EDITORIAL COMMENT

APPELLATE JURISDICTION IN INTERNATIONAL CASES

The Supreme Court of the United States on December 20, 1948, decided that it had no jurisdiction over the International Military Tribunal for the Far East. Accordingly, it denied motions for leave to file petitions for writs of *habeas corpus* made on behalf of the Japanese defendants who had appealed to the Supreme Court from their convictions at Tokyo on November 12, 1948. The *per curiam* decision held that the International Military Tribunal was not a tribunal of the United States. It was set up by General MacArthur as the agent of the Allied Powers who conquered and now occupy and control Japan. Under these circumstances, the Supreme Court said, "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners."[1]

This case raised questions of international law of fundamental importance quite apart from the issues involved in the punishment of war criminals *stricto sensu* or of the *ex post bello* type. The relation of national courts to international tribunals, and *vice versa,* will have to be thoroughly reconsidered if some proposals now under official consideration should eventually reach the adoption stage. Where the sanctions for international conventions, such as the one on genocide recently approved by the General Assembly of the United Nations, the proposed Covenant on Human Rights now being drafted under the same auspices, the hoped-for regulations for the control of atomic energy to prevent its unlawful diversion for purposes of mass destruction, and the suggested codification of the principles of the Nuremberg trial for the punishment of crimes against peace, may be made dependent upon an international criminal jurisdiction for the enforcement of penalties against individual violators, the interrelation of national and international legal processes is bound to become deeply involved.

National courts now have jurisdiction to punish certain offenses against the law of nations, such as piracy, the counterfeiting of foreign currencies and other crimes against the security of friendly governments. They are also competent to punish for the violation of the penal laws of their own governments enacted to enforce respect for international obligations arising under customary and treaty law, such as neutrality laws, statutes for the suppression of the trade in narcotics, etc. Sovereign states, however, do not permit appeals from the decisions of their national courts to international tribunals. "The jurisdiction of courts is a branch of that which

[1] See Judicial Decisions, *post,* p. 172.

is possessed by the nation as an independent power."[2] When aliens are denied justice in national courts, or the government fails to live up to an international obligation, reclamations lie through diplomatic channels, and the claim may ultimately reach an international tribunal; but redress takes the form, not of an appeal from an objectionable decision, but of damages for the injury suffered. This difference in form is important. It marks one of the contrasts between the so-called dualist and monist theories of international law. Certain previous cases, also in the Supreme Court of the United States, serve to illustrate the point.

In *The Circassian*,[3] an American Civil War case, the Supreme Court affirmed the condemnation of a British ship and cargo as lawful prize. The decision was not accepted by the British Government, and claims for the value of the ship and cargo were submitted to the American-British Claims Commission established by Article XII of the Treaty of Washington of May 8, 1871. The Commission made awards in favor of the claimants.[4] Nevertheless, the decision of the Supreme Court remains prize law as interpreted by the United States, and the principles relied upon in that decision were applied and followed in the case of *The Adula*,[5] a prize case of the Spanish-American War of 1898.

National differences in the interpretation of prize law created a widespread demand for the establishment of an international prize court in the expectation of producing uniformity in the law by judicial decision. The Second Peace Conference at The Hague in 1907 agreed upon an International Prize Court Convention, and the United States was desirous of ratifying its signature. The Convention provided for direct appeals from the decisions of national courts to the international court. Doubts as to the constitutionality of this provision were raised by eminent judges and lawyers and in the Committee on Foreign Relations of the United States Senate, to which the treaty was referred. In view of the constitutional provision that "The judicial power of the United States shall be vested in one Supreme Court" (Art. III, Sec. 1), how, it was asked, could a treaty provide for appeals from the Supreme Court of the United States to an international court? In support of an answer in the negative it was argued that a court cannot be considered supreme if appeals may be taken from its decisions to another court.[6]

To meet the constitutional difficulty and thus enable the United States to become a party to the International Prize Court Convention, Secretary of State Knox proposed that, in ratifying the Convention, governments

[2] Marshall, C. J., in *The Schooner Exchange v.* McFaddon (1812), 7 Cranch 116.

[3] (1864), 2 Wallace 135.

[4] Moore, International Arbitrations, Vol. 4, pp. 3911–3923.

[5] (1900), 176 U. S. 361.

[6] See this JOURNAL, Vol. 2 (1908), pp. 21, 458, 476; Vol. 6 (1912), p. 799; Vol. 12 (1918), p. 80.

with constitutional difficulties of this nature be permitted to provide for submission to the International Prize Court, not of appeals from their national courts, but of the original questions involved in controversy and that recourse to the international court would take the form of an action in damages for any injury caused by the capture. The other signatories agreed with the proposal and it was embodied in an additional protocol.[7] The Convention and Protocol were both acted upon favorably by the United States Senate, but a sufficient number of ratifications of other signatories was not forthcoming to establish the International Prize Court.

British fear that the Permanent Court of International Justice established at The Hague by the protocol of December 16, 1920, might be construed to have appellate jurisdiction from national prize courts apparently delayed Great Britain's acceptance of the Optional Clause conferring compulsory jurisdiction upon the international court in certain categories of so-called legal disputes. When the Optional Clause was signed by the representatives of the United Kingdom on September 19, 1929, the British Government took the precaution of issuing a memorandum in the form of a *White Paper* interpreting its action. The memorandum dealt with and discounted the apprehension felt in Great Britain that signature of the Optional Clause might "expose the legitimacy of British belligerent action at sea to the decision of an international court." The memorandum added that "our acceptance of the optional clause makes no difference to the principle that prize cases must be decided first in our own prize courts before any question of a reference to the Permanent Court could arise." It concluded that "The rule of international law that arbitration cannot be claimed unless and until the remedies provided by municipal courts have been exhausted is as applicable to prize courts as to any other municipal tribunals."[8]

If states do not permit appeals from their courts to an international jurisdiction for the reason that such procedure would be incompatible with state sovereignty, *a fortiori* national courts have no jurisdiction over international tribunals, which are but agents of the sovereign states establishing them, and exercise only the powers delegated to them by their creators. For example, the present International Court of Justice at The Hague is expressly stated in the Charter to be one of the principal organs of the United Nations (Art. 7). It has no more functions than those conferred upon it expressly or by necessary implication in the Statute annexed to the Charter. The long-established and universally acknowledged principle of international law that no state may be sued without its consent is incorporated in the Court's Statute, which provides that "Only States

[7] For Secretary Knox' note and the text of the additional protocol, see this JOURNAL, Supp., Vol. 4 (1910), p. 102, and Vol. 5 (1911), p. 95.

[8] For the full text of the British White Paper, see this JOURNAL, Supp., Vol. 25 (1931), p. 82.

may be parties in cases before the Court" (Art. 34), and that "The jurisdiction of the Court comprises all the cases which the parties refer to it" (Art. 36). No compulsory jurisdiction exists except where specially provided for in treaties or by acceptance of the Optional Clause contained in Article 36.

The Supreme Court's decision of December 20 might well have rested upon this principle of state immunity from suit without its consent. The indictment of the Japanese defendants by the International Military Tribunal for the Far East was entered against them in the name of and by the eleven governments which authorized General MacArthur to set up the Tribunal. The appeals from the judgments of the International Military Tribunal were, therefore, in the nature of suits against the eleven prosecuting governments. Aside from any question of national constitutional law, no court, national or international, had jurisdiction to entertain such appeals without the consent of the governments against whose agency—the International Military Tribunal at Tokyo—the appeals were taken. Those governments made their own provision for review of the judgments in the Charter establishing the Tribunal. Art. 17 provides: "The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon." He was authorized to "reduce or otherwise alter the sentence except to increase its severity." General MacArthur reviewed the sentences but refused to alter them, hence the petition to the Supreme Court of the United States. By making this express provision for review of the judgment, the Allied Powers foreclosed any possibility of imputing to them consent to review in any other forum.

The immunity of states from suit without their consent is firmly established in the jurisprudence of the Supreme Court of the United States. By the Constitution (Art. III, Sec. 2), the judicial power of the United States extends to controversies "between a State, or the citizens thereof, and foreign states, citizens or subjects." The Eleventh Amendment of the Constitution restricted this broad grant of judicial power so as to protect the States from suits by citizens of another State or by citizens or subjects of any foreign state, but the Amendment made no reference to a suit brought by a foreign state against one of the United States, expressly permitted by Section 2 of Article III above quoted. Yet, when the Principality of Monaco brought suit against the State of Mississippi in the Supreme Court under the constitutional provision giving the Court original jurisdiction in cases where a State shall be a party, the Court held that the waiver of consent to suit inherent in the acceptance of the Constitution by the States of the Union runs only to those States, and not in favor of a foreign state. As to suits brought by foreign states, the Court held that the States of the Union retained the same immunity that they enjoy with re-

spect to suits by individuals, and that the foreign state enjoys a similar sovereign immunity and cannot be sued without its consent.[9]

The mere statement of these elementary jurisdictional questions will serve to suggest the complexity of the many problems of substantive and procedural law which will present themselves for solution in working out any scheme for international penal jurisdiction, whether it be intended to operate concurrently with national legal processes or to be imposed upon them as an appellate jurisdiction.

GEORGE A. FINCH

THE RIGHTS OF THE UNITED STATES IN BERLIN[1]

Origin of Rights

The United States is in Berlin as of right. The rights of the United States as a joint occupying power in Berlin derive from the total defeat and unconditional surrender of Germany. Article I of protocol on zones of occupation in Germany agreed to by the Soviet Union in the European Advisory Commission on November 14, 1944 provides:

> "I. Germany, within frontiers as were on December 31, 1937, will, for purposes of occupation, be divided into three zones, one of which will be allotted to each of three powers, and a special Berlin area, which will be under joint occupation by the three powers."

This agreement (later amended to include France) established the area of Berlin as an international enclave to be jointly occupied and administered by four powers.

The representatives of commanders-in-chief adopted, on July 7, 1945, a resolution establishing the Allied Kommandatura for administration of Berlin. The Kommandatura was to be under the direction of the chief military commandant which post was to be held in rotation by each of four military commanders. The chief military commandant in consultation with the other commanders was to exercise administration of all Berlin sectors when a question of principle and problems common to all sectors arose. In order to exercise supervision of Berlin local government, one or two representatives from each Allied command were to be attached to each section of the local German government.

[9] 292 U. S. 313; this JOURNAL, Vol. 28 (1934), p. 576.

[1] Because of his official duties with the United States Delegation to the General Assembly in Paris, Mr. Jessup was unable to contribute an editorial to this issue of the JOURNAL. On December 8, 1948, President Truman designated Mr. Jessup Acting Chief of the United States Mission to the United Nations. As of interest to its readers, the JOURNAL is reproducing here an extract from the statement made by Mr. Jessup on behalf of the United States before the Security Council on Oct. 6, 1948, during the Council's consideration of the Berlin question. The full text of the statement is contained in Department of State Press Release No. 821, Oct. 8, 1948, excerpts from which appear in the Department of State Bulletin, Vol. XIX, No. 485, Oct. 17, 1948, p. 484.