We the Peoples of the United Nations

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I. Introduction

In an article for a new Yearbook of United Nations Law it may be stimulating to start at the very beginning. The most appropriate topic, therefore, seems to be the first words of the preamble of the Charter of the United Nations: "We The Peoples of the United Nations ...".

The Report of the Commission on Global Governance of 1995 (the Carlsson Commission) wrote about these words: "The assertion that it was the people of the world who were creating a world body was little more than a rhetorical flourish. But the proclamation was symbolic of the hopes of the founders of the United Nations for what they were creat-

ing"[1].The words are more than just an introduction to the Charter. They express an ideal, the aim to create an organization of the peoples of the United Nations, which should be understood as meaning: of all peoples of the world. This desired objective is still far away, if ever it can be reached. Peoples cannot easily be organized and their representation will always be disputable.

The present United Nations is not an organization of peoples, but an organization of governments of states. Sometimes these governments represent their peoples (or at least the majority of them), often they do not. But in either case it are first and foremost the interests of state governments which will be promoted by the organization. The most important duty of governments is to serve the interests of the citizens of their states. Therefore, an organization working for the promotion of the interests of state governments will usually be beneficial to the interests of the citizens. However, the interests of the governments of the member states do not always run parallel to the interests of the "Peoples of the United Nations ...".

"We the Peoples of the United Nations ...", sometimes find the interests of the governments of the existing states, as obstacles to combining our efforts to accomplish the aims enumerated in the preamble of the Charter of the United Nations.

To describe that conflict of interests and the efforts and possibilities of solving it is the aim of this article. We have two players in the field, fortunately playing most of the time together and only rarely against each other. Both players have to play an impossible part. "We the Peoples of the United Nations ...", lack a real representation of our own, we cannot even speak against the governments of the states. But these governments are also in a difficult position. They are faced with an insoluble dilemma. On the one hand, they want to keep full control, to remain the master who can make the rules and decide what should be done and what should not. On the other hand, they find their powers being drained away. The internationalization of society makes national rules increasingly ineffective. Governments need international cooperation, they need international organizations. To be effective international organizations need power and competence, but that is what governments do not want to transfer to them; they want to keep the powers for themselves.

In the present article we shall first take a look at the tasks to be performed, at the role of governments in general; then at the question of how the interests involved are managed. After that we shall pay attention

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1 The Commission on Global Governance, *Our Global Neighbourhood. The Report of the Commission on Global Governance*, 1995, 226.

to the inevitable development towards world government in an increasing number of fields. Having thus established our field of operation, we shall look at possibilities of supranational government without a decisive role of the existing governments of states. What experience do we have with independent international organs? Finally, we shall consider steps that may be taken in order to strengthen the position of the peoples of the United Nations and draw some conclusions.

II. The Role of Governments

The main task of governments is to order society, to make, execute and supervise rules serving the interest of the people. In the past, this task could be well performed at the level of the state. In fact, there were hardly any interests at a level above that of the state. International law was a system balancing conflicting sovereign interests of states. It is now at the turning point of having to develop into a system of constructive interaction for the common good[2]. This changes the role of government. An international community is developing. Many problems, such as trade, health, the keeping of the peace, employment and environment surpass the borders of states. The main reason why the United Nations, its specialized agencies and many more international organizations were created was the need of some kind of government over territory broader than that of the individual states, at least for a (as yet restricted) number of issues. Possibly, the peoples of the United Nations would have wanted to create — if only for some issues — some kind of supranational government, but not so the governments of the existing states. These governments had full powers in their states and they did not want to lose any of them.

Governments want to govern; governments of states want to govern their states. There, they see their task. Often governments have interests of their own: a human desire of power, of control, often of personal wealth and satisfaction, but their task is to defend and promote the interests of the state. All governments consider themselves most able to perform that task. Almost by definition they consider supranational organs less competent to look after the interests of their states than they are themselves. Often, this may be correct, but not necessarily. A wise supranational government will delegate much to state governments and will perform only those duties that promote the interests of the larger community, which at the same time will be the long-term interests of the populations

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2 Jutta Brunnée, ""Common Interest" — Echoes from an Empty Shell", *ZaöRV* 49 (1989), 791 et seq., (792).

of most states. In Europe this is called "subsidiarity". Sometimes, state governments defend and promote national interests less well than a supranational government would do. Most obviously this is the case where dictators are pursuing their personal interests and where incompetent governments neglect their duties. Any international government would probably serve the interests of the local population better than, for example, the government of Zaire (Spring '97). But also the most sophisticated governments of highly developed states do not always promote the interests of the people. If they did we would have achieved full disarmament years ago. Even sophisticated governments rarely look at the long term. Their own interest concerns re-election in four or five years time. Achievements must be reached by then. They do not risk great unemployment, for example in the armament industry, for the sake of a long-term interest which requires economic sacrifices in the short-term.

Of course, supranational governments may also be incompetent, or striving at their own personal interests, but we may expect that the larger international community will be more able than small individual states to prevent the coming into power of people who are unsuitable to take governmental responsibility.

The wish of the governments which created the United Nations, to fully remain masters in their own states dominated the creation of the organization. Virtually no power was granted to the organization to make binding laws and in Article 2 para. 7 it was expressly provided that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

Only in the field of peace-keeping can the organization, through the Security Council, take binding decisions.

III. The Management of Interests

At present the United Nations is still an organization of national governments unwilling to transfer real powers to the organization. "We the Peoples of the United Nations ...", have no organ directly looking after our common interests. The common interests of the peoples of the world are looked after by the collectivity of the governments of the states. There is one exception: the sea-bed and ocean floor and subsoil thereof are the "common heritage of mankind". They are beyond the limits of state sovereignty and under direct control of the International Sea-Bed Author-

ity. This Authority acts on behalf of the peoples of the United Nations. It is still to be seen how successful it can be. If it works well, it may serve as a model for similar authorities for other common interests of mankind.

For the time being, however, the vast majority of all interests are defended and promoted by the national governments. When all national interests run parallel the aggregate of the national interests will be about equivalent to the common interest[3], but rarely are all national interests the same. When national interests differ the management of the common interest by the national governments meets with at least two objections.

a) First, there is the different size of the member states, which may make it unfair that all states have equal voting rights, so that the interests of a large population can be outvoted by interests of a few small populations. The equality of the votes of all governments in the United Nations is not in all cases wrong. On organizational matters, such as dates of meetings and election of judges, the opinion of the government of a small state has no less value than that of a large one. Even in budgetary matters there is no reason to differentiate. It is true that some states contribute more than others, but that does not mean that governments of small states will lightheartedly vote for higher expenditure. The budget of the United Nations is based on capacity to pay, which means that the relative burden for each state is the same. The obligation to pay US$ 1,000 is as much a sacrifice for Barbados as an obligation to pay US$ 2,500,000 is for the United States. But, when international legislation is to be made, the voice of one million people should count more than the voice of one hundred. So far, the United Nations has coped with this problem by not making any legislation. Only non-binding recommendations are adopted or conventions which become binding only for the states which expressly accept them.

b) Another reason why the common interest of the peoples of the United Nations is not best defended by the national governments stems from the fact that not only in quantity, but also in substance national interests differ. The population of Iceland has an enormous interest in fishing, but may be outvoted in a fishing problem by the governments of two landlocked states. The Icelandic population has virtually no interest in the production of oil or wood. Nonetheless its government, on those subjects, has a vote equal to that of the governments of the population with the largest production.

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3 Brunnée uses the expression "coinciding interests" for this situation, which must be carefully distinguished from "common interests", see above note 2, at 793.

The above-mentioned problems are hard to overcome. Systems of weighted voting have been proposed but none of them is generally acceptable. The most objective one seems to be on the size of the population but would it be fair to give the Chinese representation many more votes than the representations of the United Kingdom, France and Japan on issues like air navigation, world trade or shipping where the interest of the Chinese population is rather small, notwithstanding its large size? Weighted voting has been successful in organizations charged with promoting only one particular interest. Then the votes can be weighed against that interest as in the case of monetary organizations, such as the IMF, the IBRD and the Regional Development Banks.

We must conclude that the way in which the peoples of the United Nations are represented is far from ideal. The governments of the existing states are not their best representatives, but there are no better ones and we have to accept that the population of the world will be represented by the governments of the states for a long time to come.

IV. A Universal Legal Order

Traditionally, public international law was not only a legal order regulating the relations between states, it was also created solely by the states. The main source of international law is the treaty. New rules must be codified in treaties and bind only those states which expressly accept them. The international community lacks a legislator empowered to make universal rules.

A formal filling of this *lacuna* is almost impossible. Never will all state governments of the world officially agree to empower a supranational organ to make universally binding laws. Therefore, sources of international law other than treaties must be developed for those governmental tasks which are of a global character, such as the protection of the environment and the prevention of the depletion of the ozone layer and of deforestation. General principles of law, repeated resolutions of the UN, resolutions of other organizations and of special conferences, as well as consistent writings by experts may help to build *jus cogens*, the only rules of law which are widely accepted as universally binding.

V. Development towards Supranational Government

National governments do not want to transfer their powers to supranational bodies, but sometimes they are forced to do so. In that respect the European Union offers a clear example. Even the government of the Unit-

ed Kingdom, the most reluctant to sacrifice any powers, has been compelled to delegate authority to the Union. Economic and other forces may compel operation at a scale larger than the state. In the United Nations developments are slower and great divergencies bar supranationality in many fields, but still we can identify a gradual development towards supranational legislation, that is legislation for the peoples of the United Nations. Supranational rules are imposed by three needs which governments cannot ignore, a technical need, a need to cope with global risks and a human need.

1. Technical Needs of Supranational Legislation

Increasingly, society is influenced by international relations. Domestic rules become insufficient. In many specific fields international cooperation has become inevitable. Health is just one example. Diseases do not stop at borders. Nor in many cases, do unsafe foodstuffs.

Any international cooperation between the responsible national departments will be beneficial to the common aim. The same is true for most technical cooperation. Rules for international sea and air navigation cannot be made by individual state governments. Neither can the rules for the international mail. In these technical fields international rules are needed as well as international organizations to draft them and to coordinate — if not to supervise — their application. When the need arose, technical organizations have been created. Some of them are old, e.g. the UPU, others are of a more recent date, such as the World Tourism Organization, but they are all in fact, run by experts. Officially, the specialized agencies of the United Nations are governmental organizations and occasionally government policy is imposed upon them (see below, VI.4) but usually authority is delegated to governmental departments, or even to departments operating independently from the governments. The most fruitful international cooperation is that of people who all strive for the same aim: good and effective technical rules. Though officially organizations of governments, most specialized agencies have developed some degree of independence of the governments. In fact, the technical people run the organization. Often the governments exert only little influence. A good example is the UPU. Technical experts make rules on international mail. According to international law such rules are binding only after ratification by the states, but the postmasters do not bother about international law. Dutifully, they require ratification, but, at the same time, they agree to apply the rules from a particular date and, ignoring whether there are any ratifications, they apply the rules from that date. States are considered bound, even if they did not ratify (and many of them never ratify at all).

For all practical purposes the Congress of UPU is a supranational law-making body, though in the restricted field of mail only. Beyond doubt it serves the interests of the peoples of the United Nations and it serves them well.

2. The Need to Cope with Global Risks

Most technical needs of supranational legislation can be met by a close cooperation between all interested states. States that do not want to participate can stay aloof. The cooperation can be initiated by a restricted number of states. Others can join later.

This is different in the cases where the world is confronted with a global risk such as a depletion of the ozone layer, deforestation or pollution of the environment. There, the cooperation of all states is required. Since, for some time to come, it is unlikely that all states will accept a universal legislator in this field, we will have to start with some more modest steps, such as the creation of a watch-dog commission or an ombudsman for the protection of the rights of future generations[4].

3. Human Needs of Supranational Legislation

Gradually, the governments in the organization assumed an increasing responsibility for the peoples of the United Nations. Traditionally, the international community had no contact with individuals. All control over people was through the national governments. In the war crime tribunals of Nuremberg and Tokyo the victorious states recognized some direct link between individuals and the international community. Over the years the United Nations has strengthened this link. Fundamental human rights have increasingly become a matter for the organization. In the United Nations supranational rules in the field of human rights slowly but steadily develop. Two examples may illustrate how the organization protects and promotes the interests of the peoples of the United Nations in this field.

(a) When one of these peoples badly suffered from the South African policy of *apartheid* the organization took a brave step by establishing that this policy, though legally within the domestic jurisdiction of South Africa, was a threat to peace and could therefore be countered by binding deci-

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4 As suggested by E. Brown Weiss, "Intergenerational Equity: Toward an International Legal Framework", in: N. Chourci (ed.), *Global Accord*, 1993, 333 et seq., (348).

sions of the Security Council. In a series of resolutions the Security Council established and confirmed an arms embargo against South Africa including the supply of vehicles and equipment for the use of armed forces[5]. In its resolution of 5 November 1976 the General Assembly condemned other cooperation with the South African government of that time[6]. In later resolutions this condemnation was expanded and refined to a general economic boycott[7].

(b) Promoting and encouraging respect for human rights is one of the aims of the organization. Still, in the early years there was no doubt that the way governments treated their citizens was an internal matter of each state. When the General Assembly, or any other organ of the United Nations, criticized a state for the way it treated its inhabitants, the state would reply that Article 2 para. 7 prohibited the organization to discuss such questions. The relationship between government and inhabitants was an internal matter of each state, beyond the reach of the organization. Gradually, this changed. By means of declarations, conventions, resolutions and through Special Rapporteurs the United Nations became increasingly involved with protection of human rights, not only at the international level, but also inside its member states. Finally, when very serious infringements of human rights occurred in Bosnia and Rwanda, the organization intervened. It may be true that these first interventions were not very effective, but still their occurrence is of major importance as a sign that the organization takes the interest of the peoples of the United Nations to heart. It did not stop at the border of the domestic jurisdiction of states. Still, it is not more than a beginning. In other cases the United Nations did not have the courage to protect the interests of populations against their rulers. When in 1990 Iraq had committed aggression against Kuwait and the United Nations had come to the rescue of the victim-state, the aggressor was defeated. Without much difficulty the United Nations could then have established another government in Iraq, but it did not, considering that it was beyond its competence to do so. Already at that time it was clear that a change of government in Iraq would be to the benefit of the people. Why did the United Nations not want to protect the Iraqi people? Of course, the lack of a proper legal basis played an important role, but also the fear of precedent. The United Nations are an organization

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5 S/RES/282 (1970) of 23 July 1970, S/RES/418 (1977) of 4 November 1977, S/RES/558 (1984) of 13 December 1984 and S/RES/591 (1986) of 28 November 1986.

6 A/RES/31/7 of 5 November 1976.

7 See e.g. A/RES/46/79 of 13 December 1991, A/RES/47/116 of 18 December 1992 and for the termination of the sanctions A/RES/48/1 of 8 October 1993.

of governments and governments do not like to create a rule permitting the organization to interfere with governments. It remains difficult to overcome this barrier.

VI. Experience with Non-Governmental Organs

1. Courts

There is some experience with supranational organs independent from governments. The clearest examples are the supranational courts. On the one hand, they show that decisions can be taken above the level of the states and that these decisions may help in establishing supranational rules. On the other hand, there are clear limits. First of all, the influence of courts depends on their authority. In some communities courts have great authority which entails a general willingness to accept and execute their judgments. In other communities one tends to see judges as individuals with some technical skills which may exert some influence in a narrow field of law but whose judgments would not be given any general effect without the involvement of political organs (that is the state governments). Because of widely different views the influence of the ICJ is limited. Because of a traditionally strong position of the judiciary in Europe the influence of the Court of Justice of the European Communities and also, in a more restricted field, that of the European Court of Human Rights is enormous[8].

However this may be, courts must always have a limited task. They may settle disputes and interpret legislation, which means that they can extend or limit the effect of legislation to a considerable degree, but they should not become governments. Even though the European Court of Justice established the Community legal order as a separate, independent legal system, even though the European Court of Human Rights succeeded in having several national laws changed, even though both courts helped to shape Europe and to develop common European rules of law, they could not and should not govern Europe in any way[9].

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8 See thereon, my contribution to the *Liber Amicorum* for Rolv Ryssdal, which was to appear in 1995, but has been postponed several times.

9 On the influence of the Court of Justice, in cooperation with the domestic courts of the member states, see R.Lecourt, *L'Europe des Juges*, 1979.

2. Non-Governmental Boards

In the early years of the United Nations system several executive boards were created and composed not of government representatives, but of experts in their individual capacity. Thus one wanted to avoid that national interests would dominate the policy of the organization. Any state that was not a member of the organ concerned and the peoples of the United Nations would have greater confidence in independent experts than in representatives of states other than their own. Also, individual experts would strive solely for the interest of the organization, whilst government representatives would be guided by general political considerations and national interests. Another advantage is that amongst the specialists in the field, an organ composed of famous experts will have greater authority than an organ of government officials. Furthermore, a greater variety of specialization can be achieved when the appointing authority can freely elect persons in their individual capacity. If the board has different tasks then an expert for each of these tasks can be elected. The totality of the board will then have more knowledge than a board of government officials who, more likely than not, will each have about the same experience.

Whatever the advantages were, later experience moved the governments concerned to prefer boards of government representatives. FAO and UNESCO decided (respectively in 1947 and in 1954) to transform their boards of individual experts into boards of government representatives. The most important argument for doing so was the need for consistency. Individual experts may adopt projects which the states are unwilling to finance. They could also adopt projects which conflict with activities in other international organizations. Government representatives will receive instructions which take account of government policy in other organs. As they will be backed by their governments, government representatives may have greater authority amongst other governments than individual experts. Their decisions may be better implemented.

This experience demonstrates that composing international organs of independent experts will not necessarily lead to a better representation of the "Peoples of the United Nations". As long as the power of execution and the budget strings are in the hands of the governments, it may be necessary to also charge government representatives with decision-making.

3. Secretariats

In the early years of international organizations one of the member states undertook to perform the administrative duties of the organization. Since

the creation of the League of Nations international organizations have secretariats of their own and strive at composing their secretariats of independent staff. Though in practice some staff members take instructions from their governments, most staff members will consider themselves as representatives of the peoples of the United Nations and will strive to promote the interests of all. Though they usually have no decisive influence on decision-making, the international secretariats are an important centre for the creation and supervision of international rules. In practice, they largely manage the little supranational legislation which exists. International legislation may be improved by enlarging the role of the secretariats of international organizations. This should be combined with trying to attract the most competent and the most independent people. To gain confidence of all regions of the world equitable geographical distribution of secretariat posts must play a role. Article 101 of the Charter indicates, however, that it should be a secondary role, not a principal aim, and certainly not a division of posts between regions.

4. Semi-Independent Agencies

After World War II, the specialized agencies of the United Nations were created as separate international organizations, unlike in the League of Nations where the aim was to incorporate all universal agencies in the League, an aim which was only partly successful (for e.g. health, culture, education). One of the reasons for keeping the agencies separate from the United Nations was the wish to keep politics away from them, which meant in practice that the technical experts should have the power of decision, rather than the general governments. In many respects this aim was reached but the hottest political issues of the time could not be avoided. Whether this was a gain or a loss depends on how one looks at it. Governments clearly considered their influence beneficial, independent experts may judge differently. Two examples may clarify the issue.

(a) When the WMO was an organization of only heads of meteorological services, it was the interest of meteorology alone that counted. When WMO had become a specialized agency in 1951, political arguments entered into the field. The President of WMO originally had the power to invite any director of a meteorological service to the sessions of the World Meteorological Congress. In 1963 he intended to invite the director of the meteorological service of the then communist German Democratic Republic, because the data of that meteorological service were of essential importance for the weather forecasts in Europe. But the politicians intervened. According to them, any form of recognition of the German Democratic Republic was objectionable. No one from that "so-called State"

could be invited. Subsequently, this specific power of the President of WMO was curtailed by the 1963 Congress.

(b) Also in the UPU political issues entered into the organization. Originally, it were the postmasters who ran the organization completely, but when it had become a specialized agency n 1948 it was subjected to policy considerations. Because of these considerations South Africa was excluded from participation in UPU meetings in 1974 and, subsequently in 1979, was banned from the organization, clearly against the wish of most postmasters and against the aim of the organization to promote international mail. The political aim of the expulsion, to isolate South Africa and to block their postal connections, was largely sabotaged by UPU which continued to handle South African mail as if South Africa were still a member. In 1981 South Africa acceded again, which as a member of the United Nations it was entitled to do.

It may be difficult to draw conclusions from the above examples. The isolation of the German Democratic Republic and of South Africa may have been in the interest of the peoples of the United Nations but these interests are difficult to define. It is clear that the interests for which the organizations were established suffered. It is also clear that in the short term the interests of the peoples of the territories concerned suffered. Also the black population of South Africa would have badly suffered if their letters, reports on their situation and newspapers could no longer be sent abroad and if no foreign mail could be received.

It may be doubted whether a proper evaluation of the interests involved was ever made. More likely the political issues of the time, the preponderant wishes to isolate detestable governments, prevented any evaluation of the interests of the peoples. It is an element of politics that governments focus their attention on a limited number of topics. The human mind is unable to oversee everything. Certain topics will then usually get priority irrespective of the question whether they actually merit it.

VII. Steps for the Future

Most evil in the world, like most good, is caused by people and often by people with government powers. Often these people are uncontrolled. As long as they are not answerable to others, they can act as they please. In the international field they block accountability by invoking state immunity and the rule of international law that other states and international bodies are not permitted to interfere in the internal matters of their states, i.e.: to interfere with what these people are pleased to do within their states and with respect to their populations.

The world would be safe if we were able to educate all people in such a way that those who end up with government power would act only in a proper way and beneficially to the population. Since this seems to be a rather far-fetched ideal we must look for some system of control; people with government power must be made accountable to others. Of course, these others should ideally be wise and well informed, but that is not the most essential. The simple fact of accountability will often be sufficient to prevent abuses, provided that the accountability is combined with power. Simple reporting to others may be of some influence, it is insufficient if no further effect is given to the reports. Some kind of sanctions must be possible to impose improvement.

How can we make governmental people, including heads of state, accountable for their acts, not only for their acts in the international scene, but also for their acts with respect to their own populations? Two methods of control are to be considered.

1. Parliamentary Control

In some states, persons with governmental power are accountable to the population, through elections. The accountability is enforced by the election system. Persons who misbehaved may not be reelected. They lose their power. This accountability will usually prevent excessive behaviour. It is one of the greatest values of our modern Western democracy. The simple fact that all persons, even persons with government power, are answerable to others offers the strongest protection against serious infringements of the rights of the people. Usually it works, but not always. Clever propaganda may misguide the population and may blur abuses. Throughout the middle of the thirties the majority of the German population supported Hitler, dazzled by his successes in fighting unemployment and inflation. Always, the population must remain vigilant and always it must be protected against false propaganda. For that reason full freedom of the press is an equally essential condition for our free democracy.

One way to a better world would be the creation of Western type democracies throughout the world. Some Western states strive at this aim. One may doubt, however, whether this can work. The Western democratic system is founded upon a certain level of development of the population and on the presumption that the population supports certain moral values, such as fundamental rights for each individual and equality for all. A population which wants to exterminate a minority, which supports a government for the sole reason that it stems from its own tribe, or which is so underdeveloped that it cannot be reached by the opposition press,

will not sufficiently supervise persons in government to obtain sufficient accountability. Furthermore, even if Western type democracies would prevent abuse of government power, it may not be possible to establish such democracies in all parts of the world. Other ways may be needed.

2. International Criminal Law

Accountability can also be to the international community. For a long time to come this community will be less critical than the domestic population. It will probably not easily condemn persons in government because of a high unemployment rate or because of taxation or inefficiency. But modern communications enable the international community to notice quite well the most serious infringements of the fundamental rights of the peoples of the United Nations.

In the beginning of this century hundreds of thousands of Armenians were killed. Some faint protests were heard but no guilty persons were punished. In a speech to his generals on 22 August 1939 Hitler said: "Wer redet heute noch von der Vernichtung der Armenier?"[10]. In other words: You can safely kill an entire population; after 20 years nobody will bother. Had the killers of the Armenians been punished, Hitler would probably still have wanted to annihilate the Jews, but he would have had less cooperation from those who did the actual killing.

Slowly, but gradually the United Nations makes persons with governmental power answerable to the international community. In resolutions of the General Assembly the worst infringements of human rights are criticized. Special Rapporteurs have been appointed to verify situations, resolutions are adopted, reports are written. This may be a weak form of supervision, but it is a kind of supervision which can be further expanded. It is a first step. National governments are supervised. The bad boys are identified. This first step is not enough, however. Though nobody will like to be identified as a violator of the rights of the people under his authority, the identification alone will not change the situation nor will it deter from further infringements. Some kind of sanction is needed.

Of vital importance is the development of an international criminal court. This court will eventually offer the possibility to punish those who, in abuse of their governmental powers, infringe the rights of the peoples

10 "Who after all is today speaking about the distruction of the Armenians?" Quoted by V. N. Dadrian, *The History of the Armenian Genocide. Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, 1995, 258–260; P. Michielsen in NRC Handelsblad of 30 August 1996, 38.

for whom they are responsible. The establishment of that court will mark the fact that the international community takes responsibility for supervising the behaviour of persons in government. The possibility of sanctions may have a deterrent effect. The existence of a criminal court will be an important first step to international intervention against crimes against the peoples of the United Nations. Much resistance must be overcome. International decision-making is not by the peoples of the United Nations who, most likely, support the creation of an international criminal court helping to protect them against excessive governmental acts. No, decision-making is by the governments themselves, by those who risk to be censured and, finally, to be tried by the international criminal court. In order to obtain any success we must be extremely careful. Only small steps can be taken and they must be taken slowly, allowing time for national communities to accept them. In practice, steps towards an international criminal court can be taken only after grave violations of human rights. Only when the world is shocked by severe crimes is it prepared to react.

In 1947 the General Assembly of the UN invited the ILC to study international crimes[11]. In 1948 the General Assembly of the United Nations invited the ILC: "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions"[12]. In 1950 the ILC adopted the first Principles of crimes under international law, among which inhuman acts against any civilian population were classified as crimes against humanity[13]. No sufficient support could be found for any kind of international criminal court. After the 1950's the project was more or less given up.

Finally, a beginning of an international criminal court was brought about by the atrocities in Yugoslavia and Rwanda. The effectiveness and the possibilities to expand into a real international criminal court still remain to be seen. But the beginning is there and it may finally lead to the possibility of sanctioning persons committing crimes against the peoples of the United Nations.

What crimes are to be covered? Again, we must be careful and slow. Proposals for too broad a field of action will provoke reluctance. Governments will resist any criminal court which may finally decide against them. I think, the United Nations overplayed her hand when she decided that

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11 A/RES/177 (II) of 21 November 1947.

12 A/RES/260 (III) B of 9 December 1948.

13 Doc. A/1316 Report of the ILC covering its 2nd Session, 5 June–29 July 1950, ILCYB 1950, Vol.II, 364 et seq.

apartheid was an international crime for which the authors should be held internationally punishable. However repugnant the policy may have been, we must take account of the fact that it was not fully recognized as an international crime at the time the legislation was adopted. During most of the twentieth century racial discrimination was accepted under international law. Too easy a classification of acts as international crimes will impede the development of international criminal jurisdiction. Not only should the acts be clearly identifiable as criminal by those who committed them, but also prosecution and punishment should be reasonably possible.

For the time being, competence of an international criminal court will have to be limited to trying persons who committed or ordered genocide, ethnical cleansing, massive killings or torture. Only much later, when the authority of the court has been established, will it be possible to expand its tasks. There is a long way to go. Some serious crimes against humanity, such as the production of land mines, have not even been recognized as crimes yet. And that must unequivocally be done first. An established rule of criminal law, codified in Article 15 of the International Covenant on Civil and Political Rights, provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. Criminal law must be clear. It is unacceptable to hold a person criminally responsible unless he could reasonably be able to know that what he did was a criminal offence.

Why should the supervision of national governments be attributed to an international criminal court? Most important is the existence of supervision. The possibility to control governments will most likely limit, or even exclude, the most atrocious infringements of the rights of the peoples of the United Nations. The advantage of a court over any governmental body is the independence, the smaller likelihood that the persons who decide will consider that they themselves may ever come under similar criticism. Governmental organs are too easily influenced by the political considerations of the day and should, therefore, be prosecutors rather than judges. The role of the national governments in fighting international crime will be great anyway. They decide the policy of organizations such as the United Nations, they will have to provide the means for the execution of international court judgments for a long time to come. By providing or withholding the necessary financial means they may make the present international tribunal a success or a failure. We can but hope that the governments will recognize their responsibility towards the peoples of the United Nations and increase their efforts to make the Yugoslavia and Rwanda tribunals successful.

VIII. Conclusions

An organization of the peoples of the United Nations without a dominant role of the governments of the states of this world is inconceivable. Inevitably, the state governments will remain the principal actors in any form of world government. We must, however, take account of the fact that not all governments are worth playing this role and that there are issues which can be handled better by others rather than the state governments. It is important, therefore, that independent international institutions, and in particular international courts, are established who can truly defend the interests of the peoples of the United Nations, in case they may differ from the interests of state governments. Internationalization of an increasing number of issues will force state governments to transfer powers to international organizations. For any effective exercise of such powers unanimity of all participating governments will gradually become impossible. Either power should be exerted independently of the governments or some form of decision-making by majority should be accepted. In both cases powers may be abused, vital interests of states or of individuals may be ignored. This will be another argument for creating an international court competent to verify whether the conditions under which powers have been transferred have been fulfilled.

In the — fortunately rather rare — cases where governments ignore and infringe the interests of the peoples for which they are responsible, the international community must exert control and must, in some way, retaliate to prevent repetition and to deter others. A successful international criminal court is one of the greatest needs of the near future.