not evolved into rules of conduct. The problem in the prevention of war crimes is to inscribe these rules on the public consciousness so that a perpetual external enforcement of them will be unnecessary. In principle, war crimes should be regarded by the peoples of the world much as they regard incest, *i.e.*, they should be so universally condemned that no law would be needed for deterrence. Social force and the individual conscience would, on the whole, suffice. If anyone suspects that such a condition cannot be reached, let him ask himself if he imagines that the rate of incest in the United States would skyrocket tomorrow if the sanctions making such conduct criminal were removed from the statute books. A better example, perhaps is the actual outlawing of a particular war crime by the Tuaregs of North Africa. These people, living under conditions of the most severe scarcity of water, have learned over the course of years that the poisoning of wells is a war crime. However bitter their internecine strife, they will not allow it. If a party engages in it, all will abandon him and even turn upon him, so great is the degree of consensus over the heinousness of his act.

The law concerning war crimes would be enveloped within the *superego* of individuals. The existence of a war crimes tribunal would tend to reinforce the *superego*. Though the law must enlist the aid of the *superego* to maintain order, the law also strengthens the *superego*.¹³ The rule of law does not find its authority in a command or a sanction, but is based on the recognition that it is obligatory, the recognition that we are bound by it.¹⁴ This recognition could be instilled by an international tribunal.

Thomas Hobbes, who had a perceptive insight into the nature of man, perceived that while man has a restless desire for power, the quest for leisure and repose have also led to civil disobedience. To Hobbes, the three principal causes for quarrel were competition, diffidence and glory, while fear consigns men to peace. While in the state of nature each man has a right to everything, a fundamental law of nature as derived from reason is peace, which is necessary for survival. Therefore, certain rights were transferred to a sovereign authority by contract, thereby constituting the basis of political authority.¹⁵ Today, survival and the need for peace require states as sovereign entities to transfer certain rights to an international body. The same fear which forced man to give up certain of his rights to a sovereign state now requires granting certain of the rights of the sovereign state to a supernational authority.

As yet, world opinion on war crimes has not reached this self-governing stage. The people of the world have only imperfectly internationalized the notion that such conduct must not be allowed and that, if it does occur, even those taking orders may be held responsible. Creating preconditions for the internationalization of the law is properly the function of some authoritative institution, one that can determine the law and state it without ambiguity, one that can punish with the utmost public attention. This article will demonstrate that

13 Schoenfeld, *The Superego's Influence on the Law*, 14 DE PAUL L. REV. 299 (1965).

14 Goodhart, *supra* note 2, at 774.

15 T. HOBBS, *THE LEVIATHAN* 99-109 (1951).

such a body would represent not an impractical innovation, but the logical outcome of our country's trends in international jurisprudence, and that such a body is especially needed at the present moment. Lastly, this argument will undertake to show that the tribunal should be a part of the peace-keeping apparatus of the United Nations. No new surrender of national sovereignty by treaty or other means would be necessary to establish the jurisdiction of the proposed permanent war crimes tribunal. It would only be necessary that men generally agree that war crimes should no longer be a subject of only occasional justice.

II. The Growth of the Concept of the War Crime

The notion of war crimes emerged prior to World War II, though far more extensive publicity was given to its war crime trials than to any previous trials of war criminals. From quite early times, states have punished violations of the laws of war, whether committed by their own troops or by the enemy; and the concept of laws of war has precedent at least as far back as the medieval period. One thinks of the illegitimacy of fighting on the Sabbath, of the rules of chivalry, and the conception of knightly behavior as embodying the obligation to manifest moral values even on the battlefield. The peculiar contribution of our age lies not in the formulation of laws of warfare, but in the creation of institutions and procedures by which sanctions might be applied in lieu of the universal sanctions once possessed by the Church.

The precursor to the notion of war crimes may be found in the concept of a just war which had its roots in the practice of Greece and Rome. In Rome, the justness of waging a war was decided by the priest or *fetiales*.¹⁶ The concept was revived by St. Augustine who firmly approved participation in war if the purpose of the war was just, such as to avenge injury and suffering.¹⁷ To Thomas Aquinas a war was just if authorized by the prince; the other party was to be fought against because of some guilt of his own; and the belligerent was possessed of the right intention to promote good and avoid evil.¹⁸ To the Scholastics, a war could only be just on one side, which side had all the rights of warfare, including the right to kill prisoners.¹⁹ The Spanish Scholastic, Vittoria, applied the concept of just war with regard to the Indians whose paganism was excused because of ignorance, but whose resistance to missionaries was not to be permitted.²⁰ Gentili was the first to recognize that a war may be objectively just on both sides.²¹ Grotius subsequently adopted these concepts, stressing tolerance with no distinction made as to infidels. However, he included private wars in his concept.²² Later writers thought that the justness of a war had no relationship to the consequences of its legal effects. More recently,

16 A. NUSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 10 (2 ed. 1961).

17 *Id.* at 35.

18 *Id.* at 36-37.

19 *Id.* at 37-38.

20 *Id.* at 80.

21 *Id.* at 95.

22 *Id.* at 107.

the maintenance of a balance of power has been related to the just war concept. To the Soviets, a war is just if it serves the interests of the proletariat.²³

The nineteenth century concept of the unqualifiedly equal legality of belligerents almost made the just war concept disappear. This resulted from the insistence upon state sovereignty and the absence of any human authority that could finally declare where justice lay. According to Vattel, to pass judgment on acts of states constituted a violation of sovereignty.²⁴ However, the effort to check war's inhumanity by rules governing the commencement and conduct of hostilities achieved a number of documentary successes and practical results culminating in the Hague Peace Conferences of 1899 and 1907 and later in the Nuremberg Trial of 1946.²⁵

Most commonly, jurisdiction in modern times in cases of crimes that we would now call "against humanity" is justified on one of two grounds. Either it is said to be founded on a theory of natural law or it is posited on the same basis as the universal jurisdiction over pirates, *i.e.*, crimes against the species as a whole may be punished by whoever has the power.²⁶ Paradoxically, while in personam jurisdiction over war criminals in our age was first partially justified by reference to these old cases involving pirates, it is now true that jurisdiction over war criminals is far better established in international custom and consent than jurisdiction over pirates ever was.²⁷ The man who was a pirate in the view of one sovereign may have been a privateer with letters of marque from another. Our age, on the other hand, is notable for its examples of entirely unjustifiable brutality, crimes against humanity without any cover of law.

In the generation before World War I, a growing concern for developing international order manifested itself in a variety of treaties and conferences, the most famous of which was the meeting at the Hague in 1907. The violation of a sense of world order by criminal acts on the part of the Central Powers in World War I led to the inclusion of Articles 227 and 228 in the Versailles Treaty. In Article 227, the Allies undertook to appoint one judge from each of their nations to a special tribunal for the purpose of trying the Kaiser. This court was to vindicate "the highest obligations of international undertakings and the validity of international morality."²⁸ Although the plan was doomed with the refusal of Holland to surrender the defendant, it was significant because an international responsibility for war crimes was found to lie upon a head of state, and the doctrine of act of state was not regarded as a prima facie defense.

In Article 228, it was provided that "the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs

23 *Id.* at 287-88.

24 P. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 211 (1951).

25 See generally Cowles, *Universality of Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177 (1945).

26 *Id.* at 182.

27 *Id.* at 185.

28 *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (Report Presented to the Preliminary Peace Conference), 14 AM. J. INT'L L. 95 (1920).

of war." For political reasons, however, the Allies saw fit to delegate the enforcement of that right to the highest German court, which held twelve trials, with only half the defendants found guilty. A principle to be of the greatest importance a generation later was enunciated by this German court in the case of the naval officers Boldt and Dithmar who received four years imprisonment for firing upon the survivors in lifeboats of a British hospital ship. The officers' defense that their superior, the U-boat commander, had ordered the atrocity was held unavailing, and they were held personally liable for having obeyed an order patently in violation of the laws of war.²⁹

The next stage in the expansion of war crimes doctrine came in 1945 with the conclusion of an agreement among Britain, the United States, and the U.S.S.R. to try jointly those war criminals whose offenses were without particular geographical localization.³⁰ In that document, the Nuremberg Charter, war crimes were specified to include the murder or ill-treatment of prisoners of war or of persons on the seas, the killing of hostages, the plunder of property, and all devastation not justifiable as militarily necessary. In addition to these traditional categories, two new classes were included: (1) crimes against the peace, consisting in "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 foregoing"; and (2) crimes against humanity, consisting in "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of domestic law of the country where perpetrated . . ."³¹

In its judgment,³² the International Tribunal at Nuremberg, established by the tri-partite agreement, pointed to certain precedents in defense of its jurisdiction that are relevant to the legitimacy of a war crimes tribunal at the present time. The court noted that the Germans, like practically all other civilized nations, had bound themselves to the Hague Convention of 1907 and the Kellogg-Briand Pact of 1928. By the former, the signatories had renounced the stated categories of violations of the rules of war; by the latter, the signatories, of whom there were sixty-three, bound themselves to renounce war. This latter agreement was held by the court to have given to aggressive war the character of a crime in the international community. With regard to the jurisdiction of an international tribunal over individuals, the court rejected the older doctrine that natural persons can never be subjects of international law.³³ Reference was made to *Ex parte Quirin*,³⁴ wherein the Supreme Court of the United States had assigned individual liability to foreign saboteurs captured on American

29 See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, DEPT. OF STATE BULL., Aug. 12, 1945, at 222.

30 *Id.* at 423.

31 *Id.* at 224.

32 *Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172 (1947).

33 *Id.* at 174.

34 317 U.S. 1 (1942).

soil for actions committed by those saboteurs in violation of the laws of war. The true test, the judgment concluded, was not the existence of an order but whether moral choice was in fact possible.

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 any consideration of Allied war criminals, who were to be tried by the military courts of their own governments. Hence, notwithstanding its name, the tribunal was not an international court established to try international crimes but an Allied court established to try Nazis.³⁵ The proceedings contained an element of hypocrisy in that the tribunal contained representatives from the Soviet Union which had been a co-conspirator in the initiation of the war. Moreover, an estimated 45 to 85 million people had been murdered or eliminated as a result of the Russian Revolution.³⁶

The objectives of the Nuremberg trials were: (1) to carry out a major war aim of the Allies that major war criminals be brought to justice with sentences to be given according to the law and the evidence before the tribunal; (2) to exemplify the possibility of co-operation among the great powers; (3) to give the world a historical record of what happened in Germany during the fifteen years from 1930 to 1945; (4) to give an example of a fair trial; and (5) to contribute to the development of international law by applying the law of the Nuremberg Charter.³⁷ The significance of the trials lay in their focusing upon individual responsibility. The court did not focus only upon the individual who waged aggressive war, but also upon the individual who formulated national policies and participated in the preparation of war. The concept of conspiracy was thus formulated, and precedent may furnish the foundation for the United Nations to take positive steps when it concludes there is a *prima facie* case of conspiracy.³⁸

It should be realized that while the international military tribunal rendering this judgment derived its powers from the charter authorizing its existence, the principles expressed in the Charter of the Nuremberg tribunal and the judgment itself were affirmed by the United Nations General Assembly on December 11, 1946.³⁹ At the same time (the period 1945-46) the many trials, both in Europe and Asia, of war criminals as initiators of aggression affirmed a similar doctrine.⁴⁰ The Resolution of December 11, 1946, also denounced genocide as an international crime and, on December 9, 1948, the General Assembly adopted a convention on that question, defining genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

35 Note, *Nuremberg Trials*, 24 U. PITT. L. REV. 73, 77 (1962).

36 E. LYONS, *WORKERS' PARADISE LOST* 6 (1967).

37 Wright, *The Nuremberg Trial*, 246 ANNALS AM. ACADEMY POL. AND SOC. SC. 72-80 (1964).

38 Doman, *The Political Consequences of the Nuremberg Trial*, 246 ANNALS AM. ACADEMY POL. AND SOC. SC. 81 (1964).

39 1 U.N. GAOR 1144 (1946).

40 Walkinshaw, *The Nuremberg and Tokyo Trials: Another Step Toward International Justice*, 35 A.B.A.J. 299 (1949); Wright, *War Crimes Under International Law*, 62 LAW Q. REV. 40 (1946).

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁴¹

Conspiracy to commit genocide is punishable under the convention, as are attempts, incitement, if direct and public, and all complicity. By article VI persons charged with the enumerated acts are to be tried by a competent tribunal in the state in which the offense was committed or by such international tribunal as may have jurisdiction through an agreement of the parties to accept its jurisdiction. Under article VII the enumerated crimes are not to be regarded as political crimes for the purpose of extradition, and all signatories pledge themselves to grant extradition in accordance with existing laws and treaties. Significantly, when the Soviet Union suggested deletion of the reference to an international penal tribunal, the proposal was voted down thirty-eight to eight.⁴²

A court approaching the conception of an international tribunal for protecting human rights came into existence in 1953 when the fifteen states of the Council of Europe created the European Court of Human Rights and with it the Commission of Human Rights empowered to hear complaints from natural persons, groups, and member nations. The International War Crimes Tribunal proposed by this paper would seek in part to universalize the notion of such a court and to direct its attention specifically to the class of violations of human dignity that has caused the greatest suffering in our century.

III. The Present Need for the Tribunal

The summary above demonstrates the evolution of the attitude of the international community regarding the treatment of war crimes. Early in this century, states formally abjured certain acts during war (the Hague Convention of 1907). By 1919, the commission of these acts was regarded as punishable by an international tribunal. Furthermore, liability for these acts was seen to extend to individuals (even to heads of states) and to supersede the doctrine of act of state. Finally, in the present phase, as indicated by the Genocide Convention, a large part of world opinion is ready to accept a permanent international tribunal with jurisdiction over war crimes.

Such a tribunal would serve urgent purposes. It would serve to clarify this most important branch of international law. The tribunal, being free of the constitutional limitations that prevent our Supreme Court from rendering advisory opinions, would be able to refine and make lucid the present body of

⁴¹ G.A. RES. 260 (III) A, 3 U.N. GAOR Res. 1948, at 174.

⁴² *Id.* at 175. There were also eight abstentions.

war crime law upon authoritative request, *e.g.*, that of the General Assembly. Presently, the elements necessary to establish a war crime are not always explicit. The enumerated acts section of the Genocide Convention illustrates this. The Convention, for example, purports to make criminal an attempt to destroy in whole or in part a "group" but it does not refer, *inter alia*, to the role of the defenses of insanity and impossibility. Does the Convention, taken as an expression of world opinion, mean that a man, who attempting to shoot all Negroes, mildly wounds one, is guilty of attempted genocide? If insanity is a defense would it be taken to excuse the Nazis, some of whom may have been clinically insane? If the crime of genocide is taken to include the conspiracy — without overt action — to cause "serious bodily or mental harm," then a few men who band together to insult certain of their neighbors because their neighbors are members of a "group," are guilty of genocide. The section outlawing measures intended to prevent births is quite ambiguous if cut loose from the experience of involuntary sterilization during the Second World War. Taken literally, it might indict the distribution of contraceptives by the United States Army in Viet Nam.

These questions, of course, cannot be answered by a statute. It is the business of courts to expand the common law of war crimes and for that reason the necessity of a permanent court for war crimes is manifest. The clarification of these questions is not an academic exercise, but is the first step toward the creation of a common understanding of the obligations of international life. It is precisely such agreement on who owes what to whom, what X or Y means, that forms the underpinnings of a system of law. Such agreement is most easily brought about by an institution that is both a focal point for debate and an authoritative source of decisions.

A problem to be considered by a war crimes tribunal would be the application of the principle of military necessity. Belligerents are obliged to follow the internationally recognized rules of war with military necessity a defense for violation, such as self-preservation. The underlying principle is that no more force or violence should be used to undertake a military action than is absolutely necessary. The doctrine was clarified in a number of cases at Nuremberg, such as those holdings forbidding the killing of unarmed enemies or the use of mass deportations.⁴³ Today, the problem is particularly acute in light of the availability of weapons of mass destruction. The proposed tribunal should be obliged to determine whether the use or threatened use of such weapons may be justified, whether in a state of war or cold war.

At the moment, violations of the laws and customs of war occupy a prominent place in our newspapers. It is common knowledge that during the recent hostilities in the Middle East, official radio facilities of certain Arab governments spoke of the intention of these states to exterminate the Israelis. At the same time, photographs and reports by neutral observers demonstrated the use of poison gas by Egyptian air forces against the civilian population of Yemen.

⁴³ Mashaw, *Federal Issues in and about the Jurisdiction of the Court of Justice of the European Communities*, 40 COLUM. L. REV. 21 (1965); Schwelb, *The Protection of the Right of Property of Nationals under the First Protocol to the European Convention on Human Rights*, 13 AM. J. COMP. L. 518 (1964).

Finally, the presence and character of the American involvement in Viet Nam is increasingly questioned. Bertrand Russell, for one, has called it criminal.⁴⁴ The deterrent effect, both moral and political, of the war crimes trials of our century has been dissipated for the want of a permanent body capable of defining the extent of the concept of the war crime and moving legally against mutual instances of war crimes. In the absence of such a body, private individuals like Russell are forced to resort to what the common law would call self-help. Clearly, however, such measures can not bear the moral or the legal impact of determinations by an international tribunal functioning with the general consent of the world community and under the auspices of the United Nations. Assuming that the United States may have committed acts in Viet Nam which constitute war crimes, the Russell tribunal may have had before it evidence that established this fact. But the obvious political purpose of the body and the stated prejudices of its members prevented the assurance of an objective decision. It is self-evident that those who wish to try American actions as well as those who wish to defend them require an impartial judge; for without the assurance of impartiality, neither a conviction nor an acquittal carries much weight.

A most important case for such a tribunal would be the issue of the unresolved war in the Middle East. The Arab states have continuously made known to the world their intent to commit acts illegal under the definitions of war crimes given in this article.⁴⁵ The war is still under way, though presently quiescent, and the danger of the commission of war crimes—even genocide—is very real. An expression of will on the part of the majority of the world's people, acting through the United Nations, could forestall such crimes. If it were understood by the Arab powers that criminal acts would be judged by the United Nations and punished by the concerted force of the great powers, then one suspects that war crimes in the area would be effectively deterred.⁴⁶

Much the same can be said of other chief examples of manifest intent to violate the principles of the Resolution of December 11, 1946. On the whole, these cases involve small nations whose acts the United Nations might realistically hope to influence through moral and political suasion. The typical example might be the African state pieced together after colonial liberations from various hostile tribes or religious groups. The prevention of war crimes during civil hostilities in such states—such as those now taking place in Nigeria with regard to the Ibo tribe—will prove to be a major concern in the diplomacy of the remainder of our century, and a permanent war crimes tribunal would

44 See Hook, *Lord Russell and the War Crimes "Trial,"* 112 CONG. REC. A5866 (daily ed. Nov. 21, 1966).

45 113 CONG. REC. A3675-6 (daily ed. July 20, 1967); 113 CONG. REC. H9643-6 (daily ed. July 31, 1967); 113 CONG. REC. S11275-86 (daily ed. Aug. 10, 1967).

46 Jewish residents in Arab countries have been subjected to oppressions somewhat verging on genocide. The Syrian regime has set up a 2.4 mile radius beyond which the Jews of the Damascus Ghetto may not venture. Telephones are tapped and mail is censored. Jews are banned from buying land or dealing in imports. In Egypt, 500 Jews were arrested and crammed into tiny cells with many detainees beaten and tortured. In Iraq, 100 Jewish leaders were arrested while the entire community is under house arrest. Though North African governments sought to protect their Jews, the Jewish community was subjected to mob harassment and many have been forced to flee. *Exodus*, NEWSWEEK, Nov. 27, 1967, at 57-58. Israel's Chief Rabbinate has issued a passionate appeal to the conscience of the world to act in favor of the Jews in Arab lands. *THE ISRAEL DIGEST*, Oct. 20, 1967, at 5.

offer at least a first step in bringing that problem under control. At the same time, it is likely that there will be an escalation in the frequency and severity of external conflicts in the Third World, generally comprising the developing nations of Asia, Africa and Latin America. Permanent sources of conflict lie not only in tribal and racial conflict, but also in the traditional causes of war between nations: ideological conflict, clashes over contested real estate (Kashmir), and self-aggrandisement at the expense of others (India's occupation of Goa).

The post-war world has witnessed a simultaneous diffusion in the underdeveloped world of the most hateful products of the industrial West: militaristic nationalism and advanced military technology. Political systems of a relatively primitive order now possess helicopters, poison gas, napalm, airplanes, and fragmentation bombs. It is unlikely that they will use them more wisely than do the "advanced" countries. The frightful atrocities committed in 1966 in Indonesia against the resident Chinese indicate the potential for genocidal and war crimes that exists in the Third World.

At all previous stages of this century's movement toward a criminal law among nations, opponents of this movement and those honestly concerned with the viability of legal doctrine have objected to the application of legal sanctions on the ground that such punishments are *ex post facto* and violate the principle forbidding retroactive application of criminal law. While this principle is of some theoretical importance, it has not been a practical barrier to the prosecution of war criminals. Germans prior to the Second World War, for example, were bound not merely by custom and agreement but also by article 38 of the International Court, which regarded acts as criminal if they violated fundamental principles of justice recognized by civilized nations. Concerning the future, however, it is certainly desirable to extinguish any trace of ambiguity lingering in the concept of the war crime in order to deprive all violators everywhere of the defense that they lacked sufficient notice of the law to conform their behavior to its demands. This function is difficult for a parliamentary body to perform. It requires a revision of the concept of the war crime in accordance with changing circumstances. It is properly the work of a commission of trained jurists.

IV. The Form and Functioning of the Tribunal

Article VI of the Genocide Convention contemplates lodging jurisdiction in courts of two kinds: competent tribunals in the state where the offense was committed and such international tribunals as the contracting parties shall accept as having jurisdiction. It may be that no further conferring of jurisdiction is necessary. The essential question is whether the doctrine of universal jurisdiction over war criminals has not already been accepted. That doctrine was advanced by the judgment unanimously affirmed by the General Assembly on December 11, 1946,⁴⁷ and it was advanced again by Israel during the debate

⁴⁷ 1 U.N. GAOR 1144 (1946); Finch, *The Nuremberg Trial*, 41 AM. J. INT'L L. 20 (1947).

on the propriety of Israeli jurisdiction over Adolf Eichmann.⁴⁸ In the latter case, the General Assembly did not rebut the Israeli reading of the law, but instead resolved that people in all countries wished Eichmann brought to appropriate justice.⁴⁹

The crimes that may be punished by any state (or at least by any member of the United Nations), including genocide, are limited to the crimes punished at Nuremberg and piracy. The internationality of jurisdiction over the first two is established by resolution; that of the third is a product of custom and as such is of some doubt. The Israeli court in the *Eichmann* trial addressed itself to the trial provision in article VI of the Genocide Convention and found it to grant a nonexclusive jurisdiction. Indeed, it would abridge all common principles of construction to interpret the convention as having repealed by implication the bases of jurisdiction existing before 1948. These bases, commonly called the nationality and protective or passive personality principles, allow a state to claim jurisdiction over its nationals who commit offenses abroad and over nationals of other states who commit wrongs against its own population, whether on its territory or not. To the *Eichmann* court, the trial was justified not merely by the principle of universal jurisdiction over war crimes but also by the doctrine of protective jurisdiction. The court maintained that while the Jewish state had not been in existence at the time of Eichmann's crimes, that state was the embodiment of the Jewish Nation against which Eichmann's crimes had in fact been committed. As such, the court held, it had the power to punish his crimes.⁵⁰

Before *Eichmann*, the protective principle had justified only what might be called the protective jurisdiction of incorporated groups, *i.e.*, nation-states. It made no provision for the protection of persecuted internal minorities, or of such minorities who have at a later time formed themselves into a separate state. The Genocide Convention, by its broad use of language, does make provision for such cases and provides a rationale for the exercise of jurisdiction in them. In doing so, it expands the concept of the war crime, making the term one of legal art. Under the convention, the existence of civil or external hostility is no longer a prerequisite for commission of crimes punishable as against the laws and customs of nations. If we wish to describe these crimes as war crimes without "war," it will be no stranger than saying that "malice aforethought" has with the passage of time come to signify certain states of mind punishable when found existing with homicide and may have nothing to do with malice or premeditation. Throughout this paper the term "war crime" has been used for the sake of uniformity and convenience, but *Eichmann* should make clear that genocide and war crimes are both examples of crimes against humanity and are criminal under the principles of the Nuremberg judgment.

48 Note, *Eichmann—International Law?*, 24 U. PITT. L. REV. 116 (1962).

49 The authorities are in conflict, however, over whether piracy is an international crime A study of the few materials in point suggests that the [Israeli] court's conclusion that the universality principle covers Eichmann's crimes is substantially accurate, though admittedly the sources are insufficient to establish this conclusion as a rule of international law. *Id.* at 127-28.

50 *Id.*

This is as it must be. The older authorities regarded war crimes as arising from the activities of one state against another, and crimes under such circumstances are penal under the protective and nationality principles.⁵¹ But modern warfare has created the possibility of the extermination of the entire external enemy or some internal minority. If the Arab forces in the recently concluded war had succeeded in their avowed intention to destroy the whole population of Israel, the older principles of international law would be unable to furnish a forum. Thus, the trial provisions of the Genocide Convention provide for two kinds of trials: trials in the state in which the offense was committed, and trials by an international court whose jurisdiction has been accepted by the States. The first situation *prima facie* must look to the fall of a government and the surrender of its officers either to foreigners whom they have abused or to the courts of the new government. The second situation insures that a forum may exist even in the case of successful mass murder. In this respect, international law before the convention and the two resolutions that preceded it, may be thought of as looking to damage, rather than the possibility of extermination, to tort, rather than to homicide. The situation is rather like that which prevailed in common-law jurisdictions prior to the enactment of wrongful death acts. At that time, it was safer to kill a man than to hurt him through one's negligence. Unless universality of jurisdiction over the crimes enumerated in the Nuremberg and Genocide resolutions is recognized, one might say that the same situation prevails in the international community, and that it is safer to exterminate a nation than merely to attack it.

For such an international tribunal to be effective it must apply norms and principles within the context of the realities of international life. A moralistic posture must be eschewed. For example, in determining what constitutes aggression or a justified resort to force under article 5 of the United Nations Charter, it must not apply a mechanistic formula, but must consider the context of the particular situation.⁵² Such an approach would be similar to that of applying notions of due process in American courts. Such a tribunal must also take into account the inclinations of what has been regarded as the Third World. Of particular concern must be the attitude of the emerging nations as to the use of force to fight colonialism and to protect kith and kin.⁵³

In making a judicial determination, such a tribunal must consider the type of conflict involved. There may be a direct and massive use of military

51 MacGibbon, *The Scope of Acquiescence in International Law*, 1954 BR. YEAR BOOK INT'L L. 293.

52 See generally J. STONE, *AGGRESSION AND WORLD ORDER* 10-13 (1958). Article 2(4) of the Charter, which is the cornerstone, explicitly provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations." However, article 51 recognizes an inherent right of self-defense.

53 Dugard, *The Organisation of African Unity and Colonialism: An Inquiry Into the Plea of Self-Defence As a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L COMP. L. Q. 157 (1967). What such a tribunal will be able to accomplish is quite limited. "[W]orld public opinion is 'color coded.' Its reactions are conditioned by differing historical and psychological perceptions of concepts like 'democracy,' 'self determination,' 'liberation,' 'colonialism,' and 'imperialism.'" Glick, *The United Nations: Uses and Abuses*, CONGRESS BI-WEEKLY, Sept. 25, 1967, at 11. However, the same writer admits it is the task of democracies to justify its actions before such a tribunal.

force by one political entity across the frontier of another as in Korea or at Suez in 1956 and 1967, or a substantial military participation by one or more foreign nations in an internal struggle for political control, such as the Spanish Civil War, or an internal struggle for control of a national society, the outcome of which is independent of external participation, such as Hungary prior to Soviet intervention.⁵⁴

If the analysis of the principle of universal jurisdiction given above is correct, the basis for a permanent ad hoc tribunal already exists. No new treaties or negotiations would be required to establish it, though they might be desirable to solemnize the court's birth and to reaffirm world belief in its task. Nor does it strain the proper construction of the resolutions we have discussed to regard them as demonstrating a fundamental agreement on the right of all humanity to punish crimes against humanity. All international law is a matter of deriving indications as to the will of nations from their acts, scrutinizing verbal and physical manifestations to discover what rights and obligations nations think themselves to possess.⁵⁵ Full consideration should be given to resolutions carried unanimously in the General Assembly of the United Nations as indicative of the opinions of states. Though the contention has been put forth that the proposal for such a tribunal presupposes the existence of universal principles or a natural law that does not exist,⁵⁶ the tribunal could express those principles derived from the shared values of the world community as expressed by international decision-makers and the recognized claims of states. These shared values would constitute the norms for such an international tribunal.⁵⁷

Through the United Nations Charter, the Nuremberg Charter and verdict, and other significant manifestations of authority, the general community of mankind has established a basic distinction between permissible and impermissible use of violence with authoritative prohibition of impermissible coercion. In essence, this new principle seeks to preclude all deliberate use of violence, other than by agents of the international community, as an instrument of policy between peoples. It seeks to prevent attacks upon the territorial integrity and political independence of people and to preclude threats of violence that may put their targets under such apprehension that they must use military instruments to defend their territorial integrity and independence.⁵⁸

The existing judicial apparatus of the United Nations is not fitted to the task here proposed. The International Court of Justice is limited by chapter III, article 34, section I of its statute in the following manner: "Only states may be parties to cases before the Court." This, of course, is inadequate. One of the immediate functions to be performed by a war crimes tribunal would be the removal of any taint of illegality from all future trials of the *Eichmann* sort. Furthermore, trials of war criminals are, above all, trials of individuals. There

54 Falk, *International Law and the United States Role in The Viet Nam War*, 75 YALE L. J. 1122, 1126 (1966).

55 MacGibbon, note 51 *supra*.

56 Note, *War Crimes Trial: A Second Look*, 24 U. PITT. L. REV. 132 (1962).

57 See Generally M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM PUBLIC ORDER* (1961).

58 M. McDUGAL, H. LASSWELL, & J. MILLER, *INTERPRETATION OF AGREEMENTS AND WORLD ORDER* 107 (1967).

is much to be said for the existence of a forum in which a threatened state can judicially challenge the aggressor, but the enforcement of sanctions against the guilty party in such cases is quite difficult. The international tribunal that punishes war crimes must spread a doctrine of individual liability if it is to have any deterrent effect upon those natural persons, often in quite petty capacities, in whose hands the capacity to commit war crimes lies.

The tribunals contemplated by the Versailles Treaty and the Nuremberg Charter were to be composed of one judge each from a stated number of nations. To some extent the General Assembly also functions on a basis of equal representation so that logically a court intended to represent the condemnation of mankind should have behind it as wide a geographical distribution as possible. At the same time, the Charter of the United Nations does recognize certain disparities in the distribution of power among states and balances the egalitarianism of the General Assembly with veto powers in the Security Council. If it were felt desirable that the tribunal's judiciary reflect not merely the balance of opinion but also the balance of power, it might be arranged that they be drawn from among some smaller group of nations, such as the permanent members of the Security Council. Chapter VI, article 33 of the United Nations Charter binds the member nations who are parties to any dispute to first seek a solution by judicial settlement, regional arrangements or agencies, or "any other peaceful means of their own choice." Moreover, the Security Council is provided with the power to call upon the parties to settle their disputes by such means. Article 36 requires the Security Council to refer judicial disputes to the International Court of Justice "as a general rule." Article 34 gives the Council (or presumably any such agency as it may create as its representative) the power to investigate disputes, and the power to make recommendations upon the result of those investigations. Here is a court in everything but name.

The Security Council is, as originally contemplated by the Charter, the agency chiefly responsible for the deterrence of the use of force in world affairs. Nothing in the Charter prevents the Council from reserving to itself that special class of disputes involving the commission of war crimes, the extradition of the criminals, and the recommendation of appropriate punishment. It might be held, however, that such action is blocked by the language "means of their own choice." If this language is construed to modify all previous terms ("judicial settlement," "regional arrangements," etc.), then it might imply a veto in the hands of the potential defendants. But if it is construed merely as an alternative to "settlement," no such veto arises. Here it is necessary to consider the purpose of the Council as a whole. The Charter does not simply create a mediator among states. It contemplates creating a power for the purposes of keeping the peace. Thus, a permanent tribunal is compatible with the Charter of the United Nations. It is suggested, however, that the problems of war crimes indictment might best be handled by a body that has behind it a more immediate background of political power than does the International Court of Justice.

V. Summary and Conclusion

This proposal is not utopian in its implications. Such a tribunal would be acceptable to the United States Senate if it were limited only to making determinations without having the means for enforcement,⁵⁹ a conception that may be acceptable to other states as well. Such a tribunal would contribute to international order by clarifying the norms of the world community as applied to particular cases. After making such determinations, reference would then be made to the political organs of the United Nations.

Generally, the enforcement of judicial decrees has not been 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 liability or the merits of the particular case. This principle applies a fortiori to proceedings between states in international tribunals, both arbitral and judicial. The enforcement process could neither be undertaken nor directed by the international tribunal. Its judgments would be purely declaratory. The distinguishing feature of an international tribunal is that it does not have the means for enforcement, while a national court acts for and in the name of a sovereign entity—a concept entirely absent in the idea of an international tribunal.⁶⁰

The enforcement of decrees of an international tribunal is political. Under the United Nations Charter, enforcement may be undertaken by the Security Council.⁶¹ Generally, however, coercion to compel involuntary compliance with the decrees of international tribunals is an exceptional and rarely required remedy. Similar considerations would apply to the enforcement of the decisions of a war crimes tribunal. Where a state refuses to adhere to a determination by the tribunal, it would be subjected to the censure of public opinion. Enforcement may be undertaken by the appropriate regional organization, if it is functioning, or by application of sanctions pursuant to the United Nations Charter. States committed to the principle of world order, or who find such commitment to be in their national interest, could induce a recalcitrant state to comply.

Clearly, the establishment of a war crimes tribunal would reflect international realities. States would retain their sovereignty, although it would be somewhat limited. States have already limited their sovereignty by renouncing the use of force to resolve international disputes when they signed the United Nations Charter. The nineteenth-century notions of absolute sovereignty can no longer prevail in the contemporary world community. As one commentator has observed:

In effect, what has occurred is a *mass exchange of hostages*, leaving

⁵⁹ Rosenberg, *Bratum Fulmen: A Precedent for a World Court*, 25 COLUM. L. REV. 783 (1925).

⁶⁰ Deutsch, *Problems of Enforcement of Decrees of International Tribunals*, 50 A.B.A.J. 1134 (1964).

⁶¹ U.N. CHARTER art. 94, para. 2.

the population of the world's major cities subject to sudden slaughter by hostile governments. This is interdependence on a new plane of intensity: to an unbelievable and gruesome degree we now depend on each other's leaders to be rational, to be predictable, to be sane. One has only to imagine for a moment what the situation would be like today if Hitler and the Nazi Party were in charge of a military force like that of the U.S. or the U.S.S.R. to appreciate how desperately we depend on each other's leaders to be relatively free of paranoia, and endowed with humane qualities.⁶²

Impartial judges could be found for an international war crimes tribunal. Despite subjectivity and psychological factors, judicial decision-makers are capable of rendering impartial decisions. Problems do exist, however, such as environmental and cultural backgrounds. A judge could be precluded from deciding a matter in which his nation has a primary interest. Another approach might be the idea of chambers, of referring disputes to a group of neutral judges. Where judges are to be disqualified, it may also be necessary to disqualify a judge allied with the state affected. An active recruitment program should be instituted to recruit unbiased decision-makers. Selection of judges should be made from a number of sources, so that no judge will feel he owes his position because of selection from one source. One model might be selection by means of an international commission with approval from the candidate's government and from the General Assembly.

The notion of adherence to law and the judicial tradition will tend to inculcate objectivity.⁶³ Studies of the behavior of international tribunals do indicate objectivity.⁶⁴ Judges on the International Court of Justice and its predecessor, the Permanent Court, have on numerous occasions deviated from the interests of their home countries in rendering decisions.⁶⁵ The incidence for such deviation is considerably less where ad hoc judges are selected.⁶⁶ Some studies have also noted that ideological lines are often blurred as socialists join with nonsocialist coalitions in deciding issues, and no evidence indicates a consistent bias that separates either the developed or underdeveloped or the major or minor powers, though such a distinction did exist in the recent Southwest African decision.⁶⁷ Judges would do well to examine themselves for bias, and provision should be made for conflict of interest and recusancy.⁶⁸

Cases should be referred to such a tribunal with caution. The proposed war crimes tribunal would be but one mechanism for the resolution of conflict. The resolution of a particular conflict may be best resolved through negotiation and mediation rather than through submission to a tribunal to determine which party is just. Indeed, in some instances, the finding that one party is criminal may actually create psychological blocks to prevent a resolution. However,

62 Benoit, *Interdependence on a Small Planet*, 1 COLUM. J. OF WORLD BUS. 9, 10 (1966), in 112 CONG. REC. 9014 (daily ed. May 2, 1966).

63 Franck, *Some Psychological Factors in International Third Party Decision Making*, 19 STAN. L. REV. 1217 (1967).

64 *Id.* at 1220.

65 *Id.* at 1221.

66 See generally M. McDUGAL, H. LASSWELL, & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 259 (1967).

67 *Id.*

68 *Id.*

where a party commits, or threatens to commit, an act of aggression and refuses to seek a peaceful accommodation of an issue — such as the resolution of the Arab states to destroy Israel as the only solution⁶⁹ — referral to a war crimes tribunal would become imperative.

Clearly, an initial problem to be determined is the extent to which cold war issues — matters involving confrontation between the Western and Soviet blocs — should be referred to such a tribunal for determination. Ritualistically, American political leaders have asserted the rights of the captive nations — those states situated east of the Oder-Niese River upon whom Communist regimes were imposed in the course of occupation by the Red Army following World War II.⁷⁰ Concern for the fate of these peoples became especially acute following the brutal suppression of the Hungarian Revolution through the deployment of Red Army troops.⁷¹ This Communist domination, though somewhat eased today, stands in violation of notions of the national right of self-determination and the norms of the United Nations Charter. The problem of these countries, however, requires an understanding of history. The territory of the Soviet Union had been invaded twice in the twentieth century from the frontiers on which these states are situated. Between the wars all these states, with the exception of Czechoslovakia, had dictatorial regimes that were hostile to the Soviet Union, and some of these regimes even collaborated with the Axis powers. Stalin had, even during the war, asserted the need for having friendly governments in these states and made clear that hostile regimes would not be tolerated.⁷² The agreements entered into by the Allies were informal and unclear.

A war crimes tribunal would need to take all these factors into account in rendering any decision. Moreover, it would have to consider the impact of its decision upon the relationship between the bipolar blocs. It is doubtful whether a determination unfavorable to the Soviet Union would have any practical effect. Because of what it considers as its security interests, the Soviet Union will not loosen its hold upon these nations, except perhaps through an evolutionary process of permitting these governments to assert greater independence. On the other hand, a determination favorable to the Soviet Union may cause frustration for those who seek the national aspiration of these peoples. The Western Powers and the Soviet Union have, in effect, accepted the principle of co-existence, which has meant a *de facto* acceptance of the status quo in Eastern Europe. Any change in this situation can only be resolved through diplomatic negotiation and mutual settlement by the two super powers rather than through the resort to legal rostrums.⁷³

On the other hand, the war crimes tribunal could make objective determi-

69 Hourani, *supra* note 11.

70 Examples of Captive Nations Week declarations are presented in 113 CONG. REC. H13419 (daily ed. Oct. 16, 1967).

71 *The Hungarian Revolution*, 13 WORLD TODAY 3, 13-14 (1957).

72 See generally H. FEIS, CHURCHILL, ROOSEVELT, STALIN: THE WAR THEY WAGED AND THE PEACE THEY SOUGHT (1957); H. FEIS, BETWEEN WAR AND PEACE: THE POTSDAM CONFERENCE (1960); W. MCNEILL, AMERICA, BRITAIN AND RUSSIA: THEIR COOPERATION AND CONFLICT (1953); Lynd, *How the Cold War Began*, 30 COMMENTARY 379 (1960).

73 Different perspectives on Russian intentions and the nature of the cold war are presented in THE COLD WAR (Graebner ed. 1963).

nations with regard to wars of liberation, as in Viet Nam and perhaps in Thailand. The tribunal could find, after objectively considering all the facts, the extent to which a particular armed conflict is an internal insurgency as opposed to an external intervention. Such a determination could be made with regard to alleged Cuban interventions in the Western Hemisphere.

A war crimes tribunal could also determine whether the actions of the Soviet Union against the Jews and other national groups constitute genocide.⁷⁴ The pressure of public opinion from such a determination may induce a modification of Soviet policy. But such efforts must be limited within the context of particular situations, and radical change cannot be expected.

A war crimes tribunal could be particularly appropriate in focusing upon the genocidal actions committed by the People's Republic of China in Tibet in breaking up families and preventing marriages.⁷⁵ Nationalist China also may be condemned for its reported acts of suppression on Taiwan. Though representing less than 20 percent of the total population, Chiang Kai-shek and his mainland cohorts have kept a rigid and sometimes ruthless upper hand over the Taiwanese who have been subjected to frequent intimidation and humiliation. Following an uprising in reaction to Nationalist oppression, 10,000 Taiwanese were killed in 1947 as the Nationalist regime contrived to keep the Taiwanese generally in a state of subjection and to remove from the scene all leaders and potential leaders of the Taiwanese opposition. The Taiwanese are denied the right to participate in the government. Significantly, Taiwanese feel that their only recourse is to appeal to outsiders who may be in a position to influence opinion outside Taiwan to an extent where it will affect the Nationalist regime.⁷⁶ In such a situation a determination by a war crimes tribunal might have particularly salutary effect.

The war crimes tribunal would play a special role within the context of disarmament. A case may be made that under existing treaty law — the Charter of the United Nations, the Nuremberg Charter and the Kellogg-Briand Pact of 1928 — the excessive production of armaments with an overkill capacity is illegal.⁷⁷ In the existing international legal order, an excessive measure of armament constitutes a permanent threat to peace.⁷⁸ Rearmament beyond what is required for an effective second strike capacity may raise the presumption of preparation for aggressive war.⁷⁹ States, by joining the United Nations, may have accepted an obligation to enter into a disarmament treaty.⁸⁰ Conceivably,

74 Wohl, *Reds Spar with Jews in Russia*, CHRISTIAN SCIENCE MONITOR, July 12, 1967, at 9. Ukrainians in exile claim that their co-nationals in the Soviet Union are subject to oppression and genocide and claim a struggle for independence is taking place. See advertisement for World Congress of Free Ukrainians, N.Y. Times, Nov. 16, 1967, at 51.

75 INTERNATIONAL LEAGUE FOR THE RIGHTS OF MAN, THE RIGHTS OF MAN AND THE WRONGS OF STATES, A SUMMARY OF THE ACTIVITIES 1964-5, at 9.

76 Fitzgerald, *Taiwan for the Taiwanese*, ATLAS, Nov., 1967, at 36.

77 Esgain, *The Legal Aspects of Arms Control and Disarmament Treaties*, 38 TEMPLE L. Q. 133 (1965).

78 *Id.* at 134.

79 I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 196 (1963). Brownlie notes, however, that the Nuremberg Tribunal held that the mere policy of rearmament is not criminal even if one were in a position to know that the only object consistent with such rearmament was war.

80 Esgain, *supra* note 77, at 135.

a non-aligned state could seek a determination from the war crimes tribunal as to the legality of the big powers arms race or of the particular policies of one of the powers. For example, the legality of the Soviet Union's development of a suborbital bomb or the United States' development of an anti-ballistic missile may be challenged. A ruling could be made with respect to the interpretation of the Nuclear Test Ban Treaty.⁸¹ The omission of a provision for third party adjudication provides an unfortunate legal precedent and the danger of adherence to an outdated and incompatible doctrine of state sovereignty.⁸²

In order to assure compliance, arms control and disarmament treaties should expressly adopt the principle of universal jurisdiction over individuals whose acts or omissions constitute breaches of their provisions. Penal and procedural codes of universal application should be adopted. Accessories before and after the fact and attempts to commit offenses that are prohibited by the treaty should be punished by its provisions. Such provisions may not be too difficult to negotiate. The Soviet Union took the position that violations of the Nuclear Test Ban Treaty would be nothing more heinous than negligent acts or omissions of subordinate personnel, that offenses under the Treaty would not be inspired by governments and, generally, that they would be contrary to the policies of state involved and, as such, readily punished by it. The United States position has been that the most important violations that are likely to occur would be government directed, especially in the case of the Soviet Union.⁸³

A war crimes tribunal would play a special role within the context of such a situation. Though violators would be subject to the jurisdiction of municipal authorities, they would also be required to answer for their actions before an international tribunal. The tribunal would make a determination as to guilt and mete out punishment. With disarmament, war will be eliminated as an instrument of national policy and law would become the means for resolving disputes. A war crimes tribunal would play a crucial role. In a disarmed world, decisions of a war crimes tribunal could be enforced by the creative application of principles of nonviolence as suggested by the experience of Gandhi and the civil rights struggle in the United States.⁸⁴

The implementation and application of a war crimes tribunal require serious thought and study. The focus must be upon the behavior of man — his capacity for self-delusion in justifying violence and his propensity to bully and torture a defenseless victim. It is necessary to observe the way in which men actually behave and the forces that have changed their behavior and then, reasoning from such observations as to what a human being really is, determine how further changes might be effected. This requires the application of the social sciences, particularly psychology.⁸⁵

81 Esgain, *supra* note 77, at 142.

82 Martin, *Legal Aspects of Disarmament*, INT'L COMP. L. Q. 17 (Supp. Pub. No. 7 1963).

83 Esgain, *supra* note 77. Soviet treaty violations have occurred with treaties primarily concerned with issues of nonaggression and respect for the sovereignty and the independence of states, the establishment and maintenance of effective international controls, and the forbidding of revolutionary propaganda and subversive activities abroad. J. TRISKA & K. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* 394-5 (1962).

84 See generally M. SIBLEY, *THE QUIET BATTLE* (1963).

85 Wharton, *En Route to a Massacre?*, SATURDAY REVIEW, Nov. 4, 1967, at 19-21.

At traditional international law, the punishment of war crimes was in the hands of states and jurisdiction was founded on the principles of nationality of the defendant and protective jurisdiction over offenses committed against one's own nationals. Individuals were thought not to be triable, and universal jurisdiction was thought to lie, if in any case, only for piracy. However, in a series of steps chiefly associated with this century's great wars, these doctrines have been modified. At the present time, individuals are the chief subjects of the international law of war crimes. Universal jurisdiction, by consent of the chief nations, is said to lie against the crimes enumerated in the resolutions by the General Assembly of the United Nations condemning war crimes and genocide. This general consent forms the legal basis for a permanent ad hoc war crimes tribunal for the punishment of war crimes and genocide. Only by focusing the spotlight of international publicity can outrages to international order be averted.