SOME PROBLEMS ARISING FROM INDIVIDUAL CRIMINAL PROSECUTION IN INTERNATIONAL SOCIETY

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Whereas other speakers have covered more technically legal aspects I will consider more general aspects or policy issues of international society, taking war crimes as example.

At the very end of this century, the Statute of an International Criminal Court is being adopted. There is no doubt that this corresponds to welcome progress. This event has also prompted a wide array of often excessively enthusiastic reactions which sometimes seem difficult to square with persistent realities of international life. Some of the problems arising in the context of individual criminal prosecution in international society will be addressed in the following analysis.

International criminal law has evolved very slowly. The power to punish is a prerogative directly linked to sovereignty. States always feared to abdicate a power directly linked to the core of their territorial *imperium* and to vest it in an international organism with a supraterritorial competence (i.e. a direct power relation between the international organ and the individual under the State's jurisdiction). Moreover, in a matter as burdened with preoccupations of high politics as the present one, a series of problems emerge inevitably. They were already seen at the beginning of this century, at a time when projects to establish an international criminal court flourished[1]. They may not be less great today.

Problems of Policy

It is a regrettable fact that in the minds of peoples the national (or otherwise local) solidarity still largely outweighs any spirit of international solidarity. This fact can be witnessed over and over again. If there is a real identification with the common weal of the nation, especially at times of emergencies, there is little of an *esprit communautaire* rooted directly in the common good of the international society.

As Ch. De Visscher very astutely wrote some time ago: "It is in contact with the world outside that any social group differentiates and becomes conscious of itself. Only against the stranger does its solidarity fully assert itself. (...). The international community has no such decisive factor of social cohesion. (...). In the State it is the vital interests, the

[1] See the short survey of N. Politis, *Les nouvelles tendances du droit international*, Paris, 1927, p. 95 ff.

most highly political, that evoke the supreme solidarities. The opposite is the case in the international community. There one observes minor solidarities of an economic or technical order for example; but the nearer one approaches vital questions, such as the preservation of peace and prevention of war, the less influence the community has on its members. Solidarities diminish as the perils threatening them grow. The solidarities that then assert themselves turn back towards their traditional home, the nation. On the rational plane, men do not deny the existence of supranational values; in the sphere of action they rarely obey any but national imperatives[2]."

From this representation of allegiances flows what could be called a double standard of morality. Thus, for the same persons, an individual who kills another for private ends within the State is an evil murderer, the death of whom may even be passionately asked for. On the other hand, the individual who atrociously kills defenceless human beings during a war will be proclaimed by the same persons a national hero if only the massacred individuals belonged to the enemy.

Such is the situation in almost every war; we witnessed it again in the wars taking place after the splitting up of Yugoslavia. But it is nothing new. In the Llandsdowery Castle Trial at Leipzig after World War I, some German soldiers who had shot dead a number of shipwrecked British military men at sea were sentenced by the German Supreme Court to imprisonment as war criminals. On delivery of the sentence, many persons who had assisted at the trial went to congratulate the sentenced soldiers for their patriotic services. The British delegation who was present had to be brought out of the courtroom under police protection and by a side-door.

This state of affairs does not augur well for the judicial handling of war crimes. The extremely passionate, political and, in the sense indicated, particular character of the matter raises a number of problems. *First*, there is a danger of (political) manipulation of trials as always in questions highly emotive, for which courts of justice are not well armed to deal with. *Second*, there is also a danger for peace in a society which is still largely incumbent upon the maxim that peace precedes justice. Reopening the wounds of the war by criminal proceedings after a fragile peace-equilibrium has been found can put in danger those very results which are the precondition for ending the hell of the war. It may well be true that a lasting peace could neither be achieved without justice being done, even if for centuries it obviously has. But the often explosive tension between the two terms should at least be seen. This tension can become even greater in cases where there is no complete surrender and occupation. Here the peace treaty will normally be concluded with the very persons who at the highest level are held responsible for the criminal conduct; and these

[2] C. De Visscher, *Théories et réalités en droit international public*, 4. éd., Paris, 1970, p. 111-2.

persons may well be indispensable to secure peace for they have their own population behind them. A permanent international criminal court has the advantage of administering justice outside of the theatre of conflict. It may thus contribute to a more objective application of the law than that by *ad hoc* tribunals on the spot and especially avoid adding to local friction by its activities in the area where the war took place.

Legal Problems

This is not the place for discussing the manifold, often quite technical problems, which flow from the administration of the law in this particular field. Only three problems will be mentioned here.

First, contrary to a very widespread opinion held in uninformed circles, the International Criminal Court will handle only a very small number of cases. Theoretically these will be the most important ones: that top of the iceberg, visible to anybody, for instance because of the high positions held by the individuals indicted. The court is not equipped to deal with the overwhelming number of small or middle-size cases which arise, for example, out of a war. Eighteen judges cannot substitute themselves to the capillary spreading of State jurisdictions. A look at the situation in Rwanda, where thousands of alleged criminals are awaiting their trial in prison – the State courts being themselves saturated – provides a clear illustration. The International Criminal Court will inherit the most important and delicate cases. At best, it will thus be able to function as a signalling post and to contribute to the evolution of the law. But, on the other hand, hard cases sometimes make bad law. This may be even more true if the cases are scattered. It is the large number of apparently insignificant cases which permits a court to establish a jurisprudence. This jurisprudence is essential for a restatement or development of the law. It is also essential for the court itself: all national courts consolidated through that increasingly tight web of pronouncements which they were able to shape.

From another perspective, it may be that the almost complete lack of coherent international jurisprudence in matters of international criminal law will give the court, even if it decides only a few cases, a conspicuous role in the development of the law. This happened with the Permanent Court of International Justice and with its successor (not in a legal sense), the International Court of Justice.

Second, if national courts will continue to be essential in the suppression of international crimes, the problems of incoherence in the applicable law, in the practice of prosecution and in sentencing are bound to remain with us. The International Criminal Court may obviously contribute to somewhat greater uniformity; but probably this will remain quite marginal for a longer period. It has to be stressed that the Court has no appellate or cassation powers over judgements rendered by national courts. The equal application of the law in similar cases will remain a grave concern.

Third, there are problems of justice *stricto sensu*. Let us again take the example of war crimes. In the extreme violence of war, when all social structures collapse, when the rumours circulate and the minds are enflamed, when criminal acts spread, reliable evidence is difficult to obtain. Ordinarily a reliable witness is the one who is called to testify about facts that he came to know without being personally interested in the outcome of the procedure. In our case, the witnesses almost all belong to friend or foe; they are not neutral nor can they be neutral; they may be ideologised, and often are ideologised. Manipulation may also be widespread in such conditions. Pressures of every type exist after a war where the *règlement de comptes* and the *épuration* seldom permit dispassionate justice to be done. I remember that some weeks ago the ICRC was asked by a counsel of an indicted person to disclose if his client was by any chance prisoner in a specified camp at a specific date. For if he had been there, he could not have committed the crime. One should think it easy to deliver that information, the inmates being registered. But in fact it proved impossible to be affirmative; the registers were not reliable especially as to the dates of entry in a camp; under emergency conditions they were updated only as circumstances permitted. What should be said, then, about judicial proceedings in such situations?

Aspects of Credibility

From a positive perspective, there seem to be four minimal conditions for the International Criminal Court to succeed. It was the way in which these conditions materialised that decided the successful fate of the Permanent Court of International Justice established in 1920 and, on the other hand, the demise of the Central American Court of Justice created in 1907[3].

There is first a *personal condition*: the judges of the Court must be distinguished jurists; they must be above all suspicion of every kind; they have to be kept far from political struggles; they must not have an activist temper. Moreover they have to show discretion, integrity and aptitude for patient work. It has to be stressed that any scandal (e.g. corruption), may do irreparable harm to the prestige of a freshly established court.

There is, second, an *institutional condition*. It is essential that the Court should not only be, but also appear to be a true judicial body keeping away from political contingencies: "justice should not only be done, but should be seen to be done". The Court should not become embezzled in such contingencies which are likely to weigh heavily upon matters as deeply political as international crimes. The prestige of the Court could otherwise receive fatal strains. Therefore, the Court has to pay special attention towards avoiding selectiveness in prosecution which is the first hallmark of political influences. In the context of a war this means that all

[3]On the reasons of that demise, cf. N. Politis, *La justice internationale*, Paris, 1924, p. 139 ff.

persons credibly charged with war crimes would have to be investigated and possibly prosecuted. Attention will especially have to be paid to the fact that not only the criminals of the vanquished, of the aggressor or of the party denounced in the media, are to be investigated. Obviously, the question of the prosecution of the accused belonging to the victor is particularly delicate. There is certainly no valid tu quoque argument in international criminal law: you cannot claim impunity because others having also committed criminal deeds are not or cannot be prosecuted. But equality of prosecution is an essential element for the credibility of an international criminal court.

Finally, the Court must carefully weigh its judicial policy. It must consider the views of the governments and take account of them. Too bold judicial action or a conspicuous tendency to yield to the development of the law by judicial legislation may curtail the evolution of the Court. For such a course may be disclaimed by the States who not only are the masters of its Statute, but also remain the ultimate power entities in international relations. Without the support of the large majority of States, the Court's future is doomed to be sterile. On the other hand, carefulness in judicial action does not mean conservatism or even backwards-oriented jurisprudence. As the Supreme Court of the United States of America at the time of the New Deal has shown, there is also excessive judicial caution which may discredit a court of justice. A balance will have to be carefully sought between these forces. This question of judicial policy is the most exacting task of every court. From its adequate solution depends the role that any court is able to play in social affairs.

There is third an *environmental condition*: the Court must be able to work in quietness and objectivity. If it is put under spotlights, reported upon by mass journalism, exposed to public interest, pressure, emotions or passions, a court is rarely able to produce justice. This will be particularly true for the International Criminal Court. The expectations of the man of the street will hardly coincide with the results obtained by the undisturbed application of the special rules of international criminal law and procedure. As in this field the emotions of the masses are liable to rise quite high, the gap between diffuse expectations and judicial realities could become disquieting for the Court. In that sense one should wish that it might take up its work in the shadows of a great garden, sufficiently forgotten by dubious mediatic interest and unrealistic public expectations.

There are also other aspects of the environmental condition, but these are beyond the reach of the Court. They are linked to the evolution of international society and the responses found in order to grapple with the crises inherent in human affairs. No court of justice bound to the administration of the law functions well in times of social upheavals. Thus, for example, the influence of the Permanent Court of International Justice diminished dramatically in the 1930s.

Conclusion

From a certain point of view, obstacles exist to be overcome. None of the problems highlighted is insoluble. None is devoid of some counter-part which may even out-weigh it. But on the other hand naïve optimism is usually the forerunner of bitter disillusions. The 1920s are instructive to that end. It is only by examining meticulously and patiently the ways to push back the obstacles of reality that one can hope to achieve a perhaps slower, but probably more effective progress. This can be turned also into positive words: one should not immediately be discouraged when the International Criminal Court will face its first drawbacks. Instead, the thoughts of a master of international law and diplomacy may well be in point: "[L]es plus gros obstacles ne sont, sur une longue route, que difficultés relatives et passagères. La justice internationale vient de loin et va plus loin encore. Quand on connaît son passé, on peut avoir confiance en son avenir[4]." ("The greatest obstacles on a long road are only relative and passing problems. International justice has travelled a long road and will go still far ahead. When one knows its past, one can be confident in its future.")

[4] N. Politis, *La justice internationale*, Paris, 1924, p. 255.