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THE RECENT DEVELOPMENT OF  
INTERNATIONAL CRIMINAL LAW  
WITH SPECIAL REFERENCE TO THE  
PROPOSAL OF THE ILC FOR AN  
INTERNATIONAL CRIMINAL COURT

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by

Nathan Richards

M. Jur. (1993)



30 JUN 1994

THE RECENT DEVELOPMENT OF INTERNATIONAL CRIMINAL  
LAW WITH SPECIAL REFERENCE TO THE PROPOSAL OF  
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**ABSTRACT**  
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This dissertation considers the evolution of international criminal law, both of the responsibility of the individual and of the State itself, in an international legal system which is not well developed. International society is horizontal in nature and all states are considered equal. There is no higher authority to enact legislation to which all states must conform and no form of international criminal tribunal to resolve those cases which arise. In the absence of the appropriate legal machinery, international criminal law is dependent upon enabling provisions in municipal law and national criminal courts. But the reliance of the international legal system on national laws and courts presents certain problems. Municipal law is restricted in its application by notions of state jurisdiction, the extradition of fugitives and by the limitations of inter-state cooperation. Therefore, the implementation and enforcement of international criminal law is far from simple.

Recent events surrounding the aerial incident over Lockerbie suggest that the United Nations Security Council is increasingly willing to enforce international criminal law directly. Economic sanctions have been imposed against the state of Libya for its refusal to surrender the individuals alleged to have committed the bombing. In another development, the Security Council has established an ad hoc tribunal to hear criminal charges against individuals accused of serious violations of international humanitarian law arising out of events in the former Republic of Yugoslavia. However, such action by the Security Council is only warranted where the circumstances can be considered to constitute a threat to international peace and security. Thus, attention has shifted to recent international efforts to create a permanent international criminal court. The International Law Commission has established a working group to draw up a statute for a permanent international criminal court and its initial proposals have been favourably received by states. While none of these developments are final or decisive, they represent an ongoing process designed to secure more effective implementation of international criminal law.

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## CHAPTER ONE

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### AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW WHAT IS IT AND WHERE IS IT GOING ?

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The power of the modern state to inflict great harm to the interests of its own citizens, of other states and of the international community demands that society establish certain minimum standards of behaviour to which states must conform. Action is necessary to secure respect for those standards and in the worst cases to punish those responsible for their violation.

The notion of the criminal responsibility of the state is fraught with conceptual difficulties. The clear lack of correlation between the decision-making process of the state and decision-making process of the individual suggests that the traditional theories of criminal responsibility are incompatible with the concept of state-will. Moreover, the state, as an incorporeal body politic, would appear to be beyond effective punishment. Thus, the international community has sought to regulate the conduct of affairs by asserting the criminal responsibility of the individual on an international level.

For the purposes of the law, criminality of conduct is established by the law-making process attaching particular consequences to the perpetrator of the conduct identified as constituting the crime. In the international system, the law-making process is not well developed. International society is horizontal in nature. All states are considered to be sovereign and equal to each other. There is no governing body that can lay down laws that states are obliged to obey. International criminal law is the product of the international community agreeing on and recognising norms of behaviour from which states may not derogate.

If the criminal law is not to be used for oppressive purposes, the law-making process should identify conduct as criminal on the basis that the conduct prohibited is widely deprecated within the international community as a whole. That is not to say that it is necessary to secure the consent of every state in the international community in order to formally identify such conduct as criminal. But there must be a consensus within the international community that the conduct is sufficiently serious and sufficiently widely condemned to be regarded as proper subject-matter for treatment by the criminal law. Under the regime of the U.N. Charter, there are processes akin to legislation which allow some sense of community values to develop and which measure the degree of consensus which exists. Recent political developments have perhaps helped



those processes. The U.N. system can then prepare legislation if the circumstances so warrant. However, the law-making process requires state participation in turning the political/moral consensus into a legally binding criminal standard.

The institution of criminal legislation inevitably demands the existence of some form of judicial body to determine the application of the law. However, at present, there is no international equivalent of the municipal criminal court. Frequent attempts have been made to develop such a court but with little success.<sup>1</sup> In the absence of an international criminal court, states have been forced to resort to a variety of alternative methods to enforce the provisions of international criminal law.

The first option is to try offenders in the municipal courts of interested states for crimes against international criminal law, rather than against the domestic criminal legislation of the state. The viability of this option is dependant upon the satisfaction of the constitutional requirements of the individual state. Some states directly acknowledge international criminal law to be a part of their domestic criminal law. Other states require the legislature to approve the enactment of any specific provisions of international criminal law before they can be considered part of the domestic criminal law.

The second option is for states to agree to enact domestic legislation to criminalise specified conduct in the municipal law of each nation. There is no implication that such conduct would constitute a crime under international criminal law. In this way, state parties are empowered to provide for the trial of individuals for the breach of their own domestic criminal law rather than international criminal law.<sup>2</sup> However, the reluctance of the international community to act collectively has exposed significant difficulties with this approach. An act which constitutes a crime under the domestic legislation of a state party to a treaty agreement will not necessarily constitute a crime under the domestic legislation of a state which is not a party to the relevant convention. Thus, the application of the law is a haphazard rather than a uniform process. Moreover, the application of domestic legislation differs from state to state according to the principles of jurisdiction acknowledged by the state concerned. Where jurisdiction is predicated on some basis other than territoriality or nationality, the individual may be able to argue that the law does not bind him and the

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<sup>1</sup> A history of the ill-fated attempts to establish an international criminal court is contained in Chapter Seven.

<sup>2</sup> The phenomenon of the indirect criminalisation of conduct in international society is discussed further in Chapter Three.

exercise of criminal jurisdiction breaches the principle of legality.

The third method by which states have sought to circumvent the need for an international criminal court is through collective action to establish an *ad hoc* international tribunal. There are no set conditions in which an international tribunal may or must be convened. The only examples of international tribunals are the Nuremburg and Tokyo trials that took place after the Second World War. It is possible that these trials may remain unique in the annals of international criminal history.<sup>3</sup>

Regardless of method, the application of international criminal law is predicated on the basis that an accused has the right to a fair trial. International standards of procedural justice demand that an accused has the right<sup>4</sup> :

- 1) To be informed of his trial and the exact nature of the charges against him;
- 2) To be given an opportunity to prepare a proper defence to the charges against him and to select or to be assigned competent counsel to assist him in his defence;
- 3) To be tried without undue delay;
- 4) To a fair and public hearing before an independent and impartial tribunal;
- 5) To be considered innocent until proven guilty;
- 6) To the service of an interpreter if the trial is to be conducted in a language unfamiliar to the accused;
- 7) To call witnesses on his behalf and to examine witnesses against him;
- 8) Not to be forced to testify against himself.

National trials are assessed against these minimum standards of treatment. Trials *in absentia* do not automatically violate the minimum standards. However, if

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<sup>3</sup> However, the U.N. Security Council has established an international tribunal to consider charges relating to war crimes in the former republic of Yugoslavia, see below.

<sup>4</sup> As established by the customary principles of the international law of human rights and codified in the International Covenant on Civil and Political Rights by G.A. Res. 2200A (XXI) Annex 21, U.N. GAOR Supp. No. 16 at p.49-60, U.N. Doc. A/6316 (1966).

the accused is not in the custody of the authorities then the court will not be able to impose any form of effective punishment against him. The obvious impotence of the court may subject the interests of justice to ridicule and not promote respect for the law. Thus, the custody of the accused is generally considered as a prerequisite for the commencement of a trial.

Accordingly, one of the major problems inherent in international criminal law is the difficulty in obtaining custody of the accused.<sup>5</sup> In order to facilitate the punishment of offenders, states have concluded a series of treaties of extradition with other nations, whereby an accused can be transferred to another jurisdiction to face trial for his alleged crimes. However, the network of treaties of extradition is far from comprehensive and the system is both slow and costly.<sup>6</sup> Extra-legal alternatives, such as deportation and abduction, are increasingly common. Thus, there is a clear need for the development of a new regime of cooperation between states in order to suppress international criminality.

The advent of perestroika may have heralded a new era of international cooperation and mutual assistance.<sup>7</sup> The subsequent disintegration of the Soviet Union and the enormous economic problems of Eastern Europe brought world leaders face to face across the negotiating table. Politicians and lawyers began to speak of a "a new world order"<sup>8</sup>. The rule of law was to replace the law of the jungle. The fanfares and congratulatory speeches have now faded into the distance. The world must take stock of the situation.

Can world society justifiably claim that it has reaped the peace dividend? Has the international community taken full advantage of the prevailing atmosphere of cooperation and consensus? Above all, has "a new world order, an order

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<sup>5</sup> For example, Pol Pot, the former dictator of Cambodia, has escaped punishment for the genocide of his people because no-one has been able to obtain custody of him.

<sup>6</sup> The extradition process and the extra-legal alternatives to extradition are considered at length in Chapter Five.

<sup>7</sup> William E. Butler, ed, Perestroika and International Law; Anthony Carty and Gennady Danilenko, ed, Perestroika and International Law.

<sup>8</sup> Statements from some of the leaders are abstracted in Benjamin B. Ferencz, World Security For The 21st Century - Challenges And Solutions (1991) p.111-153.



worth preserving for the ages"<sup>9</sup> finally arrived? This dissertation attempts to analyze the development of international criminal law and its application to modern world problems in order to provide some answers to such questions.

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<sup>9</sup> See Reuters, Mideast Diplomacy; Excerpts From Bush's Address To General Assembly: For A Pax Universalis, N.Y. Times, Sept 24, 1991 at 14A, col. 1 as cited in Benjamin B. Ferencz, "An International Criminal Code and Court" (1992) 30 Columbia Journal of Transnational Law p.393.

## CHAPTER TWO

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### CRIMES OF STATE AND THREATS TO INTERNATIONAL PEACE

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According to the traditional pattern of international law, relationships between states at the international level are essentially bilateral in nature. International law is composed of a series of correlative rights and obligations of its subjects. Multilateral treaties merely involve the juxtaposition of two groups of states (or one state and a group of states), each of which can be considered as a single entity for practical purposes. Obligations under such treaties are bilateral in nature but on a larger scale.

From the viewpoint of legal policy, international bilateralism has both advantages and disadvantages. On the positive side, it enables the observer to identify exactly who has a right or claim against whom and who may enforce it. It is also clearly compatible with notions of state sovereignty. However, on the negative side, the rigidity of the doctrine hinders the progressive development of stronger solidarity in the international community and ensures that the bilateral enforceability of a state's international rights depends upon a favourable distribution of power.

Community interest, the antithesis of bilateralism, is a comparatively recent development in international law. The evolution of the international community on a sociological level has resulted in the consecration in legal and institutional terms of one supreme value : the necessity and indivisibility of world peace. The subsequent remoulding of a purely atomistic (undifferentiated and unicellular) international legal order into a hierarchical normative structure has resulted in considerable erosion of the traditional paradigm of bilateralism. In recent years, true multilateral treaties, which can not be split up into individual bilateral relationships, have emerged.<sup>1</sup> In such treaties, the rights and obligations of the contracting parties are inextricably interrelated, forming an indivisible whole, so that the obligations contained therein are to be fulfilled by every party vis-a-vis every other party.

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<sup>1</sup> For example, the Nuclear Test Ban Treaty (1963).

The concept of an obligation that in a given case exists towards many states was explicitly recognised by the International Court of Justice in the Barcelona Traction Case. Obiter dicta, the Court stressed :

an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-a-vis another state... By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be said to have an interest in their protection; they are obligations erga omnes.<sup>2</sup>

The court sought to distinguish between legal rules which impose on states obligations whose breach concerns one or more specifically affected states, on the one hand, and, on the other, those rules whose violation affects a number of states, irrespective of the existence of a specific interest on their part. In the latter case, the rule seeks to protect a common interest in international society, pertaining to many states. Therefore, an obligation is imposed which in a given situation exists towards several states, although a violation of that obligation may not have a direct one on any of them. The recognition and development of the concept of obligations erga omnes forms the skeleton of an emerging body of universal law, of which the doctrine of state criminality is a part.

#### The Work Of The International Law Commission

In 1956, Mr Garcia Amador, the first Special Rapporteur on State Responsibility, submitted a report to the International Law Commission (hereafter referred to as the ILC) dealing with violations of international obligations concerning the treatment of aliens. The report sought to distinguish between 'merely wrongful' and 'punishable' acts under international law.<sup>3</sup> In the subsequent debate in the United Nations, the General Assembly decided that it was inappropriate to take such a distinction into account at that time.<sup>4</sup>

In 1962, a Sub-Committee was set up to consider the scope of the ILC's intended work on state responsibility for internationally wrongful acts. There were two schools of thought : the first argued for the continued examination of the obligations and responsibility for violations of

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<sup>2</sup> The Barcelona Traction Case (1970) ICJ Rep. p.32.

<sup>3</sup> ILC Yrbk (1956) Vol.II p.182-3 and p.211-13.

<sup>4</sup> ILC Yrbk (1956) Vol.I p.237-42.

obligations concerning the treatment of aliens. The second school of thought called for consideration of violations of the fundamental principles of international law. A compromise was reached. Professor Roberto Ago was appointed as the second Special Rapporteur for the codification of the rules of state responsibility generally.<sup>5</sup>

The ILC asked Professor Ago to consider a possible distinction between internationally wrongful acts involving a duty to make reparations only and those also involving the application of sanctions.<sup>6</sup> Professor Ago replied that :

The members of the Commission seemed to be unanimous in recognising the need first to establish the basic conditions of state responsibility and then to determine the consequences. A twofold distinction then had to be made relating, first, to the importance of the obligation violated and, secondly, to the gravity of the violation. The consequences of a wrongful act certainly depended on the nature of the obligation violated. Similarly, there could be different degrees of gravity in the violation itself, irrespective of the importance of the obligation violated, and there again the consequences would not be the same.<sup>7</sup>

Accordingly, Professor Ago began to develop a series of Draft Articles on the basis of these guidelines. In 1973, the ILC moved on to consider the question of whether it was necessary :

to recognise the existence of a distinction based on the importance to the international community of the obligation involved, and accordingly whether contemporary international law should acknowledge a more serious category of wrongful acts, which might perhaps be described as international crimes.<sup>8</sup>

Professor Ago argued that international law reflected a distinction between general rules of international conduct and certain fundamental principles (such as obligations erga omnes and peremptory norms of ius cogens) that could not be derogated from by special agreement.<sup>9</sup> He pointed out that the Vienna Convention on the Law of Treaties in 1969 had expressly recognised that :

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<sup>5</sup> ILC Yrbk (1963) Vol.II p.86.

<sup>6</sup> ILC Yrbk (1963) Vol.II p.228.

<sup>7</sup> ILC Yrbk (1969) Vol.I p.241.

<sup>8</sup> ILC Yrbk (1973) Vol.II p.172.

<sup>9</sup> ILC Yrbk (1976) Vol.II pt.1 p.24-61.

a norm accepted and recognised by the international community of states as a whole is a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>10</sup>

Professor Ago concluded that it was inconceivable that the work of the Commission would not incorporate the existing differentiation between the general rules of international law concerning state responsibility for the breach of international obligations and the special rules concerning state responsibility for the breach of obligations essential for the safeguard of the fundamental interests of the international community.

The vast majority of the Commission agreed with the Special Rapporteur that their work should take account of the gravity of the obligation violated. The socialist and third world countries were strongly in favour of such a distinction.<sup>11</sup> Accordingly, the ILC endorsed Professor Ago's approach.<sup>12</sup> Later that year, the Special Rapporteur presented a series of Draft Articles to the Commission for its approval. Article 19 specifically differentiated between international crimes and international delicts.

#### Article 19. International Crimes and International Delicts

1. An act of a state which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.

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<sup>10</sup> Vienna Convention on the Law of Treaties (1969) Art.53.

<sup>11</sup> See the speeches of Byelorussia A/C.6/SR.1326 para.34, Bulgaria A/C.6/SR.1191 para.29, Cuba A/C.6/SR.1108 para.27, Cyprus A/C.6/SR.1550 para.12, Czechoslovakia A/C.6/SR.1488 para.17, German Democratic Republic A/C.6/SR.1399 para.21, India A/C.6/SR.1404 para.2, Iraq A/C.6/SR.1104 para.9, Pakistan A/C.6/SR.1492 para.80, Rumania A/C.6/SR.1260 para.32, Syria A/C.6/SR.1491 para.45, Ukraine A/C.6/SR.1256 para.37 and the USSR A/C.6/SR.1105 para.10.

<sup>12</sup> ILC Yrbk (1976) Vol.I p.253.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from :

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

General reaction to the draft articles was favourable. The majority of states approved the content of Article 19.<sup>13</sup> Only six states actively rejected the concept of international crimes of state (Australia, France, Greece, Portugal, Sweden and the U.S.A). The ILC formally approved the distinction between international crimes and international delicts in its first reading of Part One of the Draft Articles on State Responsibility For Internationally Wrongful Acts in 1980.

The ILC moved on to consider the question of what form the consequences of internationally wrongful acts should take. Professor Riphagen was appointed as the third Special Rapporteur for State Responsibility. He was instructed to draw up a comprehensive catalogue of the legal consequences for the two different categories of internationally wrongful acts. In his Fifth Report, Professor Riphagen introduced a set of draft articles dealing first with the consequences of international delicts, then international crimes and finally with the crime of aggression.<sup>14</sup> However, as yet, he has refused to specify the exact legal

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<sup>13</sup> See Spinedi, ed, International Crimes of State, p.46 for a full list of references for speeches of individual state representatives.

<sup>14</sup> U.N. Doc. A/CN.4/380 (1984).

consequences of international crimes, preferring to refer to the "rights and obligations as are determined by the applicable rules accepted by the international community as a whole."<sup>15</sup>

Consequently, it is unsurprising that the members of the Commission wished "the draft articles to elaborate more in the particular legal consequences of international crimes, and, more specifically, on the legal consequences of aggression."<sup>16</sup> The work of the ILC is still underway but progress is slow. It is important to appreciate the precise nature of the difficulties involved in order to understand why the work has taken so long. There are a variety of complex reasons for the delay and these must be discussed in depth.

### Article 19 - The General Debate

The debate regarding 'crimes of states' has been so confused as to be intellectually incoherent.<sup>17</sup>

Why should this be so? Ted Stein argued that there were a number of reasons. Firstly, he believed that the nature of the codification process of the ILC was partly to blame. Many state representatives on the Sixth Committee were distracted by political manoeuvring and other important duties. The consideration of many different topics across too many sessions, extending over too many years ensured that a certain degree of confusion reigned.

In particular, the consideration of the concept of crimes of state was a compromise between those states wishing to discuss violations of the primary rules of international law, concerning peace and security, and those states more concerned with the treatment of aliens by foreign states. The net result was a political commitment to a conceptual category whose legal content and functions were left entirely open. In addition, the problem was further exacerbated when the ILC deferred consideration of the contentious issue of the forms of responsibility related to crimes of states until later. The Commission acted on a laudable motive - to maximise agreement for the project - but in so doing it was attempting to separate the inseparable.

Pierre-Marie Dupuy feared that the discussion of the concept of international crimes of states had resulted in a confusion of priorities in the international community. He believed that states were being misled into thinking

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<sup>15</sup> Draft Articles Part II, Art.14, para.1.

<sup>16</sup> U.N. Doc. A/39/10 (1984) para.364.

<sup>17</sup> Ted Stein in Spinedi, ed, International Crimes of State, p.194.

that international crimes were the rule, and international delicts the exception :

The responsibility of states must essentially be conceived from a viewpoint of international crimes and other flagrant breaches of the U.N. Charter and of contemporary international law.<sup>18</sup>

The responsibility of states must first of all be seen in connection with international crimes and other manifest breaches of the U.N. Charter under contemporary international law.<sup>19</sup>

Dupuy claimed that states will come to regard the notion of sanctions as the natural remedy for the violation of international rules of conduct. He feared that states would use the concept of reprisals to publicly legitimate otherwise unlawful acts committed by the state in the furtherance of foreign policy.

However, it should not seem surprising that the international community appears more concerned with the potentially catastrophic consequences of international crimes than with the less serious problem of international delicts. International crimes threaten the peace and security of the international legal order. It is only natural that the international community would be more concerned to diffuse major international tension than to resolve less serious questions concerning international delicts.

But Dupuy also argued that Article 19 may result in the weakening of the international legal order. He pointed out that the determination of a wrongful act as an international crime is dependent upon the international community as a whole. In the words of the International Law Commission :

This does not mean the requirement of unanimous recognition by all the members of the community... but by all the essential components of the international community.<sup>20</sup>

Thus, a breach of an international obligation will only be regarded as an international crime if states belonging to the Third World, those belonging to the Western countries and those in the other relevant groups collectively agree. Dupuy believed that some dissent is inevitable since the wrongdoer is bound to belong to one of those power blocs.

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<sup>18</sup> Delegate of Byelorussia - (1983) Doc.A/C.6/38/SR.48 p.36.

<sup>19</sup> Delegate of Ukraine - (1983) Doc.A/C.6/38/SR.50 p.44.

<sup>20</sup> ILC Yrbk (1976) Vol.II pt.2 p.119.



He feared that if the U.N. was collectively paralysed then some states may take individual action :

The very basis of the notion of crime, which aims above all to ensure respect for obligations essential to the international community as a whole, risks all too often becoming a convenient excuse for the initiatives of states who will seek in the defence of major principles for public carte-blanche legitimation of actions taken in furtherance of their own foreign policy goals. After all, whatever might be the good faith of the states applying the sanctions, their actions will be more easily opposable by the states they are aimed at for not being under the U.N. aegis. And here the question arises whether the very institutionalization of crime might not harbour the seeds of international anarchy.<sup>21</sup>

This would be a powerful and damning objection to the principles of Article 19. However, with the recent collapse of the Socialist bloc, it is to be hoped that the international community is moving away from a system of multiple alliances towards a community of true sovereign equality among states. The chances of international deadlock will be more remote. Moreover, given the recent success of U.N. collective action against Iraq in the Gulf conflict, such criticism seems unduly pessimistic.

But the most serious criticism of Article 19 concerned the misleading use of the term 'crime' by the ILC. The concept of the penal responsibility of states has constantly threatened to disrupt any prospect of international agreement on the forms of state responsibility. Thus, Ted Stein was led to remark that :

The International Law Commission's choice of the term 'crimes of state' bears part of the responsibility for incoherence in the intellectual debate on Article 19. Crime is an emotionally laden word; in addition, it suggests all sorts of analogies to municipal law that may or may not have been intended... The confusion over whether the crimes of state concept embodies some sort of penal responsibility of states is, in my view, almost directly attributable to the use of the word 'crime'.<sup>22</sup>

Confusion and misapprehension was common during the debate. Many of the states which initially opposed the adoption of

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<sup>21</sup> Pierre-Marie Dupuy in Spinedi, ed, International Crimes of State, p.178.

<sup>22</sup> Ted Stein in Spinedi, ed, International Crimes of State, p.311.

Article 19 did so on the basis that the introduction of the notion of international crimes would entail the penal responsibility of states. As Marina Spinedi observed :

The most striking example in this connection is the development of the position of the Federal Republic of Germany. That state's representative on the Sixth Committee stated in 1976 that he had not been convinced by the distinction drawn in Article 19, and pointed out that he was against any idea of the penal responsibility of states. In 1980 the representative of the F.R.G. declared that the distinction between international crimes and delicts established by the Draft Articles might find its justification in a difference of position of third state with respect to such conduct. In 1981 the government of the F.R.G. stated 'no objection is raised to the proposition that a specific provision must be found to cover serious violations by states of elementary international obligations. The distinction between crimes and delicts... might find its justification in the treatment of the legal consequences. It is indeed a generally held concept that the gravity of the breach of an obligation shall determine the gravity of the legal consequence. Another justification for distinguishing between international crimes and international delicts may be seen in the possibility of a different position of third states vis-a-vis an international delict and vis-a-vis an international crime.'<sup>23</sup>

In the face of such criticism, it may seem surprising that the ILC has not chosen to amend the confusing terminology of 'crimes of states'. However, Joseph Weiler believed that even if universal agreement as to the forms of state responsibility could be achieved by changing the term, states would be unwilling to pay the price. In his opinion, the concept of 'crimes' of state is a powerful symbol.

A state's submission to international jurisdiction is essentially voluntary. The binding resolutions of international authorities are frequently flouted and the jurisdiction and decisions of international adjudicators are often disregarded. But states always manoeuvre in such a way as to avoid having their actions characterised by the international community as illicit - whether it be by the use of the their veto on the U.N. Security Council, by denying the jurisdiction of the appropriate authorities or simply debating the content of international law. Thus, Weiler argued that the use of the term 'crime' acts as a powerful constraint upon the behaviour of a state in the international community.

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<sup>23</sup> Ibid. at p.49.

The supporters of Article 19 believe that states will seek to avoid such condemnation. Their opponents claim that the characterisation of such behaviour as criminal may have a sanctioning effect but it is likely to diminish the potency of the label in constraining behaviour.

**Inflation devalues every currency, including verbal currency... to accentuate the label would be similar to printing money without increasing the corresponding quantity of wealth.<sup>24</sup>**

However, Weiler believed that the term 'crime' has a second great symbolic meaning. Following the devastation of Europe in the Second World War, the international community sought to establish a new order of peace and security for mankind based on the U.N. Charter. Hope for the future was rooted in three fundamental beliefs : that the U.N. Charter system, being a consensual order, was a stable source of higher law; that the newly emerged sources of international law would strengthen the international community; and a belief in the power of objective and scientific jurisprudence. Such faith was sadly misplaced. There has been at least one war each year since the introduction of the Charter and there is now widespread disillusionment with the system. Supporters of Article 19 see it as a chance to breathe new life into the system and revitalise the Charter. The dissenting states see only the same tired characteristics of a failed system - vague, open-textured, and open to excessive manipulation.

Weiler compared the debate concerning Article 19 with the text of the Ten Commandments from the Bible :

**Thou shalt not have any other gods before me; Thou shalt not kill; Thou shalt not steal...**

**He that sacrificeth to any God, save unto the Lord only, he shall be utterly destroyed. He that smiteth a man, so that he shall die, shall be surely put to death. If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep.**

The first passage lists the Commandments in their pure form. The second text contains the laws that developed from the Commandments. Which of these is more effective?

The 'Prophets' of international law point to the timelessness of the Commandments and how they have outlived the archaic judgements that were developed from them. The moral force of the Commandments transcends people and generations - it is the basis of all modern society.

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<sup>24</sup> Weiler in Spinedi, ed, International Crimes of State, p.311.

However, the 'Judges' of international law remind us that the Commandments by themselves are not enough. Only forty days after receiving them, the people of Israel began to worship the graven image of calf. Today, the Prophets argue that the acceptance of the normative imperative of the concept of international crimes will force the international community to evolve and develop a system of state responsibility. The Judges believe that the acceptance of Article 19 without the full development of an accompanying system of responsibility for international crimes will condemn it to irrelevance because state practice can not emerge without a clear code of what is lawful.

These two different strategies reflect the inherent uncertainties and contradictions in the international legal order : Naturalism and Positivism; Consensualism and Majoritarianism; Justice and Order. Such issues defy complete resolution. Yet some consensus must be reached if the international community is to establish an accepted and coherent system of state responsibility for international wrongful acts. In the absence of any other practical and mutually-acceptable system of state criminal responsibility, one possible option is to concentrate on the punishment of the natural persons who decided upon and ordered the commission of the crimes on behalf of the state. Thus, the criminal responsibility of the individual must be considered at length.

## CHAPTER THREE

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### THE DEVELOPMENT OF THE CONCEPT OF THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS

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A civilised society can not permit lawlessness if it is to survive. The interests of the community demand the punishment of those who commit crime. International society is no exception. In the words of Lord Shawcross, the British Chief Prosecutor at Nuremburg in 1945 :

The immeasurable potentialities for evil inherent in the state in this age of science and organisation would seem to demand quite imperatively means of repression of criminal conduct.<sup>1</sup>

But, the state, as an incorporeal body politic, is an institution which would appear, at least for the time being, to be beyond effective punishment. As a result, the evolution of the concept of the criminal responsibility of individuals was inevitable.

The origins of the concept of the criminal responsibility of individuals are inextricably intertwined with the evolution of the notion of crimes against international law. Thus, the most logical starting-point for an understanding of the concept of the criminal responsibility of individuals is an analysis of the ancient laws concerning piracy on the high seas and the laws of war.

#### The Crime of Piracy

The notion of piracy conjures romantic images in the mind of Douglas Fairbanks Jnr or Errol Flynn risking everything to rescue his sweetheart from the evil clutches of the villainous local Governor. The reality was rather different. Pirates were ruthless cutthroats and mutineers who prowled the high seas. They were such a disruption to international trade that states were compelled to take steps to combat them. Thus, piracy is the oldest and most established crime against international law. However, there has been persistent confusion as to the nature and scope of the crime of piracy because of the contrasting attitudes of

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<sup>1</sup> Ginsburgs and Kudriavtsev, ed, The Nuremburg Trial and International Law, at p.159.

international law and the municipal law of individual nations.<sup>2</sup>

In the absence of any international tribunal, municipal laws were enacted to empower domestic courts with the jurisdiction to punish pirates. Piracy came to be regarded as a crime against international law because it reflected a uniform practice among civilised nations. However, municipal law continued to evolve. The definition of piracy in municipal law began to differ from international law in respect of the elements of the offence, the catalogue of offensive acts, and the locus of the offence.<sup>3</sup>

Under the municipal law of many states, some acts are deemed to be piratical in nature and punishable as such although they are not recognised as piratical in international law. However, municipal laws which extend the concept of piracy beyond the limitations assigned by international custom will only govern the subjects of the state enacting them and any aliens who commit offences within its territorial jurisdiction.<sup>4</sup> In the international sense, pirates are considered to be *hostis humani generis*, the enemies of all men, who have placed themselves outside the protection of their national state. Moore J remarked :

As the scene of the pirates operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish.<sup>5</sup>

All states are empowered to capture and punish pirates on the high seas. However, piracy represents a special case in international law and is best considered *sui generis*. Thus, the law of piracy should not be held to support any general rule of international law which purports to establish the criminal responsibility of individuals.

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<sup>2</sup> See generally, John Colombos, The International Law of the Sea, 6th Ed., p.443-449; O'Connell, The International Law of The Sea, p.966-983; and Dubner, The Law of International Sea Piracy.

<sup>3</sup> See In Re Piracy Iure Gentium (1934) A.C. p.586.

<sup>4</sup> See Halsbury's Laws Of England, 4th Ed., Vol.18, para 1534, n.2; Colombos, *op. cit.*, p.447; and O'Connell, *op. cit.*, p.967.

<sup>5</sup> The Lotus Case (1927) PCIJ Series A No.10 p.70 per Moore J.

## The Jus Ad Bellum

The doctrine of the *jus ad bellum*, the right to go to war, begins with a theological debate in which St Augustine confirmed the capacity of a Christian to be a soldier if the war was just and proper.<sup>6</sup> At that time, the power of the Church over the local populace was so great that it soon became vital for a ruler to state the justice of his cause in order to win the support from his people necessary to wage a war.<sup>7</sup> The principle of the just war became incorporated in feudal law and a vassal was not bound to support his liege in an unjust cause (although St Augustine permitted the soldier the benefit of the doubt under the concept of the defence of superior orders).<sup>8</sup> Thomas Aquinas permitted war on three conditions :

- 1) Authority from a prince - which thereby distinguished war from private violence and feud;
- 2) Just cause - which thereby distinguished self-defence or the lawful enforcement of a right from mere aggression;
- 3) *Recta intentio* - which thereby distinguished the just war from a war motivated by greed or revenge.<sup>9</sup>

This formulation of what constitutes a just war was adopted by the *Corpus Juris Canonici* and prevailed in scholarly writings for a long time. Later, jurists acknowledged that *bona fides* will make a war just for both sides. Grotius recorded that :

by the consent of nations, a rule has been introduced that all wars, conducted on both sides by authority of a sovereign power, are to be held just.<sup>10</sup>

and Vattel considered *jus gentium voluntare* to be superior to *jus gentium naturale*, so that a war undertaken in due

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<sup>6</sup> Corpus Juris Canonici, Causa 23.

<sup>7</sup> History records the case of Conradin von Hohenstaufen in Naples in 1268 who was placed on trial and sentenced to death for initiating an unjust war. See Bassiouni and Nanda, A Treatise on International Criminal Law, p.560.

<sup>8</sup> See generally Melzer, Concepts of Just War; O'Brien, The Conduct of Just and Limited War.

<sup>9</sup> Corpus Juris Canonici, Causa 23, qu. 40, Art.1.

<sup>10</sup> Lib.II, cap. XXIII.

form would be just on both sides.<sup>11</sup> Thus, the concept of the just war declined in importance.

### The Jus In Bello

The historical importance attributed to the idea of the just war undoubtedly inhibited the development of any body of law to govern the conduct of war. In the Middle Ages, the just war was seen as the chosen instrument of God for the punishment of the wicked on earth. Grotius, the father of international law, observed that any actions were permitted in order to win a war.<sup>12</sup> Thus, it was within the discretion of the army to give quarter or to offer none.

The more barbarous practices of warfare were restricted by the power of the Church and prohibited by the threat of excommunication.<sup>13</sup> In later years, the code of chivalry and the concept that *noblesse oblige* prevented many of the excesses of war.<sup>14</sup> However, mercenary warfare in this period was characterised by sheer brutal violence. Thus :

as war came to be regarded as a natural catastrophe, like a flood whose occurrence was uncontrollable, emphasis shifted to the attempt to control its consequences.<sup>15</sup>

The coming of the Enlightenment and the growing needs of military discipline emphasised the need for the formulation of a body of rules to govern the conduct of war. The *jus in bello*, the laws relating to the conduct of war, began to emerge. The military profession was keen to put into writing what had already become its practice and so the codification of the law began.

It is difficult to say with any certainty when any particular modern rule of war emerged. One example of a case often cited as a precedent for a modern war crimes

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<sup>11</sup> Lib.III, cap. XII.

<sup>12</sup> Lib. III, cap. 1.

<sup>13</sup> For example, the ruling of the Lateran Council of 1139 forbade the use of crossbows by Christians against one another. See Bassiouni and Nanda, A Treatise On International Criminal Law, p.559.

<sup>14</sup> For example, Commynes discussed whether Charles the Bold could hang a nobleman for trying to enter Nancy after the cannon had been fired against the town (Memoirs, Lib. V, cap.6).

<sup>15</sup> L.H. Miller, "The Contemporary Significance of the Doctrine of Just War" in World Politics (1964) Vol.16 p.259.



tribunal is the trial of Peter von Hagensbach.<sup>16</sup> In 1469 Sir Peter von Hagenbach was appointed as the Governor or 'Landvogt' of the fortified town of Breisach by Duke Charles of Burgundy. Hagenbach instituted a regime of terror in Breisach, unique in its ferocity for the time. The neighbouring states, Austria, France and the towns and knights of the Upper Rhine united against Duke Charles of Burgundy and in the war that followed Peter von Hagenbach was captured.

On 4 May 1474, Hagenbach was tried in the market place of Breisach for the crimes he had committed as the Governor of that city before a bench of judges from Austria and the Allied cities. He was sentenced to death and executed. However, the case can not be regarded as a true precedent for a war crimes trial. Hagenbach was charged with the common crime of murder for actions that were committed before the beginning of the war. Furthermore, the Breisach trial was conducted under the authority of the Holy Roman Empire. Therefore, it is much more analogous to a municipal trial for murder rather than an international war crimes tribunal.

Another possible precedent is the Allied treatment of Napoleon Bonaparte.<sup>17</sup> According to the Convention of 11 April 1814 with Austria, Prussia and Russia, Napoleon had agreed to retire to Elba. He escaped and returned to France. On 13 March 1815, the Congress of Vienna issued a declaration stating that Napoleon had violated his agreement and had thereby placed himself outside the protection of the law. As an outlaw, he was subject to the any action that the victorious powers should deem appropriate and fitting. The Prussian Marshal Blucher recommended that he should be shot on sight. After much discussion, Napoleon was remanded in the custody of the British Government and banished to the island of St Helena.

The concept of the criminal responsibility of the individual for his actions in the conduct of war really began to emerge in the late nineteenth century. However, at this time, the trial of individuals responsible for war crimes was still predicated on the basis of existing municipal legislation. The Hague Conferences of 1899 and 1907 concerning the Rules of Land Warfare served only to codify the existing law and did not stipulate penalties for the violation of the those rules. The stage was set for change.

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<sup>16</sup> Robert K. Woetzel, The Nuremburg Trial in International Law, p.19.

<sup>17</sup> Woetzel, *ibid.*, p.23.

## The Leipzig Trials

The unprecedented destruction of World War One provoked moral outrage and a widespread revulsion of war. The laws governing the right to go to war and the conduct of war began to change to reflect the atmosphere of the times. Politicians demanded that measures were taken so as to prevent the repetition of such devastation. Under the terms of the Versailles Peace Treaty of 1919, individual persons were to be held criminally responsible for violations of the laws of war.<sup>18</sup> The German Emperor himself was to be tried "for a supreme offence against international morality and the sanctity of treaties"<sup>19</sup>.

The accused were to be delivered to the Allies by the German Reich and tried under pre-existing municipal law for war crimes. But after negotiations, the Allies declined to exercise their claims for extradition on the understanding that the German Reichsgericht would punish those responsible for crimes of war.<sup>20</sup> The subsequent trials at Leipzig used international law to determine the illegal character of an act but applied German law in defining such an act and in fixing the punishment for it. In the event, the trials proved to be little more than a farce. Of the forty-five cases submitted by the Allies, twelve were tried by the Leipzig court and six defendants were convicted.<sup>21</sup> Some of the defendants later 'escaped' from prison and fled to safety where they were hailed as heroes.

## The Jus Contra Bellum

At the same time, the emphasis shifted to attempts to prevent the outbreak of war rather than to regulate the conduct of war. In 1919, the international community established a League of Nations, dedicated to the peaceful settlement of international disputes between states. The Covenant of the League provided that :

The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger

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<sup>18</sup> See Articles 227-230.

<sup>19</sup> Article 227 - However, Kaiser Willhelm fled to the Netherlands which refused to extradite him for trial on the grounds that his offence was political in nature.

<sup>20</sup> In a Message of the Allied Powers of 13 February 1920.

<sup>21</sup> Woetzel, *ibid.*, p.30-34.

of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.<sup>22</sup>

In 1927, the Assembly of the League of Nations declared unanimously that aggressive war would henceforth be considered to be an international crime.<sup>23</sup> The Declaration provided that all wars of aggression were, and always had been, prohibited and that every pacific means should be employed to settle disputes which might arise between states.

The subsequent signing of the Paris Treaty for the Renunciation of War in 1928, better known as the Kellogg-Briand Pact, established a landmark in international law. The treaty provided that :

The high contracting parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.<sup>24</sup>

Sixty-three states ratified the treaty and since it contains no provision for renunciation and/or lapse at least one author considers the treaty to be still in force.<sup>25</sup>

In February 1928, the Sixth Pan-American Conference declared that "war of aggression constitutes an international crime against the human species... all aggression is illicit and as such is declared prohibited."<sup>26</sup> In 1933, the countries of the American continent solemnly declared in the Treaty of Non-Aggression and Conciliation that they "condemn wars of aggression in their mutual relations or in those with other states."<sup>27</sup> This treaty was reproduced in the Buenos Aires Convention of 1936 and was ratified by large number of the American states, including the United States. The possibility of war seemed unthinkable. But the events of World War Two were just around the corner.

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<sup>22</sup> The Covenant of the League of Nations, Art.10.

<sup>23</sup> See The Declaration on Aggressive Wars.

<sup>24</sup> The Kellogg-Briand Pact, the League of Nations Treaty Series Vol.94 Art.1 p.57.

<sup>25</sup> Brownlie, International Law and the Use of Force by States, p.75.

<sup>26</sup> Ginsburgs and Kudriavtsev, op. cit., at p.127.

<sup>27</sup> Ibid.

During the course of the Second World War, the Germans committed war crimes on an unprecedented scale. Atrocities were part and parcel of the Nazi conception of total war and were committed in pursuance of a preconceived and preconcerted plan to terrorize and exploit the inhabitants of invaded and occupied territories and to exterminate those elements among them inimical to German conquest and Nazi domination.<sup>28</sup> Throughout the course of the war, the Allies repeatedly affirmed their intention to punish those responsible for such atrocities. On 13 January 1942, the representatives of nine European powers formally adopted the Declaration of the Court of St James which stated :

Whereas Germany, since the beginning of the recent conflict which arose out of her policy of aggression, has instituted in the Occupied countries a regime of terror characterized amongst other things by imprisonment, mass expulsions, the execution of hostages and massacres... (the undersigned representatives)

(1) affirm that acts of violence thus perpetrated against the civilian population are at variance with accepted ideas concerning acts of war and political offences, as these are understood by civilised nations...

(3) place among their principal war aims the punishment, through the channels of organised justice, of those guilty or responsible for those crimes, whether they have ordered them, perpetrated them, or participated in them...<sup>29</sup>

On 1 November 1943, Roosevelt, Churchill and Stalin issued a Declaration at Moscow that :

at the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken part in the atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those

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<sup>28</sup> See generally Lord Russell of Liverpool, The Scourge of the Swastika.

<sup>29</sup> See the Declaration of the Court of St James on 13 January 1942 by the representatives of nine European powers, as reprinted in Lord Wright, The History of the United Nations War Crimes Commission and the Development of the Laws of War, p.109-113.

liberated countries and of the free government which will be erected therein.<sup>30</sup>

At the Yalta Conference of 1944, the Allied statesmen announced "their inflexible purpose to... bring all war criminals to just and swift punishment."<sup>31</sup>

Thus, when the National Socialist government of Germany surrendered in May 1945 the Allies had committed themselves to bringing the war criminals to trial. They were faced with the difficulty of drafting a basic charter of the powers and rules of procedure for the tribunal. The French were invited to contribute to the discussions and this further complicated the negotiations. The chief difficulty was due to the extreme diversity of the legal systems represented by the Allied powers. But on 8 August 1945 the Allies formally adopted the Charter of the International Military Tribunal.<sup>32</sup>

The aim of the Charter was not to legislate, to create new law. Instead, it aimed to set down on paper a statement of the law as it already existed. Law comes into being in two ways - it may be created by an instrument (the decree of a King or an Act of Parliament) which lays down new rules or amends old ones. In international law there are no such instruments. The second source from which the law is derived is the custom and practice of states. This sort of law grows gradually and at a certain point it is generally convenient to reduce it to writing and publish it by decree. Thereafter, the enactment serves as evidence of the existence and content of the law - but no such enactment is required to make it law. The Charter of the International Military Tribunal purported to reduce the existing practice of states, in combination with the relevant treaty law of the time, to writing. Thus, the Allies sought to guide the decisions of the tribunal they would establish.

The Charter of the International Military Tribunal recognised three distinct and separate categories of international crimes<sup>33</sup> :

- 1) Crimes Against Peace - namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or

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<sup>30</sup> See the Moscow Declaration of 1 November 1943 printed in 9 U.S. State Department Bulletin 1943 at p.310.

<sup>31</sup> See the Yalta Declaration of 11 February 1944 as printed in 13 U.S. State Department Bulletin (1945) p.137.

<sup>32</sup> The parties to the agreement were the United States, Great Britain, France and Russia.

<sup>33</sup> Article 6 of the Charter.

assurances, or participation in a common plan or conspiracy for the accomplishment of such acts.

- 2) Crimes of War - namely, violations of the customs of war... murder, ill-treatment or deportation to slave labour or for any other purpose of the civilian population of or in occupied territory, murder, or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of personal or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.
- 3) Crimes Against Humanity - namely, 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 whether or not in violation of the domestic law of the country where perpetrated.

Twenty-two defendants were arraigned for trial at Nuremberg before a bench of international judges drawn from the four Allied powers. Each Allied power selected two representatives to act as judges on its behalf. The trial commenced in November 1945 and was to last ten months.

#### A Question of Jurisdiction

At the beginning of the trial, the defendants attempted to contest the validity of the Charter and thereby the jurisdiction of the tribunal itself. Goering claimed the trial was nothing more than "victors' justice". However, the tribunal stated that it was bound by the Charter and that the jurisdictional basis of the tribunal, as expressed by the Charter, could not be challenged.

When the German government surrendered unconditionally to the Allies it had forfeited all right to exercise legislative power. The Four Powers had assumed supreme authority over the state of Germany on 5 June 1945.<sup>34</sup> The civilised world had recognised the right of the Allies to legislate for the occupied territories.<sup>35</sup> Therefore, they

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<sup>34</sup> For the actual text of the document, see C.A. Colliard, Droit International et Histoire Diplomatique, p.632.

<sup>35</sup> Under normal international practice this right would pass to the subjugating countries upon the issue of a Decree of Annexation. However, the Allies specifically declined to effect the annexation of the Germany (see *ibid*). Hence, it is presumed that the state of Germany continued to exist. The Allies constituted the government of Germany until

were entitled to dispense justice in the name of the state of Germany.

In addition, the tribunal maintained that it was the right of every state to set up courts to administer law. The decision of the Permanent Court of International Justice in the case of the *Lotus Steamship* in 1927 had confirmed the right of a state to administer law unless a rule of international law prohibited it from so doing.<sup>36</sup> There was no such rule to prohibit the exercise of Allied jurisdiction over war criminals.<sup>37</sup> The Allied states that had sponsored the trial had merely decided to do together what each of them could have done separately. Thus, the tribunal did not represent an arbitrary exercise of power by the Allied states, but rather it was "the expression of international law existing at the time of its creation."

Jurists have pointed out that the Allies specifically declined to issue a declaration of annexation.<sup>38</sup> Hence, the state of Germany continued to exist, despite the unconditional surrender of its government. Thus, technically a state of *occupatio bellica*, or belligerent occupation, existed. At that time, the powers of an occupying government were restricted by Article 43 of the Hague Rules of Land Warfare of 1907. The occupying nation was entitled to prosecute war crimes *stricto sensu* but it could not punish other crimes committed before the

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legislative power could be transferred to a free and elected German government.

<sup>36</sup> The Lotus Case, Judgement No.9, Series A, No.10.

<sup>37</sup> A report by the American Bar Association during the war had confirmed that there was no rule in international law to prevent the Allies from exercising jurisdiction and concluded that :

it has long been an accepted principle of international law that a belligerent may punish with appropriate penalties any of the enemy forces within its custody who have violated the law and customs of war.

"Proceedings of the Section of International and Comparative Law of the American Bar Association" (1942-1943) in 37 American Journal of International Law (1943) at p.663.

<sup>38</sup> See generally K.V. Laun, "The Legal Status of Germany", American Journal of International Law (1951) p.267; Gros, "La Condition Juridique de l'Allemagne", Revue General de Droit International Public (1946) p.67; and Sauser-Hall, "L'Occupation de l'Allemagne par le Puissances Alliees", Schweizerisches Jahrbuch fur Internationales Recht (1946) Vol.III p.46.

beginning of the occupation except where the local courts were unable to function. Since the German courts were able to function after the winter of 1945 it is said that the tribunal acted in excess of its jurisdiction.

However, Kelsen argues that status of belligerent occupation had become impossible :

This status presupposes that a state of war still exists in the relationship between the occupant state and the state whose territory is under belligerent occupation. This condition implies the continued existence of the state, whose territory is occupied and consequently, the continued existence of its government recognised as the legitimate bearer of the sovereignty of the occupied state.<sup>39</sup>

In any event, the exceptional circumstances that prevailed in Germany at the time of the surrender can be said to justify the assumption by the Allies of special authority over and above the established rights of an occupying power. It is perhaps unfortunate that the nations which subscribed to the London Agreement did not specifically state the basis for their endorsement of the Allies action at Nuremburg. However, it can hardly be doubted that the international community approved and endorsed the trial and punishment of the authors of the war. Thus, the authority of the Allies to establish the Nuremburg Tribunal flowed directly from the approval, express and implied, of the world community. As Kelsen observed, "justice required the punishment of these men as the Nuremburg defendants."<sup>40</sup>

#### The Doctrine Of Act Of State

During the course of the Nuremburg trial, the defendants sought to establish their immunity from prosecution on the grounds that their actions constituted acts of the state. The doctrine of act of state is based on the principle that an individual can not be held responsible for an act which he performed as an instrument or 'organ' of his state, since responsibility for such violations rests on the collective responsibility of individuals, which is the state. The validity of the act of state doctrine is widely acknowledged as a necessary limitation of the right of states to prosecute foreign nations.<sup>41</sup>

However, the Charter of the International Military Tribunal had specifically provided that :

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<sup>39</sup> Woetzel, op. cit., p.79.

<sup>40</sup> Hans Kelsen, "Will the Judgement in the Nuremburg Trial Constitute A Precedent in International Law?", International Law Quarterly, (1947) No.2 p.165.

<sup>41</sup> For example, see Kelsen, Peace Through Law, p.82.



the official position of the defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.<sup>42</sup>

Thus, the tribunal categorically rejected the doctrine of act of state in its judgement :

It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as states has long been recognised.

### The Defence of Superior Orders

The Nuremburg defendants also attempted to justify their actions on the grounds that they had been instructed to carry out their orders by superior officers. They argued that personally they had committed no crime since the responsibility for their actions should fall upon the heads of those above them. There was some validity to their argument.

The first edition of Oppenheim, published in 1906, affirmed the principle that members of the armed forces who commit breaches of the law in conformity with the orders of their superiors are exempt from liability.<sup>43</sup> The British Manual of Military Law and the United States Rules of Land Warfare of 1914 both contained provisions to this effect.<sup>44</sup> The Leipzig Trials, which followed World War One, considered the defence of superior orders in two instances involving the destruction of hospital ships. In The Dover Castle, the commander of a U-boat torpedoed a hospital ship on the orders of the German Admiralty.<sup>45</sup> The orders had been issued in the belief that, contrary to the laws of war, the Allies were using hospital ships for military purposes. The commander was acquitted. The court held that

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<sup>42</sup> The Charter of the International Military Tribunal, Art.7.

<sup>43</sup> Vol.2, s.253.

<sup>44</sup> See The British Manual Of Military Law (1914) para.443; and The United States Rules of Land Warfare (1914) Art.336.

<sup>45</sup> H.M.S.O. (1921) Cmd 450; as cited by L.C. Green, Superior Orders In National and International Law, p.266.

under German military law a subordinate could not be considered to be responsible for the execution of a superior order which constitutes an offence against international criminal law unless the subordinate had gone beyond the orders given to him or he knew that his superiors has ordered him to carry out acts which constituted a civil or military crime. The commander of the U-boat genuinely believed that the measures taken by the German Admiralty constituted legitimate reprisals. Thus, he was innocent.

In *The Llandovery Castle*, the commander of a U-boat had torpedoed a hospital ship outside the area authorised by the orders of the German Admiralty.<sup>46</sup> The court held that the commander had acted in excess of his orders. His subordinates had known that the sinking of the hospital ship was manifestly illegal. Thus, they were guilty of aiding and abetting the crime.

Despite the decisions of the Leipzig court, Anglo-American texts continued to reflect the traditional doctrine of superior orders. The first edition of Oppenheim to appear after the war was unaltered except for a note by the editor that :

the contrary is sometimes asserted... {but} the law can not require an individual to be punished for an act which he was compelled to commit.<sup>47</sup>

The British Manual of Military Law of 1929 and the United States Rules of Land Warfare of 1940 also remained unchanged. But the Lauterpacht edition of Oppenheim in 1940 stated that :

the members of the armed forces are bound to obey lawful orders only and they cannot therefore escape liability if, in obedience to a command, they commit acts which violate both unchallenged rules of warfare and outrage the general sentiment of humanity.<sup>48</sup>

It was only in 1944 that the British Manual of Military Law and the United States Rules of Land Warfare were amended to give effect to the new principle.<sup>49</sup> Thus, the Nuremburg defendants had good reason to believe that they might

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<sup>46</sup> Ibid.

<sup>47</sup> (1921) Vol. 2, s.253, p.342, n.3.

<sup>48</sup> (1940) s.253, p.453-454, n.2.

<sup>49</sup> The amendment to the British Manual of Military Law reproduced the passage from Oppenheim *expressis verbis* and was clearly written by Lauterpacht himself.

escape punishment for their crimes. However, the Charter of the IMT had laid down that :

The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but they may be considered in mitigation of punishment if the tribunal determines that justice so requires.<sup>50</sup>

Therefore, the tribunal rejected the defence of superior orders, commenting that :

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.<sup>51</sup>

#### The Importance Of The Nuremburg Trial

Any analysis of the long-term importance of the Nuremburg Trial must be tri-partite in nature because it must consider the effect of the IMT in three different spheres : history, justice and the law. The Nuremburg Trial in its historical aspect was important because it signalled the end of the war by exposing the corrupt heart of the old Nazi regime. Second, the Trial was the first action of the new peace in that it clearly heralded a return to the values of justice and decency. Finally, the Trial established a fair and objective record of the excesses of the Nazi government, lest future generations forget.

The Trial in its aspect of justice is no less important. The tests of legality involve complex technical arguments that laymen neither understand nor want to understand. A trial may be perfectly legal in its inception, conduct and result, yet seem unjust. If a trial appears to be unjust then the criminal becomes a martyr. A great deal of the evil which befell the world after 1919 was caused by the fact that too many people believed the provisions of the Treaty of Versailles to be harsh and unjust. Whether the treaty was unjust or not is another question. But Hitler was able to play upon those doubts in order to strengthen his position. Thus, any attempt to

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<sup>50</sup> The London Agreement, 8 Aug. 1945, 82 UNTS 279, Arts. 7,8.

<sup>51</sup> (1946) Cmd. 6964 p.42; repeated in American Journal International Law (1947) p.221.

discredit the Nuremburg Trial as unjust would have been potentially far more serious than an attempt to represent it as unlawful.

The importance of the Nuremburg Trial in its aspect as law can not be understated. The primary effect of the Trial was to confirm the notion of individual responsibility for criminal acts in international law and to establish that it applied to offences beyond war crimes *stricto sensu* and to high officials of the State. In 1946, the principles of international law contained in the Charter of the IMT and affirmed in the judgement of the IMT were unanimously accepted by the General Assembly of the United Nations.<sup>52</sup>

The General Assembly directed the Committee for the Progressive Development of International Law and its Codification to identify the important principles formulated by the Nuremburg Charter and the Judgement of the International Military Tribunal and to prepare a Draft Code of Offences Against the Peace and Security of Mankind.<sup>53</sup> In turn, the Committee decided to consult the opinion of the International Law Commission that was soon to be established.<sup>54</sup> In 1950, the International Law Commission codified the legal principles recognised in the Nuremburg Trial and established the foundations of modern international criminal law.

### The Nuremburg Principles

Principle I. Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable for punishment.

Principle II. The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.

Principle III. The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.

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<sup>52</sup> Resolution 1(95) on 11 December 1946.

<sup>53</sup> G.A. Res. 177(II) - U.N. Doc. A/CN.4/4 1947 at p.9.

<sup>54</sup> Report of the Committee on the Progressive Development of International Law and its Codification, U.N. GAOR, 2nd Sess., p.211, U.N. Doc. A/332 (1947). Reprinted in 2 Benjamin B. Ferencz, An International Criminal Court - A Step Towards World Peace, p.129-130.

Principle IV. The fact that a person acted pursuant to order of his government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and the law.

Principle VI. The crimes hereafter set out are punishable as crimes under international law :

a. Crimes against Peace:

(1) Planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances;

(2) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (1).

b. War Crimes:

namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes against Humanity:

namely, murder, extermination, enslavement, deportation or other inhuman acts done against a civilian population, or persecutions done on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime or a crime against humanity, as set forth in Principle VI, is a crime against international law.

It was 1951 before the International Law Commission submitted a Draft Code of Offences Against the Peace and

Security of Mankind.<sup>55</sup> In its report, the Commission reaffirmed that the crimes established in the Nuremburg Charter - aggression, war crimes, and crimes against humanity - were crimes against international law. However, there was some debate as to the definition and scope of the crime of aggression. Accordingly, the Commission referred the question back to the General Assembly.

Throughout the period from 1951 to 1954, the General Assembly was unable to agree on any definition of aggression.<sup>56</sup> Indeed, one international jurist was drawn to remark that "the attempt of nations to agree upon a definition of aggression elicited more aggression than definition."<sup>57</sup> Thus, the General Assembly decided to postpone further action on the development of a criminal code pending agreement on a definition of aggression.<sup>58</sup> It was not until 1974 that the General Assembly was able to agree upon a suitable definition.<sup>59</sup> But by 1977, several states had requested that the concept of a draft code should be reconsidered.<sup>60</sup> Accordingly, the topic was remitted to the consideration of the International Law Commission in 1981.<sup>61</sup>

In 1991, the ILC completed its first reading of the draft code of offences against the peace and security of

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<sup>55</sup> See Report of the International Law Commission Covering The Work of Its Third Session, U.N. GAOR, 6th Sess., Supp. No. 9, p.11-14, U.N. Doc. A/1858 (1951). Reprinted in 2 Ferencz, *supra* note 13, p.332-336.

<sup>56</sup> A more detailed consideration of the attempts by the General Assembly to define aggression can be found in 2 Ferencz, *supra* note 13, at p.32-100.

<sup>57</sup> See Ferencz, "An International Criminal Code and Court : Where They Stand and Where They're Going", 30 Columbia Journal of Transnational Law (1992) p.377.

<sup>58</sup> G.A. Res. 897 and 898, U.N. GAOR, 9th Sess., Supp. No. 21, at p.50, U.N. Doc. A/2890 (1954). Reprinted in 2 Ferencz, *supra* note 13, at p.467, 485.

<sup>59</sup> G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at p.142-144, U.N. Doc. A/9631 (1974).

<sup>60</sup> United Nations, General Assembly, Request For The Inclusion Of An Additional Item In The Agenda Of The Thirty-Third Session; Draft Code Of Offences Against The Peace And Security Of Mankind, U.N. Doc. A/32/247 at p.1 (1977).

<sup>61</sup> G.A. Res. 36/106, U.N. GAOR, 36th Sess., Supp. No. 51, at p.239, Doc. A/RES/36/106 (1981).

mankind.<sup>62</sup> The code was divided into two parts. Part I established certain general principles relating to crimes against international law. Offences were to be considered as crimes against the peace and security of mankind even if not punishable by the internal law of a state (Articles 1-2). Individuals, including those who aided, abetted or attempted the crime, would be held responsible (Article 3). The motives for the crime would not excuse the offence (Article 4). States would be held responsible for their acts and omissions (Article 5). States would be obliged to either try or extradite an accused (Article 6). No statute of limitations would apply (Article 7). Fair trial would be guaranteed (Article 8).

There would be no double jeopardy or retroactive application of the code except for acts which were previously recognised as international crimes (Articles 9-10). The order of a superior would not excuse the crime, nor would the superior be relieved of responsibility (Articles 11-13). Finally, the competent court would determine the admissibility of permissible defences and extenuating circumstances (Article 14).

Part II of the code definitively listed the crimes covered by the code: an act or threat of aggression by a state, intervention in the internal affairs of a state; colonial or alien domination; genocide; apartheid; systematic or mass violations of human rights; "exceptionally serious" war crimes; the recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment (Articles 15-26).

Initial reactions to the ILC code were mixed. Much comment was made of the shortcomings of the draft and of the ambiguity of the text.<sup>63</sup> Such criticism was inevitable, given the need to reach any sort of consensus. In the words of the ILC itself, the draft was :

**still open to some improvements, which can be made on second reading, with the benefit of further points**

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<sup>62</sup> Report of the International Law Commission on the Work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at p.238-250, U.N. Doc. A/46/10 (1991).

<sup>63</sup> The Draft Code and the International Criminal Court were discussed during the 29th through 37th meetings of the Sixth Committee, November 5-13, 1991. U.N. GAOR 6th Comm., 46th Sess., 29th-37th mtgs., U.N. Doc. A/C.6/46/SR.29-37 (1991).

made in the comments and observations of governments.<sup>64</sup>

The political indications are such that it is unlikely that the draft code of crimes will be ratified. Thus, international society will have to rely upon a piecemeal approach to the recognition of international criminal law for some time to come.

### The Development of International Criminal Law

It is hard to compile a comprehensive list of existing international criminal treaty law because of differences between states as to the validity of certain convention agreements. However, most commentators' lists would include the following : Convention on the Prevention and Punishment on the Crime of Genocide (1948); Geneva Conventions (1949); Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others (1949); Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); Single Convention on Narcotic Drugs (1961); Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Hague Convention for the Suppression of the Unlawful Seizure of Aircraft (1970) Convention on Psychotropic Substances (1971); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); International Convention Against the Taking of Hostages (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988); and Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

However, the world has been unable as yet to establish any form of standing international criminal court to act on

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<sup>64</sup> Report of the International Law Commission on the Work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991) at p.237.



behalf of the international community as a whole.<sup>65</sup> Thus, the enforcement of international criminal law has become inherently dependant upon the municipal courts of individual nations. All post-Nuremburg criminal law treaties have sought to broaden the jurisdictional basis of municipal courts in order to prevent and punish international crime. The manner in which they seek to do so varies from one treaty to another. This, in itself, warrants further analysis.

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<sup>65</sup> See Chapter Seven for a more detailed account of the attempts of the international community to establish an international criminal court.

## CHAPTER FOUR

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### THE METHODOLOGY OF INTERNATIONAL CRIMINAL LAW

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The development of international law has traditionally been heavily dependent upon the ideas and innovations of leading international jurists.<sup>1</sup> International criminal law has been no different to international law in this respect. However, with the continuing evolution of the international community, the influence of authors and jurists has waned.

International law developed to facilitate the interests of the strong. However, the development of advanced communications technology has made the world a smaller place. It is now far more difficult to conceal illegal government conduct from the public eye. In addition, the potential consequences of the abuse of government power are far more severe. The law has reacted to protect the weak, especially in the field of international peace and security and human rights. Government misconduct may result in public condemnation and the imposition of punitive trade sanctions by the international community at large. The potential disruption is such that a state can not entirely disregard the views and attitudes of the other states in the international community.

A variety of quasi-legislative organisations have been established to facilitate international understanding and to promote consensual world government.<sup>2</sup> The combined economic and military power of the states involved can not be ignored. The political influence of such organisations is so extensive that the modern state can not afford not to be represented in international deliberations of this nature. Thus, authors and jurists now work within the institutional framework of the international legal order under the sponsorship and supervision of the state parties concerned.

In the modern era, the law-making process is dependant upon the conjunction of three factors : the acknowledgement of the international community of the necessity for action, the subsequent submission of suitable proposals for

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<sup>1</sup> G.J.H. van Hoof, Rethinking the Sources of International Law.

<sup>2</sup> C.H. Alexandrowicz, The Law-Making Functions of the Specialised Agencies of the United Nations.

consideration and the political will to implement the chosen solution. When these factors coincide, the international community generally finds it convenient to reduce the text of the agreement into treaty form.<sup>3</sup> Thus, while the influence of authors and jurists has waned there has been a corresponding increase in the volume of U.N. and state-sponsored bilateral and multilateral treaty law.

Treaty law has both advantages and disadvantages. On the positive side, it is a precise and effective method of recording the terms of an international agreement in a legally binding form. The parties to the agreement are instantly identifiable and the scope and application of the law contained in the treaty is exact. But on the negative side, treaty law is rigid and inflexible. It can not adapt to meet new challenges and different situations. Treaty law is 'static' law in the sense that it does not evolve from the point of its inception. Often, treaty law is not accompanied by the legal machinery necessary to enforce the terms of the agreement.

For criminal law treaties, the absence of an international enforcement agency is a serious flaw. There is no international police force or international judicial system which can enforce international criminal law.<sup>4</sup> The application and enforcement of international criminal law is primarily dependent upon the municipal judicial machinery of individual states. It is not unknown for an ad hoc judicial tribunal to be established for a specific short-term purpose but such phenomena are very much the exception rather than the rule.<sup>5</sup> International treaty agreements reflect the unlikelihood of this event. The majority of criminal law treaties establish the criminality of the conduct to be proscribed in direct relation to the domestic legal machinery which will enforce the terms of the agreement.<sup>6</sup> Modern criminal law treaties require States Parties to enact domestic legislation to criminalise prohibited conduct under their own municipal law. There is no implication that such conduct is criminal in international law.

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<sup>3</sup> Van Hoof, *op. cit.*, at p.117-119.

<sup>4</sup> The potential for an international criminal court is discussed in Chapter Seven.

<sup>5</sup> Cf The Nuremburg and Tokyo War Tribunals as discussed in Chapter Three.

<sup>6</sup> The process by which the suppression and punishment of international crime depends upon municipal law has been called "adjective international criminal law". This concept is in direct contrast to the notion of "substantive international criminal law", which would involve an international criminal code and supporting institutions for its implementation and enforcement. See Bassiouni, International Terrorism and Political Crimes, at p.490.

Exceptionally, some international treaties do seek to establish the criminality of prohibited conduct under international criminal law. During the drafting of the Hostages Convention it was mooted that hijacking, like piracy, should be declared an international offence.<sup>7</sup> However, it was recognised that piracy became an international crime under customary international law only after general acceptance by all states over many centuries. It was doubted whether the same result could be achieved by simply declaring it to be so in a convention. As a result, the Hostages Convention opted to establish the criminality of the conduct to be proscribed therein through municipal law.<sup>8</sup> International treaty agreements which purport to establish the criminality of conduct to be proscribed therein under international law do exist. However, such treaties are rare and are still dependent upon the state machinery of domestic law for their enforcement.

### Principles of International Jurisdiction

The manner in which the criminality of proscribed conduct is established will affect the application of the law. In order to recognise the precise implications of the distinction between direct and indirect treaty law, it is necessary to understand the principles of jurisdiction that govern international law.<sup>9</sup> The legislative jurisdiction of a state is limited according to international law. There are five bases for legislative jurisdiction accepted under international law but not all of these theories enjoy the same degree of recognition.

- 1) **The Territorial Principle** - the right of the state to legislate to make conduct occurring within its territory criminal in nature.
- 2) **The Active Personality Principle** - the right of the state to legislate to make the conduct of its nationals outside of its territory criminal in nature.
- 3) **The Passive Personality Principle** - the right of the state to legislate to make the conduct of aliens

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<sup>7</sup> White, "The Hague Convention for the Suppression of Unlawful Seizure of Aircraft", in 6 The Review of the International Commission of Jurists (1971) at p.41.

<sup>8</sup> *Infra*.

<sup>9</sup> See Akehurst, "Jurisdiction in International Law", in British Year Book of International Law (1973) at p.145; Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", in 53 British Year Book of International Law (1982) at p.1; Schachter, "International Law in Theory and Practice", in 178 RC (1982-V) at p.239.

abroad criminal in nature if the victim of the conduct is a national of the state.

- 4) **The Protective Principle** - the right of the state to legislate to make the conduct of aliens abroad criminal in nature if that conduct poses a serious threat to the vital interests of the state.
- 5) **The Universality Principle** - the right of the state to legislate to make the conduct of any person in any location criminal in nature, regardless of the nationality of the victim or the threat to the state.

The potential implications of the commission of a crime against international law are so serious that international treaty law considers that crimes against international law are crimes of universal jurisdiction. All states are empowered to exercise jurisdiction over such offences wherever they are committed. Such crimes are called *delicti ius gentium*, offences against the law of nations. But where the criminality of proscribed conduct is established in indirect form by the enactment of domestic legislation the potential implications of the commission of a crime are not so serious as to justify the treatment of such an offence as a crime of universal jurisdiction. Thus, in order to maximise the application of domestic legislation enacted in accordance with the treaty, the contracting parties establish a two-tier system of jurisdiction in the treaty that indirectly mimics the effect of universal jurisdiction.

The first tier (primary jurisdiction) authorises the contracting parties to the treaty to exercise jurisdiction over the conduct proscribed therein in accordance with accepted principles of international jurisdiction such as territoriality and personality.

The second tier (secondary jurisdiction) compels a party to the agreement that discovers an offender within the boundaries of its territory to extradite him to a state with primary jurisdiction or to prosecute him itself in accordance with the maxim *aut dedere aut iudicare*.

There are two possible interpretations of the legal nature of the terms of such a treaty.<sup>10</sup> The first suggests that, because the test has been adopted in the multilateral treaty framework of the international legal order, the international community has recognised that these are offences of universal jurisdiction and that all the states have the right (but not the obligation unless they are parties to the relevant instrument) to exercise

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<sup>10</sup> Schachter, *ibid.*, at p.262-264.

jurisdiction on this basis.<sup>11</sup> The second theory contends that the treaty represents an agreement between states not to object to the exercise of jurisdiction on this basis by any other party to the agreement, and therefore the rights of non-parties are not affected.<sup>12</sup>

The true interpretation will only be ascertained when a case comes to court in which a non-party to a treaty seeks to assert its right to exercise jurisdiction on the basis of the treaty.<sup>13</sup> However, the matter is unlikely to be resolved for some years. Given the complexity of the issues involved, it is, perhaps, appropriate to illustrate the distinction between direct and indirect treaty law by reference to several case examples of current treaties.

#### Case Example - The International Conventions Against Terrorism

Terrorism dates back to antiquity but international terrorism is a more recent phenomenon.<sup>14</sup> International terrorism is a direct result of the technological development of improved international travel facilities. The unprecedented speed and convenience of modern foreign travel has enabled the terrorist to extend his theatre of operations onto the international stage.

Initial attempts to control international terrorism were prompted by the actions of nineteenth and twentieth century anarchists. After the assassination of King Alexander of Yugoslavia and French Foreign Minister Barthou in 1934, the League of Nations prepared a draft convention

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<sup>11</sup> Wood, "The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents", in 23 International Criminal Law Quarterly (1974) at p.809.

<sup>12</sup> In accordance with Art.34 of the Vienna Convention of the Law of Treaties.

<sup>13</sup> Compare and contrast "Extradition of the Achille Lauro Hostage Takers" in 20 Vanderbilt Journal of Transnational Law (1987) at p.254 in which Paust states that the exercise of universal jurisdiction over nationals of non-parties would be 'highly suspect' and "International Law in Theory and Practice" at 178 RC (1982-V) at p.263 in which Schachter maintains that the objection of a non-party to the agreement would only be valid if that state had objected to the jurisdiction clause at the time of the drafting of the convention.

<sup>14</sup> See generally, Bassiouni, International Terrorism and Political Crimes; Lambert, Terrorism and Hostages in International Law.

to suppress international terrorism.<sup>15</sup> However, the treaty received only twenty-four signatories and one ratification before it was superseded by the events of World War Two.<sup>16</sup> Further efforts in the post-war period were inconclusive.<sup>17</sup> A fundamental difference in outlook existed between the established states and the developing nations. The politically-stable colonial powers sought to characterise low-level violence, by which many wars of liberation were inevitably waged, as terrorism - and therefore illegal and possibly criminal. However, the developing nations, many of whom had just won their freedom, were sympathetic to those struggling for self-determination.

Thus, the international community was unable to decide whether terrorism should be defined without reference to the motive of the terrorist and if it should, whether the problem should be dealt with by concerted action to punish the perpetrators or by seeking to eliminate the underlying causes of terrorism. In the face of the apparently insuperable disagreement as to the definition and/or causes of terrorism, the international community opted to proceed on the basis that it was more expedient to list in non-exhaustive fashion those acts which they had mutually agreed to criminalise in their respective domestic legal systems. Therefore, the methodology underlying all international agreements to suppress international terrorism is an attempt to identify and isolate specific manifestations of terrorist conduct harmful to the peace and security of mankind.

The Hague Convention (1970) was sought to suppress the unlawful seizure of civilian aircraft. The Montreal Convention (1971) prohibited unlawful acts (such as the introduction of explosive devices) against the safety of civil aviation. The New York Convention (1974) established the criminality of unlawful acts against internationally protected persons and diplomats. The Hostages Convention (1980) prohibited the taking of hostages and the Rome Convention (1988) was concluded to suppress unlawful acts against the safety of maritime navigation.

The Hague, Montreal, New York, Rome and Hostages Conventions were not identical but they were remarkably similar. All the treaties require States Parties, *inter alia*, to enact domestic legislation to make the listed

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<sup>15</sup> The Convention on the Prevention and Punishment of Terrorism LN Doc. C.546(1).M.383(1).1937.V.

<sup>16</sup> Hudson, ed, *International Legislation*, Vol.VII at p.862.

<sup>17</sup> Lambert, *ibid.*, at p.29-45.

offences punishable under their own municipal law,<sup>18</sup> to establish their jurisdiction over the offences and to submit all offenders discovered in their territory to the appropriate authorities for prosecution if they did not extradite the offenders to another state.<sup>19</sup>

For example, the Hijacking Convention states that :

Art.2 : Each Contracting State undertakes to make the offence punishable by severe penalties.

Art.4(1) Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases :

(a) when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

Art.4(2) Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article.<sup>20</sup>

The Terrorism Conventions sought to establish in indirect fashion that specific manifestations of terrorism will constitute crimes of universal jurisdiction. Terrorism is not an international crime. Nor is terrorism per se outlawed in international society. Certain specific acts of terrorists, such as aerial hijacking and violence directed at diplomats, are outlawed by the majority of states. But such manifestations of terrorist conduct are not considered to be crimes under international law. International treaty agreements merely purport to establish an obligation on

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<sup>18</sup> The Hague Convention (1970) Art.2, The Montreal Convention (1971) Art.3, The New York Convention (1974) Art.2(2), The Rome Convention Art.5 and the Hostages Convention Art.2.

<sup>19</sup> The Hague Convention (1970) Art.4, The Montreal Convention (1971) Art.5, The New York Convention (1974) Art.3, The Rome Convention (1988) Art.6 and the Hostages Convention Art.5.

<sup>20</sup> Ibid. at p.578.



States Parties to criminalise such conduct in their respective domestic legal systems. Thus, the prosecution and punishment of terrorist attacks is purely a matter for the municipal courts of individual nations.

#### Case Example - The International Law of Torture

Torture has long been employed as a legal, political and economic tool. A historical review of the subject confirms that torture has been practised by nearly all nations.<sup>21</sup> The Ancient Greeks practised torture on their slaves and against criminals although torture was not applied to free citizens for the purpose of testimony or confession. Similarly, in Rome the free-man was not normally tortured except in the event of treason. Torture was used mainly on slaves and detailed rules were established for the application of such torture.<sup>22</sup> The influence of Roman law contributed to the development of the use of torture in nearly all the legal systems of Europe.<sup>23</sup> The law of torture was acknowledged from Sicily to Scandinavia and from Iberia, across France and the German Empire, to the Slavic East.

China and Japan both used torture. In China one method of execution was called the Torture of the Knife or "the death of a thousand cuts". An executioner would randomly pick out a knife from a covered basket containing a number of such knives. Each knife had a specific part of the body written on it and the executioner would then cut that part of the body specified on the knife. He would continue to draw knives from the basket so long as the victim lived.<sup>24</sup>

The torture of women has been particularly prevalent in Africa, Asia and Latin America. In Iran, "bag punishment" is common for religious crimes. The victim is placed vertically into a hole and a bag is placed on her head so that half her body is covered by it. Then the faithful are invited to stone her. It is said that the greater the number of stones thrown the greater the mercy

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<sup>21</sup> See Bassiouni and Derby, "The Crime of Torture", in Bassiouni, ed, International Criminal Law : Crimes, at p.363-386.

<sup>22</sup> Peters, Torture, at p.11 et seq.

<sup>23</sup> Grote, The History of Greece, Vol.VII at p.274.

<sup>24</sup> Scott, The History of Torture Throughout the Ages, at p.105-111.

the thrower will receive from God. The stoning continues until the victim falls to the ground.<sup>25</sup>

Modern jurisprudence has recognised the wrongfulness of torture. The Universal Declaration of Human Rights (1948) established :<sup>26</sup>

**No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.**

The Geneva Conventions (1949) proclaimed the criminality of torture in war and declared that torture was a crime under international law of universal jurisdiction :<sup>27</sup>

**Art 49 : ...Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts...**

**Art 50 : Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention : wilful killing, torture or inhuman treatment,...**

However, subsequent legislation returned to the conventional formula expressing the wrongfulness (rather than the criminality) of torture. The terms of the Universal Declaration of Human Rights (1948) were reiterated in identical terms in the International Covenant

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<sup>25</sup> Malekian, International Criminal Law, at p.390.

<sup>26</sup> Resolutions of the General Assembly of the United Nations are not altogether legislative in effect but nevertheless those resolutions which have been approved by a majority/consensus may create international legal force. For an analysis of the legal effect of resolutions, see Malekian, The System of International Law, at p.43-50.

<sup>27</sup> The criminality of torture in war is recognised in a considerable number of documents relating to World War Two : The London Charter (1945); The Charter of the IMT (1945); The Charter of the IMT for the Far East (1946); The Affirmation of the Principles of International Law recognised by the Charter of the Nuremburg Tribunal (1946); and the Draft Code of Offences Against the Peace and Security of Mankind (1954) to name but a few.

on Civil and Political Rights of 1966 and in similar terms in the European Convention of Human Rights of 1950.<sup>28</sup>

In 1978 the International Association of Penal Law submitted a draft convention on the prevention of torture to the U.N. Sub-Committee on the Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights.<sup>29</sup> The draft proposal resulted in the adoption of a resolution by the General Assembly on torture in 1984.<sup>30</sup> It contained a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which establishes the criminality of torture in indirect fashion.<sup>31</sup>

The U.N. Convention on Torture (1984) states :

Art. 4(1) : Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Art. 5(1) : Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Art.4 in the following cases :

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state;

(b) When the alleged offender is a national of that state;

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<sup>28</sup> Art.7 of the International Covenant on Civil and Political Rights adopted under General Assembly Resolution 220 (XXI) on 16 December 1966. The Covenant came into force on 23 March 1976.

Art.3 of the European Convention on Human Rights (1950) reprinted in Brownlie, Basic Documents on Human Rights.

<sup>29</sup> Question of the Human Rights of All Persons subjected to any Form of Detention or Imprisonment and in Particular the Body of Principles for the Protection of All Persons under any Form of Detention of Imprisonment, U.N. ECOSOC Doc. E/CN.4/NGO/213, 1 February 1978.

<sup>30</sup> Resolution adopted by the General Assembly on the report of the Third Committee (A/39/708 and Corr.2).

<sup>31</sup> Reprinted in Malekian, International Criminal Law, Vol.I at p.449.

(c) When the victim is a national of that state if that state considers it appropriate.

Art. 5(2) : Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him...<sup>32</sup>

The treaty seeks to establish the criminality of torture on an international level in indirect fashion. Article 4 establishes an obligation on the state parties to the convention to enact domestic legislation to criminalise the use of torture and Articles 5(1) and 5(2) introduce the two stage process of indirect universal jurisdiction. Thus, international treaty law relating to torture falls into three categories : the majority of international treaty law merely recognises the wrongfulness of torture; the U.N. Convention on Torture (1984) establishes the criminality of torture in indirect fashion through municipal law; the Geneva Conventions (1949) establish the criminality of torture in the context of war in direct fashion on an international level.

#### Case Example - The Apartheid Convention

South Africa consists of four racial groups - Africans, Whites (European), Coloureds and Asians (mostly Indians). Apartheid represents a conflict of ideology between those ethnic groups based on the rejection of one group or race by another.<sup>33</sup>

The doctrine of apartheid developed as a result of the conquest and manipulation of South Africa by European powers seeking economic gain. The Afrikaners, who colonised South Africa in the 1650's, and the English-speaking Europeans, who arrived in the 1820's, considered themselves to be superior to the indigenous people of the country because of the pigmentation, level of technology, beliefs, customs and way of life of the native South Africans.<sup>34</sup> The colonists were able to perpetuate the supremacy of the white minority (who constitute 15% of the population but own 87% of the country's land) because they were more advanced technologically.<sup>35</sup> The South African regime

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<sup>32</sup> Ibid. at p.451.

<sup>33</sup> See generally, Ozgur, Apartheid : the United Nations and Peaceful Change in South Africa.

<sup>34</sup> Keohane, "South Africa", in Vincent, ed., Foreign Policy and Human Rights, at p.33-59.

<sup>35</sup> Malekian, International Criminal Law, at p.325.

instituted a systematic policy of discrimination which was designed to set one race against another and thereby ensure the control of power and economic mastery of the white elite. But it is important to realise that although the South African regime is the most prominent and acknowledged system of apartheid the practice of discrimination is not unique to that part of the world.<sup>36</sup>

In 1946 The General Assembly of the United Nations adopted Resolution 103(I) concerning Persecution and Discrimination. It declared that :

**The General Assembly declares that it is in the higher interests of humanity to put an end immediate to religious and so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to confirm both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end.**

A series of resolutions in similar vein followed but they were largely ineffective.<sup>37</sup> However, Resolution 1663 (XVI) declared that the racial policies of the Government of South Africa constituted a flagrant and serious breach of the fundamental rights of man as stipulated in the Universal Declaration of Human Rights.<sup>38</sup> In effect, the resolution criminalised the activities of the Government of South Africa.

In the following year the General Assembly adopted another resolution concerning the policies of apartheid. In Resolution 1761 (XVII) it requested member states to take measures, separately or collectively, against South Africa in order to put an end to apartheid.<sup>39</sup> Three years later

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<sup>36</sup> A similar policy of segregation was practised in the United States until comparatively recently. See Bassiouni, International Criminal Law : A Draft International Criminal Code, at p.77; Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal, at p.145.

<sup>37</sup> See Resolutions 44(I) and 265(III) and 365(V) concerning the Treatment of People of Indian Origin in the Union of South Africa, Resolution 616(VII) on the Question of Race Conflict in South Africa Resulting from the Policies of Apartheid of the Government of South Africa, The Report of the U.N. Commission on the Racial Situation in the Union of South Africa - Official Records of the General Assembly, Eighth Session, Supp. No.16, U.N. Doc. A/2505.

<sup>38</sup> Resolution 1663 (XVI) of 28 November 1961.

<sup>39</sup> Resolution 1761 (XVII) of 6 November 1962.

the General Assembly formally condemned the states which supported the South African regime with political, economic or military help.<sup>40</sup>

In 1966, the General Assembly went so far as to categorise "the policies of apartheid practised by the Government of South Africa as a crime against humanity."<sup>41</sup> The resolution also condemned three of the permanent members of the Security Council for their refusal to cooperate in the elimination of apartheid.<sup>42</sup> Further resolutions repeatedly reaffirmed the criminality of the policies of apartheid in South Africa.<sup>43</sup>

Under Resolution 3068 (XXVIII) of 1973, the General Assembly formally adopted the Convention on the Suppression and Punishment of the Crime of Apartheid. The Convention states :<sup>44</sup>

Art.I : The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security...

Art.IV : The States Parties to the present Convention undertake

(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregation policies or their manifestations and to punish persons guilty of that crime;

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in Article II of the present Convention, whether or not such persons

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<sup>40</sup> Resolution 2054 (XX) of 15 December 1965.

<sup>41</sup> Resolution 2202 (XXI) of 16 December 1966.

<sup>42</sup> The United States, Great Britain and France.

<sup>43</sup> Resolution 2396 (XXIII) of 2 December 1968, Resolution 2446 (XXIII) of 19 December 1968, Resolution 2775 (XXVI) of 29 November 1971 and Resolution 2922 (XXVII) of 15 November 1972.

<sup>44</sup> The Convention is reprinted in Malekian, International Criminal Law, at p.360.

reside in the territory of the State in which the acts are committed or are nationals of that state or of some other State or are stateless persons.

The Convention clearly seeks to legislate to define apartheid as conduct that is criminal in both national and international law. Jurisdiction is intended to be universal. However, the majority of the countries which have supported the adoption and implementation of the Convention against Apartheid have been from Eastern Europe, Africa the Caribbean and Latin America. The states of Western Europe have refused to acknowledge the criminality of apartheid. The use of the veto by certain permanent members of the Security Council has consistently prevented the application of collective sanctions against South Africa.<sup>45</sup> It is therefore arguable whether the international community has achieved the necessary consensus to establish the criminality of apartheid in international law.

#### Case Example - The Genocide Convention

Although the actual crime of genocide dates back to antiquity, the modern term of genocide was coined by the jurist Raphael Lemkin in the period during the Second World War.<sup>46</sup> Literally, the term genocide consists of "genus" and "cide" meaning "the killing of a race". However, genocide, as it is understood in international criminal law, means the destruction of the cultural characteristics of an indigenous people.<sup>47</sup>

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<sup>45</sup> In 1987, the Security Council discussed official sanctions against South Africa. They were rejected by the United States of America and the United Kingdom. See Malekian, op. cit., at p.357.

<sup>46</sup> See Lemkin, "Axis Rule in Occupied Europe" and "Genocide as a Crime under International Law", in 41 American Journal of International Law (1947) at p.145-151.

<sup>47</sup> On the international crime of genocide, see Lemkin, "Genocide as a Crime under International Law", in 41 American Journal of International Law (1947) at p.145-151; Kunz, "The United Nations Convention on Genocide", in 43 American Journal of International Law (1949) at p.738-746; Kuhn, "The Genocide Convention and State Rights", in 43 American Journal of International Law (1949) at p.498-501; Finch, "The Genocide Convention", in 43 American Journal of International Law (1949) at p.732-738; Drost, The Crime of State : Genocide; Malekian, The International Criminal Responsibility of States, at p.87-92; and Malekian, International Criminal Law, at p.287-323.

The Convention on the Prevention and Punishment of the Crime of Genocide was originally submitted to General Assembly of the United Nations in the aftermath of the Second World War as a Draft Resolution on Genocide by the delegates of Cuba, India and Panama. The recent discovery of the full extent of the systematic extermination of the Jewish race in Nazi Germany ensured that the General Assembly unanimously adopted Resolution 916 (I) in which genocide was formally recognised as an international crime.<sup>48</sup> The Resolution directed the Economic and Social Council to study the subject-matter with a view to presenting a draft convention on the crime of genocide. Two years later, the Convention on the Prevention and Punishment of Genocide was adopted by the General Assembly under Resolution 260 (II) and entered into force on 12 January 1961.<sup>49</sup>

The Convention consists of 19 Articles and states that :<sup>50</sup>

**Art.I :** The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

**Art.VI :** Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The Genocide Convention is an anomaly in the otherwise uniform practice of treaty law. There can be no doubt that Article I of the Convention establishes the criminality of genocide in international law. However, Article VI purports to limit jurisdiction to the courts of the territorial state or an international tribunal. Such phraseology is an unnecessary and unnatural limitation of the traditional principles of jurisdiction accepted in international law.

Given that the institution of a policy of genocide must depend upon the authorisation (or at least the toleration) of the state authorities, it is perhaps not surprising that there have been few trials for the crime of

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<sup>48</sup> Resolution 96 (I) of 11 December 1946.

<sup>49</sup> Resolution 260 (II) of 9 December 1948 was adopted with 55 votes in favour and none against.

<sup>50</sup> The text of the Genocide Convention is reprinted in Malekian, *International Criminal Law*, at p.320-323.



genocide.<sup>51</sup> However, the decision of the Israeli Supreme Court in the case of Eichmann would suggest that the customary law jurisdiction for the crime of genocide is universal.<sup>52</sup>

### In Conclusion

International treaty legislation falls into two categories. The vast majority of criminal law treaties establish an obligation upon the state parties to criminalise the conduct proscribed therein through the enactment of domestic legislation. A tiny minority establish the criminality of the offences listed in the treaty under international law.

Whether conduct which is established as criminal according to municipal law enacted under an international treaty agreement can be considered to constitute an international crime is debateable. One commentator argues the term "international crime" refers to those offences "which endanger the fundamental values of the international community as a whole".<sup>53</sup> A second believes that a common crime becomes an international crime when it is committed

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<sup>51</sup> Apart from the prosecution of Nazi war criminals, there have been only two reported trials under the Genocide Convention. In Equatorial Guinea, President Francisco Macias Nguema was overthrown for systematically slaughtering his subjects. In 1979 he was found guilty of a number of crimes, including genocide, and executed. The legal officer of the International Commission of Jurists concluded that Macias had been wrongly convicted with respect to genocide - see "The Trial of Macias in Equatorial Guinea" ICJR (Dec 1979). In the other case, Pol Pot, the former prime minister of Cambodia, was found guilty of genocide in absentia by a people's revolutionary tribunal after the Khmer Rouge were overthrown by the Vietnamese - see Shawcross, Cambodia, Holocaust and Modern Conscience.

<sup>52</sup> The Eichmann Case (1961) 36 I.L.R. at p.59. The case has been supported in this respect by the practice of the United States Supreme Court despite the fact that America has refused to ratify the Genocide Convention. In Demjanjuk v Petrovsky (776 F.2d at p.571, 475 U.S. (1986) at p.1016) the Supreme Court recognised the applicability of universal jurisdiction for genocide when it ruled for the extradition to Israel of accused Nazi war criminal John Demjanjuk. Demjanjuk was acquitted of all charges against him on appeal to the Supreme Court of Israel on 29 July 1993 on the ground that there was reasonable doubt as to his identity.

<sup>53</sup> Feller, "Jurisdiction over Offences with a Foreign Element", in Bassiouni and Nanda, ed., A Treatise on International Law, Vol.II at p.41.

in more than one state or where no state has exclusive national jurisdiction or if it affects citizens of more than one state or an internationally protected person or object.<sup>54</sup> Yet a third maintains that the term "international crime" is limited to those offences which give rise to direct individual liability under international law without the intermediate provisions of municipal law.<sup>55</sup> However, there is no international criminal court to judge those accused of crimes against international law. Thus, the distinction is, at the current time, academic.<sup>56</sup>

The enforcement of international criminal law is entirely dependant upon the domestic courts of the states concerned, regardless of the method by which the criminality of the proscribed conduct is established. Individual state institutions for law enforcement recognise no difference between the international criminal and the municipal offender. As a result, the fight against international crime is dependant upon the traditional methods and procedures of domestic law enforcement. The effectiveness of this approach is questionable and therefore warrants further analysis.

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<sup>54</sup> Bassiouni, "Methodological Options for International Legal Control of Terrorism", in Bassiouni, ed., International Terrorism and Political Crimes, at p.487.

<sup>55</sup> Jescheck, "International Crimes", in Berhard, ed., Encyclopedia of Public International Law, Vol.8 at p.332.

<sup>56</sup> Although if an international criminal court were to be established the distinction might become paramount.

## CHAPTER FIVE

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### THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

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In the absence of an international court, the enforcement of international criminal law is dependant upon the exercise of the judicial authority of the state through the medium of municipal courts. The sovereign power of the State to enforce its law against an individual alleged to have committed a crime is generally dependant upon in personam jurisdiction over the alleged wrongdoer.<sup>1</sup> However, the domestic authority of a State ends at its borders. A criminal who succeeds in escaping from the State where he is to be tried will remain unpunished until he can be brought before the courts of a State which is both willing and legally competent to prosecute him.

Extradition is the only formal and regular method of rendition under which a State may demand the return of fugitive criminals from another jurisdiction.<sup>2</sup> Extradition is the formal surrender of an individual accused or convicted of an offence outside the territory of the state in which he is found to a state which demands the surrender and which is competent to try and punish him.<sup>3</sup> The specific obligations of the state of refuge depend upon the terms of the treaty of extradition. However, extradition treaties have certain general features of near universal application.

Extradition is only permissible for serious offences. The interpretation of what constitutes a serious offence is determined either expressly by mutual agreement in a definition text accompanying the extradition treaty or alternatively by reference to a certain minimum period for punishment upon conviction. The act for which the fugitive is sought must be an extraditable crime under both the law of the requesting State and the law of the State of refuge

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<sup>1</sup> Criminal trials in absentia are possible but extremely rare since they are widely considered to be ineffective.

<sup>2</sup> See generally, Ian A. Shearer, Extradition in International Law; Cherif Bassiouni, International Extradition and World Public Order; Ivor Stanbrook, The Law and Practice of Extradition; Geoff Gilbert, Aspects of Extradition Law.

<sup>3</sup> Gilbert, *ibid.*, at p.1-12.

(the principle of double criminality)<sup>4</sup>. This prohibits the manifestly unjust situation wherein a person can be arrested and deprived of his liberty for a considerable period of time for an act that could never have been prosecuted if it had been committed in the State of refuge.

If extradition is granted, the requesting State may prosecute the fugitive for the offenses specified in the act of extradition and no others (the principle of speciality)<sup>5</sup>. The requesting State can not surrender the fugitive to a third State or deprive him of his liberty arbitrarily. In general, if the fugitive is acquitted at trial the requesting State is barred from bringing further proceedings until the fugitive has been at liberty for thirty days or unless the State of refuge consents.

However, the effectiveness of extradition in the international community is limited because international criminal law prohibits the surrender of fugitives accused of political offences.<sup>6</sup> This exception originates from the historical reluctance of the more civilised nations to surrender a fugitive to a state in which he might have been maltreated or refused the chance of a fair trial.<sup>7</sup> A considerable diversity of opinion exists as to the scope and interpretation of the concept of the political offences exception.<sup>8</sup> As Lord Radcliffe observed in 1962 :

No definition has yet emerged or by now is ever likely to... [but] the meaning of such words as 'a political offence', while not to be confined within a precise definition, does nevertheless represent an idea which is capable of description and needs description if it is to form part of the apparatus of a judicial decision.<sup>9</sup>

Common agreement as to the ambit of such description has been hard to reach. The difficulty in so doing has been aptly demonstrated in the common cliché - "One man's

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<sup>4</sup> See Bassiouni, op. cit., at p.314-329; Gilbert, op. cit., at p.47-55.

<sup>5</sup> Bassiouni, op. cit., at p.352-359.

<sup>6</sup> See Van der Wijngaert, The Political Offence Exception to Extradition; Warbrick, "Analysis of Political Offences", in Public Law (1980) at p.113.

<sup>7</sup> Wijngaert, *ibid.*, at p.4-26.

<sup>8</sup> Wijngaert, op. cit., at p.95-162; Shearer, op. cit., at p.169-193.

<sup>9</sup> Lord Radcliffe in Schtrak's Case (1962) 2 All E.R. at p.529.

terrorism is another man's heroism". Thus, one commentator has remarked :

the political offences exception appears to be the Achilles' heel to the international resolve to bring terrorists to justice.<sup>10</sup>

The problem is accentuated by the transnational nature of terrorist crime. Terrorist attacks by nationals of one State against the interests of another often occur outside the territorial jurisdiction of the latter. The motive or purpose of the terrorists often falls within the modern understanding of the political offences definition and so States are reluctant to return terrorists to their enemies.

A number of unsuccessful attempts have been made to circumvent this problem. The Genocide Convention of 1948 expressly prohibited the parties thereto from qualifying genocide and related crimes as political in nature and so prevent the extradition of those responsible.<sup>11</sup> Specifically because of this attempted restriction on the concept of the political offences exception, Great Britain withheld ratification of the Genocide Convention until 1969.<sup>12</sup>

More recently, the European Convention on the Suppression of Terrorism in 1977 purported to depoliticize many of the crimes that have become the traditional modus operandi of the contemporary terrorist. The Convention sought to deny the protection of the political offences exception to extradition from fugitives who committed offences of the type used by violent terrorists. Although the Convention rendered a specified list of offences as non-political in nature, the same document permits the State of refuge to deny extradition under Article 13 if it has :

substantial grounds for believing that the request for extradition... has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.<sup>13</sup>

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<sup>10</sup> Alona E. Evans, International Aspects of Criminal Law, at p.19.

<sup>11</sup> Art.7 of the Genocide Convention (1948) 78 U.N. Treaty Series at p.277.

<sup>12</sup> Shearer, op. cit., at p.186.

<sup>13</sup> Art.5 of the European Convention for the Suppression of Terrorism.

A number of European states have reaffirmed their dedication to the political offences exception.<sup>14</sup> As a result, at least one commentator has observed that "The attempt at co-operation against terrorism by the ECST is already being branded as a failure."<sup>15</sup>

It is possible for states to agree informally to the return of a fugitive in the absence of a treaty of extradition. However, there is no legal obligation in international law to surrender a wanted criminal in the absence of an extradition treaty between the countries concerned.<sup>16</sup> As a whole, common law States refuse extradition in the absence of a treaty. Nations outside the common law bond are generally not prevented from extradition in such circumstances but invariably these countries require a guarantee of reciprocity as a condition precedent to extradition. Often the requesting State is unable to give such an assurance and so examples of extradition in the absence of a treaty are comparatively rare.

The need for a widespread system of treaties of extradition is widely recognised. A well-established system of bilateral and multilateral extradition agreements already exists - but it is by no means comprehensive. The deportation or abduction of the fugitive often appears swifter and less demanding than the process of extradition in terms of both the trouble and expense involved and so states are increasingly turning to irregular methods of rendition.

#### Deportation, Exclusion and Expulsion

Deportation is the compulsory ejection of an alien from the territory of the deporting State, normally accompanied by the threat of exclusion (refusal of permission for entry) should the alien attempt to return.<sup>17</sup> It is often used as

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<sup>14</sup> Ireland has incorporated elements of Art.13 in its domestic law - s.4(1)(a) Extradition (ECST) Act 1987; Italy has formally stated that it will not extradite a fugitive offender for a "political offence, an offence connected with a political offence or an offence inspired by political motives" - see Green, "International Crimes and the Legal Process", in 29 International & Comparative Law Quarterly at p.582.

<sup>15</sup> Kelly, "Problems of Establishing a European Judicial Area", in AS/POL/COLL/TERR(32)8 at p.3; as cited in Warbrick, *op. cit.*, at n.203.

<sup>16</sup> Bassiouni, *op. cit.*, at p.9-12; Shearer, *op. cit.*, at p.27-33.

<sup>17</sup> Bassiouni, *op. cit.*, at p.133-142; Shearer, *op. cit.*, at p.76-91.

a procedure for de facto extradition since the alien can be deported to a specific destination where the local authorities seek his prosecution.

But extradition and deportation should not be confused because they are (in theory) separate and distinct in purpose. The object of extradition is to return a fugitive criminal to the jurisdiction of a State lawfully empowered to try and punish him for his crimes whereas the purpose of deportation is to rid the State of an undesired alien. The ultimate destination of the deportee should be of no concern to the State. However, deportation is increasingly used by states as tool of convenience to circumvent the difficulties inherent in the extradition process. Thus, it is often referred to as 'disguised extradition'.

The power of the expulsion of aliens appears to be virtually unfettered in international law. The leading English authority in this field is the decision of the Court of Appeal in R. v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry.<sup>18</sup> In its decision the Court of Appeal held that :

(1) The Secretary of State has no direct power to order the deportation of an alien to a specific foreign State.

(2) However, the Secretary of State is lawfully entitled to order that an alien be placed on board a particular ship chosen by the Secretary of State and detained there until the ship leaves the United Kingdom with the result that the alien is forced to disembark at a destination selected by the authorities. Thus, the Secretary of State can lawfully and indirectly effect what he has no power to do directly - i.e. secure an alien's deportation to a particular State.

(3) The fact that an alien is a political refugee, or is likely to be punished for a political offence in the country to which it is intended that he should, albeit indirectly, be deported, is no defence to a deportation order.

The law of deportation was clarified by the English Court of Appeal in 1962 in Soblen's Case.<sup>19</sup> Dr Soblen, a naturalized citizen of the United States, was convicted in that country of espionage and sentenced to a long term of imprisonment. While on bail pending the hearing of an appeal, he fled to Israel, using the passport of a deceased brother, and claimed asylum as a Jew under the Israeli law of return. Israel rejected Dr Soblen's application for asylum and ordered his deportation to America (which, being the national State of the deportee was the only country

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<sup>18</sup> R v Secretary of State for Home Affairs, Ex parte Duke of Chateau Thierry (1917) 1 K.B. at p.922.

<sup>19</sup> Soblen's Case (1962) 2 Q.B. at p.283.

bound to accept him). He was placed on an El-Al aircraft bound for New York via London. In order to frustrate his deportation, Dr Soblen inflicted significant injury to himself as the plane approached London, necessitating his removal to hospital.

Under the terms of the Anglo-American Extradition Treaty of 1931 Dr Soblen could not be extradited to America because espionage was not an extraditable offence and his offences were political in nature. However, Dr Soblen had not been legally admitted to the country and so the Home Secretary ordered his deportation. The place of embarkation (Israel) could not be a possible destination since Dr Soblen had just been deported from there. However, Czechoslovakia announced that it was willing to accept Dr Soblen. Despite this offer, the Home Secretary ordered Dr Soblen to be placed on board a flight leaving for New York. Dr Soblen appealed on the grounds that the Home Secretary had an ulterior motive in ordering his deportation to the United States rather than elsewhere.

The Court held that it was entitled to look behind the deportation order and to consider any evidence that the decision had been made mala fide. Lord Denning M.R. concluded

If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful: but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the common good, then his action is lawful... The Court can not compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the Court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order. But on the facts of this case I can find no such evidence.<sup>20</sup>

The deportation order of the Home Secretary was upheld. But in the event, perhaps ironically, Dr Soblen died in hospital.

#### Abduction and Kidnapping

Abduction is the removal of a person from the jurisdiction of one State to another by force or by extra-legal collusion with the law enforcement agents of the local

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<sup>20</sup> Lord Denning MR in R v Governor of Brixton Prison ex parte Soblen (1962) 3 All E.R. at p.661.



State.<sup>21</sup> It is characterized by the complete absence of regular proceedings sanctioned by the law of the place where the abduction was effected. As a consequence, abduction involves the disruption of world public order, an infringement of the territorial sovereignty of the State where the kidnapping took place, and the violation of the human rights of the individual unlawfully seized.

The international law of abduction is based on a long-standing series of English and American cases. In Ex parte Susannah Scott the English Court of Appeal determined that the circumstances of the apprehension of the alleged offender are irrelevant - *mala captus bene detentus*.<sup>22</sup> A court is only bound to take into account matters directly relevant to the alleged crime. Any question of the violation of the rights of the individual on his apprehension is a matter for separate legal action. Subsequent case law affirmed the validity of this approach.<sup>23</sup>

If the abduction is carried out in violation of the territorial sovereignty of the state in which the offender is hiding then the injured state is entitled to demand reparation in the form of the repatriation of the individual abducted. However, the question of whether the territorial sovereignty of the State in which the abduction took place has been violated appears to depend upon whether the abductors received any assistance from local law enforcement officers.

In The Savarkar Arbitration Case in 1911 an international tribunal considered the question of unlawful international abduction.<sup>24</sup> A fugitive had escaped from a British vessel in Marseilles whilst being conveyed to India in custody. The French police had assisted in his arrest and return to the vessel under a genuine misapprehension of their authority. France subsequently asked for the surrender of the fugitive. The tribunal concluded that a State was under no obligation to surrender a prisoner arrested in such circumstances.

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<sup>21</sup> Bassiouni, *op. cit.*, at p.121-201; Gilbert, *op. cit.*, at p.183-208.

<sup>22</sup> Ex parte Susannah Scott (1829) 9 B & C at p.446; 109 E.R. at p.106.

<sup>23</sup> Ex parte Elliott (1949) 1 All E.R. at p.373; U.S. v Rausher (1886) 119 U.S. at p.407; Ker v Illinois (1886) 119 U.S. at p.436.

<sup>24</sup> The Savarkar Arbitration Case (1916) Hague Court Rep. at p.276.

This rationale was confirmed in the case of U.S. v Sobell in 1956.<sup>25</sup> Sobell was abducted in Mexico by a party of Mexican officers. He was carried to the U.S. border against his will and surrendered to the American authorities even before crossing into the United States. The latter brought him to New York to face charges on conspiracy to commit espionage. On his behalf, it was argued that abduction was illegal and that the court had no jurisdiction to try him. However, the Court held that the collaboration of the Mexican police deprived Mexico of any basis for complaint and it was therefore competent to try him.

All the case law concerning international abduction was reviewed by the Israeli Supreme Court in the case of Adolf Eichmann in 1960.<sup>26</sup> Eichmann was the former chief of the Jewish Affairs Section of the Reich Security Head Office under the Nazi regime of Adolf Hitler. He had been entrusted with "the final solution of the Jewish problem" and in this capacity he was responsible for the execution of six million men, women and children. After the war, he escaped justice and fled to Argentina where he lived in hiding for fifteen years.

In 1960 he was abducted by private volunteers operating with the connivance of the Israeli government. Argentina protested that the abduction of Eichmann by Israel had violated the territorial sovereignty of Argentina.<sup>27</sup> A diplomatic settlement was agreed. Israel formally apologised that it had acted in violation of Argentinean sovereignty and Argentina waived any claim for the restoration of Eichmann.<sup>28</sup>

Eichmann was charged under the Nazi and Nazi Collaborators Act (1950) in Israeli state law. At the trial, the defence argued that :

(1) Eichmann had been abducted from Argentina by agents of the State of Israel without the assistance of local law enforcement officers. The abduction was unlawful and therefore Eichmann was still subject to the jurisdiction of Argentina. Thus, Israel did not have the jurisdiction to try him.

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<sup>25</sup> U.S. v Sobell (1956) 142 F. Supp. at p.516.

<sup>26</sup> See The Eichmann Case (1961) 36 Int L. R.; Silving, "In Re Eichmann : A Dilemma of Law and Morality", in Mueller and Wise, ed., International Criminal Law, at p.290; Woetzel, "The Eichmann Case in International Law", in Mueller and Wise, op. cit., at p.354.

<sup>27</sup> Security Council Records 15th Year Supplement (Apr/Jun) 1960 at p.27.

<sup>28</sup> Reprinted in 36 Int L. R. at p.59.

(2) The Nazi and Nazi Collaborators Act was enacted *ex post facto* and was therefore only valid against Israeli citizens.

(3) Eichmann's actions were committed in another country by a citizen of a foreign state. His crimes were extra-territorial in nature and Israel did not have the jurisdiction to try him.

(4) Eichmann's conduct amounted to an Act of State and Eichmann himself could not be held personally responsible for the crimes alleged against him.

(5) The Israeli judges were, as Jews, psychologically incapable of providing Eichmann with the opportunity of a fair trial.

The Israeli Supreme Court considered the case carefully. It is fair to say the Israeli judges did not shirk their duty to confront the difficult aspects inherent in the case for the defence. After due consideration, the Court ruled that :

(1) The circumstances surrounding the abduction of Eichmann constituted a violation of the state sovereignty and rights of Argentina.

(2) In the joint communique of 3 August 1960, Argentina had condoned the violation of its state sovereignty by Israel and waived its right to have Eichmann returned to its shores.

(3) Eichmann's conduct amounted to crimes of universal jurisdiction which the state of Israel had opted to prosecute under its own municipal law. The Israeli courts were entitled to exercise jurisdiction over Eichmann under international law.

(4) The Nuremburg precedent categorically denied that Eichmann's conduct could be considered to constitute an Act of State.

(5) The Israeli judges, although Jewish, were duty bound to put all concepts of national or religious revenge out of their mind when judging the case. There was nothing to suggest that they were incapable of so doing and so the verdict of the District Court of Jerusalem would be upheld.

However, the established lines of judicial authority as to the consequences of international abduction were recently cast in doubt in the recent American Supreme Court case of U.S. v Humberto Alvarez-Machain.<sup>29</sup> The respondent, a citizen of Mexico, was forcibly kidnapped from his home and

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<sup>29</sup> U.S. v Humberto Alvarez-Machain (1992) AJIL at p.811.

flown to America. There he was arrested for his participation in the kidnapping and murder of an American Drug Enforcement Administration (DEA) agent. The District Court found that DEA agents were responsible for the abduction. Mexico formally protested against the violation of the treaty of extradition between the two countries and of its sovereignty. Thus, the Court held that jurisdiction was improper and ordered the repatriation of the respondent. The Court of Appeals affirmed the decision. The authorities then appealed to the Supreme Court.

The Supreme Court held by a majority of six to three :

(i) A defendant can not be prosecuted in violation of the terms of a treaty of extradition, per United States v Rauscher.<sup>30</sup>

(ii) However, a court may exercise proper and valid jurisdiction even though the defendant's presence has been procured by means of a forcible abduction if it is not in violation of the terms of the treaty of extradition, per Ker v Illinois.<sup>31</sup>

(iii) The language of the treaty of extradition between Mexico and the United States was silent on the question of the forcible abduction of individuals from the territory of the other.

(iv) The presence of a term in the treaty of extradition between Mexico and the United States prohibiting international abduction could not be implied from the general principles of international law.

(v) Therefore, the abduction was not in violation of the treaty of extradition and the court could exercise proper and valid jurisdiction over the defendant.

(vi) The question of repatriation, as a matter outside the scope of the treaty of extradition, was a matter for the Executive.

Thus, the appeal was upheld.

It is scarcely credible that the American Supreme Court should blatantly disregard the principles of international law and so seek to subvert the Rule of Law. Such a narrow and literal interpretation of the treaty of extradition between Mexico and the United States makes a mockery of international co-operation in the suppression of crime. In the words of J.H. Morgan :

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<sup>30</sup> U.S. v Rauscher (1886) 119 U.S. at p.407.

<sup>31</sup> Ker v Illinois (1886) 119 U.S. at p.436.

A hostess does not think it necessary to put up a notice in her drawing room that guests are not allowed to spit on the floor... What should we think of a man who committed this disgusting offence, and then pleaded that there was nothing to show that the hostess had forbidden it?<sup>32</sup>

It is a paradox that on the one hand States universally condemn terrorism, which includes kidnapping, but on the other States are prepared to condone abduction when it is committed by their agents or by private volunteers for their benefit. This duality of standards encourages the blatant disregard of human rights and the violation of established principles of international law which rely on voluntary compliance. Such a situation can not be allowed to continue.

As Justice Brandeis argued in 1928 :

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>33</sup>

### Conclusion

Sociological analysis has shown that in recent history there has been an increasing trend towards organised international crime and away from the traditional concept of individual opportunistic crime. Despite the reluctance of States to concede any restriction of their sovereignty, States have been forced to accept that :

it is to the interest of civilised communities that crimes acknowledged to be such should not go unpunished and it is part of the comity of nations

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<sup>32</sup> J.H. Morgan, An Introduction to the German War Book, Being the Usages of War on Land, at p.6; as cited by Peter Rowe, Defence : The Legal Implications, at p.145.

<sup>33</sup> Justice Brandeis in Olmstead v U.S. (1928) 277 U.S. at p.438; as cited by Justice Stevens in his dissenting judgement in U.S. v Humberto Alvarez-Machain.

that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice.<sup>34</sup>

The technological development of increasingly destructive weaponry has further underlined the need for and importance of international co-operation between States. But with the advent of the atomic era it is evident that widespread judicial co-ordination of the fight against international crime is essential for the preservation of the community of States and the peace and security of mankind. However, individual States appear to be reluctant to fulfil their international obligations. The persistent abuse of international criminal law is tolerated and thereby condoned by international society. When States do seek to enforce the rule of law the problems are significant.

The treaties of extradition in the modern world are rigid and inflexible. Many are old and have not been amended so as to keep pace with the increasing range of offenses arising out of scientific advancement and changing social conditions. Moreover, the practice of specifying extradictable offenses by name in the treaties has resulted in numerous serious omissions. There are frequent procedural problems. The time and expense involved tend to discourage the extradition of all but the most wanted criminals. Above all, too few treaties of extradition exist between States. Many are rapidly expiring for a variety of reasons. But they are not being replaced with sufficient speed. The structural framework itself is crumbling away through neglect.

Deportation can not be an acceptable substitute for extradition. It encourages the sacrifice of the rights of the individual upon the altar of expediency. The evidence suggests that this is already happening on a large scale. States are being tempted to disregard applicable extradition treaties in favour of convenient deportation. The process deprives the deportee of certain fundamental and basic rights. There is no restriction on the deportation of political offenders and no protection under the principle of speciality.

Abduction can not be condoned. The use of force in international affairs encourages the doctrine of right through might. The integrity of the international legal order demands the suppression of such manifestly extra-legal acts. What, then, is the answer? One possible solution is the direct enforcement of international criminal law in international society. The recent events surrounding the destruction of an airliner over Lockerbie suggest that the Security Council is willing to assume such a role. Such a possibility demands further examination.

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<sup>34</sup> Shearer, *op. cit.*, at p.12.

## CHAPTER SIX

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### THE LOCKERBIE AFFAIR - A NEW MEANS OF ENFORCEMENT FOR INTERNATIONAL CRIMINAL LAW ?

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On 21 December 1988 Pan American World Airways flight 103 left Heathrow Airport in London on route to John F. Kennedy Airport in New York. An improvised explosive device detonated and exploded on board the aircraft while in flight over the Scottish village of Lockerbie. The aircraft was destroyed and the wreckage crashed to the ground. The 259 passengers and crew and 11 residents of Lockerbie were killed. The United Nations Security Council condemned the crime and called upon all States to assist in the apprehension and punishment of the terrorists responsible.<sup>1</sup>

On 14 November 1991 the Lord Advocate of Scotland announced that the subsequent investigation had identified Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah of the Libyan Arab Jamahiriya as responsible for the incident.<sup>2</sup> It was alleged that they had placed or caused to be placed on board Air Malta flight KM 180 from Malta to Frankfurt a suitcase containing clothing and an explosive device concealed in a radio cassette recorder. The suitcase had been tagged so as to be transferred to Pan Am flight 103 A to Heathrow and then on to flight 103 to New York. As a direct result of these activities, Pan Am flight 103 had exploded in mid-air over Lockerbie. It was further alleged that the accused were senior members of the Libyan Intelligence Service who had acted in pursuance of a policy of State terrorism. Warrants were issued for the arrest of the two Libyan nationals on charges of conspiracy, murder and contravention of the Aviation Security Act 1982.

On the same day, the Foreign Secretary, the Rt. Hon. Douglas Hurd, stated in the House of Commons that the accused had acted as part of a conspiracy to further the purposes of the Libyan Intelligence Services by criminal means. In the opinion of the British government, this was

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<sup>1</sup> I.C. 5067, 30 December 1988.

<sup>2</sup> Announcement by the Lord Advocate of Scotland, 14 November 1991, reproduced in a letter, dated 20 December 1991, from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General S/23307, 20 December 1991, Annex 1. Reprinted in 31 ILM (1992) at p.718.

a clear case of "mass murder, which is alleged to involve the organs of government of a State".<sup>3</sup> Similar developments were announced simultaneously in Washington by the American Attorney General. Forthwith, the British and American governments issued a joint statement demanding that the government of Libya surrender the accused for trial in accordance with the extradition procedure of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971. They also demanded that the Libyan government must disclose all knowledge of the crime, accept full responsibility for the actions of any Libyan state officials involved and pay appropriate compensation to the families of the victims.<sup>4</sup>

Further investigation suggested distinct similarities between the Lockerbie bombing and the destruction of French airliner UTA flight 772 over Niger in 1989. After examination of the evidence, the President of the French Republic issued a statement that :

the attack on the UTA DC-10, which resulted in 171 deaths on 19 September 1989 places heavy presumptions of guilt for this odious crime on several Libyan nationals.<sup>5</sup>

Accordingly, the French government demanded that the Libyan authorities

cooperate immediately, effectively and by all possible means with French justice in order to help establish responsibility for this terrorist act.<sup>6</sup>

However, in contrast to the Anglo-American position, the French government did not maintain that Libya was under a duty to extradite the accused. Instead, the French government requested that Libya produce any relevant material evidence in its possession and facilitate access to all the appropriate documents and witnesses for investigation by an examining magistrate in accordance with the procedural requirements of French law.

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<sup>3</sup> Hansard Vol.198 14 November 1991 at p.1227. Reprinted in 31 ILM (1992) at p.721.

<sup>4</sup> Supra n.2, Annex III; and letter, dated 20 December 1991, from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General S/23308, 31 December 1991. Reprinted in 31 ILM (1992) at p.723

<sup>5</sup> Letter, dated 20 December 1991, from the Permanent Representative of France to the United Nations addressed to the Secretary-General S/23306, 31 December 1991. Reprinted in 31 ILM (1992) at p.718.

<sup>6</sup> Ibid.



## The Question Of Extradition

Libya does not maintain any treaty of extradition with France, the United Kingdom or the United States and there is no duty in customary international law to extradite a suspected criminal in the absence of a formal treaty of extradition. Extradition is permissible in the absence of a treaty only as a matter of comity between states.<sup>7</sup> However, Libyan national law forbids the extradition of Libyan nationals to a foreign state. Similar provisions exist in the majority of European States. Therefore, Libya claimed that it was unable to comply with international calls for the extradition of the accused as a matter of comity.

But, Libya, France, Great Britain and the United States are all parties to the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. According to the terms of the Convention, the acts of individuals which violate the standards set down by the agreement will be offences under the domestic law of a state which has enacted legislation to criminalise such conduct. Article 7 of the treaty demands that a State which finds persons on its territory who are alleged to have committed an offence specified in the Convention must either extradite them to a State competent to try them or prosecute them itself, in accordance with the maxim *aut dedere aut judicare*.

Libya publicly acknowledged the terms of the Montreal Convention and accepted the responsibility for the trial and punishment of the accused.<sup>8</sup> The Libyan authorities announced that the General People's Committee for Justice had authorised the appointment of an investigating magistrate upon the receipt of the appropriate indictment documents pertaining to the Lockerbie bombing. In addition, the Committee invited the governments of the United Kingdom and the United States to nominate representatives to monitor the fairness and impartiality of the inquiry.<sup>9</sup>

However, the United Kingdom and United States authorities declined to respond to formal requests by the investigating magistrate to view the records of the investigation of the destruction of the airliner.<sup>10</sup> They argued that crime had been committed on the direct orders of the state of Libya in the execution of a policy of state terrorism. The Montreal Convention was not intended to deal

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<sup>7</sup> See Chapter Five (*supra*).

<sup>8</sup> Libyan Press Release, 18 November 1991.

<sup>9</sup> Libyan Press Release, 29 November 1991.

<sup>10</sup> Letter, dated 20 November 1991, from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council S/23417, 13 January 1992, Annex.

with questions of state terrorism and the provisions of the agreement were redundant in this particular instance. Thus, the Western authorities continued to demand the surrender of the accused.

### The Diplomatic Initiative

The Western powers began to increase the diplomatic pressure on Libya to surrender the accused. A draft resolution was submitted to the United Nations Security Council condemning Libya for its action. No evidence was produced in support of the allegations against Libya and the claimants refused to submit evidence to an impartial investigatory tribunal.

Initially, the non-aligned states on the Council (Morocco, Cape Verde, India and Zimbabwe) resisted the application, arguing that it would constitute a significant violation of the sovereignty and internal affairs of Libya. Many of the speakers in the ensuing debate argued that the dispute should be settled in accordance with established international law and alluded to the terms of the Montreal Convention.<sup>11</sup> A number of the delegations participating in the debate were also concerned that the proposed resolution introduced special rules of international law specifically applicable to Libya alone.<sup>12</sup>

The Libyan delegation argued strongly that the issue of the proposed surrender of the accused was a purely legal question and not a political decision - therefore, the matter was outside the competence of the Security Council.<sup>13</sup> Libya maintained that it had fully complied with its legal obligations under the Montreal Convention and was willing to submit the matter to arbitration. The proposed resolution prejudged Libyan responsibility, even before the accused were submitted for trial, and thereby prejudiced the rights of Libya and the individuals concerned.

However, the Western powers lobbied aggressively, using their position as permanent members of the United Nations Security Council to full effect. Russia was induced to toe the line in concern over an upcoming economic aid conference. China was influenced by heavy pressure from the United States over favoured trade status. The other nations rapidly fell into line.

The resolution was adopted on the basis that the refusal of the Libyan government to surrender the accused was a

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<sup>11</sup> S/PV.3033, Arab League at 28; Sudan at 32; Iraq at 37; Mauritania at 52; Yemen at 56; Morocco at 58; Iran at 63; China at 86.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid. at p.14-15.

security matter rather than a legal issue. The validity of this purported distinction is somewhat questionable, particularly given the procedural irregularities involved. Despite being directly involved in the dispute, the Western powers were permitted to exercise their votes in the ensuing debate. The Libyan delegation justifiably objected :

It is inconceivable that this could be achieved through the participation of the parties to this dispute in the voting of the present draft resolution. To disregard the legal nature of the dispute and treat it as a political matter would constitute a flagrant violation of the explicit provisions of Article 27, paragraph 3 of the Charter.<sup>14</sup>

Despite the semantic Western distinction between the political and legal nature of the issues involved, the Libyan protestations were ignored. On 21 January 1992 the Security Council of the United Nations formally adopted Resolution 731 under the terms of Chapter VI of the U.N. Charter concerning the peaceful settlement of international disputes. The Security Council formally condemned the destruction of the French and American airliners and urged Libya to provide a full and effective response to the demands of the Western powers.<sup>15</sup> The decision was unanimous.

However, the final text of the resolution reflected the uncertainty and unease of many of the representatives on the Security Council. Resolution 731 referred to the demands of the Western powers but it did not fully endorse them. Nor did the text attempt to define the nature of what would constitute a full and effective response. A number of the delegates to the debate had indicated that they considered Libyan compliance with international law sufficient. Thus, it is arguable whether Resolution 731 amounted to any more than a propaganda victory.

#### An Appeal To The Law

On 3 March 1992 Libya filed legal proceedings in the International Court of Justice against the United Kingdom and the United States of America. Libya asked the Court for a declaration that it had fully complied with its obligations under the Montreal Convention. Furthermore, Libya alleged that the United Kingdom and the United States were in breach of their obligations under the Montreal Convention by refusing to assist Libya in the prosecution of the accused. It therefore requested that the United

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<sup>14</sup> Supra n.11 at p.23-24.

<sup>15</sup> The text of Resolution 731 is reprinted in 31 ILM (1992) at p.731.

Kingdom and the United States be compelled to fulfil their responsibilities and to desist from all violations of the sovereignty, territorial integrity, and the political independence of Libya, including the use of force.

In addition the Libyan Government asked the Court to order provisional measures for its protection in the interim period before the case was resolved. Specifically, Libya requested that the United Kingdom and the United States be compelled to refrain from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside Libya. Furthermore, Libya requested that the Court ensure that no action could be taken that would prejudice in any way the legal proceedings before the Court.

Public opinion began to move in favour of Libya in response to the clear willingness of the Libyan Government to settle the dispute by diplomatic and legal means. On 22 March 1992 the Arab League, of which all Arab countries and the Palestine Liberation Organisation are members, held an emergency meeting. The Arab League declared its solidarity with Libya and urged the Security Council to reject any proposal for diplomatic or economic sanctions until the case had been considered by the International Court of Justice.<sup>16</sup> But despite the protestations of the Arab League, the Western powers continued to exploit their positions of privilege on the United Nations Security Council.

On 31 March 1992 the Western powers applied for a further resolution from the Security Council under the terms of Chapter VII of the United Nations Charter. It was alleged that the inertia of the Libyan government was a threat to international peace and security. However, the Western powers appeared to have undergone a subtle evolution in their interpretation of the legal position. In the ensuing debate, the Western contended that the suppression of international acts of terrorism was essential for the maintenance of international peace. The reluctance of the Libyan government to surrender the accused for trial and thereby to make a full and effective response to Western demands for extradition was the latest step in a continuing pattern of tacit state support for international terrorism. Thus, the continued failure of the Libyan government to demonstrate its renunciation of terrorism by concrete action constituted a significant threat to international peace and security.

Resolution 748 was adopted by ten votes to nil, with five abstentions. Nine votes in favour are necessary for formal approval by the Security Council. In substance, Resolution 748 established an air and arms embargo against Libya and

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<sup>16</sup> Letter, dated 23 March 1992, from the Charge d'Affaires of the Permanent Mission of Jordan to the United Nations addressed to the President of the Security Council S/23745, 23 March 1992.

the reduction of all diplomatic representation in Tripoli. However, the secondary effect of the proposed resolution purported to deny Libya the provisional interim measures for protection that it sought in the International Court of Justice.<sup>17</sup>

The International Court of Justice responded to the adoption of Security Council Resolution 748 by inviting the parties to submit, in written form, their interpretations of the legal implications of the text. The Libyan government contended that the decision of the Security Council did not prejudice the current proceedings and did not bar the Court from ordering the provisional measures of protection requested. Secondly, the Libyan delegation argued that the Security Council and the International Court of Justice were independent of each other and that each was entitled to exercise its jurisdiction autonomously. In contrast, the Western powers submitted that under Articles 25 and 103 of the United Nations Charter the obligations owed by all the parties concerned to the Security Council took precedence over any other international agreements.

On 14 April 1992 the International Court of Justice announced its decision on the question of the applicability of provisional measures of protection for Libya in the interim period before full judgement.<sup>18</sup> In the opinion of the majority of the attendant judiciary, all the parties, as members of the United Nations, were obliged to accept and implement all decisions of the Security Council in accordance with Article 25 of the United Nations Charter. Prima facie that obligation required the parties to carry out Security Council Resolution 748 regardless of their interpretation of its validity in international law. Therefore, the Court held that

the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention

and thus

whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention can not now be regarded as appropriate for protection by the indication of provisional measures.

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<sup>17</sup> The text of Resolution 748 is reprinted in 31 ILM (1992) at p.749.

<sup>18</sup> Cases Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie, Request for the Indication of Interim Measures, Order of 14 April 1992, at p.15. Reprinted in 31 ILM (1992) at p.662.

Therefore, the International Court of Justice decided by eleven votes to five that it would not exercise its power to grant Libya provisional measures for protection in the interim period until the case is tried.

### In Conclusion

The action of the United Nations Security Council concerning the failure of the Libyan government to surrender the accused for trial in the West constitutes a radical new approach to the enforcement of international law. According to the Lockerbie precedent, the Security Council is entitled to interpret isolated incidents on the world stage in the context of a continuing pattern of events. If the Council is of the opinion that the pattern of events constitutes a threat to the peace and security of the international community then it can order punitive sanctions against the state responsible.

It is open to question whether the International Court of Justice is entitled to pass judgement on the validity of the actions of the Security Council. The draughtsmen of the United Nations Charter intended to create an efficient executive machinery empowered to combat any threat to international peace and security instantly. But the draughtsmen presupposed that the Council was bound to act in accordance with the terms of the Charter. Thus, it remains to be seen whether the Court will confirm the procedural and substantive validity of the Security Council action against Libya.

However, there is a presumption of lawfulness inherent in the decisions of all the organs of the United Nations.<sup>19</sup> Therefore, the Lockerbie precedent would appear to be a powerful new weapon for the combat of international lawlessness in the world community. In practice, there will be little opportunity to exercise such power. The occasions in which it will be possible to characterise the actions of a state as a threat to international peace and security will be few. For this reason, the Security Council can never be a substitute for an international criminal court. Is the creation of an international criminal court a viable solution? The possibility clearly demands consideration.

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<sup>19</sup> Certain Expenses of the United Nations (1962) ICJ Rep. at p.168

## CHAPTER SEVEN

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### THE DESIREABILITY OF AN INTERNATIONAL CRIMINAL COURT

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Proposals for an international criminal court are not new. The provisions of the Treaty of Versailles in 1919 demanded the trial of the German Emperor "for a supreme offence against international morality and the sanctity of treaties"<sup>1</sup> and was endorsed by the Report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties. In the event, Kaiser Willhelm died in exile in Switzerland but there were widespread calls for the creation of an international criminal court to try other individuals accused of offences against the laws of war.

In 1920, the Advisory Committee of Jurists, which was set up by the League of Nations to consider plans for the Permanent Court of International Justice, recommended the creation of an international criminal court.<sup>2</sup> The idea was rejected as premature.<sup>3</sup> However, the concept of an international criminal court remained a powerful Utopian ideal in the minds of international jurists.

Between 1922 and 1926, the International Law Association considered the possibility of an international criminal court and Dr H.L. Bellot went so far as to produce a draft statute for such a court.<sup>4</sup> The idea was taken up at the First Congress of the International Association for Penal Law in 1926.<sup>5</sup> Professor V.V. Pella was instructed to prepare a draft statute for a court. It was submitted in

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<sup>1</sup> Art. 227 Treaty of Versailles.

<sup>2</sup> See *Proces-verbaux of the Proceedings of the Advisory Committee of Jurists (The Hague 1920)* p.142 and especially p.748.

<sup>3</sup> See *Records of the First Assembly of the League of Nations (1920) Plenary Meetings* at p.744.

<sup>4</sup> See *The Reports of the 31st, 33rd, and 34th Conference of the International Law Association in 1922, 1924 and 1926.*

<sup>5</sup> *Actes du Premier Congres International de Droit Penal (1926)* at p.366-480.

1928 but by then the appeal of an international criminal court was beginning to wane.<sup>6</sup>

The concept gained fresh impetus following the assassination of King Alexander of Yugoslavia and the French Foreign Minister, Monsieur Barthou, in Marseilles in 1934. Repeated outbreaks of violence by nationalists in the Balkans increased the international pressure to search for a solution. In 1937 the League of Nations formulated a convention against terrorism.<sup>7</sup> A protocol annexed to the convention called for the establishment of an international criminal court to try the offences contained therein. However, only one country, India, ratified the treaty before the events of World War II superseded any possible agreement. Thus, the convention never entered into force.

After the war, the four Great Powers convened a conference in London to consider the question of military trials.<sup>8</sup> They established an International Military Tribunal at Nuremburg to try all the major war criminals. Thus, the four Powers did jointly what any one might have done singly. The principles that evolved from that trial were subsequently codified and adopted by the United Nations in 1948.<sup>9</sup>

The General Assembly then invited the International Law Commission to consider the desirability and practicability of the creation of an international criminal court. The Commission proved in favour of the idea.<sup>10</sup> Two committees were set up in 1951 and 1953 to formulate a draft statute for the court but they encountered significant difficulties.<sup>11</sup> Part of the difficulty centred on the immense variety of cases which different states expected the court to be able to judge. The majority of states acknowledged that the court should be empowered to consider allegations of war crimes and genocide. But states were divided as to whether the court should be able to hear cases concerning the abuse of human rights, international

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<sup>6</sup> See 5 *Revue International de Droit Penal* 1928 at p.293.

<sup>7</sup> *Convention for the Creation of an International Criminal Court League of Nations (1938) O.J. Spec. Supp.156.*

<sup>8</sup> See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945 - 59 Stat. 1544, 1547, 82 U.N.T.S. at p.279, 288.*

<sup>9</sup> See *Report of the International Law Commission Covering Its Second Session, U.N. GAOR, 5th Sess., Supp. No.12, at 11-14, U.N. Doc. A/1316 (1950).*

<sup>10</sup> See *Historical Survey on the Question of an International Criminal Jurisdiction - U.N. Doc. A/CN.4/7/Rev.1.*

<sup>11</sup> See U.N. Doc. A/2136 and A/2645.



drug trafficking and state terrorism. Thus, in 1954 the General Assembly ordered that further debate on the question of a international criminal court should be deferred.

In 1989 world developments prompted the United Nations General Assembly to call for a fresh examination of the concept of an international criminal court. The International Law Commission considered the matter and issued a report in favour of the establishment of some form of trial mechanism.<sup>12</sup> The General Assembly considered the report in 1991 and requested the Commission to :

consider further and analyse the issues...concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism.<sup>13</sup>

The Commission discussed the matter at its forty-fourth session, during its deliberations on the Draft Code of Crimes against the Peace and Security of Mankind. A Working Group, chaired by Mr Abdul Koroma, was set up :

to consider further and analyse the main issues raised in the Commission's Report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism.<sup>14</sup>

The Working Group commenced its study with an analysis of the problems inherent in the current system for the enforcement of international criminal law.

### The Arguments For An International Criminal Court

#### 1. Equality Before The Law

Detailed analysis of international lawlessness has shown that international crimes are usually committed by

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<sup>12</sup> See Report of the International Law Commission, U.N. GAOR 42d Sess., Supp. No. 10, at 36-54, U.N. Doc. A/45/10 (1990).

<sup>13</sup> General Assembly Resolution 46/54 (9 December 1991).

<sup>14</sup> See Report of the International Law Commission on the Work of the 44th Session - Supp. No 10 (A/47/10) at p.143.

individuals and small groups either with or without state support. Therefore, a distinction can be drawn between three separate and recognisable forms of international criminality. Individual criminality is where the crime is committed by the individual for personal reasons and in disregard of national laws and/or superior orders. A typical example would be the soldier who steals the personal effects of the enemy dead on the field of battle. The authorities, although reluctant to bring such misbehaviour out into the open, may prosecute the criminal because his conduct undermines civil and military discipline or encourages hostility among the local population against the governing forces.

In contrast, system criminality is where the crime is committed by the state authorities on the direct command of the state. One such example would be the execution of the Jewish people by Germany in the Second World War. National authorities naturally refuse to prosecute or punish their own soldiers for system criminality. The third form of international criminality is where the crime is committed by the individual in the implementation of a policy of system criminality which is not directly ordered by the state but which is tolerated or condoned by state officials. One example of this would be the alleged shoot-to-kill policy carried out by British troops in Northern Ireland in the 1980's.

The Working Group acknowledged that existing methods of international criminal law enforcement using municipal courts are by-and-large sufficient to deal with the problems of individual criminality. However, it also accepted that system criminality can not be punished fairly and effectively through domestic and national criminal justice.

The problem is not that national courts are working improperly or are misconstruing the provisions of international treaties or the meaning of general international law. The problem is that such courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially state-sponsored crime or crime which represents a fundamental challenge to the integrity of state structures.<sup>15</sup>

All individuals should be equal in the eyes of the law. The protection of heads of state and other senior government officials should be no more and no less than the protection afforded any other individual accused of misconduct. However, political reality dictates that some individuals are more equal than others. National governments instinctively seek to restrict public knowledge of the unlawful acts of the servants of the state because

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<sup>15</sup> Ibid at p.160.

revelation will reflect unfavourably on both the government and the nation. Thus, heads of state and senior public officials are often effectively immune to prosecution. For example, the trial of General Noriega on charges of drug-trafficking was possible only after the military invasion of Panama by the United States with an estimated three thousand deaths.

The creation of an international criminal court would provide an appropriate forum for the consideration of accusations of system criminality. It is true that the more a particular crime contained a political component and the more the accused represented a particular political persuasion, group or state the less likely it would be that an international criminal court could obtain the necessary evidence and in personam jurisdiction over the accused. However, the refusal of the accused to acknowledge the case against him would restrict his movements to his state of refuge and provide considerable political embarrassment to the local government. In addition, an international criminal court would encourage the state prosecution of cases of individual criminality in domestic and municipal courts.

## 2. A Compromise Of Jurisdiction

International society is based upon the fundamental equality of all states. There is no sovereign authority above the states and each state is responsible for the enforcement of international criminal law in its own domestic courts, according to the accepted principles of international jurisdiction. The lack of a standing international criminal court requires each state system of municipal criminal law to determine for itself whether, and to what extent, it applies to crimes with a foreign element.

Generally, national courts will only recognise and enforce domestic criminal law. But a state will enact often legislation to criminalise certain conduct in satisfaction of an international obligation or treaty agreement to outlaw such conduct.<sup>16</sup> In this event, domestic courts enforce international criminal law in so far as it is incorporated in their own municipal law. However, on certain rare occasions, the state authorities neglect to introduce appropriate legislation. In such a case, domestic courts will only enforce international criminal law in so far as the executive has seen fit to recognise such law. As a result, there are frequently conflicting claims for jurisdiction in any given case. The attendant uncertainty as to which court is best qualified to sit in judgement has hindered the development of international law and disrupted diplomatic and foreign relations between states.

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<sup>16</sup> As explained in Chapter Four.

The Achille Lauro incident is an illustrative example of this problem. The passengers and crew of the Italian vessel, Achilles Lauro, were taken hostage while on the high seas. The citizens aboard the ship were of different nationalities. After negotiations, the ship docked in Egypt and the persons involved were seized by the Egyptian authorities. It emerged that an innocent American citizen had been killed during the siege. The United States sought the extradition of those responsible. The lack of any agreed forum for trial caused considerable diplomatic tension.

A diplomatic settlement was agreed wherein Egypt would transfer custody of the accused to the Palestine Liberation Organisation in Tunis for trial. However, the United States doubted that such a trial would be effective. In violation of international law, American jet planes forced the Egyptian civilian airliner carrying the accused to land in Italy, without permission from the Italian authorities. The jurisdictional complexities of the subsequent trial were immense. Ultimately, all but one of the accused were tried and convicted by the Italian authorities.<sup>17</sup>

Problems of conflicting jurisdiction between states can be resolved by the International Court of Justice. However, the attendant delay required by the judicial process ensures a significant postponement in the resolution of the dispute. Moreover, the intervention of the court is completely dependent upon the states in the dispute voluntarily submitting the matter for the consideration of the court. The creation of an international criminal court would provide an obvious and immediate compromise solution in any dispute as to jurisdiction. Ostensibly, it should also be a solution acceptable to all because it would, in theory, be a politically neutral forum for any trial. In this way, an international criminal court could help to minimise jurisdictional disputes between states.

### 3. Impartial Justice

The trial of international criminals in national courts will always be viewed with suspicion. Allegations of bias and prejudice are difficult to counter because a case is likely to be heard in the municipal courts of a state which has a vested interest in the outcome of the trial. Thus, there is a clear danger that the trial may be used to authenticate the propaganda of the nation that is sitting in judgement.

The trial of international criminals needs to be just and fair and must be seen to be so. After the conclusion of the First World War, the terms of the Versailles peace

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<sup>17</sup> See generally, Ronzitti, Maritime Terrorism and International Law; Cassese, Terrorism, Politics and Law.

settlement were widely thought to be harsh and unjust. Whether they were unjust or not is another question, but these stirrings of conscience were seized upon and exploited by propagandists with the result that many more people, ignorant of the merits of the case, became convinced that the Versailles Treaty had been unjustly imposed. Post-war orators such as Adolf Hitler were able to capitalise on public resentment of the Versailles Treaty and thereby foster support for the nationalist movement that plunged the world into the Second World War.

At the Nuremburg Trial in 1946 Goering declared that the only crime he had committed was by being on the losing side of the war and that he was a victim of victors' justice. His words have been seized upon by political agitators in Germany today and the spectre of nationalism once more threatens to engulf Eastern Europe. Thus, some form of impartial and unimpeachable justice is vital.

The trials held by the losing nation in a war are unreliable and open to suspicion. The trial of German war criminals by the German courts in Leipzig after World War One were little more than a travesty.<sup>18</sup> Of the six cases put forward for trial by France, five ended in acquittal. The sole Belgian case was dismissed. Of the four men tried at the institution of the British government, one was acquitted and the other three were sentenced to terms of between six and ten months in prison. The only severe punishments recorded were those of the two naval officers who had sunk the life boats of the hospital ship their U-boat had torpedoed. They were sentenced to four years imprisonment but escaped from prison a few months after judgement and fled to Sweden.

One notable case was that of Captain Ernest Mueller, a peacetime member of the German bar, who was accused of the repeated and grave mishandling of the prisoners of war under his control.<sup>19</sup> The court stated that :

his conduct has sometimes been unworthy of a human being... Such conduct dishonours our army, and is singularly unfitting in a man of his education and military as well as civilian position.

Notwithstanding this harsh criticism of the accused's behaviour, the court concluded that :

it must be emphasised that the accused has not acted dishonourably, that is to say, his honour as a citizen and as an officer remains untarnished.

Such a conclusion is incomprehensible and clearly illustrates the problems of the inherent bias in the

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<sup>18</sup> The German War Trials 1920 Cmd. 1450.

<sup>19</sup> Ibid. at p.26.

municipal courts of a vanquished nation. The creation of an international criminal court would appear to be an obvious solution. The court would be immune to the accusations of bias and partiality which devalue municipal trials in the courts of the perpetrator or the victim state. Thus, objective and impartial judgement could be assured and be seen to be fair to the accused.

#### 4. A Clear Precedent

Modern law is founded on the doctrine of precedent. This ensures that like cases are treated alike and thus a degree of parity is assured. However, international criminal law is enforced by national courts in many different countries with many different legal systems. It is therefore difficult to retain the same degree of parity between legal systems that exists within any single system. As a result, anomalies occur and it is hard to escape the conclusion that an injustice has been done.

For example, in 1946 a British military court tried three members of a German firm of chemical manufacturers for supplying the poison gas Zyklon B which was used to exterminate allied nationals in German concentration camps.<sup>20</sup> Two of the accused were found to have supplied the gas knowing for what purpose it was to be used. They were found guilty and sentenced to death. In an almost identical case before a German court the manager of a chemical firm was found guilty of supplying Zyklon B knowing that it was to be used at Auschwitz for the extermination of the inmates of the camp.<sup>21</sup> He was sentenced to penal servitude for five years and to the loss of civil rights for three years.

That two such inequable penalties should have been imposed in these cases is manifestly unjust. The severity of the punishment should not depend upon the court before which the accused is tried. Such a situation hinders the harmonious development of international criminal law. An international criminal court would be able to provide consistent and coherent decisions in questions of interpretation and give authoritative guidance as to the state of the law, thus minimising uncertainty. Over a period of time, the court would develop a tangible and universal body of international criminal law. This would ensure that like cases were treated alike and avoid the occurrence of such anomalies. In turn, this would command public respect and thereby strengthen the rule of law.

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<sup>20</sup> Zyklon B Case, 1 Law Rep. of Trials of War Criminals - HMSO (1947) at p.93.

<sup>21</sup> Honig, "Criminal Justice in Germany Today", in 5 Yearbook of World Affairs (1951) at p.131.

## 5. Effective Implementation

The implementation of international criminal law is dependant upon the domestic enforcement of the law by individual states in national criminal courts. However, the long arm of the law can not catch the criminal who escapes abroad and takes refuge in another state which declines to try and punish him. In this event, the enforcement of the law requires the extradition of the accused to a state that is both willing and entitled to try the criminal under the principles of international jurisdiction.

A wide network of bilateral and multilateral treaties of extradition exists but it is by no means comprehensive. The existing treaty agreements are old and inflexible and many have not been updated to keep pace with changing technological and scientific developments. Moreover, the widespread practice of specifying extraditable offences by name has resulted in a number of serious omissions from the lists. The time, expense and procedural problems inherently involved in the extradition process discourage states from seeking the extradition of all but the most wanted criminals. The extradition process is also limited significantly by the political offences exception. The state of refuge can refuse the extradition of the accused if the alleged offence is political in nature. But states disagree as to what constitutes a political offence. As a result, the more powerful states have opted to enforce their concept of right by means of their economic and military might.

The abduction of international criminals is becoming increasingly common in world society, even to the extent that it is tacitly condoned and sanctioned by the state authorities. The establishment of an international criminal court would provide all states with a viable forum for the prosecution of international offenders. No state could justifiably refuse to give up an accused for trial by an international criminal court on the grounds of the political offence exception.<sup>22</sup> The very existence of an international criminal court would therefore circumvent the law versus morality dilemma that currently results in international kidnapping by state officials.

## 6. Problem Cases

The Working Group also identified certain special circumstances in which an international criminal court might prove useful :

a) An international criminal court would protect a state which has custody of persons accused of crimes under international law from the threat of further acts of

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<sup>22</sup> Although this is not to suggest that states would not attempt to do so!

terrorism if it proceeds with the trial. A clear example of such a situation is the case of Mohammed Hamadei.<sup>23</sup> The German authorities arrested two individuals accused of the hijacking of TWA Flight 783 in Lebanon. The United States requested their extradition, but the German officials opted to prosecute the accused themselves. As a result, the terrorist group to which the two hijackers belonged kidnapped two German citizens in Lebanon in an attempt to blackmail the German government. The kidnapping had no effect on the trial. After years of diplomatic negotiation, the hostages were released unharmed but they were the last of those held in Lebanon to be set free.

b) An international criminal court would ensure that international criminals, who were formerly members of the government of a particular state, would be prosecuted for their crimes even if the successor government was unwilling or unable to hold them for trial. For example, if President Corazon Aquino, upon being elected in the Phillipines, had sought the extradition and trial of the late President Ferdinand Marcos, the ensuing political insurrection could have destabilized the government.

The lack of any clear forum for trial at an international level has exacerbated existing difficulties in the enforcement of the law. For instance, there has never been a prosecution for genocide contrary to the Genocide Convention of 1948, despite the fact that there have been notorious cases of genocide since that date. International justice demands that such criminals are punished if the norms of international criminal law are not to be discredited. The Working Group acknowledged that establishment of an international criminal court would be a step in the right direction.

## 7. World Evolution

Finally, international jurists argue that the creation of an international criminal court is an essential step towards world peace. Professor Scelle claimed that :

experience as well as logic has demonstrated the need for permanent international organs of judicature in criminal cases as well as in questions of private international law in order to achieve the elimination of conflicts of law and jurisdiction and the unification of procedures of execution and of procedural and police cooperation.<sup>24</sup>

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<sup>23</sup> Kennedy, "The Extradition of Mohammed Hamadei", in 31 Harvard International Law Journal (1990) at p.5.

<sup>24</sup> See Droit International Public at p.958.



Professor Jean Graven used more forceful language. He believed that real progress in international peace and security was impossible without the establishment of an international criminal court :

As long as there is no judicial organ for the trial of international crimes, there will be neither a serious codification of international criminal law nor any serious application of an international sanction. The world will go on living in a judicial anarchy under violence and injustice with the risk of running into destruction.<sup>25</sup>

### The Arguments Against An International Criminal Court

#### 1. Sovereignty

Many critics argue that notions of state sovereignty would not permit a state to transfer jurisdiction to an international criminal court. In the opinion of the Working Group, such criticism is unfounded. All states are prepared to relinquish jurisdiction to other states in certain circumstances, whether by extradition, transfer of proceedings or by waiver of the right to prosecute. In fact, all member states of the United Nations have expressly accepted the reciprocal limitation of their sovereignties in the interests of the organisation of peace. Thus, allowing an international tribunal to exercise jurisdiction is a logical extension of the existing international law.

It is true that certain states might be reluctant to accept the transfer of jurisdiction to an international criminal court on purely self-serving grounds. Some states would fear an investigation into the involvement of their state officials in international wrongdoing. Conversely, other states would be sceptical of the willingness of an international criminal court to prosecute offenders with sufficient vigour. Such states would be equally concerned that an international criminal court would quickly become politicised and no more than a mechanism for the production of propaganda to the political detriment of the target country. However, the integrity of the court could be guaranteed in the rules and statutes governing court procedure. Thus, such worries would surely be allayed over time if an international criminal court were given the chance to prove its worth.

#### 2. Scarcity of Work

International crimes are rare, at least in peace time. The Working Group acknowledged that some international jurists

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<sup>25</sup> See *Revue de Droit International* 1948 No.1 at p.30.

argue that the creation of a permanent international criminal court is unnecessary since it would have insufficient work to justify the considerable expense involved. Such critics would prefer an ad hoc court to be set up as and when required. But the Working Group could not accept that this was a viable option. However impartial and incorruptible members of an ad hoc tribunal might be, the mere fact the tribunal had been set up expressly to try crimes arising out of a particular set of circumstances would suggest, however unjustly, that the tribunal was not impartial. The publicity surrounding the establishment of the ad hoc tribunal would suggest that the matters to be tried had been prejudged and that the tribunal was being set up to give the false impression that justice was being done. Moreover, the establishment of an ad hoc tribunal would require time that might not be available.

Thus, the Working Group agreed that it was essential to establish a permanent international criminal court. However, the court need not be a permanently standing full-time body. The Working Group accepted that at first the operation of the international criminal court would be an exceptional rather than an everyday occurrence. Thus, it proposed that the court should be an established legal structure but not a standing full-time body. In this way, the court could be called upon to function as needed. A small secretariat could undertake investigative work and call the court into being as and when required. In this way, an international criminal court would be both permanently available but financially acceptable to states.

### 3. Political Scepticism

The Working Group acknowledged that in certain quarters a prevalent political scepticism existed that any form of workable agreement concerning an international criminal court could be reached by the international community. Such 'realists' argue that states are fundamentally unwilling to undertake the prosecution of offences of universal jurisdiction except where their own national interest is concerned and that this is reflected in the comparative scarcity of international trials. They believe that too many states are concerned solely with the protection of their own national interests and would reject any international adjudication of their affairs. Therefore, in their opinion, any consideration of an international criminal court is futile.

The task...is too great for the law. The law is there to protect us against, shall I say, the routine accidents of daily life. You know the old problem : the big man goes scot free and the little man gets hanged by the neck. The law is only one of the powers which exist, one amongst many, and, therefore, those

that are members of the law should be careful not to overstress it, because by overstressing it they can endanger it; by burdening it with tasks which the law can not fulfil, they run the risk of nullifying the idea of the law. By trying an impossible task, the law exposes itself to ridicule, and therefore it loses even that territory which it has already won.<sup>26</sup>

The Working Group accepted that grounds for scepticism do exist and that substantial difficulties must be overcome before the international community can reach any agreement on an international criminal court. However,

the task of constructing an international order, an order in which the values which underlie the relevant rules of international law are respected and are made effective, must begin somewhere.<sup>27</sup>

#### 4. Technical Difficulties

Finally, the Working Group recognised the immense volume of technical, logistical and procedural difficulties involved before any final agreement on an international criminal court could be reached. Systems of criminal justice differ markedly throughout the international community and there would be obvious problems of agreement on common procedure and on fundamental questions such as the detention of prisoners. But these difficulties must be capable of being overcome with time and effort.

The analysis in this Report suggests that they can be resolved, and the view of most members of the Working Group is that it is worthwhile trying to do so.<sup>28</sup>

After all, similar problems were once faced by the architects of the International Court of Justice. These problems are now forgotten because they were adequately resolved long ago. The architects of an international criminal court would manage just as well.

#### Conclusion

During the debate concerning the potential for an international criminal jurisdiction, members of the Working

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<sup>26</sup> Cohn, "International Criminal Justice in Time of Peace", in Report of the Grotius Society (1940) at p.141.

<sup>27</sup> Report of the International Law Commission on the Work of the 44th Session. - Supp. No. 10 (A/47/10) at p.160.

<sup>28</sup> Ibid. at p.161.

Group expressed widely differing views as to the viability of establishing an international criminal court and the usefulness of so doing.

Certain members of the Working Group continue to have doubts about whether even a comparatively modest and flexible system of the kind suggested would serve a useful purpose...<sup>29</sup>

Other members of the Working Group would have preferred to go even further, favouring a more extensive system, including a court with compulsory and exclusive jurisdiction over certain offences.<sup>30</sup>

However, the majority of the Working Group were in agreement that some form of structure for an international criminal court, along the lines contained within its report, would be a workable system to combat state-sponsored international crime.

The Working Group accepted that further debate would be necessary to determine the exact form an international criminal court should take but it acknowledged that

further work on the issue requires a renewed mandate from the Assembly, and needs to take the form not of still further general or exploratory studies, but of a detailed project, in the form of a Draft Statute.<sup>31</sup>

Accordingly, the Working Group recommended that the International Law Commission report to the General Assembly that it had completed its analysis of the question of establishing an international criminal court or other international criminal trial mechanism. The Working Group concluded that it was now a matter for the Assembly to decide whether the Commission should undertake a new project for an international criminal jurisdiction, and on what basis.

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<sup>29</sup> Ibid. at p.145.

<sup>30</sup> Ibid. at p.146.

<sup>31</sup> Ibid. at p.147.

## CHAPTER EIGHT

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### THE INTERNATIONAL LAW COMMISSION'S PROPOSAL FOR AN INTERNATIONAL CRIMINAL COURT

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In 1989, a coalition of Caribbean states, led by Trinidad and Tobago, called upon the United Nations to establish an international criminal court to deal with drug trafficking and other international crimes.<sup>1</sup> Accordingly, the General Assembly requested the International Law Commission to prepare a report within one year on the desirability of establishing an international criminal court.<sup>2</sup> The Commission concluded that states were broadly in agreement that the establishment of a permanent international criminal court was desirable. A Working Group was set up to further analyze the issues raised in the Commission's Report. The Working Group concluded that the problem with the current system of criminal law enforcement was not that national courts were working improperly or were deliberately misinterpreting the provisions of general international law but rather that such courts were ineffective in dealing with state-sponsored crime.

The Working Group acknowledged that some form of system of individual criminal responsibility was an essential part of the overall solution to the problem of international crime. However, the Working Group recognised that the reinforcement of the national systems of criminal justice would not resolve the problem of state-sponsored crime. Therefore, it accepted that "there is thus a case for some form of international criminal process, going beyond what exists at present."<sup>3</sup> But the Working Group decided that any attempt to establish a workable international trial system must start from modest beginnings because of the comparative scarcity of the assertion of international criminal jurisdiction, the lack of international judicial experience in international criminal law and the substantial costs involved in the creation of a large, complex trial apparatus.

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<sup>1</sup> U.N. GAOR 6th Comm., 44th Sess., Supp. No. 9, at p.311; U.N. Doc. A/C.6/44/SR.38-41 (1989) - as cited by Professor Benjamin Ferencz in *Columbia Journal of International Law* 1992 at p.385.

<sup>2</sup> G.A. Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 9, at p.311; U.N. Doc. A/RES/44/39 (1990) - supra n.1.

<sup>3</sup> *Ibid.* at p.161.

Members of the Working Group expressed wide-ranging and radically different views concerning the precise form any international criminal court should take. Part of the problem was that each delegate envisaged a distinctly different set of problems involved in the creation of an international criminal court because each member envisaged a distinctly different form of international criminal court. For those reasons, the Working Group was forced to conclude that the proposed international criminal court should be established primarily as an optional and flexible facility for states.

### The Format

In order to maximise the workability of the proposed system, the Working Group suggested that each state should be free to accept the jurisdiction of the court in a variety of different ways. A state could accept the jurisdiction of the court either on an ad hoc basis, or in relation to a particular category of offences, such as war crimes, or alternatively by expressly accepting the jurisdiction of the court to deal with specified international treaty agreements, such as the terrorism conventions. Logically, therefore, the Working Group concluded that the jurisdiction of the court could not be compulsory in the sense that a state was obliged to accept the jurisdiction of the court ipso facto and without further debate. Nor could jurisdiction be exclusive, and thereby deny state parties the opportunity to exercise their own rights to national jurisdiction.

The Working Group proposed that an international criminal court should be established by means of a court statute, in treaty form, agreed to by states parties. By becoming a party to the statute a state would undertake to contribute to the administrative expenses of the court, to provide a judge and to hold an accused person in custody pending trial by the court. But becoming a party to the Statute would not, of itself, imply that the state acknowledged the jurisdiction of the court to deal with any specific offences.

Each state party to the statute would nominate a suitably qualified individual to act as a judge of the court. Then, the states parties would hold a secret ballot to elect one of the judges so nominated as president of the court. Four other judges would be selected to form a bureau for the court with the president. When a trial was to be held, the bureau would appoint five judges to try the case, having due regard to the nationality of the accused and other relevant factors. In this way, the Working Group believed that the impartiality of the court could be guaranteed.

### 3. The Trial Process

The initiation of a case would be dependent upon a formal complaint being registered with the appropriate court official. However, there was some disagreement as to whether the right of complaint should be limited to those states whose consent is required for the court to exercise jurisdiction in the particular case. The Working Group agreed that every state party to the court statute should have the right to bring a complaint before the court, provided that it acknowledged the jurisdiction of the court to judge the crimes the accused was alleged to have committed. However, some delegates argued that the victim state should be entitled to make a complaint even where that state is not a party to the court statute. Other members of the Working Group argued that the state with the custody of the accused should be empowered to make a complaint because the cooperation of that state would be necessary if a trial was to be held. The matter remains open.

After the registration of the complaint, the bureau of the court would appoint an independent state to act as ad hoc court prosecutor. The prosecutor would undertake a four-stage investigation :

1) First, the court prosecutor would have to decide if the facts of the matter supported the allegations of wrongdoing. To this end, the prosecutor would investigate the complaint and receive evidence from interested bodies such as the I.C.R.C. and Amnesty International.

2) Second, the court prosecutor would have to determine if the alleged wrongdoing fell within the scope of the subject-matter jurisdiction of the court.

The Working Group recognised that states would be reluctant to accept the jurisdiction of the court for those crimes against general international law which have not yet been incorporated in or defined by the international treaties currently in force. Many of the members argued that the act of which a person is accused must constitute a crime at the time of its commission. Therefore, the Working Group accepted that the jurisdiction of the court should reflect the principle *nullum crimen sine lege*, as set out in article 15(1) of the International Covenant on Civil and Political Rights.

Thus, the Working Group proposed that the subject-matter jurisdiction of the court should extend to cover only the existing international treaties that create crimes of international character, but should include the Draft Code of Crimes against the Peace and Security of Mankind (subject to its adoption and entry into force). However, the Code and the Court Statute would constitute separate instruments. In this way, a state would be able to become a party to the Statute without thereby becoming a party to the Code.

3) Third, the prosecutor would need to confirm that the conduct of the accused was criminal at both the time and the place in which it was committed. Therefore, the prosecutor would have to ensure that :

(a) the conduct of the accused constituted a crime against international law (which was binding on the accused without intervening municipal action) at the time when it was committed;<sup>4</sup> or

(b) the conduct of the accused was in breach of existing domestic legislation enacted by the state to satisfy an international obligation to criminalise such conduct.<sup>5</sup>

4) Finally, the court prosecutor would need to secure the consent of those states involved to the trial of the offence by the international criminal court. The Working Group experienced considerable difficulty in reaching agreement as to which states should be required to give their consent before the court would be entitled to exercise personal jurisdiction over an alleged offender. It was widely accepted that the consent of the state in which the crime was committed should be required because that state would have the primary claim to jurisdiction. But, on balance, the members of the Working Group did not feel that the consent of the state of nationality of the accused need be secured since that state would be unable to contest the jurisdiction of the state in which the crime occurred.

The most flexible solution proposed that where a state party to the statute has lawful custody of an alleged offender and the state has the jurisdiction to try the offender under the relevant treaty, or under general international law, then the state could choose to cede jurisdiction to the court. Such a system would only require the consent of a state entitled to have the accused surrendered to it if the custody state did not prosecute the accused. It is dependant on the proposition that other states can not complain if a state which is entitled under international law to exercise jurisdiction over a person for an offence should choose to cede that jurisdiction to an international criminal court.

But, the Working Group argued that if a crime of international character is established under a treaty of universal jurisdiction then all states can be said to have rights of jurisdiction that can not be affected without their consent. It would be clearly impractical to secure the consent of all states before a trial could be launched. Thus, the Working Group rejected a system of ceded

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<sup>4</sup> For example - genocide.

<sup>5</sup> For example - hostage-taking.



jurisdiction. It is difficult to understand the rationale behind this decision. Jurisdiction must be considered to be a capacity, rather than a right or a duty. Such capacity is dependant upon in personam custody of the defendant. If State A and State B both have the jurisdiction to try the same offence, State B has no rights if the offender is arrested and tried in State A. If State A chooses to cede or transfer jurisdiction to the international criminal court then the capacity of State B remains unaffected.

Critics may argue that the cession or transfer of jurisdiction to an international criminal court is not sufficient to satisfy existing treaty obligations that a state must either prosecute or extradite an offender, according to the maxim *aut dedere aut judicare*. The validity of such criticism is dependant upon the interpretation of each individual treaty and the accompanying domestic legislation to enforce the duties imposed thereby. There is no definitive answer to such a question. But such treaties could be amended.

However, the Working Group concluded that at this time it was sufficient to agree that the court would exercise jurisdiction if the state or states which, under the provisions concerning personal jurisdiction, are required to consent to the jurisdiction of the court have done so, either in advance or ad hoc. Thus, the court prosecutor would only be able to issue a formal accusation against the alleged offender if :

- a) The conduct of the accused was criminal at both the time and place in which it was committed; and
- b) The crime fell within the subject-matter jurisdiction of the court; and
- c) The state or states which, under the provisions concerning personal jurisdiction, are required to consent to the jurisdiction of the court have done so, either in advance or ad hoc; and
- d) The crime fell within the terms of their acceptance of the jurisdiction (e.g. as to subject-matter, time etc).

The Working Group recognised that some form of appeal process might be appropriate to allow the states concerned to appeal against a decision of the prosecutor not initiate a trial or not to continue with a prosecution.<sup>6</sup> This would encourage confidence in the system and assure states that their complaints were being seriously considered. If the accused were found guilty, the court would be likely to impose a term of imprisonment. The Working Group agreed that the conditions of any sentence of imprisonment should be regulated by the United Nations Minimum Standard Rules

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<sup>6</sup> Cf The Honnecker Trial.

for the Treatment of Prisoners. However, the Working Group rejected the idea of establishing a purpose-built international prison facility on the grounds that it would be too costly and because the number of prisoners would not justify the expense.

Several alternative possibilities were examined, including the potential for sentences to be served in the penal facilities of the complaining state, the host state or another state party. The Working Group also recognised the problem that the court might be compelled to maintain some form of permanent inspection staff to monitor the implementation of sentences and to hear petitions for parole and compassionate release. However, the Working Group was unable to reach any agreement on these matters.

The functional mechanism of the proposed international criminal court is difficult to envisage when presented in terms of a disembodied concept and hypothetical examples. In order to best understand the operation and effectiveness of the court it seems logical to consider the ILC's proposals in conjunction with and in terms of their application to assorted modern world problems. Each case highlights a different aspect of (or potential difficulty faced by) the proposed international criminal court :

- 1) Ethnic Cleansing in Yugoslavia - the important distinction between an international armed conflict and a state of internal strife in international humanitarian law.
- 2) The Crimes of Adolf Eichmann - the difficulties inherent in the application of treaty-based law in the absence of customary international law.
- 3) The Gulf Conflict - the need for in personam jurisdiction over the accused and the problems encountered when the accused is the head of state.
- 4) The Crime of Apartheid - the problems to be faced when states disagree on what constitutes a crime.

#### Sample Case 1 - Ethnic Cleansing In Yugoslavia

##### A) The Facts<sup>7</sup>

The former Socialist Federal Republic of Yugoslavia was comprised of six republics Slovenia, Croatia, Serbia, Bosnia-Hercogovina, Montenegro and Macedonia. The Federal Government was controlled by the Presidential Council, the chairmanship of which was rotated between the six

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<sup>7</sup> The following account is based upon an article by Marc Weller, "The International Response To The Dissolution Of The Socialist Federal Republic of Yugoslavia", in the American Journal of International Law (1992) Vol.86 No.3 at p.569.

republics. The overall population of Yugoslavia was estimated at 23.69 million. Bosnia has a population of 4.1 million, of which 40% are Muslims, 32% are Serbs and 18% are Croats. On 1 March 1992, 63% of the electorate of Bosnia-Herzegovina opted for independence from the Federal Republic of Yugoslavia. However, the Bosnian Serbs refused to acknowledge the referendum. Civil war broke out between the Serb militia (assisted by the Serbian-controlled Yugoslav national army, the JNA) on the one hand, and the Muslims and Croats on the other. At the present time, the violence continues unabated.

The United Nations established a commission of experts to investigate allegations of war crimes in the former territory of Yugoslavia. The commission concluded that grave breaches of international humanitarian law had been committed, including :

- (1) ethnic cleansing - the intimidation and mass movement of people in order to create ethnically pure regions;
- (2) the organised and systematic detention and rape of Muslim women;
- (3) mass killings;
- (4) the pillage and destruction of civilian property; and
- (5) the destruction of cultural and religious property.<sup>8</sup>

#### B) In An International Criminal Court

In the first instance, a state party to the court statute would have to lodge a complaint with the appropriate court officials in order to initiate an investigation into international crimes being committed in the former republic of Yugoslavia. The complainant party would need to acknowledge the jurisdiction of the international criminal court to deal with the crimes alleged to have been committed.

Bosnia was recognised as a state in its own right by the European Community on 6 April 1992 and acknowledged the continuity of existing international treaty obligations binding on the former Republic of Yugoslavia. Serbia and Montenegro purport to continue the existence of the Federal Republic of Yugoslavia - a decision which the European Community states refuse to acknowledge. Assuming that the state of Bosnia was a state party to the court statute, Bosnia would be entitled in its own right to issue a formal complaint against the leader of the Bosnian Serbs, Radovan

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<sup>8</sup> Letter dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council and the Interim Report of the Commission of Experts - U.N. Doc. S/25724.

Karadzic, and the Serbian President, Slobodan Milosovic, for ordering a systematic policy of ethnic cleansing. But, if Bosnia were not a state party to the court statute, it would perhaps, in any event, be entitled to lodge a complaint in its role as the victim state.

An impartial prosecutor would be appointed and would launch a formal investigation into the allegations with the aid of the I.C.R.C. and other international organisations. The court prosecutor would need to identify the specific treaty agreement under which the conduct of the accused had been criminalised and confirm that the conduct complained of was criminal at both the time and the place at which it was committed.

Allegations of crimes against humanity would not fall within the subject-matter jurisdiction of the court because they are crimes against customary law rather than specific international treaty agreements. Allegations of aggression would be equally inapplicable. At the current time, the crime of aggression is rooted only in customary international criminal law and would not constitute justiciable subject matter for the court.<sup>9</sup>

Allegations of torture would fall under the ambit of the United Nations Convention against Torture of 1985. The law relating to torture is firmly rooted in customary international law. Therefore, the treaty agreement acknowledges that torture constitutes an international crime which is directly binding on all individuals, regardless of domestic legislation. Thus, allegations of torture would fall within the jurisdiction of an international criminal court.

Allegations of genocide would fall within the terms of the Genocide Convention of 1948. Genocide is an international crime in its own right and it does not require intervening municipal legislation in order to be binding upon the individual. Therefore, allegations of genocide, if substantiated, would prima facie fall within the scope of the subject-matter jurisdiction of an international criminal court.

The laws of war are governed by the provisions of the Geneva Conventions of 1949. However, different rules apply in different situations. The majority of the provisions of the convention agreements apply only where an international armed conflict exists. Matters of internal armed conflict are covered by Common Article 3 of the Conventions which only requires that those involved must treat civilians and those 'hors de combat' in a humane manner. Where the government of a state characterises its difficulties as a matter of internal strife then it is arguable whether an international armed conflict can be said to exist. The

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<sup>9</sup> But the crime of aggression will be prohibited by the Draft Code of Crimes Against the Peace and Security of Mankind, if it enters into force.

distinction is paramount. The prosecuting authorities would first have to categorise the state of affairs that prevails in Bosnia as either a matter of internal strife or an international armed conflict. If the prosecutor found that there had been grave breaches of the relevant terms of the Conventions there would be a case for the accused to answer.

The prosecutor would then need to secure the consent of the states entitled to object to the trial of the accused by the international criminal court. If the consent of the state of nationality were required the matter becomes problematic. Radovan Karadzic, the leader of the Bosnian Serbs, could potentially be prosecuted before an international criminal court because the state of Bosnia would happily consent to his trial. But, the Serbian government would surely refuse to consent to the trial of the Serbian President, Slobodan Milosovic, by an international criminal court. Under a system of ceded jurisdiction, the institution of proceedings in the international criminal court would only be dependant upon in personam jurisdiction of the accused. If the Bosnian forces could capture Radovan Karadzic or Slobodan Milosevic then a trial before the international criminal court would be viable.<sup>10</sup>

#### Sample Case 2 - The Crimes Of Adolf Eichmann

##### A) The Facts

Adolf Eichmann was the Chief of the Jewish Affairs Section of the Reich Security Head Office in Nazi Germany during the Second World War. He was entrusted with the final solution of the Jewish question and, in this capacity, he was responsible for the execution of six million jews at Auswitz and other Nazi extermination camps. After the war, he managed to evade justice until Israeli intelligence located him, living in Argentina, in 1960. He was abducted by private citizens of the state of Israel (acting with the assistance of Israeli intelligence) and brought to Jerusalem. Argentina protested to the United Nations at the infringement of its state sovereignty by Israel. Following a diplomatic agreement, Israel apologised. In return, Argentina withdrew its protest and waived its rights for the return of Eichmann.

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<sup>10</sup> Under S.C. Resolution 827, the Security Council established an international tribunal for the punishment of those persons responsible for serious violations of international humanitarian law. However, whether the political willpower exists to implement such a decision in the long term remains to be seen.

Eichmann was tried by the District Court of Jerusalem for crimes against the Jewish people, crimes against humanity, war crimes and membership in a hostile organisation as defined in the Israeli Nazis and Nazi Collaborators (Punishment) Law of 1950. He was found guilty on all counts and executed.

#### B) In An International Criminal Court

In order to initiate a case against Eichmann in the proposed international criminal court a state party to the court statute would have to file a complaint. The complainant party would need to be a state party to the appropriate international treaty agreement criminalising Eichmann's conduct and have acknowledged the jurisdiction of the court to deal with such crimes. Alternatively, the victim states - Poland and Hungary (since the victims were mainly Polish or Hungarian by nationality and since the crimes were committed mainly in the territory of those states) - could potentially file a complaint. A third possibility would be for the state with in personam custody of Eichmann (either Argentina or Israel) to file a complaint with the court officials.

An independent prosecutor would be appointed by the bureau of the court. The prosecution authorities would investigate the allegations against Eichmann and receive evidence from interested parties. Next, the prosecutor would need to identify the international treaty or convention that criminalised the offences which Eichmann was alleged to have committed. Genocide would appear to be most obvious charge against Eichmann. However, Eichmann's policy of extermination was carried out between 1943 and 1945. The Genocide Convention was not concluded until 1949. Thus, the Genocide Convention is post facto law and might not be applicable. Genocide can also be considered to be a crime against customary international law - but such law will not fall within the subject-matter jurisdiction of the court. Allegations of torture are equally inappropriate for similar reasons.

Eichmann's conduct must be considered to constitute a crime against humanity, as defined by the proceedings at Nuremburg. However, the international community has not yet seen fit to codify such crimes and they are based entirely on the principles of customary law. Therefore, they are equally inapplicable.

The law concerning crimes of war was codified in the Geneva Conventions - but not until 1949. Therefore, like the Genocide Convention, they are post facto law. However, other international treaty agreements governing the rules of war did exist prior to the Second World War - notably the Hague Convention of 1907 and the Geneva Convention of 1929 concerning the treatment of prisoners of war. Germany was a party to such convention and treaty agreements. Thus,

Eichmann's conduct would fall within the subject-matter jurisdiction of the court insofar as it violated the treaty agreements specified.

If the prosecuting authorities could obtain the consent of the states concerned - the territorial state(s) (Poland and Hungary), the state of nationality (Germany) or, under a system of ceded jurisdiction, simply the consent of the state with in personam custody of Eichmann (Argentina or Israel) - then a formal trial could be convened in the international criminal court. If the consent of the necessary states could not be obtained then national courts could try Eichmann according to customary international criminal law.

### Sample Case 3 - The Invasion Of Kuwait

#### A) The Facts

On 2 August 1990, the Iraqi army invaded the neighbouring state of Kuwait and occupied the territory. Despite international condemnation, the military leader of Iraq, Saddam Hussein, refused to order the troops to withdraw. The Security Council of the United Nations classified the invasion as threat to international peace and security and ordered the implementation of collective sanctions against Iraq. Subsequent attempts to negotiate a peaceful settlement failed. Eventually, a U.N. sponsored coalition force, led by American troops, attacked and routed the Iraqi troops occupying Kuwait.

During the course of the conflict, international observers identified repeated breaches of international law by the Iraqi authorities, including :<sup>11</sup>

- (1) the seizure and destruction of property in Kuwait;
- (2) the taking of hostages;
- (3) the use of foreign civilian hostages and prisoners of war to immunize military objectives;
- (4) the physical coercion and torture of civilians and prisoners of war;
- (5) the wilful killing and rape of innocent civilians;

After the cessation of hostilities, there were widespread calls for the trial of Saddam Hussein and other civilian officials, military officers and enlisted personnel accused

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<sup>11</sup> Moore, "War Crimes and the Rule of Law in the Gulf Crisis", in the Virginia Journal of International Law Vol.31 at p.403.

of war crimes.<sup>12</sup> However, unlike post-war Germany, Iraq was not in a state of debellatio, of complete defeat and subjugation. In order to obtain the accused for trial, the coalition force would have had to invade Iraq. In preference, America called upon the Iraqi people to rise up and overthrow their leader. However, Saddam Hussein still rules in Iraq.

#### B) In An International Criminal Court

In order to initiate an investigation into the conduct of the Iraqi forces during the Gulf conflict, a state party to the court statute of the international criminal court would have to lodge a formal complaint with the court officials. As before, the complainant state would have to have recognised the jurisdiction of the court to deal with the crime alleged to have been committed. Alternatively, Kuwait, in its role as the victim state, would be entitled to apply to the court.

The bureau of the court would appoint an independent prosecutor to investigate the allegations. The prosecutor would seek to identify the international convention or treaty agreement which had been violated and to confirm that the conduct of the accused was criminal at both the time and the place in which it was committed. Saddam Hussein certainly committed the supreme international crime of aggression. However, at the current time, the crime of aggression is based solely in customary international law and would not fall within the subject-matter jurisdiction of the international criminal court.<sup>13</sup>

Allegations of the unlawful taking of civilian hostages before the conflict would be governed by the Hostages Convention of 1980. The taking of hostages is not a direct crime against international law per se. According to the terms of the convention agreement, state parties are under an obligation to criminalise such conduct through domestic legislation. Therefore, the prosecutor would need to confirm that either the state of Kuwait or the state of Iraq had enacted legislation to this effect prior to the commission of the offence if the accused were to be formally charged before an international criminal court. In addition, the prosecutor would need to check that the complainant state was a party to the Hostages Convention and had acknowledged the jurisdiction of the court to deal with such crimes.

Alternatively, Saddam Hussein could be charged with grave breaches of the Geneva Conventions of 1949, such as

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<sup>12</sup> For example, Beres, "The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes", in the Virginia Journal of International Law (1991) Vol.31 at p.381.

<sup>13</sup> Supra note 9.



the maltreatment of prisoners of war. The laws of war are directly binding on the individual without intervening municipal action and Iraq, in any case, is a state party to Geneva Conventions. Therefore, allegations of war crimes would clearly fall within the subject-matter jurisdiction of the court.

However, the independent prosecutor would still have to secure the consent of the appropriate states to the trial of Saddam Hussein by an international criminal court. In as much as the state of Kuwait would constitute the territorial state, this would present no problem. But if the consent of the state of Iraq (as either the territorial state, national state or the state with in personam jurisdiction) was required then Saddam Hussein, as military dictator of Iraq, would remain immune to prosecution by an international criminal court.

The real difficulty that would have to be faced is the fact that any trial in an international criminal court would be dependant upon in personam custody of the accused. This factor is a major stumbling block in the application of the law. Critics argue whether the United Nations force should have advanced into the state of Iraq after the Gulf Conflict in order to apprehend Saddam Hussein. Such an attack would inevitably entail further deaths. Would they be justified? The American authorities believed that it was preferable to incite the people of Iraq to rebellion. If Saddam Hussein had been overthrown, then the new regime might have been willing to surrender him for trial. But at the current time, Saddam Hussein remains the head of the state for Iraq and the prospects of his capture are remote.

The difficulties inherent in such a problem are not new. Pol Pot butchered the inhabitants of Cambodia during his reign as head of state. However, the international community has been unable to lay it's hands on him in order to prosecute him for his crimes. Such men are condemned to a life of international isolation. But, it seems that there is no easy solution to secure the presence of an accused to stand trial.

#### Sample Case 4 - Apartheid In South Africa

##### A) A Hypothetical Situation

The Mozambique police force arrest a South African businessman who had been involved in the purchase of arms for the South African military forces. He is charged with the crime of apartheid and the Mozambique government wishes to transfer proceedings to the international criminal court. The government of South Africa protests that Mozambique does not have the jurisdiction to try the South African businessman or to transfer him to the International Criminal Court.



## B) In An International Criminal Court

The initiation of the case would be dependant upon a formal complaint by a state party to the court statute which had accepted the jurisdiction of the international criminal court to sit in judgement on the crime of apartheid. In this case, the only relevant treaty agreement is the International Convention on the Suppression and Punishment of the Crime of Apartheid from 1973. Mozambique is a party to the convention and (it is assumed) has recognised the jurisdiction of the international criminal court to deal with such crimes.

The prosecutor would then seek to determine whether the conduct of the accused was criminal in both the time and place in which it was committed. If apartheid constitutes an international crime per se then the conduct of the accused would be criminal in nature, without intervening municipal action. But if apartheid does not constitute an international crime of itself then the conduct of the accused will only be criminal if the state in which the conduct of the accused took place has enacted municipal legislation to criminalise such conduct. South Africa has not enacted such legislation. In this event, the conduct of the South African businessman would appear not to be criminal.

Is apartheid an international crime per se ? The argument remains a moot point. Article I(1) of the Apartheid Convention of 1973 states that :

**apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations.**

In as much as apartheid is a crime against humanity, it does not fall within the subject-matter jurisdiction of the proposed international criminal court since it is a crime of customary international law. However, if apartheid does constitute a crime against customary international law then it is a crime of universal jurisdiction and the government of Mozambique will have the right to try the accused or to transfer the case to the international criminal court.

In reply, South Africa could argue that even if apartheid does constitute a crime against customary international law it does not apply to South Africa since the government of the country has consistently refused to acknowledge such provision in the law. Thus, South Africa has specifically excluded itself from such a custom. But, can that exclusion be considered to extend to cover the

actions of the population of South Africa outside the territory of the state?

The matter is further complicated by the fact that Article I of the Apartheid Convention purports to declare that the practice of apartheid is in violation of the United Nations Charter. While South Africa can (and arguably has) exclude itself from the operation of customary law concerning the crime of apartheid it can not exclude itself from the interpretation and operation of the United Nations Charter. The text of the Charter certainly does appear to prohibit the operation of a policy of apartheid. However, while a breach of the provisions of the Charter is clearly wrong, it is arguable whether such a breach will constitute an international crime.

The inherent difficulties are twofold : if the case is considered to be suitable subject-matter for the jurisdiction of the international criminal court then the floodgates will open for a tide of cases in which state of nationality does not accept the criminality of the conduct of which the accused is charged. The international criminal court would risk public ridicule and inspire a fundamental mistrust among the states of the international community. But if the case is not considered to be suitable subject-matter for the jurisdiction of the international criminal court then individuals accused of offences which are not prohibited by customary international law, such as crimes of terrorism, can not be brought to justice. There are no easy solutions.

### Conclusion

The concept of an international criminal court is fraught with political considerations. But at the current time, many international states are surprisingly willing to consider the potential for such a court. The current atmosphere of political goodwill is motivated in part by the prominent media coverage of the war in Yugoslavia. The world has been forced to confront the unthinkable - the spectre of war crimes in Europe. Widespread public revulsion at the illegal and immoral practice of ethnic cleansing has increased the international pressure upon national governments to be seen to be doing something to bring international offenders to justice. Serbian soldiers are widely blamed for the majority of these crimes. It also seems likely that the Serbian forces will emerge the victors in any protracted struggle. The prospect of such war criminals being seen to escape punishment for their crimes has compelled states to reexamine their attitudes towards the principle of an international criminal court.

However, progress is slow. The international community lacks many of the conditions that are required to encourage the development of the law. Analysis has shown that the evolution of law in primitive communities is frequently dependant upon the influence of religion. Offences are treated as crimes because this is thought to be the only

means of averting the vengeance of the gods upon the tribe. Awe of the gods and fear of the priests who ministered to them provide a strong central power upon which true criminal law is later founded. But :

unfortunately, world society has no common Gods, and the high priests of international law do not inspire the holy terror of the magicians of old.<sup>14</sup>

In simple terms, the concept of an international community is not yet sufficiently advanced to support the formation of an international criminal court. The technical difficulties that remain to be resolved are considerable. The more reluctant nations will use these problems to slow down the pace of reform. A genuine impetus for some form of limited experiment in the field of international criminal law does exist. But, the world should not expect an overnight revolution in world law enforcement.

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<sup>14</sup> Dr G. Schwarzenberger in 3 Current Legal Problems (1950) at p.276.

## CHAPTER NINE

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### CONCLUSION

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The ideological differences between states which divided the international community throughout the course of the twentieth century hindered the evolution of a coherent body of international criminal law and the emergence of the appropriate international legal machinery for its enforcement. In the post-communist era, international agreement is no longer barred by conflicting ideologies. In recent years international criminal law has played an increasingly important role in world politics. In the last two years in particular, the rate at which international criminal law has developed has reached a level which could not possibly have been foreseen.

The rules governing the criminal responsibility of the individual in international law are now firmly set in place. The concept of the criminal responsibility of the state is being seriously discussed by the International Law Commission and states have acknowledged the distinction between international crimes and international delicts. But the international community still lacks the legal machinery to enforce international criminal law in a coherent and uniform fashion. It was my original intention in this dissertation to consider the development of the primary rules of international criminal law and to ask why secondary and tertiary rules had not been enacted to punish those individuals responsible for the violation of the law. However, the pace of world events outstripped my pen.

In the aftermath of the Cold War, the United Nations enforcement mechanisms have proven far more effective. The Lockerbie Case suggests that the Security Council is now willing to enforce international criminal law directly. Whether the Western states did or did not abuse their power and influence in that case in order to achieve a favourable decision is a matter for the International Court of Justice to decide. If the Security Council ruling is upheld (and it seems likely to be) then the Council will be entitled to compel state obedience if the pattern of events can be considered to constitute a threat to international peace and security. The exact limitations of this power are yet to be determined but clearly not every set of circumstances can be considered to constitute such a threat to the international community. Nor will the Council be willing to take action in every case. For this reason, the Security Council can never be a substitute for an international criminal court.

However, the International Law Commission has made significant progress in its initiative to develop an international criminal jurisdiction. The broad framework for a permanent international criminal court has been agreed. The key advantage of the proposal is its flexibility. It is for each state to decide how far it will commit itself to the jurisdiction of the court. The proposal stands a reasonable chance of securing the approval of states and the Commission's proposal for a permanent international criminal court would go a long way to solving the problem of the effective implementation of international criminal law.

Much of this dissertation has concentrated on the Commission's Report. As a result, it has not been possible to consider the Security Council's decision to establish an ad hoc tribunal to examine violations of international humanitarian law committed in the former Republic of Yugoslavia in the space of the current volume. However, its importance is such that some comment is necessary. Under Resolution 780, the Security Council requested the Secretary-General to establish a Commission of Experts to examine the evidence that grave breaches of the Geneva Conventions and other violations of international humanitarian law were being committed in the former Republic of Yugoslavia. The Commission commenced its work in November 1992 and published an interim report on 9 February 1993 in which it recommended the creation of an ad hoc war crimes tribunal. The Security Council considered the matter in its meeting of 22 February 1993. Under Resolution 808, the Council decided that a war crimes tribunal should be established. The Council requested that the Secretary-General draw up a report on the exact form such a court should take.

The Secretary-General's Report of 3 May 1993 recommended that eleven independent judges should be appointed to serve on the tribunal. The judges would be elected by vote in the General Assembly from a short list compiled by the Security Council and no two judges would be drawn from the same state. Three judges would serve in each of the two trial chambers and the remaining five judges would serve as an appeal chamber. Together, the judges would draft the rules of procedure and evidence for the court. The jurisdiction of the court would be limited to dealing with grave breaches of the Geneva Conventions and serious violations of existing international humanitarian law committed in the former Republic of Yugoslavia between 1 January 1991 and a date to be determined by the Security Council on the restoration of peace. An independent prosecutor would be appointed by the Security Council on the nomination of the Secretary-General to investigate those individuals responsible for the atrocities.

The proposals were formally approved by the Security Council under Resolution 827 and the Secretary-General was instructed to implement the proposals forthwith. The idea

of an international criminal court has intrigued jurists from all corners of the globe for more than fifty years. It therefore seems ironic that the Security Council has established an international war crimes tribunal with just over three months of work, especially since the Security Council's decision to establish a tribunal is a direct acknowledgement of the failure of the efforts of the United Nations to stem the bloodshed in Yugoslavia. It remains to be seen whether the political will exists to compensate for that failure by prosecuting the individuals responsible for the slaughter. However, if the international war crimes tribunal for Yugoslavia is a success it is not unreasonable to suppose that states will be far more willing to consider the viability of a full international criminal court. A real-life case has the dramatic appeal that dry academic proposals do not and the mystique of the Nuremberg Trial still captures the imagination of both laymen and jurists today. The experience of the war crimes tribunal for Yugoslavia could form the basis for negotiations from which, one day, an international criminal court may emerge.

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